LANDS TRIBUNAL FOR NORTHERN IRELAND

IN THE MATTER OF REFERENCES

BT/65/2019 and BT/66/2019

Between:

1. JAMES P COREY TRANSPORT LIMITED

and

2. OWEN JACOBSON

Applicants

and

BELFAST HARBOUR COMMISSIONERS

Respondent

RE: BELFAST HARBOUR ESTATE

Lands Tribunal for Northern Ireland
The Honourable Mr Justice Horner, President
and
Mr Henry Spence, MRICS, Dip.Rating, IRRV (Hons), Member

Richard Shields BL (instructed by Shean Dickson Merrick, Solicitors) for the applicants
Douglas Stevenson BL (instructed by Carson McDowell LLP, Solicitors) for the respondent

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A. Introduction

[1] The applicants in this case are:

(i) James P Corey Transport Limited ("the company") which operates from premises on the Stormont Road, Belfast Harbour Estate ("the first premises") where it carries on a road haulage business.

(ii) Owen Jacobson ("Jacobson") who trades as Jacobson Modulars from premises at 1 Stormont Road, Belfast ("the second premises") on Belfast Harbour Estate where he constructs modular buildings.

[2] The preliminary issue which the Lands Tribunal is asked to resolve is the basis upon which the company occupies the first premises and Jacobson occupies the second premises. The company and Jacobson both say that they have leases. They claim to carry on their different businesses at the first and second premises respectively. Consequently, they claim to be business tenants protected by the Business Tenancies (NI) Order 1996 ("the 1996 Order"). The Belfast Harbour Commissioners ("BHC") who own the Harbour Estate and the premises out of which each of the applicants operate deny that they have leases and say that they only have contractual licences which they can determine unilaterally with notice. Consequently, they do not enjoy any protection under the 1996 Order and the licences can and have been determined by notices to quit which have been served.

[3] It is the Lands Tribunal's task to resolve this dispute as to the basis upon which each of the applicants holds its respective premises on the Belfast Harbour Estate. The issue of whether an occupier has a lease or a licence in respect of the premises he occupies, but which is owned by a third party, is an old one. It has been the subject of too much litigation in Great Britain, Northern Ireland and the Republic of Ireland. It is a matter to which we will return in some detail later on in this judgment.

B. Background Facts

The first premises

[4] Kevin Corey (Corey) is the sole director of the company. His father, James Corey (now deceased) had set up this transport business in 1970. The business, which was unincorporated, moved in 1975 to a site at the Pollock Dock on the Belfast Harbour Estate. James P Corey (Newtownabbey) Limited ("Newtownabbey Limited") was incorporated on 6 February 1992 to carry on the business at the Harbour Estate and did so until it was dissolved on 18 February 2000. In the period between February 2000 and June 2016 the business was carried on by Corey, initially with the assistance of his father, James Corey, through an unincorporated business, Corey Transport. This business was then incorporated as a limited liability company, James P Corey Transport Limited on 21 April 2016. While Corey had begun by assisting his father, the sole director and shareholder of Newtownabbey Limited, he had in time then taken over his father's mantle and run the business. Effectively, Corey had run Corey Transport and then the company single-handedly from approximately the end of 2006/2007.

[5] The road haulage business had been based on the Belfast Harbour Estate from in and around 1975. As we have noted, it started off at the Pollock Dock where it remained until 1988 when it moved to a site at the McCaughey Road still on Belfast Harbour Estate. In 1998 it moved again to another site at 2 McCaughey Road which it occupied from 1998 to 2007. In 2007 the business moved to the Old Conexpo premises on the opposite side of the road to the premises at 2 McCaughey Road, the first premises. The documentary evidence available reveals that on 23 November 1995 Newtownabbey Limited had entered into a licence to occupy what was described as

"open storage area" within the Belfast Harbour Estate. It was to share this with "the Commissioners and the Commissioners' licensees." The licence was subject to various conditions which included requirements that:

(a) The storage area be used for "The storage of materials and goods of the nature set out in the Schedule in transit to the Port of Belfast and as ancillary thereto for temporary offices and parking of vehicles (the Permitted User)": see 1.1.

(b) All materials and goods stored must have been imported or must be intended for export in either case through the Port of Belfast and in the case of export must be so exported within a reasonable period and in the case of import must be distributed from the Storage Area within a reasonable period: see 1.2.

(c) The charge for the Storage Area was to be paid and the amount was to be subject to periodic review by the Commissioners at their discretion "which shall be absolute": see 1.3.

[6] The 1995 licence agreement was agreed by Corey's sister, Jacqueline Corey, on behalf of Newtownabbey Limited. As we have recounted, this company was dissolved on 18 February 2000. No legal advice was received by Newtownabbey Limited before it entered into the 1995 licence agreement. It was apparently simply signed by Jacqueline Corey as a matter of course and returned.

[7] The licence agreement, it is claimed, is fictional because while the permitted use was for open storage, the only business which has been carried on at these premises, or any other premises, occupied by Newtownabbey Limited or the company or by Kevin Corey trading as James P Corey Transport, has been one of road haulage. It was not clear to the Tribunal which clauses in the "licence" were inconsistent with the road haulage business nor, indeed, what additional clauses the Tribunal could have expected to be included for a road haulage business. Nor did the company seek to adduce any evidence on this issue. Instead it was left unexplored.

[8] In the second part of 1999 Newtownabbey Limited had been asked to vacate the premises it occupied at 2 McCaughey Road. Bill Luney ("Luney") of BHC gave the necessary instructions because BHC required the premises occupied by Newtownabbey Limited for port operational purposes. Luney was aggressive in his manner, it is claimed, and gave similar instructions to other businesses including Owen Jacobson who, as we have noted, traded as Jacobson Modulars.

[9] James Corey and Owen Jacobson contacted Alban Maginness, then their MLA. Mr Maginness had been a practising barrister and he advised Corey and Jacobson of the difference between a licence and lease and the protection that was afforded to business tenants under the 1996 Order. Mr Maginness on behalf of Corey and Jacobson by letter of 24 February 2000 advised the Chief Executive of BHC that they were business tenants and that their businesses enjoyed the protection afforded by the 1996 Order.

[10] Corey noticed that on the next visit Luney of BHC was much more conciliatory in his approach and he promised Corey that his business would not have to move premises. There were no further dealings between Corey and BHC between 2000 and 2007 and Corey Transport continued to use the site for its road haulage business.

[11] In April/May 2007 this changed when Michael Robinson ("Robinson"), the Port Commercial Executive, suggested that Corey Transport, which Corey was now running singlehandedly as an un-incorporated business, should relocate to the Sydenham Road side of the Harbour Estate. However this was unsuitable. Corey Transport had always operated on the north side of the Harbour Estate and by doing so was able to service the container ships which docked there. Corey said that his business was largely dependent on being based on the north side of the Harbour Estate. However, Corey Transport agreed to relocate to a new site at the corner of McCaughey Road and Stormont Road which was larger than the previous premises at 2 McCaughey Road. It claimed that this was a better shape and had easier access for lorries.

