COURT OF APPEAL

Neutral Citation Number: [2018] IECA 252

Appeal Number 2016/205

Peart J.
Hogan J.
Whelan J.

BETWEEN/

KNOCKACUMMER WIND FARM LIMITED

PLAINTIFF/

RESPONDENT

- AND -

DENIS CREMINS AND SHEILA CREMINS

DEFENDANTS/

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 30th day of July 2018

Introduction
1. In *"Irish Conveyancing Precedents"* Issue 8, B. 88 Laffoy J. presciently observed: "It is a truism that nothing appears simpler than the preparation of an Option Agreement but few documents require more careful consideration."

2. This is an appeal against the judgment and findings of Haughton J. made on 19th February 2016 in the High Court. The facts are set out in great detail in his judgment and outlined hereafter only to the extent necessary.

Key facts
3. Key facts include the following:

(i) At all material times the appellants were the registered owners of the lands comprised in 9 folios situate at Knockacummer, County Cork (hereinafter "the Cremins' lands").

(ii) The relationship of landlord and tenant subsisted between the appellants and the respondent (hereinafter "the company") since in or about the year 2003.

(iii) The company obtained a grant of planning permission for the development of a windfarm on lands comprising 375 acres at Knockacummer in 2005. The said site included the Cremins' lands.

(iv) On foot of the aforesaid grant of planning permission the company constructed a windfarm, initially comprising 29 turbines, nine of which are situate on the Cremins' lands.

(v) The relationship between the appellants and the respondent has been a turbulent one. There is a history of litigation between the parties reaching back over many years.

(vi) Litigation before the High Court was compromised by Settlement Agreement dated 22nd May 2012 ("the Settlement Agreement"). It was agreed that Mr. and Mrs. Cremins would sell to the company the lands for a price of €6 million, subject to an option to re-purchase in favour of the Cremins' and an option to lease back in favour of the company.

(vii) The Option Agreement was executed on 12th June 2012.

(viii) The Option Agreement is silent as regards:

(a) the initial date from which the option to purchase can be exercised.

(b) whether time was to be of the essence under the Option Agreement.

(ix) In November 2012 Mr. Cremins communicated to the respondent's solicitors his wish to exercise the option to purchase.

(x) By virtue of a notice in writing dated 14th March 2013, O'Connell and Clarke, solicitors on behalf of the appellants served notice purporting to exercise the option to re-purchase the lands pursuant to clause 2 of the Option Agreement. It was signed by Mr. Cremins alone. For the purposes of these proceedings, service of that Purchase Option notice is deemed to have taken effect on 16th March 2013.

(xi) Completion of the ensuing sale, assuming that the exercise is valid, can not take effect under the Option Agreement

until 2042.

(xii) If time is of the essence under the agreement then pursuant to clause 5.3.2 of the Option Agreement the company had 14 days from the 16th March 2013 within which to serve a Lease Option notice to take a 25-year lease of the lands commencing in 2042.

(xiii) By a letter/notice in writing dated 27th March 2013 addressed to the appellants, the respondent company purported to exercise the Lease Option. An envelope containing that notice was hand delivered to the appellants' 15-year old son, Michael Cremins. There was a dispute at the hearing as to where said service was effected. The appellants contend that service was invalid.

(xiv) On 28th March 2013 Messrs. A & L Goodbody, solicitors for the company, sent by e-mail a copy of the Lease Option notice to O'Connell & Clarke, solicitors for the appellants, together with a covering letter stating:

> "We enclose a copy letter of the Lease Option Notice served by hand on your client yesterday."

(xv) The company asserts that the Option Agreement should be construed as only being exercisable in 2042. In the alternative they seek rectification to that effect.

Key terms of Option Agreement

4. A number of definitions and provisions in the Option Agreement are material:

> ""**Acceleration Notice"** – means a written notice served by [the company] on Cremins requiring them to confirm in writing within 60 days whether they shall exercise their Purchase Option on the Purchase Option Date, which Acceleration Notice may be served by [the company] on Cremins at any time following the date hereof…"
>
> "Lease Option" – means the option to be granted by Cremins to [the company] to take a lease … of the Option Property which [the company] may exercise in the manner set out in Clause 5 hereof;"
>
> "Purchase Option" – means the option granted by [the company] to Cremins to purchase [the company's] interest in the Option Property for the Purchase Price on the Purchase Option Date which Cremins may exercise in the manner set out in Clause 2 hereof;"
>
> "Purchase Option Date" – the earlier of (i) [22 June] 2042 or
>
> (ii) in circumstances where [the company] serves an Acceleration Notice, the date which is 150 days after the date of service of the Acceleration Notice…"

[A footnote to 1.1(i) of the "Purchase Option Date" definition states:

"Insert date which is 30 years from Closing Date of sale of land."]

5. Clause 2 of the Option Agreement governs the Purchase Option and its exercise. In this regard the following definitions are relevant:

> "2.1 Consideration for the Purchase Option
>
> In consideration of the payment of the sum of €1 (one euro) by Cremins to [the company] (the receipt whereof [the company] hereby acknowledges), [the company] hereby grants to Cremins the Purchase Option on the Purchase Option Date.
>
> 2.2 Pre-condition to Completion/ Lease Option
>
> In the event that:
>
> (i) Cremins exercises the Purchase Option in accordance with the provisions of Clause 2.4 of this Agreement and;
>
> (ii) [the company] exercises the Lease Option in accordance with the provisions of Clause 9 of this Agreement, Completion shall be strictly subject to Cremins simultaneously granting delivery of the executed Lease to [the company].
>
> 2.3 Lapse of the Purchase Option
>
> The Purchase Option shall lapse (if not already exercised) on
>
> (i) [23 April] 2042 or
>
> (ii) in circumstances where an Acceleration Notice has been served by [the company], the date which is 61 days after the date of service of the Acceleration Notice."

[There is a footnote in relation to clause 2.3(i) which states "insert date which is one day after the date referenced in the definition of "Purchase Option Date".]

6. Clause 2.4 addresses the exercise of the Purchase Option:

> "[the company] hereby grants to Cremins the option to purchase [the company's] interest in the Option Property for the Purchase Price on the Purchase Option Date subject to compliance with the following conditions:-
>
> 2.4.1. The receipt by [the company] not less than 90 days prior to the Purchase Option Date of written notice of

intention to purchase [the company's] interest in the Option Property…

2.4.2. The notice, once served pursuant to Clause 2.4.1, shall be irrevocable without the written agreement of [the company]."

7. Clause 2.5 provides that:

"2.5.1. Immediately upon the exercise of the Purchase Option there shall arise automatically between Cremins and [the company] a binding agreement for [the company] to sell and Cremins to purchase the Option Property subject as set out in this Agreement for the Purchase Price and the Conditions of Sale as varied by the terms and conditions set out in the Second Schedule hereto shall apply insofar as they are not inconsistent herewith."

8. Clause 4 deals with completion of the sale of the option property. Should the company exercise its Lease Option, completion would take effect 14 days after the lease had been settled "in accordance with Clause 6 below (or the next Business Day in the event that such day is not a Business Day)."

9. Clause 5 governs the exercise of the Lease Option by the company. It provides:

"5.3.1. the Lease Option shall not be exercisable until and unless the Purchase Option has been exercised;

5.3.2. the receipt by Cremins not more than 14 days after the Lease Option Date of written notice of intention to take a lease … of the Option Property and the notice shall be effective and the Lease Option shall be deemed to be exercised at the time at which the notice is deemed to be delivered to Cremins pursuant to Clause 11.4…"

10. Clause 6 governs the terms of the lease in the event that the Lease Option was exercised by the company. It provides as follows:

"If [the company] shall exercise the Lease Option then the following terms and conditions shall have effect:-

6.1. No later than 7 days after the exercise of its Lease Option, [the company] shall procure that its solicitors furnish a draft Lease to Cremins and each of [the company] and Cremins covenant and undertake to adhere to the following timetable:

6.1.1. Within 14 days of receipt of the draft Lease, Cremins shall procure that their solicitors shall reply to [the company's] solicitors setting out all of the amendments which Cremins requires to be made to the draft Lease, and Cremins hereby acknowledge and agree that should there be any failure to deliver a note of all of the required amendments to [the company's] solicitors within such timeframe, Cremins shall be deemed to have accepted the draft Lease as furnished and shall be obliged to execute and deliver same to [the company] on Completion.

