THE COURT OF APPEAL

APPROVED
NO REDACTION NEEDED
Record Number: 2023/128
High Court Record Number: 2021/420S
Neutral Citation Number: [2024] IECA 15

Woulfe J.

Faherty J.

Haughton J.

BETWEEN/

LEINSTER LEADER LIMITED (IN LIQUIDATION)

RESPONDENT

-AND-

FORMPRESS PUBLISHING LIMITED

APPELLANT

JUDGMENT of Mr. Justice Robert Haughton delivered electronically on the 24th day of January, 2024

1. This is an appeal against the *ex tempore* judgment of Owens J. delivered in the High Court on 24 April 2023, and his order dated 24 April 2023 whereby he granted summary judgment against the appellant in the sum of €158,747.81, and whereby he ordered that the balance of the respondent's claim (which in total was for the sum of €178,376.31) be

adjourned to plenary hearing. The trial judge also ordered that the appellant pay to the respondent the costs of the motion for summary judgment.

2. The proceedings were commenced by summary summons issued on 12 July 2021. I will refer in this judgment to the respondent as "LLL" and the respondent's liquidator Mr. Declan de Lacey as "the liquidator". The application for summary judgment issued on 7 December 2021, grounded on the affidavit sworn on 27 October 2021 by the liquidator. A replying affidavit of Eugene McCooey, financial controller of the appellant, was sworn on 16 March 2022. A supplemental affidavit was sworn by the liquidator on 18 May 2022 and a second replying affidavit was sworn by Mr. McCooey and filed on 2 June 2022. Two further affidavits were sworn by the liquidator, on 17 June 2022 and 24 April 2023. It is fair to say that the critical evidence was documentary or otherwise uncontested and the key areas of conflict related to the legal effect of the documents and admitted facts.

3. The pleaded claim in the summary summons is for the payment of rent arrears due and owing in respect of a premises situate at and known as The Tempest Buildings, Douglas Place, Crowe Street, Dundalk, County Louth ("the Property").

4. The Property is owned by SKA Management Limited ("SKA Management"). On 29 May 1999 SKA Management was struck off the Register of Companies for failing to file returns. Despite this, on 16 August 2000 SKA Management entered into a lease of the Property to the LLL ("the Superior Lease") for a term of 25 years commencing on 16 August 2000 at a yearly rent of IR£24,000 payable in equal quarterly instalments commencing on 1 October 2000.

5. LLL paid just one sum of IR£6,000 as rent, to be held by SKA Management's solicitors in trust pending restoration of SKA Management to the Register.

6. By order of the High Court (Keane J.) made on 22 October 2018 SKA Management was restored to the Register pursuant to s. 738 of the Companies Act, 2014. Pursuant to s. 738(3) of the 2014 Act the effect of that restoration was that:

> *" ...the company shall be deemed to have continued in existence as if it had not been struck off the register ...".*

In *In re Amantiss Enterprises Ltd* [2002] 2 I.R. 177 O'Neill J. held that the equivalent words in s. 311(8) of the Companies Act, 1963 and s. 12(B) of the Companies (Amendment) Act, 1982 "*have the automatic effect of validating retrospectively all acts done in the name or on behalf of the company during the period between its dissolution and the restoration of its name to the register*." It was not disputed that s. 738(3) of the 2014 Act has the same automatic effect.

7. An extraordinary feature of this case is that restoration of SKA Management to the Register did not occur until 22 October 2018; had the application for restoration been delayed for another year it would no longer have been open to the court to make an order for restoration as there is a 20 year time limit,[1] and no rent would have been recoverable under the Superior Lease. As will be seen, following restoration SKA Management claimed in the liquidation payment of rent due under the Superior Lease from 2001 until the 31 December 2018.

