THE HIGH COURT

[2024] IEHC 398

RECORD NO. 2020/215S

BETWEEN

GRADUAL INVESTMENTS LIMITED

PLAINTIFF

AND

FIONA GRANT

DEFENDANT

Judgment of Mr. Justice Mark Heslin delivered on the 2nd day of July 2024

Introduction

1. This case involves a claim by a landlord against a tenant. The proceedings commenced by way of a summary summons which issued on 10 August 2020. Following the plaintiff's application for summary judgment, Bolger J delivered a decision on 25 July 2022 directing that the matter should proceed to plenary hearing. The summary judgment application ran for two days and was determined in accordance with principles derived from a range of well-known authorities (including *Aer Rianta CPT v Ryanair Limited* [2001] 4 I.R. 607; and *Harrisrange Limited v Duncan* [2003] 4 I.R. 1).

2. At para. 24 of Bolger J's decision she stated: *"Given my findings about the need for the plaintiff's claim for historic unpaid rent to go to plenary hearing, it is not necessary for me to determine whether the plaintiff's claim for ongoing arrears of rent beyond July 2020 is properly made out in the summary summons".* Matters have since moved on, in that a statement of claim has been delivered; particulars raised and replied to; discovery made; a defence delivered and submissions exchanged.

3. During the hearing before me, Mr. Buckley S.C. represented the plaintiff and Mr. McGarry S.C. represented the defendant. I want to express my thanks to both learned counsel for the clarity of their submissions, oral and written, all of which I have carefully considered.

4. As counsel for the plaintiff submitted when opening the case, it is the legal implications of the facts rather than significant factual disputes which give rise to the need for a determination by this court.

5. Having carefully considered all the evidence before the court (comprising of sworn affidavits; the exhibits thereto; oral testimony; and documents either admitted without formal proof or proved by the relevant author) the following chronology emerges.

The Lease

6. A commercial unit known as "Unit 3, The Village, Stepaside, Dublin 18" ("Unit 3" or "the Property") was demised to the defendant for a 35 year term commencing 27 July 2009, by means of a lease dated 14 October 2009 made between Richmond Properties Ireland Limited ("Richmond") of the one part and the defendant of the other ("the Lease" or "the 2009 Lease").

7. In the manner I will presently come to, the landlord's interest in the Lease was subsequently assigned to the plaintiff on 6 March 2014. On the front page of the Lease, a line has been drawn through the words "upwards only" and it reads:

> *" LEASE*
>
> *- of -*
>
> *COMMERICAL UNIT NUMBER 3 (DOCTOR'S SURGERY), THE VILLAGE, STEPASIDE, CO. DUBLIN*
>
> *Term: 35 years from 27th day of July 2009*
>
> *Rent Review: Every five years from (~~upwards only~~) 27th July 2014*
>
> *Initial Rent: €50,000.00 plus VAT per annum"*

8. At this juncture, it is useful to note certain provisions in the Lease, beginning with clause 1.15 which defines the "Initial Rent" as meaning €50,000.00 plus VAT per annum.

9. Clause 1.35 defines "Quarterly Gale Days" as meaning the 1st of January, the 1st of April, the 1st of July and the 1st of October in every year of the term.

10. Clause 3 on internal page 11 of the Lease begins as follows:-

> *"3. DEMISED AND RENTS*
>
> *The Landlord in consideration of the rent herein reserved (including the increases thereof which may arise as hereinafter provided) and the covenants on the part of the Tenant herein after contained HEREBY DEMISES unto the Tenant the Demised Premises TOGETHER WITH the ancillary right and easements specified in the Second Schedule but excepting and reserving the rights and easements specified in the Third Schedule TO HOLD the Demised Premises unto the Tenant from and including the Term Commencement Date for the Term SUBJECT TO all rights, easements, privileges, covenants, restrictions and stipulations of whatsoever nature now affecting the Demised Premises YIELDING AND PAYING unto the landlord during the term:*
>
> *3.1 Yearly and proportionately from the Rent Commencement Date the Initial Rent and from and including each Review Date (as defined in the Fourth Schedule), such yearly rent as becomes payable under the Fourth Schedule, or if higher the rent payable during the preceding period increased by a factor equal to the increase in the Consumer Price Index published by the Central Statistics Office (or if there shall be no index of that name or nature at that time, the newest equivalent index) over the preceding period and in every case the same is to be paid in the manner notified from time to time by the Landlord by equal quarterly payments in advance on the Quarterly Gale Days..."*

11. It is common case that the Lease which this court has been asked to interpret is one in which clause 2 of the Fourth Schedule contains typed wording through which lines have been drawn (i.e. 'struck out'). In addition, the word "*No*" has been added, in manuscript, opposite the following:-

> ~~*" The rent first reserved by this Lease shall be reviewed at each Review Date in accordance with the provisions of this Schedule and, from and including each Review Date, the rent shall equal the higher of either the rent contractually payable immediately before the Relevant Review Date or the Open Market Rent on the Relevant Review Date, as agreed or determined pursuant to the provisions of this schedule."*~~

12. Mr. Dualta Moore is the owner and a director of the plaintiff, his wife also being a director. He gave uncontested evidence that the plaintiff company was set up in 2014. He and his wife put in all their personal savings. They obtained bank borrowings and purchased a number of commercial units in Stepaside, including Unit 3. It is common case that Mr. Moore had no involvement in the property or the Lease, as of 2009.

13. In cross examination, Mr. Moore was asked about the foregoing wording and his evidence was to say *"I don't know who struck it out"* adding that *"I wasn't there for the event".* This is uncontested evidence.

Pre-Lease negotiations

14. Exhibit "CC1" to the affidavit sworn by the defendant on 25 July 2021 comprises (i) a copy letter dated 24 July 2009 which was sent by her solicitors, Messrs. O'Brien Lynam, to the solicitors for Richmond Properties; and (ii) a 27 July 2009 response by email. Both communications are headed *"Subject to Lease/Lease Denied*". The 24 July 2009 letter states that arrangements had been made for the execution of the Lease the following Monday. Leaving aside the fact that the author of neither communication gave evidence to prove their contents, it is uncontroversial to say that this communication comprises of negotiations which took place *prior* to any Lease being executed.

15. When these documents were raised with Mr. Moore in cross examination, counsel for the plaintiff made clear that it is not accepted that documents comprising of negotiations are admissible in construing the Lease. Counsel for the defendant took no issue with that submission.

Parol evidence rule

16. The foregoing would seem to reflect the 'parol evidence rule' which, notwithstanding its many exceptions, means that extrinsic evidence is not admissible for the purposes of varying, contradicting or subtracting from the terms of a document [see *Contract Law* Paul A. McDermott; Tottel Publishing 2006; para. [9.10], p. 354].

17. Keeping the foregoing in mind, the 24 July 2009 letter indicated *inter alia* that the tenant wanted the upward only rent review clause to be deleted, whereas the 27 July 2009 response "*noted*" this. Leaving aside the significant issue of the absence of the authors, it seems to me that this court's task is to ascertain the objective meaning of the Lease in front of it. In other words, even if the authors of

the foregoing exchange had given evidence regarding what was said, be that orally or in writing, prior to the execution of the Lease in 2009, the contract which this court must interpret is the Lease in which:-

(i) a single clause has been 'struck out', namely, what had originally been clause 2 of the Fourth Schedule (internal page 53);

(ii) a single word "*No*" has been added opposite the clause 'struck out'; and

(iii) no other words have been added; and

(iv) no other words have been 'struck out' (apart from the words "upwards only" on the title page of the Lease).

18. Not only is it the case that this court has not had oral evidence from anyone involved in the (i) negotiation; (ii) amendment; and/or (iii) execution of the Lease, even if it had heard such oral evidence, the task would be the same, i.e. to ascertain the meaning of the Lease. At the risk of stating the obvious, this involves the court looking at all the words in the Lease which have *not* been 'struck out' and considering them in the context of the entire document.

19. Remaining with the Fourth Schedule, the "struck out" wording is immediately followed by a clause which states:-

> *"3. <u>Agreement or determination of the reviewed rent</u>*
> *The Open Mark Rent at any Review Date <u>may be agreed in writing at any time</u> between the Landlord and the Tenant but if, for any reason, they have not so agreed, either party may (whether before or after the Relevant Review Date) by notice in writing to the other require the open market rent to be determined by the surveyor."* (emphasis added)

2009 Side Letter

20. It appears that when the defendant took on the Lease in 2009, a side letter (comprising an enclosure in a 5 October 2009 letter from O'Brien Lynam Solicitors to the defendant) stated *inter alia*:-

> *"1. The rent for the first five years will be abated/payable as follows:-*
> *Year 1 €35,000 plus VAT;*
> *Year 2 €40,000 plus VAT;*
> *Year 3 €45,000 plus VAT;*
> *Year 4 €45,000 plus VAT;*
> *Year 5 €50,000 plus VAT"*

21. Bearing in mind that the commencement date was 27 July 2009, the aforesaid side letter meant that, from July 2010, the defendant was obliged to pay €40,000 plus VAT; from July 2011, her liability was €45,000 plus VAT for a two year period; and from July 2013 she was required to pay €50,000 plus VAT (being the rent specified in the Lease).

April 2012 – Receivers appointed to Richmond

22. On 27 April 2012 Messrs. Paul McCann and Stephen Tennant of Grant Thornton were appointed as receivers over certain assets of Richmond, including Unit 3.

2013 Abatement Agreement

23. It is not in dispute that, in 2013, the defendant entered into an abatement agreement which the receivers executed on behalf of Richmond ("the 2013 Abatement Agreement") which provided *inter alia* that:-

> "*1.1 Notwithstanding that the initial rent reserved in the Lease is set at €50,000 (fifty thousand euro) plus VAT per annum (the "Rent"), the Landlord has agreed, strictly conditional upon the Tenant at all times complying with all conditions and covenants contained in the Lease, to abate the Rent to €29,520 (twenty nine thousand five hundred and twenty euro) inclusive of VAT per annum (the "Abated Rent"), which Abated Rent shall be payable by equal monthly payments in advance and in such manner as notified by the Landlord. The commencement date for the Abated Rent shall be 1 April 2013 and shall apply until 31 December 2014.*
>
> 1.2 *The Landlord and the Tenant have agreed to settle arrears which arose in respect of the rent in the period of 27 April 2012 to 30 September 2013 in return for the payment by the Tenant to the Landlord of €12,000 (twelve thousand euro) inclusive of VAT … which shall be paid in accordance with the following payment plan…"* (emphasis added)

24. I pause at this juncture to note the following:-

- the 2013 Abatement Agreement explicitly acknowledged that the rent "*reserved*" in the Lease (wherein it is payable quarterly in advance) is €50,000.00, excluding VAT, per annum, being what is referred to in the 2013 Abatement Agreement as "*the Rent*";
- it made clear that the lesser sum of €29,520.00 plus VAT, payable monthly, was "*Abated Rent*" (not "*the Rent"* payable under the Lease);
- it set specific 'start' (1 April 2013) and 'end' (31 December 2014) dates, during with the Tenant could pay this lesser Abated Rent, subject to compliance with certain terms;
- the 2013 Abatement Agreement was 'self-executing' as regards the point at which the concessions therein ceased to be available to the defendant (i.e. 31 December 2014, not later).

25. In light of the explicit terms of the 2013 Abatement Agreement, it is clear that *after* 31 December 2014, "*the Rent"* (of €50,000.00 plus VAT, payable monthly in advance) was the defendant's liability (absent any subsequent agreement).

26. Terms concerning the payment of €12,000 arrears included a setting out of specific amounts, totalling €12,000, and relevant due dates for those specific sums (between 30 September and 30 June 2013).

27. The 2013 Abatement Agreement then provided, *inter alia,* that if (i) the tenant was in default regarding any payments; (ii) failed to observe any covenants; (iii) the Lease was terminated, assigned, transferred or surrendered; or (iv) the tenant was in breach of confidentiality obligations:-

> *"…then and in any of the said cases, the terms of this signed letter will immediately become null and void ab initio in which case the landlord shall be entitled to pursue all monies owed under the Lease without reference to this side letter or the terms of the concession hereby granted."* (emphasis added)

Identical wording in a later abatement agreement

28. In the manner presently discussed, identical wording appears in a subsequent abatement agreement which the defendant entered into with the plaintiff, covering the period from 1 January 2016 to 27 July 2019. This later abatement agreement is of central importance to a determination of the plaintiff's claim in these proceedings.

29. By virtue of the 2013 Abatement Agreement, the defendant was obliged to pay rent of €29,520 per annum, by equal monthly payments (namely, €2,460 per month) up to 31 December 2014. This was the 'state of play' when the plaintiff acquired the landlord's interest in Unit 3, in the manner to which I now turn.

6 March 2014 – Landlord's interest is acquired by the plaintiff

30. By indenture of lease dated 6 March 2014 made between Richmond Properties Ireland Limited (in receivership) (defined as the "Lessor") of the first part; Paul McCann and Stephen Tennant (receivers) of the second part; Step Village Management Company Limited of the third part; and the plaintiff of the fourth part, the plaintiff (described therein as "Lessee") acquired a 999 year interest in the property from 1 January 2008 *"…subject to and with the benefit of the Occupational Lease"*. Internal page 7 of the 6 March 2014 Lease contains *inter alia* the following definition:-

> *"1.40 'Occupational Lease' means the Lease made 14 September 2009 between (1) the Lessor and (2) Fiona Grant".*

31. The evidence before the court included a copy of Land Registry Folio 152913L County Dublin ("the Folio"). The property described in Part 1(A) of the Folio is the 999 year Lease of Unit 3 to the plaintiff. Part 2 records the plaintiff as full owner and part 3 records a charge in favour of Bank of Ireland by way of a burden on the Folio.

Plaintiff registered as owner on 15 April 2014

32. In light of the entries on the Folio, it is not in dispute that the plaintiff acquired the landlord's interest in Unit 3 by way of the aforesaid 999 year Lease and this ownership was registered, as of 15 April 2014.

33. It will be recalled that the Lease provided for a rent review just 3 months later, on 24 July 2014. It will also be recalled that the 2013 Abatement Agreement was due to expire at the end of the year (i.e. as of 31 December 2014).

