

THE HIGH COURT

ON CIRCUIT

CIRCUIT COURT APPEAL

[EJ3/2010 SOUTH EASTERN CIRCUIT, COUNTY OF KILKENNY]

BETWEEN

MICHAEL DOYLE

PLAINTIFF

AND

MICHAEL LEAHY TRADING AS IDEAL KITCHENS AND BEDROOMS

DEFENDANT/COUNTERCLAIMANT

JUDGEMENT delivered by Ms. Justice Murphy on the 28th day of March, 2019

1. The plaintiff's claim is for possession of part of the premises known as Shamrock Commercial Park, Castlecomer which was rented to the defendant/counterclaimant in or about January, 2000. The said premises is part of a warehouse contained in Folio 16992 of the Register of the County of Kilkenny. The defendant/counterclaimant denies that the plaintiff is entitled to possession of the premises and has counterclaimed for an order compelling the plaintiff to sell to him an agreed site on a different portion of the folio. In the alternative, the defendant/counterclaimant seeks a declaration that he is entitled to a statutory lease of the demised premises under the provisions of the Landlord and Tenant (Amendment) Act 1980.

Established facts

2. The plaintiff, Mr Michael Doyle, is the owner of lands contained in Folio 16992 of the Register of the County of Kilkenny. The area of land contained in the folio is just under six hectares. On the land are three warehouses together with a showroom and offices at the front of the warehouses, facing on to the public roadway. The plaintiff is a businessman who engages *inter alia* in the importation of machinery, for sale and hire. He bought the property in or about 1996 from the previous owners, Roadmaster Caravans Limited. At the time of purchase, the plaintiff was aware of the presence of tenants in the property. One of those tenants was the defendant/counterclaimant Mr Michael Leahy. He had a written rental agreement with the previous owner. He held the showroom and adjacent office and toilet facilities on a yearly agreement from 1st January, 1987.

3. The plaintiff was registered as owner of the folio on 1st April, 1997. By late 1999/ early 2000, the defendant/counterclaimant had moved from the showroom area to an area in Warehouse 3 at the rear of the premises. He continued to pay rent at the same rate as he had paid for the rental of the showroom area. The defendant/counterclaimant paid rent until 2002.

The claim and proceedings

4. In determining the facts, the court considers the evolution of the claim and the proceedings, to be of relevance.

5. In January, 2008 solicitors on behalf of the plaintiff wrote to the defendant/counterclaimant at an address in Abbeylax enclosing a statement of rent due and payable to the plaintiff up to and including the month of September, 2007. The sum stated to be due for rent at that point was €17,711.98. The letter also sought possession of the premises. The letter stated that in default proceedings would be issued seeking possession of the demised property.

6. On 22nd January, 2008 the defendant/counterclaimant replied to the letter of demand. The court is reproducing the letters as written by the defendant/counterclaimant. The letter states:-

"Thank you for your letter of the 15.01.08 it is welcomed as it is time this matter is dealt with. Mr Doyle has for too many years put on the long finger undertakings to me in relation to the sale of a site at Castlecomer to build my our unit on. Mr Doyle did eventually have a third party contact me in relations to this the terms were not as agreed with Mr Doyle when the undertakings were given.

I wish to state at this time I will not be giving up possession and will defend and formalise my rights in a proceedings if necessary.

In relation to rents due, any rents that may be due will be forwarded. However for me to determine what rents may be due I require

1. A copy of the lease or rental agreement by which rents are seen to be due.

2. Any and invoices or copy of same for rents seen to by due by your client.

Yours truly,

Michael Leahy."

7. Nothing happened on the file for the following two years. On 25th January, 2010 the plaintiff's solicitors wrote again to the defendant/counterclaimant at Shamrock Commercial Park, Castlecomer, claiming arrears of rent which now amounted to €25,803.25. On this occasion, the plaintiff's solicitors did not seek possession of the property but stated that in default of payment of the sum due, Ejectment Circuit Court proceedings would be issued without further notice. The defendant/counterclaimant appears to have responded on 7th February 2010, though the letter carries a date of 22nd January, 2008. The letter states that the solicitors' letter sent to him at Shamrock Commercial Park, Castlecomer, had taken some time to reach him and he asked that his address at 11 Kilkenny Street, Castlecomer be used for further correspondence. Having referred to the plaintiff's solicitors earlier letter of 15th January, 2008 and his response dated 22nd January, 2008, the defendant/counterclaimant noted that he had received no reply or

rebuttal of the contents of his letter of 22nd January, 2008 from either the solicitors firm, or the client. He goes on to state:-

"In additional I received no information on my request in relation to the alleged rental due. This is consistent with the manner your client has dealt with his undertakings to me.

As stated in my letter of 2008 I will not be giving up possession and will defend and formalise my rights in proceedings if necessary. To qualify my possession of the said premises, I state is not based on any rental agreement but on undertakings giving by your client in relation to the sale of the site.

In relation to your client's assertion that there is rent due in absents of documentation requested in 2008, my belive is that for the agreed short rental period all rent were paid.

Unlike 2007 when Mr Doyle had a third party meet me in relation to his undertakings, land values are returning to normality. Mr Doyle may now consider fulfilling his undertaking to me at this stage. I welcome a positive response to this.

Yours truly,

Michael Leahy."

8. On 1st March, 2010, the plaintiff's solicitor served an Ejectment Civil Bill by registered post and advised the defendant/counterclaimant that he contact his solicitor immediately. The defendant/counterclaimant replied on 8th March, 2010 acknowledging receipt of the Civil Bill and confirming the entry of appearance. His letter further states:-

"I note that I have from now ten days to lodge my defence. While I acknowledge that my defence will be consistent with my actions and correspondence to date. In order to lodge a more detailed defence beyond (no rent due) I require the following copy documentation which I have requested now twice (22.01.2008 and 07.02.2010).

1. A copy of the alleged periodic lease or rental agreements by which rents are seen to be due.

2. Any and invoices or copy or same for rents seem to by due by your client.

In addition, any and all agreements between your client and the defendant in relation to all the plaintiffs' premises and lands at Castlecomer."

