THE HIGH COURT

[2021] IEHC 334

[2019 No. 415 COS]

IN THE MATTER OF ETHAFIL LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 631 OF THE COMPANIES ACT 2014

BETWEEN

MYLES KIRBY

APPLICANT

AND

EXPRESS BUS LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 14th day of May, 2021

Introduction

1. Ethafil Limited (In voluntary liquidation) ("*the Company*") is the registered owner of the property in Folio 51988F, County Dublin, which is known as Birmayne House, Mulhuddart, County Dublin. The property was formerly the headquarters of Pierse Contracting Limited ("*Pierse*") which collapsed in 2010 and went into receivership and liquidation.

2. By lease dated 15th May, 2012 Pierse, by its receiver, demised part of the property to Express Bus Limited ("*EBL*") for a term of three years from that date at an annual rent of €35,000.

3. On 19th February, 2015 EBL signed a contract to buy the entire property from Pierse for €1,005,990. That contract provided for the payment of a deposit of €100,559 and for completion in four weeks. The deposit was paid but EBL did not have the money to complete.

4. In November, 2015 an investor was identified who had, or could find, the money to fund the completion of the purchase and on 11th November, 2015 an agreement was signed the commercial object of which was to see the purchase completed by the investor, who would then grant to EBL a new lease of that part of the property which it occupied *("Lot 2*"), and options to purchase Lot 2 and the balance of the property ("*Lot 1*").

5. At the time of the contract between EBL and Pierse the Company was a wholly owned subsidiary of EBL but it was a shell company which was later used by the investor as the corporate vehicle by which the purchase was completed. In the years that followed there was a protracted exchange of correspondence, but the formal lease and option agreements contemplated by the agreement of 11th November, 2015 were never put in place. All the while EBL has remained in possession of Lot 2. It claims, variously, to be entitled to purchase Lot 2, alternatively to be entitled to a new lease of Lot 2. The Company claims that it is entitled to neither.

6. On 18th June, 2019 the Company went into liquidation and Mr. Myles Kirby was appointed liquidator. By this application Mr. Kirby seeks the directions of the court as to the rights and liabilities of the parties in relation to the property.

The facts

7. There was a protracted exchange of affidavits on the motion but to a considerable degree these were argumentative. In the end there was little or no dispute as to the objective facts, but it took some time for the full picture to emerge, partly because each of the parties was reacting to what the other had said and partly because for a long time the deponents on each side had had no direct involvement with the underlying business but were working from their files.

8. By lease made the 15th May, 2012 between Pierse, by its receiver, and EBL, Pierse demised that part of Birmayne House shown outlined in red on a map attached to EBL for a term of three years from 15th May, 2012 at a rent of €35,000 per annum, payable by equal quarterly instalments in advance. By a deed of renunciation of the same date EBL renounced any entitlement it might have under the provisions of the Landlord and Tenant Acts to a new tenancy.

9. By agreement in writing dated 19th February, 2015, in the Law Society of Ireland standard form but hollowed out by a number of special conditions, Pierse agreed to sell and EBL to purchase all of the lands comprised in Folio 51988F, County Dublin, subject to and with the benefit of the lease of 15th May, 2012, for €1,005,990. The contract provided for payment of a deposit of €100,599 and for completion in four weeks. Special condition 20 provided that the purchaser should not assign, novate, sub-sell or otherwise dispose of its interest in the property under the contract but that the purchaser might call for an assurance to a wholly owned subsidiary.

10. The deposit provided for by the contract of 19th February, 2015 was already in the hands of the vendor's solicitors, to whom EBL's solicitors had paid €10,000 on 2nd October, 2014, €40,599 on 13th February, 2015, and €50,000 on 16th February, 2015. The deposit monies had come as to €50,599 from EBL and as to €50,000 from the investor.

11. By agreement in writing dated 11th November, 2015 made between EBL, referred to as the Purchaser, the Company, referred to as the Company, Kathleen Martin, referred to as the Shareholder, and Jon Griffin, referred to as the Transferee, Mr. Griffin agreed to procure the advance to the Company of a loan in the amount of the balance of the consideration payable under the contract for the purchase of the property, and EBL and Mrs. Martin agreed to procure the transfer to Mr. Griffin of the entire issued share capital in the Company. By clause 2.1.6 it was provided that the Company and EBL would "*enter into the required property documents to give effect to the terms as set out at Schedule 1.*"

12. The issues between the parties turn on the construction and effect of Schedule 1 and I will set it out in full:-

> ***"Schedule 1 – Terms of the Lease Agreement and Option Agreement***
> *1. The Parties agree that at the Second Completion Date a:*

(i) *lease agreement; - FRI lease in the form of the Laffoy precedent subject to repairing clause being limited to a schedule of condition as of the date, of commencement;*

(ii) *deed of renunciation; and*

(iii) *a number of option agreements; incorporating the agreements at Clause 2 and 3 below will be entered into between the Company and the Purchaser in respect of Lot 2.*

2. *The Parties agree that the principal terms of the documents to be entered into between the Company and the Purchaser in respect of Lot 2 at the Second Completion Date shall be as follows:*

(i) *the Company will agree to grant, and the Purchaser will agree to take, a lease over Lot 2;*

(ii) *the rent that will be payable under the lease agreement will be €50,000 (plus VAT if applicable) per annum exclusive monthly in advance;*

(iii) *the initial term of the lease will be five years;*

(iv) *the Company will grant an option (which option shall be assignable) to the Purchaser to acquire Lot 2 within the first twelve months of the term of the lease for the sum of €190,000 exclusive of VAT. Should the Purchaser exercise the option during the option period the €190,000 will be reduced by an amount equal to any rent paid by the Purchaser during that period;*

(v) *failure to make three monthly payments in full and on time will cause the option to lapse; and*

(vi) *should the Purchaser exercise the option during the option period then on completion of the sale of Lot 2 to the Purchaser, the Purchaser shall grant the Company an option to purchase Lot 2 at market value should the Purchaser offer Lot 2 for sale to any arm's length third party;*

(vii) *for the avoidance of doubt the Purchaser will be given credit for the sum of €50,590 (sic.) already paid pursuant to the contract when exercising the option.*

3. *In addition, the Parties agree that a further option agreement will be entered into between the Company and the Purchaser at the Second Completion Date as follows:*

(i) *the Purchaser shall have an option to purchase Lot 1 at market value should the Company offer Lot 1 for sale to any arm's length third party;*

(ii) *the option shall be assignable however, the option shall not expire (sic.) should the lease agreement in respect of Lot 2 not be renewed after the 5-year term.*

(iii) *the Company must serve notice on the Purchaser of its intention to sell Lot 1 and the Purchaser shall have ten days to elect to exercise its option; and*

(iv) *the market value of Lot 1 will be determined [by] an independent valuer from either the offices of BNP Paribas Real Estate (Dublin) or CBRE (Dublin).”*

13. Lot 1 and Lot 2 were shown outlined in red on maps attached to the agreement as Schedule 2 and Schedule 3. The same map was used for each of Schedule 2 and Schedule 3, which was an extract from an ordnance survey map which had been copied into an estate agent’s brochure.

