Neutral Citation Number: [2009] IEHC 404

THE HIGH COURT

2006 3559 P

BETWEEN

PATRICK FOLEY AND LIAM FOLEY

PLAINTIFFS

AND

SIMON MANGAN

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 24th day of August, 2009.

The Proceedings
In these proceedings, which were initiated by plenary summons which issued on 28th July, 2006, the plaintiffs claim a declaration that a lease dated 12th October, 2004 (the lease) made between the plaintiffs and the defendant has been terminated by forfeiture. They also claim an order for possession of the lands demised by the lease, together with arrears of rent and mesne rates. The simplicity of the case pleaded by the plaintiffs belies the complex nature of the transactions between the parties, of which the lease was only one element. It is necessary to consider the underlying transactions before considering the case as pleaded.

The underlying transactions
The factual background to the underlying transactions is that prior to 2004 both the defendant and the plaintiffs were engaged in farming and grain production in North County Dublin. The plaintiffs were seeking to expand their operations and were looking for suitable lands for that purpose. At the time, the defendant, who owned a farm, which included a grain storage facility, in the Garristown area of North County Dublin, was under financial pressure and was interested in selling the lands. The parties were introduced by a Mr. J. J. Sullivan, who facilitated negotiations between them, the outcome of which was an agreement that the defendant would sell the lands to the plaintiffs, but there would be a lease back in favour of the defendant for a period of four years and nine months and the defendant would also have an option to re-purchase the land during the term of the lease. The composite agreement between the parties was formalised in three documents, namely:

(1) a contract for sale dated 1st October, 2004 (the sale contract);

(2) the lease; and

(3) an option agreement dated 12th October, 2004 (the option agreement).

It is necessary to consider the three documents in some detail. The parties had separate legal representation in relation to the composite agreement.

The sale contract was in the standard form *General Conditions of Sale* (2001 Edition) published by the Law Society. By virtue of the sale contract the defendant agreed to sell to the plaintiffs for €4,000,000 certain lands registered on three County Dublin folios, which I will refer to as "the sold lands", which comprised 205 acres. The special conditions in the contract which are of relevance for present purposes are:

(a) special condition 12, which was in the following terms:
> "This Contract is conditional upon the parties hereto (sic) entering into a four year nine month Letting Agreement with the [defendant] in the terms of the draft Agreement annexed hereto. The commencement date for which shall be the day of closing of this transaction *(sic*). The granting of the Letting Agreement by the [plaintiffs] shall be conditional upon the [defendant] making available to the [plaintiffs] an alternative bank of land for tillage purposes amounting to no less than 205 acres at a location or locations of the [defendant's] choosing within the vicinity of the property in sale for the duration of the Letting Agreement"

and

(b) special condition 13, which provided that the contract was conditional upon the parties entering into an Option Agreement in the terms of the draft annexed thereto.

A further special condition, special condition 14, which provided that the sale included "agricultural entitlements" referable to approximately 204 acres and that €100,000 of the purchase price was attributable to those entitlements, has been the subject of separate summary proceedings in this Court, which apparently were settled. The issues which arose between the parties out of that special condition, in my view, are relevant to the issues with which the Court is now concerned only to a very limited extent.

The sale was closed on 12th October, 2004 and the lease was entered into on that day, as was the option agreement.

The lease created a demise of all of the sold lands together "with all buildings, sheds, cattle yards, stores, etc." but with

the exception of two grain stores and an area of hard standing. It provided for shared access to and use of a weigh bridge. I will refer to the premises demised to the defendant as "the demised premises". The term created was four years and nine months from 11th October, 2004 to 10th July, 2009. The rent reserved by the lease was set out in clause 3 and was €67,500 per annum, payable in two halves on 25th March and 25th September in each year. It was "divided" between, or apportioned to, distinct parts of the demised premises as follows:

> (i) €25,000 per annum was apportioned to the lands and what was described as "the old yard"; and
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> (ii) the balance, €42,500, was apportioned to what was described as "the new yard, grain stores, weigh bridge, etc.".

An important factor, which does not appear on the face of the documentation, but which it is common case was agreed between the parties, was that the apportioned rent of €25,000 in respect of the lands would be discharged by the defendant complying with his obligation under special condition 12 of the sale contract to make available to the plaintiffs an alternative bank of land amounting to no less than 205 acres. The intention of the parties was that the defendant would take land on conacre from landowners in the vicinity and pay for it and make it available to the plaintiffs. It was never intended that the defendant would pay a money rent of €25,000 to the plaintiffs in respect of the land and old yard.

The other provisions of the lease which are invoked in these proceedings are as follows:

> (a) clause 6 under which the defendant undertook to work and cultivate the lands in a good and workmanlike manner and in accordance with proper methods of husbandry and to keep the lands free from the growth of thistles and other noxious weeds;
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> (b) clause 7 under which the defendant agreed that he would "not commit or suffer any waste, spoil or destruction on the said lands or do or suffer to be done thereon anything which may be or become a nuisance or annoyance to the [plaintiffs] or the occupiers of adjoining land";
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> (c) clause 9 under which the tenant agreed to –
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> "take out and maintain public liability and employers' liability insurance covering any liability, loss, claim or proceedings in respect of the Farm with cover of not less than €10,000,000.00 on any one claim …"; and
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> (d) clause 10, which, in addition to a statement that the lease was strictly personal to the defendant and could not be assigned or sub-let, contained a proviso for re-entry in the following terms:
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> "… in the event of any instalment of the rents mentioned in Paragraph 3 hereof being in arrears for twenty one days after becoming due or if there be any breach or non-performance by the [defendant] of any of the terms and conditions of this Lease, the [plaintiffs] shall be entitled to re-enter upon the said lands or any part thereof in the name of the whole and thereupon this agreement shall immediately terminate".

In the Option Agreement it was agreed that the defendant would have the option of purchasing the sold lands, excluding a five acre plot immediately adjoining the yard. The option was exercisable by giving at least twelve months' notice and paying a non-refundable deposit of €100,000 on any of four specified dates, the last of which was 11th July, 2008. The option price varied depending on when the option was exercised and the sale closed. If it was exercised on 11th July, 2008 to close in July 2009 the option price was to be €5,850,000 together with the plaintiffs' legal costs, VAT and outlays. The important provision of the Option Agreement for present purposes is clause 7 which provides as follows:

> "This Option shall only be exercisable in the event that the [defendant] has paid the rent provided for under the [lease] … and that the [lease] has not been terminated".

Events subsequent to 12th October, 2004 and prior to the initiation of these proceedings

The defendant continued in occupation of the demised premises after 12th October, 2004. The first moiety of the rent was due on 25th March, 2005. On 14th March, 2005 the plaintiffs (as Liam Foley & Sons, Agricultural Contractor) sent an invoice directly to the defendant claiming €21,250, being a moiety of the rent of €42,500 due in respect of the new yard on 25th March, 2005. The covering letter expressly stated that there would be no rent due for the lease of the land, as the defendant had provided the plaintiffs with two hundred acres elsewhere. The defendant duly paid the sum of €21, 250. Despite that clear and unequivocal statement, the evidence of the second plaintiff was that the defendant had not complied with his obligation under special condition 12 in the sale contract at the time.

Up to the summer of 2005 the defendant was continuing to conduct his grain business in the new yard and the plaintiffs were using the grain stores, hard standing and use of the weigh bridge excepted out of the lease for the purposes of their grain business. During the summer, negotiations took place between the defendant and the plaintiffs for the sale by the defendant of his grain business to the plaintiffs. Once again, Mr. Sullivan facilitated the negotiations. Ultimately, an Asset Sale Agreement dated 20th July, 2005 (the Asset Sale Agreement) was executed by the defendant and the plaintiffs. The plaintiffs' solicitors, but not the defendant's solicitors, were involved in this transaction, the defendant's evidence being that he decided not to involve his own lawyers because he felt it was a straightforward, simple agreement. In broad terms, the Asset Sale Agreement provided for the sale by the defendant to the plaintiffs of his grain business, his customers database and general goodwill of the business and the equipment and machinery, which was itemised in a schedule, at a price of €326,000. It was also provided that the meal and grain in the sheds, the property of the defendant, would be weighed and paid for separately at the standard rate. The Asset Sale Agreement was a complex document and, as one would expect in a contract for the sale of a business as a going concern, it contained warranties and indemnities by the defendant as vendor and he entered into restrictive covenants with the plaintiffs. At a more basic level, there was even a specific provision that the plaintiffs would make available to the defendant at a nominal rent of €100 per annum, and a contribution of €500 per annum towards electricity, a small section of the grain shed for the defendant's own cattle feed for a period of two years.

