THE HIGH COURT

2010 5702 P

BETWEEN

MALACHY Mc DANIEL STONE

PLAINTIFF

AND

RED VALLEY LIMITED

DEFENDANT

AND

2010 11697 P

BETWEEN

MALACHY Mc DANIEL STONE

PLAINTIFF

AND

RED VALLEY LIMITED, AUSTRENT LIMITED AND BALLINACARRIG PARK CLUB LIMITED

DEFENDANTS

Judgment of Mr. Justice Hedigan delivered the 29th day of July 2011.

1. The plaintiff resides at Borleagh Manor, Inch, Gorey, Co Wexford. The first named defendant Red Valley Limited is a limited liability company with its registered office situate at Ballinacarrig Park, Brittas Bay, Co Wicklow. The second named defendant Austrent Limited is a limited liability company with its registered office situate at 29 Earlsfort Terrace, Dublin 2. The third named defendant Ballincarrig Park Club Limited is a limited liability company with its registered office situate at Ballinacarrig Park, Brittas Bay, Co Wicklow.

2. In this action the plaintiff seeks:-

(a) An order for possession of all that and those lands comprised in Folio 6578F of the Register County Wicklow,

(b) Damages for breach of covenant,

(c) Mesne rates continuing to the date of possession,

(d) Interest pursuant to the Courts Act 1981,

(e) Further and other order,

(f) Costs.

3.1 The plaintiff is the owner of lands at Ballinacarrig, Brittas Bay, Co Wicklow. The plaintiff operated the said lands as a caravan and mobile home park from the 1970's until July 2000. The residents of Ballinacarrig park each held licences from the plaintiff. The residents were eager to establish a more secure system of tenure and approached the plaintiff with a proposal to lease the entire park. In July 2000, the plaintiff agreed to allow the residents to have long leases on their holiday homes instead of renewable licences. The residents established three companies Red Valley Limited, Austrent Limited and Ballinacarrig Park Club Limited for the purpose of leasing the park from the plaintiff.

3.2 On the 1st July, 2000, the plaintiff leased the caravan park to the first named defendant. This lease which is hereinafter referred to as "the head lease" was for a term of 35 years commencing on the 1st January, 2000. By sub-lease dated the 1st July 2000, the first-named defendant demised the park to the second-named defendant for a term of 10 years and the second-named defendant in turn demised the park to the third named defendant for an initial term of 6 years ("the occupational lease"). The term of this lease was extended by a further 4 years on the 26th March, 2007. By a further sub-lease dated 1st July, 2000, hereinafter referred to as "the Ballinacarrig lease", the first named defendant demised its reversionary interest in the park to the third-named defendant for a term of 35 years. The purpose of the various leases was to secure a VAT advantage. On foot of their increased security of tenure mobile home owners invested significantly in their mobile homes and improvements were also made to the park.

3.3 Under the head lease the tenant covenanted to pay the rents reserved and also to provide a bank guarantee for the payment of the rent during the currency of the lease. A dispute arose between the plaintiff and the first named defendant in and around the end of 2009. The first named defendant failed to pay an increase in the rent due under the terms of the head lease. Furthermore on the 31st December, 2009, the bank guarantee procured by the first-named defendant expired. The first named defendant contacted a

number of banks but was unable to obtain a new guarantee.

3.4 On the 29th March, 2010, the plaintiff served a forfeiture notice on the first-named defendant calling on it to remedy the alleged breaches of covenants in the head lease within 28 days of the date of service. On the 26th April, 2010, the period allowed by the forfeiture notice expired. The plaintiff issued forfeiture proceedings seeking an order for possession. The plenary summons and statement of claim were forwarded to the defendants solicitors Lavelle Coleman on the 15th June, 2010. The first and second named defendants did not contest the plaintiff's entitlement to re-enter the demised lands. However the third named defendant asserted that the lease under which it held the property namely the Ballinacarrig lease continued to subsist.

