THE HIGH COURT

COMMERCIAL

[2015/1651 P (2015) 39 COM]

BETWEEN

KNOCKACUMMER WIND FARM LTD.

PLAINTIFF

AND

DENIS CREMINS AND SHEILA CREMINS

DEFENDANTS

JUDGMENT of Mr. Justice Haughton delivered on the 19th day of February, 2016

Background

1. The plaintiff operates a renewable energy business, including Knockacummer Wind Farm in County Cork ("the Wind Farm"). The defendants were the registered owners of the property described in Folios 112393F, 112441F, 112433F, 59950F, 59951F, 59952F and 70317F, County Cork ("the Lands") comprising approximately 375 acres. In late 2002/early 2003 the Lands and the adjoining lands were identified as being suitable for the development of the Wind Farm. The plaintiff's predecessors SWS Energy Ltd. and SWS Knockacummer Wind Farm Ltd. (collectively "SWS") entered into a joint venture agreement with the defendants in 2003 to develop the Wind Farm, and planning permission was obtained in 2005. The permission is for a period of twenty years from the date of commissioning of the turbines. As commissioning occurred in December, 2014, the permission is due to expire in 2034. The Wind Farm consists of 29 turbines, 9 of which are located on the Lands.

2. Since 2003 the relationship between the plaintiff/its predecessors and the first named defendant ("Mr. Cremins") has become acrimonious, and this first came to a head in May, 2009, when Mr. Cremins instituted two sets of proceedings – the first by plenary summons under Record No. 2009 4551 P, in which Mr. Cremins sought an equity stake in the Wind Farm, and the second injunction proceedings under s.160 of the Planning and Development Act 2000, Record No. 2009 114 MCA.

3. Both sets of proceedings were compromised by written agreement dated 25th November, 2009 ("the 2009 Settlement Agreement"). Pursuant to the 2009 Settlement Agreement the defendants agreed to execute leases in favour of SWS in respect of the Lands ("the Leases"). In return SWS agreed to pay to the defendants an annual rent in the amount of €200,000.00. The defendants also warranted that they had all the necessary consents to grant the Leases and that there was nothing prohibiting them from doing so. They also agreed that they would not do, or permit to them, anything which could cause damage to or interfere with the development or the operation of the Wind Farm. Also each of the parties agreed with the other that he or it should "act in good faith in carrying out and performing the terms of this Agreement".

4. Following the execution of the Leases the defendants were asked to furnish evidence that their mortgagee, Bank of Scotland (Ireland) Ltd. ("B.O.S.I.") had consented to the Leases. When the defendants approached B.O.S.I. they were told that B.O.S.I's. consent was conditional on the defendants assigning the rental payments under the Leases to B.O.S.I. The defendants failed or refused to do this. Accordingly SWS initiated proceedings in the High Court in July, 2011, (Record No. 6468P [2011] No. 65 COM) seeking to compel the defendants to perform the 2009 Settlement Agreement and to specifically secure the B.O.S.I. consent. A trial date was fixed for 13th December, 2011, and the parties agreed to separate the issue of liability and damages. The liability issue was opened to the Court on that day, and in the afternoon a partial settlement was reached pursuant to which on consent an order was made (Dunne J.) that the defendants obtain the consent of B.O.S.I. to the Leases

> "by immediate execution and return of the facility letters … and the immediate execution and return of the assignment in respect of the rent due under the said Leases to B.O.S.I. and to otherwise take all steps and do all things necessary to procure said consent".

5. The defendants provided the B.O.S.I. consent on the 11th May, 2012. The trial of the remaining issues between the parties commenced on 15th May, 2012, and ran for five days. On the fifth day the parties entered into a Settlement Agreement dated 22nd May, 2012, ("the 2012 Settlement Agreement") which provided *inter alia* for the payment of €6 million to the defendants for the sale of the Lands to SWS:-

> "subject to: (a) a buy-back option after thirty years in favour of the defendants for €1.00 and (b) (should the defendants exercise such buy-back option) an option in favour of SWS for a twenty-five year lease of the Lands"
>
> ("the Option Agreement").

The Option Agreement was to be formalised by way of a written agreement. The Option Agreement was executed in June, 2012, and became effective on 31st August, 2012, being the date of completion of the sale of the Lands by the defendants to SWS. The delay in completion was occasioned by title issues involving Mr. Cremins's brother Patrick Cremins. This necessitated the issue of proceedings by SWS against Patrick Cremins, but these were resolved on 8th August, 2012, when Patrick Cremins attested that he had no right, title, estate or interest in the Lands.

6. By notice in writing dated 14th March, 2013, O'Connell & Clarke, solicitors on behalf of Mr. Cremins purported to exercise the defendants' option to buy-back the Lands ("the Purchase Option") pursuant to clause 2 of the Option Agreement. This notice was served on the plaintiff at its registered office in Cork and was stamped as being received on 19th March, 2013. As it was served by post, pursuant to clause 11.5.2 of the Option Agreement if it was a valid Purchase Option Notice it was deemed to have been given "two Business Days after same shall have been posted", and accordingly was deemed to have been served on 16th March, 2013.

7. If the Purchase Option Notice was valid then under clause 5.3.2. the plaintiff had fourteen days from 16th March, 2013, in which to serve a Lease Option Notice seeking to exercise the Lease Option – to take a twenty-five year leases of the Lands, commencing in 2042. By letter/notice in writing dated 27th March, 2013, addressed to the defendants at "Meeganarie, Knocknagoshel, Co. Kerry" the plaintiff purported to exercise the Lease Option. It is not disputed that on the afternoon of 27th March, 2013 the envelope containing that notice was hand delivered by Mr. Ulick Devane to the defendants' son Michael Cremins, then fifteen years of age, but it is disputed whether this occurred on the public road close to the defendants' dwelling house, or somewhat further away in the neighbouring farm yard of Mr. Patrick Cremins. In either event the defendants assert that the service was not good in law, and that Michael Cremins mislaid the envelope and it never reached them.

8. In addition to hand delivery, on 28th March, 2013, Messrs. A & L Goodbody solicitors acting on behalf of the plaintiff sent by email and enclosed a copy of the Lease Option Notice to O'Connell & Clarke solicitors for the defendants, with a covering letter stating "We enclose a copy of the Lease Option Notice served by hand on your client yesterday."

9. The defendants have since claimed that the Lease Option Notice was not properly served on the defendants and accordingly is invalid. The plaintiff has brought these proceedings to determine that issue and related issues concerning the proper construction of the Option Agreement.

10. The plaintiff asserts that the Option Agreement should be construed as only permitting the service of the Purchase Notice in 2042. In the alternative, they seek rectification to bring it into conformity, they say, with the 2012 Settlement Agreement. By way of permitted amendment of the pleadings the plaintiff also asserts that the Purchase Notice served was not a proper exercise of the buy-back option because it was sent on behalf of Mr. Cremins alone and not jointly on behalf of both defendants. As a further alternative the plaintiff asserts that time was not of the essence of the exercise of the Lease Option. They also assert that the Lease Option Notice was served on the defendants in compliance with the Option Agreement, or alternatively that the delivery of a copy by email and post to Messrs. O'Connell & Clarke should be deemed to be good service.

11. At the trial of this action the Court heard from five witnesses who gave evidence on behalf of the plaintiff, and has also considered the agreed witness statement of Laurence K. Shields, and appendices consisting of a map and photographs in the witness statement of Denis McCarthy. Four witnesses gave evidence on behalf of the defendants, and the witness statement of Martin Hayden was agreed and has been considered. In addition the Court has had the benefit of extensive written and oral legal submissions from counsel.

Option Agreement and Purchase Option Date

12. The first issue that arises is whether, or upon the true construction of the Option Agreement, the defendants had any entitlement to exercise the Purchase Option prior to 2042. The scheme of the Option Agreement contemplated firstly the defendants exercising the Purchase Option which would give rise to a contract for the sale back of the Lands to the defendants for €1.00, and secondly the exercise thereafter within fourteen days by the plaintiff of the Lease Option for twenty-five leases commencing in 2042. Certain definitions are set out in clause 1.1 of the Option Agreement that are relevant:-

> "***Acceleration Notice*** – means a written notice served by SWS on Cremins requiring them to confirm in writing within 60 days whether they shall exercise their Purchase Option on the Purchase Option Date which Acceleration Notice may be served by SWS on Cremins at any time following the date hereof...
>
> ***Lease Option*** – means the option to be granted by Cremins to SWS to take a lease (or leases at the election of SWS) of the Option Property which SWS may exercise in the manner set out in clause 5 hereof;
>
> ***Lease Option Date*** – means the date upon which the Purchase Option has been exercised...
>
> ***Purchase Option*** – means the option granted by SWS to Cremins to purchase SWS' interest in the Option Property for the Purchase Price on the Purchase Option Date which Cremins may exercise in the manner set out in Clause 2 hereof;
>
> ***Purchase Option Date*** – the earlier of (i) [22 June] 20421 or (ii) in circumstances where SWS serves an Acceleration Notice, the date which is 150 days after the date of service of the Acceleration Notice..."

[Footnote 1 reads – 'insert date which is 30 years from Closing Date of sale of Land.']"

"**The Purchase Option**" is then dealt with in clause 2;

> "2.1. Consideration for the Purchase Option
>
> In consideration of the payment of the sum of €1.00 (one euro) by Cremins to SWS (the receipt whereof SWS hereby acknowledges), SWS hereby grants to Cremins the Purchase Option on the Purchase Option Date.
>
> 2.2. Pre-Condition to completion/Lease Option
>
> In the event that:-
>
> (i) Cremins exercises the Purchase Option in accordance with the provisions of Clause 2.4 of this Agreement and
>
> (ii) SWS exercises the Lease Option in accordance with the provisions of Clause 9 of this Agreement, Completion shall be strictly subject to Cremins simultaneously granting and delivery of the executed Lease to SWS.
>
> 2.3. Lapse of Purchase Option
>
> The Purchase Option can lapse (if not already exercised) on:-
>
> (i) [23 April] 20422 or
>
> (ii) In circumstances where Acceleration Notice has been served by SWS, the date which is 61 days after the date

of service of Acceleration Notice."

[Footnote 2 reads: 'insert date which is one day after the date referenced in the definition of 'Purchase Option Date']

"2.4 Exercise of the Purchase Option

SWS hereby grants to Cremins the option to purchase SWS' interest in the Option Property for the Purchase Price on the Purchase Option Date subject to compliance with the following conditions:-

2.4.1. The receipt by SWS not less than 90 days prior to the Purchase Option Date of written notice of intention to purchase SWS' interest in the Option Property and the notice shall be effective and the Purchase Option shall be deemed to be exercised at the time at which the notice is deemed to be delivered to SWS pursuant to Clause 11.4.

2.4.2. The notice, once served pursuant to Clause 2.4.1, shall be irrevocable without the written agreement of SWS."

13. Clause 2.5 goes on to provide that immediately upon exercise of the Purchase Option there will automatically arise between the parties an agreement for SWS to sell and Cremins to purchase the Lands, and clause 3 provides that the terms and conditions that are to apply are those set out in the Second Schedule, which sets out the variations to apply to the General Conditions of sale, 2009 edition published by the Law Society.

14. Clause 4 is headed "Completion", and clause 4.1 states:-

"4.1. Completion of the sale of the Option Property shall take place at the offices of SWS' Solicitors on the later of (i) the Purchase Option Date and (ii) in circumstances where the Lease Option has been exercised, 14 days after the Lease has been settled in accordance with Clause 6 below (or the next Business Day in the event that such day is not a Business Day)."

15. Clause 4.5 provides that upon Completion the Option Property:-

"... shall be sold and bought on an 'as is' basis and SWS shall give no warranties as to the title, planning, condition or otherwise in respect of the Option Property save as set out in the Second Schedule."

16. Clause 5 then deals with "the Lease Option" and it is appropriate to set it out in full. It is also appropriate to set out parts of the ensuing Clause 6 – 6.1 and 6.2 because great reliance is placed on these provisions by the plaintiff:-

"5.1 Consideration for the Lease Option

In consideration of the payment of the sum of €1 (one euro) by SWS to Cremins (the receipt whereof Cremins hereby acknowledges), Cremins hereby grants to SWS the Lease Option on the Lease Option Date.

5.2. Lapse of the Option

The Lease Option shall lapse (if not already exercised) on the date which is the earlier of (i) the day after the date of Completion and (ii) the date of the lapse of the Purchase Option pursuant to Clause 2.3 above.

5.3. Exercise of the Option

Cremins hereby grants to SWS the option to take (or to nominate nominee/nominees to take) a lease (or leases at the option of SWS or its nominee(s)) of the Option Property on the Lease Option Date subject to compliance with the following conditions:-

5.3.1. the Lease Option shall not be exercisable until and unless the Purchase Option has been exercised;

5.3.2. the receipt by Cremins not more than 14 days after the Lease Option Date of written notice of intention to take a lease (or leases at SWS' option) of the Option Property and the notice shall be effective and the Lease Option shall be deemed to be exercised at the time at which the notice is deemed to be delivered to Cremins pursuant to Clause 11.4; and

5.3.3. The notice, once served pursuant to Clause 5.3.2, shall be irrevocable without the written agreement of Cremins.

5.4. Binding Agreement

Immediately upon the exercise of the Lease Option there shall arise automatically between Cremins and SWS a binding agreement for Cremins to grant and SWS to take a lease (or leases at SWS' option) of the Option Property in the form of the Lease and otherwise as set out in this Agreement.

6. TERMS OF THE LEASE

If SWS shall exercise the Lease Option then the following terms and conditions shall have effect:-

6.1. No later than 7 days after the exercise of its Lease Option, SWS shall procure that its solicitors furnish a draft Lease to Cremins and each of SWS and Cremins covenant and undertake to adhere to the following timetables:-

6.1.1. Within 14 days of receipt of the draft Lease, Cremins shall procure that their solicitors shall

reply to SWS' solicitors setting out all of the amendments which Cremins requires to be made to the draft Lease, and Cremins hereby acknowledge and agree that should there be any failure to deliver a note of all of the required amendments to SWS' solicitors within such timeframe, Cremins shall be deemed to have accepted the draft Lease as furnished and shall be obliged to execute and deliver same to SWS on Completion.

6.1.2. Within 7 days of receipt of Cremins' solicitors' comments on the drat Lease, SWS shall confirm in writing which of Cremins' amendments are acceptable and to the extent that any provisions of the Lease remain to be agreed between the parties, such dispute or difference shall be determined in accordance with Clauses 6.3 or 6.3 below (as appropriate).

6.1.3. On the determination of any dispute or difference relative to the draft Lease in accordance with Clauses 6.3 or 6.4, SWS shall procure that the Lease is engrossed for execution and Cremins and SWS' hereby agree to execute the Lease in duplicate (and same shall be held in escrow by SWS' solicitors to be delivered on Completion).

