Approved – no redactions required

THE COURT OF APPEAL

CIVIL

Record Number: 2019/405

High Court Record Numbers: 2018/2349P

2018/61COM

Neutral Citation Number [2024] IECA 41

Collins J

Haughton J

Pilkington J

BETWEEN/

DUBLIN PORT COMPANY

Plaintiff/Respondent

AND

AUTOMATION TRANSPORT LIMITED

Defendant/Appellant

JOINT JUDGMENT of Mr Justice Maurice Collins and Mr Justice Robert Haughton

delivered on 31 January 2024

PRELIMINARY

1. This is an appeal by Automation Transport Limited ("*ATL*") from the judgment of the High Court ([2019] IEHC 499, McDonald J.) given on 9 July 2019, and from those parts of his order dated 26 July 2019 whereby he ordered ATL to deliver up possession of premises at Promenade Road, Dublin 1 ("*the Promenade Road Premises*") comprising 0.821 hectares the subject of an Indenture of Lease between Dublin Port Company ("*DPC*") and ATL dated 11 February 2013 ("*the Lease*"), and whereby he dismissed ATL's counter claim for a declaration that it is entitled to a new tenancy in the Promenade Road Premises pursuant to Part II of the Landlord and Tenant (Amendment) Act 1980 (as amended) ("*the 1980 Act*") and for damages.

2. McDonald J found that DPC had lawfully terminated the Lease by serving a break notice on 10 February 2018 ("*the Break Notice*") and that DPC was entitled to rely on a Deed of Renunciation dated 12 November 2012 ("*the Renunciation*"), whereby ATL purportedly renounced all rights to a new tenancy, in order to deny ATL's claim to a new tenancy under Part II of the 1980 Act.

3. Central to this appeal is the validity and effect of that Renunciation which contained errors such that certain words and phrases bore no relation to the Promenade Road Premises. However, the High Court Judge considered that "*the doctrine of rectification by construction*" – as explained by Lord Hoffmann in *Chartbrook Limited v Persimmon Homes Limited* [2009] 1 AC 1101 ("*Chartbrook*") and approved and applied in this jurisdiction in *Moorview Developments Limited v First Active plc* [2010] IEHC 275 ("*Moorview*") – applied and held

accordingly that the mistakes in the Renunciation could be corrected by construction such as to render it valid and effective. That holding is the subject of challenge by ATL in its appeal.

4. DPC cross-appeals from the Judge's rejection of its alternative claim to enforce Clause 4.35 of the Lease, by which ATL covenanted to execute a Deed of Renunciation waiving any landlord and tenant renewal rights it might acquire in relation to the Promenade Road Premises. The Judge considered that Clause 4.35 was caught by Section 85(1) of the 1980 Act which had the effect of rendering the covenant void as a provision in a contract which had the effect of excluding the application of the 1980 Act. Another issue that arises on DPC's cross-appeal is whether ATL is estopped from asserting a right to a new tenancy having regard to the fact that it agreed to Clause 4.35.

5. A second set of proceedings, High Court Record Number 2018 No. 9972P, was heard by McDonald J. In those proceedings DPC's principal claim related to alleged breaches of covenant by ATL for failure to repair and to maintain the concrete surface of the yard of the Promenade Road Premises and alleged breach of user covenant in engaging in the processing or production of plastics, contrary to the terms of the Lease. DPC sought interlocutory injunctions (not pursued at trial) and damages. These claims were dismissed in the High Court, and there was no appeal from the relevant part of the judgment or order.

6. The Judge made no order as to costs.

7. By the time this appeal came on for hearing, ATL had vacated the Promenade Road Premises and no longer seeks to be restored to possession of those Premises, or a new tenancy in respect thereof, but is seeking damages on its counter claim.

BACKGROUND

8. DPC is a significant landlord in Dublin Port, and during the relevant period was seeking to prioritise the use of lands within the port for what it considered to be core port uses.

9. ATL operated a road haulage business from various premises within Dublin Port for a significant number of years. As of February 2018 it had 19 employees, 12 tractor units, 40 trailers, 2 forklifts and a lift truck. Its principal activity consisted of importing intermodal bulk material from the port to customers. Mr Simon Crosbie ("*Mr Crosbie Junior*"), a director, gave evidence in the High Court on behalf of ATL, and explained that the principal customers of ATL were those involved in continuous process industry and ATL had to be in a position to supply material as and when they were required for use in the industrial process in question. Prior to the execution of the Lease, ATL had been in occupation of part of a site on Tolka Quay Road, which is also within the Dublin Port.

10. The Tolka Quay Road premises (along with premises on the same road known as Tolka Quay Road Extension premises, and also a premises on Bond Road known as the State Warehouse) – part of which were occupied by ATL under sub-lease - were the subject of negotiations between DPC and Mr Henry A (Harry) Crosbie ("*Mr Crosbie Senior*" – the father of Mr Simon Crosbie) and two companies controlled by him, namely Henry A. Crosbie (Containers) Ltd and Storecon Limited. DPC wished to acquire these premises, which were held under leases by Mr Crosbie Senior and his companies. At this time – mid to late 2012 – Mr Crosbie Senior was, as part of his arrangements with the National Asset Management Agency (NAMA) involved in the disposal of his interests in a number of different properties.

11. Following negotiations involving Mr Crosbie Senior, NAMA and DPC, an agreement was reached on 17 September 2012 under which Mr Crosbie Senior and the two companies referred to above agreed to sell to DPC the three premises comprising the Tolka Quay Road premises for €5 million ("*the Contract for Sale*"). Mr Crosbie Senior was concerned to ensure that the business of ATL (which was run by his son) would continue to serve its customers from premises within Dublin Port, and consequently it was agreed in the Contract for Sale that arrangements would be made to allow ATL to remain on the Tolka Quay Road premises then occupied by it under licence until new premises – namely the Promenade Road Premises – became available. While the agreed Closing Date was 3 October 2012, it appears that the Contract for Sale was not in fact completed, in terms of the execution of documents, until 12 November 2012.

12. Although it was not a party to the Contract for Sale, ATL (referred to in the Contract as "*Automation*") was the subject of Special Condition 6. As this Special Condition has some bearing on the issues to be decided on this appeal it is appropriate to quote the relevant parts:

> *"Automation*
>
> *6.1(a) The Vendor shall procure that on the Closing Date Automation shall execute a deed of surrender of its sub-leasehold interest in the part of the Tolka Quay Road Premises currently occupied by Automation Transport Limited ("Automation") although there is no formal agreement in place with the Vendor. On the Closing Date Automation shall execute the Automation Renunciation (in respect of any rights which*

it might have acquired) and shall be granted by the Purchaser [DPC] a three month licence to occupy that part of the Tolka Quay Road Premises currently occupied by it in the form of the Automation Licence. On or before the expiration of the Automation Licence, Automation shall vacate the Tolka Quay Road Premises and deliver full vacant possession thereof to the Purchaser.

(b) On the Closing Date the Purchaser shall retain the sum of €20,000 from the Purchase Price which sum shall be payable to the Vendor when Automation fully vacates the Tolka Quay Road Premises in accordance with the terms of this Contract and the terms of the Automation Licence.

6.2(a) The Purchaser hereby agrees that upon expiration of the Automation Licence and on the vacation of the Tolka Quay Road Premises by Automation, the Purchaser shall immediately grant to Automation a lease of a new site (hereinafter called the "New Site") in the form of the New Site Lease.

(b) The Purchaser shall contribute a maximum sum of €100,000 (the "Works Contribution") to costs to be incurred by Automation in refurbishing the New Site and the buildings currently standing thereon. …

…

6.3 On the expiry of the Automation Licence the Vendor will deliver up possession of the Tolka Quay Road Premises to the Purchaser."

13. In the normal way the Contract for Sale set out under "*Particulars and Tenure*" the Title to be delivered in respect of the Storecon Lease, the Bond Road Lease and the Tolka Quay Road Lease, and in the Documents Schedule set out the documents to be delivered to support the Title in respect of each of those leaseholds. In addition, the Documents Schedule set out the following:

> *"4. Miscellaneous*
>
> *4.1 Form of Licence to Automation Transport Limited ("Automation Licence");*
>
> *4.2 Form of Automation Renunciation Deed ("Automation Renunciation");*
>
> *4.3 Form of Lease of New Site to Automation ("New Site Lease");*
>
> *4.4 Form of Storecon Renunciation Deed ("Storecon Renunciation");*
>
> *4.5 Form of Licence to Storecon Limited ("Storecon Licence");"*

14. The Contract for Sale included at Special Condition 34 an "*Entire Agreement*" clause with typical wording excluding any reliance by DPC on any pre-contract representations or negotiations and confirming that the Contract comprised the entire contract and superseded any other alleged contract.

15. As it will be relevant to the discussion later in this Judgment, it appears appropriate to make certain observations on the terms of the Contract for Sale at this stage.

16. Firstly, on the face of the Contract for Sale it did not impose a contractual obligation on the Vendor (Mr Crosbie Senior and his companies) or on ATL (which, as already noted, was not a party to the Contract for Sale) to execute any Deed of Renunciation rights in respect of the

"*New Site Lease*" (later to become the Lease of the Promenade Road Premises) which DPC agreed under Special Condition 6.2 (a) to grant to ATL. However, as appears below, the draft "*New Site Lease*" (and the Lease as executed) did include in Clause 4.35 a covenant on the part of ATL to execute such a Deed.

17. However, in the High Court, based on evidence given by Mr Martin Colman, who was at the time of the transaction a solicitor in Arthur Cox (the firm retained by DPC in relation to the transaction) and based on certain emails passing between McCann Fitzgerald (the solicitors acting for NAMA) and Arthur Cox in relation to the drafting of the Contract for Sale, [1] it was argued on behalf of DPC that the "*Automation Renunciation*" referred at paragraph 4.2 of the Documents Schedule referred to a renunciation in respect of the Promenade Road Premises, and that this was one of three deeds of renunciation required to complete the wider transaction (the other two being a renunciation by ATL in respect of the temporary licence to be granted to it in respect of the Tolka Quay Road premises, and a renunciation by Storecon Ltd in respect of the twelve month licence to be granted to it under Special Condition 7 in respect of the Tolka Quay Road premises). An argument to this effect was also made before this Court. The argument appears to have found favour with the High Court Judge, who refers at paragraph

[1] In particular an email of 14 August 2012 Martin Colman to Majella Egan, McCann Fitzgerald; an email of Majella Egan to Martina Firbank (another solicitor in Arthur Cox) of 13 September 2012; and two emails of 17 September 2012, both pre-finalisation of the text of the Contract for Sale, which was signed later that day. In the first of these Mr Colman informed Ms. Egan that he had made two amendments to the Contract for Sale, the first to insert a closing date of 3 October 2012, and the second: *"2. The reference to the new site lease Deed of Renunciation has been omitted in the document schedule miscellaneous and I have inserted same. You will note that there is provision for same with the new site lease. However, you night confirm same to be in order.*" In the second email Ms. Egan responded: "*I confirm that those amendments are in order. I have received the contract from your client and I've sent them to William Fry by courier.*"

34 of his judgment to Mr Colman's evidence, including his evidence as to his dealings with Ms Egan in McCann FitzGerald, and a '*Completion List*' prepared by McCann Fitzgerald in which Mr Colman highlighted item 47, "*Executed Deed of Renunciation re Lease*", which he said in his evidence related to the Promenade Road Premises (although in the list it comes under a heading "*Completion List – Tolka Quay Road*"), and which he said was borne out by words which he wrote at the end of the '*Completion List'* which include item 52. "*Copy renunciations x 3*".

18. Here it may be observed that the wording of the Contract for Sale is such that, on its face, the "*Automation Renunciation*" referred to at Miscellaneous 4.2 related to any rights that ATL might have acquired in that part of the *Tolka Quay Road premises* occupied by it. This follows from Special Condition 6.1(a), quoted above, which relates to those premises, and which refers to ATL executing on the Closing Date "*the Automation Renunciation (in respect of any rights which it might have acquired)…*" (our emphasis). On its plain and ordinary meaning, the phrase "*have acquired"* in Special Condition 6.1(a) can only be construed as referring to any rights ATL might have acquired arising from its occupation of part of the Tolka Quay Road premises which it occupied on 12 November 2012 and continued to occupy (under temporary licence) up until 11 February 2013 when it vacated that premises and commenced occupation of the Promenade Road Premises under the Lease.

19. This prompted ATL to question whether the reference to "*Automation Renunciation*" at Miscellaneous 4.2 could ever have referred to the Promenade Road Premises. ATL raise the further issue – particularly in light of the '*Entire Agreement*' clause in the Contract for Sale - as to whether DPC was entitled to rely on the evidence of Mr Colman and/or on the pre-

contract email exchanges to suggest something contrary to what is stated in the Contract for Sale, and in turn to rely on this as evidence of the context in which the purported Deed of Renunciation was signed, and to rely on it support DPC's invitation to the court to correct mistakes in the Deed of Renunciation by construction.

20. Secondly, it is apparent from Special Condition 7, relating to Storecon Limited, that the "*Storecon Renunciation*" listed at Miscellaneous 4.4. related to any rights that that company might acquire in that part of the Tolka Quay Road premises occupied by it during the period of the licence of 12 months to be granted pursuant to that special condition. Whatever else may be said, it cannot have related to the Promenade Road Premises.

21. In any event, it was common case that Clause 4.35 of the draft New Site Lease (which also appeared in the Lease as executed) contained the following covenant on the part of ATL:

> "*The Tenant shall execute a Deed of Renunciation waiving any renewal rights past, present or future, previously acquired or which may be acquired in accordance with s. 47 of the Civil Law (Miscellaneous Provisions) Act, 2008*".

