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**THE COURT OF APPEAL**

**CIVIL**

Neutral Citation Number [2023] IECA 283

Appeal Number: 2023/131

**Pilkington J.**

**Allen J.**

**Butler J.**

**BETWEEN**

**SOLAS ÉIREANN DEVELOPMENT LIMITED**

**PLAINTIFF/RESPONDENT**

**AND**

**PHILIP CLEARY**

**DEFENDANT/APPELLAT**

**EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 7<sup>th</sup> day of**  
**November, 2023.**

1. This is an appeal by Mr. Philip Cleary against the judgment of the High Court (Dignam J.) delivered on 28<sup>th</sup> March, 2023 ([2023] IEHC 172) and consequent orders made on 2<sup>nd</sup> May, 2023 and 16<sup>th</sup> May, 2023 for specific performance by the appellant of a revised option agreement dated 12<sup>th</sup> August, 2020 and dismissing a counterclaim by the appellant for a declaration that the revised option agreement was invalid.
2. The appellant is a farmer who owns lands in County Wexford. The respondent is a company which was incorporated in 2016 for the purpose of developing renewable energy projects in Ireland. In the same year the respondent identified a site in County Wexford, which included part of the appellant's farm, as suitable for the construction of a solar park and, with the appellant's written permission, applied for planning permission for the development.
3. By an option agreement in writing dated 29<sup>th</sup> March, 2017 between the appellant and the respondent the appellant granted to the respondent the option for a thirty year lease of part of the appellant's lands in the terms of a draft lease appended to the option agreement.
4. The option agreement provided for an initial option period of 36 months which was subject to extension by the respondent for two further periods of six months, so that the total option period would not exceed 48 months. By clause 3 of the option agreement the respondent had the option to extend the option period by written notice to the appellant in specified circumstances, including:-

*“3. If on the date falling 40 days prior to the third anniversary of the date of this Agreement: ...*

*3.5 The Company has accepted and paid for a connection offer from [ESB Networks Limited] but is waiting on an agreed energisation date from [ESB Networks Limited] to be able to export power from the Development;*

*then the Company may by written notice to the Landlord not less than 30 days prior to the third anniversary of the date of this Agreement extend the Option Period for a further period of 6 months and may (in the same circumstances) extend the Option Period once more by written notice to the Landlord not less than 30 days prior to the expiry of the extended Option Period such that the total Option Period shall be no more than 48 months.”*

5. The option agreement provided for an option fee – which, in the event that the option was exercised was to be deducted from the first rental payment – and a rent which as to be the greater of a fixed base rent and a turnover rent based on the revenue generated by the solar park. It also provided for payment to the appellant of a connection payment by reference to the capacity of the completed development and a contribution to the appellant’s “*reasonably and properly incurred costs in respect of this agreement up to the maximum amount of*” €2,500 plus VAT.

6. Clause 6 of the option agreement provided:-

*“6 Licence to enter*

*The Landlord grants to the Company (and anyone authorised by the Company) during the Option Period a licence to enter such parts of the Landlord’s Property (as may be reasonably necessary to exercise the rights permitted by this clause) at all reasonable times with or without vehicles, plant, machinery, equipment and materials for all purposes reasonably required;*

*6.1 to assess the feasibility of the Development; or*

*6.2 for any application for the Necessary Consents.”*

**7.** Elsewhere, it was provided that the respondent should use its best endeavours to secure the grant of planning permission and, in relation to the exercise of its rights to enter the property, to cause as little damage and disruption as reasonably practicable; to pay reasonable compensation for any damage done and not made good; to indemnify the appellant against all losses, damages, costs or claims attributable to any act or default of the respondent; and to effect and maintain public liability and employers liability insurance.

**8.** The viability of the project depended on a number of factors, not least on the respondent's ability to secure the sale of the electricity from the solar park by successful participation in a Government auction called the Renewable Electricity Support Scheme ("*RESS*"). The respondent was eventually successful in the RESS1 but this took place much later than was initially anticipated.