6.1.2. Within 7 days of receipt of Cremins' solicitors' comments on the draft Lease, [the company] shall confirm in writing which of Cremins' amendments are acceptable and to the extent that any provisions of the Lease remain to be agreed between the parties, such dispute or difference shall be determined in accordance with Clauses 6.3 or 6.3 (sic) below (as appropriate).

6.1.3. On the determination of any dispute or difference relative to the draft Lease in accordance with Clauses 6.3 or 6.4, [the company] shall procure that the Lease is engrossed for execution and Cremins and [the company] hereby agree to execute the Lease in duplicate (and same shall be held in escrow by [the company's] solicitors to be delivered on Completion)."

11. Clause 6.2 provides:

"6.2. The terms of the Lease shall mirror the commercial terms contained in the 2009 Leases save (i) that the rent payable thereunder shall be agreed between the parties (or in default of agreement between the parties in accordance with the terms of Clause 6.3 below); (ii) that the Landlord Termination Clauses contained in the 2009 Leases shall not be incorporated in the Lease; and (iii) as may be required to be amended or updated to comply and accord with (a) changes in relevant legislation, (b) current landlord and tenant practice and (c) market standard provisions for leases in the windfarm industry as at the date of the grant of the Lease."

12. Clause 6.4 provides that in the event that any other term of the lease may be in dispute, the issue is to be referred to the determination of an expert to be appointed by agreement between the parties or, in default of such agreement, upon the application of either party by the President at the time being of the Law Society.

13. Clause 7 addresses completion of the lease in the event of exercise of the Lease Option by the company. It requires the Cremins to "deliver to [the company] such documentation as may be necessary to Effect the grant of the Lease of the Option Property to [the company] and such other documentation as shall be in accordance with standard conveyancing/Landlord and Tenant law custom and practice at that time".

The pleadings

14. The proceedings were instituted on 27th February 2015. In a statement of claim delivered on the same date, the company sought, inter alia, the following reliefs:

(i) A declaration that the written notice served by the appellants exercising the option to purchase "is null and void and to no effect."

(ii) Alternatively, a declaration that no binding agreement has arisen on foot of the written notice served by the appellants pursuant to clause 2.5 of the Option Agreement.

(iii) Rectification of clause 2.4.1 of the Option Agreement to "reflect the true intention of the parties to the Option Agreement" by the insertion of the words "in 2042" for the purposes of providing that the Purchase Option would not be exercisable until 2042 and, further, would be exercisable not less than 90 days before the Purchase Option Date of 22nd June 2042.

15. There is an alternative plea for a declaration that the company properly invoked its Lease Option and that a binding agreement for a lease had arisen.

16. In an amended statement of claim delivered 19th January 2016 the company contended that it was not open to the first named appellant to exercise the Purchase Option acting alone as he had purported to do.

17. The appellants in their defence assert that the option to purchase was validly exercised by Mr. Cremins and contend that the company failed to validly exercise its Lease Option.

The judgment

Time when option is first exercisable

18. In his detailed judgment the trial judge analysed the relevant clauses and provisions of the Purchase Option, in particular clauses 2.1 and 2.4 and noted that clause 2.4.1 provided:

> "… purports to set an end date to the exercise of the option. Ninety days prior to 22nd June, 2042 would be 24th March, 2042, so the last date for exercising the option under clause 2.4.1 would seem to be 23rd March, 2014." (para. 20)

19. He then identifies the apparent internal conflict in the language. He notes:

> "… clause 2.3 provides that the Purchase Option is to 'lapse (if not already exercised) on … 23 April 2042'. These two provisions thus conflict as to the last date upon which the Purchase Option may be exercised. Nothing turns on that discrepancy in the present case and the court is not asked to resolve this difference…" (para. 20)

20. The trial judge noted the argument advanced on behalf of the Cremins was that the language in clause 2.4.1 of the Option Agreement meant that the Purchase Option was exercisable at any time after execution of the Option Agreement and up to 90 days prior to the "Purchase Option Date" (i.e. 22nd June 2042). He noted at para. 21 that it was contended on behalf of the respondent company that "this was never the intention of the parties to the Option Agreement, and that the true intention was that it would be exercised in 2042, and not less than 90 days before the Purchase Option Date being 22nd June 2042, i.e. in the period 1st January, 2042 up to and including 23rd March, 2042." Further he observed at para. 21 that the company had argued that clause 2.4 should be read with the words "in 2042" implied into it.

21. He accepted the statement of Clarke J. (as he then was) in *Moorview Developments Limited & Ors. v. First Active* [2010] IEHC 275 approving the dicta of Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No. 1)* [1998] 1 W.L.R. 896 in regard to "correction of mistakes by construction".

22. At paras. 27-28 of the judgment the trial judge states:

> "I am satisfied that there is ambiguity in the Option Agreement arising from the terms of clause 6, which is predicated on an exercise of the Purchase Option in 2042 (and not before), and the absence of a start date for exercise of the option in clause 2.4, notwithstanding the definition of "Purchase Option Date" by reference to 22 June, 2042. I am of the view that the traditional approach to construction articulated in *Leggott v Barrett* is no longer appropriate, and has been superseded by the principles enunciated by Hoffman L.J. supra and adopted in *Analog Devices v. Zurich* … in construing a contractual provision in a document the court is entitled to have regard to the document in its entirety.
>
> 28. … as an aid to construction of the Option Agreement the court should have regard to the Option Agreement in its entirety, and is entitled to have regard to the 2012 Settlement Agreement, whether as part of the "matrix of facts" or as one of a series of instruments effecting a wider transaction of which the Option Agreement was a part."

23. The trial judge noted at para. 29 of the judgment:

> "Clause 6.2 expressly envisages that the terms of the Lease, while mirroring in commercial terms those contained in the 2009 Leases, were:-
>
> "... required to be amended or updated to comply and accord with:
>
> (a) changes in relevant legislation
>
> (b) current landlord and tenant practice and
>
> (c) market standard provisions for leases in the windfarm industry as at the date of the grant of the Lease.""

24. He considered that provisions in regard to fixing the market rent as provided in clause 6.3 could only refer to 2042; "clause 2.2 expressly stipulates a condition requiring simultaneous completion and exchange of the purchase and the leaseback. Clearly the market rent could not be established until 2042, or close proximity to 2042, and the dispute mechanism envisaged in clause 6.3 could not be invoked until 2042." (para. 31)

25. He concluded at para. 33 of his judgment that it was:

> "… not possible for clause 6 to operate as the Option Agreement intended if the Purchase Option is exercised prior to 2042."

He determined:

> "I find that insofar as the intention of the parties as to the date upon which the Purchase Option might be first exercised by the defendants can be gleaned from reading the Option Agreement as a whole, it is apparent that it was to be exercisable in 2042. I would go further and find that clause 6 is rendered inoperable if the Purchase Option is exercised in advance, or at any rate significantly in advance, of 2042, as the defendants contend has occurred." (para. 33)

26. At para. 40 of the judgment the trial judge noted, after considering the language of the antecedent Settlement Agreement dated

22nd May 2012,:

> "When the words "buy-back option after 30 years" are examined, it is my view that the words "after 30 years" (which are inserted in handwriting into the document) qualify both the word "buy-back" and the word "option". On this basis both the defendants' right to buy-back the Lands and their right to exercise the option in that respect are to arise "after 30 years" i.e. in the year 2042."

27. He reached the following conclusions at para. 42 of the judgment:

> "1). That the meaning and intendment of the 2012 Settlement Agreement, when construed as a whole, was that the defendants would not be entitled to exercise the option to buy-back the Lands until the year 2042.
>
> 2). That clause 6 of the Option Agreement would be inoperable if the construction contended for by the defendants was correct.
>
> 3). The fact that only the plaintiff could serve an Acceleration Notice bringing forward the date upon which the defendants could exercise the Purchase Option implies that, absent such a notice, it was not intended that the Purchase Option be exercisable prior to 2042.
>
> 4). It could not be disputed that under the Option Agreement, if the Purchase Option and the Lease Option were both exercised, neither the conveyance to the defendants nor the leaseback to the plaintiff would be completed or come into effect until 2042.
>
> 5). The failure of the Option Agreement as executed by the parties to expressly state that the defendants could not exercise the Purchase Option until 2042 was an error of omission in drafting."

The trial judge determined that the principle of *contra proferentem* did not arise.

Rectification

28. Arising from those findings, the trial judge at para. 49 of the judgment ruled that clause 2.4 should be rectified to have the additional words "in 2042" written into it.