3.5 Around 176 mobile homes are situated in the park and each of the home owners were in occupation of their site pursuant to a licence granted by the third-named defendant. At an AGM on the 2nd August, 2010, the third named defendant resolved to grant subleases to each of the mobile homes owners. On the 11th November, 2010, the plaintiff's solicitors Ivor Fitzpatrick and Company wrote to the defendant's solicitors Lavelle Coleman objecting to this course of action on the basis that sub leases could not be created as the head lease was forfeit.

3.6 On the 8th December, 2010, a letter was written by Noel Smyth on behalf of the third named defendant to each of the mobile home owners recommending that the mobile home owners cancel all standing orders in favour of the plaintiff. In that letter the third named defendant also indicated that it intended to issue and grant sub leases for a 24 year term at a fixed rent, without any bank guarantee and with annual break options in favour of the sub-lessees/mobile home owners. On the 16th December, 2010 the plaintiff's solicitors wrote to the defendants' solicitors seeking an undertaking from the first and third named defendants to "desist from issuing such sub-leases until the final determination of proceedings between the parties". The letter went on to state that "failing receipt of same our client shall take such action as may be necessary to protect his interests which will include an application to Court for injunctive relief". On the 18th December, 2010 the defendant's solicitors responded stating that the third named defendant intended to issue the sub leases to the mobile home owners, but that it would not execute any returned leases pending resolution of the proceedings. On the 20th December, 2010 the plaintiff's solicitor sent a fax to the defendant's solicitors seeking an undertaking that the third named defendant would not issue the sub leases. When no response was received to this fax, proceedings were issued.

3.7 A statement of claim was delivered on the 20th December, 2010. Pending resolution of the matter the plaintiff sought and obtained an interlocutory injunction on the 21st December 2010, restraining the third named defendant from sub-leasing its interest in the lands. Further consolidated statements of claim were delivered on 11th February, 2011 and the 14thApril, 2011. In this action the plaintiff seeks an order for possession of the caravan park, damages for breach of covenant, mesne rates outstanding to date, and interest.

Submissions on behalf of the Plaintiff
4.1 As the first and second named defendants do not contest the plaintiff's entitlement to the relief sought these submissions are directed to the claim against the third named defendant Ballinacarrig Park Club Limited. The third named defendant does not dispute the forfeiture of the lease dated 14th August, 2001 between the plaintiff and the first named defendant (the Red Valley lease) but asserts that the lease under which it holds the property, namely the lease dated the 13th February, 2001, between Red Valley Ltd and Ballinacarrig Park Club Ltd ("the Ballinacarrig lease") continues to subsist due to the inclusion in the Ballinacarrig lease and the other leases, of a provision which it is alleged confers rights akin to landlord and tenant rights on the third named defendant. It is asserted that as a result of the inclusion of this provision an estoppel arises.

4.2 As a matter of common law, the termination of a lease by forfeiture has the effect of automatically terminating all sub-leases and sub-tenancies in the premises in question. In *Pennell v. Payne* [1995] 2 All ER 952 Brown LJ stated (at 596):-

> "At common law, the general rule is that when the head tenancy comes to an end, any sub-tenancy derived out of it also automatically and simultaneously comes to an end."

The common law rule is subject to statutory exceptions such as those contained in section 78 of the Landlord and Tenant (Amendment) Act, 1980. The plaintiff submits that unless the provisions of section 78 of the 1980 Act apply, the forfeiture of the Red Valley lease automatically terminates the Ballinacarrig lease. The third named defendant seeks to rely on special condition one of the fifth schedule to the Ballinacarrig lease which reads as follows:

> "For the avoidance of doubt, the Landlord hereby agrees that the Lease hereby granted shall obtain the benefit of all existing Landlord and Tenant legislation for the time being in force notwithstanding the fact that the premises hereby demised may not constitute a 'tenement' under existing landlord and tenant legislation or may for some other reason not comprise a qualifying lease to obtain the benefit of present or future landlord and tenant legislation. The Tenant shall have the right to renew this lease on the expiration of its term upon terms and conditions no less favourable than the terms and conditions herein contained (including this right of renewal)."