**9.** By notice in writing dated 12<sup>th</sup> February, 2020 – being a date not less than 30 days prior to the third anniversary of the option agreement – the respondent gave notice of the extension of the option period by six months. That notice was sent by the respondent's solicitors to the appellant's then solicitors under cover of a letter by which it was confirmed that the respondent had accepted and paid for a connection offer from the local electricity distribution systems operator – ESB Networks Limited – and was awaiting an agreed energisation date to be able to export power from the development.

**10.** By the summer of 2020 it was apparent that the respondent would not be able to get done all that needed to be done to allow construction to start within the outside time of 48 months provided for in the option agreement and the appellant and his neighbour were approached with a view to negotiating an extension of the option period by 24 months; and by a further agreement in writing described an addendum to option agreement the option agreement was varied by the substitution of 60 months for 36 months and by providing for

the option to the respondent – on the same terms as were set out in the option agreement – to extend the increased option period by two further periods of six months, so that the total option period should be no more than 72 months.

**11.** The addendum to option agreement was signed on behalf of the respondent and dated 12<sup>th</sup> August, 2020. The engrossed agreement had been sent to the appellant in duplicate under cover of a letter dated 15<sup>th</sup> July, 2020 and was signed by the appellant and returned to the respondent's solicitor on 5<sup>th</sup> August, 2020. A copy of the agreement signed on behalf of the respondent was sent to the appellant on 14<sup>th</sup> August, 2020.

**12.** In early 2021 the respondent's business and undertaking – as well as that of associated Solas Éireann companies – was sold to a multinational renewable energy group called Neoen. The sale and purchase were completed on 9<sup>th</sup> March, 2021 by the acquisition by a company called Neoen Renewables Ireland Limited of all of the shares in the respondent. By the way, the option agreement provided by clause 7.3.1 that the respondent might assign, novate or transfer the agreement without the appellant's consent to any other legal or natural person but that is not what happened. Legally, there was simply a change in the ownership of the respondent.

**13.** By letter dated 29<sup>th</sup> March, 2021 Neoen Renewables Ireland Limited introduced itself to the appellant as the new owner of the respondent and of the solar farm and expressed the hope of a close working relationship in the finalisation of the development and the construction and operation phases of the project. For some reason the appellant was unhappy with this change and he decided that he did not wish to proceed with the agreement.

**14.** Over the remainder of 2021 there was some contact between the respondent's representative and the appellant and a number of requests for access to the land for the purpose of surveys, which were refused. The appellant instructed another firm of solicitors

who, in correspondence, raised a number of challenges to the validity and effect of the revised option agreement and asserted that there was no binding option agreement between the parties.

**15.** In December, 2021 there was an attempt to mediate the dispute but no settlement could be achieved.

**16.** By notice on writing dated 25<sup>th</sup> February, 2022 and sent directly to the appellant by registered post, the respondent gave notice of the extension of the option period by six months to 29<sup>th</sup> September, 2022. By a further notice in writing dated 10<sup>th</sup> August, 2022 the respondent gave notice of the extension of the option period by a further six months to 29<sup>th</sup> March, 2023. In each case the notice was sent under cover of a letter to the effect that the respondent had accepted and paid for a connection offer from ESB Networks and was waiting on an agreed energisation date to be able to export power from the development.

**17.** In the meantime, relations had not improved and a plenary summons was issued on behalf of the respondent on 11<sup>th</sup> April, 2022 claiming an order for specific performance of the revised option agreement; an injunction restraining the appellant from interfering with the exercise of the respondent's right of access to the lands; an injunction requiring the appellant to facilitate the exercise of the right of access to the lands; and damages.

**18.** At the time of the negotiation and conclusion of the initial option agreement, the appellant was represented by a solicitor. At the time of the negotiation and execution of the addendum to option agreement there was some talk as to whether the appellant should go back to the solicitor who had previously acted for him, or perhaps some other solicitor, but he did neither. Following the breakdown in relations between the parties, the appellant instructed a new firm of solicitors to correspond with the respondent on his behalf and later to act for him in the mediation but following the failure of the mediation he discharged those

solicitors and has since acted on his own behalf. In the conduct of the appeal, he had the assistance of a so-called *McKenzie* friend.

