THE HIGH COURT

[RECORD NO: 2013/1722 P]

BETWEEN

OLAF SORENSEN

AND

ANNA SORENSEN

PLAINTIFF

V.

MMS MEDICAL LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Eileen Creedon delivered on the 12th day of October 2018;

1. This action was commenced by the plaintiffs by way of plenary summons in which they claim the following: -

(i) A declaration that the lease made between the first named plaintiff as lessor and the defendant as lessee (the first lease) pertaining to the premises now known as Unit 2, Matthew Hill Business Park, Lehenagh Beg, Co. Cork,(this unit is shown coloured white on the map annexed hereto) for a term of 35 years from the 8th October 1992 also comprises, by virtue of the subsequent variation agreed by the aforesaid parties in or about October 1998, the office premises shown coloured yellow on the map annexed hereto.

(ii) If necessary, specific performance of the agreement made between the first named plaintiff and the defendant for the variation of the first lease.

(iii) If necessary, a declaration that the defendant is estopped from denying that it is the lessee under the first lease (as varied).

(iv) If necessary, a mandatory injunction directing the defendant, its directors, officers, servants and agents to comply with the covenants and obligations of the lessee under the first lease (as varied).

(v) Judgment in the sum of €3,156.72 in respect of arrears of rent due to the 17th January 2013 pursuant to the first lease (as varied).

(vi) Judgment in respect of such further sums in respect of rent payable pursuant to the first lease (as varied) as may become due and owing subsequent to the commencement of the proceedings herein.

(vii) Interest pursuant to the first lease (as varied) and / or pursuant to statute.

(viii) A declaration that the plaintiffs are the lessors and the defendant is the lessee of the premises now known as Unit 1, Matthew Hill Business Park, Lehenagh Beg, Co. Cork and shown coloured red on the map annexed hereto for a term of 35 years from the 17th February 1995 and subject to the provisions set forth in a draft lease agreed between the first named plaintiff and defendant on or about the 28th May 1996 (the second lease).

(ix) If necessary specific performance of the agreement made between the first named plaintiff and the defendant for the grant of the second lease.

(x) If necessary, a declaration that the defendant is estopped from denying that it is the lessee under the second lease.

(xi) If necessary a mandatory injunction directing the defendants, its directors, officers, servants and agents to comply with the covenants and obligations of the lessee under the second lease and /or the agreement for the grant of the second lease.

(xii) Judgment in the sum of €13,206 in respect of arrears of rent due to the 17th January 2013 pursuant to the second lease and / or the agreement for the grant of a second lease.

(xiii) Judgment in respect of such further sums in respect of rent payable pursuant to the second lease and /or the agreement for the grant of the second lease as may become due and owing subsequent to the commencement of the proceedings herein.

(xiv) Interest pursuant to the second lease and / or the agreement for the grant of the second lease and / or pursuant to statute.

(xv) Damages for breach of contract.

(xvi) All necessary and consequential orders, accounts, directions and inquiries.

(xvii) Further or other relief.

(xviii) Costs.

2. The plenary summons was issued on the 20th day of February 2013. Ultimately the plaintiffs issued a notice of motion dated 11th day of January 2017 seeking judgment in default of defence. The motion was heard by the court on the 18th day of July 2017 when the motion was struck out and the defendants were given a further opportunity to serve their defence. The matter was set down for

trial on 31st October 2017.

Background
3. The properties which are the subject matter of this dispute are commercial units situated in a small commercial park in Cork known as the Matthew Hill Business Park. This business park is owned by the plaintiffs, the two commercial units in question have been in occupation by the defendants since the 1990s, it is the legal nature of this occupation that is in dispute between the parties.

4. The plaintiffs'case is that both units are held by the defendants under 35-year full repairing and insuring leases with five – year rent reviews. The first lease which is referred to as the White Unit and is referred to in para. 1 of the plaintiff's plenary summons is a unit known as Unit No. 2, Matthew Hill Business Park Lehenagh Beg, Co. Cork. The plaintiffs assert that this unit is subject to a lease for a term of 35 years from the 8th October 1992, and that it also comprises by virtue of a subsequent variation agreed by the aforesaid parties in or about October 1998, the office premises shown coloured yellow on the relevant map. The lease in respect of the White Unit is executed by both parties. While the defendants took up occupation in 1992, the plaintiffs say that there was some delay in the execution of the lease but that it was executed by both parties and sent by the plaintiffs to the defendants executed by both parties in October 1994 for the purposes of stamping and registering. The plaintiffs say that the defendants had failed to stamp that document and that the plaintiffs have now attended to the stamping of said document and the payment of additional penalties despite it being the defendants' obligation to do so. The defendants accept that they hold the White Unit under the 35 – year lease as agreed and this is not in dispute between the parties.

5. In January / February 1995, there were further discussions between the parties as MMS Medical required additional space. The additional space agreed between the parties at that time is referred to as the Red Unit. The plaintiffs say that a 35 – year full insuring and repairing lease was agreed at a rent of €10,000 per annum with five year rent reviews. While the terms of this lease differed from the terms of the lease in respect of the White Unit, the plaintiffs say that it was specifically agreed between the parties that the review dates in respect of both units would coincide.

6. It appears to be common case between the parties that the defendant and plaintiffs met again in October 1998 to discuss the additional space requirements of the defendant. It seems MMS Medical wanted further additional space, and the additional space agreed is that coloured yellow on the relevant map, which was the old offices of the plaintiff. The plaintiffs say that it was agreed between the parties that they would be let to the defendant on the same terms as the lease of the White Unit, in other words a lease for a term of 35 years commencing on the 8th of October 1992. An additional rent of €7,000 per annum was agreed to be paid in respect of this additional space. The defendant took up the possession of the Yellow unit in addition to the White Unit and it appears that until 2012 rent was paid in accordance with the agreed terms. The terms under which the defendants hold this Yellow unit is in dispute between the parties in this case.

7. With regard to rent reviews, there was a rent review in 1997 in respect of the Red and White Units aggregated. There was a further review five years later in 2002 and at this point the Yellow Unit was now part of the review as well as the Red and White Unit. There was a further review five years later in 2007 and finally a further review in 2012. Each reviewed rent was agreed between the parties.

8. At this point, under cover of letter from its solicitors dated the 6th July 2012, the defendant purported to serve a notice to quit that was said to have been given on the 9th July 2012 and to expire on the 8th August 2012. Thereafter the defendant refused to pay any rent in respect of the Red unit or the Yellow unit.

Summary of leases
9. The execution of the 1992 lease by the first named plaintiff was delayed until the 18th October 1994, but the defendant had taken possession of the white unit and commenced paying the rent of IR£8,000 per annum reserved by the 1992 lease on or about the 8th October 1992.

10. The grant of a lease for 35 years of the Red unit to the defendant at a rent of IR£10,000 was agreed in late January / early February 1995 and the defendant went into possession. A draft lease and location maps were sent to the defendant's solicitor on the 31st August 1995. In a letter dated the 19th January 1996 the solicitors for the defendant indicated that the draft lease was in order and requested executed copies. The 1995 lease, as executed in duplicate by the first named plaintiff was furnished to the defendant's solicitor under cover of a letter dated the 28th May 1996. The defendant never returned an executed counterpart of the 1995 lease nor had it stamped or registered the 1995 lease.

