**An Ard-Chúirt**

**The High Court**

**Commercial**

**Record number 2011 11692P**

**Between**

**Edward Lee and Co. [1974] Limited**

**Plaintiff**

**And**

**N1 Property Developments Limited**

**Defendant**

**Judgment of Mr. Justice Charleton delivered on the 12th day of March, 2013.**

This judgment is supplemental to that of the 12th November, 2012. It has been argued that the prior judgment has effectively decided the proper approach of the Court in the issue now before it. A full reading of the judgment indicates that this is not so. In that judgment, the Court held that the plaintiff tenant was entitled to relief in equity against a situation where the 36 year lease, on which it held a Dunnes Stores Clothing shop in the defendant landlord's premises known as the Northside Shopping Centre, provided for an automatic extension at the same excessive rent for a further 36 years unless notice was served 6 months before that lease was due to expire in late January, 2011. Clause 4.03 VII of the lease was in issue in that judgment. Four days before the lease expired, and not six months as the lease required, a notice was sent by the plaintiff tenant stating that the lease would be surrendered on its expiry. The window of opportunity to do this had ceased, however, because that window operated only from the 1st February, 2010, to the 31st July, 2010. Relief in equity was granted to the plaintiff tenant against being locked into another 36 year lease by holding that the notice should operate to determine the automatic 36 year extension of the lease. In the context of the entire judgment, paragraph 35 makes that decision explicit:

> In the result, the notice given by the plaintiff tenant to the defendant landlord that it did not wish to exercise the option of a new 36 year lease on the same terms as the previous 36 year lease is valid. Such notice does not disentitle the plaintiff tenant from statutory relief.

After that judgment, the plaintiff tenant did not seek a new tenancy pursuant to the Landlord and Tenant (Amendment) Act 1980. That judgment did not decide what notice would be required to relieve the plaintiff tenant of all of its obligations to the defendant landlord; only that relief should be given in equity in order to treat the notice as stopping a new 36 year lease coming into operation. The Court was not asked if the notice was valid to determine a 36 year lease on four days notice when the terms of the lease required six months notice. Nor did that judgment decide whether a new tenancy had come into operation by virtue of the overholding of the plaintiff tenant; the premises only having been vacated on the 9th December, 2012; in round terms a full two years after the notice from the plaintiff tenant that it wished to vacate. Nor did that judgment decide what the terms of that holding of the premises by the plaintiff tenant might be. The defendant landlord claims that it is automatically a tenancy from year to year; thus requiring six months notice expiring on a gale day. Finally, should a tenancy not have been created by the overholding of the plaintiff tenant, the defendant landlord pleads by way of amendment to the defence and counterclaim an entitlement to mesne rates.

**Facts and figures**

The overholding of the premises by the plaintiff tenant took place in particular circumstances. On the 27th January, 2011, the solicitors on behalf of the plaintiff tenant wrote to the defendant landlord that the tenant would not be renewing or extending the 36 year lease. This was accompanied by a statement that arrangements were being made to vacate the unit and to hand over the keys. On the 15th February, 2011, the landlord replied protesting that as no effort had been made to hand over the keys, this lack of action made it clear that the tenancy was being extended. It is fair to say that the main dispute in the case was then ventilated through an exchange of well-argued correspondence; the prior judgment deals with this. A demand was made by the landlord for payment of outstanding rent as of September, 2011 and this was accompanied by a threat to wind up the company as insolvent in the event that payment was not made. On the 30th September, 2011, the tenant, despite remaining in possession and trading from the premises for the previous eight months, sent a cheque to the landlord in the sum of €45,045 "in full and final settlement of all rent and outgoings due in respect of our occupancy of the unit under the lease to the date of expiry and termination of the lease on 31 January 2011." The landlord replied by pointing out that under the terms of the lease, if it continued as the landlord contended under the lease, a sum of €371,128.90 was due. On the 5th October, 2011, the tenant tendered a cheque for €267,928, claiming that this was all that was due for the additional months of occupation.

That calculation is interesting. As noted in the prior judgement, as of the last relevant rent review, in 2005, the annual rent had become €336,840 per annum. In this communication, the tenant was calculating an open market rent as mesne rates on the basis of 50% of that sum. They were tendering, as well, a reduced service charge payment, a reduced insurance payment and a reduced promotion payment; all of which would be due under the lease. In this regard, given that the plaintiff tenant is part of the Dunnes Stores group, which holds multiple properties throughout Ireland, it is hard to take seriously that the rent argued for during this hearing amounted to an equivalent of €113,000 per annum taking into account a rent-free period of two years on a 10 year lease with a five-year break clause. Notwithstanding that observation, I have adjudicated on the valuation evidence on its own merits. On the 25th November, 2011, the tenant, acting under protest, paid the landlord €485,017.90; which would be the full sum due under the lease up to that time, should it operate to fix the appropriate payment. Proceedings issued on the 16th December, 2011. The judgment of the High Court on the automatic extension of the tenancy question and on equitable relief was given on the 12th November, 2012.