6.2. The terms of the Lease shall mirror the commercial terms contained in the 2009 Leases save (i) that the rent payable thereunder shall be agreed between the parties (or in default of agreement between the parties in accordance with the terms of Clause 6.3 below); (ii) that the Landlord Termination Clauses contained in the 2009 Leases shall not be incorporated in the Lease; and (iii) as may be required to be amended or updated to comply and accord with (a) changes in relevant legislation, (b) current landlord and tenant practice and (c) market standard provisions for leases in the windfarm industry as at the date of the grant of the Lease." [Emphasis added].

17. Clause 6.3 then provides that if there is a dispute as to quantum of "*the market rent then payable for leases of lands upon which wind turbines are …erected*" it may be referred to an expert valuer for a final and binding determination to be issued within 30 days. Clause 6.4 then provides that in relation to any other terms of the Lease that may be disputed these may be referred to the determination of an expert (or appointed by the President of the Law Society), which determination is to be made within 30 days and is also to be final and binding.

18. Clause 7 headed "Completion of Lease" at clause 7.2 obliges Cremins to deliver to SWS such documentation as may be necessary to affect the grant of the Lease and such other documentation "as shall be in accordance with standard conveyance/Landlord and Tenant Law custom and practice at that time".

The Legal Argument

19. The difficulty that gives rise to these proceedings is the defendants' contention that construing clause 2, using the definitions provided in clause 1.1, and giving the wording in clause 2 its ordinary and natural meaning, no date for the commencement of the right to exercise the Purchase Option by the defendants appears from the text.

20. At first glance clause 2.1 appears to grant to the defendants the Purchase Option "on the Purchase Option Date" i.e. 22nd June, 2042, and similarly clause 2.4 grants the option to purchase "on the Purchase Option Date". However, clause 2.4.1 then provides that the written notice exercising the option must be received by SWS "not less than 90 days prior to the Purchase Option Date". This purports to set an end date to the exercise of the option. Ninety days prior to 22nd June, 2042 would be 24th March, 2042, so the last date for exercising the option under clause 2.4.1 would seem to be 23rd March, 2014. It will be noted that clause 2.3 provides that the Purchase Option is to "lapse (if not already exercised) on … 23 April 2042". These two provisions thus conflict as to the last date upon which the Purchase Option may be exercised. Nothing turns on that discrepancy in the present case and the court is not asked to resolve this difference. What is relevant, and what appears to be absent from clause 2, is any express provision or wording stating the first day or start date upon which the defendants may exercise the Purchase Option, and this is the nub of the first issue that the court must decide.

21. The defendants thus argue that clause 2.4.1 of the Option Agreement, where it refers to a notice being served not less than 90 days prior to the Purchase Option Date (of 22nd June, 2042), as meaning that the Purchase Option could be exercised at any time prior to that date. For the plaintiffs it is argued that this was never the intention of the parties to the Option Agreement, and that the true intention was that it would be exercised in 2042, and not less than 90 days before the Purchase Option Date being 22nd June, 2042 i.e. in the period 1st January, 2042 up to and including 23rd March, 2042. The plaintiff argues that clause 2.4 should be read with the insertion of the words "in 2042" as follows:-

> "SWS hereby grants to Mr. Cremins the option to purchase SWS' interest in the Option Property in 2042 for the Purchase Price on the Purchase Option and date, subject to compliance with the following conditions…"

22. The plaintiff accepts that the Court must give effect to the plain meaning of the words in the Option Agreement, but says that where there is ambiguity in the words the Court should adopt the approach set out by the Supreme Court in *Analog Devices BB & Others v. Zurich Insurance Company & Others* [2005] IR 274. In that case the Supreme Court endorsed the principles and interpretation set out by Hoffmann L.J. in *ICS v. West Bromwich Building Society* [1998] 1 WLR 896, at p. 912:-

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Wilberforce L.J. as the 'matrix of fact' but his phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as

the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax; see *Mannai Ltd. v. Eagle Star Ass. Co. Ltd*. [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Diplock L.J. made this point more vigorously when he said in *Antaios Compania S.A. v. Salen A.B.* [1985] A.C. 191, 201:-

> "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

23. Counsel for the plaintiff suggests that there is ambiguity in the Option Agreement, in that the defendants' argument based on a plain reading of clause 2 conflicts with the clear meaning of clause 6 which contemplates the lease being prepared in 2042, and would, if correct, render clause 6 unworkable. Counsel argued that if there is an error of omission in the Option Agreement this can be a remedied by proper construction of the Option Agreement. This counsel described as "correction of mistakes by construction", and he derives support for this from Hoffmann L.J. in ICS where at p. 913 after stating his five principles he continued:-

> "If one applies these principles, it seems to me that the judge must be right and, as we are dealing with one badly drafted clause which is happily no longer in use, there is little advantage in my repeating his reasons at greater length. The only remark of his which I would respectfully question is when he said that he was 'doing violence' to the natural meaning of the words. This is an over-energetic way to describe the process of interpretation. Many people, including politicians, celebrities and Mrs. Malaprop, mangle meanings and syntax but never the less communicate tolerably clearly of what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather then their listeners."

24. Counsel argues that there are two requirements before there can be "correction of mistakes by construction" – first there must be a clear mistake, and secondly it must be clear what the correction ought to be. They relied on the decision of Laffoy J. in *Point Village Development Ltd. & Crosbie v. Dunnes Stores* [2012] IEHC 482, (Unreported, High Court, Laffoy J. 15th November, 2012), where the learned judge approved the statements of Clarke J. in *Moorview Developments Ltd. & Others v. First Active Plc. & Others* [2010] IEHC 275 (Unreported, High Court, Clarke J. 9th July, 2010), as follows:-

> "45. Apart from those general propositions, counsel for the plaintiffs rely on a series of authorities in which the courts have been prepared to correct a mistake in a contract as a matter of construction. In *Moorview Developments Ltd. & Ors. v. First Active Plc. & Ors.* [2010] IEHC 275, Clarke J. considered what he described as 'correction of mistakes by construction' principles in the context of construing a guarantee, where the liabilities guaranteed were specified as including the liabilities of a company described as 'Moorview Properties Ltd.'. In his judgment (at paras. 3.5 and 3.6) Clarke J. stated:
>
> > '3.5 This aspect of the case concerns what has, in some of the case law, (see for example *East v. Pantiles (Plant Hire) Ltd.* [1981] 283 E.G. 61) been described as "correction of mistakes by construction". As is clear from East and from the speech of Lord Hoffmann in *Investors Compensation Scheme Ltd. v. Bromwich Building Society* [1998] 1 W.L.R. 896, two conditions must be satisfied in order for such a correction to occur. First, there must be a clear mistake. Second, it must be clear what the correction ought to be.
> >
> > 3.6 It is also clear from the speech of Lord Hoffmann in *Investors Compensation* that a correction of the type with which I am concerned is not a separate branch of the law, but rather an application of the general principle that contractual documents should be construed according to their text but in their context. That context may make it clear that the words used in the text are a mistake.. Thus, a reasonable and informed person may conclude that the words used are an obvious mistake and may also be able to conclude what words ought to have been used. In those circumstances, as a matter of construction, the Court will, as it were, construe the contract as if it had been corrected for the obvious mistake. The reason for so construing the contract in that way is that the proper principles for the construction of contracts lead to that construction in any event. I am satisfied that those cases, most recently restated by the House of Lords in *Chartbrook v. Persimmon Homes Ltd.* [2009] 1 A.C. 1101, represent the law in this jurisdiction."
>
> I respectfully agree with the principles outlined by Clarke J. in those paragraphs and with his explanation of the rationale underlying them."

25. Counsel for the plaintiff also argues that in construing the Option Agreement the Court should have regard to the 2012 Settlement Agreement as part of the "matrix of fact". Counsel cited *Chitty on Contracts* (Vol. 1, 31st Edition) where it is stated at para. 12-0067:

> "Several instruments made to effect one object may be construed as one instrument and be read together, but so that each shall have its distinct effect in carrying out the main design. Thus a lease and a counterpart are two documents relating to the one transaction and a palpable mistake in the lease may be corrected by reference to the counterpart, just as it might be by reference to other parts of the lease itself…Yet although the words 'contemporaneously executed' have been used, there is no doubt that this is not essential, so long as the Court, having regard to the circumstances, comes to the conclusion that the series of documents represents a single transaction between the same parties. So the articles of association of a company may be read to explain the memorandum and a prospectus which invited applications for deposit notes on certain terms could be read together with a deposit note from which one of those terms had been omitted.1"
>
> [Footnote states: see *Jacobs v. Batavia and General Plantations and Trust Ltd*. [1924] 2 Ch 329].

26. Counsel for the defendant in their written submission argued for a traditional approach as set out in *Leggott v. Barrett* (1880) 15 Ch.D 306 where Brett L.J. stated that:-

> "…where there is a preliminary contract in words which is afterwards reduced to writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing and in the second case entirely by the deed; and if there be any difference between the words on the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document."

Discussion

27. I am satisfied that there is ambiguity in the Option Agreement arising from the terms of clause 6, which is predicated on an exercise of the Purchase Option in 2042 (and not before), and the absence of a start date for exercise of the option in clause 2.4, notwithstanding the definition of "Purchase Option Date" by reference to 22 June, 2042. I am of the view that the traditional approach to construction articulated in *Leggott v Barrett* is no longer appropriate, and has been superseded by the principles enunciated by Hoffmann L.J. *supra* and adopted in *Analog Devices v. Zurich.* With regard to when the court may consider related instruments I also adopt as correct the passage from *Chitty* just quoted. It is also trite law that in construing a contractual provision in a document the court is entitled to have regard to the document in its entirety.

28. Accordingly as an aid to construction of the Option Agreement the Court should have regard to the Option Agreement in its entirety, and is entitled to have regard to the 2012 Settlement Agreement, whether as part of the "matrix of facts" or as one of a series of instruments effecting a wider transaction of which the Option Agreement was a part.

29. The plaintiff relies particularly on clause 6 of the Option Agreement which requires the delivery of a draft Lease 7 days after the exercise of the Lease Option, which in turn has to be exercised 14 days after the Purchase Option (clause 5.3.2). The argument made, which I accept, is that a meaningful draft Lease compliant with the Option Agreement, could never be delivered 30 years, or even a few years, prior to the date upon which it is to take effect. Clause 6.2 expressly envisages that the terms of the Lease, while mirroring in commercial terms those contained in the 2009 Leases, were:-

> "... required to be amended or updated to comply and accord with:
>
> (a) changes in relevant legislation
>
> (b) current landlord and tenant practice and
>
> (c) market standard provisions for leases in the windfarm industry as at the date of the grant of the Lease."

30. No one could possibly anticipate what changes may take place in landlord and tenant legislation between this and 2042. What may be "market standard provisions" for wind farm leases now are likely to change over time. There is also provision in clause 6.4 for the resolution of disputes in relation to 'other' terms – which would require consideration by the appointed "expert" of changes in relevant legislation, current landlord and tenant practice and market standard provision for leases in the windfarm industry "as at the date of the grant of the Lease", as stipulated in clause 6.2. It would be impossible for this provision to operate prior to 2042, yet the expert is expected to give a determination within 30 days of appointment.

31. Furthermore clause 6.3 makes it clear that the rent in the new lease is to "... equate to the market rent then payable for leases of lands upon which turbines are to be erected by the lessee...", and provides for a mechanism for this to be determined in the event of a dispute by a valuer appointed by the President of the Society of Chartered Surveyors Ireland. The words "then payable" can only refer to 2042, because the lease cannot be concluded and granted until 2042 once the Lands have been conveyed to the defendants and clause 2.2 expressly stipulates a condition requiring simultaneous completion and exchange of the purchase and the lease-back. Clearly the market trend could not be established until 2042, or close proximity to 2042, and the dispute mechanism envisaged in clause 6.3 could not be invoked until 2042.

32. Clause 6 is expressly referred to in clause 4.1, which also concerns completion, and provides that it is to take place, where both the Purchase Option and the Lease Option have been exercised, "... 14 days after the Lease has been settled in accordance with clause 6 …".

33. It is not possible for clause 6 to operate as the Option Agreement intended if the Purchase Option is exercised prior to 2042. Indeed under cross examination the defendants' Ms. Aoife O'Connell was unable to answer the question as to how clause 6.2 would operate if the Purchase Option Notice is served before that date. I find that insofar as the intention of the parties as to the date upon which the Purchase Option might be first exercised by the defendants can be gleaned from reading the Option Agreement as a whole, it is apparent that it was to be exercisable in 2042. I would go further and find that clause 6 is rendered inoperable if the Purchase Option is exercised in advance, or at any rate significantly in advance, of 2042, as the defendants contend has occurred.

34. Counsel for the defendants suggested that there is a simple practical solution to this, namely that suggested in a letter sent by A & L Goodbody, dated the 23rd May, 2013, to the defendants solicitors where reference was made to the terms of clause 6 and the author Mr. Alan Roberts wrote:-

> "Clearly it is not possible at this juncture to determine either the rent or the amendments which will be required as described above. We therefore propose that the question of settling the Lease be left until March 2042 when these matters will be capable of being determined (either by agreement or otherwise in accordance with clause 6.3 and 6.4 of the Agreement) and there would be sufficient time to settle the terms of the Lease before it is to be granted. We do not see any other workable approach to this matter.
>
> Kindly confirm on behalf of your clients that they are in agreement with this proposal".

The first difficulty with this is that, as the first paragraph of that letter makes clear, Mr. Roberts was writing under the assumption, at that time, that the Lease Option Notice had been properly served and was a valid exercise of the Lease Option. Had he known, at that time, the stance now taken by the defendants I am satisfied that letter would not have been written at all, or certainly not in those terms. The second difficulty is that the defendants never accepted this offer. In the absence of an acceptance of this offer, the proposal must be treated as no more than a proposal to modify the express provisions of the Option Agreement in relation to the operation of clause 6. Under clause 11.3 the Option Agreement provides:-

> "No modification of any of the provisions of this Agreement shall be binding unless the same shall be evidenced in writing duly executed by or on behalf of each of the parties hereto."

35. Mr.Robert's proposal has long since lapsed and ceased to have any relevance. It cannot be relied upon to support Counsel's argument. An argument that a contractual provision can become operative if it is modified in a manner that would require fresh agreement is not an argument for interpreting the original provision as if it were so modified.

36. The provisions relating to Acceleration Notice in the Option Agreement also lend support to the plaintiff's contention. The service by the plaintiff of Acceleration Notice at anytime would enable it to exit the Option Agreement early. The plaintiff might plausibly wish to use this exit provision for any number of reasons. For example, the 2005 planning permission provides that it will expire 20 years from date of commissioning. As the commissioning of the Wind Farm occurred in December, 2014, the planning permission is due to expire in 2034. Depending on the circumstances, such as profitability or capital cost, the plaintiff might decide not to seek to renew it. Alternatively the plaintiff might be refused permission, or it might obtain a permission with conditions that were too onerous. In such circumstances the plaintiff could, if it wished, serve an Acceleration Notice requiring the defendants to confirm in writing within 60 days whether they "shall exercise their Purchase Option on the Purchase Option Date". If the defendants indicated that they intended to exercise their Purchase Option, then the Purchase Option Date became "150 days after the date of service of the Acceleration Notice". In other words the Option Agreement envisaged that, without cause shown, the plaintiff could at any time bring forward a 90 day (or slightly longer) period during which the defendants could exercise the Purchase Option.