[12] Robinson had made it clear to Corey that BHC required the McCaughey site which Corey Transport then occupied to facilitate the extension of the Stormont Wharf. No "rent" or "fee" had been agreed for the premises at the corner of McCaughey Road and Stormont Road, the first premises, when on 18 May 2007 BHC had served a Notice to Quit requiring Corey Transport to give up vacant possession on or before 1 December 2007. A notice to determine under the 1996 Order was also served at the same time on a "without prejudice" basis.

[13] Without the benefit of legal advice Corey Transport vacated the premises at 2 McCaughey Road in October 2007 and moved to the first premises taking with them the business's plant and equipment. On 21 November 2007 Mr Joe O'Neill ("O'Neill"), the Commercial Director of BHC, advised there would be a 2.8% increase in "storage charges." On 28 December 2007 Robinson wrote to record the terms of occupation of the site now occupied by Corey Transport as follows:

> "In moving site, we would like to take the opportunity to update your original licence to occupy the McCaughey Road site, which dates from November 1995, reflect the new site area and location." (sic)

He promised to deliver two copies of the "new proposed licence" for Corey to sign in the New Year. He failed to do so and no new proposed licence was ever signed.

[14] By letter of 3 November 2008 BHC advised of a further unilateral increase in storage charges for the premises occupied by the haulage business. Corey did not agree to the increase in charges, he did not pay the increased charges and he did not reply to the correspondence. A meeting took place on 13 May 2009 between Corey and O'Neill at BHC's offices where they agreed a lower "charge." There was no

discussion about the nature of Corey Transport's occupation of the site. A letter of 18 May 2009 from O'Neill to BHC stated:

> "In respect of your final observation that no legal agreement had been provided for the new site, as explained, we are awaiting redrafting of the existing Storage Agreements by our Solicitors in order to provide you with an **up-to-date** Licence."

[15] Attached to the letter was a proposed storage agreement which Corey was asked to execute and to return. He did not respond. The agreement contained various terms consistent with the licence permitting BHC to change the allocation of the storage area to another storage area in the Belfast Harbour Estate. There was a further meeting on 2 February 2010 in which there were discussions about, inter alia, the current storage charges. Further correspondence followed. However, Corey did not return the executed storage agreement as requested as he claimed it did not reflect the basis upon which he would be occupying the premises. He claimed that he did not believe BHC had the right to move him to another area of the Belfast Harbour Estate. There was a further request on 31 May 2011 for Corey to execute the storage agreement and also to complete "on the front of the agreements the registered office and company registration number of James P Corey." This was obviously impossible because there was no limited liability company in existence at that stage. It also provides evidence of the ignorance of BHC as to the identity of the party who was occupying the first premises. Also, BHC does not seem to have appreciated that Newtownabbey Limited had been liquated.

[16] Corey Transport continued to pay storage charges "for the use of the premises." On 22 October 2018 BHC solicitors wrote to the company which had relatively recently been incorporated stating:

> "You occupy the Property on foot of a licence arrangement with our above client. Our client requires return of the Property for the purposes of imminent port development upon same and therefore we give you notice to vacate the Property and remove your possessions from same by not later than 31 December 2018."

[17] This was accompanied by a "without prejudice" letter of the same date making it clear that in the alternative that should the company have a lease, then BHC were determining the tenancy in accordance with the 1996 Order. This, "without prejudice" letter was accompanied by a Landlord's Notice to Determine under Article 6 of the 1996 Order.

[18] On 13 November 2018 Shean Dickson Merrick on behalf of the company (and Jacobson) wrote to BHC solicitors making it clear that the occupation of each of the premises at Belfast Dock by both their clients was protected by the 1996 Order. By

letter dated 22 May 2019 BHC's solicitors wrote to the company requesting that it vacate the first premises on or before 20 June 2019.

[19] Accordingly, the Lands Tribunal must determine at the outset the basis upon which the company is currently occupying the first premises and whether it is a business tenancy which attracts the protection of the 1996 Order or whether the first premises are held on a licence which can be determined unilaterally by BHC with notice.

The second premises

[20] Jacobson set up his business, which, as we have briefly noted, involves the construction of modular buildings, in 1969. In 1982 he secured premises on McCaughey Road, Belfast Harbour Estate, which we have observed, is owned by BHC and which formed part of the old Belfast Power Station car park. He occupied these premises on the basis of a verbal agreement from 1982 to 1987. In 1987 he was asked to move to accommodate Lagan Cement. Without the benefit of legal advice at the time, he agreed to move his business to 2B McCaughey Road, Belfast which he occupied from 1987 to 2008. On 11 September 1995 Jacobson had signed an agreement for the premises at 2B McCaughey Road which he occupied for business purposes. At this remove he is not sure, if he read the terms, but he is certain that he did not receive (nor did he ask for) any legal advice before he signed the agreement. He claims that the agreement is fictional because the permitted use of the premises was for covered storage only yet he was using the premises to manufacture modular buildings and BHC knew this to be the case. Again, no attempt was made by Jacobson to identify any terms present or absent from the 1995 agreement which were inimical to his business or his occupation.

[21] In the latter half of 1999 Luney of BHC visited Jacobson and the other adjacent owners because of the proposed redevelopment of McCaughey Road. He told them they had to leave their premises although no explanation for their move was provided. His tone, Jacobson also found to be aggressive. Jacobson learnt that it was to facilitate Port operational purposes. As we have recorded, following this Jacobson together with James Corey contacted Alban Maginness, their MLA. It was at this time that Jacobson learned of the legal difference between a lease and a licence. He also concluded that on the basis of what he was told by his MLA that he occupied his premises at McCaughey Road on foot of a lease.

[22] Correspondence followed which, as we have noted, Mr Maginness made the case that Jacobson and Newtownabbey Limited were business tenants. Luney attended Jacobson's premises and informed Jacobson that he could stay put. Jacobson said that this arrangement was typical – verbal and informal. From 2000 to 2007 Jacobson had little contact with BHC. During this time Jacobson had erected four large buildings and an overhead crane on site. The buildings were bolted into a concrete base on the site.

[23] In 2007 Jacobson was told by O'Neill of BHC that BHC wanted the premises to facilitate cruise liners and that there were no other suitable vacant premises which BHC could use for this purpose. The notice to quit was served on 18 May 2007 requiring Jacobson to vacate the premises by 1 December 2007. A "without prejudice" notice to determine under the 1996 Order was also served at the same time.

[24] Jacobson asked O'Neill if suitable alternative accommodation was available. O'Neill prevaricated. Jacobson then agreed with O'Neill that he would move to 1 Stormont Road ("the second premises"). O'Neill agreed to pay for a concrete base for the second premises to act as flooring for Jacobson's buildings. Jacobson was given permission to erect another building to accommodate his business's plant and machinery. There was no discussion, it is claimed, about the legal basis upon which Jacobson was to occupy these second premises.

