Neutral Citation Number: [2008] IEHC 22

THE HIGH COURT

[2004 No. 168 CA]

**IN THE MATTER OF SECTION 22(1)
OF THE LANDLORD
AND TENANT (GROUND RENTS) ACTS 1967 – 1984**

BETWEEN

DIGITAL HUB DEVELOPMENT AGENCY SUBSTITUTED BY ORDER OF THE COUNTY REGISTRAR FOR THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND

APPLICANT

AND

MARTIN KEANE AND GERRY O'REILLY, THE COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS FOR IRELAND AND PERSONS UNKNOWN

RESPONDENTS

Judgment of O'Neill J. delivered on the 31st day of January, 2008

1. This is an appeal from the order of the Circuit Court (Her Honour, Judge Linnane) made on the 23rd April, 2004 whereby the Circuit Court affirmed the order of the County Registrar made on 26th day of September, 2003. By her order as aforesaid the County Registrar, determined, awarded and directed that the respondents in this appeal (the applicants before her) had a right as incident to its existing interest, to enlarge that interest into the fee simple and for that purpose to acquire by purchase the fee simple and all intermediate interests therein for the sum of €40,600, in the premises known as:

> *"ALL THAT AND THOSE the heraditaments and premises known as Nos. 10, 11 and 12 Rainsford Street in the Parish of St. Catherine and City of Dublin and more particularly described in an indenture of lease dated the 8th of October, 1958 and made between Arthur Guinness & Son and Company (Dublin) Ltd of the one part and A Millar & Co Ltd of the other part."*

2. By her said order she further directed that the sum of €40,600 be apportioned as to €40,000 to be paid to the respondents Martin Keane and Gerry O'Reilly (the appellants herein) in respect of their freehold interest in the premises and the balance of €600 to be lodged in court to the credit of the matter in respect of all intermediate interests which are unknown and ascertained. She further directed that the appellants join in a deed of conveyance to the respondents in respect of their interest in the premises.

3. The background to this matter is as follows. By a lease made on the 20th day of July, 1860 between Edward Corles as lessor and Adam Millar as lessee, the said lessor, described as being from the City of Harcester in England demised to the lessee, described as a merchant of Thomas Street in the City of Dublin, certain premises at Rainsford Street in the City of Dublin for a term of ninety nine years from the 1st of May, 1860 at the yearly rent of £55. Six premises were thus let namely Nos. 22, 23, 24 Rainsford Street in the City of Dublin and also the premises the subject matter of these proceedings, Nos. 10, 11 and 12 Rainsford Street in the City of Dublin. The rent of £55 was in respect of all of these premises.

4. The lease in question has not survived and evidence of it is to be found in a Memorial of the indenture of lease and pursuant to s. 2 of the Vendor and Purchaser Act, 1874 the recital of facts as set out in this Memorial, insofar as there is no evidence to the contrary, is to be taken as sufficient evidence of the truth of the facts stated in the Memorial.

5. The description of the Nos. 10, 11 and 12 Rainsford Street in the Memorial is as follows:

> *"…all that and those two dwelling houses or tenements together with the ground in the rear thereof known as Nos. 10 and 11 Rainsford Street formally in the possession of the said James Vose together with the liberty of the gateway on the Westside of said houses bounded on the East by the late widowed Downes holding on the West by the late Michael Bardins holding on the North by Goldmans Brook on the South by Rainsford Street containing in breadth in front exclusive of said gateway 37 feet 9 inches and in rear 44 feet and in depth from front to rear 141 feet be the same several admeasurements more or less which said several houses were lately in the tenure or occupation of George Eastwood and also all that and those the dwelling house, tenement and premises known as No.12 Rainsford Street with the liberty of the gateway on the East side of said house, bounded on the East side by the late Thomas Mitchells Holding, on the West by Church ground, on the North by Goldmans Brook and on the South by Rainsford Street containing in breadth in the front to Rainsford Street 25 feet exclusive of the gateway and in the rear 25 feet 6 inches and in depth from front to rear 138 feet be the said admeasurements or any of the more or less which said last mentioned house and premises were formally in possession of Michael Bardin and lately in the occupation of Patrick Adams Dairyman all of which said premises are situated lying and being in the liberties of Thomas Court and Donore in the Parish of St. Catherine in the City of Dublin together with the appurtenances and all rights of way, rights of passing and easements whatsoever belonging thereto or enjoyed therewith…"*

6. By a Deed of Conveyance and Assignment dated the 28th June, 1895 between William Millar and Fitzadam Millar of the one part and A Millar & Company Ltd of the other part, the lessee's interest in the premises the subject matter of the lease dated the 20th July, 1860 was assigned to A Millar & Company Ltd. The lessor's interest under the said lease was by a deed of the 29th April, 1936 conveyed to Arthur Guinness Son & Company Ltd.

7. The term of ninety nine years granted in the aforesaid lease of the 20th July, 1860 expired on the 30th day of April, 1959. By a lease dated the 8th October, 1958 Arthur Guinness Son & Company (Dublin) Ltd. as lessors demised to A Millar & Company Ltd as lessee the premises knows as ALL THAT AND THOSE the heraditaments of premises know as Nos. 10, 11 and 12 Rainsford Street for term of ninety nine years computed from the 1st day of May, 1959 at the yearly rent of £150.

