

## THE HIGH COURT

## JUDICIAL REVIEW

[2013 No. 1648 S.]

BETWEEN

FRIENDS FIRST MANAGED PENSION FUNDS LIMITED

PLAINTIFF

AND

PAUL SMITHWICK

DEFENDANT

**JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 6th day of April, 2017**

1. By summary summons of the 21st May, 2013, the plaintiff claimed judgment for monies due in respect of rent, insurance, interest and service charges commencing with an unpaid invoice of the 1st April, 2011. Updated particulars of loss were delivered on the 21st of September, 2016, and the balance said to be due is now €189,736.80.
2. The plaintiff is the successor in title to Friends Provident Life Office with whom the defendant entered a leasehold agreement for the second floor of Duke House on Duke Lane in Dublin for thirty-five years, commencing on the 27th of May 1987.
3. A defence was filed on the 8th of May, 2014. The essential element of the defence was that:-
 

"...in or about 2004 Mr Robert Neil of Duke House Property Limited, the agent of Friends Provident Life Office, being the Plaintiff's predecessor in title, requested that the Defendant permit Mr Thomas Kennedy and/or A.T. Uniform Limited to occupy the demised premises. 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."
4. A third party notice was served on A.T. Uniform Ltd. where the defendant stated in the affidavit grounding application for same:-
 

"...in or about 2004 this deponent was contacted by the then landlords agent, Mr Robert Neil, of Duke House Properties Limited to enquire as to whether I would permit the longstanding tenant of the ground floor and first floor of the building, Mr Thomas Kennedy, a Director of A.T. Uniform Limited, to occupy the second floor of the building. I say that in or about May 2004 this deponent agreed to permit Mr Kennedy to occupy the second floor of the building."
5. In reply to the defence, the plaintiff pleads that no valid assignment of the defendant's lease took place, as required by s. 7 of Deasy's Act. Duke House Properties enjoyed the landlord's interest in the lease for many years but surrendered it to the plaintiff in 2009. In the course of that transaction, requisitions on title were raised and Mr. Neill and Duke House Properties were asked who the subtenants were, and Mr. Smithwick was identified as the subtenant of the second floor of the building.
6. The plaintiff called two witnesses (initially) Ms. Rowena Crowley and Mr. Desmond Denehy, both employed by the plaintiff as portfolio managers. Ms. Crowley gave evidence that she dealt with the "Duke House" file since Friends First's acquisition of the property. Evidence was given that the plaintiff's predecessor in title surrendered its lease in 2009 and, therefore, any subtenants became Friends First's direct tenants. According to Ms. Crowley, at that time it was Friends First's understanding that they had acquired the 1987 lease with the defendant who became their tenant. In response to questions from the court, Ms. Crowley gave evidence that to the best of her recollection the defendant was served with formal notice of the change in landlord. Thereafter, the plaintiff commenced invoicing the defendant for monthly rent of €3040. On or about April 2011, an issue arose regarding arrears and Ms. Crowley gave evidence that an agent was appointed by Friends First to pursue arrears directly with the defendant. The witness gave evidence that she was not aware of any application by the defendant to assign or underlet the lease, in accordance with clause 2.21 of the lease. At the time when Friends First acquired its interest in the lease, it had no notification of any application to assign having been made by the defendant.
7. The plaintiff's second witness, Mr. Denehy, gave evidence that Friends First received a copy of all the leases and subleases in respect of Duke House during the acquisition period. To the best of his memory, there were either none or quite minor arrears on the account, and no documentation regarding assignments or subletting were received.
8. The defendant gave evidence. He repeated the tenor of the defence advanced in the pleadings and on affidavits. He explained that the building was divided into three tenancies. The third floor of the building was occupied by Duke House Properties Ltd. and Mr. Neill. The second floor was occupied by the defendant originally. The basement, ground floor and first floor were occupied by a retail enterprise entitled Alias Tom owned by a corporate entity of the same name. Mr. Kennedy apparently was the principal shareholder of Alias Tom up until the year 2000. Thereafter, he remained as a consultant. Sometime in 2003 the defendant, who is a solicitor, vacated the second floor of the building when he joined a solicitor's practice elsewhere in the city. For approximately a year the premises lay vacant. The defendant's evidence is that he was invited by Mr. Neill to permit Alias Tom Ltd. to occupy the second floor of the premises. Mr. Smithwick's evidence was that he was willing to accommodate this request provided Alias Tom took over all obligations.
9. The court was concerned to hear this evidence and ultimately permitted the defendant to amend his defence to reflect a claim that there had been a surrender of his tenancy by act or operation of law in accordance with s. 7 of Deasy's Act 1860 rather than an assignment as originally pleaded. The court was also concerned as to how the plaintiff came to acquire its predecessor's interest without any notice of an arrangement, to use a neutral phrase, whereby Mr. Kennedy and his enterprises was permitted to occupy the second floor.
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 Funds Ltd. and Duke House Properties Ltd. on the 18th of 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.