22. We should explain here Part II of the 1980 Act gives a tenant the right to a new tenancy in certain circumstances, including where the qualifying premises (referred in the Act as a "*tenement*") was, for a period of 5 years, continuously in the occupation of the tenant and *bona fide* used wholly or partly for the purpose of carrying on a business (section 13(1)(a) of the 1980 Act). However, section 17 of the Act then sets out a number of circumstances in which the right to a new tenancy will be excluded. Section 17(1)(a)(iiia) (amended by substitution

by section 47 of the Civil Law (Miscellaneous Provisions) Act 2008) applies specifically to a tenancy within section 13(1)(a) and provides that:

> *"(iiia) if section13(1)(a) (as amended by section 3 of the Landlord and Tenant (Amendment) Act 1994) applies to the tenement, the tenant has renounced in writing, whether for or without valuable consideration, his or her entitlement to a new tenancy in the tenement and has received independent legal advice in relation to the renunciation…"*

Strictly speaking, Clause 4.35 ought to have referred to section 17(1)(a)(iiia) of the 1980 Act rather than to section 47 of the Civil Law (Miscellaneous Provisions) Act 2008 but nothing turns on that point.

23. It is on the basis of section 17(1)(a)(iiia) that, if there was a valid renunciation, any right to a new tenancy that ATL may otherwise have had in relation to the Promenade Road Premises was liable to be defeated.

24. The evidence of Mr Colman was that the documentation required to be executed by the vendor in order to complete the Contract for Sale was executed in the office of William Fry, solicitors for the vendor, on 12 November 2012, although the Lease which was executed then (by ATL – it was countersigned later by DPC) was subsequently dated 11 February 2013.[2]

[2] Transcript, Day 5, Page 72 (lines 8-17), where Mr Colman, in response to the trial Judge's question as to the date of execution of the lease responded: - Mr. Colman: "*Yes, it would have been 12th November or so. I would have collected the executed lease on the completion date which was in or about 12th November.*" Mr. Justice McDonald: "*But if you look*

25. The Lease, which was executed by Mr Crosbie Junior on behalf of ATL, demised the Promenade Road Premises to ATL for a term of 20 years, but provided in Clause 6.13 that either party might terminate the lease early. The relevant part of Clause 6.13 provides:

> *"6.13 Option to Determine*
>
> *Termination by Tenant or Landlord*
>
> *(a) The Tenant or the Landlord may terminate this Lease on the expiration of each of the 5th, 10th and 15th years of the Term (each an "Option Date" for the purposes of this Clause) subject strictly to the following terms and conditions:*
>
> *(b) Either party shall not earlier than 12 (twelve) months and not later than 6 months prior to the relevant Option Date (and in this regard time shall be of the essence) serve on the other party a notice in writing exercising the right to terminate this Lease (the "Break Notice")."*

26. In his evidence in the High Court Mr Crosbie Junior suggested that an earlier draft of the Lease had restricted the exercise of the Break Clause to the tenth year of the Lease, but the

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at paragraph 3 of your witness statement, you talk about the indenture of the lease dated 11th February. Was it not executed on that date?" Mr Colman "*No, it was executed on completion*." Mr. Justice McDonald: "*In November 2012?* Mr Colman: *"In November and then was to be exchanged when in accordance with the contract they had vacated the Automation premises.*"

trial Judge rejected that contention on the basis that the prior negotiations of the parties were inadmissible as an aid to the construction of the Lease. There is no appeal on that issue.

27. The Lease contained various covenants, including covenants relating to repairs, restricting user, nuisance/dangerous materials and environmental matters, none of which have any direct relevance to the present appeal although they were relevant to DPC's unsuccessful claims for breach of covenant. The only other relevant provision is Clause 4.35, quoted earlier, under which the tenant was to execute a Deed of Renunciation waiving renewal rights – the covenant which the trial judge found (*obiter*) to be void having regard to section 85(1) of the 1980 Act.

28. It is not in dispute that on 12 November 2012 Mr Crosbie Junior also signed on behalf of ATL a document purporting to be "*Renunciation of Rights to a New Tenancy*". This is the document successfully relied upon by DPC in the High Court in support of its claim for possession and it is appropriate to set it out it in full:

> *"**LANDLORD & TENANT (AMENDMENT) ACT, 1994***
>
> ***RENUNCIATION OF RIGHTS TO A NEW TENANCY***
>
> ***THIS RENUNCIATION** dated the 12th day of November 2012*
>
> *1. In this Renunciation the following words and expressions have the following meanings:*
>
> *1.1 "Premises" means the premises so defined and described in the First Schedule of the Lease;*

1.2 "Landlord" means the Landlord named in the Lease;

1.3 "Lease" means the lease attached to this Renunciation which is intended to be entered into between the Landlord and the Tenant; and

1.4 "Tenant" means the Tenant named in the Lease.

2. The Tenant has negotiated with the Landlord to take a tenancy of the Premises which are a tenement within the meaning of the landlord and tenants Acts for the term of one year and upon the terms and conditions contained and set out in the Lease including the condition that the Use of the Premises shall be wholly and exclusively as an office.

3. The Tenant acknowledges that he had received independent legal advice in relation to this Renunciation from a qualified solicitors who holds a practicing certificate from the Law Society of Ireland, and has been advised that under existing landlord and tenant legislation he would, subject to the terms of that legislation, be entitled to a new tenancy in the Premises at the expiry (or sooner determination) of the proposed Lease if it should continue for any reason for five years or more.

4. Having received and considered such advice, and under the provisions of Section 4 of the Landlord & Tenant (Amendment) Act, 1994, the Tenant ***HEREBY RENOUNCES*** *any entitlement he may have under the provisions of the landlord and*

tenant Acts to a new tenancy in the Premises should such an entitlement, but for this Renunciation, accrue upon the expiration or sooner determination of the proposed Lease.

5. The Tenant hereby acknowledges that the has not yet been permitted into possession of the Premises and that the tenancy to be created by the proposed Lease has not yet commenced.

SIGNED for and on behalf of _____

AUTOMATION TRANSPORT LIMITED ***Tenant***

In the presence of _____

Solicitor

DU107/399/AC#5286924.1

The signature of Simon Crosbie appears above "*Tenant*", and the signature of Edward Spain appears above "*Solicitor*". Mr Crosbie Junior accepted in his evidence that he signed the document on behalf of ATL. The number at the bottom right is the document identifier of Arthur Cox from whose office the document emanated.[3]

[3] Transcript Day 5, page 30 line 28 – page 31, line 1 (evidence in chief of Mr Colman).

29. As the Judge noted at paragraph 27 of his judgment this purported Renunciation has a number of "*striking features*". In the first place, the Landlord and Tenant Act 1994 had no application or relevance in the circumstances here. It applied only to tenements used wholly and exclusively as offices and the user of the Promenade Road Premises under the intended Lease was not limited to office use. Therefore the reference to the Landlord and Tenant Act 1994 in the heading and – perhaps more significantly – in Clause 4 of the document was inapt. Section 4 of the Landlord and Tenant Act 1994 did not authorise the renunciation by the tenant of any Part II rights it might acquire in respect of the Promenade Road Premises. For the same reason, the reference in Clause 2 to a condition that the use of the demised premises should be "*wholly and exclusively as an office*" was inapt. No such condition was contained in the proposed Lease. Furthermore, the intended Lease was for a term of 20 years, not a term of one year as stated in Clause 2. The reference to the tenant as "*he*" in Clauses 3, 4 and 5 was also inapt, in circumstances where the tenant was to be ATL, a limited company. The trial Judge noted a number of other issues in his Judgment including the fact that "*the Premises*" to which the document purports to relate is not identified in it, save by reference to the intended Lease which was said to be "*attached*". The Judge also identified as an issue whether ATL did in fact receive independent legal advice.

30. As will become apparent, ATL's appeal raises an issue as to whether, at the time that the Renunciation was signed by Mr Crosbie , any Lease (or draft Lease) was in fact "*attached*" to it. Indeed that was the principal focus of ATL's submissions at the hearing of its appeal. Mr Colman was not present when the Renunciation was signed by Mr Crosbie Junior on behalf

of ATL[4] but he gave evidence to the effect that a draft of the Lease was attached to it. He explained the attachment of a draft Lease by reference to a Law Society Practice Note.[5] The trial Judge accepted that a draft Lease was attached. ATL contends that it was not and says that there was no evidential basis upon which the trial Judge could have found that it was attached, or "*stapled*" to the purported Renunciation and makes the point that no Renunciation with a draft Lease annexed or stapled to it has ever been produced.

31. Also on 12 November 2012 Mr Crosbie Junior, on behalf of Storecon Limited as Licensee, signed another Deed of Renunciation under which Storecon Limited renounced any entitlement it might have to a new tenancy "*in the Licensed Area*". This appears to be the Renunciation required by Special Condition 7 and listed at paragraph 4.4 in the Documents Schedule of the Contract for Sale. Notably, this document was appropriately headed "*Section 17 of the Landlord and Tenant (Amendment) Act, 1980 (as amended by Section 4 of the Landlord and Tenant (Amendment) Act, 1980 and Section 47 of the Civil Law (Miscellaneous Provisions) Act, 2008) Renunciation Of Rights To A New Tenancy*".

32. Also on 12 November 2012, Mr Crosbie, on behalf of ATL signed an undated Indenture in respect of that part of the Tolka Road Quay premises occupied by ATL under an oral tenancy from Henry A. Crosbie, and ATL thereby assigned, transferred and surrendered all its interest right and entitlement in the demised premises to DPC.

[4] Day 5, page 40, Q & A 124.

[5] Day 5, page 3, Q & A 115.

33. On 13 March 2017 DPC's then State Facility Manager Mr Gerard Barry hand delivered a copy of a "*Break Notice*" to ATL, invoking the provisions of Clause 6.13 of the Lease and requiring ATL to vacate the Promenade Road Premises no later than 10 February 2018, being the end of the fifth year of the tenancy.

34. ATL failed to vacate on or before 10th February 2018, and the present proceedings seeking possession were issued.

35. It is not disputed that, after the commencement of the Lease, no Deed of Renunciation was ever executed by ATL as tenant pursuant to Clause 4.35 of the Lease.

36. In the Plenary Summons which issued on 16 March 2018, DPC sought possession of the Promenade Road Premises and damages for breach of the repairing covenant. The Statement of Claim delivered on 22 June 2018 pleaded the exercise of the break option and alleged breach of the repairing covenants. Paragraph 11 pleaded that DPC was not in a position to provide detailed particulars of disrepair and lack of decoration, but nonetheless a breach of the repairing covenant was pleaded.

37. It subsequently emerged in the evidence before the High Court that, notwithstanding the right of inspection given to DPC under Clause 4.9(a) of the Lease, it had not carried out any inspection of the premises prior to the issue of the Plenary Summons, or even prior to delivery of the Statement of Claim. In cross-examination, Mr Cormac Kennedy, the Head of Property of DPC, admitted that DPC had no "*definitive knowledge*" of any breaches of covenant at the time the possession proceedings were commenced. Furthermore, no letter before action was written by DPC alleging any breach of the repairing covenant or calling upon ATL to remedy any alleged breach. The trial Judge was prompted to comment, at para. 13 of his judgment:

> "*... I have to say that I find this approach to be unimpressive. While the claim for possession was not grounded on any breach of covenant but was instead based on the break clause in the lease, it is both surprising and very unsatisfactory that any party (let alone a public body such as the plaintiff) would make an allegation of breach of a*

covenant to repair without any prior enquiry or inspection having been made and without any evidence of a breach of the covenant relied upon."

38. In any event, in November 2018, an inspection of the Promenade Road Premises was carried out by Mr Stephen Scott, a building surveyor, on behalf of DPC for the purpose of preparing a Schedule of Dilapidations. That inspection prompted DPC to commence a second set of High Court proceedings (Record Number 2018 No. 9972P) seeking injunctive relief to restrain alleged unlawful use of the Premises by ATL. McDonald J was also critical of the manner in which those proceedings were launched and pursued, stating:

"*15. As noted above, the injunction proceedings were commenced on the basis of a mistaken understanding by the plaintiff that the defendant was involved in some form of processing or production of plastics on the Promenade Road premises. That case was made not only in the Statement of Claim delivered in the injunction proceedings but also in the written legal submissions delivered on behalf of the plaintiff and in the precis of the proposed evidence of Mr. Scott dated 31st January, 2019 (less than two months prior to the commencement of the trial). However, when Mr. Scott came to give his evidence on day three of the hearing, he confirmed that he was not making the case that any manufacturing of plastic was undertaken on the premises. In the course of his direct examination on that day (at p. 75 of the Transcript) Mr. Scott confirmed that he was willing to accept that there was no process taking place by which raw plastic was heated and turned into liquid form. Under cross-examination on the same day (at p. 100 of the Transcript) Mr. Scott further confirmed that although his precis of evidence had suggested that the defendant was carrying on a manufacturing process in the*

Promenade Road premises, he 'on reflection asked that [it] be removed because there was no manufacturing as such taking place on the site'.

16. Again, I have to observe that it is surprising and unsatisfactory that a public body such as the plaintiff would commence proceedings alleging very serious breaches of covenant without properly interrogating the intended claim so as to ensure that it was fully understood and that it had a proper evidential basis. It should be recalled in this context that, not only did the plaintiff commence proceedings to this effect, but it also invoked the jurisdiction of the court to grant an interlocutory injunction. While ultimately that application was not pursued to a hearing, a case was made on affidavit that the breaches of covenant were so serious as to justify the grant of an interlocutory injunction."

39. Returning to the possession proceedings, a full Defence and Counterclaim was delivered on behalf of ATL in which *inter alia* ATL sought a declaration that it was entitled to a new tenancy pursuant to Part II of the 1980 Act. In Particulars delivered on 23 August 2018, ATL pleaded that the Promenade Road Premises were occupied by it for the whole of the five year period expiring on 11 February 2018 for the purpose of carrying on its business, namely the operation of a road haulage business, and recorded that a Notice of Intention to Claim Relief had been served on 4 May 2018, but that Circuit Court proceedings claiming a new tenancy had yet to be issued.

