



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 83

Record Number: 2017/236

**Whelan J.
Costello J.
Kennedy J.**

BETWEEN/

FRIENDS FIRST MANAGED PENSION FUNDS LIMITED

PLAINTIFF/APPELLANT

- AND -

PAUL SMITHWICK

DEFENDANT/RESPONDENT

- AND -

A.T. UNIFORM LIMITED AND THOMAS KENNEDY

THIRD PARTIES

JUDGMENT of Ms. Justice Máire Whelan delivered on the 20th day of March 2019

1. This is the appellant's (hereinafter "the Landlord") appeal against the High Court judgment of the 6th April, 2017 and consequential orders made on 7th April, 2017 dismissing the landlord's claim against the respondent (hereinafter "Mr. Smithwick") for arrears of rent due and owing on foot of a lease on the basis that Mr. Smithwick had validly surrendered the lease by operation of law in or about November, 2004.

Background

2. Under and by virtue of a lease dated 27th May, 1987 ("the lease") the landlord's predecessor, Friends Provident Life Office granted a lease of offices comprising the second floor of Duke House, 2-5 Duke Lane, Dublin 2 ("the demised premises") to Mr. Smithwick for a term of 35 years from the 1st September, 1986. Mr. Smithwick is named as tenant in the lease and duly executed same. The term created by the said lease will not expire until the 31st August, 2021. Mr. Smithwick covenanted at 2.21 not to assign, under let or part with possession in the ordinary way. There is a proviso that the landlord's consent would not be unreasonably withheld to an assignment or underletting of the entire.

3. Mr. Smithwick carried on his business as a solicitor from the demised premises. The original rent reserved by the lease was IR£10,000 per annum. The lease contained a rent review clause and a rent review took place in 2001 which fixed the annual rent at €36,400.00 per annum. In 2003, Mr. Smithwick vacated the premises and became a partner in a solicitor's firm in another part of the city. He continued to pay the rent and comply with the covenants in the lease in 2003 and 2004 and the subsequent events surrounding the occupation of the demised premises is central to the proceedings and to this appeal.

4. The entire building and the various tenancies in Duke House were managed on behalf of the landlord/owners by Duke House Properties Ltd which maintained an office in the building. The latter company was owned and controlled by Mr. Robert Neill and acted as agent for the landlord. Mr. Neill was a witness in the High Court.

5. The appellant acquired the original lessor's interest in the lease with effect from the 31st July, 2009. The appellant's managing agent became aware in the course of the acquisition that the demised premises was at that time being occupied by a company connected to Thomas Kennedy, who held a lease of the ground floor and basement of the building and who traded through the companies Alias Tom Limited and A.T. Uniform Limited. The circumstances surrounding Mr. Kennedy's going into possession of the demised premises and the status of his companies whilst in occupation were raised by Mr. Smithwick in the course of the litigation in the High Court and will be considered further below.

The Summary Proceedings

6. From the month of April 2011, rent due on foot of the lease ceased to be paid. Thereafter, formal demands were made by and on behalf of the landlord to Mr. Smithwick in respect of the arrears of rent. On 21st May, 2013 a summary summons issued seeking €64,703.97 in respect of unpaid rent and insurance arrears. The landlord issued a motion for liberty to enter final judgment in the said amount on 27th August, 2013. Mr. Smithwick opposed that application by affidavit sworn 16th December, 2013. Subsequently, on 3rd November, 2014 Mr. Smithwick obtained an order pursuant to O. 16 of the RSC granting liberty to issue and serve third party notices on A.T. Uniform Ltd and Thomas Kennedy.

The Initial Position of the Lessee

7. In an affidavit sworn by Mr. Smithwick on 16th December 2013 for the purposes of opposing summary judgment, seeking leave to defend and to have the issue go to plenary hearing and to demonstrate that he had a genuine defence to the landlord's claim, he

deposed to the following material matters: -

- (i) That he executed the lease on the 27th May, 1987 and was the tenant in possession of the demised premises from, "on or about the 1st September, 1986 until in or about 2003 when I left the property..."
- (ii) During the time he occupied the demised premises, he dealt with the landlord's agent Mr. Robert Neill rather than directly with the landlord.
- (iii) When he vacated the demised property he was, "uncertain as to what I would do with it."
- (iv) He continued to discharge the rent and insurance, "... As I believe I had an intention of returning to the premises."

8. After vacating the demised premises in 2003, Mr. Smithwick claimed that he had been contacted, both by the landlord's agent Mr. Neill and by Mr. Thomas Kennedy, who was in occupation and possession of another part of Duke House, including a men's clothing shop at ground floor and basement level in the building. Mr. Smithwick deposed at para. 6 of his affidavit: -

"In or about April 2004 this deponent finally agreed to allow Mr. Kennedy to occupy the second floor of the Duke House."

He deposed that: -

"When this deponent agreed that Mr. Kennedy could take possession of the second floor of Duke House I made it clear to both Mr. Kennedy and Mr. Neill that it was for them to deal with all matters arising from the lease henceforth.

Moreover, I specifically informed Mr. Neill that I would sign whatever documentation was required to remove me from any future dealings with the property."

Mr. Smithwick further deposed: -

"It was this deponent's understanding that from the time Mr. Kennedy took possession of the second floor of the property in May 2004 that he would be responsible for discharging the rent, and any other associated costs, to the Landlord, through the Landlord's agent, Duke House Properties Limited, for the remaining years of the lease. *I say and believe that both Mr. Robert Neill and Mr. Kennedy understood this to be central to obtaining my consent to allow Mr. Kennedy to take possession of the second floor of Duke House.*" (emphasis added)

Mr. Smithwick deposed that from the time Mr. Kennedy took up occupation of the second floor which date he specified to be the 31st May, 2004: -

"He discharged the rent and other associated costs directly to Duke House Properties Limited. This deponent had no participation in any aspect of the relationship between the landlord, the landlord's agent Duke House Properties Limited and Mr. Kennedy."

Mr. Smithwick also deposed that he first became aware that rent was outstanding in April 2011. He states that he first became aware that Duke House was being managed by Active Facilities Property Management rather than Duke House Properties Limited in May 2010: -

"... When I first received an invoice for the rent due for the second floor of the premises. I further say and believe that I was not notified that the Plaintiff company had become the landlord of Duke House in 2007."

9. Mr. Smithwick, who is an experienced commercial law solicitor, deposed at para. 14 of his said affidavit: -

"...that as Mr. Kennedy discharged the rent and associated costs for the second floor of Duke House for almost 7 years with the consent of the landlord and its agent, Duke House Property Limited, and subsequently Active Properties Management Limited, there is a subsequent and separate agreement to the original lease and therefore Mr. Kennedy should be held responsible for the sums the Plaintiff is seeking in the within proceedings. ... I further say that even if the Court decides that I am liable for some or all of the sum being claimed by the Plaintiff herein I say that I am entitled to an indemnity from Mr. Kennedy as he agreed in May 2004 to take over the lease for the remainder of its duration. Mr. Kennedy has been put on notice that I hold him liable for the sum being claimed by the Plaintiff."

