Neutral Citation Number: [2012] IEHC 494

The High Court

Commercial

Record number 2011 11692P

Between

Edward Lee and Co. [1974] Limited

Plaintiff

And

N1 Property Developments Limited

Defendant

Judgment of Mr. Justice Charleton delivered on the 12th day of November, 2011.

1 The plaintiff is part of the Dunnes Stores group of companies. The defendant operates the Northside Shopping Centre in Dublin. The plaintiff is the tenant of a retail unit in that shopping centre of which the defendant is landlord through succession in title. The plaintiff tenant has unwittingly entered into an extension for 36 years of a 36 year lease by failing to serve a notice of surrender of tenancy within a window of between a year and six months prior to the expiry of that lease. Such a notice was, in fact, served four days prior to the expiry of the original lease and was too late. At issue in this case is whether the relevant term of the lease is void by statute; whether equity can allow the notice to be served late by reason of time not being of the essence; and whether arrears of rent or mense rates are due to the defendant as landlord.

Background

2 The Northside Shopping Centre was developed in the 1970s. When the lease was first entered into in 1975 the rent reserved was £19,650 annually. There is no information as to by how much on the first rent review, six years later, the annual rent was increased. The usual term in leases from that period was to forbid any diminution in the rent on review. This lease has such a term. On the second six yearly rent review, in 1987, the rent had increased to £85,000; on the third, in 1993, the rent had increased to £125,000; then in 1999 to £175,000; and on the last relevant rent review, in 2005, the rent had become €336,840. Putting all sums into euros the increases are from €24,950 to €107,927 to €158,717 to €222.204 to €336,840, or an increase over 30 years of 1,250% or a multiplication of about 13.5. In 2005, at the last rent review, Dublin property prices, including retail letting, were at their height. Since then purchase price of property has dropped to about a third of its value for homes and retail rents have also been markedly affected. Many tenants have sought to escape from what once seemed to be wise bargains. No relief is available at law, however, to lower an agreed rent. A lease may be terminated by disclaimer by the liquidator of a corporation or repudiated under section 20 of the Company Law (Amendment) Act 1990 by an examiner. In the latter case the landlord usually has the rights for voting purposes on the scheme of arrangement of an unsecured creditor. Neither liquidation of a company nor any power of an examiner can force a revision of the sum to be paid in rent where the corporation requires to retain the premises, as opposed to disclaiming or repudiating it. Upward only rent reviews, in respect of any lease entered into from 2009, are now subject to statutory reform. That reform arises from section 132 of the Land and Conveyancing Law Reform Act 2009. This section was commenced on the 28th February, 2010, by the Land and Conveyancing Law Reform Act 2009 (Commencement) (Section 132) Order 2009 (S.I. 471 of 2009) and provides as follows:

(1) This section applies to a lease of land to be used wholly or partly for the purpose of carrying on a business.

(2) *Subsection* (1) shall not apply where –

> (a) the lease concerned, or
>
> (b) an agreement for such a lease,
>
> is entered into prior to the commencement of this section.

(3) A provision in a lease to which this section applies which provides for the review of the rent payable under the lease shall be construed as providing that the rent payable following such review may be fixed at an amount which is less than, greater than or the same as the amount of rent payable immediately prior to the date on which the rent falls to be reviewed.

(4) *Subsection* (3) shall apply –

> (a) notwithstanding any provision to the contrary contained in the lease or in any agreement for the lease, and
>
> (b) only as respects that part of the land demised by the lease in which business is permitted to be carried on under the terms of the lease.

3 Since, in this case, had the plaintiff as tenant properly surrendered the lease on its expiry, by due notice given in 2010, it would have been entitled to a new tenancy under the s.16 of the Landlord and Tenant (Amendment) Act 1980, that new tenancy would have to have contained an upwards or downwards rent review clause. That would have provided significant relief, it might reasonably be predicted, from the very high rent. However, the terms of the lease make explicit that failing to serve the notice brings about a new term of 36 years under the same conditions as the old lease, thus allowing rent reviews for the next three decades to move only upwards. This is argued by the plaintiff tenant to be void under the Landlord and Tenant Act 1931, thus allowing the plaintiff tenant to serve notice claiming a new tenancy which will be fixed under the terms of the Landlord and Tenant (Amendment) Act 1980. The terms of such a new tenancy would, clearly, be more advantageous.

