APPROVED **[2024] IEHC 695**

THE HIGH COURT

CIRCUIT COURT APPEAL

2024 171 CA

BETWEEN

CHARLES CROWLEY AND RAYMOND CROWLEY

APPLICANTS/RESPONDENTS

AND

BARRY SHEEHAN AND ALL UNKNOWN AND UNASCERTAINED OWNER OR OWNERS

DEFENDANTS

JUDGEMENT of Mr Justice Nolan delivered on the 10th day of December, 2024

Introduction

1. This is an appeal from a decision of the Circuit Court made on the 19th of June 2024, which in turn was an appeal from the County Registrar's order made on the 14th of December 2023, granting the Applicants/Respondents ("Applicants") an order entitling them to acquire by purchase the fee simple of the property at 1b "Anneville" Coolgarten Park, Magazine Road in the County of Cork ("the premises").

2. The First Named Respondent/ Appellant ("Respondent") has denied the entitlements of the Applicants to acquire the fee simple for reasons I shall set out below.

Background

3. The Applicants are the leaseholders of the premises pursuant to a lease dated of the 12th of April 1940 made between Jeremiah Cooney as lessor on the one part and Annie Georgina Moore on the other for a term of 150 years from the 25th of March 1940, subject to a yearly rent of £3. It is, in essence, a small family home, if not somewhat neglected.

4. On the 6th of May 2022, the Applicants sought by way of a Notice of Intention to Acquire the Fee Simple to purchase the fee simple and all intermediate interests in the premises. The application was made under the Landlord and Tenant (Ground Rents) (No.2) Act 1978 ("the Act").

5. The First Named Applicant swore an affidavit that the title of the premises had devolved to him and the Second Named Applicant by way of assent to vesting dated the 15th of March 2019 and that they were entitled to the lessees' interest under the lease pursuant to the Act.

6. He swore that the lease contained a covenant on the part of the lessee to erect a dwelling house on the property demised by the lease within a period of 12 months at a cost of £400. Thereafter a cottage was erected pursuant to that covenant.

7. He confirmed that there were permanent buildings on the property demised by the lease within the meaning of Section 9 of the Act and that any lands not covered by permanent buildings were subsidiary and ancillary there too and that the permanent buildings were not erected in contravention of a covenant in the lease and were not a mere improvement within the meaning of Section 9. He confirmed that conditions 1 and 7 of Section 10 of the Act applied. In other words, that the Applicants complied in all material respects with the requirements of the Act to purchase the fee simple.

8. The Respondent, who was a solicitor and is now a barrister practicing under the authority of the LRSA, happens to own the adjacent property to the premises. It is clear from the papers that the relationship between the parties is not good. There had been threats of litigation in relation to a common area and the changing of locks to it. On the 13th of April 2022, he wrote to the Applicants' solicitors, enclosing a copy of a Deed of Assignment dated the 18th of February 2022 between Patricia Boag on the one part and the Respondent on the other. He had purchased her interest in the premises and therefore, as a result of the assignment, had become the Applicant's head landlord of the premises. He said that he had recently acquired all of the estate, title and interest of the rights of the Applicant's lessor, Jeremiah Cooney, from his granddaughter and as a result of the assignment, had become the Applicant's new landlord.

The Application for Relief against Forfeiture

9. In that letter of the 13th of April 2022, he said he was anxious to arrange an inspection of the premises in order to ascertain if the Applicants were in compliance with various covenants and he requested that the premises be made available to his engineer for inspection. Thereafter, on the 9th of May 2022, he served a Forfeiture Notice on the Applicants, stating that unless they remedied alleged breaches, he would seek forfeiture of the lease.

10. The Applicants then brought proceedings in the High Court seeking to restrain the Respondent from reentering the premises and by order of the High Court dated the 7th of November 2022, O'Regan J. granted relief against forfeiture on certain conditions as set out in the order.

The Respondent's Case

11. The case of the Respondent is that the Applicants have no entitlement to acquire the fee simple or intermediate interest in the premises as the lease is a sublease granted by a lessee to

whom Part II of the 1978 Act does not apply. That Act was amended by the Registration of Title and Deeds Act 2006, which introduced a new subsection, namely Section 16 (2) (f) the 1978 Act, which restricts the acquisition of the fee simple in certain circumstances.

