Neutral Citation Number: [2005] IEHC 168

THE HIGH COURT

Record Number: 2001 No. 32 CA

IN THE MATTER OF THE LANDLORD AND TENANT (GROUND RENTS) ACT 1967 – 1984
AND IN THE MATTER OF AN APPLICATION BY A. O'GORMAN & CO. LTD
AND IN THE MATTER OF PREMISES SITUATE AT CARRICK HOUSE, MAIN STREET, CARRICKMACROSS, CO. MONAGHAN

BETWEEN

A. O'GORMAN & CO. LTD

RESPONDENT/APPLICANT

AND
JES HOLDINGS LTD

APPELLANT/RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 31st May 2005

1. This matter comes before the Court by way of an Appeal (by way of rehearing) from the Order of His Honour Judge Hogan made in the Circuit Court on the 24th July 2000 by which the learned judge, on appeal from the determination of the County Registrar, determined as follows:

> *1. That the determination that the applicant, A. O'Gorman & Company Limited has a right, as incident to his existing interest in premises known as Carrick house, Main Street, in the town of Carrickmacross, County of Monaghan, to enlarge that interest into a fee simple, and for that purpose, to acquire by purchase the fee simple in the said dwellinghouse and premises, and to acquire from the Respondent the Lessor its estate and interest in the said premises be and the same is hereby affirmed.*
>
> *2. That the purchase price to be paid by the Applicant for the unencumbered fee simple in the said premises be and the same is hereby varied to the sum of twenty thousand pounds (£20,000).*
>
> *3. That the only incumbrances on the property or any charges or mortgages thereon only affect the interest of the Applicant in the said premises.*
>
> *4. That the person or company entitled to the fee simple in the said dwelling is A. O'Gorman & Company Limited.*
>
> *5. That JES Holdings Limited be hereby ordered and directed to assign all its estate and interest in the fee simple in the aforesaid premises to A. O'Gorman & Company Limited.*
>
> *6. That there be no order as to costs."*

2. For convenience, I shall refer to the Respondent/Applicant, A. O'Gorman & Company Limited as "the tenant", and to the Appellant/Respondent, JES Holdings Limited, as "the landlord".

3. On the 2nd March 1998, the tenant, pursuant to s. 4 of the Landlord & Tenant (Ground Rents) Act, 1967 ("the 1967 Act) served Notice of Intention to Acquire the Fee Simple in lands therein described as:

> *"ALL THAT AND THOSE the premises together with garden and outhouses occupied in connection therewith which said premises are situate at Main Street in the Town of Carrickmacross, Barony of Farney and County of Monaghan which premises are more particularly the subject matter of a Lease dated the 11th day of October 1945, Evelyn Charles Shirley of the One Part to Violet Daly of the Other Part."*

4. The 2nd March 1998 is therefore the relevant date for assessing the entitlement to acquire the fee simple.

5. In the said Notice, particulars of the tenant's Lease or Tenancy were set forth as follows:

> *"Lease dated the 11th day of October 1945 and made between Evelyn Charles Shirley of the One Part and Violet Daly of the Other Part for the residue of the unexpired term of thirty two years from the 1st day of May 1919 subject to the covenants and conditions therein contained together with the further term of 50 years from the 1st day of May 1951 subject to the payment of fifty five pounds (£55.00) per year by equal half yearly payments on the 1st day of May and the 1st day of November in every year the first payment being due on the 1st day of November 1951 together with an Agreement made the 12th day of October 1970 between John Evelyn Shirley of the One Part and Margaret Mary Rennick of the Other Part wherein the said rent was increased to Seventy Five Pounds (£75.00) for the residue of the said term."*

Outline of the statutory scheme

6. The general right to acquire the fee simple interest is *contained in s. 8 of the Landlord and Tenant (Ground Rents)(No.2) Act, 1978* ("the 1978 Act"). That section provides:

> *"8.— A person to whom this Part applies shall, subject to the provisions of this Part, have the right as incident to his existing interest in land to enlarge that interest into a fee simple, and for that purpose to acquire by purchase the fee simple in the land and any intermediate interests in it and the Act of 1967 shall apply accordingly." (my emphasis)*

7. The persons referred to in s. 8 and to whom the right to acquire the fee simple attaches are those described in s. 9(1) of that Act, as follows:

> *"9(1) – This Part applies to a person who holds land under a lease of the following conditions are complied with:*
>
> *(a) there are permanent buildings on the land and that the portion of the land not covered by those buildings is subsidiary and ancillary to them;*
>
> *(b) that the permanent buildings are not an improvement within the meaning of subsection (2);*
>
> *(c) that the permanent buildings were not erected in contravention of a covenant in the lease; and*

(d) One of the alternative conditions set out in section 10."

8. The alternative conditions in s. 10, one of which must be fulfilled for the purpose of s.9(1)(d) above are set out in s. 10 as follows:

> *"10. – ……*
>
> *1. that the permanent buildings were erected by the person who at the time of their erection was entitled to the lessee's interest under the lease, or were erected in pursuance of an agreement for the grant of the lease upon the erection of the permanent buildings;*
>
> *2. that the lease is for a term of not less than fifty years and the yearly amount of the rent or the greatest rent reserved thereunder (whether redeemed at any time or not) is of an amount that is less than the amount of the rateable valuation of the property at the date of service under section 4 of the Act of 1967 of notice of intention to acquire the fee simple, or the date of an application under Part III of this Act, as the case may be, and that the permanent buildings on the land demised by the lease were not erected by the lessor or any superior lessor or any of their predecessors in title;*
>
> *provided that it shall be presumed, until the contrary is proved, that the buildings were not so erected.*

9. For the purposes of the condition provided for in s.9(1)(b) of the 1978 Act as set forth above, the term "improvement" is defined in s.9(2) as follows:

> *"9(2) – In subsection (1) (b) 'improvement' in relation to buildings means any addition to or alteration of buildings and includes any structure which is ancillary or subsidiary to those buildings, but does not include any alteration or reconstruction of the buildings so that they lose their original identity."*

10. Section 9(5) of the Act is important in relation to the condition to be fulfilled under s. 9(1)(c) namely that the permanent buildings *were not erected in contravention of a covenant* in the lease. Section 9(5) provides:

> *"9 (5) – The arbitrator may declare a person to be a person to whom this Part applies notwithstanding that the buildings were, in whole or in part, erected in contravention of a covenant, if he is of opinion that it would be unreasonable to order otherwise."*

11. The above statutory provisions embrace conveniently the various hurdles which the tenant must successfully clear in order to be entitled to require the landlord to convey the fee simple interest in the premises to him. I will in due course set forth the provisions of the legislation which deal with the method by which a consideration for that conveyance is arrived at. Those of course do not come into play until such time as the tenant has been found to enjoy the right to acquire the fee simple.

Some general factual background

12. The land and premises the subject of this application are situated on a small part of a very large area of land in County Monaghan which was, I understand from the evidence, originally granted to the 1st Earl of Essex in about 1576 by Queen Elizabeth I of England. The premises in suit are situated on the west side of what is today the main street in Carrickmacross in County Monaghan, a town which in the past few years has experienced significant growth in population terms, as well as in economic terms. It could reasonably be described as a thriving rural town.

13. For the purpose of this case, it suffices to say that certain of that granted property, including that situated on the west side of Main Street passed by inheritance to the ancestors of the present Shirley family in about 1646 and has remained in the ownership of that family in the broad sense ever since. Today, what remains of it, including these premises, are owned by JES Holdings Limited, a company registered in the Isle of Man in 1984. It has emerged from the evidence that in about 1977 Mr John Shirley, the then owner of the Shirley properties, moved from County Monaghan to live in the Isle of Man for reasons of tax avoidance following, or perhaps in anticipation of, the introduction here of a wealth tax. He transferred the properties in question to JES Holdings Limited by Deed of Conveyance dated 2nd July 1984.

14. The premises referred to in these proceedings as Carrick House, being on the lands in suit, date back to the late 18th century according to the Report of Mr.David Semple, Consulting Engineer and Architect, and to the late 18th or early 19th century according to the Report of Mr. David Freeman, Chartered Valuation Surveyor. In his evidence to the Court, Mr Semple dated the house between 1790 and 1810. Nothing turns on the precise dating of the building.

15. According to a photograph from the Lawrence collection of photographs, and thought to date from about 1880, the building at that date comprised one of what seems to have been two adjoining buildings across which has been erected a parapet front with an arched front doorway, having two windows to south side of the door and a shop frontage of equal length, to the north of that doorway. On the first and second floors there are five windows across, the additional one on each floor being over the centre arched front doorway described. Running from the south edge of the parapet wall at ground floor level is a single storey wall, with a doorway which would appear to give access from the street into ground behind, and at least one small building.

16. Another later photograph which is thought to date from the 1930s and which is taken from an elevated position in the garden within that wall and looking eastwards, shows the south elevation of the house together with a garden in which there is also a small single storey building on the southern margin of the property. From that inside vantage point it would appear that the wall along the street front which I described from the earlier photograph appears to have been replaced by a high hedge, or possibly the hedge has grown up inside that wall.