14. The Second Completion Date was defined in clause 1 as “*the date on which the Transferee executes the lease for Lot 2 in favour of the Purchaser”*. The First Completion Date was the date on which the purchase of the property would be completed by the Company.

15. The reference in the definition of Second Completion Date to the Transferee is obviously a mistake. Mr. Griffin was to take a transfer of the shares in the Company. It is clear from clause 2 of the agreement and clause 2(i) of Schedule 1 that it was the Company which was to complete the purchase of the property and it was the Company which was to grant the lease.

16. Clause 4.1.4 of the agreement provided:-

“4.1 [EBL] represents and warrants to [Mr. Griffin] that on the date of this Agreement …

4.1.4 this Agreement constitutes legal, valid and binding obligations of [EBL] and [the Company] and such are enforceable against [EBL] and [the Company].”

17. Clause 5.1.5 provided that:-

“5.1 [the Company] and [EBL] each covenant and undertake with [Mr. Griffin]: …

5.1.5 [to] do all things as are necessary to ensure the achievement of the First Completion and the Second Completion;”

18. By deed dated 1st December, 2015 made between Independent Trustee Company Limited (“*Independent Trustee*”) and the Company, Independent Trustee agreed to lend to the Company €800,000 to complete the purchase. Unless in the event of default in the meantime, the loan was repayable in three years, at which time the Company was to pay interest at the rate of 8.25% per annum, plus 3% of the market value of the property at that time.

19. By debenture dated 18th December, 2015 the Company gave Independent Trustee a first fixed charge over the property comprised in Folio 51988F, County Dublin and a floating charge over all of its other assets, rights and property. Particulars of the charge were

duly given to the Registrar of Companies and on 25th February, 2016 it was registered as a burden on the folio.

20. On 24th December, 2015 Mrs. Martin resigned as a director of the Company and was replaced by Mr. Griffin. On the same day the other director and the company secretary of the Company, Mr. Sean Reynolds, resigned and he was replaced in both offices by Mr. Paul Gilmer.

21. On 25th February, 2016 the Company was registered as the owner of the property comprised in Folio 51988F. That was the same date as the date on which the charge to Independent Trustee was registered as a burden on the folio. There is no direct evidence as to the date on which the sale and purchase of the property was completed but it appears from a letter of 6th September, 2016 from the Company's solicitors to EBL, to which I will come, that it was on 18th December, 2015, which tallies with the date of the debenture.

22. On 22nd March, 2016 Mason Hayes & Curran, solicitors for the Company, wrote to McGarr, solicitors for EBL. The letter was marked "*subject to contract/contract denied*". Enclosed with it were a draft option agreement in respect of Lot 1, a draft option agreement in respect of Lot 2, a draft contract for sale in respect of Lot 1, a draft contract for sale in respect of Lot 2, a draft lease in respect of Lot 2, and a draft deed of renunciation in respect of the lease. It was said that the Company was having new maps prepared and intended to sub-divide the property and to carve out a folio in respect of Lot 1.

23. The draft option agreement for Lot 1 contemplated a five year option from 1st January, 2016, exercisable by notice in writing, to buy at open market value – defined as the higher of two valuations to be carried out by BNP Paribas (Dublin) and CBRE (Dublin). The draft option agreement for Lot 2 contemplated an option commencing on the execution of that document and ending on 31st December, 2016, exercisable by notice in writing, to purchase at the price of €190,000 plus VAT "*to include the Deposit [of €50,590] paid to the Grantor".* The draft contract for sale of Lot 1 was in the Law Society standard form, watered down (as the contract between Pierse and EBL had been) by a number of special conditions which would oblige the purchaser to take the property warts and all. The draft contract for Lot 2 was in the same form and showed the purchase price at €190,000, a deposit payable on execution of €19,000, and a balance of €171,000. The draft lease contemplated a term of five years from an unspecified commencement date at a rent of €50,000 per annum, payable by monthly instalments in advance. The demised premises were defined by reference to a map which was not provided, and the permitted user was "*to be confirmed*". It was a full repairing and insuring lease. Counsel were unable to say whether the draft lease was in the form of the Laffoy precedent. The tenant's repairing obligation was not limited in the manner provided for by clause 1(i) of Schedule 1 to the agreement of 11th November, 2015. The draft deed of renunciation was in the usual form.

24. McGarr addressed the draft documents in a letter of 13th June, 2016. It appears from that letter that a proposed map had come in in the meantime. McGarr were not prepared to agree that map because it was inlined rather than outlined, and it was said not to be of a suitable scale to show the agreement of the parties.

25. McGarr made a number of points in relation to the drafts. As to each of the draft option agreements, the proposed arbitration clause was said to be inconsistent with the agreement of 11th November, 2015 which provided for litigation; and the proposed provision that the options would be non-assignable was inconsistent with clause 2 of Schedule 1 which provided that they would be assignable. McGarr asked the Company's solicitors to please delete from the draft contracts for sale the special conditions in relation to title, roads and services, planning and so on.

26. As to the draft lease, McGarr invited the Company's proposal as to permitted user and made a number of very minor suggestions such as that the covenant to pay the landlord's costs of an application to assign or sub-let should be limited to its reasonable costs, and that there should not be an express covenant to clean the windows once a month. They asked for "*an appropriate map*" to be attached to the lease. They did not say anything about the term commencement date which, as I have said, had been left blank.

27. EBL's solicitors' letter of 13th June, 2016 was never replied to and the draft documents were never finalised or executed.

28. On 6th September, 2016 Mason Hayes & Curran, for the Company wrote directly to the secretary of EBL. They asserted that on 18th December, 2015 the Company had acquired the lease of 15th May, 2012. That lease, they said, had expired by efflux of time on 14th May, 2015, since when, they said, EBL had been overholding as a periodic tenant. The solicitors said that they had been instructed to give notice to quit and enclosed a notice to quit dated 6th September, 2016 for 14th May, 2017, or the end of the year of EBL's tenancy which would expire 183 days after the date of service.

