

THE HIGH COURT

[202] IEHC 855
[Record No. 2018/8404 P]

BETWEEN

CONOR MARTIN

PLAINTIFF

- AND -

RAY O'KEEFFE AND ETNA O'KEEFFE

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 12th day of March 2021

1. Owing to the effects of the global Covid-19 pandemic, in March 2020 the government increased restrictions on public gatherings with a view to containing the spread of the virus. Arising from these matters, on March 16, the President of the High Court issued a direction adjourning certain High Court proceedings. This case was amongst those adjourned.
2. Accordingly, whilst this case was heard initially over four days in February 2020, the case was then adjourned to seek a further hearing date as it had exceeded the time allocated for its hearing. It then resumed (hearing one additional witness, a valuer Mr. Younge), in late October 2020.
3. This proceeding involves an action for specific performance in respect of a contract for the exercise of an option agreement. The plaintiff claims that the contract was entered into on the 25th day of May 2016 in respect of a premises known as ALL THAT AND THOSE the premises known as the Beach Tavern situate at 7/9, Bath Street, Irishtown, in the County of Dublin ('the Beach Tavern premises' or 'the premises') for the price or consideration of €625,000.

4. In his evidence the valuer Mr. Younge (of John P. Younge, Auctioneer and Valuation Surveyor) describes the premises as an imposing three storey end of terrace 7-day licensed premises, with part two storey and part single storey rear extensions with extensive return frontage to Barrack Lane with double gate entrance to a back yard, smoking patio with access/egress onto this side lane. In his report dated 26th day of November 2019, Mr. Younge values the premises to be “*in the order of €800,000*”.
5. As Mr. Younge readily conceded at the time he gave his evidence, in the present climate determining its value might prove more problematic.
6. In any event the Plenary Summons issued on 24 September 2018. It was suggested there was some difficulty in effecting service, but in any event both defendants had been served by 22 November 2018 (they are husband and wife).
7. The next procedural step was a motion brought by the defendants to vacate a *lis pendens* that had been registered against the property by the plaintiff’s solicitor consequent upon the issue of these proceedings.
8. That application was heard in March 2019 pursuant to a Notice of Motion which was issued on 29 January 2019 whereby the defendants sought an Order pursuant to s.123 of the Land and Conveyancing Law Reform Act 2009 (“the 2009 Act”) seeking the vacation of that *lis pendens* together with certain other consequential orders and reliefs (‘the *lis pendens* application’).
9. On 9 April 2019 I delivered an *ex tempore* judgment in respect of the *lis pendens* application in which, in summary, I took the view that as proceedings had just issued, it would be inappropriate at that stage to accede to the relief(s) sought by the defendants. In the circumstances, I considered it important that a strict timetable of pleadings be agreed between the parties and that is what occurred. I also retained seisin of the proceedings.

10. Within the *lis pendens* application the first named defendant swore an affidavit on 29 January 2019, the plaintiff to these proceedings on 13 March 2019 and a Mr. Rory Browne on 14 day of March 2019. I will refer to some of these matters subsequently.

11. The Statement of Claim was delivered on 17 day of April 2019. The following matters are pleaded:

- (a) by an agreement made on 24th August 2015 between the defendants as landlords and Ducas Hospitality Management Limited (“Ducas”) as tenant, the defendants agreed to let the Bath Street premises at a rent of €400 per week;
- (b) certain terms and conditions were attached to that agreement; the specific special condition particularly invoked is Clause 10 whereby the defendants agreed to provide the plaintiff with an option to purchase. This is considered in detail below;
- (c) on 25 day of May 2016, within the first year of the tenancy at a designated location comprising the Alexander Hotel, the plaintiff pleads that he exercised the option (orally) by informing the first named defendant and his agent (Rory Browne) then of Morrisseys Auctioneers and Estate Agents that he was doing so and would be purchasing the premises in his own name;
- (d) it is pleaded that the exercise of the option is evidenced by an e-mail from Rory Browne to the plaintiff on 20 May 2016. It is pleaded that within this email the first named defendant wrongfully sought to make the exercise of the option subject to a number of additional conditions relating to the terms of the tenancy agreement;
- (e) thereafter it is pleaded that the exercise of the option on 25 May 2016 constituted a contract between the defendants and the plaintiff whereby there was an agreement to purchase the premises for the consideration of €625,000;

- (f) the plaintiff pleads that in reliance upon his exercise of the option and with the consent of the defendant he thereafter made an application to Dublin City Council for planning permission to redevelop the premises, which was obtained on 16 January 2017;
- (g) it is pleaded that the defendants ignored efforts by the plaintiff, its servants or agents to complete the Contract of Sale and on or about 15 June 2017 the first named defendant unlawfully took possession of the premises and took steps to exclude the plaintiff from the premises including the changing of locks, alarm codes and such like. Thereafter it is contended that the first named defendant operated the licensed premises, passed himself off as the legal and beneficial owner and it is pleaded that he did so to frustrate the Contract of Sale. It is further pleaded that on 25 January 2017 the first named defendant let it be known that he was prepared to sell the premises to the plaintiff for the sum of €1m.
- (h) the plaintiff pleads that he suffered, as well as the absence of his bargain, certain loss and damage primarily consequential upon the application for planning permission. There is also a particular of loss styled “loss of bargain” opportunity;
- (i) in essence the claim is that the defendants failed, neglected or refused to complete the Contract of Sale and accordingly the claim for specific performance is advanced on that basis.

12. The defence (delivered 18 April 2019) raises what are styled preliminary objections to the effect that the contract or its terms are not in accordance with s.51 of the 2009 Act, is unenforceable against the defendants, its enforcement against them inequitable, unjust and raises issues of inordinate and inexcusable delay. Within the defence it is pleaded that non-compliance by the plaintiff with the tenancy agreement renders any option to purchase within that lease void and of no legal effect.

13. The reply delivered on 10 July 2019 is in essence a denial of all matters alleged against the plaintiff.

14. One noteworthy feature of this case is that no particulars were raised and no discovery sought by either party.

The Documentation

15. The first document is a Deed of Indenture and Assignment dated 26 July 2004 between Oliver Gleeson of the one part and Ray (otherwise Raymond) O’Keeffe and Etna O’Keeffe of the other part. Nothing turns upon this document. It merely confirms the sale, for the consideration of €1,300,000 for an estate in fee simple (there is the merger of certain leasehold and sub-leasehold interests). Within the same document there was also the assignment of the goodwill together with the publican’s license in respect of the licensed premises. The registration in the Registry of Deeds is dated 1 March 2005. Both defendants therefore own the freehold of the premises.

