**Neutral Citation No. [2016] NICh 2** | *Ref:* **DEE9848**

*Judgment: approved by the Court for handing down* | *Delivered:* **28/01/2016**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISON**

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**2012/05420**

**NORTHERN IRELAND RENEWABLES LIMITED**

**Plaintiff;**

**-v-**

**HARRY CAREY (No. 2)**

**Defendant.**

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**DEENY J**

**Introduction**

[1] The plaintiff herein issued proceedings against the defendant on 24 September 2012. The principal relief sought with relevance to this judgment was an order for specific performance of a contract made, on the plaintiff's contention, on 1 December 2010. On that date the plaintiff served a notice, pursuant to an option agreement of 5 December 2003 between the parties, requiring the defendant to grant a lease of premises to the plaintiff in the terms set out in a draft lease annexed to the said option agreement.

[2] The option agreement allowed the plaintiff to exercise the option within seven years of 5 December 2003. The plaintiff did so almost at the limit of that period. It contends that that entitles it to a lease of the demised property on the defendant's lands as set out in the agreement and draft lease, on which it may then erect up to four wind turbines and an electricity sub-station with access roads to the same. The turbines are to be erected on the defendant's land at Corkey, County Antrim which, I was told, was some 57 hectares in extent, currently used for grazing sheep.

[3] The defendant refused to enter into the lease of premises as set out in the option agreement or at all.

[4] The plaintiff, on 15 November 2013, issued a summons for summary judgment in connection with this matter. When the matter was case managed before me on 5 December 2013 the view was collectively arrived at that that the matter would be better dealt with by way of an Order 33 summons to resolve one or more preliminary issues of law regarding the interpretation and enforceability of the option agreement and draft lease. In the events it was the defendant which issued that summons. It is clear that summary judgment would not have been granted. The summons was amended on consent and the court was left with three questions for consideration. These were as follows.

(1) Whether the draft lease reserves a rent within the meaning of Section 3 of the Landlord and Tenant Law Amendment (Ireland) Act 1860?

(2) If the answer to (1) 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?

(3) If the answer to (2) 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?.

[5] I heard the matter on 4 March 2014 and gave judgment on 13 May 2014. In that I reached the conclusion in answer to question (2) that the draft lease can and does give rise to the relationship of landlord and tenant between the plaintiff and the defendant, whether or not there is a rent within the meaning of Section 3 of Deasy's Act. In those circumstances I did not reach any concluded view on questions (1) and (3). In any event, counsel for the defendant objected to question (3) on the basis that this had not yet been pleaded by the plaintiff.

[6] The defendant then appealed that decision. Representation on behalf of the parties changed, in part, with Mr Mark Orr QC now leading Mr Mark Reel for the defendant and Mr Nicholas Hanna Q.C. leading Mr Douglas Stevenson for the plaintiff. The written skeleton arguments of counsel before the hearing and before the Court of Appeal led that Court to conclude that they could not properly reach a conclusion on the correctness of my decision in answering (2) without a determination as to question (1). That Court therefore remitted that question back to me on 19 February 2015.

[7] The matter came before me for case management on 4 March 2015. I directed, inter alia, that the defendant should amend its reply to plead its alternative contention of a contractual licence. Regrettably this was not done until October 2015. The matter was heard before me on 6 and 7 January 2016. In the circumstances

Mr Orr QC sensibly consented to the court also determining question (3) although not formally remitted by the Court of Appeal.

**Question (1)**

[8] The parties entered into the option agreement on 5 December 2003. As recorded therein both were advised by solicitors in County Antrim. They are not the solicitors currently acting in the matter for the parties. Section 1 of the Option Agreement has two definitions of particular relevance. "The Turbines" are defined as

> "The wind powered turbines to be constructed on the Option Property of such type, size and construction as the Grantee in its absolute discretion may decide on the exercise of the option PROVIDED THAT each turbine:
>
> (i) Shall not exceed a hub height of 85 metres above ground level.
>
> (ii) The swinging air radius horizontally shall not exceed 45 metres.
>
> (iii) Shall not sterilise more than 650 square metres of land for farming purposes excluding access roads."