30 October 2014

34. It is not in dispute that, on 30 October 2014, the plaintiff wrote to the defendant. Mr. Moore gave uncontested evidence that he asked the plaintiff's head of finance, Mr. Peter Buckley, to write to the defendant and that Mr Moore liaised with him in relation to the contents of the letter. For the sake of clarity it is appropriate to set out the material part of this letter from the plaintiff to the defendant:-

> *"October 30th, 2014*
> *Re: Rent Review*
> *Dear Dr. Grant,*
>
> *As you are aware the terms of your Lease on Unit 3, The Village, Stepaside allows for review of rent every five years from the date of commencement of the Lease, being 27th July 2009. Therefore a new rent for the period from 27th July 2014 to 26th July 2019 should now be agreed.*
>
> *As you are aware the rent (ex VAT) agreed under the terms of your Lease were as follows:-*
>
> - *Year 1 €35,000*
> - *Year 2 €40,000*
> - *Year 3 €45,000*
> - *Year 4 €45,000*
> - *Year 5 €50,000*
>
> *However, under the terms of your agreement with Richmond Properties Ireland Limited dated 15th November 2013 rent was abated to €29,520 (inclusive of VAT) for the period to 31st December 2014.*
>
> *Therefore now is an appropriate time for us to agree the rent on your property for the period from 1st January 2015 to 26th July 2019.*
>
> *Can you please contact me on* [phone number given] *to arrange a (sic) time for us to meet. I attach request for payment to cover the period from 1st October 2014 to 31st December 2014 which is set at the rent as currently applies under the terms of the Lease…"* (emphasis added)

No response by the defendant

35. It is uncontroversial to say that the foregoing constituted an explicit invitation by the plaintiff (as landlord) to the defendant (as tenant) to engage on the question of the reviewed rent which would apply following the end of the 2013 Abatement Agreement. In the manner presently explained, there was no engagement by the defendant.

36. Mr. Moore's uncontroverted evidence was that *"there was no response"* by the defendant to the 30 October 2014 letter. He went on to give evidence to the effect that the plaintiff's head of finance

had been trying to get in touch with the defendant, but without success, and that a further letter was sent by the plaintiff, on 27 November 2014.

37. Before turning to that letter, it is this Court's understanding that, in respect of the period from 1 October 2014 to 31 December 2014, the plaintiff does not seek payment other than in accordance with the terms of the 2013 Abatement Agreement (notwithstanding the request referred to in the final paragraph of the aforementioned letter).

27 November 2014

38. Recalling that the 2013 Abatement Agreement had little over a month to run, the plaintiff wrote to the defendant in the following terms, on 27 November 2014:-

> *"November 27th, 2014*
>
> *Re: Rent Outstanding and Rent Review*
>
> *Dear Dr. Grant,*
>
> *I refer to my letter, email and phone calls over the past period of time with regard to the rent review that is due on your Lease and on the rental payment that was due on 15th November 2014.*
>
> *Your receptionist contacted me on Tuesday to propose that payment of rent for November 2014 would be made on or about 15th December 2014. This is not acceptable to Gradual Investments Limited.*
>
> *If the rent due is not discharged in full by close of business on Monday 1st December 2014 (as outlined in our letter of 24th November 2014) then the company will view Clause 1 of the letter of 15th November 2013 to have been breached by you. This means that the rent due under the terms of the Lease dated 14th September 2009 will be payable. This rental liability will be for the period from when the company purchased the property in March 2014 to 31st December 2014.*
>
> *With regard to the future rent the company has attempted, without success, to engage with you with regard to the period following the end of the abatement period (being 31st December 2014).*
>
> *Under Clause 3.1 of your Lease the rent will be the higher of:*
>
> > *The open market rent and the rent payable in the preceding period (prior to the rent review date) increased by the Consumer Price Index over the preceding period.*

The increase in the Consumer Price Index for the period from 2009 (102.2) to July 2014 (106.6) has been 4.4%. Therefore the new annual rent will be €52,200 plus VAT.

Rent is due quarterly in advance on the Quarterly Gale Days (being first day of January, first day of April, first day of July and first day of October). Therefore, the amount of €13,050 plus VAT (being a total of €16,051.50) is due prior to 1st January 2015.

If you wish to engage in a discussion process with the company with regard to the future rent on your unit then I am willing to meet with you. However, the rent that was due in mid-November must be discharged as outlined above. I am available on [phone number provided] if you wish to contact me directly.

As you are aware you are personally liable for all amounts due that arise under the terms of the Lease…." (emphasis added)

39. There is no suggestion that the defendant did not receive the plaintiff's letters of 30 October and 27 November 2014. There is no evidence of the defendant responding to either the 30 October or 27 November letters. Thus, it is a matter of fact that, despite being called upon to engage in relation to a review of the rent, the defendant failed to do so.

Plaintiff's reliance on clause 3.1 to review the rent

40. In the second of the letters, the plaintiff relied explicitly on clause 3.1 of the Lease. Earlier in this judgment, I set out that clause in full. It obliged the tenant to pay, from each review date "*…such yearly rent as becomes payable under the Fourth Schedule or if higher the rent payable during the preceding period increased by a factor equal to the increase in the consumer price index published by the Central Statistics Office…"* over the preceding period. The wording used in the plaintiff's 27 November 2014 letter accurately reflected the contents of clause 3.1 (which clause had not been 'struck out' of the Lease).

41. During the course of his evidence, Mr. Moore explained that the Central Statistics Office ("CSO") website contains a "CPI Inflation Calculator" the use of which confirms, in percentage terms, the change in the cost of goods and services between such dates as are inputted, and he gave evidence to the effect that the plaintiff employed this means to arrive at a revised rent.

The rent payable had there been no review

42. The rent reserved by the Lease is €50,000 plus VAT per annum. This is something the 2013 Abatement Agreement specifically acknowledged by defining same as "*the Rent*" (as opposed to the "*Abated Rent*"). Thus, in the absence of any review of same, what the 2013 Abatement Agreement called "*the Rent*" (i.e. what the Lease called the "*initial Rent*") would constitute the 'default' passing rent payable by the defendant upon the expiry of the 2013 Abatement Agreement (i.e. the sum of €50,000.00 per annum, payable quarterly in advance).

43. In my view, no other interpretation is possible, having regard to the distinction which is drawn in the 2013 Abatement Agreement between "*the Rent*" which was "*reserved*" under the Lease and the "*Abated Rent*" which was a lesser sum the Tenant could pay, but only up to 31 December 2014, and subject to the specific terms in the 2013 Abatement Agreement.

The reviewed rent

44. Later, I will look in some detail at the meaning of clause 3.1 with a specific emphasis on the methodology for reviewing rent under the Lease. For present purposes, it is sufficient to say that the following are matters of fact:

(i) it is common case that, after the *expiry* of the 2013 Abatement Agreement, on 31 December 2014, the defendant continued to pay €2,460 per month;

(ii) it is not in dispute that 27 July 2014 is a review date in the Lease;

(iii) relying on clause 3.1 and having ascertained the relevant CPI increase, the plaintiff reviewed the rent in the sum of €52,200.00 plus VAT, payable quarterly in advance;

(iv) given the expiry (on 31 December 2014) of the 2013 Abatement Agreement, the reviewed rent was sought by the plaintiff from 1 January 2015 onwards;

(v) the plaintiff put the defendant on notice of this, by letter dated 27 November 2014; and

(vi) the defendant neither raised any objection to the way the revised rent had been calculated, nor paid the revised rent sought by the plaintiff.

13 October 2015 civil bill

45. Against the foregoing backdrop, the plaintiff caused an ordinary civil bill to be issued, on 13 October 2015, seeking judgment for arrears of rent. The indorsement of claim referred *inter alia* to (i) the plaintiff; (ii) the defendant; (iii) the property; (iii) the Lease; and (iv) the plaintiff having acquired title from Richmond, none of which can be in dispute.

Plaintiff pleads reliance on clause 3.1

46. Paragraph 6, onwards, of the indorsement of claim in the said civil bill contained the following pleas:-

> *"6. It is an express term of the Lease that an annual rent in the sum of €50,000.00 plus VAT was to be paid by the defendant in four equal quarterly instalments on the Quarterly Gale days being first day of January, first day of April, first day of July, and first day of October in each year.*
>
> *7. Pursuant to clause 3.1 of the Lease and the Review Date (as defined in the Fourth Schedule) the annual rent in the sum of €50,000.00 plus VAT was increased to €52,200.00 plus VAT for the period from 27 July 2014 to 26 July 2019.*
>
> *8. It is an express term of the Lease that the defendant covenants to pay the rents in the manner specified in clause 3 of the Lease without any deduction, except where required pursuant to statute and without any set-off or counterclaim whatsoever.*

9. *It is an express term of the Lease that the defendant covenants to pay the plaintiff, interest equal to the prescribed rate under the Lease on any rent or other sums specified in clause 3 of the Lease which remain unpaid for more than fourteen days after the date when payment was due to the date of payment to the plaintiff, both before and after any judgment.*

10. *Notwithstanding the aforesaid covenants placed upon the defendant, the defendant has been continuously in breach of same. Notwithstanding requests to discharge the rent, the defendant continues to wilfully neglect and dishonour the covenants imposed upon her pursuant to the terms of the said Lease.*

11. *In breach of the said Lease, the defendant has failed, refused and/or neglected to pay the sums due and owing to the plaintiff in respect of rent and all other additional sums due under the terms of the said Lease at the times and in the manner provided for in the Lease or at all, despite lawful demands and same remain due and owing by the defendant to the plaintiff over and above all just credits and allowances…"* (emphasis added).

No Appearance entered by defendant

47. It was not suggested that the defendant was unaware of these proceedings or that the aforesaid civil bill was not served on her. It is common case that she did not enter any Appearance.

48. Thus, it is a matter of fact that the defendant was 'squarely' on notice of the revised rent having been determined in accordance with clause 3.1. Not only was that made clear in the plaintiff's 27 November 2014 letter, the plaintiff pleaded this in very explicit terms in the civil bill which issued almost a year later. Of particular significance is the express plea that rent was increased "…*Pursuant to clause 3.1*…".

Judgment in default

49. In circumstances where no Appearance was entered, judgment in default issued from the relevant Circuit Court office as of 26 November 2015, in the sum of €37,146.00.

50. At this risk of stating the obvious, this was a judgment for a specific sum; and was based on the civil bill of 13 October 2015 in which the plaintiff pleaded that the defendant had failed to pay *rent* due under the Lease.

51. Nor was the defendant taken by surprise, given that a year earlier (by letter dated 30 October 2014), she was invited to engage with the plaintiff in relation to reviewing the rent and, having failed to engage, was notified (by letter of 27 November 2014) of the rent having been determined in accordance with clause 3.1 in the sum of €52,200.00 plus vat.

Proof of service

52. It is worth observing that the said judgment records *inter alia* that the civil bill *"…was duly served on the defendant on the 15th day of October 2015, as appears by the Statutory Declaration of Service filed herein"*. The foregoing safely allows this court to say that:-

(i) the revised rent, *per* the 27 July 2014 review date, payable by the defendant from the expiry of the 2013 Abatement Agreement was set by the plaintiff in accordance with the provisions of clause 3.1 of the Lease;

(ii) the defendant was fully aware of this, having previously been given the opportunity to engage in a rent review process, which opportunity she declined to take.

Execution Order

53. An execution order issued, also dated 26 November 2015, directed to *"the several Sheriffs and County Registrars"* which records that the judgment of €37,146 was entered on 26 November 2015 *"…together with the sum of €704.00 for costs…"*.

54. At the risk of stating the obvious, the foregoing is not a determination of the costs actually incurred by the plaintiff. Rather, it would appear to be a 'scale' figure which, as a matter of fact, comprised a portion only of the plaintiff's legal costs. This is a topic I will return to in due course.

11 February 2016 Abatement Agreement

55. It is common case that, on 11 February 2016, the defendant entered into an abatement agreement with the plaintiff ("the 2016 Abatement Agreement" or "the 2016 AA") which was executed by both parties. The 2016 AA is of such significance that I will presently set out its terms in full.

Construction

56. Before doing so, it is appropriate to note that the proper approach to the construction of a contract is not in dispute. The so-called 'principles of construction' set out by Lord Hoffman in *Investors' Compensation Scheme v. West Bromwich Building Society* [1998] 1 ALL ER 98 ("*Investor's Compensation Scheme*"), at p. 114-115, remain relevant:-

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. [1984] 3 All ER 229 at 233, [1985] A.C. 191 at 201:

> *'. . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"*

57. The principles of construction articulated by Lord Hoffmann in *Investors Compensations Scheme* have been adopted with approval by our courts. See for example the decision of O'Donnell J, as he then was, in the *Law of Society of Ireland v The MIBI* [2017] IESC 31 in which the now Chief Justice stated:-

"9. *A contract is a form of communication intended to convey the meaning agreed upon by the parties. Words are the vehicle through which that meaning is conveyed but the meaning of a document is much more than the meaning of the words. It is what the parties would reasonably have been understood to mean from a consideration of all the available guides to the meaning of the agreement. Words are an important and very often the only necessary guide to discerning the meaning, but they are only a guide, and as recognised by Lord Hoffmann, they can be ambiguous, and sometimes even, as happens in real life, it may be apparent the parties have for whatever reason used the wrong used or syntax. In those circumstances, the words must give way."*

Terms of the 2016 Abatement Agreement

58. The 2016 Abatement Agreement began as follows:

> *"Re: Rent – Unit 3, The Village, Stepaside*
>
> *Dear Dr. Grant,*
>
> *Further to your Lease for Unit 3, The Village, Stepaside, previous correspondence, meetings, discussions and legal actions.*
>
> ***Abated Rent***
>
> *The company is prepared to agree an abated rent for the period from 1st January 2016 to the next rent review day, being 27th July 2019, under the following terms:*
>
> 1. *The agreed annual rent for the period to 27th July 2019 is €52,000 (plus VAT),*
> 2. *The abated rent is as follows:*
>   - *Calendar year 2016 - €2,750 (plus VAT) per month*
>   - *Calendar year 2017 - €3,500 (plus VAT) per month*
>   - *Calendar year 2018 - €3,750 (plus VAT) per month*
>   - *From 1st January 2019 to 27th July 2019 - €3,750 (plus VAT) per month*
> 3. *Rent to be paid by Standing Order, monthly in advance on the first day of the month…"* (emphasis added)

Agreed annual rent

59. It is appropriate to pause at this juncture to note that, in the foregoing manner, the parties, as a matter of fact *agreed* that rent up to 27 July 2019 was €52,000 plus VAT. In the manner examined earlier, clause 3 of the Fourth Schedule (on internal page 53) of the Lease provides that: *"The Open Market Rent at any Review Date may be agreed in writing at any time between the landlord and the tenant…"* (emphasis added). This court is entitled to hold that there was, in fact, such an agreement reached between the defendant (as tenant) and plaintiff (as landlord) and that this agreement was recorded in the 2016 AA.