The Asset Sale Agreement was duly completed around 1st August, 2005. Its completion had a number of consequences

which are relevant in the context of these proceedings. First, on completion the defendant surrendered to the plaintiffs the portion of the demised premises to which the apportioned rent of €42,500 per annum attached, that is to say, "the new yard, grain stores, weigh bridge, etc.". It is common case that after 1st August, 2005 the defendant had no continuing liability for the apportioned rent of €42,500 per annum payable under the lease in respect of the new yard. Secondly, there is a dispute as to whether the defendant remained liable for the rent which had accrued in respect of the new yard between 25th March, 2005 and 1st August, 2005. The plaintiffs contend that he did, whereas the defendant says that, as part of the Agreement in relation to the sale of the business, it was agreed that the accrued rent would be waived, as the defendant put it, "rolled up in the agreement". Both sides have put the rent outstanding at 1st August, 2005 at €10,625, representing three months' rent, although almost ten months had elapsed from the commencement of the lease to 1st August, 2005 and the rent had only been paid in respect of a half year on 21st March, 2005.

It seems to me to be highly improbable that, in a context in which the plaintiffs paid €12,500 by way of deposit on 20th July, 2005 and €313,500 on completion of the Asset Sale Agreement and a further agreed sum, which according to the defendant's evidence was €12,000 or thereabouts, later in the month of August, 2005 in respect of the defendant's grain, the defendant was left with outstanding liability to the plaintiffs for rent of €10,625 at the conclusion of this complex transaction. The plaintiffs point to the fact that the rent was not mentioned in the Asset Sale Agreement. That is true, but, more significantly, the surrender of the leasehold interest in the new yard, grain store and weigh bridge was not addressed at all in the Asset Sale Agreement, but rather the surrender was effected by act of surrender, that is to say, by the defendant vacating, and the plaintiffs assuming possession, of the premises. Mr. Sullivan, the facilitator, who was nominated as an arbitrator by both parties in the sale contract to determine "all disputes concerning the operation of 'the lease' on the basis that his decision would be binding on both sides", testified that he was involved in the negotiations leading to the Asset Sale Agreement and that his recollection is that there was to be a clean break – that the deal that was struck was that the defendant would owe the plaintiffs nothing. I think it is probable that the basis on which the deal was concluded was that the plaintiffs would get the business, the moveable assets and the surrender of the leasehold interest in the new yard and grain stores for the agreed price and would pay an additional amount at an agreed rate for the grain and that the defendant would be discharged from liability for the rent which had accrued under the lease in respect of the new yard and grain stores. I so find.

The next event which is documented is a letter of 14th December, 2005 from the plaintiffs' solicitors directly to the defendant in which it was stated that, the defendant having "failed, refused or neglected to pay the second instalment of rent due on 25th September, 2005 pursuant to the terms of the lease", without specifying the amount outstanding, the plaintiffs were entitled to terminate the lease and enter upon the demised lands. It was also stated that the option to buy back was no longer exercisable by virtue of clause 7 of the Option Agreement. There was no allegation of any other breach of covenant. I surmise that it is of significance that approximately contemporaneously with that letter a third party had obtained a conditional order of garnishee which prevented the plaintiffs receiving payment from the Department of Agriculture and Food on foot of the sale of the "entitlements" referred to in special condition 14 of the sale contract, which was also alluded to in the letter of 14th December, 2005. The defendant responded through his solicitors, by a letter of 4th January, 2006, that he was not in any way in breach of the terms of the lease and that the lease and the Option Agreement remained valid and binding on the parties. There followed a letter of 18th January, 2006 from the plaintiffs' solicitors to the defendant's solicitors, which made no reference to the defendant's solicitors' response but complained that the land being provided by the defendant in satisfaction of his obligation under special condition 12 in the sale contract was short by in or about 65 acres. That complaint did not elicit any response from the defendant's solicitors and it was not followed up by the plaintiffs' solicitors. The issue of the shortfall was dealt with by the parties themselves.

What has been relied on by the plaintiffs as constituting , and was stated therein to be, a forfeiture notice within the meaning of s. 14 of the Conveyancing Act 1881 (the Act of 1881) is a letter of 2nd March, 2006 from the plaintiffs' solicitors directly to the defendant. In that letter the defendant was given notice of the following alleged breaches of the lease:

> (1) a breach of clause 3, in that it was contended that the defendant owed €31,875 representing nine months' rent "on the new yard etc.", which "became due in September 2005" and remained outstanding - a claim which was patently incorrect and was not persisted in, it being the plaintiffs' case at the hearing that the outstanding rent in respect of the new yard is €10,625;
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> (2) a breach of clause 8 (this should obviously refer to clause 7), in that it was alleged that the defendant permitted waste by keeping cattle in the sheds and allowing slurry to escape into the yard and waterways over an extended period of time; and
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> (3) a breach of clause 9, in that it was alleged that the defendant had failed to take out and maintain public liability and employers' liability insurance cover.

The defendant was called upon to discharge the rent due and to remedy the other breaches of covenant within three weeks of the date of the receipt of the notice, on pain of the plaintiffs having no option but to exercise their right under clause 10 of the lease to forfeit the same for breach of covenant, if he failed to do so.

The response of the defendant's solicitors to that notice, in their letter of 24th March, 2006, was as follows:

> (a) It was stated that it was the defendant's understanding that as part of the deal involved in the Asset Sale Agreement all rental payments in respect of the yard for the period from the commencement of the lease to that date were considered discharged in full.
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> (b) As regards clause 7, it was contended that it referred to "waste of the lands" and did not refer to the cattle yard. Apart from that, it was contended that there was no escape of slurry from the yard and that the defendant had not allowed slurry into the adjoining waterways at any time.
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> (c) In relation to clause 9, it was stated that the defendant did have public and employers' liability insurance cover in place. In fact, with an earlier letter of 10th March, 2006, the defendant's solicitors had furnished a letter from FBD Insurance confirming that there was employers' liability and public liability insurance in place for the demised premises, with the limit of indemnity for public liability being €2,600,000, any one accident being unlimited in any one period of insurance, and the limit of indemnity for employers' liability being €13,000,000, any one occurrence being unlimited.

Two aspects of that response elicited no reaction from the plaintiffs' solicitors. First, they did not address the defendant's solicitors' contention that there was no rent due in respect of the new yard, although invited to clarify the position and furnish invoices. Secondly, no question was raised as to the adequacy of the insurance cover. It was not until the hearing of the action that an issue was made that the lease required cover of not less than €10,000,000 on any one claim in respect of public liability and employers' liability. In March 2008 the plaintiffs' solicitors were furnished with a copy of the relevant policy, which was in conformity with the letter of 10th March, 2006, which covered the period from 10th March, 2008 to 9th March, 2009. A copy of a similar policy for the period 10th March, 2007 to 9th March, 2008 had been furnished to the plaintiffs' solicitors on 27th September, 2007.

In relation to the remaining matter raised in the notice of 2nd March, 2006, the question of waste, subsequently, by letter dated 26th June, 2006, the plaintiffs' solicitors sought a copy of a notice (the statutory notice) under s. 12 of the Local Government (Water Pollution) Act 1977, as amended by the Local Government (Water Pollution) (Amendment) Act 1990, which they understood (incorrectly as it transpired) had been served on the defendant on 27th April, 2004 in relation to the demised premises. The response of the defendant's solicitor by letter dated 27th June, 2006 was that no such notice had been served. A notice dated 27th April, 2006 had been served in relation to the demised premises, but it had been addressed to and, presumably, served on the defendant's brother, Raymond Mangan, who, according to the defendant's evidence, managed the defendant's herd at the time and also mixed in animals from his own herd with the plaintiffs' herd, in the yard and sheds on the demised premises. The notice required certain measures to be taken, namely:

> (i) all soiled water originating on the farmyard was to be stored in suitably sized storage tanks and spread on the land as per the guidelines in the Nitrates Directive (91/676/EEC), because, it was stated, the current soiled water/slurry storage facilities on the farmyard were not sufficient for the anticipated volumes that were being generated in the farmyard;
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> (ii) all silage harvested for the 2006 season was to be bailed and stored in a suitable location on the farmyard, and specifically no unbailed silage was to be stored in the existing silage bay, due to the poor condition of the concrete base and the inadequate storage and collection system for silage effluent; and,
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> (iii) as of midnight on Friday, 28th April, 2006 no animals were to be housed or over wintered in the farmyard until such time as Fingal County Council was satisfied that there was adequate soiled water/slurry storage facilities installed and all uncontaminated water, i.e. roof drainage, discharged separately to the adjacent watercourse.