8. By a Deed of Conveyance and Assignment dated the 22nd of February, 1988 Adam Millar & Company Ltd (in receivership) assigned to Lee & Company (Dublin) Ltd the lessee's interest under the said lease of the 8th day of October, 1958 in Nos. 10, 11 and 12 Rainsford Street in the City of Dublin.

9. By a Deed of Confirmation and Waiver dated the 28th August, 2000 made between Arthur Guinness Son & Company (Dublin) Ltd ("AGSD"), Guinness Ireland Group ("GIG"), DIAGEO plc ("DIAGEO") and Lee & Company (Dublin) Ltd, DIAGEO, AGSD and GIG confirmed granted and demised to Lee & Co. (Dublin) Ltd the premises the subject matter of the lease of the 8th October, 1958 for the balance of the term created by the lease and also waived compliance with clause 2(c) of the lease insofar as it related to the demolition already carried out of certain buildings on the demised premises.

10. By a Deed of Assignment dated the 17th August, 2001, Lee & Company (Dublin) Ltd assigned to the Commissioners of Public Works in Ireland the lessee's interest under the lease of the 8th October, 1958 in Nos. 10, 11 and 12 Rainsford Street in the City of Dublin.

11. By a Deed of Conveyance dated the 21st June, 2001, Guinness Ireland Group Ltd conveyed to Martin Keane the first named respondent, the lessor's interest held under an indenture of Fee Farm Grant dated the 27th of February, 1866, in Nos. 10, 11 and 12 Rainsford Street, for the sum of IR£25,000. Thereafter the first named appellant conveyed that interest to himself and the second named appellant jointly.

12. By a notice dated the 14th day February, 2003 being a notice of intention to acquire the fee simple, pursuant to s. 4 of the Landlord and Tenant (Grounds) Rent Act of 1967, the Commissioners of Public Works in Ireland served a statutory notice on the first and second named appellants of its intention to acquire the freehold interest in the lands held on foot of the lease of the 8th October, 1958, in the premises at Nos. 10, 11 and 12 Rainsford Street in the City of Dublin.

13. On the 21st July, 2003 by virtue of the Digital Hub Development Agency Act, 2003 (Establishment Day) Order (SI No.23 of 2003), the Digital Hub Development Agency was established pursuant to s. 7 of the Digital Hub Development Agency Act, 2003 [the Act of 2003]. By virtue of s. 41 of the Act of 2003 all rights and property held or enjoyed before the establishment day by the Commissioners of Public Works in Ireland in respect of the "Digital Hub" as defined in the Act were transferred to the Digital Hub Development Agency. As Nos. 10, 11 and 12 Rainsford Street are situated within the "Digital Hub" as defined in the Act, these premises were included in this transfer.

14. The first and second named appellants by its notice of opposition opposed the claim of the respondents to the fee simple of these properties; their grounds of opposition being as follows:

> *"(1) Objection: these respondents claim that the applicant does not hold under a lease as the lease relied upon has been forfeited for breach of covenant by re-entry by the issue and service of proceedings for ejectment.*
>
> *(2) These respondents await proof that the applicant has succeeded to the tenants' interest in the lease dated the 8th October, 1958.*
>
> *(3) The applicant has no legal entitlement to acquire the lesser's interest by virtue of s. 4 of the Landlord and Tenant (Ground Rents) (No. 2) Act, 1978.*
>
> *(4) The applicants are not entitled to acquire the fee simple as they do not comply with the conditions of ss. 9 and 10 of the Act of 1978…"*

15. As indicated earlier when the matter came on for hearing before the County Registrar, she upheld the claim of the appellants to the fee simple and directed and awarded accordingly and determined the purchase price to be €40,600.

16. On this appeal three issues were litigated as follows.

> *1. That the appellants were by virtue of s. 4 of the Landlord and Tenant (Ground Rents) (No.2) Act, 1978 precluded from availing of the provisions of that Act and hence the Notice of Intention to Acquire the Fee Simple dated the 14th February, 2003 was invalid.*
>
> *2. That the appellants did not comply with the conditions of ss. 9 and 10 of the Landlord and Tenant (Ground Rents) (no 2) Act, 1978 [the Act of 1978] and hence were not entitled to acquire the fee simple.*
>
> *3. That in the event that the court should hold that the appellants were entitled to acquire the fee simple that the County Registrar had erred in the computation of the purchase price in failing to have regard, pursuant to s. 7(3)(d) of the Landlord and Tenant (Amendment) Act, 1984, [the Act of 1984] to the development value or potential of the premises.*

17. I propose to deal with each of these issues in the order in which they are set out above.

First Issue

18. Section 4 of the Act of 1978 is in the following terms:

> *"4. - This Act shall not bind a Minister of the Government, the Commissioners of Public Works in Ireland or the Irish Land Commission."*

19. Mr. Ó Dúlacháin, SC for the appellants submitted that a correct construction of this provision led to the conclusion that the provisions of the Act of 1978 in general did not apply to the organs of State mentioned in the section. It was submitted that the phrase "shall not bind" given its natural and ordinary meaning, meant that these organs of State were outside the ambit of the provisions of the 1978 Act and thus in the capacity of lessor could not be compelled to convey the fee simple or such interest as it had, and in the capacity of lessee could not avail of the provisions of the Act to compel a lessor or the holder of a superior interest to convey the fee simple to them.. It was further submitted that the different formulation i.e. "this Act shall not bind a State Authority in its capacity as lessor" used in s. 4 (2) of the Landlord and Tenant (Amendment) Act, 1980 indicates an intention on the part of the lessor in s. 4 of the 1978 Act, to remove from the scope of this Act the entirety of the Landlord and Tenant relationship where any of the State organs mentioned, is a party to such a relationship. It was further submitted that, had it been intended by the Oireachtas, merely to exclude any liability to the provisions of the Act on the part of State organs as lessors, that this would have been provided for in s. 16 (2) of the Act of 1978 where that type of provision is made in respect of the Commissioners of Irish Lights and Harbour Authorities within the meaning of the Harbour Acts, 1946.