**19.** The statement of claim set out the respondent's stall: the option agreement dated 29<sup>th</sup> March, 2017; the extension notice of 12<sup>th</sup> February, 2020; the revised option agreement dated 12<sup>th</sup> August, 2020; and the extension notice of 25<sup>th</sup> February, 2022. The respondent presaged its intention to further renew the option period – which, in the event, as I have said, it did by notice dated 10<sup>th</sup> August, 2022.

**20.** The statement of claim also referred to the engagement between the parties in 2021 and the refusal of the respondent's requests for access to the lands; to the appellant's refusal on 6<sup>th</sup> September, 2021 of a request that he should acknowledge and undertake to abide by the revised option agreement; and to the assertion by the appellant's – by then former – solicitors in a letter dated 6<sup>th</sup> October, 2021 that there was no binding option in existence between the parties. The respondent pleaded that it was ready, willing and able to perform the revised option agreement and that by reason of the appellant's breach of contract it had suffered loss and damage, estimated at €861,390. The reliefs claimed mirrored those claimed in the plenary summons.

**21.** In the event, the claim for damages was not pursued.

**22.** In his defence delivered on 30<sup>th</sup> June, 2022, the appellant pleaded that the "*original option agreement*" was for a period of 36 months, subject to extension as provided and that on or about 20<sup>th</sup> [*sic.*] February, 2020 the respondent exercised its option to extend the option agreement for six months pursuant to clause 3.

**23.** He went on to plead that the respondent had breached the contract by not sending him written notice 30 days prior to the expiry of the extended option period which terminated the contract pursuant to clause 3.6; that on or about 14<sup>th</sup> August, 2020 the respondent had sent

him an addendum to the original option agreement which was not signed in a solicitor's office or witnessed by a solicitor; and that the date on the addendum under his signature was incorrect which – he asserted – rendered it void. At para. 7 he pleaded that he had not received any notice to extend the option as stated at para. 29 of the amended statement of claim.

**24.** Without any further narrative, the appellant counterclaimed for a declaration that the revised option agreement was invalid as it was not executed in a proper manner; an order compelling the respondent to pay him the outstanding rent arrears from 29<sup>th</sup> March, 2017; a declaration that the notice of 25<sup>th</sup> February, 2022 was invalid; “*an order for estoppel*”; and an order for his costs.

**25.** The action was heard by Dignam J. over four days in January, 2023 and judgment was reserved.

**26.** In a careful and comprehensive written judgment, Dignam J. set out the uncontested facts and the relevant terms of the option agreement.

**27.** Service of the first extension notice on 12<sup>th</sup> February, 2020 was proved by the solicitor who had been acting for the respondent at the time and was uncontested. The judge noted the discrepancy between the date on which the extension notice was in fact served – 12<sup>th</sup> February, 2020 – and the date of the notice admitted by the defence – 20<sup>th</sup> February, 2020 – but said that nothing turned on the date as both dates were upwards of 30 days before the expiry of the option period. The judge noted that there was no dispute that the respondent had accepted and paid for a connection offer.

**28.** On 25<sup>th</sup> February, 2022 the respondent gave notice to extend the revised option period by six months. Service of this notice by registered post was proved by a signed proof of delivery docket and was acknowledged by the appellant.



**29.** On 10<sup>th</sup> August, 2022 a further notice was served under cover of a letter of the same date further extending the option period for six months to 29<sup>th</sup> March, 2023. This was also sent by registered post and the delivery docket was signed by the appellant's sister, who lives next door. No issue was taken with this by the appellant.

**30.** The judge then outlined the chronology of the circumstances in which the revised option agreement had come to be signed; the acquisition of the respondent by Neoen; and the dealings thereafter between the respondent's representatives and the appellant.

**31.** Having reviewed the pleadings, the judge identified five points raised by the appellant.

**32.** The last of these was a suggestion that the plenary summons – or copy plenary summons – sent to the appellant was invalid because it had not been stamped in the Central Office and that the proceedings should therefore be dismissed. That, as the judge noted, had been withdrawn at the hearing. There may have been some confusion in the appellant's mind between the original summons – which would have been stamped – and the copy served on him – which would not have been.

**33.** The denial in the defence that the appellant had received the extension notice of 25<sup>th</sup> February, 2022 – which was proved to have served by registered post, signed for by the appellant's sister who lives next door – had also been withdrawn at the hearing.

