



**THE COURT OF APPEAL**

**Neutral Citation No: [2020] IECA 54**

**Appeal No.: 2018/460**

**Baker J.  
Costello J.  
Donnelly J.**

**BETWEEN/**

**VALERIE HAYES**

**PLAINTIFF/  
APPELLANT**

**- AND -**

**THE MINISTER FOR THE ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT,  
IRELAND AND THE ATTORNEY GENERAL AND  
BY ORDER PROMONTORIA (FINN) LIMITED**

**DEFENDANTS/  
RESPONDENTS**

**JUDGMENT of Ms Justice Baker delivered on the 9th day of March, 2020**

1. This is an appeal from the order of Allen J. of 29 November 2018 following delivery of a written judgment on 9 November 2018, *Hayes v. Minister for the Environment, Community and Local Government* [2018] IEHC 623, which refused the motion of Promontoria (Finn) Ltd, the fourth defendant/respondent, to dismiss the plaintiff's claim on the grounds it discloses no reasonable cause of action or is bound to fail.
2. This is an unusual appeal in that as thus stated the appellant ("Ms Hayes") succeeded in defending the motion before the High Court, and what is at the core of the appeal derives

from observations made by the trial judge and certain aspects of his reasoning which counsel for Ms Hayes argues contain findings likely to prejudice the ultimate trial.

**Background facts**

3. Ms Hayes has since 2006 occupied a residential premises at Santry Cross, Ballymun, Dublin 9, Folio 116002L, County Dublin, as tenant to the registered owner (I will refer to him as “the landlord”, although the issue of who is landlord is a central issue in the proceedings. It is unclear whether the wife of the registered owner was formally a landlord although she was a joint borrower). The landlord had purchased the property in 2005 funded by a loan from Ulster Bank Ireland Limited (“Ulster Bank”) secured by way of a charge registered on the folio. The precise date on which the tenancy was created may be in dispute at trial, but for present purposes the relevant facts are that Ms Hayes has been in occupation as tenant since early 2006, she has acquired the benefit of renewal rights under the Residential Tenancies Act 2004 (“the 2004 Act”), and a charge became and remains registered on the interest of the landlord since May 2007.
4. Promontoria (Finn) Ltd. (“Finn”) purchased the loan and security from Ulster Bank by deed of global transfer made on 29 September 2015 and thereafter it became registered as owner of the charge on 15 October 2015.
5. The landlord fell into arrears with the loan and on 20 August 2013, before the assurance to Finn, Ulster Bank issued a civil bill for possession in Dublin Circuit Court against him and his wife, a co-borrower but not registered owner. Ms Hayes was not named a party, but the civil bill was served on her in accordance with the Rules of the Circuit Court which require service on all persons in possession. On 26 March 2015 the Circuit Court made an order for possession, with a stay of three months.
6. Ms Hayes did not attend the hearing of the case in the Circuit Court. At no time has she disputed the validity of the making of that order.
7. Correspondence was had between the solicitors then acting for Ms Hayes and the solicitors for Ulster Bank who made it clear that whilst adequate notice would be afforded to the tenant before the possession order was enforced, it was not proposed to engage further with Ms Hayes. Rent has not been accepted by either Ulster Bank or Finn since the order for possession.
8. On 16 June 2015, Ulster Bank wrote to all persons in possession giving notice of its intention to take possession of the dwelling and requesting vacant possession within 112 days. This letter was addressed not to Ms Hayes personally but to an impersonal “tenant”.
9. Ms Hayes argues that she has been in possession of the dwelling as tenant with the consent of Ulster Bank and that accordingly Ulster Bank became her landlord as a result of the order for possession. On that basis Ms Hayes sought to treat its letter seeking vacant possession as a formal notice of termination and made application to the Private Residential Tenancies Board, as it then was, (“the RTB”) naming Ulster Bank as respondent and in which she claimed that the notice of termination was invalid.

10. On 22 September 2015, the RTB delivered a determination that it had no jurisdiction to entertain the complaint of Ms Hayes under the Act as it was not satisfied that Ulster Bank was the landlord of Ms Hayes.
11. That decision was appealed and on 27 October 2015 the RTB notified Ms Hayes of the decision of the Board to uphold the previous determination.
12. Mrs Hayes brought an appeal to the Circuit Court pursuant to s. 84(5) of the Act naming Ulster Bank as respondent, and Judge Linnane on 25 January 2016 affirmed the decision and held that the decision of RTB to refuse jurisdiction was correct as a matter of law, as Ulster Bank was not the landlord of Ms Hayes. Ms Hayes was represented by solicitor and counsel at the hearing of the Circuit Court and the arguments made in correspondence were advanced and elaborated upon at that hearing. Ulster Bank did not attend the hearing.
13. That decision was not appealed to the High Court on Circuit or challenged by judicial review. It is therefore a final determination of a competent court.