11. The rent review clause on the third page of the 1992 lease provides for review of the rent at five year intervals. The rent review clause on the third page of the 1995 lease ensures that the review of the rent thereunder takes place simultaneously with the review of rent payable under the 1992 lease. The 1995 lease provides as follows: -

> "Review date shall mean the last day of the fifth year and the last day of each subsequent fifth year of the term granted by indenture of lease dated the 18th October 1994 and made between the landlord of the one part and the tenant of the other part in respect of the adjoining warehouse and premises now known as Unit No. 4".

12. Consistent with the alignment of the rent review dates for the 1992 and 1995 leases, on the 15th June 1998 it was agreed between the first named plaintiff and the defendants that the combined rent in respect in respect of the White unit and the Red unit for the period 8th October 1997 to 7th October 2002 would be IR£29,000 per annum.

13. In 1998 it was agreed between the first named plaintiff and the defendant on foot of a variation agreement that the latter would take a letting of the Yellow unit at a rent of R£7,000 per annum payable as from 8th December 1998 (the defendant having been given the keys on the 27th October 1998) on the basis that this would be incorporated into the 1992 lease and was subject to the terms therein. This left the total amount to be paid by the defendant in respect of the White premises, the Red premises and the Yellow premises at a sum of IR£36,000 per annum.

14. The rents payable by the defendants in respect of the White unit, the Red unit and the Yellow unit were reviewed and agreed on the 21st October 2002 at a composite figure of €57,138.21 plus VAT for the period 9th October 2002 to 8th October 2007.

15. There was a further composite review and agreement of the rent payable for the White unit, the Red unit and the Yellow unit for the period 9th October 2007 to 8th October 2012. The first named plaintiff agreed a figure of €64,000 per annum with Mr. Gerard O'Herlihy, managing director of MMS Medical, the defendant in these proceedings, and this was confirmed by letter from his solicitors dated the 19th October 2007.

16. There was no further review of rent as under cover of letter from its solicitors dated the 6th July 2012, the defendant purported to serve a notice to quit that was said to have been given on the 9th July 2012 and would expire on the 8th August 2012. Thereafter the defendant refused to pay any rent in respect of the Red unit or the Yellow unit.

The following dates are also relevant in the chronology of events:

On the 19th April 2006, the defendant entered into a subletting of the Red unit in favour of Donworth and Co. Ltd. for a period of twelve months from the 19th April 2006 to the 18th April 2007.

On the 5th September 2007 the White premises, the Yellow premises and the Red premises became vested in the plaintiffs a s co-owners.

On the 2nd of March 2012 Mr O Herlihy wrote to Mr Sorensen in respect of the Red unit seeking *inter alia*

1. A reduction in the overall rental rate or

2. A holiday period on the current and occupied portion until it is sublet or

3. that Mr Sorenson take back 50% of the rented area, the portion now being used by Donworth Ltd. and MMS retain the remaining 50% meaning that Donworth Ltd. would become a direct tenant of Mr. Sorenson. These proposals were not acceptable to Mr. Sorensen.

As stated already, on the 6th July 2012, the defendants' solicitors sent a letter to the plaintiffs' solicitors enclosing a purported notice to quit expiring on the 8th August 2012.

On the 1st August 2012, a letter from the defendant's solicitors clarifying that the purported notice to quit pertained to the Red unit and the Yellow unit and on the 24th August 2012, Donworth Ltd. and Co. Ltd. moved out of the Red unit and moved into the White unit.

Pleadings
17. The defendant admits in pleadings the subsistence of a 35 – year lease from the 8th October 1992 but denies that it was agreed that it would include the Yellow unit. The defendant admits that it went into occupation of the Yellow unit on or about the 8th December 1998, however it denies that such occupation was other than as an oral periodic tenant which said tenancy determined on or about the 8th August 2012. The plaintiff denies the existence of any such periodic tenancy but pleads in the alternative that if there was a periodic tenancy it was not terminated on the 8th August 2012 or at any other time.

18. The defendant denies the existence of the 1995 lease or any agreement for the grant of that lease and further contends that the plaintiffs are estopped from asserting the existence of this lease by reason of assertions contained in a letter dated the 4th September 2012 and ongoing communications from agents on behalf of the plaintiffs headed subject to lease.

19. The defendant admits that it entered into possession of the Red unit on or about the 17th February 1995, however it is denied that such occupation arose otherwise than on the basis of an oral periodic tenancy which said periodic tenancy subsisted until on or about the 8th August 2012 when same terminated. Again the plaintiff denies the existence of any such periodic tenancy but pleads in the alternative that if there was a periodic tenancy it was not terminated on the 8th August 2012 or at any other time.

20. After the plaintiffs had opened their case and as they were about to go into evidence the defendants raised the issue of the plaintiffs' title to grant the leases and also indicated that they would be raising the issue of the surrender of the leases by their client. The plaintiffs at that point argued that it had not been pleaded at all that the agreement was subject to title being produced and also contended that the issue of surrender was not pleaded in the case by the defendants. At that juncture, made an application to amend their pleadings but the court did not accede to any further amendment of the pleadings at that late stage. The defendants contended that the issue of title was made by them in paragraph 3 of the defence which says; " *If, which is denied, the parties enter into a contract or agreement and enter into a lease such contract has since been discharged by negotiations between the parties in respect of a potential alternative type lease*" Further at paragraph 5 "*It is denied that any occupation arose otherwise than on the basis of an oral periodic tenancy* " The Plaintiff contended that those pleas had nothing to do with being subject to title. The defendants contended that the surrender point was contained in para. 13 of the defence. Para. 13 of the defence says as follows: - "*It is denied that the defendants' tenancy in Unit No. 1 and the office inured beyond the 8th August 2012.*"The plaintiffs argued that this is a denial and not a plea of a fact and maintained their contention that the issue of surrender is not in the case at all. These matters are addressed later in the judgment.

Issues
21. In their submissions the plaintiffs identified the following as being the core issues between the parties and these have not been disputed as being the issues by the defendants which are as follows: -

(i) Was the 1992 lease varied in 1998 so as to include the Yellow premises as contended for by the plaintiffs?

(ii) Did the defendant occupy the Yellow premises as from the 8th December 1998 as a periodic tenant as contended for by the defendant?

(iii) If the defendant occupied the Yellow unit as a periodic tenant, was that periodic tenancy determined on or about the 8th August 2012 as contended for by the defendant?

(iv) Did the first named plaintiff and the defendant enter into an agreement for the grant of a lease of the Red unit for a term of 35 years from the 17th February 1995 subject to an annual rent of IR£10,000 as contended for by the plaintiffs?

(v) Did the defendant occupy the Red unit from on or about the 17th February 1995 as a periodic tenant as contended for by the defendants?

(vi) If the defendant occupied the Red unit as a periodic tenant, was that periodic tenancy determined on or about the 8th August 2012 as contended for by the defendant?

(vii) Is the defendant in arrears in respect of rent as contended for by the plaintiffs, and if so what is a sum that is due

and owing?