"Elements of sharp practice"

29. The trial judge noted that a consultation had taken place on 31st May 2012 between the first named appellant Mr. Cremins, his solicitor and counsel. Counsel had advised that, in his view, Mr. Cremins was not precluded from exercising the option at any time up to 90 days prior to the end of the 30 year period. At para. 60 the trial judge observes:

> "I find that following this consultation Mr. Cremins' belief that the defendants could exercise the Purchase Option at any time after execution of the Option Agreement (as drafted), and his desire and intention to exercise it as soon as possible, must have been plain to Ms. O'Connell."

30. With regard to the said solicitor the trial judge found:

> "Regardless of her own opinion, and regardless of what views or advice she may have expressed to the defendants, it was incumbent on her to bring this difference in interpretation and understanding to the attention of … the plaintiff's solicitors. Whether both or either of the defendants were aware of the mistaken understanding does not matter, because O'Connell & Clarke were acting on their behalf, and they must therefore be fixed with Ms. O'Connell's knowledge." (para. 65)

He characterised the ensuing position as one of unilateral mistake.

31. The trial judge determined at para. 69 of his judgment that:

> "The failure of Ms. O'Connell to revert to Mr. Roberts caused or permitted [the company] to execute the finalised Option Agreement without material alteration. This was to the benefit of the defendants because it facilitated early exercise of the Purchase Option at any time up to 23rd March, 2042. Mr. Cremins, as Ms. O'Connell well knew, was keen to exercise the Purchase Option as soon as possible after execution, rather than having to wait until 2042. It was therefore to the defendant's advantage. It was also to the detriment of the plaintiff…"

Correction by construction

32. The trial judge determined to remedy the issue on behalf of the company by correction of the mistake (as found by him) by construction.

33. In the alternative, the trial judge concluded that he was satisfied that the Option Agreement should be rectified by the insertion of the words "in 2042" into clause 2.4 in the manner outlined above. He concluded that the defendants were not entitled to serve a Purchase Option until at the earliest the 1st January 2042. Further, he concluded that the Purchase Option notice served by letter dated 14th March 2013 was invalid and of no effect.

Land and Conveyancing Law Reform Act 2009

34. The company contended that the exercise of the Option Agreement by Mr. Cremins alone was not effective. It was argued by the appellants that s. 83 of the Land and Conveyancing Law Reform Act 2009 offered a complete answer. The trial judge determined at para. 88 of the judgment that:

> "...s. 83 is confined to covenants entered into by one person with himself or herself jointly with another person, and has no application to [the] present case."

He concluded that the terms of the Option Agreement in question were incompatible with the "default" construction provided for in s. 82(1)(b) and that s. 82(3) applies:

"I conclude that the defendants' Purchase Option can only be exercised by both defendants…" (para. 97).

35. The trial judge concluded that if his decision on construction and rectification of the Option Agreement is correct, and the option to purchase is not exercisable until 2042, then time must be regarded as being of the essence in relation to the exercise of both the Purchase Option and the Lease Option. Conversely, he held that if, contrary to his decision, the Option Agreement does permit the Cremins to serve a valid Purchase Option notice at any time prior to 2042 then time is not of the essence in relation to the service of a Lease Option notice. (para. 156)

The Appeal
36. The Cremins appeal the determinations and there is a cross appeal filed on the part of the company regarding the validity of its exercise of the option to take a lease – should the appellants succeed in having the option to purchase deemed validly exercised.

General rules with regards to interpretation of contracts
37. Contracts are to be construed objectively in accordance with the intentions of the parties as determined by reference to the terms to which they have agreed. In general the starting point and the end point is the contract document itself. The agreement is to be looked at as a whole in its context in construing individual provisions.

38. The courts will look at the circumstances surrounding the formation of the contract and in particular the express terms of an antecedent agreement, not for the purpose of ascertaining the actual subjective intentions of the party, but rather to assist in determining how a reasonable person would have understood the terms agreed to in the context that subsisted between the parties.

Time
39. In my view, an option to purchase land can be characterised as a unique type of contract coming into existence at the time of its grant, which has three distinct stages, namely the grant, the exercise and completion.

Rectification by reason of Unilateral Mistake
40. Rectification historically was initially confined to cases where there was an antecedent contract from which the subsequent written agreement or deed differed materially. That narrow view changed over time.

41. Simons J. in *Crane v. Hegeman-Harris Co. Inc*. [1971] 1 W.L.R. 1390 at p. 1391 (a judgment delivered February 1939) stated:

> ". . . it is sufficient if you find a common continuing intention in regard to a particular provision or aspect of the agreement. If you find that in regard to a particular point the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify although it may be there was, until the formal instrument was executed, no concluded and binding contract between the parties."

42. The trial judge acknowledged at para. 52 of his judgment that the law in this jurisdiction has been adumbrated in *O'Neill v. Ryan (No. 3)* [1992] 1 I.R. 166 where at p. 185 the Supreme Court endorsed a statement of principle of Costello J. in the High Court in the following manner:

> "Rectification may also be ordered when a party who has entered into a written agreement by mistake, if he establishes that the other party with knowledge of the mistake concluded that agreement (see judgment of the Supreme Court in *Irish Life Assurance Co. Ltd. v. Dublin Land Securities Ltd*.[1989] I.R. 253…"

Irish Courts
43. The availability of rectification in equity is relatively limited. The House of Lords decision in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, which was approved by the Supreme Court in *Igote Ltd. v. Badsey Ltd*. [2001] IESC 65, established that in construing a written agreement evidence of negotiations or the parties' intentions is not receivable but evidence of the factual background known to the parties at or before the date of the contract is. Lord Wilberforce emphasised at pp. 1383-84 of *Prenn* that the courts no longer interpret a contract by reference to internal linguistic considerations alone:

> "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations… We must… inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances which the person using them had in view."

44. At p. 1385 Lord Wilberforce further stated:

> "In my opinion, then, evidence of negotiations, or of the parties' intentions… ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract…"

45. In *Igote* Murphy J., delivering the judgment of the Supreme Court, reviewed the jurisprudence. He noted the dangers inherent in exploring the background or surrounding circumstances to a document under construction.

46. Murphy J. noted that Lord Wilberforce in the later case of *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*, [1976] 1 W.L.R. 989 had at pp. 995-96 repeated his views, first expressed in *Prenn*, in the following terms:

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the contract, the market in which the parties are operating."

47. Murphy J. noted that the principles in Reardon had been applied in this jurisdiction and approved by the Supreme Court in *Rohan Construction Ltd. v. Insurance Corporation of Ireland* [1988] I.L.R.M. 373. Significantly he referred to *Plumb Brothers v. Dolmac* [1984] 271 E.G.L.R. 373 1) stating:

> ". . . the warning note sounded by May L.J. must be equally applicable in this jurisdiction. At the end of the day the rule as to construction and the context in which it is to be achieved is most succinctly expressed in the judgment of the Chief

Justice in *Kramer v. Arnold* [1997] 3 IR 43 55 when he said:-

> "In this case, as in any case, where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was having regard to the language used in the contract itself and the surrounding circumstances."

48. The judge warned of the dangers of slavishly purporting to find the "factual matrix" to a concluded written agreement for the purposes of construing it, stating:

> "At worst it provides the temptation - foreseen by May LJ - of seeking to extract the subjective intention or motivation of one or other, or even both, of the parties from the history rather than construe it in the context of that history."

49. It is worth recalling that the full statement of May L.J. in *Plumb Brothers v. Dolmac (Agriculture) Ltd.* [1984] 271 E.G.L.R. 373 1 at p. 2, alluded to by Murphy J. in the Supreme Court in *Igote*. It provides as follows:

> "There has grown up a tendency in recent times to speak about construing contracts or documents in or against what is described as the "factual matrix" in which the contract or documents first saw the light of day. In truth that is only, I think, a modern way of saying what has always been the rule for a long time that, in construing a document, or documents or a contract, one must look at all of the circumstances surrounding the making of the contract at the time it was made. There is the danger, if one stresses reference to "the factual matrix", that one may be influenced by what is in truth a finding of the subjective intention of the parties at the relevant time, instead of carrying out what I understand to be the correct exercise, namely determining objectively the intent of the parties from the words of the documents themselves in the light of the circumstances surrounding the conclusion of the relevant transaction"

50. The Supreme Court decision in *Igote* is authority for the proposition that the intention of the parties may be gleaned only from the document ultimately concluded by them albeit construing it in the light of surrounding circumstances but not ascertaining their intentions from such circumstances.