11. The plaintiff proved that on the 25th of November, 2004, the defendant and Alias Tom Ltd. entered a sublease 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.

12. Mr. Kennedy gave evidence and said that a company called A.T. Uniform Ltd., which he controlled, moved into the second floor of the building "after the six month short-term let to Alias Tom." Mr. Kennedy said:-

"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."

In further important evidence given by Mr. Kennedy the court asked:-

"And by the time you had ended your occupation of the premises it was A.T. Uniform in occupation?"

Mr. Kennedy: Yes

Judge: Did you ever tell Mr. Smithwick that there had been a change between the occupation by somebody called Alias Tom and changing it to A.T. Uniform?

Mr. Kennedy: I can't recall telling him directly but it was known by all that it was A.T. Uniform. We also wrote to him and that is where the cheques were going from the A.T. Uniform's account to Mr. Smithwick. But Mr. Smithwick would have called by the shop on occasion anyway.

Judge: The cheques were going directly to Mr. Neill?

Mr. Kennedy: At the latter point, sorry. From 2009 Mr. Smithwick would have been very aware but I am sure he was aware before that.

Judge: When did A.T. Uniform start sending money to Mr. Neill?

Mr. Kennedy: In November, I think, 2004.

Judge: So initially, Mr. Neill was receiving the money from Alias Tom Ltd. corporate entity and therefore from A.T. Uniform?

Mr. Kennedy: Yes, correct."

In addition, the court asked:-

"Judge: Did you tell Mr. Neill there was going to be a new subtenant in the building?"

Mr. Kennedy: Mr. Neill would have known, yes because Mr. Neill was in the building at that point, it was quite known.

Judge: And when you say A.T. Uniform started shortly after... Alias Tom was in there for six months?

Mr. Kennedy: Yes, six months or a little bit more as far as I know."

Mr. Kennedy explained that A.T. Uniform supplied Garda and military uniforms to the State and stored uniforms on the premises.

### **The Evidence of Mr. Robert Neill**

13. The plaintiff called Mr. Robert Neill who is a chartered surveyor. He confirmed that he had the head lease from the building and collected the rents from the subtenants but paid one monthly amount to the landlord. Mr. Neill confirmed that he occupied the third floor of the building in which Mr. Smithwick originally took a tenancy and where Alias Tom had its premises. He was questioned about the requisitions on title and other information which was transmitted to the plaintiff during the acquisition by the plaintiff of Mr. Neill's (Duke House Properties Ltd.) interest in the premises. Mr. Neill said that he informed the plaintiff's agent that:-

"...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 court then asked Mr. Neill:-

"You told [the plaintiff's agent] that the reality was that A.T. Uniform were in occupation and paying the rent?"

Mr. Neill: Indeed. And had he been in the premises, and I don't know if he had or not, but it was stuffed full of Garda uniforms and wasn't in use as offices at all.

Judge: Stuffed full of uniforms.?

Mr. Neill: Yes. So there was no attempt at hiding the situation at all but the paperwork effected that there was a lease to Paul Smithwick.

Judge: But you told him the reality was there was someone else there who had been paying the rent perfectly for years?

Mr. Neill: Indeed."

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.

14. Asked by counsel for the plaintiff:-

"...was there anything that might strike you as a surrender?

Mr. Neill said:-

"Well it was true that he vacated the property as there was a new occupant and the new occupant was paying the rent directly to me, and service charges and insurance, so I knew that 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."

Mr. Neill also said :-

"I hadn't accepted a surrender. I had done nothing overtly to accept its surrender".

15. Mr. Neill's evidence was that:-

"...I told [the agent of the plaintiff] at the time of handover that A.T. Uniforms were paying the rent before the deal was signed, I told him. I thought just to be clear we have reported that the tenant is Paul Smithwick, which he was on paper, but the rents are actually being paid by a third party".