20. For the respondents in this appeal it was submitted by Ms Whelan SC that the phrase "shall not bind" in its natural and ordinary meaning, means shall not impose a liability on, and does not exclude the State Organs mentioned from availing of the benefits provided for in the 1978 Act, namely the right to acquire a fee simple provided that the conditions stipulated in the Act are fulfilled.

21. Attention was drawn to the fact that s. 2 of the Landlord and Tenant (Ground Rents) Act, 2005 [the Act of 2005] adheres to the same formulation used in s. 4 of the Act of 1978. Section 2 of the 2005 Act reads as follows:

"2.- The following section is substituted for section 4 of the Act of 1978:

4.- (1) This Act shall not bind -

(a) a Minister of the Government,

(b) the Commissioner of Public Works in Ireland,

(c) Industrial Development Agency (Ireland),

(d) Shannon Free Airport Development Company, or

(e) Udarás na Gaeltachta.

(2) Subsection (1) is in addition to any other enactment imposing a restriction on the application of this Act."

22. It was submitted that the intention of the Oireachtas in these types of provision was clear and was the same in all cases, namely to exclude from the provisions of the Landlord and Tenant Acts both claims to the fee simple under the 1978 Act and claims to new tenancies under the 1980 Act, where the lessor was an organ of the State, and the additional language used in s. 4(2) of the 1980 Act did not add to or alter this underlying provision.

23. In my opinion, it is well settled (see *Howard v. The Commissioner of Public Works* [1994] 1 I.R. 101), that there is no principle derived either from the Constitution or the common law in Ireland to the effect that a general statute does not apply to the State or State agencies. Neither is there any presumption of exemption of the State from statutory provisions, nor is there any presumption derived from the Constitution of a special position for the executive in regard to legislation.

24. Thus the question of whether s. 4 of the Act of 1978 precludes the respondents in this appeal from availing of the statutory right to acquire the fee simple, is one of statutory construction in the ordinary way.

25. The appropriate cannon of construction applicable is that which requires, that the words used be given their natural and ordinary meaning.

26. The phrase "shall not bind" means that the organs of the State mentioned cannot have imposed upon them a liability in respect of the provisions of the Act of 1978. The language used cannot be held to connote or imply any more than that because to do so, would be, to add language which has not been used. If it had been intended to exclude the organs of State mentioned from availing of the provisions of the Act as a lessee, to acquire the fee simple, in my opinion, additional language would have been necessary to achieve that particular purpose. The fact that a different formulation was used in s. 4(2) of the Act of 1980, does not in my opinion affect the proper construction of s. 4 of the Act of 1978, which must be determined by reference simply to the language actually used in s. 4, ascertaining the true intent of Parliament solely by reference to the natural and ordinary meaning of the words actually used.

27. It is submitted for the appellants that if the phrase "shall not bind" were to be construed as permitting the respondents to avail of the provisions of the Act, that would create an anomalous situation in that, notwithstanding the fact that the respondents had opted to avail of the provisions of the Act, they could then claim not to be bound by various conditions which must be fulfilled such as ss. 9 and 10 of the Act and could perhaps claim not to be bound by the terms of the award of the County Registrar.

28. In my opinion the apprehension inherent in this submission is not well founded. Manifestly, in my view if one of the State organs mentioned in s. 4 avails of the provisions of the Act to claim a fee simple they could only be so entitled if they demonstrate compliance with the conditions set out in the Act for entitlement to a conveyance of the fee simple. It must also be borne in mind that whilst every lessee claiming a fee simple must satisfy the conditions set out in the Act to succeed in the claim, no lessee is bound by the process set out in the legislation and can withdraw from it at any point up the conveyance of the fee simple. Thus a lessee who was dissatisfied with the terms of the award of a County Registrar could abandon the claim and withdraw from the process at that stage.

29. I have come to the conclusion therefore that s. 4 of the Act of 1978 does not exclude the respondents in this appeal from availing of the provisions of the Act of 1978, so as to claim a conveyance of the fee simple of the premises at issue in these proceedings.

Second Issue
Is there compliance by the Respondents with ss. 9 and 10 of the Act of 1978
30. The relevant parts of s. 9 are as follows:

"9. - (1) This Part applies to a lessee who holds land under a lease, if the following conditions are complied with:

(a) 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;

(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 s. 10.