A number of things are clear from the correspondence. Firstly, the tenant was late in surrendering the tenancy. Secondly, the tenant

threatened more than once to leave the premises but did not do so. It may be argued that this failure to hand back vacant possession of the premises was due to the threat that if the 36 year lease had been extended without relief in equity into a 72 year lease, the tenant was better off staying in the premises and attempting to trade as profitably as it could. As against that, strong arguments were available that relief in equity was applicable and that is ultimately how the legal situation transpired in the prior judgment of this Court. Thirdly, it is clear that by staying in the premises and trading the tenant was, at the least, putting itself under an obligation to pay a reasonable sum in lieu of rent. Given the length of the lease, it is also clear, fourthly, that any tenant would make substantial investment in any shop premises that was going to be held over the span of a generation. From the point of view of the landlord, a reasonable period of notice would be required in the context of that timespan in order to make arrangements for the advertisement of the premises with a view to securing a new tenant and for refurbishment. It happens that the period of notice fixed by the lease was six months and that such a term of notice seems reasonable in that context. In giving relief against the mistaken extension of the 36 year lease into double that term, account should be taken of that factor as a relevant circumstance.

**Overholding**

The defendant landlord has argued that by implication of law, the circumstances of overholding by the plaintiff tenant gave rise to a new tenancy from year to year that was determinable only by giving six months notice of surrender to expire on a gale day. Such an implication, if it arises at all, arises from particular circumstances. There is no automatic rule of law that when a tenant overholds that a new tenancy is thereby created. It can be presumed in certain circumstances; but that presumption is not automatic. The Landlord and Tenant Law Amendment (Ireland) Act 1860, known as Deasy's Act, radically reformed landholding in Ireland. It abolished any form of holding under feudal law and thus any form of tenancy in return for services such as duties owed by those who held land at sufferance from a lord. Instead, the relationship of landowner and landholder was to be replaced by contract. In Thomas Harrison, *The Law and Practice Relating to Ejectments in Ireland* (Dublin, 1903) at pages 17-19 the learned author, dealing with the continuance of a monthly tenancy, explains:

> … mere continuance in possession with the permission of the landlord after the expiration of a lease is evidence from which a new tenancy may be implied. Acquiescence by the landlord in his tenant's remaining in possession is merely *evidence* of a new tenancy. (*Nixon v. Darley*, I.R. 2, C.L. 467.) The length of the overholding, the conduct of the parties and the entire circumstances under which the tenant overheld, are elements which may either support or rebut the presumption. Receipt of rent is, however, almost conclusive evidence of the creation of a new tenancy.
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> *Prima facie* a yearly tenancy created by continuance in possession with the landlord's consent, after the expiration of a lease, is subject to the same terms as were contained in the lease itself so far as they are applicable to a yearly tenancy. But it is always a question of fact what was the precise character of the tenant's possession, and whether the new tenancy is upon the same terms as the expired lease (See *Kelly v. Patterson*, L.R. 9, C.P. 681; *Caulfield v. Farr* I.R. 7, C.L. 469.) It is open to either party to show that certain terms of the old lease have been varied or waived, either expressly or by implication, or are inconsistent with or inapplicable to the new tenancy. (*Meath v. Megan* (1897), 2 I.R., at 479.)

The automatic extension of terms is merely a matter of implication and it is one that is readily capable of being rebutted by the circumstances of the continuation of the arrangements between the tenant and landlord being inconsistent with any mutual intention to continue with the tenancy. Further, some terms may be shown to have continued and some may, by the conduct and actions of the parties, be show to have fallen away; *Meath v. Megan* [1897] 2 I.R. 477. In *Phoenix Picture Palace Ltd v. Capitol and Allied Theatres Ltd* [1951] Ir. Jur. Rep. 55, Dixon J. reviewed the authorities and his statement of the law at page 57-58 may be taken as correct:

> It is usually stated to be the law that where a tenant remains in possession after the expiration of his term and rent is paid and accepted without more, the parties are presumed to have agreed to a yearly tenancy, on the original terms and conditions so far as applicable to such a tenancy. This is, however, a very general statement. A more precise one will be found in *De Moleyns' Landowners' Guide*, 8th ed. At p.220, in these words:
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> > "No writing is needed to create this tenancy, which arises by implication of law, whenever a person remains, or is placed, in possession of premises, with the understanding, express or implied, of paying an *annual* rent *with reference to a yearly tenancy;* but this payment of rent is only evidence of the contract of tenancy and may be rebutted. The italics are the author's."
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> One of the authorities cited by *De Moleyns* in support of this proposition is the judgment of Parke B. in *Braythwayte v. Hitchcock* 10 M.&W. at p.497. In that case, Parke B. said:
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> > "Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding for in *Richardson v.- Langridge* (1811), 4 Taunt. 178 a party who had paid rent under an agreement of this description; but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be a tenant at will only."
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> In the present case, it is clear that the lease of 14th June, 1944 did not demise the premises by reference to a yearly holding or by reference to a yearly rent or even a rent for any aliquot part of a year; and it seems to me, therefore, that the necessary foundation, according to the passages just cited, for presuming an agreement for a yearly tenancy is missing.

In *Baumann v. Elgin Contractors Ltd*. [1973] I.R. 169 Finlay J. rejected as "unreal" an assertion that a new tenancy had come into operation through the mere payment of rent. He assessed that overholding as being a "temporary arrangement" until a new tenancy could be fixed through application to the Circuit Court in due course. The background is all important. As Finlay J. stated at p. 177:

> As I understand the legal principles applicable, the true origin of an implied tenancy is that the law implies from the conduct of the parties what is, in effect, a silent agreement that their relationship shall be arranged in a certain contractual fashion.

Mere payment of rent is no secure basis, without enquiring into all the other relevant circumstances, for any implication that a new tenancy was created merely by the fact of overholding; *Twil Ltd v. Kearney* [2001] 4 I.R. 476 at 493.

In the context of the correspondence quoted, an implication of a new tenancy as contended by the defendant landlord cannot arise. There is no basis in law for applying any inference of, much less legal presumption of, a new tenancy from year to year on the facts

of this case. The circumstances are clear in raising an inference to the contrary. From January, 2011 the plaintiff tenant was protesting that the lease had come to an end by efflux of time. The plaintiff tenant, by proffering various sums of money that were less than the rent and other charges fixed by the lease was making it clear throughout that year that whatever it was obliged to pay, that sum was different from and was less than that specified under the lease. The defendant landlord was demanding the full sums due and was also claiming that a new 36 year tenancy had, through the terms of the lease, come into automatic operation. Nothing about this case suggests the kind of typical situation that is canvassed in the cited cases whereby a cosy arrangement is continued over a substantial time between landlord and tenant, through consensus or sheer lassitude, or because the existing arrangements suit both parties. Nothing, in fact, could be further from this case.

I therefore hold that a new tenancy from year to year was not created through the actions of the parties.

**Mesne rates**
As a matter of law, the defendant landlord is entitled to reasonable remuneration in respect of the occupation by the plaintiff tenant of the premises. What is reasonable depends not only on the valuation of the appropriate rent of the premises on the open market but also must be assessed by reference to what period of notice to determine the arrangement is reasonable in the context of the occupation that has taken place, the character of the property, over what time span and under what circumstances the overholding has taken place, and what might be envisaged by a diligent landlord as a reasonable period to make attempts to arrange for a replacement tenant. Any protest by the tenant that the landlord is holding the tenant to an unfair bargain must also be taken into account. I take all of these factors into account in the calculation that follows.

Section 46 of Deasy's Act sets forth a rule equivalent to the doctrine in contract of *quantum meruit*. This is the entitlement of a person who provides services to another in the implied expectation of a reward to receive reasonable remuneration where no payment has been specified by contract. In those circumstances, a worker is entitled to the value of his or her work. The rule as to remuneration as between landlord and tenant is, by statute, similar:

> Every person entitled to any Lands, and who shall suffer the said Lands to be holden or occupied by any Person under an Agreement not specifying or determining the Amount of Rent, shall be entitled to recover a reasonable Satisfaction for the Use and Occupation of the said Premises holden or occupied by the said Person in Action…

There is no rule that remuneration by way of an equivalent to what the rent would be worth, mesne rates, is to be invariably assessed on the basis of equivalence to any prior rent paid. Any such approach gleaned from disparate decisions responding to varying sets of facts has long since been superseded. In Wylie, *Landlord and Tenant Law*, 2nd Ed., (Dublin, 1998) at 27.17, the author correctly comments:

> Formerly there was a rule of thumb that mesne profits would be assessed at the same rate as the former rent no matter how long that rent had operated. Modern courts tend to assess a fair market rent or thereabouts though this may be affected by factors such as the short term nature of the overholding period in most cases and that the tenant is departing at the end of the period.