Counsel for the plaintiff intervened and said that according to his instructions Mr. King (the agent of the plaintiff) did not deal with Mr. Neill until after the conclusion of the transfer but Mr. Neill responded to this by saying:-

"That is not my recollection. I would have been careful to inform him beforehand".

The court asked:-

"Why would you have been careful to inform him beforehand"

And Mr. Neill replied:-

"Well just aware that he should be aware that the rents are actually being paid by a third party. It wasn't normal that we would accept rent from a third party.

Judge: But you had been doing it for years.

Mr. Neill: Yes and that enabled us to pay the head rent."

### **The Plaintiff's case**

16. The plaintiff submits four bases on which it is said the defendant assigned, rather than surrendered, his interest in the lease when he vacated the second floor and Mr. Kennedy moved in. The plaintiff's case is that the assignment was ineffective because it was not in writing as required by s.7 of Deasy's Act. First, it was submitted that the manner in which the defendant categorised Mr. Kennedy as taking over "the balance of the term of the lease" throughout his affidavits and third party notices points to an assignment rather than a surrender as the question of a surrender does not arise where what is in issue is the balance of the term of an existing lease. Second, the evidence from witnesses for the plaintiff suggests that when Friends First acquired Duke House in 2007, it had no notification of an assignment or surrender by the defendant and as far as it was concerned, it had acquired the subsisting 1987 lease with the defendant as their tenant. Accordingly, Duke House could not have surrendered its interest with the benefit of the defendant's live lease, if it had previously been surrendered by the defendant. Third, it was submitted that the defendant made two pleas in his defence which contemplate a continuing lease and thereby eliminates the possibility that the defendant had surrendered his interest in the lease. At para. 8 the defendant pleads indemnity against Mr. Kennedy in the following terms:-

"Without prejudice to the foregoing, if, which is denied, any sum is due and owing to the Plaintiff by the Defendant, the Defendant is entitled to a contribution and/or indemnity from the Mr. Thomas Kennedy (sic) ... and/or A.T. Uniform Limited ... as a result of each or either or both of them being in possession of the demised premises from in or about May 2004, and from which time each or either of those parties agreed to discharge the monies owed to the Plaintiff pursuant to the Lease, directly to the Plaintiff, and/or its agent, without any involvement of the Defendant."

17. It is pleaded at para. 9 that it was in response to Mr. Neil's requests that the defendant permit Mr. Kennedy to occupy the second floor that he consented to Mr. Kennedy taking over the remaining years of the lease. The defendant says:-

"... in or about 2004 Mr Robert Neil of Duke House Property Limited, the agent of Friends Provident Life Office, being the Plaintiff's predecessor in title, requested that the Defendant permit Mr Thomas Kennedy and/or A.T. Uniform Limited to occupy the demised premises. 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." (emphasis added)

18. Finally, Counsel for the plaintiff points to a short term letting agreement for the second floor of Duke House between the defendant and "Alias Tom Ltd" (company of Mr. Kennedy), dated the 25th November, 2004, as proof that the defendant could not have alienated his interest by assignment or surrender in May 2004 as he would have believed he had sufficient interest in the property to grant the occupation lease to Alias Tom Ltd by Memorandum of Agreement dated the 25th November, 2004. It is further submitted on behalf of the plaintiff that the defendant failed to deal with this Memorandum of Agreement in any of his affidavits.

19. The defendant responded to the Memorandum of Agreement point by explaining that he granted Mr. Kennedy the short-term lease contained therein on advice from a solicitor he knew very well for the purpose of providing Mr. Kennedy with the option of breaking the lease with the landlord if his business was not doing well. The defendant says that at his direction the rent was paid directly to

the landlord, and that Mr. Neill was aware of the position and knew that no money was to be paid to the defendant.

## The Law

20. Section 7 of Deasy's Act provides:-

"The estate or interest of any tenant under any lease or other contract of tenancy shall not be surrendered otherwise than by a deed executed, or note in writing signed by the tenant or his agent thereto lawfully authorized in writing, or by act and operation of law."

21. The law in relation to surrender is accurately set out at para. 25.11 of Professor J.C.W. Wylie, *Landlord and Tenant Law*, 3rd Ed., (Dublin, 2014) in the following terms:-

"Perhaps the best statement of the meaning of this expression in s. 7 of Deasy's Act was given in a case decided before the enactment of Deasy's Act, *Lynch v. Lynch* (1843) 6 Ir LR 131 where it was held that an oral assent by the tenant to a new letting of part of his premises being given to another party constituted a surrender of that part. Brady C.B. 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 effect 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.'

