THE HIGH COURT

[2021] IEHC 88

RECORD NUMBER: 2020 204 CA

BETWEEN

IN THE MATTER OF THE LANDLORD AND TENANT (GROUND RENT) ACTS 1976 – 2007

PRIME GP2 LIMITED

APPELLANT/DEFENDANT

AND

TECHNOLOGICAL UNIVERSITY DUBLIN

RESPONDENT/PLAINTIFF

JUDGMENT of Ms. Justice Niamh Hyland delivered on 9 February 2021

Background

1. This is an application by the plaintiff (Technological University Dublin "TUD") brought under the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 (the "1978 Act") to acquire the fee simple interest in two contiguous plots of land. That fee simple interest was formerly held by Atlas Limited Partnership (acting by its general partner Atlas GP Limited) ("Atlas") and is now held by Prime GP2 Limited ("Prime"). Prime were substituted for Atlas in these proceedings by Order of the Circuit Court of 22 September 2020.

2. TUD holds the leasehold interest in the first plot (plot A) under a lease made on 13 October 1952 between Stanley A. Siev of the one part and Peter J. Cunningham of the other part, for a term of 150 years, and an annual rent of IEP60.00 (the "1952 lease"). TUD holds the leasehold interest in the second plot (plot C) under a lease made on 3 May 1978 (the "1978 lease") between Stanley A. Siev of the one part and Irish Life Assurance Limited of the other part, the term being coterminous with the 1952 Lease, and with no additional rent being payable.

3. The two plots form part of TUD's Kevin Street campus in Dublin 8, formerly occupied by TUD.

Applicable Law

4. The 1978 Act gives a right to acquire the fee simple and identifies conditions that must be met by a person holding land under lease seeking to acquire the fee simple in same, as follows:

8.— A person to whom this Part applies shall, subject to the provisions of this Part, have the right as incident to his existing interest in land to enlarge that interest into a fee simple, and for that purpose to acquire by purchase the fee simple in the land and any intermediate interests in it and the Act of 1967 shall apply accordingly.

9.—(1) This Part applies to a person who holds land under a lease, if the following conditions are complied with:

(a) that there are permanent buildings on the land and that the portion of the land not covered by those buildings is subsidiary and ancillary to them;

(b) that the permanent buildings are not an improvement within the meaning of subsection (2);

(c) that the permanent buildings were not erected in contravention of a covenant in the lease; and

(d) one of the alternative conditions set out in section 10.

…

10.— The following are alternative conditions one of which must also be complied with in a case to which section 9 relates:

1. that the permanent buildings were erected by the person who at the time of their erection was entitled to the lessee's interest under the lease or were erected in pursuance of an agreement for the grant of the lease upon the erection of the permanent buildings;

…

Chronology of the Proceedings

5. TUD served a notice of intention to acquire the fee simple pursuant to the 1978 Act on 29 April 2019 in respect of plot A and plot C on both Atlas and the Estate of Stanley Siev, deceased, as it was not then known if Atlas had acquired the Lessor's interest. No response was received from Atlas. Accordingly, a notice of application to acquire the fee simple of 16 August 2019 was served on Atlas (after it had become clear that Atlas had acquired the interest).

6. The matter came on for hearing before the County Registrar on 20 January 2020 and on 11 March 2020 the County Registrar held that TUD were entitled to acquire the fee simple in respect of the two plots for €8,150.

7. This decision was appealed to the Circuit Court by way of Notice of Motion dated 20 March 2020 by Atlas. In September 2020 the matter was listed before the Circuit Court on three occasions for directions and on 22 September 2020 the matter ultimately came on for hearing before Judge Linnane and was heard over the course of a day.

8. On 12 November 2020 Judge Linnane gave her decision, dismissing the appeal of Prime (who had by then been substituted for Atlas). That decision was appealed to this court.

9. The matter came on for hearing on 26 January 2021. An application for discovery was made on the first day of the hearing by way of notice of motion dated 25 January 2021. I heard and determined the application, refusing discovery on the grounds that it was neither relevant nor necessary, and that there had been a failure to furnish reasons as to why the category should be discovered.

The evidence

10. TUD served a notice of application to acquire the fee simple of 16 August 2019 grounded upon the affidavit of Denis Murphy sworn the same day. In that notice, TUD sought an order awarding the fee simple and any intermediate interests in the premises described in

the first schedule, held under the lease and supplemental lease described in the second schedule, together with any intermediate interests, to TUD.

11. The first schedule identifies the property comprised in land registry folio 145094L. The second schedule refers to the lease and supplemental lease, the lease being that of October 1952 and the supplemental lease being that of 3 May 1978.

12. In Mr Murphy's affidavit, he refers to the premises identified in the first schedule to the notice of application and to the leases in the second schedule. He describes the terms of the 1978 supplemental lease, including the provision to the effect that the 1952 lease shall be read and construed as if the additional premises had been originally included in same. He avers that the intent and effect of the 1978 supplemental lease is simply to extend the portion of ground demised by the 1952 lease.

13. At paragraph 8 he avers that the 1952 lease as amended by the 1978 supplemental lease complies with the requirements made out in s. 9 of the 1978 Act in that there is a permanent building erected on the land and a portion of land not covered by that building is subsidiary and ancillary thereto, the permanent buildings are not an improvement within the meaning of subsection 9(2) or erected in contravention of a covenant in the lease, and there is compliance with condition 10 (1).

14. A valuation report prepared by Duff & Phelps of 26 April 2019 is exhibited by Mr. Murphy.

15. In response, three affidavits were filed by Atlas, one by a Mr. Barrett, engineer, one by a Mr. Sweetman, expert conveyancer, and the last by Mr. Crean of Atlas.

16. Mr. Barrett of Barrett O'Mahony, consulting engineers, swore his affidavit on 17 January 2020, and exhibited a copy of a report he had carried out, outlining the physical condition and layout of the property. His report identifies the land demised under the 1952 lease as plot A and that demised under the 1978 lease as plot C. A map is attached to the report which identifies plot A and plot C. The majority of the land in plot A is covered by a building save for a small area to the north and a small strip to the south. The map identifying plot C does not show buildings on same. I address the evidence in respect of plot A further below.

17. In relation to what is described as the 1978 lease, the report notes that "*this lease covers the plot of land behind the College court development which houses the Boojum Burrito restaurant. The plot is used for fire escape access from the annex building only and there is no access to it from the restaurant or the College court development*".

18. The affidavit of Mr Sweetman is sworn 20 January 2020 and exhibits his opinion, in which he identifies his qualifications as an expert conveyancer, including the fact that he was the head of the commercial property department in Matheson solicitors and has been a member of the Conveyancing Committee of the Law Society of Ireland since 1995 and served as chairman until recently. He states that he has been asked to review the lease and supplemental lease and to give his opinion from a conveyancing point of view as to

the relationship between them. I deal with the conclusions of Mr. Sweetman below in the context of (a) the discussion on how plot A and plot C are held and (b) the question of surrender and re-grant.

19. Mr. Crean swore an affidavit on 21 January 2020 summarising the history of the interaction between the parties in respect of the application to acquire the fee simple. I deal with certain of its contents below in the context of the admissibility of the subsidiary/ancillary argument.