17. It is certainly clear, if the dating of this photograph is in any way accurate, that by the 1930s Carrick House was a significant and substantial house on the Main Street, in Carrickmacross, with a large garden adjoining same, as well as outhouses of various kinds. From the evidence which I have heard and the Historical Rateable Valuation Certificate and some copy deeds which have been provided, it appears that certainly by the end of the 19th century and well into the 20th century this house was the residence of various medical doctors who serviced an adjoining surgery. In a Lease dated 27th May 1919 made between Evelyn Charles Shirley of the One Part and Edward Phelan of the Other Part for example, there is a reference in the description of the premises to same being "lately in the occupation of Doctor McCaul". Edward Phelan is described in that Indenture as a "solicitor". Clearly the premises were considered to be a suitable residence for a professional person, even though there is amongst the copy documents of title provided, a copy of a "*Schedule of Improvements and Renovation of Premises…for Edward Phelan"* dated April 1919 which sets out a considerable quantity of repair work to be carried out to the premises. I am not clear whether Mr Phelan, solicitor or the Lessor was

to carry out these works, but one way or another Edward Phelan assigned the premises to one Ann Jane Daly "wife of Michael Daly" on the 31st October 1919 for the consideration of the sum of Two thousand Five hundred pounds for the residue of the term of years created by the 1919 Lease.

18. An Indenture of Lease dated 11th October 1945 between Evelyn Charles Shirley of the One Part and Violet Daly, spinster of the other part records the fact that by this date the said Violet Daly was entitled to the lessee's interest under the 1919 Lease. It is pure speculation but it is certainly a possibility that she was the sister of the Michael Daly referred to in the Assignment by Edward Phelan dated 31st October 1919. Nothing turns on it however.

19. In any event, this Indenture granted a Lease to Violet Daly for the term of fifty years from the 1st May 1951 subject to the annual rent of £55. This Lease contained a number of covenants, including the usual covenants as to payment of rent and repair of the premises. There are also two covenants which have a relevance to the present Appeal, namely one that restricted use to that of a private dwelling-house, and another in the following terms:

> *"…[the tenant] will not at any time during the said term without the previous license in writing of the landlord erect any new building walls or other erections on the premises hereby demised or make any alteration or addition in or to the said messuage and premises without such license as aforesaid."* (my emphasis)

20. The Lease provided a power of re-entry to the landlord in the event of the tenant failing or neglecting to perform or observe any of the covenants conditions or agreements therein contained, so that the landlord could thenceforth hold and enjoy the re-entered premises "*as if these presents had not been made" and "without prejudice to any right of action or remedy of the landlord in respect of any antecedent breach of any of the covenants by the tenant…"*

21. By May 1969 the lessee's interest in the premises had been assigned to one Margaret Mary Rennick, and relevantly to these proceedings, and by Variation Agreement dated 12th October 1970, John Evelyn Shirley, in exchange for an increase in the yearly rent to the annual sum of seventy five pounds (£75.00) removed "*all restrictions on the user of the premises demised by the Lease (other than the restriction on the Lessee using the premises in a manner which would be or cause a nuisance)*"

22. The next important and significant happening in the interesting history of these premises is that by Deed of Assignment dated 16th August 1972, Ms. Rennick assigned the premises to Michael Connolly for the residue of the term of years granted by the Lease of 1945.

23. It appears that thereafter Mr Connolly set about developing the premises into a supermarket and operated as such until by Indenture dated 1st July 1974 he assigned the premises to A. O'Gorman & Company Limited ("the tenant" in this Appeal), for the consideration of Twenty Five Thousand Pounds (£25,000), including therein a covenant on his part that he and his successors in title "*will not carry on the business of retail grocer within a radius of one mile of the property presently being disposed of for a period of three years.*"

24. Mr O'Gorman bought the premises with the benefit of a tenancy in respect of the butcher's shop on the ground floor of Carrick House.

Developments by the tenant 1974 onwards

25. From photographs taken of the premises after purchase by the tenant in 1974, it is apparent that on what was in the 1930s an attractive garden at the south side of Carrick House, there had been constructed a single storey supermarket premises stretching back some distance from the main street. It is also apparent that the two ground floor windows in Carrick House to the south of the front door of Carrick House, which I described already, had been replaced also with a shop front window and entrance door leading into a butcher's shop.

26. Evidence has been given of the various developments which have taken place since 1972 with the benefit of appropriate planning permissions.

1. Application dated 16th May 1972 – T.P.193 – Michael Connolly

27. Permission was granted to convert "the existing residential property" to a butcher's shop and to erect a supermarket premises. The plans accompanying this application show in great detail the extent of the works to be undertaken. It first involved the demolition of the small building at the southern extremity of the garden as shown in the 1930s photograph to which I have referred. Then a single storey supermarket premises was constructed so as to cover the area previously covered by the demolished building as well as what had been the garden between it and the southern gable of the house. The newly erected supermarket therefore adjoined the southern gable of the house. What had been the lounge room in Carrick House on the ground floor was converted into a butcher's shop with its own street entrance. These works involved the demolition of the original side entrance into Carrick House with its glass porch area, as well as the demolition of certain sections of the southern wall of Carrick House at ground floor level to make way for the rere part of the supermarket premises which was to occupy what had been the kitchen and dining-room area of the former residence. In addition, the supermarket itself would extend considerably beyond the back wall of the house, so that what had been obviously part of the rere garden of the house was now to be covered by the rere part of the new supermarket premises in which there was a storage, toilet area and cold-room located. On the eastern wall of the new supermarket there is a goods entrance into the storage area which also served as a fire exit from the premises, according to the plans.

28. The area at this time covered by the new supermarket and storage area at the rere is shown to be 3970 sq. feet, and the area of the butcher's shop is shown to cover 368 sq. feet.

29. I have set out the detail of this first development of the premises in some detail as I regard it as important in the context of an argument put forward by the landlord in these proceedings that the works which have been carried out constitute an "improvement" for the purpose of s. 9(2) of the 1978 Act, and are not such as to have caused the premises to "lose their original identity" for the purpose of that section. There has of course been significant further development of the premises since then by virtue of works carried out pursuant to further planning permissions as further set forth hereunder.

1. Application dated 3rd July 1979 – T.P. 434/79 – A. O'Gorman:

> Having bought the premises in 1974, Mr O'Gorman carried out certain alterations and extensions to the premises at the rere after planning permission was granted in August 1979. These works involved the construction of a much larger store and loading bay area at the rere of the premises, the relocation of the toilets to the southern side, as well as the creation of a canteen adjacent to the news toilets. There were certain other internal alterations.

2. Application dated 3rd May 1982 – T.P. 11/82 – A. O'Gorman:

In this application, the tenant applied for a change of use permission in respect of the dwelling accommodation on the first and second floors of Carrick House, so that these areas could be converted into flats. All necessary works appear to have been internal.

3. Application dated 22nd February 1985 – T.P. 7/85 – A. O'Gorman:

In this application, the tenant applied for permission to further and significantly extend the store facility and to provide some car-parking, all at the rere of his supermarket premises. In fact from the plans it appears that this extension at least doubled the stores area at the rere of the supermarket. This application was granted with, inter alia, a condition that none of the extended store area would be used as retail space.

4. Application dated 14th March 1990 – T.P. 9/90 – A. O'Gorman:

The next application was for permission to alter the appearance of the front of the supermarket by the erection of a new first floor level façade and new shopfront and sign. This work gave the front of the premises a pitched roof and an appearance of a having ground and first floor, but in fact internally it was still a single floor premises, the works creating what could best be described as an atrium type interior at the front of the supermarket. But when seen from the street outside, there are windows at first floor level.

5. Application dated 7th July 1994 – T.P. 29/94 – A. O'Gorman:

Finally, in 1994 the tenant made application to further alter the front of the premises. What had been the butcher's shop earlier referred to was now to be accessible from within the supermarket by the creation of an internal entrance, so that this premises could operate as an off-licence, having also a separate entrance off the street. From the style and colour scheme of the new frontage, covering now the entire front, including the off-licence premises, it is obvious to anyone looking at it that this ground floor area is now part of the one premises, whereas previously, the butcher's shop was clearly and distinctly in appearance a separate premises. By now the floors above what was the butcher's shop and now the off-licence consist of one room which has been converted into an office used by Mr O'Gorman in connection with the supermarket business, and there are two other rooms converted into flats, one on the first floor and one on the second floor. There was then a further area within Mr O'Gorman's 'take' under the 1945 Lease, which extended at first floor level only over the premises adjoining Carrick House and which comprised a third flat. Nobody seems to be sure quite how it happened that the 'take' under the 1945 Lease included this extra space on the first floor of the adjoining premises, but there is apparently no dispute that it does. It will later be referred to as a "flying freehold" in the event of the acquisition of the freehold by the tenant.

30. Mr O'Gorman stated during his evidence that these flats were let out for a short period, after which members of his own family accommodated themselves there while waiting for a houses of their own. It is apparently about ten years since these flats were let out.

31. As of the present time, these supermarket premises are now closed, but the off-licence remains open. It appears that the tenant has in fact moved his supermarket business to a premises in another part of the town in 2003.

Tenant's Expenditure

32. I have received evidence that between the years 1979 and 1996, the tenant has expended a total sum of £327,835 in developing these premises to their present state. In evidence he stated also that he would not have expended this amount of money if he had any doubt about whether or not he was entitled to acquire the freehold in due course. Whereas the building when he bought it had an area of some 283 sq. metres, this has now been extended to some 1339 sq. metres – almost a fivefold increase.