The important point is that it is the court's construction of the parties' acts which is important, ie, what they amount to as a matter of substance, not necessarily what the parties thought they had achieved by their acts. (see per Kenny J. in *McSweeney v. McKeown* (7th December 1970) High Court.) This matter is to be viewed objectively, so that in that sense the parties' subjective intentions are irrelevant. (*Zionmor v. Islington London Borough Council* (1998) 30 HLR 822; *Maddey Securities Ltd. v. Ervin* [1998] 2 EGLR 66). 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. (*Bellcourt Estates Ltd. v. Adesina* [2005] EWCA Civ 208; *Artworld Financial Corporation v. Safaryan* [2009] EWCA Civ 303). Surrender cannot be brought about unilaterally. (*Edward Lee and Co. v. N1 Property Development Ltd.* [2012] IEHC 494). It has often been said that its basis is estoppel (see *Wallis v. Hand* [1893] 2 CH 75; *Foster v. Robinson* [1951] 1 KB 149; *Gibbs Mew Plc. v. Gemmell* [1999] 1 EGLR 43; *Allen v. Rochedale Borough Council* [1999] 3 All ER 433; *Fordgate Wandsworth Ltd. v. Neville & Co.* [1999] EGCS 98; *Ealing Family Housing Association Ltd. v. McKenzie* [2003] EWCAZ 1602). 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. It must also be noted that, as we have seen, a surrender 'by operation of law' may be effected under statutory provisions ..."

22. The circumstances in which the defendant disengaged from his tenancy were not straight forward and were perhaps not as neat as one might expect of a solicitor. (I note the defendant's evidence that he is not a conveyancer). Ultimately the following evidence has assisted me in reaching my conclusion:

- (a) The defendant vacated his premises in mid-2003 but continued paying rent for approximately a year;
- (b) Alias Tom wanted to occupy the vacant floor of Duke House;
- (c) Mr. Neill, the person occupying the position of landlord at the material time, initiated or encouraged, at the very least, the idea that Alias Tom would occupy the second floor;
- (d) 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;
- (e) This was ultimately arranged by way of a short-term business letting together with a call option whereby Alias Tom could opt to take an assignment of the remainder of Mr. Smithwick's term;
- (f) When that option was not exercised, the corporate entity A.T. Uniform, controlled by Mr. Kennedy, took up occupation of the premises. Mr. Kennedy was also formerly the owner/controller of Alias Tom. Mr Kennedy was very well known to Mr. Neill;
- (g) A.T. Uniform's occupation happened with the full cooperation of Mr. Neill who for many years accepted rents and other payments from A.T. Uniform;
- (h) A.T. Uniform commenced occupation of the premises in sometime after June 2005 – i.e. on the expiry of the short-term lease between the defendant and Alias Tom Ltd. There was no attempt to disguise the identity of the new occupier of the premises. Any inspection of the premises would have revealed a facility used to store military and Garda uniforms for onward supply to the State. Self-evidently it was not in use as a solicitor's office;
- (i) 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.

23. The plaintiff is bound by the actions of its predecessor in title. Its plea in reply to the amended defence that it is a stranger to arrangements between Mr. Neill and Mr. Smithwick is ineffective.

24. 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 Ltd on a short-term letting with an option to take an assignment of the defendant's unexpired term and then by Mr. Kennedy with A.T. Uniform Ltd. 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.

25. The defendant has not paid rent for the premises since November 2004. The plaintiff's predecessor in title facilitated the departure of the defendant and the arrival of a new and trustworthy tenant. 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.

26. In *Edward Lee & Co. Ltd. v. N1 Property Development Ltd.* [2012] 3 I.R. 201; [2012] IEHC 494 Charleton J. said:-

"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 to 125, the 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 ...
- (2) The adoption by the tenant, with the sanction of the landlord, of a position inconsistent with his position as tenant.
- (3) The acceptance by the tenant of a new lease or of an agreement operating as a lease.
- (4) The admission of a new tenant under a new letting made with the privity and consent of the former tenant."

27. It seems to me that the matter at No. 2 and the matter at No. 4 are apposite in this case. 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.

28. In those circumstances, I dismiss the proceedings.