The notice stipulated that the foregoing measures were to be taken by 12:00 midnight on Friday 28th April, 2006.

Apart from a letter of 28th June, 2006 from the plaintiffs' solicitors, asserting that the defendant had told the plaintiffs that he had received a notice from Fingal County Council, no further correspondence passed between the parties' respective solicitors prior to the plenary summons issuing on 28th July, 2006.

The case as pleaded
As I stated at the outset, the case as pleaded is simple. Alleged breaches of the obligation to pay rent and of clauses 7 and 9 of the lease are pleaded in the statement of claim delivered on 21st August, 2006, as is the proviso for re-entry in the lease (clause 10) and the notice of 2nd March, 2006 and that the defendant failed to remedy the breaches alleged in it within three weeks or the extension for a further three weeks of that period. It is also pleaded that the plaintiffs were thereby terminating the lease pursuant to clause 10. There is also an allegation, which was not the subject of a prior complaint, and does not require to be addressed further, that the defendant had failed to comply with his obligations under clause 6 and keep the lands free from thistles and other noxious weeds.

The total arrears of rent alleged to be due and owing by the defendant according to the statement of claim was €50,625. As clarified by the plaintiffs' solicitors' replies to a notice for particulars delivered on behalf of the defendant, €31,875 of the total sum was alleged to be due in respect of the rent which fell due in respect of the new yard, grain stores and weigh bridge. That allegation was incorrect to the extent, as was admitted, that the sum alleged to be due and unpaid on 25th March, 2005, €21,250, had in fact been paid. As regards the balance of €10,625, I have already made a finding that it was not due on 25th September, 2005, because I have found that whatever sum would have been outstanding on 1st August, 2005 was subsumed in the consideration for the Asset Sale Agreement. The remainder of the total, €18,750, was claimed as arrears of rent in respect of the land and the old yard, which it was alleged fell due in respect of the period from November, 2004 to July, 2005 and became payable on 20th July, 2005. That was patently incorrect, in that it was clearly and unequivocally acknowledged in the letter of 14th March, 2005 that there was no rent due for the land for the first year of the term of the lease.

Although it was not pleaded at all, part of the plaintiffs' case at the hearing, and a time consuming aspect of the case, was that the defendant was in default in relation to his obligation to pay rent under the lease by reason of the fact that the land which had been made available by him throughout the remainder of the term after the first year did not fulfil his obligations under special condition 12 in the sale contract. I will return to this aspect of the matter.

The sum claimed by the plaintiffs in their pleadings for arrears of rent is €50,625.00 together with mesne rates from the date of issue of the plenary summons, 28th July, 2006.

In the defendant's defence, which was not delivered until 18th June, 2007, which demonstrates a certain leisurely approach on all sides to the matters which provoked these proceedings, it is denied that there was any rent due under the lease, on the basis that the price paid by the plaintiffs on foot of the Asset Sale Agreement was calculated on the basis, and it was expressly agreed that, the rent payable in respect of the new yard up to the date of completion of that Asset Sale Agreement was considered to have been paid in full. It is also denied that there was any breach of clause 7 or clause 9 of the lease. While admitting the service of the notice dated 2nd March, 2006, it is denied that it was a valid or effective notice for the purposes of s. 14 of the Act of 1881. It is also alleged that the notice was not motivated by any *bona fide* desire to ensure compliance with the covenants in the lease but sought to contrive a forfeiture in the hope of forfeiting the defendant's rights under the option agreement. There is a denial of the entitlement of the plaintiffs to forfeit the lease. There is also an assertion that, since the proceedings had issued, the plaintiffs had waived the forfeiture by accepting the provision of alternative land in lieu of rent. Finally, without prejudice to the defence, the defendant seeks relief against forfeiture.

The plaintiffs in their reply have joined issue with all of the assertions of the defendant in his defence.

The issues raised on the pleadings
Against the factual background which I have outlined, the issues raised on the pleadings which the Court has to determine are as follows:-

> (1) Whether there was a default by the defendant in his obligation to pay rent under the lease, so as to give rise to an entitlement on the part of the plaintiffs to re-enter under the terms of the lease or a common law.
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> (2) Whether there was a breach of either clause 7 or clause 9 of the lease prior to the service of the notice of 2nd March, 2006.
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> (3) If there was a breach of the defendant's obligation under either clause, whether the notice of 2nd March, 2006 was a valid forfeiture notice for the purpose of s. 14 of the Act of 1881.
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> (4) If the defendant was in breach of either clause 7 or clause 9, and if the notice of 2nd March, 2006 was a valid forfeiture notice, whether the defendant had remedied the alleged breach or breaches prior to the initiation of the proceedings.
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> (5) If the initiation of the proceedings effected a forfeiture, was the forfeiture waived by the conduct of the plaintiffs subsequently.
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> (6) Alternatively, if the plaintiffs were entitled to forfeit the lease when these proceedings were initiated, whether the defendant is entitled to relief against forfeiture, either equitable relief against forfeiture or statutory relief under s. 14 of the Act of 1881.

I will deal with each of the issues, either singly, or, where appropriate, in conjunction with others.

Default in obligation to pay rent?
Having found that there was no default in relation to payment of the part of the rent attributable to the new yard and grain stores in respect of the term up to the time of the surrender of the lease in relation to that part of the demised premises on 1st August, 2006, the issue of fact which remains is whether there was default in payment of the rent in kind attributable to the land by discharge of the obligations of the defendant pursuant to special condition 12 of the sale contract.

In respect of the first year of the lease from October 2004 to October 2005, on the basis of the clear and unequivocal acknowledgement in the letter of 14th March, 2005 that special condition 12 had been complied with, I find that there was no default in that year, so that there was no default whatsoever in relation to rent when the plenary summons issued.

As I have already indicated, in the second year from October 2005 to October 2006 there was a complaint in the letter of 18th January, 2006 that the defendant was short by about 65 acres in making available alternative land. The defendant's evidence was that land comprising 47 acres at Kilmartin was offered in December 2005 or early January 2006 to the plaintiffs and was accepted by the plaintiffs. The second plaintiff's evidence was that the land was not acceptable. Having regard to the fact that the complaint in the plaintiffs' solicitors' letter of 18th January, 2006 was not followed up, I accept the evidence of the defendant that the land at Kilmartin was accepted by the plaintiffs as fulfilling the defendant's obligation in respect of rent in relation to the lands. Having made that finding, it is necessary to refer to a distinction which the plaintiffs made on the evidence as to the exploitability of the land to which they were entitled under special condition 12. The distinction was between –

> (1) land in respect of which the plaintiffs were only able to claim Area Aid from the Department of Agriculture and Food, in respect of which the plaintiffs were able to claim €155 per acre, but which land was unsuitable for tillage, and;
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> (2) land which was additionally croppable or sowable, in the sense that the plaintiffs could use it for sowing winter wheat, as was their intention, which, on their case, would have netted them a further return of €200 profit per acre.

As a matter of construction of special condition 12, I conclude that, as the wording expressly indicates, what was intended was that the plaintiffs would get 205 acres which were suitable for tillage, not merely that they would get 205 acres in respect of which they could claim Area Aid. However, as I have found, the fact is that in the second year of the term of the lease the plaintiffs accepted the land proffered and did not make any formal complaint that the rent due under the lease was in arrears by reason of the plaintiffs not having been provided by the defendant with 205 acres all of which were suitable for tillage. Nor was any formal demand made for the rent in kind alleged to have been in arrears.