60. It will be recalled that rent for this period (i.e. to 27 July 2019) had previously been determined by the landlord (relying on 3.1 of the Lease) in the sum of €52,200 plus VAT, as the defendant was made aware. It may well be that a typographical error made its way into the 2016 AA (which records agreement on a sum which is lower by €200). However, nothing turns on this, in circumstances where the plaintiff has at all material times relied on the lower figure of €52,000 plus VAT. The 2016 Abatement Agreement went on to state:-

> *"**Arrears and Legal costs***
>
> *The company is prepared to agree a payment schedule as follows with regard to the amount outstanding as per the execution order and the legal costs involved:*
>
> 1. *Post-dated cheques to the value of €18,000 to be provided to the company. These cheques to be for €500 each and to run for the period from 15th January 2016 to*

15th December 2018. On the clearing of all of these cheques the company agree (sic) *to write off the balance outstanding on the Execution Order.*

Provided always that:

If:

1. *The tenant is in default of any payments payable under the Lease (other than in respect of Rent) or in default of the Abated Rent for a period of 7 (seven) days or more following receipt of written demand from the Landlord or on his behalf;*
2. *The tenant fails to honour any of the post-dated cheques provided to clear the arrears outstanding;*
3. *Any of the covenants on the part of the Tenant whether set out in the Lease or this side letter shall not be observed or performed;*
4. *The Lease is terminated or if the Tenant purports to assign, transfer or surrender the Lease; or*
5. *The Tenant the breaches the obligations in respect of confidentiality set out in this side letter.*

then and in any of the said cases, the terms of this side letter will immediately become null and void ab initio in which case the Landlord shall be entitled to pursue all monies owed under the Lease without reference to this side letter or the terms of the concession hereby granted.

The Tenant hereby acknowledges, and agrees, having taken independent legal advice prior to the signing of hereof, that the terms of this side letter are fair and reasonable having regard to the concessions granted by the Landlord herein (vis a vis the landlord's rights enforce the terms of the Lease).

Confidentiality

The tenant hereby agrees to treat the existence of this side letter and the terms hereof as being strictly private and confidential and to take all precautions to maintain its status as such PROVIDED that disclosure to the Tenant's professional advisors (provided further that any such professional advisors also agree to keep the terms of this side letter confidential) or where disclosure is required by law, shall not be in breach of these obligations.

Acknowledgement

The Tenant acknowledges that the terms of this side letter are personal to her and may not be assigned to any third party.

This offer will remain open until 5p.m. on Friday 12th February 2016. If this offer is not accepted by this time then the full rent under the terms of the Lease will become and payable…" (emphasis added)

61. It is a matter of fact that the 2016 AA makes explicit that if the defendant did not enter into the said agreement by the relevant deadline "*…then the full rent under the terms of the Lease will become due and payable"* (emphasis added).

"*Full rent*" had the defendant not entered the 2016 AA

62. It is appropriate to recall the following:-

(i) had there been no review, the full rent payable under the Lease was €50,000 plus VAT i.e. the "*Initial Rent*" therein defined (being what the 2013 Abatement Agreement called "*the Rent"*, as opposed to the "*Abated Rent"*);

(ii) the rent was, in fact, reviewed by the plaintiff (with reliance on clause 3.1 of the Lease) without participation or objection by the defendant, such that the full rent payable after the expiry of the 2013 Abatement Agreement was €52,200 plus VAT; and

(iii) the parties also reached an agreement that the full rent was €52,000 plus VAT, up to 27 July 2019.

63. Central to the defendant's case is the submission that, if the 2016 AA is null and void, the proper construction of its terms (in particular, the words void "*ab initio"*) means that there was no agreement regarding the 2014 rent review sum, in which case the extent of the defendant's liability is to pay €29,520 (inclusive of VAT) per annum.

64. In other words, the defendant's case is that, if she defaulted on the 2016 AA, her annual liability for rent would revert of €29,520 (inclusive of VAT). It will be recalled that €29,520.00 was the sum which the landlord's predecessor in title (Richmond) accepted as "*Abated Rent*" in the 2013 Abatement Agreement.

65. However, it is a matter of fact that the 2013 Abatement Agreement made explicit that *"the commencement date for the abated rent shall be 1 April 2013 and shall apply until 31 December 2014"*. In other words, the logic of the defendants case is that, were she to breach the terms of the 2016 AA, she could revert to paying an annual rent which *ceased* to apply as of 31 December 2014 (i.e. well over a year before she entered into the 2016 Abatement Agreement). I am bound to reject that proposition.

66. Furthermore, the submissions made on this issue on behalf of the defendant are impossible to reconcile with the very terms of the 2016 AA which made explicit that, were the defendant not to enter into it, her liability would be to pay "*full rent*". Put simply, I cannot interpret "*full rent*" as meaning "*Abated Rent*".

67. These findings also seem to me to reflect any common sense analysis of the position (i.e. it is common case that the defendant's rental obligation under the 2016 AA was to pay *greater* than €29,520 per annum). If it was truly the case that a decision by the defendant (i) not to enter the

2016 AA at all; or (ii) to enter same but breach its terms, would immediately trigger a *lesser* liability, it would rob the 2016 AA and the Lease of all business efficacy.

Meaning

68. Guided by the aforementioned principles, and on the basis that the Lease comprised a key element of the matrix of fact, or context, in which the 2016 AA came into being, I am satisfied that the following can be said in relation to the *meaning* of the 2016 Abatement Agreement, as opposed to the meaning of specific words, such as *"ab initio".*

- Subject to compliance with the terms of the 2016 AA, the defendant was permitted to pay a *lower* rent than would otherwise apply and to pay *less* than the sum for which the plaintiff had agreed judgment;
- In other words, subject to compliance by the defendant with the terms set out in the 2016 AA, her liability was to pay what the agreement described as the *"abated rent"* rather than what the same agreement called *"full rent under the terms of the Lease"*;
- However, if the defendant defaulted in respect of her obligations as set out (under the heading *"Provided always that:"*) the 2016 AA would immediately become void;
- This was the 'automatic' consequence of the defendant's breach;
- In other words, the agreement was not voidable at the discretion of the plaintiff – rather, the agreement was 'self-executing' in that respect;
- In short, failure by the defendant to honour its terms automatically rendered the 2016 AA void, as a consequence of which the defendant ceased to have an entitlement to rely on the concessions in the agreement;
- The proper interpretation of the agreement being void *ab initio* is that the defendant would cease to have the benefit of any concession made *to* her by the 2016 AA.

69. In short, applying the principles of construction set out in *Investors' Compensation Scheme*, I cannot agree with the defendant's interpretation of the 2016 AA.

Issue estoppel

70. The plaintiff submits, and I agree, that an issue estoppel arises by virtue of the default judgment in the Circuit Court proceedings against the defendant. On this issue, my attention was drawn to the judgment of Irvine J, as she then was, in *Murphy v Cement Roadstone Limited* [2015] IECA 35 ("*Murphy*") wherein the Court of Appeal considered whether an issue estoppel could result from a default judgment. From para. 34 the learned judge analysed the matter as follows:-

> "*34. As to whether there is any frailty in a plea or res judicata in circumstances where the judgment relied on as being final and conclusive was obtained by default rather than in the course of a contested hearing, the authorities do not suggest that this is so. In McConnell v Lomard and Ulster Banking Ltd. [1982] NI 203 Gibson L.J. pointed out that where the judgment is granted in default of appearance or defence, then as between the parties and for the purpose of the action, all allegations in the statement of claim are deemed to have been admitted by the defaulting party and to that extent he will generally be estopped from setting up in any subsequent proceeding any*

matter of defence which was "necessarily and with complete precision" decided against him by the previous default judgment. He went on however, to qualify this statement somewhat when he stated as follows:-

> *'The courts will scrutinise such judgments with extreme particularity in order to ascertain the bare essence of what must necessarily have been decided and to avoid implying as having been decided by a judgment in default anymore than is necessarily involved by reason of the fact that judgment has been obtained'."* (emphasis added)

71. In the foregoing manner, the Court of Appeal has made clear that a judgment in default of appearance *does* give rise to an issue estoppel in respect of allegations of fact that are clearly pleaded and are deemed to be admitted by the defendant.

Essence of what must have been decided

72. It seems to me that, for the default judgment to have issued, the essence of what was decided *necessarily* included the following facts:-

- The relationship between the defendant and the plaintiff is governed by the terms of the Lease (see para. 3 of the indorsement of claim in the civil bill);
- It is an express term of the Lease that an annual rent of €50,000.00 plus VAT was to be paid by the defendant to the plaintiff in four equal quarterly instalments on 1 January, 1 April, 1 July and 1 October in each year (see para. 6 of the indorsement of the claim);
- Pursuant to clause 3.1 of the Lease and the review date (as defined in the Fourth Schedule), the annual rent in the sum of €50,000.00 plus VAT was increased to €52,200.00 plus VAT for the period from 27 July 2014 to 26 July 2019 (see para. 7 of the indorsement of claim);
- The defendant covenanted to pay the rents in the manner specified in clause 3 of the Lease without any deduction (see para. 8 of the indorsement of claim);
- The defendant failed to discharge the rent payable and breached her covenants under the Lease (see para. 9-12 of the indorsement of claim);
- The plaintiff was entitled to judgment on the basis of the foregoing facts (see judgment in default of appearance dated 26 November 2015).

73. The foregoing constitutes the factual basis necessary to underpin the judgment in question. Not having disputed the foregoing facts pleaded in the 13 October 2015 civil bill, which was served on the defendant on 15 October 2015, she is deemed to have admitted them.

74. Applying the principle set out by the Court of Appeal in *Murphy*, the fact and outcome of the review of rent for the period 27 July 2014 to 27 July 2019 is *res judicata.* Thus, the defendant cannot now deny that the 2014 rent was, in fact, reviewed pursuant to clause 3.1 and was, in fact, increased to €52,200.00, plus VAT, for the five year period commencing 27 July 2014.

75. It is important to note at this juncture that, consistent with the principle articulated in *Murphy*, the issue estoppel extends only as far as the review of the 2014 rent, not any *subsequent* rent review.

76. In other words, the default judgment does not estop the defendant from contending that, with respect to reviewing the rent from 27 July 2019 onwards, it is impermissible to rely exclusively on clause 3.1. This is perhaps an obvious point, given that the October 2015 civil bill was a claim for a liquidated sum and neither sought, nor resulted in, any interpretation of the meaning of provisions in the Lease. Nevertheless, it appears to me to be a relevant point, as will become clear when I come to examine the rent review which took place in respect of the rent payable from 27 July 2019.

Agreed rent

77. In light of the matters which, by virtue of the default judgment are *res judicata*, the statement contained in the 2016 AA that *"The agreed annual rent for the period to 27th July 2019 is €52,000 (plus VAT)"* was simply a recognition of reality. It was not a concession by the defendant.

78. Similarly, the reference in the same document to the defendant being liable for the *"full rent"*, were she not to accept the offer of abatement, was very obviously a reference to the *same* figure of €52,000 (plus VAT).

Breach of the 2016 Abatement Agreement

79. Although the defendant chose not to appear as a witness, she admits entering into the 2016 AA. The next significant question arising is whether the defendant breached its terms.

80. The defendant submits that she has not been in breach of the 2016 AA, whereas the plaintiff submits that there have been multiple breaches, entitling the plaintiff to recover the full rent due under the Lease and to treat the 2016 AA as null and void.

81. It is appropriate to return to the facts as disclosed by the evidence which was put before this court.

€18,000 by 15 December 2018

82. It will be recalled that the 2016 AA required the defendant to provide post-dated cheques, each for €500, totalling the sum of €18,000 (covering the period from 15 January 2016 to 15 December 2018).

83. It will also be recalled that €18,000 represented a portion, only, of the default judgment sum of €37,146.00 (with the relevant execution order also referring to €704.00 for costs).

Mr Birmingham's evidence

84. Mr. John Birmingham is a Chartered Surveyor and he gave uncontroverted evidence that, as of March 2017, he was in practice on his own account. He was retained by the plaintiff to assist in managing properties in Stepaside, including Unit 3. With the plaintiff's authority, he wrote to all

tenants, including the defendant, and made appointments to meet with them. At that time, he understood, based on information from the plaintiff, that the defendant was in arrears with respect to payments due under the 2016 AA, including arrears arising from post-dated cheques being dishonoured. He met with the defendant and wrote to her immediately thereafter.

28 March 2017

85. Mr. Birmingham provided a copy of his 28 March 2017 letter to the defendant which began by referring to their meeting (the previous day) and the 2016 AA. Regarding the defendant's payment of the abated portion of the Circuit Court judgment, Mr. Birmingham's letter stated:-

> " *(2) Post-dated cheques*
>
> *As advised several the* (sic) *post-dated cheques held by Gradual Investments Limited have been returned by the bank marked 'refer to drawer' and have had to be re-presented. I note that this can arise due to your cash flow issues however it is giving rise to increased cost to my client in terms of bank charges and time spent in administering the matter and is also a breach of terms of the abatement letter. To assist in managing your cash flow please see below dates for the remaining cheques currently held:*
>
> - *15/04/17*
> - *15/05/17*
> - *15/06/17*
> - *15/07/17*
> - *15/08/17*
>
> *Please note that the cheque dated 15th March 2017 which was returned by the bank will be re-lodged this week."* (emphasis added)

The said letter went on to request that the defendant clarify the occupancy status of certain parties, pointing out that the Lease prohibits sub-letting or sharing of part of the demised premises.