The plaintiff submits that the intention of this clause is to confer on the lessee under the Ballinacarrig lease renewal rights similar to such rights that would exist if the provisions of the Landlord and Tenant Act did apply. Any other interpretation of this clause would be ineffective because parties cannot contract out of the common law rule identified above.

4.3 Parties cannot seek to bring themselves within a statutory framework such as a landlord and tenant framework, where the statutory criteria necessary to come within that framework are not satisfied. In *Carr v. Phelan* [1967] ILRM 149 a lease conferred on a lessee an option to purchase the freehold at a price to be ascertained under the Landlord and Tenant (Ground Rents) Act, 1967 as if the rent reserved by the lease was a ground rent. The rent was not in fact a ground rent and the County Registrar refused to entertain the application to fix the purchase price, a course of action which Hamilton J. in the High Court considered correct. Similarly, in the present case, it is not open to the third named defendant to seek to avail of the various rights conferred on certain lessees under the 1980 Act. The third named defendant does not appear to assert that the Ballinacarrig lease is a lease to which any part of the 1980 Act applies. Even if the interpretation of the special condition is as appears to be suggested by the third named defendant, the basis for the estoppel as asserted by that defendant does not exist. The mobile home owners who it is alleged placed reliance on the alleged "scheme" are not parties to the litigation and the third named defendant has expressly agreed that it has not placed reliance on any statement or representation other than statements and representations set out in the Ballinacarrig lease. In this regard clause 6.4 of the Ballinacarrig lease states as follows:-

> "The Tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the Landlord, except any such statement or representation that is expressly set out in this Lease."

4.4 The automatic termination of the Ballinacarrig lease as a result of the forfeiture of the Red Valley lease does not leave the third named defendant, as lessee under the Ballinacarrig lease, without any remedy. Section 4 of the Conveyancing Act, 1982 confers on a court jurisdiction to grant relief to a sub lessee where a superior lease is forfeit. Section 4 provides as follows:-

> "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease ... make an order vesting for the whole term of the lease or any less term, the property comprised in the lease or any part thereof ..."

Thus, it is open to the third named defendant to seek to step into the shoes of the lessee under the Red Valley lease. Significantly, no such application has been made, presumably because having regard to the conduct of the third named defendant that application would be bound to fail. Stepping into the shoes of the lessee would require the third named defendant to pay rent and provide a bank guarantee. It appears that the third named defendant is unwilling to take either of these steps.

4.5 In the event that the Court determines that the Ballinacarrig lease has not automatically terminated by virtue of the forfeiture of the Red Valley lease, the plaintiff submits that the Ballinacarrig lease has been forfeit due to non-payment of rent. Under the Ballinacarrig lease rent is payable quarterly. Clause 6.1 provides for forfeiture of the Ballinacarrig lease where:

> "The whole or any part of the rents or other sums reserved by this Lease is unpaid for fourteen days after becoming payable."

The third named defendant failed to pay the entire of the rent falling due on 1st October, 2010. The third named defendant also failed to pay any of the rent falling due on 1st January, 2011. As of the 18th May, 2011, the total amount outstanding for "rent" and interest calculated in accordance with the Ballinacarrig lease is €670,044.60. The plaintiff relies on this rent as his only source of income.

4.6 The third named defendant does not deny non payment of the rent but asserts that the non-payment arises because the plaintiff wrongfully obtained an injunction on the 21st December, 2010, restraining the third named defendants from sub-leasing the lands making it impossible for the third defendant to seek to collect monies from the users of the park with which to pay the rent to the plaintiff. The plaintiff submits that this is merely an excuse. On the 8th December, 2010, Noel Smyth, on behalf of the third named defendant, wrote to each of the mobile home owners recommending that the mobile home owner cancel all standing orders and/or direct debit payments theretofore existing in favour of the plaintiff. This letter was written prior to the injunction referred to above and consequently, it is this letter, and the recommendation contained therein, that is the reason why the monies have not been paid to the plaintiff.