Terms of the lease
4 I will now set out the main terms of the lease. The indenture was made on the 1st December, 1975, between the predecessor of the defendant, as landlord, and by the plaintiff, as tenant. The rent reserved was £19,650, payable quarterly in advance; the term was for 36 years from the 1st February, 1975; there were to be six yearly rent reviews, under which the rent was never to fall; the premises were to be kept open for business during normal shopping centre hours; repairing and insuring the premises were specifically provided for; and there were the usual covenants in relation to peaceful occupation.

5 It is clause 4.03 VII which is at issue in this case. Just before the lease expired, in late January, 2011 a notice was sent by the plaintiff tenant stating that the lease would be surrendered on its expiry. The window of opportunity to do this had ceased, however, because that window operated only from the 1st February, 2010, to the 31st July, 2010. The relevant clause occurs beside a side note which reads "surrender and extension of lease" and is in the following form:

Not more than twelve months nor less than six months before the expiration of the term hereby granted:-

(a) the Lessee may serve upon the Lessor notice of his intention to surrender the premises, or

(b) the Lessor may serve upon the Lessee notice of his intention to refuse to extend the tenancy.

No such notice shall be served by the Lessor save for good and sufficient reason therein set forth which emanates from or is the result of or is traceable to some action or conduct of the Lessee and which in the opinion of the Lessor makes it desirable to refuse to extend the tenancy, or such extension would not be in accordance with good estate management or possession is required in connection with the scheme of rebuilding or re-development of the Northside Shopping Centre or any part thereof. In default of the servers of either such notice by either party the term hereby granted shall for all purposes be deemed to have been extended for the like term subject in all respects to the covenants and conditions provisos and stipulations herein contained including that provides over rent review every sixth year of the term as so extended and this proviso and for the purpose of removing any doubt IT IS HEREBY AGREED AND DECLARED that the intent of meaning and purpose of this proviso is that the Tenant shall be entitled to surrender the premises at the expiration of the term hereby granted or of any term for which the said term shall be deemed to have been extended and the Lessor shall be entitled to refuse to extend the Tenancy at the expiration of the said term or any such term as aforesaid under the provision in that behalf hereinbefore contained any of the reason is hereinbefore specified but that's subject to such respective rights the Lessee should enjoy the ride indefinitely to extend its tenure and occupation of the premises nearby demise subject to the terms, conditions and provisos herein contained.

6 Key to any decision in this case is the concept of surrender of a lease. At clause 3.15 the tenant covenants with the landlord:

At the expiration or sooner determination of this demise decently and in good and substantial repair and condition as aforesaid (damaged by the insured risks only accepted subject as aforesaid) to surrender and yield up the demised premises onto the Lessor together with all fixtures and additions thereto PROVIDED HOWEVER that the Lessee shall be at liberty to remove ... trade fixtures ...

7 The core of the argument for the plaintiff tenant is that surrender of a lease disbars the surrendering tenant from obtaining a new tenancy under the Act of 1980. The clause as to extension of the tenancy is deliberately structured, it is claimed, so that the tenant has the choice either of, firstly, walking away from the premises after the term of 36 years has expired with the consequence that a new tenancy fixed by agreement or by the court under the Act of 1980 is not available because of that surrender or, secondly, accepting the continuation for a second term of 36 years of the precise terms of the first term of 36 years. Since this would include upwards only rent reviews, the continuation of an inflated rent and a term that might be too long to suit the purposes of the tenant, the contention is that the Act of 1980 has been unlawfully thwarted and that the entire clause is void for illegality.

Landlord and Tenant Acts
8 The Landlord and Tenant Act of 1931 was introduced in order to give security of tenure to a business which had rented premises, provided the tenancy there had subsisted for at least three years. Residents of homes and flats obtained such relief only after a period of 30 years. Under section 21 of the Act of 1931, restrictions were placed on those who had terminated their own tenancy, had been ejected or where the landlord had a scheme of redevelopment. Where a new tenancy was to be fixed by the court, the duration, of no less than 21 years was set, unless the tenant wanted less, and a gross rent was fixed. At a time of low inflation, the rent was set for the entire 21 years. It shortly became clear that such a scheme was unfair. Rents in the 1970s were set high for the first number of years, about right for the middle years and low for the last few. The Landlord and Tenant (Amendment) Act 1980 introduced rent reviews into tenancies that were to be fixed by the courts and made certain other changes including a clearer allowance for compensation for improvements and the reduction of the security of tenancy for residential leaseholders to 20 years. Neither of these Acts could be contracted out of. Section 42 of the Act of 1931 governs this lease since it is expressed to have immediate effect and was in force at the time when this lease was signed. I regard as unsustainable any argument to the effect that this situation is governed by legislation that was not then in force. That section reads:

A contract, whether made it before or after the passing of this Act, by virtue of which a tenant would be directly or indirectly deprived of his right to obtain relief under this Act or any particular such relief shall be void.