10. This affidavit is noteworthy for its failure anywhere to assert that Mr. Smithwick had ever surrendered the lease to the landlord. Whilst the language is equivocal, and the word "assigned" is avoided and nowhere mentioned, the tenor of the language used is consistent with a contention that, with effect from May 2004, he had assigned his interest in the demised premises held under the lease to Mr. Thomas Kennedy for the residue of the term created, and had done so with the knowledge and assent of the lessor's duly authorised agent, Mr. Neill.

11. That position is supported by exhibit "PS3", to Mr. Smithwick's affidavit sworn 16th December, 2013. It comprises a letter written by Mr. Smithwick's solicitors (a firm in which Mr. Smithwick had previously been a partner) to Thomas Kennedy on the 5th December, 2013: -

"We are instructed by our client that *you took over the lease* of the above-mentioned premises in May 2004 for the remainder of the term of 35 years from the 27th May 1987..."

As you are aware, our client is no longer tenant of the property and has not been for some considerable time. ...We now call on you to immediately discharge the outstanding arrears in rent due and owing... and we require your confirmation and undertaking that you will ensure that the appropriate deed necessary to reflect your tenancy is put in place with the landlord immediately." (emphasis added)

A letter in similar terms was sent to A.T. Uniform Limited and is integral to exhibit PS3 of the said affidavit. The letters both of which are dated 5th December, 2013 are inherently inconsistent and potentially contradictory insofar as one is addressed to Mr. Kennedy personally and the other to A.T. Uniform Ltd but each asserts that the addressee "...took over the lease..." in May 2004.

A further inconsistency apparent in the said letters is where both state: -

"...we require your confirmation and undertaking that you will ensure that the appropriate deed necessary to reflect your tenancy is put in place with the landlord immediately."

If a deed of assignment was being referred to, then presumably it is Mr. Smithwick who would be executing same rather than the landlord. It is difficult to understand how both Mr. Kennedy and A.T. Uniform Ltd would have a liability to enter into separate deeds with the landlord. However, they are not parties to this appeal and third party proceedings remain extant before the High Court.

12. In November 2014 Mr. Smithwick brought a motion before the High Court seeking, *inter alia*, liberty to issue and serve third party notices on:

(i) A.T. Uniform Limited; and

(ii) Thomas Kennedy.

13. In the grounding affidavit sworn on the 7th August, 2014 Mr. Smithwick deposed at para. 14: -

"...It was this deponent's understanding and belief that Mr. Thomas Kennedy had taken over the lease of the demised premises in May 2004 for the remaining years of the lease..." (emphasis added)

He deposes that A.T. Uniform Limited was in possession of the demised premises until January 2013.

Exhibited are two letters, one addressed directly to Mr. Thomas Kennedy dated the 5th December, 2013 appears to be a modification of the letter exhibited PS3 to the affidavit sworn 16th December, 2013 and referenced at para. 9 above. The letter addressed to Mr. Kennedy asserts: -

"You took over the lease of the above mentioned premises in May 2004 for the remainder of the term of 35 years from 27th May 1987."

Exhibit PS3 to this later affidavit also incorporates another letter dated 5th December, 2013 addressed to the said Mr. Kennedy at A.T. Uniform Limited. This letter states:

"We are instructed that our client sub-let the above mentioned premises to you, with the consent of our client's landlord, in May 2004. Furthermore, from that date we note that you as sub-tenant took over our client's lease with Friends Provident Life Office for the remainder of the term of the lease."

One letter expressly asserts that a sub-letting was granted, the other by use of the words "took over our client's lease" in terms asserts that an assignment was effected in May 2004. Neither asserts a surrender by Mr. Smithwick of his leasehold interest to the landlord. The existence of a sub-lease created by Mr. Smithwick is alluded to for the first time.

Position of Thomas Kennedy and A.T. Uniform Limited

14. Neither Thomas Kennedy nor A.T. Uniform Ltd are parties to this appeal. As stated above, leave was granted to Mr. Smithwick to issue and serve third party notices on both on 3rd November, 2014. However, the nature of the course of dealings between them and Mr. Smithwick is of relevance to understanding their respective legal positions and in particular the legal status of Mr. Smithwick *vis-à-vis* the demised premises as at the date of institution of the above entitled proceedings on 21st May, 2013.

15. In a letter dated the 15th January, 2014, solicitors for A.T. Uniform Limited responded to the contentions advanced in correspondence by Mr. Smithwick that the said company had taken over the lease and was responsible for the rents and liabilities for the residue of the term of 35 years commencing the 27th May, 1987. It was asserted that this contention was "totally incorrect". It was outlined that in November 2004, a company, Alias Tom Limited, had entered into an agreement with Mr. Smithwick: -

"For a short term letting of the above property from the 26th November 2004 to the 24th June 2005. That agreement at clause 12 thereof granted an exclusive option to take up 'an assignment of the landlord's lease for the unexpired term of the lease dated 27th May, 1987 and made between Friends Provident Life Office of the one part and Paul Smithwick of the other part.' The said option was never exercised."

The letter continued: -

"Subsequently A.T. Uniform Limited, with the knowledge of your client, occupied the said premises on a month to month basis, and on specific instructions from your client, paid the rent, on his behalf, directly to Robert Neill of Duke House Properties while he was your client's landlord and subsequently to Active Management."

"There was never any agreement whatsoever between your client and A.T. Uniform Limited to acquire the leasehold interest in the lease of the 27th May 1987 or to take over Mr. Smithwick's/lessee's responsibilities and liabilities under the lease of 27th May, 1987."

The letter concludes by indicating that A.T. Uniform Ltd. had delivered the keys of the premises to Mr. Smithwick and same had been accepted and signed for on the 25th January, 2013.

16. That letter was responded to over two months later on the 18th March, 2014 which reiterated instructions: -

"That *the agreement entered into by your client was to take over the lease for the remaining years thereof*. As such we hold your client liable for the arrears in rent, which you will note continue to accrue." (emphasis added)

It was separately asserted that the keys to the premises were: -

"Never in fact returned or signed for by our client."

The letter concludes: -

"We welcome the acknowledgment made in yours of the 15th January, 2014 that your client held possession of the premises from April 2011 to January 2013."

Discovery and additional documentation and correspondence

17. Thomas Kennedy, the third party, made voluntary discovery in the course of the High Court proceedings. His affidavit of discovery was sworn on the 10th February, 2017. The documentation discovered and later adduced in evidence included correspondence passing between Mr. Smithwick and Gleeson McGrath Baldwin, the firm of solicitors acting for Thomas Kennedy in the year 2004, particularly leading up to the execution of a short term sub-letting memorandum of agreement on the 25th November, 2004. This correspondence is of assistance in identifying the actual facts and events and contemporaneous intentions of the parties, in 2004 in particular, rather than the labels ascribed to same many years later.

Sub-Lease of the 24th November, 2004

18. On the 11th May, 2004, Thomas Kennedy, who operated his tenancies through two limited liability companies, Alias Tom Limited and A.T. Uniform Limited, acting through his solicitors Gleeson McGrath Baldwin, gave instructions in relation to taking on a "short term let of the 2nd floor of Duke House" for a six-month period. It is common case that this referred to the demised premises. It was initially contemplated by Mr. Kennedy that the subletting would commence on the 31st May and end on the 29th November, 2004 with an option to take an assignment of the entire property ("the call option"). Correspondence from Mr. Smithwick's solicitors indicated that the "... rent rates and service charge are to be paid each month." Progressing the transaction took some time, primarily due to Mr. Smithwick's non-availability to deal with the matter. On the 18th May, 2004 there was a request to him to "Forward short-term business letting agreement by return."