[25] On 1 October 2007 Jacobson received a letter from BHC granting Jacobson a 10 year licence on new terms. Draft terms were attached, but they were marked "without prejudice" and "subject to contract." Jacobson was required, inter alia, to provide gates for the second premises and connect the electricity/water/sewage to the mains. BHC was to provide fencing on all four sides of the site and water/sewerage facilities to the perimeter of the site. This move created a number of logistical challenges which resulted in two of the buildings being split into sections and the overhead crane being dismantled. Jacobson's business left the old premises at 2B McCaughey Road on 23 February 2008 and moved in to the second premises. BHC were to have a licence agreement drawn up which they would then forward to Jacobson. The draft terms provided for a 10 year licence at an initial yearly fee of £16,500 per annum. Our attention was not specifically drawn to any licence agreement. However, there is a document which we have referred to earlier entitled "DRAFT TERMS" and marked "without prejudice, subject to contract", which states that there is to be a licence agreement of 10 years on a .55 acre site at Stormont Road at an initial fee of £16,500 per annum subject to annual review "as per Port Charges Review." No document which could be described as a final signed licence agreement was ever produced to the court.

[26] On 25 May 2008 O'Neill spoke to Jacobson's daughter at the second premises. He then spoke to Jacobson and arranged a temporary connection to provide water and sewage facilities which remained in place for 10 years.

[27] On 22 October 2018 BHC's solicitors wrote giving Jacobson Notice to Vacate the second premises by 31 December 2018 and terminating his licence. BHC also served, without prejudice, a notice to determine under the 1996 Order, determining the business tenancy, if there was one in existence.

[28] Jacobson claims he was shocked. He had invested heavily in the new premises, purchasing, for example, a second overhead crane at a cost of some £15,000 and erecting a further fifth building. Jacobson claimed to have cancelled and delayed orders in response to BHC's letters.

[29] There then followed correspondence between Jacobson and his solicitors, who were instructed following receipt of the Notice. BHC's solicitors wrote on 22 May 2019 requesting that Jacobson vacate the premises on or before the 20 June 2019.

[30] It can be seen from the brief history involving both the company and Jacobson that at least part of the problem shared by both owner and occupier as to the nature of the occupation is due to the failure on the part of BHC to ensure clear terms were agreed and signed by the occupiers before the occupiers entered into occupation of their respective premises. If that had been done, which is elementary estate management, then there could be no dispute as:

(a) Who were the parties occupying the respective premises; and

(b) The terms upon which they were occupying those premises.

[31] In turn that would have permitted the Lands Tribunal to concentrate on the thorny issue as to whether the terms of occupation constituted a lease or a licence. Instead, the Lands Tribunal has had to receive extensive evidence and legal submissions about who occupied the respective premises and on what terms those premises were occupied before going on to consider the central issue as to whether each of them enjoyed the protection of the 1996 Order.

The respective positions of the parties

[32] Corey Transport says, inter alia, that:

(a) It has no written agreement with BHC.

(b) It has exclusively possessed and occupied the first premises from 2007.

(c) They are the sole business premises of Corey Transport which employs 10 people.

(d) The first premises are gated and fenced. No-one is permitted access without permission from Corey Transport. It is the sole key-holder and the gates are locked at the close of business each day.

(e) The first premises are protected by surveillance cameras.

(f) The first premises are individually metered for electricity. Access is permitted to allow BHC to read the meter periodically.

(g) Corey Transport pays rent and has done for the past 10 years. From June 2019 BHC have not accepted any rent to date.

[33] Jacobson says, *inter alia*, that:

(a) He has a long established business.

(b) He has exclusively possessed and occupied the second premises from 2007.

(c) He has 7 employees on site.

(d) The premises are fenced and gated on all sides and locked either by Jacobson or by an employee of his at close of business each day. BHC does not have either a key or means of access to the premises which are subject to CCTV surveillance.

(e) While the premises are individually metered for electricity and Jacobson pays BHC for the electricity he uses, the only access permitted to BHC is for the meter checker who attends periodically to read the meter during business hours.

(f) He has paid "rent" for the premises but has not made any further payment from June 2019 when BHC refused to accept the sums tendered.

[34] BHC's response is that:

(a) When Corey Transport and Jacobson moved to the first and second premises respectively on the Stormont Road, it was an empty car park.

(b) They both have been the sole occupiers of the first and second premises but neither of the applicants have enjoyed exclusive possession of them.

(c) Any structures erected on the premises can be easily removed.

(d) Neither considers themselves to be in exclusive occupation of the premises for the purposes of the Rates (NI) Order 1997 as the rates are not separately assessed for rent.

(e) The company occupies the first premises under the same terms as the 1995 agreement which was a BHC open storage licence and is therefore a licensee.

(f) The facts and circumstances, construed objectively, show that Jacobson occupied premises under 1995 licence agreement on the Belfast Harbour Estate. This was a covered storage licence. He then moved to the second premises which he occupied pursuant to a licence as per the letter of 1 October 2007 and the draft terms attached.

C. Legal background

[35] There have many cases in which the courts here, in Great Britain and in the Republic of Ireland, have been asked to rule on whether one party has been granted a lease or a contractual licence over land owned by another. This often arises because the protection enjoyed under some statutes by a tenant is greater than that enjoyed by a licensee: see for example the Rent Acts. In some of the jurisdictions it is possible to opt out of the protection afforded to business tenancies. In other jurisdictions such as Northern Ireland, it is not. It has long been recognised that landlords will use their economic muscle, especially when they are in an asymmetrical relationship, to avoid laws which apply to tenancies and limit a landlord's powers: see, for example, Norma Dawson on Business Tenancies in Northern Ireland at page 7.

[36] In the Republic of Ireland and Northern Ireland, the Landlord and Tenant Law Amendment Act (Ireland) 1860 (otherwise known as Deasy's Act) has governed the relationship of landlord and tenant. Whereas in England, Wales and Scotland it is of no effect. Consequently, in the Republic of Ireland's jurisdiction the intention of the parties is thought to be very important in determining whether the occupation is pursuant to a lease or a licence. However, in Great Britain, the issue is one of whether "exclusive possession" has been provided by the agreement. As Fox LJ said in *AG Securities v Vaughan* [1990] 1 AC 417 at 431G the question in England and Wales is not "what, did the parties intend?" the question is "what is the effect in law of the rights which they actually created?" Or as Lord Templeman trenchantly put it in *Street v Mountford* [1985] 2 All ER 289 at 300, the only intention which is relevant "is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent."

[37] The reliance on exclusive possession as the touchstone for a lease may not be particularly helpful because as Wylie suggests the concept of exclusive possession is an "elusive one." Indeed, it has been suggested that looking for an all embracing test for exclusive possession is an elusive one akin to searching for a chimera: see *Mehta v Royal Bank of Scotland* [2000] 32 HLR 45. Whereas, Professor Wallace has suggested, the reason why the decisions on this vexed subject "are difficult to reconcile in principle and/or common sense may be that on occasions, appellate judges have used language which implies that the distinction between a lease and licence is both substantive and obvious." It is no doubt for this reason the Court of Appeal in Northern Ireland in *Northern Ireland Renewables Limited v Carey* [2016] NICA 30, when it had to consider the issue of whether a so-called "draft lease" constituted a contractual licence, drew attention to the fact that the work of the "reform of landlord and tenant in Ireland had been under consideration for a very long time." Furthermore, that reform "requires a comprehensive reconstruction by legislative intervention rather than any minor adjustments by judicial action." Unfortunately, six years on the laws in Northern Ireland still await "comprehensive reconstruction." The failure to legislate cannot be brushed aside as an unimportant omission. It has long-term consequences for commerce. In this case Belfast Port aspires to be a thriving, competitive and successful enterprise. It depends critically on a mix of tenancies and licences, 60%-40% at present it is claimed, to give BHC sufficient flexibility to organise and operate the Harbour Estate as efficiently and effectively as

possible for the benefit of all the citizens of Northern Ireland. The occupiers of each of those premises on the Harbour Estate are entitled to know whether they have a lease, with the protection that such an agreement necessarily brings or a licence, which offers other advantages, including that of flexibility.