[9] In Clause 1 "the Option Property" is defined as "such part or parts of the Owner's Property as the Grantee shall choose in its absolute discretion as sites for the erection of the Turbines ("the Turbine Sites"), such sites not to exceed four in total and each site not to exceed 50 meters [sic] in diameter, and as the site of the Control Unit and Electricity Sub-Station ("the Control Unit and Electricity Sub-Station Site)".

The owner is the defendant and the grantee is the plaintiff.

[10] By virtue of Clause 2 of the Option Agreement the Owner, in consideration of the payment of £1,000, which was paid, "hereby grants to the Grantee during the Option Period the option to call for the grant of the lease of the Option Property …" The option, it is agreed, was validly exercised within the meaning of Clause 3 of the Option Agreement.

[11] Clause 4 of the Option Agreement is labelled' The Contract.'

> "4.1 On the exercise of the option the owner shall deduce a marketable title to the Option Property and

> any dispute as to whether marketable title has been deduced shall be submitted to counsel of not less than ten years standing who shall be appointed by the President for the time being of the Law Society of Northern Ireland whose decision shall be final and binding on the parties.
>
> 4.2 The conditions shall form part of the contract to the extent that they apply to an Agreement for Lease except where they are not consistent with the express terms contained herein."

[12] As I said above the parties accept that the plaintiff's notice exercising the option was validly served. On foot of that the plaintiff therefore maintains that it is in agreement for a lease in the terms of a draft lease exhibited to the Option Agreement. It is in that draft lease that we find the reference to rent which has arisen in this dispute between the parties. At Clause 1.5 of the draft lease 'The Rent' is defined 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 property to be demised by the lease is, it is not disputed, pursuant to the first and second schedules of the draft lease, to be an area not exceeding 650 square metres for the four turbines and the control Unit and Electricity Sub-Station etc. Mr Hanna QC points out that this is a mere 0.11% of the 57 hectare holding. Clause 3 of the draft lease is headed Demise:

> "In consideration of the sum of one pound (£1) (the receipt of which is hereby acknowledged) and the Rent hereby reserved the LANDLORD DEMISES on to the Tenant the Demised Property together with the rights specified in the Second Schedule and the benefits of the restrictive covenants set out in Clause 5 TO HOLD the Demised Property for the duration of the term YIELDING AND PAYING to the Landlord the Rent."

There then follows several pages of tenant's and landlord's covenants and also, at Clause 6, certain provisos to which I will make further reference in due course.

[14] I have already referred to the First Schedule. It is not necessary to address the Second Schedule to the draft lease in detail which sets out the rights included in the Demised Property. The Third Schedule is important as it defines the calculation of rent. In effect this means that the tenant under the lease i.e. the plaintiff grantee

"shall pay the landlord to the rate per year of £2,000 per megawatt of manufacturer's rated installed capacity, from the first day of contracted supply, in arrears."

[15] The essence of the matter is that this rent, while not strictly speaking dependent on the supply of electricity, because it is dependent on the 'installed capacity' once contracted, is only payable if the plaintiff erects one or more wind turbines and contracts to supply such installed capacity. No minimum periodic figure is fixed in the option agreement or the draft lease.

[16] Furthermore, and importantly, the draft lease does not impose a duty on the plaintiff to erect wind turbines at all, even if it exercised the option, either within a specified time or at any time. The plaintiff, therefore, could enjoy the lease for the term of 25 years without building a single wind turbine and, therefore, without paying a penny in rent to the defendant. Furthermore he has a right to renew the lease for a further 25 years at the conclusion of the first period. His counsel submitted that there was therefore no rent, properly defined, payable under the lease within the meaning of Section 3 of Deasy's Act.

[17] The court had the assistance of written and oral submissions from counsel for both parties. Without expressly referring to them I have taken them all into account in my consideration of the issues below.