16. The next document is the Heads of Terms, in respect of the terms of a proposed lease, dated 2 March 2015. It is headed “*Strictly without prejudice subject to contract/lease/contract/leased denied.*” It is furnished by Mr. Rory Browne of Morrisseys Chartered Surveyors and addressed to Peter Morrissey solicitor in the same building. I understand that they are separate entities though there is some familial relationship between the two (Mr. Browne and Mr. Morrissey).

17. In any event it sets out that the plaintiff, Ducas Hospitality Management Limited (‘*Ducas*’), (described as “*your client*” and the first named defendant “*our client*”).

18. The opening portion of the letter is as follows:

“*Dear Peter,*

I refer to the above and to instructions received from our client, to issue our Heads of Terms letters in respect of the intended sale of these licensed premises by way of a Lease with Purchase option to your client, Mr. Conor Martin, of Ducas Hospitality Management Limited.”

19. The Heads of Terms “*as agreed*” are set out in some detail.

20. The lease term is stated to be:

“four year term with the tenant agreeing to forego statutory rights of occupation under the Civil Law Amendments Act. [there is no statute of that name in respect of the foregoing of tenancy rights].

The tenant will enjoy the benefit of a purchase option throughout each year of the term of the lease as set out in Section 16 below.”

21. The rent is stated as follows:

“Year 1 - €400 per week equating to €20,800 exclusive and Year 2-4 - €500 per week equating to €26,00 per annum exclusive.”

22. There are other terms and conditions including that the tenant provide a Tax Clearance Certificate to the landlord and that the 7-day licence be transferred into the name of the tenant by means of an *ad-interim* transfer.

23. Under the heading “Trading” it states:

“Tenants will furnish the landlord with detailed profit and loss account of the business annually, signed off by his accountant and which forms part of his annual returns to the Revenue”

and

“Tenant to provide confirmation annually that all trade creditors are fully paid to date together with confirmation that VAT, PRSI etc. is also paid fully up to date.”

24. The option to acquire (s.16) is in the following terms:

“The tenant is to be enjoy an option to acquire the subject licensed premises throughout each year of the lease at the following pre-arranged rates:

Year 1: €625,000

Year 2: €725,000

Year 3: €825,000

Year 4: €925,000”

25. The security deposit (s.17) is as follows:

“The tenant is to make payable the following non-refundable security consideration throughout the first three years of the term:

Year 1: €15,000

Year 2: €12,000

Year 3: €15,000

The foregoing security consideration is to become deductible from the purchase consideration at the time of the tenant exercising their option to acquire the licensed premises. In the event that the tenant does not exercise their option to acquire, the security consideration is non-refundable.”

It concludes:

“Finally and in accordance with standard practice please note that we have advised the purposed tenant that we have no authority whatsoever to bind our client in this or in any other related correspondence and that no lease shall exist or be deemed to exist within our client and the proposed tenant until such a time as formal documents are executed and exchanged between the parties, and the full amount paid and receipted.”

26. This documentation is in letter form with the various terms set out in a grid type structure. There are other terms included but I have highlighted the principal ones above.

27. Next, is a Caretaker's Agreement dated 9 June 2015 executed by Conor Martin as Director of Kabardin Limited acknowledging that that company had been put into possession of the Beach Tavern property as caretaker and not under any contract as tenancy and further acknowledges:

“And now hereby undertakes and agreed with Ray O’Keeffe and Etna O’Keeffe to take care of the said premises for Ray O’Keeffe and Etna O’Keeffe and to preserve same from trespass and injury, and to deliver up possession thereof to the said Ray O’Keeffe and Etna O’Keeffe their successors and assigns, when required to do so.”

28. The agreement is signed by the plaintiff (on behalf of the company) and the first named defendant. There is also a handwritten notation “€750 paid weekly” a sum all agree refers to the rent.

29. The Agreement itself is dated 24 August 2015 between the defendants and Ducas. The term of the lease is expressed to be from 24 August 2015 to 23 August 2019. I can see no reference to any foregoing of any statutory rights of occupation as provided with the heads of terms. The rent payable is confirmed at €400 per week, rising and in Year 2 to Year 4 to €500 per week.

30. Clause 10 contains the terms of the option agreement as follows:

“Conor Martin, Director and Shareholder of the tenant shall enjoy an Option to acquire the Premises in his own name or otherwise at this exclusive discretion throughout each year of the Term at the following agreed rates:-

Year 1: €625,000,

Year 2: €725,000

Year 3: €825,000

Year 4: €925,000

31. Clause 11 states as follows;

“The Tenant shall make payable the following Non-Refundable Security consideration with payment made in three instalments throughout the first three years of the Term as follow;”

These three instalments are set out as comprising Year 1 - €7,500, Year 2 - €12,000 and Year 3 €15,000.

32. It is noteworthy that the conditions in Clause 11 above differs significantly from the proposed terms in s.17 of the draft heads of lease. In the draft heads of lease document this consideration is stated to be deductible from the purchase price at the time of the tenant exercising their option to acquire the premises. It further confirms that in the event that the tenant does not exercise their option to acquire, the security consideration is non-refundable. That would be considered as a standard requirement in the exercise of an option. This linkage between Clauses 10 and 11 is absent within this tenancy agreement. This point was not adverted to within these proceedings.

33. There is also a memo dated 25 September signed by the plaintiff, first named defendant and Rory Browne agreeing to pay the first year’s non-refundable deposit in the sum of €7,500 (reduced by agreement from €15,000) paid not later than 30th October 2015. This did not occur.

34. In my view much of the evidence adduced in this case and indeed by way of submissions does not concern issues upon which I am required to decide. In my view;

(a) The terms of the option agreement are contained within a standalone Clause (10) in the tenancy agreement.

(b) The option agreement is (unusually) silent as to the method or manner of its exercise.

- (c) In my view any exercise of the option agreement must be on notice or expressed to the parties who granted it.
- (d) The differing considerations set out within Clause 10 are to be dated from the date of the tenancy agreement itself and thereafter on an annual basis.
- (e) There is no linkage within this tenancy agreement between any exercise of the option agreement and the payment of any security monies, agreed at €7,500 for the first year.
- (f) Clause 4.1.1 of the tenancy agreement states that where there has been a breach or non-performance or non-observance by the tenant of any of its provisions then the landlord “*shall be entitled to re-enter upon the premises whereupon this letting shall determine...*”. It clearly states the letting shall determine; there is no reference to the status of the exercise of the option in such circumstances.
- (g) The exercise of the option cannot be interpreted as requiring compliance with the terms of the tenancy agreement other than as to its proper execution. There is no condition precedent in terms of compliance with any other terms of the tenancy agreement prior to its exercise.
- (h) All parties to the tenancy and option agreement had the benefit of legal advice throughout.