4.7 The letter of 8th December, 2010, also identifies a strategy whereby the third named defendant is offering to each mobile home owners a sub-lease for a 24 year term at a fixed rent, without any bank guarantee, with annual break options in favour of the sub-lessees/mobile home owners. This strategy is clearly designed to interfere with and damage the economic interests of the plaintiff. The terms of the sub-lease are significantly more favourable to the mobile home owners than the existing licences enjoyed by those home owners, in particular, having regard to the annual break options. The third named defendant is consciously and willingly placing itself in a position where it will not be able to discharge the rent and other financial contributions for which it is liable under the terms of the Ballinacarrig lease. The result of this is that the plaintiff instead of receiving an annual rent of €1,284,974.88 which is supported by a bank guarantee, will now merely receive rent from such limited number of mobile home owners that enter into a sub-lease, and only then for so long as those homeowners do not exercise the break option.

Submissions on behalf of the Third Named Defendant

5.1 The plaintiff alleges that the third named defendant had no "estate, right, title or interest" in the lands as of December, 2010. The plaintiff alleges that consequently the third named defendant could not lawfully issue sub-leases to mobile home owners. The basis for this assertion is the forfeiture of the Red Valley lease. The plaintiff also contends that if he is incorrect in the foregoing assertion and the third defendant had an interest in the lands as of December, 2010, on foot of the Ballinacarrig lease then that lease is nevertheless forfeit by reason of the failure by the third defendant to pay rent for the first two quarters of 2011. The third defendant submits that the answer to these claims is straightforward. Under common law when a head tenancy ends, any sub tenancy derived out of it also ends. But this rule is subject to statutory exceptions. One such exception is contained in the Landlord and Tenant (Amendment) Act 1980. This Act applies to the Ballinacarrig lease by virtue of special condition one of the fifth schedule of the lease which states:-

> "For the avoidance of doubt, the Landlord hereby agrees that the Lease hereby granted shall obtain the benefit of all existing Landlord and Tenant legislation for the time being in force..."

5.2 Section 78 of the Landlord and Tenant Act 1980 states that where a lease is terminated before its normal expiration then:

> "(a) a lease or other contract of tenancy or any premises comprised in the terminated lease or contract shall not, if it is a lease or contract, to which any part of this Act applies, inferior to the terminated lease or contract, be terminated by the termination.
>
> (b) the person who would, but for this subsection, become entitled by virtue of the termination of the terminated lease or contract to the possession of the premises shall become entitled to the reversion on the inferior lease or contract."

The third defendant alleges that by reason of special condition one of the fifth schedule which is contained in each of the leases, the third defendant was as of December, 2010, as a matter of contract or in the alternative on foot of an estoppel, lawfully in possession of the premises. In those circumstances the third defendant had the right to issue sub leases of the lands to the mobile home owners. Both the Red Valley lease and the Ballinacarrig lease give the tenants an express right to issue such sub leases. Further, the plaintiff freely admitted in his evidence that it was always envisaged that either Red Valley Limited or the third defendant would have the right to issue sub leases to the mobile home owners. The third defendant claims that the plaintiff is not entitled to seek to forfeit the lease in circumstances where the plaintiff had unlawfully prevented the third defendant from raising revenue by issuing sub leases. It is submitted that it is clear on the evidence that the third defendant was *bona fide* engaged in a course of action, which in its opinion would generate sufficient revenue to pay the rent. The suggestion that the third defendant had devised "a strategy" designed to interfere with the plaintiffs economic interests is wholly unsustainable.

5.3 The plaintiff maintains that the Court should construe the terms of the fifth schedule to each of the leases as only referring to rights of renewal under Landlord and Tenant Legislation. The fifth schedule of the Ballinacarrig lease states:

> "For the avoidance of doubt, the Landlord hereby agrees that the Lease hereby granted shall obtain the benefit of all existing Landlord and Tenants legislation for the time being in force . . . The Tenant shall have the right to renew this lease on the expiration of its term upon terms and conditions no less favourable than the terms and conditions herein contained (including this right of renewal)."