(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…"

31. The relevant parts of s. 10 are as follows:

"10. – The following are alternative conditions one of which must be complied with in a case to which section 9 relates:

1. that the permanent buildings were erected by the person who at the time of the 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 building;

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 (either 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 services 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;

…

5. that the lease was granted, either at the time of the expiration or surrender of a previous lease or subsequent to such expiration or surrender –

(a) at a rent less than the rateable valuation of the property at the date of the grant of the lease, or

(b) to the person entitled to the lessee's interest under the previous lease, provided that the previous lease expired or was surrendered before the 31st day of March, 1931 and that it would have been a lease to which this Part applied had this Act then been in force and provided that it shall be presumed, until the contrary is proved, that the person to whom the lease was granted was so entitled;

6. that the lease is a reversionary lease granted on or after the 31st day of March, 1931 to a person entitled thereto under Part V of the Act of 1931 or the Act of 1958, whether granted on terms settled by the Court or negotiated between the parties;…"

32. Before considering compliance with either s. 9 or any of the relevant conditions set out in s. 10, I should consider the history of the buildings on these premises. In the course of the hearing several days of evidence were concentrated on the provenance of these buildings with particular controversy focused on the portion of No. 12 Rainsford Street which adjoins Rainsford Street itself. The thrust of the evidence adduced by the appellants, i.e. from Mr. Myles, an archaeologist, was that the building which now stands fronting onto Rainsford Street at No.12 was constructed well in advance of the grant on the 20th day of July, 1860 of the lease from Edward Corles to Adam Millar. The significance of this controversy was that if the appellants were correct, it would mean that at least one of the buildings now on the site was constructed by the lessor rather than the lessee and hence it would at the very least deny compliance with conditions 1 and 5 as set out s. 10.

33. A starting point in an analysis of the history of the buildings that stood on the lands demised as Nos. 10, 11 and 12 Rainsford Street is the recital in the Memorial of the Deed of 1860. Insofar as No.12 is concerned as, quoted above this premises was described as "ALL THAT AND THOSE the dwelling house, tenement and premises". Nos. 10 and 11 are similarly described in the Memorial.

34. The 1847 ordinance survey map was put in evidence. Although this map is dated as of 1847 the evidence was that it described the picture on the ground as of 1838. The earliest reliable survey of property in this part of the city was agreed in evidence to be John Rocques Survey of 1756. The picture demonstrated on this map insofar as the buildings at Nos. 10, 11 and 12 Rainsford Street now fronting onto the street are concerned is by and large similar to that shown in the 1847 Ordinance Survey. Undoubtedly there are changes towards the rear of these properties. A feature of the 1847 Ordinance Survey map is it that it shows steps leading to the fronts of Nos. 10 and 11 but no steps at the front of No. 12. The valuation records for 1853 for these properties described No. 10 as house and yard in common, no. 11 as house and rooms over gateway and no. 12 as house and yard. There is a no. 11a which is described as a dairy yard.

35. It is apparent thereafter that significant change occurred in the nature of these properties. As of November 1863 the valuation record describes No. 10 as dilapidated and Nos. 11 and 12 as offices and yards. It is clear from the later Ordinance Survey Maps, that is to say the 1864 map, the 1887 map and the 1908 map, that considerable development took place on the site of these three properties thereafter. The 1864 map shows a long building where No. 12 was, extending right to the back of the site and indeed continuously on towards Thomas Street. Behind Nos. 10 and 11 there is also a new structure extending a considerable way back into the site. An L-shaped structure which is present on the 1847 map behind Nos. 10 and 11 and partially behind No. 12 has been removed. The 1887 map demonstrates that the building behind Nos. 10 and 11 has been extended back further into the site and part of a building extending back from Thomas Street encroaches into the site. The 1908 map demonstrates further development with the filling in of a gap between a long building at No. 12 and Nos. 10 and 11. The 1926 Ordinance Survey shows no change to that of the 1908 survey. The 2007 Ordinance Survey map demonstrates considerable change with a removal of all of the buildings where Nos. 10 and 11 stood and the presence of a new building, apparently built after 1979, a corner of which extends into the site occupied by 10, 11 and 12.

36. All of this development was carried out by Adam Millar or his Company who engaged in the business of rectifying distillers, together with other commercial enterprises over many years. This business would appear to have been conducted primarily from premises which fronted onto Thomas Street and the buildings developed on the site of Nos. 10, 11 and 12 Rainsford Street appear to have been developed as part of the enterprises conducted by Adam Millar or his Company.

37. The buildings which now stand on this site are, for convenience, divided into four parts described as A, B, C, and D. Building A is that part of No. 12 which fronts on to Rainsford Street. Building B is the block immediately behind this and building C is the block immediately behind building B. Building C extends onwards beyond the site and is part of the buildings extending backwards from Thomas Street. Building D is at the corner of a structure which was built post 1979 and is a warehouse type building used by Lee and Company for the purposes of a cash and carry business.

38. As far as the provenance of building C is concerned there was little or no controversy. I am satisfied from the evidence that this building was built between 1900 and 1910. The structure of this building is supported by RSJs and the brickwork is built into the supports and it was uncontested that this type of steel structural arrangement did not become available in Ireland until towards the end of the nineteenth century. More particularly the joinery work used in this building is typical of that used in the period in question, i.e. 1900 to 1910.

39. Building B can be reliably dated to not earlier than 1880. This is because the building is supported on cast iron columns which bear the manufacturers name, namely "J. Sharkey, Church Street". This manufacturer was not in business prior to 1879. It is apparent from the evidence that these columns were an integral part of the construction of this building and as a matter of probability if not certainty were part of the original construction of the building rather than some later addition.