29. By letter dated 14th September, 2016 McGarr expressed themselves to be at a loss in understanding the letter enclosing the notice to quit and asked for a copy of the lease on which the Company was relying.

30. McGarr followed up on 19th September, 2016 by a letter sent to Mason Hayes & Curran purportedly exercising the option referred to in clause 2(iv) of Schedule 1 of the agreement of 11th November, 2015 and purportedly accepting the draft contract for sale, subject to those parts of their letter of 13th June, 2016. By reference to clause 2(vii) of Schedule 1 they asked that the sum of €50,590 and a sum of €25,000 said to have been paid by bank draft in response to an e-mail from the Company of 30th May, 2016, be assimilated to the purchase price and be treated as a deposit pending closing. They asked for a reply to their letter of 13th June, 2016, as well as a response to an earlier letter of 11th May, 2016 which was not in evidence before me.

31. On 26th October, 2016 Mason Hayes & Curran wrote to McGarr, strictly without prejudice to the notice to quit, to say that as EBL had failed to make three monthly rental payments in accordance with what was referred to as "*the memorandum of understanding dated 11th November, 2015" and asserted that "the options contained in the memorandum of agreement have now lapsed."* They asked for clarification as to what the payment of €25,000 related to and by whom that payment had been made to their client on 30th May, 2016.

32. On 17th December, 2016 McGarr wrote directly to the Company. They referred to clause 2(iv) of Schedule 1 to the agreement of 11th November, 2015 by which the Company had agreed to grant EBL an option to acquire Lot 2 and gave notice to the Company that EBL was "*exercising the option as a supplement to the notification sent to Mason Hayes and Curran by letter dated 19th September, 2016*." They said that they accepted the draft contract for sale of Lot 2 which had been sent by Mason Hayes & Curran on 22nd March, 2016, subject to their letter of 13th June, 2016. As they had in their letter to Mason Hayes & Curran of 19th September, 2016, McGarr asked that the sums of €50,590 and €25,000 be assimilated and treated as a deposit; and they asked for replies to their letters of 11th May, 2016 and 13th June, 2016.

33. I pause here to observe that the letter of 17th December, 2016 sent directly to the Company was more or less identical to the letter of 19th September, 2016 which had been sent to its solicitors. The second letter was probably written against the eventuality that the Company would argue that the earlier letter was not a valid exercise of the option because it had not been sent to the Company, but in the event no such issue arose.

34. On 19th January, 2017 McGarr wrote directly to the Company enclosing a notice of intention to claim relief under the Landlord and Tenant (Amendment) Act, 1980 and – strictly without prejudice to the terms of their letters of 19th September, 2016 to Mason Hayes & Curran and 17th December, 2016 to the Company, and for the avoidance of doubt – a formal notice called "*Exercise of Option*" purportedly exercising its option to buy Lot 2 at the agreed price of €190,000. The notice of intention to claim relief identified the relevant lease or tenancy as the lease of 15th May, 2012 at a rent of €35,000 per annum.

35. On 2nd February, 2017 McGarr replied to Mason Hayes & Curran's letter of 26th October, 2016. They disagreed with the suggestion that any default in payment would cause the options to lapse, arguing that clause 2(v) of Schedule 1 only related to the option to purchase Lot 2, and then only when rent was not paid under the lease, which, in breach of Schedule 1, had not been granted.

36. By letter dated 4th May, 2017 to McGarr, Mason Hayes & Curran identified an estate agent to whom the keys should be given on 14th May, 2017, and on 15th May, 2017 they followed up with a protest that EBL had not yielded up possession.

37. By letter dated 18th May, 2017 addressed to the secretary of EBL, Mason Hayes & Curran, on behalf of the Company, made a statutory demand for payment of €29,583.33 for rent. The basis on which the sum demanded had been calculated was not evident. It was said in the course of the hearing to have been a calculation of outstanding rent at the rate of €35,000 per annum. McGarr replied on 1st June, 2017 insisting that EBL had given notice of its intention to exercise the option to purchase Lot 2, disagreeing that the option had lapsed, and protesting that the Company had continuously failed to grant a lease despite sending a draft lease on 22nd March, 2016. The demand for rent was said to be incorrect and it was said that EBL "*intends to exercise*" its option to purchase Lot 2 and would deduct from the "*market value*" all rent that would have been payable under the lease if granted on 22nd March, 2016.

38. Without dwelling on the detail, there was an exchange of correspondence between August and early October, 2017 by which the parties sought, but in the event failed, to agree terms on which the sale and purchase might be completed. Thereafter, until about June, 2018, there was some discussion of a sale of the property and a division of the proceeds, and then silence for more than a year until Mr. Kirby, following his appointment on 18th June, 2019, took up the cudgels on behalf of the Company by instructing his solicitors to write to McGarr on 2nd September, 2019. There having been no response in the meantime, this motion was issued on 8th November, 2019.

The application

39. In his affidavit sworn on 6th November, 2019 in support of this application Mr. Kirby put up the documents and correspondence which he had and offered his assessment of the situation.

40. Mr. Kirby suggested that EBL might be in unlawful occupation of the property. The notice to quit, he said, required EBL to yield up vacant possession by 14th May, 2017, which had not been done. The notice of intention to claim relief, he said, appeared to have overlooked the renunciation by the Company of any entitlement to a new tenancy.

41. Mr. Kirby suggested that any option which EBL might have had to purchase the property had lapsed because it had failed to pay the rent. He suggested that aspects of the agreement of 11th November, 2015 were unclear and Schedule 1 appeared to be an agreement to agree. In any event, he said, clause 2(v) of Schedule 1 provided that the option to purchase Lot 2 would lapse in the event of a failure to make three monthly payments in full and on time. No rent had been paid since the 2015 agreement save €25,000 received by the Company on 22nd June, 2016. Mr. Kirby had, he said, invited McGarr, if they disagreed with him, to set out the basis on which EBL claimed to be entitled to occupy the property but he had no response.

42. The notice of motion asked four questions, to which I will come. Mr. Kirby indicated that if the court were to take the view that there is a valid and subsisting option for EBL to purchase the property, he would seek leave to disclaim it on the basis that it appeared to have been given to EBL without consideration. If the court were to find that EBL is not in lawful occupation and/or did not have a valid and subsisting option to purchase, Mr. Kirby

asked for such ancillary orders or directions as might be necessary to secure vacant possession.