37. Two points may be made in relation to this:- firstly it is consistent with the plaintiff's contention that the Purchase Option was not to be exercised until 2042 *unless Acceleration Notice was served earlier by the plaintiff*. Secondly, there was no similar provision expressly conferring on the defendants the right to exercise the Purchase Option prior to 2042. The Option Agreement therefore envisaged the plaintiff alone having the power to accelerate the date of exercise of the Options.

38. The plaintiff also relies, for its construction, on the 2012 Settlement Agreement, the relevant part of which reads:-

> "1. The Defendants will within 7 days hereof execute a Contract for Sale of the Lands (details of which Lands are more particularly set out on the attached schedule) with a closing date of 1 month from today's date (or such longer period as Parties' solicitors shall agree). The sale of the Lands to the Plaintiffs shall be subject to:
>
> (a) A buy-back option after 30 years in favour of the Defendants for €1.00 and
>
> (b) (Should the Defendants exercise such buy-back option) and option in favour SWS for a 25 year lease of the Lands on the terms of the existing Leases subject to statutory amendment subject to a market rent being fixed by a valuer nominated by the President at the time of I.A.V.I."

The plaintiff argues that the words "buy-back option after 30 years" indicates the intention of the parties that the buy-back should not be exercised until 2042. The defendants in response argued that nowhere in the 2012 Settlement Agreement is there any reference to the time period during which the buy-back option may be exercised. They relied on evidence from Counsel (in particular Senior Counsel who conducted the negotiations on the defendants behalf) and the solicitor who represented the defendants during the negotiation and conclusion of the 2012 Settlement Agreement, all of whom asserted that at no point in the negotiations was the issue of when the buy-back option could be exercised addressed.

39. It is clear from the third principle enunciated by Hoffmann L.J. that the Court should exclude from its consideration "the previous negotiations of the parties and their declarations of subjective intent" in construing the Option Agreement and, by extension, the 2012 Settlement Agreement. The Court cannot therefore have regard to the evidence of Mr. Hayden S.C., Mr. Oisín Collins B.L., and Ms. O'Connell, the defendants' solicitor, in relation to the negotiations or subjective intent for the purpose of construing the 2012 Settlement Agreement, and equally cannot have regard to the evidence of Mr. Alan Roberts, the solicitor acting on behalf of the plaintiffs at the time of the 2012 Settlement Agreement, or that of Ms. Joanne Ross who was the legal officer most closely involved in giving instructions on behalf of SWS at the time. The Court must also disregard the evidence given in relation to the parties' understanding or subjective intentions at the time of the preparation and execution of the Option Agreement in construing that document.

40. When the words "buy-back option after 30 years" are examined, it is my view that the words "after 30 years" (which are inserted in handwriting into the document) qualify both the word "buy-back" and the word "option". On this basis both the defendants' right to buy-back the Lands *and* their right to exercise the option in that respect are to arise "after 30 years" i.e. in the year 2042. I am lead to this conclusion by the wording used (also inserted in handwriting) in the ensuing subparagraph (b) relating to the Lease Option, and the reference there to the terms of the Leases being "subject to statutory amendment", and "subject to a market rent being fixed by a valuer nominated by the President at the time of the I.A.V.I". This phraseology made it clear that the Leases were to reflect changes in landlord and tenant legislation existing in 2042, and that it was to be at a market rent at that time, and that, in the event of dispute, the valuer was to be nominated by the President of the I.A.V.I. "at that time" i.e. in 2042. Accordingly when sub-clauses (a) and (b) are considered together they make it clear that the buy-back option is to be exercised and take place in 2042, and likewise the Lease Option falls to be exercised and completed in 2042. This also accords with business common sense as there is no logic or reason for the defendants to enjoy a right to exercise the Purchase Option at an early date, and no wording of the 2012 Settlement Agreement supports the defendants' contention.

41. Some further support for this construction is given by clause 4 of the 2012 Settlement Agreement under which the defendants consented to certain orders including:-

> "(c) An Order not to do or commit anything that would cause or damage or interfere with the development of or the operation of the Knockacummer Wind Project or any other SWS Wind Project."

Having regard to the background history of acrimony between the parties up to that point, and the further fact that under the 2012 Settlement Agreement the defendants were to receive €6 million for the Lands, it seems clear that the plaintiff was intent on ensuring that for a period of some thirty years the defendants would not do anything that could, in anyway, interfere with the development or operation of the Wind Farm. Thus the 2012 Settlement Agreement did not envisage the exercise by the defendants of the Purchase Option, or the need to consider exercising the Lease Option, prior to 2042.

Conclusions

42. In weighing up these factors I have come to the following conclusions:-

> 1) That the meaning and intendment of the 2012 Settlement Agreement, when construed as a whole, was that the defendants would not be entitled to exercise the option to buy-back the Lands until the year 2042.

2) That clause 6 of the Option Agreement would be inoperable if the construction contended for by the defendants was correct.

3) The fact that only the plaintiff could serve an Acceleration Notice bringing forward the date upon which the defendants could exercise the Purchase Option implies that, absent such a notice, it was not intended that the Purchase Option be exercisable prior to 2042.

4) It could not be disputed that under the Option Agreement, if the Purchase Option and the Lease Option were both exercised, neither the conveyance to the defendants nor the lease back to the plaintiff would be completed or come into effect until 2042, and indeed it was expressly provided that the exchange of the conveyance and lease(s) would take place simultaneously on completion.

5) The failure of the Option Agreement as executed by the parties to expressly state that the defendants could not exercise the Purchase Option until 2042 was an error of omission in drafting.

6) Under the usual convention the defendants' lawyers would normally have prepared a first draft of the Option Agreement, because the defendants were to have the first option in time, to buy-back the property, and hence were in the notional position of grantees. I am satisfied on the evidence that, at the request of the defendants' solicitors, it was in fact prepared by Mr. Alan Roberts in A&L Goodbody solicitors for the plaintiff, and that the error arose in the first draft presented by that firm. Construing the Option Agreement *contra proferentum* i.e. against the plaintiff, does not therefore arise (even if it is a principle of construction that survives the decision in Analog Devices)".

Correction of Errors by Construction

43. In order for this Court to correct or remedy that mistake by proper construction of the Option Agreement the authorities indicate that "it must be clear what the correction ought to be". In *Moorview* the reference to "Moorview Properties Ltd." in the guarantee was a clear mistake - "Moorview Properties Ltd" did not exist and had never existed, whereas "Moorview Developments Ltd." was at the same time as the guarantee was entered into involved in entering into loan arrangements with the lender. Clarke J. held that it was inconceivable that there could have been any other intention of the parties when the company whose liabilities were to be guaranteed was Moorview Developments Ltd. That is an example of a case where there was evidence showing clearly what the parties must have intended.

44. The question arises as to just how clear the evidence of the proposed correction must be. In Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Thomson Reuters, 1st Edition, 2010) the author under the heading "A Clear Solution", at para. 2-65, suggests the following statement of principle:-

> "In order to correct an obvious mistake in a document by construction, it must be clear what has gone wrong with the wording of the document, and how the mistake should be corrected. But it is not necessary to be able to identify precisely what words have been mistakenly omitted, or inserted, provided that the Court knows the gist of what the parties truly intended. Moreover, the existence of two plausible alternative constructions should not be allowed to undermine the case for correction, nor should it force a Court to adopt a solution which has no plausibility at all."

45. A case that supports this is *KPMG LLP v. The Network Rail Infrastructe Ltd*. [2007] EWCA Civ. 363 where Carnwath L.J. commented on the House of Lords decision in *Homburg Houtimport B.V. v. Agrossin Private Ltd*. [2003] UKHL 12 (where the House of Lords supplied missing words from a standard form "in very wide use") in the following terms in para. 64:-

> "Thirdly and perhaps more contentiously, I think it would be wrong to apply too literally Bingham L.J's. reference to the need for clarity both as to the omission of words and "what those relevant words were". As Millett L.J. said it is sufficient if the Court is able to ascertain "the gist" of what has been omitted. I would go further. Once the Court has identified an obvious omission, and has found in admissible background materials an obvious precedent for filling it, it should not be fatal that there may be more than one possible version of the replacement, or more than one explanation of the change …"

46. I find these statements helpful as showing that a court enjoys some latitude in determining what the relevant but missing words should be, and can have regard to background materials, although I believe that the court must tread carefully and objectively in establishing 'the gist' and formulating appropriate words. The court should not supply words that would not have been used by reasonable draftsmen bearing in mind the relative position of the parties. In this respect it is helpful to consider some of the time provisions that do appear in the Option Agreement.

47. I have already found that there was a clear mistake in the Option Agreement in failing to stipulate a start date to commence the period within which the defendants would be entitled to exercise their option to buy-back the Lands. The definition of "Purchase Option Date" refers to 22 June, 2042. Clause 6, under which the terms of the Lease could only be finalised in 2042, points firmly to the period for exercise of the defendants Purchase Option as commencing in the year 2042. Further evidence in support of the year 2042 is derived from the words "after 30 years" in the 2012 Settlement Agreement – although as that was signed on 22nd May, 2012, the 30 years would not elapse until 23rd May, 2012. Clauses 2.3 and 2.4 of the Option Agreement indicate that the Purchase Option lapses either on 23rd April, 2042, or 24th March, 2042. The subsequent timeline shows that the parties intended that once the Purchase Option was exercised for there was to be two or three months, depending on which date is taken, within which the conveyance and lease might be completed before the Purchase Option Date of 22nd June, 2042. Of course the completion could be extended beyond this date allowing for the timelines provided for in clause 6, for the preparation and exchange of the draft Lease and, if required, the determination of the rent and any other disputed terms. However the times allowed are quite short: for furnishing a draft lease 7 days from exercise of the Lease Option; 14 days for the defendants to comment on the draft; 7 days for the plaintiff to rejoin on those comments; and if disputes arise then clauses 6.3 and 6.4 contemplate that the dispute resolution will determine these matters within 30 days of appointment of the expert who is to decide. It is not unreasonable to suggest that the parties contemplated all of these steps being taken in the year 2042.

48. When one considers these various provisions in my view the gist of an appropriate correction becomes clear, namely that the defendants were to be entitled to exercise their Purchase Option from the beginning of 2042 up to the date upon which it lapses. On this construction under clause 2.4 the defendants would have from 1st January, 2042, until 23rd March, 2042, inclusive in which to comply with condition 2.4.1 relating to "the receipt by SWS … of written notice of intention to purchase SWS' interest in the Option Property …", and until 23rd April, 2042, if clause 2.3 trumps the date in clause 2.4.1. A period of two months and 23 days for the

exercise of the Purchase Option does not in my view offend any notion of what might be regarded as reasonable when the Option Agreement is considered objectively as a whole and when considered with the 2012 Settlement Agreement.

49. I therefore hold that the Option Agreement in clause 2.4 should be construed to read –

> "SWS hereby grant to Cremins the option to purchase SWS' interest in the Option Property ***in 2042*** for the Purchase Price on the Purchase Option Date subject to compliance with the following conditions …"

Rectification

50. The plaintiff's alternative claim is for rectification on the basis that the Option Agreement as executed did not reflect the true agreement between the parties as expressed in the 2012 Settlement Agreement.

51. Rectification may be ordered where there is a mistake common to the parties in the drawing up of relevant document. It may also be ordered in certain instances where one party is mistaken as to the terms of the relevant document and the other party is aware of this mistake and does not draw it to the attention of the other party prior to execution. It is the latter situation that is relied upon by the plaintiff.

In the seminal case of *Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd*. [1981] 1 AER 1077, the English Court of Appeal confirmed that rectification is available in such circumstances. Buckley L.J. said at p. 1086:-

> "…The reference to 'sharp practice' may thus be said to have been an obiter dictum. Undoubtedly I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies 'some measure' of sharp practice, so be it; but for my part I think that the doctrine is one which depends more on the equity of the position. The graver the character of the conduct involved, no doubt the hearvier the burden of proof may be; but, in my view, the conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake.
>
> "For this doctrine (that is to say the doctrine of *A. Roberts v. Leicestershire Co. Council*) to apply I think it must be shown: first, that one party, A, erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; second, that the other party, B, was aware of the omission or the inclusion and it was due to a mistake on the part of A; third, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely that the mistake must be one calculated to benefit B. If these requirements are satisfied, the Court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of the execution of the document, a common mistake."

52. In *O'Neill v. Ryan (No. 3)* [1992] 1 IR 166, at p. 185, the Supreme Court endorsed a statement of principle of Costello J. in the High Court as follows:-

> "The Court will also grant relief by way of rectification where the parties have reached an agreement but where an error is made in giving effect to the parties' common intention in a written agreement. The general rule is that where there is a common shared mistake in that the written agreement fails to record the intention of both parties the Court will order its rectification. Rectification may also be ordered when a party who has entered into a written agreement by mistake, if he establishes that the other party with knowledge of the mistake concluded that agreement (see judgment of the Supreme Court in *Irish Life Assurance Co. Ltd. v. Dublin Land Securities Ltd.* [1989] I.R. 253, 260 and *Monaghan County Council v. Vaughan* [1948] I.R. 306, 312)."

While some of the case law indicates that there is a very high onus of proof on the party seeking rectification, suggesting that the Court needs to be convinced that a case for rectification is made out, it is now well established that the ordinary standard of proof, namely the balance of probabilities, applies see *Re: Tara Mines Pension Plan: Boliden Tara Mines Ltd. v. Cosgrove and Others* [2010] IESC 62 (Unreported, Supreme Court, 21st December, 2010) per Hardiman J. (nem diss).

Findings of Fact

53. The plaintiff's solicitors A & L Goodbody (Mr. Alan Roberts) prepared the first draft of the Option Agreement and sent it by email to Messrs. O'Connell & Clarke, the defendants' solicitors, on 28th May, 2012. I am satisfied from his evidence that Mr. Roberts believed that the first draft of the Option Agreement contained terms providing for the exercise of the Purchase Option only in 2042, and that this was in accordance with his understanding of the 2012 Settlement Agreement.

54. On 30th May Mr. Roberts had a telephone conversation with the defendants' solicitor Ms. Aoife O'Connell in which they discussed various aspects of the conveyance of the Lands (it will be recalled in the first instance the defendants were to convey the Lands to SWS pursuant to the 2012 Settlement Agreement). In the course of that conversation Ms. O'Connell requested that there be inserted into the draft Option Agreement some mechanism whereby the plaintiff would notify the defendants of the Option Date. This arose from her concern that the defendants would omit to exercise the option in 30 years time, or might not be available to exercise it and theirs estate(s) might not be aware of the option. This request was declined as SWS did not want to take on any obligations in circumstances where the entire benefit of the Purchase Option was for the defendants. This is recorded in Mr. Robert's contemporaneous telephone attendance note where he also recorded his response:

> "I told her that this will not be acceptable to SWS. All of the benefit of the Opt[ion] is for her client – he must order his affairs to take advantage of the Option."