20. Prior to the substantive Circuit Court hearing, three further reports were filed – two by Paul Kelly, architect, on behalf of TUD, of 17 and 20 September 2020 and one by Barrett Mahony of 17 September 2020. Although not placed on affidavit, it was agreed by the parties at the hearing that I could treat same as evidence. Those reports are considered in more detail below in the context of my consideration of whether there are permanent buildings on the land demised by the 1978 lease, plot C.

Terms of the 1978 lease

21. The 1978 lease contains the following clauses which I set out in full given the reliance placed on Clause 2 by TUD and that placed on Clause 1 by Prime:

> *NOW THIS INDENTURE WITNESSTH AS FOLLOWS:*
>
> *1. The Lessor hereby demises unto the Lessee ALL THAT the plot or piece of ground situate in Church Lane off Lower Kevin Street in the Parish of Saint Peter in the City of Dublin which said plot or piece of ground is now known as "the additional premises" and which adjoins the existing premises on the North side and is more particularly delineated and described on the map or plan annexed hereto and thereon edge in red TO HOLD the same unto the Lessee from the date hereof for the residue of the term now unexpired created by the Lease subject to the rent reserved by the Lease and to the covenants by the Lessee and conditions contained in the Lease.*
>
> *2. The Lessor and the Lessee hereby agree that all the said covenants provisos and conditions contained in the Lease shall apply to the existing premises and the additional premises as they hitherto applied to the existing premises solely and will be by the Lessee performed and observed as fully as if the same had been therein repeated in full and that the Lease shall hereafter be read and construed as if the additional premises had been originally included therein.*
>
> *3. The additional premises shall stand charged with the payment to the Lessor of the rent reserved by the Lease and the right of re-entry in the Lease shall extend to the additional premises.*

Outline submissions of the parties

Prime

22. Although TUD bears the burden of proof in this application, I think it more logical to outline the objections of Prime to the acquisition and then to identify TUD's response to

same. The approach of TUD is that all the lands to which its application relates are held under the 1952 lease alone and therefore compliance with conditions s.9 and 10 should be tested on that basis. Prime objects to that approach and has consistently argued that as the two leases create two separate leasehold interests, TUD must satisfy s.9 of the 1978 Act in relation to each of the plots demised by these leases, and that each plot must be considered separately.

23. In the alternative, Prime argues that if the intent and effect of the 1978 lease was to extend the portion of land demised by the 1952 lease, then the effect of the 1978 lease was to surrender the 1952 lease and re-grant a lease over the modified lands on identical terms. If that is so TUD cannot satisfy any of the s. 10 conditions and cannot establish an entitlement to acquire a fee simple. However, at the hearing it was conceded that if there had been a surrender and re-grant, TUD would in fact satisfy the requirements of s.10(5).

24. Assuming the 1978 lease is considered separately, Prime argues that it does not meet the condition at s.9(1)(a) that there must be "permanent buildings" on the plot demised by the lease, as the lands only have an open-air steel fire escape from the buildings demised by the 1952 lease.

25. It further argues that even if s.9(1)(a) is satisfied, TUD cannot satisfy the burden of proof of establishing that the fire escape was erected by the person who at the time of its erection was entitled to the lessee's interest under the 1978 lease and therefore cannot satisfy s. 10(1).

26. Separately, Prime argues that separate notices of intention to acquire the fee simple were required to be served under s. 4 of the 1967 Act in respect of both the 1952 lease and 1978 lease and because only one notice was served, the statutory notice served is invalid.

27. Finally, in an argument raised for the first time in the High Court, Prime argues that a portion of the land demised by the 1952 lease not built upon is not subsidiary and ancillary to the permanent buildings situated on the lands. There is strenuous opposition to that ground being raised and I deal with the question of its admissibility below.

TUD

28. TUD maintains that the matter before the Court is straightforward and that it has complied with all the requirements of the 1978 Act. TUD argues (as it did before the County Registrar and the Circuit Court) that the land held under the 1952 lease and 1978 lease must be deemed to be held in accordance with the provision of the 1978 lease to the effect that the 1952 lease is to be interpreted as if the additional portion of ground the subject matter of the 1978 lease had been included therein.

29. In response to Prime's argument if the land is deemed to be held under one lease, then the land had been surrendered and subject to a re-grant, TUD argues that it cannot be deemed to be a surrender and a re-grant because that was clearly not the intention of the parties and is contrary to the intention of the parties as expressed. TUD argues that the Irish Courts have accepted in the past that parties to a lease are entitled to amend the

provisions of their lease by consent without finding a surrender and re-grant. Moreover, even if there had been a surrender and re-grant TUD would still have an entitlement to acquire the fee simple as the entirety of the lands would be held under the 1978 lease and would comply with s. 9 and s.10(5) of the 1978 Act.

30. TUD argues that, even if the premises are found to be held under two leases, and the lands require to be assessed separately for the purposes of the application to acquire the fee simple, the fire escape on the lands the subject of the 1978 lease should be treated as permanent buildings meeting the requirement of s.9(1)(a). Further, there is sufficient evidence to hold that same was erected by the person who at the time of their erection was entitled to the lessee's interest under the lease and that therefore the statutory grounds have been complied with under s.10(1). Accordingly, the application to acquire the fee simple should be granted in respect of plot C.

31. Finally, TUD argues that there is no requirement under the Ground Rents Acts to have a separate notice of intention to acquire the fee simple in respect of two portions of land under two leases, where the identity of the person entitled to the lessor's interest and the interest itself is the same.

How plot A and plot C are held

32. The core issue in this case is whether plot A and plot C can be treated as being held under one lease, i.e. the 1952 lease. If plots A and C are deemed to be held under separate leases, then TUD must meet the conditions of s.9 and 10 separately in respect of both leases and, as I conclude below, it cannot in fact do so in respect of the 1978 lease. This core issue can only be determined by considering the terms of the 1978 lease and the statutory requirements.

Arguments of the parties

33. Counsel for TUD argued that the leasehold interest was registered under both leases as shown on the folio and that the property held by TUD is the property demised under the 1952 and 1978 leases and, in accordance with the terms of same, is deemed in effect to have been originally demised by the 1952 lease. He accepted that he had two leases, he did not obtain plot C in 1952 but the grant of 1978 is an indication that it is supplemental to 1952 and that it should be treated as one. He submits that the parties' intention when the 1978 lease was granted was that premises demised by that lease were to be henceforth looked upon as if they had been demised by the 1952 lease. In respect of Mr. Sweetman's report, it was observed that Mr. Sweetman notes there are two leases but that he did not deal with the provisions of the 1952 lease at all relied upon by TUD, and in fact he does not even refer to them.

34. In support of the argument that there are two separate leases under which plot A and C are separately held, counsel for Prime pointed to the fact that (a) the application to register the land in 2009 was made on the basis of two leasehold interests separately identified in relation to two distinct portions of lands; (b) the 1952 Lease and the 1978 Lease are registered as separate leasehold interests in Folio DN145094L of the Land

Registry; and (c) the 1952 and 1978 leases are identified separately in the notice of intention to acquire the fee simple and the notice of application to acquire the fee simple.