2 May 2017

86. On 2 May 2017 Mr. Birmingham wrote again to the defendant stating *inter alia* that rent of €4,305 was paid for April but going on to state:-

> *"…there is a balance of €2,767.50 due in respect of the under payment in January, February and March. Please arrange payment as a matter of urgency."* (emphasis added)

18 May 2017

87. Mr. Birmingham wrote to the defendant again, on 18 May 2017, pointing out that the defendant had not provided any response to his letters of 28 March and 2 May 2017. Having pointed out that the defendant's failure to honour the 2016 AA was of serious concern, Mr. Birmingham's letter proceeded to state:-

> " *(1) Post-dated cheques*
>
> *As I mentioned at our meeting on 27th March 2017 and reiterated in my letter dated 28th March there has been an ongoing problem with your monthly cheques for €500*

being returned by the bank unpaid. The cheque dated 15th April was lodged on 28th April and returned by your bank unpaid at a cost of €3.30 to my client. It was relodged on 11th May and has again been returned by your bank unpaid at a further cost of €3.30. Please note the post-dated cheque for €500 dated 15th May 2017 is now due to be lodged.

(2) Rent arrears

I also note that the rent arrears of €2,765.50 as set out in my letter dated 28th March remain outstanding…" (emphasis added)

25 May 2017

88. Mr. Birmingham wrote a further letter, on 25 May 2017, pointing out that the defendant had not replied to his 18 May letter and going on to state that arrears then outstanding comprised:-

"2017 rent uplift arrears - €2,765.50
April & May 2017 returned cheques - €1,000
Total due - €3,765.50"

That letter proceeded to make a demand for payment within seven days and referred to the plaintiffs entitlement to:-

"…seek recovery of:-
(i) all sums due in accordance with the Lease
(ii) the full balance outstanding under the Circuit Court judgment and execution order dated 26th November 2015; and
(iii) costs and interest."

Payment was requested as a matter of urgency.

12 June 2017

89. By letter dated 12 June 2017, Mr. Birmingham wrote to the defendant to confirm that cheques for April and May of €500 each had been cleared by the bank, but €2,765.50 rent arrears remained outstanding. A seven day demand was made.

30 June 2017

90. On 30 June 2017 Mr. Birmingham wrote again to the defendant to state *inter alia*:-

"*I regret to advise that yet again one of your monthly €500 cheques has been returned unpaid by your bank. Furthermore despite several letters, the 2017 rent uplift arrears of €2,765.50 remain outstanding*."

91. A seven day demand was made and Mr. Birmingham referred to the plaintiff's rights to seek recovery of all sums due under the Lease as well as the full balance of the outstanding Circuit Court judgment, plus costs.

4 September 2017

92. Mr. Birmingham wrote again to the defendant on 4 September 2017 stating *inter alia* the following:-

> *"I regret to advise that yet again, your monthly €500 cheques have not been honoured by your bank and in addition, despite numerous letters, the 2017 rent uplift arrears of €2,765.50 remain outstanding.*
>
> *Under the abatement letter dated 11th February 2016 my client agreed to accept €18,000 in settlement of the amount of €37,146 due under the Execution Order award made against you by the Circuit Court on 26th November 2016, subject to you providing post-dated cheques totalling €18,000 in amounts of €500 payable monthly between 15th January 2016 and 15th December 2018. To date you have provided twenty cheques of which three remain outstanding: June and July 2017 which have both been returned by your bank and August 2017 which has yet to be presented.*
>
> *Please note that in order to regularise this matter, within fourteen days of this letter my client requires the following:-*
>
> *(i) You will provide further cheques totalling €8,000 as agreed in the letter dated 11th February 2016 and will ensure that there will be sufficient funds to honour these cheques as they fall due.*
>
> *(ii) You will ensure that there are sufficient funds in your account to meet the June, July and August cheques previously provided.*
>
> *(iii) You will pay the rent uplift arrears of €2,765…"* (emphasis added)

The letter went on to specify the consequences of failure to comply, with respect to the plaintiff's entitlements to seek rent of €52,000.00 per annum, net of VAT, from 1 January 2016, as well as the full amount outstanding of the Circuit Court judgment, together with costs and interest on all outstanding sums.

11 December 2017

93. By letter dated 11 December 2017, Mr. Birmingham wrote to the defendant once more and stated *inter alia* that:-

> *"…despite previous letters you have failed to provide cheques to clear the outstanding balance of €8,000 due under the agreement dated 11th February 2016 and have also failed to pay the rental uplift arrears of €2,765. Please note that unless these arrears are paid in full, my client reserves the right to take all steps as outlined in previous letters, most recently on 4th September 2017.* (emphasis added)

17 July 2018

94. On 17 July 2018 Mr. Birmingham wrote to the defendant in the following terms:-

> *"I refer to the letter of agreement dated 11th February 2016 signed by both Gradual Investments as landlord and countersigned by you as tenant, which sets out terms for a rental*

abatement and a compromised payment plan in respect of a Circuit Court execution order obtained against you by Gradual Investments dated 26th November 2015.

To date, per the Letter of Agreement, there are arrears of €3,690.00 in respect of rent (€922.50 from 2016 and €2,767.50 from 2017) and €8,000 in respect of the balance of the comprised payment plan. This is despite numerous letters requesting payment, all of which have been ignored. You have also ignored requests to provide information on any sub-letting or premises sharing arrangements into which you have entered.

Please note that unless payment of €11,690.00 in respect of the rent arrears and outstanding settlement amount is received within twenty one days of this letter, together with full disclosure of any sub-letting and/or premises sharing arrangements enter into, my client will enforce the terms of the Letter of Agreement in full and initiate proceedings to recover the following sums:-

(1) Rent calculated at €52,000 per annum backdated to 2nd January 2016 plus VAT which amounts to €44,381.23.

(2) €27,146 being the full balance outstanding on the Circuit Court execution order dated 26th November 2015.

(3) All interest, costs and expenses incurred in recovering these debts.

Please note that if you do not discharge the debt of €11,690.00 in full by close of business on Tuesday 7th August 2018, the Circuit Court judgment will be sent to the Sheriff's office for enforcement action to satisfy the debt." (emphasis added)

95. It is clear from the evidence given by Mr. Moore and by Mr. Birmingham that all the aforesaid letters were written to the defendant on the instructions of and with the plaintiff's authority.

96. In his oral testimony, Mr. Birmingham gave uncontested evidence to the effect that he was not aware of any payments having been made in response to his letter dated 17 July 2018.

97. Furthermore, during the course of his oral testimony, Mr. Moore gave uncontroverted evidence to the following effect:-

- *"It was hard to get cheques"* from the defendant;
- *"they'd come late"*;
- *"most of the time they'd bounce"*;
- *"we'd have to make multiply attempts"* to get value for the cheques; and
- *"then she stopped sending the cheques".*

98. Before proceeding further, it should be recalled that one of the 'defaults' by the defendant which renders the 2016 AA void is *"If…2. the tenant fails to honour any other of the post-dated cheques provided to clear the arrears outstanding"* (emphasis added). The evidence before the court safely allows for a finding that the defendant breached the foregoing term.

99. Furthermore, uncontested evidence was given on behalf of the plaintiff to the effect that, as of the end of December 2018, no more than €10,000 of the €18,000 obligation had been paid.

100. This breach is sufficient, of itself, to allow for a finding that the 2016 AA became void by reason of the defendant's breach of its terms.

101. The foregoing is not the only breach of the 2016 AA. The defendant also failed to pay the sum of €2,767.50 (despite Mr. Birmingham's letters dated 28 March; 2 May; 18 May; 25 May; 12 June; 30 June; 17 July; 4 September; and 11 December 2017).

102. I am satisfied that no possible unfairness arises from this court's consideration of letters written by Mr. Birmingham on the instructions of Mr. Moore, both of whom gave sworn evidence during the hearing. I say this notwithstanding the fact that Mr. Birmingham produced correspondence at, or very shortly before, the hearing. It was submitted on behalf of the plaintiff that the correspondence did not fall within any category of discovery and I was not called upon to make any determination in that regard. There was certainly no application to the effect that there had been a failure to make proper discovery. Nor was it submitted that it would give rise to unfairness, were the court to receive letters which the author of same introduced in evidence, albeit very late in the day.

103. This court's consideration of this correspondence cannot give rise to any prejudice to the defendant. Why? Even if *none* of the aforesaid letters had been considered, facts which emerge from the evidence undoubtedly establish that the defendant was in breach of the terms of the 2016 AA. These facts include:-

(i) the defendant's failure to honour numerous post-dated cheques;
(ii) the defendant's failure, by some €8,000, to pay cheques to the value of €18,000; and
(iii) the defendants failure to pay at least €2,767.50 of the abated rent.

€922.50

104. There was some dispute in relation to whether the defendant also failed to pay some €922.50 of the abated rent, relating to early 2016. In short Mr. Chambers, the defendant's accountant, understood that it *had* been paid, whereas Mr. Moore gave evidence that the plaintiff has no record of such a payment been received. Focussing on the question of whether the defendant breached the terms of the 2016 AA, it does not appear to me that anything turns of the question of whether or not €922.50 was paid. Other evidence puts beyond doubt the defendant's breach of the terms of the 2016 AA.

A *de minimis* breach

105. The defendant's position is that there was no breach of the 2016 AA. With a focus on what the defendant's counsel describes as *"the minimal underpayment of rent in 2016 and 2017"*, it is submitted that this was *"at most, a de minimis breach"* (see para. 8 of the defendant's written submissions).

Unpaid Rent

106. However, it is important to note that the *entire* of the €18,000 which the defendant was required to pay, also constituted abated *rent*. Why? Because the default judgment was in respect of the plaintiff's claim for *"arrears of rent"* in the manner pleaded in the indorsement of claim. As para. 12 thereof makes clear, the specific claim related to four quarters of rent (due on 1 January; 1 April; 1 July; and 1 October 2015).

107. The foregoing puts beyond doubt that the post-dated cheques which the defendant agreed to provide under the terms of the 2016 AA were for arrears of *rent*.

108. Furthermore, whereas the judgment was for €37,146, the 2016 AA required the defendant to pay less than half that amount, namely €18,000. Thus, the post-dated cheques required of the defendant were for *abated rent.*

109. In light of the foregoing, the defendant's breach of the 2016 AA cannot conceivably be categorised as *de minimis.*

Consequences of the defendant's breach

110. The concessions in favour of the defendant in the 2016 AA were subject to compliance with the terms of that agreement, and, in the absence of compliance, became void.

111. *Pat O'Donnell & Co. Ltd. v Truck & Machinery Sales Ltd.* [1998] 4 IR 191 ("*Pat O'Donnell*") concerned the Sale of Goods and Supply of Services Act 1980 and proceedings issued by the plaintiff who sought to recover the purchase price of goods delivered to the defendant, as well as accrued interest at the rate of 2.5% per month. The defendant counterclaimed, alleging breaches of the 1980 Act. This Court found that the goods were of merchantable quality. The plaintiff appealed and the defendant cross-appealed on the basis that the interest clause in the relevant contract for the sale of the machines was a penalty and, thus unenforceable. The Supreme Court allowed the plaintiffs appeal, dismissed the counterclaim and remitted the matter to this Court for a decision on the appropriate rate of interest. The judgment of Barron J included the following:-

> "…*where an agreement has been reached that an agreed sum may be paid by the instalments or by a lesser amount at different times, failure to abide by what the courts regard as a concession does not make the original sum, though larger than the concessionary sum, a penalty: see Wallingford v Mutual Society (1880) 5 Ap. Cas. 685. This is because it was the sum which was originally payable*." (pp. 217-218)

112. But for the 2016 AA, the defendant's liability for rent was to pay €52,000 per annum plus VAT, quarterly in advance (*per* the Tenant's obligations in the Lease). The defendant's breach of the 2016 AA triggered the aforesaid liability in respect of rent for the period ending on 27 July 2019 (being the next review date). The defendant's obligation to pay the larger sum results from her failure to comply with the terms upon which the lesser sum was payable. In short, applying the principle articulated by

Barron J, there is no question of the landlord imposing a penalty by relying on an entitlement to the full rent due under the Lease.

17 May 2019

113. Consistent with the foregoing analysis and *"As agent for and on behalf of Gradual Investments Limited",* Mr. Birmingham wrote to the defendant on 17 May 2019 stating *inter alia*:-

> *"As you are in breach of the abatement dated 11th January 2016 it is accordingly null and void and the following sums are due:-*
>
> *(1) Rent calculated at €52,000 per annum backdated to 2nd January 2016 plus VAT which amounts to €51,557.33.*
>
> *(2) €27,146 being the full balance outstanding of the Circuit Court Execution Order dated 26th November 2015.*
>
> *Future rental monthly payments of €5,330.00 (€4,333.33 plus VAT) must be made to the following account…"* (emphasis added)

The plaintiff's position

114. Between Mr. Birmingham's 17 July 2018 letter (which was sent *prior* to the 15 December 2018 deadline for the payment of cheques in the sum of €18,000) and his 17 May 2019 letter (which was *after* the expiry of the 15 December 2018 deadline), the defendant could have been in no doubt as to the plaintiff's position, namely, that the defendant's obligation regarding rent, from 1 January 2016 onwards, was to pay €52,000 per annum, excluding VAT, in accordance with the terms of the Lease.

115. Regardless of what sums the defendant paid, there is no evidence that the plaintiff or its agent ever resiled from the position that the voiding of the 2016 AA triggered the defendant's obligation to pay €52,000 plus VAT per annum. I say this in circumstances where counsel for the defendant laid some emphasis on the contents of invoices issued by the plaintiff, to which I now turn.

Invoices

116. A number of invoices comprised exhibit "AA3" to the defendant's affidavit, sworn on 29 June 2021. These include invoice number 556, dated 13 March 2019, which the plaintiff issued to the defendant. The description on the invoice is *"rent for March 2019"* and the sums on the invoice comprise a net amount of €3,750.00; VAT of €862.50; and a total of €4,612.50. However, it is a statement of the obvious to say that nothing in this document constitutes an agreement by the plaintiff to accept less than €52,000 per annum, to be paid quarterly in advance, as required by the Lease.

117. Furthermore, having given no oral evidence, the defendant has not claimed that she reached any oral agreement with the plaintiff which ran contrary to the position articulated in Mr. Birmingham's 17 July 2018 letter, from which I quoted earlier.