Evidence.
22. Evidence in this case on behalf of the plaintiff was given by the first named plaintiff Mr. Olaf Sorensen, and his solicitor Mr. Michael Bolger. Evidence in respect of MMS Medical Ltd. was given by Mr. Patrick Durham Solicitor and Ms. Jennifer McIntosh, Solicitor. The Plaintiff Mr Sorensen was clear and forthright in his evidence. He said that he had always enjoyed an effective and cordial business relationship with Mr O' Herlihy of MMS Medical Limited. He indicated that their discussions in respect of the various premises and rent reviews had been negotiated in a business-like manner and that they had always managed to reach agreement. He was very clear in his understanding of the terms of the lettings of the various premises. He understood the premises to be held by MMS Medical Limited under 35 year leases. He went so far as to say that the term of any agreed lease would affect the level of rent and so he always conscious of this when negotiating. He said matters had run smoothly up to 2012 with rent always being paid on time and each rent review being negotiated successfully. Each time that he had been approached for additional space by the defendant an accommodation was reached to the satisfaction of both sides. He understood that the defendant had encountered certain difficulties in particular around V.A.T. due to various delays and was sympathetic to assisting the defendants in resolving those difficulties. This had led to the discussions in 2007. Mr. Sorensen's evidence in respect of the tenants purported surrender was that he held the key simply from a health and safety point of view and it was not his intention to accept that the 35 – year leases had been terminated or surrendered.

23. The remaining evidence was given by the solicitors involved in the transactions, one on behalf of the plaintiff and two on behalf of the defendant. They were led through the various pieces of correspondence and discussions pertaining to this very protracted matter.

The Plaintiffs Arguments
24. The plaintiffs argue as follows: -

(i) They submit that the 1992 lease as varied and the 1995 lease exist either at law or in equity and in each case the demise is binding as between the plaintiff and the defendant.

(ii) They submit that the legal nature of the relationship of landlord and tenant is defined as follows in section 3 of the Landlord and Tenant (Amendment) Act Ireland (1860) (Deasey's Act) as follows: -

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

(iii) They further submit that in laying down certain formality requirements, section 4 of Deasey's Act requires that only the landlord but not the tenant should have executed or signed the relevant document. That section provides: -

> "Every lease or contract with respect to lands whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time not being from year to year or any lesser period, shall be by deed executed, or note in writing signed by the landlord or his agent thereunto lawfully authorized in writing."

(iv) They further submit that even if it cannot be said that a formal grant has taken place at law, an agreement to grant a lease shall be regarded as giving rise to a lease in equity on an application of the principle that equity regards as done that which ought to be done.

(v) They submit that the classic statement of this principle was made by Sir George Jessel MR in *Walsh v. Lonsdale* [1982] 21 CHD 9, from which they quote. They further state that Hogan J. quoted the case of *Walsh v. Lonsdale with approval in the case of North Quay Developments Ltd. v. Carthy* [2014] IEHC 444. They further quote the case of *Cosmoline Trading Ltd. v. DH Burke & Sons Ltd.* [2006] IEHC 38 and the judgment of Finnegan P. in which he identified the ingredients that are required for there to be an enforceable agreement for leases as follows: -

> (1) The parties;
>
> (2) The premises;
>
> (3) The term;
>
> (4) The commencement date;
>
> (5) The rent.

(vi) The plaintiffs argue that each of these elements was satisfied in respect of the agreement to grant a lease of the Red unit in that the terms were set forth in the draft lease and included the necessary ingredients set out above.

(vii) They further argue that likewise the variation agreement whereby the Yellow unit became part of the demise affected by the 1992 lease contained all the necessary elements as follows: -

(viii) The parties were the first named plaintiff as landlord and the defendant as tenant;

(ix) The premises were the Yellow unit;

(x) The term was the balance of the term of 35 years' demised by the 1992 lease (i.e. a term expiring on the 7th October 2027);

(xi) The commencement date was the 8th December 1998;

(xii) The rent was IR£7,000 per annum subject to review.

25. With regard to the use of the term "subject to lease" in correspondence they argue that these agreements were reached in 1995 and 1998 respectively. They argue that the use of the phrases such as "subject to lease" in subsequent correspondence between solicitors cannot reverse or nullify agreements that already existed and indeed were part performed by the parties. They make reference to the case of *Supermacs Ireland Ltd. v. Katesan (Naas) Ltd* [2000] 4 IR 273 where Hardiman J. (Denham J. concurring) observed: -

> "Counsel on behalf of the defendants submitted that all discussions between the second plaintiff, the second defendant and Mr. Chambers should be interpreted "against the background" of the correspondence between solicitors all of which was "subject to contract". This, he said, coloured all dealings between the second plaintiff and the second defendant.
>
> In my view it is plainly arguable that the use of this rubric by the solicitors does not preclude the existence of a "done deal" between the parties themselves, which the plaintiffs contend for. Insofar as it is contended that the plaintiffs are estopped by the use of the rubric from asserting a completed and enforceable agreement, this seems to me to be plainly a matter for evidence at the trial."

The plaintiffs argue that the evidence shows that the defendant occupied the Red unit and the Yellow unit as a lessee and that such possession was never agreed to be referable to any agreement other than those mentioned above. In particular, the plaintiffs argue no temporary or interim arrangements were agreed and prior to the defendants contrived attempt to extricate itself in July 2012,there was never any agreement or suggestion that the defendant held any of the premises as a periodic tenant (monthly or otherwise).

26. In dealing with the purported notice to quit the plaintiffs submit that for the reasons set out above, the plaintiffs contend that the defendant is the lessee of (a) the White unit and the Yellow unit for a term of years expiring on the 7th October 2027,

….and;

(b) the Red unit for a term of years expiring on the 16th February 2030.

27. Accordingly, the plaintiffs submit that the defendant never had any entitlement to assert the existence of a monthly periodic tenancy or to serve a notice to quit in respect of the Red unit or the Yellow unit.

28. It is further argued that not only is it impossible for the defendant to prove the existence of periodic tenancies pertaining to the Red unit or the Yellow unit, its stance is entirely inconsistent with how they acted in its dealings with the plaintiff. In particular, the plaintiffs point to the following matters: -

(i) Each of the rent reviews (in 1997 for the White and the Red premises, and in 2002 and 2007 for the White the Red and the Yellow premises) was premised on the defendant agreeing to pay a new annual rent for (at the very least) the following five years;

(ii) There was no reference to, or suggestion of, a periodic tenancy on the part of the defendant at any time prior to service of the purported notice to quit on the 6th July 2012. Not only was there a complete absence of any such claim but the defendants solicitors did not offer the slightest dissent when the existence of the 1992 lease, the 1995 lease and the variation agreement was specifically adverted to by the plaintiffs' solicitors in a letter dated 10th March 2006.

(iii) On the contrary the plaintiffs submit that less than three weeks later the defendant's solicitors sought consent from the first named plaintiff to a twelve – month subletting of the Red unit. That subletting to Donworth and Co. Ltd. proceeded pursuant to a letting agreement dated the 19th April 2006, for a period of twelve months from the 19th April 2006 to the 18th April 2007 which term could not have been carved out of a mere monthly tenancy; and

(iv) They say that in a similar vein the defendant agreed to grant Plasma Ireland Ltd. a ten – year sublease of the White and the Yellow premises and by a letter dated the 4th May 2006 sought the consent of the plaintiffs to this letting (to which consent was refused as the rent for the subletting was less than that payable under the1992 lease). The plaintiffs argue, it is impossible to reconcile this intended course of action with the existence of a monthly tenancy or for that matter any genuine belief on the part of the defendant or its advisors that such a tenancy provided the basis for the defendant's possession of the Yellow unit.

29. The plaintiffs then go on to argue that without prejudice to the foregoing arguments, that even if only a periodic tenancy had existed the purported notice to quit would not have been effective to terminate it. The purported notice to quit stated *inter alia* :-

> "Take notice that MMS Medcial Ltd., formerly Munster Medical Supplies Ltd. hereby serve notice on Olaf Sorensen that they intend to vacate that part of the warehouse known as numbers 1 and 2 Matthew Hill Business Park, Lehenagh Beg, Forge Hill Cross, Kinsale Road in the County of Cork as more particularly delineated on the map attached hereto and thereon coloured yellow and red.
>
> Munster Medical Supplies Ltd. hold this property as a tenant over holding in possession and accordingly give one month's notice of their intention to quit the premises. This notice is given on the 9th day of July 2012 and will expire on the 8th day of August 2012."