9. The defendant/counterclaimant agreed to accept the documentation by email, given the short time available. The plaintiff's solicitor wrote back acknowledging receipt of the appearance and seeking delivery of the defence. A further letter was sent on 23rd March, 2010, noting that a defence had still not been delivered, and agreeing to an extension of time for the late delivery of a defence. On 24th March, 2010, the plaintiff's solicitor received a letter dated 19th March, 2010. The letter refers to the proceedings and under the heading "DEFENCE" states:-

"The Plaintiff claims in its civil bill that there is periodic agreement in place from in or about 2000 to December 2009 and from this periodic agreement rents are due.

In defence of this I state that the Periodic Agreement ended in or about 2001/2002 and no rents are due from this periodic agreement.

I further state that the agreement with the plaintiff for my possession of the said premises from the end of the periodic agreement is not rent based and no rents are due from this agreement.

I further say that the plaintiff's action and use of an Ejectment civil bill is misleading to the court and abuse of the court as no rents are due."

The letter is signed Michael Leahy.

10. On 31st March, 2010 the plaintiff's solicitor by letter sought particulars of the "defence" delivered. The particulars sought were as follows:-

1. Please identify on what basis is it alleged that the periodic agreement was terminated in 2001/2002.

2. Is it alleged that the Defendant was not a tenant during the period referred to?

3. Is it alleged that the Defendant has not occupied the said premises since 2001?

4. What does the Defendant allege is the basis for the agreement between the parties in circumstances where it is alleged that it is not "rent based"?

5. On what basis is it alleged that the within proceedings are an "abuse of the court"?

The plaintiff's solicitors' letters sought replies within fourteen days and advised that in the event of failure to reply within that time frame a notice of trial in the matter would issue. The defendant/counterclaimant did not reply to that letter for particulars either at that time or since.

11. On 15th April, 2010, the plaintiff's solicitors served by registered post, both a notice to produce and a notice of trial returnable for 20th July, 2010. From the papers before the court it is not clear what transpired between the original trial date of July, 2010 and July, 2011. However, it does appear that the matter was dealt with by Judge Doyle in the Circuit Court on 26th July, 2011, because by letter dated 27th July, 2011, from the plaintiff's solicitors, it is noted that Judge Doyle had adjourned the proceedings preemptorily against the defendant/counterclaimant for the next sessions of Kilkenny Circuit Court beginning on 25th October, 2011; that the defendant/counterclaimant was ordered to deliver a defence within seven days of that date; and third that an undertaking was given by the defendant/counterclaimant to Judge Doyle to remove building rubble from the plaintiff's property. That letter also notes that

Terry Doyle solicitor, of Malcolmson and Law, personally gave the defendant/counterclaimant a set of pleadings, two sets of photographs and rent invoices immediately following the court hearing.

12. The defendant/counterclaimant filed a defence and counterclaim on 2nd August, 2011 and on the same day, served a notice for particulars. The court notes that the defence and counterclaim filed is lawyerly in tone and the court thinks it reasonable to infer that the defendant/counterclaimant had access to legal advice in the preparation of both his defence and counterclaim and his notice for particulars. In his defence, the defendant/counterclaimant denied the existence of a periodic tenancy agreement. He denied that he had failed to pay the rent allegedly due on various occasions since 2002. The amount of the rent claimed is denied. The defendant/counterclaimant asserts that there was no rent due to the plaintiff as alleged and he denies there had been any demands for payment of the amount claimed. In the alternative the defendant/counterclaimant pleaded The Statute of Limitations 1957 in respect of any rents due prior to 25th February, 2004. In the further alternative, the defendant/counterclaimant asserted that the plaintiff was not entitled to an order for possession in circumstances where no or no proper notice of termination had been delivered to the defendant/counterclaimant as required by law.

13. In his counterclaim, the defendant/counterclaimant sets out for the first time, details of what he claims to have been his agreement with the plaintiff. The defendant/counterclaimant described his tenancy as follows:-

"1. From in or about the month of June in the year 1986 to in or about the month of October in the year 2000 the Defendant was in occupation of part of the 'lands and premises owned by the Plaintiff and situate in the Townland of Moneenroe Barony of Fassadinin and being part of the property comprised in Folio 16992 of the Register County of Kilkenny and being part of the property known as Shamrock Commercial Park, New Road, Castlecomer, County Kilkenny' (hereinafter referred to as 'Take A'). The Defendant begs to refer to a Map or Plan of the said premises when produced. Take A comprised somewhere between 16,000 and 20,000 square feet, portion of which comprised an office and showroom fronting onto the main Castlecomer to Athy/Dublin road, and a large factory manufacturing and storage area. The Defendant used the factory area of Take A for the manufacture of kitchen units and storage thereof, and used the road frontage area as offices and showrooms to show samples of a number of completely erected kitchens. The Defendants' occupancy of Take A was on foot of an oral agreement with Mr Myles McCabe and/or Roadmaster Caravans Limited, the previous owner(s) of the subject premises allegedly owned by the Plaintiff in or about the year 2000 subject to the tenancy interest and statutory rights of the Defendant in and to Take A.

2. Immediately after the completion of the sale of the subject premises including that part thereof (Take A) at that time occupied by the Defendant subject to his statutory rights therein and thereto the Plaintiff's employee, whose name I cannot recall, but who was part of the management team of the new owner, entered into dialogue with the Defendant for the purpose of securing vacant possession of Take A. As part of that dialogue, the Defendant was locked out of the offices in the road frontage part of Take A."

This plea contradicts his evidence at trial, that nothing had happened for twelve to eighteen months after the plaintiff had bought the premises, and his denial at trial that he had agreed anything with Mark Hilliard, who is the plaintiff's employee referred to.