[18] Mr Hanna QC for the plaintiff addressed the Option Agreement, the provisions in Deasy's Act to which I will turn, United Scientific Holdings Limited v Burnley Borough Council [1978] AC 904; Bruton v London and Quadrant Housing Trust [2000] 1 AC 406; Haigh v Brookes [1839] 10 A@E 309, 320; Royal Philanthropic Society v County [1986] 18 HLC 83; Daniel v Gracie [1844] 6 QB 145; Attorney General for Ontario v Canadian Niagara Power Company [1912] QC 852; Walsh v Lonsdale [1882] 21 ChD 9; Crane v Knockton [1912] IR 318, 325; M'Areavy v Hannon [1862] CLR 70 and in his reply, Coal Commission v Earl Fitzwilliams Royalties Company [1942] Ch 365.

[19] In his response Mr Orr dealt with these authorities where necessary and also cited Attorney General of Alberta v Huggard Assets Limited et al [1953] AC 420; [1953] 2 AER 951. Mr Orr also relied on Chitty on Contracts 31st Edition 5.025, now 32nd Edition 4.025 and on Wylie, Law of Landlord and Tenant 3rd Edition 2.19 in which reference is made to my earlier decision in this case Northern Ireland Renewables Limited v Harry Carey [2014] NICh 15. Counsel also referred to Stabalad [1999] 2 All ER Comm. 65 and to CH Bailey Limited v Memorial Enterprises Limited [1974] 1 WLR 728.

**The Law**

[20] It is appropriate to consider the approach the court should adopt in its consideration of the two questions before it. The first clearly involves the interpretation by the court of the contract made between the parties by way of

option agreement in 2003, albeit in the light of the provisions of Deasy's Act. I take into account the following passage from Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 912g:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact" but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear but this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investments Co Ltd v Eagle Star Life Insurance Ltd [1997] Appeal Cases 749)."

[21] I also take into account the judgment of the Court of Appeal in England in CH Bailey Ltd v Memorial Enterprises Ltd [1974] 1 WLR 728, which has been cited with approval. It was dealing with the issue of a rent in an office building at page 731 Lord Denning expressed the view as follows:

> "It is time to get away from the medieval concept of rent. That appears from a passage in Holsworth, a History of English Law, Vol VII (1900, p.262), which was referred to by Evershed L.A.J in Property Holding Company Limited v Clarke [1948] 1 KB 630-648:
>
> > "… in modern law, rent is not conceived of as a thing, but rather as a payment which a tenant is bound by his contract to make to his landlord for the use of the land."
>
> The time and manner of the payment is to be ascertained according to the true construction of the contract, and not by reference to outdated relics of medieval law. So I think these rent reviews clauses are to be construed according to their natural meaning."

[22] Megaw LJ agreed as did the third member of the court, Sir Eric Sachs, who said the following at page 735:

> "The objective of the courts in a case relating to office leases is naturally to determine the intended commercial effect of the particular agreement reached between the parties. In this respect a lease is no less a contract relating to the use of premises than an agreement in relation to the supply of furniture for those premises is also a contract. It follows to my mind that the court should in this class of case avoid resort, so far as practicable, to any of the highly technical points that stemmed from the intricacies of the ancient law of landlord and tenant. As the construction of each relevant lease depends on its own particular words, it would normally suffice for me to say that I am in complete agreement with what has fallen from Lord Denning M.R. and Megaw LJ."

But Sir Eric went on to say more as he was differing from the trial judge and from Pennycuick V-C:

> "With very real respect to those two judges, it yet seems to me that, whatever the position last century, the word "rent" today can often simply refer to any contractual

> sum to which a landlord becomes entitled for the use of his land."

[23] In his judgment Lord Denning returned to the doctrine of equitable estoppel which he had developed in our law. He envisaged that delay on the part of a landlord which prejudiced the tenant might well allow the tenant to "pray in aid the principle of equitable estoppel" ( 732 G).

[24] I observe that if Mr Carey, either of his own motion or pursuant to an order of the court, allowed the plaintiff access to the land and years went by without him ever building a turbine it might conceivably be unconscionable for the plaintiff to seek to enforce the terms of the lease and the defendant could rely on the doctrine of equitable estoppel but that is not on a matter on which I need express any further opinion at this time.

**Consideration**

[25] At the hearing before me earlier this month plaintiff's counsel went first, without dissent from Mr Orr, but as it is the defendant's summons and for convenience I propose to address the defendant's principal submissions and arguments in favour of their contention and to do so seriatim.