[38] Since this decision of the Court of Appeal in 2016, the Northern Ireland Court of Appeal has had cause yet again to consider the issue of whether there was a lease or licence granted in *Car Park Services v Bywater Capital* [2018] NICA 22. But some may consider that this decision, which we will discuss in greater detail later on in the judgment, provides yet more support for Weatherup LJ's comments that "comprehensive reconstruction" is required rather than judicial fine tuning to solve the lease or licence conundrum.

[39] Both the Member and I, sitting as the Lands Tribunal, determined in *Car Park Services v Bywater Capital* that the agreement was a licence. On appeal Gillen LJ agreed with the Lands Tribunal. However, Stephens LJ and McBride J decided it was a lease. However, each gave different reasons for their decision. Stephens LJ decided that the lawyers and clients in recording that the "licence creates no tenancy or lease whatever between the parties" were guilty of a "pretence" given all the other indications in the agreement and the surrounding circumstances. McBride J also decided that it was a licence, but on different grounds. She did not consider that it was a "sham or a device" designed to evade the protection afforded by the Business Tenancies (NI) Order 1996 ("the 1996 Order") but rather it was a simple mistake and that the parties had inadvertently attached the wrong label to the relationship.

[40] However, it is of some significance that there was no mention or consideration in either the judgment of the Lands Tribunal or the Court of Appeal of the effect of Deasy's Act in general, and section 3, in particular. The reason being is that section 3 was not raised by either side as it should have been if the issue of whether it was a lease or licence was to be fully argued. Section 3 reads:

> "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."

[41] This section was described by Wylie as the starting point for the modern law: see 2.07 of Wylie's Landlord and Tenant Law (3rd Edition). He also comments:

> "The precise effect of this, almost unique, provision on the law of landlord and tenant in Ireland has been a matter of considerable controversy and not a little doubt."

Differing views have emerged as to what the section means and what its significance is for Landlord and Tenant Law in Ireland, both north and south of the border.

[42] As we have noted this section applied, at the time, both to Northern Ireland and the Republic of Ireland, but not to Great Britain. Its meaning has been the subject of considerable judicial scrutiny in different cases including *Northern Ireland Renewables Ltd v Carey*. Unfortunately, there is no unanimity about first of all what was the purpose in passing section 3 and secondly, as to what section 3 actually means in practice. Weatherup LJ in *Northern Ireland Renewables Ltd v Carey* said at paragraphs 16-18:

> "[16] There are three elements to section 3. The first is that 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. At common law the relation of landlord and tenant was based on tenure and on contract and tenure required a reversion. The first element of section 3 is a deeming provision that the relation of landlord and tenant is founded in contract. It is apparent that the relation of landlord and tenant also concerns a proprietary interest.
>
> [17] The second element of section 3 is that a reversion shall not be necessary for the relation of landlord and tenant. Prior to Deasy's Act the relation of landlord and tenant required a reversion. …
>
> [18] The third element of section 3 is that the relation of landlord and tenant 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. This is a second deeming provision in section 3. There is a requirement for 'rent' as a condition of deeming that the relation of landlord and tenant subsists."

This was the background to section 3 of Deasy's Act which allowed the parties in such circumstances to give effect to their intention of creating a reversionless lease, but at the same time keeping the head landlord at arms' length by providing that where a rent had been reserved the relation of landlord and tenant was deemed to exist.

[43] The role of the middleman in Ireland during the 18th and 19th centuries, had previously been examined by Professor JL Montrose in 3 NILQ page 83 onwards, and the reader, if he wishes to obtain a fuller explanation of the position, can do no better than refer to it. The situation can, however, be summarised briefly. Until the enactment of section 3 of Deasy's Act a middleman who wished to create a reversionless lease between himself and his sub-tenant encountered considerable

difficulties. Even though the parties intended to create a sub-lease, if the whole the middleman's term is assigned, the common law stepped in and frustrated the parties' intentions. This was the background to section 3 of the Deasy's Act which allowed the parties in such circumstances to give effect to their intention of creating a reversionless lease, while at the same time keeping the head landlord at arms' length, by providing that where a rent had been reserved the relation of landlord and tenant was deemed to exist. The Land Law Working Group at page 263, para 4.2.19 of their report summarises this in the following words:

> "…section 3 of Deasy's Act did not make contract the sole basis of the relation of Landlord and Tenant. It did not apply to that relation all the rules appertaining to contract. What it did was to allow the parties to constitute that relation by contract and in circumstances where the relation would not have arisen at common law. The category of the relation was extended by that section, and the law was to recognise as the relation of landlord and tenant a relation which the parties by their contract considered as being that of landlord and tenant."
> [the Tribunal's emphasis]

[44] The President of the Lands Tribunal, His Honour Judge Gibson QC, in *Todd v Unwin R/16/1992* also summarised the effect and background to section 3 of Deasy's Act as follows:

> "Until the enactment of section 3 of Deasy's Act a middleman who wished to create a reversionless lease between himself and his sub-tenant encountered considerable difficulties. Even though the parties intended to create a sub-lease, if the whole of the middleman's term was assigned the common law stepped in and frustrated the parties' intentions."

The President said:

> "The Tribunal has thus reached the conclusion that the real issue in this case is the intention of the parties, as gathered from a construction of the Deed of 14 July 1983."
> [Emphasis added]

[45] Section 3 of Deasy's Act was thus a statutory intervention to allow the parties to reflect their intention, namely to create a lease, although a middleman was assigning his entire term. What is important, however is that the starting point was the intention of the parties. Only if that intention is to create a lease (or a sub-lease)

does section 3 begin to bite. That is why the Land Law Working Group emphasised that:

> "… the law was to recognise as a relation of landlord and tenant a relation which the parties by their contract considered as being that of landlord and tenant."
> [Again the Lands Tribunal's emphasis]

[46] The decision of the Lands Tribunal in *Todd v Unwin* went on appeal to the Court of Appeal where Carswell LJ at [1994] NIJB 230 at 233E said:

> "The Tribunal examined the historical background of s3 of Deasy's Act and came to the conclusion that it is a permissive or enabling provision, which extends to a situation which relationship of landlord and tenant is created and does not purport to define them. We agree with the analysis of the object of the section contained in the Tribunal's decision and set our own views in a fairly summary manner."

[47] He then went on in giving judgment to look at what the President of the Lands Tribunal had said (and which we have set out) and said:

> "We agree with this statement of the law, and consider that the correct approach to the present case is to attempt at the outset to ascertain the intention of the parties in executing the 1983 deed, which is to be gathered from its construction."

[48] This approach of Northern Ireland's Court of Appeal followed the approach taken in many, but not all, of the cases in the Republic of Ireland, when the courts had looked at the objective intention of the parties in order to determine whether the agreement was a lease or a licence.

