

Neutral Citation: [2016] NICA 30

Ref: **WEA10002**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **30/06/2016**

IN HER MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION (CHANCERY)

BETWEEN:

NORTHERN IRELAND RENEWABLES LIMITED

Plaintiff/Respondent

and

HARRY CAREY

Defendant/Appellant

Before: Morgan LCJ, Weatherup LJ and Weir LJ

WEATHERUP LJ (delivering the judgment of the Court)

[1] The effects of the Landlord and Tenant Law Amendment Act (Ireland) 1860 (“Deasy’s Act”) continue to occasion debate in the courts. This appeal concerns section 3 of the Act. Mr Orr QC and Mr Reel appeared for the appellant and Mr Hanna QC and Mr Stevenson for the respondent.

[2] The respondent is a wind farm development company. The appellant is a land owner at Loughguile, County Antrim. On 5 December 2003 the parties entered an option agreement by which, on payment of £1,000 and other sums, the appellant granted the respondent an option to call for the grant of a lease over such part of the appellant’s property as the respondent chose for the erection of four turbines and sites for a control unit and electricity sub-station, which option was to be exercised by 5 December 2010. The lease to be granted was to be in the form of the draft

annexed to the Option Agreement, subject to such alterations as were agreed between the parties.

[3] On 1 December 2010 the respondent exercised the option whereby it was contended that a contract came into existence obliging the appellant to deduce marketable title to the option property and to grant the respondent a lease in the form of the draft. The appellant has failed to grant the respondent a lease.

[4] The draft lease provided for the demise of sites on two folios owned by the appellant for turbines, a control unit and electricity substation and a mast for a term of 25 years, with an option for renewal for 25 years. The demise was subject to tenant's covenants and landlord's covenants and with what was stated to be a rent calculated on the capacity of the equipment installed on the land. The permitted user of the lands was in connection with the construction, repair, replacement, use and operation of the turbines and the mast and the electricity substation and matters associated with the wind-power project. The area proposed to be demised by the draft lease represented a small percentage of the Appellant's property in the two folios.

[5] The respondent commenced these proceedings for specific performance of the agreement to grant a lease and for the appellant to deduce marketable title. By his defence the appellant pleaded that when the respondent purported to exercise the option there were no wind turbines on the appellant's land and consequently no rent could or would have been payable to the appellant so as to give rise to the relationship of landlord and tenant under section 3 of Deasy's Act and thus the appellant was not obliged to grant a lease to the respondent.

[6] The following preliminary issues arose:

(i) Whether the draft lease reserves a rent within the meaning of section 3 of the Landlord and Tenant Law Amendment Act (Ireland) 1860.

(ii) If the answer to (i) is in the negative, whether this means that the draft lease does not (and cannot) give rise to the relationship of landlord and tenant between the plaintiff and the defendant.

(iii) If the answer to (ii) is in the affirmative, whether the draft lease then constitutes a contractual licence and whether the defendant is obliged to grant that contractual licence to the plaintiff.

[7] By a decision dated 13 May 2014 (Neutral citation [2014] NICH 15) Deeny J addressed the second question, having concluded that it was not necessary to answer the first question. In answer to the second question he stated that the draft lease can and does give rise to the relationship of landlord and tenant between the respondent and the appellant, whether or not there is a rent compliant with Deasy's

Act. In the circumstances it was considered neither necessary nor appropriate to answer the third question.

[8] By a decision dated 28 January 2016 (Neutral citation [2016] NICH 2) Deeny J addressed the first and third questions. His conclusion on the first question was that the draft lease did reserve a rent within the meaning of section 3 of Deasy's Act. In answer to question 3 Deeny J concluded that, if the respondent was not entitled to a lease, it was entitled to a contractual licence.

[9] The appellant appeals against the decisions of Deeny J dated 13 May 2014 and 28 January 2016. The grounds of appeal are that there were errors of law, first, in finding that a rent had been reserved, second, in relying on the decision in Daniel v Gracie [1844] 6 QB 145, third, in holding that the law of Northern Ireland differed from the law of the Republic of Ireland in relation to the common legislation in Deasy's Act, fourth, in holding that the agreement took effect as a contractual licence, absent a lease and, finally, that sections 1 and 3 of Deasy's Act had been misinterpreted. By a Respondent's Notice it was contended that there were errors of law, first, in holding that the definition of rent in the draft lease was determinative of the rent, second, in holding that the consideration payable is different from the rent payable, third, in holding that the £1 consideration did not constitute rent and finally stating that the decision under appeal should be affirmed on the additional ground that the £1 payable under the draft lease was rent for the purposes of section 3 of Deasy's Act.