[26] It is the defendant's contention that the only "rent" under the option agreement and draft lease is the potential periodic payment of £2,000 per megawatt of manufacturer's rated installed capacity arising from clause 1.5, clause 3 and the 3rd Schedule of the draft lease. Mr Hanna sought to argue that the £1 mentioned in clause 3 was also part of the rent of the property. Indeed, he sought to draw an analogy between it and the judgment of Gibson J in Crane v Knockton op. cit. In that case the judge held that a rent of 100 guineas paid in advance for 5 years tenancy was the same as 20 guineas paid in each year. In my view that is utterly different from the position here. Clause 3 of the draft lease clearly recites that:

> "In consideration of the sum of one pound (£1) (the receipt of which is hereby acknowledged) and the Rent hereby reserved the landlord demises …YIELDING AND PAYING to the Landlord the Rent."

[28] There is a clear distinction there between the one pound, which is consideration and the Rent which is rent. The syntax is disjunctive. When I made this point to Mr Hanna he sought to argue that there were two Rents, a Rent and a rent which included the one pound. However, Mr Orr pointed out that under clause 1.5 of the same document the clause begins "The Rent" and goes on to interpret it as "The rent reserved by Clause 3 of this lease …" Therefore, whether rent is referred to with a capital R or a lower case R is irrelevant, as one might expect. Clearly there is only one rent and it is the rent to be calculated under the third schedule. This is borne out by the concluding words of cl. 3 above. Mr Orr further pointed out that

this idea that the one pound was part of the rent was not argued initially by the plaintiff at the previous hearing but was only introduced in a more recent skeleton argument. A single pond paid at the start is not the same as a peppercorn paid annually. The latter is an acknowledgement that the grantee does not hold outright. (Authorial underlining throughout)

[29] It seems to me that the significance of the one pound is quite different from that submitted by the plaintiff. It is likely to have been put in as a precaution by the plaintiff's solicitors to make it clear that there was consideration for the lease, given that the rent calculated under the 3rd Schedule was indeed to a greater or lesser degree uncertain as the defendant contends. That is what the opening words of cl.3 say. They indicate the intention of the parties, who were both advised by solicitors when these documents were being prepared, that there was to be a legally binding agreement, which any lawyer would know requires consideration. However, I reject the plaintiff's contention that part of the rent, as opposed to the consideration, was the one pound.

[30] The defendant then argues that the rent defined under Clause 1.5 and the 3rd Schedule is an amount that may never be paid at any time to the defendant. It is valid to submit that, as the lease omits any obligation on the plaintiff to pay a minimum sum per annum once it has exercised its option under the option agreement of 2003. It also omits, in the alternative, to place an obligation on the plaintiff to install a minimum capacity, either by a fixed date or at all. Clearly this is an agreement which the defendant now regrets. It may well be that he was ill-advised to enter into it but that is not something on which I have to rule in this case. The issue is whether the degree of uncertainty, in the surrounding factual matrix, is such as to mean that this is not "rent" at all within the meaning of Deasy's Act. The defendant argues that for rent one needs a sum of money (or payment in kind although that does not arise here) that is <u>certain or capable of being certain,</u> citing Woodfall, Law of Landlord and Tenant, Volume 1, paragraphs 7.024 and 7.04. The defendant's difficulty is that the Rent payable under this draft lease <u>is</u> "capable of being made certain". It is entirely certain if the plaintiff was permitted to and did proceed to build one or more turbines with installed capacity and contracted supply.

[31] The defendant relied in support of its submission on <u>Attorney General for Alberta</u> v <u>Huggard Assets Limited</u> op.cit. This was a case relating to royalties in respect of petroleum and natural gas extraction in the province of Alberta in Canada. The factual matrix is very different from that in the instant case. The judgment of their Lordships was delivered by Lord Asquith of Bishopstone and commences at 436. The relevant passage is to be found at page 440. I shall set it out in full.