There was a considerable amount of interaction between the parties in relation to the compliance by the defendant with his obligation to furnish the alternative 205 acres of land for tillage in the third year of the term, that is to say, the year from October 2006 to October 2007, which covered the 2007 harvest. Some of the correspondence was directly between the parties and some was channelled through their solicitors, although, it is only fair to record that the involvement of the parties' solicitors in relation to the practicalities of fulfilment of special condition 12 was sporadic. Neither strain of correspondence is conclusive. In particular, the correspondence between the solicitors, which concluded with the defendant's solicitors' letter of 5th February, 2007, and which seemed to be heading towards some consensus, had proceeded on the basis of an assumption that a certain area comprising 72 acres was available to the plaintiffs. It subsequently transpired that the assumption was erroneous. The defendant continued through April and May 2007 to proffer alternative parcels of land to the plaintiffs. However, the plaintiffs neither accepted nor rejected the defendant's offers in writing. There was a conflict of evidence between the second plaintiff and the defendant as to whether the defendant had fulfilled his obligation. The defendant's evidence was that he had made available a greater acreage than he was obliged to, 251 acres, whereas it was the second plaintiff's evidence that only 198 acres had been made available, of which 128 acres had been proffered late in the season and was not of a quality suitable for tillage. Once again, there was no formal demand made by the plaintiffs for the rent in kind alleged to have been in arrears.

In the following year of the term, from October 2007 to October 2008, covering the 2008 harvest, there was no complaint in writing from the plaintiffs as to the quality of the lands proffered by the defendant. There was a conflict of evidence, in that it was the evidence of the second plaintiff that the plaintiffs received only 175 acres, whereas the defendant's evidence was that they were given 202 acres and contemporaneous documentary evidence corroborated the defendant's version. There was no formal demand from the plaintiffs for the rent in kind alleged to have been in arrears.

In the final nine month period of the term from October 2008 to July 2009, which was still running at the time of the hearing, there were complaints from the plaintiffs as to the quality of the land being proffered. The final position prior to the hearing is reflected in a letter dated 16th October, 2008 from the defendant to the plaintiffs confirming acceptance of four parcels comprising 230 acres and agreement that one of the parcels would be limed at the expense of the defendant. Despite that letter, to which there was apparently no response from the plaintiffs; the evidence of the second plaintiff was that only 190 acres had been made available.

Even though there were conflicts on the oral evidence between the second plaintiff and the defendant as to the croppable acreage which the plaintiffs received for the 2007 harvest, the 2008 harvest and the 2009 harvest, I am satisfied that the defendant made every effort to comply with his obligation under special condition 12 of the sale contract. I am also satisfied that the ultimate outcome in relation to each season was that the plaintiffs accepted the land made available by the defendant as satisfying his obligation in relation to the payment of the rent in kind reserved by the lease in respect of the land and the old yard. It was acknowledged by the first plaintiff that, as he put it, "at the end of the day" the plaintiffs had to accept the land made available. The absence of any sustained formal complaints by the plaintiffs or any formal demand for compliance by the defendant with his obligation to pay rent in respect of the land by compliance with special condition 12 of the sale contract must be regarded as amounting to acceptance by the plaintiffs of compliance on the part of the defendant. I so find.

Although forfeiture for non-payment of rent is expressly excluded from the operation of s. 14 of the Act of 1881, even if the plaintiffs had got less alternative land suitable for tillage than they bargained for, having regard to the manner in which they conducted their dealings with the defendant over the term of the lease, they would have an insoluble problem in translating the defendant's failure in that regard into a breach of the defendant's obligations under the lease, which would have given the plaintiffs a right at common law or under contract of re-entry on the demised premises and forfeiture of the lease. As is pointed out in Wylie on *Landlord and Tenant Law* (2nd Ed.,) at para. 24.09, at common law the rule was that a landlord had to make a formal demand for the rent before he could invoke a right of re-entry. However, this was usually dispensed with, as a matter of contract, by an express provision in the re-entry clause – by words such as "whether formally demanded or not". As will be clear from clause 10 of the lease, the relevant portion of which I have quoted earlier, it contained no such express provision which would have excluded the necessity for a formal demand. Not only was there no formal demand by the plaintiffs on the defendant, but at no stage, either before these proceedings were initiated or in the course of the proceedings, were the alleged arrears of rent for the second and subsequent years of the term at any time quantified in money terms by the plaintiffs. That would have been theoretically possible by identifying the alleged shortfall in the acreage provided by the defendant against his contractual obligations and multiplying it by €121.95 (€25,000 ÷ 205), the notional rent per acre or, indeed, €125.00 per acre, which the defendant utilised consistently in demonstrating compliance in his correspondence with, and in invoices issued to, the plaintiffs.

In summary, I have found that, when the notice of 2nd March, 2006 was served and the plenary summons issued, the defendant did not owe any rent in respect of the new yard and the grain stores for any period prior to the surrender of those premises to the plaintiffs. Nor did the defendant owe any rent to the plaintiffs in respect of the land and old yard, as pleaded in the statement of claim or at all. For those reasons, the plaintiffs' case for forfeiture as pleaded, based on alleged arrears of rent, is not sustainable. Furthermore, the case made for the first time at the hearing on behalf of the plaintiffs, which was not pleaded, that the failure of the defendant to comply with his obligation under special condition 12 of the sale contract post the commencement of these proceedings has given rise to a right of re-entry for non-payment of rent, even if such failure was established, which I am satisfied is not the case, is misconceived, in the absence of a formal demand for rent.

Accordingly, the plaintiffs' claim that they have forfeited the lease for non-payment of rent fails.

Breach of clause 7 or clause 9?
Unlike the position in relation to forfeiture for non-payment of rent, which by virtue of subs. (8) thereof is expressly excluded from the operation of s. 14 of the Act of 1881, that section restricts forfeiture for breach of any covenant such as a covenant of the types contained in clause 7 and clause 9. Section 14(1) provides as follows:

> "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

The only notice relied on by the plaintiffs in this case as constituting a notice for the purposes of s. 14(1) is the notice of 2nd March, 2006. Therefore, as regards the alleged breaches by the defendant of his obligations under clauses 7 and 9, the first issue is whether the defendant was in breach of either prior to 2nd March, 2006. If he was, then the issue whether the notice of 2nd March, 2006 complied with s. 14(1) arises in relation to that breach. If it did, then the final issue as to the enforceability of the right of forfeiture is whether, when the plenary summons issued on 28th July, 2006, the defendant had been allowed a reasonable time in which to remedy the breach and whether he had done so.

Different considerations apply to the application of s. 14 to clause 7 and to clause 9. Accordingly, I propose to consider them separately.

Clause 7
To recapitulate, under clause 7 the defendant agreed not to commit or suffer any waste or to do or suffer anything which might be or become a nuisance or annoyance to the plaintiffs or adjoining occupiers. The breach alleged by the plaintiffs in the notice of 2nd March, 2006 was that the defendant had permitted waste by keeping cattle in the sheds and allowing

slurry to escape into the yard and waterways over an extended period of time. The argument made on behalf of the defendant in response – that in referring to "the said lands" clause 7 was not referring to activities in the yard – was wholly specious. Clause 7 clearly refers to all of the demised premises.

As I understand the evidence, the plaintiffs' complaint was not so much that the defendant was over-wintering cattle in the sheds which he held under the lease but rather the complaint was that, having regard to the numbers of cattle involved and the manner in which they were housed and the state and condition of the sheds and the ancillary facilities, the yard and the surrounding areas were being polluted because of the escape of slurry.

On behalf of the plaintiffs, evidence in relation to waste and pollution was given by the second named plaintiff, two members of the firm of Philip Farrelly & Company, Agricultural Consultants, namely, Freda Salley and Philip Farrelly, and Seamus Phelan of Teagasc. Philip Farrelly & Company were clearly instructed after these proceedings were commenced. Ms. Salley inspected the locus on 25th January, 2007, on 1st June, 2007 and on 22nd October, 2008. Mr. Farrelly visited the locus with Ms. Salley on 1st June, 2007. A comprehensive report dated 22nd August, 2008 of Philip Farrelly & Company was put in evidence. Counsel for the defendant objected to the evidence of the witnesses from Philip Farrelly & Company on the basis that it did not relate to the condition of the farm on the date of the purported forfeiture. While the evidence was admitted *de bene esse*, I am satisfied that it is pertinent to the issues which have to be decided arising out of the allegation that clause 7 was breached by the defendant and that the breach was not remedied.

No expert evidence was adduced on behalf of the defendant. The defendant himself gave evidence, which was vague and imprecise. Indeed, apart from Mr. Sullivan, he was the only witness for the defence. In general, I formed the view that he demonstrated quite a cavalier approach to his obligations under clause 7.