30. The plaintiffs say that on its face, the purported notice to quit was founded on the express premise that the defendant held on foot of a monthly tenancy. The defendant has not pleaded how that periodic tenancy arose and in particular, how the supposed base period thereof happened to be a month. While the plaintiffs denied that there was any periodic tenancy, their position (as pleaded in the alternative) is that even if there was a periodic tenancy it was not determined.

31. They say that as pleaded in the statement of claim that it is not disputed anywhere in the defence or the evidence that the individual rents referable to the White premises, the Yellow premises and the Red premises respectively and the rents later reviewed and expressly agreed on a composite basis for all three properties were all calculated by reference to a year. Accordingly, if there ever was a periodic tenancy (which the plaintiffs dispute) it would have been yearly in nature and thus incapable of being terminated

by a months' notice to quit. Instead a half – years' notice expiring at the end of a year of the tenancy would have been required. In this regard the case of *Wright v. Tracey* [1874] IR 8 CL 478 quote as follows: -

> "A tenancy from year to year may be created by express contract between the parties that the tenant shall hold from year to year, so long as both parties please, or by implication of law from certain other lettings at will. In both classes of cases the estate is by construction of law "a term "- an estate for one year certain, determinable at the end of that year by half year's notice to quit, but enuring for another year if not so determined, and so on"

32. The plaintiffs argue that is has long been established that a crucial indicator as to the exact nature of a periodic tenancy is the manner in which the rent is calculated as opposed to how it might actually be paid. In short, they say that an annual rent paid over twelve monthly instalments is still an annual rent and thus indicative of a yearly tenancy.

33. Thus, they say that in the case of *Wren v. Buckley* [1904] 4 NIJR 171, the defendant held under an agreement which reserved a yearly rent that was payable monthly and provided that the tenancy would terminate on one months' notice from either the landlord or the tenant subject to the qualification that the landlords would not serve a month's notice to quit unless the tenant was in arrears with the rent or the demised premises had been damaged. At first instance it was held that the defendant was a monthly tenant but on a case stated to the Kings' Bench division it was held that this was wrong in law and that the tenant held under a yearly tenancy. In the course of his judgment, Palles LCB quoted with approval the following observation of Bailey J. in the English case of *R. v. Inhabitants of Herstmonceux* [1827] 7 B and C 551 as follows: -

> *" A taking at an annual rent though the rent is to be paid weekly is prima facie a yearly tenancy if there has been no proviso about quitting at three months' notice there could have been no doubt on the subject as it would have been an ordinary yearly tenancy with the rent to be paid weekly instead of quarterly or half yearly. What then is the legal effect of a tenancy of a year with a proviso for determining it in the middle of the year? Such a proviso does not prevent it from being a yearly tenancy when the party is in, he is in of the whole estate for a year, liable to a defeasance on a particular event."*

34. The plaintiffs argue that the initial rents agreed in respect of the Red unit and the Yellow unit were yearly sums as were the composite rents subsequently agreed on review. They say that as is apparent from the foregoing authorities the manner in which such rent is actually paid does not dislodge the inference of a yearly tenancy which if it is to be determined must be brought to an end through service of a half year's notice to quit, ending at the end of a year of the tenancy. They say therefore that the service of a months' notice to quit in such a situation is futile and ineffective.

35. The plaintiffs contend that the issue of surrender is not in the case at all. The plaintiffs say however, that in any event, the point of surrender made by the defendants is mistaken as a matter of law and quoted one of the leading authorities in that regard of *Oastler v. Henderson* [1877] QBD 575 and they refer the court to the judgment of Coburn C.J. in support of their argument that by merely passing the keys backwards and forwards does not succeed in bringing about a surrender by operation of law.

36. In any event, Mr. Sorensen's evidence on that point said that he held the key simply from a health and safety point of view and it was not his intention to accept that the 35 – year lease had been terminated or surrendered. They further say that it is the plaintiffs assertion that in any event it would have been a yearly tenancy and not a monthly tenancy and accordingly the monthly notice is insufficient

37. With regard to the notice to quit the plaintiffs say that the defendants seem to contend that the fact that they had made an offer to discharge the rent for the six – month period required (which was not taken up), that this in some way validates their notice to quit. The plaintiffs strongly argue that this is not sufficient to validate the notice to quit. The say that you either terminate your tenancy by giving a correct notice to quit, or you do not. They say that the defendants cannot deny that the rent is a yearly rent and at the very least it would have been a yearly tenancy requiring six months' notice and that they never amended their hand in that regard. The plaintiffs say that you cannot offer to serve a notice of quit, it must be actually served. The plaintiffs say that the defendants are accordingly liable for the yearly rent at a minimum.

38. The plaintiffs also say it has not been proven that the defendants did not sign the 1995 lease. All that Mr. Bolger could say is that he had never seen a signed copy. The plaintiffs also say that the defendants make much of the fact that the plaintiffs did not positively assert that the 1995 lease was in subsistence, the plaintiffs say in fact that a letter from O'Flynn Exhams in 2006 did so assert and that there was no denial received in response. The response that came back was seeking consent for a subletting.

39. With regard to the title issue, Mr. Derham in his evidence accepted that with regard to the triangular piece of ground, a deed of exchange had been signed and lodged for registration.

40. The plaintiffs say that discussions in respect of the proposed alternative composite lease in 2007 were an attempt to work through problems which the defendants were having in respect of VAT by delaying matters for upwards of 10 years and in respect of stamp duty for similar reasons. They submit that when the defendant was not able to extract itself from the lease through negotiation, it attempted to do it by way of notice to quit but that if they had been strategic about that they would have served a notice to quit that would have pertained to a yearly tenancy not a monthly tenancy.

41. In summary, the plaintiffs argue that as the rents paid in respect of the Red premises and the Yellow premises were always yearly in nature if there was a periodic tenancy (which the plaintiffs dispute) it was yearly and not monthly, it survives to this day and the defendant had no entitlement to cease paying rent in respect of the Red premises and the Yellow premises. Consequently, they argue that the defendant is indebted to the plaintiff in respect of the sums referred to in the orders sought. Moreover,they submitted in the course of the case and in their written submissions that they were now seeking declaratory relief and if necessary specific performances and other relief as follows: -

> (i) That the defendant holds the White premises and the Yellow premises for a term of years that will expire on the 7th October 2027 under the terms contained in the 1992 lease;

And

> (ii) The defendant holds the Red premises for a term of years that will expire on the 16th February 2030 under the terms contained in the 1995 lease subject to a composite rent of €64,000 per annum plus VAT to €203,763.87 arrears of rent;
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> (iii) The sum of €438.50 being the cost of stamping a 1992 lease (which costs should have been met by the

defendants pursuant to Clause 3 (27) of the 1992 lease) interest and costs.

