Neutral Citation [2013] IEHC 223

2012 4052 P

THE HIGH COURT

COMMERCIAL

BETWEEN

TANAT LIMITED

PLAINTIFF

AND

THE MEDICAL COUNCIL

DEFENDANT

JUDGMENT of O'Neill J. delivered on the 16th day of May 2013

1. In these proceedings, the plaintiff seeks three declarations and damages. The first of these declarations is to the effect that s. 132 of the Land and Conveyancing Law Reform Act 2009, does not apply to a lease entered into by the parties in respect of premises known as Kingram House, Kingram Place, Dublin 2 for a term of twenty years commencing on 1st January 2013. The second declaration is to the effect that the establishment of the Basic Rent for the purposes of the lease to be entered into does not constitute a rent review to which the provisions of s. 132 of the Land and Conveyancing Law Reform Act 2009, apply. The plaintiff finally seeks a declaration that the defendant is estopped from contending that s. 132 of the Land and Conveyancing Law Reform Act 2009, applies to the lease in question, and finally, the plaintiff claims damages.

2. Section 132 of the Land and Conveyancing Law Reform Act 2009, is the legislative provision which prohibits "*upward only*" rent review clauses in leases of premises used for business purposes and reads as follows:

> *"132.— (1) This section applies to a lease of land to be used wholly or partly for the purpose of carrying on a business.*
>
> *(2) Subsection (1) shall not apply where—*
>
> *(a) the lease concerned, or*
>
> *(b) an agreement for such a lease,*
>
> *is entered into prior to the commencement of this section.*
>
> *(3) A provision in a lease to which this section applies which provides for the review of the rent payable under the lease shall be construed as providing that the rent payable following such review may be fixed at an amount which is less than, greater than or the same as the amount of rent payable immediately prior to the date on which the rent falls to be reviewed."*

Section 132 came into effect on 28th February 2010.

3. From the evidence given in the case, I am satisfied that the following is established as a matter of probability.

4. In 1989, the plaintiff acquired Kingram House. It is and always has been the only asset of the plaintiff company. The shareholders in the plaintiff company are Mr. John Ronan and Mr. Peter Conlon, each of whom has a 50% shareholding. For many years, through the guise of a variety of corporate entities, they have engaged in the business of property development. With regard to those developments in which Mr. Ronan was involved, his preference always was to retain properties which were built by companies in which he had an interest and to let these on long leases, namely, not less than 25-year leases. Thus, 95% of the buildings constructed in which he had an interest were retained in that way.

5. Kingram House is situated at Kingram Place, which is just off Fitzwilliam Place East, Dublin 2. The property, when acquired by the plaintiff, consisted of a small double-fronted Georgian building behind which was a larger old fashioned factory-type building. The Georgian building to the front had been a school which Oscar Wilde attended and the factory premises behind was, in days gone by, used for the manufacture of bandages for the British Army. From the time of its acquisition until about 2006, the premises had been let by the plaintiff. In 2006, the plaintiff set about redeveloping the property into the modern, high quality offices which are there now and which are currently occupied by the defendant as its headquarters. The original Georgian building to the front has been retained and the old factory to the back has been entirely replaced by a modern state-of-the-art office development.

6. In 2006, the defendant was in search of a new headquarters building. Lynn House in Rathmines, which they then occupied, was inadequate for their needs, particularly in light of the coming into effect of the Medical Practitioners Act 2007, which would have required the defendant to conduct public hearings, with all of the necessary accommodation that would be required for that.

7. I am satisfied on the evidence of Mr. Lamont, the then Registrar of the Medical Council, that the defendant was interested in buying a building rather than in leasing one, and through its agents, HT Meagher O'Reilly, were in the process of conducting a comprehensive trawl of the market to find a building suitable to their needs in a location that, likewise, was suitable for them.

8. Partly through this process of searching, and also as a result of a personal contact between Mr. Ronan and Professor Brian Keogh, a member of the then Medical Council, the plaintiff and defendant came into contact with each other. It is obvious that it quickly became apparent that Kingram House met the requirements of the Medical Council, both as to quality of building and location, and I have no doubt the plaintiff was pleased at the prospect of having the Medical Council, either as a purchaser of their building or as a lessee under a long term lease.

9. This was the situation as of late autumn 2006. However, an obstacle emerged, which was, that the plaintiff was unwilling simply to sell the building to the Medical Council, mainly because in so doing they would draw down upon the company a Capital Gains Tax (CGT) liability of approximately €2.7m. In addition, a distribution to the shareholders of the profit on the transaction would lead to a substantial Income Tax liability in the hands of the two shareholders. Whilst this was their obvious and primary objection to proceeding by way of a sale of the building, I am satisfied that there was also a strong in-built bias in the plaintiff company against the sale of a building, preferring instead to hold on to it and let it on a long lease.

10. All of this did not suit the Medical Council who were strongly of the view that they wished to purchase a building rather than to engage in a long lease.

11. The solution to the problem emerged early in 2007 in the form of a proposal to sell the shares in the plaintiff company instead of the building. The shareholders in Tanat were willing to countenance this and it had significant tax advantages, not just for the plaintiff but also for the defendant. Insofar as the plaintiff was concerned, whilst it did not avoid a liability to the Capital Gains Tax falling on the shareholders on a sale of the shares, it did avoid a liability to Income Tax which would have arisen from the profit on the sale of the building, had the building been sold by the company and that profit distributed to the shareholders. Insofar as the Medical Council was concerned, there was also a substantial saving on tax, in that the Stamp Duty applying to the purchase of the shares was 1% as against 9% on the purchase of the building, and also avoided having to pay VAT at 13.5% on the purchase of the building. There was agreement in the evidence that the net saving in tax that would have been achieved by the Medical Council on a purchase of the shares in total amounted to €3.45m.