Section 16(2)(f) of the 1978 Act

12. Section 16(2)(f) as amended by the Registration of Deeds and Title Act 2006 reads as follows:-

> *"Restrictions on right to acquire fee simple*
>
> *(2) A person shall not be entitled to acquire the fee simple under this part if the lease on which such right is based is-*
>
> *(f) subject to subsection (3), a sub lease of land granted by a lessee who is not a person to whom this part applies-*
>
> *a. (ii) on or after 27 February 2006, or*
>
> *(ii) before that date, unless before that date-*
>
> *(I) a notice of intention to acquire the fee simple in the land was served by the sublessee in accordance with Section 4 of the act of 1967, or*
>
> *(II) An application was made by the sublessee to the Registrar of Titles under Part III of this Act."*

The Respondent's Submission in regard to Section 16 (2) (f)

13. Mr. Rooney BL on behalf of the Respondent, says that the Applicants are not lessees but sub-lessees and therefore, any right to purchase the fee simple has been circumscribed by the provisions of the section. He submits that an absence of a covenant to build in the head lease renders the head lease a non-qualifying lease. This has the effect of removing from a sub-

lessee the right to acquire the fee simple where the head lessee, himself, does not have the right to do so or does not come within the provisions of Part II of the Act.

14. This is based upon what he describes as the logical notion that a tenant should never have a better title than his landlord.

15. To understand this submission in more depth, it is necessary to have a look at the title of the premises.

The Premises' Title

16. The title reads as follows:-

> "*By indenture of lease dated the 21st of July 1893 made between Marmaduke Coghill Cramer and Elizabeth Cramer on the one part and John Cooney on the other part ALL THAT AND THOSE that part of the lands at Huggardsland otherwise Huggartsland containing 5 acres, one rood and 27 perches statute measure delineated on the map endorsed on the lease and coloured pink situated in the barony of cork and county of cork were let for a term of 200 years from the 25th of March 1893 at a yearly rent of £16.50 subject to the lessees covenants and conditions contained therein*".

17. This is the head lease. The Respondent submits it contained no covenant to build and therefore Sections 16(2)(f) and 16(3) apply. Section 16(3) says that subsection (2)(f) does not apply where at the date on which the sublease is granted, the sole reason why the lessee is not a person to whom this part applies, is that a covenant by the lessee to erect permanent buildings on the land has not been substantially complied with. He further relies upon the views expressed in Wylie's 'Landlord and Tenant Law' (3rd edition) para 31.18, where he says there is a flaw in the legislation which gives rise to an unintended consequence, relating to subleases who subsequently erect permanent buildings, as in this case, where he said:-

"It applies only where the head lease contained a covenant to erect such buildings; many older leases will contain no such covenant nor any restriction on building, so that a sublessee may have erected such buildings quite lawfully yet be caught by the restriction and the new paragraph f".

18. However, the interest which the Applicant seeks to purchase derives from such a sublease, dated the 12th of April 1940 which reads:-

"Between Jeremiah Cooney on the one part and Anne Georgina Moore on the other part ALL THAT a piece or plot of ground of part of the same lands is described as the sublease subject to covenants and conditions to erect a dwelling house on the property demised by the lease within a period of 12 months at a cost of not less than £400".

19. In summary, the head lease has no covenant to build but the sub lease did. A large number of homes similar to this premises and the one owned by the Respondent, were built on the lands which has become a well-known area in the city of Cork. If this submission were correct, no sub tenant would ever be able to purchase the fee simple, notwithstanding that may affect hundreds of perspective purchasers.

The Applicant's Submissions

20. Mr. O'Dwyer BL, on behalf of the Applicants, submits that it would misconstrue the purpose behind Section 16(2)(f), if it were to be applied in the way that the Respondent suggests. The purpose of the amendment brought in by the 2006 Act, was to deal with an entirely different type of mischief. In this regard, the Applicants relies heavily upon the Law Reform Commission's paper dealing with Land Law and Conveyancing Law published in 1998.

21. In the case of *Wanze Properties (Ireland) Ltd v Mastertron Ltd* [1992] ILRM 746, Murphy J. suggested that a lessee who did not hold under a qualifying lease could grant a lease

to a third party which would itself be a qualifying lease and enable that third party to acquire the fee simple to the property. This would have the effect of nullifying the intention of the superior landlord who had deliberately granted the lease in a particular form believing that the landlord was secure against any application to acquire the fee simple under the 1978 Act.

22. The Law Reform Commission's paper gave a number of examples all relating to the construction of shopping centres where, for example, a landlord seeking to have a shopping centre built on a particular land, grants long term leases at relatively nominal rents to the operators of supermarkets, including covenants by the lessee to erect the supermarket.

23. In order to avoid the lease being a qualifying lease, provisions enabling alterations of the amount of the rent to be reserved by the lease within 26 years from the commencement of the leases would have been included.

24. Accordingly, if a supermarket operator holds under a 150-year lease from 1985, which would not be a qualifying lease, the lessee could, without being obliged to seek the landlord's consent, grant a lease to a third party, which would be a qualifying lease.

25. The existence of the supermarket building would ensure that the lease complied with Section 9 of the 1978 Act and the lease would clearly be drafted so that it complied with alternative condition 7 of Section 10, being a lease of not less than 50 years made partially in consideration of payment of a sum of money by the lessee to the lessor, which sum is not less than 15 times the greatest rent reserved by the lease.