35. Counsel for Prime argued that Clause 2 of the 1978 lease was incompatible with Clause 1 which she described as the critical provision since it demises the land and it creates a lease for a fixed term by the words "*the lessee under the 1978 lease will hold the premises from the date hereof".* She submitted that one cannot simply ignore the fact that Clause 1 uses the words of demise, being "*hereby demises*" and creates a leasehold interest. She referred to paragraph 5.7 of Mr Sweetman's report where he observes that the leasehold title to plot C commences with the 1978 lease and submits that this is the root of title.

36. She submitted, as per the observation of Mr. Sweetman, that the two leases cannot be treated as a single lease because they commenced at different times and noted that the leases are almost 27 years apart.

37. In respect of Clause 2, counsel for Prime submitted that it is a device or a legal fiction not reflected in the key operative provisions of the deed and that it would subvert the intention of s.9 (1) if the parties could deem something to be held under a lease, while at the same time actually demise it for a different term 27 years later.

38. In response, counsel for TUD raised an estoppel point not previously identified to the effect that Atlas/Prime knew what it was buying i.e. a lease that contained Clause 2, and that it could not raise an argument in contradiction of the terms agreed in the 1978 lease, as it was stuck with the terms of that lease.

39. As discussed below in this judgment, parties are only permitted to raise new arguments on an appeal from a Circuit Court decision where it is in the interests of justice that they be permitted to do so. Here, where the estoppel argument was not raised before either the County Registrar or the Circuit Court, was not identified in the legal submissions filed on behalf of the TUD in the High Court and was only made in reply by counsel for the TUD, it seems to me it is much too late to seek to introduce the argument at this point and it would not be in the interests of justice to do so. I will therefore not entertain it.

40. In relation to the substantive points identified above, counsel for TUD focused upon the wording of Clause 2 and submitted there was nothing in any of the provisions of the Act that altered the situation that the parties had chosen to provide for by way of the 1978 lease.

Report of Mr. Sweetman

41. Mr. Sweetman, expert witness for Prime, addresses the issue of whether there are one or two leases, and how plot C was demised. At 4.10 he notes as follows:

> *"it is the Applicant's case that the 1952 Lease and the 1978 Lease should be construed as a single demise, or effectively held under the same lease. On that basis it is argued that the Additional Plot is ancillary and subsidiary to the Main*

Holding, and the lessee therefor has a right to acquire the freehold in the Additional Plot."

42. At paragraph 5.1 he identifies that the net question for him to consider is whether as a matter of conveyancing practice, the 1952 lease and the 1978 lease are effectively a single demise, or a single lease.

43. At paragraph 5.6 he refers to the provision in the 1978 lease that applies the existing covenants conditions and provisos contained in the 1952 lease to the additional premises identified in the 1978 lease and that provides the lease of 1952 shall be read and construed as if the additional premises had been originally included therein. He opines that that latter provision does not as a matter of conveyancing practice mean that there is a single demised premise but rather that there remain two distinct leases, each containing its own (if similar) rights and obligations. He notes that the leasehold interest in the additional plot commences with the 1978 lease.

44. At paragraph 5.9 he observes that the 1952 lease and the 1978 lease cannot be treated as a single lease because they commenced at different times and they therefore created separate and distinct interests in the respective premises demised by each. He refers to the deed of assignment to Dublin Institute of Technology, the predecessor of TUD, that identifies three leasehold titles, including one under the 1952 lease and another under the 1978 lease. He also refers to the registration in the Land Registry of the leasehold title on folio DN 145094F as describing the two distinct titles in the main holding and additional plot each by reference to the lease under which it is held.

45. No expert conveyancing evidence was provided by TUD controverting same.

Discussion

46. There is no doubt in my mind but that there are two leases, as evidenced by (a) the Land Registry folio that describes the 1952 lease and the 1978 lease separately; (b) the deed of assignment to Dublin Institute of Technology that refers to the 1952 and 1978 leases separately; and (c) the notice of application in these proceedings, which identifies the intention to acquire premises held under what it describes as the "lease" (1952 lease) and the "supplemental lease" (1978 lease).

47. However, my task in these proceedings is not to decide in the abstract whether there are one or two leases, or the relationship between them but to consider, in respect of the land sought to be acquired by TUD, the legal interest pursuant to which that land is held so that I can ascertain whether the requirements of s.9 of the Act are met. The question of compliance with s. 9 is not addressed by Mr. Sweetman, although his views as set out above are of assistance to me in deciding this question.

48. Insofar as the scope of its application goes, s.9 (1) is expressed in simple language. It states that "*this part applies to a person who holds land under a lease*". Section 8 is also relevant here, providing as it does that "*A person … shall, subject to the provisions of this*

part, have the right as incident to his existing interest in land to enlarge that interest into a fee simple, and for that purpose to acquire by purchase the fee simple in the land …".

49. Thus, the legislative scheme accords a person a right to enlarge his or her existing interest in land into a fee simple, including a person who holds land under a lease. To decide if a person has the right to enlarge their interest under the Act, it is necessary to identify precisely the nature of the existing interest that they hold.

50. TUD submits that plot A and plot C are both held under the 1952 lease, presumably to avoid the difficulty it faces if the 1978 lease is to be assessed for compliance with the statutory requirements on its own. To succeed in this argument, TUD must demonstrate, in the words of s.9, that it is a person "*who holds*" plot A and plot C "*under a lease*" i.e. the 1952 lease. In the words of s.8, TUD is seeking to establish that its existing interest in plot A and plot C derives from the 1952 lease.

51. As noted above, under Clause 2 of the 1978 lease, the 1952 lease must be read and construed as if the additional premises had been originally included therein i.e. that the 1952 lease is deemed to include the lands identified in the 1978 lease described as plot C.

52. But no matter how one interprets Clause 2, at most it requires the 1952 lease to be read as if it includes plot C. It does not and cannot provide that plot C is, in the words of s.9, held "under" the 1952 lease. The correctness of that proposition can be tested by considering what would happen if the 1978 lease was terminated. If the 1978 lease no longer existed, plot C would not be held under the 1952 lease. TUD is only entitled to an interest in plot C because plot C was demised under the 1978 lease. The fact that the 1978 lease seeks to create something of a legal fiction by requiring that the 1952 lease will be interpreted as if it both includes and has always included plot C, does not mean that plot C is in fact held under the 1952 lease.

53. In my view it is not even a question of conflicting provisions in the lease of 1978, as submitted by counsel for Prime. Rather, even fully accepting the instruction at Clause 2 and reading and construing the 1952 lease as if plot A had originally been included therein, Clause 2 does not and could not provide that the lands demised by the 1978 lease and held thereunder are in fact demised by the 1952 lease and held thereunder.

54. For the purposes of s.9, the only question I must ask is whether the TUD holds plot C under the 1952 lease or under the 1978 lease. The answer to that is self-evident. Plot C was demised to TUD under the 1978 lease and is therefore "held" for the purposes of s. 9 on that basis. TUD's existing interest in plot C derives exclusively from the 1978 lease.

Surrender/re-grant of lease

55. It has been Atlas/Prime's consistent position since the start of these proceedings that, if the intention of the 1978 lease was that plot C be held under the 1952 lease, then by operation of law, there was a surrender of the 1958 lease and a re-grant of a lease over the modified and extended demise, albeit on identical terms. When the matter came before the County Registrar, the written submissions of Atlas indicated that, if the intent

and effect of the 1978 lease was to extend the portion of ground demised by the 1952 lease, then by operation of law, the effect of the 1978 lease was to surrender the 1952 lease and to re-grant a lease over the modified and extended demised, albeit on identical terms (see paragraph 5.3).