**The pleadings and motion**

14. The plenary summons issued on 22 April 2016 against the State parties only. Finn was joined on 19 May 2017 and amended pleadings delivered.
15. The statement of claim seeks declarations against the first, second, and third defendants ("the State defendants"), *inter alia*, that ss. 576 and/or 84 of the 2004 Act are incompatible with the State's obligations under Articles 34, 40.1, 40.3, 40.5, 42A and 43 of the Constitution, amount to a failure to make provision in law for the rights of Ms Hayes, including her right to respect for her private or family life and/or to have her dwelling protected, and that her right to a remedy safeguarded by Articles 34, 40.1 and 40.3 of the Constitution is infringed by reason of the absence of an effective remedy to enforce and vindicate her statutory and/or constitutional rights or rights under the European Convention of Human Rights ("ECHR"). A declaration is sought that Irish law is incompatible with the State's obligations under articles 2, and/or 3, and/or 6, and/or 8, and/or 13, and/or 14 ECHR by its failure to provide in law for the protection of tenants living in homes which have been repossessed by charge holders with tenants *in situ*.
16. The pleas which lie at the centre of this appeal are those directed towards Finn. Ms Hayes seeks a declaration that Finn, now entitled to the benefit of the order for possession made by the Circuit Court on 26 March 2015 as successor in title of Ulster Bank, is to be treated as her landlord within the meaning of s. 5 of the 2004 Act, that she is entitled to a Part 4 statutory tenancy of the dwelling within the meaning of s. 28 of the 2004 Act, and that the statutory protection afforded to the tenant by the Act may be enforced by her against Finn. She seeks an order restraining Finn from taking possession of the premises in breach of these asserted rights.
17. In short, the pleas are that Finn, and its predecessor in title, Ulster Bank, are on a proper construction of the 2004 Act to be treated as her landlord for the purposes of the Act.

18. Against the State defendants it is pleaded in the alternative that, if the legislation cannot be so construed, it thereby fails to make provision for the protection of tenants where a mortgagee or person holding a charge obtains an order for possession against a landlord on foot of the security.
19. Finn served a defence on 10 November 2017 and pleads a preliminary objection, *inter alia*, that the order of the Circuit Court and the finding that Finn is not the landlord of Ms Hayes as a matter of law is final and conclusive and that the matter is *res judicata*.
20. Without prejudice to the preliminary objections, Finn denies that it is the landlord of Ms Hayes within the meaning of the Act.
21. On 22 December 2017, Finn issued the motion the subject of the present appeal for an order that the proceedings against it be dismissed pursuant to O. 19, r. 28 of the Rules of the Superior Courts ("RSC") or to the inherent jurisdiction of the court on the grounds that it discloses no reasonable cause of action.

#### **The High Court decision**

22. Allen J. heard the motion of Finn, in which the State defendants took no part, and concluded that the pleaded case of Ms Hayes that Finn is her landlord was bound to fail. The statement at para. 44 of his written judgment is central to the appeal:

"As far as this application is concerned, I accept the argument made on behalf of the fourth defendant that the plaintiff's case **that the fourth defendant is her landlord** is bound to fail but I am not satisfied that she has no case. I find that there is an issue to be determined as to whether the Circuit Court order of [26th] March, 2015 requires the plaintiff to deliver actual possession of the property or whether the fourth defendant's entitlement to enforce its security is subject to the plaintiff's tenancy, not with the fourth defendant, but with Mr. and Mrs. Doyle." (emphasis added)

23. Allen J. had already noted that s. 84 of the Act of 2004 gave the RTB express jurisdiction to determine a dispute referred to it subject to the right of any party to appeal to the Circuit Court. The Circuit Court on appeal decided that Ulster Bank and *ipso facto* Finn was not the landlord of Ms Hayes and Allen J., at para. 49 of his judgment, considered that the point is now *res judicata*:

"Counsel for the fourth defendant submits that this claim seeks to raise the same issue as was decided by the Private Residential Tenancies Board and the Circuit Court and is *res judicata*. I accept that submission. Judicial tribunals include, besides the courts, statutory tribunals. The Private Residential Tenancies Board is such a tribunal. By section 84 of the 2004 Act the Board has express jurisdiction to determine whether a dispute referred to it comes within its jurisdiction, subject to the right of any party to the dispute to appeal to the Circuit Court. The issue identified by the Board in this case was whether Ulster Bank, against whom the

complaint had been made, was the plaintiff's landlord. The Board and the Circuit Court on appeal from the Board decided that it was not."

24. He had earlier stated, at para. 30, that the true import of the decision of the RTB and of the Circuit Court on appeal was a determination on jurisdiction but that:

"The finding of lack of jurisdiction was a direct consequence of a decision that Ulster Bank was not the plaintiff's landlord."

### **The appeal**

25. The grounds of appeal may be summarised as follows:

- 1) that the trial judge wrongly concluded that Ms Hayes was not the tenant to Ulster Bank having regard to s. 5 of the 2004 Act, when read in conjunction with s. 3 and s. 62(7) of the Registration of Title Act 1964, as the order for possession meant that Ulster Bank and later Finn became entitled to the rents and profits of the dwelling and thus came within the statutory definition of landlord;
  - 2) that the determination of the Circuit Court did not mean that the issue was *res judicata*;
  - 3) that the High Court being a court with full original jurisdiction could not be bound by the decision of an administrative body in a challenge to the constitutionality and/or ECHR compliance of statutory provisions.
26. Finn pleads that the trial judge was correct in his analysis of the 2004 Act and in his conclusion that Finn did not become landlord to Ms Hayes by reason of the order for possession and its subsequent acquisition of the rights of Ulster Bank. It says that the finding of *res judicata* is correct and has the effect of precluding Ms Hayes from agitating further the point that she was tenant to Ulster Bank or Finn, the owner of the charge registered on the title of her landlord.
27. The first matter for consideration is the nature of the appeal. The order as drawn did not reflect the finding of the trial judge that the issue of whether Finn was the landlord to Ms Hayes was *res judicata*, but the parties do agree that the effect of his order is that a trial judge would, or at least could, feel constrained by his finding, and by his observations quoted above at para. 22 that, as a matter of law, the relationship of landlord and tenant does not exist between Ms Hayes and Finn.