9 A similar provision is contained in section 85 of the Act of 1980 in the following terms:

So much of any contract, whether made before or after the commencement of this Act, as provides that any provision of this Act shall not apply in relation to a person or that the application of any such provision shall be varied, modified or restricted in any way in relation to a person shall be void.

10 It is noteworthy, reading the Act of 1931 that the circumstances disqualifying tenants from a new tenancy are all ones of misbehaviour whereby a landlord is forced to lose the economic benefit of the lease; see section 21. That model is maintained in the Act of 1980 whereby section 17(1)(a) provides:

A tenant shall not be entitled to a new tenancy under this Part if-

(i) the tenancy has been terminated because of non-payment of rent, whether the proceedings were framed as an ejectment for non-payment of rent, an ejectment for overholding or an ejectment on the title based on a forfeiture, or

(ii) the tenancy has been terminated by ejectment, notice to quit or otherwise on account of a breach by the tenant of a covenant of the tenancy, or

(iii) the tenant has terminated the tenancy by notions of surrender or otherwise, or

(iv) the tenancy has been terminated by notice to quit given by the landlord for good and sufficient reason, or

(v) the tenancy terminated otherwise than by notice to quit and the landlord either refused for good and sufficient reason to renew it or would, if he had been asked to renew it, have had good and sufficient reason for refusing.

11 All of these are situations where a tenant, through unacceptable behaviour, throws away his or her rights to a new tenancy. The relevant subsection also refers to termination by surrender "or otherwise". What is that? Clearly, it encompasses walking away without saying anything. That is also a wrongful action. It is hard to see it as just acknowledging the end of a term of a tenancy. At the end of the tenancy, through efflux of time, no such wrong is involved and instead the term of the contract simply comes to an end. In those circumstances, a tenant is entitled to compensation for such improvements as have been made in the tenement.

12 At issue here is whether there has been a scheme to effectively force the tenant to surrender the tenement in advance of the term and thereby disbar the fixing of a new tenancy, and the terms thereof, by application to the court. Such a scheme would render the relevant clause void under the Act of 1931, which in all material respects is the same as the Act of 1980. The entire contract is not void, simply the offending clause: *Hardiman v. Galway County Council* [1966] I.R. 124 at 131 per Ó Dálaigh C.J. I do not believe that a court is entitled, however, to rewrite a clause by running a blue pencil through offending words so as to rewrite the meaning of what the parties intended into a meaning that they never intended. The law is strict. Direct and indirect attacks on rights under either the Act of 1931 or the Act of 1980 will not be tolerated. In *Bank of Ireland v. Fitzmaurice* [1989] I.L.R.M. 452 a lease was fixed with certain index-linked provisions that were tied to what was described as "the cost of living index". These statistics had not been published by the Central Statistics Office since the 1953. Instead, and unfortunately, this index which measures the course of property and mortgages was replaced by a consumer price index that would have markedly increased in the decade up to 2008 had it included the cost of accommodation for families and business premises for firms. Instead, the people of Ireland were left with no statistic that would starkly state how bad huge increases in property prices were for the economy. Lardner J. struck down as void a clause in a lease providing an effective penalty against any tenant who sought to stay on past the first or second rent review. As a matter of ordinary contract law the relevant clause could have been struck down had it related to damages as it had nothing to do with genuinely pre-estimating loss. The clause provided that where the tenant stayed on beyond the term of a rent review of the rent firstly, increased by the non-existent index and then, secondly the next review, quadruple on that occasion and on the next. Lardner J., at p 460 of the report reasoned as follows:

I am satisfied that this rent was intended by the plaintiff and was designed to exercise a compelling pressure on the defendant to surrender his tenancy in order to escape liability for the increased rent. This pressure was likely to be increased by the provision that the increased rent will during the remainder of the term be subject to further fourfold multiplications viz for the two years ending on 31 May 1994 and for the period of one year ending on 31 May 1999. The position is that, if the defendant succumbing to this pressure, surrenders his lease he excludes himself from any right to claim a new tenancy under s. 17(1)(a)(iii) of the 1980 Act: any negotiations which may then take place between the plaintiff and the defendant in regard to a new lease will be free from the provision that in default of agreement the court will fix the terms of any new lease and will not be affected by the guidelines which should be applied by the court in fixing such terms. And lastly the compelling pressure to surrender exercised by the multiplier clause restricts and reduces the lessees security of tenure which is one of the purposes of the Act to confer.