14. The defendant/counterclaimant pleads his agreement with the plaintiff as follows:-

"a. That the Plaintiff would pay to the Defendant a sum of €30,000.00 to buy out Defendant's statutory rights in and to Take A, and;

b. That the Plaintiff would rent to and make available to the Defendant an alternative part of the 'lands and premises owned by the Plaintiff and situate in the Townland of Moneenroe Barony of Fassadinin and being part of the property comprised in Folio 16992 of the Register County of Kilkenny and being part of the property known as Shamrock Commercial Park, New Road, Castlecomer, County Kilkenny' (hereinafter referred to as 'Take B'), and being the premises referred to at Paragraph 3 of the Ejectment Civil Bill herein; and

c. That the Plaintiff would sell to the Defendant for the agreed sum of €30,000.00 (being the same value as the Plaintiff's buy-out of the Defendant's Statutory rights in and to Take A) an alternative agreed site with all necessary rights of ingress and egress, and being part of the 'lands and premises owned by the Plaintiff and situate in the Townland of Moneenroe Barony of Fassadinin and being part of the property comprised in Folio 16992 of the Register County of Kilkenny and being part of the property known as Shamrock Commercial Park, New Road, Castlecomer, County Kilkenny', upon which (subject to planning permission) the Defendant would build a purpose built factory premises into which he would re-locate his kitchen manufacturing business. It was anticipated that the construction of the new factory premises would be completed within a two year period."

The defendant/counterclaimant begs to refer to a map or plan of the said site (Take C) when produced. No map or plan of the alleged site has ever been produced by the defendant/counterclaimant.

"d. It was agreed between the Plaintiff and the Defendant that those parts of the agreement referred to at Sub-paragraphs a. and b. above of this paragraph would be implemented immediately, but Sub-paragraphs c. above of this paragraph would be postponed for at least twelve months to allow a reasonable period of time between the purchase of the entire property and the sale of the subject site to the Defendant by the Plaintiff and such that there would be no complications relating thereto."

15. The counterclaim continues:-

"5. On foot of the said part performance of the said agreements by the Plaintiff and as agreed with the Plaintiff the Defendant vacated Take A and executed a formal deed of surrender thereof, and moved into Take B, from where he has been carrying on his commercial enterprise to date. If, which is denied, there are any rents due to the Plaintiff by the Defendant, the Defendant claims that he has acquired statutory rights to a statutory tenancy in and to Take B under the provisions of the Landlord and Tenant (Amendment) Act 1980.

6. The Plaintiff has to date not completed the sale of the agreed site (Take C) to the Defendant despite numerous verbal requests of the Defendant to do so and further despite the Plaintiff's verbal undertakings to the Defendant on numerous occasions to do so. As a result of the Plaintiff's failures in that regard the Defendant has suffered substantial losses and damages, which losses and damages are continuing."

16. He then claims an order for specific performance of the alleged sale of Take C to the defendant/counterclaimant for €30,000; a declaration that the defendant/counterclaimant has occupied and continues to occupy Take B rent-free, pending the completion of the sale of Take C to the defendant/counterclaimant and the completion of the construction of a new factory premises by the defendant/counterclaimant thereon. In the alternative, in the event that it is found that the defendant/counterclaimant is obliged to pay rent to the plaintiff in respect of his occupation and use of Take B, he seeks a declaration that he is entitled to a statutory lease under the provisions of the Landlord and Tenant (Amendment) Act 1980.

17. Delivered on the same day was a notice for particulars of the plaintiff's claim which again, has all of the hallmarks of having been drafted by a lawyer. It seeks *inter alia*:-

- all alleged terms and conditions of the alleged periodic tenancy agreement;
- the names and addresses of all the plaintiff's employees who had direct dealings with the defendant/counterclaimant in relation to the premises;
- all documentation in the possession of the plaintiff, including but not limited to all papers, all notes, all memoranda, all letters, all emails, all maps, all drawings, all minutes of meetings, and all invoices touching and/or concerning and/or relating to the alleged periodic tenancy agreement, and/or the alleged rent due by the defendant/counterclaimant in the Ejectment Civil Bill;
- a copy of the "paid" cheque tendered by the plaintiff to the defendant/counterclaimant in respect of the defendant/counterclaimant's surrender of the Myles McCabe/Roadmaster Caravans Limited tenancy;
- a copy of the deed of surrender signed by the defendant/counterclaimant in respect of the defendant/counterclaimant's surrender of the Myles McCabe/Roadmaster Caravans Limited tenancy;
- a copy of the plaintiff's title to the lands in Folio 16992 of the Register of the County of Kilkenny; and
- a copy of each and every demand for rent together with a copy of the proof of delivery of the rental demand to the defendant/counterclaimant.

18. Following the delivery of the defence and counterclaim and the notice for particulars there was correspondence between the plaintiff's solicitors and the defendant/counterclaimant relating to his undertaking to court given on 26th July, 2011 to remove some rubble from the plaintiff's property. On 22nd September, 2011 the defendant/counterclaimant sought replies to his notice for particulars. The defendant/counterclaimant erroneously, dated the letter 22nd September, 2010. A period of inactivity appears to have ensued and the next letter furnished to the court is dated 16th April, 2012, from the plaintiff's solicitors to the defendant/counterclaimant. The letter refers to a letter from the defendant/counterclaimant of 11th April, 2012, in which he was clearly looking for replies to his notice for particulars delivered on 2nd August, 2011. The letter apologises for the delay in furnishing those replies and indicates that following a consultation within the coming two weeks, they hoped to revert shortly thereafter. The plaintiff's solicitors raised particulars of their own. They raised two queries:-

(i) The defendant/counterclaimant was asked to clarify the alleged method of payment of the sum of €30,000. He was asked whether he was alleging that it was the plaintiff or an employee who paid him the money. He was asked to say when it was paid and where it was paid.

(ii) In relation to the alleged deed of surrender, the plaintiff's solicitors asked the defendant/counterclaimant where the document was signed, when it was signed and who had presented this document to him for execution.

19. The case appeared in the call-over of the Kilkenny Civil List on Wednesday 23rd May, 2012. The attending solicitor's note indicated that the defendant/counterclaimant was at the call-over and had informed the County Registrar that once he received replies to his particulars of 2nd August, 2011, he anticipated furnishing a further lengthy request for particulars. In the circumstances, rather than fixing a date, the case was adjourned generally with liberty to re-enter.