The Law Society of Ireland v. MIBI

51. O'Donnell J. in *The Law Society of Ireland v. The Motor Insurers Bureau of Ireland* [2017] IESC 31, delivering the majority judgment of the Supreme Court, memorably stated:

> "The legal ideal aspires to clarity, certainty and precision, but much of the business of the courts, particularly in the interpretation of contracts or statutes involves a consideration of ambiguity." (para. 1)

He noted the operative principles governing construction of a contract were those set out in pp. 114-5 of the decision of Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No. 1)* [1998] 1 W.L.R. 896. The oft cited principles include:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification…
>
> (4) The meaning which a document… would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean…
>
> (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:
>
> > ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.""

52. O'Donnell J. echoed at para. 8 of the judgment the cautionary language of Murphy J. in *Igote* where he states:

> "These principles represent a significant staging point in the development of what might be described as a modern approach to the interpretation of contracts, a development which, as the principles recognise, has not necessarily reached its terminus. The common law is treated as a coherent and consistent body of law developing incrementally by subtle changes, and only on occasion by sharp and dramatic turns… In my view, it is important to understand the full import of the changes wrought by the approach set out in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*. It is also necessary to be aware of the significance of this development for the overall approach to the interpretation of agreements, and not to simply mix and match authorities drawn from different eras and contexts, as if they were a body of coherent rules produced by a single author."

53. O'Donnell J. opined that:

> "It is also inevitable that when there is a dispute about an issue, that there is a tendency to approach the interpretation of an agreement through that dispute…

> But it is an error, which can sometimes lead to the wrong result, to approach the interpretation of the Agreement solely through this focus… Much more difficulty arises when the issue… is one which is not specifically addressed, discussed or negotiated. Although the question can be framed as to what the parties agreed about that specific issue, the true question is perhaps subtly different. It is necessary to understand the entirety of an agreement and then to consider what that means for the specific issue now raised." (para. 14)

54. This is relevant in the instant case in circumstances where the Option Agreement is wholly silent as to the date when the right of the Cremins to exercise the option to re-purchase the land would first arise.

55. Clarke J.'s dicta in his partly dissenting judgment in *The Law Society v. MIBI* must be recalled:

> "The modern approach has sometimes been described as the "text in context" method of interpretation. It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the document in question came into existence. On the other hand it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established… To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence." (para. 10.4)

Rectification

56. The requirements for rectification were reviewed by Lord Hoffman in *Chartbrook Limited v. Persimmon Homes Limited* [2009] 1 A.C. 1101 a decision which has been cited with approval by Clarke J. (as then was) in *Moorview Developments Limited & Ors. v. First Active Plc & Ors.* [2010] IEHC 275. Lord Hoffman in *Chartbrook* at para. 48 stated:

> "The party seeking rectification must show that:
>
> (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter…;
>
> (2) there was an outward expression of accord;
>
> (3) the intention continued at the time of the execution of the instrument sought to be rectified;
>
> (4) by mistake, the instrument did not reflect that common intention."

The burden of proof

57. In *Frederick E Rose (London) Ltd. v. William H Pim Junior and Co. Ltd*. [1953] 2 Q.B. 450 Lord Denning stated at p. 462 that:

> "There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different."

58. In *Swainland Builders Ltd. v. Freehold Properties Ltd*. [2002] E.G.L.R. 71 Gibson L.J. considered the burden of proof. At para. 34 he stated:

> "34. (1) The standard of proof required if the court is to order rectification is the ordinary standard of the balance of probabilities but as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself…
>
> > "81. The 33rd Edition of Snell's *"Equity"*, para. 16-002 makes it clear that:
> >
> > "convincing proof is required to contradict the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by them. Equally, certainty and ready enforceability would be hindered by constant attempts to cloud the issue by reference to pre-contractual negotiations… The burden of proof is on the party seeking rectification and this burden is particularly formidable if the formal instrument is detailed and recorded with the benefit of expert legal advice."

Elements relevant for rectification

59. At issue in this case was whether the words "subject to : (a) a buy-back option after 30 years in favour of the defendants …" in the antecedent agreement precluded exercise of the option at all by the appellants until on or after 1st January 2042.

60. In my view it did not. The said words in the antecedent agreement were directed towards the earliest date at which the completion of the option to re-purchase would take place rather than its exercise. It was directed towards the date when the legal freehold title would be capable of reverting back to the vendors, Mr. and Mrs. Cremins, under the agreement. The option cannot be completed nor a transfer of the lands effected until 2042 but in the meantime there is nothing to prevent the appellants from serving a notice exercising the option and thereby securing their rights in equity. Since the rule against perpetuities was abolished in 2009 no legal impediment lies in their path.

61. I am satisfied that the language in the Settlement Agreement of 22nd May 2012, as an antecedent accord, was not sufficiently clear to establish a prior agreement unequivocally providing that the exercise -as distinct from the completion- of the option to purchase was to be impermissible until 2042.

62. Sight must not be lost of the critical fact that the grant of the option to purchase in and of itself created an interest in the land for the benefit of the Cremins. Hence such an interest was held by them from 12th June 2012 onwards. Valid exercise of the option would create automatically the relationship of vendor and purchaser between the company as owner of the land and Mr. Cremins as purchaser for the ultimate sale of the land- a sale that by the option contract could not be completed until 2042.

63. The terms of the Option Agreement of 12th June 2012 was what the respondent intended it to be. The hinterland of fact in this case includes the Cremins' own mortality and the certainty that they would wish to ensure that lands in the 9 folios would be recovered and secured for future generations of the family. Once the option was exercised a will could be made devising the interest and making provision for family and dependants that would enure in 2042.

64. Irrespective of the reasons for the arrangement, it was the respondent's lawyer who was primarily responsible for the drafting of the Option Agreement. The evidence was that it was carefully prepared and scrutinised over time by a highly qualified lawyer. The Option Agreement was an important document of title for both parties. This was especially so for the company which stood to ultimately suffer a defeasance of its freehold title and a determination of its fee simple in 2042 in the event of the exercise of the option to purchase by the Cremins. It was wholly foreseeable if not inevitable that the option would be exercised as a matter of course by the Cremins'.

65. Rectification in equity requires a mistake about whether the written instrument conformed with the prior consensus, not whether it conformed with what one party believed that consensus to have been. There is a great difference between the two.

Unilateral mistake and unconscionability
66. There are significant authorities, including the case of *Thomas Bates & Son Limited v. Wyndhams (Lingerie) Limited* [1981] 1 W.L.R. 505 and also *Monaghan County Council v. Vaughan* [1948] I.R. 306, both of which were considered by the trial judge, for the proposition that where the conduct of a non-mistaken party goes beyond the boundaries of fair dealing and is unconscionable it is open to the court to grant rectification. This is so even in the case of an arms-length commercial transaction where the parties have been fully legally represented throughout the process of negotiations as indeed was the position in the instant case.

67. In my view the court should be slow to amend an option to purchase in the absence of clear and compelling evidence of an error induced by unconscionable conduct or sharp practice. There is no such evidence in this case.

68. The necessary inference flowing from paras. 59 to 65 of the judgment is that the trial judge considered that the appellants' solicitor Ms. O'Connell lacked integrity in her dealings with Mr. Roberts the solicitor who acted for the respondent company. In effect he ascribes that elements of sharp practice to her.

69. Para. 61 of the judgment necessarily implies that she had an obligation to communicate to the company's solicitors the legal advice given by counsel to her client. However, several critical findings and inferences were not put to her during cross examination in the High Court.

Fairness
70. The judgment of Charleton J. in *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 46, with which the majority of that court concurred, considered the central importance of fairness towards a witness in a trial. He stated at paras. 40-41:

> "….. In *McNamee v Revenue Commissioners* [2016] IESC 33, the judgment of Laffoy J approves the decision of the House of Lords in *Browne v. Dunn* (1893) 6 R 67 which is encapsulated in the following statement of Lord Halsbury at pages 76-77:
>
> > "To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

Charleton J. continued at para. 41:

> "The extent to which fairness requires cross-examination is essentially dependant on how a trial runs. Fairness, however, is what the law requires both in relation to procedures that are dedicated towards achieving a correct conclusion in a trial and in relation to the right of a witness to be given a real opportunity to comment on a verdict the implication of which may only be interpreted as adverse."

71. I am in agreement with the specific determination of Mr. Justice Peart at para. 36 of his separate judgment and for the reasons he states therein. The findings of the trial judge at paras. 65, 68, 69 and 70 of his judgment that the conduct of Ms. O'Connell was tantamount to sharp practice is unsafe in the circumstances and, in the interests of fairness, ought not be allowed to stand.