8. By Underlease entered into between LLL and the appellant on 28 March 2014 ("the Underlease") the Property was underleased to the appellant for a fixed term of eight years commencing on 28 March 2014. The title page of the Underlease describes it as "*Underlease by reference to superior lease*", and in large part it mirrors the Superior Lease. The following somewhat unusual terms are important in the context of this appeal:-

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[1] Section 738(1) of the Companies Act, 2014 provides that an application to the High Court for restoration to the Register must be made "*within 20 years after the dissolution of the company.*"

*"**Background***

(A) *The Landlord is entitled to possession of the Demised Premises under the terms of the Superior Lease (as hereinafter defined and a copy of which is appended thereto).*

(B) *The Landlord has agreed to grant an underlease of the Demised Premises to the Tenant on the terms set out in this Lease.*

...

1.1 *The definitions and rules of interpretation set out in this clause apply to this lease.*

...

Annual Rent: *an amount equivalent to all monies reserved as rent payable by the Landlord pursuant to the terms of the Superior Lease payable within 7 days of demand being served on the Tenant provided that the rent has been demanded of the Landlord in accordance with clause 2.7(a)."*

"Superior Lease: *the lease by virtue of which the Landlord holds the Demised Premises a copy of which is appended hereto..."*

"Incorporated Terms: *all of the terms, requirements, covenants and conditions contained in the Superior Lease with such modifications as are necessary to make them applicable to this Lease and the parties to this Lease:*

(a) *including:*

(i) *the definitions and rules of interpretation in the Superior Lease;*

(ii) *..."*

"2. ***Grant***

2.5 This grant is made on the terms of this Lease, which include the Incorporated Terms as if they were set out in full in this Lease.

…

2.7 The grant is made subject to the Tenant paying the following as rent to the Landlord:

(a) the Annual Rent but for the avoidance of doubt the Tenant shall not be obliged to pay the Annual Rent unless the rent payable under the Superior Lease has been demanded of the Landlord by the Superior Landlord or such other party acting on his behalf;

(b) all sums payable by the Landlord under the Superior Lease to the Superior Landlord for insuring the Demised Premises against the Insured Risks (as defined in the Superior Lease) but for the avoidance of doubt the Tenant shall not be obliged to pay such costs of insurance unless they have been demanded of the Landlord by the Superior Landlord or such other party acting on his behalf;

(c) the Additional Sums; and

(d) all interest payable under this Lease.

2.8 Where payment is made by the Tenant to the Landlord in accordance with clauses 2.7(a) or 2.7(b), the Landlord will, on receipt of written request from the Tenant, furnish to the Tenant reasonable evidence of the payment of those amounts received by the Landlord on to the Superior Landlord.

3. ***The Annual Rent***

3.1 The Tenant shall from the Rent Commencement Date pay the Annual Rent in accordance with the term of this Lease.

…

6.2 The Landlord hereby exercises the Landlord's option to tax the Lease in accordance with Section 97 of the VAT Act and the Tenant shall pay to the Landlord on receipt of a valid VAT invoice on an amount equal to the VAT at the appropriate rate on the rents, fees and other sums payable by the Tenant under or in connection with this Lease and shall keep the Landlord fully and effectively indemnified against same.

…

15. ***Tenant's Acknowledgement***

15.1 Tenant acknowledges that notwithstanding the terms of the Superior Lease, the Landlord has not applied for and the Superior Landlord has not granted its consent to the Landlord to the grant of this Lease."

9. Accordingly the annual rent due under the Underlease was IR£24,000 plus VAT, mirroring the appended Superior Lease, and this was payable on quarterly gale days of 1 January, 1 April, 1 July and 1 October in each year. However under Clause 1.1 the rent was only payable by the respondent if rent had first been demanded by SKA Management under the Superior Lease, in accordance with Clause 2.7(a) of the Underlease, and it was only payable by the appellant within seven days following demand being served on it.