### **An appeal against a judgment?**

28. Paragraph 5 of the notice of appeal seeks an order "vacating the *judgment*" (emphasis added) of Allen J. delivered on 9 November 2018, and that reference to "judgment" is unlikely to be an error as the written judgment was delivered on the date identified, 9 November 2018, some twenty days before the order was pronounced on 29 November 2018.
29. In its notice of opposition, Finn pleads as a preliminary matter that it is "unclear" how a written judgment rather than an order of the High Court can be vacated.

30. Counsel for Finn is correct that an appellate court will not vacate the *judgment* of Allen J. Indeed, I would observe that counsel for Ms Hayes does not seek to argue that every word of the judgment is to be vacated, but only that part of the reasoning which comes to a conclusion on the nature of the relationship.
31. A written judgment is part of the record of the reasoning of a judge, whether it be a trial judge or a judge sitting in an appellate court, and when that reasoning is found to be flawed or incorrect, the decision on appeal is not to vacate the judgment, but to make a determination that the reasoning was incorrect or did not justify the conclusion, or was correct but was to give way to another conclusion. These illustrations are examples of the type of approach that an appellate court may take to the written judgment of a lower court, but the appellate court does not “vacate” the written judgment or interfere with its content.
32. A finding contained in the judgment which is not reflected in the perfected order may be subject to an appeal, but the written judgment *per se* is not what is under consideration in an appeal.

**What did the High Court judge decide?**

33. The order of the High Court judge as perfected in its curial part records as following:

“And in accordance with said written judgment THE COURT DOTH REFUSE to grant the reliefs sought in said Notice of Motion

And IT IS ORDERED that the Plaintiff be, and she is hereby at liberty to issue a Notice of Motion herein (returnable to the Chancery List) seeking an Order amending her Statement of Claim herein”.

34. No findings concerning the relationship between Ms Hayes and Finn are to be found in the perfected order. As is apparent from my earlier analysis, the trial judge refused the relief sought in the motion as he considered on a correct application of the authorities that the claim could be saved by more precise pleadings.
35. Allen J. did find part of the case advanced by Ms Hayes against Finn was bound to fail, that part which relied on the plea that Finn was her landlord, but declined to strike out the claim as being bound to fail in its entirety because he considered that there were two issues which ought to be allowed to be determined at trial, namely:
- (i) Whether the cumulative effect of the order of the County Registrar made on 26 March 2015 granting an order for possession and the Circuit Court order made on 25 January 2016 in the appeal of MS Hayes against the decision of the RTB which affirmed the decision of the RTB did, as a matter of law, require Ms Hayes to deliver possession of the property;
  - (ii) Whether the entitlement of Finn to enforce its security is subject to the tenancy of Ms Hayes not with Finn but with the mortgagors, and what, if any, effect flows therefrom.

36. Article 34.4.1 of the Constitution vests in the Court of Appeal an appellate jurisdiction from “all decisions of the High Court” or from such other courts as may be prescribed by law.
37. Order 86, r. 1(1) RSC defines a “decision” to include “judgment, order, verdict, finding or determination”. That broad definition cannot be conclusive as an interpretive tool and could not displace any decision of the courts regarding the interpretation of the constitutional provision, but it does inform the answer.
38. Part of the argument on the appeal concerned the question of whether Allen J. had made a finding that Ms Hayes was not the tenant of Ulster Bank and *ipso facto* of Finn, its successor in title, and whether that finding, if such it be, is capable of being appealed.
39. It seems to me for the reasons I now analyse that he did make such an adjudication, and it was the reason for his decision that the claim as pleaded against Finn was bound to fail. There was a “determination by a High Court judge of an issue”, the expression used by Denham J., with whose judgment the other judges of the Supreme Court agreed, in *Dublin Wellwoman Centre Ltd v. Ireland* [1995] 1 ILRM 408, at p. 417. There, what was under consideration was the meaning of the word “decision” in Article 34.4.3 of the Constitution, and the question was whether the High Court judge had determined an issue which affected the interests of one of the parties by refusing to recuse herself from the case on the grounds of objective bias. Denham J. observed that “the determination had all the characteristics of a decision”, at p. 418.
40. The Supreme Court there and in the earlier *Society for the Protection of Unborn Children (Ireland) Ltd v. Grogan* [1989] IR 753 approached the question as one of substance not form, and at p. 763, Finlay C.J. stated that:

“no mere absence of formal words from a High Court Order could be permitted to remove from the appellate jurisdiction of this Court a determination of a High Court Judge which affects one of the parties involved and has all the characteristics of a decision.”
41. An adjournment was held to be a decision amenable to appeal, where the interests of the plaintiff were clearly affected.
42. The Supreme Court considered the question of whether a decision of the High Court to make a preliminary reference to the Court of Justice of the European Union under article 267 of the Treaty on the Functioning of the European Union in *Data Protection Commissioner v. Facebook Ireland Ltd* [2019] IESC 46 was amenable to appeal and held that whilst such a decision was not itself appealable the findings of law and fact of the referring court that informed or accompanied the reference could be appealed.
43. Clarke C.J. set out the proposition:

“6.9 [...] it does not seem to me that it can properly be said that the determination of contested facts or matters of national law by a trial court, as part of the process

leading to a reference, can be described in any way other than as a 'decision', in the constitutional sense of that term [...]. The reaching of such conclusions [or in the facts and matters of national law] must undoubtedly represent a 'decision' for the purposes of Art. 34 of the Constitution and must, therefore, in principle, be open to the appellate process which the Constitution provides."