Exercise of the Option

35. The plaintiff gave evidence that on 25 May 2016, which he states was within the first year of the tenancy (which is correct) at the Alexander Hotel he exercised the option by informing the first named defendant and his agent, Rory Browne (of Morrisseys Auctioneers and Estate Agents), that he was doing so and would purchase the premises in his own name. The first named defendant denied that the option had been exercised at all; Mr. Rory Browne

was more equivocal and agreed that it was mentioned but not exercised. The second named defendant's evidence (which I accept) was that she was not informed of the meeting and the exercise of any option at that time.

36. The next day (26 May 2016 at 7.59) an e-mail was sent by Rory Browne to Conor Martin (cc the first named defendant and his solicitor). The subject is headed "*Lease in respect of licensed premises...*".

37. After referring to a meeting the previous day at 4.40 p.m. in the Alexander Hotel with the first named defendant he states:

"In this regard and as agreed, immediate regularisation of the following points is required to Ray O'Keeffe providing any consideration towards the option contained within the lease for the sale of the signed property to you."

38. There is then a series of nine listed items which it appears that Ray O'Keeffe has required that some matters be actioned in respect of each category. After this the following appears:

"Please note that the relevant conditions in respect of the above points 1 to 8 inclusive are required to be delivered not later than 5 p.m. on Monday of next week 30 May 2016.

We note your advices that you will require approximately two to three weeks to secure the relevant supporting evidence from your funding institution in respect of your available unencumbered funds to meet the purchase option price of €625,000. It is therefore agreed that this confirmation is to be delivered not later than 5 p.m. on Thursday 16 June 2016."

'Without Prejudice and Subject to Contract – Contract Denied' appears at the foot of the document.

39. I also note that the first and second named defendants gave evidence that on the next day, 26 May 2016 the first named defendant had emergency open heart surgery. A letter exhibited within the *lis pendens* application from his cardiothoracic surgeon confirmed these matters and stated, as at the date of the letter (6 July 2016) that he was to be discharged home on 10 July 2016. He had a period of recuperation thereafter. With respect to the first named defendant, both in giving his evidence and his daily attendance in court, he did appear unwell on occasions.

40. On 8 July 2016, Rory Browne sent another e-mail to the first named defendant (this time he cc's his solicitor and it appears the second named defendant). Amongst other matters it states:

“I unfortunately do not have any note of the actual date that Conor took occupation. I however recall that same was sometime in May/June 2015 which was in advance of the lease officially commencing as at 14 August 2015.”

41. There is then a letter of 24 September 2016 written by the first named defendant to Dublin City Council confirming his ownership of the Beach Tavern property and confirming he had no objection to the plaintiff making a planning application for the development of the property.

42. The first letter from either party's solicitor opened to this Court is a letter dated 17 October 2016 to the defendants' solicitors Kelly, Kennedy & Company, from Peter Morrissey & Company Solicitors for the plaintiff. After describing the property in the heading of the letter it states:

“We confirm the exercise by our client of his option to purchase the property for the sum of €625,000.

Kindly forward draft conditions of sale and supporting documentation to enable us to take our client's further instructions.”

43. There is no reference to a prior exercise of the option as contended by the plaintiff on 25 May 2016. Nor was the documentation now sought required or referenced at any time between May and the date of this letter in October. Thereafter there seemed to be no immediate follow up correspondence. The date of this letter is of course beyond the first twelve months of the tenancy agreement.

44. An e-mail of 5 January 2017 from Rory Browne to the first named defendant Mr. O’Keeffe and his solicitors records a lunch meeting with the plaintiff and continues:

“Conor has advised me that he is now interested in exercising his option to acquire the above licensed premises and further that he has through his solicitor, Peter Morrissey, written to your solicitor, Paddy Kennedy (copied) to confirm his appetite to exercise his option.

I note your advices that you have advised Conor that you are prepared to sell these licensed premises, however, not for a price less than €1m.

I further note your advices that Conor has confirmed he will not pay €1m., however, he has not confirmed a price that he is prepared to pay.

In this regard, and so as to finally resolve matters pertaining to the lease and potential sale of these licensed premises, I would suggest that we arrange a meeting with Paddy in his office as a date in time convenient to him before the end of next week...”

45. There is then a further e-mail from Mr. Browne to the same parties of 17 July 2017 saying that the manner in which the parties should proceed is, in his view, straightforward given the current impasse between the plaintiff and the first named defendant. He states that there is very little he can do by way of assistance in the absence of the provision of proof of

funds by the plaintiff, together with confirmation that all matters such as rent, rates, tax and utility bills are up to date.

46. There is an e-mail from Patrick Kennedy, solicitor, of 9 January 2019 confirming that he will attend a meeting provided the plaintiff provides proof of funds. He also states, *'The amount of attention and work in this matter to date is a real JOKE'*. There is also an e-mail from Peter Morrissey of 26 January 2017 confirming that the meeting between the parties might prove what he describes as *"helpful in finding a pathway acceptable to all parties at an early date."* The e-mail continues:

"Clearly each party has obligations and rights under the documentation that exists between you and my client. All of this will be discussed, including any proposals that you may have intimidated to Paddy, when we met."

47. I note that each email contains the standard disclaimer of 'Without Prejudice and Subject to Contract – Contract Denied'.

48. There is an e-mail of 26 January 2017 from the first named defendant to Peter Morrissey (cc: his solicitor) which states:

"Kelly Kennedy Solicitors are awaiting a proof of funds letter from your client, Conor Martin. We are also waiting a payment of €27,200 to Ulster Bank and payment of €14,200 to Ray O'Keeffe as per Lease Agreement dated 14 August 2015. Can you please get your client to furnish the above to progress matters? Failing to provide the above will leave me with no option but to take the property back". (there is subsequently an apology for the direct client approach as opposed to between solicitors).

49. There is a letter dated 20 February 2017 from Peter Morrissey and Company Solicitors clearly headed *"Subject to contract/contract denied"* attaching a copy letter regarding funds

available to the plaintiff and asking that a contract and supporting papers be forwarded. It concludes with the standard disclaimer.

50. On 27 April 2017 there was then what perhaps might be called a more formal letter from Peter Morrissey & Company Solicitors to the defendants' solicitors enclosing a copy of the Lease, quoting Clause 10 and reciting the meeting on '26th May 2016' and the exercise of the option at €625,000 and stating that 'Rory Browne of ... was present at the meeting and can verify the position'.