The first preliminary issue.

[10] The first preliminary issue is whether the draft lease reserves a rent within the meaning of section 3 of Deasy's Act.

The terms of the draft lease

[11] Under the terms of the draft lease the demise is stated in Clause 3 as follows:—

“In consideration of the sum of £1 (one pound) (the receipt of which is hereby acknowledged) and the Rent hereby reserved the landlord DEMISES unto the tenant all the demised property together with the rights specified in the second schedule and the benefits of the restrictive covenant set out in clause 5 to hold the demised property for the duration of the term yielding and paying to the landlord the rent.”

[12] The rent is defined by Clause 1.5 as “the rent reserved by Clause 3 of this lease calculated in accordance with the provisions of the third schedule payable annually in arrears.”

[13] The third schedule provides for the calculation of rent as follows –

“1.1 The tenant shall pay the landlord to the rate per year of £2,000 Sterling per MW of manufacturers rated installed capacity.

1.2 The rent to be calculated from the first day of contracted supply. The amount calculated as rent is to be paid within 35 working days of the end of the year.”

The provisions of Deasy's Act

[14] Section 1 of Deasy's Act provides –

“The word ‘lease’ shall mean any instrument in writing, whether under seal or not, containing a contract of tenancy in respect of any lands, in consideration of a rent or return.

The word ‘rent’ shall include any sum or return in the nature of rent, payable or given by way of compensation for the holding of any lands.”

[15] Section 3 of Deasy's Act provides –

“The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent.”

[16] There are three elements to section 3. The first is that the relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties and not upon tenure or service. At common law the relation of landlord and tenant was based on tenure and on contract and tenure required a reversion. The first element of section 3 is a deeming provision that the relation of landlord and tenant is founded in contract. It is apparent that the relation of landlord and tenant also concerns a proprietary interest.

[17] The second element of section 3 is that a reversion shall not be necessary for the relation of landlord and tenant. Prior to Deasy's Act the relation of landlord and tenant required a reversion. However, many absentee landlords engaged middlemen as agents who made grants of their whole interest in the land and wanted to maintain the right of distress for rent but did not enjoy the rights of landlords. The second element of section 3 was designed to address the practicalities of land holdings in Ireland so as to provide for middlemen to exercise the rights of landlords. The result was to facilitate the creation of fee farm grants for tenants.

[18] The third element of section 3 is that the relation of landlord and tenant shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent. This is a second deeming provision in section 3. There is a requirement for “rent” as a condition of deeming that the relation of landlord and tenant subsists.

The scope of section 3 of Deasy’s Act

[19] Different views have been expressed on whether section 3 defines the relation of landlord and tenant in Ireland or whether the relation of landlord and tenant can be created outside Deasy’s Act. *Wylie’s Landlord and Tenant Law (3rd ed.)* at para. 2.10 states that the arguments seem evenly balanced and with a dearth of authority difficult to resolve. In Northern Ireland the *Land Law Working Group Discussion Document No 3*, at para. 2.4, stated what it called the conservative theory, that section 3 merely extended the circumstances in which the relationship of landlord and tenant arose to include a contract to create the relationship. The Discussion Document also stated what it called the revolutionary theory, that tenure was totally abolished and the relationship of landlord and tenant was created by contract. Wylie states the conclusion was that “In the end the conservative theory won, not by any signal victory but by a common understanding of judges and practitioners.”

[20] A conservative view has been adopted by this Court of Appeal, which considered the scheme of section 3 in Todd v Unwin [1994] NIJB 230. The matter arose out of a claim to acquire a fee simple under the Leasehold (Enlargement and Extension) Act (NI) 1971 whereby lessees of certain premises held on long leases may enlarge their leasehold estates into a fee simple. The issue became whether the lessee held land for more than 21 years for the purposes of the 1971 Act. This turned on whether a Deed operated as an assignment or a sub-lease as in the former case the lessee would have held under a lease first granted for more than 21 years whereas in the latter case the unexpired term under the head lease was less than 21 years. The argument was that an intermediate Deed should be treated as a sub-lease whatever the intention of the parties by the operation of section 3 of Deasy’s Act.

[21] The Court of Appeal agreed with the Lands Tribunal that section 3 of Deasy’s Act was “a permissive or enabling provision, which extends the situations in which the relationship of landlord and tenant is created and does not purport to define them.”