44. Having regard to the fact that Ms Hayes seeks to now argue that the observations and findings contained in the judgment regarding the nature of the relationship are incorrect as a matter of law, it is patent that this, and not the terms of the perfected order, is her focus.
45. Initially, the parties disagreed as to how the decision of Allen J. is to be characterised but as the hearing progressed they agreed that it is correctly to be considered as a final determination. That approach is consistent with the decision of Hogan J. in *O'Dwyer v. Daughters of Charity of St Vincent de Paul* [2015] IECA 226, [2015] 1 IR 328, with whom the other members of the Court of Appeal agreed, that the decision of the High Court to strike out the claim of the plaintiff on the basis that it was statute barred was a final order as it had finally disposed of the issue between the parties, and referred to the decision of Hardiman J. in *Minister for Agriculture v. Alpe Leipziger* [2000] 4 IR 32, where he expressed the following test at p. 50:

"[I]t is quite sufficient if the order in question finally disposes of a particular issue between the parties, at least where that issue is discretely raised by some proper procedure."

46. In the light of the authorities, the decision of Allen J. can be construed as a final order as its effect is that the trial judge may not revisit the question he concluded was bound to fail, namely the question of whether Ms Hayes was a tenant to Finn and or its predecessor in title, Ulster Bank. He came to the conclusion that the question had been determined against Ms Hayes in a final and binding decision of the Circuit Court. In substance, his conclusion has that effect, albeit he did not strike out the claim for the reasons stated.
47. Even if the observations of Allen J. regarding the nature of the relationship, at para. 44 of his judgment, and that Ms Hayes is not the tenant of Finn are *obiter*, these are the core of his decision and have legal consequence. For that reason, it seems to me to be correct that the question is considered in this judgment and I accept that they amount to a decision of the High Court within the meaning of the authorities discussed above and therefore appealable to this court.

#### **The appeal reformulated**

48. After oral and further written submissions it became clear that two questions fall for consideration in the appeal: Whether the plea that Finn is landlord of Ms Hayes is bound to fail, and the associated but different question, whether the issue has been determined by the Circuit Court on the appeal from the RTB.



49. Before dealing with these two identified grounds of appeal, I wish to make some general observations. Neither the appellant nor the respondents exhibited the mortgage or charge created by the landlord in favour of Ulster Bank and the precise obligations of the mortgagor were never identified in the course of oral arguments save in a general way and by reference to general principles. It was not clear, for example, whether the mortgage or charge contained the almost universal clause restrictive of creating a lease or parting with possession without consent. The correspondence suggests that such a clause was contained in the charge but at no point in the currency of the hearing was this clarified.
50. In the correspondence it was suggested that, as the premises was “self-evidently” purchased by the landlord with a view to rent, a so called “buy-to-let”, and because the rent was transmitted directly by Ms Hayes to the account of the mortgagor in Ulster Bank, the bank knew or ought to have known of the existence of the tenancy, and therefore that the bank’s interest is encumbered by the tenancy and must be held as having taken subject to it.
51. As Allen J. noted, that was not pleaded. I agree with him that it would not have been an unstateable plea. I also agree with the proposition at para. 23 of his judgment that it is not necessary for Ms Hayes to establish that Finn is her landlord to make the case that Finn’s interest is subject to her tenancy. I share his view that were it to be so framed, the claim is not bound to fail.
52. Those points are not central to the present appeal, and I do not propose dealing further with the various legal propositions contained in the correspondence.
53. I will first consider the effect of the Circuit Court order on appeal from the RTB.

**The decision of RTB and on appeal of the Circuit Court**

54. Ms Hayes made a complaint to the RTB and it declined jurisdiction under s. 84(1) of the 2004 Act as it considered that Ulster Bank was not the landlord of the dwelling to which the 2004 Act applies.
55. In its decision, the RTB said that it had formed the opinion that the dispute did not come within its jurisdiction under s. 84(1)(b) of the 2004 Act. It gave the following reasons:
- (a) that it was precluded from looking behind a court order, including an order for possession;
  - (b) that correspondence from Ulster Bank made it clear that it had never received any rent from any tenant of the premises;
  - (c) that the Ulster Bank mortgage contained a general prohibition on the leasing of a mortgaged property without the consent of the Bank.

56. The RTB formed the view that no landlord and tenant relationship between Ms Hayes and Ulster Bank existed and that its dispute resolution jurisdiction did not permit it to deal with the issue.
57. Judge Linnane in the Circuit Court held that the RTB had no jurisdiction to determine the matter of dispute between Ms Hayes and Ulster Bank, and *ipso facto* its successor in title, as the relationship between Ms Hayes and Ulster Bank was not one of landlord and tenant. The power to make a determination as to the correctness of the approach taken by the RTB is vested in the Circuit Court, and the decision of that Court is final as between the parties in the absence of either a judicial review or an appeal to the High Court on Circuit.
58. Section 84(5) of the 2004 Act provides as follows:
- “The party who referred the dispute concerned to the Board or, as the case may be, any other party to the dispute may appeal to the Circuit Court against a decision of the Board (made in consequence of the procedures under this section having been employed) not to deal with or, as appropriate, to deal with the dispute.”
59. No authority has been opened to support the proposition that the Circuit Court determination could not bind the High Court on account of the fact that the Circuit Court is a court of local and limited jurisdiction, and because that Court has no jurisdiction to interpret a statutory or constitutional provision. The submission is not correct. The Act of 2004 expressly vests the jurisdiction to hear an appeal from the RTB in the Circuit Court, and that Court, notwithstanding its local and limited jurisdiction, may make a final and legally binding determination within that jurisdiction and must, as all courts in the State are required to do, interpret the law in a constitutionally compliant manner: *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] IR 317.
60. The Oireachtas has chosen to regulate the private rental sector by vesting jurisdiction to hear disputes in the RTB and by s. 84(5) of the 2004 Act has vested the power to hear appeals from a determination of the RTB on the Circuit Court. Ms Hayes may not, by these proceedings, circumvent that express statutory scheme and may not relitigate the point of law and fact determined against her in the Circuit Court, in which the jurisdiction to decide the point has been vested.
61. I agree with the view of the trial court, at para. 30, that the finding of the Circuit Court was a “direct consequence of a decision that Ulster Bank was not the plaintiff’s landlord.” In my view, the trial judge was correct, and a determination was made by the Circuit Court that Ulster Bank was not the landlord of Ms Hayes, and that finding, not having been appealed or reviewed, is final and binds Ms Hayes.
62. Costello J. explained the proposition in *Morrissey v. Irish Bank Resolution Corporation Ltd (in Special Liquidation)* [2015] IEHC 200, at para. 5, as follows:

"It is a fundamental principle of law that a party should not be entitled to re-litigate matters or raise issues which have already been determined by a final judgment of a court of competent jurisdiction between the same parties and their privies. This is known as the principle of *res judicata*."

63. But the trial judge also considered the proposition that Ulster Bank, and by implication Finn, was, on a correct interpretation of the 2004 Act, the landlord of Ms Hayes, and the legal foundations of the proposition were fully argued as the appeal evolved. It was well within the jurisdiction of the trial judge to afford Ms Hayes an opportunity to amend her pleadings, but she has not yet taken that opportunity and did not present to this Court any amended pleadings. A consideration of the nature and source of the relationship will assist therefore in the drafting of the reconstituted pleadings. Accordingly, and notwithstanding my view that the trial judge was correct that the matter is *res judicata* and that Ms Hayes is bound by the finding of the Circuit Court, I propose to now consider the legal nature of the relationship rather than decide the matter wholly on procedural grounds.

**Is Ms Hayes a tenant of Finn?**

64. The claim of Ms Hayes is that once Ulster Bank obtained an order for possession against the landlord by the order of the Circuit Court on 26 March 2015, Ulster Bank became landlord to her.
65. Counsel for Ms Hayes argues that Ulster Bank and its successor in title Finn has "stepped into the shoes of" the landlord by virtue of the order for possession.
66. Section 5(1) of the 2004 Act provides the definitions of "landlord" and "tenant" as follows:
- ""landlord" means the person for the time being entitled to receive (otherwise than as agent for another person) the rent paid in respect of a dwelling by the tenant thereof and, where the context so admits, includes a person who has ceased to be so entitled by reason of the termination of the tenancy;
- [...]
- "tenant" means the person for the time being entitled to the occupation of a dwelling under a tenancy and, where the context so admits, includes a person who has ceased to be entitled to that occupation by reason of the termination of his or her tenancy."
67. It is somewhat unfortunate that the 2004 Act did not provide any statutory guidance as to the meaning of a tenancy and the Law Reform Commission's Consultation Paper on the General Law of Landlord (March 2003) recommended that it might be usefully done. Notwithstanding that, it seems to me that the 2004 Act takes as its starting point the existing law, including formal requirements for the creation of a tenancy, and for that purpose I note in particular that the definition of "lease" means an instrument in writing whether or not under seal containing a contract of tenancy in respect of a dwelling and that tenancy is said to include a periodic tenancy or a tenancy for a fixed term, whether

oral, in writing, or implied. None of these words are defined, but equally none is mysterious in the general law of landlord and tenant, and the creation of each gave rise to different considerations.

68. The law regarding the nature of the relationship of landlord and tenant derives from the Landlord and Tenant Law Amendment Act, Ireland 1860 ("Deasy's Act"). The relationship is founded on contract, the relevant contract being a contract to pay rent in return for the right to occupy a premises in accordance with the terms agreed.
69. The earlier written submissions furnished by counsel did not make any mention of the provisions of Deasy's Act and liberty was granted to deliver further written submissions in the light of the far-reaching argument made by counsel for Ms Hayes that the provisions of Deasy's Act had been, as she put it, "overtaken" by the 2004 Act. Written submissions in turn were delivered by counsel for Finn. The central question then became, and this was accepted by counsel for Finn, whether any stateable argument could be made that Finn became the landlord of Ms Hayes by operation of law.

#### **The relationship of landlord and tenant**

70. Section 3 of Deasy's Act sets out in clear terms the contractual foundations of the relationship of landlord and tenant. It provides as follows:

"The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent."

71. The basic proposition therefore is that the relationship of landlord and tenant rests upon a contract, whether implied or express, made between the parties, the landlord and the tenant. Some forms of contract must be in writing or made by deed such as a contract by which the relation of landlord and tenant is created for a freehold estate (a fee farm grant) or for a definite period of time not being from year to year or any lesser period (s. 4).
72. Certain tenancies can exist by implication, such as a tenancy created on the expiration or determination of a fixed term agreed in a lease or instrument in writing.
73. I have no difficulty with the general proposition advanced by counsel for Ms Hayes that the 2004 Act expressly includes in the definition of tenancy an "oral" or "implied" tenancy, and such indeed is a definition consistent with the interpretation of the provisions of Deasy's Act, and with the general legal provisions concerning the relationship of landlord and tenant. But I do not agree with her submission regarding the relevance of Deasy's Act for the reasons I now explain.

#### **Relationship founded in contract**

74. The contractual foundation of the relationship has been considered in many judgments of the Irish courts and the courts of England and Wales and that is not surprising having

regard to its vintage. Professor Wylie, in the definitive text of his *Landlord and Tenant Law* (3rd ed., Bloomsbury Professional, 2014), para. 2.12, suggests that:

“[...] it is the intention of the parties, as exhibited by their contract or conduct, which is of paramount consideration.”