> "Their Lordships … do not consider that the first of the arguments in question is established. There may well be an analogy between royalties in respect of a grant, and rent in respect of a lease, and it may well be that rents must be in some sense of the word "certain". But what

> does "certain" mean in this connection? What is an "uncertain" rent? A rent, payable in year 1, the amount of which is to depend on events which cannot happen until year 3, would seem to be in any sense of the word, "uncertain" and bad. The tenant could never tell until year 3 how much rent he was liable to pay in year 1; consequently, neither he nor his lesser could know for how much, if anything, the latter could in year 1 distrain. This is an extreme case. Short of it, it is clear that a fluctuating rent is not as such necessarily "uncertain" – certainly not if it is mathematically calculable, so as to attract the operation of the maximum "certum est quod certum reddi potest". The only decided case cited to the Board in which a rent was held "uncertain" is the old case of Parker v Harris [1692] 1 SALK 262, the report of which is both laconic and obscure. It would seem that what was "uncertain" there was not the quantum of the rent but the times at which it was to be payable. 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."

[32] It can be seen that the suggestion that a rent payable in year 1 which depended on events which could not happen until year 3 being 'bad' is of assistance to the defendant here. But His Lordship's phrase, clearly obiter in this context, must be put in the context of his remarks that rents "must be in some sense of the word 'certain'". He does not consider that an uncertain rent is necessarily fatal. He considers a fluctuating rent is not necessarily "uncertain". So this citation is something of a curate's egg from the point of view of the parties here but in any event is not binding on me as an obiter dictum in a Privy Council case and evoked by quite different facts.

[33] The case of Daniel v Gracie [1844] 6 QB 145 was cited to the Privy Council. In that case the proprietor of a house and of a marl pit and brick mine demised the house by unwritten agreement to a tenant. It was at the same time agreed, without writing that the tenant would take the marl pit and the brick mine and pay quarterly 8 pence for every solid yard of marl that he got and 1 shilling and 8 pence per thousand for all the bricks that he made. The tenant took the marl and made bricks accordingly for a period of time and paid the sums but afterwards ceased to do so. On appeal from Assizes Lord Denman CJ, with Patteson, Williams and Wightman JJ held as follows at [152]:

> "It appeared that these pits or mines, near to a house of Creswell occupied by the plaintiff (for the rent of which a distress was put in, but about which there was no

> question), were in work before they were taken by the plaintiff. And the question is, whether in this case rent is reserved for which a distress lies. That land was the subject of demise, was, we believe, hardly questioned in the argument. Indeed, from the nature of the thing, the work on the mines or pits could not be prosecuted by the plaintiff at all without taking land in proportion to the extent of the operation.
>
> Now, upon the principal question we find in Co.Litt 96 the following passage:
>
> > "It is a maxim of law, that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty; for, id certum est quod certum reddi potest; and upon the avowry, damages cannot be recovered from that which neither had certainty nor can be reduced to any certainty. And yet in some cases there may be a certainty and uncertainty; as a man may hold of his lord to sheer all the sheep, depasteuring within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this uncertainty being referred to the manor which is certain, the lord may distrain for this uncertainty. Et sic de similibus."

[34] And again at page 142(a) Coke C.J., in commenting upon the expression "certain rent" in the text of Littleton, observes, "the rent must be certain, or which may be reduced to a certainty; for id certum" etc. And the rent may as well be in delivery of hens, capons, roses, spurs, bowls, shafts etc or other profit that lieth in render, office, attendance, and such like, as in payment of monies."

[35] One therefore has the high authority of Coke and this appellate decision of 1844 for two propositions. Firstly, as summarised by Woodfall, that rent should be certain or capable of being made certain – "reduce to a certainty". Or as Lord Denman elsewhere says: "capable of being ascertained." That would seem to accommodate what had been agreed here.

[36] Secondly, the plaintiff argues that this is expressive of what the common law was prior to the passing of Deasy's Act. No contrary case, Irish or English has been

identified. So unless Deasy's Act amended the meaning of rent within that statute the word rent clearly includes something 'capable of being ascertained'.