43. The replying affidavit on behalf of EBL was sworn on 23rd January, 2020 by Mrs. Martin. She expressed the belief – based on legal advice – that EBL has at all times been in lawful occupation of Lot 2. She asserted a right on the part of EBL to purchase Lot 2 in accordance with the agreement of 11th November, 2015 and in any event, at a minimum, an entitlement to a new tenancy.

44. According to Mrs. Martin's affidavit, the Company, by its solicitors, had accepted that EBL remained in possession of the premises as a yearly tenant after the expiry of the term of the lease. This is very confusing. It is true that the Company, by its solicitors, had asserted that EBL remained in possession as a yearly tenant but that was not really EBL's position.

45. While I have to say that it appeared obvious to me, Mrs. Martin spelled out the consideration which EBL had given for the agreement of 11th November, 2015. At that time, and since 19th February, 2015, EBL had an enforceable contract with Pierse for the purchase of the property for €1,005,990, of which €100,559 had been paid by way of a deposit. By s. 52(1) of the Land and Conveyancing Law Reform Act, 2009, it was the beneficial owner of the entire property in Folio 51988F and had a right to call for an assurance either to itself or to a wholly owned subsidiary. The 2015 agreement gave the Company the right to complete the purchase, which it did, upon terms that EBL would have the agreed options and a lease in respect of Lot 2. If Mr. Kirby, as the liquidator of the Company, could not see the value in EBL's contract, Mr. Griffin as its effective promoter, and Independent Trustee, as its financier, plainly could (or thought that they could) for the underlying commercial expectation was that three years after the drawdown of the loan of €800,000 – and even if EBL bought Lot 2 for €190,000 – the Company would be able to repay the €800,000, plus three times 8.25% of €800,000, plus 3% of the value of the property. The fact that EBL did not have the money to complete the purchase did not mean that the contract was not valuable.

46. Mrs. Martin asserted that on 11th October, 2017 the Company had agreed to sell Lot 2 to EBL for €190,000 but that it did not execute the deed or contract furnished to it. This introduced further confusion. While Mrs. Martin asserted that an agreement had been made on 11th October, 2017, she did not make the case that this was an enforceable agreement, rather the case made is that that EBL is entitled to buy by reference to the 2015 agreement. Puzzlingly, the case made by Mrs. Martin is on the one hand that the option granted by the 2015 agreement was exercised and on the other that the option could not have lapsed or expired because it was never granted.

47. In his second affidavit Mr. Kirby deposed that EBL has paid no rent since mid-2015. Mr. Kirby does not explain how he knows what rent was or was not paid to Pierse before the Company completed the purchase of the property on or about 18th December, 2015 but his averment was not contested by EBL. Significantly, there is no evidence that EBL paid rent to Pierse after the expiry three year term of the 2010 lease.

48. The contract for sale dated 19th February, 2015, as I have said, provided for payment of a deposit of €100,599 but there was no stakeholder receipt on the face of the contract. Moreover, the provision in clause 2(vii) of Schedule 1 to the 2015 agreement that EBL would have credit for the sum of €50,590 already paid did not obviously fit with the suggestion that the entire deposit had been paid. Mr. Kirby could not find any evidence of a payment of €50,590 by EBL to the Company. The explanation was a bit tortuous. Mrs. Martin first exhibited a letter from Pierse's solicitors acknowledging receipt of all of the deposit monies, but it was eventually explained that €50,590 part of the deposit was provided by EBL and the balance of €50,000 by Mr. Griffin.

49. The recurring theme of Mr. Kirby's affidavits and Mr. McCarthy's submission was that EBL had not paid any rent since mid-2015. Mr. Kirby could see a credit of €25,000 in the Company's bank account on 22nd June, 2016. He was prepared to contemplate that this was the €25,000 which Mrs. Martin had said had been paid by EBL in response to an e-mail, but he did not have the e-mail and did not understand the basis on which that payment had been made. The second affidavit of Mrs. Martin showed that the e-mail of 30th May, 2016 referred to in McGarr's letter of 19th September, 2016 was not an e-mail of that date but a text message of 13th June, 2016 by which Mr. Griffin had said "*no messing, where's the rent*". On 14th June, 2016 EBL bought a bank draft for €25,000, which was deposited to the Company's bank account on 22nd June, 2016. Mrs. Martin's evidence was that Mr. Griffin did not then or later suggest that any further rent was due.

50. On 13th May, 2020, Mr. Griffin swore an affidavit on behalf of Mr. Kirby. He noted that two affidavits had been sworn on behalf of EBL by Mrs. Martin but said that he had never met her or communicated with her. Rather, he said, all of his dealings had been with Mrs. Martin's son, Alan Martin.

51. It was Mr. Griffin unlocked the mystery of the deposit. The deposit of €100,950 was made up of €50,599 paid by EBL and the balance, he said, by the Company, to whom he, Mr. Griffin, had loaned the money. The figures and dates at para. 10 of this judgment come from an e-mail of 18th June, 2020 from Pierse's solicitors.

52. Without any criticism of him, Mr. Griffin's affidavit was largely argumentative. He confirmed that EBL paid €25,000 for rent in June, 2016. He asserted that the rent was at that time significantly in arrears and that the arrears were not satisfied by the payment then made: but he did not say what the rent was, or what the arrears were, and he did not say that he had then or later asked for more than was paid. According to Mr. Griffin, the Company was prepared to sell Lot 2 to EBL if it had been in a position to pay the €190,000 but he suggested, variously, that by 2017 it was clear that EBL did not have the money, and that the Company wanted, but EBL would not agree to, a right of way over Lot 2 for the benefit of Lot 1.

53. Mr. Alan Martin swore an affidavit on behalf of EBL on 30th June, 2020. He describes himself as "*a manager*" of EBL and acknowledges that it was he, on behalf of EBL, who dealt with Mr. Griffin. While Mr. Martin does not expressly agree with Mr. Griffin's evidence as to the provenance of the deposit, neither does he contest it. Mr. Martin

denied that EBL had withheld rent and gave his version of the engagement in June and July, 2016, and eventual disagreement in relation to the right of way over Lot 2. While McGarr, in their correspondence in 2016, had asked that the €50,590 be credited against the purchase price, Mr. Martin, in his affidavit sworn in 2020, seems to suggest that the €50,590 could, or should, or might, have been credited against EBL's liability for rent.