56. TUD's response was that the parties intended the 1978 lease to be seen as an amendment (for want of a better phrase) of the 1952 lease and not a surrender and re-grant. At paragraph 10 of its written submissions before the County Registrar, it was submitted that if the effect of the 1978 lease was a surrender and re-grant then it would not affect the TUD's entitlement to acquire the fee simple, in that there would be compliance with s. 9 and also with s. 10 (5). It was also noted that the notice under section 4 of the 1967 act would still be valid even if the 1978 lease operates as a surrender and re-grant.

57. A similar approach was taken by both parties before the Circuit Court in their written submissions, with Atlas observing that:

> *"regardless of how the parties might have chosen to describe the effect of the transaction, or whatever labels they might have used, the fact remains that the 1978 Lease increased the extent of the premises demised under the 1952 Lease. That being the case, the law will infer a surrender and re-grant, as opposed to interpreting the 1952 Lease as having continued in force after 1978".*

58. In its High Court submissions, TUD maintained its constant position that this was not surrender and re-grant because the effect of the 1978 lease is to amend the 1952 lease so that same is to be interpreted as if it included the additional premises demised in 1978. However, it noted that even if a surrender and re-grant was inferred, TUD would still be entitled to acquire the lands as they would comply with s. 9 and s. 10 (5).

59. During the hearing before this court, counsel for Prime accepted that if there was a valid surrender and re-grant, the requirements of s.10(5) would indeed be met.

Discussion

60. As identified above, I have already concluded that plot A is held under the 1952 lease and plot C under the 1978 lease. Given that Atlas/Prime's primary argument was that the question of surrender and re-grant would only arise if it was decided both plots were held under one lease, it ought not be necessary to decide the question of surrender and re-grant. However, at times Atlas/Prime's argument on surrender and re-grant took on the appearance of an independent, stand-alone argument. Similarly, at times TUD, although arguing against an intention on the part of the parties to surrender and re-grant, submitted that if its argument that the plots A and C were held under the 1952 lease was unsuccessful, it would be entitled to acquire the fee simple on the basis of surrender and re-grant. For that reason, I deal with the argument now.

61. I was referred by counsel for TUD to the Law Reform Commission on General Law of Landlord and Tenant LRC CP 28-2003, which in turn referred to an academic article

entitled "*Variation of lease or new tenancy*", Dowling, (1995) Conv 124, which sums up the underlying principles in respect of surrender and re-grant as follows:

> *"The basis of the doctrine of surrender by operation of law is estoppel: if a tenant accepts a new lease from his landlord he is estopped from saying the landlord did not have power to grant it. It is the acceptance of a new lease which gives rise to the estoppel: the landlord cannot grant a new lease until the existing one is out of the way .... It is the impossibility of giving effect to the new agreement without also holding that a cancellation of the existing agreement has taken place that is the foundation of the doctrine of surrender by operation of law. A number of cases have stressed that it is the inconsistency of the latter agreement standing with the former which results in a surrender taking place. The ordinary case, as Upjohn L.J. explained, is where the parties in the middle of a tenancy agree on new terms to take effect during the continuance of the old term; in such a case the old term must be surrendered by operation of law because the parties have agreed on new terms relating to those very premises".*

62. Further, in the Irish cases, intention as to the nature of the new estate is a vital part of the doctrine. As identified by Palles CB in *Conroy v. Marquis of Drogheda* [1894] 2 I.R. 590:

> *"a surrender is caused by the acceptance of a new estate by the tenant, that is, by a new tenancy; and as the relation of landlords and tenants is constituted by contract, before we can decide that there was a new tenancy, we must decide that there was a new contract; and before we can decide that there was a new contract we must decide if the minds of both parties were ad idem.".*

Later he noted that it was necessary to:

> *"examine very critically the exact intention of the parties, to see whether both agreed as to the nature of the new estate which the landlord should grant; and thus we are brought into all the old learning in reference to surrender by operation of law, in which the primary consideration was intention".*

In a footnote to his judgment, Palles CB quoted with approval the author Edge, *"Forms of Leases*" 2nd edition, where Mr. Edge observed:

> *"… in case, then, a landlord and tenant agree to substitute a future for a present tenancy, without calling in aid the supervision of a Court, the consideration for the change should be apparent on the contract which ought to be in writing, and the intention to surrender the existing tenancy should be expressed in it, and not left to mere inference…"*

63. In the same case, Walker C observed, in a pithy summary of the law, "*Surrender depends on intention".*

64. Applying those principles, first, there is no evidence that it was the intention of the parties that the 1952 lease should be surrendered or that there should be a re-grant of the lands by the 1978 lease. Crucially, the lease of 1978 does not demise the 1952 lands. It cannot be interpreted as granting a new lease over the 1952 and 1978 lands. The 1978 lease does not deal with the lands the subject matter of the 1952 lease but in a different way. There is therefore no question of a re-grant of the lands the subject of the 1952 lands.

65. That means that the necessary condition of inconsistency of one lease with the other does not exist. In fact, the two leases are not inconsistent; it is quite possible to operate both together, with all the 1952 covenants and conditions applying to the land demised by the 1978 lease. There is the curiosity already identified in that the 1978 lease requires the 1952 lease to be interpreted as if it always included the 1978 lands. But that does not provide evidence of an intention that the terms of the 1978 lease should govern plot A and plot C. In fact, the intention of the 1978 lease is quite the opposite – it seeks to emphasise that the terms governing both plot A and plot C are those in the 1952 lease rather than the 1978 lease.

66. None of this points to a surrender and re-grant. The terms of the 1978 lease cannot be construed to constitute a re-grant. I am fortified in my conclusions in this regard by Mr. Sweetman's views, who was of the view that a surrender and re-grant might have been one possible approach (though bringing with it some disadvantages and practical issues) but had not occurred here given that there remained two distinct leases.

67. At paragraph 5.13 he notes as follows:

"5.13 It would have been possible for the parties to the 1978 Lease to have merged the Main Holding and the Additional Plot in the one demise had they wished to do so. This would have required the lessee to have surrendered the 1952 Lease and contemporaneously for the Landlord to have granted a new lease of the Main Holding and the Additional Plot.

5.14 Had that been done, then there would have been a single demise, and the unbuilt on lands comprising the Additional Plot would have been held under the same lease as the Main Holding.

5.15 However as a matter of practice it would have been unusual to have done so, and I have not personally seen it done in practice. The usual means by which additional premises are added to a demised premises is by the grant of a separate lease of the additional plot, as in this instance."

68. At paragraphs 5.16 he identifies the considerations for the parties if they were to accept a surrender and grant of a lease of a larger demise, including stamp duty issues, VAT treatment, legal fees, change in nature of tenant's interest and implications for security.

69. For those reasons, it seems to me that the leases, properly construed, do not give rise to a surrender of the 1952 lease or a re-grant of those lands pursuant to the 1978 lease.

Permanent building on Plot C

70. Given my conclusion that the two leases, and the lands held thereunder, must be treated separately, I turn now to a consideration of whether the lands held under the 1978 lease satisfy the requirements of s. 9 and 10. Prime asserts that there are no permanent buildings on plot C as required by s.9(1)(a).