33. He thinks that a number of years before applying to acquire the freehold he had consulted his solicitor for advice in that regard, but he could not say exactly when, and neither was his then solicitor called to give evidence in this regard.

34. Mr O'Gorman also gave evidence that the area now at the rere of the building is used for the emptying of empty pallets, containers and storage, and for staff car parking. Some incineration of rubbish also took place in this area. He described this area as being necessary and useful for the shop.

35. The western boundary of the entire property consists of a river, and the land slopes very steeply down to the water level after the rubbish and parking area which I have just described.

Landlord's consent to alterations to the premises

36. When the tenant took the assignment of the premises from Michael Connolly in 1974, the consent to that assignment was obtained although in fact such consent was not required under any term of the 1945 Lease.

37. But as I have already set forth, there is a covenant requiring the tenant to obtain prior written consent from the landlord in respect of any works to be carried out to the premises. This is relevant because, as I have already set forth, one of the conditions set forth in s. 9(1)(c) of the 1978 Act is "*that the permanent buildings were not erected in contravention of a covenant in the lease*" (my emphasis)

38. It is not in dispute that in fact there was no such prior consent obtained by the tenant prior to the works that were carried out up top 1990. In evidence he stated that it was his belief at the relevant times that any consents required to be obtained for the works were obtained by his then solicitor. Mr Owens questioned him closely in this regard and sought to cast doubt on this evidence by pointing to the fact that when his architect, Mr White was lodging the various applications for planning permission, the premises were described in the application form as being held in freehold, and it was suggested that the tenant must have so instructed his architect. Mr O'Gorman denied instructing anybody that the premises were freehold. It was also put to him that since he was spending a considerable amount of money on these premises he would have been anxious to make sure that any necessary consents were obtained. Mr O'Gorman stated that in this regard he relied at all times on his solicitor to do what was necessary. Mr Owens asked him whether he could be wrong about having asked his solicitor to obtain the necessary consents, but Mr O'Gorman stated that

his solicitor had always told him that he needed consents and that he thought then that he would have proceeded to obtain them. His then solicitor was not called to give evidence. But Mr Owens referred to a letter dated 10th September 1990 which was written by his then solicitor to the landlord's solicitor and this letter refers to the fact that under the lease the prior consent was required, but that his client was not aware of the covenant, and went on to state that had his client been aware of the need to obtain the prior consent he would have done so. The letter went on to request the necessary consents to the completed works in order to regularise matters. Mr O'Gorman was not really able to account for the contents of that letter, and relied on his solicitor at all times to do anything necessary in relation to these matters. One way or another the consent was not sought when it ought to have been sought, but retrospective consent was obtained.

39. Mr Owens sought to cast further doubt on what Mr O'Gorman stated in this regard by referring to the fact that even in respect of the planning permission obtained in 1995 (ref: T.P. 29/94) there was no prior request to the landlord for his consent to the proposed works, even though given the retrospective consent which had been obtained in 1990 he must have been aware of the need to obtain it. Mr O'Gorman accepted that after 1990 he was aware of the need to obtain prior consent, but said also that what they were doing in 1995 involved only a change of use and nothing structural. But Mr O'Gorman accepted that some works were required in relation to the shop-front and also an entrance into the off-licence from inside the supermarket.

40. It is an undoubted fact that it was not until 1990 that consent was sought retrospectively to the alterations which had been made up to that point. There is however a written consent executed under the seal of JES Holdings Limited and dated 15th February 1990 in respect of developments already carried out in respect of Planning Permission refs: 434/79, 11/82, 7/85 and 8/90. It is also undoubted at this stage that no consent, prior or retrospective, was obtained for the work carried out in 1995/96.

41. I will return to this matter when dealing with the submissions made in relation thereto.

42. The point has been reached where enough background facts and evidence in relation to this part of the case has been set out. I will no doubt refer to additional pieces of evidence as I go through the legal submissions which have been made.

Legal Submissions

The tenant's hurdles
43. There is no controversy between the parties as far as the premises being held under a lease is concerned, nor that there are permanent buildings thereon. That much is clear. There is however considerable dispute between the parties as to whether other requirements are met by the tenant in this case so as to bring him within the statutory scheme under which he would be entitled to acquire the fee simple interest from the landlord. I will examine each of the requirements in turn.

1. *That there are permanent buildings on the land and that the portion of the land not covered by those buildings is subsidiary and ancillary to them - s.9(1)(a) of 1978 Act*:

Mr O'Neill has submitted that the question arising under this subsection is whether the relatively small area of what the tenant describes as waste ground between the rere of the supermarket premises and the river which acts as the western boundary of the property is "subsidiary and ancillary" to the permanent buildings. I have already set out briefly the evidence of Mr O'Gorman that this area is used for the assembling of empty pallets, containers and rubbish of one kind or another in connection with the supermarket business, and he has also said that some incineration of rubbish takes place here also, as well as part of the area being used for the parking of cars by his staff. He said this area was necessary and useful the business which he carried on in the premises.

Mr O'Neill submits that the permanent buildings for the purpose of this subsection are the original Carrick House, as well as the additional structures constructed from time to time by the tenant, and that the area of ground not built upon at the rere of the premises themselves is "ancillary and subsidiary". That phrase is not defined in the Landlord and Tenant legislation, but Mr O'Neill referred the Court to the judgment in the Circuit Court of Judge Shannon in *Killeen v. Baron Talbot de Malahide* [1951] Ir. Jur. Rep. 19. In that case a reversionary lease had been applied for to the respondent in respect of a substantial house built by the lessee of the land, as well as in respect of a small grass plot in front of that house and a field which lay beyond a wire fence dividing it clearly from that grass plot. It appears that the lessee had for some 30 years previously let out that field for agricultural purposes. It was held that while the grass plot was ancillary and subsidiary to the house, the field beyond it was not. The judge prefaced his conclusions with a cautionary note as follows at p.21:

> *"I do not think it possible in any given case to lay down exact meanings for these two words which will enable anyone to say in another case that upon my definition he will either win or lose his case. The terms must be interpreted having regard to the facts in each case."*

He went on to conclude:

> *"On examination of the words, it seems to me that the word "ancillary" is stronger against the applicant than the word 2subsidiary", but by reason of the draughtsmanship of the Act, I need do no more that decide that either of the words is inapplicable to the particular facts…… I think that "ancillary" means ministering in an active way, whereas "subsidiary" means suggests a mere passive addition to the building……the words "ancillary and subsidiary" require the giving or doing of something actively benefiting the house and are not satisfied by proof that the land is aesthetically advantageous to the building."*

Given the cardinal rule of statutory construction that words contained in a statute must be given their ordinary meaning, it is helpful to refer to the meaning of these words as set forth in *The Concise Oxford Dictionary of Current English*, [Clarendon Press Oxford 1990].

The word "ancillary" when followed by the word "to" is defined as "subordinate, subservient". The former in turn being defined as "of inferior importance or rank; secondary, subservient", and the latter as "subordinate". Clearly there is considerable overlap in these dictionary definitions.

The word "subsidiary" is given the meaning "serving to assist or supplement".

I find it helpful to regard "ancillary" as meaning "of lesser importance or subordinate" and "subsidiary" as "serving to assist or supplement". These meanings seem to me to accord with one's ordinary usage of the terms.

Mr O'Neill has set out a number of reasons for his submission that the area of ground between the rere of the supermarket and the river is ancillary and subsidiary to the permanent buildings:

> (a) part of it is used for car-parking for staff in conjunction with the business, and in this regard he refers to the judgment of Lardiner J. in *Fitzgerald v. Corcoran* [1991] ILRM 545 in which that learned judge held in relation to Castleknock Tennis Club that the car-park was subsidiary and ancillary to the clubhouse premises, while the hard tennis court was not.
>
> (b) That this area, along with the other land adjacent to Carrick House has since 1919 been regarded as part of the curtilage of Carrick House. In this regard it will be recalled that with the exception of the area on which the small house (demolished by Mr Connolly in the early 1970s) stood, the remainder of the ground was the garden and outhouses forming an amenity to or enjoyed by Carrick House.
>
> (c) The unbuilt portion is both small in area, as well as being small relative to the remainder of the area.
>
> (d) The unbuilt area is within the physical boundary of the property.
>
> (e) The unbuilt area is incapable of any independent use, and do not serve any other lands.

Mr Owens on behalf of the landlord has submitted that there is no evidence that this waste ground area has in any way actively benefited the building on the land, and therefore cannot be regarded as being ancillary and subsidiary to same. He has pointed to the evidence that rubbish has been burned in that location and that there has been some parking of staff cars, but that the area has not been developed in any way for parking, and that for the most part the area is simply an area of waste ground incapable of benefiting the building.