**34.** Although it had not been raised as an issue in the defence, the judge carefully examined the appellant's claim that before he signed the addendum, he had been told by Mr. Simon Maguire – the director of the respondent who had asked for the extension of time – that there was no need for him to use a solicitor. The judge summarised the evidence of the appellant and Mr. Maguire as to what was said as to whether the appellant should instruct a solicitor. There was a direct conflict of evidence as to what precisely Mr. Maguire said. For

the reasons given, the judge preferred Mr. Maguire's evidence as to the actual terms of the conversation but could see how the appellant could have interpreted that as meaning that he did not really need to see a solicitor.

**35.** The judge found, however, that even if Mr. Maguire had said what the appellant had said that he said, that could not be determinative of the legal issues. Firstly, said the judge, there was no general principle that a party will only be bound by an agreement if they obtained legal advice before signing it, nor that one party to a commercial contract must advise the other to obtain legal advice. He referred to *Ulster Bank Ireland Ltd. v. Roche* [2012] IEHC 166 and *ACC Bank v. Kelly* [2011] IEHC 7. Referring to *Donnelly The Law of Credit and Security* (3<sup>rd</sup> Ed., 2021), the judge noted that this could conceivably arise where there is a very particular relationship between the parties, such as a fiduciary relationship: but said that there was no basis for suggesting the existence of such a relationship in this case. As a matter of fact, said the judge, the appellant had ample time to reflect on whether he should take advice and to make his own decision. The appellant had acknowledged that in saying that he had considered whether to seek legal advice but had decided not to.

**36.** There was no suggestion that the appellant had been pressured to sign the addendum without legal advice or that the terms of document had been misrepresented to the appellant.

**37.** As to the suggestion in the defence that the addendum was invalid because it had not been signed in a solicitor's office or witnessed by a solicitor, the judge said that there was no legal requirement that a document must be signed in a solicitor's office or witnessed by a solicitor and that as a matter of fact there was no dispute that the appellant had signed it.

**38.** As to the appellant's argument that the option expired because the original 36 month option was not further extended beyond the expiration of the six months extension by the notice of 12<sup>th</sup> February, 2020, the judge found that the requirement for any further extension

of the original option was superseded by the revised option agreement which had been signed during the currency of the first extension of the 36 month term. As the judge put it, the option agreement was still live at the time the option period was revised by the addendum agreement.

**39.** As to the appellant's plea that the addendum agreement was invalid because the date below his signature was incorrect, the judge recalled that the appellant had agreed in cross examination that immediately below his signature he had first written "28/8" and then scribbled that out before writing "28/7/20." The judge found as a matter of probability that the appellant had mistakenly dated his signature as 28<sup>th</sup> August and then corrected it to 28<sup>th</sup> July, 2020. In any event, he said, it was clear from the fact that the appellant had returned the signed document on 5<sup>th</sup> August, 2020 that he had signed it before then. And – for good measure – even if 28<sup>th</sup> August, 2020 had been the date of signature, it would still have been within the life of the option agreement.

**40.** The appellant's plea in his defence that the rent had not been paid and his counterclaim for rent were dismissed as misconceived. The rent would only become payable on the exercise of the option and the granting and acceptance of the lease. The appellant's counterclaim for an order of estoppel was not expanded on or developed and the judge could see no basis for any such order.

**41.** Finally – although this, too, had not been pleaded – the judge dismissed a suggestion that Mr. Maguire had a conflict of interest on the ground that there was no basis for it in fact.

**42.** As the judgment of 28<sup>th</sup> March, 2023 shows, the High Court was invited to first determine the status of the revised option agreement and then, if necessary, consider any damages claim. Further, in circumstances where the option had not at the time of the trial of the action been exercised, the judge said that he would not make any other orders at that stage

but would adjourn the action generally with liberty to re-enter. He said that it would appear to follow at the level of principle that were the option to be exercised, the respondents would be entitled to orders.