40. All the controversy in the evidence centred on building A.

41. Before dealing in particular with this I should observe that it was clear from the evidence, and indeed there was no contest on this, buildings A, B and C were part of an integral whole, in that the floors ran uninterrupted between all three and were all at the same level and the load bearing capacity of the floors was roughly similar throughout and this load bearing capacity was significantly greater than normal domestic loading but was well below normal industrial warehousing capacity, but may have been adequate and suitable for the particular enterprise carried on there.

42. I am satisfied from the records mentioned above that when the lease of this building was granted in 1860 No. 12 Rainsford Street was a dwelling house. There may indeed have been some form of lean-to structure in the rear garden of it but no more. It is quite clear from the evidence that the structure which is there now could never have been used as a dwelling and has absolutely none of the attributes of a dwelling house.

43. The façade of No. 12 onto Rainsford Street is particularly interesting. Mr. Myles, the expert witness called by the appellants, was adamantly of the view that this façade was built well before 1860. He placed particular emphasis on a finding by him of bricks at the side of No. 12 where the archway into the rear was, which he said, dated from an earlier period. He also compared the unusual appearance of the façade to some older buildings in that area of Dublin. He was of the view that the brick pattern used, namely the English Garden Wall Pattern, was commonly used in the early part of the nineteenth century.

44. Mr. Stewart, a conservation architect, gave evidence for the respondents, was of an entirely different view. His evidence was that the façade of No. 12 as it now stands had not been altered or interfered with since its original construction, save that the top storey was added on later, in his opinion after the construction of the Vat house next door by Arthur Guinness and Company. It was his opinion that the brick pattern used, namely the English Garden Wall Pattern, began to be used only in the later part of the nineteenth century and he was of the opinion that the bricks used in the construction of building A were similar to those used in building B. He was also of the opinion that because of the thickness of the walls in building A and in particular of the party wall with the Vat house next door, that building A was built after the Vat house was constructed in or about 1864 or 1865. In general it was his opinion that the thickness of the walls reflected a later period of building rather than early nineteen century or an eighteen century form of construction.

45. As said earlier the buildings as demonstrated on Rocques map of 1756 broadly correspond with the buildings depicted at Nos. 10, 11 and 12 fronting onto the street in the 1847 Ordinance Survey map. The evidence from Mr. Myles was that Rainsford Street was first laid out in the early years of the eighteenth century and thereafter plots were sold off and developed speculatively.

46. In my view it is probable that the buildings at Nos. 10, 11 and 12 which were depicted in 1847 were the same buildings as were shown on Rocques map. As indicated earlier when the lease was granted in 1860, Nos. 10, 11 and 12 were described as dwelling house tenements. It is highly probable, in my view therefore, that the buildings which stood on these premises when the lease was granted were old tenement dwellings. Valuation records confirm this insofar as in November 1863 No. 10 is described as dilapidated. It is clear also from these records the use of Nos. 11 and 12 had by then changed from being that of dwellings to office and yard.

47. It would seem to me to be improbable that the lessor of these premises, Mr. Corles who lived in England, undertook any development of them before granting the 1860 lease. On the other hand, the lessee, Adam Millar, had a substantial business based in Thomas Street and was clearly in expansion mode when he took this lease in 1860. On the balance of probabilities I would be quite satisfied that it was he who undertook all of the redevelopment that occurred on the sites of Nos. 10, 11 and 12 Rainsford Street.

48. I accept Mr. Stewart's evidence that the façade of No. 12 on Rainsford Street, that is still there, was never constructed as the façade of a dwelling house and that this façade has not been interfered with since its original construction. It is quite clear that this façade simply bears no relation to that of a dwelling house. The apertures in it at the ground and first floor level are wholly inconsistent with it being a dwelling house. The fact that similar brick was used in construction of building A and building B suggests to me that it is probable that building B was built soon after building A.

49. I have come to the conclusion that it is probable that the dwelling structure which was on the site of No. 12 in 1860 was at some stage between 1860 and 1880 demolished and replaced with the structure that stands there to-day and that this new structure was built for the purposes of Mr. Millar's business. It is not entirely clear exactly what was the original use of this building A. The openings to the side of it do suggest that it may have been used for the stabling of horses. This use is further suggested by the rendering on the walls at the lower level. What is absolutely clear, however, is that building A was never a dwelling house, could never have been a dwelling house.

50. I have come to the conclusion therefore that all of the permanent buildings now on the sites of Nos. 10, 11 and 12 were constructed by the person who was entitled to the lessee's interest in the property.

51. This brings me to a consideration of compliance with ss. 9 and 10 of the Act of 1978.

52. It is quite clear that for the purposes of s. 9(1) that there are permanent buildings on the land and it was not seriously contested but that the portion of the land not covered by buildings was subsidiary and ancillary to these buildings.

53. The only alteration or addition is building D. Building D is the corner of a much larger warehouse building which extends considerably beyond the boundaries of the sites of Nos. 10, 11 and 12. This building was built after 1979 and a cash and carry business was carried out in it. On the evidence adduced in this case there is no way that this brand new substantial building could be regarded as subsidiary or ancillary to buildings A, B or C. When I speak of the terms "subsidiary and ancillary", I accept the definition of them set out by Peart J. in the case of *A. O'Gorman & Co. Ltd. v. JES Holdings Ltd.* (judgment delivered 31st May, 2005) where he says:

> *"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 terms."