On the basis of the evidence of the second named plaintiff, which I accept as being accurate on this issue, I am satisfied that there was inadequate slurry and pollution control on the demised premises during the period from the commencement of the lease to 2nd March, 2006 due to the manner in which the cattle were housed, the state of repair of the housing, the absence of proper drainage and storage facilities for contaminated runoff in the animal housing sheds, dungsteads, manure pits, the silage pits and so forth. I am satisfied that what Ms. Salley and Mr. Farrelly observed in 2007 was happening in 2006, perhaps with more serious consequences in 2006. I am also satisfied that the plaintiffs had received complaints from occupiers of land in the vicinity of the farmyard and in turn made complaints to the defendant to no avail. Because of their concern, the plaintiffs retained Mr. Phelan to conduct water sampling, which he did on 1st February, 2006 and subsequently. An analysis of samples he took from a drain running along the farmyard on 1st February, 2006 disclosed coliforms above the accepted level, which was evidence of faecal contamination of the water. I am satisfied that the defendant's farming activities and his use and the condition of the farmyard were the source of the contamination.

While no witness was called from Fingal County Council, the statutory notice dated 27th April, 2006 served in relation to the farmyard corroborates the plaintiffs' evidence. The defendant took issue with some of the evidence adduced on behalf of the plaintiffs. For instance, he was adamant that there was a slurry tank which was covered over by cement slabs but served by a manhole located outside the yard gate, which was pumped out from time to time when the need arose. Neither Ms. Salley or Mr. Farrelly observed this tank and both were implicitly critical of its location and efficacy, if it existed. When the concept of waste was being explored with the defendant during cross-examination, he accepted that allowing pollution to run across the demised lands should not have happened. He implicitly accepted that it did happen. His evidence was that he tried to prevent and reduce it.

On the totality of the evidence I am satisfied that the defendant's farming activities and use of the demised premises prior to 2nd March, 2006 had given rise to the escape of slurry and consequential pollution and contamination, which affected the plaintiffs and had the potential to affect occupiers of land in the vicinity of the demised premises. Accordingly, I am satisfied that the defendant had committed waste within the meaning of clause 7 and was in breach of clause 7.

In arriving at that conclusion, I have not ignored the submissions made on behalf of the defendant that the conduct on the part of the defendant complained of does not constitute waste. Counsel for the defendant correctly pointed out that there are two limbs to clause 7, one being a commitment not to commit or suffer waste and the other being a commitment not to do or suffer conduct which would amount to a nuisance or annoyance to the landlord or adjoining occupiers. It was submitted that the notice of 2nd March, 2006 invoked the first limb only and the conduct complained of could not constitute waste. In support of this submission, counsel for the defendant relied on a passage in *Halsbury's Laws of England* (4th Ed., Re-issue) at para. 345 in volume 27(1) to the following effect:

> "Waste consists of any act or omission which causes a lasting alteration to the nature of the land in question to the prejudice of the person who has the remainder or reversion of the land".

It is clear from the next sentence that what the editors of Halsbury are addressing there is the liability of a tenant at common law, because they point out that the obligation not to commit waste is an obligation in tort, and is independent of contract or implied covenant. What the Court is concerned with here is not whether there is liability at common law or under an implied covenant; rather it is the interpretation of clause 7 and the application of the notice of 2nd March, 2009 to it. Apart from that, in advancing the argument that neither the escape of slurry from sheds to a yard nor the escape of slurry from the demised premises into waterways outside the demised premises, as opposed to into waterways within the demised premises, can constitute waste, the underlying assumption seems to be that damage to the reversion means physical damage to the land or buildings on the land. In my view, it would be absurd to construe a covenant in an occupation lease for a term of less than five years of farmland, farm buildings and a farmyard created in the first decade of the 21st century, under which lessee covenants not to commit or suffer any waste, as not being contravened where the lessee engages in conduct which results in the accumulation and escape of slurry, pollution and contamination, as not damaging the reversion, when the lessor may be faced with proceedings under statutory provisions governing waste management by public authorities and, perhaps, actions in nuisance or negligence by adjoining occupiers, which necessitate the taking of remedial action or the payment of compensation when the lease expires. To put it another way, the type of conduct of which the plaintiffs complain has the effect of increasing the burden on the reversion and, in my view, does constitute waste within the meaning of clause 7.

Turning to the adequacy of the notice of 2nd March, 2006 for the purposes of s. 14 of the Act of 1881, while it outlined

the breach of clause 7 complained of in general terms, nonetheless, I am satisfied that it did adequately specify the particular breach complained of. As is pointed in Wylie (*op. cit.)* at para. 24.14, the notice need not go into specific details of the breach, e.g., in respect of repairs not done, so long as it indicates to the lessee what is required to effect a remedy. In my view, it is quite clear what was necessary to remedy the breach of clause 7 complained of: it was to take the appropriate steps in relation to the housing of cattle and the conduct of the farming operations so as to prevent slurry escaping into the yard and into the waterways. I am satisfied that, as regards the breach of clause 7, the notice was adequate as regards its content.

As regards identifying the time span allowed to the defendant in which to remedy the breach of clause 7 complained of by the plaintiffs with a view to determining whether it was reasonable, counsel for the defendant took issue with what counsel for the plaintiffs suggested was the proper interpretation and application of s. 14. The position adopted by counsel for the plaintiffs was that s. 14 does not require a time limit to be specified in the forfeiture notice itself, but the right of re-entry or forfeiture is not enforceable unless and until the lessee fails "within a reasonable time" after the service of the notice to remedy the breach complained of. Citing the decision of Browne-Wilkinson V.C., delivering the judgment of the Court of Appeal in *Billson v. Residential Apartments Ltd.*, (No. 1) [1991] 3 All ER 265, it was submitted on behalf of the plaintiffs that the crucial period is the time which has elapsed between the service of notice and the initiation of the legal proceedings, in this case, the period from 2nd March, 2006 to 28th July, 2006. Counsel for the defendant took issue with that proposition, submitting that, where, as here, the lessor has stipulated a period of time in the forfeiture notice, the lessor is bound by it and it is that period which must be reasonable. Counsel for the defendant was unable to refer to any authority for that proposition but pointed out that in *Campus and Stadium Ireland Development Ltd. v. Dublin Waterworld* [2006] IEHC 200, in which judgment was delivered by Gilligan J. on 21st March, 2006, the issue had been canvassed but did not have to be decided. The passage in the judgment of Gilligan J. to which the Court was referred was in the following terms:

> "The second aspect is the question of the period of time that was allowed to the tenant to comply with the notice of forfeiture and remedy the alleged breaches. Whether the time period was 28 days or 39 days, and taking into account all the circumstances of this case and bearing in mind that at all times since the commencement of dealings between the parties the defendant had the benefit of legal advisors, I do not believe that there was any real difficulty in the defendant, as tenant, complying with the requirements made of it in the notice of forfeiture."

The reference in that passage to 28 days was the period stipulated in the forfeiture notice and the period of 39 days was the period which elapsed from the service of the forfeiture notice to the initiation of the proceedings by plenary summons.

In the *Billson* case Browne-Wilkinson V.C., in the relevant passage (at p. 273), noted that the forfeiture notice in that case did not limit a time within which the breach was to be remedied and continued:

> "All that the statute requires is that a reasonable time to remedy the breach must elapse between the service of the notice and the exercise of the right of re-entry or forfeiture. If the actions of the lessee make it clear that he is not proposing to remedy the breaches within a reasonable time, or indeed any time, in my judgment a reasonable time must have elapsed for remedying the breaches once it is clear that they are not proposing to take the necessary steps to remedy the breach but are committing further breaches. If this were not the case, what would the landlord's rights be if the defendant continues to commit the very breaches complained of by the section 146 notice after the date of its service? If he were to take proceedings to restrain further breaches of covenant, he would subsequently be faced with the contention ….. that the landlord had waived his right to forfeit by seeking to enforce the covenants. The only effective remedy of a landlord, faced with intransigent behaviour such as that of the defendant's in the present case, must be to forfeit the lease on the grounds that whatever time was allowed the defendant was showing no intention of remedying the breach at all."

The reference to s. 146 in that passage is to s. 146 of the Law of Property Act 1925, which is the analogue in England and Wales in s. 14 of the Act of 1881.