19. Correspondence signed by Mr. Smithwick dated the 15th June, 2004 states: -

"It would appear to us that the only issue of material importance that will arise is that in relation to what stipulations and conditions the landlord may have with regard to the proposed assignment. We understand from the landlord that in the event that the proposed assignment is to be taken in the name of Mr. Kennedy's company, that they will require sight of the accounts of that company and presumably the personal guarantee of Mr. Kennedy."

The letter also confirms that "the landlord's consent will be obtained on closing." On the 3rd November, 2004 Gleeson McGrath Baldwin forwarded the copy short term letting agreement with amendments. By letter dated the 24th November 2004 Adams Corporate Solicitors, in which firm Mr. Smithwick was then a partner, wrote: -

"Our client confirms that your client may enter into occupation provided we are in receipt of the engrossed letting agreements and a cheque for the rent. On receipt of these we will telephone you with the alarm code."

Payment of rent to agent

20. The letter continues: -

"In relation to the payment of the monthly rent, our client instructs us that it should be paid by cheque to him at this address and not by standing order."

An acknowledgement of receipt of rent was provided by Messrs. Adams, who were acting as Mr. Smithwick's agents, on the 25th November, 2004. By letter of the 6th December, 2004 Mr. Smithwick wrote to Thomas Kennedy as director of Alias Tom Limited: "I hereby authorise you to pay the monthly rent to the following account..."

The account identified was in the name of Duke House Properties Limited Group Account. On the 6th December, Messrs. Adams indicated: -

"It has been agreed between our clients that the rent should be paid by direct debit to the account of Duke House Properties."

On the following day, solicitors on behalf of Thomas Kennedy responded: -

"...Our client feels he must pay the money to Paul Smithwick as his immediate landlord. As you might appreciate, this will prove compliance with the terms of the letting agreement between the parties. There will be a constant record of the rent being paid out of our client's account to your client's account."

21. In response to that letter, on the 13th December, 2004 Mr. Smithwick's solicitors responded: -

"If our client appoints Duke House Properties Limited as his agent to accept rent for the duration of your client's tenancy then acceptance of the rent by the agent will be proof of performance of the covenants and conditions in the lease."

Attached was a letter signed by Mr. Smithwick and dated the 17th December, 2004 which stated: -

"I hereby appoint Duke House Properties Limited as my agent to accept the payment of rent from my tenant Alias Tom Limited."

On foot of that express agency agreement it was confirmed that Thomas Kennedy would pay the rent directly to Duke House Properties Limited as agent for Mr. Smithwick.

Call option to take assignment of 1987 Lease

22. Under the call option executed at the time of the sub-letting agreement, Mr. Kennedy's company had the option to take an assignment of the 1987 lease for the residue of the term thereby created, which option ended on the 24th June, 2005. Mr. Kennedy subsequently made a decision not to take an assignment of Mr. Smithwick's leasehold interest under the 1987 lease. At one point in 2005, Mr. Kennedy contemplated that a further short term letting agreement would be entered into but same was never executed. Thomas Kennedy's company overheld in occupation and possession of the property after the determination of the term of the sub-letting. He continued to pay the rent and it would appear that, at some indeterminate point, another of his companies, A.T. Uniform Limited, commenced paying the rent. The latter company supplied uniforms to the army and Gardai and the demised premises was used for the storage of clothing.

23. There is an attendance of the 9th January, 2006 by Gleeson McGrath Baldwin on Mr. Kennedy which involved a discussion of the sub-let of the second floor of Duke House: -

"I advised that we hadn't heard anything from Paul Smithwick in relation to renewing the short-term let. He said that he hadn't heard anything either but he didn't think he was going to keep it on in any event. He said he would probably give it up in April or before, that it was too expensive and that they had just had a number of rent reviews on the shop. He told me not to chase Paul Smithwick on it and to just let it lie."

24. It appears Mr. Smithwick visited Mr. Kennedy at the Alias Tom premises which operated at ground floor and basement level very occasionally. Mr. Kennedy continued to occupy the demised premises through his companies and the rent was paid directly each month to the landlord's agent.

Events from 2010 onwards

25. In the letter of the 27th July, 2010 from Mr. Smithwick addressed to Thomas Kennedy he states: -

"I refer to our meeting last week when you furnished me with two cheques, as per the enclosed copies, both dated 19th July, each for the amount of €9,120.00. The landlord's agents of Duke Lane have, as you know, been in contact with me by telephone."

He points out that he is lodging the cheques, "strictly without prejudice" and when cleared they would be forwarded to the landlord's agent. The letter concludes, "You of course have been in occupation of the property since 2005."

26. By letter dated 3rd May, 2011 Mr. Smithwick wrote to Thomas Kennedy of A.T. Uniform Limited, "You should deal with them directly [referring to Active Facilities Property Management] as you did with Robert Neill of Duke House."

27. A letter of the 5th December, 2013 from Messrs. Adams addressed to Mr. Thomas Kennedy of A.T. Uniform Limited stated: -

"We are instructed by our client that you took over the lease of the above mentioned premises in May 2004 for the remainder of the term of 35 years from the 27th May 1987."

28. The position of A.T. Uniform Limited and Mr. Kennedy was that occupation of the premises was on a month to month basis and that the rent had been paid: -

"On specific instructions from your client... directly to Robert Neill of Duke House Properties while he was your client's landlord, and subsequently to Active Management. There was never any agreement whatsoever between your client and A.T. Uniforms Ltd. to acquire the leasehold interest in the lease of the 27th May 1987 or to take over the tenant's/lessee's responsibilities and liabilities under the lease of the 27th May 1987."

29. A defence was delivered on behalf of Mr. Smithwick on the 8th May 2014. It pleaded that:

"In consideration of Mr. Thomas Kennedy and/or A.T. Uniform Limited taking over the lease of the demised premises for the remaining years of the lease the defendant consented to the request. The consent for the aforementioned assignment of the lease was given on behalf of and with the authority of the plaintiff's predecessor in title."

30. In its totality, the said defence was consistent with a proposition that Mr. Smithwick had no liability on foot of the lease by reason that he had effected a disposition of his interest in the lease to Mr. Thomas Kennedy and/or A.T. Uniform Limited. Further, that the said assignment had been consented to by the landlord's predecessor in title. In a reply delivered on behalf of the landlord it was contended that no valid assignment of the lessee's interest had been effected by reason of non-compliance with s.9 of the Landlord and Tenant Law Amendment Act, Ireland, 1860, otherwise known as Deasy's Act: -

"By way of further special plea in respect of paragraph 9 of the defence, the plaintiff pleads that in the absence of a deed or instrument in writing sufficient to satisfy section 9 of Deasy's Act... any purported or pleaded assignment is void."