**43.** The case came back into the list on 2<sup>nd</sup> May, 2023. By then, it appears, the option had been exercised by notice dated 21<sup>st</sup> March, 2023 to which there was annexed a form of lease in the terms appended to the option agreement but the appellant had not signed it. There was some discussion as to the form of order. The respondent obviously wanted a lease but with a view to – or at least in the hope of – fostering amicable relations, the court was asked to order only that the revised option agreement remained valid and binding and that the appellant be restrained from interfering with the exercise of the right of access to the option lands. The judge made those orders and refused the reliefs sought by the counterclaim; and ordered that the respondent recover from the appellant the costs of the claim and counterclaim.

**44.** The case was listed again on 16<sup>th</sup> May, 2023. The appellant had not in the meantime signed the lease and – without demur from the appellant – the respondent’s solicitor handed in a copy of the option notice of 21<sup>st</sup> March, 2023 and the form of lease. The appellant then made clear that he intended to appeal. Counsel for the respondent pressed for further orders, which were said to flow naturally from the judgment. It was said that it would be desirable that if the appellant wished to appeal, that there would be an appeal that embraced all of the issues.

**45.** The transcript shows that the judge agreed that it would be as well that if the appellant was going to appeal that all issues be decided so that this Court could deal with all issues. The judge portentously observed that the Court of Appeal might deal with the appeal in any number of different ways. It might find that he was wrong in his initial judgment. Or it might find that he was right in his initial judgment but wrong to make the ancillary orders.

**46.** Counsel for the respondent then asked for two further orders. First, an order for specific performance of the revised option agreement and secondly, an order compelling the appellant to execute the form of lease provided under cover of the letter of 21<sup>st</sup> March, 2023. The discussion then turned to the question of a stay and to the risk that the respondent might – in reliance on the lease ordered to be executed by the appellant – enter on the land and begin construction but might later lose the appeal.

**47.** A second order was made on 16<sup>th</sup> May, 2023 for specific performance of the revised option agreement and for the execution of the draft lease attached to the option notice of 21<sup>st</sup> March, 2023 within two weeks.

**48.** By notice of appeal dated 8<sup>th</sup> June, 2023 the appellant appealed. On the face of the notice of appeal it is an appeal against the judgment of 28<sup>th</sup> March, 2023 and the order of 16<sup>th</sup> May, 2023 but it fairly obviously was intended to be an appeal against both the order of 2<sup>nd</sup> May, 2023 and 16<sup>th</sup> May, 2023. At the hearing of the appeal the appellant confirmed that that had been his intention and counsel for the respondent confirmed that that was how it had been understood.

**49.** There are seven numbered grounds but – it seems to me – only really one point. The first ground of appeal is the suggestion, at ground No. 1, that:-

*“The defendant had an unease when faced with endorsing the final contract as of the business relationship between the defendant’s purported independent solicitor [named] and the plaintiff of which caused the defendant to decline the full and final contract.”*

**50.** The remaining grounds – expressed this way and that – are that the contract was invalidated by the fact that the contribution of €2,500 plus VAT to the appellant’s costs in respect of the option agreement was paid directly to the solicitors who acted for the appellant

at that time rather than to the appellant directly; and was paid against an invoice addressed to the appellant but sent by his solicitors to the respondent. The seventh ground of appeal ties back – or at least goes back – to the first by suggesting that:-

*“While not limited to the above the defendant’s unease of which caused the defendant to decline the full and final contract was that of the plaintiff’s own making as to the business relationship between the plaintiff and the defendant’s purported independent solicitor [named.]*

**51.** Under the heading *“The legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom”* the appellant states:-

*“The legal principle stands that the courts cannot ‘ratify an illegal act’ by giving judgment for a plaintiff where an illegal act occurred – the plaintiff having without engagement and/or consent of the defendant inappropriately paying the defendant’s purported independent solicitor [named] – on the said solicitor been instructed by the plaintiff to issue a VAT invoice drafted to the defendant and dated 15 March 2017 – the plaintiff had no authority in law to pay the defendant’s invoice and or threat [sic.] the VAT invoice as issued to the plaintiff.”*