12. All of the negotiations in this regard reached fruition, and by a letter of 12th April 2007, Messrs. HT Meagher O'Reilly on behalf of the Medical Council, said the following:

> "***RE: Kingram House, Kingram Place, Dublin 2***
>
> *Further to your letter dated 23rd October 2006 to Mr. Brian Keogh of the Medical Council, we confirm that the terms proposed therein are acceptable to the Medical Council subject to the following conditions:*
>
> *1. Verification of the building's floor area by an on-site measurement;*
>
> *2. Survey;*
>
> *3. Satisfactory title;*
>
> *4. As the property will be transferred by way of a sale of shares in a holding company, the Medical Council will need to complete a due diligence exercise on this company. We would be grateful if you could provide details in this regard as soon as possible.*
>
> *5. Contracts are to be exchanged by 18th May 2007 with the closing date eight weeks thereafter . . .* "

13. This letter of 12th April 2007, was replied to by a letter from Mr. Michael Healy of Savills Hamilton Osborne King who were the agents for the plaintiff, and in that letter Mr. Healy set out the agreed Heads of Terms to confirm the sale of the property by way of a sale of the shares in the plaintiff company for €20m exclusive of VAT and Stamp Duty. It provided for the payment of a booking deposit of €50,000 to secure the premises and it confirmed contract exchange date and closing date as being 18th May 2007, and 14th July 2007, respectively. It also stipulated the payment of the balance of a 10% deposit on the signing and exchanging of the contracts.

14. The transaction proceeded on the basis of these arrangements and the solicitors, Mr. Keane for the plaintiff and Mr. O'Malley for the defendant set about the extensive and intricate work involved in the sale of shares in the plaintiff company. Matters progressed uneventfully into the summer of 2007. It is apparent that by mid-summer i.e. July 2007, a hold up was encountered, believed by the plaintiff's legal advisors to be, that the necessary consent of the Minister for Finance to the transaction had not yet been obtained. No one anticipated any real difficulty in getting this consent. The matter then seemed to go into a form of hibernation during August and into September 2007, there being no formal exchange of any description between the parties in that period.

15. However, on the Medical Council side of the transaction, a serious difficulty had emerged and that was the realisation, that under the then Medical Practitioners Act 1978, the Medical Council did not have a power to acquire shares in the plaintiff company and the absence of that power was an insurmountable obstacle to completing the transaction in the way that had been agreed at that time. This problem, however, was to be cured by the supply of the missing power, in the new Medical Practitioners Act 2007, but this legislation, or more particularly, that part of it which supplied the missing power, was not envisaged as commencing until well into 2008. In the event, the relevant section did commence in July 2008.

16. Before alerting the plaintiff to this difficulty, the Medical Council, with its advisors, considered what needed to be done in order to preserve the prospect of acquiring Kingram House and to devise a proposal which would be sufficiently attractive to the plaintiff to achieve that purpose.

17. The proposal arrived at and communicated by a letter of 25th September 2007, from Mr. Declan O'Reilly of HT Meagher O'Reilly to Mr. Michael Healy of Savills Hamilton Osborne King was as follows:

> *"Dear Michael*
>
> ***RE: Kingram House, Kingram Place, Dublin 2***
>
> *I refer to our ongoing discussions in connection with the above.*
>
> *As you will be aware, under current legislation, the Medical Council do not have powers to acquire the building by way of*

a share transfer. However, they will have powers to do so under the provisions of the Medical Practitioners Act 2007 which will come into effect in early 2008.

To progress matters until the new Act comes into effect, we have been instructed to enter discussions regarding the leasing of Kingram House with an option to purchase as follows:

***Property** Kingram House, Kingram Place, Dublin 2, which extends to approximately 1, 493 sq.m. together with five surface car parking spaces.*

***Lease** The Medical Council will enter in to a 9 year 11 month full repairing and ensuring lease of the entire building at a rental of €820,000 per annum exclusive. There will be an upward only rent review at the end of the 5th year of the term.*

***Purchase Option**The Medical Council will have an option to purchase the property holding company, Tanat Ltd., by the 1st September 2009 for a consideration of €20 million exclusive.*

***Costs** Each party will bear their own legal costs incurred I the transactions.*

Our client greatly appreciates your client's patience to date in connection with the transaction and if acceptable, they will use their best endeavours to conclude the transaction as quickly as possible.

We look forward to hearing from you soon.

Finally in accordance with standard practice please note that all discussions to date are of an exploratory nature only and the existence of a contract, oral or otherwise, is expressly denied. No contractual obligation exists or shall be deemed to exist until such time as both parties have signed and exchanged contracts."

18. This proposal proved unattractive to the plaintiff. It would not accept a 9-year 11-month lease, it being too short for their essential requirements. To progress the matter in the way proposed, they required, that if the option to purchase the shares was not exercised by the Medical Council that they would be in a position to compel the Medical Council to take a long lease on the expiry of the first lease.

19. After more discussions, a meeting was arranged for 6th November 2007, involving the relevant advisors of both sides. This meeting produced what became the final proposal and this is contained in a letter of 7th November 2007, from Mr. Robert Fay of HT Meagher O'Reilly for the Medical Council addressed to Mr. Michael Healy of Savills Hamilton Osborne King for the plaintiff and it is in the following terms:

"Dear Michael,

RE: Kingram House, Kingram Place, Dublin 2

Further to our meeting yesterday in connection with the above, we set out the proposed terms as discussed:

***Property** The Medical Council will have an option to purchase the property holding company, Tanat Ltd., within three years from the date of lease, commencement for a consideration of €20 million exclusive. If not exercised within this 3 year period, the initial 5 year lease will convert to a 20 year full repairing and ensuring lease subject to 5 yearly rent reviews.*

***Costs** Each party will bear their own legal costs incurred in the transaction.*

We look forward to hearing from you soon . . ."

20. Following on from the foregoing, the plaintiff, through its solicitor, Mr. Colin Keane of McCann FitzGerald wrote by letter of 20th November 2007, as follows:

"Dear Sirs,

In order to further the recent negotiations between our clients, we now attach:-

1. Draft Five Year Lease;

2. Draft Twenty Year Lease; and

3. Draft Put Option Agreement.

We would be obliged if you could approve these as soon as possible.

We are separately drafting an option agreement for the Medical Council to acquire the shares in Tanat Limited within three years at the net asset value of the company based on the property continuing to be valued at €20,000,000.

We must emphasise that no binding agreement will be deemed to have come into effect until all documents have been agreed and signed and we would further point out that we are not authorised to sign any note or memorandum of agreement on behalf of our client . . ."

21. The foregoing 'Put Option Agreement' provided for the plaintiff to have an option whereby the plaintiff could call upon the Medical Council to enter into a 20-year lease of the property from the date of expiration of the 5-year lease.

22. Yet another addition to the transaction emerged in the ensuing days. The Medical Council, not wishing to find themselves disadvantaged at the expiration of the 5-year lease, should they not exercise their option to purchase the shares in the plaintiff company, demanded a 'Call' option to require the plaintiff to grant them a 20-year lease in those circumstances. This was quickly agreed by the plaintiff.