40. On 18 December 2018, DPC delivered an Amended Statement of Claim in which Clause 4.35 of the Lease – the covenant to sign a Deed of Renunciation of any renewal rights – was

invoked for the first time. Notably, in view of what was to follow, it was then pleaded (paragraph 10):

> *"Despite requests, no Deed of Renunciation was ever executed by the Defendant pursuant to Clause 4.35 of the Lease. The Defendant would not execute a Deed of Renunciation unless ordered by this Honourable Court to do so".*

Paragraph 12 of the Amended Statement of Claim also contended that, having regard to Clause 4.35 of the Lease, ATL was estopped from seeking a new tenancy of the Promenade Road Premises. In the prayer, DPC sought an order for specific performance of the obligation contained in Clause 4.35 of the Lease.

41. ATL pleaded to these new pleas in an Amended Defence delivered on 30 January 2019. DPC furnished written submissions on 27 February 2019 purporting to support the case made for specific performance of clause 4.35. Replying submissions were filed by ATL based on the pleaded claim, the précis of witness evidence filed by DPC up to that time, and DPC's written submissions. The allocated trial date was 12 March 2019. In a nutshell therefore, up to Friday 8 March 2019, DPC's case was that the breach by ATL of the repairing covenants in the Lease, together with its refusal to execute a renunciation in accordance with clause 4.35 of the Lease, provided the basis for its claim for possession of the Promenade Road Premises, and for damages.

42. McDonald J then records in his judgment the manner in which DPC came to rely on the Renunciation at trial, notwithstanding the parameters of its pleaded case. As his account of this at paragraphs 20 – 23 of his judgment was not disputed, it is convenient to quote it in full:

> "*20. When Mr. Kennedy came to provide his witness statement in the possession proceedings in January 2019, he referred to a letter dated 7th December, 2018 sent by the plaintiff's solicitors to the solicitors acting for the defendant calling upon the defendant to execute a Deed of Renunciation in accordance with clause 4.35. In his witness statement, Mr. Kennedy stated that the defendant had previously executed a Deed of Renunciation in November 2012 but that, following service of the break notice, the plaintiff became aware that this deed 'may not relate to occupation of the premises by the defendant pursuant to the lease'. Furthermore, in a witness statement provided by Martin Colman (the solicitor in Arthur Cox who acted on behalf of the defendant in relation to the transactions of 2012 and 2013) he stated:*
>
> > *'It was contemplated that the defendant would execute a Deed of Renunciation in favour of the Plaintiff for the Lease and I understand that the Defendant is contractually required to do so under clause 4.35…'.*
>
> *21. Thus, a positive case was made by the plaintiff at that time that the defendant had failed, notwithstanding a belated demand in December 2018, to execute a Deed of Renunciation of its rights under the 2008 Act and that it was thereby in breach of clause 4.35 of the lease. However, on Friday 8th March, 2019 (just two working days*

prior to the commencement of the trial) the solicitors for the plaintiff wrote by email[6] *to the solicitors for the defendant informing them that, at the time the amended statement of claim was filed, it was the plaintiff's understanding that the defendant had not executed a Deed of Renunciation. The email explained that the plaintiff was aware of the existence of a deed dated 12th November, 2012 executed by the Defendant but understood that it related to the licence of the Tolka Quay Road premises (formerly occupied by the defendant) rather than the lease of the Promenade Road premises. The email then explained that, on the previous day (namely Thursday 7th March, 2019), an inspection of the Arthur Cox file had taken place*[7] *and, from a review of the documents on that file, it now appeared that the Deed of Renunciation dated 12th November, 2012 was in fact referable to the lease the subject matter of these proceedings. A copy of the signed Deed of Renunciation was attached to that email.*

22. Subsequently, on 12th March, 2019 (namely on Day 1 of the trial) a re-amended statement of claim was delivered in which, directly contrary to the terms of the amended statement of claim described in para. 18 above, a case was now made that on 12th November, 2012 the defendant had executed a Deed of Renunciation whereby it renounced any entitlement it might have to any rights under Part II of the 1980 Act to a new tenancy in the Promenade Road premises. It was also alleged that, having regard to the provisions of s. 17 (1) (a) (iiia) of the 1980 Act (as inserted by s. 47 of the 2008 Act), the defendant is estopped or precluded from seeking a new tenancy in

[6] The body of the email sets out a "*letter*" dated 7 March, 2019, but it was in fact emailed on Friday 8 March, 2019.

[7] Evidently, a junior solicitor in Beauchamps, solicitors for DPC, had attended the offices of Arthur Cox and undertaken this inspection. It was not an inspection by Mr Martin Colman.

the premises. A declaration to that effect was also sought in the prayer to the re-amended statement of claim.

23. On the evening of Day 2 of the trial, a new witness statement of Mr. Colman (the solicitor who had acted on behalf of the plaintiff in the relevant transactions) was also provided by the plaintiff. In that witness statement, Mr. Colman referred to the Deed of Renunciation of 12th November, 2012 and said that, while there were 'certain errors' in the deed, he was 'satisfied beyond doubt that the Deed … was intended to and does relate to the premises and the Lease'."

43. An electronic copy of the email sent by Beauchamps on 8 March 2019, with a copy of the signed Renunciation as an attachment, was furnished to the Court.

44. It is something of an understatement to observe that McDonald J was critical of the manner in which the Renunciation came to be relied upon at the trial, and again it is appropriate to quote what he said at paragraph 24 of his judgment:

"*24. I regret to say that the manner in which the plaintiff has presented its case is unimpressive. I am left with the impression that no proper investigation was undertaken by the plaintiff of its case prior to the launch of these proceedings or even before delivery of its witness statements. This is particularly difficult to understand given that the plaintiff has invoked the jurisdiction of the Commercial Court. Before invoking the jurisdiction of the Commercial Court, one would expect that a party had thoroughly investigated the case which it proposed to pursue so that it would be in a*

position to deliver its pleadings and witness statements in an accurate and comprehensive form and in a timely way. In this context, it is noteworthy that when Mr. Gerard Barry (the retired Estates Manager of the plaintiff) came to give his evidence on Day 3 of the hearing, he revealed, under cross-examination, that, at the time of service of the break notice, he was aware of the existence of the renunciation and that he had a copy of it on file. The following exchange then took place between counsel for the defendant and Mr. Barry: -

> *'Q. And did you read it?*
>
> *A. Yes.*
>
> *Q. And did you see the references to one year term and exclusively as offices?*
>
> *A. Correct.*
>
> *Q. Did that give you any pause?*
>
> *A. It did, yeah.*
>
> *Q. But you decided to run with it anyway?*
>
> *A. No, I decided – sorry, I took some advices on it. I didn't decide it myself, that in the context of what had preceded it, in the context of the understanding of the parties were, in the context of the lease in the clause that we effectively had a deed. There was a Deed of Renunciation that had been signed off by Automation.'*

Surprisingly, Mr. Barry was not re-examined on this issue. At the conclusion of his cross-examination I enquired of him whether I was right in understanding his evidence

that, when he came to serve the break notice in 2017, he investigated whether a renunciation existed in relation to the lease. In response, he confirmed that he did so and he was happy that it existed. He also confirmed that he checked the position with Mr. Colman of Arthur Cox at that time. Mr. Barry was not personally aware of what subsequently happened when the proceedings were issued. However, his evidence on this issue exposes a very significant failing in the manner in which the plaintiff mounted and pursued these proceedings. On the basis of the clear discrepancy between Mr Barry's evidence on the one hand and the terms of the amended statement of claim (described in para. 18 above) on the other, it appears that no attempt was made to check the position with Mr. Barry prior to the commencement of the proceedings – notwithstanding that he had only recently retired. The proceedings were accordingly commenced (and an amended statement of claim was delivered) on the incorrect premise that no renunciation existed."

45. It is not necessary to reprise here all the evidence given in the High Court. Instead, such evidence, so far as relevant to the issues in these appeals, will be referred to later in our judgment.

HIGH COURT JUDGMENT

The Purported Renunciation

46. In his judgment, the learned trial Judge set out the purported Renunciation in full, as we have done above. He then identified the many "*striking features of this document*" to which we have also referred. We should, however, expressly notice the Judge's observations at paragraph 27 of his judgment on the absence of any identification of the "*Premises*" in the document and the related question of whether the intended Lease was attached to the document.

> "*(h) Clause 1.3 of the document is potentially important. It makes clear that the lease, the subject of the renunciation, is attached to the document and is intended to be entered into between the landlord and tenant. The evidence of Mr. Colman was that a draft of the lease was so attached.*
>
> *(i) The definition of 'premises' in clause 1.1 allows the premises to be identified by reference to the first schedule to the lease. Thus, <u>if a draft of the lease was attached to the renunciation</u>, it follows that it would be possible to identify that the document was intended to refer to the Promenade Road premises, the subject matter of these proceedings.*" (our emphasis).

47. The observations of the trial Judge on the Renunciation were, with one exception, not the subject of any dispute before us. The exception relates to the issue raised by ATL as to whether

at the time the Renunciation was executed by Mr Crosbie Junior "*the lease…intended to be entered into*" was in fact attached to it as stated in Clause 1.3, thus identifying the "*Premises*" to which the Renunciation related. The trial Judge's observation in (i) above in relation to the identification of the premises the subject matter of the Rectification is predicated on a draft of the lease being attached to it, as is clear from the words we have highlighted. The trial Judge states in (h) that "*the evidence of Mr. Colman was that a draft of the lease was so attached*". It will be necessary to refer further in due course to Mr Colman's evidence on this issue.

48. McDonald J then addressed the issue whether, notwithstanding the difficulties he had identified in paragraph 27 of his judgment, the document could be said to constitute an effective renunciation of ATL's rights to a new tenancy under Part II of the 1980 Act. He noted that DPC had sought to invoke the ability of the court to correct obvious mistakes in documents by construction and referred to the fact that in *East v Pantiles Plant Hire Limited* (1981) 263 EG 61 Brightman LJ had coined the term "*correction of mistakes by construction*". Brightman LJ explained that two conditions must be satisfied if the court is to take that approach. In the first place, there must be a clear mistake on the face of the document. Secondly, it must be clear what correction ought to be made in order to cure the mistake. McDonald J then referred to the classic statement of principles to be applied in a construction of contractual documents in the speech of Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, which identified the importance of looking at documents against the backdrop of the relevant factual matrix, which might also identify that the parties had made mistakes in the language of the relevant document. McDonald J quoted from Lord Hoffmann at page 912, including the following:

"*(4)…The background may not merely enable the reasonable man to choose between the possible meanings of 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; …* ."

49. The Judge then referred to the principles set out by Lord Hoffmann in his speech in *Chartbrook* (to which he referred as the "*Chartbrook principles*", a usage we will, for convenience, also adopt[8]) setting out a lengthy passage from that speech which is also set out later in this judgment. As he noted, those principles have been approved and applied in this jurisdiction by Clarke J (as he then was) in *Moorview* and by Haughton J in *Knockacummer Wind Farm Limited v Cremins* [2016] IEHC 95.

50. Noting DPC's contention that the evidence established a clear mistake in the drafting of the Renunciation, and that it was equally clear what corrections were required in order to remedy the mistake, the Judge then considered the available evidence. His judgment recounts the evidence of Mr Colman in relation to the transactions the subject of the Contract for Sale of 17 September 2012, and the structure of the transaction, which involved ATL remaining in occupation of the Tolka Quay Road premises under licence for a period of three months pending the Promenade Road Premises being refurbished and made available and the involvement of Ms. Majella Egan of McCann Fitzgerald (who acted for NAMA) and Mr

[8] There are, in strictness, no freestanding or separate "*Chartbrook principles*". As Lord Hoffman was careful to explain in *Chartbrook*, the correction of mistakes by construction is simply one aspect of the general approach to contractual construction identified by the House of Lords in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (approved and applied by the Supreme Court here in *Analog Devices BV v Zurich Insurance Company* [2005] 1 IR 274). Nevertheless the reference is a convenient one.

Edward Spain of William Fry (who acted on behalf of Mr Crosbie Senior and the companies controlled by him). His judgment records the evidence of Mr Colman that, for the purposes of the transaction, three Deeds of Renunciation were sought by him on behalf of DPC:

> "*34. … These were a Deed of Renunciation in respect of the Promenade Road premises, a renunciation to be executed by [ATL] in respect of the licence to be granted to [ATL] in respect of the Tolka Quay Road premises, and a renunciation to be executed by Storecon Ltd in respect of a twelve month licence (as provided for in special condition 7 to the contract of sale) in respect of the Tolka Quay Road premises occupied by it. Mr. Colman identified the completion list which had been prepared in preparation for the closing of the contract which showed the Storecon Deed of Renunciation at item 13 and the Renunciation in respect of the Tolka Quay Road licence to be granted by [ATL] at item 45. In addition, he drew attention to item 47 on the completion list (which had been inserted by him) dealing with the execution of a Deed of Renunciation by the defendant in respect of the lease of the Tolka Quay Road premises. It is clear from the completion list and from the terms of the contract itself that only one lease was to be executed as part of the transaction namely the lease to be granted by the plaintiff to the defendant in respect of the Promenade Road premises".*

51. The trial Judge then referred to Mr Colman identifying "*each of the three Deeds of Renunciation that were executed*", including the Renunciation at issue here. The Judge noted Mr Colman's acknowledgment that the document contained errors, as described earlier and that he had been asked by counsel for DPC whether he could be satisfied beyond doubt that

the Renunciation related to the Promenade Road Premises. The trial Judge sets out, and appears to have relied upon, the response given by Mr Colman:

> *"I suppose there is a number of items; one is that the focus was… to have a renunciation of the new site lease on completion and you will see from the list of completion requirements that that was there. It is also the case that this renunciation has a draft to the lease attached to it in the documents in Arthur Cox which I inspected too. And generally speaking it was a case that I wanted or needed to have a Deed of Renunciation for each of the occupations or future occupations of the premises and this one related to the lease."*[9]

52. The Judgment recorded Mr Colman's explanation for the errors on the face of the document as being his use of an incorrect precedent, i.e an old precedent relating to the amendments made by the 1994 Act, rather than a precedent based on the "*broader terms*" of the amendment made by the 2008 Act. The Judge then noted:

> "*37. Under cross-examination, Mr. Colman explained that in accordance with the Law Society Practice Note on Deeds of Renunciations it is recommended that a draft of the lease should be attached to the renunciation and he said that he followed this recommendation. Mr. Colman accepted that he had no direct contact with Mr. Crosbie Jnr. in relation to the signing of the document. He confirmed that he had dealt solely*

[9] It emerged that Mr Colman's inspection of the file in the office of Arthur Cox took place on the morning of the day that he gave evidence in the High Court. The question whether, as a matter of fact, a draft of the lease was attached to the purported Deed of Renunciation at the time it was executed is addressed later in this judgment.

with Ms. Egan of McCann Fitzgerald on behalf of NAMA and she, in turn, had dealt with Mr. Spain of William Fry."