72. Quite apart from that I find that the sustained failure for over 2 years on the part of the company's solicitor to assert sharp practice or lack of candour against the appellants' solicitor arising out of a telephone conversation held between them on 30th May 2012 tends to undermine the possibility that Mr. Roberts actually believed in the years 2013 and 2014 that any such sharp practice had ever occurred in the first place.

Legal consequence of finding that unconscionable conduct on part of appellants' agent not made out
73. Since the adverse findings against the solicitor, Ms. O'Connell, cannot stand it follows that the legal basis for rectification based upon unilateral mistake falls away. There is no probative evidence that the appellants "with knowledge of a mistake" on the part of the company concluded the Option Agreement. The test in *Thomas Bates* and other relevant jurisprudence including *Monaghan County Council v. Vaughan* [1948] I.R. 306 and *O'Neill v. Ryan (No 3)* [1992] 1 I.R. 166 at 185 is not met. Hence the respondent has no entitlement to rectification for unilateral mistake as a matter of law and equity.

Correction of errors by construction

Interpretation by construction
74. Sight must not be lost of the fact that an option agreement is a significant muniment of title – vesting valuable future interests in the parties thereto.

75. Clarke J. in his partly dissenting judgment in *The Law Society v. MIBI* stated:

> "It is also appropriate to take into account the fact that part of the overall context requires a consideration of the nature of the type of document which requires to be interpreted. It has again often been said that part of the reason for

conferring a significant weight to the text actually used is that we do not expect persons to make mistakes or use loose language in important documents. Similar considerations would apply with the same, or perhaps even greater, force in the case of legislation or the like… As per the judgment of McCarthy J. in In *Re XJS Investments* [1986] I.R. 750, such documents are not to be construed in the same [way] as, for example, documents of title. Furthermore, many types of formal legal documents are written in a traditional language typically used for documents of the type in question and this itself forms part of the context." (para. 10.7)

Business efficacy

76. Another permissible route to the same end is by the implication of terms "necessary to give business efficacy" to the contract. Lord Hoffman in *Attorney General of Belize v. Belize Telecom Ltd*. [2009] 1 W.L.R. 1988 explained the two important limitations underlined by that formulation stating:

> "The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties… The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means." (para. 22)

Text in Context

77. The trial judge considered the power of a court to correct mistakes by construction arising from the line of authorities including Investors Compensation Scheme Limited and *Moorview Developments Limited & Ors. v. First Active Plc & Ors*. [2010] IEHC 275. In considering the key authorities Clarke J. in *Moorview* had reiterated that two preconditions must be satisfied in order for a court to exercise its power to correct mistakes by construction; Firstly there must be a clear mistake and second it must be clear what the correction ought to be.

78. Clarke J. stated at para. 3.6:

> "It is also clear from the speech of Lord Hoffman in *Investors Compensation* that a correction of the type with which I am concerned is not a separate branch of the law, but rather an application of the general principle that contractual documents should be construed according to their text but in their context. That context may make it clear that the words used in the text are a mistake… a reasonable and informed person may conclude that the words used are an obvious mistake and may also be able to conclude what words ought to have been used. In those circumstances, as a matter of construction, the court will, as it were, construe the contract as if it had been corrected for the obvious mistake. The reason for so construing the contract in that way is that the proper principles for the construction of contracts lead to that construction in any event. I am satisfied that those cases, most recently restated by the House of Lords in *Chartbrook v. Persimmon Homes Ltd* [2009] 1 A.C. 1101, represent the law in this jurisdiction."

79. In *Moorview* the appellant had entered into a guarantee for the benefit of the bank which was specified as including liabilities of a company described as Moorview Properties Ltd. However, the company, which had potential liabilities to the lender, First Active Plc., was Moorview Developments Ltd. On that basis it was contended that the guarantee was not effective insofar as the debts of Moorview Developments Ltd. were concerned. The trial judge considered the evidence of the mortgagee including documents and correspondence contemporaneous to the creating of the loans and security all of which referred to the loans being advanced to Moorview Developments Limited. It was proven at the hearing that no company called Moorview Properties Limited ever existed. Clarke J. stated:

> "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."

80. By contrast, in the instant case the trial judge concluded that there was ambiguity in the Option Agreement arising from the terms of clause 6. He found clause 6 to be predicated on an exercise of the Purchase Option in 2042, when considered with the absence of any start date for exercise of the option in clause 2.4, notwithstanding the definition of "Purchase Option Date" by reference to the 22nd June 2042. (See at para. 27 of the judgment).

81. In my view the decision in *Moorview* is entirely distinguishable in a material respect from the instant case. There was a patent error in *Moorview*. The name of a non-existent company was erroneously specified in the mortgage instruments. There is no such clear error demonstrated by the company in the instant case. To rectify an instrument in such circumstances is novel and not supported by precedent.

82. Certainty is a quality greatly prized in the law. It is a fundamental quality of the rule of law. The law has to be as certain, clear and as accessible as possible. That is as true of the principles governing the interpretation of a legal instrument as of any other branch of legal activity. In order to have as much certainty as possible, there ought to be resilient application of settled principles which are of general application and which are reliably applied by judges when it comes to resolving disputes as to contractual construction. Otherwise there is the risk of succumbing to the comment of Etherton L.J. in his dissenting judgment in *Daventry District Council v. Daventry & District Housing* [2011] EWCA Civ. 1153, a case concerning rectification on the basis of mistake, where he percipiently surmised that the differences of approach between him and other members of the court "almost certainly reflect a different instinctive view of the underlying merits of each side's case."

83. Whilst there are superficial attractions in the arguments advanced on behalf of the company contending that a plain reading of clause 2 of the Option Agreement conflicts with the clear meaning of clause 6 which contemplates the lease being prepared in 2042 and further that clause 2 would, if correct, render clause 6 unworkable, on closer scrutiny that argument is not viable in my view. The exercise of an option and the completion of the option rights are in practice and reality two distinct and discrete elements – often separated, as in the instant case, by a significant time lapse.

84. There is of course at least some ambiguity to be found in the Option Agreement. However, I am satisfied that the apparent inconsistencies as between clauses 2 and 6 can be harmoniously reconciled once it is understood that the exercise of the option – creating rights in equity only between the parties - and the completion of the transaction vesting the legal title in the grantee in 2042- as was envisaged by the terms of the Option Agreement in the first place are separate and distinct events, elements of a three stage valid conveyancing transaction; creation, exercise and completion.

85. It would likely have been void for offending the rule against perpetuities if such an agreement were exercised prior to 1st December 2009 when the Land and Conveyancing Law Reform Act came into force abolishing the rule against perpetuities. Exercise of the option and completion of the conveyance are governed by separate legal principles. There is a period of over two decades between exercise of the option in March 2013 creating rights in equity and vesting of the freehold in the option holder which will not occur until 2042. That is what this particular agreement contemplates. That is the bargain entered into by the parties. It must not be forgotten that commercial documents are meant to embody practical arrangements whereby business can be done- sometimes long into the future.

The proper approach to interpretation of an express term
86. In his separate judgment in *The Law Society v. MIBI* Clarke J. stated at 7.41: "… the Law Society, placing reliance on *ICDL v. ECDL* [2012] 3 I.R. 327, and *Arnold v. Britton* [2015] A.C. 1619, suggests that it is clear, as a matter of principle, that a business sense argument cannot be used to displace the clear wording of an agreement".

87. Noteworthy in the said *Arnold* decision of the UK Supreme Court which was referred to by Clarke J. above is the following passage of Neuberger L.J.:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"… And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of
>
> (i) the natural and ordinary meaning of the clause,
>
> (ii) any other relevant provisions of the lease,
>
> (iii) the overall purpose of the clause and the lease,
>
> (iv) … facts and circumstances known or assumed by the parties at the time that the document was executed, and
>
> (v) commercial common sense, but
>
> (vi) disregarding subjective evidence of any party's intentions." (pp. 1627-28)

Whilst the common law does not allow pre-contract negotiations or post-contract actions to be taken into account when interpreting a contact, the overall purpose of the contract, the surrounding circumstances known to both parties and commercial common sense may all be considered when assessing what a contractual provision means:

> "… the exercise of interpreting a provision involves identifying what through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision." (p. 1628)

The role of the court in implying terms into contracts
88. The law is normally slow to imply rights and obligations into contracts because it involves holding parties to something which they have not expressly agreed to in the instrument the subject matter of the litigation. When interpreting what the contract means the importance which the law attaches to the words in which the parties have expressed their contract is mirrored by the reluctance of the law to impose on the parties a term which they have not expressly agreed. At common law implication of terms into a contract have been seen as a different exercise from interpretation of the contract's express terms.