75. There is much judicial support for the view that whether or not a tenancy has been created is essentially a matter of construction in each case of any written agreement entered into, or of any oral agreement sufficiently evidenced through the course or dealing or of the actions of the parties in relation to the land.
76. By way of illustration only, I mention the Supreme Court decision in *Irish Shell Ltd v. Costello Ltd* [1984] IR 511, which raised the question of whether the defendant was a tenant or a licensee of a petrol station and garage premises, and is often quoted as a leading judgment on the principle that “the intention of the parties” is the starting point from which the ascertainment of the nature of the relationship is to be assessed.
77. Furthermore, that judgment is authority for the proposition that the acceptance of rent does not create a new tenancy, although that fact may be evidence from which a tenancy may be presumed as being the intention of the parties.
78. It is also settled law that the actual payment of rent is not necessary to create the relationship of landlord and tenant, but the agreement by one party to permit another to occupy a premises in consideration of rent does create the relationship.
79. Counsel for Ms Hayes argues that s. 3 of Deasy’s Act governs only the commencement and not the continuation of the tenancy, and that it does not require there to be a new agreement between a tenant and the person becoming entitled to the landlord’s interest as successor in title.
80. That proposition incompletely states the law. Section 3 of Deasy’s Act is not to be read to mean that whilst the creation of the relationship of landlord and tenant is founded on the express or implied term of a contract between the parties, any ongoing relationship is otherwise founded. The Act means, and has been understood to mean, that the relationship throughout its currency is one founded on the intention of the parties and is for that reason derived from contract. Whether a landlord or tenant is the same person or entity throughout the tenancy is a different question. Many letting agreements or leases in writing will define the tenant or the landlord as meaning an identified person or body and his or her or its successors in title or permitted assignees. Thus, a lease may be made between an identified tenant and landlord who can assure their respective interests, subject to the provisions of any relevant legislation and the express terms of the lease, and following such assignment become lessee or lessor as the case may be.
81. These propositions are well established in law and do not require further consideration here. However, counsel for Ms Hayes argues that because a tenancy or letting may

continue, as a matter of law, once the statutory period of possession has passed, Deasy's Act has no application.

82. The broad scheme of the 2004 Act contained in Part 4 provides that if a tenant has been in occupation of a dwelling for a continuous period of six months, the tenancy shall continue in being for a period of four years and thereafter for a further period of four years, a "new Part 4 tenancy". The Act continues the term of the original six-month tenancy for the further period of four years and s. 30 makes provision for the continuation and also for the variation by the parties by agreement of those terms. The Act provides for restrictions on the right of the landlord to terminate and the grounds on which termination can occur.
83. Thus, as a matter of statute there is afforded a degree of security of tenure to a tenant of residential dwellings as the landlord is obliged to offer a tenant a new tenancy. A tenancy of a dwelling to which the 2004 Act applies now contains by statutory implication certain benefits and burdens, covenants and conditions, and some of the obligations and rights arising therefrom are not expressly agreed by the parties but are imported or implied as a matter of statute. The Act is concerned to afford certain implied rights and impose certain obligations on the parties, including a right to the tenant should he or she elect to take a new tenancy at the expiration of the first.
84. It is self-evident that should a tenant of residential property not choose to elect to take a new Part 4 tenancy, he or she is not obliged to do so. The relationship giving rise to the new Part 4 tenancy is one the parties agree to assume, albeit certain indices of that relationship are fixed by statute, including the right on the part of the tenant to opt for the new tenancy.
85. Counsel argues that there is what she calls a "tension" between Deasy's Act and the 2004 Act and she says that a distinction can readily be drawn between the power of the landlord reflected in s. 5 of Deasy's Act to elect to treat the continuation in occupation by a tenant paying rent as the continuation of a tenancy, and the provisions of ss. 41 and 45 of the 2004 Act, by which the continued tenancy is described as a "new tenancy" which she says arises by operation of law without any agreement by the landlord.
86. The new tenancy described in Part 4 of the 2004 Act, the new Part 4 tenancy, does not arise by operation of law but a tenant is, as a matter of law, entitled to call for such a tenancy. What is implied is a right to a new tenancy, and this is not to say that the tenancy is wholly devoid of contractual import. Section 41(1) provides as follows:

"If a Part 4 tenancy continues to the expiry of the 4-year period without a notice of termination under section 34 or 36 having been served in respect of it before that expiry, then a new tenancy shall, by virtue of this section, come into being between the landlord and the tenant on that expiry."
87. The section creates a new tenancy between the landlord and the tenant. Throughout, the legislation uses the language of "landlord" and "tenant" and its cognates. What is

fundamental to s. 41 is that what is created thereby is a continued tenancy between the same landlord and tenant, subject to any intermediate assignment or assurance of their respective interests.