[37] Another relevant point advanced by counsel, from Chitty on Contracts, 31st Ed., v.1, 3.025 is that consideration would be illusory if it was to consist of a discretionary promise i.e. the terms of which left performance entirely to the discretion of the promisor. A person does not provide consideration by promising to do something "if I feel like it", or "unless I change my mind". Mr Orr argues that if that is true for consideration in general it must be so, a fortiori, for rent. I am not at all sure that that is something which inevitably follows but, in any event, there is a qualification which is of relevance here. As the learned authors acknowledge the Court of Appeal in England in Stabilad op.cit., at page 660, per Peter Gibson LJ, with whom Ward and Chadwick LJJ agreed, having quoted the 27th Edition of Chitty to like effect, went on:

> "In the latter paragraph it is pointed out that a promise, the terms of which leave performance entirely to the discretion of the promisor will not be enforceable, the consideration being illusory. In contrast, if the promisor choses to perform, the actual performance will constitute consideration. See also Graham v Pitkin [1992] 2 All ER 235 at 27, [1992] 1 WLR 4384 at 6 where the Privy Council, commenting on Lee-Parker v Izzet doubted the finding that there was no contract in that case, because the purchaser could always have decided that the mortgage was satisfactory and proceed. So, in my judgment, in the present case there was no satisfaction of the condition precedent in clause 8 unless and until S&C communicated to Stabilad its intention to go ahead whether by declaring that the evaluation was complete or by paying the money required by Clause 4 or by signing the further agreements contemplated." (Authorial underlining).

[38] In the present case Mr Carey has declined to enter into the draft lease or to admit the plaintiff company onto his lands. The plaintiff therefore has had no opportunity to demonstrate his good intent. To put it another way he has had no opportunity to convert his discretionary promise into actual performance which would undoubtedly constitute consideration. In any event, as I pointed out above, there is a distinction between consideration and rent although both counsel in different ways were inclined to equate the two. There must be consideration for a contract to be legally binding. Whether or not there is a rent under a lease is not the same thing.

[39] As cited above such contracts should be read in their natural and ordinary meaning. The meaning of rent, for example, in Chambers' English Dictionary is:

> "Periodical payment for use of another's property, especially houses and lands: revenue."

In this particular case I am asked, of course, whether this is rent within the meaning of Deasy's Act.

[40] In support of his case Mr Orr pointed to the onerous covenants by which the landlord, ie the defendant, would be bound if he is obliged to grant and adhere to the terms of this draft lease. Clause 5 of the draft lease contains no less than 15 covenants imposed upon him. Furthermore, he is affected by a number of the subsequent 9 provisos at clause 6 of the draft lease. He submits that the landlord's land is sterilised for up to 50 years without any certainty at all that he will receive a penny in rent. In effect he argues that that cannot have been the intention of the parties.

[41] This is a strong point which needs careful consideration. Firstly, on examination one finds that the restrictive covenants largely relate to "the demised property". That is elsewhere defined as the site of 4 turbines and the control unit and electricity substation amounting in all to a maximum of 650 square metres in a property of 57 hectares, 0.11% in the plaintiff's calculation. Some of these covenants will not apply in any event if the plaintiff does not in fact build on the property. Mr Orr pointed to clause 5.6 as a restriction on his ability to sell the property. But the restriction is merely to obtain a covenant from the proposed purchaser allowing a use "similar to the wind power project during the term".

[42] It is true that the landlord is not permitted to use the development area for sporting purposes pursuant to clause 6.3. This would seem a fair point except that the use of the land has not been for sporting purposes but for raising sheep, which is expressly reserved to the landlord under proviso 6.2. Possibly the strongest point in favour of the defendant is under 6.6 where, counsel submits, he would be obliged to renew this onerous and unrewarding lease of 25 years for a further 25 years if the plaintiff so desired. However, it is necessary to set out that clause in full to address this submission. It reads as follows:

> "If the tenant wishes to renew the Lease it shall give to the Landlord not more than 12 and not less than 6 months' notice in writing before the expiry of the Term and upon receipt of same the Landlord shall renew the Lease for a term of 25 years PROVIDED THAT during the term the tenant shall have paid the Rent promptly and shall have met its obligations under this lease to the reasonable satisfaction of the landlord."

It seems to me therefore that the right to review and extend the lease is only if the tenant has "paid the rent promptly". How can he claim that if he has not paid any rent at all? And see my observation about equitable estoppel at [24] above.