[49] In many cases in the Republic of Ireland it has been emphasised that in construing the agreement the court is seeking to find the objective intention of the parties. The issue of whether the agreement gives to the "grantee exclusive possession is an important consideration in ascertaining the true intention of the parties but not a determinative one": see 2.31 of Wylie on Landlord and Tenant Law.

[50] It was understood that the problem with licences and leases in the Republic of Ireland was going to be resolved by statutory intervention and the proposed provision that the court should give effect to the express agreement that a tenancy had been created except where it is established that a party had not received advice and therefore might disregard any such provision as to intention "if satisfied that to give effect to it would not reflect the true intention of that party or prejudice that party":

see 2.35 of Wylie on Landlord and Tenant Law. However the relevant reforming part of the Landlord and Tenant Law Reform Bill presented in 2011 by the Minister of Justice never found its way into the statute books.

[51] The general consensus in the Republic of Ireland was somewhat upset by Peart J's decision in *Smith v CIE* [2002] IEHC 103 where the trial judge placed much weight on the English authorities and emphasised the court's duty to see through sham agreements and the importance of "exclusive possession."

[52] In *NIHE v McCann* [1979] NI 39 Murray J held that in determining whether there is a tenancy the "fundamental law – so to speak – is section 3 of Deasy's Act." In *NIHE v Duffin* [1985] NI 210 Carswell J said about Murray J's dicta in *McCann* as follows:

> "His conclusion, with which I respectfully agree, was that section 3 of Deasy's Act requires an express or implied contract that a tenancy should be created, and that on the facts no such contract could be said to have been made."

[53] However, the decision in both these cases was given before the House of Lords' decision in *Street v Mountford* [1985] AC 809 when the House in Lords, in general, and Lord Templeman in particular, when considering the position under England and Wales land law, concluded at 823D:

> "Exclusive possession is of first importance in considering whether an occupier is a tenant."

Lord Templeman went on to say at 824E:

> "In my opinion the agreement was only 'personal in its nature' and created 'a personal privilege' if the agreement did not confer the right to exclusive possession of the filling station. No other test for distinguishing between a contractual tenancy and a contractual licence appears to be understandable or workable."

At 825C he stated:

> **"**But in my opinion in order to ascertain the nature and quality of the occupancy, the court might decide whether upon its true construction the agreement confers on the occupier exclusive possession. If exclusive possession at a rent for a term does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence becomes wholly unidentifiable."

Professor Wallace in his article on *Street v Mountford* at 41 NILQ 145 said that:

> "… a person who is in exclusive possession must have exclusive territorial control over it subject only to the possible limited rights of access which may exist in favour of others."

[54] In England and Wales the key issue in identifying whether an agreement gives rise to a lease or licence is the issue of whether the grantee has been given exclusive possession and the intention of the parties as to whether they entered into a lease or licence is of marginal relevance. Indeed, Lord Templeman said that "the professed intentions of the parties are irrelevant" : see p822B.

[55] In the Republic of Ireland, on the other hand, it has been emphasised in most of the cases that in construing the agreement the court is seeking to find the objective intention of the parties. The issue of whether the agreement gives the grantee exclusive possession is an important consideration in ascertaining the true intention of the parties, but it is not a determinative one unlike the position in England and Wales as we have already noted. Of course, in Northern Ireland some of the decisions to which we have referred preceded the decision in *Street v Mountford.*

[56] There are a number of issues which require careful consideration. These are:

(i) What is the relevance, if any, of section 3 of Deasy's Act?

(ii) Is the law in respect of lease and licence the same in Northern Ireland (and the Republic of Ireland) as in England and Wales despite section 3 of Deasy's Act which only applies to Ireland?

(iii) What is the effect of *Street v Mountford* given that section 3 of Deasy's Act applies to Northern Ireland?

[57] Unfortunately, even the commentators, are divided on these issues.

[58] In an article for the Northern Ireland Quarterly Review in 1990 at page 143 Professor Wallace in an article entitled "The legacy of *Street v Mountford*" looked at the issue of section 3 of Deasy's Act and concluded it was doubtful that the cases of *McCann* and *Duffin* made the "ratio of *Street* inapplicable to Northern Ireland." Firstly, because *McCann* predates *Mountford* and *Duffin* was based on pre-*Street v Mountford* English case law. Secondly, although section 3 was mentioned in both *McCann* and *Duffin*, both decisions were based largely on pre-*Street* English case law as to the effect of the statute. For example, in *McCann* Murray J cited with approval a passage from Woodfall's Landlord and Tenant (27th Edition, 1968) at page 3 which states:

> "The law does not impute an intention to enter into the legal relationship of landlord and tenant where the

> circumstances and the conduct of the parties negative any such intention."

[59] Professor Wallace went on to state that he considered that the Irish authorities were equally inconclusive. However, in *Gatien Motor Co Ltd v Continental Oil Co of Ireland Ltd* [1979] IR 406, for example, the Supreme Court had indicated that the intention of the parties which was "to be found in the terms of the contract between the two parties" (see Giffin J at p414) was a critical factor in determining whether or not there was a tenancy in existence. Exclusive possession was one of a number of factors that had to be taken into account in ascertaining that intention. However, Professor Wallace says that the deeming provision "appears to negative the paramountcy of subjective intention." He goes on to say that section 3 did "not make the intention of the parties conclusive" and that this is "demonstrated by the fact that this section does not say that the relationship is founded on contract but rather that it is deemed to be so founded, instead of tenure or service." He concludes that the test set out in *Street v Mountford*, once it has been determined that there is an intention to enter into a legal relations, is to decide as a matter of fact and law, whether what has been granted amounts to exclusive possession. If it does, then a lease has been created.

[60] Mark Hayward in his article entitled "Exclusive possession or the intention of the parties? The relation of landlord and tenant in Northern Ireland" NILQ 68(2) 203-223 takes a different view to Professor Wallace. Hayward says:

> "If, as seems to be the purpose behind section 3 of Deasy's Act, the relation arises out of the contract of the parties, then, in order to decide whether the relation has arisen, the contractual agreement will need to be construed and, in so doing, particular importance is placed on the intention of the parties as evidenced in the agreement. However, this approach to deciding whether the relation has arisen would appear to be incompatible with the House of Lords' decision in Street v Mountford, which held that the only relevant consideration is whether the tenant had exclusive possession of premises, the parties' intentions being irrelevant."

[61] Therefore, while exclusive possession will assist in determining whether there is a relation of landlord and tenant, it cannot be the determining factor in making that assessment. Mr Hayward analysed *Street v Mountford* and noted that the relation of landlord and tenant occurs as a "matter of law where exclusive possession has been granted for a term. The intentions of the parties are only relevant in deciding, first, whether the parties intended to create legal relations and, second, whether their agreement granted exclusive possession."

[62] Hayward comments that:

> "This sits uneasily with the statutory landscape in both parts of Ireland, where a tenancy is deemed to be founded on contract. If *Street v Mountford* were to be applied in Ireland, then there would be no place for contractual construction (other than to determine whether a contract existed). Such an application appears to be incompatible with section 3 of Deasy's Act and the *Street v Mountford* version of exclusive occupation that has not been applied in reported cases in either jurisdiction."

[63] Hayward concluded that greater weight should be given to the Republic of Ireland's Supreme Court decisions than those of the House of Lords because of the different statutory landscape prevailing in the different jurisdictions.