20. These matters rested for four years and nine months during which there was no activity in relation to the claim. A notice of re-entry was filed on 10th February, 2017. On the same date the plaintiff delivered replies to the defendant/counterclaimant's notice for particulars of 2nd August, 2011. The replies identified the employees and associates of the plaintiff who had had dealings with the defendant/counterclaimant. The relevant invoices were furnished again, though there is specific reference to them having been furnished by the plaintiff during the currency of the rental and again having been furnished by the plaintiff's solicitor on 27th July, 2011. The replies made clear that the plaintiff was contending that there was no cheque and no deed of surrender.

21. On 22nd February, 2017 further copies of the replies to particulars and the notice of re-entry were sent by ordinary post. In addition the plaintiff's solicitors again asked for a copy of the map showing Take A, Take B and Take C. No map or drawing showing Take C was ever produced.

22. Having been re-entered, the case appeared in the Kilkenny Circuit List on Tuesday 21st March, 2017, at which point the plaintiff's solicitors indicated to the defendant/counterclaimant that they would be applying to have the proceedings listed for hearing before Judge Doyle as she had seisin of the case, having regard to previous orders made by her, and to the fact that the defendant/counterclaimant had given undertakings to her in respect of removal of rubble from the plaintiff's lands.

23. Following re-entry there was to-ing and fro-ing between the parties relating to case progression hearings and the list to fix dates. In the course of that correspondence the defendant/counterclaimant asked by what authority the proceedings had been listed in the absence of a "notice of intention to proceed". On 13th September, 2018, the plaintiff's solicitor pointed out to the defendant/counterclaimant that he had been informed by the County Registrar at a call-over on 6th June, 2018 that if he had an issue with the notice of re-entry served on him in February, 2017, he should bring a motion before the court, presumably to set aside the notice of re-entry. No such motion was served.

24. During the course of these interactions, the plaintiff filed a defence to the counterclaim on 29th May, 2018, in which the plaintiff denied that he had entered into the agreement described in the counterclaim and the contents of the counterclaim were denied as if set forth and traversed *seriatim*. The plaintiff pleaded that there was no note or memorandum in writing of the alleged agreement as required by the Statute of Frauds, which he wrongly pleaded to be a statute of 1965, instead of 1695. It was pleaded that in the absence of a note or memorandum in writing, any agreement referred to in the counterclaim was not enforceable against the plaintiff.

25. Eventually, the matter came on for hearing before Her Honour Judge Alice Doyle, on the 27th and 28th September, 2018, following which the court granted an order for possession of the property to the plaintiff, to be delivered up within ten weeks from the 28th September, 2018. Judge Doyle also ordered that the defendant/counterclaimant pay to the plaintiff the sum of €29,796 in respect of arrears of rent and mesne rates. The plaintiff was awarded the costs of proceedings to be taxed in default of agreement and the defendant/counterclaimant's application for a stay on the order was refused. A stay was ultimately granted by MacGrath J. in the High Court in December, 2018. The stay granted by MacGrath J. is for the duration of this appeal.

The plaintiff's case

26. The plaintiff gave evidence on his own behalf and in addition called Mark Hilliard his manager/accountant; Barry Monaghan, a property developer, with whom Mr Doyle had an arrangement from 2003 on in relation to the management and development of his properties; and Collette Buggy, his bookkeeper who has been employed in Mr Doyle's businesses since in or about 1998.

27. Mr Doyle is a businessman who is engaged in a number of ventures which include the retailing of builders supplies and the hire, sale and importation of machinery allied to building and household use. In the 1990s he was particularly involved in the importation of lawnmowers from around the world. At that time, he was paying significant rental for the storage of his machinery imports. He became aware that the Roadmaster Caravans Limited property in Castlecomer was up for sale. It was suitable for his machinery import business because it consisted of three warehouses, together with a showroom and offices. He contracted with Myles McCabe, managing director of Roadmaster Caravans Limited, for the purchase of the premises and surrounding lands in or about 1996 and he was ultimately registered as full owner of the property in April, 1997.

28. When he bought the property there were a number of tenants in situ. There was a bread distribution company in one part of the premises in Warehouse 3. There was a kitchen maker named Terry Smith in another part of the same warehouse. There was a Go Cart company in Warehouse 1. There was a medical appliances company at the front of the property adjacent to the public roadway. There was the defendant/counterclaimant Mr Leahy occupying a showroom and adjacent offices and toilet facilities. In addition he was using Warehouse 2 for the storage of property and equipment.

29. According to Mr Doyle's evidence, his manager/accountant handled most of the dealings with the tenants. Mr Doyle was aware when he purchased the property, that at least some of the tenants had acquired a business equity under the Landlord and Tenant (Amendment) Act 1980. According to Mr Doyle, he had dealings with most of the tenants and he acknowledged that during that period he had had a number of conversations with Mr Leahy. According to Mr Doyle his priority was to get access to the warehouses for the storage of his machinery. He does not have a strong memory of the sequence of events because he left most of the details to Mark Hilliard, his manager/accountant. He was aware that the defendant/counterclaimant Mr Leahy had some materials stored in Warehouse 2 and Mr Doyle was anxious to get access to that area for the storage of his own machinery. He does not have any particular memory of discussions with Mr Leahy around that time but he does recall that Mr Leahy wanted IR£17,000 in cash in order to waive his statutory entitlements to a new tenancy. He directed Mark Hilliard to pay him that sum in cash, to his recollection, in or about the summer of 1997, for the primary purpose of getting access to Warehouse 2 where Mr Leahy had some of his goods. Following payment Mr Leahy removed his goods and Mr Doyle refurbished Warehouse 2. The money paid by him to Mr Leahy came from earned income from the retail sales and was kept in a safe in his Carlow premises.

30. According to Mr Doyle, once he got access to Warehouse 2 he was happy enough to leave Mr. Leahy in the showroom area *pro tem*. When in due course he needed the showroom area and the ancillary offices for his own business, he agreed to let Mr Leahy occupy part of Warehouse 3 for his manufacturing business. He gave evidence that he did not give Mr Leahy a cheque nor was the agreement to waive his statutory rights reduced to writing. All of the other tenants left, leaving only Mr Leahy in occupation of part of Warehouse 3, as of late 1999/early 2000.

