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Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 13/05/14

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

2012/05420

CHANCERY DIVISION

NORTHERN IRELAND RENEWABLES LTD

Plaintiff

and

HARRY CAREY

Defendant

DEENY J

[1] The plaintiff herein issued proceedings against the defendant on 24 September 2012. The principal relief sought with relevance to this judgment was an order for specific performance of a contract made, on the plaintiff's contention, on 1 December 2010 by notice pursuant to an option agreement of 5 December 2003 requiring the defendant to grant a lease of premises to the plaintiffs in the terms set out in a draft lease annexed to the said option agreement.

[2] The option agreement allowed the plaintiff to exercise the option within 7 years of 5 December 2003. It did so almost at the limit of that period. It contends that that entitles it to a lease of the defendant's lands, as set out in the agreement and draft lease, on which it may erect one or more wind turbines.

[3] The plaintiff, on 15 November 2013, issued a summons for summary judgment in connection with this matter. When the matter was case managed before me on 5 December 2013 the view was collectively arrived at that the matter would be better dealt with by way of an Order 33 summons to resolve one or more preliminary issues of law regarding the interpretation and enforceability of the option agreement and draft lease. In the events it was the defendant which issued that summons. It was amended on consent and the court was left with 3 questions for consideration.

- (i) Whether the draft lease reserves a rent within the meaning of Section 3 of the Landlord and Tenant Law Amendment Act (Ireland) 1860?
- (ii) If the answer to (i) is in the negative, whether this means that the draft lease does not (and cannot) give rise to the relationship of landlord and tenant between the plaintiff and the defendant?
- (iii) If the answer to (ii) is in the affirmative, whether the draft lease then constitutes a contractual licence and whether the defendant is obliged to grant that contractual licence to the plaintiff?

[4] The essence of the matter as to the first question was this. The rent to be paid to the defendant under the draft lease, if the option was exercised by the plaintiff, as here, was to be calculated under the third schedule to that draft lease. Pursuant to that schedule the tenant, i.e. plaintiff, was to pay the landlord defendant rent per year at the rate of £2,000 per megawatt of manufacturers rated installed capacity from the first day of contracted supply. However, the defendant points out that that meant there was no rent payable at the date the draft lease was entered into because at that time there was no wind turbine producing electricity, let alone one which had commenced contracted supply. There was no minimum rent figure, nominal or otherwise, specified in the draft lease.

[5] Furthermore, and importantly, the draft lease did not impose a duty on the plaintiff to erect wind turbines, even if it exercised the option, either within a specified time or at all. It could enjoy the lease for the term of 25 years without building a wind turbine and, therefore, without paying a penny in rent to the defendant. His counsel submitted that there was therefore no rent, properly defined, payable under the lease or, at least, no certain rent.

[6] Mr Douglas Stevenson appeared for the plaintiff and Mr Stephen Shaw QC with Mr Mark Reel for the defendant. There was no dispute between them that the Landlord and Tenant Law Amendment Act (Ireland) 1860, commonly referred to as Deasy's Act from the name of the law officer who was responsible for its passage through the House of Commons, does require a rent, i.e. "any sum or return in the nature of rent, payable or given by way of compensation for the holding of any lands" (Section 1 and see Section 3).

[7] The area of dispute was as to whether this could and did in law constitute a rent. Counsel referred to Irish Shell and BP Ltd v Costello [1891] ILRM 66; Escalus Properties Ltd v Robinson [1995] 4 All ER 852; R v Westbrook [1847] 10 QB 177; Attorney General of Alberta v Huggard [1953] AC 420; Daniel v Gracie [1844] 6 QB 144 and Street v Mountford [1985] 1 EGLR. I also considered Ashburn Anstalt v Arnold [1989] Ch. 1 and Prudential Assurance Company Ltd v London Residuary Body [1992] 3 All ER 504. Counsel also referred to leading text books on the subject.

[8] In the light of my conclusion on the second question it is not necessary for me to resolve this interesting point.

[9] It was an essential part of the defendant's case for the determination of these preliminary issues that not only did the rent provided for in the Draft Lease not constitute a rent within the meaning of Deasy's Act but that Deasy's Act was the only way in which the relationship of landlord and tenant could be formed in Ireland, including, for these land law purposes, Northern Ireland. It was necessary for them to establish this as it clearly is not the law in England that the payment of a rent is essential to create the relationship of landlord and tenant. See Woodfall, Law of Landlord and Tenant, Volume 1, paragraph 7.003 and Ross, Commercial Leases: Division G, Rent Review, Chapter 10, paragraph 768 and the case law cited therein.

[10] The defendants' starting point must be Section 3 of Deasy's Act itself. It reads 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."

[11] The first thing that must be said about that is that it does not expressly say that it is the only way of creating the relationship of landlord and tenant in Ireland thereafter. It says that the relationship of landlord and tenant is founded on the contract between the parties. That could be a contract not requiring rent, although if there is rent then the relationship is deemed to subsist.