54. All the appearances are that Mr. Griffin and Mr. Martin fell out over the cost of surfacing a right of way over Lot 2 for the benefit of Lot 1, but it is not contended by either the Company or by EBL that the other was thereby in breach of any legal obligation. The falling out does rather appear to be the reason why the Company took the position it did in Mason Hayes & Curran's letter of 6th September, 2016 but it is immaterial to whether the Company was entitled in law to take the position it did, or to the legal effectiveness of what the Company then did, or purportedly did.

55. On 13th August, 2020 Mr. Kirby's solicitors gave notice to cross examine Mr. and Mrs. Martin but at the hearing on the motion did not seek to do so.

56. Mr. Martin swore a further affidavit on 12th January, 2021 to exhibit an e-mail to him of 21st May, 2018 from Mr. Paul Gilmer, who, it will be recalled, was the other director of the Company. As explained by Mr. Martin, that e-mail was written against a background in which EBL had threatened an action for specific performance of an alleged contract for the sale to EBL of Lot 2, in response to which Mr. Gilmer had proposed a sale of the entire property and a division of the proceeds. Mr. Griffin promptly swore a replying affidavit in which he deposed that the e-mail on which EBL sought to rely (which he said was in any event of no assistance to it) and to which EBL had not replied, had been written in the course of a lengthy engagement between the parties and their solicitors on a without prejudice basis. That, I have to say was my distinct impression, even from what Mr. Martin had said. A further affidavit was sworn by Mr. Martin on 20th January, 2021 in which he acknowledged that he did not reply to the e-mail but asserted that it evidenced a concluded agreement, which was not implemented because the Company was unable or unwilling to pay the estate agent's fees.

57. The alleged concluded oral agreement referred to in Mrs. Martin's first affidavit was an agreement said to have been made in September or October, 2017 for the sale and purchase of Lot 2 for €190,000. The substance of the alleged agreement referred to in Mr. Martin's second affidavit and said to be evidenced by the e-mail of 21st May, 2018 was that the entire property in Folio 51988F would be sold with vacant possession and the proceeds divided.

58. The e-mail of 21st May, 2018 was plainly part of the exchange of correspondence between 19th September, 2016 and 8th June, 2018, referred to by Mrs. Martin at para. 11 of her second affidavit and, save as to the extract pinned together and marked "2KM5", said by her to be privileged. This e-mail was not part of that exhibit and so Mr. Martin's assertion that it was not privileged is diametrically opposed to Mrs. Martin's evidence that it was. Mrs. Martin is a director of EBL. Mr. Martin describes himself as a manager and an employee. While there is a conflict of evidence between Mr. Griffin and

Mr. Martin as to whether an agreement was reached in 2018, I think that I am entitled to decide the issue of privilege on the evidence of the directors of the two companies. Mrs. Martin has sworn that the e-mail of 21st May, 2018 was part of a without prejudice exchange, and so has Mr. Griffin. I find that it was a privileged communication and I disregard it.

59. If I am wrong in that, what the e-mail says is that if the contemplated sale of Lot 1 and Lot 2 did not succeed, then all parties would revert back to the option agreement of 11th November, 2015. If that is the same as saying – as Mr. Martin suggests – that if the property was not sold, the Company would honour its obligations pursuant to the 2015 agreement, it begs the question as to what those obligations were.

60. Finally, as to the evolution of the application, I record that EBL initially contested the jurisdiction of the High Court to deal with the application, asserting that Dublin Circuit Court had exclusive jurisdiction to hear and determine EBL's claim for specific performance of the agreement and, in the alternative, for a new tenancy, and that Mr. Kirby was asking the court to conduct on affidavit a surrogate trail of a plenary action. By the time the application came on, however, Mr. Frank Crean, for EBL, agreed that the court could and should endeavour to decide the rights and liabilities of the parties and that it would be just and beneficial if the court were to do so.

The questions posed

61. The questions posed by the liquidator for determination by the court are rather general and, if I will be forgiven for saying so, confused. The court is asked to determine:-

    1. Whether EBL is in lawful occupation of the property in Folio 51988F (or any part thereof);

    2. Whether EBL holds a valid and subsisting option to purchase the property (or any part thereof) pursuant to the agreement of 11th November, 2015;

    3. If the answer to question 2 is in the affirmative, whether EBL has validly exercised an option under the 2015 agreement;

    4. If the answer to question 2 is in the affirmative, whether the liquidator is entitled to disclaim the 2015 agreement pursuant to s. 615 of the Companies Act, 2014.

62. Firstly, there is no issue that EBL is in occupation of anything other than that part of the lands shown outlined in red on the maps attached to the 2012 lease and the 2015 agreement and in the latter agreement referred to as Lot 2. Secondly, there is no question that EBL has a subsisting option. EBL's case is that it had an option, which it has validly exercised, and so that it has a contract for the purchase of Lot 2. Thirdly, the question as to whether the option was validly exercised depends not on the existence of a subsisting option but on whether EBL had an option under the 2015 agreement, which was subsisting at the time when it was purportedly exercised.

63. In the course of argument it was acknowledged that the resolution of the dispute entailed the identification and determination of a number of issues of law and there was a further exchange of submissions on an issue paper agreed between counsel.

The arguments

64. The premise of the submission by Mr. Gary McCarthy S.C., on behalf of the liquidator, was that when the term of the lease of 15th May, 2012 expired on 14th May, 2015 EBL remained in occupation under a periodic tenancy from year to year, which tenancy had been determined on 14th May, 2017 by the service of the notice to quit dated 6th September, 2016, and since when EBL was in unlawful occupation. It was said that EBL had failed to pay any rent since 2015, or at the latest, 2016. It was said that at the date of the purported exercise of the option on 19th September, 2016 no formal option agreement had been executed and if there ever had been any option in place, EBL had failed to comply with the terms of any such option, specifically, the obligation to pay the rent.

65. By reference to the definition of "*Second Completion date*" as the date on which *"the Transferee*", defined as Mr. Griffin, would execute a lease in respect of Lot 2, Mr. McCarthy argued that it is unclear when the agreements contemplated by Schedule 1 of the 2015 agreement were to be entered into. As I have said, I think that the reference to "*the Transferee*" in the definition of Second Completion Date is obviously a mistake but the fact remains that the Second Completion Date was defined as "*the date on which the second completion occurs",* which would allow the date to be identified after it had passed, if the second completion occurred, but not, in advance, as the date on which it should take place.

66. Mr. McCarthy submits that the 2015 agreement does not itself constitute an option, that it is hopelessly unclear, and at best amounts to an agreement to agree. Clause 2(iv), he argues, contemplated that the Company "*will*" grant an option for EBL "*to acquire Lot 2 within the first twelve months of the term of the lease*". The provision that the Company "will" grant an option at some time in the future must mean that it was not then granted. Secondly, since EBL never accepted the new lease, the circumstances never came into existence which would have entitled EBL to exercise any option.