My conclusion is that in the light of the evidence of Mr O'Gorman, and I accept his evidence in this regard, that the area has been used in connection with the business of the supermarket for the parking of cars, and also for the collecting and incineration of rubbish, it is an area which comes within the definition of "ancillary and subsidiary". It is clearly "of lesser importance or subordinate" and it has also been an area "serving to assist or supplement" the premises in the sense of being of assistance to the business run out of the premises. An important factor in my consideration of the point has been the certain fact that at all relevant times this small area has been within the boundary of the property, is not of sufficient size or character to be capable of any independent use, and that, accordingly it is of an entirely different character to the field beyond the grass plot in front of the house, which was the subject of the judgment of *Judge Shannon in Killeen v. Baron Talbot de Malahide* [supra].

2. That the permanent buildings are not an improvement within the meaning of subsection (2) - s.9(1)(b) of the 1978 Act:

For the purposes of this condition provided for in s.9(1)(b) of the 1978 Act, the term "improvement" is defined in s.9(2) as follows:

> *"9(2) – In subsection (1) (b) 'improvement' in relation to buildings means any addition to or alteration of the buildings and includes any structure which is ancillary or subsidiary to those buildings, but does not include any alteration or reconstruction of the buildings so that they lose their original identity."*

I have already set out in considerable detail the history of development at this property, both in terms of what changes took place within Carrick House itself, as well as on the area formerly comprising the garden and outhouses and on which the supermarket was erected by Michael Connolly, and which was significantly added to by Mr O'Gorman after he purchased same. The first thing to note is that the subsection defines what is meant by an improvement as being "*any addition to or alteration of the buildings*". The new building erected first of all by Mr Connolly, and so greatly expanded by Mr O'Gorman in the years since 1974 must be regarded as an "addition", and the works carried out within the original Carrick House itself must be regarded as an "alteration" to that building.

So, were it not for the saving clause at the conclusion of ss.(2) ("*but does not include any alteration or reconstruction of the buildings so that they lose their original identity*"), it would be very difficult to argue that these works would not immediately take this property outside the category of lease entitling the tenant to acquire the fee simple interest.

The interesting question remains as to what precisely is caught by this saver. The word "addition" is excluded from the saver clause, whereas "addition" constitutes "improvement" in the definition. It would appear therefore that the additional buildings erected by the lessee at various times cannot avail the tenant in order to come within the saver. In other words, the additions cannot be called in aid in order to satisfy the Court that the improvements done to the premises as a whole have caused the original building to lose its original identity. It seems to be to inevitably mean that when seeing whether the original identity of Carrick House has been lost, the Court must have regard only to work which impacted directly upon that original structure by way of "alteration or reconstruction".

Prior to the purchase of Carrick House by Mr Connolly, this was a significant private residence. The main entrance into the house itself was at the southern side of the house in the garden, and took the form of a curved front entrance door. There was an entrance into that part of the garden from the Main Street. After that purchase, this entrance was removed, and thereafter entrance to the house was gained directly from the Main Street. In addition, Mr Connolly also applied for and obtained planning permission to install a butcher's shop on the ground floor of Carrick House. I have already set out in the history of this property that the landlord, in exchange for an increase in the annual rent to £75 had removed the restriction as to user only as a private dwelling. This no doubt enabled or at least assisted Ms. Rennick to dispose of the property to Mr Connolly whose intention clearly was to use the property as a commercial property. As we have seen, he erected a supermarket premises on the property adjacent to the house, and let out the ground floor of the

house itself to a sub-tenant to operate it as a butcher's shop, access to which was gained through a new and separate front door on the street.

Thereafter, as far as Carrick House is concerned, the kitchen at the rere of the house as well as the dining room of the house became part of the supermarket premises. Certain changes to the southern wall of the house were also required in connection with the erection of the supermarket. I have detailed these matters earlier. Internally within Carrick House, the stair return was demolished although the original staircase remains in situ to this day, as do a number of other original features of which evidence has been given.

In addition, within Carrick House itself, there have been major changes upstairs so that there are now three separate flats which have been rented out or used by O'Gorman family members as dwellings. There is also an office in that building which Mr O'Gorman has used in connection with his business.

Mr Owens submits that the original identity of Carrick House has not been lost. He has adduced evidence to the effect that reinstating Carrick House to its original state would not be impossible and in fact that it would be a relatively easy task once the supermarket was demolished. That evidence has highlighted such matters as the retention within Carrick house of the original staircase, some original cornicing and plasterwork, the retention of the original roof structure. Mr Semple on behalf of the landlord stated that he did not think it would require much structural alteration to restore Carrick House to its original state as being a separate self-contained building as it had been originally. He did not consider that upstairs there had been much alteration of a structural nature, but that the ground floor area had been altered to an extent as shown, but he felt that the various partition walls which had been put up in order to facilitate the development of the supermarket could be removed so that the southern wall of the house could be reinstated to its former state. As far as the ground floor was concerned he stated that two things would be necessary. Firstly, replace the front with two windows as before, and secondly leave various Reinforced Steel Joists (RSJs) in place, and build up the walls again in concrete block.

My conclusion is that the subsection does not speak in terms of how easy it might be to return the building to its original state. It speaks of whether the building, as a result of alterations carried out to it has lost its original identity. The question in my mind seems to be reduced to whether in the light of the works carried out within the original house, and the change of use on the ground floor and the creation of rented flats on the two floors above, as well as the loss of the garden and outhouse, this property is no longer identifiable as the house that it was before 1972. The answer to that question as far as I am concerned is quite obviously that it has lost that original identity. By no stretch of anybody's imagination could it be said that this is still the same premises as the rather attractive private residence with garden and outhouses which one can see in the photograph taken in the 1930s. It is, like it or not, now a commercial premises - a change to which the landlord in effect consented to by the removal of the restriction as to user as a private dwelling in exchange for an increased rent. The character of the building is so completely altered from what it was that one would be forced to conclude that its original identity has been lost, and in saying that I am closing my mind to the additional buildings, for the reason that I am of the view that they are not caught by the saver in the section.

As to the meaning of identity, it is worth resorting to the definition of that word to be found in the Concise Oxford Dictionary of Current English [op. cit.] in order to consider the ordinary meaning of the word. The word is defined as "*the quality or condition of being a specified person or thing……the state of being the same in substance, nature, qualities, etc; absolute sameness*". This embraces far more in my view than the physical structure, and can therefore include or embrace a change of character, such as referred to by Lavan J. in the passage of his judgment as provided to the Court in unapproved form in *Crosbie v. Dublin Port and Docks Board*, unreported, October 1993.

It is worth also looking at the description of the premises as described in the 1945 lease:

> *"ALL THAT dwellinghouse and premises known as Carrick House in the Main Street, Carrickmacross at present in the occupation of the tenant together with the garden and outhouses occupied in connection therewith ……"*

If a solicitor was preparing a contract for sale now of what is contained within the original structure of Carrick House, one might usefully ask rhetorically how different the description of the premises would be.

As I have already stated, I do not think that it is correct to look at the loss of identity from the perspective of what would be involved in restoring the premises to its original identity. It is a question simply as to whether that identity, in the sense which I have outlined, has been lost by the alterations made.

3. That the permanent buildings were not erected in contravention of a covenant in the lease - s.9(1)(c) of the 1978 Act:

As I have already set forth there is no doubt that the alterations to Carrick House were carried out without the prior consent in writing of the landlord. It is also a fact that the additional buildings erected on the property were erected in similar breach of the covenant in that regard. However, as I have set forth, the landlord gave his retrospective consent in 1990 to the works which had been carried out up to that point. The work carried out subsequent to that date do not appear to have received consent, retrospective or otherwise, although Mr O'Gorman expressed the view that there was nothing of a structural nature involved, but merely change of use. I do not think he was quite accurate about that, and he accepted as much when cross-examined about it. Mr Owens was at pains to demonstrate that Mr O'Gorman was being less than honest or forthright as to his knowledge as to the need to obtain prior written consent to any work he was carrying out. Mr O'Gorman says that he simply relied on his solicitor to keep him right on all such matters. I have to say that I do find it somewhat extraordinary that after 1990 when retrospective consent was obtained for a whole raft of works carried out over many years, that nobody seems to have thought to approach the landlord again after 1990 in respect of the later works, especially when there does not appear to have been any reluctance on the part of the landlord to consent, or any difficulty about it.

I think that while Mr O'Gorman has stated that he simply relied on his solicitor to keep him right about these matters, there is a certain old-fashioned naivety about placing such blind faith in his solicitor, no matter how reputable and previously reliable that solicitor has proven to be. As the client, Mr O'Gorman bore the responsibility to ensure that in his dealings with the property he was not acting in breach of his covenants. I have heard no evidence from his then solicitor, but a reasonably prudent client in this case after 1990 would have ensured not only that he had asked his solicitor to

obtain the prior consent to the proposed work, but would have gone further in that regard, and made sure that this step was in fact taken on his behalf. As I have said I have heard no evidence about this from the solicitor concerned, and therefore I do not wish to be taken as accepting that the solicitor was instructed to obtain the consent, either expressly or by any implied instruction, but on an assumption that a solicitor was so requested, and if a solicitor failed to carry out that instruction, there are remedies which the client might be forced to pursue in order to seek redress for any loss arising from what may be regarded as negligence and/or breach of contract. Any arbitrator or Court would in my view be entitled to weigh in the balance when considering whether it would be unreasonable not to exercise the s.9(5) discretion in favour of the tenant, the fact that the section was not designed to prevent a solicitor from being sued.