89. Over time the law developed and refined the principles and proofs to be established before a term would be implied into a written contract. Essentially there would appear to be five requirements which have to be satisfied before a court will correct by construction the terms of a concluded agreement namely that:

> (a) it does not conflict with any express term;
>
> (b) it is necessary to give the contract business efficacy;
>
> (c) it is so obvious that it must have gone without saying;
>
> (d) it is reasonable; and
>
> (e) it is capable of clear expression.

90. In the instant case the Option Agreement is wholly silent as to the commencement date for exercise of the option to purchase. Hence the company seeks the interpolation of the words "in 2042" for which the parties have made no express provision. However rectification on this basis could only be warranted if exercise and completion of the option to purchase were required to be close in time.

91. This is so because the court is concerned with the objective question of what it would mean to a hypothetical reasonable person in the position of the parties when they are entering into an exercise of interpreting the terms of a written contract.

92. Historically the case law indicates that the following factors and matters cannot be taken into account when interpreting a contract:

1. What either party says that they meant or intended.

2. What either party believed that they intended.

3. Facts known to one party but not to the other.

4. What was stated in negotiations, including earlier drafts of the contract.

5. What the parties did or said post the entering into the contract.

93. In my view it is significant that at no time was it contended on behalf of the company that the parties had ever even discussed or considered including a commencement date for exercise of the option to purchase into the contract. That fact is fatal to the claim for entitlement to amendment by implication.

94. While some weight does have to be attached to the business sense argument, it is not sufficient to displace what seems to me to be the natural and ordinary meaning of clauses 2 and 6 which are capable of operating effectively and harmoniously once it is recalled this is a two step process and that the exercise of the option creating rights in equity in the first place and the completion vesting of the legal interest thereunder in 2042 in the second place are wholly separate legal steps. To take any other view would be to elevate generic words in the antecedent agreement to a status and particularity which they do not deserve and would be to significantly undermine the clear meaning of the key operative clauses of the Option Agreement itself.

95. In my view the proper interpretation of the Option Agreement as a whole, both having regard to its text and the context in which it was concluded – particularly in light of the tenor of the antecedent accord of 22nd May 2012- is such that it must be held to include a right to exercise the option to purchase at any time after its execution. Exercise of the option did not interfere with the company's beneficial ownership and occupation of the lands pending 2042.

Contra proferentem

96. The appellants contend that the Option Agreement ought to be construed in accordance with the *contra proferentem* rule.

97. The principle of interpretation known as "*contra proferentem*" may usefully be applied not just to exemption clauses but to a contract in general but normally only as a last resort in the case of ambiguity and not as a general approach. The purpose of this principle is to resolve ambiguity and not to create it. The first question to be considered is whether it is necessary or appropriate to have resort to this maxim to resolve the issue of interpretation in the instant case.

98. The trial judge determined at para. 42(6) of his judgment that the principle of *contra proferentem* did not arise. The general rule is that the drafter or proferror can be assumed to have taken care of his own interests and that of his client. Whereas both parties are bound by the agreement, one party's commitment by the acceptance of the document is referential to the other party's terms and amounts to an acceptance of whatever terms the other party has proposed. In this case Mr. Roberts is the proferror in regard to the *contra proferentem* rule irrespective of what the historic or factual background as to how his firm came to draft the option document. The agreement is formed upon the reasonably apparent meaning of the proposer's draft option agreement .

99. It is a basic rule of common sense that responsibility for any ambiguity usually falls on the drafter, particularly since pre-contractual negotiations are inadmissible. The maxim is a rule of construction so that where there is a doubt about the meaning of a contract the words will be construed against the person who put them forward based on the Latin maxim *verba chartarum fortuis accipiuntur contra proferentem.*

100. Clarke J. in *The Law Society v. MIBI* in referencing the *contra proferentem* rule observed:

> "The reasonable and informed person would be likely to assume that an individual who wished to insert a clause into a contract specifically for their own protection or benefit would ensure that the clause was expressed in clear terms. It would follow that, provided that the terms were clear and that there was no ambiguity, the clause should stand and provide whatever protection its terms permitted. However, if the clause were unclear and an ambiguity existed, then the clause should be construed against the profferer for the reasonable and informed observer would be likely to take the view that, if greater protection or benefit had truly been agreed, the profferer would have ensured that it was clearly specified." (Para. 10.6)

101. There is no valid reason identified in the judgment to exclude the operation of the *contra proferentem* principle in the instant case.

Land and Conveyancing Law Reform Act 2009

102. The notice dated 14th March 2013 purporting to exercise the option to purchase the freehold was in the name of Denis Cremins alone. The company asserted that s. 82 of the Land and Conveyancing Law Reform Act 2009 did not permit exercise other than by Mr. and Mrs. Cremins jointly.

103. The relevant part of the section provides as follows:

> "82.— (1) Where under a covenant persons are—
>
> … (b) covenantees, the covenant shall be construed as being also made with each of them…
>
> (3) This section takes effect subject to the terms of the covenant or conveyance in which it is contained or implied or of any statutory provision implying the covenant.
>
> (4) In this section 'covenant' includes an express or implied covenant and a bond or obligation contained in a deed."

104. As JC Wylie, in the text "*The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary*", 3rd Ed., 2017 notes:

> "Section 82 is another 'word saving' provision and, in essence, provides that where a covenant is entered into by or with two or more persons, it is deemed to be made with them jointly and severally and binds their respective survivors when

one or more of them dies: see *White v. Tyndall* [1888] 13 APP CAS 263.2"

105. The latter case concerned covenants in a lease dated 21st January 1842, predating the Conveyancing Act of 1881, by almost 40 years. Section 60(4) of the 1881 Act provided that the section applied only to covenants made after commencement of the Act.

106. Section 82(1)(b) re-enacts the substance of s. 60 of the Conveyancing Act 1881 in substance.

107. It is clear that the import of the implied provision in general is that one of several covenantees can sue separately to enforce a covenant or rights on foot of an instrument.

108. In construing the agreement, reference to the "Cremins" throughout requires as a matter of construction the deemed addition of the words "and each of them" to give effect to s. 82(1)(b) of the 2009 Act. That is the statutory impact of the legislation. It is erroneous to infer from the absence of those express words, per se, that there is to be implied a term excluding the operation of s. 82(1)(b).

109. The trial judge found that the first named appellant was not entitled to exercise the Option Agreement on his own behalf acting alone, finding that the operation of s. 82(3) effectively ousted the statutory construction of s. 82(1)(b) contended for by the appellants.

110. The trial judge stated in his judgment at paras. 92-94:

> "Most significantly the definition of "Cremins" in the Option Agreement does not refer to "them and each of them". Instead it merely refers to "their and each of their heirs, executors and administers"…
>
> Moreover no where in the Option Agreement is there any separation out of Mr. Cremins from Mrs. Cremins in relation to the exercise of their rights and obligations. The fact that clause 8.2 prohibits them from signing or disposing of their rights and benefits under the Option Agreement is also significant because it demonstrates the desire of the company to ensure that it would continue to deal with Mr. and Mrs. Cremins, or their heirs, and that they would not have to deal with other unknown parties in the operation of the Option Agreement.
>
> In other respects the wording used in the Option Agreement, and its broader terms, do not fit comfortably with the idea that one of the defendants, or the heirs of one of the defendants, could exercise the Option. Thus, the definition of "Acceleration Notice" refers to "Cremins", "them" and "they" and not to one or either of them. If defence counsel's submission is correct it would follow that not only could one defendant serve a Purchase Notice, but this could be done secretly and without communicating that fact to the other defendant, or (if deceased) to that defendant's heirs. It is a significant factor that the Option Agreement provides that the buy-back option consideration is only €1.00, and on receipt of this, if the defendant's contention is correct, the plaintiff would be obliged to convey the Lands to the one party exercising the Option. Thus one defendant could obtain a windfall, simply by serving a notice (with or without €1), and the other defendant would be left with nothing. Whatever might be said about an agreement which requires that upon exercise of the option the grantee must pay market value, it seems to me that s.82 will generally yield to the express terms of an option agreement where the "covenantees" do not have to pay anything to enjoy the benefit of the option."

Exclusion

111. Section 82(3) is of note insofar as any instrument or conveyance in which a covenant is contained or of the covenant itself may exclude or vary the provisions of s. 82 (1). It provides:

> "This section takes effect subject to the terms of the covenant or conveyance in which it is contained or implied or of any statutory provision implying the covenant."