31. Mr Doyle is adamant that he never entered the elaborate arrangement contended for by Mr Leahy. In 2006, he and Mr Barry Monaghan were considering developing the substantial remainder of the property into a business park. In 2003, he had entered an arrangement with Barry Monaghan of Monaco Properties Limited for the purpose of development in relation to this and other property that he owned. He was aware that Mr Leahy had expressed an interest in buying a site or a unit, as had a gentleman by the name of Bambrick. He notified Mr Monaghan of this fact. The proposed development came to nothing.

32. In 2008, he instructed his solicitors to seek payment of arrears of rent from Mr Leahy. At this point, Mr Leahy had been in occupation of a portion of Warehouse 3 for seven years. As we have seen, Mr Leahy responded with his letter of 22nd January, 2008 referring to undertakings given to Mr Leahy by Mr Doyle in relation to the sale of a site at Castlecomer. Mr Leahy also indicated in that letter that he would pay any rents that may be due and sought a copy of the lease or rental agreement.

33. Mr Doyle gave evidence that the rent had been paid for a year or two and then stopped; that invoices had been sent out, but the bills were not paid. Asked why he had not followed up on the letter of 15th January, 2008, Mr Doyle said that during that period he had heart problems and that Mr Leahy was more trouble than he was worth.

34. Mr Doyle gave evidence that in 2006 when consideration was being given to developing the balance of the site, he asked Barry Monaghan to contact the plaintiff, as the plaintiff had told Mr Doyle that if the property was going to be developed that he would be interested in a site. Mr Doyle denied with some vigour the agreement which the defendant/counterclaimant alleged he had reached with him in the office in 1999, and described the alleged deal as a concoction made up by Mr Leahy to suit his purposes. He denied specifically that he had given Mr Leahy a cheque for €30,000 or for any amount. He denied that the surrender agreement was reduced to writing. He denied that he told Mr Leahy in 2000 that he would have to wait a little longer for the site because it had been so recently purchased. He denied that he told Mr Leahy in 2002 that he could hold on to Take B rent-free until such time as he was in a position to sell him a site. Asked why nothing was done between 2012 and 2017, Mr Doyle explained that during much of that period that he was in NAMA which he described as the greatest ordeal of his life. He exited NAMA in 2015.

35. The next witness was Mark Hilliard, who gave evidence that he had been working with Mr Doyle and/or his companies since in or about 1993; that he was a qualified accountant; that he was the financial controller; that he was the managing director of the hardware and hire section of the business; and that he had the accounting function for the whole of the business, as well as for the personal financial affairs of Mr Doyle. He was heavily involved in the purchase of the property in Castlecomer. He stated that at the time of purchase, there were five tenants in the property: the bread distributors; the Go Cart company; Terry Smith; Mr Leahy, who at that point was trading as South Leinster Interiors Limited; and a medical supply company in the front area beside the showroom. He dealt with the tenants after the purchase. The Go Cart company in Warehouse 1 wanted to vacate, and that released Warehouse 1 to Mr Doyle. Mr Leahy had off-cuts of material and some machinery in Warehouse 2, and also had a car stored there. Mr Hilliard was doubtful that this was a manufacturing area. Mr Hilliard was under the impression that Mr Leahy had rights in relation to Warehouse 2. He came to an arrangement with Mr Leahy that he would vacate the showroom and warehouse. Mr Doyle instructed him to make the agreement and he did so in July/August of 1997. The payment for the waiver of his statutory rights was made in cash because Mr

Leahy had requested it in cash. The sum paid was some IR£17,000. Mr Hilliard confirmed that the cash came from Mr Doyle and it was in a safe in the Shamrock premises in Carlow. The priority was to get access to the warehouses for the storage of machinery connected to the import business. According to Mr Hilliard, Mr Leahy did vacate the warehouse shortly after payment, in mid-1997. Thereafter he stayed on in the showroom by arrangement with Mr Doyle. Mr Hilliard's priority was to get access to Warehouses 1 and 2 and other arrangements and details would fall into place over time. Warehouse 2 was cleaned out, and readied for use. By 1999, things had progressed to the stage where they needed the showroom and office area for their own uses.

36. The next witness was Barry Monaghan who is an accountant and a property developer. In 2003, he entered a 50/50 joint venture with Mr Doyle to develop property. Consideration was given to developing a business park at Mr Doyle's lands in Castlecomer. In July, 2006, Mr Monaghan met with Phonsie Meally and Mr Doyle to discuss the prospects for development. Mr Monaghan produced a diary entry of that meeting. Mr Doyle had suggested that he have a chat with Mr Michael Leahy, who had expressed an interest in acquiring a site or a unit, if the property was being developed. He also suggested that he meet a gentleman by the name of Bambrick, who might also be interested. Mr Monaghan gave evidence that having telephoned Mr Leahy, he subsequently met him on site. They discussed the potential to provide either a serviced site or a completed unit in turn key condition. At that meeting, according to Mr Monaghan, Mr Leahy did not refer to any agreement that he had with Mr Doyle, for the provision of a site to him for a payment of €30,000. Mr Leahy told Mr Monaghan that his preference would be for a serviced site. Ultimately according to Mr Monaghan it became clear that the costs of development were higher than expected and the plan for development was abandoned. In cross-examination Mr Leahy put it to Mr Monaghan that they had never met.