The Defendants Arguments

42. In their arguments, the defendants maintain as follows: -

> (i) They do not dispute that the defendant did go into possession of both units and paid rent on each to the plaintiffs and thereby assumed a tenancy of the units.
>
> (ii) They state that where a party goes into possession of a premises and agrees to pay rent to the owner of that premises, the nature of the tenancy which is assumed is an oral periodic tenancy is terminable by giving a period of notice which is commensurate for the period for which rent is paid, e.g. that if rent is paid on a monthly basis the tenancy may be terminated by the tenant giving one month's notice of such termination.
>
> (iii) They say that in order for the defendant to be fixed with a tenancy which was to endure for the 35–year term provided for in the draft 1995 lease, the plaintiffs must demonstrate that there was a concluded agreement and that the defendant would be bound by its terms. Similarly, they argue, that position is the same in relation to the tenancy of the Yellow office premises.

43. The defendants say that on the facts of this case, there is no evidence to support the contention that there was a concluded agreement that the defendant would be bound by the terms of the draft 1995 lease because: -

> (i) The defendant made it clear at an early stage that it would not be bound by the draft 1995 lease unless the plaintiffs addressed several specific closing requirements, one of which was that the plaintiffs would show that they had title to grant, a lease of the whole of the Red unit and the right of way it purported to grant to it. Also that the title would be perfected by the registration of a deed of exchange under which the plaintiffs acquired title to a small triangular piece of the Red unit and the right of way.
>
> (ii) The plaintiffs acknowledged the defendant'sstipulations and agreed to deal with them prior to the draft 1995 lease becoming binding.
>
> (iii) The plaintiffs did not arrange for the deed of exchange to be registered and a grant of right of way was never executed. The defendant never signed the draft 1995 lease nor did it in correspondence accept that its closing stipulations had been satisfied. Similarly, no draft was ever prepared in respect of the letting of the Yellow office premises, instead it was suggested that it should be incorporated into a single composite lease.

44. The defendants argue that crucially the plaintiffs did not in correspondence suggest that the defendants closing stipulations had been met, or that the draft 1995 lease was binding notwithstanding that the closing stipulations had not been met. Instead they say the plaintiffs suggested that the parties should agree a single composite lease for each of the White , the Red and the Yellow units. These negotiations ultimately broke down without a concluded and legally binding agreement.

45. The defendants served a notice to quit in respect of the periodic tenancy arising in the absence of a formal lease in July 2012.

46. The defendants say that the plaintiff's failure to at any point prior to the notice of termination being given in July 2012, allege that the defendant was bound by the draft 1995 lease coupled with the suggestion made on its behalf in the letter from O' Flynn Exhams Solicitors dated 4th September 2012 that the defendant was bound by a composite lease with regard to all three of the units illustrates that they did not believe that the defendant was bound by the terms of the draft 1995 lease and

47. Accordingly, even if there was an agreement to enter into a lease, that was discharged by the negotiations between the parties in respect of the composite lease. Further, the plaintiffs are estopped from asserting that the 1995 lease binds the defendant because of the letter of the 4th September 2012.

48. The defendants go on to argue that even if the court does conclude that the defendant agreed to be bound be the terms of the draft 1995 lease, the plaintiffs accepted the surrender of the lease following service of the notice to quit in August 2012 and thus accepted that the defendant's tenancy at the Red premises was at an end.

49. The defendants go on to say that in relation to the Yellow premises the periodic tenancy of this portion was determined by service of the notice to quit. Alternatively, the defendants say the plaintiffs also accepted the surrender of this premises.

50. The defendant does not dispute that there is a binding lease in relation to the White unit of the holding from 1992. They say though that lease is dated the 8th February 1992, it was executed in 1994. They say that it is presently occupied by a sub-tenant and the defendant is paying the balance of the rent.

51. The defendants argue that it is well established that there must be a concluded contract before specific performance or an injunction can be granted and in that regard the defendants opened a number of authorities. They refer the court to the case of *Cosmoline Trading Ltd. and DH Burke & Son Ltd and DHB Holdings Ltd*. [2006] IEHC 38 and to the judgment of Finnegan P. where he set out the criteria that must be met in order to obtain specific performance of a contract. They also refer the court to the case of *Supermacs Ireland Ltd. v. Katesan (Naas)Ltd. & Sweeney* [2000] 4 IR 273 and in particular the judgment of Geoghegan J. where he stated: - "everything intended to be covered by the agreement has been either expressly or impliedly agreed". This is the test that must be met as to whether there is a concluded agreement. They also refer the court to the case of *Globe Entertainment Ltd. v. Pub Pool Ltd.* [2016] IECA 272 and again refer the court to the judgment of Finlay Geoghegan J. in the Court of Appeal and quote as follows: -

> "The question as to whether a term is material and must be agreed in order that a concluded agreement has come into existence depends upon a subjective assessment of the facts with particular regard being had to what the parties themselves considered to be material terms requiring express agreement."

They opened the case of *Mackey v. Ryall (No. 2)* and the judgment of Byrne J. in the Supreme Court where he stated: - "The essential question is whether the parties have left over some matter to be determined which can only be determined by themselves. So an agreement to enter an agreement is not a concluded agreement."

They returned to the case of *Cosmoline Trading Ltd*. and the judgment of Finnegan P. which had also been opened by the Plaintiffs

where he examined the material terms necessary to create an enforceable contract for the grant of the lease being

(1) The parties;

(2) The premises;

(3) The term;

(4) The commencement date;

(5) The rent.

They also opened Wylie on Land Law in particular the following quotation: - "*The courts have made it clear that what is to be regarded as essential or material in this context involves a subjective test i.e. what the parties so regard and not what the court might on an objective basis so regard.*" (Wylie, Landlord & Tenant Law, 3rd Ed. 2014 para. 5.08)l. They submit that in the light of the evidence in this case there can be no suggestion that there was any concluded agreement between the parties that MMS would be bound by the terms of the draft 1995 lease. They say that this is because the closing requirements of the defendant which the plaintiffs agreed were material, were not met at all or not met by the time the parties agreed to execute a new composite lease in 2007.

52. They go on to say that MMS went into occupation of the Red premises prior to the 13th February 1995 and commenced paying rent from the 17th February 1995. They say that correspondence from O'Flynn Exhams in respect of the defendant's occupation of the Red unit dated the 31st August 1995 and 27th February 1996, is headed "Subject to lease" which indicates that there was no agreement in place at this juncture and the parties contemplated the execution of a formal written lease by both landlord and tenant.

53. The go on to say that by letter dated the 28th May 1996 O'Flynn Exhams sent copies of the indenture of lease in respect of the Red premises signed by their client to J. Brendan O'Herlihy Solicitors. This letter they say finished by requesting as follows: - "Should you have any other closing requirements please advise us of the same."

54. They go on to say that by letter dated the 12th September 1996, J. Brendan O'Herlihy Solicitors set out a number of issues that would have to be addressed before the defendant would be bound by the terms of the draft 1995 lease. One of these requirements was that the plaintiffs would show good title to the entirety of the Red unit. It became clear however that the plaintiffs were not actually the registered owners of the small triangular plot of land constituting part of the Red unit and in order to resolve this the plaintiffs' solicitors arranged for the plaintiff to enter into a deed of exchange with the registered owner of the triangular plot and to register the deed of exchange so as to be sure that the plaintiffs would become the registered owners of the plot. They say it was never suggested that the defendant should accept the draft 1995 lease before the deed of exchange was registered and the correspondence shows that the deed of exchange was not in fact registered at the material times.

55. They say that Paul Derham solicitor to the defendants summarised the problems in relation to the properties during his examination in chief in this case and that Michael Bolger solicitor for the plaintiff, accepted that these matters had to be dealt with They say that Michael Bolger testified that his firm never received the counterpart of the lease for the rent premises and under cross – examination accepted that he had never seen a signed copy of the 1995 release. They say that Paul Derham also stated that he had no recollection of seeing a signed copy.