112. The company contended that the provisions of s. 82(1)(b) were inconsistent with implied terms of the Option Agreement and were excluded by implication in light of s. 82(3) of the Act.

113. The mischief which s. 82 of the 2009 Act was intended to remedy must not be lost sight of. The spirit and intendment of s. 82(1)(b) is to be borne in mind particularly where nothing in the Option Agreement can be fairly said to displace it either expressly or impliedly and in accordance with the rules of statutory construction. It is a mere re-statement of the law as it has stood from on or about 1st January 1882.

114. At the level of principle I am unable to agree that the mere description of the Cremins in the option instrument itself is sufficient to oust the rights prima facie vested in them severally by operation of law pursuant to s. 82(1)(b) of the 2009 Act. It is too slender a proposition to bear the weight and exclusionary import implied into it by the trial judge. I am not satisfied that it amounts to a "term" of the option instrument in that sense. Neither is there any necessity for there to be a "separation out of Mr. Cremins from Mrs. Cremins in relation to the exercise of their rights and obligations" as is contended for at para. 93 of the judgment.

115. It is freely acknowledged by the covenantees that their rights under the Option Agreement itself are not assignable but that is a wholly separate matter and the two issues ought not be conflated.

116. Nowhere is there an express exclusion of s. 82(1)(b) to be found in the option instrument. Nowhere in the option instrument is there unequivocal language expressing or implying an intention that precludes the right of one or other of the Cremins under s. 82(1)(b) to severally exercise the option right thereunder. It was open to the drafter Mr. Roberts to so draft it were it the intention of his client.

117. The decision in *MacDonald v. Robins* [1953] 90 C.L.R. 515 relied upon and cited by the trial judge appears to be distinguishable on its facts. It did not concern the statutory implication of a right, for the benefit of covenantees, by operation of law to be read into an option agreement but rather appears to have been confined to the separate exercise of contractual construction.

118. As a matter of construction the definition of the "Cremins" in the Option Agreement must be construed as incorporating the provisions of s. 82(1)(b) of the 2009 Act. The provision is incorporated by operation of law that the covenant shall be construed as being also made with each of them. Hence it is necessary to construe the agreement having due regard to the operation of s. 82(1)

(b) given the several nature of the agreement as amended statutorily. The exercise by one party alone of the option was perfectly valid.

119. Considering the Option Agreement as a whole and its relevant provisions, there is no clause contained in the Option Agreement, or capable of being reasonably implied into it, capable of excluding or disapplying the provisions of s. 82(1)(b) of the 2009 Act. By contrast, there is a clause in the Option Agreement expressly excluding assignment.

Relevance of covenant against assignment

120. It is freely acknowledged by the covenantees that their rights under the Option Agreement itself are not assignable but that is a wholly separate matter and the two issues ought not be conflated.

121. Clause 8.2 of the Option Agreement provides:

> "Cremins covenants with [the company] that they shall not charge assign or otherwise dispose of their rights and benefits hereby granted under this Agreement."

The "uncertainty" identified by the trial judge at para. 91 of his judgment is not sufficient to displace the clear statutory mandate to be found in s. 82(1)(b) which requires that the covenant be construed as being also made with each of the Cremins severally. Severality operates by operation of law pursuant to s. 82(1)(b) and express incorporation is not necessary.

122. As a matter of construction it cannot reasonably be inferred from clause 8.2 of the Option Agreement that it extended to precluding assignment of rights enuring from the exercise of the option to purchase. Had that been the intention of the respondent, particularly in circumstances where their solicitor Mr. Roberts drafted the agreement, a clear and unequivocal exclusion of the operation of s. 82(1)(b) ought to have been incorporated into the Option Agreement. That never occurred. It calls for considerable and disproportionate violence to the reasonable and ordinary meaning of the language in the Option Agreement in my view to arrive at the conclusion which doubts whether s. 82(1)(b) "will ever apply to the benefit of an option granted to two or more persons jointly in the absence of clear indication that it is intended to apply to one or each of them." (para. 95)

123. Insofar as it is suggested that the operation of s. 82(1)(b) is diluted or otherwise debased in circumstances where an option agreement is exercisable for modest consideration or that in such circumstances the terms of the Option Agreement are incompatible with the "default" construction provided for in s. 82(1)(b) and that s. 82(3) of the 2009 Land and Conveyancing Law Reform Act so operates I respectfully disagree. I am satisfied that the notice signed by Mr. Cremins alone was operative for its purpose and its validity was underpinned by s. 82(1)(b) of the Land and Conveyancing Law Reform Act 2009.

124. I am satisfied that clause 8.2 of the Option Agreement -the covenants on the part of the Cremins contained in the Option Agreement - is not consistent with the construction imposed on it by the trial judge at para. 93 of the judgment. Merely because the Cremins' covenanted not to charge, assign or otherwise dispose of their rights and benefits under the Option Agreement to third parties is not in any way inconsistent with the agreement being construed as having been made with each of them enjoying joint and several rights.

125. The words "and each of them" is to be treated as incorporated by operation of law into the definition of Mr. and Mrs. Cremins as covenantees.

126. The ambiguity contended for by the trial judge at para. 91 only arises from the non-application of the rule of construction in s. 82(1)(b) of the Act.

127. The company and their solicitor as the drafters of the Option Agreement had the opportunity of excluding or varying the operation of s. 82(1)(b) in the option had they chosen to do so. It is significant that they refrained from expressly incorporating s. 82(3) of the act when the opportunity presented.

128. I am satisfied that there is nothing in the Option Agreement that delimits the application of s. 82(1)(b) of the Land and Conveyancing Law Reform Act 2009 to this option. Words which are a mere description of the parties "Cremins" do not, as a matter of construction, displace the operation of s. 82(1)(b) of the 2009 Act that joint parties be treated jointly and also severally.

129. Accordingly, the conclusion at para. 97 of the judgment where it is stated "…I am of the view the terms of the Option Agreement are incompatible with the 'default' construction provided for in s.82(1)(b), and s.82(3) applies. I conclude that the defendants' Purchase Option can only be exercised by both defendants…" cannot stand.

Estoppel by convention

130. It is significant that for a period between November 2012 and February 2015, no objection was raised on the part of the company to the exercise of the option by Mr. Cremins. Objection was first raised in February 2015 by the institution of the within proceedings. Likewise, it would appear that in regard to the discovery, no internal memos or records show the respondent company impugning the 2013 service of the Purchase Option as being improper, sharp practice or contrary to the settlement agreement between the parties executed in May 2012.

131. Communications from the respondent to the appellants prior to the institution of the proceedings focused exclusively on seeking to establish the validity of service on behalf of the company of its Lease Option notice.

132. The conduct of the respondent and its solicitors from November 2012 when it first became apparent that Mr. Cremins wished to serve notice and exercise the option to purchase until the institution of the within proceedings over two years later in 2015 calls for scrutiny and an explanation. It is particularly relevant that no evidence was adduced in court nor did the respondent assert in correspondence that an exercise of the option to purchase was intended to not be permissible prior to 2042. Neither was it suggested that such exercise was intended to be precluded on the part of the company let alone that it was the joint common intention of the parties that exercise be deferred until at the earliest 2042.

133. The stance adopted prior to the institution of the proceedings in February 2015 was to call upon the appellants to accept that service by the respondent of the Lease Option notice in March 2013 was valid. It will be recalled that two separate attempts at service occurred. The first was service on the minor child of the appellants, Michael Cremins, the other by e-mail on the solicitor Ms. Aoife O'Connell.

134. It is significant that no originating letter was sent nor communication of any kind to the solicitor articulating these complaints of misconduct prior to service of the proceedings in February 2015.

135. Throughout the period of time from November 2012 up to February 2015 the parties outwardly acted on the assumption that the option to purchase had been validly exercised. The question arises whether it would now be unjust or unconscionable to allow the company resile from that position. The appellants rely on Hodge, "*Rectification, the modern law and practice governing claims for rectification for mistake*", 2nd Ed., 2016, which provides:

> "The common assumption shared by the parties must be both unambiguous and unequivocal. Estoppel by convention is generally concerned with post-contractual rather than pre-contractual matters. In relation to pre-contractual matters the appropriate remedy is rectification, although the principle of estoppel by convention may be available where a particular clause or expression has an agreed mutually-understood meaning."