13 It is also true that it should be noted that genuine entry by a tenant into a caretaker's agreement, as opposed to a lease, may avoid the operation of the Act of 1931 since there is, in those specific circumstances nothing to which the legislation applies; *Gatien Motor Company Limited v. Continental Oil Company of Ireland Limited* [1979] I.R. 406.

14 A further argument of the plaintiff tenant whereby the tenant seeks to have the relevant clause declared void, and thus bypass the time limit for surrender, is that on going to court the terms of the new tenancy will already have been set. There is nothing, however, in the clause, once the surrender has been made within the six-month window provided for whereby the tenant and the landlord do not come before the court in the ordinary way because in the event that notice is served within that period there is no agreement of any kind as to the terms of any new tenancy. The parties are at large as to what may be agreed; the court is at large in the event that there is no agreement in fixing the terms that are suitable, including a term of less than the ordinary statutory period of 35 years; see section 23 of the Act of 1980.

15 Would the action of the tenant in surrendering the lease, as provided for in the clause, disbar the operation of the Act of 1980, in force when that would take place, by acting as a surrender and thus coming within one of the categories of section 17(1)? In my judgment, it would not.

Surrender

16 The lease must be construed in order to give the document business efficacy. If two possibilities are open in terms of the meaning of a clause, one of which is in conformity with the law and the other of which offends the relevant legislation, then a court is obliged to presume that the parties intended a lawful purpose. The court is not entitled to re-word an agreement in such a way as to ascribe to the parties an intention which they did not hold.

17 Modern authority confirms, firstly, that the intent of the parties as construed from the entirety of the document governs the construction of the agreement as opposed to any misuse of a technical term and, secondly, that the return of the tenancy to the landlord during the currency of the term of a demise with the consent of the landlord, is what is most properly referred to as a surrender in landlord and tenant law.

18 As to the first point, in *PW and Co. v. Milton Gate Investments Ltd. (B.T. Property Ltd. and another, Part 20 defendants)* [2004] Ch. 142, Neuberger J. made it clear that in the construction of an agreement, substance should prevail over form. At pp. 178-179 he persuasively stated:

So far as the first limb of the argument is concerned, I accept that the law, particularly since equity prevails over the common law, is concerned with substance rather than with form. The law on this topic was discussed and applied in characteristically authoritative fashion by Wilberforce J in In re *Stirrup's Contract* [1961] 1 WLR 449 at 452-453. He quoted at 453, Lord Mansfield CJ in *Goodtitled Edwards -v- Bail* (1777) 2 Cowp. 597, 600:

> "The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense: That they shall operate according to the intention of the parties, if by law they may: And if they cannot operate in one form, they shall operate in that, which by law will effectuate the intention."

Wilberforce J then immediately went on to apply that approach to the case in front of him:

> "[A]s a matter of general approach, once the court is satisfied that the intention of a document is to pass the legal estate ...it should not allow that intention to be defeated by the fact that instead of the word 'grant' or 'conveyance', the word 'assent' is used."

The words of Lord Mansfield C.J. are salutary, and I would not wish to derogate in any way from them; on the contrary. However, it would scarcely be consistent with what Lord Millett, in *Barrett v Morgan* [2000] 2 AC 264, 274G, called "the orderly development of the common law", if those observations were interpreted so widely as to enable the court to give effect to whatever intention the parties expressed, provided that it did not infringe public policy or statute.

To construe a document, which on its face, plainly intends to effect a transfer of a property, as conveying the property, notwithstanding the fact that the parties have not used the appropriate language of "conveyance" or "grant", but instead have used the word "assent", is a long way away from the characterisation of the effect of the service of a notice pursuant to a break clause in a lease as a surrender. Indeed, it appears to me that, the proper characterisation of the relationship between the parties or the effect of an act permitted by contract, is ultimately a question of law, although the intention of the parties (particularly if expressed in the document concerned) may be a significant factor in some cases. As Mr Dowding says, that proposition is familiarly demonstrated in the landlord and tenant field by the decision of the House of Lords in *Street -v- Mountford* [1985] AC 809. In that case, because the agreement in question involved the grantor giving exclusive possession to the grantee in return for a periodic payment, the arrangement created a tenancy, notwithstanding the fact that it was plain from its terms that the parties intended it to create a licence.