The basis on which counsel for the defendant argued that a lessor who stipulates a short time for remedying an alleged breach of covenant in a s. 14 notice should be bound by that period of time and its reasonableness or otherwise was that, if the lessor stipulates a period within which it is impossible to remedy the breach, the lessee is put at a disadvantage because he will see no point in starting something that he cannot finish in the stipulated time. In that hypothetical situation it is always open to the lessee to inform the lessor that the stipulated time is not sufficient and to seek an extension of it. If the lessor does not accede to the request, then he runs the risk of the stipulated time being held to be unreasonable in due course. However, the factual situation in this case is more akin to what happened in the *Billson* case than that hypothetical situation. As I have outlined, by his solicitor's letter of 24th March, 2006, which was on the cusp of the three weeks period allowed in the notice of 2nd March, 2006, the defendant denied that there was any breach of clause 7. It seems to me that, accordingly, the rationale of the passage from the judgment of Browne-Wilkinson V.C. quoted earlier equally applies in this case. That denial and the subsequent conduct of the defendant suggested that the defendant had no intention of remedying the breach at all.

On that basis, for the purposes of the application of s. 14(1), the question is whether the period from 2nd March, 2006 to 28th July, 2006 represented a reasonable time within which to require the defendant to remedy the breach of clause 7. Having regard to the evidence of the second plaintiff, and to the evidence of Ms. Salley and Mr. Farrelly as to what required to be done I consider that it was, even though the evidence of the experts did not specifically address the length of time which would reasonably be involved in adopting the measures they recommended to remedy the breach. A period of almost five months elapsed between the 2nd March, 2006 and 28th July, 2006. As a matter of common sense, I have come to the conclusion that that was an ample period within which, if he was minded to do so, the defendant could have taken all the steps necessary to prevent waste and pollution from his farming operations in the farmyard and the farm buildings, subject, of course, to compliance with the requirements of Fingal County Council in the statutory notice.

It remains to consider what steps, if any, were taken by the defendant to comply with the notice requiring him to remedy the breach of clause 7 complained of within that period or at all.

Of course, within about six weeks of receipt of the notice of 2nd March, 2006, the defendant was faced with the

statutory notice dated 27th April, 2006. Insofar as he took steps, it was with a view to complying with that notice. His evidence was that he took the following steps:

> (1) There was a reduction of cattle numbers to comply with the statutory notice. The defendant's evidence was that for the end of the calendar years 2006, 2007 and 2008 the numbers of animals housed in the wintertime had been drastically reduced and he supported this evidence by computer generated herd records. While I accept there was a reduction, it did not solve the problem. While the defendant took issue with Ms. Salley's evidence that the defendant was crowding cattle in the sheds and testified that his enterprise had been passed by An Bord Bia as regards food quality assurance every year, no expert evidence was adduced on his behalf to contradict the evidence of Ms. Salley and Mr. Farrelly.
>
> (2) In response to the statutory notice, he ceased using the silage pit as theretofore and baled his silage from 2006 onwards. His evidence was that the pit was covered with a sheet of black polyethylene to prevent overflow. Mr. Farrelly's evidence was that there was still hay in the pit when he visited the locus. Mr. Farrelly's evidence was that compacted silage in a silage pit is the most toxic pollutant material. I consider that the run off from the silage pit, which continued, comes within the complaint in relation to the escape of slurry.
>
> (3) Generally, he kept the place clean and tidy and the tanks pumped out, but, of course, it is clear from the evidence that the defendant was only at the demised premises at weekends.
>
> (4) Following a visit from official of Fingal County Council in January 2008, a list of repairs was attended to: covering an open drain outside the gate; repair of drains in the yard; and repair of guttering. The list was a verbal list, not a written list. When the work was completed the official, whom he named, returned and inspected the work and said "that's fine". On her subsequent visit, Ms. Salley did not find the condition and use of the farm buildings and the farmyard as being "fine".

There is one other aspect of the defendant's evidence which is of relevance in this context. The defendant stated that he applied for grant aid under the Farm Waste Management Control Scheme and a grant, which was intended to fund putting in waste facilities, was approved by the Department of Agriculture. He also got planning permission for the intended improvements. Like all of the defendant's evidence this was very vague, but Mr. Phelan cast some light on the matter, because, prior to being retained by the plaintiffs to take the water samples, apparently, he had advised the defendant's brother, Raymond Mangan, in connection with an application for an agricultural grant to upgrade the facilities to the Nitrates Directive standard. It was clear from the defendant's evidence that no action was going to be taken on foot of the grant approval or the planning permission until these proceedings had been resolved.

Taking an overview of the evidence, I am satisfied that the defendant had not remedied the breach of clause 7 when the plenary summons was issued on 28th July, 2006 and it was not remedied subsequently prior to the hearing. The defendant's evidence, as I have stated, was very vague. That is understandable, as he made it clear that during the relevant years he was not running the farming enterprise on the demised premises, but was involved in business in the United Kingdom and he was also running a business in France. His brother, Raymond Mangan, was running the farming enterprise on the demised premises. However, Raymond Mangan was not called as a witness and, if he had been, I think that it is improbable that he could have contradicted the evidence that the enterprise is being run in a manner and without adequate measures being in place to prevent slurry escaping and consequential pollution occurring.

Clause 9

The defendant acknowledged that, due to an oversight, he did not put public liability and employers' liability insurance in place when the term of the lease commenced in October 2004. His evidence was that the insurance was put in place in 2005. I suspect that is not correct and that the insurance was put in place for the first time in March 2006 following the service of the notice of 2nd March, 2006. In any event, the defendant did put in place insurance which provided substantial cover against public liability and employers' liability and, even though it did not match the specific requirements of clause 9 in relation to cover, that fact alone could not form the basis of the forfeiture of the lease. This is particularly so as the details of the policy and the cover were furnished to the plaintiffs' solicitors in 2006 and in each succeeding year and no issue was raised by the plaintiffs as to the level of cover until the hearing of the action.

I consider it unnecessary to consider clause 9 further because, insofar as there was a breach of clause 9, I am satisfied it was remedied by the defendant putting in place insurance with an appropriate insurer which provided, on any objective assessment, adequate cover. Allied to that is the fact that there was no suggestion that any claim was made during the term of the lease which involved or may involve invoking the cover provided by the insurer.

Waiver?

It is common case that it is established law that "a notice under s. 14 referring to several breaches is not invalidated *in toto* because some of them never took place and have to be abandoned" (per Andrews L.J. in *McIlvenny v. McKeever* [1931] N.I. 161). On the basis of the findings I have made above, the only breach of the defendant's obligations under the lease on which the plaintiffs are entitled to rely for forfeiture is the breach of clause 7. The plaintiffs exercised their right of forfeiture under the lease by issuing and serving these proceedings on the defendant. Despite a rather limp argument of counsel for the defendant to the contrary, the acceptance of service by the defendant's solicitor on his behalf had the same legal consequence as service directly on him would have had.

It is also well settled that the defence of waiver may preclude a lessor from exercising his right of re-entry or forfeiture. The defence was explained in the following passage in the judgment of Andrews L.J. in *McIlvenny v. McKeever* (at p. 172):

> "Dealing first with the defence of waiver, it is well recognised that Courts of law have always leant against forfeitures …. They have, accordingly, readily held that an alleged forfeiture has been waived if the lessor, with full knowledge of the breach of covenant or condition relied upon, has by some positive unequivocal act recognised the continued existence of the tenancy at a period subsequent to such breach. Acceptance of rent accruing due after the forfeiture, an action for the same, and even an unqualified demand for such rent have been held to constitute such waiver notwithstanding the lessor's protest that he was acting without prejudice to his right to insist on a

prior forfeiture …".

However, Andrews L.J. went on to set out two exceptions or qualifications to that general proposition, the first of which is of particular relevance here, stating:

> "The first is that when once a landlord had definitely exercised his option of relying upon the forfeiture, and has shown a final and unequivocal determination to take advantage of it by instituting proceedings in ejectment, no subsequent act, whether receipt of rent or otherwise, will be held to operate a waiver."

In arguing that the defence of waiver applies, the defendant has ignored the existence of that exception or qualification. The defendant did not point to any demand for rent by the plaintiffs between the 2nd March, 2006 and 28th July, 2006 when these proceedings were commenced. The defendant's position was that, following the initiation of the proceedings, the second named plaintiff, in direct correspondence with the defendant by letter of 17th August, 2006 indicated that the plaintiffs were ready to start sowing in early September and sought clarity in relation to the availability of 90 acres of alternative land. The defendant's argument is premised on that request, and the provision of alternative land to the plaintiffs, as being the equivalent of a request for, and payment of, rent. That premise is the agreed position of the parties. The defendant submitted, correctly in my view, that similar arrangements were made for the remainder of the term of the lease. The existence of the arrangements which are the equivalent of the payment of rent, it was submitted, indicated that the defendant was to continue to consider himself bound by the terms of the lease irrespective of what "the legal papers", presumably, meaning the pleadings and *inter partes* correspondence, stated.