31. The matter came on for hearing in the High Court in October 2016. In the course of the hearing the trial judge acceded to an application permitting the tenant, Mr. Smithwick, to amend his defence to assert that he had surrendered his tenancy by act and operation of law within the meaning of s.7 of Deasy's Act, 1860. An amended defence was delivered on the 10th November, 2016 which pleaded as follows: -

"8. Without prejudice to the foregoing and in reply to paragraph 8 of the statement of claim, the defendant specifically pleads that from in or about late 2003 the defendant was repeatedly contacted by the landlord's agent Mr. Robert Neill of Duke House Property Limited, and requested to permit a third party to occupy the demised premises.

9. In or about April 2004 Mr. Robert Neill of Duke House Property Limited, the servant or agent of the plaintiff's predecessor in title, gave his consent to the act of surrender of the defendant's interest in the lease. The said consent was given on behalf of and with the authority of the plaintiff's predecessor in title."

32. The landlord in an amended reply delivered on the 2nd December, 2016 denied the claim of surrender. The creation of the subletting and the call option agreement dated the 25th November, 2004 is specifically pleaded: -

"The plaintiff will rely on the fact, which has been admitted by the defendant, that the defendant purported to sublet the premises the subject of his lease... by memorandum of agreement dated 25th November 2004 and also prepared a call option in favour of Alias Tom Limited pursuant to which Alias Tom Limited could exercise a right created thereby to take an assignment of the defendant's leasehold interest in the said premises."

It was further pleaded that no consent had been given on behalf of the landlord's predecessor in title to the alleged or any purported "act of surrender". Non-compliance with the provisions of s. 7 of Deasy's Act was raised.

Judgment of the High Court

33. Following a resumed hearing in March 2017 a judgment was delivered on the 6th April, 2017. Mac Eochaidh J. outlined the history of the litigation. The court noted at para. 10: -

"Having regard to these developments, a further hearing of this case was scheduled and additional evidence was called. Evidence was led about the 'due diligence' process whereby the plaintiff considered the title it was acquiring. Replies to

requisitions on title revealed that no notices had been served in relation to any subleases. In addition, correspondence exchanged between Friends First Managed Pension Fund Ltd. and Duke House Properties Ltd. on 18th November, 2009, indicated that Paul Smithwick was the tenant on the second floor, and Alias Tom Ltd. was the tenant on the basement, ground floor and first floor."

The trial judge noted that: -

"The plaintiff proved that on the 25th November, 2004 the defendant and Alias Tom Ltd. entered a sub-lease for the second floor of the premises from the 26th of November, 2004 to the 24th of June, 2005, together with an option to take an assignment of the defendant's unexpired term – which option was not exercised by Alias Tom Ltd. The court accepts the submission by the plaintiff that this transaction was not any form of surrender by the defendant of his thirty-five-year lease for the second floor."

34. In his judgment the High Court judge reviewed the evidence given by Mr. Thomas Kennedy. Part of that evidence was as follows: -

"Alias Tom no longer needed it and I was a director of A.T. Uniform. So A.T. Uniform at that point continued to pay rent to Mr. Neill until Mr. Neill left the premises in 2009."

The evidence of Mr. Kennedy was that in the first instance, the rents had been paid by a company of which he was director, Alias Tom Limited, and subsequently it was paid by another of his companies, A.T. Uniform Limited.

35. The evidence of the landlord's agent, Mr. Robert Neill was that whilst, "... strictly speaking the lease was there to Paul Smithwick but, in fact, in occupation of the floor was A.T. Uniform Ltd. and we were receiving rent and service charges and insurance directly from them. He said that is fine by him, so long as they are paying the rent." The trial judge had at page 7 of the judgment characterised the evidence of Mr. Neill as follows: -

"Mr. Neill's evidence was that though on paper Mr. Smithwick was still the tenant, the reality was that A.T. Uniform, at the material time, was the tenant."

Mr. Neill's evidence also was: -

"I knew we were on slightly delicate ground because we were now dependent on a third party to pay the rent because Paul Smithwick was no longer paying it."

However, he also stated: -

"I hadn't accepted a surrender. I had done nothing overtly to accept its (sic) surrender." (para. 14 of judgment)

36. The judgment noted that the landlord had advanced four separate bases for their contention that Mr. Smithwick had not surrendered his interest in the lease when he vacated the second floor and Mr. Kennedy had moved in. First, it was contended that there had been non-compliance with s. 7 of Deasy's Act, which governs the mode of assignment of the estate and interest of a tenant under a lease. Second, the landlord relied on the affidavits sworn by Mr. Smithwick which, it was contended, did not support an alleged surrender. The clear statements deposed to by Mr. Smithwick were inconsistent with a surrender. Third, the trial judge noted that it was contended that the landlord had received no notification of either an assignment or surrender by Mr. Smithwick at the time they had acquired Duke House in 2007, and all the indications were that the 1987 lease was subsisting.

37. The judgment noted that the landlord had placed reliance on the defence initially pleaded and delivered by Mr. Smithwick and in particular, two pleas which contemplate the continuation of the 1987 lease, which, it was contended, eliminated the possibility that Mr. Smithwick had surrendered his interest under the 1987 lease. In particular, reliance was placed by the landlord on paras. 8 and 9 of the defence. It had been pleaded that in consideration of Mr. Thomas Kennedy and/or A.T. Uniform Limited taking over the lease of the demised premises for the remaining years of the lease, Mr. Smithwick consented to the request. The court cited at para. 17 of the judgment from the defence (para. 9): "The consent for the aforementioned assignment of the lease was given on behalf of and with the authority of the plaintiff's predecessor in title." Fourth, the landlord further relied on the short term letting that had been entered into and executed by Mr. Smithwick on the 25th November, 2004 "as proof that the defendant could not have alienated his interest by assignment or surrender in May 2004."

38. The trial judge reviewed the relevant legislation with regard to surrenders including s. 7 of Deasy's Act. He noted at para. 21 of his judgment: -

"The important point is that it is the court's construction of the parties' acts which is important, i.e., what they amount to as a matter of substance, not necessarily what the parties thought they had achieved by their acts."

He continues: -

"This matter is to be viewed objectively, so that in that sense the parties' subjective intentions are irrelevant...What the court must look for is conduct pointing unequivocally to termination of the tenancy in question and it must be conduct by both parties."

The judge continues: -

"Surrender cannot be brought about unilaterally... It has often been said that its basis is estoppel... The burden, which is a high one, of establishing that surrender by act and operation of law has occurred relies on the party claiming this."

The court noted that the circumstances "in which the defendant disengaged from his tenancy were not straightforward and were perhaps not as neat as one might expect of a solicitor." The court noted, *inter alia*, at para. 22 of the judgment: -

"The defendant expressed a wish that should Alias Tom take possession of his premises that henceforth arrangements for rent etc. would be exclusively a matter between Mr. Neill and Alias Tom."

The court noted that when the call option was "not exercised, the corporate entity A.T. Uniform, controlled by Mr. Kennedy took up

occupation of the premises." The court observed that: -

"A.T. Uniform's occupation happened with the full cooperation of Mr. Neill who for many years accepted rent and other payments from A.T. Uniform.. Any inspection of the premises would have revealed a facility used to store military and Garda uniforms for onward supply to the State."

The court noted that: -

"Mr. Neill informed the plaintiff's agent that A.T. Uniform were in occupation of the second floor and paying the rent prior to the plaintiff's acquisition of title, but this oral communication was not reflected in the written replies to requisitions on title raised by the plaintiff."