**52.** A number of observations immediately occur. Firstly, and fundamentally, there is no suggestion of any error on the part of the High Court judge. Secondly, as far as the pleadings and evidence go, there was no previous complaint – ever – as to the payment by the respondent directly to the solicitor of the agreed contribution to costs. Thirdly, the validity of the original option agreement of 29<sup>th</sup> March, 2017 was never previously impugned. Fourthly, as far as the pleadings and evidence go, there was no previous complaint as to the independence of the solicitors who acted for the appellant at the time of the original option

agreement. Fifthly, as far as the pleadings and evidence go, there was no previous suggestion that the manner in which the appellant's previous solicitor and/or the respondent dealt with the payment of the agreed contribution to costs had anything to do with the fact that the appellant "*declined the full and final contract*"; whether that was the revised option agreement of 12<sup>th</sup> August, 2020 or, following the exercise of the option, the execution of the lease in the agreed form. Finally – and by no means least – the grounds of appeal acknowledge the existence of a "*full and final contract.*"

**53.** By notice of motion dated 17<sup>th</sup> July, 2023 the appellant applied to this Court for a stay on the order of the High Court pending the determination of his appeal and by notice of motion dated 21<sup>st</sup> July, 2023 he applied to amend his notice of appeal. Both motions were heard by Costello J. on 28<sup>th</sup> July, 2023 and were refused.

**54.** On 12<sup>th</sup> October, 2023 – about six weeks after he ought to have done so – the appellant filed and served his written submissions. Undaunted by the judgment and order of the Court of Appeal of 28<sup>th</sup> July, 2023 by which he was confined to the grounds of appeal set out in his notice of appeal, and by a further case management order made on 6<sup>th</sup> October, 2023 by Noonan J. refusing him permission to bring a second motion seeking leave to amend his grounds of appeal, the appellant sought to take issue with the February, 2020 notice of extension – the fact and validity of which he had admitted – and the alleged failure of his former solicitors – who he had decided not to consult – to ensure that the addendum of 12<sup>th</sup> August, 2020 was not completed elsewhere than in a solicitor's office. He also sought to impugn the validity of the High Court proceedings by reference to an arbitration clause in the option agreement, which he had never previously invoked. Quite brazenly, the appellant's written submissions reference the "*purposed amended notice of appeal*" which presumably is the proposed amended grounds of appeal, which had been refused.

55. Notwithstanding the order of Noonan J. of 6<sup>th</sup> October, 2023 refusing him permission to do so, the appellant issued a second motion amend his grounds of appeal, which was refused by Costello J. on 13<sup>th</sup> October, 2023.

56. Quite properly – and underlined by the order of Costello J. on 13<sup>th</sup> October, 2023 – the written submissions filed on behalf of the respondent were limited to what were described as the permitted grounds of appeal set out in the notice of appeal of 8<sup>th</sup> June, 2023. I take the description of the grounds of appeal set out in the notice of appeal as “*permitted grounds*” as intended to distinguish them from the additional grounds of appeal which were refused rather than as a concession that any of the grounds are permissible.

57. The respondent’s submission comprises in large part a chronology of the facts as proved in the High Court and uncontested by the appellant. The respondent makes the case that all of the grounds of defence advanced in the High Court were rejected.

58. The respondent’s written submissions, at para. 35, identify the legal principles to be applied by an appellate court, as set out in the judgment of MacMenamin J. for the Supreme Court in *M.C v. F.C.* [2013] IESC 36, [2014] 1 ILRM 1 and, at para. 36, a passage from the judgment of the O’Donnell J. (as he then was) in *Lough Swilly Shellfish Growers Co-Op Society Ltd. v. Bradley* [2013] IESC 16, [2013] 1 I.R. 277 where he said, at para. 28:-

*“There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K.D. (otherwise C.) v M.C. [1985] I.R. 697 for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News Ltd v Galway County Council (Unreported, Supreme Court, 25th July, 1977)); or, for example where a party sought to make an argument*



*which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made.”*

**59.** Doing the best they can, counsel for the respondent discern in the notice of appeal two points; the first being the appellant’s declared “*unease*” when endorsing the “*final contract*” – which counsel discern or divine as probably being the option agreement of 29<sup>th</sup> March, 2017 – and the second being the payment by the respondent of the contribution to – as it is put – the appellant’s legal costs relating to the execution by him of the option agreement.