118. In addition to the foregoing, Mr. Moore gave oral evidence to the following effect:-

- *"VAT is due on invoices raised"* by the plaintiff;

- *"If we raised an invoice and did not get paid, we'd be liable for VAT"*;
- *"We didn't say what you owe us. This is what we received from her"*;
- *"If she'd have paid a different amount, then she'd have received a different invoice".*

119. As well as accepting the foregoing uncontroverted testimony, there is also clear evidence that invoices exhibited by the defendant were issued *after,* rather than before, payment by the defendant.

120. Mr. Moore prepared a spreadsheet entitled "Rent received" from the defendant. The first 6 columns are headed:-

(i) Due Date;
(ii) Due Amount;
(iii) Payment Received Date;
(iv) Payment Amount;
(v) Underpayment per Quarter; and
(vi) Running Balance.

121. Recalling that, under the Lease, rent was payable quarterly in advance, Mr. Moore's spreadsheet records €15,990.00 as being the quarterly payment due on 1 January 2019. It is common case that no such payment was made. Instead, the following payments are recorded:-

15/01/2019 | €4,612.50
15/02/2019 | €4.612.50
15/03/2019 | €4,612.50

122. Thus, the following can be said in relation to the invoice dated 13 March 2019 (no. 556). First, it reflected the fact that the defendant was failing to pay rent quarterly in advance as required by the Lease. Second, by the time this invoice was issued on 13 March 2019, the defendant was in delay, approaching two and a half months, with respect to the quarterly payment of rent due on 1 January 2019 (having paid €4,612.50 on 15 January and 15 February 2019).

123. Turning to the following quarter, beginning 1 April 2019, the plaintiff records €15,990.00 due, in advance. However, the payments which were in fact received are reported as follows:-

16/04/2019 €4,612.50
15/05/2019 €4,612.50
17/05/2019 €4,612.50

124. Leaving aside the fact that the defendant failed to pay rent quarterly in advance as required under the Lease, it is clear that invoice number 567, which is dated 21 May 2019, was issued by the plaintiff *after* the plaintiff received €4,612.50 on 17 May 2019.

125. This foregoing accords entirely with Mr. Moore's evidence concerning the plaintiff's VAT liability in respect of invoices raised.

No estoppel

126. In light of the facts which emerge from the evidence, there is no basis for this court holding that invoices issued by the plaintiff created any form of estoppel which prevents the plaintiff from recovering all rent due by the defendant, from 2 January 2016, at the rate of €52,000 plus VAT per annum, up to and including the next review date, on 27 July 2019. In summary:-

(i) The defendant's obligation was to pay rent, quarterly in advance, under the Lease;

(ii) Certain invoices were issued by the plaintiff *after* payments were made by the defendant;

(iii) There was no representation by or on behalf of the plaintiff that it would accept rent other than in accordance with the terms of the Lease;

(iv) The defendant has not given evidence of any reliance on any such representation; and

(v) I accept the plaintiff's evidence regarding the role of the plaintiff's VAT liability with respect to invoices; and

(vi) I also accept the plaintiff's evidence that invoices reflected, not what was payable, but what was paid.

127. In short, I am satisfied that the issuing of invoices by the plaintiff, in respect of monthly payments made by the defendant following the voiding of the 2016 AA, does not give rise to any form of estoppel.

Payments by the defendant

128. Despite the contents of Mr Birmingham's 17 May 2019 correspondence (which correctly pointed out the defendant's liabilities, given the voiding of the concessions in the 2016 AA) it is common case that the defendant continued to pay €3,750 plus VAT per month.

129. €3,750 plus VAT is the equivalent of the abated rent provided for at para. 2 on the first page of the 2016 AA which stated: " *Calendar year 2018 – €3,750 (plus VAT) per month".* This was significantly *less* than the defendant's liability, which, in the manner explained, reverted to the obligation to pay full rent under the Lease (i.e. then the sum of €52,000, excluding VAT, quarterly in advance, from 1 January 2016 up to the 27 July 2019 review date).

March 2020

130. It is common case that the defendant made no payment of rent in March 2020 and has never done so.

April 2020

131. It is also common case that the last monthly payment of €4,612.50 (i.e. €3,750.00, plus VAT of €862.50) was made by the defendant on 16 April 2020.

May 2020

132. As of 18 May 2020, the defendant unilaterally reduced monthly payments to €2,306.25 (inclusive of VAT). The first of these was made on 18 May 2020 and they continued up to 18 May 2021.

10 June 2020

133. By letter dated 10 June 2020, Messrs. Dillon Eustace, solicitors for the plaintiff, wrote to Daragh M. Keane, solicitors for the defendant. This letter referred *inter alia* to the Circuit Court judgment and execution order, stating: *"To date €10,000 of the judgment has been repaid by your client…"*

134. It will be recalled that, under the terms of the 2016 AA, the defendant had been required to pay €18,000 by 15 December 2018. However, as the aforesaid letter of 10 June 2020 illustrates, even 18 months *after* the deadline specified in the 2016 Abatement Agreement, the defendant had paid only €10,000 of the €18,000 obligation (which, in the manner examined earlier, represented arrears of abated rent).

Demand

135. The 10 June 2020 letter went on to make a demand for the following:-

> *"Rent underpayment since January 2016 €73,338.75*
> *Service charge underpayment €5,105.86*
> *Interest on late payment of rent €44,446.43*
> *Legal fees €4,712.63"*

136. It would appear that the aforesaid figure for rent represents a calculation of arrears on the basis of annual rent at €52,000, excluding VAT. This correctly reflected the defendant's liability.

10 August 2020 – Summary Summons

137. The plaintiff subsequently caused a summary summons to be issued, on 10 August 2020.

The most recent Rent Review

138. It is common case that 27 July 2019 was specified in the Lease as the next review date, after 27 July 2014. The Fourth Schedule of the Lease is entitled "*Rent Reviews*" and clause 11 thereof states:-

> *"11.* <u>*Time not of the essence*</u>
> *For the purpose of this Schedule, time shall not be of the essence."* (emphasis added)

4 June 2021

139. By letter dated 4 June 2021, the defendant's solicitor wrote to the plaintiff's solicitors referring to Clause 3 of the Fourth Schedule of the Lease and noting that the review date of 27 July 2019 had passed without the plaintiff having engaged *"…in the rent review process as per the terms of the Lease Agreement"*.

Fourth Schedule, Clause 3

140. For the sake of clarity it is appropriate to set out clause 3 of the Fourth Schedule, which provides:-

> *"3. <u>Agreement or determination of the reviewed rent</u>*
>
> *The Open Market Rent at any Review Date may be agreed in writing at any time between the Landlord and the Tenant but if, for any reason, they have not so agreed, either party may (whether before or after the Relevant Review Date) by notice in writing to the other require the Open Market Rent to be determined by the Surveyor."*

141. The said letter of 4 June 2021 went on to state the following:-

> *"Please note that we have engaged the services of Mr. Conor McCormick, McCormick Auctioneers who has independently assessed the yearly open market rent as of 27th July 2019, for the above commercial unit at €30,000 per annum. You are hereby called upon to review and agree the aforementioned figure as being the Open Market Rent for the purposes of the Rent Review and for the purposes of assessing the interim payments between the 27th July 2019, and the date hereof pursuant to clause 8.1 of the Lease Agreement.*
>
> *PLEASE TAKE NOTICE that if you fail, refuse and/or neglect to agree the said Open Market Rent and/or engage with issue as required by clause 3, schedule 4, the tenant will seek the appointment of a surveyor for the purposes of confirming the open market rent pursuant to the Lease Agreement…"*

16 June 2021

142. In terms of payments made by the defendant, on 16 June 2021, the sum of €500 was tendered.

16 July 2021

143. On 16 July 2021 €500 was paid.

17 August 2021

144. As of 17 August 2021, the defendant resumed paying €2,306.25 (inclusive of VAT).

October 2021

145. By letter dated 6 October 2021, the defendant's solicitor wrote to the plaintiff's solicitor stating *inter alia*:-

> *"…We confirm that we are now writing to the President of the Society for Chartered Surveyors in Ireland pursuant to clause 4.1 requesting that he appoint a surveyor for the purposes of assessing the open market rent of the property in accordance with the Fourth Schedule of the Lease Agreement."*

November 2021

146. As of November 2021, the plaintiff's attitude to the rent payable from 27 July 2019 onwards, can be summarised as follows,:-

(i) The plaintiff regarded itself as entitled to rely on clause 3.1 of the Lease;

(ii) As the plaintiff's solicitors stated, by letter dated 19 November 2021 *"…the rent calculated pursuant to the increase in the Consumer Price Index over the preceding period amounts to €52,915.77 plus VAT per annum."*;

(iii) They had obtained an independent surveyor's report, prepared by QRE Real Estate Advisers, who were of the opinion that the current rent was fair, but advised that annual rent should be in the region of €47,500 plus VAT; and

(iv) because both Mr. McCormick and QRE suggested an annual rent *less* that the €52,000 plus VAT, payable up to 27 July 2019, the plaintiff's position was that rent should be calculated *"…pursuant to the applicable CPI increase, namely €52,915.77 plus VAT per annum"* (see Dillon Eustace letter dated 19 November 2021).

Fourth Schedule, clause 4

147. It is common case that clause 4 of the Fourth Schedule deals with *"Appointment of Surveyor"* and provides that, in default of agreement between the parties on the appointment of the surveyor, the appointment shall be made by the "President" (defined in clause 1.6 as being the President for the time being of the Society of Chartered Surveyors or similar body).

Independent expert

148. Both parties, through their respective solicitors, confirmed their intention to seek the appointment of an independent expert to determine the open market rent as defined in the Lease.

3 March 2022

149. By letter dated 03 March 2022, Dillon Eustace, solicitors for the plaintiff, wrote to the defendant's solicitors in the following terms:-

> *"Further to previous correspondence in relation to this matter, please see enclosed the application which we intend on submitting to the Society of Chartered Surveyors Ireland (S.C.S.I.) tomorrow afternoon, 4 March 2022, seeking the appointment of an Independent Expert to determine the open market rent (as defined in the Lease between our respective clients)."*

24 October 2022 - Expert's determination

150. It is common case that Mr. Brian Neldon, Chartered Surveyor, was appointed by the relevant President in March 2022, and his 24 October 2022 determination states the following:-

> *"Re: Reference to a chartered surveyor acting as Expert in the matter of rent review.*
>
> *Premises: Commercial Unit 3, The Village, Stepaside, Dublin 18.*
>
> *Gradual Investments Limited, the present Landlord, represented by Dulta Moore and Fiona Grant, the present Tenant, represented by McCormick Estates.*
>
> *Dear Sirs,*

1. *I accepted the nomination of the President of the Society of Chartered Surveyors Ireland dated 25th March 2022 to act as independent expert in the above matter, reference TJC. 60. E22.*
2. *The only matter to be determined by me is the 'Open Market Rent' payable as defined under the provisions of the Fourth Schedule to the Lease dated 14th September 2009 made between Richmond Properties Ireland Limited, whose interest is now vested in Gradual Investments Limited, and Fiona Grant.*
3. *In accordance with the directions set out in paragraph 5 of the Fourth Schedule to the Lease I invited both parties to provide me with written representations and cross-representations in support of their opinions as to value. They did this.*
4. *I have carefully considered the representations made by both parties, made my own enquiries, inspected the subject unit and the comparisons put forward.*
5. *I confirm that my fees in this case have been fully paid.*
6. *I hereby award and determine that the "Open Market Rent" as defined under the Fourth Schedule to the Lease as at the 27th July 2019 is represented in the amount of €38,500 per annum (Thirty-eight thousand five hundred euro per annum)."*

151. I pause at this juncture to contrast the review of rent in respect of the 27 July 2014 review date, with the review in respect of the 27 July 2019 review date. With respect to the former, a summary of the position includes the following:-

(i) The plaintiff invited the defendant to engage in the process and she failed to do so;

(ii) The plaintiff relied on clause 3.1 to review the rent;

(iii) This was pleaded in clear terms in a civil bill served on the defendant, who neither paid the rent claimed nor opposed the proceedings;

(iv) A default judgment issued from the Circuit Court, which estops the defendant from asserting that rent was not increased pursuant to clause 3.1 of the Lease, from €50,000 plus vat per annum, to €52,200 plus VAT, for the period 27 July 2014 to 26 July 2019 (payable quarterly in advance *per* the terms of the Lease);

(v) The parties agreed the annual rent for the period to 27 July 2019 in the marginally lesser sum of €52,000 plus VAT (see pg. 1 of the 11 February 2016 Abatement Agreement); and

(vi) The foregoing *also* constituted a review of the rent payable up to 27 July 2019 in accordance with clause 3 of the Fourth Schedule of the Lease (which begins *"the open market rent at any review date may be agreed in writing at any time between the Landlord and the Tenant…"*). (emphasis added)

152. For the reasons explained in this judgment, I am satisfied that the plaintiff has established its entitlement to receive what the 2016 AA referred to as *"the full rent under the terms of the Lease"*.

153. In other words, the plaintiff is entitled to recover the difference between (i) the sums actually paid by the defendant; and (ii) rent at the rate of €52,000 per annum plus VAT, payable quarterly. In

short, the evidence before the court establishes the pleas made at para. 13 of the statement of claim, dated 9 September 2022.

Extended claim

154. In circumstances where the court declined summary judgment and directed a plenary hearing, the claim articulated in the statement of claim extends beyond the sums for which summary judgment was sought. As pleaded in the statement of claim the plaintiff also seeks *"judgment in such further sums in respect of arrears of rent and service charge as may accrue pending the trial of the action"*.

Order 20, rule 6

155. Order 20, r. 6 of the Rules of the Superior Courts provides that:-

> *"Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement on the summons".*

156. There is nothing in O. 20 which disapplies the foregoing in circumstances where the action was initially commenced by summary summons (as opposed to plenary summons). No authority was opened to me during the hearing to the effect that it was inappropriate for this court to engage with the full extent of the pleaded claim.