71. No building appears on the map attached to the 1978 lease. The evidence demonstrates that the only structure that might conceivably qualify as a building on plot C is the fire escape. A description of same is given in the Valuation report submitted by TUD "*There is a fire escape at first floor level to the northern elevation of the building which leads out to a small courtyard which subsequently provides access onto Church Lane on the northern side of the steel gate*" (para. 3.0 under the heading "*Property*").

72. There is a reasonably detailed description of the fire escape in the report submitted by Mr. Barrett and the two reports submitted by Mr. Kelly, which addressed the likely date of construction of the fire escape and therefore describe it in some detail and provide good quality colour photographs and maps of it and surrounding areas. Mr. Barrett in his report on behalf of Atlas entitled "*Report on follow up inspection of 8 September 2020*" describes it as follows: "*The fire escape door opens out onto a flat roof and at the northern end of the flat roof there is an external fire escape stair constructed in steel… The escape stair itself is a standard scissors format with a half landing supported on steel posts, steel threads and stringers and a steel handrail. It is fixed to the building wall via standard end place connections on the stringers bolted to the building masonry".* Mr. Kelly on behalf of TUD described it in his second report of 20 September 2020 as follows: "*The Stairway on Plot C is a substantial and permanent structure framed in steel beam and column sections with steel checker plate floors, treads and risers and steel balustrading and guardings. The supporting columns are carried down below ground to (assumed) concrete foundations".*

73. To decide whether the fire escape can be described as a permanent building within the meaning of the Act, I must consider the correct interpretation of "*permanent building*".

74. In *Cement Ltd v. Commission of Valuation* [1960] I.R. 283, Davitt P. considers the concept of a building and states the primary meaning of the word as understood in its popular sense should be considered. He noted:

> *"The word "building" has to be interpreted with reference to the word "built" but cannot be simply equated to something that is built … Unless there is some good reason for doing otherwise the word should be construed in its popular sense as including what an ordinary lay person would understand by the word …In that sense I understand it to mean a structure which is large when compared with an adult human being; which is intended to last a long time; which is intended to remain permanently where it is erected; and which, whatever its material, use, or purpose, is something in the nature of a house with walls and a roof."*

It is true that this view was identified in respect of the concept of a building for the purpose of the Valuation Acts. Nonetheless, that seems a sensible approach to me and the fire escape does not in my view correspond with the generally understood meaning of a building.

75. Equally in Mason v. Leavy [1952] I.R. 40, Maguire C.J. noted that "*A building which is the subject of a tenancy usually consists of walls and a roof*" (page 45). In *Fitzgerald v. Corcoran* [1991] I.L.R.M. 545 it was held that a tennis court or car park could not be considered a permanent building.

76. Counsel for Prime laid stress on the basis principle that a building would generally have walls and a roof and this structure does not have a walls or roof and it is not intended that it would have.

77. In my view, having regard to the evidence before me, including the map of Plot C attached to the 1978 lease, the reports of Mr. Barrett and Mr. Kelly, and the photos attached thereto, I am satisfied the fire escape cannot be described as a permanent building. It has no walls or roof, it is not an enclosure of brick or stonework, it is not in the nature of a house or anything akin to a house; and it could be removed without any significant impact to the fabric of the building to which it is attached as it is not part of that building. Even the report of Mr. Kelly submitted by TUD does not refer to it as a building but rather as a permanent structure.

78. Accordingly, plot C, held under the lease of 1978, does not meet the requirements of s.9(1)(a). Given that compliance with same is mandatory, there is no purpose in going on to consider the question of compliance with s.10 (1) i.e. the identity of the person who constructed the building as, even if the fire escape met those requirements, TUD would still not be entitled to acquire the fee simple for plot C.

Was notice of intention to acquire fee simple sufficient?

79. Prime contends that the notice of intention to acquire the fee simple under the 1978 Act was invalid because only one notice was given. It argues that as there were two separate leases, s.4 of the Landlord and Tenant (Ground Rents) Act 1967 (the "1967 Act") requires that separate notices be served in respect of each lease, given the reference in s. 4 to the "next superior interest in the land" in the singular. It is not entirely clear whether its objection also encompasses the notice of application to acquire the fee simple. I will proceed on the basis that it does as only one notice was served in that respect also and my conclusion therefore applies to both notices.

80. Prime also invoked Form No. 1 to the Landlord and Tenant (Ground Rents) Act, 1967 (Forms) Regulations, 1967 ("S.I. 43 of 1967") which prescribes for the purposes of the Act the forms set out in the schedule to the Regulations. Form No. 1 is the Notice of intention to acquire a fee simple and requires, *inter alia*, that there must be a description of land to which the notice refers and "*particulars of applicant's lease or tenancy*". Prime argues that Form No. 1 (notice of intention to acquire the fee simple) is premised on an assumption that the notice will be served in respect of one lease only, given that the

notes to it, forming part of the Statutory Instrument, refer in the singular to a lease or yearly tenancy which indicates it was understood that individual notices would issue in respect of individual leases.

81. No case law was cited in support of this proposition. *Fitzgerald v. Corcoran* [1991] ILRM 545, relied on by the TUD, was sought to be distinguished. In that case, it was held that an application to acquire the fee simple can succeed in respect of a part of the relevant lands only, even where the statutory notice identified a larger parcel of land and did not avert to the possibility of acquiring only part of the lands. Prime pointed out that in *Fitzgerald*, all the lands were held under the one lease unlike the present situation where two leases are at issue, thus requiring (on its case) two notices.

82. In response, the TUD referred to the Interpretation Act 2005, s. 18(a) of which provides that a word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular.

83. It argued that if, contrary to its interpretation, the court held there were two separate leases and the application related to two portions of ground held under two different leases, even in that case there was no requirement to have two separate notices of intention to acquire and notices of application where the identity of the person entitled to the lessor's and lessee's interests are the same. Relying on *Fitzgerald* (referred to above) and *Smith* (*Harcourt Street) Limited v. Hardwicke Limited* (Unreported, High Court, 20 July 1971), it argued that the purpose of the notice is to notify the landlord as to what portions of ground the application refers to, and there is no strict necessity for compliance by serving different notices for different portions.

Discussion

84. To resolve the arguments raised by Prime, it is necessary to consider the terms of s. 4 of the 1967 Act and the wording of the regulations adopted thereunder. This is because s. 8 of the 1978 act applies the provisions of the 1967 Act, including the requirement to serve a valid notice of intention to acquire the fee simple, to applications to acquire under the 1978 Act.

85. Section 4 of the 1967 Act reads as follows:

> *4.— A person who proposes to acquire the fee simple in land by virtue of this Act shall serve a notice in the prescribed form upon each of the following persons who can be found and ascertained, that is to say, the person who is for the time being entitled to the next superior interest in the land, every (if any) person who is, in relation to the land, the superior lessor of the person so proposing and every (if any) person who is the owner of an incumbrance thereon.*

86. S.I. 43 of 1967 provides that the forms set out in the schedule to the Regulations are prescribed for the purposes of the 1967 act. Form No. 1 is the Notice of intention to acquire a fee simple and requires, *inter alia*, that there must be a description of land to

which the notice refers and "*particulars of applicant's lease or tenancy*". There are notes to the form as follows:

"A. section 4 of the act provides that notice should be served by a person who proposes to acquire the fee simple on the person entitled to the next superior interest in the land, each superior lessor and any person who is the owner of an incumbrance.