23. A further agreement reached was that the rent under the 5-year lease would commence on 1st January 2008. The rent had been agreed at €820,000 *per* annum. A meeting of the Medical Council on 7th December 2007, approved the proposal to proceed by way of a 5-year lease together with a 3-year option to purchase the shares in favour of the Medical Council and with a 'Put and Call' option in respect of a 20-year lease of the building in the event that the Medical Council did not exercise its option to purchase the shares of the plaintiff.

24. Later, shortly before the closing by way of execution of the various documents to conclude the transaction, it was agreed that the shareholders in the plaintiff company would provide the Medical Council with a Tax Deed of Covenant whereby the vendors agreed to indemnify the Medical Council against tax liability which might arise in the then unforeseen but defined circumstances set out in paragraph 2.1 of the Tax Deed of Covenant.

25. In due course, on 10th March 2008, the transaction was closed by the execution of the 5-year lease which commenced on 1st January 2008, the 3-year purchase option which ran from 10th March 2008, until 9th March 2011, the Put and Call option agreement in respect of the 20-year lease and the Tax Deed of Covenant.

26. Before proceeding further, it is appropriate to consider the reasoning behind these complex arrangements.

27. I am satisfied from the evidence that the primary interest of the Medical Council was in purchasing this property, preferably by a straightforward sale of the building, but if that was not available, to do it by way of the purchase of the shares in the plaintiff company. This latter proposition had the additional advantage of significant tax savings for the Medical Council. I am also satisfied that the plaintiff's preferred option was a long lease, but it was quite willing also to dispose of the property by sale but only by way of the sale of the shares in the plaintiff company.

28. When it became apparent in mid-summer 2007 that the Medical Council could not, at that time, proceed with the purchase of the shares in the company, they were faced with a prospect of losing the acquisition of the property altogether unless they could come up with an attractive proposition for the plaintiff. The plaintiff, on the other hand, was still continuing to market the property. I am satisfied from the evidence that the value of the property had continued to increase throughout 2007 and into 2008. I am quite satisfied that the collapse of the property market which occurred in 2009 was totally unforeseen by all of the participants in this transaction and that all of these participants, without exception, proceeded on the basis that this was a very attractive property which, at €20m, was conservatively valued. I am quite satisfied that the Medical Council readily appreciated and were probably apprehensive that there was a serious risk that they would lose the acquisition of the property altogether. I am also satisfied that the plaintiff was then in the secure comfort zone of thinking it had an attractive property which could be easily be disposed of in the market, as it was at the time, probably for a price in excess of €20m. The evidence establishes that the Medical Council did have a valuation of €22m on the property, at that time.

29. The set of proposals put forward by the Medical Council in late September 2007, was manifestly designed to put them into possession of the property for long enough to enable them to acquire the power to purchase the shares, and for that purpose, to have an option to so do. Thus, they proposed, initially, a lease of 9 years and 11 months. I am quite satisfied that the period of 9 years and 11 months was chosen so as to be as attractive to the plaintiff in terms of the length of the lease, as was consistent with the Medical Council not incurring a VAT liability under the lease. The evidence establishes to my satisfaction that a lease in excess of ten years at that time would have been treated for VAT purposes as the purchase of the property and VAT would have been charged on the capitalised value of the rent which would have meant that a lease in excess of ten years would have attracted a VAT liability of approximately €1.7m.

30. Once it became apparent that the plaintiff would not countenance any arrangement which did not secure its position by way of being able to compel the Medical Council to take a 20-year lease, if they did not exercise the option to purchase the shares, the essential elements of the transaction fell into place. Although the Medical Council, at that time, was not interested in a 20-year lease, I am satisfied that they were prepared to grant the 'Put' option to the plaintiff because they firmly believed that it would never arise because they would have exercised their option to purchase the shares in the company within the three-year period.

31. The derivation of the rent payable under the five-year lease and thereafter the initial rent under the 20-year lease was explained in the evidence of Mr. Ronan and I accept his explanation in that regard. He was not prepared to part with the building for less than €20m, which he saw as its value, and which he could reap either by way of a sale for that sum, by way of the shares transaction, or by way of rent over 25 years. Twenty-five years rent at €820,000 *per* annum amounts to €20m. Mr. Ronan envisaged that over the duration of the lease, rent reviews would probably increase the rent periodically during the term of the lease.

32. Thus, the transaction as was finally constructed was in the interests of both parties. The Medical Council were getting the building they wanted, on foot initially of a short term lease which would enabled them to exercise their option to purchase, and the plaintiff was assured of a satisfactory return from the building either by way of purchase of the shares in the plaintiff company or €820,000 payable on foot of the two leases over 25 years, all of which rendered the building an attractive investment to institutional investors.

33. There was some controversy in the evidence as to whether or not these elaborate arrangements were constructed to benefit one side, namely, the Medical Council of the transaction rather than both.

34. I am quite satisfied that the use of a short term lease *i.e.* the five-year lease was selected to meet the need of the Medical Council to acquire the building in some guise or other for a sufficient length of time to be able to purchase the shares in the building, hence the three-year option to purchase. A longer lease could have been put in place from the outset which would have suited the plaintiff better, but I am quite satisfied that was not done because it would have attracted a VAT liability to the Medical Council in the region of €1.7m. Thus, it is quite clear to me that the use of the vehicle of the short term lease was to enable the Medical Council to avoid that liability.

35. Whilst there was that immediate benefit to the Medical Council, it cannot be said that there was any detriment to the plaintiff arising from this arrangement because the position of the plaintiff was amply secured in the 'Put and Call' option agreements for the 20-year lease. Thus, it is quite clear that the Medical Council were obviously anxious to acquire this property, and notwithstanding the apparent buoyancy of the market at the time, the plaintiff was obviously more than willing to acquire a State Agency as a long term lessee. Therefore, there can be no doubt that the agreement, which was effected through these elaborate transactions, rested upon mutuality of benefit.

36. The Medical Council went into possession and occupation of the property pursuant to the five-year lease. They did not exercise the option to purchase the shares in the plaintiff company within the three-year period up to 31st March 2011. Once the property

market collapsed in 2009, the value of this property collapsed with it, and thus, the option to purchase at a price of €20m became unattractive.

37. By a notice dated 22nd December 2011, the plaintiff exercised the Put option and called upon the Medical Council to take the long lease in the property.