The court concluded: -

"In my view it would be an injustice to permit the plaintiff to deny that there was a mutually understood arrangement between the defendant and the plaintiff's predecessor in title whereby the defendant would depart the premises and his premises would be occupied by Alias Tom Limited on a short term letting with an option to take an assignment of the defendant's unexpired term and then for Mr. Kennedy with A.T. Uniform Limited. I find that there was agreement between the plaintiff's predecessor in title (Mr. Neill) and the defendant that the defendant would vacate his demised premises and that he would be replaced by a person well known to Mr. Neill."

The court observed at para. 25 of the judgment: -

"Having had nothing to do with the premises since November 2004, it would be an extraordinary result for the plaintiff to obtain a sum of approximately €190,000.00 in missing rent from the defendant at this long remove."

39. The court considered the jurisprudence, particularly the decision of Charleton J. in *Edward Lee & Co. Limited v. N1 Property Development Limited* [2012] 3 I.R. 201 where the learned judge had cited Harrison's *"Ejectments in Ireland"*, published in 1903, where the author had considered the law on surrender by operation of law. Having considered an excerpt from the said text the trial judge concluded: -

"In particular it may be said that the defendant adopted a position inconsistent with his position as tenant i.e., he vacated the premises and ceased paying rent in November 2004 and he did this at the request of, or at the very least, with the sanction of the plaintiff's predecessor in title. In my view, the defendant surrendered his lease by his conduct which was encouraged, endorsed and accepted by Mr. Neill."

He dismissed the proceedings.

The Appeal

40. In their appeal, the landlord contends that the trial judge erred in law in finding that an informal assignment of a sub-lease could amount to a surrender of Mr. Smithwick's interest in the lease by act or operation of law, and further that he erred in interpreting the evidence of Mr. Robert Neill, that whilst on paper Mr. Smithwick was the tenant the reality was that A.T. Uniform at the material time was the tenant. It was contended that the trial judge erred in accepting the evidence of Mr. Smithwick that he had been prevailed upon by Mr. Robert Neill to sub-let his premises, and further that the trial judge had attached undue weight to the fact that the sub-tenant of the premises used the premises for a clothing business rather than an office as evidence of surrender. It was contended that the trial judge had erred in attaching "too much weight to the assertion by Mr. Robert Neill to the plaintiff when purchasing his interest that a sub-tenant was paying rent and service charges, and too little weight to Mr. Neill's evidence that the tenant at the time was Mr. Smithwick". Further, it was contended that the trial judge erred in finding that there was an agreement between Mr. Neill and Mr. Smithwick, that Mr. Smithwick would vacate his demised premises and that he would be replaced by a person "well known to Mr. Neill". It was contended that same described an assignment which was "proven not to have occurred". It was contended that the trial judge had erred in finding that Mr. Smithwick had not paid rent for the premises since November 2004 in circumstances where he had appointed a collection agent of the rent from his sub-tenant. Further, it was argued that the trial judge had erred in law in failing to have regard for the fact that the sub-tenant had no privity of estate with the landlord or his predecessor in title. It was contended that the trial judge was erroneous in finding (para. 27 of judgment) that a sub-letting by Mr. Smithwick amounted to the adoption by him of "a position inconsistent with his position as tenant." It was contended that the trial judge erred in finding that there was an admission of a new tenant "at the request of, or at the very least, with the sanction of the plaintiff's predecessor in title" (para.27 of judgment). Finally, it was contended that the trial judge attached too little or no weight to the contradictory sworn testimony of Mr. Smithwick. It was further contended that he had attached no weight, or too little weight to the failure of Mr. Smithwick to produce the written sub-lease which was created in 2004 and which contradicted his own sworn evidence that he had assigned his interest in the lease. It was contended that this further contradicted his claim to have surrendered the lease.

The Law

41. The cardinal element underpinning the relationship of landlord and tenant finds its expression in s. 3 of Deasy's Act, 1860 which provides: -

"The relation of landlord and a tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent."

42. As was observed by J.C.W. Wylie in *"Landlord and Tenant"*, (3rd ed., 2014) at 2.09:-

"The precise effect of this, almost unique, provision on the law of landlord and tenant in Ireland has been a matter of considerable controversy and not a little doubt."

43. The relationship between Mr. Smithwick and the landlord was governed first and foremost by the terms of the lease entered into and executed on the 27th May 1987. The landlord is clearly successor in title to the original lessor Friends Provident Life Office. The lease contains no proviso which confers an entitlement on Mr. Smithwick to surrender the lease during the term. It is common case that there was no surrender by deed or note in writing within the meaning of s. 7 of Deasy's Act, 1860. A surrender is a bilateral act and cannot take effect without the lessor's consent unless the lease itself or a statute confers the right to surrender. Neither arises

in the instant case. That being so, the question to be determined is whether Mr. Smithwick validly surrendered the 1987 lease "by act and operation of law" within the meaning of s. 7 of Deasy's Act, 1860.

Surrender by Operation of Law

44. The principles governing operation of the doctrine of surrender by operation of law are not in doubt. There are extensive Irish authorities on the issue. In the first instance, the doctrine of surrender by operation of law is founded on the principle of estoppel. This was so held by O'Connor J. in *Glynn v. Coughlan* [1918] 1 I.R. 482, where at p. 485 he stated:-

"The cases on the subject of surrender by operation of law are numerous. I merely propose to indicate what I conceive to be the effect of them without dealing with them in detail. In my view, this principle may be deduced from them: -

In order to constitute a surrender by operation of law there must be, 1, an act of purported surrender, invalid per se by reason of non-compliance with statutory or other formalities, and 2, some change of circumstances, supervening on and arising from the purported surrender, which, by reason of the doctrine of estoppel, or part performance, makes it inequitable and fraudulent for any of the parties to rely upon the invalidity of the purported surrender. In other words, the acts of the parties, other than the surrender itself, bring into force a general principle of law which, operating upon an informal and worthless surrender, infuses validity into it. The supervening circumstances which may have this effect may vary according to the facts of the case."

It was held in *Lynch v. Lynch* [1843] 6 I.L.R. 131 that the doctrine of surrender by operation of law was said to have originated in modern times. In *Lynch*, the English case of *Thomas v. Cook* 2B. & Al. 119 was relied on as an authority for the proposition that when a tenant assented to his landlord making a new lease and taking a new party as tenant in his place, the transaction amounted to a valid surrender of his lease by operation of law notwithstanding that there was no note or surrender in writing. Brady C.B. at p. 138 in *Lynch* stated: -

"A surrender by 'act and operation of law', I think may properly be stated to be a surrender effected by the construction put by the Courts on the acts of the parties, in order to give to those acts the effects substantially intended by them; and when the Courts see that the acts of the parties cannot have any operation, except by holding that a surrender has taken place, they hold it to have taken place accordingly."

In the first instance Cherry in the text "*The Irish Land Law and Land Purchase Acts 1860 – 1891*", published in 1893, provided an analysis of the operation of surrender by operation of law as of that time. At p. 18 he states: -

"The acts of the parties which may thus constitute a surrender by operation of law may be classed under four headings -

1. The delivery of possession of the demised premises to the landlord;
2. The tenant adopting a position inconsistent with the fact of holding as tenant;
3. the acceptance by the tenant of a new lease or agreement; or
4. the admission of a new tenant under a new letting made to the knowledge of, and with the consent of the former tenant."