88. Counsel argues that the continuation of the landlord and tenant relationship for which the 2004 Act provides does not require or depend upon agreement. She points to the fact that the definition of the Act of "tenancy" in s. 5 makes no reference to an agreement and while it envisages a tenancy being *created* orally, in writing, or by implication, continuation of that tenancy is not dependent upon agreement, or, as she puts it, "it continues irrespective of, or in the absence of, agreement by operation of law".
89. The argument is that Part 4 of the 2004 Act gives a tenant holding premises to which the Act applies a right to continue in possession and describes the tenancy as a "new" tenancy in ss. 41 and 45. Thus, it is said that, as a matter of law and on a true construction of the section, no agreement is required, or to put it in more simple terms, the tenant is entitled to a new Part 4 agreement even when the landlord does not choose to continue the tenancy, or to put it in plain language, where the landlord does not "agree".
90. These submissions seem to be misconceived. The protection afforded by the 2004 Act is to permit the tenant to call for a new tenancy after six months, or four years, as the case may be. The Act contains certain deeming conditions necessary to give effect to that right, including provisions that the old tenancy continues. This is apparent from the definitions of landlord and tenant in the Act. The landlord is the person "entitled to receive" the rent paid by the tenant, the tenant is the person "entitled to the occupation of a dwelling under a tenancy", or the person entitled to occupation by reason of the termination of his or her tenancy if the statutory provisions have the effect that the old tenancy continues or is deemed to be a new tenancy grafted upon the old.
91. The starting point has to be an entitlement to receive the rent and an entitlement to possession in consideration of that rent. The relationship exists by reason of the entitlements and the obligations. The entitlement derives from agreement. The tenancy is created by the entitlement to receive the rent, and the obligation to pay that rent. That a tenant has a right to a new tenancy is implied by statute, but the right is to a tenancy and not to a different form of relationship, nor is the right of someone to occupy the dwelling by reason of anything other than an agreement to pay rent in consideration of a right to possession.
92. The proposition advanced by counsel for Ms Hayes that a landlord does not have to be a party to the "new" or continued tenancy agreement is not arguable. Rather, the correct position is that the qualifying tenancy carries certain implications which have the effect of continued tenure, imposed by statute into the agreement between landlord and tenant.
93. While the 2004 Act undoubtedly creates a new and socially important protection for residential tenancies and creates for the first time a degree of security of tenure for tenants who have been in occupation as tenants for the relatively short period of six

months, it does not, in my view, deprive the provisions of Deasy's Act of meaning or effect.

94. The reason seems to me to be one of broad import. The relationship of landlord and tenant is founded on contract. The Oireachtas has opted to grant certain rights which might be said to be grafted upon the contractual relationship, including, in the case of the 2004 Act, the right on the part of the tenant to seek and obtain a new tenancy. What the tenant becomes or remains in those circumstances is a tenant to a landlord, albeit that some of their respective obligations and rights derive from the statutory regime. This does not mean, however, that the relationship is no longer founded on contract, but rather that the contract is one which, by implication of law, now contains certain statutory indices which are implied as a matter of law and do not derive from the express agreement of the parties. The terms of the agreement can then be properly said to be implied, as a matter of law.
95. However, the relationship remains one founded on contract.
96. In short, my view is therefore that the plea that Finn has become landlord to Ms Hayes is bound to fail as there is no contractual nexus between Ms Hayes and Finn. Ms Hayes' entitlement to remain in occupation as tenant under the 2004 Act is a right enforceable against her landlord and not against her landlord's charge holder. The 2004 Act did not create a contractual relationship between a tenant and a mortgagee of a landlord but rather reflects the mutual rights and obligations of tenant and landlord. These observations illustrate the difficulty that Ms Hayes faces in the cases currently pleaded.

**Assurance of the interest of the landlord by operation of law?**

97. Counsel for Ms Hayes also argues from another perspective: She argues that Ulster Bank "stepped into the shoes of the landlord" and, in the absence of any express assurance of his interest by the registered owner, she relies on the statutory provisions.
98. Before that argument is considered I must observe that the interest of Finn is as owner of a charge or security interest on registered land: Section 62 of the Registration of Title Act 1964. There is, by statute, no transfer of ownership from the registered owner to the chargeant on the registration of a charge. I propose for convenience to use the word "mortgage" and its cognates in the following analysis, and there is no need for the purposes of the present appeal to consider the different means by which mortgages of unregistered land were created prior to the Land and Conveyancing Law Reform Act 2009, and whether different considerations might arise.
99. The argument made by counsel for Ms Hayes is that Ulster Bank, as a result of the order for possession, became entitled to receive the rent and must therefore be considered to be a landlord within the meaning of s. 5(1) of the 2004 Act. Reliance is placed on the provisions of s. 62(7) of the Registration of Title Act 1964, by which a registered owner of a charge may obtain an order for possession of land and upon obtaining possession "shall be deemed to be a mortgagee in possession".