54. Neither in my view can the corner of building D which is on this site be regarded as "an improvement" within the meaning of s. 9(2). Building D is not an alteration or addition to any of the other buildings on site, namely buildings A, B and C. Building D is part of a large modern warehouse building which in turn was part of the complex of buildings which fronted onto Thomas Street and cannot in any sense be considered an addition to or alteration to buildings A, B or C or as ancillary or subsidiary to them.

55. It remains to consider whether the respondents have satisfied any one of the conditions set out in s. 10. The respondents contend that they satisfy four of these conditions, namely conditions 1, 2, 5 and 6.

Condition 1
56. For the purposes of a consideration of the applicability of this condition, s. 35 of the Landlord and Tenant Act, 1931 is of crucial importance. It reads as follows:

"35. – Whenever a tenancy is continued or renewed or a new tenancy is created under this Act, in a tenement, such continued renewed or new tenancy shall for the purposes of this Act be deemed to be a continuation of the tenancy previously existing in such tenement and shall for all purposes be deemed to be a graft upon such previously existing tenancy and the interest of the tenant thereunder shall be subject to any rights or equities arising from it being such a graft."

57. It is apparent that condition 1 is confined to the person who "was entitled to the lessee's interest under the lease…". The lease under which the respondents hold their interest is the 1958 lease. Manifestly the permanent buildings were not built during the currency of that lease except for building D. Buildings A, B and C were built during the currency of the 1860 lease. However, in my opinion, and I will deal with this later in greater detail, when the 1958 lease was granted the lessee under the 1860 lease was in my view, entitled to a reversionary lease under the Landlord and Tenant Act, 1931 which was negotiated between the parties and hence the tenancy created in the 1958 lease became by virtue of s. 35 of the Landlord and Tenant Act, 1931 a graft upon the tenancy existing under the 1860 lease.

58. The importance of this is that for the purposes of condition 1, the reference to "the lease" in condition 1 includes also the 1860 lease both tenancies being grafted.

59. As I have held that buildings A, B and C were erected by the person entitled to the lessees interest under the 1860 lease and building D was built by the person entitled to the lessee's interest under the 1958 lease, it necessarily follows therefore that all of the permanent buildings were erected by the person who was entitled to the lessee's interest. Hence in my view, condition 1 has been amply satisfied.

Condition 2
60. Manifestly the term of the 1958 lease is for not less than 50 years and the rent at £150.00 is, on the face of it, less than the rateable valuation as of the 14th February, 2003. The certificate of valuation put in evidence shows that the rateable valuation as of that date was €761.84.

61. The appellants contend that the certificate of valuation demonstrates that the rateable valuation of €761.00 is in respect of several properties, including Nos. 10, 11 and 12 Rainsford Street. The evidence of the appellants was that the true valuation of Nos. 10, 11 and 12 at the relevant date was €40.00.

62. It was submitted by the appellants that the onus rested on the respondents to establish precisely the rateable valuation of the premises. The respondents submit that they were entitled to rely upon a certificate of valuation as *prima facie* evidence of the valuation and if that was disputed by the appellants or any other parties, they were entitled to apply to the Commissioners of Valuation under s. 3, subs. (5)(b) of the Landlord and Tenant (Ground Rents) Act, 1967 [the Act of 1967] for an apportionment of the rateable valuation. The subsection reads as follows:

"(b) where land demised by a lease or held on a yearly tenancy does not on a particular day bear a separate rateable valuation, the Commissioner of Valuation shall have power for the purpose of this subsection to apportion the rateable valuation or valuations of the properties in which the land was comprised on that date and to charge a fee for the apportionment…."

63. Furthermore it was submitted that the appellants did not in the course of the arbitration before the County Registrar seek to rely upon s. 20(1) of the Act of 1967 which reads as follows:

"20. - (1) A county registrar conducting an arbitration under this Act may and, if so requested by any party concerned, shall cause to be sent to the Commissioner of Valuation a request for a valuation, estimate or statement in respect of any particular matter relevant to the determination of the purchase price of the fee simple in land being acquired under this Act or to the apportionment of a rent under this Act and may for the purpose adjourn the arbitration."

64. It was submitted that the appellants failed to rely on either of these two provisions which would have enabled them either independently of the arbitration or as part of the arbitration to have established a separate valuation for Nos. 10, 11 and 12 Rainsford Street and having failed to do this, the rateable valuation as established in the certificate of valuation cannot be disturbed.

65. Valuations are determined by the Commissioner of Valuations. There are procedures there as set out above for seeking an alteration or apportionment of the same.

66. Where there are established statutory procedures for seeking separate valuations as provided for in s. 3(5)(b) and also in s. 20(1) of the Act of 1967 and where no recourse was had to the Commissioners of Valuation under these statutory procedures which were available to the appellants, in my view this Court should not go behind the certificate of valuation so as to in effect usurp the statutory function of the Commissioners of Valuation to determine the correct valuation.

67. The determination of valuations is a function which requires expertise. That function has, for over 150 years, reposed by virtue of statute, in the Commissioners for Valuations who, in my opinion,, are to be regarded for that purpose as an expert Tribunal, to whom

the courts should accord curial deference. This is entirely appropriate having regard to the fact that the Oireachtas has made provision for recourse to the Commissioners, where that is necessary or appropriate, as mentioned above.