The Landlord and Tenant (Ground Rents) (No 2) Act 1978

26. The purchase of the fee simple is governed by The Landlord and Tenant (Ground Rents) (No. 2) Act 1978. It was designed to achieve several purposes including the introduction of a new special procedure for acquisition of the fee simple to complement the scheme introduced by the Landlord and Tenant (Grounds Rent) Act of 1967. The second purpose was to extend

the categories of tenants who are entitled to acquire the free simple under either the 1967 Act or this Act. This gave effect to various recommendations made by the Landlord and Tenant Commission in its report on "*Certain questions arising under Landlord and Tenant Acts*". Thus, the Act was an enabling act to allow lessees to acquire the fee simple and was therefore an enfranchising piece of legislation. The Respondent argues that whilst the legislation is clearly enfranchising it is also disenfranchising, since it excludes a category of persons. It is this category which the Respondent says the Applicant falls into.

Other relevant provisions of the 1978 Act

27. The right to purchase the fee simple primarily derives from Section 9 and Section 10 of the Act. It is agreed by the parties that were it not for the Respondent's argument in relation to Section 16(2)(f) and Section 16(3), the Applicants would qualify to purchase the fee simple since they satisfy the requirements of Sections 9 and 10. In those circumstances, I do not think it is necessary to set out those provisions, safe to say that it is self-evident that the Applicants do indeed satisfy the requirements of Section 9 and one of the requirements of Section 10, which is all that is required.

Discussion and Decision

28. The Act came into being to address the historical anomalies which arose at the time of the creation of the State. Its purpose is clear, and that was to give the holders of leases the opportunity to purchase the fee simple at a relatively inexpensive cost without having to launch significant litigation.

29. In this case, it is alleged that the absence of a covenant to build in the head lease renders it a non-qualifying lease and as such, the provisions of Section 16(2)(f), should apply since it is not saved by Section 16(3).

30. It is abundantly clear from the discussion in the Law Reform Commission report, and indeed from the *Wanze* case itself, that the mischief, which was intended to be addressed, was uniquely focused on the creation of leases surrounding the construction of supermarkets. Nothing could be further from the circumstances of this case.

31. The legislation itself is complex. Its wording is difficult to understand, containing ambiguous and confusing interaction of various sections, subsections and other legislation. It is noteworthy that there does not seem to be a clear, easily read copy of the legislation on the Oireachtas website nor has either party produced any case law to support or nullify the argument of the Respondent. To that extent, therefore, it seems to me that it is appropriate to consider the Interpretation Act of 2005.

32. Section 5 of the Act deals with construing ambiguity ambiguous or obscure provisions. In particular section 51B says:

> "*5. (1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—*
>
> > *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or*
> >
> > *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole*."

33. There is little doubt in my mind what the Oireachtas intended when it introduced the Act of 2006, that was to prohibit a lessee who did not hold under a qualifying lease, granting a lease to a third party which would become a qualifying lease, to enable a third party to acquire the fee simple to the property in the context of large commercial developments. It was not intended to exclude or disenfranchise the Applicants or the many similar tenants who live on the Huggartsland lands and indeed the many other tenants which Mr. Wylie refers to, whose original lease did not contain a building covenant.

34. That would give rise to a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas, the interpretation which the Respondent urges. In my view that can not be correct. It would have the effect of defeating the very purpose of the Ground Rents Legislation

35. Even if I am incorrect in that interpretation, it seems to me that Section 6 of the Act also applies. It reads :-

> "*Construing provisions in changing circumstances*
>
> > *In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit."*

36. In *Heather Hill Management Company CLG v. An Bord Pleanala and others [2022] IESC 43*, Murray J. in the Supreme Court stated that "*context it was critical: both immediate and approximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that*".

37. He went on to say that the authorities made clear was that with or without Section 5 of the 2005 Act:

> "*In no case can the process of ascertaining "the legislative intent" or the "Will of the Oireachtas" be reduced that a reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of the statute as a whole or the context in which, and the purpose for which it was enacted*."

38. In those circumstances, it is clear that the court can, in construing the provisions of Section 16(2)(f), consider the social conditions in the context of changing circumstances. The context is the purpose of purchasing the fee simple and the changing circumstance of those commercial developments which do not apply in this case.

39. Either way, on the grounds of statutory interpretation, it seems to me that interpretation put forward by the Respondent cannot be correct.

40. In those circumstances it seems to me that the lease in question is not a non-qualifying lease within the meaning of the legislation, as seen through the prism of the Interpretation Act 2005 and therefore the Applicants do not fall into the potential negative interpretation of Section 16(2)(f), as urged by the Respondent.

41. Further, I am of the opinion that this interpretation is proportionate and reflects the value the respective parties have in the premises. By far the greatest value to the sub lease was the construction of the building referred to in the covenant of 1940, funded by the predecessors in title of the Applicants.

42. Accordingly, I shall affirm the order of the learned circuit judge.