**60.** On the premise that the “*final contract*” was the option agreement of 29<sup>th</sup> March, 2017 counsel submits that there is no sustainable ground of appeal in that regard. It is submitted – and it is undoubtedly the case – that the validity of the original 2017 option agreement was never impugned. Rather, the appellant’s defence was exclusively focussed on – or perhaps the *mot juste* is directed to – the addendum agreement. I accept the respondent’s submission that it is not open to the appellant to seek to advance on appeal a case that was never made in the High Court.

**61.** Counsel identifies in the transcript of the hearing before the High Court several passages which demonstrate the appellant's enthusiastic engagement with the option agreement in 2017. As counsel observes, there was no previous complaint or criticism as to the independence of the solicitors.

**62.** On the premise that the "*final contract*" referred to in the grounds of appeal might have been the 2020 addendum rather than the original agreement, counsel points out that the solicitors were simply not involved.

**63.** On either premise, any examination of the role of the solicitors would entail re-opening the evidence. On the authority of *Lough Swilly* that is impermissible.

**64.** To what counsel has said, I would add that the High Court judge allowed the appellant great indulgence and latitude allowing him to make, and dealing with, arguments that strictly speaking were not open to the appellant on the pleadings but which the judge considered the respondent was in a position to meet.

**65.** It is submitted on behalf of the respondent that the case which the appellant would make on the appeal that there was an inappropriate relationship between the respondent and the solicitors would be wholly discordant with the case he made in the High Court that he ought to have been advised to, or afforded the opportunity to consult his solicitor, specifically the named solicitor. I accept that the case which the appellant would now make would be discordant with the case he made in the High Court, but I am not convinced that any solicitor whom the appellant might have engaged in 2020 would necessarily have been the same solicitor he instructed in 2017.

**66.** There was evidence in the High Court as to the payment by the respondent of the contribution to the appellant's costs in connection with the option agreement. The appellant's recollection was that the respondent had paid a total of €5,000, €2,500 in respect of the option

fee and €2,500 in respect of the costs. The appellant was not sure about the VAT. The appellant may have been mistaken as to the precise detail as the respondent's then solicitor's ledger shows a payment on 21<sup>st</sup> March, 2017 of €5,605 in respect of "*Lodged Philip Cleary (Option & Landlord legal fees)*": which would correspond to €2,500 for the option fee and €3,105 for the solicitor's bill. But the point is that there was no hint of irregularity and the appellant swore that he got the money. There was no suggestion either at the time the fee was paid or in the course of the trial that the solicitors were not then immediately entitled to the entire sum paid as a contribution to the appellant's costs.

**67.** In his oral submission, the appellant attempted to drift into an argument that the respondent had not put in place – or at least had not proved that it had put in place, the public liability and employers liability insurance required by the option agreement. This was no part of the case made in the High Court and – the request for proof of the insurance having been first made on 31<sup>st</sup> October, 2023 – was obviously an afterthought.

**68.** It was no part of the appeal that the judge erred in finding that there was no requirement in law that the addendum be executed in a solicitor's office and its execution witnessed by a solicitor. But if it had been, the judge was perfectly correct.

**69.** I am satisfied that there is no substance to this appeal and that it must be dismissed.

**70.** I want to add, for completeness, that it was not obvious to me that service of the option notice on 21<sup>st</sup> March, 2023 had been properly proved. Nor was it clear to me that as a matter of law, the respondent was entitled on a claim for specific performance of an option agreement to an order for specific performance of a contract that first came into existence long after the issue of the summons and, indeed, long after the action had been heard. However, the real and ultimate dispute between the parties is whether the appellant is bound to grant the respondent a thirty year lease of the option lands. The order of 16<sup>th</sup> May, 2023

plainly directs specific performance of the contract to grant the lease which came into existence on the exercise of the option. There was no ground of appeal directed to the entitlement of the court to have made the order which it did and no hint of any challenge to the validity of the notice exercising the option. Rather the appeal was confined to the existence of the option at the time it was exercised.

**71.** At the hearing of the appeal both parties confirmed that they wished the court to rule on all issues between them and this made practical sense. There was no issue as to service of the option notice or – if the option was still subsisting – the validity of the option notice.

**72.** In any event, for the reasons given, I am of the view that the appeal must be dismissed.

[Pilkington and Butler JJ. agreed.]