In the present case, clause 5(6) permitted PW to determine the head lease on 24 June 2002 simply by serving a notice of requisite length, and nothing more was required to put an end to the term. To my mind, if the parties had characterised that arrangement as a surrender, they would have been attempting that which Lord Templeman said in *Street v. Mountford* [1985] AC 809 they could not effectively do. As he graphically observed, the parties can no more turn an agreement, which in law creates a tenancy, into a licence by calling it a licence, than they can turn a five pronged digging instrument, which as a matter of concept and language is a fork (albeit with a supernumerary tine), into a spade by calling it a spade. Clause 5(6) in the instant case is a provision which entitles the tenant thereunder to determine it simply by service of a notice: that is determination by notice, and not determination by surrender. A surrender, as a matter of law, involves some subsequent consensual act, such as execution of a deed of surrender or handing over and acceptance of the key, before the transaction is completed. The fact that there can be a unilateral aspect of surrender (in the sense that the landlord - or indeed the tenant - can commit himself in advance to execute or accept a deed of surrender) does not call that point into question, in my view.

19 It is clear to me, as clear as a spade is not a fork, as Neuberger J. puts the matter, that in referring in the relevant clause to a surrender, this should not be construed as a wrongful action putting the tenant outside the relief available under the Act of 1980.

20 As to the second point, the nature of what a surrender is remains clear from the earliest authority on the issue. The concept of surrender is classically dealt with in Thomas Harrison, *The Law and Practice Relating to Ejectments in Ireland* (Dublin, 1903) where at pp. 124 to 125, the learned author sets out the following:

The acts of the parties which constitute a surrender by operation of law may be classed under four heads. ("Cherry," p.21.)

> (1.) The delivery of possession of the demised premises to the landlord and his acceptance thereof. (*Oastler v. Henderson*, 2 Q.B.D. 575; *O'Reilly v. Mercer*, 10 I.J.N.S. 149.)
>
> (2.) The adoption by the tenant, with the sanction of the landlord, of a position inconsistent with his position as tenant. (*Lambert v. M'Donnell*, 15 I.C.L.R. 136, 9 I. Jur., N.S., 371.)
>
> (3.) The acceptance by the tenant of a new lease or of an agreement operating as a lease. (*Lynch v. Lynch*, 6 I.L.R. 131.)
>
> (4.) The admission of a new tenant under a new letting made with privity and consent of the former tenant. (*Doran v. Kenny*, I.R. 3 Eq. 148.)

21 The author also comments, pertinently, that the tenancy may be brought to an end, where it is a periodic tenancy, as in from month to month, by either the landlord or the tenant serving a notice to quit that expires on the appropriate gale day. The author notes, at p. 123, that there is a distinction between yielding up a tenancy on the expiry of a term and of a notice to quit. He says:

A notice to quit served by a tenant is sometimes inaccurately called a surrender. The former is, however, a voluntary determination of a tenancy by the tenant upon the expiration of a definite period fixed by custom, statute, or mutual agreement whereas the latter is the re-vesting in praesenti by mutual agreement of the lessee's interest in the lessor during the continuance of the lease or tenancy. A surrender is, in fact, an immediate transfer or conveyance of the lessee's interest to the lessor. (*Neville v. Harman*. 17 I.L.T.R. 86.)

22 This remains the case. In *Barrett and Others v. Morgan* [2000] 2 A.C. 264 the House of Lords extensively discussed the nature of a surrender in contrast to the service of a notice to quit. Lord Millett gave this helpful exposition, at pp. 270 to 271:-

A lease or tenancy may also be surrendered at any time by the tenant to his immediate landlord. A surrender is simply an assurance by which a lesser estate is yielded up to the greater, and the term is usually applied to the giving up of a lease or tenancy before its expiration. If a tenant surrenders his tenancy to his immediate landlord, who accepts the surrender, the tenancy is absorbed by the landlord's reversion and is extinguished by operation of law.

A surrender is ineffective unless the landlord consents to accept it, and is therefore consensual in the fullest sense of the term. In Coke's Commentary upon Littleton (1832), vol. II, s. 636, p. 337b the nature of a surrender is described as follows:

> "SURRENDER", sursum redditio, properly is a yeelding up an estate for life or yeares to him that hath an immediate estate in reversion or remainder, wherein the estate for life or yeares may drowne by mutuall agreement betweene them" (my emphasis).