His evidence was that he did nonetheless agree to amend the draft to provide for an extension of the time within which the defendants could exercise their option, by reducing the period of notice that the defendants would have to give to the plaintiff from 2 years to 90 days – hence the reference to 90 days in clause 2.4.1 of the Option Agreement (thus extending the end date for exercise of the Purchase Option from a date in 2040 to a date in 2042).

55. Mr. Roberts' evidence, which was not challenged, was that he understood from this conversation that Ms. O'Connell's understanding (and hence that of the defendants) was that the Purchase Option could not be exercised until 2042. I am satisfied that at no point in this conversation was there any suggestion that the defendants took a different view as to when the Purchase Option could be first exercised.

56. Critically Mr. Roberts followed up this telephone conversation with a letter to Ms. O'Connell, sent by email and also dated 30th May, 2012, the relevant parts of which state as follows:-

> "Dear Sirs,
>
> We refer to your letters today and the writer's telephone conversations with your Aoife O'Connell over the last 3 days. The terms of the Settlement Agreement dated 22nd May, 2012, between our respective clients obliges your client to execute a Contract for Sale of the Lands within one week. Your client has failed to comply with this obligation.
>
> In order to facilitate you and at your request, we drafted the Contract for Sale and the Option Agreement and furnished them to you last week ….
>
> 2. ***Option Agreement***
>
> We have extended the period during which your clients may exercise their Purchase Option. However, our client is not willing to accept any obligation to notify your client of the availability of the Option after 30 years. As discussed, the entire benefit of the Purchase Option accrues to your client and, in those circumstances, our client is not willing to assume any obligations with respect to the exercise of the Purchase Option."

57. The wording of this letter corroborates Mr. Robert's evidence and recollection of the telephone conversation. In particular the reference to "exercise their Purchase Option" followed almost immediately by the reference to "availability of the Option after 30 years" makes it plain that what was being discussed was the *exercise of the option after 30 years*, and on the mutual assumption that it could only be exercised after 30 years.

58. I find that as of 30th May, 2012 Ms. O'Connell was fully aware both that the Option Agreement as drafted was *intended* to grant a Purchase Option that would not be exercisable before 2040, and that this was the belief and assumption of SWS's solicitors. I find that this was also the belief and assumption of Ms. O'Connell at that time. I found telling the following evidence of Ms. O'Connell under cross examination (Day 3, p.123):

> "Q. So how, Ms. O'Connell is it possible to provide for the service of the Purchase Option Notice before 2042 bearing in mind the requirements of 6.2 and the time lines in Clause 6?
>
> A. I don't have an answer to that. This is how the document was presented and these were the conditions that were inserted by SWS."

Thus Ms. O'Connell was unable to attempt any explanation for the internal inconsistencies in the Option Agreement as executed. This supports my finding that she held a different view of the (draft) Option Agreement on 30th May, 2012, namely that as first drafted it provided for an option exercisable in 2040 (but not before then). I am also satisfied that her understanding at that time was clearly conveyed to Mr. Roberts in the telephone conversation on that day. Insofar as there was any conflict of evidence on this I prefer the evidence of Mr. Robert's whom I found to be candid and whose evidence was corroborated by contemporaneous documents.

In my view the only reasonable inference that can be drawn from Ms. O'Connell's request for reduction of the reducing the period of notice to the plaintiff from 2 years to 90 days was her belief and understanding that the Purchase Option could not be exercised until at or near the end of the 30 year period. I find that as she was acting for the defendants in relation to all matters touching on the Option Agreement at the time Ms. O'Connell's belief and understanding must be imputed to the defendants.

59. On 31st May, 2012, Mr. Cremins met with his solicitor Ms. O'Connell and his Junior Counsel Mr. Oisin Collins B.L., and the issue of the exercise of the Purchase Option under the terms of the draft provided by Mr. Roberts was raised by Mr. Cremins, and discussed. The advice given by counsel was that under the Option Agreement as drafted the defendants were *not* precluded from exercising the option *at any time* up to 90 days prior to the end of the 30 year period (clause 2.4.1). Mr. Cremins thereafter had reason to believe that there would be an entitlement to exercise the Purchase Option immediately after the Option Agreement was executed. Although he was advised against the wisdom of so doing, I accept that Mr. Cremins was intent on following that course of action.

60. I find that following this consultation Mr.Cremins' belief that the defendants could exercise the Purchase Option at any time after execution of the Option Agreement (as drafted), and his desire and intention to exercise it as soon as possible, must have been plain to Ms. O'Connell. It is also probably that following this consultation her own understanding of the period during which the Purchase Option could be exercised under the Option Agreement as drafted had changed.

61. Ms. O'Connell did not thereafter or at any time prior to execution of the Option Agreement, or prior to completion of the conveyance, communicate to SWS's solicitors that the legal advice to the defendants', and their understanding, was that the Option Purchase Notice could be exercised at any time up to 2042 – notwithstanding the earlier understanding to the contrary which she displayed in the conversation with Mr. Roberts, and as reflected in his email of 30th May, 2012.

62. The Option Agreement was executed by the defendants on 11th June, 2013. and later sealed by SWS, in line with Mr. Robert's first draft, save in respect of the reduction (in ease of the defendants) of the end date for exercise of the Purchase Option from two years to 90 days from the Purchase Option Date of 22 June, 2042.

63. If upon its true construction the Option Agreement did allow the defendants to exercise the Purchase Option *at any time* up to 90 days prior to the end of the 30 year period, then I find that at the date of execution of the Option Agreement there was a clear divergence of understanding between SWS/its solicitors on the one hand, and the defendants / their solicitors on the other hand, and on that construction SWS/its solicitors were mistaken as to its effect. The rectification sought is therefore on the basis the SWS's unilateral mistake as to the meaning of the Option Agreement from the time it was first drafted up to and including the date of its execution.

64. As I have already found there was, upon the true construction of the 2012 Settlement Agreement, a common intention that the defendants' buy-back option could not be exercised until 2042. Mr. Cremins gave evidence of his subjective intention at the time of the 2012 Settlement Agreement in which he sought to contradict this. He stated that at the time of the negotiation "…I said I want to be able to buy this thing back immediately and, basically that was it." (Day 3, p.147). If that was so then it is extraordinary that it was not reflected in the text of the 2012 Settlement Agreement, and no evidence was adduced to suggest that this was ever part of the negotiation. When probed on why he use the word "immediately" Mr.Cremins rowed back on his evidence and stated:

> "No, no, Judge, I didn't mean that. What I actually said is when the €1 came into it, that I wanted my land to come back to me for the €1. That I can sign something that it will come back after 30 years. I never wanted the land – look, the deal was done and I'm a man of my deal, if the deal was done for 30 years it was done for 30 years. And I knew that walking away form the Court that evening."

Mr.Cremins evidence was self-contradictory and uncorroborated on this issue. It does not displace my finding, based on the plain wording of the 2012 Settlement Agreement.

65. From 31s May, 2012 Ms. O'Connell, who continued to act on behalf of the defendants in relation to completion of the Option Agreement and the transfer of the Lands, had knowledge of the mistaken understanding of the plaintiff's solicitors as to the meaning and effect of the Option Agreement as drafted. Regardless of her own opinion, and regardless of what views or advice she may have expressed to the defendants, it was incumbent on her to bring this difference in interpretation and understanding to the attention of Mr. Roberts/the plaintiff's solicitors. Whether both or either of the defendants were aware of the mistaken understanding does not matter, because O'Connell & Clarke were acting on their behalf, and they must therefore be fixed with Ms. O'Connell's knowledge.

66. On the basis of these findings the first three requirements of the doctrine as summarised by Buckley L.J. are satisfied; firstly the plaintiff's solicitors erroneously believed that the Option Agreement contained terms that did not permit the exercise by the defendants of the Purchase Option before 2042; secondly the defendants through their solicitors became aware of that mistaken understanding; thirdly the defendants through their solicitors omitted to draw the mistaken understanding to the notice of the plaintiff's solicitors prior to execution.

67. With regard to the fourth element mentioned by Buckley L.J., namely the requirement that the mistake "must be one calculated to benefit B" Eveleigh L.J., in *Thomas Bates Son v. Wyndhams Ltd.* differed. He stated (at p. 1090):-

> "I do not think that it is necessary to show that the mistake would benefit the party who is aware of it. It is enough that the inaccuracy of the instrument as drafted would be detrimental to the other party, and this may not always mean that it is beneficial to the one who knew of the mistake."

68. In *Chitty on Contracts* (30th Edition) at para. 5.188 the authors resolve this difference as follows:-

> "It is submitted that either should suffice. In practice, if the claimant's mistake was known to the defendant, or the defendant deliberately induced the mistake in the way described earlier, and the terms of the written document are less favourable to the claimant than those the defendant knew that the claimant actually intended, it will be inequitable for the defendant to insist on the terms stated in the document and the grounds for rectification will be satisfied."

I accept as correct the position as stated by Eveleigh L.J., and in my judgment it is sufficient if in the circumstances of a unilateral mistake the claimant/plaintiff suffers a detriment in circumstances where it would be inequitable for the defendants to rely on the mistake of which their solicitors had knowledge. This also accords better with the view expressed by Costello J. in O'Neill v. Ryan quoted previously. Nonethelsss I do find in the present case elements of sharp practice, the term used by Buckley L.J.

69. The failure of Ms. O'Connell to revert to Mr. Roberts caused or permitted SWS to execute the finalised Option Agreement without material alteration. This was to the benefit of the defendants because it facilitated early exercise of the Purchase Option at any time up to 23rd March, 2042. Mr. Cremins, as Ms. O'Connell well knew, was keen to exercise the Purchase Option as soon as possible after execution, rather than having to wait until 2042. It was therefore to the defendants advantage. It was also to the detriment of the plaintiff, in that its officers, and in particular Ms. Joanne Ross who was then Head of Legal Regulation of Bord Gais Energy (and whose evidence in this regard I accept), believed that the defendants option was not exercisable until 2042, and that accordingly the plaintiff did not have to take a decision on exercising the Lease Option until 2042 when the planning and business plan required to make an informed decision would have been developed.

70. Also while I am satisfied that Mr. Cremins always wanted to buy back the Lands, I do not accept as credible his evidence that at the time of the 2012 Settlement Agreement he said or believed that he could exercise the option "immediately". In my view in opposing the plaintiff's claims he is seeking to take advantage of a perceived error in drafting that would not have occurred if it had been drawn to the attention of SWS's solicitors by his solicitors, as should have happened. These circumstances make it inequitable for the defendants to rely on or take advantage of the Option Agreement as executed if it has the meaning that they now assert. Moreover the fact that the plaintiff's solicitors were responsible for the perceived drafting error cannot be relied on by the defendants in circumstances where A & L Goodbody were obliging the defendants' solicitors in drafting the Option Agreement – and the reliance placed on this by the defendants solicitor and counsel in their evidence was ill judged.

71. I am therefore satisfied that the Option Agreement should, in the alternative, be rectified by the insertion of the words "in 2042" in clause 2.4, line 1 after the words "the Option Property".

Consequences of Construction/Rectification
72. It follows, whether the Option Agreement is so corrected by construction or by rectification, that the defendants are not entitled to serve a Purchase Option until, at the earliest, 1st January, 2042. Accordingly, the Purchase Option Notice which Messrs. O'Connell & Clarke purported to serve by letter dated 14th March, 2012, was invalid and of no effect on any terms.

Other Issues
73. A number of other issues arise in these proceedings. In case I am wrong in my earlier determinations, I propose to address some of these and to make primary findings on certain issues of disputed fact, and further in deference to the legal argument that was presented.

Notice dated 14th March, 2013 – In the Name of Denis Cremins Alone

74. The letter dated 14th March, 2013 from O'Connell & Clarke to the plaintiff purported to exercise the Purchase Option in the following terms:

"Re: Exercise of Option Agreement

Our Client: Denis Cremins

> Dear Sirs,

> We further refer to the Option Agreement entered into between our respective clients in pursuance of the settlement entered into on the 22nd of May, 2012.
>
> TAKE NOTICE that our client, Mr. Cremins, hereby intends to exercise the Purchase Option at Clause 2.4 of that Agreement.
>
> Pursuant to Clause 2.4.1 this letter constitutes written notice of our Client's intention to purchase the interest of SWS in the property.
>
> Accordingly, upon your receipt of this notice, the notice is effective and pursuant to Clause 2.4.1 of the Agreement shall be deemed to be exercised at that time.
>
> Pursuant to 2.5.1 of the Agreement there now arises automatically a binding agreement for SWS to sell and for Mr. Cremins to purchase the Option Property, as set out in this Agreement for the purchase price.
>
> Please find enclosed €1.00 been the purchase price, kindly acknowledged receipt of this Notice together with the purchase price and confirm that the Purchase Option has been exercised.

Yours sincerely,"

75. The plaintiff argues that the heading refers to "Our client: Denis Cremins", and it is said that O'Connell & Clarke only refer to one client namely Mr. Cremins, and consistently throughout the letter to "our client Mr. Cremins". It was submitted that O'Connell & Clarke do not purport to represent Mrs. Cremins, nor do they name her as a person exercising the option.

76. It was contended on the plaintiff's behalf that the Purchase Option could only be exercised by the defendants, that is to say Mr. and Mrs. Cremins jointly, and that it is not open to one of them to exercise the option. Reliance is placed on the introductory part of the Option Agreement where it is provided that the Agreement is made between the plaintiff and – "(2) DENIS CREMINS AND SHEILA CREMINS of Meengarnaire, Knocknagoshel, Co. Kerry (hereinafter collective called ***Cremins*** which expression shall where the context so admits or requires includes their and each of their heirs, executors and administrators)."

77. Reliance is then placed upon the wording used in clause 2 quoted earlier in this judgment. Under clause 2.1 the consideration is to be paid "by Cremins". In clause 2.2 the opening words are "in the event that (i) Cremins exercises the Purchase Option …", and it goes on to state that "completion shall be strictly subject to Cremins simultaneously granting and delivering the executed Lease to SWS". In other words the wording only contemplates both defendants granting the lease. Similarly in clause 2.4 the references are to "Cremins" as the party to whom SWS grants the option to purchase, and clause 2.5.1 provides "immediately upon the exercise of the Purchase Option there shall arise automatically between the Cremins and SWS a binding agreement for SWS to sell and Cremins to purchase the option property ….". Clause 3 headed "Terms of Sale" opens "if Cremins shall exercise the Purchase Option then the following terms and conditions shall have effect …". Clause 5 concerning the Lease Option is similarly worded, referring at all times to "Cremins" as the person to whom notice must be given and the parties granting the option to take a lease or leases. It was submitted that the definition of "Cremins" and the use of that term throughout did not permit a construction that would entitle one of the defendants alone to exercise the option.

78. The plaintiff also relies on clause 8.2 which states:-

> "Cremins convenants with SWS that they shall not charge assign or otherwise dispose of their rights and benefits hereby granted under this Agreement."