38. In the meantime, on 28th February 2010, s. 132 of the Land and Conveyancing Law Reform Act 2009, came into effect, and the first issue which arises for determination in these proceedings is whether s. 132(3) which prohibits an "*upward only*" rent review clause applies to the rent review provisions set out in the Put and Call option agreement and in the 20-year lease so that the rent review clauses in the lease would have to operate so as to permit, if the market rent so indicated, a reduction in the rent payable prior to the review.

39. Before going on to consider the legal submissions on this topic, I should say that I am quite satisfied from the evidence in the case that the rent review clause as provided for in the Put and Call option agreement and in the lease was an "*upwards only"* review clause and it was quite clear from the evidence that none of the participants in these elaborate transactions contemplated anything other than an upwards only rent review clause which was the absolute norm in the market until the property market crashed in 2009.

40. It is instructive to consider the consequences which can flow for either plaintiff and defendant in these proceedings, depending upon whether the court determines that s. 132(3) of the Act of 2009 applies to the Put and Call agreement or whether that agreement is to be considered and "*agreement for such a lease*" as provided for in s. 132(2)(b), and therefore exempt from the application of s. 132(3).

41. A valuation report prepared by Ms. Johanna Gill of Messrs. DTZ Sherry Fitzgerald was put in evidence and not contradicted.

42. This report disclosed that the market rent of this property as of 3rd December 2012, was the sum of €374,100.

43. On the basis of an initial rent of €820,000 and with and upward only rent review provision, the valuation of the property was put at €9,100,000. Mr. Ronan, in his evidence, however, was of the view that the market had strengthened in the last few months and it was his opinion that the value was now, on this basis, about €11m.

44. On the basis of an initial rent of €820,000 from 1st January 2013, but with an upward and downward rent review provision from January 2018, the value of the property was put at €6,720,000.

45. Finally, on the basis of an initial rent which would be market rent, namely, €374,100, and with an upward and downward rent review clause, the value of the property was said to be €5,020,000 as of December 2012.

46. Thus, it is apparent that whether or not s. 132(3) of the Act applies to the Put and Call agreement can have quite dramatic effects on the interests of either the plaintiff or defendant in this case.

47. It is apparent that in its express terms, s. 132 is drafted so as to avoid having a retrospective effect, hence the inclusion of s. 132(2). Retrospective effect was described by O'Higgins C.J. in *Hamilton v. Hamilton* [1982] I.R. 466, in the following terms:

> *"For the purpose of stating what I mean by retrospectivity in a statute, I adopt a definition taken from Craies on Statute Law (7th ed., p. 387) which is, I am satisfied, based on sound authority. It is to the effect that a statute is to be deemed to be retrospective in effect when it 'takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past'."*

48. Thus, the court must examine closely the transactions concluded between the plaintiff and defendant in this case to ascertain with precision what existing rights and obligations are changed, beneficially or detrimentally by the operation of s. 132(3) of the Act. If the court concludes that existing rights or obligations are impaired materially by the potential operation of s. 132(3), then the court must construe the term "*agreement for such lease*" as used in s. 132(2) in a manner that excludes such material interference with existing rights and obligations.

49. The transaction in question was constructed and completed on the basis of the execution of four instruments, namely, the five-year lease, the option to purchase the shares in Tanat, the Put and Call option agreement for a 20-year lease and finally, the 20-year lease itself.

50. Of these, the one which is said to be an *"agreement for such lease"* for the purposes of s. 132(2) is the Put and Call option agreement. It can hardly, however, be gainsaid that all four instruments were interlinked and interdependent in order to achieve one or other of the outcomes intended by the parties in their overall agreement, namely, to achieve the acquisition of Kingram House by the Medical Council, either by way of a share transfer or by way of a long lease.

51. If s. 132 of the 2009 Act was not enacted or did not come into effect until after 1st January 2013, there can be no doubt but that the Medical Council, having decided not to exercise its option to purchase the shares in Tanet, would, upon the expiry of that share purchase option, have been obliged to enter into the 20-year lease from 1st January 2013, upon notice for that purpose being served upon them by Tanat, as was done by a letter of 22nd December 2011. There is no doubt that the rent review clause would have operated on an upwards only basis.

52. If it is to be the case, then, that s. 132(3) does apply to the 20-year lease, there can be little doubt but that the carefully arranged and constructed bargain between these parties would have been substantially changed to the extent that an upwards and downwards rent review provision would be likely to greatly diminish the rent accruing to the lessor and thereby significantly reduce the value of the lessor's interest in the property, unless for reasons, which at this stage are entirely unforeseeable and indeed highly improbable, there is an unexpected and dramatic recovery in the market for this type of office development. In effect, the operation of s. 132(3) in this case would insulate the Medical Council from the loss which would inevitably have ensued had their original agreements taken full effect, and Tanat would be deprived of the original intended full benefit from these agreements. The operation of s. 132(3) would shift the losses resulting from the collapse in the property market as that affected the capital and rental value of Kingram House from the Medical Council on whom it would have fallen but for s. 132(3) to Tanat.

53. Mr. Dwyer S.C. for the Medical Council submits that the issue falls to be determined by my ascertaining precisely what the parties were legally entitled to, and specifically, what Tanat was legally entitled to under the Put and Call agreement in February 2010, when

s. 132 came into operation. He submits that at that time, Tanat did not have any legally enforceable right to compel the Medical Council to take the 20-year lease, that the right to compel the Medical Council to take the 20-year lease did not arise until the notice exercising the option was served on 22nd December 2011, and thus, as of February 2010, because they did not have an enforceable right to compel the Medical Council to take a lease, he submitted that the Put and Call agreement could not be considered to be a "*agreement for such lease*" for the purposes of s. 132(2).

54. There was considerable debate in the submissions as to the legal nature of an option agreement. For the defendant, it was submitted that an option was merely an "*irrevocable offer*" and that no mutual contractual obligations arose until the exercise of the option by the grantee. For the plaintiff, it was submitted by Mr McDonald SC that an option was a conditional contract, the condition being the exercise by the grantee of the option on such terms as were provided for that in the agreement.

55. This topic has received considerable judicial attention in the United Kingdom. The defendant relies upon dicta from the cases of *United Dominion's Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd.* [1968] 1 WLR 74, and *Sudbrook Trading Estate Ltd. v. Eggleton* [1993] 1 ACC 444, in support of their submission that an option agreement is merely an irrevocable offer. In addition, the defendant relies upon the judgment of Charleton J. in *Reox Holdings plc. v. Cullen* [2012] IEHC 299, in which a guarantee in a lease which obliged the guarantor to accept a new lease of premises was held not to be an "*agreement for such lease*" as provided for in section 132(2).