The calculation of mesne rates is thus dependent upon the factors which go to make up a fair market rent. As a matter of law, I hold that the assessment of what is fair as remuneration to a landlord by an overholding tenant may allow for a period of rent in lieu of notice or for notice while the premises continue to be used by a tenant. No other approach complies with the fundamental principles of law in the context of a dispute over commercial premises between a professional landlord and a large and highly respected retail organisation. A 'pop-up-shop', as a very temporary arrangement to lease premises from week to week or month to month with little alteration to the fabric of the premises is called, must be assessed as being radically different to how an overholding of a long tenancy is to be treated in these circumstances.

As a matter of fact, once the judgement of the court was given on the 12th November, 2012, the defendant landlord demanded payment of sums equivalent to those due under the lease that had expired. For its part, the plaintiff tenant by letter dated the 26th November, 2012, notified the defendant landlord that it would not be seeking a new lease pursuant to the statutory scheme set out in the previous judgement in this case but would instead be vacating the premises. On the 3rd December, 2012, the plaintiff tenant wrote to the defendant landlord stating starkly "we ... will be gone on or before 10 December 2012." How was anyone to know where this dispute was going prior to this time? From my view the correspondence, as emerges in the prior judgment, it seemed to me that what was in issue was the level of the rent. I have been shown nothing otherwise; though there was a statement made by counsel to a witness during the hearing that for some years the plaintiff tenant was trying to get out of "this shopping centre". As a question, that is fine. It is not, however, evidence. There is nothing in the correspondence to back that up. If that was the attitude, a tenant would be studying their lease with a view to getting a determination of the tenancy. There is nothing to suggest that. The impression created by all of the correspondence was a move towards a new tenancy at a probably much lower rent under the Landlord and Tenant (Amendment) Act 1980. The now entrenched attitude of both parties is clear.

In *Dean and Chapter of the Cathedral and Metropolitan Church of Christ Canterbury v. Whitbread PLC* [1995] 1 E.G.L.R. 82, Judge Cooke gave a summary of the principles applied to this kind of assessment for overholding from the former authorities in England and Wales at p.85:

> Where the holding is consensual, as here, and not trespassatory, the basis of the action is for a payment for use and occupation… *Woodfall* at paras 10.017 takes the view that the distinction is of no practical importance and none of the authorities cited to me suggest that there is any real difference in the measure of damage or sum payable or that the proposition in *Woodfall* is in any way to be doubted. It seems to me that I can obtain help from authorities on both types of claim.
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> How one approaches the assessment of the figure and what principles one applies are, however, somewhat more complex to explain.
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> (a) There is no need for the landlord to show that he could or would have let the premises to somebody else at the material time: see *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 following the well known "wayleave" case of *Whitwham v Westminster Brymbo Coal & Coke Co* [1896] 2 Ch 538.
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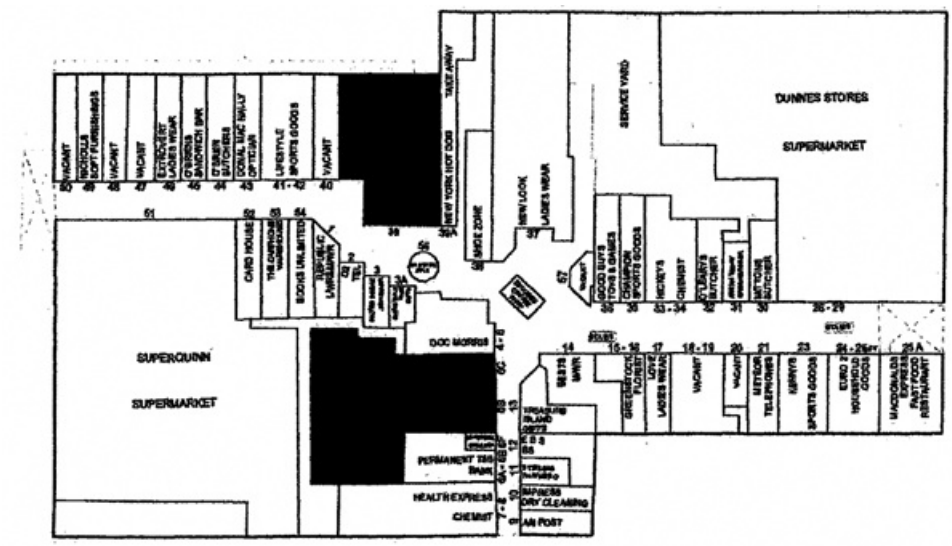
> (b) There are alternative and mutually exclusive bases of claim: (1) loss actually suffered; and (2) value of benefit which the occupier has received. The letter is a restitutionary claim and there has to be election before judgment: see *Ministry of Defence v Ashman* (1993) 66 P&CR 195, at p 201, Hoffmann LJ… The restitutionary claim is, in effect, the same as the *Whitwham* claim.