68. In these circumstances therefore, I have come to the conclusion that this Court must accept the valuation as stated in a valid and subsisting certificate of valuation and accordingly must conclude that the respondents were entitled to rely upon condition 2 in that the rent of the property as of the 14th February, 2003 was £150.00 which manifestly is much less than the certified rateable valuation as of that date.

Condition 5
69. The 1860 lease expired on the 30th April, 1959. The lease of 1958 commenced on the 1st May, 1959, i.e. only on the expiry of the 1860 lease. The rateable valuation in 1958 was £550.00, both in respect of Nos. 10, 11 and 12 Rainsford Street and of the other properties. This valuation was never separately apportioned to any of these properties individually and having regard to what I have previously said it has to be taken as the operative rateable valuation for the purposes of s. 10 of the Act of 1978. Accordingly on that basis alone condition 5(a) is satisfied.

70. Insofar as condition 5(b) is concerned, there was the same lessee under both 1860 lease and the 1958 lease, the latter becoming a graft upon the former and in my opinion had the 1978 Act being in force in 1958, clearly the 1860 lease was a lease to which Part II of the Act of 1978 would have applied.

71. I am satisfied therefore that the respondents in this appeal comply with condition 5.

Condition 6
72. The question here is whether or not the lease of 1860 is to be regarded as a "building lease" within the meaning of s. 46(1) of the Landlord and Tenant Act, 1931 thereby entitling the lessee to a reversionary lease under s. 41(1) of that Act.

73. Section 46(1) is in the following terms:

> *"46. - (1) In this part of the Act the expression 'building lease' means a lease in respect of which all the following conditions are complied with, that is to say: -*
>
> *(a) the land demised by such lease is situated wholly in an urban area;*
>
> *(b) there are permanent buildings on such land and the portion of such land not covered by such buildings is subsidiary and ancillary to such buildings;*
>
> *(c) such permanent buildings are not an improvement within the meaning of this Act;*
>
> *(d) such permanent buildings were erected by the person who at the time of such erection was entitled to the lessees interest under such lease;*
>
> *(e) such permanent buildings were not erected in contravention of a covenant, condition or agreement contained in such lease."*

74. For the reasons already stated above, in my opinion the lessee on the expiration of the 1860 lease satisfied all of the conditions (a) to (e) inclusive set out above.

75. Section 47(1) of the Act of 1931 provides as follows:

> *"47. – (1) At any time within seven years before the expiration of a building lease, any person in possession of the land or any part of the land comprised in such lease and holding the same under such building lease or under a proprietary lease shall, subject to the provisions of this Part of this Act and obtaining the consent (if any) required by this section, be entitled to obtain from the person in receipt (otherwise than as agent for another) of the rent reserved by such building lease, a reversionary lease on the terms fixed by or under this Part of this Act of the said land so possessed held for him as aforesaid."*

76. It is clear, in my view, that from 1952 onwards the lessee, under the 1860 lease, was entitled to seek and obtain a reversionary lease of these premises.

77. There is no evidence of the lessees having applied to Court to fix the terms of such lease and it would seem to me to be probable that the granting by the lessor of the 1958 lease was by virtue of the entitlement of the lessee to a reversionary lease and accordingly the granting of the lease and the terms thereof were probably fixed by agreement.

78. That being so, it is my view that the respondents herein satisfy condition 6.

79. Thus I have come to the conclusion that the respondents have satisfied the requirements of ss. 9 and 10 of the Act of 1978 and are entitled to a conveyance of the fee simple.

Third Issue
Computation of Purchase Price
80. The determination of the purchase price is now governed by s. 7 of the Landlord and Tenant (Amendment) Act, 1984, and in particular s. 7(3) thereof. This subsection reads as follows:

> *"(3) Subject to the provisions of this section, the purchase price shall be the sum which, in the opinion of the arbitrator, a willing purchaser would give and a willing vendor would accept for the fee simple or other interest at the relevant date having had regard to—*
>
> *(a) the rent payable for the land by the person acquiring the fee simple,*
>
> *(b) where, at the relevant date, the land is held under a lease which provides for an increased rent payable within fifteen years after that date, the amount of that increase and the time when it becomes payable,*

(c) the current interest yields on securities of the Government issued for subscription in the State,

(d) if the land is used for the purposes of business, or exceeds one acre in area and is not used for the purposes of business, the area and nature of the land, its location and user and the state of repair of any buildings or structures thereon,

(e) the price paid for the fee simple or any other interest in the land on a sale taking place on or after the 22nd day of May, 1964,

(f) any mortgage or other charge on the interest in the land of any person from whom, mediately or immediately, the person acquiring the fee simple holds the land,

(g) the costs and expenses which, in the opinion of the arbitrator, would be reasonably incurred by the persons from whom, mediately or immediately, the person acquiring the fee simple holds the land, in investing the purchase money payable in respect of the acquisition of the fee simple,

(h) the costs and expenses which, in the opinion of the arbitrator, have been incurred by a person acquiring the fee simple who holds the land under a lease by reason of the failure of the lessor to maintain any amenities which he is required to maintain under a covenant in the lease,

(i) the current price of the immediate lessor's interest in land held under leases or yearly tenancies similar to the lease or yearly tenancy, as the case may be, under which the land is held by the person acquiring the fee simple, and

(j) such other matters as are, in the opinion of the arbitrator, relevant to the determination of the purchase price."