[12] The defendant relies on part of the conclusion of the learned authors of Wylie, Irish Landlord and Tenant Law, 3rd issue, paragraph 2.10. But it is necessary to quote a slightly longer extract than that relied on by the defendant. This is at the conclusion of a consideration of the matter by the authors:

"The arguments seem evenly balanced and, with a dirth [sic] of authority, difficult to resolve. Fortunately, as the weight of judicial authority suggests, the point probably has little practical significance, except, perhaps, on the question of whether rent must be reserved. On this question, we take the view that the better opinion is that a rent must be reserved to create the relation in Ireland."

[13] The defendant also relies on the dissenting opinion of Kenny J in a three man Irish Supreme Court in Irish Shell and BP Ltd, op. cit. I am not convinced that the

majority were expressing any clear opinion on this issue, as Mr Shaw argues. If they were it was obiter and, in any event, not binding on me.

[14] I drew to the attention of counsel a decision of the Court of Appeal in Northern Ireland which appears to me to resolve the issue. It is an unreported judgment of Carswell LJ, as he then was, in Todd v Unwin and Others, 5 May 1994, sitting in the Court of Appeal with one or more unnamed colleagues. This was on an appeal from a decision of the Lands Tribunal for Northern Ireland in which the then President, His Honour Judge Gibson QC, held in favour of the respondent on a preliminary point of law. The facts were quite different from those before me and involved an issue as to whether a deed operated as an assignment or a sub-lease. The following passage is, however, very relevant.

“The Tribunal examined the historical background of section 3 of Deasy's Act and came to the conclusion that it is a permissive or enabling provision, which extends the situations in which the 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 can set our own views in a fairly summary manner.

At common law a reversion was always required to create the relationship of landlord and tenant: Pluck v Digges [1832] 5 Bligh NS 31; Porter (lessee of) v French [1844] 9 Ir LR 514. The object of enacting section 3 of Deasy's Act was to make provision for the "middlemen", who stood between the great landowners and their tenants. Their role was of considerable social importance in rural Ireland in the 18th and 19th centuries. They were the agents of absentee landlords, who in effect operated as retailers of land to the tenant occupiers, in that they took larger holdings from the landlords, by way of wholesale transactions, then sub-let in smaller holdings to the occupiers without reserving a reversion. In the absence of a reversion they might find themselves unable to invoke the remedies available to a landlord, such as distress. Historically one of the main reasons for the enactment of section 3 of Deasy's Act was to confer a lessor's rights upon the middleman and fee farm grantor: see Wylie, *Irish Land Law*, 2nd ed, para 17.006; Montrose, "The Relation of Landlord and Tenant", [1939] 3 NILQ 81;

and of Chute v Busted [1865] 16 ICLR 222. The Land Law Working Group summarised its effect in their Report, para 4.2.19, in a passage quoted by the learned President of the Lands Tribunal in his decision:

‘. . . 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 do was to allow the parties to constitute that relation by contract 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 conclusion which the President of the Lands Tribunal drew from this is contained in a passage at pages 9 to 10 of his decision:

‘Section 3 of Deasy's Act was thus a statutory intervention to allow the parties to reflect their intention (namely to create a lease, even although the middleman was assigning his entire term). What is quite vital, however, is that the starting point is the intention of the parties. Only if that intention is to create a lease (or a sub-lease) does section 3 begin to bite . . . The argument for the Respondents in the present case thus appears to have been based on a false premise. It begins by looking for a rent, and having found one, works backwards by way of ex post facto rationalisation. A rent exists, therefore the relation of landlord and tenant is deemed to exist, therefore the deed of 4 July 1983 is a lease and not an

assignment. The proper starting point is, however, not whether a rent has been reserved but the intention of the parties in creating the deed of 4 July 1983. If that intention was to create the relationship of landlord and tenant then section 3 of Deasy's Act helps the parties. If, however, the intention was the opposite then section 3 has no role to play.'

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."

[15] Mr Shaw submits that these remarks are obiter dicta. Even if this is so and this judgment in our Court of Appeal is not expressly binding upon me, I propose to follow it. I respectfully agree with the view the Court and Judge Gibson Q.C. formed and consider it clearly preferable to the alternative, for the reasons set out therein and at [11] above. On that basis, therefore, the second question of those posed to me must be answered with the finding that the draft lease can and does give rise to the relationship of landlord and tenant between the plaintiff and the defendant, whether or not there is a rent compliant with Deasy's Act, so far at least as the issues have been canvassed before me. The court was informed that the defendant had issued proceedings against the solicitor who had acted for him in 2003.

[16] In the circumstances therefore it is neither necessary nor appropriate to address the third question. Mr Shaw submitted, in any event, that that proposition had not been pleaded and was not in a position to be resolved by the court.