56. The plaintiff, on the other hand, relies upon the judgment of Clarke J. in *BNY Trust Company (Ireland) Ltd. v. Treasury Holdings Ltd.* [2007] IEHC 271, and the judgment of Hoffmann J. in *Spiro Glencrown Properties Ltd.* [1991] Ch. 537, in support of its submission that an option agreement is, in essence, a conditional contract. In addition, the plaintiff relies upon two Australian cases, namely, *Laybutt v. Amoco Australia Pty. Ltd*., a decision of the High Court of Australia [1974] HCA4 49, and also the case of *Mark Bain Construction Pty. v. Barling*, a decision of the Supreme Court of Queensland [2006] QSC 48. The plaintiff draws attention to the fact that neither the judgment of Hoffmann J. in Spiro nor Clarke J. in *BNY* were opened to Charleton J. in *Reox*.

57. In the *Spiro* case, Hoffmann J. closely analysed the authorities on this topic and came to the conclusion that neither the "*irrevocable offer*" nor "*conditional contract*" descriptions universally applied to option agreements, and that in reality and in different circumstances, each of these concepts had varying degrees of application. In short, these concepts were merely analogous to an option agreement rather than descriptive of this type of agreement and the analogies did not adhere in all circumstances. For the purposes of the issue arising in the *Sprio* case, namely, whether there had been compliance with s. 2 of the U.K. Law of Property (Miscellaneous Provisions) Act 1989, which provided that a contract for sale or disposition of an interest in land could only be in writing and had to incorporate all the terms which the parties had expressly agreed in one document or in a document referred to and signed on behalf of each of the parties, Hoffmann J. concluded that the notice exercising the option in that case which was signed only by the purchaser was not the contract, but rather the option agreement itself, signed by both parties.

58. In the present case, there is, as described above, a complicated sequential and contingent series of transactions starting, initially, with the 5-year lease, then the option to purchase the shares in Tanat with a three-year period for the exercise of this option, followed on the expiration of this, by the Put and Call option agreements.

59. As is apparent, the exercise of the Put option was contingent upon the Medical Council not, in the first instance, exercising its option to purchase the shares in Tanat, and then once the Put option period commenced, the exercise of the option was contingent upon the service of the notice provided for. I am quite satisfied on the evidence, as mentioned earlier, that the agreed objective of this interdependent and interlinked series of transactions was to assure possession of Kingram House to the Medical Council and a return equivalent to €20m to the shareholders in Tanat one way or the other, namely, either by way of the transfer of the shares in Tanat to the Medical Council or, failing that, by way of the 20-year lease following upon the expiry of the 5-year lease.

60. In my opinion, it would be wholly unreal and indeed a denial of the agreements reached between these two parties to abstract from this complex of arrangements one element only, namely, the service of the notice exercising the Put option and to treat that in isolation, or to put it another way, to treat the Put option on an entirely standalone basis, as an "*irrevocable offer*". Thus, I have come to the conclusion that the "*irrevocable offer*" analogy is wholly inappropriate as a purported description of the legal nature of this Put option.

61. On the other hand, the description of conditional contract is much closer to the reality of the Put option as part of an integrated scheme of agreements, with the Put option or perhaps the Call option being the last step as *per* the overall agreement between these parties to bring to fruition their common objective to put the Medical Council into possession of Kingram House on a basis clearly agreed. The fact that that final step or final agreement was conditional upon the non-exercise by the Medical Council of its option to purchase the shares in Tanat in the first place, and secondly, the service of the notice to exercise the Put option does not, in my view, detract from the fact that at all times, there was an agreement between these parties which provided, albeit on a sequential conditional basis for these events to occur. From the outset, there was an inexorable contractual pathway which neither party could evade or avoid given that there were Put and Call options, leading to the Medical Council continuing to possess Kingram House after the expiry of the 5-year lease.

62. This is what has occurred. The Medical Council is in possession of Kingram House and it is agreed that that possession is now on the basis of the 20-year lease. That fact, now, makes it virtually impossible for anyone to deny that the Put option was anything other than an "*agreement for such lease*".

63. The following passage in the judgment of Clarke J. in the BNY case is entirely apposite to this case:

> *"The next question which, therefore, arises concerns the contractual status of the put and call option which had already been entered into, prior to the service of the clause 4 notice, by BNY and Ark. It is said, on behalf of BNY and Ark, and it is correct insofar as it goes, that a put and call option is not the same thing as a contract for sale. It does have to be said, however, that the difference is more as to form than as to substance. The reality is that even where a contract for sale is in place, it does require one or other of the parties, in practice, to pursue a closure of that sale for such closure to, in fact, occur. If both parties let matters lie, then it becomes entirely possible that the contract will, in time, become devoid of any practical legal effect. Similarly where there is a put and call option in place which, in effect, allows either party to insist on contractual relations coming into being (by the simple expedient of serving a notice exercising one or other of the options) then it follows that either side can insist on a sale going ahead.*
>
> *As a matter of substance, therefore, the net effect of there being in place a put and call option in respect of the sale of a property is that either side can insist on the sale going ahead. That is exactly the same situation as arises when there is a contract for sale in being.*

> *The only difference between the two situations is that, in the case of a put and call option, it is necessary that one or other party take a positive step (in the form of the service of an appropriate notice to exercise the option) in order for matters to go forward. In the case of a contract of sale no such positive step is required although, as I have pointed out, the absence of any party taking any practical steps to move towards completion may, in time, lead to the contract becoming unenforceable in practice. The extent to which even this, almost theoretical, level of difference between a put and call option on the one hand and a contract for sale on the other hand, may be of any substance can, of course, depend on the terms of the put and call option. If it is limited as to time, then the absence of a positive act by either party within the time specified will lead to an end being brought to any contractual entitlements . . .*"

It would seem to me, in light of the complex set of transactions in this case with a common intended objective, that the reasoning of Clarke J. as set out in the above passage would apply *a fortiori* to the circumstances of this case.

64. I have therefore come to the conclusion that the Put option in this case was in the nature of a conditional contract.