B. Sufficient particulars should be given to identify the property.

C. State amount of rent and whether the land is held on a yearly tenancy or under a lease. If the land is held under a lease, state date of lease, length of term and parties to the lease."

87. Here, the notice of intention to acquire fee simple was served on Atlas/Prime on 29 April 2019 and under the heading "*Description of land and premises to which this notice refer*s" the following was inserted:

> *"All that and those the hereditaments premises situated at Church Lane, Kevin Street, in the parish of St Peter and City of Dublin, being all of the property comprised in the Land Registry folio 145094L of the registered (sic) of leaseholders County Dublin, more particularly shown on the file plan map attached hereto and there are outlined in green".*

88. Under the heading "*particulars of applicant's lease or tenancy*" it provided as follows

> *"Held pursuant to:*
>
> *(i) lease dated 18 October 1952 between (1) Stanley A. Siev and (2) Peter J. Cunningham for the term of 150 years from 29 September 1951 subject to the yearly rent of £60-0-0 (sixty pounds) thereby reserved and the covenants and conditions therein contained; and*
>
> *(ii) supplemental lase dated 3 May 1978 between (1)Stanley A. Siev and (2) Irish Life Assurance Company Limited for the term from 3 May 1978 to 29 May 2101 subject to the yearly rent of reserved by the lease specified at paragraph 2(i) above of this notice and the covenants and conditions therein contained".*

89. No response to the notice was received from Atlas and in the circumstances on 18 June 2019 TUD's solicitors wrote to Atlas's solicitors indicating that given that no response had been received, they would now proceed to issue an application to acquire the fee simple.

90. There can be no doubt about what TUD was seeking to acquire having regard to the terms of the notice of intention and at no point in these proceedings has been any complaint by Atlas/Prime about a lack of clarity in this regard or a confusion on its part about what TUD was seeking to acquire.

91. In this case, as identified above, the land sought to be acquired was all comprised in Folio 145094L. It was held under two separate leases. The person entitled to the superior interest in respect of both leases was the same person i.e. Atlas. In the circumstances it made perfect sense to use one notice to notify Atlas of TUD's intention to acquire the relevant interests.

92. There is no requirement in either s. 4 or Form No. 1 and its notes, requiring that there be separate notices of intention or notices of application to acquire, in respect of either separate plots of land or separate leases. The purpose of s. 4 is to ensure that a person proposing to acquire the fee simple shall serve a notice in the prescribed form upon *inter alia* the person who is entitled to the next superior interest in the land. Having regard to s. 18 of the Interpretation Act 2005 "lands" can where appropriate be interpreted to mean "lands". Equally, the reference to "lease" in the Regulations may be read as including "leases".

93. The core purpose of s. 4 is to ensure that adequate notice is given. Nothing identified by Atlas goes to the adequacy of the notice. An attempt to construe s.4 strictly was rejected in the case of *Fitzgerald* referred to above, where Finlay C.J. held that a right to enlarge a trustee's interest could not be defeated by the fact that the notice served under s.4 referred to a greater area than that to which the applicant had any potential claim. Equally, in *Smith (Harcourt Street),* complaint was made that the notice under s. 4 did not refer to a right of way and it was contended that the plaintiff therefore had no right to acquire the fee simple in the right of way. It was held by O'Keefe P. as follows:

> *"…the notice was in the form prescribed by the Minister in SI number 43 of 1967. That notice requires a description of the land to which the notice refers. The note by the Minister is as follows "sufficient particulars should be given to identifying the property" … I consider that the notice under section 4 need not have the same precision as a deed of conveyance, so long as it identifies to the vendors the land which it is sought to acquire".*

94. Applying this principle to the facts of the case, he concluded that the vendors served with the notice would understand that the purchaser wished to acquire the fee simple in the lands described, together with the rights appurtenant to them under the lease and that it was not suggested that the defendants understood otherwise. Accordingly, he concluded that the notice served was sufficient to entitle the plaintiff to proceed to acquire the fee simple together with the right of way.

95. Precisely the same situation pertains here. It is not suggested that Atlas did not understand what land was sought to be acquired. There is nothing in the section or the regulations that requires separate notices. The reliance on the use of the singular in s. 4 does not survive an application of the Interpretation Act 2005. There is nothing to support Prime's claim that its predecessor was not properly served, even having regard to my conclusion that there were two leases. It was acceptable in the circumstances of this case to serve one notice that identified the interests sought to be acquired, even where those

interests were held under two separate leases. Accordingly, I reject Prime's argument in this respect.

Admissibility of argument on presence of subsidiary/ancillary lands under 1952 lease

96. Prime seeks to argue in the High Court that there was no entitlement on the part of TUD to acquire the lands the subject of the 1952 lease, because those parts of the land not covered by buildings are not subsidiary and ancillary to the buildings ("the subsidiary/ancillary argument"). TUD vehemently objects to the introduction of that argument on the basis that it was never made either before the County Registrar or the Circuit Court. I must therefore decide whether this argument is a new one and, if so, whether it should be permitted to be introduced at this stage.

97. In this context, I should make it clear that I fully accept Prime's submission that TUD undoubtedly bears the burden of proof of satisfying the conditions identified in s.9 and 10, including before the High Court on an appeal by a defendant against a decision by the Circuit Court ordering acquisition of the fee simple.

Is the subsidiary/ancillary argument a new one?

98. In an application such as this, there are unfortunately no pleadings and therefore, when faced with an assertion that a new argument has been raised, one cannot take the usual course and consider whether such an argument was identified in the pleadings. I must start therefore by looking at the evidence initially adduced in the proceedings.

99. As identified above, in his affidavit grounding the motion to acquire the fee simple, Mr Murphy avers to the fact that the portion of the lands not covered by the buildings in plot A were subsidiary and ancillary. He had therefore satisfied his obligation by establishing by evidence the requisite proofs under s. 9 and if Atlas wished to challenge that evidence by identified grounds, it was open to it to do so.

100. As identified above, three replying affidavits were sworn on behalf of Atlas. Mr. Sweetman did not address this issue. Mr. Barrett, engineer, exhibited his report. In respect of plot A, his report identifies that the property is "*almost entirely occupied by a two-storey educational building*", which it describes as the Annex building and notes that that building is ancillary to the college campus. The report does not address whether the small portions of plot A (two in total) not covered by the Annex building are subsidiary or ancillary, nor does it describe the use of the unbuilt upon land. As identified above, a map is attached to the report which shows that vast majority of the land in plot A is covered by a building save for a small area to the north and a small strip to the south.