53. The Judge noted that Mr Colman had accepted in cross-examination that he knew the premises were an industrial property and not (as the Renunciation indicated) an office. He then noted the cross-examination of Mr Colman in relation to his first witness statement where in one paragraph he appeared to say that ATL had *executed* a Deed of Renunciation in respect of the Promenade Road Premises and attached a copy of the lease but in the very next paragraph seemed to say that it was "*contemplated*" under Clause 4.35 that ATL would execute such a Deed. He noted Mr Colman's response that there "*might have been a misunderstanding at some point as to whether the Renunciation existed or not but there was never any doubt in my mind*" and went on to observe that " … *In fairness to Mr. Colman, it should be noted that in his first witness statement, he had said that he had reviewed the title documents held by Arthur Cox relating to the lease but that he had not examined the file. While I do not believe that it was appropriate to prepare a witness statement on that attenuated basis, it does provide some level of explanation for the inconsistencies between the first and second witness statements.*"[10]

54. The trial Judge then referred to the cross-examination of Mr Colman about the reference to "*the term of one year*" in paragraph 2 of the purported Renunciation, and the suggestion that this might have been understood by Mr Crosbie Junior to relate to the Storecon premises in which Storecon was to have a one year licence. Mr Colman in response drew attention to the

[10] Mr Colman's first précis of his intended evidence is dated 4 February 2018. His second précis of evidence was made shortly before the trial commenced in the High Court. However he did not examine the file in Arthur Cox until 8am on the morning of the fifth day of the trial, on which day he gave evidence.

way in which the Renunciation did not mention Storecon, but clearly mentioned ATL (presumably a reference to the fact that its name appears in the signature clause). The trial judge then observed:

> *" … It should be noted, in any event, that, when Mr. Crosbie Jnr. subsequently came to give his evidence, he did not make the case that he understood the renunciation in issue in these proceedings to relate to the Storecon premises. In addition, it is worth bearing in mind that the renunciation also refers to a lease and, as noted above, the only lease to be executed by the defendant was that proposed in respect of the Promenade Road premises."*

55. The Judge then noted that it was put to Mr Colman that Special Condition 6.2(a) of the Contract of Sale[11] envisaged that a deed of surrender would be executed by ATL in relation to what was described as its "*sub leasehold interest*" in part of the Tolka Quay Road premises. This line of cross-examination was pursued with a view to suggesting that the Renunciation executed by Mr Crosbie Jnr related to the "*sub-lease*" rather than the Lease in relation to the Promenade Road Premises. The trial Judge noted Mr Colman's explanation that a deed of surrender was executed by ATL in respect of any sub-lease of the Tolka Quay Road premises, and that that deed of surrender said in very clear terms that ATL surrendered the premises to the plaintiff "*to the intent that the residue of the term and all or any other estate, right title to*

[11] The reference to Special Condition 6.2(a) here appears to be an error, as it is Special Condition 6.1(a) that provides "*the Vendor shall procure that on the Closing Date Automation shall execute a deed of surrender of its sub-leasehold interest in the part of the Tolka Quay Road premises currently occupied by [ATL]*…" – whereas 6.2(a) contains DPC's commitment to grant a lease of the new site upon ATL vacating the Tolka Quay Road premises.

or interest of the tenants shall merge and be extinguished in the reversion immediately expectant on the determination of the term". The Judge observed that, as section 17(1)(a)(iiia) of the 1980 Act makes clear, no entitlement to a new tenancy will arise where the tenant terminates a tenancy by notice of surrender and "*in circumstances where the defendant executed a surrender, there was plainly no need to execute, in addition, a renunciation of rights*".

56. The Judge then turned to the evidence of Mr Crosbie Jnr in relation to the Renunciation. While Mr Crosbie Jnr had asserted that William Fry was not acting on behalf of ATL, he acknowledged that his father, Mr Crosbie Snr, was a sole or primary shareholder in ATL at the time of the transaction and remained so until March 2018, and that Mr Crosbie Snr had instructed William Fry, and that it was possible he had instructed them to act on behalf of ATL. He accepted that the transaction was necessary for the survival of ATL, and that therefore it was a transaction to which he, as a director of ATL, would have paid significant attention. As to the circumstances of the signing, the Judge noted that:

> "*43. According to Mr. Crosbie Jnr., he signed whatever he was asked to sign and whatever he was told was necessary to execute. He explained that there were so many documents that it simply was not possible to read all of them. In the course of his direct evidence he maintained that he was not advised by William Fry as to the content of any of the documents he was asked to sign. His evidence was:*
>
> *'But at no point as I said we were in a process where it was kind of like nearly a fire sale and at no point did I, was I advised that I would be renouncing my rights*

because part of what made me accept the deal, not that I had a choice, was that we had security of tenure and that we could survive this because I can't state it more plainly, I mean it was a time of survival and, you know, certain bits of paper were floating in front of you and you might be able to survive. I signed everything in the presence of people but as I said, nothing was made clear to me …that I would be renouncing my rights'."

57. The Judge records however that on cross-examination Mr Crosbie Jnr confirmed that there might have been "*general overviews but nothing specific*" and that he did not ask questions of William Fry in relation to the documents and he never took the opportunity to raise questions in relation to them. He accepted that he had executed the Renunciation. He could not remember whether he got advice from Mr Spain of William Fry in relation to the document, but he confirmed that he executed as a director, and he confirmed that the signature of the witness was that of Mr Spain.

58. In paragraph 46 of his judgment the trial Judge usefully summarises the various arguments made by ATL in response to DPC's reliance on the Renunciation. It is not necessary to recite these in any detail at this point because they are the subject of discussion in the context of this appeal later in this judgment. In brief, counsel for ATL asserted that the purported Renunciation should be strictly construed against DPC, the party seeking to rely on it; that it was not appropriate to apply the *Chartbrook principles* to a Renunciation which was "*not a negotiated document between two parties*"; that there was a duty to take extra care because the document emanated from a third party (in that ATL was not a party to the Contract of Sale); that ATL did not obtain fully independent legal advice; that it was not appropriate to

apply the *Chartbrook principles* to landlord and tenant law, which was a discrete and separate *corpus* of law; that the *Chartbrook principles* had no application unless there was a common mistake, and that it would be inappropriate for the Court to apply equitable principles (of rectification) to correct that mistake and that there are cases where a document contains a fatal error, such as a guarantee to a bank failing to mention the proper parties or the proper facility, and accordingly no reliance could be put on it.

59. The Judge ultimately rejected all of these arguments. In rejecting the contention that any renunciation would have to be strictly construed against the parties seeking to rely upon it, the trial judge stated, at para. 48, that:

> *" ... Of course, any renunciation must comply with the provisions of s. 17 (1) (a) (iiia) of the 1980 Act if the renunciation is to be relied upon. That is an issue which I address further below. In addressing that issue, it will be necessary to bear in mind that, because a renunciation necessarily involves the giving up of a potentially valuable right, I will have to be satisfied that the terms of the renunciation are sufficiently clear and unambiguous to constitute a valid renunciation. Furthermore, I must keep in mind that the renunciation was drafted not by the defendant but by the solicitor for the plaintiff and in those circumstances any ambiguity in the renunciation must be construed contra proferentem. It is important, however, to bear in mind that, as Clarke J. (as he then was) explained in Danske Bank v. McFadden [2010] IEHC 116 at para. 4.1, the contra proferentem rule is to be applied only in cases of ambiguity and where other rules of construction fail. Thus, it does not displace the Chartbrook principle. That principle is an inherent part of the principles of interpretation of contracts*

embodied in the Investor Compensation Company principles approved by the Supreme Court in Analog Devices."

60. The Judge also rejected the argument that the Chartbrook principles were not appropriate to apply in the area of landlord and tenant law. He relied on the judgment of the Supreme Court in *Stapleyside Company v Carraig Donn Retail Ltd.* [2015] IESC 60 for the proposition that the ordinary principles of contractual interpretation apply in the context of property documentation, citing particularly the observations of Clarke J (as he then was) at para. 6.2 - 6.3:

> *"6.2 … A court is required to do the best it can with the language used by the parties (the text) to be construed in the light of all of the circumstances in which the agreement was entered into (the context). But it is important to acknowledge that both text and context are relevant in the proper interpretation of commercial documents.*
>
> *6.3 Those principles of interpretation (the 'text in context' method) apply to no lesser extent in the field of property documentation. To ignore context is to ignore the well accepted fact that words used in agreements would be seen by any reasonable person having knowledge of the surrounding circumstances as being potentially affected as to their meaning by the context in which the agreement was entered into in the first place. But equally, the text must be given all appropriate weight, for it is in the terms of that text that the parties have settled on their arrangement."*

61. The Judge noted that the *Chartbrook* principles had been applied specifically in the landlord and tenant context in England in *Littman v Aspen Oil (Broking) Limited* [2006] 2 P & CR 2,

in the context of construing a break clause, where the court found that there was an obvious mistake and in one part "*the landlord"* should be read as "*tenant*". In his view, there was no basis for excluding the application of the *Chartbrook* principles, as he explained at paragraphs 50 and 51:

> *"50. … Having regard to the factors discussed in para. 46 (f) above, I do not believe that there is any basis to suggest that the Chartbrook principle is incapable of application to a document such as a renunciation of rights under the 1980 Act. There is nothing in the case law to support such a proposition. On the contrary, the case law suggests that the ordinary principles of contractual interpretation apply equally to property documents including leases.*
>
> *51. Nonetheless, in light of the sheer number of problems with the text of the renunciation in this case, I have considered whether that, of itself, renders the Chartbrook principle inapplicable. However, on reflection, I do not believe that it does. On the contrary, as Lord Hoffmann made clear in the Chartbrook case itself, there is no limit to the amount of red ink or verbal rearrangement or correction which the court is allowed under the principle. The principle therefore appears to be capable of application in any case where the court, having regard to the relevant factual background, can come to a clear conclusion that (a) the parties to a contractual document have failed to express themselves correctly such that there are obvious mistakes in the document and (b) it is equally obvious how those mistakes should be corrected."*

62. The critical reasoning of the learned trial Judge for coming to the conclusion that the mistakes in the Renunciation should be corrected by construction, and how that should be done, is then set out: His analysis merits extended quotation:

> "*52. Turning to the mistakes in the renunciation in this case (as quoted in para. 26 above) the following observations can be made:*
>
> *(a) In the first place, insofar as the reference to 'he' is concerned, that is a very obvious mistake in circumstances where it is clear from the document itself that the entity purporting to renounce its rights is a corporate body in respect of which the inanimate pro-noun 'it' should have been used. This is an obvious mistake which a court can readily correct by reference to a consideration of the document as a whole.*
>
> *(b) However, there are a series of words and phrases in the renunciation which bear no relationship to the Promenade Road premises. These include the reference to negotiations between the tenant and landlord to take a tenancy of the premises for a term of one year. The relevant term of the lease of the Promenade Road premises (subject to the break clause) is 20 years. There is then the reference to a condition that the use of the premises should be wholly and exclusively as an office. That is equally inapplicable to the Promenade Road premises where the permitted user is focused on the operation of a road haulage business. If these are to be considered to be 'mistakes', one would have to be confident that the renunciation was intended to refer to the lease of the Promenade Road premises and not to some other premises.*

(c) In my view, it is clear from a consideration of the background facts that the renunciation was intended to apply to the Promenade Road premises. There are a number of features of the factual background that overwhelmingly point to this conclusion. In the first place, as Mr. Crosbie Jnr. acknowledged in the course of his evidence, the defendant has only once entered into a lease in relation to premises within the Port of Dublin namely the Promenade Road premises. Second, it is clear that the renunciation had a copy of the draft lease attached to it in which, of course, the Promenade Road premises were identified. Third, as Mr. Colman confirmed in his evidence, the Promenade Road lease had been drafted at the time of execution of the contract between Mr. Crosbie Snr. and his company and the plaintiff. It is specifically referred to in the Document Schedule at para. 4.3. In turn, the form of the lease is specifically referenced in special condition 6.2 (a). The draft lease contained a covenant that the tenant should execute a Deed of Renunciation waiving any renewal rights in accordance with s. 47 of the 2008 Act. Fourth, a Deed of Renunciation in respect of the Promenade Road premises was expressly included in the completion list for the purposes of completion of the contract. Mr. Colman confirmed that it appears at Item 47 on that list.

(d) In my view, all of these factors point in one direction. There is a renunciation which is signed by Mr. Crosbie Jnr. on behalf of the defendant which refers to a lease to be given to the defendant. We know that the only lease of Dublin Port premises ever taken by the defendant was in respect of the Promenade Road premises. In addition, the draft version of that lease contained a covenant to execute a renunciation. It must follow that the renunciation can only relate to the Promenade Road premises. There is no

other plausible explanation why the defendant should execute a renunciation in respect of those premises.