[22] Carswell LJ in the Court of Appeal summarised the historical background to section 3 as follows:

“At common law a reversion was always required to create the relationship of landlord and tenant *Pluck v Digges* [1832] 5 Bligh NS 31; *Porter v French* [1844] 9 IRLR 514. The objective of enacting Section 3 of Deasy’s Act was to make provision for the ‘middlemen’,

who stood between the great landowners and their tenants. Their role was of considerable social importance in rural Ireland in the 18th and 19th centuries. They were the agents of absentee landlords, who in effect operated as retailers of land to the tenant occupiers, in that they took larger holdings from the landlords, by way of wholesale transactions, then sub-let in smaller holdings to the occupiers without reserving a reversion. In the absence of a reversion they might find themselves unable to invoke the remedies available to a landlord, such as distress. Historically one of the main reasons for the enactment of Section 3 of Deasy's Act was to confer a lessor's rights upon the middleman and fee farm grantor; see *Wylie's Irish Land Law 2nd Edition paragraph 17.006*; *Montrose the Relation of Landlord and Tenant* (1939) 3 NILQ 81 and cf *Chute v Busted* [1865] 16 ICLR 222."

[23] It is hardly a satisfactory position that the relationship of landlord and tenant may arise and exist both within and without Deasy's Act and that it should remain unclear whether that is indeed the case. The appellant contends that this Court should revisit the position adopted in *Todd v Unwin*, pointing to various judicial and academic authorities that would indicate a different approach. This included an interesting excursion into the history of the introduction of the legislation by Dr Dowling in *The Genesis of Deasy's Act* (1989) *Northern Ireland Legal Quarterly* 53. However, having previously stated, albeit obiter, that section 3 of Deasy's Act extends the situations in which the relationship of landlord and tenant is created and does not purport to define them, this Court does not consider that it would be helpful to review that position. The work of reform of the law of landlord and tenant in Ireland has been under consideration for a very long time. That reform requires a comprehensive reconstruction by legislative intervention rather than any minor adjustments by judicial action.

[24] However, the scope of section 3 is not directly in issue on the first question, which concerns the nature of rent for the purposes of section 3.

The meaning of 'rent' under Deasy's Act

[25] Turning to the question of "rent", section 1 of Deasy's Act provides that rent shall include any sum or return in the nature of rent, payable or given by way of compensation for the holding of any lands. The definition is not exhaustive but it is stated that it "shall include" that which follows. This includes any "sum" payable or given by way of compensation for the holding. In addition it includes any "return in the nature of rent" payable or given by way of compensation for the holdings. The definition of "lease" refers to an arrangement "in consideration of a rent or return". Presumably the "return" referred to in the definition of lease is the same as a return in the nature of rent.

[26] The question is: Does the draft lease provide for a "rent" as defined in Deasy's Act? The appellant urges caution in relation to references to English

authorities because there is no equivalent to Deasy's Act. We accept the need for such caution. In Escalus Properties Ltd v Robinson [1996] QB 231 Nourse LJ referred to "... rent in its correct sense being (i) a periodical sum (ii) paid in return for the occupation of land (iii) issuing out of the land (iv) for non-payment of which a distress is leviable."

[27] The above reference to "periodical sum" requires qualification in two respects. First, as to the word "periodical", we adopt the approach of Gibson J in Crane v Naughten [1912] IR 318 where it was stated -

"If a person lets his lands for 5 years for 100 Sovereigns the relation of landlord and tenant is created as much as if he got a rent for it by annual or semi-annual payments. I do not think it is necessary for the action of Deasy's Act that the rent should be an annual one. It is sufficient that there be a rent in a bulk sum."

[28] The second qualification concerns the word "sum". For the purposes of Deasy's Act the definition of rent includes not only a sum, if that is to be understood as money, but also a return in the nature of rent, in either event as compensation for the holding, as consideration for the agreement.

Whether the £1 consideration constitutes rent.

[29] The respondent contends that the sum of £1 payable under Clause 3 of the draft lease amounts to "rent". The presence or otherwise of "rent" will not be determined by how the parties elect to describe any payment but by the substance of the arrangement. The provision for two or more payments, fixed or variable, may involve one or more or all the payments representing the rent. In Lloyd v Keys 34 ILTR 149 a dwelling house was demised subject to a fixed sum and an annual sum that reflected the repayments due by the lessor to a third party on a loan to build the dwelling house. Both payments represented rent and the terminable character of one part was found not to be inconsistent with the nature of the true rent.