The letter of 27 April 2017 continues:

- “1. There is no requirement set out in the document (reference to the lease agreement) in Clause 10 or elsewhere that the exercise of the option required either a notice period in advance or be in writing.*
- 2. In addition, the exercise of the Option by our client is not and was not conditional on compliance or otherwise of the Tenant with any of the terms of the Lease. In addition, there was never any requirement that our client would have to produce proof of funds or other papers.*
- 3. The firm wrote on two occasions since then seeking draft conditions of sale and supporting documentation which to date has not been furnished to us.*
- 4. Our client validly exercised his option to acquire the property for the sum of €625,000 and your client is obliged to sell same to him for that figure.”*

51. The position adopted by the plaintiff is that the option agreement was exercised within the first year and accordingly is obliged to complete the sale at the price of €625,000.

52. There is a replying letter from the defendants' solicitors dated 28 April 2017 stating (with the standard heading subject to contract/contract denied):

“We have today received evidence to contradict the points made in your letter yesterday.

Also, your client made an appointment to meet our client this morning to make payment of all outstanding money. As happened on many previous occasions, your client did meet with Mr. O'Keeffe, but he stated that he was not in a position to make any payment to your client and, as usual, he made promises."

53. There is an e-mail from the defendants' solicitors of 21 June 2017 to Morrissey & Company Solicitors in which he alleges an assault by the plaintiff upon the first named defendant. In evidence the plaintiff contended that he was the injured party. In one sense, this alleged incident is of little relevance (although obviously regrettable) but it does show the depth of feeling between the parties.

54. There is also the grant of planning permission issued to Conor Martin (dated the 16 day of January 2017) giving permission for a development for the conversion of existing three storey building comprising a public house with a duplex apartment over into three apartments arranged around a courtyard.

The exercise of the Option

55. The plaintiff is a businessman with extensive experience of the bar trade. He agreed that he had initially executed a caretaker agreement in order that his company, Kabardin Limited, might take possession of the premises prior to any leasehold agreement being executed by the parties, with a rental of €750 per week.

56. He was adamant that from the outset he always wanted to exercise the option within the first year and that he also never had any intention of running the premises as a public house. It was always his intention once he was in a position to do so that he would seek planning permission and then develop the site for apartments. Upon execution of the caretaker's agreement in March 2015 he put in his own team who took over the running of the premises as a public house, but he very much considered this to be an interim measure.

57. The plaintiff gave evidence of meeting Mr. Browne and Mr. O’Keeffe in the foyer of the Alexander Hotel on 25 May 2016 with a view to exercising the option. He stated that he had held back some rent in order to assure they attended the meeting. In my view the most straightforward manner for the exercise of the option would be by way of a short exchange of correspondence between the party’s respective solicitors. There was no necessity for the parties to meet.

58. In his evidence the plaintiff stated that he was aware that both defendants owned the Beach Tavern premises and both had executed the Lease Agreement containing the option agreement. In evidence the plaintiff stated that he assumed that Mr. O’Keeffe would tell his wife of the exercise of the option. There appears to have been no reference to Rory Browne acting as the defendants’ agent in this regard, although this is what counsel for the plaintiff maintains.

59. The clear evidence of the second named defendant regarding the option agreement is that she only learnt it had been exercised at a much later stage (around the time of the *lis pendens* application).

60. The first named defendant was adamant the option was not exercised at that meeting. He said that he had asked Rory Browne to call the meeting because he was becoming increasingly disturbed as to what he believed to be the non-compliance with the terms of the lease by the plaintiff. As set out above he was taken very seriously ill the following day.

61. The plaintiff also gave evidence that he and the first named defendant did have subsequent discussions and that the first named defendant indicated to him that he wanted at least €1m (the first named defendant regarded this as something of a throw away remark).

62. The only witness not a party to his litigation who gave evidence was Mr. Rory Browne.

63. Rory Browne was called by the defendants (in answer to a subpoena). Much was made by the defendants’ counsel of the fact that the entirety of his correspondence at the operative

time appeared at all points to be marked “*without prejudice*” together with the lengthier disclaimer which I have also set out above. Mr. Browne confirmed there was no formal engagement between the parties. Upon cross examination he confirmed that there were no formal terms of engagement executed but conceded that, on balance, he acted for the first named defendant and perhaps both defendants. In his examination in chief he confirmed he had never met the second named defendant until this litigation was in contemplation.

64. Mr. Browne had extensive experience with Morrisseys, the auctioneers, (they had merged with Lisneys in 2018), he was involved in matters relating to the licensed trade over a considerable period of time. He knew both the plaintiff and the first named defendant in that context prior to these matters. He was aware that the first named defendant wished to lease the premises and sought to put him in contact with the plaintiff with that in mind. He drew up the initial Heads of Agreement.

65. Of course, matters very much centred upon his attendance at the meeting of 25 May 2016 where the plaintiff contends that he exercised his entitlement in respect of the option agreement. Mr. Browne was more equivocal. He gave evidence that the first named defendant had contacted him on a number of occasions to make a series of ongoing complaints with regard to the plaintiff’s conduct as a tenant of the licensed premises. In his view the principal reason for the meeting (and that discussed in advance) was to see if the issues regarding the tenancy might be resolved to each party’s mutual satisfaction. When pressed Mr. Morrissey accepted that he acted for the defendants but on more than one occasion Mr. Browne referred to himself as having a role akin to a mediator. In my view, rightly or wrongly, that is how he perceived himself.

66. The plaintiff’s evidence was that he may have been in arrears of rent for a few weeks, but he went to the meeting and he informed Mr. Browne in advance that he wished to exercise the option at that meeting. Mr. Browne did not recollect that he was asked to

arrange a meeting on that basis rather than dealing with all of the outstanding landlord and tenant matters. In cross examination Mr. Browne confirmed that the option was discussed at the meeting. In that regard Mr. Browne, in cross examination, stated:

“My recollection is that Conor stated something like that it was his intent to exercise. I said that my understanding of the reason I was there was to go through the outstanding breaches to try and bring the matter to resolution and try and regularise everything that needed to be regularised and that in the exercise of any option or in somebody confirming they were going to pay any form of consideration that we would require proof of funds”.

67. Mr. Browne was clear that the option was not exercised, that in a casual manner the plaintiff had indicated an intention to exercise the option. Mr. Browne also gave evidence of having met with the plaintiff on 5 January 2017 where again the exercise of the option was discussed. That in turn is reflected in this email of that date above.