101. Mr Crean's affidavit sworn 21 January 2020 contains the following averment at paragraph 15:

> *"as explained by that report and as can be seen from the first attached map, the lands demised under the 1952 Lease are almost entirely covered by a two-storey college building which is bounded to the south by St Kevin's Park, a public space which is under the control of Dublin City Council."*

102. At paragraphs 18-19, he avers as follows:

> *"18. Atlas does not accept that the Applicant has established an entitlement to acquire the fee simple to the lands the subject of the 1952 Lease. While I do not wish to trespass upon matters more properly reserved for legal submission, part of Atlas's opposition to this aspect of the application will be based on the deficiencies in the applicant's statutory notices, which have been exhibited to the grounding affidavit. Atlas will in that connection contends that the applicant was required, under the relevant legislation to serve separate statutory notices in respect of the Leases.*
>
> *19. As for the lands demised under the 1978 lease, I am advised they comprise an open plot of land, to the rear of the Boojum restaurant on the ground floor of the College Court development, which is used for fire escape access from the Annex Building. I am advised that there is no access to this open plot of land from the College Court development. It would appear that there are no permanent buildings (or any buildings) standing on the lands demised under the 1978 Lease."*

103. No challenge is made to the 1952 lease on the basis that it contains lands that are not subsidiary/ancillary.

104. The reports by Mr. Barrett and Mr. Kelly in respect of the question of when the fire escape was constructed did not touch on this issue at all, although Atlas could presumably have asked Mr. Barrett to address the issue at this stage.

105. In the written submissions provided by Atlas before the County Registrar, at paragraph 14 it is submitted that the leases should be treated as separate leases. At paragraph 15 it is identified that "*if the Leases are separate leases, then no entitlement to acquire the lands the subject of the 1978 Lease can be established. Those lands are, in their entirety, uncovered and built upon, and the mandatory Section 9 conditions cannot therefore be satisfied"*. Again, no complaint is made about the entitlement to acquire the land the subject of the 1952 lease (save in respect of failure to serve adequate notice, discussed above).

106. In Atlas's written submissions before the Circuit Court, paragraph 6 identifies that the principal grounds upon which the application is opposed are (a) that separate statutory notices were required to be served and (b) that the application must fail as regards the lands the subject of the 1978 lease, as they are open and unbuilt upon and there are no permanent buildings on the lands concerned, arguing that "*If the Leases are separate leases, then no entitlement to acquire the lands the subject of the 1978 Lease can be established*." (paragraph 16).

107. The import of the above summary of evidence and submissions is that it was never argued by Atlas that the 1952 lands could not be acquired because of an absence of subsidiary/ancillary lands, before either the County Registrar or the Circuit Court.

108. Counsel for Prime relies upon an exchange between counsel and the Circuit Court judge to support a claim that this issue was raised in oral submissions in the Circuit Court. However, having read the full transcripts of the Circuit Court hearing, I am not satisfied that this is so.

109. At pages 44-45 of the transcript of the Circuit Court hearing, counsel for Atlas identified the key points he would be arguing and did not identify the subsidiary/ancillary argument.

110. Later, at page 108 of the transcript, near the end of the hearing, counsel for Atlas was asked by Judge Linnane whether, on the basis there were two separate leases, TUD was entitled to acquire the fee simple in the lands demised by the 1952 lease. Counsel replied that TUD bore the burden of proof of satisfying the courts that the uncovered portion of the lands were subsidiary and ancillary. The short exchange in my view did no more than set out the correct legal position, that TUD must satisfy the court of all the elements required by s. 9 (1), including the requirement that there must be permanent buildings on the land and that the portion of the lands not covered by those buildings is subsidiary and ancillary to them.

111. In the course of this appeal to the High Court, the subsidiary/ancillary argument was identified for the first time in the legal submissions delivered the day before the case was heard and took up in substance just one paragraph as follows:

> *"A portion of the plot demised by the 1952 Lease, however, consists of an unbuilt on laneway, serving a car park which does not form part of the demise. This portion of the demised lands, therefore, is not "subsidiary and ancillary" to the permanent buildings situate on this portion of the lands. See second page of report of Messrs. Barrett O'Malley of 14 January 2020, for confirmation of the existence of this laneway and its use, and the map attached to the affidavit of Patrick Crean of 21 January 2020, which shows the car park outside the lands demised by either the 1952 Lease or the 1978 Lease". (para. 28).*

112. That argument was then expanded upon in oral submissions although, as noted above, counsel for TUD vigorously objected at the start of the case to this new ground being introduced. I permitted the argument to be made on the basis that I would rule on the question of admissibility when deciding the case.

113. The oral submissions made in this respect demonstrated the last-minute nature of this argument. As noted above, in the written legal submissions it was submitted that the unbuilt on laneway served a car park. The map identifies two very small parts of plot A that are not built upon and TUD's counsel argued in oral submissions that only one of these was not subsidiary/ancillary. It was then argued that as the laneway was used to access the car park, it was ancillary to the car park rather than to the building on plot A, and that the dominant purpose of the laneway was used to access the car park. However, upon counsel reading out Mr Barrett's reports, a different submission was made to the effect that there was no access via the laneway within plot A to the car park.

114. Accordingly, in all the circumstances, I am satisfied for the reasons set out above that the subsidiary/ancillary argument is a new one and was sought to be introduced in this case at the eleventh hour in the High Court proceedings by way of written submissions filed on 25 January 2021, the day before the hearing.

Should the subsidiary/ancillary argument be permitted to be introduced before the High Court?

115. Submissions were made by both parties at the start of the case in relation to the extent to which a party is entitled to raise new arguments at appeal stage. Counsel for Prime relied heavily upon the fact that an appeal under s. 37 of the Courts of Justice Act 1936 is a *de novo* appeal and argued that this meant new matters (while not accepting this was indeed a new matter) could be introduced. In support of this proposition she referred *inter alia* to *Lough Swilly Shellfish Growers Co-Operative Society Limited* and *Atlanfish Limited v. Bradley and Ivers* [2013] 1 IR 227. Counsel for TUD indicated that there is a constitutional right to an appeal and permitting a new ground to be introduced at the stage of an appeal against a decision of the Circuit Court prevents any right of appeal in relation to same.

Relevant case law

116. Prior to the decision in *Lough Swilly*, as identified in Dowling and Martin, *Civil Procedure in the Circuit Court*, 3rd Ed at 16-24, appellate courts would not generally permit an appellant to raise for the first time an issue that was not heard and decided before the lower court, unless it considers that the issue raised is exceptional and in the interests of justice. The decision of Henchy J. in *Movie News Ltd. v. Galway County Council* (Unreported, Supreme Court, 15 July 1977), was cited in support of this proposition. Similarly, in *KD v. MC* [1985] I.R. 697K.D., Finlay C.J. said that it was a fundamental principle that *"… save in the most exceptional cases, the Court should not hear and determine an issue that has not been tried and decided in the High Court. To that fundamental rule or principle there may be exceptions, but they must be clearly involved required in the interests of justice".*

117. Movie News involved an appeal against the quashing of a Compulsory Purchase Order. It was sought to argue that Galway County Council were empowered to acquire the lands compulsorily by s. 10 of the Local Government (Ireland) Act 1898, however this was the first time that this ground had been raised. Henchy J. held that new arguments:

> *"should not – except for exceptional reasons which do not exists in this case – under the guise of an appeal, enter on the trial of a matter as of first instance and thereby deprive the party aggrieved with its decision of the constitutional right of appeal which he would have if that matter had been decided in the High Court".*

118. That rationale was reconsidered by the Supreme Court in the decision of *Lough Swilly*. Discussing *Movie News v. Galway County Council* and *KD v. MC [*1985] I.R. 697, O'Donnell J. noted that those cases might be understood as creating an absolute rule against the argument of any points not raised explicitly in the High Court. However, he went on to observe that *"the proposition that the objection to any argument of a new*

point in an appeal is grounded in the constitutional right of appeal is not beyond argument". Rather, he identified that appeals from the High Court to the Supreme Court must ensure that the correctness of the decision and the resolution of the case in the High Court is capable of being reconsidered by a court of appeal. Referring to the right to adduce fresh evidence before the Supreme Court in certain circumstances, O'Donnell J. observed that, by definition, that meant that the Supreme Court would hear matters never advanced in the High Court.