That argument, in my view, ignores the reality of the situation. I have found that there was a breach of clause 7 of the lease, that the plaintiffs served a valid notice under s. 14 of the Act of 1881 and allowed a reasonable time for compliance with the notice before electing to forfeit the lease. By issuing these proceedings on 28th July, 2006 the plaintiffs finally and unequivocally determined to rely on the forfeiture. They persisted in that position at all times thereafter, in that they have prosecuted these proceedings to conclusion. Even if the plaintiffs had wished to waive the forfeiture after 28th July, 2006, they could only do so by agreement with the defendant. As I stated in *Moffat v. Frisby* [2007] 4 I.R. 572 (at p. 583), citing Wylie (*op. cit.)* at para. 24.25, "by electing for the remedy of forfeiture, the lessor thereafter deprives himself of remedies based on the continued existence of the lease or tenancy". That has been the position for centuries, as the following statement of Parke B. in *Jones v. Carter* (1846) 15 M. & W. 718 at p. 726 illustrates:

> "… the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once for all … for after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it."

As was explained by Lightman J. in *G.S. Fashions Ltd. v. B. & Q. Plc.* [1995] 1 WLR 1088, that statement of Parke B. was made in the context of the breaches of covenant by the lessee and the entitlement of the lessor to forfeit having been established. Lightman J. went on to explain the position where the lessee in the court proceedings has put in issue the lessor's right to forfeit or claimed relief against forfeiture prior to determination by the Court. Lightman J. stated (at p. 1093):

> "The words [of Parke B.] and the same principles have been applied in cases where, after the service of the writ, the lessee has challenged the lessor's right to forfeit or claimed relief from forfeiture. In such a situation the validity of the forfeiture must await to be determined either by the Court or by agreement of the parties. In the meantime there is inevitably a twilight period of some uncertainty. During this period the lessor is on the principle stated by Parke B. precluded from treating the terms of the lease or the covenants in the lease as on foot as against the lessee; but the lessee who has not elected to determine the lease can seek to rely on and enforce the covenants in the lease against the lessor …"

In this case, the defendant elected not to treat the lease as forfeited. On the contrary the defendant defended the proceedings on the basis that there had been no breach and no forfeiture, and, in the alternative, he has sought to be relieved against any forfeiture found to be established. Consistently with that approach, the defendant discharged the rent in kind for which he was liable under the lease. If he had taken a different stance and treated the lease as forfeited he could have lawfully resisted the plaintiffs' claim for rent in kind. Counsel for the plaintiffs need not have sought to have the plaintiffs exonerated from waiver on the basis of the principle of the plaintiffs being obliged to mitigate their loss, as he did. Once the plaintiffs had elected to treat the lease as forfeited by issuing ejectment proceedings, assuming they were entitled so to do, the lease was terminated. Their only entitlement was to *mesne* profits thereafter.

On the basis of the foregoing interpretation of the respective positions of the parties, there was no waiver of the forfeiture in this case and, accordingly, the controversy which arose between the parties as to whether s. 43 of the Landlord and Tenant Law Amendment Act, Ireland, 1860 (Deasy's Act) has application to the situation which has arisen here is academic. As is pointed out in Wylie (*op. cit*) at para. 24.27, there is a major limitation of the operation of the doctrine of waiver in Ireland, as was recognised in the *McIlvenny* case, in that under s. 43 a waiver is ineffective between landlord and tenant unless it is signified by the landlord or his authorised agent "in writing under his hand" in the case of a lease granted after 1860. Section 43 provides as follows:

> "Where any lease made after the commencement of this Act shall contain or imply any condition, covenant, or agreement to be observed or performed on the part of the tenant, no act hereafter done or suffered by the landlord shall be deemed to be a dispensation with such condition, covenant, or agreement, or a waiver of the benefit of the same in respect of any breach thereof, unless such disposition or waiver shall be signified by the landlord or his authorised agent in writing under hand."

Because of a reported observation by Palles C.B. in *Foott v. Benn* (1884) 18 ILTR 90, in the past doubts have arisen as to the scope of s. 43 and, in particular, whether it applies only to a "general" waiver of the covenant as a whole, the position suggested by Palles C.B., but also to waiver of a particular breach of covenant. In *Crofter Properties Ltd. v.*

Genport Ltd. (Unreported, High Court, 15th March, 1996), McCracken J. addressed the controversy. Having stated his view that the suggestion of Palles C. J. was not correct, he concluded:

> "The wording of the section is quite clear, and relates to 'any breach thereof', which I think can only be reasonably interpreted as meaning that there cannot be a waiver of any specific breach unless that waiver is in writing."

Counsel for the defendant took issue with that conclusion. While I agree with the construction put on s. 43 by McCracken J., I consider that s. 43 is of no relevance to the issues in this case for two reasons. The first is that what the defendant is attempting to set up is waiver of the fact of forfeiture by the act of receiving rent in kind after the commencement of these proceedings, which, not only on the authority of the *McIlvenny* case he clearly cannot do, but also on the basis of first principle, as enunciated by Parke B. The second is that, as happened in the *McIlvenny* case, the breach at issue here is of a continuing character. The second exception or qualification in the *McIlvenny* case applies to such a circumstance. As Andrews L.J. explained:

> "… waiver of the forfeiture up to a particular day cannot be relied upon as a defence to an action for ejectment in respect of a subsequent breach. The reason for this is simply that, as there is a continually recurring cause of forfeiture, a new right arises each day that the breach continues, and the landlord's waiver of a prior right cannot prejudice him or preclude him from taking advantage of a new and subsequent right. It has further been held … that the mere acceptance of rent which becomes due pending a notice to repair is no waiver of a subsequent forfeiture occasioned by non-compliance with such notice …".

On the controversy arising from the observation of Palles C.B. as to the application of s. 43, Andrews L.J. stated later:

> "It is unnecessary, however, to determine in the present case whether the restricted operation of the section suggested by the Lord Chief Baron is well-founded, as the view admits the necessity for writing in the case of a general waiver of dispensation of a covenant and nothing short of such a general waiver would avail the defendant in the present case because of the continuing nature of the covenant and its breach already referred to."

In the *McIlvenny* case, the plaintiff's landlord had accepted rent after the service of the s. 14 notice but before the writ of summons had issued, which did not happen in this case, and after the service of the writ on a "without prejudice" basis. It was held that the plaintiff had not waived the forfeiture by acceptance of rent.

Relief against forfeiture?
Having found that the plaintiffs are entitled to forfeit the lease for breach of the covenant by the defendant in clause 7 of the lease, such entitlement as the defendant has to seek relief against forfeiture is a statutory entitlement under s. 14(2) of the Act of 1881. That sub-section, which entitles a lessee to apply to Court for relief against forfeiture where the lessor is seeking to enforce his right of re-entry or forfeiture by action or otherwise, gives the Court a broad discretion when dealing with that application. The Court may grant or refuse relief as it thinks fit "having regard to the proceedings and the conduct of the parties under the foregoing provisions of this section, and to all other circumstances". Further, the Court may grant relief "on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit". It is suggested in Wylie (*op. cit*.) at para. 24.21 that, although the relief is granted under statutory powers, it seems clear from the wording of the sub-section that the jurisdiction is discretionary and is to be exercised largely on the same principles as the general equitable jurisdiction to afford relief which may be invoked in cases of forfeiture for non-payment of rent.

The nature of the Court's discretion in considering whether to grant relief against forfeiture when dealing with substantial commercial transactions was considered by the Supreme Court in *Cue Club Ltd. & Ors. v. Navaro Ltd.* (Unreported, 23rd October, 1996). In his judgment, Murphy J. stated as follows:

> "The nature of the discretion exercised by the Courts of Equity in granting relief against forfeiture is hardly applicable or applicable to the same extent, at any rate where the Court is dealing with substantial commercial transactions in which the lessor and the lessee are on equal terms. In *Sweeney v. Powerscourt Shopping Centre Ltd.* [1984] I.R. 501, Ms. Justice Carroll recognised the injustice which could be caused to the owner of a shopping centre by a tenant who failed to pay promptly the rent due by him….
>
> Ms. Justice Carroll was not then dealing with the right to relief against forfeiture. In the case before her such relief had not been sought. Reference is made to her decision only for the recognition which it gives the commercial realities which might properly [be] taken into account by a Judge in dealing with the question of forfeiture where that issue does arise."