If I was satisfied that Mr O'Gorman deliberately and consciously set about ignoring his obligations under the covenant because he thought that the landlord would refuse his consent, or was otherwise badly motivated towards the landlord in this regard, I would be obliged to take that into account in my consideration of whether it would be reasonable to exercise the discretion contained in section 9(5) of the 1978 Act which, as I have set forth above already, provides:

> *"9 (5) – The arbitrator may declare a person to be a person to whom this Part applies notwithstanding that the buildings were, in whole or in part, erected in contravention of a covenant, if he is of opinion that it would be unreasonable to order otherwise."*

I have come to the view that it would be unreasonable not to so order in view of the fact that the landlord was clearly aware, and indeed in effect consented, to the fact that the premises were changing from being a private dwelling and being turned into a significant commercial property after 1970. He accepted a higher rent in exchange for that concession. In 1990 he consented without any apparent demur on his part to a significant amount of development on the property which had already taken place in breach of the covenant. I do not feel, given these facts, that the landlord has been prejudiced by any sort of creeping, clandestine and callous disregard by the tenant of his obligation to seek prior consent, thereby wandering into the area of mala fides. Indeed, I have little, or in fact no doubt in my mind in this case that had consent been sought after 1990 for the later works in advance, these too would have been consented to. It would seem entirely unreasonable that the failure to obtain the consent to the post 1990 works should debar the tenant from his entitlements, inspite of the fact that there has been a breach of the covenant.

Mr Owens has also submitted that even though the landlord consented retrospectively to the work up to 1990, that did not imply, and should not be considered to be a waiver by him of any other entitlements which might arise due to the failure by the tenant to observe that covenant, such as the benefit that the tenant might have taken himself outside the statutory scheme for the acquisition of the freehold.

Reference has been made to the fact that these developments which were carried out without consent gave rise to an increase from time to time in the rateable valuation of the property, and of course, an effect of that is that over time the rateable valuation came to exceed the amount of the annual rent - a requirement under s.10(2) to which I shall be referring in due course. However, it appears that in 197o the landlord gave his consent to the removal of the user restriction covenant in the lease in exchange for an increased rent. The premises were developed by Mr Connolly into a butcher's shop on the ground floor of Carrick House and a supermarket to the south thereof. Following this development, and before any assignment to Mr O'Gorman the rateable valuation of the entire premises had been increased to £76.50. In due course the landlord gave a retrospective consent to the works done by Mr O'Gorman up to 1990, and while strictly speaking this does not cover the work done by Mr Connolly, still I believe that it was intended to be a consent to all that had occurred up to that point.

I believe that it would be unreasonable not to exercise the discretion in s.9(5) of the 1978 Act on that account, since the landlord clearly knew what had taken place and raised no objection to it. He cannot now be seen to gain an advantage in another way. I do not want to call it an estoppel, but it certainly is of similar effect in my view.

Matters may well have been different for the tenant had he not in 1990 sought and obtained retrospective consent. The subsection places the onus on the tenant of satisfying the arbitrator (and in this case the Court) that it would be unreasonable not to make the order, and not simply showing that it would be reasonable to do so. The Court must have some rational basis for the exercise of any discretion, and without the demonstration of some good faith in the matter of the covenant, the Court may well have had no basis for rescuing the situation by reference to s. 9(5) of that Act. But I am of the view that the purpose of subsection (5) is to prevent an injustice otherwise arising in an appropriate case such as the present one.

4. That one of the alternative conditions set out in section 10 is satisfied - s.9(1)(d) of the 1978 Act:

> *1. that the permanent buildings were erected by the person who at the time of their erection was entitled to the lessee's interest under the lease, or were erected in pursuance of an agreement for the grant of the lease upon the erection of the permanent buildings;*
>
> *or*
>
> *2. that the lease is for a term of not less than fifty years and the yearly amount of the rent or the greatest rent reserved thereunder (whether redeemed at any time or not) is of an amount that is less than the amount of the rateable valuation of the property at the date of service under section 4 of the Act of 1967 of notice of intention to acquire the fee simple, or the date of an application under Part III of this Act, as the case may be, and that the permanent buildings on the land demised by the lease were not erected by the lessor or any superior lessor or any of their predecessors in title;*
>
> *provided that it shall be presumed, until the contrary is proved, that the buildings were not so erected.*

I will consider each of these conditions in turn and decide which if any the tenant satisfies, or indeed whether he in fact, as submitted by Mr O'Neill on his behalf, satisfies both conditions.

1. that the permanent buildings were erected by the person who at the time of their erection was entitled to the lessee's interest under the lease, or were erected in pursuance of an agreement for the grant of the lease upon the erection of the permanent buildings:

In his written submissions to the Court, Mr O'Neill has stated that "while it seems likely that Carrick House was built by some previous lessee, cogent evidence of the same is not available. However, clear evidence is available that substantial additional permanent buildings were erected by the Lessee and its predecessors in title under the 1945 Lease. These additional buildings have resulted in nearly a fivefold increase in the size of buildings on the site." However, s. 10(1) refers to "the permanent buildings" being erected by the lessee, and not to just some of the permanent buildings. As Mr O'Neill has said, there is no cogent evidence as to who built Carrick House itself at the end of the 18th century. Neither could ant lessee be reasonably expected to be in a position to adduce any such evidence some two hundred years later.

This difficulty perhaps accounts for what Prof. Wylie has stated about this condition in his work *Irish Landlord and Tenant Law, Butterworths,* [1996].at page 1003 in footnote 78, as follows;

> *"This covers the typical building lease, i.e. where the permanent buildings on the land were erected by the lessee or were erected by a person in pursuance of an agreement to grant a lease upon erection of the building……"*

The evidential difficulty which confronts the tenant in these proceedings obviously do not present themselves to a tenant who has built pursuant to a covenant to build contained in his lease, or pursuant to an agreement to grant a lease upon the erection of the building, and I believe that it is reasonable to interpret that condition as not being applicable to the instant case. I do not take the view that it can be satisfied in the present case by establishing or at least satisfying the Court that the works carried out to Carrick House by the tenant are of such a nature as to have caused Carrick House to have lost its original identity, and that in that sense the present Carrick House structure has been erected by the lessee. That seems to me to be straining the meaning of s. 10(1) of the Act. Therefore I hold that condition 1 is not satisfied in this case.

2. that the lease is for a term of not less than fifty years and the yearly amount of the rent or the greatest rent reserved thereunder (whether redeemed at any time or not) is of an amount that is less than the amount of the rateable valuation of the property at the date of service under section 4 of the Act of 1967 of notice of intention to acquire the fee simple, or the date of an application under Part III of this Act, as the case may be, and that the permanent buildings on the land demised by the lease were not erected by the lessor or any superior lessor or any of their predecessors in title;

provided that it shall be presumed, until the contrary is proved, that the buildings were not so erected.

There is no difficulty with the first parts of this condition, namely that the lease is for a term of not less than fifty years, and that the rent is not greater than the rateable valuation at the date of service of the notice under section 4. Those matters cannot be in dispute, since the term of years granted is fifty years, and the rent, as adjusted, is £75 per annum, whereas the Rateable Valuation as of the 2nd March 1998 was, and in fact remains £211.50. What gives rise to controversy is the final requirement that the permanent buildings on the land demised by the lease were not erected by the lessor or any superior lessor or any of their predecessors in title.

Under the latter part of condition 2 the onus is clearly on the landlord to rebut the presumption that the permanent buildings, and for this purpose this must mean the original Carrick House and its outhouses as demised in the 1945 lease, were not erected by the lessor or any superior lessor or any of their predecessors in title.

If he is unsuccessful in discharging this onus upon him, the Act clearly works in the tenant's favour. Some very interesting work has been undertaken by the landlord in assembling estate records from the late 18th century onwards in order to try and satisfy the Court that the probability is that these buildings on the land were erected by the landlord. It is perhaps a pity that many of the estate records no longer exist, but a great deal of work has been put into the task of trying to piece together the history of the occupation of this particular house and property over the past two hundred years or so.

Mr O'Neill has submitted that in order to discharge this onus the landlord must first of all establish that the substantial additional buildings erected on the property (increasing the built-on area almost fivefold) and which essentially comprise the supermarket building, albeit linked into portion of the ground floor of Carrick House, are mere "improvements" to Carrick House, rather than an addition. Otherwise the landlord cannot begin to satisfy the Court that "the permanent buildings" (meaning all the permanent buildings) were erected by the lessor or any superior lessor or any of their predecessors in title. It is worth recalling that already, albeit in a different context I have decided that the "additions" which resulted in the supermarket building are not such as to take them out of the definition of an "improvement" for the purpose of s.9(1)(b) of the 1978 Act. However, that definition is expressly confined to the context of s.9(1)(b) by the wording of s.9(2), as can be seen.

Therefore I am not, in my view, confined or restricted in my consideration of whether the more recent structures erected on the property by the tenant are merely an "improvement" to Carrick House, or whether they constitute a permanent building erected by the tenant for on of the legislation. Indeed, Prof. Wylie in his work already cited has a footnote on p.1132 in relation to s.45 of the Landlord and Tenant (Amendment) Act, 1980 in which he states "*In view of the different senses in which the concept of 'improvements' is used in the Landlord and Tenant Acts, it is crucial to note the definition given by s. 45……*"

If the "additions" to the property (i.e. the supermarket structure) as opposed to the "alterations or reconstruction of Carrick House can be regarded as themselves being permanent buildings, and not simply improvements to Carrick House, then clearly the landlord has an impossible task in attempting the rebut the presumption expressed in s. 10(2).