67. Alternatively, he submits, if the 2015 agreement did give rise to an option, it also gave rise to an obligation to pay rent at the rate of €50,000 per annum by monthly instalments which, on any analysis, was upwards of three months in arrears at the date of purported exercise of the option on 19th September, 2016. If the 2015 agreement did give rise to an option, it is said, that would have meant that the rent payable by EBL would have increased from €35,000 to €50,000 from the date on which the 2015 agreement came into effect.

68. Mr. McCarthy points to a number of contradictions in Mrs. Martin's evidence as to the payments of €50,590 and €25,000. As to the €50,590 he suggests that the true position was that this was paid by EBL to Pierse and that it was never treated as rent by either party. As to the €25,000, if the annual rent increased from 11th November, 2015, the

€25,000 paid on 14th June, 2016 was not sufficient to cover the arrears. In any event any option created by the 2015 agreement would already have lapsed in February, 2016. Even if the payment of €25,000 brought the rent up to date in June, it was at least three months in arrears again by 19th September, 2016.

69. Mr. McCarthy points to the negative pledge in the debenture provided to Independent Trustee – which was signed by Mrs. Martin on behalf of the Company while she was still a director of the Company – which precluded the Company from selling or leasing the property or granting any option over it.

70. I will deal with this argument immediately. In the first place the debenture which was executed on 18th December, 2015 post-dated the agreement of 11th November, 2015. Secondly, the express purpose of the debenture was to secure the Company's liabilities on foot of the loan agreement of 1st December, 2016, the express purpose of which was to facilitate the completion of the purchase of the property. Thirdly, and by no means least, EBL was not privy to the arrangements made between the Company and Independent Trustee and the Company could not possibly be entitled to rely on an obligation later assumed to a third party to justify the non-performance of obligations earlier incurred to EBL.

71. As to EBL's occupation of Lot 2, Mr. McCarthy argued that if no new lease and no option ever came into existence, then EBL remained in occupation of Lot 2 under a periodic tenancy from year to year, which was determinable by six months' notice, and which had been determined by the notice to quit dated 6th September, 2016. He submitted that any entitlement on the part of EBL to purchase Lot 2 was quite separate to its entitlement to occupy it, and that even if EBL could demonstrate an entitlement to purchase Lot 2 " … *it may nevertheless be the case that it is currently in unlawful occupation*."

72. The written submissions filed on behalf of the liquidator dealt *seriatim* with a number of assertions of law made in Mrs. Martin's affidavits but as the case evolved many of these evaporated and I need not dwell on them.

73. As to EBL's claim in the alternative to be entitled to a new tenancy, Mr. McCarthy argues that the notice of intention to claim relief is invalid because of the deed of renunciation of 13th May, 2012, and because at the date of service of that notice on 17th December, 2017, EBL had not been continuously in occupation for five years. While it was acknowledged that those were matters which might fall within the jurisdiction of the Circuit Court, the fact was that no application had been made to the Circuit Court for a new tenancy so that the statutory entitlement to remain in possession did not apply.

74. While Mr. McCarthy makes much of the fact that EBL did not long ago make whatever application it wanted to the Circuit Court, the objective fact of the matter is that until Mr. Kirby was appointed the Company acquiesced in the stand-off. I mention for completeness that by notice of motion issued on 17th July, 2020 EBL has applied for an order pursuant to s. 678 of the Companies Act, 2014 giving leave to issue proceedings but that motion stands adjourned pending the outcome of the directions application.

75. Finally, Mr. McCarthy in his written submissions suggested that if EBL had an option to purchase the property it was onerous property which he sought leave to disclaim. This, however, failed to recognise that EBL's case was not that it had an option but that it had an enforceable contract, and in any event, there was no evidence as to the capital value or rental value of the property by reference to which it might be said that any contract which EBL might have was or was not onerous. The suggestion that the liquidator might disclaim was abandoned.

76. EBL's position, as Mr. Crean put it, was simply that the 2015 agreement gave EBL a specifically enforceable right to be granted a lease of Lot 2 within a reasonable time after 11th November, 2015 and an option to purchase Lot 2 within the first year of the term of the lease. EBL, he submitted, had lawfully exercised that option and was entitled to remain in possession of Lot 2 pending completion.

77. Mr. Crean submitted that to interpret the 2015 agreement the court must consider the circumstances in which it was made, construe the words used, and bear in mind the terms which were to be implied as a matter of law.

78. The primary rule of construction is that the court must determine objectively the intention of the parties from the words used, and the surrounding circumstances. Mr. Crean referred to *Analog Devices v. Zurich Insurance Company* [2005] 1 I.R. 274, at pages 280 to 281. Contractual documents are to be approached in a holistic way rather than having immediate resort to case law. *Law Society of Ireland v. Motor Insurers Bureau of Irelan*d [2017] IESC 31. Commercial contracts must be construed in a manner that makes good commercial sense. *Keating v. New Ireland Assurance* [1990] 2 I.R. 383. And in accordance with business efficacy. *Edward Lee & Co. Ltd. v. N1 Property Developments Ltd*. [2012] 3 I.R. 201.

79. Mr. Crean submitted that the principal elements of the commercial agreement were clear. EBL agreed to procure that the property would be assured to the Company. The Company agreed to grant and EBL to take a lease of Lot 2 and a defeasible option to purchase Lot 1 and Lot 2.

80. If necessary, terms should be implied to give effect to the presumed intention of the parties, or deriving from the nature of the contract itself. Reference was made to Sweeney v. Duggan [1997] 2 I.R. 531 and *Carna Foods Limited v. Eagle Star Insurance Co. (Ireland) Ltd*. [1997] 2 I.R. 193. In this case, counsel submitted, a term should be implied that the parties should use reasonable efforts to achieve the agreed outcome, and to ensure that the Company would not be allowed to deprive EBL of the benefit of the bargain that it had made. He referred to *Rooney v. Byrne* [1933] I.R. 609 and *Royal Trust Company of Canada (Ireland) Ltd. v. Kell*y (Unreported, High Court, Barron J., 27th February, 1989). The court should not lightly condemn a commercial contract for uncertainty but should strive to ensure that apparent commercial contracts should be enforced. *Fitzsimons v. O'Hanlon* [1999] 2 I.L.R.M. 551.