56. The defendants say that Jenny McIntosh solicitor's evidence was that she had advised MMS that this lease could not be executed until the matters in relation to title had been resolved. She further testified that to her knowledge, Gerard and Kathleen O'Herlihy never executed or sealed the Red lease.

57. The defendants say that no evidence was adduced that the draft 1995 lease had ever been signed, sealed or executed by both parties. They say that it therefore follows that the defendants occupation of the Red premises was not on foot of a concluded written agreement to the effect that the defendant would be bound by a lease for 35 years from 1995.

58. They further say that Michael Bolger, solicitor for the plaintiff, further accepted under cross – examination that the defendant had made it clear that whilst they were in occupation of the premises and paying rent that they would not commit to term or terms of the lease until their requirements had been met.

59. The defendants go on to say that following inquiries from Paul Derham solicitor in relation to Ordnance Survey Maps required for registration by letter dated the 15th February 2006, Michael Bolger wrote to Daly Derham Donnelly suggesting subject to taking instructions from the plaintiff Olaf Sorensen that a new lease could be executed. The defendants say that it is instructive that the plaintiffs' position was not to argue that the draft 1995 lease was binding on the defendant even though it was not signed and even though the deed of exchange had not been registered. The defendants go on to say that it can reasonably be assumed that if the plaintiffs had instructed their solicitor to communicate to the defendant their belief that the defendant was bound by the draft 1995 lease, he would have done so. They say that thus the absence of any allegation by the plaintiffs' solicitor that the defendant was bound by the draft 1995 lease indicates that the plaintiff never instructed him to advance that position and that therefore they did not believe that the defendant was bound by the draft 1995 lease.

60. The defendants go on to say that by letter dated the 8th March 2006 Olaf Sorensen the plaintiff wrote to O'Flynn Exhams, his own solicitors, agreeing with their recommendation that a new lease would be put in place to reflect the present position by letter dated 10th March 2006.

61. They say that Michael Bolger solicitors evidence in chief was that the 2007 lease negotiations were an attempt to resolve matters in relation to previous leases neither of which had been stamped and one of which appeared not to have been executed. They say that under cross examination, Michael Bolger agreed at no point during the negotiations in respect of the 2007 lease did he or the plaintiffs assert that the defendant was bound by the draft lease of 1995. They say that during his evidence in chief, Mr. Derham concurred that there had never been any suggestion that the draft unsigned 1995 lease was binding on his clients.

62. The defendants then go on to deal with the issue of the periodic tenancy. They say that the term periodic tenancy refers to tenancies for successive definitive periods and comprises both the tenancy from year to year or yearly tenancy and tenancies for successive periods less than a year for example weekly and monthly tenancies. They say that the essence of a periodic tenancy is that it is one of uncertain duration or a grant for an indefinite period. They go on to say that periodic tenancies can arise by the express agreement of the parties or by implication. They say such a tenancy often arises by implication in circumstances where a

tenant for a fixed term holds over after the expiry of that term.

63. The defendants go on to refer the court to the case of *Earl of Meath v. Megan* [1897] 2 IR 477 and to the judgment of Fitzgibbon L.J. where he said: -

> "Where a tenant holds under a lease or agreement in writing for a term which comes to an end and he continues in possession without making any fresh agreement, there is a presumption that all of the terms of the old agreement continue to apply except so far as they are rendered inapplicable by the changes in duration of the tenancy".

They say that the example quoted above refers to a term which has come to an end and the absence of a fresh agreement. They say however in the absence of any agreement as to the duration of the tenants' occupation the court will imply a periodic tenancy. They say that the court will generally look to the rent as an indicator of the type of periodic tenancy to be applied in any given case, and refer the court to Wiley's Landlord and Tenant, 3rd Ed. 2014. They refer the court to the case of *Forte v. Wright* [1908] 42 ILTR 264, which was an appeal to the Court of Appeal by the tenant from the dismissal by the Recorder of Belfast of his application for compensation under the Town Tenants Ireland Act 1906. The application had been dismissed on the grounds that the tenant held under a monthly tenancy and was therefore not within the purview of the Act. In the appeal in that case, Walker L.J. observed: -

> "The point is, what was the character of the tenancy when he made his claims? The tenant when he made his claim was a monthly tenant, the rent reserved is not a yearly rent but at a rate of £65 a year, it is made payable monthly and all the provisions as to terminating the tenancy are those applicable to a monthly tenancy."

64. The defendants therefore argue that in this case there was no concluded agreement by the defendant that in occupying the Red unit and paying rent to the plaintiffs it would be bound by the terms of the draft 1995 lease. Instead they say the defendant held the premises on foot of an oral periodic tenancy. Similarly, they assert that the draft 1995 lease did not extend to the Yellow office unit and the 1992 lease was never varied or amended to include it. They go on to say that it is in an essential feature of any periodic tenancy that it is determinable by either party by notice to quit. A monthly periodic tenancy is terminable upon one month's notice. They quote from Wylie's Landlord and Tenant Law at p.588 3rd. Ed. 2014 as follows: -

> "It is settled that a month's notice is required to determine a monthly tenancy. The notice should expire at the end of the monthly period or, possibly, on a given day. The monthly period is a minimum period and a longer period is valid, provided, however, it does not expire during the currency of the relevant month of the tenancy."

The defendants say that by letter dated the 6th July 2012 the defendants served notice to quit in respect of the Red and Yellow premises on the basis that they held them as monthly tenants over holding in possession.

65. The defendants say that the plaintiffs' response to the news that the defendant intended to vacate the units within a month was not to allege that the defendant was bound by the draft 1995 lease and the 35 – year term referred to therein. Instead by letter dated the 4th September 2012, the plaintiffs alleged that the defendant had agreed in October 2007 to lease the premises for a term of nine years and eleven months from October 2007 with an agreement to renew for a further period of nine years and eleven months upon termination of the term.

66. The defendants say that it should be noted that by letter dated 20th November 2012 the plaintiffs had resigned from the position set out on the 4th September 2012 and asserted for the very first time in over seventeen years that the parties were bound by the terms of the unsigned 1995 lease. The defendants say that neither letter appears to have dealt with the position in relation to the 1998 tenancy of the Yellow offices. The defendants go on to say that similarly there is no evidence that the defendant agreed to be bound by the 1992 lease and that lease was never amended. The defendant submits that unless the plaintiffs can demonstrate that a concluded agreement to that effect was entered into by both parties, then the defendant was in occupation of the Red premises under an oral periodic tenancy which it was entitled to terminate on notice to the plaintiffs.

67. The defendants then in their submissions go on to deal with the issue of the surrender. In that regard, they say that a lease or tenancy agreement will come to an end when the tenancy is surrendered to the landlord, usually by the tenant voluntarily. They say that section 7 of Deasey's Acts 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."