As already seen, the definition of "improvement" for the purpose of s.9(1)(b) of the 1978 Act is "any addition to or alteration of buildings", but it goes on to state that this "includes any structure which is ancillary or subsidiary to those buildings". Given my conclusion already expressed as to the meaning of "ancillary or subsidiary", it is hard to see how the additional buildings erected on this property are "ancillary or subsidiary" to Carrick House, given the fact that the additions in question are so much greater in size and importance in the present day context of the property than the original building. In fact I am satisfied that the reality now is the reverse, namely that Carrick House is ancillary and subsidiary to

the additional structure, given that a small portion of the original house is used as office space for the supermarket, and that some of the original ground floor is taken up now with the business of the supermarket. Upstairs, of course there are the flats which are not linked to the supermarket business in any way. But that reversal of roles, as it were, clearly for present purposes, and outside the context of s.9(1)(b), takes the additions beyond consideration as improvements to Carrick House.

There is also definition of "improvement" contained in s. 45 of the Landlord and Tenant (Amendment) Act, 1980 in the context of the Part IV provisions therein relating to compensation by a landlord to a tenant for improvements, and which provides as follows:

> *"45. -- For the purposes of sections 46 to 57, 'improvement' in relation to a tenement means any addition to or alteration of the buildings comprised in the tenement, and includes any structure erected on the tenement which is ancillary or subsidiary to those buildings……."*

Again in another footnote to this section on page 1133 of his said work, Prof. Wylie states:

> *" 'addition to or alteration of ' : it must be an addition to or alteration of the 'buildings', not the 'land' as distinct from 'buildings'. Therefore it does not include erection of a new building unless it can be regarded as ancillary or subsidiary to the existing buildings"*

Reference is made in that footnote to the helpful judgment of Kingsmill Moore J. in *O'Neill v. Murphy* [1948] IR 72 in which the learned judge held that in order to constitute an improvement within the meaning of the Landlord and Tenant Act, 1931 the improvement must be an improvement to the existing building, and not an improvement to the land by the erection of other buildings, and furthermore that the erection of a building is not an improvement unless it is ancillary or subsidiary to the existing building.

In my view therefore the buildings erected on the land subsequent to 1972 by Mr Connolly and later by Mr O'Gorman are not simply improvements to Carrick House, but are additions and are as a consequence to be regarded as permanent buildings. These buildings cannot be regarded as having been erected by the lessor or any of his predecessors in title. Therefore in my view the condition required to be met by the tenant, as appearing in s. 10(2) of the 1978 Act is satisfied by the tenant in this case.

It is accordingly not necessary to go further and deal with the submissions skilfully presented by Mr Owens in relation to the attempt to rebut the presumption in relation to the original Carrick House. But I want to say, without going into the evidence such as it is in full detail, that I would not be satisfied that the records and old maps and drawings which have been produced in evidence go further than suggesting a possibility that Carrick House is a building which was erected by the Shirley estate.

A very interesting attempt has been made to show by reference to these old records that a building referred to by different numbers at different times and by reference to certain other numbering appearing on an old estate map is one and the same as Carrick House. That may or may not be so. But even if it is does succeed in so showing, and I am not completely convinced that the evidence goes beyond informed and careful speculation in this respect, it cannot be conclusive evidence that it was not the tenant at a particular time who paid for the building or erected it. Certainly the rent appears to have been very low at any time, but at this temporal remove it is impossible to say with any necessary certainty or even probability whether the rent charged a couple of hundred years ago was a rent appropriate to a situation where the tenant had erected the building.

In my view, given the wording of s.10(2) of the 1978 Act, and of the proviso, it would be necessary for the landlord to show conclusively, and certainly as a matter of almost inescapable probability, that the lessor or his predecessors in title erected the building, given that the proviso is clearly intended to be in ease of the tenant who has no manner or means of establishing the situation one way or another in relation to buildings which are so old. The evidence in this case, while interesting and carefully put together, does not go sufficiently far to rebut the presumption.

Now, Mr Owens has also made elaborate submissions based on a wide interpretation of the term "predecessor in title" appearing in s.10 (2) so that the term should embrace also lessees whose leases expired resulting in the lessor regaining possession of Carrick House before creating a new lease or tenancy in favour of another tenant. If he is successful in that submission, it would mean that if it can be shown that at any stage prior to the erection of the new buildings by Mr Connolly or Mr O'Gorman, Carrick House came back into the possession of the Shirley estate, then it would not matter one way or the other whether it was the Shirley estate or any lessee who erected Carrick House, since such a lessee whose lease expired would come within the wider definition of a "predecessor in title" and the landlord would succeed in his task of rebutting the presumption that "the buildings were not so erected".

Given the nature of the conclusion which I have reached in relation to the satisfying by the tenant of condition in s.10(2) I prefer to express no view in relation to the carefully crafted submission made by Mr Owens in which he urges the Court to adopt a purposive and wide interpretation of the term "predecessor in title". Part of his submission in that regard is that were the Court not to accede to this purposive and wide interpretation of the term, the narrower and literal interpretation of the term would involve an arbitrary transfer of benefit from the lessor to the lessee, and it is submitted that this cannot have been the statutory intention, and furthermore that it would cause the condition in s.10(2) of the Act to operate in a way which constitutes an unjust attack on the property rights of the lessor in a way which is repugnant to Article 40.3.2 of the Constitution. Given the existence of the challenge to constitutionality of the statutory scheme as appearing in the plenary proceedings before the Court and yet to be fully heard and determined, it is undesirable that I express any view on these particular submissions since it is unnecessary for the purpose of my determination of the issues on the facts of this Appeal. Even if I were to find in favour of these submissions, it would not avail the landlord in this Appeal.

The "flying freehold" argument

44. Mr Owens has argued that the area on the first floor in the building immediately to the north of Carrick House, and which for some

reason has come to form part of the lessee's take under the 1945 lease, cannot be regarded as coming within the definition of "permanent buildings on the land" as this area consists simply of a physical space above a permanent building below which is in contact with the ground, and defined in height by the presence of another structure above it. It is a space sandwiched between what is above and below it, and Mr Owens submits that this cannot therefore be regarded as a permanent building, and I shall refer to this space hereafter as a flying freehold, since that is a phrase which has been generally adopted to describe it.

45. In making this submission, Mr Owens has referred to the wording of s.9(1) of the 1978 Act and there is no need to set that out once more. He refers to the fact that the Interpretation Act, 1937 defines "land" as including "messuages, tenements and hereditaments, houses and buildings of any tenure". He submits that it is necessary for the tenant to show that the land on which any permanent building exists has been demised to that tenant, and that in the present case, it is not sufficient for the tenant to show merely that he holds part of a permanent (i.e. the flying freehold) if the land itself below the ground floor beneath him was not demised to him. The question arising is whether the term "land" can be interpreted to include the flying freehold, since s.9(1) requires that the tenant holds "land" under a lease and that there are permanent buildings on the land.

46. Interestingly, s.1 of Deasy's Act, 1860 defines "land" as "houses, messuages and tenements of every tenure whether corporeal or incorporeal". There is no reference to "hereditaments" as appears in the Interpretation Act, 1937, and of course that term denotes some property which can be inherited. If the area consisting of the flying freehold was held by A in fee simple, and it is clear that such a thing is legally permissible these days, one could never say that A could not make a devise of that flat by will to whomsoever he/she may choose. Equally, the term "tenement" while generally defined in the Concise Oxford Dictionary of Current English [op.cit.] as "a room or set of rooms forming a separate residence within a house or block of flats……any kind of permanent property, e.g. lands or rents, held from a superior", has a specific meaning given to it, as far as its physical aspects are concerned in s.5(1) (a)(i) of the Landlord and Tenant (Amendment) Act, 1980 as follows:

> *"5. -- (1) In this Act "tenement" means --*
>
> *(a) premises complying with the following conditions:*
> *(i) they consist either of land covered wholly or partly by buildings or of a defined portion of a building;"*

47. Interestingly, the word "covered" has been held not to be confined to what is above the ground, but can include some area which is underground, such as an underground well for a petrol storage tank - see *Mason v. Leavy* [1952] IR 40.

48. Mr Owens has submitted that where there is a building underneath the area demised to the lessee (as in the present case) such an area, a flying freehold, is not "land" held by the lessee or capable of being acquired for the purposes of s.9(1) of the 1978 Act, even though in other circumstances it may be possible to convey the fee simple in horizontal elements of a building.

49. It seems clear to me that the definition of "land" in the Interpretation Act, 1937 is sufficient to embrace the flying freehold, even though such a concept may not have been within contemplation of the legislators at the time that Act was drafted. Neither can I see any reason in principle why it should not be so, nor can I discern any contrary intention in the 1978 Act, which might override the definition in the Interpretation Act, 1937.