[30] Deeny J, at paragraph 29 of the judgment of 28 January 2016, rejected the contention that the £1 was part of the rent. He concluded that the £1 was likely to have been included as a precaution to make it clear that there was consideration for the lease, given that the rent calculated under the third schedule was to a greater or lesser degree uncertain.

[31] The draft lease provides that the consideration for the demise is the £1 and the rent reserved. A lease is defined as a contract of tenancy in consideration of a rent or return. Rent includes any sum or any return in the nature of rent given by way of compensation for the holding. There may be a difference between a payment made in consideration of the agreement to demise and a payment made in consideration of the demise and a payment made in consideration of the holding. However, the statutory definitions concern rent as consideration for the contract

(under the definition of lease) and as compensation for the holding (under the definition of rent). The draft lease states that both the £1 and the reserved rent are in consideration of the demise. What is stated to be the reserved rent, if it amounts to rent for the purposes of the statute, will be compensation for the holding. Is there a reason why the £1 should not also be regarded as compensation for the holding? This Court is satisfied that the sum of £1 does not appear to be a sum payable as compensation for the holding of the lands but rather appears to be directed at establishing consideration for the agreement, a matter we do not consider to be necessarily coincidental with rent. If it is not to be compensation for the holding it is not rent.

Whether the reserved rent is sufficiently certain.

[32] Rent must be certain or capable of being reduced to a certainty at the date it is due. The appellant contends that there is no such rent in the present case because the draft lease contains no obligation to install the turbines and thus the reserved rent is potentially nil throughout the term. Under the third Schedule the rent is calculated as a rate applied to the “manufacturers rated installed capacity”. It is therefore not calculated by reference to electricity generated but by the capacity of the equipment installed to generate electricity and to be calculated from the first day of contracted supply. The result may be a potentially nil rent which the appellant contends is not a rent at all under the statute.

[33] In addition, says the appellant, such consideration as is provided for under the draft lease is illusory, relying on *Chitty on Contracts* 32nd Edition, at paragraph 4-025. It is there stated that consideration would be illusory where it was alleged to consist of a promise, the terms of which left performance entirely to the discretion of the promisor. Does that concept translate into a contract for the relationship of landlord and tenant?

[34] In Attorney General for Alberta v Huggard Assets [1953] AC 420 Lord Asquith in the Privy Council posed the question:

“What is an ‘uncertain’ rent? A rent, payable in year one, the amount of which is to depend on events which cannot happen till year three, would seem to be in any sense of the word, ‘uncertain’ and bad. The tenant could never tell till year three how much rent he was liable to pay in year one; consequently, neither he nor his lessor could know for how much, if anything, the latter could in year one distrain. This is an extreme case.

It is said in the present case that the royalty is ‘uncertain’ because its amount depends on the whim, from time to time, of the grantor. It seems doubtful whether this quality is fatal. In this very case, the Charter of 1670 provided for a royalty which in some sense depends on the whim of the grantor, the King. He is to receive two

elks and two black beavers every time he visits the territories in question. No one can tell whether he will visit the territory at all; nor if he does, how often; yet his unpredictable election to visit it never, seldom, or repeatedly determines the number of elks and beavers to be 'yielded up'. In these circumstances their Lordships are not satisfied that this contention is made out."

[35] By the first paragraph above the Privy Council confirmed that the rent must be ascertainable when it is due to be paid. In the example given the rent is "payable" in year one but cannot be ascertained when it is payable. In the present case the reserved rent would be ascertainable when payable as it would be calculated after the end of the relevant year based on the capacity of the installation.

[36] In the second paragraph above the Privy Council stated that it was doubtful that performance resting on the discretion of one party rendered the rent uncertain. The appellant dismisses any comparison between rents in Ireland and a royal entitlement to elks and beavers.

[37] *Woodfall's Law of Landlord and Tenant, Volume 1*, from paragraph 7.024, discusses the requirement for certainty of rent at the date it is due and the degree of certainty required, relying on Attorney General of Alberta v Huggard Assets to state that a rent which depends on the whim of the landlord is not uncertain 'in this sense'. It seems that the concept of illusory consideration that arises where performance depends on the whim of one party does not translate to the relationship of landlord and tenant.