65. Mr. Dwyer S.C. submitted that it was immaterial whether the Put option was categorised as either an irrevocable offer or a conditional contract, that what mattered was whether or not it was enforceable and it was his submission that as of 28th February 2010, when s. 132 of the Act came into effect, the Put option was not enforceable because, in the first instance, the period for the exercise of that option had not yet commenced, and secondly, the notice required to exercise the option was not served until 22nd December 2011.

66. Mr. Dwyer is undoubtedly correct in that the Put option was not enforceable as of 28th February 2010. As of that date, its status was that of a conditional contract, but necessarily, as of yet, there was non-fulfilment of the condition to which the contract was subject. As remarked earlier, in addition to the service of the necessary notice, there had to be awaited the commencement of the option period after the expiry of the option period for the exercise by the Medical Council of its option to purchase the shares in Tanat.

67. Whilst the Put option was not, as of 28th February 2010, enforceable, it was undoubtedly a conditional contract which was capable of enforcement as all the elements identified by Finnegan P. (as he then was) in the case of *Cosmoline Trading Ltd. v. DH Burke & Son Ltd. and DHP Holdings Ltd.* [2006] IEHC 38, were present and agreed, namely, the parties, the premises, the term of the lease, the commencement date and the rent.

68. The following passage from Halsbury's *'Laws of England'* (2006 Reissued) Vol. 27 (1) at para. 75, clearly illustrates that a valid and binding agreement for lease may be subject to a variety of conditions which no doubt impair its enforceability but do not detract from its validity:

> *"An instrument which only binds one party to create and the other to accept a lease in the future is in agreement for a lease. Moreover, an instrument is construed as an agreement for a lease and not as a lease, notwithstanding that it contains words of present demise, if the provisions to be inserted in the lease are not finally ascertained . . . or where certain things have to be done by the landlord before the lease is granted, such as completion or repair or improvement of the premises, or by the tenant, such as obtaining of sureties. . . ."*

69. There is no doubt that the existence of a condition affecting the performance of or enforceability of a contract does not vitiate the existence of the contract itself. The following passage from the judgment of Geoghegan J. in *O'Connor v. Coady* [2004] 3 I.R. 371, illustrates this fundamental proposition as follows:

> *"(Mason J. in Perrie v. Collangatta Investments Pty. Ltd. [1982] 129 Clr. 537) points out that generally speaking, the court will tend to favour the construction which leads to the conclusion that a particular stipulation is a condition precedent to performance as against that which leads to the conclusion that the stipulation is a condition precedent to the formation or existence of the contract. He point out that in most cases, it is artificial to say, in the face of the detail settled upon by the parties, that there is no binding contract unless the event in question happens. This view exactly corresponds with the view expressed by McWilliam J. in Omulane v. Riordan [1978] ILRM 73 at p. 77, where he said the following:*
>
> *' . . the fact that a contract is subject to a condition has the effect of a making it unenforceable until the condition is fulfilled but it does not mean that there is no contract at all'."*

Later, Geoghegan J. says:

> *"In my view, the more helpful terminology is the distinction between a 'conditional contract' and 'unconditional contract'. As we all know, by a strange quirk of the law, ordinary terms of an unconditional contract, if they are of sufficient importance, will themselves be described as 'conditions' but that does not mean that the contract is conditional. Normally, a conditional contract will not mean a contract which comes into existence only upon fulfilment of the condition, but rather a contract which can be enforced only upon fulfilment of the condition . . ."*

70. Clearly, the reasoning of Geoghegan J. in this case applies to an agreement for a lease subject to a condition. The question which next necessarily arises is whether or not an agreement for such lease as set out in s. 132(2) encompasses an agreement for a lease subject to a condition and therefore until fulfilment of the condition not enforceable, as in this case.

71. Manifestly, s. 132(2) does not expressly say that it applies only to enforceable agreements for a lease, thereby excluding all such agreements subject to a condition. If one were to apply a literal construction to s. 132(2) i.e. giving to the words their natural and ordinary meaning, one would be compelled to conclude that the sub-section did not exclude conditional agreements for lease as that is not expressly provided for in the language used and to achieve that exclusion would necessarily involve adding into the words used in the sub-section the additional word of "*enforceable*" immediately before the word "*agreements*". Clearly, the Oireachtas did not do this.

72. On the other hand, it may be argued that the term "*agreements for such lease*" is a technical term or a term of art, an approach which appealed to Charleton J. in the *Reox* case. Construing the sub-section in this way means one must ascertain the meaning of the term "*agreements for such lease*" from the applicable law which defines that term in law, insofar as this would produce a meaning which differed from the meaning resulting from a literal interpretation. In doing this, one has recourse to clearly settled law on what constitutes an agreement for lease, mentioned briefly above, and here it becomes apparent that a valid agreement for a lease does include a lease subject to a condition which, until fulfilment of the condition renders the agreement unenforceable, but does not

invalidate the agreement.

73. Thus, it would seem to me that whether one adopts the literal approach to the construction of s. 132(2) or whether one treats the expression "*agreements for such lease*" as a technical term or a term of art to be defined by reference to applicable law, the end result in either case is that agreements for lease subject to a condition are, nonetheless, included.

74. Thus, in my view, it is not possible to interpret s. 132(2) as including only "*agreements for such lease*" that are enforceable or not subject to a condition.

75. In my opinion, construing sub-section 132(2) in this way is also necessary in order to give the sub-section a constitutional interpretation. If one were to construe the sub-section in the manner contended for by the defendant, that would have the effect of interfering in a very material way in the complex set of contractual arrangements made between these parties, to achieve the acquisition from the plaintiff of Kingram House for the Medical Council.

76. If s. 132 was never enacted, there is no doubt but that the Medical Council would have been bound to take the 20-year lease with the upward only rent review clause in it, and if sub-section 132(2) does not apply, they still take the same lease subject to all of its myriad terms and conditions except that the rent review provision is altered as per s. 132(3) to permit a review downwards of the rent. The net effect of all this is that s. 132(3), if it applies, radically alters the contractual arrangements in existence between these parties and shifts the loss resulting from the collapse of the property market from the Medical Council where it would undoubtedly have rested but for the intervention of s. 132, over to Tanat Ltd. which would have escaped that loss but for s. 132. There could hardly be a better illustration of impermissible retrospective interference with existing, vested property rights. I have therefore come to the conclusion that the Put option in this case is a *"agreements for such lease"* as is provided for in s. 132(2) of the Act of 2009, and therefore the upwards only rent review clause provided for in the lease appended to the Put option is unaffected by s. 132.