[43] Mr Orr also relied on the most recent, 3rd, Edition of Wylie, Law of Landlord and Tenant in Ireland, at paragraph 2.19. There the learned editors repeated their earlier view that it was probable that there was no relationship of landlord and tenant "in Ireland" if there was no rent. However, in a footnote they cite my earlier judgment in this case as authority for a different conclusion in Northern Ireland. It is clear from that and from the preface to the work that they are referring to the other jurisdiction in this island rather than Ireland as a whole. Furthermore, again this is something of a double-edged sword for the defendant because the learned editors disclose that a Bill had been drafted in the Republic in 2011 to clarify this very point, which might be thought to imply that there was uncertainty as to the true view of the position. Apparently the relevant clause was "an obligation to pay rent is necessary in all cases for creation of a tenancy". As the text book was published in 2014 it would appear that the Oireachtas declined to pass that Bill, or at least that provision, into law in the previous three years.

**Conclusion**

[44] It can be seen that the defendant has points of substance in this matter but that there are answers, to a greater or a lesser extent, to those submissions. In any event it seems to me that there are further factors which allow me to reach a clear conclusion on the issue before me. That question, for convenience, is "whether the draft lease reserves a rent within the meaning of Section 3 of the Landlord and Tenant Law Amendment Act (Ireland) 1860?" If one looks at Section 3 of the Act as set out above in this judgment, it is clear that one must seek the definitions in Section 1 dealing with the interpretation of terms. Section 1 has two relevant passages.

> "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."

Pausing there, a lease within the meaning of Deasy's Act can be established without a rent if there is a "return". That would appear to offer an alternative ground both for answering question 1 and question 2 as the plaintiff would wish.

[45] Section 1 goes on:

> "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."

In my view that is a wide definition. The use of the word "include" points to that. The use of the phrase "any sum or return in the nature of rent" points to that. The word "payable" includes in its ordinary meaning "that may or should be paid" per Chambers' English Dictionary.

[46] The Rent in this lease, meaning the £2,000 per year per megawatt of installed capacity, would in my view be payable "by way of compensation for the holding of any lands" ie the 650 square metres of demised property. It is true that there would be access roads in addition to that but that is likely to be an element of betterment to the lands rather than a detriment to the defendant.

[47] It does not seem to me that the definition of rent in the lease is incompatible with the definition in the Act. Furthermore, I have already held in my earlier judgment that this Act is permissive in nature. It was to address the situation of middlemen who held land but were not reversioners. There is nothing before me to suggest any intention on the part of Parliament to cut down or restrict the meaning of rent.

[48] The only authority before me on the issue of rent before the Act is the English case of Daniel v Grace op. cit. which included rent which might never be paid and after a while was not paid.

[49] I have already quoted above the leading case in the United Kingdom on contractual interpretation. One must seek the intention of the parties. This was an agreement not made casually between two laymen but entered into by two parties with the assistance of solicitors, albeit not, perhaps, specialist commercial solicitors. The intention of the parties is to be found in their agreement. They themselves refer to the £2,000 sterling per megawatt of installed capacity as "the Rent". Given that I have found that a definition which covers this uncertain and only possible periodic payment is not inconsistent with Section 1 and Section 3 of Deasy's Act I, therefore, conclude that the draft lease does indeed reserve a rent within the meaning of the Landlord and Tenant Law Amendment Act (Ireland) 1860.

[50] Question 3, which I mentioned at the beginning I will rule on out of caution, reads as follows:

> "If the answer to question 2 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?"

This therefore deals with the situation where either I had arrived at a different decision following question 2 than the one I did or another court concludes that I am in error in my answers to the two questions. It is a familiar issue on the cases as to whether a relationship between an occupier of property and the owner of the property constitutes a licence or a lease. It is undoubtedly the case that there was consideration here for the option agreement entered into between the parties. It is not in dispute that a valid notice was served under the option agreement. It seems to me that if, for whatever reason, the plaintiff were not entitled to specific performance of the agreement requiring a lease it is entitled to a contractual licence

and I so find, having taken into account the respective submissions of counsel for the plaintiff and the defendant.