On its surrender the tenancy is brought to end prematurely at a time and in a manner not provided for by the terms of the tenancy agreement. In this respect it differs from the case where a tenancy is determined by notice to quit. It is because the landlord or his

predecessor in title has not, by granting the tenancy, previously agreed that the tenant should have the right to surrender the tenancy prematurely that the landlord's consent is necessary.

The destruction of the tenancy by surrender reflects the principle that a person cannot at the same time be both landlord and tenant of the same premises. *Nemo potest esse tenens et dominus*: see *Rye v. Rye* [1962] A.C. 496, 513 per Lord Denning.

23 Later in the judgment, at p. 272, four principles are set:-

First, when a tenancy is surrendered it is brought to an end prematurely otherwise than at the time and in the manner stipulated by the tenancy agreement. When it is determined by notice to quit it is determined in accordance with the provisions of the tenancy agreement and at a time and in the manner previously agreed between the parties or their predecessors in title.

Secondly, the landlord or his predecessor in title has not agreed in advance to accept the premature determination of the tenancy by surrender, and accordingly a surrender is ineffective without his consent. But by granting and accepting a periodic tenancy the parties or their predecessors in title have agreed in advance that the tenancy should be terminable by notice to quit served by either party on the other, and accordingly no further consent is necessary whether or not it is forthcoming in fact.

Thirdly, a subtenant holds a derivative title which cannot be prejudiced by the surrender of the head tenancy from which it is derived or any other agreement between the parties to the head tenancy which is later than the creation of his subtenancy. His title is, however, precarious, for it cannot survive the natural termination of the head tenancy in accordance with its terms agreed before his subtenancy was created.

Fourthly, when the head tenancy is surrendered, it is treated as continuing until its natural termination so far as this is necessary to support the derivative interest of the subtenant. That is all that is meant by saying that "the estate … hath . . . a continuance." But when it is determined by notice to quit, it has come to the end of its natural life. There is no further period remaining during which the tenancy can have continuance.

24 In *PW and Co v. Milton Gate Investments Ltd*, an analysis to the same effect was applied by Neuberger J.

Relief in equity
25 Correspondence has been exchanged between the parties. From these letters it is difficult to discern whether the plaintiff tenant deliberately adopted a policy of not seeking a determination of the tenancy for negotiating purposes; whether a mistake was understandably made because of the passage of a generation since the lease was first signed; or whether someone genuinely decided that they could not surrender the lease because otherwise they would be debarred from a new tenancy under the Act of 1980. There is nothing by way of inference or evidence from which the first and the last possibilities could be preferred as an explanation. As a probability, it seems that the parties sleepwalked into this situation.

26 The balance of Irish authority is that time should not be of the essence of the performance of this clause in the contract. In *Hynes Limited v. Independent Newspapers Limited* [1980] I.R. 204 the plaintiff tenant sought a declaration that a notice requiring a rent review that was served by the defendant landlord six weeks late should be disregarded. That notice was to be served "before the first day of October in the seventh year of the term". In the High Court, it was held by McWilliam J. that neither the subject matter of the contract nor the surrounding circumstances required that time should be considered of the essence. In the Supreme Court, the appeal was disallowed on the basis that in the absence of special circumstances, nothing in the lease of 1972 nor the surrounding circumstances constituted grounds for implying a condition that time was of the essence. In that case, the Supreme Court referred to the earlier decisions of the House of Lords in *United Scientific Holdings v. Burnley Borough Council* [1978] A.C. 904 where there was an adoption and application to a rent review clause of the following rule from *Halsbury's Laws of England*, 4th Ed., volume 9, para. 481:

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

27 O'Higgins C.J. emphasised that it was the weighing of the equities involved that would result in relief in equity or in the refusal of that relief, at p. 215 to 216:-

> *The result was that, in the absence of any contra indication in the lease itself, the House of Lords in the Burnley Case 1 [1978] A.C. 904. ruled that there is a presumption (stemming from the application of equitable principles) that in all rent review clauses time should not be regarded as essential to the initiation or operation of the rent review, even if the right to review is unilateral.*