(c) The ordinary measure is a proper letting value of the property for the relevant period, there being in the ordinary case in a free market the value to the trespassers of its use; see *Swordheath*.

I have taken the relevant background into account. Having regard to all of the circumstances, my decision is that it is reasonable for the plaintiff tenant to pay an open market rent for the two years 2011 and 2012 during the use of the premises for trading and that it is also reasonable on the particular facts of the case that a reasonable period of notice should be given to the landlord as to the vacation of the premises. In the context of the relevant factors set out previously in this judgement, my view is that such period is six months. From the date of the expiry of the lease, therefore, the plaintiff tenant must pay two and a half years rent and other charges. I am assuming that the other charges are not to be proportionately reduced as no submission to that effect has been made to me. Nothing in the lease seems to allow for such a reduction but, if absolutely necessary, I will hear counsel on the matter. It is therefore appropriate to turn to an assessment of the open market rental valuation of these premises for that period beginning in January, 2011.

**Valuation**
The issue as to the appropriate valuation of the premises is best seen in the context of a diagram of the premises. To the top of this plan of the ground floor of the Northside Shopping Centre is shown the Dunnes Stores Clothing shop occupied by the plaintiff tenant until December, 2012. The other marked area below it is a store that was recently rented out by the defendant landlord.

Two distinguished valuers gave evidence and I am grateful to both. Having regard to all of the evidence, the manner in which the evidence of each was given and my assessment of their approach to testimony, I clearly prefer the evidence given on behalf of the defendant landlord. It was more objective and was also based on long experience of this shopping centre. I do not, in particular, accept evidence from the plaintiff tenant that this is a shopping centre that is "on its knees". Rather, it is clearly a good and pleasant place for general shopping and has an excellent catchment area.




The unit formerly occupied by Dunnes Stores Clothing, the plaintiff tenant, is over three floors with a central staircase and a goods lift. The ground floor has ample space of 520 m², with slightly more on the first floor and slightly less in the basement. It is an extremely practical trading space, at ground floor level particularly, and has dual frontage totalling 29.5 m. It was reasonable to draw a comparison with a recently rented unit in the centre, as shown in the lower part of the diagram. It also seems to me to be objectively reasonable to conclude that there are advantages to the former Dunnes Stores. The unit is fitted out with floors and ceilings, though any trader taking over the space will need to do more. There is good configuration within the store, it has good frontage, it is in a very good location and the premises can be used as storage either above or below the ground floor, if desired. There is no basis on which a discount of 25% might be rationally applied and the indications are strong that the desirable elements of the unit should attract a good price. As mentioned earlier, as of the last relevant rent review, in 2005, the annual rent had become €336,840 per annum. Retail rents are down considerably since that time. Commencing the rental period in January, 2011 the evidence suggests a probability that an annual rental of €250,000 should be achievable on a ten year lease with a five year break clause. On the evidence, I do not accept that a rent-free holiday of two years is appropriate for an incoming tenant for every five years. I do, however, accept that some period of settling in on a rent free basis should be initially allowed for; in the light of all of the evidence, a year seems reasonable. That would be assessed by ordinary bargaining between the landlord and the tenant. Here, in setting the figure I have regard to the evidence of both valuers. On that basis, doing the best that I can, given that these figures are likely to be the result of negotiation, the rent is therefore reduced to €200,000 per annum on an averaged basis. In addition, my view is that under the lease, a promotional levy and service charge would continue to be payable, as would insurance contribution. Since the premises were occupied during 2012, the sum chargeable would be calculated as of that date. For 2011 and 2012 there were also promotion charges, insurance for those two years and service charge as well. I do not regard it as reasonable that for a period of notice where the tenant is not in occupation that anything other than rent is payable.

**Duration**
The relevant duration where the plaintiff tenant overheld and traded is two years and the relevant period of notice which the tenant did not give under the terms of the lease but which the lease reasonably provided for in the context of the length of the tenancy is six months.

**Result**
Against the sum calculated in respect of rent, service charge and insurance will be set off the amount of €485,417.90 that was paid by the plaintiff tenant to the defendant landlord on the 25th November, 2011.

My figures indicate a total sum due of €358,447. Fortunately these figures are agreed as to calculation.

In the result, there will be a decree in favour of the defendant landlord in that sum.