79. It was argued by the plaintiff that whereas the opening definition of "Cremins" made it clear that on the death of either one of them their estate would inherit their interest under the Option Agreement, clause 8.2 prohibits them from assigning, charging or disposing of their benefits under the Agreement during their respective lifetimes.

80. Counsel for the plaintiff relied on *MacDonald v. Robins* [1953] 90 CLR 515, a decision of the High Court of Australia. Mr. Robins had taken a lease with his brother from Mr. MacDonald of extensive farmlands. The partnership between Mr. Robins and his brother was dissolved, and the plaintiff acquired the interest of his brother in the farming enterprise, and his assets which included the lease and an option to renew it. The express terms of the option were granted to the lessees "and each of them, unless repugnant to the sense or context". Two of the three judges held that to read that definition as allowing one to exercise the option to the exclusion of the other would be repugnant to the definition and to its sense and context. Dixson C.J. at p. 523 stated:-

> "Nevertheless the words in the definition 'and each of them' create difficulties. Clearly only one option is given and yet to insert the words 'and each of them' into the covenant for the option after the words 'lessees' and read them literally would mean grammatically that each of the lessees should have the option of purchasing the land. It could not have been intended that they could severally exercise separate rights to buy the same land or that one could buy it to the exclusion of the other. To read the words as applicable only to the extent of giving to each a separate right to exercise an option of purchase under which both would become purchases is to take a course which, instead of rejecting so much of the definition as is embodied in the words 'and each of them' as being inapplicable by reason of the context and subject matter, applies the words with a modified meaning. To do this seems unsatisfactory in point of logic."

81. Dixson CJ. went on to find for Mr. Robins on other grounds – namely that Mr. Robins was acting under the authority which the dissolution of the partnership with his brother gave him combined with his own right. On the point of relevance to the present case Taylor J. agreed with Dixson C.J. At p. 527 he stated:-

> "The expression 'the lessees' where it first appears in the lease is defined to include 'the lessees and each of them and their respective executors, administrators and permitted assigns unless repugnant to the sense or context'. But to apply this definition to the option provision and read that provision as conferring upon the lessees 'and each of them' a right to exercise the option would be, substantially, to alter the very obvious character of the option thereby conferred. It is, in my opinion, clear that only one option is created by the relevant provision, and it would be repugnant to that clause to hold that it creates both an option jointly exercisable by both lessees and also options exercisable by each lessee severally. To give such effect to the clause would, I think, be to transform its real character. I agree also with the reasons of the Chief Justice on this point."

82. In response to these contentions counsel for the defendants relied on the Land and Conveyancing Law Reform Act, 2009. In s. 3

the following definition appears:-

> "Covenant' includes an agreement, a condition, reservation and stipulation."

Counsel contended that this definition is wide enough to encompass an option agreement such as the one under consideration. This was not disputed and I assume for the purposes of this judgment that "covenant" can include an option Agreement.

83. Reliance was then placed on s.82 which provides:-

> "82.- (1) Where under a covenant persons are –
>
> (a) covenantors, the covenant binds them and any two or more of them jointly and each of them severally,
>
> (b) *covenantees, the covenant shall be construed as being also made with each of them.*
>
> (2) A covenant made with persons jointly to convey, pay money or do any other act to them or for their benefit, implies an obligation to do the act to, or for the benefit of –
>
> (a) the survivor or survivors of them, or
>
> (b) any other person on whom the right to sue on the covenant devolves.
>
> (3) *This section takes effect subject to the terms of the covenant* or conveyance in which it is contained or implied or of any statutory provision implying the covenant.
>
> (4) In this section 'covenant' includes an express or implied covenant and a bond or obligation contained in a deed."[Emphasis added].

84. Reliance was also placed on s. 83 which provides:-

> "83.— A covenant, whether express or implied, entered into by a person with that person jointly with another person or other persons shall be construed and is enforceable as if it had been entered into with that other person or persons alone."

Counsel contended that Mr. Cremins could rely on s.82. Alternatively, it was argued that under s.82(1) both defendants are "covenantees", and that therefore the Option Agreement should be construed as a "covenant" being made with "each of them". With regard to subs.3, it was contented that the Option Agreement does not expressly seek to exempt s.82, nor does it do so impliedly, for instance by stating that the Purchase Option could only be exercised by the defendants jointly.

85. Counsel argued that s.82 replaces s.60 of the Conveyancing Act 1881, and mirrors s.81(1) of the U.K. Law of Property Act 1925. *Barnsley's Land Options* (Castle Ed., 3rd Edition, Sweet and Maxwell, 1998) refers to this U.K. provision at pp. 84-85:-

> "Exercise by one of two grantees
>
> Section 81(1) of the Law of Property Act 1925 enacts that a covenant made with two or more jointly is to be construed as being made which each of them, provided no contrary intention is expressed in the covenant. It operates as a separate covenant with each covenantee, and that separate covenant can be relied upon by any covenantee. The general rule therefore is that an option granted to X and Y is exercisable by X alone to the exclusion of Y, and X can call for a conveyance of the land in his own name. Compare the Australian decision in *MacDonald v. Robins* … where the effect of an option conferred on 'the lessees and each of them' was variously construed by the court. The grantee, X, may not however, be permitted to retain the property for himself. In the case of an option to purchase a reversion, the principle relating to fiduciary grantees prevents the exercise of the option by one of two joint lessees for his own sole benefit. The exercise by one lessee enures for the benefit of the other, unless the other declines to take the property.
>
> It is vital to exclude the operation of s.81(1) whenever it will lead to a result not intended by the option holders …"

86. Not surprisingly counsel for the plaintiff relied on s.82(3), and argued that the provisions of the Option Agreement were inconsistent with and therefore excluded the application of s.82.

Discussion

87. I am not persuaded that s.83 has any application to the Option Agreement. Professor J.C.W. Wylie, the architect of the 2009 Act, providing a a commentary on s.83 in *The Land and Conveyancing Law Reform Act 2009: and notations and commentary* Bloomsbury, 2009 notes at p. 246:-

> "1. Section 83 is equivalent for covenants of the provisions in s. 66 for conveyance (see the Notes to that section). Both are designed to get round the common law restriction that one cannot contract with oneself, so that a covenant with or conveyance to oneself was generally unenforceable. Sections 66 and 83 create an exception where the covenant or conveyance is jointly with or to oneself and another or others. It is enforceable by or effective as regards that other or others.
>
> 2. Thus a covenant entered into by A and B with A is enforceable by B against A as if it had been entered into with B alone. As regards the converse position, a covenant by A with A and B, again A can enforce a covenant against B …"

88. It is apparent from this and I accept that s. 83 is confined to covenants entered into by one person with himself or herself jointly with another person, and has no application to present case.

89. I am satisfied therefore that s.82 is the appropriate section for consideration in the context of this Option Agreement where the

"covenants" are made by the plaintiff with the defendants. The question is therefore whether, as the defendants assert, s.82(1)(b) applies, or whether that statutory construction is ousted by s.82(3) because it "takes effect subject to the terms of the covenant".

90. This does not mean that the Option Agreement must expressly provide that 's.82 is not to apply to this agreement', or words to that effect. S.82(3) does not refer to or require an express clause exempting the application of the rule of construction in s.82(1)(b). This may be implicit. I take s.82(3) as requiring the court to consider the relevant provisions of the Option Agreement, and the Option Agreement as a whole, in determining whether and to what extent s.82(b) may apply, or not apply.

91. In approaching this aspect, as in the construction of contracts generally, where there is ambiguity or uncertainty the court is also entitled to have regard to context and relevant background facts. The uncertainty arises here by virtue of the provisions of the Option Agreement relied on by the plaintiff as showing that a several exercise Purchase Option was not intended. I regard the following matters as relevant: when the 2012 Settlement Agreement was entered into the defendants were co-owners of all the Lands; both defendants signed the 2012 Settlement Agreement; they were paid €6 million for the transfer to SWS completed in August 2012; and both of them signed the Option Agreement.

92. Most significantly the definition of "Cremins" in the Option Agreement does not refer to "them and each of them". Instead it merely refers to "their and each of their heirs, executors and administers". In other words it does not contemplate a splitting of the benefit of the option that is granted to both of them save in the event of death, in which case their estate or heirs stand in their shoes.

93. Moreover no where in the Option Agreement is there any separation out of Mr. Cremins from Mrs. Cremins in relation to the exercise of their rights and obligations. The fact that clause 8.2 prohibits them from signing or disposing of their rights and benefits under the Option Agreement is also significant because it demonstrates the desire of SWS to ensure that it would continue to deal with Mr. and Mrs. Cremins, or their heirs, and that they would not have to deal with other unknown parties in the operation of the Option Agreement.

94. In other respects the wording used in the Option Agreement, and its broader terms, do not fit comfortably with the idea that one of the defendants, or the heirs of one of the defendants, could exercise the Option. Thus, the definition of "Acceleration Notice" refers to "Cremins", "them" and "they" and not to one or either of them. If defence counsel's submission is correct it would follow that not only could one defendant serve a Purchase Notice, but this could be done secretly and without communicating that fact to the other defendant, or (if deceased) to that defendant's heirs. It is a significant factor that the Option Agreement provides that the buy-back option consideration is only €1.00, and on receipt of this, if the defendant's contention is correct, the plaintiff would be obliged to convey the Lands to the one party exercising the Option. Thus one defendant could obtain a windfall, simply by serving a notice (with or without €1), and the other defendant would be left with nothing. Whatever might be said about an agreement which requires that upon exercise of the option the grantee must pay market value, it seems to me that s.82 will generally yield to the express terms of an option agreement where the "covenantees" do not have to pay anything to enjoy the benefit of the option.

95. The possibility in this case of just one the defendants exercising the option points up other difficulties: Is the plaintiff to convey only to that one defendant? What then would be the position if, pending completion, the other defendant (or, if deceased, his/her heirs) served a (second) Purchase Notice? Would the plaintiff be entitled to disregard it and simply convey the Lands to the first party to serve a Purchase Notice? And if that happened, if the plaintiff exercises the Lease Option, upon whom is it to be served? And who is to grant the Lease – can it be done by one defendant alone, and can that defendant be solely entitled to the rent? These conundrums would be bound to give rise to disputes and further litigation of the type that the plaintiff has been anxious to avoid at least since the 2012 Settlement Agreement. It raises the question whether s. 82(1)(b) will ever apply to the benefit of an option granted to two or more persons jointly in the absence of clear indication that it is intended to apply to one or each of them.

96. I am also persuaded by the logic expressed by Dickson CJ. and Taylor J. in *MacDonald v. Robins*. Were s.82 applied to the Option Agreement in my view it would "transform its real character" from the grant of an option to the defendants, exercisable by the defendants jointly for €1, to one that either of them could exercise without the knowledge or concurrence of the other, and thereby obtain valuable Lands without paying valuable consideration.

97. On this reasoning I am of the view the terms of the Option Agreement are incompatible with the 'default' construction provided for in s.82(1)(b), and s.82(3) applies. I conclude that the defendants' Purchase Option can only be exercised by both defendants (or in the event that one of them is deceased, one of them and that person's estate) or if both are deceased, by both estates/heirs acting together.

98. Accordingly on its face the purported notice contained in O'Connell & Clarke's letter of 14th March, 2013, was not valid, because it only purported to be a notice from Mr. Cremins.

99. Mr. Cremins sought to circumvent this difficulty by stating (Day 4 p. 8):-

> "Well, Mrs. Cremins leaves everything up to myself and everything I do is on her behalf and if she's waiting around to give that evidence to the Court that's the way we have been doing with banks and everything. Like, she knows everything that I do and I does everything on her behalf and that's the way we always do it, like, and she knows that herself quite clearly."

He went on to state that she was a co-owner of the Lands with him because that was required by the banks to whom the Lands were mortgaged.

100. Under cross examination a letter from Mrs. Cremins to A&L Goodbody dated 15th April, 2015, was put to Mr. Cremins. In that letter Mrs. Cremins states:-

> "In this letter to A&L Goodbody solicitors, I have attached copies of airline tickets, and from them you will see that I was not in Ireland between the 24th March, 2013 and 30th March, 2013. I was never part of signing any Option Agreement nor was I ever in Knockacummer, all that I know is that it is in Rockchapel, Co. Cork. The first that I became part of this Knockacummer Wind Farm was when Nigel Hayes was sent from Brandon Co. Cork by Tim Cowhig, who was CAO of SWS, to Farranfore, to meet me for the signing of some sort of agreement. To this day I do not know what the agreement was about. Every since I have been dragged in and out of the Commercial Court and the sad thing is that my children are going through the same now. I am asking you personally, the solicitor acting for Brookfield/SWS Knockacummer Wind Farm, to seek a truce in this litigation which you are taking against my husband. I have given Authority to Denis Cremins to represent me in these High Court proceedings."

It was put to Mr.Cremins that this contained no reference to any authority that Mr. Cremins had prior to that time, nor that he had been acting on her behalf in relation to the Purchase Option Notice. In response Mr. Cremins accepted that Mrs. Cremins had had to sign all the relevant conveyancing and Option Agreement documents, but he said that was simply because her name was on the Folios. He said she wasn't party to the s.160 proceedings, but was dragged in because of the fact that she was on the Folios.

101. Apart from these assertions by Mr. Cremins, there was no documentary evidence before this Court to show that Mrs. Cremins gave Mr. Cremins authority to act on her behalf in serving a Purchase Notice, or indeed that she had any knowledge that he attempted to take that action. More significantly there was no evidence adduced by Messrs. O'Connell & Clarke to demonstrate that they had instructions on Mrs. Cremins behalf to serve the Purchase Notice, or that, that wording that was adopted was intended to include her.

102. This is not merely a technical point. Assuming that the defendants were entitled to exercise the Purchase Option in 2013, then the decision to exercise it was a serious one with immediate and long term consequences. The immediate consequence would be that a binding contract to buy-back would come into existence. The notice once served would be "irrevocable" without the written agreement of SWS (clause 2.4.2). The long term consequences, of getting back the Lands in 2042, could not easily or accurately be assessed, but certain possibilities would need to be considered before an informed decision could be taken. Under clause 3.3 "SWS shall not be obliged to (but may at its discretion) remove any buildings, erections or structures that it has constructed on the Option Property." Thus, and assuming the Lease Option was not exercised, the defendants could be left potentially with land with redundant buildings and structures including turbines, foundations, cables, wires etc. The existing planning permission granted in 2005 has some onerous conditions, including conditions relating to the removal of structures at the end of the 20 year period (Condition 1), and reinstatement of the Lands (Condition 17). It may reasonably be assumed that if a new or extended permission were obtained it would be subject to a similar conditions. While these might add value to the land, it is also conceivable (even if unlikely) that in the defendants' hands they might be an economic burden.