68. The second named defendant in her evidence made it clear that, she and her husband had certain ongoing financial difficulties. They purchased the premises in 2004 for a sum of €1.2m. They took a significant mortgage of some €900,000 with Ulster Bank charged against that public house as well as re-mortgaging their private home. Accordingly, at about the time of this litigation the defendants had significant financial concerns, in respect of their outstanding liabilities to Ulster Bank. In her evidence she confirmed that there had been discussions with Ulster Bank as to the sale of the Beach Tavern premises in order to deal with that indebtedness. The second named defendant held a responsible position within a Dublin university and her evidence was clear and cogent throughout.

69. She was adamant that she was not told of the meeting at the Alexander Hotel on 25 May 2016. She was not invited nor was she aware of it. She was not informed of its outcome and in particular the exercise of any option at that meeting. She subsequently learned of its

existence when these proceedings were mooted (which is when she also met Mr. Rory Browne for the first time). It came as some surprise to her. I found her to be a compelling witness.

Other Issues

70. In the evidence before the court much was made of the terms of the tenancy agreement as to;

- (a) Rent, sub-leasing and the payment of the security deposit
- (b) Other issues regarding the tenancy
- (c) the use of the phrase ‘Subject to contract, contract denied’ and other usual or standard form disclaimers as to the existence of a binding contract between the parties.

71. Outside of the tenancy agreement much was made by counsel for the defendants of the use of the notation by Mr. Rory Browne of ‘without prejudice’ and the other disclaimers inserted to deny the existence of a binding contract.

72. I am very far from certain of the relevance of any of these matters, which were considered at some length. One assumes it was to argue that there had been no exercise of the option agreement on 25 May 2016 as the document sent by Mr. Browne the following day and also that Mr. Browne gave evidence the meeting was itself ‘without prejudice’ and that this had been asserted by Mr. Browne at the time. This is in my view to conflate two matters; the exercise of the option and any additional contractual documentation including agreed conditions of sale. Either the option was exercised on 25 May or it was not; whether a disclaimer is inserted within a subsequent document is not determinative of the matter. The email of 26 May 2016 makes no reference to the meeting being ‘without prejudice’ although Mr. Browne asserted it was always his practice to insist upon this and to add the disclaimers to every document, which he did throughout the documentation.

73. It appears to suggest an alternative argument to the effect that, if any option was exercised (which was denied), as the meeting was on a without prejudice basis, it was not validly exercised. I am far from satisfied on the evidence that the plaintiff and first named defendant had any awareness it was a ‘without prejudice’ meeting; both however cast it in a very different light – the plaintiff that he wished to exercise the option, the first named defendant (seeking the assistance of Mr. Browne) with the issues surrounding the tenancy. In my view it is clear that issues surrounding the tenancy were discussed between the parties and there is significant correspondence after this meeting, between solicitors and also emails to the parties from Mr. Browne that there were ongoing efforts to seek to resolve these issues. The other issue is whether the option was exercised.

74. The issue of rent also assumed a life of its own. This was in part due to the fact that there was significant divergence between the parties as to what it actually was, notwithstanding it being clearly stated on the tenancy at €400 per week. Some of that divergence occurred within the evidence advanced by a party to this Court and that sworn within the earlier *lis pendens* application.

75. The plaintiff in his evidence stated that he made a one-off payment to Ulster Bank of €800 and thereafter that he paid €400 a month cash to the first named defendant. He gave evidence that, at the first named defendant’s request, he delivered that amount in cash to the defendants’ private house (at a separate location from the Bath Tavern premises) and that he did so every month. He said that there sometimes could be a little “*slippage*” in respect of the payment of the rental monies but that they were discharged. He gave evidence of a specific request by the first named defendant that (in respect of the non-refundable security deposit of €7,500 for the first year) he initially furnished a sum of €5,300 in cash and thereafter €2,200 (again it appears in cash) shortly prior to the first named defendant’s departure to Chicago to watch an important rugby match at that venue in November 2016.

76. Within the *lis pendens* application (the plaintiff averring that he had paid the security deposit of €7,500 in cash) in which he states:

“Your deponent paid €7,500 as provided for in Clause 11 in cash on the evening of 02 November 2017 at an area to the front of the licenced premises now known as “The Merry Cobbler”, Irishtown Road, Dublin 4”.

77. This is at variance with his evidence to this Court and he accepted he had been incorrect within his affidavit evidence (which I note is precise as to amount and specific location). It is difficult to imagine how cash payments of this magnitude might be confused. However it is clear that, on his own evidence, he was still paying cash sums to the defendants long after the time when he claims to have exercised the option agreement (May 2016).

78. The first named defendant was adamant he received no amount by way of security deposit. Indeed he was equally adamant that he received very little by way of rent. He stated that the amount of rent was as set out by his wife in her evidence (which is also at variance with his account within his affidavit in the *lis pendens* application).

79. The second named defendant expressly denied that there was a cash payment of €400 per month. She pointed out that the caretaker agreement rental amount was €750 and that there was no way that a lesser sum would be accepted in respect of the tenancy agreement itself. She was very clear that there was a payment of €400 to Ulster Bank per month (to deal with or at least stave off their difficulties with the Bank for a little longer) and a payment of €600 per calendar month for their household and other expenses, paid in cash by the plaintiff.

80. Mr. Browne confirmed his understanding that the total rental sum was €1,000 with the split between Ulster Bank and the first named defendant. In his professional view a rental of €1,000 a week was an appropriate rental rate for a licensed premises such as the Beach

Tavern. Why a different sum very clearly appears on the draft Heads of Agreement and the Lease with which he would have been familiar, remains unresolved.

81. Whilst in one sense the amount of rental monies paid (or not) is not central to the adjudication of any issues before this Court; nevertheless, it is indicative of the fact that issues that should have been crystal clear appeared to be somewhat murky as each party to the tenancy agreement had a separate and distinct version of events. There is also the issue of credibility and the invocation of equitable reliefs in such circumstances.

82. Both the plaintiff and the first named defendant gave evidence of having accountants and it is noteworthy that none gave evidence (I appreciate the plaintiff stated that his accountant's firm was no longer in existence) – it would seem that these matters could have been clarified very simply in such circumstances. I again point out that in this case no particulars were raised and no discovery sought.

Sub-Leasing the premises

83. The plaintiff stated in evidence that the first named defendant would visit the premises on occasion and was aware of all steps he and his company were taking. He said that those steps included doing some renovation work particularly with regard to the upstairs portion of the premises as he wished to execute short term leases in respect of that portion. To that end he gave evidence of having advertised on daft.ie and obtained a satisfactory response from one Christian Carter. The agreement with Mr. Carter (and no documentation was furnished to the court, merely the evidence of the plaintiff) was that he leased the entirety of the upstairs premises to Mr. Carter in or about late 2015. He stated that he afforded Mr. Carter two months' rent free as he was making improvements and furnishing the upstairs premises (in evidence he also stated he was making renovations an instanced this as a reason as to why the amount of €400 was less than in the caretakers agreement – however in effect, given his stated intention from the outset to exercise the option he was refurbishing for his

benefit). Thereafter, he had an agreement with Mr. Carter where Mr. Carter paid him an amount of €2,000 per month. His evidence was that Mr. Carter paid no rent in November and December of 2015. Thereafter up until June of 2017 when the first named defendant took back the premises he was paid €2,000 per calendar month each month.