(e) In circumstances where it can only relate to the Promenade Road premises, I believe it is clear that something has gone wrong with the language contained in the renunciation. In particular, it seems to me that the references therein to office premises and to a one year term are very clear errors in the document. The Promenade Road premises are not solely - or even mainly - for office use. Likewise, there was never any question that the term of the lease would be for one year only.

(f) It seems to me to be equally clear what corrections need to be made to the document. The references to a term of one year and to the use of the premises 'wholly and exclusively as an office' are not only inappropriate but they are otiose. Having regard to the terms of s. 47 of the 2008 Act (which is referenced in clause 4.35 of the Lease) there was no need to include that language. In these circumstances, I am of the view that clause 2 of the renunciation should be interpreted as though those references did not appear therein.

(g) The remaining error of substance in the document is the reference in para. 4 to s. 4 of the 1994 Act and the reference in the title to the 1994 Act. Again, it seems to me that this is a clear error in the document. Section 4 of the 1994 Act has no application whatever to premises of the kind found on the Promenade Road premises. Section 4 of the 1994 Act is confined very narrowly to tenements which were used wholly and exclusively as an office. Having regard to that very obvious fact and having regard to

the terms of clause 4.35 of the lease, it seems to me that the correction to be made to the language of para. 4 of the renunciation is very clear – namely that it should refer to s. 47 of the 2008 Act which, at the time of execution of the renunciation, was the relevant statutory provision in force providing for renunciation of the rights in respect of premises of the kind in issue here.

(h) Accordingly, in my view, subject to the discussion below in relation to legal advice, para. 4 of the renunciation should be read as though the reference to s. 4 of the 1994 Act actually cited s. 47 of the 2008 Act. In my view, the Chartbrook principle very clearly applies.

(i) Moreover, even though para. 4 refers erroneously to s. 4 of the 1994 Act, the operative language of para. 4 very clearly evidences an intention to renounce any entitlement which the tenant might have under the provisions of the Landlord and Tenant Acts to a new tenancy. There is no error in any of that language. Nor is there any ambiguity. On the contrary, the terms of para. 3 of the renunciation are plain. In the circumstances, I cannot see any scope for the application of the contra preferentem principle. That principle only applies where there is ambiguity in the language used.

(j) Paragraph 3[12] *is the critically important provision in the renunciation. By its terms, the defendant unambiguously gave up any right to a new tenancy under the Acts. In circumstances where (for the reasons outlined above) the renunciation must refer to the Promenade Road premises (notwithstanding the errors in the language in other paragraphs of the document) I am of the view that para. 4 very clearly constitutes a renunciation of rights to a new tenancy in those premises."* (our emphasis)

63. We have emphasised in para 52(c) above the Judge's finding that "*it is clear that the renunciation had a copy of the draft lease attached to it in which, of course, the Promenade Road premises were identified*."

64. The Judge then considered and rejected an argument that DPC should not be permitted to rely on the correction by construction principle in circumstances where the Renunciation had not been relied upon in the Statement of Claim in its original or first amended form. He also rejected ATL's argument that the *Chartbrook* principles could have no application to a renunciation which was not put in place pursuant to any negotiations directly between ATL and DPC. His reasoning was that there may be many circumstances where a document having contractual force is required from a third party as a consequence of an agreement between two contracting parties, citing the example of a guarantee. In paragraph 55 of his judgment, he observed that the rationale for the application of the *Chartbrook* principle "*as explained by Lord Hoffmann, … is to correct obvious errors in the language used by parties to contractual*

[12] The thrust of this paragraph suggests that the reference to Paragraph 3 is an error and that the Judge intended to refer here to paragraph 4 of the Renunciation.

documents" and he saw no reason in principle why that rationale could not apply to a unilateral document having contractual force, such as a renunciation or a guarantee, adding:

> "*The reason why a court is entitled to form the view that the language in the contractual document contains a clear error does not depend on what transpired between the parties in the negotiations leading up to the execution of that document. On the contrary, what was said between the parties is inadmissible in order to construe the true meaning and intention of the document. The court is limited to the objective factual background*. …"

The Judge then referred to an example of the application of the *Chartbrook* principle to documents executed unilaterally in the judgment of Asplin J in *ICM Computer Group Limited v Stribley* [2013] EWHC 2995 (Ch).

65. In concluding this part of his judgment, the Judge stated at paragraph 57 that:

> "*… It is clear that something has gone wrong with the language of the renunciation. I have already dealt with the errors and inconsistencies that appear in the document. While there are a surprisingly large number of such errors and inconsistencies, it seems to me that these are very clearly mistakes in the document and it is equally clear what corrections ought to be made. Accordingly, the document should be read in the manner outlined in para 52 above. When read in that way, it seems to me that the document is clear on its face. There is no ambiguity in its terms such as to attract the application of the contra proferentem principle. In particular, para. 4 of the*

renunciation contains a clear and unequivocal renunciation by the defendant of any right which it might acquire to a new tenancy under the Landlord and Tenant Act."

66. The Judge went on to address the question of independent legal advice and the argument made by ATL that a party wishing to rely on a renunciation emanating from a third party such as ATL had a duty to take extra care to ensure that the document is reliable and that in such circumstances there was an obligation on DPC to ensure that ATL obtained truly independent legal advice. The Judge rejected the argument that DPC had any wider duty to take extra care that the renunciation was reliable, but he nonetheless addressed the independent legal advice issue in some detail. He rejected a preliminary point made on behalf of ATL who suggested that it was fatal to the renunciation that the document referred to the inapplicable 1994 Acts. His reasoning was that the nature of the legal advice to be given to a tenant is not identified, either in the amendments made by section 4 of the 1994 Act or the wider amendment under section 47 of the 2008 Act – both provisions merely impose as a condition validity that the tenant should have received independent legal advice.

67. McDonald J concluded that the statutory requirement in section 17(1)(a)(iiia) of the 1980 Act had been satisfied. DPC was entitled to rely on the acknowledgement in paragraph 3 of the Renunciation that "*he*" (to be read as ATL) had received independent legal advice from a qualified solicitor as to its entitlement to a new tenancy if the proposed Lease continued for five years or more and the statement in paragraph 4 that having received and considered such advice "*the tenant*" (ATL) renounced any such entitlement. In paragraph 65, the Judge concluded that, quite apart from the text of paragraph 3, "*legal advice was given to Mr Crosbie Jnr. by William Fry*". He referred in that context to the evidence of Mr Crosbie. In any event,

the Judge concluded, it was not open to Mr Crosbie to contend that he had not been advised, given the terms of paragraph 3. At paragraph 69 of his judgment, the Judge stated:

> "*Mr. Crosbie Jnr. is undoubtedly a very intelligent man. He was signing documents in a solicitor's office. The very fact that he had to attend a solicitor's office to sign documents would have carried its own message. The renunciation in question is clearly headed: 'RENUNCIATION OF RIGHTS TO A NEW TENANCY'. I find it impossible to accept that, in these circumstances, the defendant is entitled to contend that the legal advice recorded in para. 3 of the renunciation was not duly given to a defendant prior to its execution by Mr. Crosbie Jnr. on the defendant's behalf.*"

He also rejected the suggestion made on behalf of ATL that it should have been advised not to execute the renunciation as it was against the tenant's interests to renounce, noting that no authority was cited in support of that proposition, nor was it supported by the text of section 17(1)(a)(iiia).

68. The Judge went on to note that there was no suggestion that ATL or Mr Crosbie Jnr were to be treated as vulnerable persons, or that the move to the Promenade Road Premises was not in ATL's interests. He also rejected the argument that William Fry's advice could not be said to be "*independent*" on the grounds that they also acted for Mr William Crosbie Snr and the company is controlled by him. He found that a significant difficulty for ATL in putting forward that argument was that Mr Crosbie Snr was not called as a witness, and the evidence of Mr Crosbie Jnr did not substantiate the existence of a conflict. He also considered that in using the word "*independent*" in the context of section 17(1)(a)(iiia) the Oireachtas "*clearly*

had in mind advice which is independent of the landlord". He deduced this from its position within Part II of the 1980 Act – a part which was concerned with the right to new tenancies as between landlord and tenant and which was not concerned with third parties at all.

69. Notwithstanding that he was satisfied that ATL in fact had had the benefit of independent legal advice within the meaning of section 17(1)(a)(iiia) of the 1980 Act, the Judge went on to consider the alternative argument put forward by DPC that ATL was estopped from contending that it did not receive independent legal advice. On this issue, he concluded that "*a clear case of estoppel by representation*" arose, for the reasons set out in paragraph 81 of his judgment.

DPC's alternative case to enforce Clause 4.35 of the Lease

70. The Judge then proceeded to address DPC's alternative case for specific performance lest he be wrong in the conclusions reached by him on its primary case. He did so by addressing the two arguments raised by ATL:

(a) Firstly, that Clause 4.35 of the Lease was caught by section 85 of the 1980 Act and was therefore void; and

(b) Secondly, that DPC had lost the ability to rely on the covenant in circumstances where DPC did not seek to rely on it until after it had exercised the break option in the Lease.

71. McDonald J rejected the second argument. In his view, it ignored the provisions of Clause 6.13(h) of the Lease which expressly provided that any termination under the break clause "*shall be without prejudice to any right or remedy of either the Landlord or the Tenant in respect of any antecedent breach by the other of any of their respective covenants contained in this Lease*". If ATL had failed to comply with an obligation imposed by Clause 4.35, that would constitute an "*antecedent breach*" and service of the Break Notice would not affect DPC's entitlement to enforce the obligation.

72. However the Judge accepted ATL's argument that Clause 4.35 of the Lease was caught by section 85 of the 1980 Act and was therefore void. By its terms, on the execution of the Lease, ATL had committed itself to executing a Deed of Renunciation come what may and it was on that basis that DPC had sought specific performance of ATL's obligation under clause 4.35. However, section 85 of the 1980 Act expressly rendered void (a) any provision of a contract excluding the application of the 1980 Act or (b) any provision which varies, modifies or restricts the application of the Act in anyway. The Judge accepted the argument that Clause 4.35 of the Lease could not take the benefit of section 85(2) (which disapplies subsection (1) where independent legal advice has been received in relation to the renunciation) in circumstances where it was not itself a renunciation which complied with the requirements of section 17(1)(a)(iiia). He accepted the argument that "*Clause 4.35, by its terms, constitutes a commitment by the defendant, given in advance of the receipt of legal advice, to execute a renunciation.*" (para. 87). Having regard to the terms of section 17(1)(a)(iiia) the independent legal advice to be provided to the tenant must exist at the time of renunciation as the protection of independent legal advice would be of no benefit to the tenant if it were provided after the renunciation had been executed. He continued:

"*89. It might, of course, be said that there is no reason why the advice could not be given before the formal renunciation is executed by the defendant pursuant to clause 4.35. However, that would seem to entirely undermine the policy of the Act. By committing the tenant to renounce, clause 4.35 could plainly have the effect that a tenant would lose the right to a new tenancy before the tenant has had the benefit of any independent legal advice as to the nature of the right to be renounced. It would reduce the requirement that the tenant should have the benefit of independent legal advice to a purely formal step. The tenant would be committed to executing the deed of renunciation irrespective of the advice subsequently given and irrespective of whether the tenant had understood (prior to the execution of the lease) the valuable right that would otherwise be available in the event that the conditions for the entitlement to a new tenancy were satisfied.*

90. I am very conscious that, in circumstances where the renunciation has become the main plank of the plaintiff's case, the issue in relation to the enforceability of clause 4.35 was not addressed extensively in the plaintiff's argument. I am also very conscious that, in light of the view which I have formed in relation to the renunciation, any view I express on this issue is strictly obiter. Subject to those very important qualifications, it seems to me that the argument of the defendant in relation to this aspect of the case is correct. On the basis of the arguments which I have heard, it seems to me that clause 4.35 is caught by the prohibition contained in s. 85 (1) of the 1980 Act. It is clearly a provision which restricts the rights of the defendant under the 1980 Act and s. 85 (1) therefore prima facie applies. In circumstances where it cannot itself be said to

constitute a renunciation which complies with the requirements of s. 17 (1) (a) (iiia) of the 1980 Act, it does not seem to me to have the benefit of s. 85 (2). In those circumstances, it must follow that clause 4.35 is void and unenforceable."

73. The Judge did not consider it necessary to deal with DPC's alternative argument, based on estoppel principles, in relation to Clause 4.35. If Clause 4.35 was void by reason of section 85(1) of the 1980 Act, there was no basis on which any estoppel could be said to arise as, in such circumstances, the Lease must be interpreted as though it did contain that clause and therefore the argument that the clause gave rise to an estoppel "*must, of necessity, fall away*" (paragraph 91).

APPEAL AND CROSS APPEAL

74. ATL's Notice of Appeal set out no less than 59 grounds (some with multiple sub-grounds) and was rightly criticised by DPC as prolix and repetitive. Many of those grounds overlap or relate to matters that no longer arise or are peripheral to the appeal, such as breaches of the repairing covenants.

75. One of the grounds of appeal (ground 21) is that the Judge erred in finding that the Renunciation was effective "*notwithstanding his findings that ..(f) There was no draft lease attached to any document presented to the Court*". It will be necessary to come back to that ground later, but it may be observed immediately that the Judge appears not to have made any such finding in the course of his judgment. None of the other grounds of appeal dispute that a draft Lease was attached to the Renunciation on 12 November 2012. On the contrary, ground 8 in fact states that "*the evidence was that on the 12 November 2012 a draft lease only was appended to the purported deed of renunciation*" (emphasis in the original).