It is submitted that the Court should give the terms of the fifth schedule their natural and ordinary meaning, i.e. that the rights conferred on the first and third defendant are all of the rights provided for in legislation that is deemed, by agreement, to be applicable. In *I.C.S v. West Bromwich B.S.* [1998] 1 W.L.R. 896 Hoffman J stated at 912:-

> "The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents".

The third defendant submits the phrase "the benefit of all existing Landlord and Tenant legislation" is entirely clear and unambiguous. If the plaintiff is contending that the parties agreed that the benefit was to be confined to renewal rights, then he should have sought to have the contract rectified. He did not do this nor did he plead in the original or amended statement of claim that the Ballinacarrig and Red Valley leases were to be so construed. The actual pleading made by the plaintiff is that the provisions of the fifth schedule in the Ballinacarrig did not bind the plaintiff in circumstances where he was not a party to that lease. That argument has now apparently been abandoned, presumably because in light of the evidence given by the plaintiff concerning his knowledge of the structure put in place by the defendants, the lack of privity argument cannot be maintained.

5.4 If the third defendant is correct in asserting that benefits referred to in the fifth schedule include the provisions of section 78 of the 1980 Act, then its interests must have survived the forfeiture of the Red Valley lease. The third defendant does not need to establish that it is entitled, as a matter of contract, to the benefit of the provisions of section 78 of the 1980 Act. The same result can be achieved through an estoppel. This is clear from *PW & Co v. Milton Gate Investments* [2004] Ch 14 where Neuberger J referred to the principle of estoppel by deed. At page 181 Neuberger J quoted from *Halsburys Laws of England,* (4th Ed. vol. 16 (1992) para. 1018) where the concept of estoppel by deed is explained as follows at:-

> "Estoppel by deed is based on the principle that, when a person has entered into a solemn engagement by deed as to certain facts, he will not be permitted to deny any matter which he has so asserted . . . The averment relied upon to work an estoppel must be 'certain to every intent' without any ambiguity, but may be contained in the recital or in any part of the deed."

It is submitted that special condition one of the fifth schedule is clear insofar as the provisions of section 78 of the 1980 Act are concerned. Even if there is no estoppel by deed then the fifth schedule taken together with the provisions expressly conferring on Red Valley and Ballinacarrig the right to grant subleases would unarguably found an estoppel by convention. The plaintiff contends that it is not possible to contract out of the common law rule that the termination of a tenancy brings all inferior interests to an end. On one view, the entire rationale of a contract is to avoid the common law rules that would otherwise apply and it is hard to see any principled basis for a court refusing to give effect to the parties clear intentions as manifested in the terms of the Red Valley and Ballinacarrig leases.

5.5 If the third defendant did have an interest in the lands as of December 2010, then the balance of the plaintiff's case falls away. During the course of evidence it became clear that, in reality, the plaintiff's principal objection to the granting of sub leases and the subsistence of the Ballinacarrig lease is the absence of a bank guarantee in the sub leases and the Ballinacarrig lease. It is submitted that this objection cannot avail the plaintiff if the third named defendant can show that it is otherwise entitled to an interest in the lands as of December, 2010. If the plaintiff had wished to insert provisions in the terms of the Red Valley lease or Ballinacarrig lease restricting the terms of any sub leases issued, then it was open to him to do so. He did not. Even if Ballinacarrig is obliged to obtain a bank guarantee then that cannot avail the plaintiff in these proceedings. In the first instance, the third defendant does not accept that it is required to furnish a guarantee. In any event, the plaintiff has not sought to forfeit the Ballinacarrig lease on that basis and to do so would require a notice under the Conveyancing Act. Were such a notice to be served the third defendant would seek, and would it is submitted, obtain relief against forfeiture on the grounds that the technical requirement to obtain a bank guarantee has, for reasons outside its control, become impossible to fulfil. Insofar as complaint is made about the non-payment of interest, that is equally not an issue in these proceedings and would again require a notice under the 1884 Act.