I have considered very carefully the reasoning which led to the decision in the Burnley Case.[1] It is based on the assertion that such leases for long terms would not be granted or concluded without acceptance by the tenant of rent reviews and that, as a consequence, it would be unfair and inequitable that such a tenant should be allowed to repudiate an obligation he had accepted merely because, in carrying out what was agreed, a time clause was not observed. I find this reasoning compelling. I accept that there may be circumstances in which delay has been extreme or where, because of it, other factors have arisen which alter the equities. However, in the ordinary case where the payment of an increased rent is expressly envisaged and accepted, and where the failure to observe the requirements of a time clause is due to mere inadvertence and is not prolonged and in no way alters obligations already undertaken, I see no reason for saying that the equitable rule as to time in contracts should not apply. This is not to say that failure by the landlord to act in time may not be a breach of contract for which he may be liable in damages, if damage is caused. However, his failure in this respect should not be regarded as such a breach as would entitle the tenant to repudiate obligations which under the contract he has already accepted.

In Ireland the fusion of common-law and equitable rules was initiated by the Supreme Court of Judicature Act (Ireland), 1877, which contains similar provisions [2] in s. 28(7) to those already noted in the English Acts, and was completed by the Courts of Justice Act, 1924, and the Courts (Establishment and Constitution) Act, 1961.

In the circumstances existing in this appeal, it seems to me that the reasoning in the Burnley Case [1] applies. The wording of the reddendum indicates that the plaintiffs accepted an obligation to pay not only the initial rent but also "such increased rent as may from time to time be payable hereunder." The lease contains no break clause or anything which would distinguish it from a lease under which the lessee accepts the normal obligation of periodic reviews of rent. It appears to me that the rent review clause amounts to

machinery for the implementation of what was accepted from the commencement of the lease, that is to say, a review of the rent at the stipulated periods

28 In order to strike that balance it is necessary to look at the entirety of the obligations of the parties and as to whether the effect of delay is to cause disadvantage to the landlord at the expense of the tenant. At pp. 220 to 221 of the report Kenny J. laid particular emphasis on this point:

On many occasions counsel for the plaintiffs referred to the lessors' option to serve a revised rent notice. In my opinion the use of the word "option" to describe the lessors' right to serve such a notice is both incorrect and apt to mislead. In most cases the specified dates within which an option may be exercised are of the essence. An option gives a right to acquire property - usually at a specified price and within a named time. Its exercise creates the relationship of vendor and purchaser or of landlord and tenant. In the instant case neither the plaintiffs nor the defendants acquire any property by the service of a revised rent notice. When it is served, the plaintiffs continue to hold for the term created by the lease and on its terms: the only change is that a term of the lease (which is a contract) is altered. ... I think that the nature of the clause in the lease shows that time is not of the essence for the purpose of the service of the revised rent notice. If the new rent is fixed after the 1st January, the plaintiffs will have the use of the money which represents the rent until the rent is determined - though when it is fixed they will have to pay it from the 1st January. They suffer no disadvantage if the rent is fixed after the 1st January and they get some advantage. However, if we hold that time is of the essence, the defendants will have to continue until 1985 to receive a rent which was fixed in 1972. During the last three years there has been an inflation of between 15% and 20% in each year and it is clear that one of the main purposes of the relevant clause in the lease was to prevent the rent remaining constant at the 1972 amount if the high rate of inflation continued.

29 In addition to this authority, much emphasis has been placed upon case law from England and Wales. In that regard, it is to be noticed that the approach to rent review clauses in that jurisdiction differs from the approach of the Supreme Court in *Hynes Limited v. Independent Newspapers Limited* in respect to the passing of a rent review option date. More significantly, the earlier cases make it clear that there is a basis in the rigidity of the law in that jurisdiction that is based on the unilateral nature of an option granted by contract to purchase property. In *Hare v. Nicoll* [1966] 2 Q.B. 130, a number of shares in a private company were sold to the defendant under an agreement which allowed for the repurchase of 50% thereof. That option was to be exercised by a particular date, with the payment by another specified date. The Court of Appeal held that the condition as to date had to be strictly complied with; failure to do so meant loss of the option. It was contended that time was not of the essence of this contract. That argument was rejected at p. 141 by Wilmer L.J.:-