76. ATL's written submissions recite in detail the course of the proceedings in the High Court and refer extensively to the judgment of McDonald J. The submissions identify what is characterised as *"a vital factual issue in the case*" namely when the Promenade Road Premises Lease was finalised and executed. ATL makes the case that the evidence actually indicated that the draft lease was amended (to provide for the first break option at 5 rather than 10 years

– an amendment said by ATL to be one of "*enormous significance*") sometime after 12 November 2012 i.e subsequent to the purported execution of the Renunciation.[13]

77. Whether, on that (disputed) premise, the purported Renunciation was invalid is one of seven issues identified in ATL's submission as issues to be decided on appeal. The other issues are: whether the Renunciation related to the Promenade Road Premises; whether the Renunciation was invalid due to "*manifest errors on is face*"; whether, given that the Renunciation was not a contractual document but "*a waiver of valuable statutory rights*", such errors were capable of correction by the application of the *Chartbrook* principles; two issues as to whether ATL actually received independent legal advice in relation to the Renunciation; and, finally, the issue of whether DPC ought to have been refused equitable relief on the grounds of its "*inappropriate conduct*". Each of these issues is then addressed in the submissions. The submissions also challenge the Judge's findings of fact based on the evidence of Mr Colman, suggesting that the Judge should have effectively disregarded that evidence and that the findings made by him are unsound, not based on credible evidence and ought to be overturned by this Court. Citing *Doyle v Banville* [2018] 1 IR 505, ATL contend that the Judge failed to engage properly with the evidence of Simon Crosbie and Gerry Barry (DPC) to the effect (so it is said) that the draft Lease was "*radically altered*" some months *after* execution of the Renunciation.

78. Notably, ATL's written submissions do not assert that the draft Lease was not attached to the Renunciation when Mr Crosbie signed it on 12 November 2012 or challenge the Judge's

[13] ATL written submissions, paragraphs 60 – 62.

findings in that respect (except, indirectly, insofar as it is suggested that the Judge should have disregarded the entirety of Mr Colman's evidence). In fact, the submissions relied on Mr Colman's evidence that he had attached the draft Lease to the Renunciation as a springboard for the argument that the Renunciation was invalid because the draft was subsequently materially amended prior to the Lease being executed (an argument which did not feature at all in its oral submissions).[14]

79. DPC's written submissions also refer in detail to the Judgment of McDonald J. and cite *Hay v O' Grady* [1992] 1 IR 210 and *Leopardstown Club Ltd v Templeville Developments Ltd* [2017] IESC 50, [2017] 3 IR 707 as authority for the contention that this Court has only limited capacity to interfere with the findings of fact made by the Judge. DPC says that ATL has failed to demonstrate any basis for interfering with any such findings, including the findings made in reliance on Mr Colman's evidence. Its written submissions then address the issues identified by ATL, emphasising the specific findings made by the Judge which led him to conclude as he did that the Renunciation related to the Promenade Road Premises, that the Renunciation could and should be given effect notwithstanding the errors in it, and that ATL had had the benefit of independent legal advice as required by section 17(1)(a)(iiia) of the 1980 Act. As for the argument that the Renunciation was invalid because of the subsequent amendment of the draft Lease, DPC say that no such argument was made in the High Court and, citing *Lough Swilly Shellfish Growers Co-Op Society v Bradley* [2013] 1 IR 227 and *Ambrose v Shevlin* [2015] IESC 10, say that it would not be fair to permit ATL to rely on such an argument for the first time before this Court. Without prejudice to that objection, DPC says that it does not

[14] ATL written submissions at paragraphs 80 – 86.

matter whether the draft Lease was amended or not after 12 November 2012 but also says that the evidence does not, in fact, establish any such subsequent amendment.

80. DPC is clearly correct in stating that no argument was made in the High Court to the effect that the Renunciation was invalid because of the subsequent amendment of the draft Lease. Such an argument is not advanced in ATL's grounds of appeal either.

81. As to its cross-appeal, ATL's written submissions suggest that the approach adopted by McDonald J was inconsistent in that, while accepting that a renunciation could be made "*at any time*" – whether before, at time of, or after the grant of a tenancy – he effectively negated that conclusion by finding that to enforce Clause 4.35 would undermine the policy of the Act. However, the submissions appear to place greater weight on DPC's argument that the conduct of ATL in entering into the Lease, including Clause 6.35, gave rise to an estoppel by representation or convention precluding ATL from relying on section 85, though the submissions are notable for their failure to engage with the reasoning of the Judge on this point.

82. ATL filed separate submissions in response to DPC's cross-appeal. It accepts that a renunciation can be executed at any time but says that that does not affect the requirements for an effective renunciation (which it states to be "*agreement, a proper document and independent legal advice*") or dilute the requirement that such independent legal advice be given before renunciation. ATL says that there is no basis for any form of estoppel in the circumstances here.

83. At the hearing of the appeals, Mr Gardiner SC for ATL (who did not appear in the High Court) focussed largely on the question of whether the Renunciation could properly be linked to the Promenade Road Premises Lease. He observed of the Contract for Sale that it did not refer to any renunciation in relation to the "*New Site*" and that it required *both* a surrender and a renunciation in respect of the Tolka Quay Road Premises. However, his principal point was that there was no or no adequate evidential basis to link the Renunciation to the Lease and, in particular, no adequate evidential basis on which to hold that the Lease, or a draft of it, was attached to the Renunciation at the time of its execution by Mr Crosbie on 12 November 2012. It had not been put to Mr Crosbie that that was the case. Mr Gardiner questioned why the Lease would have included Clause 4.35 if it was the case that a renunciation in relation to the Promenade Road Premises had independently been executed before that Lease ever came into effect. Mr Gardiner appeared to accept that, if it was established that at the time that the Renunciation was executed by Mr Crosbie, it had the Lease, or even a draft Lease, attached to it, the *Chartbrook* principles might properly apply but that was not, he said, established by the evidence. He emphasised that only objective evidence was admissible in this context and that the subjective understanding and/or intentions of the parties – and *a fortiori* of someone such as Mr Colman, who was not a party, had to be disregarded, as had evidence of prior negotiations or engagement. The Judge, he said, thus erred in attaching any reliance to Mr Colman's evidence regarding the completion list. Referring to the judgment of the High Court Judge, Mr Gardiner submitted that it did not contain any clear finding of fact that the Lease or draft Lease was attached to the Renunciation at the time that Mr Crosbie signed it in William Fry's offices on 12 November 2012.

84. As Mr McGrath SC observed when he came to make DPC's replying submissions, Mr Gardiner's oral submissions did not address any of the remaining grounds of appeal in ATL's Notice of Appeal, including the grounds relating to independent legal advice, or the argument made prominently in ATL's written submissions to the effect that that the Renunciation was invalid on the basis of a subsequent amendment of the draft Lease in relation to break options.

85. Mr McGrath SC (who had appeared in the High Court) began his submissions by emphasising that this was an appeal and not a *de novo* hearing or rerun of the trial. It was not, he said, open to ATL on the appeal to raise objections to the admissibility of evidence which had been heard by the High Court without objection. It was, he submitted, too late to raise any issue about the non-production of original documents at trial or to challenge the evidence given by Mr Colman – most of which, he observed, was elicited in cross-examination. Mr McGrath cited *Mapp v Gilhooley* [1991] 2 IR 253 and *RAS Medical Ltd v Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 IR 63, in support of these submissions. He referred to the analysis of section 17(1)(a)(iiia) in Wylie, *Landlord and Tenant Law* (3rd ed, 2014) ("*Wylie*") in which the author emphasised that the purpose of the amended provision was to facilitate contracting out of new tenancy rights and to simplify the requirements for a valid renunciation (paragraph 30.24). He also noted that the analysis in *Wylie* (at paragraph 30.23) of the requirement for "*independent legal advice*" (advice independent of the landlord) supported the approach taken by the High Court. There was, he said, no basis in the 1980 Act for requiring a very strict approach to the Renunciation here, less still to exclude the application of the *Chartbrook* principles from the area of landlord and tenant. Neither did the authorities support any argument that *Chartbrook* did not apply to documents relating to property or to

documents which were not contractual in nature or which were not the subject of direct negotiation between the interested parties.

86. According to Mr McGrath, Mr Colman's "*unequivocal*" evidence was to the effect that the draft Lease was attached to the Renunciation at the time of signature, having been attached by Mr Colman himself. That evidence was not challenged in cross-examination or contradicted by any other witness. As the Judge had noted in paragraph 39 of his judgment, Mr Crosbie had not suggested in his evidence that he thought that the Renunciation related to any other premises. Mr Gardiner's submission that there was no evidential basis for the Judge's findings was a "*remarkable*" one. In addition to the evidence of Mr Colman, there was a significant body of objective evidence supporting the Judge's conclusions, including the fact that the only lease involved was the Promenade Road Premises Lease. He also referred to the completion list and the evidence given about it by Mr Colman in this context. The issue of whether the Renunciation related to the Promenade Road Premises Lease was ultimately one of fact and the Judge had made a clear finding on that issue which he was entitled to make on the evidence before him.

87. Mr McGrath also addressed his cross-appeal and it was addressed briefly by Mr Gardiner in his reply.

ANALYSIS

ATL'S APPEAL

The "*Chartbrook* Principles"

88. As will be apparent from the account above, the fundamental issue in this appeal is whether the trial Judge was correct to conclude that the undoubted mistakes in the Renunciation executed by Mr Crosbie on 12 November 2012 were susceptible to "*correction by construction*" on the basis of the approach articulated by Lord Hoffman in *Chartbrook*.

89. As the appeal was presented, the major points of conflict appear to be factual/evidential rather than legal but it nonetheless appears appropriate to begin our analysis by considering the legal framework, as that provides the context in which the findings of fact made by the Judge, and ATL's challenge to those findings, fall to be assessed.

90. The principle that a court may, as part of the process of construction, correct obvious mistakes in a contract in fact pre-dates the decision in *Chartbrook*. In *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] Bus LR 1336, Carnwath LJ (as he then was) noted a statement of that principle at para 9.01 of Lewison, *The Interpretation of Contracts* (3rd ed, 2004) ("*Lewison*") for which *Wilson v Wilson* (1854) 5 HL Cas 40 and *East v Pantiles (Plant Hire) Ltd* (1981) 263 EG 61 were cited as authority. Carnwath LJ regarded as "*uncontentious*" the statement made by Brightman LJ in *East v Pantiles* as to the two conditions which had to be satisfied, at least as regards errors on the face of the instrument

(namely that there must be "*clear mistake on the face of the instrument*" and that "*it must be clear what correction ought to be made in order to cure the mistake*"). However, Carnwath LJ went on to approve an observation in *Lewison* that the principle is not confined to such errors on the face of the instrument and that "*in order to decide whether there is such a mistake, the court may take into account such evidence of background facts as is admissible in order to interpret the contract*" (at paragraph 46).

91. As it happens, *East v Pantiles* was a landlord and tenant case, in which an issue arose as to whether rent review notices were served in time. The landlord argued that a date specified in the lease was in error and that the clause should be construed as if a different date was specified. The High Court agreed that there had been an obvious clerical blunder. On appeal, however, the Court of Appeal was not satisfied that there had been a clear mistake. But it is clear from the judgment of Brightman LJ (with whom the other members of the court agreed) that, in principle, the court had the power to correct any such mistake, provided that it was sufficiently clear and provided that it was clear what the correct should be made.

92. *KPMG LLP v Network Rail Infrastructure Ltd* was also a landlord and tenant case, this time involving a break clause in a lease of commercial office premises. Difficulties arose from the fact that words clearly had been omitted from the break clause. Some years before the tenant's predecessor and the landlord's predecessor had entered into an agreement for a lease, with a draft lease attached, which included a break clause in clear terms. The High Court ordered rectification of the break clause in the lease, on the basis of a finding that the common intention of the parties was to reproduce the break clause in the earlier draft lease. That finding was reversed by the Court of Appeal on the basis that it was not supported by the evidence.

However, the court also held that there was a clear mistake in the wording of the break clause and considered it appropriate to construe the clause by reference to the equivalent clause of the earlier draft lease.

93. *Chartbrook* involved a complex commercial contract for the development of site owned by Chartbrook, on which the defendant, Persimmon Homes, was to construct a mixed residential and commercial development and sell on long leases to be granted by Chartbrook at the direction of Persimmon. The development was duly constructed but a dispute then arose as to the price payable to Persimmon. That dispute related to the construction and effect of a provision of the contract providing for a balancing payment to Persimmon, referred to in the contract as the "*additional residential payment*" or ARP.

94. Giving the principal speech, Lord Hoffmann accepted that something had gone wrong in the syntax of the relevant contractual provision. At paragraph 21, he observed that when the language used in an instrument gives rise to difficulties of construction, the process of interpretation did not require one to formulate some alternative form of words approximating as closely as possible to that of the parties. Rather, the task was to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the court might have to express that meaning in "*language quite different from that used by the parties*" was no reason for not giving effect to what they appeared to have meant. He then referred to the statement of Brightman LJ in *East v Pantiles* to which we have referred above and went on:

"23 Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in KPMG LLP v Network Rail infrastructure Limited [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that 'correction of mistakes by construction' is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said (at p. 1351, para. 50):

> *'Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended.'*

24. The second qualification concerns the words 'on the face of the instrument'. I agree with Carnwath LJ ... that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.

25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language

and that it should be clear what a reasonable person would have understood the parties to have meant…"

95. Lord Hoffman went on to make it clear that, for the purpose of contractual construction, the admissible context and background does *not* include evidence of pre-contractual negotiations (though that exclusionary rule did not exclude the use of such evidence for other purposes such as to establish that a particular fact was known to the parties) (paragraph 42).

96. *Moorview* appears to be the first time that *Chartbrook* was considered by an Irish court. In an action against a guarantor, it emerged that the guarantee referred to the liabilities of a company called Moorview Properties Limited and not Moorview Developments Limited, the company to which the relevant funds had been advanced and which was the primary debtor. Giving judgment for the claimant bank, the High Court (Clarke J) expressly endorsed the principle of "*correction of mistakes by construction*" and stated that *Chartbrook* represented the law in this jurisdiction: paragraphs 3.5-3.6. Having referred to the bank's evidence, which relied on letters and contractual documents that had passed between the parties at or around the time that the guarantee was entered into and had identified the wider series of transactions of which the guarantee was an element, Clarke J had no difficulty in concluding that the reference to Moorview Properties Limited was a clear mistake and that it was equally clear that the guarantee should have made reference to Moorview Developments Limited: paragraphs 3.7-3.8.