119. I therefore accept that, contrary to the submission of counsel for TUD, it is not the case that a new ground can never be introduced at appeal stage for constitutional reasons.

120. However, O'Donnell J. noted that there is a spectrum of cases in which a new issue is sought to be argued on appeal.

> *"There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K D. for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made."*

121. No case has been cited to me where a court has grappled with this issue of an entirely new ground in an appeal from the Circuit Court to the High Court. However, it seems to me that, applying the principles set out in *Lough Swilly*, a similar position must prevail in relation to Circuit Court appeals. I am conscious of course that an appeal against a Circuit Court decision is heard *de novo* and to that extent is different from an appeal from the High Court to the Supreme Court. However, I do not believe that simply because this is an appeal *de novo*, there is an entitlement to introduce new grounds in all circumstances even where this would introduce an injustice. The reference to "*rehearing*" in s. 37 of the 1936 Act suggests that the matters that were before the Circuit Court must be reheard, entirely afresh, in the appeal, without reference to the correctness of the decision of the lower court. However, this is different to permitting an entirely new argument to be introduced. The jurisdiction to rehear a case does not of itself, in my view, introduce an

entitlement to raise new arguments in the High Court not previously raised in the Circuit Court without leave of the court.

122. Moreover, the restriction identified by s.37(2) on the introduction of evidence "*not given or received"* unless special leave is given by the judge hearing the appeal, and reflected in Order 61 Rule 8 of the Rules of the Superior Courts, strongly suggests that a party is not at liberty to introduce a new ground, at least where that new ground requires evidence, without the permission of the court.

123. The observations of Clarke J. in *Fitzgibbon v. Law Society* [2015] 1 IR 516 lend weight to the impermissibility of introducing a new argument at appeal stage without special leave. At paragraph 103, he notes: "*The pleadings which were exchanged pre-trial in the Circuit Court may well have narrowed the issues between the parties so that, at least in the absence of leave to amend, the issues remain narrowed on any appeal*", thus suggesting that the arguments in the appeal are to be those as pleaded, save that the issues may limited by any agreement between the parties.

124. At paragraph 104, he observes:

> *"It seems to me that the default position, in the absence of any specific rule to the contrary, must be that, in the case of a* de novo *appeal, it remains for the parties to again present to the appellate body whatever evidence or materials may be considered necessary for their case". The reference to "again" suggests that the parties are re-presenting the case already made. This is confirmed by paragraph 108, where he notes: "… the default position will be that it will be necessary that all materials on which the appellate body is to reach its adjudication are properly re-presented to that body in whatever form may be appropriate to the type of proceedings concerned".*

125. In conclusion, there is no constitutional impediment *per se* to a ground not argued in the Circuit Court being introduced in an appeal to the High Court, but it cannot be introduced as of right. Rather, whether it will be permitted in any given circumstance will depend on the overall justice of the case.

Justice of permitting subsidiary/ancillary argument to be introduced

126. In this case, the following factors appear to me to mitigate strongly against permitting the subsidiary/ancillary argument to be introduced by Prime at this stage in the proceedings.

127. If TUD were to be faced with this argument now for the first time in the High Court proceedings, having been put on notice of it the day before the hearing by way of legal submissions, it would be significantly prejudiced. It has had no opportunity to put any evidence on affidavit rebutting the challenge to the subsidiary/ancillary argument. As identified above, it placed evidence before the court by way of affidavit from Mr. Murphy to the effect that the land was not subsidiary and ancillary and this was not challenged by Atlas.

128. Had Atlas wished to challenge this before the Country Registrar, it would have been obliged to explain why it asserted that what part of the unbuilt upon land was not subsidiary or ancillary and why. TUD would then have presumably put forward evidence in response, and, had it decided it was not in a position to identify that the land in question was indeed subsidiary or ancillary, it could have brought an application under s. 14 of the 1978 Act in respect of partly built leases. Under this section, a plaintiff seeking to acquire the fee simple may seek to deem the lease as comprising of two separate leases, one demising the land covered by permanent buildings together with as much of the land as is subsidiary and ancillary to those buildings, and the other comprising the residue of the land. Had TUD done so, this would have allowed it to proceed in respect of the land that met the criteria under s.9, while not proceeding in respect of that portion of land not meeting the criteria. Such an application, if sought and granted, would have permitted TUD acquire the vast majority of the lands at plot A (assuming it considered that it could not meet the criteria in respect of the entirety of the land). TUD is therefore substantially prejudiced by the attempt by Prime to introduce this matter only at this very late stage of the proceedings.

129. Separately, Prime did not bring an application at any stage to this court to adduce new evidence in relation to the question of whether one portion of unbuilt upon land in plot A was subsidiary/ancillary because of the use to which it was put (despite bringing an application for discovery returnable to the hearing date). Counsel for Prime sought to argue that there was evidence in this regard in the form of the report from Barrett O'Malley of January 2020. However, as identified above, that report simply describes plot A in brief terms and does not address at all the question of the use of the two small unbuilt portions of plot A or whether it is subsidiary/ancillary to the buildings on the site.

130. That leaves the court in an impossible situation where I am being asked to determine this issue without any substantive evidence on the issue from either party apart from TUD's uncontradicted averments to the effect that any unbuilt upon land is not subsidiary/ancillary. I am therefore not in a position to determine the question of use (a key issue in deciding upon whether land is subsidiary/ancillary to buildings on the plot in question) and should I do so, as urged by Prime, it would both work a substantial injustice on TUD and would also mean that my decision would be made without an evidential basis.

131. Indeed, this is precisely one of the situations identified by O'Donnell J. - where argument of the point would necessarily involve new evidence - as being a case where leave may not be granted to argue a new point of appeal.

132. Finally, Atlas/Prime has already had not just one but two chances to raise this issue before now, at County Registrar and Circuit Court level, but did not do so. No explanation has been given for its failure in this regard, or its decision to introduce the argument for the first time the day before a hearing in the third fora where the entitlement of TUD to acquire the fee simple was being contested.

133. For all those reasons it seems to me that it would be quite unjust to permit Prime to introduce this argument at this point in the proceedings and I refuse to permit the introduction of same.

Conclusion

134. For the reasons identified in this judgment I conclude:

- That TUD is entitled to the fee simple and any intermediate interests in the land held under the lease of 13 October 1952;

- That TUD is not entitled to the fee simple and any intermediate interests in the land held under the 1978 lease as it does not meet the criteria at s.9(1)(a) that the land has permanent buildings on it;

135. In the circumstances where I have varied the decision of the Circuit Court and am directing the acquisition of a smaller portion of land than permitted by the Circuit Court, I will hear submissions on the purchase price to be paid for TUD's interest.