[64] It is unfortunate that section 3 of Deasy's Act was not considered by the Lands Tribunal or the Court of Appeal in *Car Park Services*. The continuing relevance of Deasy's Act to land law in all parts of Ireland may well be one of the reasons why Lord MacDermott, in his book "An Enriching Life" said:

> "And it might be even desirable to go a step further and agree with the South an identical or nearly identical code in both jurisdictions, for they suffer in their land law from a variety of defects due to similar causes." (see p209)

[65] It is fair to describe the legal landscape in Northern Ireland as being "woefully murky." In *Car Park Services* there was an obvious, but understandable, failure to definitively address the effect of section 3 of Deasy's Act. It seems to us reviewing all the relevant authorities that there was a strong argument for concluding that the proper test to be applied to this vexed question should be for any Tribunal or court in Northern Ireland to ask itself whether the contractual arrangements found to exist between the parties establish an intention by the owner to give exclusive possession of the relevant lands and effective control over those lands to the occupier during the period of the contractual arrangements. However, in light of the present uncertainty, we propose to consider the arrangements for both the first and second premises and whether those arrangements amounted to leases or licences not only from that view but also from the two other tests which have been propounded, namely:

(a) Was the occupier granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments per Lord Templeman at p818E of *Street v Mountford* ? or

(b) Was the intention of the parties, collected from the agreement, to enter into the relation of landlord and tenant?

We acknowledge that there is considerable overlap among all three tests.

[66] In *Car Park Services v Bywater Capital* [2018] NICA 22 the Court of Appeal considered some of the difficulties that can arise when trying to apply the law so as to distinguish between what is a lease and what is a licence on facts which can often be disputed and/or confused.

[67] The relevant legal principles, excluding the proper approach to section 3 of Deasy's Act, in respect of how to differentiate between a lease and a licence were summarised without apparent contradiction by BHC's legal team as follows:

(a) What must be determined initially is the terms of the agreement under which the occupier holds the premises in question: see *Street v Mountford* [1985] AC 809 at paragraph 819E. The court is looking for the "true bargain" struck by the parties regardless of the language used: see *Aslan v Murphy* [1989] 3 All ER 130 at 133.

(b) Once those terms have been determined, then for the agreement to constitute a tenancy, the occupier must be granted exclusive possession for a term: see *Street v Mountford* paragraph E at page 818 and paragraph C at page 825.

(c) To determine whether an agreement grants exclusive possession the court must consider the agreement as a whole.

(d) Exclusive possession means a legal right to keep out strangers and to keep out the owner: see *Street v Mountford* at page 816 (B).

(e) Exclusive possession is not the same as exclusive occupation. A person can be in exclusive occupation of premises but not have exclusive possession: see *Car Park Services* at paragraph [21] and Woodfall on Landlord and Tenant paragraph 1.023. The question is whether the occupier has a legal right to exclude all others (i.e. exclusive possession) and not whether the occupier has, in fact, enjoyed exclusive occupation. This is an important distinction.

(f) Following on from (e), in construing the agreement the subsequent actions of the party may not (save as stated below) be taken into account: see *AG Securities v Vaughan* [1990] 1 AC 417 at 469 and Car Park Services at paragraph [20](i). It does not therefore matter whether a party has <u>in fact</u> had exclusive occupation of the premises. What matters is whether <u>the agreement</u> grants exclusive possession.

(g) Whilst the party's subsequent actions are not relevant to the question of construction of the agreement which was originally reached, it can be relevant in determining whether an agreement is a sham: see *Car Park Services* at paragraph [20](k) and [84]. A sham is an agreement or series of agreements which are deliberately framed with the object of deceiving third parties as to the true nature and effect of the legal relations between the parties.

(h) If the owner has the ability to require an occupier to transfer his occupation to other premises selected by the owner, then this negates any grant of exclusive possession: see *Dresden Estates v Collinson* [1988] 55 P and CR 47.

[68] We stress that the courts should always be looking at the substance not the form. They want to find the "true bargain reached between the parties and will not be distracted or diverted from examining "the precise terms of the agreement and its surrounding circumstances": see Hoffman J in *Essex Planning Ltd v Broadminster Ltd* [1998] 56 P and CR 353 at page 356.

[69] Further, in a commercial lease, because of the importance of choosing a tenant who is going to abide by the covenants considerable care will be taken to ensure that a suitable tenant is found. Our experience is that in such a lease there will almost certainly be a clause precluding assignment (or sub-letting) without the consent of the landlord. If the agreement is a licence, then no right to assign arises, and no such clause is needed. Accordingly in deciding whether a commercial agreement is a lease or a licence, the absence of a clause precluding assignment of the lease (without the landlord's permission) is often a reliable indicator that the agreement is a personal one, that is a licence, and not one giving rise to an estate or interest, that is a lease, which can be assigned.

[70] It is also important to note that in a lease the "rent" cannot be varied at the whim of the landlord. If the rent is to be increased, then there will need to be provision for a rent review. With a licence, the fee can be varied at the discretion of the owner. A term in any agreement permitting the owner to unilaterally increase the rent is inimical to a lease. Therefore where a relationship of landlord and tenant exists in a commercial setting there will invariably be a rent review procedure providing for how any new rent is to be determined.

[71] It is important to stress that the applicants were not of equal standing to BHC. Their relationship was asymmetrical, as we have noted. BHC was more powerful and they had the benefit of legal advice. The company and Jacobson were not legally represented. They were small time employers making use of the Port's facilities to further their modest commercial ambitions.

D. The Company's Occupation

[72] It is first of all necessary to determine on what basis the company occupied the site on the Belfast Harbour Estate given that on the facts, as found, the agreement which BHC had originally was with a limited liability company, which went into liquidation and the business which had been carrying on at the site, unbeknown to BHC was an entirely different entity, Corey Transport, which was unincorporated. The company then, once it was incorporated, carried on the business previously carried on by Newtownabbey Limited and Corey Transport.

E. Terms of Occupation

[73] There can be no doubt that Newtownabbey Limited occupied the McCaughey Road premises at the Harbour Estate on the terms set out in the letter sent to it and signed by Jacqueline Corey, Corey's sister, as the authorised signatory of Newtownabbey Limited, on 23 November 1995. Accordingly, Newtownabbey Ltd was bound by those terms: eg see *L'Estrange v Graucob* [1934] 2 KB 394. If that was a licence to occupy, it terminated on the liquidation of Newtownabbey Limited. If it was a lease, then the benefit of the lease passed to the Crown as bona vacantia.

[74] On the basis of the evidence we find that Corey, who was the point of contact with BHC, continued to carry on the business from the McCaughey Road premises after Newtownabbey's liquidation through an unincorporated business, James P Corey Transport, without BHC being aware of what had happened to Newtownabbey Limited. While this does not reflect well on BHC, their dealings were with Corey, and he had been the effective representative of Newtownabbey Limited. Corey Transport continued to occupy 2 McCaughey Road, at best, on the same terms as Newtownabbey Limited, whether as lessee or licensee.

[75] There is, of course, an argument that given BHC's mistake as to the identity of the occupier rather than a mistake as to the attributes of the occupier, that any agreement was void. However, on balance, we consider that the relevant mistake was one as to attributes, given that BHC was content to deal with Corey.