It is well established that an option for the purchase or repurchase of property must in all cases be exercised strictly within the time limited for the purpose. The reason for this, as I understand it, is that an option is a species of privilege for the benefit of the party on whom it is conferred. That being so, it is for that party to comply strictly with the conditions stipulated for the exercise of the option. In the present case, clause 2 of the agreement prescribes two specific dates: (1) a date before which the plaintiff must give notice of his desire to repurchase the shares, and (2) another date before which he must make his payment of the purchase price. In these circumstances, I am of the opinion that the judge, in construing clause 2 of the agreement, rightly followed the reasoning of Kindersley V.-C. in Ranelagh (Lord) v. Melton [2 Drew. & Sm. 278]. The judge also relied on three other cases, namely, Brooke v. Garrod [(1857) De G. & J. 62], Davis v. Thomas [(1830) 1 Russ. & M. 506, L.C.], and Weston v. Collins [(1865) 12 L.T. 4, L.C.], as exemplifying the same principle. In this, too, I think he was right, for although the options in question in those cases arose in relation to circumstances quite different from those in the present case, the principle applied was one which is, I think, of general application.

30 In *Benito di Luca v. Juraise (Springs) Limited and Others* (2000) 79 P. & C.R. 193, under a written agreement the plaintiff was granted an option to purchase shares in land. That option was to be exercised within six years of the date of the agreement subject to planning permission being granted. Once planning permission was secured, the plantiff had two months to give notice in writing to the defendants exercising his option. The plaintiff became aware that planning permission had been granted somewhat late, and the notice was served out of time. Nourse L.J. held that time was of the essence both at common law and in equity in relation to options to purchase. This principle applied regardless of whether the party granting the option needed to know with certainty when the option period had come to an end. Equity would not relieve against contractual stipulations as to time, save only in cases established by the case law, as where there is a contract for the sale and purchase of land with a specified date for completion. He followed *United Scientific Holdings v. the Burnley Borough Council* where, at p. 929 of [1978] A.C. , Lord Diplock had said that a "practical business explanation why stipulation as to the time by which an option to acquire an interest in property should be exercised by the grantee must be punctually observed" was that the party granting this option was fettered in the exercise of the ordinary right of disposal of the property. Relief in equity was not to be extended even to cases where the party granting the option did not necessarily need to know with certainty the date when the option period had come to an end.

31 It is clear from the decision of the Supreme Court in *Hynes Limited v. Independent Newspapers Limited* that relief in equity against the passing of a date may be granted where the balance of the rights and obligations of the parties require an amelioration of the strict terms of the contract. That amelioration will benefit a landlord where a tenant claims not to be subject to a rent review clause simply because the date of the exercise of that option has passed. I find it impossible to approach this decision on the basis that such relief, established by the Supreme Court as applicable to options to review rent, should not be available where circumstances make it equitable to intervene in favour of a tenant.

32 The correspondence makes it clear that there is little objection by either the plaintiff tenant or the defendant landlord to an extension in the terms of the tenancy into another period. What is also clear is that under ordinary circumstances upon the determination of the tenancy a right is vested in a tenant to seek a new tenancy either on agreed terms, or if terms cannot be agreed, on terms to be set by the Circuit Court.

33 There is no right of a landlord, apart from any rights that might be established by agreement, to require a tenant to continue on in a tenancy beyond any term agreed. What is also clear is that what is crucial to the determination of the dispute between the parties is the rent review clause that is fixed by agreement so that it may never reflect the deflation in the property market by being revised downwards. Were there to be the fixing of a new tenancy by agreement or by the Circuit Court, that term could not possibly survive intact; whether as a matter of agreement or by virtue of the Act of 2009. Further, the defendant landlord expects the plaintiff tenant to pay rent at a level appropriate to the last rent review. Rent property prices were, as has been noted, markedly inflated. In effect, this case is about the cost of the tenancy. It is neither right nor fair to simply mark the passing of the date a generation after the lease was signed as establishing rights in favour of the defendant landlord to command a rent that is probably appropriate to another era.

34 Relief in equity being available, as established by the decision of the Supreme Court in *Hynes Limited v. Independent Newspapers Limited*, I propose to grant that relief as a matter of equity.

Result
35 In the result, the notice given by the plaintiff tenant to the defendant landlord that it did not wish to exercise the option of a new 36 year lease on the same terms as the previous 36 year lease is valid. Such notice does not disentitle the plaintiff tenant from statutory relief.

36 It is now clear that notices under the Landlord and Tenant (Amendment) Act 1980 may now be served.

37 In the absence of successful negotiation as to the duration, rent and conditions of the new tenancy, application may be made to the Circuit Court for the statutory relief that is ordinarily available to tenants as a matter of law on the determination of any business tenancy of more than three years duration.

38 I therefore propose to grant an appropriate declaration to that effect to the plaintiff tenant.