97. *Moorview* has frequently been cited and applied in this jurisdiction, both in the High Court and in this Court. However, the outer parameters of the courts' power to "*correct by*

construction" have not been considered in this jurisdiction. Lord Hoffman's statement in *Chartbrook* that "*there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed*" must be understood in context. The objective of all contractual construction is to ascertain the objective meaning of the language used by the parties to express their bargain. A court is not entitled to rewrite the bargain made by the parties. It is only where it is very clear that something has gone wrong with the language used by the parties to express their bargain ***and*** it is also equally clear "*what a reasonable person would have understood the parties to have meant*" – what their bargain was – that any use of "*red ink*" can arise and then only to give effect to the bargain made by the parties, not to rewrite or restructure that bargain. Such limitations are of critical importance if the court is to not to stray beyond the legitimate limits of the construction exercise.

98. It was not suggested by ATL that the *Chartbook* principles did not form part of Irish law. Neither was it suggested that the Judge misunderstood those principles. A number of arguments were, of course, made in the High Court to the effect that the principles did not apply in the circumstances here. Thus, it appears from the High Court judgment that it was contended by ATL (or, at least, that the Judge understood it to be contended) that the principles did not apply at all in the area of landlord and tenant law.[15] The Judge rejected that contention for the reasons set out at paragraph 46(f) of his judgment. No such categorical exclusion was contended for before this Court and it is therefore unnecessary to address the point here, other than to observe that, in addition to the decisions referred to by the Judge in this context, *East*

[15] Ground 29 in ATL's Notice of Appeal suggests that its submission was as to the inapplicability of contractual interpretation rules to a deed of renunciation and that the Judge mistakenly took that submission as being that the contractual interpretation rules did not apply in landlord and tenant in general.

v Pantiles and *KPMG* were both landlord and tenant cases and *Chartbrook* itself was a dispute arising from a property transaction.

99. It was also contended in the High Court that the *Chartbrook* principles had no application to a "*unilateral document*" such as the renunciation at issue here which, it was said, differed from a negotiated bilateral contract. Again, that argument was rejected by the Judge, both as a matter of principle and because there was authority (*ICM Computer Group Ltd v Stribley*) for the application of the principles to documents executed unilaterally, such as a deed amending a pension scheme: High Court judgment at paragraphs 55-57.

100. A version of that argument was advanced on appeal and so it is necessary to address it here. As we understand the argument, it is that the *Chartbrook* principles do not apply to the Renunciation, not so much because it was a unilateral document but because it involved the waiver of a valuable statutory right. As it observed in its written submissions, in *Chartbrook* neither party had the benefit of any statutory protection by virtue of its contractual position.[16] However, the argument is not really developed in those submissions, which, instead advance various unrelated complaints to the effect that ATL was not a willing contacting party, having been "*coerced*" into ceding its sublease on the Tolka Quay Road premises (on foot of which, it is suggested, ATL had likely acquired Part III rights)[17] and about the alleged changes in the break clause which, it is said, reduced the value of the Promenade Road Premises Lease to ATL, such that "*no concession should be made to [DPC] and no allowance for 'incorrect*

[16] ATL written submissions, para 75.

[17] *Ibid*, para 77.

precedents' or misdescription or omissions."[18] The only other point made in this part of ATL's submissions is as to the absence of any earlier record of the parties' intentions prior to the presentation of "*the flawed draft renunciation*."[19] No authority is referred to by ATL in support of this aspect of its submissions.

101. In response, DPC stressed the scope of application of *Chartbrook* demonstrated (it says) by the decision of the Court of Appeal of England and Wales in *Ong v Ping* [2017] EWCA Civ 2069 in which the court applied *Chartbrook* in construing a unilateral deed of trust. The suggestion that *Chartbrook* can be distinguished or disapplied where there is an alleged inequality of bargaining power is, it says, unsupported by any authority. Finally, it says that, as the Judge explained in paragraph 46(g) of his judgment, a prior record of the parties' intention is a requirement in an action for rectification, it is not a requirement where it is sought to correct an error by construction.[20]

102. No argument was made at the hearing of the appeal that *Chartbrook* has no application where there was an inequality of bargaining power between the parties. In any event, any such argument is not well-founded in our view. As for the point made about the absence of any prior record of the parties' intention, we agree with the Judge that the availability of such a record is not a pre-condition to the application of the *Chartbrook* principles, whatever may be the position as regards an action for rectification.

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[18] *Ibid*, para 79.

[19] *Ibid*, para 78.

[20] DPC written submissions, paras 37-41.

103. As the Judge observed in his judgment, *ICM Computer Group Limited v Stribley* illustrates the application of *Chartbrook* to the construction of "*unilateral document*",[21] in that case a deed of amendment of a pension scheme adopted by the relevant employers. Although the issue is not addressed in terms in her judgment, the fact that the deed was adopted unilaterally, and not negotiated bilaterally, appears not to have been regarded as a difficulty by Asplin J in the Chancery Division. In *Ong v Ping*, the Court of Appeal applied *Chartbrook* to the interpretation of a declaration of trust made by a deceased settlor.

104. We see no reason of principle why "*unilateral documents*" should, as a category, be regarded as excluded from the application of the *Chartbrook* principles and no such reason has been identified by ATL. Such documents may have significant legal consequences (as indeed is the position here) and, even if unilateral in form (in the sense of being made by one party only), will often be the entered into in the context of a wider commercial transaction(s) (as was also the position here) and as a result of requirements imposed by another party involved in the transaction (as, at least on DPC's case, was the position here). A tenant who executes a renunciation is not free to withdraw it subsequently (any more than a guarantor is free to withdraw a guarantee once given and acted on). The construction and effect of such documents will often be a matter of dispute (as is illustrated here) and, where such a document contains an obvious error and where it is clear how that error should be corrected – the fundamental requirements of "*correction by construction*" – we can see no reason why, by

[21] We are consciously avoiding use of the expression "*unilateral contract*" in this context as that expression is commonly understood to refer to options, to which very particular rules of construction apply: See *Lewinson* (6th ed, 2015) at 16.14. A renunciation under section 17 of the 1980 Act is clearly not a "*unilateral contract*" in that sense. Moreover section 17(1)(a)(iiia) makes it expressly clear that a renunciation in writing does not require consideration moving from the landlord to the tenant (*"whether for or without valuable consideration"*).

reason only of the fact that the document was made by one party only, the court should be compelled either to give effect to the erroneous document (to the extent that effect can be given to it) or hold the document ineffective, in either case frustrating the intentions and expectations of the parties involved.

105. In our view, it would seem very anomalous if a free-standing renunciation such as that at issue here was to be regarded as *ipso facto* falling outside the scope of the *Chartbrook* principles because it is a unilateral instrument whereas if a renunciation was to be incorporated into the lease itself, *Chartbrook* would apply.

106. In any event, as we have observed, the gravamen of ATL's argument here is that *Chartbrook* should not apply because the document at issue involves the waiver of valuable statutory rights under the 1980 Act. We readily accept that this statutory context is relevant to the application of *Chartbrook*, as was also accepted by the Judge at paragraph 48 of his judgment. But as the Judge observed, renunciation of Part II rights is expressly provided for by the 1980 Act and the amendments made to section 17(1)(a)(iiia) in 2008 were, as Mr McGrath emphasised in his submissions, intended to facilitate such renunciation. We agree with the Judge that the statutory context demanded that the High Court "*be satisfied that the terms of the renunciation are sufficiently clear and unambiguous to constitute a valid renunciation*". Applying *Chartbrook*, the Judge was indeed satisfied that that was the case. That conclusion is, of course, the subject of challenge, based on what are said to be errors made by the Judge in his assessment of the evidence. But we are not persuaded that the statutory context *a priori* excludes the application of the *Chartbrook* principles. Take, by way of illustration, a situation where an otherwise valid renunciation under section 17(1)(a)(iiia) misidentified the leasehold

premises. In such circumstances, assuming that it was clear what premises were intended to be referred, we consider that there would be no obstacle to the correction of that error by construction in reliance on *Chartbrook* and *Moorview*. That would be so notwithstanding that doing so could be said to involve depriving the tenant of a right to a new tenancy under Part II.

107. Here, of course, it is evident that the errors in the Renunciation go beyond the identification of the premises and there is significant dispute as to whether and how those errors should be corrected but, in our view, those issues go to the application of the *Chartbrook* principles by the Judge in the particular factual context here rather than to the question of whether those principles apply in the first place.

108. In the result, the limited argument made to the Court on this issue has not persuaded us that the Judge erred in principle in applying the *Chartbrook* principles. We therefore turn now to the challenge made to the Judge's assessment of the evidence and ATL's fundamental contention that the Judge was wrong to conclude that, applying *Chartbrook*, the undoubted errors in the Renunciation could and should be corrected by construction in the manner contended by DPC.

The Application of the *Chartbrook* Principles here

Appellate Review of the Judge's Findings of Fact - this Court's Proper Role

109. As Mr McGrath observed at the start of his submissions, this is not a rerun of the High Court hearing. This Court's role in assessing the evidence, and reviewing the findings made by the Judge, is a narrow and limited one. That is a fundamental tenet of appellate review in this jurisdiction, dating back to *The SS Gairloch* [1899] 2 IR 1

110. It is unnecessary to review the modern authorities in any detail. The jurisprudence is usefully summarised in the judgment of Denham CJ (with which the other members of the Supreme Court agreed) in *Leopardstown Club Limited v Templeville Developments Ltd* [2017] IESC 50, [2017] 3 IR 70 (at para 82):

> *"• An appellate court does not proceed by way of a full rehearing of a case.*
>
> *• An appellate court is bound by the findings of fact of a trial judge which are supported by credible evidence.*
>
> *• In general, an appellate court proceeds on the findings of fact of a trial judge.*
>
> *• The fact that there is contrary evidence does not alter the position.*
>
> *• An appellate court should be slow to substitute its own inferences of fact where such depends upon oral evidence, and a different inference has been drawn by the trial judge.*
>
> *• The fact that there is some evidence before a trial judge which may lead to a different conclusion does not alter the fundamental principle.*
>
> *• A finding of the credibility, or not, of a witness is a primary finding of fact*."

111. An appellate court may intervene where the trial judge makes a material and significant error in the assessment of the evidence or clearly fails to engage with a significant element of the evidence put forward: see, for example, *Doyle v Banville* [2012] IESC 25, [2018] 1 IR 505. But "*non-engagement*" means something "*truly glaring*" that goes to the "*very core, or the essential validity*" of the trial judge's findings and involves "*a high threshold*", effectively requiring a conclusion that the judge's conclusion is "*so flawed, to the extent that it is not properly 'reasoned' at all*": per McMenamin J (Dunne and O' Malley JJ agreeing) in *Leopardstown Club Limited v Templeville Developments Ltd*, at paragraph 110.

112. In addressing this appeal, it is essential to keep the proper boundaries of this Court's role in mind. It is important not to overstep the Court's appellate function by substituting the Court as fact-finder. That is not its role. At the same time, it is important that the Court should not surrender its proper appellate function; it is entitled – indeed it is the Court's duty – to "*ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts*" (per Clarke J in *Doyle v Banville*, at paragraph 14).

The Findings made by the Judge and the Challenge to those findings

113. As we have already noted, the principal focus of ATL's oral submissions was on the Judge's finding that the draft Lease was appended to the Renunciation when it was signed by Mr Crosbie Junior. Accordingly, we shall address that issue first.

114. That the Judge *made* such a finding is clear. We have already referred to the relevant portions of his judgment. To recap, at paragraph 27(i) the Judge noted the definition of "*premises*" in clause 1.1. of the Renunciation and observed that "*if a draft of the lease was attached to the renunciation, it follows that it would be possible to identify that the document was intended to refer to the Promenade Road premises.*" The reference to the draft lease being *attached* must clearly be understood as "*attached at the time*". In the previous sub-paragraph, the Judge referred to Clause 1.3 of the Renunciation which made it clear that "*the lease, the subject of the renunciation, is attached to the document*" and noted that the evidence of Mr Colman "*was that a draft of the lease was so attached.*" Again, that can only mean "*attached at the time*". Finally, and most significantly, at paragraph 52(c) the Judge expresses the view that it was clear from a consideration of the background facts that the Renunciation was intended to apply to the Promenade Road Premises, identifying a number of features that "overwhelmingly point to this conclusion", one of which was that it was "*clear that the renunciation had a copy of the draft lease attached to it in which, of course, the Promenade Road premises were identified*."

115. It is, in our view, equally clear that there was an adequate evidential basis for that finding. Mr Colman gave evidence to that effect on Day 5, page 46. The Judge having drawn his attention to the definition of lease in Clause 1.3 of the Renunciation ("*the lease attached to this Renunciation which is intended to be entered into …*"), Mr Colman stated "*…exactly which is intended to be entered into between the landlord and the tenant and that is the form of document. Judge, that was attached*" (our emphasis). Later in his evidence he re-iterated that the Renunciation had been attached, by him, to a draft of the Lease (Page 72, line 25 - Page 73, line 23 and Page 77, line 28 – Page 78, line 17).

116. That evidence clearly conveyed, and was understood by the Judge to convey, that, when the Renunciation was signed by Mr Crosbie on 12 November 2012, a draft of the Promenade Road Premises Lease was attached to it, having been attached by Mr Colman.

117. This evidence was not challenged on cross-examination. It was not suggested to Mr Colman that he only attached the draft Lease sometime after the execution of the Renunciation by Mr Crosbie Junior When, immediately after Mr Colman's evidence concluded, Mr Crosbie returned to the witness box to resume his evidence in chief (Mr Colman having been interposed in the middle of his evidence), he was not invited to give – and did not give – evidence contradictory of Mr Colman's evidence on this issue. Mr Spain might have been in a position to give contradictory evidence but he was not called as a witness by ATL.