84. In general terms Mr. Rory Browne in confirming his awareness that the first named defendant, at some point in 2017 took possession of the premises. He expressed surprise that there were seven tenants living upstairs and described Mr. Christian Carter as:

“known for being a landlord that would have numerous occupiers within dwellings that may not be suitable for the number of occupants in that dwelling”.

85. He also confirmed that he learned to his surprise that the tenants were there with inappropriate or no fire safety regulations and that the tenancy had not been registered with the PRTB.

86. On 5 July 2017 the defendants’ solicitors wrote to O’Brien Redmond Solicitors in respect of the subject premises in the following terms:

“We act for Raymond O’Keeffe, the owner of the property known as the Beach Tavern..., we understand that you act for Mr. Christian Carter, a person unknown to our client, who has recently been passing himself off as the Letting Agent of the said property. For the avoidance of doubt, Mr. Carter does not have and has never had any interest in the premises. He has no permission to act on behalf of our client. We understand that he has repeatedly made contact with various tenants of the property and advised them to make payments to him personally...

Finally, my client has in his possession a letter dated 26 June 2017 from your firm addressed to the tenants of the Beach Tavern. The said letter is clearly designed to mislead them. While all solicitors must act on the instructions received from their

clients, they cannot suspend their disbelief while doing so. Mr. Carter is well known to the Courts and you are well aware that he has been “involved with” an unlawful tenancy in Cabinteely. If it transpires that your firm has conspired with Mr. Carter to cause economic loss to our client, we will not hesitate to bring independent proceedings against O’Brien Redmond Solicitors.”

87. There was a short reply from O’Brien Redmond Solicitors confirming they act for Mr. Carter, that their client is involved with the property and that he is acting as agent for the collection of rents.

88. In a letter dated 26th September 2017 from Dublin City Council addressed to the owners of the Beach Tavern, a warning letter under s.152 of the Planning and Development Acts 2000-2016, it is contended that there has been a change of use from commercial to residential in respect of the upper floors of the premises *“without the benefit of planning permission”*.

89. The plaintiff denied any knowledge of Mr. Carter other than as a person whom he had selected as a suitable tenant to arrange the sub-tenancies of the premises. No legal documentation regarding any tenancies was produced. The plaintiff was clear in his evidence that he paid €400 in cash per week to the defendants for the rental of the premises; a monthly sum less that he received from his own sub-tenant.

Re-Possession

90. The plaintiff claims that the first named defendant regained possession of the premises whilst he was on holiday in June 2017. There was some suggestion that there was a difference of opinion in the public house (possibly a physical altercation) with the first named defendant when he returned but that in any event he did not take any immediate steps to rectify the position.

91. It also emerged that the tenant of the property, Ducas, had itself been dissolved on 19 April 2017 and this was advanced as to one of the reasons why interim injunction relief could not be sought. No reasons were advanced as to why the company could not have been restored to the register as a matter of urgency.

92. What is even more startling, or intriguing is that the plaintiff (not Ducas) took no immediate steps when the first named defendant regained possession of the premises. On his version of events he had validly exercised an option to purchase the property (in his name and not Ducas) in May 2016 and he takes no immediate steps to deal with the position when the defendants take possession. His solicitors wrote for the first time in October 2016 confirming the exercise of an option agreement and yet the first named defendant appears to take no steps when possession is taken in mid-2017.

93. If his version of events is correct he has a beneficial interest in the property upon the exercise of the option and yet he does nothing when the first named defendant re-takes possession of the premises. Upon the uncontroverted evidence of the first named defendant the tenants were then requested to leave and did so, so the plaintiff was thereafter bereft of his €2,000 per month from Mr. Carter. Accordingly, he permitted the first named defendant to re-enter and appears only to consider taking any legal steps when he becomes aware that the defendants are seeking to market and sell the property (through CBRE) and issues proceedings in September 2018.

94. The plaintiff indicated that he felt significantly let down but that he had other projects and matters to deal with and accordingly did not fully address his mind to take any further steps in respect of this matter until he gave his solicitors instructions to issue proceedings in September 2018.

95. The first named defendant in particular takes particular issue with the fact that once the tenancy agreement was executed and Ducas/the plaintiff became the tenant of the

premises that effectively virtually no rent (and possible the security deposit) was payable thereafter. For reasons that remain unclear if, as the defendants contend, there was a lease in existence, it appears that no legal steps were taken to enforce any non-payment of rent at the time, within these proceedings or otherwise.

Option Agreement

96. The matters set out within Clause 10 of the Tenancy Agreement as quoted in full above constitutes the totality of the agreement between the parties.

97. It is certainly succinct. It is not unusual for a tenancy agreement to contain an option to purchase. It would be usual that the option agreement itself or possibly conditions of sale would be annexed to the document so if the option were exercised (the mode and manner of such an exercise is usually specified) the documentation could then be executed.

98. The total period of the option agreement is four years and its exercise affords valuable legal rights upon its execution. As a matter of law, if a vendor gives an option to purchase in respect of the property, that property is “*locked in*” for the period of the option, which not only restricts the vendor from selling the property to another party but moreover from making any changes to the property within that period. The option is in respect of the property as it existed at the date of the grant of the option.

99. It has been suggested that the furnishing of the security deposit was the consideration for the option agreement. I can find no construction which confirms that, particularly as that provision was referenced with the heads of agreement but not included within the agreement itself. However given that the Agreement itself of dated 24 August 2015 contains both the letting agreement and the grant of an option in my view the execution of this composite document will suffice.

100. I also accept that the terms of the option agreement were in no way referable to the conduct of the parties with regard to their exercise of the tenancy. I can construe no term whereby all of the tenancy obligations must have been or should have been dealt with, as a condition precedent or otherwise, prior to the exercise of any option. It is not an express term and I can see no basis for construing it as an implied term. Nor has any legal claim been issued separately or by way of counterclaim in these proceedings in respect of any issues arising pursuant to the tenancy agreement.

101. The plaintiff asserted throughout that as a businessman his intention was to purchase the property and that the mechanism or means simply transpired to be the landlord and tenant arrangement and whatever exigencies he had to put in place with regard to the tenancy agreement was also secondary to his wish to acquire the property. As a businessman he was intent on doing so within the first year of the tenancy so as to procure it for the lowest possible price (€625,000).