157. Recalling that the statement of claim was delivered on 09 September 2022 (which was *prior* to the 24 October 2022 determination of the open market rent by Mr. Meldon), para. 14 of the statement of claim pleads a claim for *"…rent due under the Lease in the sum of €52,000.00 plus VAT per annum payable quarterly in advance (i.e. €15,990.00 per quarter) pending completion of the next rent review."* (emphasis added)

158. The evidence before the court underpins the validity of the following particulars which are pleaded at para. 14 of the statement of claim:-

> *"(i) From August 2019 to April 2020 (with the exception of March 2020), the defendant paid €4,612.50 per month in respect of rent;*
>
> *(ii) The defendant made no payment of rent in respect of March 2020;*
>
> *(iii) From May 2020 onwards, the defendant unilaterally reduced her rental payments to €2,306.25 per month;*
>
> *(iv) In each of the months of June and July 2021 the defendant only paid the sum of €500.00 in respect of rent;*
>
> (v) *In respect of the payments actually made by the defendant, the defendant failed to make payments of rent on time on the quarterly gale days specified under the Lease (i.e. 1 January, 1 April, 1 July and 1 October). The defendant unilaterally elected to make payments on a monthly basis, albeit not consistently on the first day of each month*."

159. Paragraph 15 of the statement of claim goes on to plead a claim for rent totalling €158,592.50. It is clear that this figure is calculated on the basis of €63,960.00 (i.e. €52,000.00 plus VAT) per

annum for each of the years 2016; 2017; 2018; 2019; 2020; 2021; and up to 16 August 2022. Actual payments made are also pleaded, as is the shortfall.

9 December 2022

160. However, in the manner explained, Mr. Meldon determined the open market rent, as and from the 27 July 2019 review date, as being in the sum of €38,500.00, excluding VAT. In light of the foregoing, the plaintiff's solicitors wrote to the solicitor for the defendant on 9 December 2022 stating *inter alia* the following:-

> *"Our client contends that in accordance with clause 3.1 of the Lease it is entitled to charge a rent which is the higher of the open market rent determined in accordance with the Fourth Schedule and the rent payable during the preceding period increased by a factor equal to the increase in the Consumer Price Index during the preceding period. Your client has contended in the ongoing High Court proceedings that she was entitled to the benefit of the reviewed rent as of 27 July 2019. Without prejudice to our client's contention that a rent of €38,500 plus VAT per annum is less than our client is currently entitled to charge by reference to clause 3.1, for present purposes, it is clear that at a minimum, your client was obliged to pay a rent of €38,500.00 plus VAT per annum (i.e. €47,355.00) from 27 July 2019 onwards.*
>
> *Accordingly, the difference between the minimum rent due from your client and the actual rent received from her is as follows:*

Minimum Rent for a period from 27 July 2019 – 30 September 2019 (Incl. VAT)	*€8,335.78*
Minimum Rent for a period from 1 October 2019 – 31 December 2022 (13 x quarters) (Incl. VAT)	*€153,903.75*
Total sum paid by your client in respect of rent for period from 27 July 2019 – 16 November 2022 (Incl. VAT)	*€106,421.50*
Shortfall	*€55,818.03*
Balance outstanding on judgment dated 26 November 2015	*€5,146.00*
Minimum sum now due and payable by your client:	*€60,164.03*

> *Our client reserves the right to claim a higher rent set by reference to the Consumer Price Index and we will advise you for same in early course. Our client further reserves the right to claim interest on arrears of rent and late payment of rent.*
>
> *As is clear from the above, not only are your client's payments lower than the 'Open Market Rent' determined by Mr. Meldon but the payments are late and not being made in accordance with the terms of the Lease (i.e. on the Quarterly Gale Days)."*

Forfeiture

161. The said letter, dated 9 December 2022, went on to refer to clause 7.1 of the Lease which concerns forfeiture and referred to a forfeiture notice which called on the defendant to pay

€60,964.03 within fourteen days, failing which the plaintiff would treat the Lease as forfeited and would seek to retake possession.

162. As both counsel acknowledge, this court is not asked to determine the validity of any forfeiture notice. The question of forfeiture is of no direct relevance to the claim articulated in the statement of claim. However, it is uncontroversial to say that the outcome of the present claim may well have a bearing on what steps either side may wish to take. Indeed, reference was made by the defendant's counsel to the potential need, depending on the outcome of this case, to seek relief against forfeiture.

Injunction

163. Without determining the validity of any forfeiture notice, it is sufficient to say that the defendant took objection to the delivery of the said and subsequent forfeiture notices (of 9 August and 3 October 2023) following which the defendant sought injunctive relief. Quinn J granted an interim injunction restraining the plaintiff from enforcing the 3 October 2023 forfeiture notice; and Hyland J made an interlocutory order in similar terms, pending the trial.

164. At the conclusion of the hearing before me, counsel for the defendant applied to extend the said order and, without objection from the plaintiff, the injunction was extended until the first 'for mention' date following the delivery of this judgment.

Alleged sub-letting

165. It would appear that the latest forfeiture notice was based on a range of alleged breaches of the Lease, namely:-

(i) Underpayment of rent since 2019 and a failure to pay rent quarterly;

(ii) Failure to pay service charges, with a balance of €10,553.40 specified;

(iii) The sum of €5,146 remaining outstanding in respect of the 2015 Circuit Court default judgment; and

(iv) Alleged sub-letting without consent, contrary to s. 4.14 of the Lease.

166. Allegations in relation to (iv) do not form part of the plaintiff's claim in these proceedings. Even if they were, there was insufficient evidence before this court on which to base any determination of such an issue. It will be recalled that this court did not have the benefit of oral testimony from the defendant and it seems to me that it would be wholly unfair for this court to make any observations, still less findings, as regards the sub-letting issue, given the dearth of evidence.

Rent determined and ascertained

167. For the sake of clarity, clause 8 of the Fourth Schedule begins:-

"8. Interim payments pending determination

8.1 If the reviewed rent in or in respect of any period (the "Current Period") is not ascertained on or before the review date referable thereto, rent shall continue to be payable up to the Quarterly Gale Day next succeeding the ascertainment of the reviewed rent at the rates payable during the preceding period AND within seven days

of such ascertainment the Tenant shall pay to the Landlord the appropriate instalment of the reviewed rent together with any shortfall between

(i) the aggregate of the rents actually paid for the Current Period and

(ii) rent at the rate of the reviewed rent attributable to the interval between that Review Date and such Quarterly Gale Day together also with interest at the Base Rate on said shortfall, such interest to be computed on a day to day basis.

8.2 For the purpose of this paragraph the reviewed rent shall be deemed to have been ascertained on the date when the same shall have been agreed between the parties or, as the case may be, on the date of the notification to the Tenant of the determination of the arbitrator/expert." (emphasis added)

Active participation in the 2019 Rent Review

168. Unlike the position which pertained in 2014, the defendant was an active participant in the 2019 review. With regard to the claim pleaded at para. 14 of the statement of claim (i.e. a claim for annual rent of €52,000.00 plus VAT per annum, payable quarterly, pending completion of the 27 July 2019 rent review), the following seems to me to be the position:-

- Rent under the Lease is payable quarterly and an independent surveyor, acting as expert, "*determined"* the open market rent for the period 27 July 2019 to 27 July 2024 as being €38,500 per annum. This figure excludes VAT.
- Bearing in mind that the reviewed rent had not been "*ascertained"* on or before 27 July 2019, the period commencing on that date was the *"Current Period"* as defined in clause 8.1 of the Fourth Schedule.
- 24 October 2022 was the date when the reviewed rent was "*ascertained"* (i.e. Mr. Meldon's expert determination)
- Under clause 8.1, the defendant was obliged to continue paying rent at the rate of €52,000 plus VAT per annum up to *"the Quarterly Gale Day next succeeding the ascertainment of the reviewed rent",* being 1 January 2023 (having regard to the definition in clause 1.35 of the Lease).
- Within seven days of Mr. Meldon's 24 October 2022 determination, the defendant was required to pay *"the appropriate instalment of the reviewed rent together with any shortfall",* as defined in clause 8.1, together with interest.

169. The foregoing obligations on the part of the defendant cannot be in doubt, given the plain meaning of the provisions in the Fourth Schedule. Thus, the evidence entirely supports the defendant's liability in respect of rent as articulated in the 9 December 2022 letter sent by the plaintiff's solicitors, i.e. that, at a minimum, the defendant was obliged to pay rent, quarterly, at the rate of €38,500 plus VAT per annum (i.e. €47,355.00) from 27 July 2019 onwards. The plaintiff is entitled to judgment in that sum.

170. It is common case that the expert determination by Mr. Meldon speaks from 27 July 2019. This is of course consistent with the terms of the Lease which, *inter alia*, makes clear that time is not of the essence insofar as reviewing rent in accordance with the Fourth Schedule.

171. It is clear, however, that the 9 December 2022 letter sent by Dillon Eustace, Solicitors for the plaintiff was without prejudice to the plaintiffs contention that:-

> *"In accordance with clause 3.1 of the Lease it is entitled to charge a rent which is the higher of the open market rent determined in accordance with the Fourth Schedule and the rent payable during the preceding period increased by a factor equal to the increase in the consumer price index during the preceding period."*

This is the position maintained by the plaintiff *after* Mr. Meldon's independent review and accords with the claim articulated in para. 14 and particularised at para. 15 of the statement of claim. Thus, it is necessary to engage with what might be called the 'clause 3.1 issue', as follows.

The 'clause 3.1 issue'

172. At the outset, it appropriate to repeat that this court was required to approach the task of interpreting the Lease without the benefit of any oral evidence from either of the parties who entered into that contract in 2009 or those who may have acted for them (including as regards the 'striking out' of wording in clause 2 of the Fourth Schedule concerning upwards only rent reviews).

173. In other words, this is not a situation where evidence was given in relation to the 'matrix of fact' as regards background knowledge available or which might reasonably have been available to the parties who entered into the contract, or who 'struck out' a single clause from the copy Lease which this court was called upon to interpret. Nor is this a situation where it is pleaded that the parties are operating at 'cross-purposes'. No 'mutual mistake' is pleaded to have arisen (such as whether clause 3.1 (i) is valid and exercisable in accordance with its terms; or (ii) is not valid; or (iii) was intended to be amended, and if so, in what form).

174. In other words, this is not a situation where either side makes a claim of *mistake* as to the nature of the agreement reached. Rather, the Lease which binds the parties is the copy which has been exhibited, and it is a well-established principle that it is not this court's role to re-draft contracts for the parties (whether by deletion or addition).

175. It will be recalled that Clause 3.1 of the Lease provides:

> *"…YIELDING AND PAYING unto the landlord during the term:*
>
> *3.1 Yearly and proportionately from the rent commencement date the Initial Rent and from and including each Review Date (as defined in the Fourth Schedule), such yearly rent as becomes payable under the Fourth Schedule, <u>or if higher</u> the rent payable during the preceding period increased by a factor equal to the increase in the Consumer Price Index published by the Central Statistics Office (or if there shall be no index of that name or nature at that time, the newest equivalent index) over the*

preceding period and in every case the same is to be paid in the manner notified from time to time by the Landlord by equal quarterly payments in advance on the Quarterly Gale Days..." (emphasis added)

176. The foregoing provision appear in the Lease. Not a single word of clause 3.1 has been 'struck out'. Nor is there any evidence before this court that the plaintiff or the defendant agreed to any amendment with respect to the terms of clause 3.1 (e.g. the deletion of the words beginning *"or if higher…".* In my view, there is no ambiguity as to the meaning of clause 3.1. The literal and plain meaning is that the demise of the premises to the tenant was subject to *inter alia*, their obligation to pay the landlord the "*Initial Rent"* defined in the Lease (i.e. €50,000.00 plus VAT per annum) and from each Review Date "*… such yearly rent as becomes payable under the Fourth Schedule, or if higher the rent payable during the preceding period increased by a factor equal to the increase in the consumer price index…"* (emphasis added)

Meaning

177. In order to ascertain meaning, I have not merely focussed on the words in clause 3.1, but have considered them in the context of the entire agreement. Not only is the meaning of clause 3.1 perfectly clear 'on its face', the Fourth Schedule of the Lease is perfectly capable of operation in accordance with the ordinary meaning of the words used in both the Fourth Schedule and in clause 3.

178. The operation of both the Fourth Schedule *and* clause 3.1, in accordance with the literal meaning of the words in the Lease, looked at as a whole, gives rise to no irreconcilable conflicts. I say this because:-

- The methodology for carrying out a rent review is specified in the Fourth Schedule.
- Given the fact that clause 2 of the Fourth Schedule in the copy Lease before this court has been 'struck out', the outcome of a rent review in accordance with the Fourth Schedule methodology may be either higher or lower than the rent during the preceding period.
- However, clause 3.1, which has *not* been 'struck out' is still perfectly capable of a literal interpretation which is unambiguous, namely, the tenant's liability is to pay the "*higher"* of the rent (i) payable under the Fourth Schedule or (ii) payable during the preceding period increased by the CPI factor.
- Whilst the plain meaning of clause 3.1 is to create the obligation on the tenant to pay the higher of the two alternatives specified, nothing in the Lease prevents a landlord from accepting the lower.

179. Commercial considerations might well come into play at any given rent review, such as an assessment of the tenant's financial capacity; the availability of commercial space to rent in the wider market; the number of potential alternative tenants; and the nature and history of the landlord and tenant relationship, etc.

180. Taking a purely theoretical scenario, it is not difficult to conceive of a situation where, following a review pursuant to the methodology set out in the Fourth Schedule, a landlord decided to accept the

open market rent as independently determined by an expert, rather than to insist on the higher rent option (*per* clause 3.1).

181. This court needs no expert evidence to understand that economies can be 'cyclical'. Indeed the courts continue to deal with disputes which have their genesis in the economic 'crash' which occurred well over a decade ago. My point is that the terms of the Lease before this court are capable of accommodating, for example (i) a high rent (e.g. fixed during a 'boom') followed by a much lower rent (e.g. decided in a 'bust') accepted by the landlord notwithstanding their entitlement to insist on much more (*per* clause 3.1) followed by (ii) either a higher or lower rent ascertained at the following review date (whether 'boom' or 'bust') in accordance with the Fourth Schedule, with the landlord entitled to take (or not) the higher of the alternatives produced by clause 3.1.