50. The concept of a flying freehold has achieved complete recognition as a legitimate means of holding freehold land, even though it is recognised that there can be problems as between the different owners of the various horizontal layers in the building concerned, such as in relation to right of support from those owning the portions below, or in the area of nuisance - see, for example, *Lyall, Land Law in Ireland, 2000, Roundhall, Sweet & Maxwell* at p.38 et seq. But these difficulties have not lain in the way of the very existence of the flying freehold concept.

51. There is also specific provision in the Land Registration Rules, 1972 at Rule 30(1) (a) and (b) thereof for the registration, in relation to registered land, of the ownership of "a flat or floor, or part of a flat or floor, of a house, or a cellar or tunnel, or mines and minerals, or an underground space apart from the surface".

52. Prof Wylie in *Irish Conveyancing Law*, 1996 ed. Butterworths at p. 702 discusses the sometimes proffered notion that the entire concept of flats *"particularly where a building is divided horizontally, so that all flats, other than those at ground level, exist 'in the air' offends against the basic principles of our land law.*"

53. He goes on:

> *"….this view now seems to be discredited, for it seems clear that, that while this maxim [cuius est solum, eius est usque ad coelum et ad inferos] states the general rule that a person owning land also owns the vertical column of air space above it, there is no reason at common law why the owner of the land cannot convey horizontal slices of the air space above it to others, whether by way of lease, or by conveying the freehold interest in it. In other words there can be separate ownership of the air space above the surface of the land just as much as there can be such ownership of the subterranean area below the surface, which is also mentioned in the maxim and which may contain valuable assets such as minerals. And the fact is that the English courts seem to have recognised the validity of such a division of the air space as occurs through flat developments for many decades."*

54. The learned author refers in that regard to *Dalton v. Angus* [1881] 6 App Cas 740, and to other English cases of the late 19th century, noting that they predate the English Law of Property Act, 1925 which specifically contained, within the definition of land, the inclusion of horizontal divisions of buildings.

55. Reference has been made to the obiter comments of O'Flaherty J. in *Metropolitan Properties Ltd v. O'Brien* [1995] 1 IR 467 at p. 482 in relation to whether a horizontal slice of a building such as what is being described as the "flying freehold" can be the subject of a right to acquire the fee simple under the 1978 Act. The other members of the court felt that it was preferable to make no comment on the question as to do so was unnecessary for the purpose of their decision. But O'Flaherty J. expressed the view that in 1978 the concept of conveying horizontal slices of buildings would have been "a fairly new concept" and he stated: "*I believe that if the legislature had intended that this could be done it would have provided for it in more explicit terms.*"

56. For my own part, and since they are not binding comments upon me, I would take a different view with the greatest possible respect for the views of such a learned judge of the Supreme Court. I find it to be somewhat anomalous, if not inequitable, that there could be a situation within one building where those who perhaps by some pure chance only, find themselves in occupation under a lease of part of the ground floor, can be entitled to acquire the fee simple interest in their property, whereas those on the floor or

floors above have no such entitlement even though they are in occupation on precisely the same terms as the ground floor occupants.

57. I appreciate that there could be difficulties arising, for example in relation to implied easements of support or repair and suchlike, but these difficulties ought not to be so insuperable as to present a principled objection to the concept. In fact it is a matter perhaps more properly the subject of regulation by statute, as appears to have happened in some other jurisdictions, such as Australia.

58. Perhaps I am missing some fundamental point, but for the purposes of the present case, I would not be prepared to hold that the 'flying freehold' part of these premises is such as to take this tenant outside the statutory scheme for the acquisition of the fee simple interest in the property demised by the Lease.

59. Having so found, and without prejudice to any benefit the landlord may yet gain resulting from the determination of the constitutional challenge in the plenary proceedings, it remains to deal with the appeal related to the fixing of the price for the acquisition of the freehold. I reiterate that I am concerning myself only with what is to be regarded as the appropriate price under the scheme as statutorily provided. There is a difference of opinion between the valuer called to give evidence on behalf of the tenant, Mr Good, and Mr Freeman, and indeed Mr Murtagh who were called to give evidence in that regard on behalf of the landlord. All are respected and reputable expert valuers, and the fact that the Court must at some point come down in favour of one view rather than another, or arrive at a middle ground, must not be taken as any diminution or dilution of that respected, reputable and expert status.

Determination of the price to be paid by the tenant for the fee simple interest:
60. The starting point is clearly s. 7 of the Landlord & Tenant (Amendment) Act, 1984 ("the 1984 Act"). Under subsection (1) of s.7 thereof, the relevant date for the purpose of the valuation is the date of service of the notice on the landlord, i.e. the 2nd March 1998 in the present case.

61. Section 7(3) of the Act provides for what shall be the purchase price, subject to the other provisions of s.7, and sets out a number of matters which the arbitrator shall have regard to. One of those other provisions is ss. (9) which refers to a situation where at the relevant date the lease will expire within fifteen years, and in effect provides that in such a case the arbitrator shall have regard to, *inter alia*, the mechanism for assessment of price set out in s.7(4) of the Act. It is really those provisions which are the relevant ones for the purpose of this appeal, and which have been principally addressed by the parties in this appeal.

62. Section 7(4) of the Act sets out the mechanism by which the Arbitrator or, as in the present case, the Court, is to determine the price. That section provides as follows:

> *"7(4) (a) Where at the relevant date, the land is held under a lease that has expired or is held at a rent which, whether under the terms of the lease or by operation of a statute, is subject to a review which is due but has not been made, the purchase of the fee simple shall, subject to the other provisions of this section, be a sum equal to one-eighth of the amount which, at that date, a willing purchaser would give and a willing vendor would accept for the land in fee simple free of all estates, interests and incumbrances, but having regard to any covenant which continues in force by virtue of section 28 of Act (No.2) of 1978, and assuming that the lessee has complied with any other covenants or conditions in his lease that could affect the price.*
>
> *(b) Deduction shall be made from that amount equal to the value of the goodwill, if any, in the premises of the person acquiring the fee simple.*
>
> *(c) A deduction shall also be made from that amount equal to any addition to the value of the premises resulting from such works as would qualify for the special allowance mentioned in section 35 of the Act of 1980.*
>
> *(d) In determining the amount referred to in paragraph (a) any addition to value deriving from contemplation of substantial rebuilding, or a scheme of development (such as are mentioned in section 33(1)(b)(i) and (ii) of the Act of 198 shall be disregarded.*

63. As regards the "special allowance" referred to in (c) above, section 35(2) of the 1980 Act provides as follows:

> *"35.--(2) The special allowance for the purpose of subsection (1) shall be such proportion of the gross rent as, in the opinion of the Court, is attributable to works of construction, reconstruction or alteration carried out by the lessee or any of his predecessors in title which add to the letting value of the land, other than works carried out wholly or partly in consideration of the grant of the lease or repairs and maintenance during the currency of the lease."*

64. The rationale for the deduction of the special allowance is to protect the lessee from a situation in which he would be paying rent in respect of his own works to the premises, which he has already paid for.

Some valuation evidence
65. Mr Freeman is instructed on behalf of the landlord. In approaching the task of arriving at the correct assessment of price on the basis of a stand-alone Carrick House, given the requirement under s.7(4)(d) to disregard any potential development value, as well as giving credit for the "special allowance", Mr Freeman first of all looked at the rateable valuation of the entire premises, and he calculated that the rateable valuation for a stand alone Carrick House nowadays would be in the region of €48.

66. He calculated the total area of Carrick House as it originally stood to be in the region of 1188 sq. feet.

67. He considered that s.7 was open to a number of possible interpretations as to the basis of valuation, and accordingly he came to a separate valuation based on each of these possible interpretations. The three different bases for valuation were said to be as follows:

> 1. Valuation on an assumption that the value of the supermarket buildings erected by the tenant are to be included in the calculation;
>
> 2. Valuation based solely on the premises as originally demised;
>
> 3. Valuation on the basis that the property might have potential for use, other than development or reconstruction.
>
> *Basis 1:*

He placed a rental value on Carrick House, as a stand alone building, on the basis of €20 per sq. foot. It will be recalled that he calculated that the area in question is 1180 sq. feet. He felt that it was a clearly identifiable unit in its own right, and that the small floor area of that until alone meant that a rent of €20 per sq. foot could be justified.

As far as the rental value of the supermarket premises is concerned Mr Freeman stated that the area in question was about 5700 sq. feet and that a rental value of €10 per sq. foot was appropriate.

The total annual rental value on this basis according to Mr Freeman's figures was therefore in the order of €89,000 per annum. He stated that the rental value was the basis for arriving at the capital value of the premises, which he calculated to be €1,200,000. He accepted that Mr Good on behalf of the tenant may have some issue with a 6.5% rate which he used for this calculation, but felt that even if he used Mr Good's 8% rate, the valuation figure arrived at would be in the region of €975,000. There is a considerable disparity between the value placed by Mr Freeman on the property and that given by Mr Good, which is in the region of €300,000. Mr Good does not accept that the rental values taken by Mr Freeman would have been achievable for these premises in 1998 in Carrickmacross, but I will come to his evidence in due course. Mr Freeman in turn cannot accept the rental value of €20,000 per annum for the entire premises, since as far as he could calculate, this reduced the rent per sq. foot to €2, and he felt that this was simply unrealistic. In his evidence under this heading of valuation, Mr Freeman explained that while the buildings erected by Mr O'Gorman had a value in themselves, they in fact in his view did not add anything to the value of the overall property, because, as he explained, the supermarket building is a fairly basic industrial building with low headroom, which may not be much use for any alternative use, and therefore somebody buying the site in the open market would probably pay the same price whether those buildings were there or not. He went on to express the view that the real capital value of the site as a whole is in its development potential, but that this is not something which can be regarded when valuing for the purpose of s. 7 of the Act.