103. On the evidence as it unfolded it was clear that Mrs. Cremins was not privy to the cautionary advice given by solicitor and counsel to Mr. Cremins on 31st May, 2012. It may well be that she deliberately did not interest herself in the Wind Farm affairs. Nonetheless she had the right and entitlement, jointly with Mr. Cremins, to exercise the Purchase Notice, and Messrs. O'Connell & Clarke could only have sent a valid Option Purchase Notice with her authority and on her instructions, expressed or implied. There was no evidence of express instructions. I am not satisfied that there were any implied instructions to Messrs. O'Connell & Clarke. In the circumstances I do not accept that Mr. Cremins' bare assertions in giving oral evidence that he was acting on Mrs. Cremins behalf, and that his solicitors where acting with her authority, are sufficient. On this further ground I would find that the purported Purchase Option Notice in O'Connell & Clarke's letter of 14th March, 2013, to be invalid.

Estoppel Argument

104. In coming to the foregoing conclusions I considered the defendants submission that the plaintiff was estopped from challenging the validity of the Purchase Notice of 14th March, 2013. This submission was based on the fact that the plaintiff, on receipt of the Purchase Option Notice, went through a process which led to a decision to serve a Lease Option Notice, that such a notice was prepared and signed, and that the plaintiff attempted to serve same on the defendants.

105. An obvious difficulty with this plea is that it could be said to rely on the Lease Option Notice being valid, whereas the defendants' central contention in these proceedings was that that it was invalid because it was not served in accordance with the requirements of the Option Agreement. Leaving that aside when pressed the defendants were unable to identify any act or omission on their part by which it could be asserted that, as a result of the purported Lease Option Notice (or the decision to serve it), they altered their position or acted to their detriment. This is fatal to their estoppel argument. Nor is this plea improved by their complaint that the plaintiff's argument that Purchase Notice was invalid because it was on behalf of Mr. Cremin's alone was not raised directly in the Statement of Claim, and only came to prominence in the opening of the case and as a result of an amendment to the pleadings.

Adequacy of service of the Lease Option Notice

106. The plaintiff asserts that if the Purchase Option Notice was valid, then the Lease Option Notice was properly and adequately served on the defendants when it was handed to the defendants' son Michael Cremins on the public road near the entrance to the defendants' unnamed dwelling house situate in the town land Meenganaire.

107. The defendants assert that such notice was not served there but was hand-delivered to Michael Cremins in the farmyard of the neighbouring property of his uncle Patrick Cremins (also within the townland of Meenganaire), and it is contended that this is not a valid service because it does not comply with the requirements of the Option Agreement.

108. The plaintiff makes the alternative argument that the Lease Option Notice was validly served by delivery of a copy by email to the office of O'Connell & Clarke, solicitors on 28th March, 2013.

The Disputed Evidence of Service

109. Mr. Ulick Devane, a summons server based in Tralee, Co. Kerry, gave evidence that he was instructed by the plaintiff's solicitors to collect the document in Cork and serve it on the defendants at their home in Meenganaire, Knocknagoshel, Co. Kerry. He said that on 27th March, 2013, he drove from Tralee to Cork and collected an envelope from the plaintiff's office and proceeded to Meenganaire. He could feel a coin through the envelope. He was familiar with the defendants' home having served them on behalf of A&L Goodbody on various occasions. He said he arrived at about 2.30 pm, but he got no reply from the front door. He said that as he drove out onto the public road he observed the defendants' son Michael Cremins on his bicycle. He stopped his car near him and asked him whether his parents were nearby. He was informed by Michael Cremins that his mother was abroad and his father was away for the day. Mr. Devane then drove on down the road – photographs of which show it to be a very minor road – towards the main road that would lead into Castleisland. About 500 yards down that road he rang the offices of A&L Goodbody to seek instructions. It is not known to whom he spoke, but I am satisfied that it was not Mr. Alan Roberts. Mr. Devane said that he was then instructed to leave the letter with the defendants' son, Michael Cremins. He said he turned around his car and met Michael Cremins on the public road. He identified photograph number 4, where Mr. Devane is to be seen standing on the roadway, as the place at which he hand-delivered the envelope to Michael Cremins from his car. The entrance to the defendants house can be seen on the left in this photograph, about 50 yards away. As one would exit the defendants' property it would be necessary to turn right to reach this point. Mr. Devane said he then left and went home. It should be noted that in order to do this because of the narrowness of the lane he would need to have proceeded on towards Patrick Cremins' house to get to space to turn his car, and then proceeded back towards the main road leading into Castleisland. He denied that on that day he had proceeded into the farm of Patrick Cremins, or that he had there handed the envelope to Michael Cremins.

110. Of significance in Mr.Devane's evidence is that he said:–

> "... I have had occasion to go into [Patrick Cremins's] yard with different summonses and different correspondence and there was an occasion in July, 2012 when I entered his uncle's yard, Patrick Cremins' yard and Patrick was out, he was away for the day and Michael Cremins was there and I handed the envelope, it was correspondence from A&L Goodbody, I handed the envelope to Michael and asked him to put it on Patrick Cremins's kitchen table. Unless he is mixing it up with that." (Day 2 p. 152.)

111. In response to a request from A&L Goodbody Mr. Devane prepared a Statutory Declaration dated 1st April, 2014, recording his service of the document. In response to questions from the court Mr. Devane confirmed that initially when he exited from the defendants' house he turned *to his left* on the narrow public road, and was facing towards the main road to Castleisland when he observed Michael Cremins coming towards him on his bicycle and had his first conversation.

112. Mr. Michael Cremins gave evidence that he was 15 years old at the time, having been born on 17th February, 1998. He was first asked to recall the circumstances of service by Mr. Devane in or about March, 2015, and on 10th March, 2015, he signed a statement setting out his recollection of what occurred two years previously. His recollection was that his mother was in Hungary visiting his sister, and that his father was out lambing as it was a very busy time on the farm. As a result he was staying with his uncle Patrick Cremins. At the time he said he was on his bike going from his "scrap yard" (a bicycle scrap yard situated between the defendants home and the main Castleisland road) to his uncle's place. He said he had passed the entrance to his home when Mr. Devane driving his car stopped beside him, introduced himself and asked if his parents were at home. He said that his response was "my mom is in Hungary but my father is around", to which Mr. Devane responded "I will call to the house later to meet him". He said he proceeded to his uncle Patsy's farm where he was working putting waste plastic into bags for landfill when Mr. Devane drove in past Patrick Cremins' house and over to the farmyard and handed him a letter through the window of the car, and asked him to bring it home.

113. As to what may have become of the letter, in his statement of 10th March, 2015, he said "I do not know where this letter is gone. It must of gotten blown away as I was working outdoors at my uncle's farm yard". In his Witness Statement prepared for this case on 18th December, 2015, he said –

> "6. …I have no recollection of the type of envelope that was handed to me. I was busy with my work on the day and I put the envelope aside.
>
> 7. As I was staying with my Uncle Patsy for a number of days, as I do from time to time, I completely forgot about the envelope and I did not meet my Father or Mother for a few days after and I never informed my parent's about it."

In his earlier statement he said that it was –

> "about a year later I was asked by my dad did I get a letter from anybody on the 27th March 2013 but I could not remember as I was working hard at that time studying for my junior certificate exams and I was not asked anymore about this letter …"

until 5th March, 2015. On that day Mr. Devane served a summons on Mr. Cremins at the defendants' house, and there was a conversation at the door witnessed and overheard by Michael Cremins which he said triggered his memory. In his oral evidence he said that the time lapse between his first meeting Mr. Devane and the second occasion when the envelope was given to him was some ten minutes (Mr. Devane had indicated in his evidence that it was considerably less than this). The evidence was that Patrick Cremins's house was about 500 yards away from the defendants' home. Michael Cremins said that after the first contact Mr. Devane proceeded on down the road towards Patrick Cremins' farmyard where he had turned "at the top of the road". This was not evidence that was put to Mr. Devane in cross examination.

114. Under cross examination various discrepancies between the original statement signed by Michael Cremins' on 10th March, 2015, and his witness statement of 18th December, 2015 and his evidence in chief were put to him. The following was also put to him:-

> "Q … Now, just so I am clear about this, Mr. Devane was not challenged at all when he told the Court that in July, 2012, he served you in your uncle's yard with papers for your uncle. Do you remember that evidence?
>
> A … that didn't happen. I never seen Mr. Devane in my uncle's yard."
>
> (Day 3 p. 81).

115. Michael Cremins also stated that he had not mentioned the hand delivery of the envelope to him by Mr. Devane on 27th March, 2013 to his uncle Patrick Cremins. As to what became of the envelope he said "I misplaced it. I don't know what I did with it" (Day 3 p. 85). He gave evidence in relation to Mr. Cremins's lambing activities, from which it emerged that the defendants have sheep in a number of different farms at some distance from their home, and that he didn't know which farm his father was in, that his father would have been out some days from 8 o'clock in the morning to 10 or 11 o'clock in the evening, and that his father didn't have a mobile phone. He said that his first reaction on seeing Mr. Devane's car coming out of the home driveway was that it could have been a burglar. He said it was when he was finishing putting waste plastic into the bags and Mr. Devane came over to him on the second occasion that he realised he wasn't a danger to him. Notwithstanding this he reaffirmed that he did not mention the meeting or delivery to his father, whom he said he didn't see for a few days afterwards in early April after his mother returned home.

116. I prefer the account given by Mr. Devane. As an experienced summons server he appreciates the importance of giving accurate evidence to Courts, and on affidavit, in relation to service. I felt that he had a reasonably good recollection of the service on this occasion, and his evidence did not falter under cross examination. He was first asked to recollect the detail of service when providing his Statutory Declaration in 2014, whereas Michael Cremins was not required to commit his recollections to writing until the statement of 10th March, 2015. In general terms the level of recollection of Michael Cremins appearing from that statement and his Witness Statement and oral evidence was surprising given his evidence that following service he somehow mislaid the document and failed to remember to mention the service either to his uncle Patrick Cremins or to his parent's when he met up with them some four days or so later. I believe that his recollection was faulty.

117. Two other factors weigh heavily in favour of Mr. Devane's recollection. Firstly Mr. Devane said that when no-one was in the defendants' home he came out of the gate and turned to his left. This is entirely consistent with Mr. Devane, having found no-one at home, exiting the property and heading back towards the main road, and then ringing A&L Goodbody to take instructions. He would have had no reason to turn to his right. I therefore accept his evidence that he first met Michael Cremins on his bicycle on the

roadway on the Castleisland side of the defendants' house entrance – not on the other side closer to Patrick Cremins's house, as Michael Cremins had suggested. It follows from this that after the initial conversation Mr. Devane would have preceded in the direction of the main road to Castleisland, made his telephone call and then returned to hand the document to Michael Cremins as instructed. Given that Mr. Devane's car would then be facing in the wrong direction it would have been necessary for him to proceed "up the road" in the direction of Patrick Cremins's farm to turn before proceeding back towards the main road. This manoeuvre may be what Michael Cremins's recollects, but mistakenly attributes to the first encounter on 27th March.

118. Secondly, I am satisfied that in July, 2012 Mr. Devane had occasion to hand deliver to Michael Cremins in Patrick Cremins's farmyard a document intended for service on Patrick Cremins. This related to the proceedings taken by SWS against Patrick Cremins which were required to address adverse title claims by Patrick Cremins in order to pave the way for ultimate completion of the 2012 Settlement Agreement which occurred on 31st August, 2012. Mr. Devane was not cross examined in relation to this. I believe that Michael Cremins was mistaken in his recollection, and his evidence that this did not happen. I believe he confused that occasion with the later one when the envelope with the Lease Option Notice was handed to him on the public road.

119. Accordingly, I find that at around 2.40pm on 27th March, 2013 Mr. Devane served the Lease Option Notice in an envelope, addressed to the defendants at their home address at Meenganaire, and in which envelope there as a €1.00 coin, by hand delivering it to Michael Cremins on the public highway some 50 metres from the entrance to the defendants house, and that Mr.Devane thereupon asked Michael Cremins to give it to his parents. I am satisfied that Michael Cremins received the document on this basis without objection. I am also satisfied that this service took place within the townland of Meenganaire, but not within the curtilage of the defendants' house/property. However I accept the evidence of Michael Cremins to the effect that he lost this envelope and never gave it to the defendants.

Adequacy of Service

120. Under clause 5.3 of the Option Agreement the grant of a Lease of Lands to the plaintiff is "subject to compliance with the following conditions":-

> "5.3.2 The receipt by Cremins not more than 14 days after the Lease Option date of written notice of intention to take a lease … and the notice shall be effective and the Lease Option shall be deemed to be exercised at the time at which the notice is deemed to be delivered to Cremins pursuant to clause 11.4."

121. The contractual provisions relating to service in Option Agreement appear in sub clauses 11.4 and 11.5:-

> "11.4. Any notice, demand or other communication required or permitted to be given or made under this Agreement shall be addressed or sent as follows:-
>
> If to Cremins to:- Meenganaire, Knocknagoshel, Co. Kerry
>
> Attention: Denis & Sheila Cremins
>
> If to SWS:- SWS Knockacummer Wind Farm Limited

Gasworks Road, Cork.

Attention: The Company Secretary

or any such other address as any party may previously have notified to the other parties in writing.

> 11.5 Any notice or demand required or permitted to be given or made hereunder shall be validly given or made if delivered personally or dispatched by pre-paid letter post addressed as aforesaid and shall be deemed to be given or made:-
>
> 11.5.1. if delivered by hand – at the time of delivery; and
>
> 11.5.2. if sent by post – two Business Days after same shall have been posted."

122. Some case law assists the Court in the application of such provisions to the facts. In *Hare v. Nicoll* [1966] 2 QB 130 the Court was concerned with an option to repurchase shares at a fixed price, which option was excisable "before May 1", with a further proviso that the fixed sum be paid "before June 1". The Court of Appeal held that the two conditions as to date had to be strictly complied with and that the option was not validly exercised unless notice was giving before May 1st and payment before June 1st – and as the payment was only made on June 4th that condition was not fulfilled. At p. 141 Willmer L.J. stated:-

> "… It is well established that an option for the purchase or repurchase of property must in all cases be exercised strictly within the time limited for the purpose. The reason for this, as I understand it, is that an option is a species of privilege for the benefit of the party on whom it is conferred. That being so, it is for that party to comply strictly with the conditions stipulated for the exercise of the option."

Danckwerts L.J. agreed and at the end of his judgment stated at p. 148:-

> "In my judgment this case is one of a privilege rather than an option, and accordingly I find direct guidance towards the opinion which I have formed, ultimately without a shadow of doubt, in *Davis v. Thomas.* Equally if the provision be regarded, as may well be right, as an option, it is, I think, necessary, in accordance with general principles, to treat the terms of the option as strict conditions, failure to comply with which renders the option, and the rights conveyed by, ineffectual."