77. I reach this conclusion after giving careful consideration to the judgment of Charleton J. in the *Reox* case. It was only with the greatest of difficulty and hesitation that I ultimately found it necessary not to follow the reasoning of my esteemed colleague in that case. I was persuaded so to do by the fact that it appeared to me that the facts in that case, relating to what was the unintended, indeed accidental, eventuality which ensued in the calling in of the guarantee in that case, differed so markedly from the elaborate, carefully arranged series of contractual transactions leading ultimately to a common agreed objective, which was the factual matrix that I had to deal with in this case. Thus, I concluded that the *Reox* case ought properly to be distinguished, and I am also fortified in this approach by the fact that neither the *Spiro* case nor the *BNY* cases were opened to Charleton J. in the *Reox* case.

78. In light of the foregoing conclusion, it is unnecessary for me, in order to determine these proceedings, to deal with the further two issues raised in the proceedings, but for the sake of completeness and in deference to the learned submissions made, I propose to adjudicate upon them.

79. The second issue arises only if the court were to conclude the s. 132(3) applies in this case. In that situation, an issue arises as to whether or not s. 132(3) applies to the initial rent to be paid under the lease from 1st January 2013, namely, whether or not that rent is to be established by reference to open market rent ascertained pursuant to the review procedures set out in the 20-year lease.

80. Clause 5.1 of the Put and Call option agreement provides that:

> *"The initial rent to be reserved by the long lease shall be the greater of:-*
>
> *(a) €820,000 per annum; and*
>
> *(b) the open market rent of the property at the date of commencement of the term of the long lease."*

81. Clause 1.5 of the Long Lease provides:

> *"THE BASIC RENT - € per annum or such other rent as shall be payable in consequence of review pursuant to the provisions of the SECOND SCHEDULE hereto."*

82. Clause 1.6 of the Long Lease provides:

> *"THE REVIEW DATES - the first day of the sixth year of the Term and the last day of the tenth year of the Term and every fifth year thereafter."*

83. Paragraph 2 of Schedule 2 to the Long Lease provides:

> *"The Basic Rent payable under this lease shall be reviewed as at the Review Dates to the open market rent of the Demised Premises and the Basic Rent payable from each respective review date shall be either the Basic Rent payable immediately preceding such review (whether the same be fully recoverable or not as a result of any statue or orders, rules or regulations relating to the control of rent) or the open market rent of the Demised Premises as at such Review Date and in each case whichever is the higher."*

84. In the 5-year lease, from 1st January 2008, in which the Particulars of Lease are identical to the Long Lease, save for the absence of a provision for review dates, at clause 1.5 of same the basic rent is stated to be €820,000 *per* annum.

85. I am quite satisfied on the evidence that it was at all times agreed between the parties that the rent which would be payable on foot of the Long Lease, if that came in to effect in circumstances where the Medical Council did not exercise its option to purchase the shares in Tanat, was to be the sum of €820,000 *per* annum.

86. Clause 5.1 of the Put option agreement expressly provides that the initial rent reserved by the Long Lease was to be the greater of €820,000 *per* annum or the open market rent at the date of commencement of the term of the Long Lease.

87. Manifestly, the sum in respect of the Basic Rent as provided for at clause 1.5 of the Long Lease was, when these transactions were entered into, left blank for the obvious reason that as of March 2008, it was not known at that stage that the market rent would be less than €820,000 per annum and the expectation probably was that it would be greater and therefore to be ascertained in accordance with the provision of clause 5.2 of the Put agreement which provides as follows:

"5.2 If, by a date three months before the date of commencement of the term of the Long Lease or such extended period as may be agreed by the landlord and the Council, the landlord and the Council shall not have agreed the open market rent, then in that event the open market rent shall be determined in the manner provided for in Schedule 2 of the long lease and reference to Schedule 2 to relevant Review Date shall be deemed to refer to the date of commencement of the term of the long lease."

88. Clause 5.3 of the Put option provides that if the initial rent reserved by the long lease has not been agreed or determined prior to the commencement of the long lease, the rent payable in respect of the period of time from the commencement of the term of the lease until next gale date was to be the rent payable under the short-term lease.

89. The evidence satisfies me that there was no disagreement between the parties but that the open market rent which would be payable in respect of these premises at the commencement of the Long Lease had fallen well below the sum of €820,000 *per* annum. If there had been any disagreement on this or if it was contended by Tanat that the open market rent might have been greater than €820,000 *per* annum, the parties would have been obliged pursuant to clause 5.2 of the Put option to have recourse to the review procedures set out in Schedule 2 to the Long Lease. However, given that it was obvious to all that the open market rent was well below the €820,000 *per* annum, there was no need to invoke that procedure and it was not done.

90. In my view, the Basic Rent as from the commencement of the term of the lease is conclusively settled by the terms of the Put option agreement. Once it was clear that the market rent was below €820,000 *per* annum, then, as provided for in the Put option agreement, the initial rent payable from the commencement of the term of the lease was €820,000 *per* annum and it thereby became the Basic Rent payable under the lease until the first review date as provided for in clause 1.6 of the Long Lease.

91. Apart from ascertaining market rent under clause 5.2 of the Put option agreement for the purposes of establishing the initial rent, there could be no recourse to the rent review procedures set out in Schedule 2 of the Long Lease by either party, save for the purposes of a review of the rent at the expiration of the periods for such reviews as provided for in clause 1.6 of the Long Lease.

92. Therefore, I cannot accept the submission of the Medical Council which seems to be to the effect that by recourse to this procedure the fixing of the initial rent, as provided for in the Put agreement, could be characterised as a "*review*" of the rent, thereby falling within the ambit of s. 132(3), thus defeating the provision in the Put agreement which provided for an initial rent of €820,000 per annum if that was greater than the open market rent.

93. It is apparent that s. 132(3) applies only to "*the review*" of a rent. The fixing of the initial rent payable from the commencement of this lease was, in my view, clearly not a "review" of the Basic Rent payable from the commencement of the term of the long lease. The earliest point in time at which a "*review*" could arise which would fall within the ambit of s. 132(3) would have been as provided for in clause 1.6 of the lease, "*the first day of the sixth year of the term*".

94. In short, therefore, the attempt to argue that because the review machinery can be invoked under clause 5.2 of the Put option, that this can constitute the fixing of the initial rent as a "*review*" for the purposes of s. 132(3), is wholly unconvincing to me and I would reject that argument.