81. It was submitted that it is settled law that in analysing a commercial contract it is not necessary that every term must be agreed before the contract can be enforced, or that he parties should have agreed a completion date. Mr. Crean referred to *Boyle v. Lee* [1992] 1 I.R. 555, where Egan J. said, at page 593:-

> *"It has long been established that where no time for performance is agreed the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case."*

82. Mr. Crean referred to the judgment of Lord Denning M.R. in *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd*. [1967] 1 Lloyds Rep. 53 where he said:-

> *"In a commercial agreement the further the parties have gone on with their contract, the more ready are the courts to imply any reasonable terms so as to give effect to their intentions. When much has been done, the courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say that there has been no agreement between the parties because the essential terms have not been agreed. But where an agreement has been acted upon and the parties, as here, have been put to great expense in implementing it, we ought to imply all reasonable terms so as to avoid uncertainties."*

Discussion

83. It seems to me that the alternative positions adopted gave rise to a degree of inconsistency in the positions adopted on both sides. In my view, the liquidator's argument that there was no consideration for the 2015 agreement was irreconcilable with his submission that the €50,590 paid by EBL to Pierse was not to be treated as rent but was "*accepted by the Company as consideration for the 2015 agreement."* The liquidator's argument that the €25,000 paid in June, 2016 was intended to be, or should be treated as, a payment on account in respect of outstanding rent at the rate of €35,000 per annum on foot of a yearly tenancy struck me as unlikely, but less unlikely than EBL's argument that it was intended to be, or should be treated as having been, a payment of three months arrears of an annual rent of €50,000 rent – from 22nd March, 2016 when the draft lease was sent – and three months' rent in advance, to bring the rent up to shortly before the exercise of the option by the letter of 19th September, 2016.

84. While the liquidator's position on the one hand is that EBL has failed to pay rent from 2015 or 2016, on the other his position is that it has been a trespasser since 14th May, 2017 so that whatever its liability might be in respect of the use and occupation of the property, it could not be a liability to pay rent.

85. As to the status of EBL after the expiration of the three year term, the Company was clear in its submission that a yearly tenancy arose on the same terms as the expired lease. EBL was less definitive, submitting that the continued occupation of Lot 2 gave rise to a presumption of a tenancy from year to year on the same terms as the lease, in the absence of an agreement to the contrary or evidence to rebut the presumption. Again Mr. Crean was in the position of having to attempt to ride two horses, for the agreed

option period was to be for the first twelve months of the term of the five year lease and the existence of a yearly tenancy was inconsistent with his primary argument that EBL had exercised its option.

86. The foundation of EBL's argument was that its legally enforceable option to buy Lot 2 was to be found in the 2015 agreement and was not dependent on the agreement or execution of a further document. By the plain terms of clause 2(v) of Schedule 1, any option created by the 2015 agreement was dependent on the payment of an annual rent of €50,000 by monthly instalments in advance. If the option was to be found in the 2015 agreement, because only €25,000 had been paid in respect of rent, Mr. Crean was driven to try to find a term commencement date which was later than 11th October, 2015 and later than the date on which the Company completed the purchase of the property and he settled on 22nd March, 2016 when the draft lease was sent. This put him in the position of arguing at the same time that the option was not dependent on any other document and that it was dependent on the grant or tendering of a lease.

87. In my view the key to unravelling this case is to establish the rights and obligations of the parties immediately before and after the execution of the agreement of 11th November, 2015.

88. As of 11th November, 2015 EBL was in possession of Lot 2. It had had a three year lease from 15th May, 2012 which had expired on 14th May, 2015. In the meantime, on 19th February, 2015, it had signed a contract for the purchase of the entire folio, subject to and with the benefit of that lease, with a completion date of four weeks thence – which would have been within the currency of the three year term. When the term of the three years expired on 14th May, 2015 EBL remained in possession of Lot 2. Left to my own devices I should have thought that EBL was, as to Lot 2, a purchaser in possession, but whether it was or not, it seems to me that any presumption of a new periodic tenancy would be inconsistent with the obligations of both EBL and Pierse under the contract for the sale and purchase of the entire folio. Special condition 14.2 of that contract disapplied the purchaser's right to vacant possession under general condition 21, but special condition 14.1 was directed to the presence on the property in sale of contents, rubbish, spoil, fittings, machinery and so forth and not a periodic tenant.

89. By the time the three year term expired, the closing date under the contract for sale had passed. There is no suggestion that Pierse was not then ready, willing and able to complete, so EBL was liable to pay interest on the purchase price. There is no evidence that EBL paid rent to Pierse after 14th May, 2015. The implication of a tenancy from year to year of Lot 2 it would have meant that until completion EBL would have been bound to pay interest on the purchase price for the entirety of the property and rent in respect of Lot 2. In the event that EBL might not complete the purchase, it would have meant that EBL was entitled to notice to quit and in the meantime its occupation as tenant would be grafted onto the previous three years. Moreover, a new tenancy from year to year would have been difficult to reconcile with the renunciation by EBL on 15th May, 2012 of any rights it might have under the Landlord and Tenant Acts. At least arguably, that

renunciation was limited to whatever rights might arise by reason of the expiry of the three year term and did not cover any later determination of a yearly tenancy. For good measure, the rent which might be fixed in respect of any new statutory tenancy might be less that the agreed rent.

90. The position of an overholding tenant is a matter of construction: *Earl of Meath v. Megan* [1897] 2 I.R. 477. If the payment of rent is not necessary to imply a tenancy from year to year, it seems to me that any such tenancy must be evidenced otherwise. In my firm view any presumption of a tenancy from year to year of Lot 2 was rebutted by the fact that at the date of termination of the term there was a contract for sale in place, the closing date for which had passed.

91. In any event, as I will explain, I do not believe that when the Company completed the purchase of the property on 18th December, 2015 it did so subject to and with the benefit of a yearly tenancy in favour of EBL.

92. I am satisfied that the 2015 agreement was intended to create binding rights and obligations. Mr. Griffin, by the vehicle of the Company, was to have the right to complete the purchase of the entire folio. EBL was to have a five year lease of Lot 2 at €50,000 per annum. Clearly a rent of €50,000 per annum is bigger than a rent of €35,000 per annum but it would not be strictly correct to say that the rent was to be increased. The rent under the 2012 lease was payable by quarterly instalments, while the rent under the new lease was to be payable by monthly instalments. The repairing covenant in the 2012 lease was limited to the interior of the premises, while the covenant under the new lease was to keep the exterior and interior in the same condition as they were at the date of the demise. If the Company had taken the property subject to and with the benefit of a yearly tenancy, the Company's right to the new rent and enhanced repairing covenant and EBL's option to purchase Lot 2 would have been deferred until the yearly tenancy had been determined, by when (as EBL now argues in the alternative) EBL might have accrued five years continuous occupation and a right to a new tenancy on the determination of a periodic tenancy which was not covered by the 2012 renunciation. That was plainly not the intention of the parties.