[76] When Corey Transport moved from McCaughey Road to the first premises, we find, that Corey had concluded that given the terms of the 1995 agreement, he had no alternative. He knew that BHC had the authority under the 1995 agreement to re-allocate the unincorporated association to different premises. It may be that the move was made more attractive by the configuration of the first premises. However, we are satisfied that Corey's decision to move was primarily prompted by the terms of the 1995 agreement and BHC's ability to require Corey Transport to re-allocate to the first premises. As the move to the first premises was pursuant to re-allocation under the 1995 agreement, the occupation of the first premises was also on the same terms as the 1995 agreement. These are the relevant terms which the Tribunal must "meticulously examine" before coming to a conclusion about whether Corey Transport or the company occupied them as tenants or licensees.

[77] We do note that there were to be revised terms to the original licence to take account of the site area and the location: eg see fax of 28 December 2007 from Michael Robinson of BHC. Draft "licence" agreements were sent but never signed. If Corey (or the company) was making the case that he had a lease not a licence, and he was perfectly well aware of the important distinction from 2000 at the very latest, then we would have expected him to do so at this time. For example, we would have expected him to send a letter setting out what he claimed the legal position to be. At a minimum, we would have expected him to make a phone call contradicting the assertion by BHC that Corey Transport only had a licence. His silence speaks volumes.

[78] It does appear from the correspondence that BHC did find out that the unincorporated Corey Transport had been incorporated into the company: eg see letter of 22 October 2018. BHC made the case that the company occupied the first premises "on foot of a licence agreement." This was not contradicted by either the company or Corey. Again, we find this to be of significance.

[79] For the avoidance of doubt, we find on the basis of all the evidence, both written and oral, that Newtownabbey Limited occupied the McCaughey Road premises on foot of the 1995 agreement. When it went into liquidation in 2000 Corey took over on the same terms without BHC being aware of the change of occupier. Those terms of occupation did not change. The first premises were allocated to Corey Transport in 2007 and Corey moved because he felt obliged to do so under the terms of the 1995 agreement given that BHC were permitted to make such a re-allocation and he was required to accept it. The company was then incorporated and BHC impliedly agreed to take it as the occupier on the same terms as its unincorporated predecessor. In other words the company occupied the first premises on the same terms as Newtownabbey Limited and Corey trading as JP Corey Transport had done so, namely under the terms and conditions of the 1995 agreement.

Jacobson

[80] Jacobson had occupied 2B McCaughey Road, Belfast from 1987 to 2008. The terms on which he had occupied these premises from September 1995 were contained in an agreement of 11 September 1995 for covered storage within the Belfast Harbour Estate. That agreement was signed by Jacobson, a businessman with limited academic qualifications and no legal advice. Again, we are satisfied after hearing the witnesses give evidence that BHC required 2B McCaughey Road for its own purposes and that Jacobson moved following service of the notice to quit on 18 May 2007 because he realised that under the terms of that agreement he had no alternative. As noted BHC had the power under the agreement to re-allocate an occupier to other premises It is also important to note at that time that he had been advised some seven years before as to the difference between a licensee and a lessee and the protection that was afforded to a lessee with a business lease but not to a licensee. In any event we find that he moved to the second premises at Stormont Road because he appreciated that under the 1995 agreement he had no alternative. We have no doubt that Jacobson knew that in the absence of agreeing new terms he would be occupying the second premises on the terms of the 1995 agreement. Again, there were further proposals put forward by BHC as to the occupation of the second premises: see letter of 1 October 2007 proposing a 10 year agreement. These never appeared to have crystallised into a further agreement. However, Jacobson has never asserted either in correspondence or orally that he enjoyed a lease, not a licence, over the second premises. We are satisfied from the evidence that he moved to the second premises at the prompting of BHC because he had concluded the terms of the agreement that he had with BHC left him with no alternative but to comply with the re-allocation of premises put forward by BHC. We conclude that Jacobson occupied the second premises from 23 February

2008 to date pursuant to the terms of the 1995 agreement. Again, it is of considerable significance it is only now in 2021/2022 that Jacobson has for the first time made the case that he has a lease not a licence over the second premises. We are satisfied that Jacobson occupies the second premises pursuant to the 1995 agreement having been allocated these under clause 2 of that agreement.

Lease or licence?

[81] The 1995 agreements entered into with the company and Jacobson respectively are for open storage and covered storage respectively. The terms of the agreement are identical save that in the terms offered for covered storage there is a clause at 11.7 which states:

> "That if the Storage Shed shall be at any time fitted with roller shutter doors you forthwith enter into a contract with a reputable contractor previously approved by the commissioners for the routine maintenance and repair of such doors and that you pay all fees and charges in relation thereto and indemnify the Commissioners in respect thereof."

This clause is not of assistance in deciding whether or not the agreement constitutes a lease or a licence.

[82] The conditions which are common to both agreements are as follows:

> "1.1 That you use the Storage Area for the storage of materials and goods of the nature set out in the Schedule in transit through the Port of Belfast and as ancillary thereto for temporary offices and parking of vehicles (`the Permitted User')."

There is nothing in this condition which assists in determining whether or not the agreement is a lease or a licence.

> "1.2 All materials and goods stored must have been imported or must be intended for export in either case through the Port of Belfast and in the case of export must be so exported within a reasonable period and in the case of import must be distributed from the Storage Area within a reasonable period."

Again, this clause is consistent both with a lease and a licence.

> "1.3 That you pay a charge for the Storage Area commencing at the initial rate set out in the Schedule

> which charge will be payable one with arrears such charge to be subject to periodical review by the commissioners at their discretion which shall be absolute."

This clause is only consistent with the agreement being a licence. Rent is fixed, subject to rent review clauses. It is only a fee under a licence that can be charged at the sole discretion of the licensor.

> "1.4 Your occupation in the Storage Area complies with the Belfast Harbour Acts Bye-Laws 1974 made thereunder and any statutory amendment or re-enactment thereof and the requirements of the Health and Safety Inspectorate."

This is consistent both with a lease and a licence.

> "1.5 You pay the Commissioners the cost of electricity and/or water consumed at the Storage Area such payment to be made within one month from the date of furnishing account."

Again, this is consistent with there being in place a lease or a licence.

> "1.6 No material goods, plant or equipment be placed against any fence of the Storage Area and loading to the surface of the Storage Area shall not exceed the weighting which the surface is designed to bear which design weighting you shall obtain by inquiry from the Engineering Manager or his deputy. In the event of breach of this condition you will immediately make good all damage to the Storage Area to the satisfaction of the Commissioners and at your own expense."

Again, this clause is consistent with both a lease or a licence.

> "1.7 That if the Storage Shed shall at any time be fitted with roller shutter doors you forthwith enter into contract with a reputable contractor previously approved by the commissioners for the routine maintenance and repair of such doors and that you pay all fees and charges in relation thereto and indemnify the Commissioners in respect thereof."

This is the only clause which is not common to both and it appears in the covered storage agreement relating to Jacobson. It is consistent with their being both a lease and a licence.