81. As is readily apparent (b), (f), (h), and (i) have no relevance to the computation of the purchase price in this case.

82. The case made by the appellants on the question of valuation, supported by the evidence of Mr. Ffrench O'Carroll, a valuer, was that the premises in question were ripe for redevelopment; that the buildings on the site, by and large, had reached the end of their natural life and were fit only for demolition and added nothing to the value of the property; that the inclusion of the site in the Digital Hub area meant that the premises had a very favourable zoning for development purposes; that having regard to the time left to run on the 1958 lease, i.e. a fifty six years from the service of the statutory notice, the lessee would not be in a position to develop the premises and offer marketable titles. Thus, in the context of a conveyance of the fee simple from a willing vendor to a willing purchaser, the purchaser i.e. the lessee would be willing to pay a significant portion of the potential development value, in order to achieve the uplift in that value which the acquisition of the fee simple would contribute. Without that acquisition, it was contended, it would not be possible to market the redevelopment of the premises.

83. It was submitted that the development potential of the site was a factor which should have been taken into account by the County Registrar under subpara. (d) of s. 7(3).

84. Against this it was submitted by the respondents that subpara. (d) did not have any application because the premises in question have not been used for the purposes of business since the Commissioners of Public Works in Ireland purchased the leasehold interest in 2001, and the site does not exceed one acre in area. In this regard reference was made to the evidence of Mr. Ffrench O'Carroll who regarded the premises as a disused or brown field site. It was further submitted that having regard to the time left to run on the lease i.e. fifty six years from the service of the notice of intention to acquire the fee simple, that the fee simple interest carried with it no development potential as the right to occupy and develop was too far into the future to attract any development value.

85. In this regard reference was made to s. 7(4) which deals with the computation of purchase price where a lease has expired and where there is specific provision that the development plans of the lessor or the party from whom a conveyance is sought, are to be disregarded for the purposes of computation of the price to be paid.

86. Achieving a full understanding of subpara. (d) is not easy, particularly in the context of a brown field site.

87. On the one hand, it could be said that, in the situation where the permanent buildings on the land have by and large reached the end of their life and contribute little or nothing to the overall value of the premises that the intrinsic value contributed by the ground and in particular potential development value should be a weighty factor in determining price.

88. However, the initial phrase in subpara. (d) "*if the land is used for the purpose of business*" militates against such an approach in the sense that when the buildings reach this stage of dilapidation and disuse, it is likely that they are no longer used for the purpose of business and hence, unless the area exceeds one acre the factors set out in subpara. (d) would have to be disregarded.

89. If one places a very broad construction on the phrase "*used for the purposes of business*" so as to permit the application of subpara. (d), one is still left with the operation of the governing principle, namely, what would a willing purchaser pay a willing vendor, for the interest being sold. In this case the interest being sold is the fee simple in circumstances where there will be no occupation by the fee simple owners for at least fifty six years but in reality, assuming the existence of statutory rights to a new lease similar to those currently existing, the right of the fee simple owner to resume possession is postponed well beyond the 56 years.

90. If subpara. (d) applies, the factors to which regard must be had under it, must be given due weight. Thus, whereas in this case, the buildings on site contribute little intrinsic value and the real value of the premises is contributed by the ground, regard must be had to this and due weight given. Necessarily however, if the right to repossess is remote in the future the ultimate weight to be attached to these factors in terms of the purchase price will have to be greatly attenuated.

91. Mr. Ffrench O'Carroll estimated the value of the site at approximately €4.6 million. Mr. Goode, the valuer who gave evidence on behalf of the respondents disagreed with this valuation. If one were to accept that the actual value of the site was in the region of €3.5 million euro because of its development potential as part of the Digital Hub area, giving fair weight to the contribution of the ground to that value but bearing in mind the remoteness of the fee simple owners right to possess and thereby enjoy that development potential, only a very small portion of the full value of the premises enhanced by that development value should be reflected in the purchase price. In my view this should not exceed five per cent of this. In this case I would estimate that to be approximately €17,500.

92. I am inclined to the view that the court should adopt a broad approach to the question of whether or not the premises were used for business purposes. Although the premises were acquired by the Commissioners of Public Work in Ireland in 2001, the photographs which were put in evidence illustrate that after the service of the notice on the 14th February, 2003, some kind of business activity was going on there. This appears to have been concentrated in building D and the car park appears to have been well used. On that basis, therefore, I would be inclined to the view that these premises were used at the relevant time for the purposes of business and therefore subpara. (d) does apply.

93. The purchase price fixed in this case of €40,600 represents some uplift on the price paid by the appellants for this site namely £25,000 in the year 2001, but it would not in my view appear to reflect any sum in respect of the factors set out in subpara. (d) as discussed above.

94. In order to give application to the factors set out in subpara. (d) which are in my view relevant in this case having regard to the nature of the premises as of the date of service of the notice to acquire the fee simple in February, 2003, a sum in the order of that I have mentioned above should have been added to the purchase price so that due regard can be said to have been given to these relevant factors.

95. Therefore I would alter the purchase price by the addition thereto of the sum of €17,500 bringing the purchase price to €58,100.