37. The next witness was Collette Buggy. Collette Buggy is a bookkeeper who has been employed in the plaintiff's various businesses since in or about 1998. She gave evidence that she was in charge *inter alia* of Mr Leahy's rental account. She produced invoices sent to Mr Leahy in respect of the rent between January, 2000 and December, 2009. The rent was the same as he had previously paid in respect of the showroom and ancillary offices. The rent was payable quarterly. The rent was paid for the year 2000. The rent was not paid in 2001. In July, 2002 the defendant/counterclaimant paid a sum of €5,000 in respect of the rent due from 2001. Ms Buggy produced a statement showing that this payment discharged the rent up until the end of September, 2002 leaving a small residue in respect of payment of the quarter October, 2002 to December, 2002. Her evidence is that no rent has been paid since the payment of the €5,000 in July, 2002. Invoices raised in respect of the rent were initially sent to his address at Shamrock Commercial Park, Castlecomer. Later they were also sent to another address given to her by Mr Doyle, being premises occupied by the defendant/counterclaimant at an industrial estate in Portlaoise, Co. Laois. On occasion invoices and statements were hand delivered to the defendant/counterclaimant at the premises in Castlecomer. Ms. Buggy also gave evidence that she rang the defendant/counterclaimant's business landline on 056 41533 on a number of occasions. Ms Buggy stated that on occasion, she spoke to a woman who answered the phone at the business, and who promised to bring the matter to the attention of Mr Leahy the defendant/counterclaimant. On at least one occasion, the female who answered the business landline requested copies of the invoices which had been sent out and remained unpaid, and these were delivered directly to Mr Leahy's premises at Shamrock Commercial Park, Castlecomer. She states that she rang Mr Leahy's mobile phone 0872636531 in an attempt to secure the overdue rental payments, but that the calls invariably went to voicemail and that he never once returned a call. In cross-examination it was suggested to her that the calls to Mr Leahy's direct line at Shamrock Commercial Park had to have been made prior to February, 2002 because his direct line to the premises was disconnected at that time. Ms Buggy replied that she did not have the particular dates of the calls with her, but indicated that the calls had been made during the period of the tenancy.

The defendant/counterclaimant's case

38. The defendant/counterclaimant gave evidence that he moved into Shamrock Commercial Park in 1987 and that at the time he was the only tenant. Initially he occupied the showroom and office area. After some time he needed extra space and he spoke with the owner Myles McCabe who allowed him to use Warehouse 2 because at the time he was the only tenant who was maintaining the property and providing security. The next tenant to take up occupation was a Go Cart company who took Warehouse 1. That tenant was followed by a bread distribution company who took part of Warehouse 3. A competitor in the kitchen manufacturing business, Terry Smith, occupied another part of Warehouse 3. The defendant/counterclaimant gave evidence that he used Warehouse 2 for manufacturing purposes. He stated that at the time when the property was for sale by Roadmaster Caravans Limited, he had approached the managing director Myles McCabe, to inquire about the purchase of a site. Mr McCabe he stated, wanted to sell the property as a single lot. He gave evidence that at the time of the sale to Mr Doyle the plaintiff, he was willing to surrender the showroom to Mr McCabe without requiring any payment. After the purchase by Mr Doyle according to the defendant/counterclaimant, nothing happened for a period of approximately twelve to eighteen months. During that period his evidence is that he continued to fix the roofs of the warehouses and that he continued to use Warehouse 2 for manufacturing his kitchens. His evidence is that in 1999, Mr Doyle's manager, without notice to him, locked him out of the offices and toilets attached to the showroom. He states that Mr Doyle the plaintiff approached him and told him that he needed the showroom area, as a display area. By this time in 1999, he states that he was the only tenant left of the five original tenants. He fixes the time of these events by reference to the period of employment of an acquaintance of his. In late 1999, he states that he had several meetings with Mr Doyle. These took place in the offices in Castlecomer. He states that at that point he was locked out of the offices and toilets but still occupied the showroom. He gave evidence that he was anxious to remain on the premises as he had developed an attachment to the site and that it was close to his own house. He states that he discussed with Mr Doyle his interest in acquiring a site in the property. He states that he entered a surrender agreement with Mr Doyle. He states that in principle he did not require payment of any funds as he was willing to do a straight trade of Warehouse 2 and the showroom in return for a half acre site. He states that around this time he walked the site with Mr Doyle and that they discussed the position of the septic tank relative to a potential site which Mr Leahy had identified. He states that Mr Doyle informed him that since he had only bought the premises, he did not want to ask the bank to release any property at that stage. At a meeting some weeks later, he states that it was agreed that as there was no urgency in relation to a site, that he would move his kitchen machinery and production into Warehouse 3, and that in return he would receive a written agreement on the surrender of his tenancy rights, together with a payment of €30,000 as security against the provision of a site. The €30,000 was to be returned on the site being transferred to him within a period of two years.

39. He states that Mr Doyle paid him the €30,000 by cheque in late 1999. He says that at the same time he signed two written agreements, both of which were to protect Mr Doyle's interests. The payment for the surrender agreement was to ensure that Mr Leahy's statutory rights had been waived and that the sum of €30,000 would be returned once the half acre site was transferred to him. He maintains that there was a second written agreement relating to his tenancy in Warehouse 3 and that this was executed in order to ensure that he did not acquire further statutory rights in relation to that property. He maintains that the written agreement was for a two-year tenancy. He gave evidence that in Christmas 1999 he moved out of the showroom and Warehouse 2 and moved into the smaller unit in Warehouse 3, and that his kitchen production business never ceased. He gave evidence that between Christmas 1999 and 2002, the nature of his business was such that he no longer required a kitchen showroom. The main focus of his work at that point, consisted of contracts to provide kitchen units to various bodies. He referenced social housing in the Ballymun Regeneration project, and a firm of builders in Kilkenny, for whom he made fixed kitchen units of a single design for each development. He also provided kitchen units to a charity known as 'Respond'. In 2002, he gave evidence that he invested in a new business, making single-piece kitchen worktops, which he set up in Portlaoise. Ultimately that business got into difficulties and has been the subject of

further litigation by Mr Leahy against a German company. While Mr Leahy concentrated and invested heavily in his new business venture relating to kitchen worktops, he gave evidence that his employees in Castlecomer were continuing to manufacture and supply kitchen units. The defendant/counterclaimant also gave evidence about his involvement with a company called Tippto International Limited and a UK company, Laminated Products Limited.

40. He denies that he received invoices in respect of rent after 2002. He states that at the end of 2002 he had a meeting with Mr Doyle about the transfer of the agreed half acre site. He states that at the meeting at the end of 2002, Mr Doyle told him that he needed more time and that if the defendant/counterclaimant did not push the issue of the transfer of the site, that he would not charge him any rent on the unit. After that time he was heavily engaged and occupied with his kitchen worktop business and adopted the attitude that Mr Doyle would give him the site in Castlecomer when he was ready to do so.