> "1.8 That you indemnify the Commissioners against all losses, damages, expenses which may be sustained or incurred by the Commissioners in all actions, proceedings, claims and demands which may be brought or made against the Commissioners in respect of any damage done to any property whether belonging to the Commissioners or not and any injury caused to any person whether in the employment of the Commissioners or not and any other damage or injury whatsoever where such loss, damage, expense or injury in any way arises out of or is in any way either directly or indirectly attributable to or caused by your use or occupation of the Storage Area except insofar as such loss, damage, expense or injury is attributable to the act or default of the Commissioners, their servants or agents."

This clause is consistent with both a lease and a licence. We appreciate that both premises are locked and covered by CCTV and that BHC apparently does not have a key to access them. But it is not exclusive occupation which is the test. But it is territorial control of the premises which is very different: see (2) below.

> "1.9 That if the Storage Area is gated you ensure that all gates of the Storage Area are and remain closed except when vehicles and persons are entering or exiting from the Storage Area."

This clause is consistent with both a lease and a licence.

> "1.10 That on any termination of this Licence the Storage Area is returned to the Commissioners in a condition comparable to that of the date of commencement of this Licence."

Again, this is consistent with both a lease and a licence.

> "2. The Commissioners may by terminating this Licence change the allocation of the Storage Area to another Storage Area in the Harbour Estate by giving to you notice in writing specifying the other Storage Area provided in the event of the other Storage Area not being acceptable to you, you may terminate this Licence."

This clause is consistent with a licence and inconsistent with a lease. The ability of BHC to move occupants around the Harbour Estate in the interests of flexibility is inconsistent with the occupants having exclusive possession. In both the case of the company and Jacobson, BHC has sought to reallocate the company and Jacobson to

different premises. We have found that both the company and Jacobson have moved as a consequence. We do not accept the reasons offered by the company and Jacobson for moving from the premises they had previously been occupying. We find that each of them moved to the first and second premises respectively in 2007/2008 on the instruction of BHC. This clause is an operative one. It is not a sham. It was the reason why, we find, both the company and Jacobson felt compelled to move their premises, regardless of what they might say now.

> "3.1 This Licence may be terminated by the Commissioners giving to you notice in writing given at any time."

The ability to terminate the agreement at any time suggests that this is more likely to be a licence than a lease.

> "3.2 Any termination of this Licence should be without prejudice to any claims by the Commissioners for antecedent breach of the conditions of this Licence or any of them."

This clause is consistent with both a lease and a licence.

> "4. If this Licence should be terminated immediately you shall remove all items from the Storage Area making good any damage done to the Storage Area."

This clause is consistent with both a lease and a licence.

> "5. The Storage Area is at all materials times shall remain the sole property of the Commissioners."

This clause is highly suggestive of a licence rather than a lease as it makes clear that the occupier does not enjoy exclusive possession.

> "6. All goods laid down on or passing over the quays of the Commissioners or placed in the Storage Area or elsewhere within the Harbour Estate are at your sole risk in every respect. The Commissioners have no custody of such goods and will not be responsible for loss thereof or damage thereto for whatever cause arising. Persons in charge of goods should protect them from such loss, damage or injury. Special care is necessary in the case of goods susceptible to taint or stain or damage from other goods."

This clause is consistent with both a lease and a licence.

> "7. If on the termination of this Licence any property remains on the Storage Area, the Commissioners may remove such property and if you have not collected it within 14 calendar days after termination of this Licence the Commissioners may sell it as your agent and retain the proceeds of sale and the indemnity in paragraph 1.7 shall apply to any claim from any third party resulting from any such sale."

This clause is consistent with both a lease and a licence.

> "8.1 This licence is personal to you as it is not in any circumstances transferable nor may it be under let or under licence nor does it permit any partner or other person connected with you to use the Storage Area."

This clause is consistent with a licence and inconsistent with a lease.

> "8.2 This licence is not intended to create or grant to you any estate or interest in the Storage Area or to give rise to the relationship of landlord and tenant."

This clause is consistent with a licence not a lease. However limited weight can be given to it because of the asymmetrical nature of the relationship between the Commissioners and both the company and Jacobson. We will look to the substance of the agreement.

> "8.3 You shall not be or become entitled to any estate or priority interest in or to exclusive possession or occupation of the Storage Area."

This clause is consistent with a licence but inconsistent with a lease. However limited weight can be given to it because of the asymmetrical nature of the relationships.

> "9. Any notice to be served on the Commissioners pursuant to this Licence shall be served at the Belfast Harbour Office and any notice to be served on you may be left at the Storage Area or by ordinary first class post to your address last known to the undersigned."

This clause is consistent with both a lease and a licence.

[83] Some terms set out above in respect of agreement are inconsistent whether taken on their own or taken together with there being a lease in place in either case. They are however consistent with each agreement being a licence. This is further

emphasised by the language of the licence which is being used. Of course, as we have emphasised, the Tribunal will always look to the substance not the form. The Tribunal will not be side-tracked in its search for the true bargain by the use of language if its only purpose is to serve as camouflage.

[84] However, the matter is put beyond any doubt by the clauses which are not included in the agreement. Any commercial lease will necessarily include the following terms:

(a) The right to re-enter in the event of non-payment of rent.

(b) The right to re-enter in the event of breach of covenant.

(c) The prohibition against assignment save with the consent of the landlord.

The absence of these terms, all of which will inevitably be included in a professionally drafted lease (and these are professionally drafted documents) is a very strong pointer to both agreements being licences not leases. A licence does not need such terms because of the different personal nature of the occupation. We also take into account the basis upon which the rates are assessed which is consistent with the respective occupations being licences.

[85] We have no doubt the true bargain reached between firstly the company and BHC and secondly between Jacobson and BHC was in each case a licence. This is clearly demonstrated by a careful perusal of each of the agreements and involves looking at the terms included in each agreement and the terms omitted from each agreement. We find on the evidence adduced that both the company and Jacobson had contractual licences over the first and second premises.

[86] In the end it does not matter how the Tribunal approaches the issue of whether there is a lease or a licence. Regardless of whether the Tribunal approaches it on a strict *Street v Mountford* approach and looks at whether exclusive possession was granted to the applicants or whether it looks at the objective intention of the parties as manifest in the agreement for the occupation of the first and second premises, the answer remains the same. Indeed, the same conclusion is reached if the test favoured by this Tribunal is used. On the evidence before this Tribunal there can only be one answer in respect of both the occupation of the company and the occupation of Jacobson. It is an unequivocal one because neither applicant enjoyed exclusive possession of the premises which they occupied nor was it intended that they would have exclusive possession. Further, neither agreement intended to establish the relation of landlord and tenant. At all times the Tribunal finds that neither applicant had effective control over the first and second premises.

F. Conclusion

[87] In the circumstances, on the basis of all the evidence adduced, and for the reasons appearing above, the Lands Tribunal has no hesitation in concluding that:

(i) Firstly, the agreement entered into between the company and BHC which presently governs their relationship in respect of the first premises is a licence not a lease;

(ii) Secondly, the agreement entered into between Jacobson and BHC and which presently governs their relationship in respect of the second premises is a licence not a lease.

The Honourable Mr Justice Horner and
Henry Spence MRICS Dip.Rating IRRV (Hons)
LANDS TRIBUNAL FOR NORTHERN IRELAND

6 May 2022