[38] *Woodfall* at paragraph 7.026, under the heading "Variable Rent", states that a rent may be made to vary according to the use which the tenant makes of the holding, citing the example of Daniel v Gracie [1844] 6 QB 145. D took a demise of a house and a marl pit and brick mine to pay quarterly 8d per solid yard for all the marl that he got and 8d per 1000 for all the bricks that he made. The demise did not oblige D to take the marl or make the bricks. Having paid the stated sums for a time he fell into arrears. It was held that the agreement was the demise of the land from year to year at a rent capable of being ascertained with certainty and for which the lessor might distrain. Lord Denman CJ stated: "And the question is, whether in this case rent is reserved for which a distress lies." In answer he quoted Littleton 'It is a maxim in law, that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty' and Coke "The rent must be certain, or which may be reduced to certainty." Lord Denman CJ found the rent reserved in money and capable of being ascertained.

[39] The appellant accepts that Daniel v Gracie concerned rent that could be calculated with certainty within a formula that permitted a nil value, pointing out that, in England, it was possible to create a tenancy with no rent, as for example in Ashburn Anstalt v Arnold [1989] Ch 1. However, the appellant contends that no

relationship of landlord and tenant could be created in Ireland with a nil rent as that would not meet the statutory requirements for rent.

[40] Ashburn Anstalt v Arnold concerned possession of shop premises without payment of rent and while stated to be a licence the arrangement was held to be a tenancy. Fox LJ stated that Lord Templeman's reference in Street v Mountford [1985] 2 All ER 289 to three hallmarks as decisive of a residential tenancy, namely exclusive possession, for a term, at a rent, did not lay down a principle of 'no rent, no lease'. In the first place, it was stated by Fox LJ such a principle would be inconsistent with section 205 (i)(xxvii) of the Law of Property Act 1925 (possession or reversion "whether or not at a rent"). Secondly, it would be inconsistent with prior authority on the fundamental right of a tenant to a legal right of exclusive possession for a term. Statutory provisions in England contribute to the existence of a tenancy in the absence of rent.

[41] The draft lease provides for a sum payable as compensation for the holding of the land. The draft lease is a contract of tenancy in consideration of £1 and the rent reserved. In a case where there is no sum or return reserved as compensation for the holding there is no rent. However, a reserved rent may vary depending on the use made of the land or it may be performance related and nevertheless amount to rent. In the present case there is the restraint of a permitted user but no obligation to undertake that user. If the respondent undertakes the permitted user, the obligation to pay the reserved rent is engaged, varying by the capacity of the installation. The discretion of a party as to performance does not render uncertain the compensation for the holding based on performance. If, where the sum or return depends on performance, there is performance in one year and no performance in the next, it cannot be that the relationship changes character based on actual performance and ceases to be that of landlord and tenant in the year that the calculation of rent results in no sum or return falling due. Actual performance is not what determines the relationship or the nature of the obligation.

[42] The appellant contends that a rent that is calculated at nil cannot constitute a "sum" payable as it does not amount to compensation or consideration. However, there is provision for compensation for the holding and consideration for the tenancy based on the performance and user of the land, ascertainable at the end of each year, sufficiently certain in the absence of an obligation to perform and payable on performance. This Court is satisfied that the draft lease contains arrangements that constitute "rent" for the purposes of the Act.

[43] The argument is not, in reality, about the certainty of the rent because at the conclusion of each year the amount payable for the holding of the lands is capable of being ascertained by reference to the capacity of any installation. Nor is the argument, in reality, about the discretionary nature of the performance, because, as the authorities illustrate, it is not such an uncertainty as to affect the reserved rent. The appellant's argument is, in reality, with the value of the bargain made, which is not a sound defence to the respondent's claim.

[44] In answer to the first preliminary issue this Court is satisfied that the draft lease reserves a rent within the meaning of section 3 of Deasy's Act. Accordingly, the relationship of landlord and tenant arises between the parties for the purposes of Deasy's Act.

The second preliminary issue

[45] The second preliminary issue is whether, if the answer to the first question is in the negative, this means that the draft lease does not (and cannot) give rise to the relationship of landlord and tenant between the plaintiff and the defendant.

[46] In other words, does the absence of rent, contrary to our finding above, prevent the existence of the relationship of landlord and tenant? As the answer to the first preliminary issue was in the affirmative it is not necessary to answer the second and third preliminary issues. However, this Court recognises that the authorities have been divided on whether a rent is required for the relation of landlord and tenant in Ireland.

[47] As to the requirement for rent, Wylie states at paragraph 2.19 that it is probable that the relation of landlord and tenant does not exist in Ireland if no rent or other return in the nature of rent is to be paid or given by the occupier holding under the agreement in question. The dictum of Picket CB in Corrigan v Woods [1867] IR 1CL 73, at 75 that it was perfectly consistent with the relation of landlord and tenant that the tenant should hold rent free, it is said, must be treated with caution, as the case involved an action for use and occupation and Picket CB may have had in mind a tenancy at will.