41. In 2006/2007 he learned of a potential development of the property. This he says, led him to phone Mr Doyle and threaten him with the involvement of his then-solicitor, Padraig Butler, if he did not get more detailed information. According to him, Mr Doyle said that he would get someone to contact him. Subsequently he received a phone call from a person who turned out to be Barry Monaghan, who he says, told him that he had been asked by Mr Doyle to contact Mr Leahy, because Mr Leahy had an agreement with Mr Doyle in relation to the Castlecomer property. Prices of serviced sites and completed units were discussed and according to Mr Leahy rejected by him immediately, because he knew that he could build a unit twice the size for half the price. He denies that he met Mr Monaghan.

42. Ultimately no planning was sought for the development of the Castlecomer property and Mr Leahy says that Mr Doyle told him that the service costs were as he put it prohibitive. According to the witness, Mr Doyle also told him that if he proposed to build on his site, that there would be exceptionally high costs in relation to the issue of water management.

43. In 2008 he says, that out of the blue, he received a letter seeking payment of rent from 2002 to 2008. He answered the letter on 20th January, 2008. We have seen earlier the contents of that letter. In February, 2010 a further letter seeking payment of rent and possession was sent. As we have seen, the defence of the defendant/counterclaimant was ultimately delivered on 2nd August, 2011 and on the same date a notice for particulars was served. Those particulars remained outstanding according to the plaintiff during five call-overs of the Civil List in Kilkenny. As we have seen, the proceedings were adjourned generally with liberty to re-enter on 23rd May, 2012. The witness laid particular emphasis on the fact that nothing happened throughout the remainder of 2012, 2013, 2014, 2015, and 2016 until a notice of re-entry and replies to the particulars sought in August, 2011 were served in February, 2017. The plaintiff raised an issue that no notice of intention to proceed had been filed. He also questioned whether Judge Doyle had seisin of the case. The witness laid particular emphasis on the source of the money with which Mr Doyle had paid him. The court made it clear in the course of the hearing, that this was not an issue which affected the court's determination of the rights of the parties. One way or another, it was agreed that Mr Doyle had given him money in payment for the surrender of his statutory rights to a new tenancy.

Discussion

44. Having reflected on the evidence, the court considers that the evidence of the plaintiff and the witnesses called by him, is more credible than that offered by the defendant/counterclaimant. The core element of the defendant/counterclaimant's counterclaim is that in 1999, in the showroom which he rented at Shamrock Commercial Park, Castlecomer, he reached an agreement with the plaintiff, which agreement was reduced to writing, that he, the defendant/counterclaimant, would surrender or waive his right to a new tenancy in the premises, in return for an agreed site elsewhere on the property, on which he could develop his own manufacturing unit. The alleged written agreement also provided that pending the transfer of the agreed site the plaintiff would pay to the defendant/counterclaimant the sum of €30,000, which sum was to be returned to the plaintiff, on the transfer to the defendant/counterclaimant of the agreed site. Ancillary to this agreement, according to the defendant/counterclaimant, was a formal written agreement for the lease to him of another part of the property for a period of two years, until the plaintiff was in a position to execute the transfer of the agreed site to the defendant/counterclaimant.

45. Apart from the fact that the court considers it inherently unlikely that a businessman of Mr Doyle's experience would agree and sign such a complex deal, without the benefit of legal advice, or indeed a witness to the transaction, the court on the evidence has concluded on the balance of probabilities that there was in fact, no such agreement as is now contended for by Mr Leahy. The basis upon which the court has come to this conclusion is as follows. First of all, there is the defendant/counterclaimant's correspondence of 22nd January, 2008 and 7th February, 2010, in response to the plaintiff's demands for possession of the rented property and the arrears of rent. Had there been in existence a written agreement such as the defendant/counterclaimant now contends for, one would have expected that agreement to be front and centre of his response to the plaintiff's demands. In neither letter is there a reference to the alleged deal of 1999. Each letter refers to undertakings by the plaintiff to the defendant/counterclaimant, in relation to the sale of a site. The nature and extent of the alleged undertakings are not set out in either letter. This court has no difficulty accepting that the defendant/counterclaimant was at all times interested in acquiring a site in the Shamrock Commercial Park in Castlecomer. The court similarly, has no difficulty accepting that during his admitted discussions with the plaintiff Mr Doyle, that Mr Doyle may have promised him that in the event that he decided to develop the park, that he would let the defendant/counterclaimant know, and perhaps even give him first refusal on a site. That would be entirely consistent with the evidence of Mr Doyle and Mr Monaghan that when consideration was being given to the development of a business park, Mr Doyle asked Mr Monaghan to contact the defendant/counterclaimant Mr Leahy, to discuss the proposal, on the basis that Mr Leahy had expressed an interest in acquiring a site. That however, is a long way from establishing the existence of the agreement which the defendant/counterclaimant now says he made with the plaintiff in late 1999. Finally, on this aspect of the case, the court notes that Mr Leahy could not have made any agreement with Mr Doyle in 1999 which involved a payment of €30,000. This is because the Euro only became legal tender in this jurisdiction in early 2002.

46. There are other aspects of the evidence which cause the court to doubt the reliability of the defendant/counterclaimant's evidence. Without purporting to produce an exhaustive list, the following examples come to mind. Barry Monaghan gave evidence that he met Mr Leahy following a meeting in July, 2006 with Mr Doyle and a local auctioneer, for the purpose of discussing the potential development of Shamrock Commercial Park. Mr Leahy has sworn that he never met Mr Monaghan yet, in his letter of 7th February, 2010, he states, *"Unlike 2007 when Mr Doyle had a third party meet me in relation to his undertakings, land values are returning to normality."* This in the court's view, is as a matter of probability, a reference to his meeting with Mr Monaghan.