102. His evidence was that he did so orally at a meeting at the Alexander Hotel on 25 May 2016. There were only three people present at that meeting. The only written document is that sent the following day by Rory Browne. It gives some credence to the fact that the option may have been discussed because proof of funds is referred to and, in my view, that can only relate to the option agreement itself.

103. If as the plaintiff asserts and seeks by way of this litigation specific performance of that agreement, then a number of curiosities follow. It might have been imagined that, following the verbal exercise of the option, there would be immediate contact between the solicitors to ensure that the requisite legal documentation was processed. Nothing appears to have occurred. The first letter opened to the court is from the plaintiff's solicitor in October 2016.

104. Subsequently the plaintiff puts in place the tenancy of Mr. Carter and his sub tenants. The second named defendant gave clear evidence that when her husband was hospitalised that she accepted rental monies from the plaintiff in November 2016. The plaintiff contended he made payments around this time. It is certainly curious that a tenant, who claims to have executed a valid option, would continue to maintain rental payments rather than immediately seek to ensure that the premises is conveyed to him.

105. Moreover, there is no correspondence between the solicitors with regard to the option agreement (its exercise and the various legal matters that would have to be attended to thereafter) prior to a short letter from Peter Morrissey & Company Solicitors in October 2016.

106. However what there is in the interim is significant correspondence between the various parties concerning aspects of alleged non-compliance with the tenancy agreement.

107. The plaintiff's actions consequent upon his assertion that the option agreement was exercised are totally at variance with his contention. There was no formal letter within year one of the tenancy agreement to ensure that all parties understood the position so as to ensure it was procured at the lowest amount. All of the correspondence at that time referred to issues surrounding the tenancy itself.

108. The plaintiff contends that Mr. Browne, as agent for both defendants, bound them under the doctrine of agency, when the plaintiff exercised his entitlement to exercise the option on 25 May 2016.

109. On the balance of probabilities, having carefully considered all of the party's evidence, I am not satisfied that there was a verbal exercise of the option by the plaintiff at the meeting in the Alexander Hotel in May 2016. The evidence amounts to a potential discussion of the issue, but I can find no evidence that satisfies this Court that the exercise in fact took place. In my view it is noteworthy that thereafter the plaintiff did not conduct himself as if the

option had been exercised; rather to the contrary, negotiations regarding the tenancy continued apace.

110. I accept that the option is a standalone legal entitlement pursuant to the terms of the tenancy agreement; it did not require as a condition precedent or otherwise compliance with the remaining clauses of the lease.

111. The first evidential document that refers to the exercise of the option agreement is the solicitor's letter from Peter Morrissey to his opposing number in the letter of 17 October 2016. It is and I reiterate its terms:

"We confirm the exercise by our client of his option to purchase the property for the sum of €625,000.

Kindly forward draft conditions for sale and supporting documentation to enable us to take our client's future instructions."

112. Again, this letter is interesting for the matters not stated as well as those that are. There is no reference to any date upon which the option is exercised. In my view, this is the first document upon which this Court can (potentially) rely as to the exercise of the option and pursuant to its date and the terms of the tenancy agreement, the option was therefore exercised within this letter. It is addressed to the solicitors for the defendants so both defendants are, in such circumstances, on notice of its exercise. The terms of the tenancy agreement are clear as to the consideration to be paid. Thus, the option has two parts; its exercise (and it is silent thereafter as to how service is to be affected) and, secondly, the price or consideration to be paid is specific as to the year of the tenancy within which it is exercised and is to be construed accordingly.

113. The plaintiff's case has the merit of simplicity. The terms of the lease of 25 August 2015 are set out and it is said that there is clear evidence of the oral exercise of the option on 25 May 2016. Of course, that could easily (and in my view, preferably) have been done by

the correspondence between solicitors. There was no necessity for the exercise of the option that the parties meet in order for it to be exercised.

114. The evidence of Mr. Brown is, in my view, equivocal. His e-mail of the following day certainly does refer to the option, but it does not assert and nor did his evidence that the option was exercised on that day. Moreover, in my view, that option can, on the plaintiff's case, only have been exercised on that day if two matters occurred:

- (a) there was a clear, unequivocal oral exercise of the option, and
- (b) that Mr. Browne had clear and unequivocal authority on behalf of both defendants to accept the option in such circumstances.

115. For a significant period of time thereafter the plaintiff remains absolutely silent as to the exercise of the option. Rather he (through his solicitor) enters into correspondence regarding the tenancy and he in turn executes a sub-tenancy. Mr. Browne reports upon meetings with him he discusses exercising the option (present tense). The plaintiff even appears to accept possession being re-taken. That is totally at variance in my view with the actions of a party having validly exercised an option. As set out above proceedings are only contemplated when it appears the defendants are seeking to sell the property.

116. On the balance of probabilities, I am not satisfied that Mr. Browne had a contract of agency on that day. After some equivocation Mr. Browne did accept that his clients were the defendants (as I set out above his view that he regarded himself as akin to a mediator throughout). However, he had no contract of engagement with the defendants (of which I am aware) and had not met the second named defendant at all at that stage.

117. These defendants had two assets; their family home and the public house. They were seriously indebted. This was a significant transaction for them. Simply because Mr. Browne acts as the agent for the defendants does not, in my view, necessarily follow that in all matters

and at all meetings, without express authority or instruction, that he is competent to bind the defendants on the facts of this case.

118. The day after the purported exercise of the option the first named defendant had a serious urgent medical condition necessitating a stay in hospital for a period of six weeks and thereafter a significant recuperation period.

119. It was pointed out by counsel for the defendants (on numerous occasions) that Mr. Browne in any documentation was careful to ensure that all meetings and correspondence were “*without prejudice*” and contained the usual disclaimer of “*subject to contract/contract denied*”. It is therefore contended that if the option was exercised on 25 May 2016 that it was done on a ‘without prejudice’ basis. I do not find sufficient evidence before the court to suggest that if the plaintiff did exercise an option, which of course is denied, that he did so in a meeting that was being held entirely on a without prejudice basis.

120. Counsel for the defendant relies upon the doctrine of *laches*. In my view, having carefully looked at the time limits on this case, there is insufficient delay on the parties such as to constitute a finding of *laches* on the facts of this case.

121. In my view, the operative document is clearly that of 24 August 2015. Its terms are to be strictly construed and they are as set out above.

122. For the reason set out above I find that there was no exercise of the option by the plaintiff on 25 May 2016 at the Alexander Hotel.