More recently in the *Campus and Stadium Ireland* case Gilligan J. considered the nature of the discretion in the context of an occupation lease of the National Aquatic Centre at Abbotstown, County Dublin. In his judgment, Gilligan J., having stated that from his perusal of the authorities he was of the view that the Courts in general strive not to place rules or restrictions on the exercise of judicial discretion in relation to relief against forfeiture, quoted from the judgment of Earl Loreburn L.C. in *Hyman & Anor. v. Rose* [1912] AC 623 (at p. 630) in which it was stated appropos of relief under s. 14(2):

> "I desire in the first instance to point that the discretion given by the section is very wide. The Court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to someone else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion."

Gilligan J. also had regard to the observations of Murphy J. in the *Cue Club* case, which I have quoted. He then set out his approach to dealing with the issue before him as follows:

> "I take the overall view that in order to exercise my discretion fairly, I must take into account the conduct of the parties, the wilfulness of any breach by the tenant, the general circumstances particular to the issue, the nature of the commercial transaction the subject matter of the lease, whether the essentials of the bargain can be secured, the value of the property, the extent of equality between the parties, the future prospects of their relationship, the fact that even in cases of wilful breaches it is not necessary to find an exceptional case before granting relief against forfeiture and then apply general equitable principles in reaching a conclusion."

The lease at issue in the *Cue Club* case was a lease of unit in a shopping centre and the "commercial realities" adverted to by Murphy J., by reference to the judgment of Carroll J., were the implications for the commercial viability of a shopping centre of non-payment of rent and service charges by a tenant or tenants. The lease at issue in the *Campus and Stadium Ireland* case was a lease of a major national sports facility, which had been sponsored by the State. While a lease of a farm and farm buildings in North County Dublin on its own might be regarded as in a different category, nonetheless, the position here is that the lease is only part of the composite transaction which, in reality, must be considered to be a major commercial transaction.

The situation which prevails at the time of delivery of this judgment is that the term created by the lease has expired by effluxion of time. Accordingly, the position is that, if the lease was a stand alone transaction, irrespective of whether the defendant is entitled to relief against forfeiture, the plaintiffs would be entitled to possession of the demised premises and the question of relief against forfeiture would be moot. However, the lease is part of the composite agreement, which includes the option agreement. As the validity of the exercise by the defendant of the option is conditional on the lease not having been terminated, whether the defendant is entitled to relief against forfeiture, and, if so, on what terms, is a live issue.

A relevant issue in considering how the Court's discretion should be granted is whether, as the defendant contended, the plaintiffs in seeking to forfeit the lease were not motivated by any *bona fide* desire to ensure compliance with the covenants in the lease, but sought to contrive a forfeiture of the lease in the hope of forfeiting the defendant's rights under the option agreement. The plaintiffs' position, which was not contradicted, was that the defendant had given an assurance in 2004 that he would not want to exercise the option to buy back. It was put to the second named plaintiff during cross-examination that this action was brought in 2006 to stop the defendant from exercising his option. It was also put to him that from at least 2006 the plaintiffs have known that the defendant intended to exercise the option. Finally, it was put to him that if the defendant exercises the option, he will get the farm back if the lease is not forfeited (Transcript Book 2, page 39). The second named plaintiff answered all of those questions in the affirmative. Although it was not the only motive for pursuing the defendant for breach of clause 7 of the lease, I am satisfied that precluding the defendant from exercising the option was a major aspect of the motivation on the part of the plaintiffs in prosecuting these proceedings. That conclusion is informed by the approach adopted by the plaintiffs in relation to what, given the nature and scope of the insurance which the defendant had put in place, was no more than a technical breach of clause 9, which was clearly of no concern to the plaintiffs.

I have already addressed the submission of counsel for the defendant that the failure to comply with clause 7 does not involve damage to the plaintiffs' reversion. The burden which the defendant's failure to deal with the escape of slurry and pollution created adheres to the ownership and possession of the demised premises. Therefore, if the defendant is allowed to complete the re-acquisition of the demised premises on foot of the exercise of the option, the plaintiffs will avoid that burden, which will fall on the defendant.

In assessing the conduct of the parties, even though the second named plaintiff acknowledged that the plaintiffs were motivated by the prospect of preventing the defendant exercising the option, I am satisfied that they also had genuine concerns about the effects of the failure of the defendant to deal with slurry and waste in accordance with his obligations under the lease and in accordance with the law and about the implications of that failure for them. I am satisfied that they took appropriate action to deal with the matter. The defendant, who was obviously aware of the deficiencies in the facilities in the farm buildings and the farm sheds, having pursued an application for a grant from the Department and having obtained planning permission, postponed taking any definitive action until the outcome of these proceedings would be determined, as he was entitled to do. However, he also failed to take other steps to comply with his obligation under the lease, which he was not entitled to do. Counsel for the defendant submitted that the farm buildings and farmyard were in the same condition at the commencement of the term of the lease as they were during the term. That may be the case, but, in the lease, the defendant undertook to use the demised premises in a certain way, but the manner in which the farming enterprise was conducted during the term was not in accordance with those obligations. As I have already commented, I consider that the defendant took a cavalier attitude to his obligations, which cannot be ignored.

Therefore, I have come to the conclusion that, applying equitable principles, the proper approach to take is to preclude the plaintiffs from achieving their ulterior motive of frustrating the option agreement, while ensuring that the defendant is required to give redress for his conduct. Therefore, subject to conditions, I propose to grant the defendant relief against forfeiture. In summary, the conditions are as follows:

> (1) The first condition relates to the timely completion of the sale on foot of the exercise of the option in the option agreement.
>
> (2) The second condition is that the defendant gives a personal undertaking to the Court that during his ownership of the demised premises, whether in his own name or through the medium of a company, he will observe all statutory regulations in force in relation to waste management, pollution and contamination in relation to the demised premises, the undertaking to be for the benefit of the plaintiffs during their ownership of the new yard and the adjoining lands purchased under the sale contract but which were excluded from the lease and the option agreement.
>
> (3) The final condition is that the defendant is liable for the costs of the issue of the notice of 2nd March, 2006 and the costs of these proceedings.

I will elaborate on the first and third conditions in turn.

In relation to the first condition, the defendant was cross-examined by counsel for the plaintiffs as to his ability to pay the deposit of €100,000 payable under the option agreement and the balance of the purchase monies. The defendant's

evidence was that, a cheque for the deposit of €100,000 having been rejected by the plaintiffs' solicitors, the sum of €100,000 is held in the defendant's solicitor's client account. The defendant's evidence was that, in relation to the balance of the purchase money (€5,750,000), he has a bank which will back him and he has "the letter of offer". He named the lender in question. He described the letter of offer as a "standard loan offer".

Under the option agreement the closing date was to be twelve months following the exercise of the option. That date has passed. As a condition to giving relief against forfeiture, the defendant must pay the deposit of €100,000 to the plaintiffs' solicitors not later than 31st August, 2009 and must prove to the Court when the matter is next listed at the vacation sitting on 23rd September, 2009 that the financial arrangements are in place to complete the sale not later than 30th September, 2009. The proof should be in the form of an unconditional loan approval exhibited in an affidavit of the solicitor for the defendant. The defendant's solicitor should confirm in the affidavit that the requirements of the lending institution can be met.

To enable those matters to be dealt with, the action will be adjourned until 23rd September, 2009, to ascertain whether there is, and will be, compliance with this condition. If not, an order for possession will be made in favour of the plaintiffs.

In relation to the third condition the plaintiffs will be entitled to their costs of these proceedings against the defendant on a party and party basis. The rare sighting of an exclamation mark in a footnote in a Professor Wylie text (in this case – op. cit., footnote 141 to para. 24.22) has prompted the precise terms of this condition. In the text, Wylie states that it has been suggested that an order should not be made against the applicant for relief against forfeiture for costs on an indemnity basis as this offers no inducement to the landlord to compromise the dispute. The footnote adds that it is also said "to encourage lawyers and surveyors and other advisers to charge large fees!", referring to the speech of Lord Templeman in *Billson v. Residential Apartments Ltd.* [1992] 1 All ER 141 at p. 150. In any event, I consider it to be a proper exercise of the Court's discretion under s. 14(2) that the costs be on a party and party basis.

No entitlement to arrears of rent or mesne rates on the part of the plaintiffs has been established.

Orders
I have indicated in broad terms the orders I propose to make in accordance with my decision. I will, of course, hear any further submissions which the parties wish to make as to the actual terms of the orders.