100. Section 3 of the Registration of Title Act 1964 defines "possession" for the purpose of the Act as including "the receipt of the rents and profits".
101. The rights and obligations of a mortgagee in possession are long established in law. As Professor Wylie says in his *Irish Land Law* (5th ed., Bloomsbury Professional, 2013), at para. 14.76, a mortgagee can take "possession" merely by taking receipt of rents and profits and other payments without taking physical possession. The definitions of "possession" in s. 2 (iii) of the Conveyancing Act 1881 and in s. 3 of the Land and Conveyancing Law Reform Act 2009 recognise this.
102. By taking possession, a mortgagee becomes entitled to the receipt of the rents and profits defined in s. 3 of the Registration of Title Act 1964. Professor Wylie, at para. 14.77 of his *Irish Land Law*, explains that the mortgagee could "direct [an existing tenant] to pay to him any rents which might otherwise be paid to the mortgagor." That quote from para. 14.77 is contained in the written submissions of Ms Hayes but the submission does not reflect the full contents of the paragraph. The entitlement is to the "receipt of rent", not an entitlement to rent howsoever the obligation to pay arises.
103. The proposition that by having the benefit of a court order for possession, a mortgagee becomes landlord to an existing tenancy is not correct as a matter of law, or at least is not correct as an absolute statement. The order entitling the mortgagee to possession and to thereby receive the rents and profits arises by statute from the contract between mortgagee and mortgagor. It does not create privity between a mortgagee and a tenant of the mortgagor.
104. The registration of a charge on registered land confers no right on the charge holder to take possession, hence the provisions of s. 62(7) of the Registration of Title Act 1964. Notwithstanding that a charge holder or mortgagee has obtained a court order for possession, the title of the mortgagor is not extinguished, and the mortgagor continues to have the right as a matter of contract to receive the rent of the dwelling from the tenant under the tenancy. Taking possession, as Professor Wylie says in *Irish Land Law*, para. 14.76 "does not of itself put an end to the mortgage", and it is rather a step towards the realisation of the security by sale.
105. The express language of s. 62(7) of the Registration of Title Act 1964 is of consequence. The section does not provide that the taking of possession has the effect that the interest of the mortgagor is extinguished. Counsel for Ms Hayes is therefore incorrect that Finn has "stepped into the shoes of" the landlord/mortgagor. There is no statutory merger of the interest of mortgagor or mortgagee, and the Registration of Title Act 1964 provides otherwise. The order for possession constitutes the holder as mortgagee in possession and does not extinguish the interest of the registered owner.
106. A mortgagee may, in certain circumstances, be bound by a tenancy, if, for example, consent had been given to the creation of the lease or letting, and the lease or letting then becomes an encumbrance on the title of the mortgagee. Even where this happens, however, there is no contractual nexus between the tenant and the mortgagee and

merely on account of the granting of consent to create the lease or tenancy the mortgagee does not become entitled as against mortgagor to receive the rents from the tenant.

107. In broad terms, an order for possession is not a foreclosure of the interest of the registered owner. There is no statutory provision the effect of which was to transfer the interest of the registered owner to Ulster Bank.
108. Accordingly, as Ulster Bank did not become the owner of the property or extinguish the rights of the mortgagor on account of taking possession, the argument that the interest of the landlord had become vested in Finn cannot succeed.

**The argument that Deasy's Act was amended**

109. Finally, I must make a general observation regarding the broad assertion made by counsel for Ms Hayes that the 2004 Act implicitly repeals the provisions of Deasy's Act concerning the creation of tenancies. Such an argument immediately offends "the presumption against implicit alteration of law", the description of Roy, Galpin and Maxwell, *Maxwell on the Interpretation of Statutes* (11th ed., Sweet and Maxwell, 1962), at p. 78, quoted with approval by McLoughlin J. in *Minister for Industry and Commerce v. Hales* [1967] IR 50, at p. 76:

"[...] that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intentions with irresistible clearness [...]."

110. I cannot therefore accept the general argument made by counsel for Ms Hayes that the fundamental cornerstone of Deasy's Act and the extensive common law that has evolved in the area of landlord and tenant since Deasy's Act was enacted in 1860 is to be ignored insofar as it recognises that the relationship is one founded on the agreement made by one party to hold land from or under another in consideration of any rent. The identification of the landlord and tenant relationship must take that proposition as a starting point
111. I am fortified in my view by the fact that s. 193 of the 2004 Act does make express reference to s. 42 of Deasy's Act by providing that the obligations on the tenant to deliver up possession of the premises in good repair at the conclusion of the lease deriving therefrom do not apply to a letting to which the 2004 Act applies.
112. Further, s. 59 of the 2004 Act expressly provides that no rule of law or any provision of any enactment in force immediately before the commencement of the Act which applies in relation to the "termination" of a tenancy shall apply in relation to the termination of a tenancy of a dwelling:

"Subject to section 60, neither—

- (a) any rule of law, nor
- (b) provision of any enactment in force immediately before the commencement of this Part,

which applies in relation to the termination of a tenancy (and, in particular, requires a certain period of notice or a period of notice ending on a particular day to be given) shall apply in relation to the termination of a tenancy of a dwelling."

- 113. The provisions of Deasy's Act or any other legal provision dealing with the termination of a tenancy, therefore, are therefore expressly excluded for lettings to which the 2004 Act applies. There is no other statutory express amendment or exclusion of Deasy's Act and for the reasons stated none is to be implied.
- 114. Finally, the long title of the 2004 Act recites its general purpose as the provision of "a measure of security of tenure for tenants of certain dwellings" and to make provision "for amendments of the law of landlord and tenant in relation to the basic rights and obligations of each of the parties to tenancies of certain dwellings".
- 115. Whilst it might not be dispositive, I note that the recited purposes do not include an intention to alter the meaning or means of creation of the relationship of landlord and tenant, and the Act is described as an amendment of the law in relation to the rights and obligations of the parties to the relationship.

### **Summary**

- 116. I agree with the trial judge that the claim as pleaded is bound to fail. The plea that Ms Hayes became tenant to Finn on account of the order of possession is not legally sustainable. Ms Hayes may have a valid and subsisting tenancy and rights derived therefrom against her landlord, and that claim is not bound to fail. Nonetheless, it bears comment that no claim was made against the landlord and he or they are not identified in the pleadings.
- 117. I also share the view of the trial judge that the appointment, or purported appointment, of a receiver has no effect on the claim, and it is more likely, subject to the express terms of the mortgage or charge, that the receiver was expressly appointed to act as the agent of mortgagor.
- 118. I would not interfere with the decision of the trial judge in his direction to permit Ms Hayes to amend her pleadings, and that approach is well supported by the authorities.
- 119. For these reasons I would dismiss the appeal.
- 120. In the light of the fact that Ms Hayes has remained in the dwelling without paying rent since the order for possession was made in March 2015, and subject to hearing from the parties, I propose that this Court should make a direction that any motion to amend the statement of claim be delivered within a specified time.