93. Moreover, the existence of a yearly tenancy at a rent of €35,000 per annum would have been inconsistent with the mutual obligations of the Company to grant and of EBL to take, within a reasonable time, a five year lease at €50,000 per annum, which is the foundation of EBL's case.

94. It is true, as Mr. McCarthy says, that Schedule 1 speaks prospectively but that does not necessarily mean that the agreement was uncertain or vague. At the date of the 2015 agreement the Company was not in a position to grant either the lease or the options since it did not own the property. The separation of the First Completion and the Second Completion and the language of Schedule 1 points to an intention that there would be further documents but clause 1 of Schedule 1 specifically provided what the contents of those additional documents were to be. As McGarr pointed out in their letter of 13th June, 2016, the drafts prepared by Mason Hayes & Curran diverged in a number of

respects from Schedule 1of the agreement. It seems to me that the very fact that this could be done goes to show that the 2015 agreement was clear as to what the rights and liabilities of the parties were to be after the purchase of the property had been completed by the Company.

95. Mr. Crean, as I have said, argues that the 2015 agreement gave rise to a specifically enforceable right to be granted a lease of Lot 2 within a reasonable time after 11th November, 2015. I accept that that is correct, but it does not engage with the core issue, which is the term commencement date. The formal lease, if granted, would have needed to identify the date from which the five year term was to run.

96. It could not have been 11th November, 2015 because the Company was not then the owner of the property.

97. It could not, I think, have been the date upon which the Company would be registered as the owner of the folio because that would be to leave the parties to the accident of when (with no disrespect to the solicitors who were involved) the Company's solicitors might lodge the application for registration, whether the application would be in order, and when the Property Registration Authority might be in a position to deal with it. Moreover, there is no reason in principle why the lease in respect of Lot 2 could not have been granted before the Company was registered as owner of the property.

98. It could not, I think, have been the date on which the Company would proffer a lease, *a fortiori* a form of lease that was not in accordance with the agreement as to what it should be. I emphasise that I am focussing on discerning the common intention of parties at the time the 2015 agreement was made but, on the evidence, the draft lease was never agreed, and the points made by McGarr as to divergence between the agreement and the drafts appear to me to have been well made: so that 22nd March, 2016 – the term commencement date contended for by EBL – is a date upon which precisely nothing happened. If the term commencement date were to be the date upon which the Company would tender a form of lease in compliance with Schedule 1, the option to this day would not have arisen.

99. EBL argues that the court – not to add to the agreement signed by the parties but to spell out what the instrument means – should imply a term as to the term commencement date, which is that the term of the lease would commence within a reasonable time of the agreement of 11th October, 2015. The commercial agreement was that Mr. Griffin would provide or procure the wherewithal – €900,000 – for the completion of the purchase, to which he had already, by means of a loan to the Company, contributed €50,000. Whoever it was would fund the completion – whether it was Mr. Griffin, or an investor sourced by him, or as in the event happened a combination of the two – would expect a return on their money. If I am to apply commercial common sense to give business efficacy to this contract, the question, in practical terms, is for how long was it reasonable that the Company – which had incurred obligations to its lenders – should have no return on its investment in the property, or at least in Lot 2? The 2015 agreement on its face contemplates first the completion of the purchase and then the grant of the lease and

options. It might very well be said that the preparation of the documents required for the second completion was a matter entirely within the control of the Company, but I cannot see how business efficacy might require that EBL should have a right to occupy the property rent free for as long as it took to do so. That, it seems to me, would be the inevitable consequence of implying a term commencement date any later than the date of completion of the purchase by the Company.

100. After careful consideration I have come to the conclusion that Mr. Crean is correct in his submission that the 2015 agreement, without the necessity for any further document, created an option on the part of EBL within twelve months of the term of the agreed lease of Lot 2, to purchase Lot 2 for €190,000, with credit for the €50,590 already paid and any rent paid in the meantime. Mr. McCarthy, however, is correct in his submission that if the 2015 agreement created the option it also created the obligation to pay rent, for the option was conditional on the rent not being three months in arrears.

101. If, as I have found, the time from which EBL was liable to pay the rent and the time within which option was exercisable ran from the date of completion of the purchase by the Company on 18th December, 2015, the rent was more or less six months in arrears when the €25,000 was paid on 14th June, 2016, and the option had lapsed in the previous March. Ingenious as it is, I cannot accept the argument that the payment in June, 2016 was for three months rent in arrears and three months in advance. It was not argued that clause 2(v) of Schedule 1 could be construed as meaning anything other than it said, or that the Company was somehow estopped from relying on it.

Conclusions

102. The effect of the agreement of 11th November, 2015 was that EBL was entitled to a five year lease of Lot 2 at a rent of €50,000 per annum payable by monthly instalments in advance, and on the terms set out in Schedule 1, and to an option to purchase Lot 2 for €190,000, with credit for the sum of €50,590 paid.

103. The agreement contemplated that additional documents would be prepared and executed but the substantive right and liabilities of the parties were not conditional upon that being done.

104. There was no express agreement as to the term commencement date but a matter of business efficacy it is to be implied that the term of the lease and of the option would run from the date on which the Company completed the purchase of the property.

105. EBL was entitled to an option to purchase Lot 2 within the first twelve months of the term of the lease, subject to the proviso that the option would lapse in the event of a failure to make three monthly payments in full and on time.

106. EBL did not pay the rent in full and on time and the option had lapsed at the time it was purportedly exercised.

107. EBL did not, on the expiration of the term of the lease of 15th May, 2012 on 14th May, 2015 hold over as a tenant from year to year and was not a tenant of the Company on

those terms but rather for a five year term from 18th December, 2015, on the terms set out in Schedule 1 to the agreement of 11th November, 2015.

108. Since my analysis and conclusion as to the nature of EBL's occupation do not quite match the submissions of either party, I will hear counsel further as to the precise answer to the first of the liquidator's questions.

109. To facilitate that, and to deal with the costs of the motion, I will list the case for mention on Friday 4th June. At the same time I will hear counsel as to the listing of EBL's s. 678 application.