136. The constancy or convention of relevance in the instant case operated from March 2013 onwards. It was never denied that Mr. Cremins had validly exercised the option to purchase. A single constant position was maintained in that regard by both parties throughout up until the institution of the proceedings.

137. Estoppel by convention differs from other categories of estoppel, particularly proprietary estoppel, where frequently there will have been an expenditure of money or other acts of forbearance characterised as detrimental in nature.

138. Estoppel by convention finds its expression in the modern times in cases such as *Moorgate Mercantile Co. Ltd. v. Twitchings* [1977] A.C. 890 and the court generally considers it sufficient that if the party to whom an assurance is given acts on the faith of it in such circumstances it would be unjust or inequitable for the party making the assurance to go back on it.

139. I am satisfied on the basis of the available evidence that the conduct of the respondent between March 2013 and February 2015 is consistent only with an acceptance that the first named appellant had validly exercised the option to purchase.

140. The corpus of communications that passed between the parties over that period is consistent with the parties engaging on an assumed state of facts. This assumption was shared by both sides and actively acquiesced in by the respondent.

141. I accept the statement of Lord Steyn in *Republic of India v. Indian Steamship Co. Ltd*. [1998] A.C. 878 at p. 913 where he stated:

> "The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption… It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

142. I am satisfied that there was clear communication between the parties, including the legal representatives for the time being of the respondent, on the one part and the appellants on the other part. The respondent actively acquiesced in that position and it would now be unjust and even unconscionable to allow the respondent go back on the relevant assumption. I am satisfied it was a shared assumption and it was reasonable on the part of the solicitor Mr. Roberts to conduct himself as he did for it reflected the law and it reflected the true circumstances as obtained between the solicitors.

Time of the essence

143. Generally, option agreements are strictly construed with regard to the time of their exercise in accordance with the principles for the construction of time provisions in option agreements. Nothing contained in the agreement between the parties contemplates deviation from the commercial realities and usage with regard to time provisions for the exercise of options. This agreement is silent as to whether time was intended to be of the essence under the agreement or not.

144. It is noteworthy that the trial judge considered U*nited Scientific Holdings v. Burnley Borough Council* [1978] A.C. 904 a case to which Hoffman J. (as he then was) considered in *Spiro v. Glencrown Properties Ltd*. [1991] Ch. 537, at p. 545, where the purchaser had:

> "…relied strongly on the decision of the House of Lords in *United Scientific Holdings Limited*…as authority for the universal application of the irrevocable offer characterisation. That case concerned the rule that the conditions for the exercise of an option, including any time stipulations, must be strictly complied with. The rule had been developed by analogy with the rule that an ordinary offer can be accepted only by strict compliance with the conditions which it lays down."

145. Hoffman J. earlier at p. 544 stated:

> "an option is not strictly speaking either an offer or a conditional contract. It does not have *all* the incidents of the standard form of either of these concepts. To that extent it is a relationship sui generis. But there are ways in which it resembles each of them. Each analogy is in the proper context a valid way of characterising the situation created by an option. The question in this case is not whether one analogy is true and the other false, but which is appropriate to be used..."

146. The trial judge determined that time was not of the essence with regard to the provisions of the Option Agreement. In arriving at this conclusion the trial judge attached weight to a number of elements. Firstly, thirty years was a very lengthy period of time for the exercise of any option. Secondly, that the Lease Option, being a second option, was dependent on the exercise of the first option. Thirdly, it was common case that neither the conveyance to the appellants nor the leaseback to the respondent could occur until 2042. Fourthly pursuant to clause 8.2 the appellants were specifically prohibited from charging, assigning or otherwise disposing of any rights or benefit under the Option Agreement although same could devolve on death to their heirs.

147. The trial judge found at para. 148:

> "They can never alienate such interest in the Option as they are granted under the Option Agreement. No similar provision prevents the plaintiff disposing of its interest in the Lands and the Option Agreement at any time – indeed clause 8.1 expressly confirms [the company's] right to dispose of or charge their interest in the Lands and their rights under the Option Agreement."

148. The appellants contend that the trial judge erred at para. 148 of his judgment in determining that they were prevented from disposing of a proprietary interest in the land until the year 2042 and that therefore time could not be considered of the essence under the Option Agreement.

149. The appellants acknowledge that the benefits of the option itself could never be assigned or disposed of having regard to clause 8 of the Option Agreement. However they argue that it was always open to the appellants to enter a contract with third parties in regard to their future reversion in the lands. I consider that the appellants are correct in that regard. The judgment appears to have conflated two discrete matters, firstly the impact of clause 8.2 whereby Cremins covenanted, *inter alia*, not to "… dispose of their rights and benefits hereby granted under this agreement." Separately, the rights and interests of the appellants to their future interests in the lands which operated in equity from the exercise of the option and would vest in possession at the determination of the company's fee simple in 2042 were freely alienable, particularly having regard to the freehold nature of the title. Any alienation of such a future interest had no relevance to or impact upon the covenant not to dispose of their rights under the option agreement.

150. Once the option to purchase was validly exercised the respective rights of the parties were predominantly governed by the contract for sale as envisaged by the Option Agreement and were governed by the general conditions of sale save to the extent modified by the Option Agreement.

151. The authorities indicate that in general time is of the essence in the exercise of an option agreement.

152. Barnsley's *Land Options*, 6th Ed., 2016, considers the consequences of late notice stating at 4-023:

> "The time prescribed for exercise of the option must be punctually observed. Various reasons have been advanced for this proposition:
>
> (i) that an option is a species of privilege which must be exercised in strict conformity with the terms of its creation.
>
> (ii) that so long as the option remains a foot, the grantor is disabled from disposing of his propriety interest to anyone other than the grantee (at least without the purchaser being bound by the option). Accordingly, given the fetter on the powers of the grantor, the grantor needs to know with certainty when it has come to an end."

153. There can be no question of the delay being a "frustrating" delay in the instant case in circumstances where the freehold interest of the respondent is determinable at the earliest in 2042. Wylie and Woods "*Irish Conveyancing Law*", 3rd Ed., 2005, Wylie and Woods, states at 8.05:-

> "The contract creating the option to purchase may contain various terms as to its exercise and as to the conditions of sale applicable. Exercise of the option creates automatically the relationship of vendor and purchaser between the owner of the land and the person exercising the option, i.e. it brings into effect the binding contract for the sale of the land."

154. As was stated by Charleton J. in *Edward Lee & Co. Ltd. v. N1 Property Developments Ltd.* [2012] IEHC 494:

> "Time will not be considered to be of the essence unless:
>
> (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or
>
> (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence…"

155. It will be recalled that the Supreme Court in reaching its determination in *Hynes Limited v. Independent Newspapers Limited* [1980] I.R. 204, a case which concerned the service of a notice requiring a rent review, referring to the House of Lords decision in *United Scientific Holdings v. Burnley Borough Council* [1978] A.C. 904, emphasised that it was the weighing of the equities involved that would result in relief in equity or in the refusal of that relief at pp. 215-216 he stated:

> "The result was that, in the absence of any contra indication in the lease itself, the House of Lords in the Burnley Case ruled that there is a presumption (stemming from the application of equitable principles) that in all rent review clauses time should not be regarded as essential to the initiation or operation of the rent review, even if the right to review is unilateral."

156. In this case the option in favour of the company is governed by the principles governing options in relation to leases where greater latitude on time provisions has been historically afforded.

157. I am satisfied that time was not of the essence of the Option Agreement. It cannot be so having regard to the subject matter of the lease that in light of the test in the *Edward Lee* case. For it to be so it would per force render nugatory the reciprocal rights of the respondent company to procure a valid lease in the event of the Cremins exercising their option to purchase.

Conclusions

158. Accordingly, I find as follows:

> i) Findings adverse to the solicitor Ms. Aoife O'Connell require to be set aside on the basis of the principle of fairness.
>
> ii) No right to rectification of the Option Agreement dated 12th June 2012 based on unilateral mistake is established.
>
> iii) No right to rectification by construction of the Option Agreement dated 12th June 2012 is made out.
>
> iv) The company is estopped by convention from denying that the first named appellant validly exercised the option to purchase.
>
> v) The Option Agreement ought to be construed contra proferentem.
>
> vi) Section 82(1)(b) of the Land and Conveyancing Law Reform Act 2009 is operative and the first named appellant validly exercised the option to purchase.

vii) Time was not of the essence of the agreement and the time for valid exercise of the Lease Option on the part of the company has not expired.

159. I would allow the appeal and set aside the declarations made in the High Court and allow the cross appeal for the reasons stated above.