Mr O'Neill put it to Mr Freeman that while he is saying that the added buildings do not add to the market value of the premises, they must on the other hand add to the rental value. Mr Freeman accepted that this was so, and in this regard Mr O'Neill pointed to the wording of s.35(2) of the 1980 Act in relation to the special allowance, and which specifies that it is such proportion of the gross rent as is attributable to works carried out by the lessee "*which add to the letting value of the land*".

In my view, Mr Freeman's acceptance that the tenant's works have added to the letting value of the premises, undermines fatally the basis on which the proposition under Basis 1 is put, namely that because the tenant's works have added nothing to the market value of the premises they ought not to be disregarded for the purpose of the valuation. The Court proposes therefore to ignore that submission, in favour of Basis 2 which appears below, since Basis 3 is not really relied upon at all any longer by Mr Freeman, as it is a somewhat novel approach if it is acceptable at all, which I doubt.

Basis 2:

For this purpose, Mr Freeman excluded completely the supermarket building, so as to value the property as originally demised. His valuation on this basis was arrived at by taking a value of €330,000 for the property as originally demised, dividing it by eight, and deferring it. He explained in his evidence that he valued what he described as the free standing unit (that was the original butcher' shop to the south of the main house and which Mr Connolly demolished to clear the site for the first supermarket development) at €20 per sq. foot, which gave him a rent of €6500 per annum. He then capitalised that figure which produced a value on that structure of €100,000. He then took what he called a guess at the value of the then three storey dwellinghouse with large garden, which he described as a high quality house and one of the most important houses on that street, and placed a value of €230,000 on it, thereby producing an overall value for the premises as originally demised of €330,000. Dividing that amount by 8, he arrived at €41,250, and having deferred that figure for three years until expiry, he concluded that the valuation figure, under this heading, taking account of passing rent for three years, was *€35,732.*

Mr Good in his evidence gave his evidence of having carried out a similar exercise to that carried out by Mr Freeman under Basis 2. He took the value of the originally demised premises on the basis of a vacant freehold possession in good order, and ignored any tenant works (the special allowance), as well as any goodwill factor or development potential. He carried out his valuation on the basis of an expired lease and on the basis that therefore s.7(4) of the Act applied. The formula he used was to value the premises at "between 150,000 and 180,000" (I presume he is referring to IR£s), then take one eighth of that figure, and defer it as Mr Freeman had done. This gave him a value of IR£20,000 or *€25,400*. Mr Good said that he had taken account of the area which projects over the adjoining building, namely that referred to earlier as the flying freehold. While it is not apparent from his direct evidence or his valuation that he had taken into account the value of the separate building which stood to the south of the premises, which had been a butcher's shop and which was demolished around 1971 by Mr Connolly, and on which Mr Freeman had placed a value of €6500 for the purpose of his calculations, Mr Good stated when cross-examined about it, that he had taken that structure into account in his valuation.

In his evidence, Mr Good had also stated that as of March 1998 he would value the supermarket premises, excluding goodwill and so on, at about IR£300,000. Mr Owens cross examined him about this valuation on the basis that it was far too low by reference to certain other specified sales in the area, but Mr Good stated that in relation to the comparators referred to, it was the business turnover in the premises which determined the higher prices gained, and that the purchasers were in effect buying a business rather than a premises. Mr Good stated his opinion that there was no chance that the supermarket premises in this case could be worth €1.2 million, as suggested by Mr Freeman.

Mr Peter Murtagh, another valuer called to give evidence on behalf of the landlord, gave his opinion that the 1998 market value of the property, disregarding tenant's improvements, and presumably taking no account of goodwill or development potential, was €320,000.

He valued the property, including the tenant's improvements at €1.3 million as of 1998; and if one added to that any development potential, he valued the premises at 1998 at €1.4 million.

Basis 3:

There really is no need to deal with this basis as, and I think that Mr Freeman in fairness accepted this to be the case, that there is no room within the statutory scheme, for a valuation to be made on the basis of this potential, nuanced as it may be.

All valuers gave quite extensive evidence relating to comparative sales to which they had regard when reaching their conclusions as to both rental and capital values. There is no need for me to set that evidence out in any detail for the purpose of my decision on price. There is so much variation from one comparator to another, and of course each premises compared is unique, and will have elements to itself which may explain any apparent anomaly appearing in the price achieved on sale or on price negotiation, or rental value.

Conclusion

68. I am satisfied that under the scheme as provided in s. 7 of the 1984 Act, the only basis for arriving at the price to be paid for the purpose of acquiring this freehold is as set forth in s. 7(4) of that Act, given that at the 2nd March 1998 there was only a matter of three years to run, and bearing in mind the provisions of s.7(9) of the 1984 Act.

69. It is necessary therefore to assess the purchase price on the basis of what I have referred to as Basis 2, namely by taking the open market value, as of the 2nd March 1998, of the premises then on the ground, free of incumbrances, and deducting therefrom any element of that value attributable to goodwill, if any, and further deducting therefrom the 'special allowance'(as defined in s.35 of the 1980 Act), and taking no account in the value of the premises derived from any substantial rebuilding or a scheme of development, and then dividing the result by eight.

70. Prof. Wylie has described the mechanism at arriving at the price in the following way in footnote 94 on page 1264 of his work already referred to:

> *"The correct procedure is to ascertain the 'amount' having taken into account the directions in paras (b), (c) and (d), and then divide the result by eight. One does not ascertain the amount first, then divide by eight and adjust the result in accordance with those directions."*

71. In the present case, this mechanism results in the relevant premises for the purpose of the valuation, being confined effectively to the premises as originally demised, since I am satisfied, as accepted by Mr Freeman, that all the additions and alterations made by the lessee since 1971 result in an increase in the rental value of the premises; and therefore, by reason of the fact that such works are within the meaning of the 'special allowance' referred to in s. 35 of the 1980 Act, the amount by which they add value must be deducted.

72. This mechanism results in the valuers having to imagine or pretend that all the works whether by way of demolition of part of the original buildings, alterations/extensions to the original buildings on the site, or the erection of new structures on the site by the tenant or Mr Connolly, had never taken place, and attempt to arrive at an estimate of what such premises, in their unaltered state as originally demised in 1945, would have fetched on the 2nd March 1998.

73. That must be a somewhat difficult task, especially given the scale of the works in this case which have in fact taken place, and which for all practical purposes has transformed the originally demised premises from being a significant professional person's residence with a large garden, outhouses and so on, into a substantial supermarket premises and off-licence, with some residential flat accommodation on two floors above the ground floor of part thereof. As I have already stated, the original identity has been lost.

74. It is of relevance in this task of valuation that by 2nd March 1998, the Main Street in Carrickmacross had become a busy commercial street, and it is reasonable to infer from that fact, that residential accommodation may not attract the sort of price which the quality of the house might have otherwise achieved, relatively speaking, in former times, since persons might not wish as much to reside at this location in 1998. However, that is the valuers' task, and I am satisfied that all the valuers in this case have gone about their task, albeit instructed by opposing parties whose interests differ for obvious reasons, in a responsible and professional manner. Opinions between professionals constantly differ, and it is frequently the experience of the Courts in a variety of different types of litigation, that in the absence of agreement between the valuers as to a value or a price, the Court is left either to choose between the two differing values, or to find a basis for accepting neither, while at the same time arriving at its own opinion of the right price.

75. Mr Good, as I have outlined already has placed assessed the purchase price to be IR20,000 *(€25,400*), based on a open market value of what he stated in evidence to be between £150,000 - £180,000.

76. Mr Freeman's price, arrived at on the same basis is about €37,500. There is no meaningful distinction between that and the value arrived at by Mr Murtagh.

77. The difference in the overall result is relatively small, given the division of each of the values by a factor of eight.

78. I have decided to take a pragmatic route to the resolution of the issue of price, given the relatively small disparity. I am in effect splitting the difference, due to the fact that having heard the valuation evidence, I am left with a feeling that perhaps while Mr Good was being somewhat pessimistic about the 1998 value of the original Carrick House, albeit as a stand alone residence with garden and outhouses at that date, while perhaps Mr Freeman and Mr Murtagh were at the optimistic end of the value spectrum.. By taking an unspecified middle ground figure I hope to have reached a just figure based on the statutory criteria, and I assess the purchase price to be €30,000.

79. As I stated to the parties after submissions had closed last Thursday, these findings which I have made are subject to further arguments which I will be hearing in relation to the constitutional challenge ordered to be heard simultaneously with this Circuit Appeal. Having discussed the logistics of this with Counsel for all parties, it is my understanding that all are agreed that in so far as any final decision on that challenge may impact on what I have decided thus far in the Circuit Appeal, the benefit or detriment, as the case may be, of such ultimate decision will be available to this case, even though my findings in the Appeal have pre-dated the decision in that challenge.