123. The first document that in my view notifies both defendants as to the exercise of the option agreement is that from Peter Morrissey & Company Solicitors for the plaintiff to Kelly Kennedy & Company Solicitors for both defendants of 17 October 2016. I have quoted it in full above. It does not state that the option was exercised at some time in the past. It appears to be written in the present tense. Pursuant to the terms of Clause 10 of the lease, in my view, that is a valid exercise of the option but contrary to Clause 10, it is for a

sum (being exercised on 17 October 2016) as falling within the year 2 criteria and accordingly the option is exercised at the sum of €725,000.

124. Much of the confusion regarding the payment of rental and security deposit monies is not relevant to any argument other than any breach of covenant had the effect of declaring the lease and the option agreement null and void and of no legal effect. However on the facts of this case pursuant to the requisite clause within the lease agreement the premises were re-taken. No proceedings relating to any aspect of the tenancy agreement have been instituted. I am far from satisfied that the option agreement was therefore ‘caught’ if the terms of the lease were not upheld. It was up to the parties to negotiate such terms and none appear within the agreement. The same applies for the security deposit monies. I again reiterate that no particulars or discovery were sought by either party in this litigation. It is not necessary for me, in the adjudication of any issue of this case to make any finding with regard to the variations on what should be straightforward matters, such as the amount of rental payable for the premises and I do not do so. However I note the significant discrepancies between the plaintiff and the first named defendant on many factual issues, that should have been perfectly straightforward to address within these proceedings.

125. In oral and written submissions the plaintiff relied significant upon *Spiro v. Glencrown Properties Ltd & anor* [1991] 1 All E.R 600 where Hoffman J. stated;

“The granting of the option imposes no obligation on the purchaser and an obligation on the vendor which is contingent on the exercise of the option. When the option is exercised, vendor and purchaser come under obligations to perform as if they had concluded an ordinary contract of sale . . . The exercise of the option is a unilateral act. It would destroy the very purpose of the option if the purchaser had to obtain the vendor’s countersignature to the notice by which it was exercised.”

This case was quoted with approval in a recent decision of the Court of Appeal in *Knockacummer Limited v Cremins & Anor* [2018] IECA 252. In that case Whelan J stated

“General rules with regards to interpretation of contracts

37. Contracts are to be construed objectively in accordance with the intentions of the parties as determined by reference to the terms to which they have agreed. In general the starting point and the end point is the contract document itself. The agreement is to be looked at as a whole in its context in construing individual provisions.

38. The courts will look at the circumstances surrounding the formation of the contract and in particular the express terms of an antecedent agreement, not for the purpose of ascertaining the actual subjective intentions of the party, but rather to assist in determining how a reasonable person would have understood the terms agreed to in the context that subsisted between the parties.

Time

39. In my view, an option to purchase land can be characterised as a unique type of contract coming into existence at the time of its grant, which has three distinct stages, namely the grant, the exercise and completion”.

126. The court in that case also point out that the exercise of an option and completion of the conveyance are governed by separate legal principles. The defendants seek to rely upon s.51 of the 2009 Act and cases such as *Silver Wraith Ltd. v. Siúicre Éireann CPT* (unrept. H Ct, 8 June 1989) and the seminal judgment of *Boyle v Lee* [1992] 1 IR 555 [1989] IEHC 34 with regard to the existence or otherwise of a binding contract of sale. In my view that is to overlook the kernel of this case; the valid exercise of an option automatically creates the relationship of vendor and purchaser by bringing into effect a binding contract of sale. By agreement of all parties (legally

represented throughout) the beginning and endpoint of this contract is Clause 10. I accept that an option to purchase it would be usual to find the terms of any future contract of sale to also be fixed and agreed at that time, with various terms as to the manner of its exercise and its applicable conditions of sale. This option agreement does not contain or refer to any of these matter but that does not make it in any sense invalid.

127. Adopting the terminology of Whelan J. above the grant of the option is clear (clause 10), its exercise more difficult to discern, and its completion is yet to occur.

128. Before setting out my summary below I confirm that, as this hearing was truncated, I have also had regard to all the transcripts furnished in respect of this litigation.

129. In summary therefore;

- (a) All parties to this litigation had the benefit of legal advice throughout.
- (b) Clause 10 of the Agreement dated 24 August 2015 (itself comprising a letting agreement and an option agreement) is a valid grant of an option. It is silent as to how its acceptance is to be exercised. The only requirement is the price linked to the annual period (from the date of the lease) within which it is exercised.
- (c) There is no condition precedent or any other requirement or obligation requiring compliance with any other terms of the tenancy agreement prior to the exercise of the option. In my view non-compliance with any terms of the lease is dealt with within Clause 4.1.1 of the agreement and its provision for re-entry which is precisely the step taken by these defendants. I am not satisfied on the evidence or the submissions advanced that any determination of what the document refers to as the 'letting' refers also to the option agreement thereby rendering it null and void. This issue was not argued or raised at the time re-entry was affected.

- (d) On the balance of probabilities, I do not consider that the option was exercised by the plaintiff on 26 May 2016. The reasons are as set out in detail above. I have had particular regard to the conduct of the plaintiff himself after 26 May 2016. Both he and his advisers conducted themselves, in my view, as if negotiations in respect of a number of matters were ongoing and the failure immediately after 26 May for any steps to be taken within the first year of the tenancy agreement to seek any form of enforcement of the option agreement is particularly noteworthy.
- (e) In my view the first time when a court would, with any degree of certainty find the option had been exercised is in the plaintiff's solicitor's letter of 17th October 2016, clearly addressed to the defendants' solicitors. I do not construe this as having retrospective effect and there is no reference to any specific prior point for the exercise of the option. Accordingly in my view the option has been exercised within the second year of the agreement of 24 August 2015, which pursuant to clause 10 is for a consideration of €725,000.

130. In terms of the reliefs sought within the statement of claim I refuse the reliefs sought within paragraphs 2, 3 and 4. Paragraphs 5 and 6 do not arise and the question of costs is yet to be determined. With regard to paragraph 1, I do not believe it appropriate to grant the relief of specific performance. In my view the following order should be made;

A Declaration that pursuant to clause 10 of an Agreement dated 24 August 2015, the plaintiff exercised an option, by letter from his solicitor Peter Morrissey & Co to the defendants' solicitor Kelly Kennedy & Co dated 17 October 2016, to acquire the premises known as ALL THAT AND THOSE

the premises known as the Beach Tavern situate at 7/9, Bath Street, Irishtown, in the County of Dublin for the price or consideration of €725,000.

131. This judgment is to be delivered electronically.

132. The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions (not to exceed 1,000 words each) should be filed electronically with the Office of the Court within 21 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.