Subjective intent

182. It is conceivable that the subjective intention of the unknown party or parties who 'struck out' the wording which previously appeared in clause 2 of the Fourth Schedule may have been to 'strike out' or amend other wording in the Lease. However, *if* this formed part of the 'matrix of fact', there was certainly no evidence before this court in relation to same. I can see no jurisdiction for this court to amend the copy Lease (by deletion, addition, or otherwise). Moreover, and at the risk of oversimplification, the aim of contractual interpretation is to ascertain meaning in *objective* terms. In other words, subjective intent (if ascertained) cannot 'trump' objective meaning if that would do violence to the words used, when given their plain meaning and considered in context.

183. Focusing on the rent review with respect to the 27 July 2019 review date, insofar as the defendant contends that *"the plaintiff has sought to rely incorrectly on clause 3.1 of the general conditions of the Lease as replacing the schedule of the Lease which deals expressly with the rent review"* (para. 20 of the defendant's written submissions) I feel bound to reject that argument.

Fourth Schedule process

184. As a matter of fact, both parties engaged fully, albeit belatedly, in the rent review methodology or process which is provided for in the Fourth Schedule. In a 'nut shell', the plaintiff's case on this issue is that the Fourth Schedule methodology having produced a sum, the plaintiff has invoked the provisions of clause 3.1. In my view, the plaintiff is entitled to do, so given the ordinary meaning of the words in that clause, considered in the context of the entire Lease.

185. For similar reasons, I feel bound to reject the submission that *"the plaintiff's reliance on 3.1 in isolation seeks to provide for an upward only rent. The upward only rent was expressly removed from the Lease by the parties to it"* (see para. 20 of the defendant's written submissions). With respect to the 2019 rent review, there is no question of the plaintiff relying on clause 3.1 *"in isolation"*. Rather, it is a matter of fact that, in the manner envisaged by clause 3.1, the rent *"payable under the Fourth Schedule"* has been determined. However, the plaintiff relies on its rights flowing from the words in the balance of what is a single sentence in 3.1 and which continues *"…or if higher the rent payable during the preceding period increased by a factor equal to the…"* CPI increase.

186. It seems to me that there is a material difference between the following issues:-

(i) That rent is reviewable downwards as well as upwards and on an open market basis;

(ii) That the landlord is entitled to the higher of the rent assessed in the foregoing manner or the rent payable during the period preceding the relevant review.

187. An exchange of communication (dated 24 July and 27 July 2009) between Crowley Millar Solicitors and O'Brien Lynam was exhibited by the defendant in her affidavit of 25 July 2021 (being the second affidavit she swore in opposition to what was then the plaintiff's application for summary judgment). This correspondence concerns pre-contract negotiations before the defendant executed the Lease. The 'height' of the defendant's evidence concerning that correspondence comprises the following averments:-

"5. *I say that the Lease agreement, negotiated and executed by your deponent and the plaintiff's predecessor in title, and dated the 14th September 2009, expressly removed the entitlement of the landlord to an upward only rent review. In this regard I beg to refer to documents passing between your deponent's legal advisor and the plaintiff's predecessor at the time of the execution of the Lease…"*

6. In furtherance of the foregoing issue I confirm that the original signed Lease agreement is available for the court which expressly excludes or, strikes through, the provisions of upward only rents, in respect of the present property. I say that were the plaintiff to now contend that the Lease Agreement is not that which the defendant contracted for in 14th September, 2009, then such an issue is a matter for legal submissions."

188. Leaving aside the fact that the court has not had the benefit of any oral evidence from the authors of the relevant correspondence, or from the defendant, and taking her averments at their very 'height', they speak only to the first of the issues I have identified above (at para 186). They do not speak to the second. The exhibited correspondence is entirely silent on the second issue. Similarly, the Fourth Schedule of the Lease speaks to the first issue, whereas clause 3.1 speaks to the second.

189. Even if this court were entitled to rely on pre-contract negotiations to determine the meaning of this Lease (and it is not) there is simply no evidence of any agreement to amend this Lease by placing a 'full stop' on the third line of clause 3.1 after the words "Schedule" and striking out, from clause 3.1, all the words which follow (i.e. *"~~or if higher the rent payable during the preceding period increased by a factor equal to the increase in the Consumer Price Index…~~").*

190. I ask, rhetorically, how can this court validly ignore the balance of the wording in the foregoing sentence, none of which has been 'struck out' of clause 3.1? In my view, it cannot.

191. As I have acknowledged, words concerning upwards only rent review have been 'struck out' of the Fourth Schedule. The effect is that the outcome of a rent review, in accordance with the

methodology set out in the Fourth Schedule, may be a rent higher or lower than the rent payable immediately prior to the relevant review date. However, clause 3.1 has not been 'struck out' and no authority has been opened to me to the effect that this court has any jurisdiction to undertake what would, in substance, be an 'own motion' re-writing of the contract which has been exhibited.

'Blue pencil'

192. To put things another way, this court has no jurisdiction to take a 'blue pencil' to this Lease and to 'strike out' words which appear in the contract and have an obvious literal meaning. Similarly, this court has no jurisdiction to conduct some form of review of the Lease and to amend its terms in accordance with what the court might regard as sensible, in light of an assumed intention. Such an approach would very obviously strike at the heart of the principle of certainty in written agreements.

193. This may well come as very unwelcome news to the defendant. However, contract law reflects the strong public policy in favour of certainty and, where the meaning of a written document is clear, the court's findings must accord with this.

194. Returning to the 27 July 2014 review date, I feel bound to reject the submission that *"the 2014 rent has never been reviewed in accordance with the Lease"* (para. 20 of the defendant's written submissions). It is certainly the case that the Fourth Schedule methodology was *not* used and, in my view, clause 3.1 is not the method by which rent is reviewed. Therefore, absent other considerations, there might well have been an infirmity with respect to the 2014 review. However, there were other considerations of a very material sort, as examined earlier in this decision. First, an issue estoppel arose as and from 26 November 2015 (when the Circuit Court issued judgment in default against the defendant). Second, the parties agreed the annual rent for the period up to 27 July 2019 at €52,000 plus VAT (with their written agreement, dated 11 February 2016) constituting compliance with clause 3 of the Fourth Schedule.

195. Oral submissions on behalf of the defendant were to the effect that if there is no rent review under the Fourth Schedule, the reference in clause 3.1 to the CPI *"doesn't come into it"* . All things being equal, this submission would carry great force. However, two fundamentally important issues deserve emphasis. First, the defendant is estopped from asserting that no review took place concerning the annual rent payable from 27 July 2014 (again, see Circuit Court default judgment and subsequent agreement, in writing, on the reviewed rent). Second, a Fourth Schedule rent review did take place in respect of the rent payable from 27 July 2019 onwards.

Statement of claim paras. 14 and 15

196. For the reasons set out, a consideration of the evidence put before the court, in particular, the plain meaning of the Lease, supports the pleas made at paras. 14 and 15 of the statement of claim.

Service Charges

197. Pursuant to clause 3.3 of the Lease, the defendant covenanted to pay to the landlord, during the term:-

"3.3 The General Common Parts Service Charge to be paid on demand in accordance with clause 8." (emphasis added)

198. Clause 8 (comprising clauses 8.1 to 8.9.3) runs to over two pages (internal pages 43 – 45) of the Lease. Clause 8.1.3 states:-

"8.1.3 'Service Costs' means the General Common Parts Service Costs and the Residential Service Costs".

199. Clause 8.1.1 defines the "*General Commons Parts Service Costs*" to mean "*…the aggregate of all costs, fees, expenses and outgoings, whatsoever incurred by the Landlord in providing the services set out in the Fifth Schedule hereto in relation to the General Common Parts…".*

200. Clause 8.2 creates (by use of the term "*shall*") the following mandatory obligation on the landlord:-

"8.2 The landlord shall as soon as practicable after the end of each Financial Year prepare an account showing the Service Costs for that Financial Year apportioned between the General Common Parts Service Costs and the Residential Service Costs containing a false summary of the various items comprising the Service Costs and upon such account being certified by the accountant (a copy of which account and certificate shall be provided to the tenant), the same shall be conclusive evidence, for the purposes of this Lease of all matters of fact referred to in the account." (emphasis added)

201. There was no evidence before this court to the effect that the landlord discharged the obligations contained in clause 8.2. No account was produced to the court. There was no evidence of any such account having been certified by the accountant. Nor was there evidence of any account and certificate having been provided to the defendant.

202. I accept the plaintiff's evidence to the effect that the management company (Step Village Owners Management Company CLG) has issued demands to the defendant for the payment of service charge in respect of Unit 3, including a demand dated 16 February 2023 which sought *"estate service charge; yearly charge 1 Jan. 2023 – 31 Dec. 2023"* of €968.78 as well as a *"balance forward from previous financial year(s)"* of €9,584.62, giving a total of €10,553.40.

Payment by the plaintiff

203. I further accept that the management company called upon the plaintiff to discharge the aforesaid sum. I also accept the evidence that the plaintiff did, in fact, pay €10,553.40 to the management company in respect of service charge for Unit 3. In this regard the evidence before the court included a statement of account, dated 4 October 2023 issued by the management company to the plaintiff which acknowledged the payment of €3,500.00 made on 21 September 2023 *"by online payment: Unit 3…"*. Mr. Moore also gave uncontested evidence that the total of €10,553.40 had been paid by the plaintiff to the management company by means of three instalments.

204. During oral submissions, counsel for the defendant made reference *inter alia* to clause 8.9 which states:-

> *"The landlord shall not be able to recover from the tenant expenditure on any of the following:-*
>
> *8.9.1 The costs of any works where money has been or is recoverable from third parties in respect thereto (including insurers);*
>
> *8.9.2 The costs of any works involving the enhancement of any part of the Centre;*
>
> *8.9.3 Any costs of any expenditure attributable to any vacant or unlet Units in the Centre."*

205. The thrust of the submission made on behalf of the defendant is that there is a very logical reason why the landlord is required to prepare an account and provide same to the tenant, namely, to explain what the service charge is for, so as to enable the tenant to assess the basis for same, particularly having regard to items for which a landlord is not entitled to seek recovery. As well as the obvious force in that submission, the evidence allows for a finding that the plaintiff has not complied fully with the requirements of clause 8.

206. Thus, whilst I accept that the plaintiff has made payment to the Management Company of €10,553.40, until such time as clause 8 has been fully complied with, the plaintiff has not established an entitlement to recover the service charges claimed.

"*Sums which were never set as rent*"

207. At para. 26 of the defendant's written submissions, it is contended that *"the sums sought by the plaintiff for rent are sums which were never set as rent in accordance with the Lease. Thus, no interest, as defined by clause 1.18 can accrue on such sums"* (emphasis added). For the reasons set out in this judgment I must reject that submission. I am satisfied that the *rent* sought by the plaintiff reflects its entitlement, as landlord, and the concomitant obligations on the defendant, as tenant.

Interest

208. Clause 1.18 of the Lease states:-

> *"1.18 'Interest' means interest at the Prescribed Rate calculated on a daily basis from and including the date upon which interest became due on any sum demanded in writing and payable under this Lease unto the date on which payment is made to the landlord."*

209. Clause 4.2 of the Lease states:-

> *"4.2 Interest on arrears*
>
> *Without prejudice to any other right, remedy or power herein contained or otherwise available to the landlord, if any of the rent (whether formally demanded or not) or other sums specified in clause 3 remain unpaid for more than fourteen days after the date when payment was due, to pay interest thereon at the Prescribed Rate from and including the date on which payment was due to the date of payment to the Landlord (both before and after any judgment)."* (emphasis added)

The Prescribed Rate

210. The "*Prescribed Rate*" is defined as follows in clause 1.3.4 of the Lease:-

> *"1.34 'Prescribed Rate' means the rate per centum per month which exceeds by one half per centum per month the monthly rate of interest for the time being chargeable under section 1080 of the Taxes Consolidation Act 1997 (or such other monthly rate of interest as may from time to time be chargeable upon arrears of income tax) or should there be no such rate, the rate of fifteen per centum per annum."*

0.57534% per day

211. At para. 18 of the statement of claim it is pleaded that, at all material times, the prescribed interest rate was 0.57534% per day. During the hearing, the plaintiff's counsel asked Mr. Moore about the basis upon which the plaintiff approached the calculation of the interest rate with respect to the schedule of payments due by the defendant. Mr Moore's response was to say the following:-

> *"So the interest clause relates to s.1080, that's based on what the revenue charges on late income payment. That was calculated monthly, and it changed in 2009 or thereabouts, to be calculated on a daily rate. What we did was we extrapolated out the daily rate back into a monthly rate and then applied the .05 per cent (sic) based on what the current way is the revenue calculates it."*

212. In the course of Mr Moore's cross-examination by counsel for the defendant, the following exchange took place:

> **Mr McGarry** "*And you say, I believe, the plaintiff is entitled to charge interest on arrears in accordance with the terms of the* [Lease]….*you then say by virtue of Clause 4.2 that the defendant covenanted that if the sums remained unpaid then interest would be due. Then you say at all material times the prescribed rate was 0.57534% per day"*
>
> **Mr Moore**: "*yes"*
>
> **McGarry:** "*That is the rate that you says applies under the Lease, is that right?"*
>
> **Mr Moore:** "*yes"*
>
> **McGarry:** *Mr. Chambers will say that when that figure is annualised, even on a simple interest basis,* [it] *comes to around 20-21%- sorry 22%.*

0.0383380% per day

213. Despite the foregoing, it appears that the plaintiff is seeking interest at a *lesser* rate. Elsewhere in his evidence, Mr Moore referred to a spreadsheet which he prepared, upon which the *"prescribed rate per day"* of interest is specified to be 0.0383380%. Mr. Moore's evidence included to say the following:-

> *"We calculated the interest then on the running balance or the overdue amount, based on the interest provision in the Lease. That's given based on the number of days which is the next*

column. The first prescribed rate is 0.038 and the number of days is 76 due and the interest rate is a calculation where you multiply the amount due, the running balance by the prescribed rate and the number of days"

214. The following exchange took place between Counsel for the defendant and the defendant's accountant:

> **McGarry:** *Mr. Moore produced this document and that document seems to have a slightly different figure*
>
> **Mr Chambers**: *Yes, .03833*
>
> **Mr McGarry**: *Yes although in the affidavit 0.57 figure is used, but we'll take Mr. Moore's evidence that he gave. That 0.38 figure, Mr. Moore's calculation changes from 0.5, to 0.3, and that's the evidence as an alternative. What would that work out as at an annual rate?*
>
> **Mr Chambers**: *Simple interest rate, a tiny fraction less than 14% but it would be more if it was compound.*

Not compounded

215. Whilst the defendant's accountant, Mr. Chambers, appeared to believe that interest had been compounded, I am satisfied that this is not the case. This is clear from an examination of the fifth and sixth columns of the plaintiff's spreadsheet (entitled *"Underpayment per quarter"* and *"Running balance"*, respectively). In short, the running balance increases by the relevant underpayment without interest being compounded.