That analysis of the principle was followed in subsequent texts including Deale, *The Law of Landlord and Tenant in the Republic of Ireland* (1968). The implications of the equitable origins of surrender by operation of law was noted by Gibson L.J. in *Bellcourt Estates Limited v. Adesina* [2005] EWCA Civ 208 as follows at para. 30: -

"The doctrine of surrender by operation of law is founded on the principle of estoppel, in that the parties must have acted towards each other in a way which is inconsistent with the continuation of the tenancy. That imposes a high threshold which must be crossed if the tenant is to be held to have surrendered and the landlord is to be held to have accepted the surrender."

That position was echoed in *Artworld Financial Corporation v. Safaryan* [2009] EWCA Civ 303, where Jacob L.J. stated: -

"The legal test for surrender by operation of law is essentially accurately set out in Woodfall Law of Landlord and Tenant (2007) at para. 17.018 which provides:

'there is a legal distinction between a surrender by operation of law and an implied surrender.' The terms surrender by operation of law 'is applied to cases where an owner of a particular estate has been a party to some act the validity of which he is afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist...'"

Jacob L.J. continues: -

"This principle does not depend on the actual intention of the parties but on estoppel. A surrender by operation of law does not depend on the intention of the parties; it takes place independently and, even in spite of intention, the foundation of the doctrine is estoppel."

He continues further: -

"Most critically for present purposes is para. 17.020 headed 'Act Must Be Unequivocal [Woodfall]':

'The conduct of the parties must unequivocally amount to an acceptance that the tenancy has ended. There must either be relinquishment of possession and its acceptance by the landlord, or other conduct consistent only with the cesser of the tenancy, and the circumstances must be such as to render it inequitable for the landlord or the tenant to dispute that the tenancy has ceased.'"

Whereas surrender by operation of law is a consensual transaction, its consensual nature is to be tested objectively. Surrender does not rest upon subjective intentions but is founded on estoppel.

45. The first category of acts of the parties which constitute a surrender by operation of law is the delivery of possession of the

demised premises to the landlord and his acceptance thereof. The decision in *Oastler v. Henderson* (1877) 2 Q.B.D. 575 is an early authority for the proposition. That decision was referred to, but not considered in *Clements v. Richardson* [1888] Q.B.D 535 (22 L.R.I. 535) the decision of Harrison J. In *Edward Lee & Co. Limited v. N1 Property Developments Limited* [2012] 3 I.R. 201 at para. 20 Charleton J. succinctly outlines the principle of surrender by operation of law in the following manner: -

"...The nature of what a surrender is remains clear from the earliest authority on the issue. The concept of surrender is classically dealt with in Thomas Harrison, *The Law and Practice Relating to Ejectments in Ireland* (Dublin, 1903) where at pp. 124 – 125 the learned author sets out the following: -

'The acts of the parties which constitute a surrender by operation of law may be classed under four heads. ('Cherry' p. 21)

1. The delivery of possession of the demised premises to the landlord and his acceptance thereof. (*Oastler v. Henderson*, 2 Q.B.D. 575, *O'Reilly v. Mercer*, 10 I.J.N.S. 149)
2. The adoption by the tenant with the sanction of the landlord of a position inconsistent with his position as tenant (*Lambert v. McDonnell* 15 I.C.L.R. 136)
3. The acceptance by the tenant of a new lease or of an agreement operating as a lease (*Lynch v. Lynch* 6 I.L.R. 131)
4. The admission of a new tenant under a new letting made with the privity and consent of the former tenant (*Doran v. Kenny* I.R. 3 E.Q. 148)"

Ground 1: The delivery of possession of the demised premises to the landlord and his acceptance thereof

46. There is no evidence to suggest that Mr. Smithwick delivered up possession of the property to his landlord, or more particularly, that the landlord ever accepted possession of the property. Therefore, this category does not warrant further consideration.

Ground 2: The adoption by the tenant with the sanction of the landlord of a positioning inconsistent with his position as tenant

47. At para. 27 of his judgment Mac Eochaidh J. considered that this ground had been established by Mr. Smithwick: -

"It may be said that the defendant adopted a position inconsistent with his position as tenant i.e., he vacated the premises and ceased paying rent in November 2004 and he did this at the request of, or at the very least, with the sanction of the plaintiff's predecessor in title."

This analysis fails to effect a comprehensive evaluation of the effect of the landlord's and Mr. Smithwick's respective conduct as a whole. The question to be determined is whether the totality of the respective acts on the part of Mr. Smithwick and the landlord are consistent only with a surrender and with an acceptance of that surrender by the landlord. In the instant case however, there is no evidence that Mr. Smithwick ever communicated to the landlord a wish to surrender the lease. Contrary to the determination at para. 27 of the judgment in the High Court, Mr. Smithwick had vacated the premises long before November 2004. His own evidence was he vacated the premises in 2003, possibly in mid-2003. However, he continued to pay and discharge the rent in accordance with the lease at all material times thereafter until the month of November 2004. In November 2004, he entered into and executed a sub-lease for the benefit of Thomas Kennedy. Unequivocal steps taken by Mr. Smithwick in the year 2004, which are fundamentally inconsistent with a proposition that he surrendered the lease at that date and, critically, that the lessor (or its duly authorised agent) accepted surrender, include the following: -

(a) Mr. Smithwick entered into a protracted period of negotiations evidenced in correspondence with Messrs. Gleeson McGrath and Baldwin, solicitors for Thomas Kennedy in connection with a proposed short term business letting of the property by way of sub-let. This correspondence extends from May until November 2004.

(b) It is noteworthy that none of the correspondence of relevance is with the lessor or the lessor's agent. It was clear from the 24th May, 2004 that Thomas Kennedy had in contemplation that the sub-letting would not be taken in his own name, but in the name of one of his companies.

(c) Mr. Smithwick represented that he would be procuring the prior consent of his landlord in connection with the proposed letting. Throughout the year 2004, negotiations also took place regarding the grant by Mr. Smithwick, of an option to take an assignment of the 1987 lease.

(d) The letting agreement was executed by Mr. Smithwick on or about the 25th November, 2004 and was for a term from the 26th November, 2004 to the 24th June, 2005, a period of approximately 7 months.

(e) By notice in writing dated 17th December, 2004 Mr. Smithwick appointed Duke House Properties Limited as his agent "to accept the payment of the rent from my tenant, Alias Tom Limited." This established Duke House Properties Limited as agent for Mr. Smithwick in respect of the collection of rent.

(f) Separately, Mr. Smithwick granted an option to take, by way of assignment, his leasehold interest. This was effected by way of a call option, the term of which expired on the 24th June 2005.

(g) Mr. Smithwick was fully aware that, at the determination of the term created by the short term letting, Mr. Kennedy/Alias Tom remained on in occupation and possession of the premises. Therefore, a periodic tenancy arose by implication. It is a matter of construction of the terms of the subletting agreement as to which type of periodic tenancy was created. On the evidence in this case the tenant overheld as tenant from month to month.