[48] Reliance was placed on the decision of the Irish Supreme Court in Irish Shell and BP Ltd v Costello Ltd [1981] ILRM 66. A petrol station was operated under an agreement where the operator paid hiring fees for the use of equipment supplied with the premises and the question arose as to whether there was a tenancy under section 3 of Deasy's Act. The majority of the Supreme Court held that the hiring fees were in substance rent and that the agreement did create a relation of landlord and tenant. Kenny J, dissenting on the finding that the hiring fees amounted to rent, stated that the payment of rent is in Ireland an essential for the creation of the relationship of landlord and tenant.

[49] On the other hand, *Hadden and Trimble on Northern Ireland Housing Law*, at paragraph 27, refer to the definition of a lease in Deasy's Act and state:

“But this definition is only for the purposes of that Act. It is still possible to create a lease without a rent, although none of the provisions in Deasy's Act will apply to such a lease.”

[50] However, it appears to be the position in this jurisdiction that certain provisions of Deasy's Act apply to all relationships of landlord and tenant. For example, in Craigdarragh v Doherty [1986] NI 218, in considering section 10 of Deasy's Act in relation to assignments, Murray J stated that "The weight of authority appears to be in favour of saying that a failure to observe section 10 of Deasy's Act renders void the purported assignment."

[51] If the main reasons for the enactment of section 3 were to found the relationship of landlord and tenant in contract and to remove the need for a reversion, as addressed in the first and second elements of section 3, it may be that the statutory requirement for rent can be interpreted as applying in all instances of landlord and tenant just as the requirements as to assignments apply in all instances.

[52] It would also appear to be the case that the differences about the requirement for rent do not necessarily coincide with the differences over the scope of section 3. Wylie, in the footnote to paragraph 2.19, refers to the first instance decision of Deeny J in these proceedings as recognising a rent free lease and then states that Deeny J is following the views of the Northern Ireland Court of Appeal in Todd v Unwin. While Deeny J did follow those views in relation to the scope of section 3 of Deasy's Act, those views of the Court of Appeal did not address the requirement for rent and nor does the presence or absence of any requirement for rent follow necessarily from the views expressed.

[53] While not necessary for this judgment, this Court prefers the view stated in *Wylie* that it is probable that, throughout both jurisdictions in Ireland, the relation of landlord and tenant does not exist if no rent or other return in the nature of rent is to be paid or given by the occupier holding under the agreement in question.

[54] This Court, while preferring to follow the approach already adopted by the Court of Appeal in Todd v Unwin that section 3 is a permissive or enabling provision which extends the situations in which the relationship of landlord and tenant is created and does not purport to define them, nevertheless prefers the view that it is probable that rent is required for the relationship of landlord and tenant.

[55] In answer to the second preliminary issue, if the draft lease does not reserve a rent within the meaning of Deasy's Act, the draft lease cannot give rise to the relationship of landlord and tenant.

The third preliminary issue

[56] If there is no relationship of landlord and tenant is there a contractual licence? The appellant objects to changing the character of the purported agreement if it has failed to achieve its purpose. The respondent refers to the agreement and to consideration and seeks to enforce what has been achieved, even if it has not achieved what was intended.

[57] This Court is satisfied that the draft lease indicates an intention to create legal relations, an agreement in relation to specific lands, consideration for that agreement and, in the assumed absence of a reserved rent, that the agreement amounts to a contractual licence.

[58] In answer to the third preliminary issue, if the draft lease does not give rise to the relationship of landlord and tenant, the draft lease constitutes a contractual licence and the appellant is obliged to grant that contractual licence to the respondent.

[59] In summary the answers to the preliminary issues are as follows –

In answer to the first preliminary issue, this Court is satisfied that the draft lease reserves a rent within the meaning of section 3 of Deasy's Act. Accordingly, the relationship of landlord and tenant arises between the parties for the purposes of Deasy's Act.

In answer to the second preliminary issue, if the draft lease does not reserve a rent within the meaning of Deasy's Act, the draft lease cannot give rise to the relationship of landlord and tenant.

In answer to the third preliminary issue, if the draft lease does not give rise to the relationship of landlord and tenant, the draft lease constitutes a contractual licence and the appellant is obliged to grant that contractual licence to the respondent.