Decision of the Court

6.1 On the evidence I find the following; after protracted negotiations in the year 2000, the parties agreed that the plaintiff would lease to the defendant the holiday park at Ballinacarrig. The landlord would give a head lease to Red Valley Ltd for a term of 35 years. It would sublease to another company Austrent Ltd for a term of ten years who in turn would grant an occupational lease to Ballinacarrig Ltd initially for a term of 6 years. This was subsequently extended for a further 4 years in March 2007. The quid pro quo was that the landlord would have one tenant, which would manage the holiday park that he had previously managed. In addition he would have a bank guarantee for the payment of the rent. The tenants, for their part, would arrange their affairs so that by use of the three above companies they would be able to avoid liability for VAT on their rent payments. They would obtain security of tenure so that they could invest in improvements to the park and their properties thereon. They would thereby also obtain something of value.

6.2 The Ballinacarrig holiday park developed as a real community. Substantial sums of money were spent by the tenants on developing and improving the facility. It has been emphasised that there is a very strong sense of community within the park. The plaintiff himself has a home there. This arrangement worked well up to the end of 2009. Unfortunately, at this time, the effects of recent economic difficulties in Ireland began to manifest themselves. Some tenants were forced to leave. An increase of rent was awarded. On the 31st December 2009, the bank guarantee expired. Eight Banks including AIB, ACC, NIB, and Bank of Ireland were contacted to provide a bank guarantee. All refused to do so. No bank guarantee was possible. The tenants did not pay the increased rent. On 29th March 2010, a forfeiture notice was served on Red Valley calling on it to remedy the alleged breach i.e. non payment of rent. 28 days later, on 26th April, 2010 the forfeiture notice expired. The plaintiff issued forfeiture proceedings seeking an order for possession. The first and second defendants did not contest the forfeiture. Ballinacarrig Ltd however asserted that its lease continued to exist because it had survived the forfeiture of the head lease.

6.3 Throughout this time, the tenants of Ballinacarrig notably Noel Smyth, tried to devise some *modus operandi* whereby the community could continue and the relationship with the landlord be altered to reflect the difficult times now affecting everyone. Ultimately there evolved a plan for Ballinacarrig to issue subleases to the individual tenants. This would be for a 24 year term and would contain break clauses permitting the tenants to leave if they so chose. Reflecting apparent financial reality, there would be no bank guarantee. This in itself would make a considerable saving for the tenants. Mr Smyth and his colleagues who were working on this plan were convinced that with this proposal they could get a sufficiently large take-up of tenants to enable Ballinacarrig to pay

the rent required under its lease. They thought they might get 135-150 of the tenants to take up such sub leases. In the event they could not get sufficient numbers, it was understood they would have to give up the Ballinacarrig lease and hand back the park to the landlord. This plan was blocked when the plaintiff, believing that Ballinacarrig had no right to issue subleases because its own lease had been forfeited with that of Red Valley, sought and obtained an injunction restraining Ballinacarrig from issuing any subleases. In consequence of the uncertainty then pertaining, 120 of the tenants had already cancelled their standing order to pay their rent. 50 tenants had continued these orders. Ballinacarrig advised this 50 to cancel their orders. The reason for this was because the company looked like it might go into liquidation. If this happened, these 50 most loyal supporters would lose their money. Thus a complete impasse has been reached. Ballinacarrig cannot generate the income to pay its rent or mesne rates as the case may be. The plaintiff whose sole income is derived from this rent is left bereft of his only source of support.

6.4 It has been asserted throughout by the plaintiff that the whole subleasing project by Ballinacarrig was a sham to avoid paying the rent and to force him to accept terms much less favourable to him and more favourable to the tenants. I do not accept this. I am convinced from the evidence I have heard on behalf of the third defendant that they were genuinely trying to sort out a very difficult situation. The issuance of subleases was a central plank of this project.