47. Collette Buggy a bookkeeper employed by Mr Doyle gave clear evidence, which evidence the court accepts, that throughout the period 2000 to 2009 she sent invoices and/or statements to the defendant/counterclaimant in respect of rents due on the property occupied by him. Those invoices and/or statements were sent to the property and as of 2005, they were also sent to an address at an industrial park in Portlaoise, from which the defendant/counterclaimant was operating another business. This address was given to Ms Buggy by the plaintiff Mr Doyle. Ms Buggy also gave evidence that on occasion the invoices and/or statements were hand delivered by one Oliver Carey, an employee of Mr Doyle. Mr Leahy asserted that he did not receive these invoices and/or statements, and demanded proof of posting. As it happens, there is within the correspondence related to the claim, proof that correspondence

addressed to Mr Leahy at the Shamrock Commercial Park, Castlecomer, did find its way to him. The initiating letter of 25th January, 2010, and the registered letter enclosing the Ejectment Civil Bill, and subsequent correspondence, were all addressed to the defendant/counterclaimant at the Shamrock Commercial Park address in Castlecomer and all were received by him. The court therefore rejects the defendant/counterclaimant's assertion that he did not receive the invoices and statements sent to him in respect of rent due. Similarly, in the face of the evidence of Collette Buggy that over the period, she phoned his direct business line at Shamrock Commercial Park, Castlecomer, as well as his mobile phone number, in an attempt to obtain payment of the rent due, he swore that any call to his direct business line had to have been made in 2001, as he had disconnected his business line in 2001 or 2002. No evidence of disconnection was offered. Quite apart from the fact that Mr Leahy adduced no evidence as to the disconnection of his direct line to the premises in 2002, that evidence flies in the face of his other sworn evidence that after 2002 the kitchen manufacturing business in Castlecomer was very busy doing contract kitchens. It had three named people employed. Under contract, it was supplying kitchens to a charity called Respond, and it had a contract to supply kitchens to a Kilkenny builder as well as to the Ballymun Regeneration project. It seems to the court that one or other of Mr Leahy's sworn statements in this regard is untrue. Either he was doing no business from the premises and the phone line was disconnected, or the business was very busy with contract work in which case as a matter of probability there had to be a working business line.

48. Another discrepancy which indicates the unreliability of Mr Leahy's evidence is the fact that he pleaded occupation of Warehouse 2 as part of his tenancy agreement with Myles McCabe of Roadmaster Caravans Limited. That is not true and on the evidence he knew that it was not true. His tenancy agreement which was written and not oral as pleaded, was specifically limited to the showroom, and ancillary office and toilet facilities. When it became clear that the written tenancy agreement was other than pleaded, Mr Leahy pivoted and swore that his occupation of Warehouse 2 was by virtue of an arrangement with Myles McCabe whereby he was allowed to occupy the warehouse in return for doing maintenance work, particularly on the asbestos roofs of all of the warehouses. The court has no idea whether this is true or not, but even if it is, such an occupancy would not give rise to landlord and tenant rights under the Landlord and Tenant (Amendment) Act 1980.

49. In cross-examination it transpired that during the currency of these proceedings, Mr Leahy had lodged a section 49 application under the Registration of Title Act 1964, with the Property Registration Authority, claiming adverse possession of the land adjoining the development. This may well include the land to which he claims to be entitled as a matter of contract. The extent of his claim to adverse possession is not before the court. The application appears to have been rejected by the Property Registration Authority. The only significance of this matter in determining the rights of the parties before the court on this claim, is that in cross-examination, Mr Leahy stated that he had sought squatter's title as a bargaining tool, to bring the plaintiff Mr Doyle to the table. That frank admission, in the court's view, provides the key to the unlocking of this whole case.

50. Mr Leahy considers that he was short-changed by Mr Doyle in the trading of his statutory rights to a new tenancy for a payment of IR£17,000. As he said, he considered that Mr Doyle "*screwed me*". He believes that Mr Doyle took unfair advantage of his inexperience to get a deal that was far less than his statutory tenancy was worth. He may or may not be right about that. The court was not particularly impressed by Mr Doyle's explanation that he had paid Mr Leahy in cash because Mr Leahy had asked for cash. Just because someone requests payment in cash does not mean that they have to be paid in cash. There is no doubt in the court's mind that conducting the deal in cash and without a written agreement, was also to Mr Doyle's benefit. By doing so, he avoided legal costs and legal scrutiny of the arrangement, and thereby avoided the possibility that someone might advise Mr Leahy, that in the context of Mr Doyle's plans for the property, Mr Leahy's waiver might be worth considerably more than IR£17,000. That said, the court is persuaded on the balance of probabilities that Mr Leahy did "*the deal and took the cash*".

51. Mr Leahy in these proceedings, has attempted to right the wrong he perceives was done to him. He has done so by creating a claim which in his view, accurately reflects the return that he should have had from Mr Doyle, for the waiving and surrender of his statutory rights. It appears to the court that Mr Leahy views the litigation process as a battle to be won, in which the ultimate prize is to best your opponent, and during which whatever is necessary to achieve that end, is considered fair game. Each time Mr Leahy encountered an obstacle in the evidence he simply pivoted and adjusted his evidence, to either surmount or circumvent the obstacle. That approach unfortunately makes his evidence unreliable. Mr Leahy should accept that sometimes in life we make bad deals. When we do so, we should learn from it and move on.

52. For the foregoing reasons the court is satisfied on the balance of probabilities, that the arrangement contended for by Mr Leahy is a fiction. The court's findings of fact therefore as to what transpired following the purchase of Shamrock Commercial Park, Castlecomer by Mr Doyle are as follows. Following the purchase of the property Mr Doyle paid the defendant/counterclaimant Mr Leahy IR£17,000 for a waiver or surrender of his rights under the Landlord and Tenant (Amendment) Act 1980. In late 1999, when Mr Doyle required the use of the showroom area which Mr Leahy had rented from the previous owner, he permitted Mr Leahy to occupy another part of the premises on the same terms and conditions as he had occupied the showroom. Mr Leahy went into occupation in late 1999 or early 2000. He paid rent until in or about September/October, 2002. Despite demand, in the form of invoices and/or rental statements, he has paid no rent since that time. He remains in occupation and has asserted in correspondence a willingness to pay any rent found to be due.

53. The court is satisfied for the reasons set out herein that there were no agreements written or otherwise between the parties of the type alleged by Mr Leahy. Such rights as he may have (if any) derive solely from the provisions of the Landlord and Tenant (Amendment) Act 1980. The court proposes to hear legal submissions from the parties on that issue, based on the findings of fact made in this judgment.