123. In the subsequent case of *Holwell Securities Ltd. v. Hughes* [1974] 1 W.L.R. 155, October, 1971, the defendant had granted the plaintiff's six months option to purchase certain property which was to be exercised by "notice in writing to" the defendants, and on 14th April, 1972, the plaintiff's solicitors sent a written notice exercising the option by ordinary post to the defendant. The notice never reached the defendant or his address. The action for specific performance was dismissed at first instance on the ground that the defendant had not received a notice, and the plaintiffs had not exercised the option to purchase. Russell L.J. stated at p. 158:-

> "The relevant language here is, '[t]he said option shall be exercised by notice in writing to the intending vendor …,' a very

> common phase in an option agreement. There is, of course, nothing in that phase to suggest that the notification to the defendant could not be made by post. But the requirement of 'notice … to,' in my judgment, is language which should be taken expressly to assert the ordinary situation in law that acceptance requires to be communicated or notified to the offeror, and is inconsistent with the theory that acceptance can be constituted by the act of posting, referred to be *Anson's Law of Contract,* 23rd ed. (1969), p. 47 as 'acceptance *without notification*.'"

124. Lawton L.J. took as a starting point that "it is a truism of the law relating to options that the grantee must comply strictly with the conditions stipulated for exercise: see *Hare v. Nicoll* …". He went on to state:-

> "… should any inference be drawn from the use of the word 'notice'? In my judgment, yes. Its derivation is from the Latin word for knowing. A notice is a means of making something known. *The Shorter Oxford English Dictionary* gives as the primary meanings of the words: 'intimation, information, intelligence, warning … Formal intimation or warning of something.' If a notice is to be of any value it must be an intimation to someone. A notice which cannot impinge on anyone's mind is not functioning as such."

He then referred to *Henthorn v. Fraser* [1892] 2 Ch. 27 where Hershell L.J. stated at p. 33:-

> "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usage of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

Lawton L.J. went on to state:-

> "….the wider principle, namely, that the rule does not apply if, having regarded to all the circumstances, including the nature of the subject matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other. In my judgment, when this principle is applied to the facts of this case it becomes clear that the parties cannot have intended that the posting of a letter should constitute the exercise of the option."

From this jurisprudence I adopt the following principles which I consider applicable:-

> (1) Generally in construing an option agreement the conditions and terms in relation to service of notice and the timing of service should be construed strictly. (This observation however, is without prejudice to my later consideration in this judgment of whether time is of the essence or should be strictly construed in relation to the service of the Lease Option Notice.)
>
> (2) *Save as may be expressly permitted by an option agreement,* notice or notification which is sent or delivered but that does not actually reach the intended recipients, or cannot be proven to have been communicated to them within the requisite time, is inadequate.

125. Applying these principles, the use of the words in clause 5.3.2 of "the receipt by Cremins … of written notice of intention to take a Lease" *prima facie* contemplates the defendants actually receiving the notice in order for it to be effective. The use of the word "notice" in clause 11.4 is consistent with this. I agree with the observation of Lawton L.J. in *Holwell* that "a notice is a means of making something known", and it is ineffective if it goes astray. That it is intended to communicate information to, in this case, the defendants, is emphasised by the use of the word "communication" in clause 11.4. Sub clause 11.5 reinforces this intention by deeming good the service "if delivered personally … 11.5.1 if delivered by hand – at the time of delivery". Thus if a pre-paid letter addressed to "Denis & Sheila Cremins" at "Meenganaire etc." had been delivered personally by hand to them that would have been sufficient. This would have been sufficient in my view whether or not the delivery took place at Meenganaire or at their house, the essential requisite being that it be "delivered personally…by hand".

126. The only other exception to personal delivery is that set out in clause 11.5/11.5.2 – the Lease Option Notice would have been deemed to have been given or made if sent by post to the defendants given address – the date of delivery being deemed to be "2 Business Days after same shall have been posted". There is no express requirement that this posting be by registered post – which of course would prove delivery and receipt – and the sender is entitled to assume that ordinary post is sufficient. So for example if it is assumed that the Purchase Option Notice was received by the plaintiff at its registered office on 16th or 17th March, 2013, a Lease Option Notice addressed to the defendants at Meenganaire and posted by ordinary post on the 27th March, 2013, would be deemed to have been served under clause 11.5.2 on 29th March, 2013 – and such service would have complied with clause 5.3.2 and the service requirements of subclause 11.5.

127. The plaintiff of course opted not to send the Lease Option Notice by post, and perhaps the advice was that this would be problematic given that the Purchase Notice was dated 14th March, 2013, and the fourteen day period might be held to expire on the 28th March, 2013. At any rate the plaintiff opted to deliver by hand. Mr. Devane who was following instructions did not deliver by hand personally to either of the defendants, nor did he, as he might have done, simply leave it in the letterbox of the house at Meenganaire Had he done so that might well have sufficed on the basis that it would be an improvement on the sending by ordinary post contemplated as sufficient in clause 11.5.2. In serving Michael Cremins on the public road, even though it was very close to the defendants' home, it could not be said that Mr. Devane was serving at the address specified in clause 11.4. The fact that the defendants' home does not bear a house name, and that it is a townland, and that the service on Michael Cremins took place within the townland of Meenganaire, does not overcome this difficulty. This is because it is clear that the reference to the defendants' address in clause 11.4 is meant to be a reference to their home.

128. For these reasons I do not consider that the service of the envelope/notice by Mr. Devane on Michael Cremins on the public road outside the defendants' home was in compliance with the Option Agreement. The decision on this would be the same whether one accepted Mr. Devane's account of service (which I do) or that of Michael Cremins. The mere fact that Michael Cremins was a fifteen year old at the time does not in my view provide a further ground for invalidating the service made. I have the opportunity of assessing Michael Cremins in the witness box, albeit that he is now a seventeen year old and studying for his Leaving Certificate. He seemed to me to be a perfectly normal young man and I had no reason to doubt his capacity at the time to follow Mr. Devane's simple instruction to pass on the envelope to his parents. Although it is true that service on a minor of court documents would not generally be regarded as sufficient to comply with the Rules of the Superior Courts, counsel for the defendants was unable to cite any authority to suggest that, outside of court documents, service could not be affected on a minor of the age of understanding, and having the capacity to receive and pass on those documents.

129. I am further satisfied on the evidence of Michael Cremins, and on the evidence of Mr. Cremins, that the envelope and notice hand delivered by Mr. Devane to Michael Cremins on 27th March, 2013, was not in fact brought to the attention of the defendants or either of them in the month of March, 2013. Accordingly I would find, were it is necessary to do so, that the purported service of the Lease Option Notice by Mr. Devane did not comply with the Option Agreement, and was invalid.

Alternative Service – On O'Connell & Clarke

130. As a fall back argument counsel for the plaintiff relied upon the letter dated 28th March, 2013, emailed by A&L Goodbody to Ms. Aoife O'Connell of O'Connell & Clarke, and also sent to that office by post, in which they stated "we enclose a copy of the Lease Option Notice served by hand on your client yesterday", and with which they did indeed enclose a copy that notice.

131. In making this submission counsel relied on the decision of the English Court of Appeal in *Westway Homes Ltd. v. Moores and other* (1992) 63P. & C.R. 480. That case concerned an option agreement where written notice of intention to exercise the option was required on or before 20th July, 1987, extended by agreement initially to 20th July, 1987, and finally to 19th February, 1988. There was regular correspondence between the solicitors acting for each party whilst a possessory title was being sorted out. Finally on 15th February, 1988 the plaintiff's solicitors wrote giving notice of intention to exercise the option to the defendant's solicitors, who wrote the same day to their client informing him of same. A further letter from the plaintiff's solicitor was sent on 18th February giving formal notice of the exercise of the option and enclosing a cheque in accordance with the option agreement. The defendant was not on the telephone and did not receive the notification of the second letter until 22nd February. The High Court held that the option had been validly exercised. The Court of Appeal unanimously upheld that decision. Dillon L.J. stated at pp. 487-488:-

> "My conclusion from the course of that correspondence is that by February 18, 1988, [the defendants' solicitors] were firmly in the saddle, instructed by Mr. Moores to deal with all matters relating to the improvement of his title, or the protection of the title by insurance, or anything else which would enable the property to be developed and for the development to be marketable and to enable the option to be exercised, which was of course the way in which Westway would be developing the property and the only reason, so far as Westway were concerned, as must have been apparent to Mr. Moores, why Westway were concerned with the improvement of Mr. Moores title.

In those circumstances, and on the facts of this case, I have no doubt that [the defendants' solicitors] had authority from Mr. Moores to accept the notice in the letter of February 18, exercising the option. Had objection not been taken which led to these proceedings, the correspondence would have gone on in the normal way to the conveyancing completion under the option agreement. "

That decision was reached even though there was no suggestion by anyone that the defendants' solicitors had authority to accept a notice exercising the option.

132. Counsel for the plaintiff asked this Court to apply *Westway Homes Ltd. v. Moores* by analogy, arguing that A&L Goodbody solicitors for the plaintiff were in correspondence with Messrs. O'Connell & Clarke up to and including March, 2013. I do not consider that this analogy stands up to scrutiny, and I agree with the submission of counsel for the defendants that the particular facts in *Westway Homes Ltd. v. Moores* make it distinguisable from the present case.

133. The nature of the correspondence between A&L Goodbody and O'Connell & Clarke from November, 2012, to March, 2013, was extremely limited. Letters were written by O'Connell & Clarke on behalf of Mr. Cremins in an effort to exercise the Purchase Notice – on 2nd November, 2012, 28th November, 2012 (a reminder), 12th December, ,2012 (a reminder, and enclosing €1.00), and further reminders on 9th January, 2013, and 16th January, 2013. Surprisingly this correspondence was not even acknowledged until A&L Goodbody sent a holding letter to O'Connell & Clarke on 22nd January, 2013, stating "we are reviewing same and the terms of the Option Agreement with and our client and will revert to you". This failure to respond was both unprofessional and discourteous, and compares unfavourably with the engagement between the parties' solicitors in *Westway Homes*. O'Connell & Clark wrote again on 30th January, 2013, acknowledging A&L Goodbody's letter, and mentioning Mr. Cremins' concern that the option which he had exercised be registered in the Property Registration Authority. A&L Goodbody responded on 31st January, 2013, simply indicating that the registration was a matter for the defendants. O'Connell & Clarke wrote again on 11th March, 2013, on behalf of "our client: Denis Cremins" by way of a further reminder in relation to the exercise of the Option Agreement, and A&L Goodbody replied on 13th March, 2013, and stated "we are taking our clients instructions in relation to this matter." From this it may be deduced that nothing had been done by the plaintiffs' solicitors in response to O'Connell & Clarke's correspondence in the period from early November, 2012, to mid-March, 2013. This was substantially confirmed by Mr. Roberts when he gave evidence and expressed regret that his office's response was neither timely nor adequate.

134. Apart from the unsatisfactory and one-sided nature of this correspondence, there is no indication or hint that O'Connell & Clarke are acting on behalf of Mrs. Cremins, or that they had instructions to accept service on behalf of the defendants or either of them of a Lease Option Notice. As I have already held, in my view this rendered invalid the Purchase Option Notice which Messrs. O'Connell & Clarke on behalf of Mr. Cremins purported to serve on the plaintiff at its registered office in the form of the letter/notice dated 14th March, 2013. Overall I am of the view that the quality and substance of the correspondence cannot be compared to that in *Westway Homes* where the Court of Appeal considered that the defendants' solicitors were "firmly in the saddle". A further distinction is that in *Westway* the first letter of 15th February giving notice of an intention to exercise the option was promptly sent on by the defendant's solicitors to the defendant, and he received it within the timeframe for exercising the option. By contrast I am satisfied from the evidence of Ms. O'Connell that she was not present in the office of O'Connell & Clarke on 28th March, 2013, and that the emailed copy of the Lease Option Notice was not in fact communicated by her or her office to the defendants at that time, and certainly not within the fourteen day period stipulated in the Option Agreement.

135. It is also the case, although it may not be critical, that A&L Goodbody in their letter of 28th March, 2013, did not actually purport, on their clients behalf, to exercise the Lease Option – the letter was simply passing on to the defendants solicitors a copy of the Notice without comment.

136. Accordingly I reject the plaintiff's argument that the email of 28th March, with copy Lease Option Notice, to O'Connell & Clarke could constitute a valid Lease Option Notice or adequate communication of same for the purposes of the Option Agreement.

Time of the Essence

137. A further issue arises in the event that the Notice served by O'Connell & Clarke on 14th March, 2013, was a valid Purchase Option Notice on behalf of the defendants. In those circumstances was time of the essence in the exercise of the Lease Option Notice?

138. Counsel for the plaintiff, while accepting that time is generally of the essence in an option agreement, argued that it could never have been intended that time was of the essence in relation to the service of the Lease Option Notice in the instant case because it could not be acted upon for 30 years, and an effective draft lease reflecting changes in landlord and tenant law, market standard provisions for wind farms, and market rents, as of 2042, could not have been delivered under clause 6 until 2042.

139. Reliance was placed on *Hynes Ltd. v. Independent Newspapers* [1980] IR 204. In that case the Supreme Court found that a time limit in a rent review clause did not operate to bar the right to a rent review when the review was not sought within the time provided by the clause. In both the High Court and the Supreme Court it was found that since the contract did not make time of the essence the time limit would not operate to bar the right to a rent review. O'Higgins CJ. Stated at p. 216:-

> "It is based on the assertion that such leases for long terms would not be granted or concluded without acceptance by the tenant of rent reviews and that, as a consequence, it would be unfair and inequitable that such a tenant should be allowed to repudiate an obligation he had accepted merely because, in carrying out what was agreed, a time clause was not observed. I find this reasoning compelling. I accept that there may be circumstances in which delay had been extreme or where, because of it, other factors have arisen which alter the equities. However, in the ordinary case where the payment of an increased rent is expressly envisaged and accepted, and where the failure to observe the requirements of a time clause is due to mere inadvertence and is not prolonged and in no way alters obligations already undertaken, I see no reason for saying that the equitable rule as to time in contracts should not apply. This is not to say that failure by the landlord to act in time may not be a breach of contract for which he may be liable in damages, if damage is caused. However, his failure in this respect should not be regarded as such a breach as would entitle the tenant to repudiate obligations which under the contract he had already accepted."

140. Counsel also relied on the judgment of Kenny J. where, at p. 219, he approved the following passage at p. 502 of the 6th ed. of Fry on Specific Performance:-

> "Time is originally of the essence of the contract, in the view of a Court of Equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. As this intention may either be separately expressed, or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to one or more of its terms, either by virtue of an express condition in the contract itself making it so, or by reason of its being implied."