6.5 In my view, special condition one of the fifth schedule to the Ballinacarrig lease may be and should be read literally without importing anything into it. It is not ambiguous. It is an undoubted fact that the plaintiff was well aware of the existence of this lease. This lease was in effect, the community or club lease. He himself is a member of this community or club. It was a logical and sensible part of a somewhat complex mechanism whereby the tenants in effect held title of the landlord. This special condition provides;

> "for the avoidance of doubt, the landlord hereby agrees that the lease hereby granted shall obtain the benefit of all existing landlord and tenant legislation for the time being in force."

This means, *inter alia*, that section 78 of the Landlord and Tenant Act, 1980 is brought into play for the benefit of the Ballinacarrig lease. Section 78 of the Landlord and Tenant Act 1980 states that where a lease is terminated before its normal expiration then:

> "(a) a lease or other contract of tenancy or any premises comprised in the terminated lease or contract shall not, if it is a lease or contract, to which any part of this act applies, inferior to the terminated lease or contract, be terminated by the termination.
>
> (b) the person who would, but for this subsection, become entitled by virtue of the termination of the terminated lease or contract to the possession of the premises shall become entitled to the reversion on the inferior lease or contract."

I accept the submission of Mr. Brady that parties in Ireland may contract out of a common law rule. Thus there is nothing to prevent the condition being effected, as was the clear intention of the parties. This means and I hold that the Ballinacarrig lease survived the forfeiture of the Red Valley lease. This in turn means that, in accordance with that lease, Ballinacarrig was entitled to issue subleases. This indeed was the whole point of the arrangement in the first place. Thus the plaintiff is estopped by deed from denying the right and title of the third defendant to issue subleases. Were this not so, I would still have held that he was estopped by conduct because he was well aware of the leasehold structure put in place in 2000 of which he himself was a part and benefited thereby.

6.6 Thus the plaintiff wrongfully obtained the injunction restraining the third defendant from issuing subleases. It was as a direct result of this action that the plaintiff prevented the third defendant generating the income to pay the rent due to him. In this regard, as I have held above, the third defendant was at the time *bona fide* attempting to find a solution to the difficulties which faced everyone including the landlord, whether he chose to admit it or not. The plaintiff has moved to forfeit the Ballinacarrig lease for non-payment of rent. As he himself prevented the third defendant from paying the rent, he is not entitled to do so.

6.7 The plaintiff admitted in evidence that it was always envisaged that either Red Valley or the third defendant would have the right to issue subleases. The plaintiff's central objection to the project involving the issuance of subleases by the third defendant was the absence of any bank guarantee, the break clauses provided in the subleases and the prospect that if Ballinacarrig ends up forfeiting its lease, he will then ,on the basis of condition one, end up as landlord directly of each individual leaseholder. It is clear from the evidence that for the present and for the foreseeable future, bank guarantees of rent payment are unavailable. The condition has thus become impossible. Were the plaintiff to seek to forfeit the lease on this basis, he would clearly fail as the third defendant would be entitled to claim relief from such a condition. If any of the sub-lessees exercised their right to break the lease and walk away, Ballinacarrig's obligation to pay the rent due by it would remain. The clause breaking provision would thus throw onto the remaining sub-lessees the burden of covering the loss of income from the broken lease. If a sufficiently large number exercised the break option, then Ballinacarrig will no longer be able to pay its rent and the lease will be forfeit. If that results in the unbroken sub leases surviving and the plaintiff ending up as landlord directly of the sub-lessees, then he is in little different position from where he was in 2000. On the evidence his main concern was the absence of a bank guarantee. As is also clear from the evidence, this non-availability is now an economic fact of life.

6.8 The plaintiff therefore, is not entitled to an order for possession nor to damages as claimed. The injunction granted herein was wrongly obtained and it will be necessary to have an inquiry as to damage incurred thereby.