14% per annum

216. It is common case that the interest rate claimed by the plaintiff, of 0.0383380% per day, equates to just under 14% per annum. No evidence was given by either side as to what would constitute a commercial rate of interest. During cross examination, Mr. Moore gave evidence to the effect that breaches by a tenant of the terms of their Lease lowers the value of the landlord's asset, but no specific figures were given.

217. It is common knowledge, however, that until relatively recently, interest rates have been very low. Even in the absence of any evidence concerning commercial rates, it seems uncontroversial to say that 14% is, in objective terms, a high rate.

218. The defendant contends that the interest claimed is excessive and submits that, insofar as the *'loss'* is rent otherwise due to the plaintiff, the latter can only be entitled to the payment of interest *"at a reasonable rate"*.

Penalty

219. At page 218 of the reported judgment in *Pat O'Donnell & Co. Ltd. v Truck & Machinery Sales Ltd.* [1998] 4 IR 191, Barron J made clear that it did not amount to a penalty:-

> *"…where the debtor has an option to pay the entire sum or to leave all or part of it outstanding and agrees to pay interest at a fixed rate until final payment. In such a case the provisions for the payment of the fixed rate of interest is a term of the contract and the parties are performing it in accordance with its terms."* (emphasis added)

220. As mentioned during the hearing, a credit card agreement may well be an example of the foregoing contract. However, the example given by Barron J is markedly different to the position in respect of the Lease in the present case, where the tenant is given no such option. Barron J went on to give the example of contracts for the sale of land stating that:-

> *"….the normal rule is that on the date fixed for completion the character of the parties changes and the purchaser becomes entitled to the rents and profits of the property but must at the same time pay interest on the balance of the purchase money for the time being outstanding."*

221. The learned judge went on to say:-

> *"In any event the principles relating to penalties would not apply since the payment of interest is being paid in the course of the performance of the contract and before the mutual obligations of the parties had been finally discharged. Another obvious example of where an agreed rate of interest will not be interfered with by the court is seen in the use of credit cards. The borrower does not have to pay off the entire debt on a fixed date, but may interest at an agreed rate thereafter on the amount for the time being remaining unpaid. Here again the test which I have indicated is fulfilled. By accepting the option not to pay the whole sum, the debtor is performing the contract in the manner intended by the parties."*

Analogous position

222. Regardless of the skill with which counsel for the plaintiff contends that this court is dealing with *"an analogous position"* because there is a *"subsisting relationship"*, I cannot agree. Whilst the contract as a whole may well be a subsisting one for so long as the Lease is not terminated, there is no contractually-compliant option for a tenant to pay their rent *late* or by way of *instalments*. On the contrary, the clear obligation imposed on the tenant by the Lease is to pay rent quarterly, in advance, and in full.

223. Taking the rate, claimed by the plaintiff, as being 14% per annum, it can certainly be said that it is not triggered by the tenant exercising any *right* to make late payment, or electing to pay only *part* of rent due on a particular date in accordance with any entitlement to pay less than the full amount due, per quarter. Rather, it is triggered by a failure to honour a 'core' term in the contract, namely, to pay rent in the manner required by the Lease.

224. In short, the 14% rate was only triggered by the tenant's *failure* to perform the contract in the manner intended by the parties. To look at it another way, if the Lease was performed fully and properly, then (wholly unlike the credit card example) interest would *never* be payable by the tenant.

225. Before leaving Barron J's decision it is appropriate to note that, from p. 213 of the reported judgment, he summarised matters as follows:-

> "*The sum of money to be paid upon breach of a term of a contract may be either a penalty or agreed liquidated damages in the event of breach occurring. The principles to be applied are set out in Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited [1915] A. C. 79. In the course of his opinion Dunedin L. J. accepted the following propositions as authoritative. He said at p. 86.:-*
>
> > *'1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.*
> >
> > *2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.*
> >
> > *3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided on the terms and inherent circumstances of each particular contract judged of as at the time of the making of the contract, not as at the time of the breach…'*
>
> *Dealing with the circumstances in which an agreed sum might be held to be a penalty, he said at p. 87:-*
>
> > *'(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by the Lord Halsbury in 'Clydebank' case)*
> >
> > *(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.*'" (emphasis added)

226. The defendant placed considerable reliance on the decision of Finlay Geoghegan J on behalf of the Court of Appeal in *Sheehan v Breccia & Ors*. [2018] IECA 286 ("*Breccia*"). I have carefully considered the analysis (in particular from paras. 34-44) where the learned judge analysed the proper approach for a court to take in accordance with the principles set out in the *Pat O'Donnell* and *Dunlop* decisions. Finlay Geoghegan J also referred to her own decision in a *ACC Bank v Friends First* [2012] IEHC 435 which relied on the judgment of Colman J in the High Court of England in *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 ("*Lordsvale Finance*") where, at p.763, Colman J stated:-

"It is perfectly true that for upwards of a century the courts have been at pains to define penalties by means of distinguishing them from liquidated damages clauses. The question that has always had to be addressed is therefore whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss." (emphasis added)

227. It is sufficient for present purposes to quote paras. 43 and 44 of the decision in *Breccia:-*

"*43. In Durkan New Homes v Minister for Environment, Heritage and Local Government [2012] IEHC 265, [2014] 2 I.R. 440, Charleton J in the High Court referred to an extract from Treitel – The Law of Contract (13th ed., 2011) at para. 20.131 in the context of the principles set out by Lord Dunedin in Dunlop. The passage from Treitel cited with apparent approval by Charleton J and again set out with apparent approval by the Supreme Court per McKechnie J in Launceston Properties Finance Limited v Burke [2017] IESC 62 [2017] 2 I.R. 798 states:-*

> *"A clause is penal if it provides for 'a payment of monies stipulated as interrorem of the offending party' or, as it has been put more recently, if the contractual function of the clause is 'deterrent rather than compensatory'. If, on the other hand, the clause is a 'genuine' attempt by the parties to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. This is so even though the stipulated sum is note precisely equivalent to the injured party's loss…"*

44. I would respectfully agree that expressing the question to be determined as to whether "the clause is a genuine attempt by the parties to estimate in advance the loss which will result from the breach" may be a better way of putting the question. This approach permits the court to uphold a clause which is a genuine attempt by the parties to estimate in advance the loss which will result from the breach but where by reason of the uncertainty of the loss it may be a sum which differs from the actual loss anticipated."

228. As Finlay Geoghegan J made clear (at para. 46):-

"*The relevant clause must be construed from its terms in the contract of the agreement as a whole and taking into account the permissible background of factual matrix at the time the agreement was entered into.*"

Estimate of loss

229. Applying the foregoing principles, I am not satisfied that the interest provisions in the Lease constitute a genuine attempt by the parties to estimate, in advance, loss resulting from a tenant's breach of payment obligations. There was certainly no evidence before the court as to *why* interest was set at this particular level.

230. It is obvious that a tenant's failure to pay rent means that the landlord will not have that rental money. However, other than a reference by Mr. Moore to the plaintiff having borrowings, there were

no specifics given, such as quantum or interest rate(s) on same. In other words, there was no evidence linking (i) any sum which the tenant failed to pay with (ii) any loss which the landlord was or was likely to suffer, other than the loss of the sum itself.

231. Properly construed, it seems to me that the interest provisions represent a deterrent and in my view they cannot *"pass muster as a genuine pre-estimate of loss"* (to quote *Lordsvale Finance*).

232. Whilst no evidence was given in relation to what would constitute an appropriate commercial rate, there was certainly no suggestion that it would be anything as high as 14%. Nor was there any evidence given that, at the time the agreement was entered into, 14% would have constituted a typical commercial rate.

233. For the foregoing reasons, I am satisfied that the interest provisions in the Lease are penal *not* compensatory and, in line with the authorities, are unenforceable.

234. As counsel for the plaintiff submits, having found that the interest rate was not a genuine pre-estimate of loss, Barron J in *O'Donnell* remitted the matter to this court *"…to have the appropriate rate of interest assessed at the commercial rate applicable at the time of the breach".* Guided by the Supreme Court's approach, it would appear to be necessary for this issue to be determined at a subsequent hearing, unless agreed between the parties.

Legal Costs

235. Paragraphs 24 and 25 of the statement of claim concern the plaintiff's claim for legal costs in the sum of €6,973.14. Clause 4.16 of the Lease is headed "*Landlord's Expenses*". The tenant's covenants begin at clause 4 and include the following:-

> "*4.16 Landlord's expenses*
>
> *To pay and indemnify the Landlord against all reasonable costs and expenses properly incurred by the Landlord in relation to;*
>
> *4.16.1 the preparation and service of any notice and of any proceedings under the 1860 Act or the 1881 Act;*
>
> *4.16.2 the preparation and service of any notice and schedule relating to disrepair;*
>
> *4.16.3 the recovery or attempted recovery of arrears of rent or other sums payable under this Lease;*
>
> *4.16.4 procuring the remedying of any breach of covenant by the tenant...*"
>
> (emphasis added)

236. Against the forgoing backdrop, uncontested evidence proffered by Mr. Moore establishes the following facts. The plaintiff retained Messrs. Leman Solicitors to bring the Circuit Court proceedings pursuing the defendant for rent arrears. The total legal costs incurred by the plaintiff was in the sum of €7,677.14. Giving 'credit' to the defendant for the sum of €704.00 (comprised in the execution order dated 26 November 2015) resulted in a net liability of €6,973.14 which the plaintiff paid to Leman Solicitors. In this regard, Mr. Moore also produced a "client statement" furnished by Leman

Solicitors, which detailed the costs invoiced in respect of the Circuit Court proceedings. That statement showed payments corresponding with each of the invoices and reflects the net sum claimed in these proceedings. In short, a consideration of the evidence establishes the defendant's liability to the plaintiff in relation to the sum claimed for costs.

237. I feel obliged to reject the submission that it was inappropriate for this claim to be included in these proceedings. It would have been a waste of court resources for the plaintiff to have commenced separate legal proceedings in a lower court with respect to this amount alone. I am also satisfied that no '*Henderson v Henderson'* issue arises. Clause 4.16 creates a contractual obligation on the defendant. There is nothing in the relevant clause which limits the plaintiff's ability to recover costs and expenses to such 'scale' contribution as was comprised in the execution order. Nor does clause 4.16 require that legal costs must be *"taxed in default of agreement"* before becoming recoverable. There was no evidence put before the court to suggest that the costs actually incurred by the plaintiff were other than reasonably and properly incurred by the plaintiff in relation to the recovery, or attempted recovery, of arrears of rent. Nor is this a situation where the contractual term 'jars' with any court order for costs (such as might occur if a court awarded costs *against* the landlord).

Summary

238. The defendant's position can be distilled into the following core arguments:-

(i) there was no rent review in 2014;

(ii) if the defendant is wrong in that contention, the reference in clause 3.1 to the 'CPI – related' increase applies to the rent which the defendant was paying immediately prior to July 2014, namely, €29,000.00 per annum; and

(iii) rent of €50,000.00 per annum plus VAT *"was never agreed to be paid"*.

239. For the reasons given in this judgment, I am satisfied that the defendant is incorrect in all 3 of these arguments.

240. This court has nothing but sympathy for a tenant who finds themselves in financial difficulties vis-a-vis their Lease. This is all the more so where the tenant is a medical professional contributing so much to society by providing primary care in the community.

241. Doubtless this judgment will come as a major disappointment and that is a matter of sincere regret, on a human level. However, this court's obligation is to give effect to the bargains made by interpreting their meaning, not to change meaning by way of deletion or addition.

242. At paras. 25 and 26 of her judgment on the summary application, Bolger J explained why her indictive view was that the costs should be treated as 'costs in the cause'. I propose to offer a preliminary view in respect of the costs concerning this hearing.

243. For the reasons set out in this judgment, the plaintiff has been entirely successful, other than in respect of the service charge and interest issues. However, it is also important to note that the vast

majority of time over the two day hearing was devoted to issues in respect of which the plaintiff has succeeded.

244. To take a theoretical example, this is not a situation where in a 5 day hearing, the plaintiff has succeeded in relation to issues canvased on days 1, 2 and 3, whereas the defendant succeeded on issues to which days 4 and 5 were devoted (allowing for a clear apportionment of costs to reflect success/failure of arguments which lasted days). Aided by my contemporaneous notes and having had recourse to the DAR, it seems to me that less than an hour, of the 2-day hearing, was devoted to claims for which the plaintiff has not succeeded.

245. Bearing in mind that further evidence at a future date will be needed in order to determine the question of a commercial interest rate (reflecting the approach by Barron J in *Pat O'Donnell*), it seems to me that the costs of a such of a *future* hearing could not fairly be visited on the defendant.

246. These are, as I say, merely preliminary views but I felt it important to make them clear, given the 'normal rule' that 'costs' should 'follow the event' (which is given statutory expression in s.168 of the Legal Services Regulation Act, 2015).

247. I also want to make clear that a consideration of all of the evidence does not allow for a finding that the plaintiff conducted this litigation in such a way that would justify a departure from the 'normal' rule. In other words, subject to a suitably modest percentage reduction to reflect the outcome of the interest and service charge issues, my preliminary view is that costs should follow the event.

248. The parties are invited to liaise in relation to producing a draft order to reflect the findings in this judgment and to provide a copy within 14 days. In the event of disagreement on any issue, including the question of costs, short written submissions are invited within a further 14 days.

249. I also invite learned counsel to agree a mutually convenient date when the matter can be listed before me on a 'for mention' basis. The relevant injunction remains in place until that date, when any outstanding issue can be raised - be that in relation to the terms of an order or the time required to hear evidence, at a future hearing, in respect of the commercial interest question, or otherwise.