141. Counsel argued that there was no valid reason why time should be implied as being of the essence in circumstances where the relationship between the parties was a continuing relationship over the thirty year period. Counsel referred to the decision in *Anglia Commercial Properties Ltd. v. North East Essex Building Co. Ltd.* [1983] 1 EGLR 151, where the Court was asked to determine whether time was of the essence in a clause requiring a developer to complete a development within four years. The developer was responsible for letting the units once constructed. The development was not completed within four years and the developer refused to continue construction on the basis that existing units were not being let as quickly as he had hoped and it was no longer commercially viable for him to continue construction, and he sought an extension to the four year time period. This was refused by the owner who argued that time was of the essence. The Court disagreed holding the time as not of the essence in circumstances where other clauses envisaged the developer continuing on beyond the four year period to let the properties once constructed. Lord Grantchester QC., sitting as deputy judge of the Chancery Division said, at p. 155:-

> "I pass to the agreement again to construe it. I do so against the background, of course, of Mr. Miller's acceptance that under clause 2(b) time was initially, as he described it, not of the essence. It seems to me that that concession was rightly made because the way the agreement operates is that the developer shall erect, construct and complete the units for which purpose the four-year period is imposed, but thereafter he proceeds to attempt to let and that provision and the eventual letting of the units may take place considerably later, depending entirely on the market. Therefore, it seems to me that a breach of the condition is *prima facie* not a breach of a provision of which time is of the essence, because the liability of the other party arises not in relation to the act of completion of the units but on the letting of the units which may take place some time thereafter. As we know, the lettings of some of the units constructed in the period up to June 1976 were only completed in September 1978. Therefore, it seems to me on the question of construction that Mr. Colyer is correct, and Mr. Miller's concession is correct, that time is not of the essence of the contract. Therefore on the authority of the Bunge case, that being the case, the provision cannot be upgraded to a condition and cannot be made so as to make time of the essence, by reason of the manner in which one party overran the time-limit or by virtue of the gravity to the other party which resulted or may have resulted therefrom."

Counsel then refers to the expressed wording of clause 2.5.1 of the Option Agreement to suggest that time is not of the essence unless expressly made so. It will be recalled that this clause provides:-

> "2.5.1 Immediately upon the exercise of the Purchase Option there shall arise automatically between Cremins and SWS a binding agreement for SWS to sell and Cremins to purchase the Option Property *subject as set out in the Agreement for the Purchase Price and the Conditions of Sale as varied by the terms and condition set out in the Second Schedule* hereto shall apply insofar as they are not inconsistent herewith." [Emphasis added]

142. Counsel argued that because the Conditions of Sale included condition 40, which requires the service of a Completion Notice, the parties did not intend time to be of the essence in relation to the Purchase Option. I did not follow the logic of this argument. Equity has always afforded relief in cases where there is a contract for sale and purchase of land with a specified date for completion, and completion does not take place before that specified date. This led to the development of a standard condition 40 in the Conditions of Sale published by the Law Society. In my view the importation of this standard condition to the contract of sale that comes into being upon service of a valid Purchase Option Notice does not support the argument that time was not of the essence of the exercise of the Lease Option. There is simply no logical connection between the two.

143. Counsel for the defendants relied on the established jurisprudence to the effect that time is of the essence in relation to the date by which an option to purchase land is expressed to be exercisable – a principle which also applies to options to take a lease. Reliance was placed on the decision in *Hare v. Nicoll* to which I have referred earlier in this judgment, and to the more recent decision of the UK Court of Appeal in *Benito Di Luca v. Juraise (Springs) Ltd. & others* (2000) 79 P. & C.R. 193. In that appeal Nourse L.J. delivering the judgment of the Court opened with the following remark at p. 194:-

> "The question here is whether time is of the essence in relation to the date by which an option to purchase land is expressed to be exercisable. It comes as something of a surprise to find that such a question should not be regarded as having been settled well before the middle of the last century."

Nourse L.J. went on to approve the judgment of Danckwerts L.J. in *Hare v. Nicoll*, and on p. 6 of the decision he stated:-

> "The difficulty, if indeed there is one, has been caused by some observations of Diplock L.J. in *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] A.C. 904, in which it was held by the House of Lords that time was not usually of the essence in relation to timetables specified in rent review provisions in leases. At p. 929C, Lord Diplock said:
>
> > "Again I will refrain from repeating the more elaborate juristic analysis of the distinction between the two types of contract that I attempted in the *United Dominions Trust case* [1968] 1 W.L.R. 74, 83–84. A more practical business explanation why a stipulation as to the time by which an option to acquire an interest in property should be exercised by the grantee must be punctually observed, is that the grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee. In accepting such a fetter upon his powers of disposition of his property, the grantor needs to know with certainty the moment when it has come to an end."

Nourse L.J. rejected the reliance by the appellant on these words as a basis for submitting that the rule did not apply where it could be shown that the grantor did not reasonably need to know with certainty the date when the option period has come to an end. In rejecting the submission Nourse L.J. stated:-

> "The rule is a universal one and, *except where the language of the option demonstrates the contrary*, it applies irrespective of what may or may not be reasonably thought to have been the needs of the grantor. A tentative explanation of the rule which Diplock L.J. thought was helpful in deciding an entirely different case cannot erode its application. Indeed, at any rate in regard to options to purchase land, the rule is so well established that it needs no explanation and I apprehend that no experienced conveyancer would pause to give it one."[Emphasis added].

In response to this counsel for the plaintiff relied on the phrase emphasised above for the existence of an exception. He argued that the rational referred to by Diplock L.J. – that the grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee – has no application in the present case. If the defendants exercise the option early they cannot in any event carry out any disposition of their interest in the Lands until 2042. Adopting the terminology used by Nourse L.J., counsel argued that the language used in the Option Agreement demonstrates a contrary position.

Discussion

144. I am of the view that the principles enunciated in *Hare v. Nicoll*, and restated recently in *Benito di Luca* are well established and represent the law in this jurisdiction.

145. Assuming the Purchase Option is not excercisable until 2042, these principles mean that time is of the essence in relation to the exercise both of the Purchase Option and the Lease Option under the Option Agreement. In other words time is of the essence of clause 2, and under clause 2.4.1 the notice must be served on or before 23rd March, 2042. This is only subject to an argument that might be made that the Purchase Option does not lapse until 23rd April, 2042, being the date mentioned in clause 2.3 – a difference that has not been fully addressed in argument and does not fall to be decided in these proceedings. However the point is that even if that later date is the final date upon which the Purchase Option can be exercised, time is still of the essence. Equally it means that under clause 5.3 time is of the essence in relation to service of the Lease Option Notice, which must be received by the defendants not more than 14 days after the date of exercise of the Purchase Option in 2042.

146. However, if the defendants are entitled to serve their Purchase Option Notice *at any time* from the date of the Option Agreement up to the end date of 23rd March, 2042 (or 23rd April, 2042), I consider that there are strong arguments for holding that time is not of the essence in relation to the exercise by the plaintiff of the Lease Option.

147. I respectfully accept as correct Lord Diplock's. explanation for why time is generally of the essence in relation to option agreements when he observed that "so long as the option remains open, [the grantor] thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee…". That applies in the usual option agreement where the grantee has a number of months or perhaps a few years in which to exercise an option to purchase, or take a leasehold interest. Once the option period expires the grantor knows, because time is of the essence, that he is now free to dispose of his propriety interest or lease his property elsewhere.

148. The present case could hardly be more different if it is assumed that the defendants can exercise the Purchase Option at any time up to March or April, 2042. Firstly 30 years is a very lengthy period of time for the exercise of any option. Secondly there is a second option, the Lease Option, dependent on the exercise of the first option. Thirdly it was not disputed that the effect of the express terms of the Option Agreement is that neither the conveyance to the defendants nor the lease back to the plaintiff could occur until 2042 (absent any Acceleration Notice). Fourthly under clause 8.2 the defendants are specifically prohibited from charging, assigning or otherwise disposing of any rights or benefits under the Option Agreement (although these can devolve on death to their heirs). They can never alienate such interest in the Option as they are granted under the Option Agreement. No similar provision prevents the plaintiff disposing of its interest in the Lands and the Option Agreement at any time – indeed clause 8.1 expressly confirms SWS's right to dispose of or charge their interest in the Lands and their rights under the Option Agreement.

149. It therefore cannot be said that the general principle that makes time of the essence in an option agreement applies in this case, because the defendants are in any event disabled from benefiting from the exercise of the option or taking any interest in the Lands, or disposing of any interest in the Lands or Option Agreement, until 2042. Indeed the only certainty in this case is that the defendants cannot recover possession or ownership of the Lands until 2042.

150. I have also found helpful certain pronouncements of the Supreme Court in *Hynes*, although it must immediately be acknowledged that time stimulations in leases relating to renewals or rent reviews are to be distinguished from other option agreements. In pointing out this distinction at p. 220 Kenny J. stated:-

> "On many occasions counsel for the plaintiffs referred to the lessors' option to serve a revised rent notice. In my opinion, the use of the word 'option' to describe the lessors' right to serve such a notice is both incorrect and apt to mislead. In *most* cases the specified dates within which an option may be exercised are of the essence. An option gives a right to acquire property - usually at a specified price and within a named time. Its exercise creates the relationship of vendor and purchaser or of landlord and tenant." [Emphasis added]

151. I have no doubt that Kenny J., a pre-eminent property and chancery judge, used the word "most" advisedly, and left open the

possibility that time might not be of the essence in all option agreements. In his judgment O'Higgins C.J. at p. 215 approved the statement in the 4th ed. of Halsbury that:-

> "Time will not be considered to be of the essence unless:
>
> (1) the parties expressly stipulate that conditions as to time must be strictly complied with or; or
>
> (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence …"

This statement was approved two years earlier by the House of Lords in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, the seminal decision followed by the Supreme Court in *Hynes*.

152. In my view the correct test, in relation to option agreements where time is not expressly stipulated to be of the essence, is to construe the relevant terms and the agreement as a whole, with particular reference to whether the nature of the subject matter of the contact or the surrounding circumstances show that time should be considered to be of the essence. This accords with the concept that a court of equity should seek to ascertain what is the real intention of the parties from the terms of the agreement. As expressed in the extract from Fry on Specific Performance, quoted with approval by Kenny J. in *Hynes*, this intention may be separately expressed "or may be implied from the nature or structure of the contract". This also accords more broadly with the principles of construction approved by the Supreme Court in *Analog Devices*. Hoffmann L.J's. fourth principle emphasises that "the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean".

153. In the present case the parties did not expressly stipulate that conditions as to time must be strictly complied with and it is therefore appropriate to examine the relevant Option Agreement terms and the agreement as a whole. I have already done this in distinguishing this Option Agreement from what I have described as the normal option, and the same four factors lead me to the conclusion that time is not of the essence in relation to service of a Lease Option Notice if the Purchase Notice can be served immediately or at any time between 2012 and 2042.

154. *Anglia Commercial Properties* is a good example of a case where the Court considered the agreement as a whole and concluded that the way in which it operated was such that the four year period imposed for development did not make time of the essence because it contemplated a continuation of the agreement until the letting of units which might take place some time thereafter. The fact that an agreement contemplates a continuing relationship between the parties, notwithstanding the exercise of an option or the passing of a time limit, is a further significant factor in assessing the intention of the parties.

155. If the Purchase Notice can be served at any time up to 23rd March, 2042 I am unable to discern any good reason for implying a term or construing the Option Agreement to make time of the essence of the exercise of the Lease Option.

156. I conclude therefore :-

> (1) that if my decision on construction/rectification of the Option Agreement is correct and the defendants' Purchase Option is not exercisable until 2042, then time must be regarded as being of the essence in relation to the exercise of both the Purchase Option and the Lease Option, because the normal principle that time is of the essence of an option agreement applies in circumstances were the agreement contemplates that both options will be exercised and completed within the year 2042.
>
> (2) However if, contrary to my decision, the Option Agreement does permit the defendants to serve a valid Purchase Option Notice at any time prior to 2042 then time is not of the essence of clause 5.3.2 in relation to the 14 days stipulated for the service of a Lease Option Notice.

157. As a result of these conclusions it is not necessary for the Court to consider counsel for the plaintiff's further submission based on a strong decision of five judges of the Australian High Court in *Legione v. Hateley* (1983) 152 CLR 406 which considered whether, time being of the essence of a contract for sale of land, the Court in the exercise of its equitable jurisdiction may grant relief against a failure to comply with a time stipulation. It will be for another court to decide whether the equitable principles of relief against forfeiture and estoppel enunciated in that case, and applied in the U.K. in at least one case, should be applied in this jurisdiction, and whether in any case they could be extended to an option agreement in which time is of the essence.

Summary and Proposed Declarations

158. A. The mistaken omission from the Option Agreement of a start date for exercise of the Purchase Option should be corrected by construction so that the opening lines of clause 2.4 are read with the underlined words as follows:-

> "SWS hereby grants to Cremins the option to purchase SWS' interest in the Option Property in 2042 for the Purchase Price on the Purchase Option Date subject to compliance with the following conditions":-

This is to reflect the true meaning of the Option Agreement and so that it is construed in conformity with clause 6, and clause 1 of the 2012 Settlement Agreement.

B. If the Option Agreement is not susceptible to "correction by construction" in the manner indicated, the Option Agreement should be rectified, by insertion of the words "in 2042" in like manner as in A above, in order to reflect the true meaning and intent of the 2012 Settlement Agreement.

C. In any event the purported Purchase Notice by letter dated 14th March, 2013, from O'Connell & Clarke to the plaintiff could not be valid because it purported to be given on behalf of Mr. Cremins alone, whereas the Purchase Option can only be exercised by both defendants (or, on the decease of one or both of them, their heirs, administrators and assigns). Section 82(1)(b) of the Land and Conveyancing Act 2009, which provides for "covenants" to be construed such that one of two or more joint covenantees can enforce a covenant severally, is by virtue of s.82(3) subject to the terms of the Option Agreement and does not apply to this Option Agreement because the express terms are inconsistent with the application of s.82(1)(b).

D. The Court prefers the evidence of Mr. Ulick Devane in relation to the delivery to Michael Cremins on 27th March, 2013, of the envelope containing the purported exercise of the Lease Option. This was hand delivered by Mr. Devane to Michael Cremins a few minutes after 2.30 pm on 27th March, 2013 on the public roadway some 50 metres from the defendants' home property in the

townland of Meenganaire.

E. Such service, not being personal to the defendants, and not being by post or hand delivery to their house, would not be sufficient to comply with the terms of the Option Agreement.

F. The sending of a copy of such purported exercise of the Lease Option to the defendants' solicitors, O'Connell & Clarke, would not have constituted valid service of that notice under the Option Agreement.

G. If, as I have held, the Purchase Option can only be exercised by the defendants in 2042, then time is of the essence in relation to the Option Agreement in relation both to the exercise of the Purchase Option and in relation to the subsequent exercise of the Lease Option.

H. If, contrary to my decision, the defendants can exercise the Purchase Option at any time prior to 2042, then upon such exercise time is not of the essence in clause 5.3.2 in relation to the exercise of the Lease Option.

159. Subject to hearing the parties further I propose to make the following declarations in relation to the Purchase and Lease-Back Option Agreement dated 2012 ("the Option Agreement"):-

> "(a) A Declaration that the written notice by letter dated 14th March, 2013, served by the defendants in purported compliance with clause 2.4.1 of the Option Agreement is null and void and of no effect.
>
> (b) A declaration that upon the true construction of the Option Agreement the Purchase Option cannot be exercised until 2042 and accordingly that the opening lines of clause 2.4.1 should be read and understood by the insertion of the words "in 2042" so that it reads:-
>
> *"SWS hereby grant to Cremins the option to purchase SWS' interest in the Option Property in 2042 for the Purchase Price on the Purchase Option Date subject to compliance with the following conditions:- …"*