118. We should note that in his closing address counsel for ATL did observe that, while there had been reference to there being "*a stapled version of the renunciation to a draft lease*" in Arthur

Cox, "*we didn't see it.*"[22] But that point was made as a preliminary to a complaint that it was the draft of the Lease, rather than the Lease itself, that had been attached to the Renunciation and a suggestion that, if the Lease signed by Mr Crosbie had been attached *"there might have been more weight attachable to [DPC's] submission*."[23] Neither at that point or any other point in counsel's closing submissions was the Judge invited to reject the evidence of Mr Colman on this issue or find that nothing was, in fact, attached to the Renunciation when it was signed and/or that the draft Lease was only attached at some later time.

119. Furthermore, and as we have already noted, the Judge's finding that the draft Lease was attached to the Renunciation at the time that it was signed by Mr Crosbie was not the subject of challenge in ATL's (lengthy) Notice of Appeal or its written submissions. Such a challenge was first articulated in ATL's oral submissions. That is not generally an appropriate or permissible procedure and, in itself, demonstrates the weakness of this aspect of ATL's appeal.

120. It is, in any event, too late for objection to be taken about the non-production of original documents at the trial. Any such objection could and should have been taken before the Judge. It would be wholly unfair to DPC, and fundamentally inconsistent with the appellate character of this Court's jurisdiction, to permit such an objection to be advanced here for the first time: *RAS Medical Ltd v Royal College of Surgeons in Ireland*, per Clarke CJ at paragraphs 84 and 85.

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[22] Day 6, page 85.

[23] *Ibid*

121. We were invited to infer from Mr Colman's evidence to the effect that he could have attached the Lease signed by Mr Crosbie to the Renunciation before it was signed, but instead attached the draft Lease as per the Law Society Practice Note, that the attachment must necessarily have occurred sometime after 12 November 2012, given that Mr Colman was not present in William Fry on 12 November. As a matter of logic, that point has some force but, again, it is simply not a point that can be taken, for the first time, in an appeal to this Court. If there was such an inconsistency or contradiction in Mr Colman's evidence, it should have been explored in cross-examination. Mr Colman might have accepted that his recollection was mistaken and that the draft Lease was indeed attached subsequently. Alternatively, he might have explained that his recollection, that the Lease signed by ATL was available to him at the time that he had attached the draft Lease, was itself mistaken. He may have some other explanation for the apparent inconsistency. But the issue was not explored and it would be wholly inappropriate for this Court to speculate on what the state of the evidence would have been in the event that the issue had been pursued or whether or how, on that hypothesis, the Judge's assessment might have been different.

122. In these circumstances, we must reject ATL's challenge to the Judge's finding that the draft Lease was attached to the Renunciation when it was signed by Mr Crosbie. That challenge is made too late. In any event, there was evidence to support the Judge's finding and the Judge was not guilty of any material error in his assessment of the evidence or any material failure to engage with it such as might attract the application of *Doyle v Banville*. On this and all other issues raised before him, the Judge engaged very fully with the evidence and arguments and explained in lucid detail his conclusions and the reasons for them.

123. That was not, of course, the only factor on which the Judge relied in finding that the Renunciation related to the Promenade Road Premises. Another was the fact that the only lease entered into by ATL in relation to a premises with the Port of Dublin was the Promenade Road Premises. That was not disputed and it is evident from his judgment that the Judge regarded it (and in our view was entitled to regard it) as significant: paragraph 52(c) and (d). Yet another factor referred to by the Judge in paragraph 52(c) was that the draft Lease contained a covenant that ATL should execute a Deed of Renunciation waiving any renewal rights in accordance with section 47 of the 2008 Act. The significance of that fact is that, even on the hypothesis that such a covenant was void by reference to section 85(1) of the 1980 Act, its inclusion in the draft Lease clearly evidenced an intention by the contracting parties that ATL should execute a renunciation of Part II rights in respect of the Promenade Road Premises.

124. A legitimate issue does appear to arise as to the Judge's reliance on Special Condition 6.2(a) of the Contract for Sale and the Document Schedule. His interpretation of those provisions and his apparent reliance on Mr Colman's evidence as to what they referred to (which evidence was, it might be said, supported by email correspondence between him and McCann Fitzgerald in September 2012) has been subject to forceful criticism (though no objection appears to have been taken to the admissibility of Mr Colman's evidence on this issue at the time). Complaint is also made about the Judge's apparent reliance on Mr Colman's evidence that item 47 on the Completion List ("*Executed Deed of Renunciation re Lease*"). Again, however, no objection to the admissibility of that evidence appears to have been taken at the time. But even if these matters were to be wholly disregarded, there remains a more than

adequate evidential foundation for the Judge's finding that the Renunciation related to the Promenade Road Premises. In reality, the finding by the Judge that the draft Lease was attached to the Renunciation when it was signed by Mr Crosbie made that further finding inevitable.

125. On the basis of that finding, the Judge was entitled to conclude that something had gone wrong with the language in the Renunciation. Indeed, that is obvious on the face of the document. Its title referred to renunciation under the Landlord and Tenant Act 1994 and Clause 4 specifically refers to renunciation under section 4 of that Act. However, as of November 2012, section 4 (the only provision of the 1994 Act that provided for renunciation of rights under Part II of the 1980 Act), while technically unrepealed, effectively had no existence. Section 4 had inserted a new sub-section, section 17(1)(a)(iiia), into the 1980 Act but a new section 17(1)(a)(iiia) had been substituted by section 47 of the Civil Law (Miscellaneous Provisions) Act 2008. In those circumstances, the references to the 1994 Act and to section 4 of that Act were clearly mistakes. The references to use of the Premises as an office was also very clearly a mistake – the proposed Lease was not confined to office use. The reference to a term of one year was also an obvious error, as such a term would not be capable of giving rise to any Part II rights in the first place and the proposed Lease was for a 20-year term. We have nothing further to add to the Judge's analysis on this issue and we also agree with his analysis and conclusions to the effect that it was clear how those clear errors should be corrected.

126. Earlier in this judgment we stressed the limits of the *Chartbrook* principles. We are mindful – as was the Judge – of the extent to which "*something went wrong*" with the language of the Renunciation and the significant volume of "*red ink*" required to correct the document. But

the question of whether the exercise undertaken here was within, or went beyond, permissible limits, is not to be determined in the abstract or on a *priori* basis but is critically dependent on the evidence. In our view, the Judge's assessment of the essentials of the evidence cannot be faulted and, on the basis of the particular findings that he made, the Judge was, in the circumstances here, entitled to conclude that, properly construed, the effect of the Renunciation was clear: Judgment, paragraph 57.

127. That finding, as well as our earlier analysis of the *Chartbrook* principles, disposes of issues (i), (ii) and (iii) identified in ATL's written submissions ((i) "*Did the purported Renunciation relate to Promenade Road?*", (ii) "*Was the purported Renunciation invalid due to manifest errors in its face?*" and (iii) "*Whether or not such errors on its face are capable of correction by the application of the Chartbrook principles*").

128. That leaves for consideration the issue of independent legal advice. Again, the Judge dealt with this issue very comprehensively in his Judgment, paragraphs 58 - 74. Two of the questions identified in ATL's written submissions on appeal relate to this issue.[24] First, it is said that William Fry could not give independent legal advice to ATL/Mr Crosbie Junior because it was acting for Mr Crosbie Senior and his companies and, it is said, there was a conflict of interest between ATL on the one hand and Mr Crosbie Senior and his companies on the other. But that submission fails to acknowledge or engage with the Judge's express finding of fact that the evidence of Mr Crosbie Junior did not substantiate the existence of any

[24] Issue (v) at ATL's written submissions, paras 87 – 92)("*Could William Fry give ATL independent legal advice*") and issue (vi), at paras 93-95 ("*Whether or not ATL actually received independent legal advice*")

alleged conflict of interest: Judgment, paragraph 73. ATL also failed to address the Judge's legal finding that "*independent*" in this context means independent of the landlord: judgment, paragraph 74 (an interpretation that derives support from *Wylie*). No grounds were identified as to why that analysis is wrong and we agree with it. Accordingly, William Fry were in a position to give independent legal advice to ATL/Mr Crosbie Junior.

129. The second issue advanced in ATL's written submissions relates to whether ATL in fact received independent legal advice. ATL asserts that the point "*remained unproved"* but otherwise fails to engage with the analysis or conclusions of the Judge on this issue. The Judge concluded that, as a matter of fact, such advice was given: Judgment, paragraphs 63-67. Separately, he held that, having signed a document recording that ATL had received such advice, it was not open to Mr Crosbie to contend otherwise: Judgment, paragraphs 67-69 and that ATL was estopped from contending that it had not received independent legal advice: judgment, paragraphs 75-82. Nothing at all was said to us as to why either aspect of the Judge's analysis was erroneous and so these grounds of appeal must be dismissed.

130. The remaining two issues on appeal identified by ATL can be dealt with relatively quickly. We have already referred to ATL's contention that the Renunciation was invalid in circumstances where the draft lease attached to it was amended before execution (issue (iv) in ATL's written submissions). No oral submissions were made in support of that argument and we were left unclear as to whether it had been abandoned. In any event, no such contention can properly be maintained on appeal to this Court in circumstances where it was not advanced before the Judge. We agree with DPC that this is not the kind of argument that could properly be permitted to be mad for the first time on appeal, having regard to *Lough Swilly Shellfish*

Growers Co-op Society Ltd v Bradley [2013] IESC 16, [2013] 1 IR 227. In any event, the transcript fragments to which we have been referred fall far short of establishing the factual premise that there was an amendment of the break clause at some time subsequent to 12 November 2012. Given that this issue was not raised at trial, the complaint of non-engagement by the Judge (written submissions, paragraphs 109 – 114) is unstateable.

131. The final issue identified in ATL's written submissions (issue (vii) is "*Whether or not the Plaintiff ought to have been refused equitable relief on the grounds of its inappropriate conduct*". There is no doubt that there were very significant failings in the manner in which DPC mounted and pursued these proceedings: Judgment, para 24. We have set out above other severe criticisms made by the Judge, none of which have been disputed before us. But those difficulties ultimately did not prevent the Judge from adjudicating on the issues raised and reaching a clear conclusion that the Renunciation was effective and DPC was entitled to possession having regard to its earlier service of the Break Notice (which was not challenged). These are, it seems, significant commercial premises. Once the Judge concluded that the Renunciation was effective, and therefore that ATL had no basis for claiming a right to a new lease under Part II of the 1980 Act, it followed that a possession order should be made. It may be that, as a matter of principle, such an order might nonetheless be refused as a matter of discretion by reference to the conduct of the landlord – it is not necessary for us to express any view on that issue for the purpose of resolving this appeal and we do not do so - but the Judge clearly did not think that DPC's conduct here, as critical as he was of it, approached that threshold (though it appears to have been a material factor in his adjudication on costs). Nothing said in ATL's submissions on this point persuades us that the Judge was in error in the approach that he took.

132. We would therefore dismiss ATL's appeal and affirm the Order made by the High Court.

THE CROSS-APPEAL

133. In light of the dismissal of ATL's appeal, it is not necessary for us to adjudicate on DPC's cross-appeal.

134. If it had been necessary to do so, careful consideration would have to be given to the application and effect of section 85 of the 1980 Act in the particular circumstances here.

135. Section 85 provides as follows:

> "*(1) So much of any contract, whether made before or after the commencement of this Act, as provides that any provision of this Act shall not apply in relation to a person or that the application of any such provision shall be varied, modified or restricted in any way in relation to a person shall be void.*
>
> ***(**2) Subsection (1) does not apply to a renunciation referred to in*
>
> *(a) subparagraph (iiia) (inserted by section 47 of the Civil Law (Miscellaneous Provisions) Act 2008), or*
> *(b) subparagraph (iiib) (inserted by section 191 of the Residential Tenancies Act 2004)*
>
> *of section 17(1)(a).*"

136. It will be recalled that Clause 4.35 of the Promenade Road Lease provided that the "*[ATL] shall execute a Deed of Renunciation waiving any renewal rights past, present or future, previously acquired or which may be acquired in accordance with s. 47 of the Civil Law (Miscellaneous Provisions) Act, 2008*".

137. The Judge accepted the argument made by ATL that this clause fell foul of section 85(1) because it committed ATL to executing a renunciation, in advance of receiving independent legal advice as required by section 17(1)(a)(iiia). That, the Judge accepted, would undermine the policy of the 1980 Act.

138. As a matter of general principle, we readily see the rationale for that conclusion. The requirement for independent legal advice would clearly be undermined if such advice was to be given in circumstances where, regardless of what that advice may be, the tenant was nonetheless legally obliged to execute a renunciation. But that does not appear to have been the position here. Here, the Judge found, ATL *had* received independent legal advice in relation to the renunciation of its potential Part II rights in respect of its proposed occupation of the Promenade Road Premises. As the Judge also had found, having received such advice ATL was happy to proceed to execute a renunciation of those rights (in the form of the Renunciation). But even if one disregards the Renunciation itself, the fact is that on 12 November 2012 ATL (i) received independent legal advice regarding renunciation of its Part II rights and (ii) agreed to execute a renunciation in the form of Clause 4.35 of the draft Lease which was executed by it. Arguably, in those quite particular circumstances, section 85 provided no impediment to the enforcement of Clause 4.35.

139. However, given that we have dismissed the appeal and affirmed the order made by the Judge it is neither necessary nor appropriate to consider that argument further or express any concluded view on this aspect of the cross-appeal or on the separate estoppel argument advanced by DPC.

CONCLUSIONS

140. For the reasons set out in this judgment, we would dismiss the appeal and affirm the order of the High Court. In light of that conclusion the cross-appeal falls away and we make no order on it.

141. The Court will schedule a short hearing to deal with the issue of costs.

Pilkington J agrees with this judgment and the order proposed.