95. I am satisfied that even if s. 132(3) did apply to the Long Lease, this could be only on the basis that the initial rent would be €820,000 *per* annum as provided for in the Put option agreement.

96. The final issue which arises in the case is whether or not the Medical Council is estopped from denying that the Put option agreement is an "*agreement for such lease*" as provided for in s. 132(2).

97. In this respect, the plaintiff submits that it was at all times agreed that in the event of the Medical Council not exercising its option to purchase the shares in Tanat, that there would be a continuation from the short lease of a lease, so that Tanat would have the benefit of a 25-year letting. The stratagem of having a short 5-year lease to commence with derived solely for the benefit and at the instance of the Medical Council so as to enable them to avoid having to pay a tax liability of approximately €1.7m which would have arisen at the relevant time, on any lease longer than ten years. Thus, it was submitted for the plaintiff, that having had the transaction constructed in this way to meet the specific requirement of the Medical Council to avoid this tax liability, the Medical Council is now to be estopped from denying that the Put option is "*an agreement for such lease*", as provided for in s.132[2], because if the Medical Council had not been accommodated in this way there would have been in existence, prior to 28th February 2010, a long lease arrangement between the parties, to take effect in the eventuality that the Medical Council did not exercise its option to purchase the shares in Tanat. In this respect, the plaintiff characterises the nature of the estoppel claimed as being estoppel by convention.

98. Since the case of *Courtney v. McCarthy* [2008] 2 I.R. 376, estoppel by convention has been recognised by the Supreme Court to be part of our law. The following passage from the judgment of Geoghegan J. in that case illustrates the point:

"In expressing what I believe to be the relevant law of estoppel for the purposes of this case, I am placing considerable reliance on the judgment of Robert Goff J. in the English High Court in Amalgamated Property Co. v. Texas Bank [1982] 1 Q.B. 84 and the judgments in the Court of Appeal in the same case with particular reference to the judgment of Brandon L.J. He explained what was meant by the expression 'estoppel by convention'. The case related to a bank guarantee given by a company, the validity of which was being disputed by the liquidator of that company. A question arose as to whether even if the guarantee was not valid an estoppel had arisen by virtue of the conduct of the company which precluded denial of the guarantee. Brandon L.J., though forming the view that the guarantee was in fact effective, went on to consider the estoppel question in the event that he was wrong. Two main arguments against the existence of the estoppel had been put forward in the High Court and the Court of Appeal. The first was that since the bank held its mistaken belief as a result of its own error alone and that the company had at most innocently acquiesced in that belief which it also held, there was no representation which could found an estoppel. The second argument was that the bank was seeking to use the estoppel not as a shield but as a sword and that that was not permitted by the law of estoppel. Brandon L.J. rejected both arguments. He expressed the view that the particular estoppel relied on was of the kind described in Spencer Bower and Turner, Estoppel by Representation (3rd ed., 1977), at pp. 157 to 160 as 'estoppel by convention'. He cited the relevant passage of that work as follows:-

> *'This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then*

as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed'."

99. Thus, the plaintiff submits that the agreed or assumed state of facts as between the parties was that from the commencement of the 5-year lease, unless the Medical Council exercised its option to purchase the shares in Tanat, there would be a continuous leasing of these premises by the Medical Council for 25 years and this continuous leasing manifestly would have commenced prior to the coming into effect of s. 132 of the Act of 2009 on 28th February 2010. Hence, they say, that is not now open to the Medical Council to say that the Put option agreement which was the contractual device whereby the continuity of the leasing arrangement was assured from the commencement of the 5-year lease for the period of 25 years, was not an "*agreement for such lease*" as provided for in s. 132(2).

100. In response, the Medical Council does not contest that estoppel by convention is part of the law in this jurisdiction, but they say it has no relevance to the facts of this case. They submit that there was no underlying common set of facts, mistaken or otherwise which is now denied or sought to be abandoned by the Medical Council, nor was there any representation which could be said to give rise to an estoppel; nor could it be said that the reliance by the Medical Council on s. 132(3) of the Act of 2009 was unconscionable. They submit that two changes occurred; the first, the economic downturn and property crash and, secondly the change in the law brought about by s. 132 of the Act of 2009. Neither of these eventualities was contemplated by either party when they were concluding these transactions. They submit that their reliance now on s. 132(3) does not involve any denial by the Medical Council of the factual basis upon which the parties concluded their agreements, nor any departure by them from the factual matrix which was the basis of their agreements. Rather, they say, that they are now merely relying upon a change in the law, entirely unanticipated when these arrangements were made, which was brought into being by the Oireachtas to relieve the economic hardship being experienced by tenants of commercial properties such as the defendant in this case. They submit that nothing in the agreements reached between the parties nor the underlying factual matrix of these agreements could give rise to any unconscionability on their part in seeking to gain the relief provided by s. 132(3), when that change in the law was designed to provide relief for parties in the same position as the defendant.

101. In these proceedings, the defendant has not sought to deny or depart from any aspect of the factual basis upon which these elaborate agreements were constructed. The essence of the case made by the defendants was that when s. 132 came into effect on 28th February 2010, the Put option agreement was unenforceable and therefore they argued that it could not be "*an agreement for such a lease*" as provided for in s. 132(2).

102. In my view, the case made in this regard was in the nature of a legal submission rather than a denial of facts. As the basis for this legal submission depended entirely on the existence of s. 132, and as this was a change in the law brought about after the parties had concluded their agreements and as the defendant was clearly a party potentially amongst the class to whom the relief in s. 132 was directed, I can see no basis upon which it could be said that the defendant was not entitled to invoke the section and seek to have it applied to the undisputed factual matrix underlying the agreements between these two parties.

103. I am quite satisfied that they were entitled to do this and therefore an estoppel by convention or on any other basis does not arise in this case. Far less could it be said that their reliance upon s. 132 in the circumstances of the case was unconscionable.

104. In conclusion, therefore, I am of opinion that the Put option agreement in this case was "*an agreement for such lease*" as provided for in s. 132(2) of the Act of 2009. Even if I am wrong in this, I am satisfied that the Basic Rent from the commencement of the 20-year lease on 1st January 2013 was the sum of €820,000 *per* annum. Furthermore, if my conclusion that s. 132(3) does not apply in this case is incorrect, I am satisfied that the defendant is not estopped by convention from contending that the Put option agreement in this case is not an "*agreement for such lease*" as provided for in s. 132(2) of the Act of 2009.