In the present case the defendants say that the tenants surrendered the tenancy and that surrender was accepted by the landlord. The defendants opened the case of *Lynch v. Lynch* [1843] 6 IRLR 131 and the judgment in which Brady C.B. 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 by the tenant of that part. He stated: -

> *"A surrender by Act and operation of law I think may properly be stated to be a surrender reflected 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 Court see that the acts of the parties cannot have any operation except by holding that a surrender has taken place, they hold it to have taken place accordingly".*

In that regard the defendants say that Wylie states: - "*The important point is that it is the courts' construction of the parties acts which is important, i.e. what they amount to as a matter of substance not necessarily what the parties thought they had achieved by the acts. The matter is to be viewed objectively so that in that sense the parties' subjective intentions are irrelevant. What the court must look for is conduct pointing unequivocally to termination of the tenancy in question and it must be conducted by both parties."*

They refer further to the case of Cosmoline and the judgment of Finnegan J., and to Wiley and go on to state as follows: -

> "That in this case the following occurred: -
>
> (i) By letter dated the 6th July 2012 Daly Derham Donnelly wrote to O'Flynn Exhams giving one month's notice and stating "…you might please confirm where you wish us to send the keys of the property".
>
> (ii) By letter dated the 30th August 2012, Daly Derham Donnelly returned the keys stating "We now enclose the

keys for the two units as vacated". These keys were accepted by the plaintiff and the plaintiffs then sought to re-let the premises.

(iii) O'Flynn Exhams replied by letter dated 4th September 2012 seeking confirmation of the area of the subject of the notice to quit, asserting the validity of the 2007 lease or failing that asserting a yearly tenancy.

(iv) While the plaintiffs' solicitors sought to return the keys by letter dated the 14th September 2012, Mr. Sorenson retrieved them on the 13th October 2012.

(v) By letter dated the 29th January 2013, O'Flynn Exhams returned the keys and stated "We are also returning the keys" and conceded in correspondence that their clients had accepted the return of the keys albeit reluctantly and had sought to re-let the property thereafter.

(vi) By letter dated the 12th February 2013, Daly Derham Donnelly again returned the keys and thereafter they remained in the possession of the plaintiff.

68. On this basis, the defendants assert that it is clear from his evidence that Mr. Sorensen was of the view that the premises had been abandoned. They say he was aware of the significance of the keys and the reason he initially returned them was on the advice of his solicitors. They say therefore that clearly when his solicitor finally accepted the keys in February 2013 and on Mr. Sorenson's instructions did not return them their surrender was accepted. They say that he accepted that he went and got the keys back in October 2012 because he thought he had a legal obligation to mitigate his loss by re-letting the premises.

69. The defendants say that Mr. Sorensen the plaintiff and his solicitor clearly acknowledge that the tenant had abandoned the premises. They say the landlord had collected the keys in the full knowledge of what this meant having taken his solicitors' advice and resumed possession. They say that the plaintiffs then secured and made attempts to re- let the property and that he had the keys for three months before he returned them and then retained them permanently. The defendants therefore submit that in these circumstances they were acts amounting to abandonment and resumption of possession by the landlord.

70. Going on then to deal with the issue of the communication of acceptance, the defendants say as follows: -

(i) Irish law uses the idea of offer and acceptance to determine when a contract has been concluded and that an acceptance is a final and unqualified expression of assent to the terms of an offer. The general rule is then an acceptance has no legal effect until it is communicated to the offeror. Accordingly, there is no contract where a person writes an acceptance on a piece of paper which he simply keeps. The defendants opened the case of *Tansey v. The College of Occupational Therapists* [1995] 2 ILRM 601, a quotation from the judgment of Murphy J. and submit that no evidence has been adduced to the effect that the lease for the Red premises was ever signed by or on behalf of the defendant. They go on to say that in the event that the court concludes that on the balance of probabilities the lease for the Red premises was signed on behalf of the defendant, it is clear from the evidence that the fact of signature was never communicated to the plaintiffs. They go on to say neither was any counterpart lease ever returned to the plaintiffs or their agents thereby communicating the defendants acceptance of the terms of the lease. In summary the defendants conclude:

(ii) No concluded binding agreement containing all material terms evidenced in writing was ever concluded in respect of the Red premises pursuant to the draft 1995 lease or otherwise;

(iii) If there was any such agreement the plaintiff had not complied with all of the material terms and conditions of that agreement in relation to title and the right of way inter alia.

(iv) Furthermore, if there was any such agreement it was discharged by the subsequent agreement to sign a new composite lease.

(v) In relation to the Yellow office premises this was at all times a periodic tenancy given that no draft lease was ever prepared and the 1992 lease was never amended or varied to incorporate that premises.

(vi) Similarly, in relation to the Red premises they were held under a periodic tenancy.

(vii) That tenancy was determined by notice to quit served in July 2012 which determination was accepted by the plaintiff while he took back the keys and resumed possession.

(viii) Alternatively, the defendant abandoned or surrendered possession of the premises to the plaintiff in 2012 which abandonment and surrender was accepted by the plaintiff.

Decision

71. This case was heard over five days with detailed examination and cross examination of two witnesses on behalf of the plaintiff and two witnesses on behalf of the defendant. There were lengthy oral and written submissions made by both sides which have been referred to in some detail in this judgement. The court has traversed the background, the issues and the arguments and does not intend to traverse them again in its decision.

Having considered the evidence and the law opened to it the court is satisfied as to the following matters:

Having concluded a lease agreement in respect of the "White Unit" for 35 years on a full insuring and repairing lease (which is not in dispute) the parties proceeded to negotiate a further 35 full insuring and repairing lease in 1995 in respect of the Red unit. After discussions between the parties to agree terms draft leases together with maps were generated and correspondence was entered into between the parties respective solicitors. The term agreed was 35 years from the 17th of February 1995 at an annual rent of IR€10,000 subject to five year rent reviews in respect of the red unit as outlined on the map. The terms of this lease differed from the terms of the lease of the "White Unit" but it was specifically agreed between the parties that the review dates in respect of both units would coincide. The defendant went into possession of the premises and the landlord executed the original and counterpart lease and returned it to the defendants solicitors with maps attached for execution, stamping and registration by the defendant. The defendant after

taking up occupation complied with the terms of the lease, paid rent and agreed 5-year rental reviews with the landlord in 1998, 2002, 2007 and 2012.

72. Similarly, in October 1998 when MMS Medical made a further approach for additional space the premises referred to as the "Yellow Premises" were agreed which were adjacent to the White premises and it was accordingly agreed between the parties that these premises would be let to the defendant on the same terms as the White unit that is 35year full insuring and repairing lease from the 8th of October 1992 at an additional rent of IR£7000 per annum. This would mean that the review date for the Yellow premises would also coincide with the White and Red units. Again the defendant went into occupation, complied with the terms of the lease, paid rent and agreed 5 year rent reviews in respect of this premises in 2002, 2007 and 2012.

73. The business relationship between the plaintiff and defendant proceeded smoothly and in accordance with the agreed terms up to 2012. In particular rent reviews proceeded in accordance with the agreed terms as set out above. Furthermore, during that period, the defendants sought the consent of the plaintiff landlord to a 12-month subletting of the red premises to a company called Donworth and Co Ltd from the 19th of April 2006 which consent was forthcoming. Similarly, the defendant sought further consent from the plaintiff landlord in respect of the Yellow premises to grant a ten-year sublease to another company by letter dated the 4th of May 2006 which consent was not forthcoming as the rent for the subletting was less than the rent payable in respect of the yellow premises under the 1992 lease.

74. In the meantime, formalities were being attended to by the parties' solicitors. There were delays in the execution of the lease in respect of the White unit. This lease was eventually executed in October 1994 although the defendant had gone into occupation in 1992. It seems that despite being obliged to do so the defendant never stamped or registered this document. The plaintiff has now attended to these matters having to pay both stamp duty and penalties which are now a part of the plaintiffs claim.