(h) Correspondence was sent to Mr. Smithwick's solicitors, Adams Corporate Solicitors, a firm in which he was a partner, seeking a further short term letting agreement to expire in January 2006. Therefore, it is clear that, notwithstanding that no such short term letting agreement was subsequently executed, Mr. Smithwick was aware that Thomas Kennedy/Alias Tom (and later A T Uniform Ltd) was overholding in possession from month to month paying and discharging the rent reserved on foot of the sub-lease which was at that time and remained the same as the rent payable on foot of the 1987 lease.

(i) The contention in a letter of the 5th December, 2013 "We are instructed by our client that you took over the lease of

the above mentioned premises in May 2004 for the remainder of the term of 35 years from the 27th May 1987” is not consistent with a surrender, but rather with an assignment of the lease for the residue of the term created in 1987.

(j) It was the evidence of Mr. Neill that notice was served on Mr. Smithwick in 2009 informing him that the landlord had assigned its interest in the demised premises to Friends First Managed Pension Funds Limited effective from the 31st July, 2009 and therefore all rents due to the landlord arising under the lease should be paid to it “effective from the 1st August, 2009.” Whilst Mr. Smithwick does not appear to have admitted to receipt of the said letter, there exists a copy of such a letter dated the 10th December, 2009. A copy was contained in Book of Evidence, Book 1 of 2, Tab 5, page 128. It was handed into court as part of the agreed book of core documents.

(k) There does not appear to have been evidence given by Mr. Smithwick that he handed up the key to the lessor as one might have expected if a surrender was being contended for.

(l) The affidavits sworn by Mr. Smithwick in the proceedings, including in the application seeking to join Thomas Kennedy and A.T. Uniform Limited as third parties, which repeatedly depose that Mr. Smithwick has no liability in respect of the lease by reason that he had assigned his interest with the knowledge and assent of the lessor’s agent Mr. Robert Neill, are wholly at variance with and do not support the amended defence delivered on his behalf in the High Court. The evidence led by him at the hearing, which purported to assert that he surrendered his leasehold interest to the lessor is a contradictory stance. These are mutually inconsistent positions. That state of affairs significantly undermines the credibility of his contentions belatedly maintained that he surrendered the lease by act and operation of law within the meaning of s. 7 of Deasy’s Act and that he is no longer bound by same.

Ground 3: The acceptance by the tenant of a new lease or of an agreement operating as a lease

48. This ground does not arise in the instant case.

Ground 4: The admission of a new tenant under a new letting made with the privity and consent of the former tenant

49. It is clear that a letting made to a new tenant with the privity and assent of the former tenant is what is contemplated. However, no letting was ever granted by the lessor to Thomas Kennedy or any of his companies. At no time was there ever any privity of estate between them. The status of Robert Neill remained that of agent for a disclosed principal, namely Mr. Smithwick, the tenant under the 1987 lease. Whilst the trial judge characterises the evidence of Mr. Neill at para. 13 as being, “That though on paper Mr. Smithwick was still the tenant, the reality was that A.T. Uniform, at that material time, was the tenant”, this fails to address the central issue as to the identity of the party with whom A.T. Uniform had privity of estate. It is demonstrable that at no time did A.T. Uniform have privity of estate with the landlord or the landlord’s predecessor in title. The state of affairs that obtained from late June 2005 onwards was that Mr. Thomas Kennedy remained on in occupation and possession of the property after determination of the term created by the sub-lease by effluxion of time in June 2005. At some point which remains definitively unclear, but apparently after the expiry of the term created by the sub-letting, A.T. Uniform Limited took on the payment of the passing rent to Mr. Smithwick’s agent. It was not in dispute that Mr. Smithwick attended the Duke Street property from time to time and was aware of the state of affairs that obtained. He was clearly acquainted with Mr. Thomas Kennedy. Sub-letting was permissible under the terms of the 1987 lease. Mr. Neill’s evidence to the court was unequivocal and indeed, is recorded in the judgment at para. 14: “I hadn’t accepted a surrender. I had done nothing overtly to accept its surrender.” The creation of the sub-lease, the granting of the call option and the overholding as tenant from month to month at the expiration of the term of the sub-letting are – either individually or collectively – not inconsistent with the 1987 lease continuing.

Issues Arising

50. Could an informal assignment of a sub-lease amount to a surrender of Mr. Smithwick’s interest in a lease by act and operation of law? Whilst the trial judge at para. 22 identified factors which he considered to be relevant within the evidence which he identified as having assisted him in reaching his conclusion, I am satisfied that either individually or in their totality, when considered in the round, same do not amount to “conduct pointing unequivocally to termination of the tenancy.” Neither do they support a contention that the 1987 lease was validly surrendered by Mr. Smithwick by act and operation of law. In particular, of relevance is the fact that Mr. Kennedy and his original nominee company Alias Tom Limited remaining on in occupation and possession after the determination of the term occurred against a background where initially they were seeking a further short term letting for a period of months until January 2006. It is demonstrable accordingly that they (and later AT Uniform Ltd) were overholding as tenants from month to month.

51. There is no evidence that at a certain point after the expiration of the short term letting in late June 2005 the landlord’s predecessor in title and Mr. Smithwick acted towards each other in a manner which is inconsistent with the continuation of the 1987 tenancy. The rent being received by the landlord’s agent remained the same throughout. It appears to have been substantially the same rent as was reserved at the relevant time under the 1987 lease. It would appear that there was no rent increase, or rent review resulting in a rent increase, during the time of the sub-letting or the overholding after the determination of the sub-let in June 2005. Mr. Smithwick has not adduced evidence sufficient to discharge the high threshold he has to cross if he is to demonstrate that he is to be held to have surrendered and the landlord is to be held to have accepted that surrender of the 1987 lease.

52. It is not in dispute that the party in actual occupation of the demised property at the date the landlord acquired its interest in the property was indeed A.T. Uniform. However, as a matter of law, having due regard to the facts as established, that did not flow from either a surrender of the lease by Mr. Smithwick or an assignment by him of his leasehold interest to A.T. Uniform. A.T. Uniform was one of the corporate emanations of Mr. Thomas Kennedy. He had been put into possession of the property on foot of the sub-lease and had over held thereafter. The granting of a sub-lease was contemplated by the 1987 lease. Further, the transcript does not support a contention that the initiative in connection with the granting of a sub-lease to Mr. Kennedy or his company came from Mr. Neill. However, even if Mr. Neill, as agent for the lessor, played some part in the process which led to a sub-lease being granted by Mr. Smithwick to Mr. Thomas Kennedy’s company, Alias Tom Limited, the same does not support a conclusion that Mr. Neill, as agent for the lessor, assented either to a surrender of the 1987 lease or assignment of its term to any third party.

53. On the evidence, the fact that at the time of inspection of the property by the landlord it was not in use as a solicitor’s office but rather for the storage of clothing does not support a proposition in law that the landlord was thereby fixed with notice that the 1987 lease had been surrendered. The evidence in its totality at that time available to the landlord was consistent with the 1987 lease subsisting with a sub-tenant in occupation and possession of the property.