75. It seems that there was at least one change of solicitor on the defendant side which led to considerable delay of up to 10 years in dealing with the execution of the lease in respect of the Red unit by the defendant tenant and the subsequent stamping and registration of that lease by the tenant. Copies executed by the landlord with maps attached were returned by the plaintiff solicitor to the landlord for that purpose. The defendant never returned the executed counterpart and says now that neither the original or counterpart can be found nor does Mr. Derham or Ms. McIntosh have any knowledge of the defendant executing the lease

76. The court is satisfied that the negotiations which were entered into around 2007 between the parties were to address the difficulties that the defendant was facing as a result of its own delays. The correspondence supports this and indeed the plaintiff Mr. Sorensen and his solicitor also gave evidence to support this finding. Various proposals were put forward at that stage to address matters which included discussions with the defendant's accountants. It is these negotiations which generated correspondence around the suggestion that a composite lease of 9 years 11 months would be agreed. It is clear that Mr Sorenson had no role in the delay but he was happy to assist the defendant as long as a proper solution could be found. These negotiations did not reach any conclusion. However, the defendants have raised the matter of the letter of the 4th of September 2012 written by O Flynn Exhams to Daly Denham Solicitors in that regard and argue that even if there was an agreement to enter into a lease, that was discharged by the negotiations between the parties in respect of the composite lease and further that the plaintiffs are estopped from asserting that the 1995 lease binds the defendants because of that letter.

77. Michael Bolger was examined and cross examined on that point and says he cannot fully explain the letter. It seems to the court that this letter was generated from an incomplete review of the protracted correspondence on this file over at least 10 years at that stage. Given that these negotiations which were entirely at the behest and for the benefit of the defendant and were in any event never concluded the court is satisfied that the negotiations do not discharge the lease agreement nor does the letter operate as an estoppel in the manner argued by the defendant.

78. The defendant has raised the issue of the closing requirements not being fully met by the plaintiff. It was also contended that there was some difficulty with the plaintiffs title to a small corner of the Red premises. The court did not accede to the defendant's application to amend the pleadings to include a plea on title. The court agrees with the plaintiffs that the part of the defence opened to the court by the defendants in that regard does not contain a plea in respect of the plaintiff's title to the premises. In any event there is no evidence to suggest that the plaintiff did not have title to grant the lease. The registered deed of exchange would be required only to open a new folio in respect of this lease. In evidence it seems that the title difficulty to the piece of land in question was resolved to the extent that a deed of exchange had been executed and lodged with the Land Registry. Further it seems there were no difficulties on the ground. This issue would not operate to discharge the lease agreement or impede the operation of the lease.

79. With regard to the defendants proposition that correspondence sent headed "Subject to Lease" indicates that there was no agreement in place, the court notes the case of *Supermacs Ireland Limited v Katesan (Naas) Ltd*. [2000] 4 IR273 and agrees with the plaintiff's argument that the use of this phrase cannot reverse or nullify agreements that already existed or were part performed by the parties.

80. The court is satisfied that the law to include the provisions of Deasy's Act and the evidence supports the plaintiff's contention that there has been a formal grant of the 1992 lease as varied and the 1995 lease. No evidence has been put before the court of any other agreement or understanding between the parties or of any interim or temporary arrangements. Further the court finds the defendants stance is entirely inconsistent with how it acted in its dealings with the plaintiff. In particular, the following matters: -

(v) Each of the rent reviews (in 1997 for the White and the Red premises, and in both 2002 and 2007 for the White, Red and the Yellow premises) was premised on the defendant agreeing to pay a new annual rent for (at the very least) the following five years;

(vi) There was no reference to or suggestion of a periodic tenancy on the part of the defendant at any time prior to service of the purported notice to quit on the 6th July 2012. Not only was there a complete absence of any such claim but the defendants solicitors did not offer any dissent when the existence of the 1992 lease, the 1995 lease and the variation agreement was specifically adverted to by the plaintiffs' solicitors in a letter dated 10th March 2006.

(vii) Less than three weeks later the defendant's solicitors sought consent from the first named plaintiff to a twelve – month subletting of the Red premises. That subletting to Donworth and Co. Ltd. proceeded pursuant to a letting agreement dated the 19th April 2006 for a period of twelve months from the 19th April 2006 to the 18th April 2007 which term could not have been carved out of a mere monthly tenancy; and

81. Further the defendant agreed to grant Plasma Ireland Ltd. a ten – year sublease of the White and the Yellow premises and by a

letter dated the 4th May 2006, sought the consent of the plaintiffs to this letting (to which consent was refused as the rent for the subletting was less than that payable under the1992 lease). This behaviour is entirely inconsistent with the existence of a monthly tenancy or with any genuine belief on the part of the defendant or its advisors that such a tenancy provided the basis for the defendants' possession of the Yellow premises.

82. The notice to quit was founded on the express premise that the defendant held on foot of a monthly tenancy. The defendant has not pleaded how that periodic tenancy arose and in particular how the supposed base period thereof happened to be a month. It is not disputed anywhere in the defence or the evidence that the individual rents referable to the White, the Yellow and the Red punits respectively and the rents later reviewed and expressly agreed on a composite basis for all three properties were all calculated by reference to a year. Accordingly, if there ever was a periodic tenancy it would have been yearly in nature and thus incapable of being terminated by a months' notice to quit. Instead a half – years' notice expiring at the end of a year of the tenancy would have been required. The court accepts the plaintiffs arguments and the authorities opened that it has been established that a crucial indicator as to the exact nature of a periodic tenancy is the manner in which the rent is calculated as opposed to how it might actually be paid. The initial rents agreed in respect of the Red premises and the Yellow premises were yearly sums as were the composite rents subsequently agreed on review. The Court finds that the service of a months' notice to quit in such a situation is futile and ineffective. With regard to the issue of surrender the court did not accede to the defendant's application to amend their pleadings to include such a plea.

83. The plaintiffs argued that in any event, the point of surrender made by the defendants is mistaken as a matter of law and quoted one of the leading authorities in that regard of *Oastler v. Henderson* [1877] 2 QBD 575 and they referred the court to the judgment of Coburn C.J. in support of their argument that by merely passing the keys backwards and forwards does not succeed in bringing about a surrender by operation of law. Mr. Sorensen's evidence on that point said that he held the key simply from a health and safety point of view and it was not his intention to accept that the 35–year lease had been terminated or surrendered. The court notes the passage opened to it from Wiley on Land Law which states: - *"The important point is that it is the courts' construction of the parties acts which is important, i.e. what they amount to as a matter of substance not necessarily what the parties thought they had achieved by the acts. The matter is to be viewed objectively so that in that sense the parties' subjective intentions are irrelevant. What the court must look for is conduct pointing unequivocally to termination of the tenancy in question and it must be conducted by both parties."* The court is satisfied that the evidence does not support a finding of conduct pointing unequivocally to termination of the tenancy in question conducted by both parties. In any event the court has determined that any periodic tenancy would have been a yearly tenancy and not a monthly tenancy and accordingly the monthly notice is insufficient

Decision
The court therefore finds that the defendant holds the White Unit and the Yellow Unit for a term of years that will expire on the 7th October 2027 under the terms contained in the 1992 lease and that the defendant holds the Red Unit for a term of years that will expire on the 16th February 2030 under the terms contained in the 1995 lease subject to a composite rent of €64,000 per annum plus VAT. Accordingly, the court orders that arrears of rent to include interest in the sum of €239884.07 is to be paid by the defendant to the plaintiff. The Court further orders that the sum of €426.00, being the cost of stamping the 1992 lease be paid by the defendant to the plaintiff.