54. The determination of the trial judge at para. 24 of the judgment where he found that “there was agreement between the plaintiff’s predecessor in title (Mr. Neill) and the defendant that the defendant would vacate his demised premises and that he would be replaced by a person well known to Mr. Neill” is not supported by the evidence. It is clear that Mr. Smithwick vacated the premises

in the year 2003 and there was no evidence that he sought or obtained prior agreement from any party in regard to this step. The evidence of Mr. Smithwick in its particularity does not support such a contention. Further, it is inconsistent with the agency that was proven to the court to have been established on the part of Mr. Smithwick at the time of commencement of the sub-lease when he wrote a letter directing the sub-tenant to pay the rent each month to Mr. Neill as his (Mr. Smithwick's) agent.

55. Further, such an approach is not in accordance with established law, and in particular the test in *Oastler v. Henderson* (1877) 2 Q.B.D. 575 at 577 which requires the court to be satisfied that the lessor's conduct is so inconsistent with the continuation of the tenant's lease that it could only be justified as being lawful on the basis that the lessor had accepted the tenant's implied offer to give back possession and has taken possession of the premises beneficially for himself or has otherwise put a third party into occupation. I am satisfied from the conduct of the lessor's agent in accepting rent from the sub-lessee and subsequently, from the company, that whilst Mr. Smithwick vacated the premises, he never abandoned the leased premises. The creation of the sub-lease in 2004 and the call option is inconsistent with the characterisation that he surrendered the lease or abandoned the premises. In the first instance, after he vacated the premises in 2003, he continued to pay and discharge the rent due on foot of the lease as he was contractually bound to do. From November 2004 Mr. Kennedy, through his corporate emanation in the first instance Alias Tom Limited, discharged the rent to Mr. Smithwick's duly nominated agent. Thereafter, at a subsequent date which does not appear to have been definitively established but most likely occurred after June 2005, A.T. Uniforms Limited, another of Mr. Kennedy's companies, continued to discharge the same rent to the same agent. The agency was never revoked. Neither event gave rise to a surrender by operation of law. There is no evidence, for instance, that Mr. Smithwick ever handed back the keys of the property or that same were accepted either by Mr. Neill or the lessor.

56. The determination of the trial judge that Mr. Smithwick had not paid rent for the premises since November 2004 is not in accordance with the evidence. The evidence demonstrates that he appointed Mr. Neill, his agent, to accept the sub-rent, which was identical to the rent reserved under the lease, and the monies were available to be applied in and towards discharge of the rental due and owing by him as tenant under the 1987 lease. Wylie in *Landlord and Tenant Law* (3rd ed., 2014) at 22.06 considers the position of the parties after a sub-letting by the tenant. He outlines it thus: -

"The tenant remains the tenant of the head-landlord subject to all the terms of the head tenancy. In essence the relation of landlord and tenant between the original landlord and tenant is undisturbed and unaffected by the subtenancy. Of course, the tenant (head-tenant) assumes now a dual capacity, i.e., while remaining tenant of the head-landlord under the head-tenancy, he becomes landlord (sub-landlord) of the subtenant, i.e. a new relation of landlord and tenant is created between the head-tenant (or sub-landlord) and the sub tenant, with all the usual incidents of a tenancy. There exists, therefore privity of *contract*, between the head-landlord and the head-tenant (or sub-landlord) and between the head-tenant and the sub-tenant, but none between the head-landlord and the sub-tenant. Even more important, there is no privity of *estate* between the head-landlord and sub-tenant, because the sub-tenant is not an assignee of the head tenant; he does not succeed to any part of the head tenant's interest under the head-tenancy."

57. The practical consequence of this state of affairs is outlined succinctly by J.C.W. Wylie *opus cit.* at 22.07 of the said text:

"Because there is neither privity of contract nor privity of estate between the head-landlord and the sub tenant the general rule is that they cannot enforce obligations as between each other, i.e., the head landlord cannot sue or be sued by the sub tenant and vice versa on the terms of the sub tenancy."

58. There was no evidence before the court to establish that privity of estate or privity of contract ever became operative between the landlord and Mr. Thomas Kennedy or either of his companies Alias Tom Limited or A.T. Uniform Limited. The mere fact that the rent being paid by Mr. Kennedy or by one or other of his companies was substantially the same as the rent due on foot of the lease is reflective of external market forces rather than any other factor.

59. Sight must not be lost of the fact that by means of the amended defence delivered in 2016, Mr. Smithwick actively contradicts his original defence, his sworn affidavits before the High Court and the contention advanced that he had validly assigned his interest under the 1987 lease to Mr. Thomas Kennedy / A.T. Uniform Limited. The proposition latterly advanced that he had in effect surrendered the lease is entirely inconsistent with his claim as originally pleaded. Logically he cannot truly believe both propositions. Assigning his leasehold interest and surrendering it to his lessor are mutually inconsistent acts. Mr. Smithwick's claim to have surrendered the lease is contradictory and inconsistent with his grant of the sub-lease to Alias Tom Limited. The amended defence delivered on the 10th November, 2016, almost three and a half years after the institution of proceedings and after the case had gone to hearing, specifically pleads at para. 9: -

"In or about 2004 Mr Robert Neil of Duke House Property Limited, the servant or agent of the Plaintiff's predecessor in title gave his consent to the act of surrender of the defendant's interest in the lease"

60. However, the sub-lease of the 25th November 2004 was proven in evidence. It is clear that Mr. Smithwick duly executed that instrument on or about the 25th November 2004. He is estopped by his execution of the said sub-lease, an act wholly inconsistent with a prior surrender of the lease having been effected validly in April 2004, from maintaining that the 1987 lease had been validly surrendered in the manner pleaded. The sub-lease instrument flatly contradicts Mr. Smithwick's contention of surrender. The contention of surrender in April 2004 is not credible on the evidence of Mr. Smithwick himself. His affidavits and defence are mutually contradictory.

Conclusion

61. I am satisfied that there was no probative evidence before the trial judge which warranted him reaching a conclusion either that Mr. Smithwick adopted, with the sanction of the landlord or its agent, a position inconsistent with his own position as tenant under the 1987 lease or that the admission of a new tenant (being Mr. Thomas Kennedy or his companies, Alias Tom Limited or A.T. Uniform Limited) was made by Mr. Smithwick with privity and consent of the landlord. Mr. Kennedy and his companies went into occupation and possession on foot of a written sub-lease which Mr. Smithwick executed. At the expiration of the term of the sub-lease, Mr. Kennedy and one, and then the other, of his companies over held as sub-tenant from month to month. Mr. Smithwick attended at the premises from time to time and knew well the state of affairs that obtained. The finding of the trial judge of a surrender in November 2004 is contrary to the evidence. The claim advanced in this court of a surrender in late June 2005 is not established by any credible evidence nor can it be inferred from any unequivocal act or acts. Nothing occurred which could cause Mr. Smithwick to honestly or reasonably believe or understand that, whether in law or equity, either a surrender of his leasehold interest had occurred or that he had effected a valid assignment of same to one of Mr. Kennedy's companies which would bind the landlord. The trial judge correctly cited the applicable legal principles but misapplied same to the evidence and facts as proven. Accordingly, I would reverse the determination of the High Court which dismissed the appellant's claim and allow the appeal.

62. I would direct judgment for the appellant landlord against Mr. Smithwick in the sum of €189,736.80. Issues between Mr. Smithwick and the third parties as remain outstanding fall to be determined pursuant to O. 16 and any order already made on foot of the third party application and notice.