10. The appellant occupied the Property pursuant to the Underlease from 28 March 2014 until it vacated on 31 August 2017, as averred by Mr. McCooey in the affidavit which he swore on 16 March 2022 (paragraph 29). That averment is not disputed on affidavit, although the liquidator's submissions suggest that the appellant did not vacate until October

2017. Accordingly I must accept, at least for the purposes of this appeal, that the appellant vacated on 31 August 2017.

11. Remarkably no rent was demanded by or on behalf of SKA Management pursuant to the Superior Lease during the period of occupation of the property by the appellant, presumably because SKA Management remained struck off.

12. No rent was demanded of or paid by the appellant pursuant to the Underlease during the period of the appellant's actual occupation of the Property.

13. The liquidator was appointed on foot of a resolution passed by LLL on 29 January 2019.

14. By letter dated 18 February 2019 the liquidator informed the appellant of his appointment as liquidator, referred to the Underlease, and expressed his understanding that it remained in effect, and requested that "*... all future payments of rent pursuant to the [Underlease] should be made to ...*" the liquidator's account. He further indicated that he would need to deal with LLL's rights and obligations under the Superior Lease, and that he anticipated this might involve a surrender or disclaimer. This was followed up with an email on 6 March 2019 attaching the letter previously sent and requesting that the appellant would respond.

15. With regard to the demanding of rent by SKA Management under the Superior Lease, the liquidator makes the following averment in the affidavit which he swore on 24 April 2023:

> *"3. I say that an oral demand for rent due and owing under the Head Lease was made of me on the 30 September 2020 by Edward Kirk, director of the Head Lessor, SKA Management Limited, when I had a meeting with him in person. I say at that meeting I was personally served with demand for rent by Mr Kirk who furnished me with a rental statement requesting the sum of €559,747.39 and a proof of debt*

questionnaire completed and signed by Edward Kirk for the sum of €549,589.49 to be proved as a debt in the liquidation of the Plaintiff herein. The sum demanded was rent due and owing under the Head Lease from 2001 - 2018 amounting to €559,747.39. I noticed the discrepancy between the rental statement and the proof of debt questionnaire and was informed by Mr Kirk that the discrepancy was a mistake and that the amount he was claiming was as indicated on the rental statement and not the questionnaire. The figures in the statement were in agreement with my own calculations and the amount of the debt was admitted. I say that I understood the said rent was being demanded as set out in the rental statement and accepted service of the said demand. I say the said documents together with a cover letter were also sent to me by post by Donal O'Hagan & Co Solicitors, but I have no record of whether they came by ordinary or registered post."

The liquidator goes on to aver that following the admission of this debt to the liquidation he made an interim distribution payment to SKA Management on 19 May 2021 of €10,263.43, as one of the unsecured creditors receiving 1.8336% of the admitted debt.

16. The exhibited "*Creditors proof of debt questionnaire*" filled in by Mr. Kirk on behalf of SKA Management indicates that the sum claimed was for *"rent"* for the period 16 August 2000 - 31 December 2018, including VAT. The accompanying exhibit is a "*Rental Statement 22nd September 2020 - SKA Management Limited*" and refers to SKA Management as landlord and LLL as tenant under the Superior Lease of the Property, and it sets out a table of rent due for each year of the tenancy from 15 August 2001 to 15 December 2018. There are "*notes*" at the end of the rental statement stating:-

"(1) Tenant abandoned the premises (accepted abandonment on 31 Dec 2018) - key not even returned - Tenant moved to other premises in Dundalk.

(2) Rates : Tenant paid Louth Co. Co. until 31 Dec 2017

(3) For Rates Landlord prepared to take over from 1st January, 2019.

(4) Apparently by Underlease dated 28 Mar 2014 - The Tenant, The Lenister [sic] Leader purported to under-let to Formpress Publishing Limited - no Landlord's Consent obtained for this.

(5) Liquidator - Declan de Lacy [sic] - appointed for The Leinster Leader Limited on 29 Jan 2019."

The rental statement bears the date 29 September 2020.

17. The liquidator contends that these documents combined with the oral request for payment at the meeting on 30 September 2020 constitute a "*demand*" for payment of rent under the Superior Lease for the purposes of Clauses 1.1 and 2.7 of the Underlease. The appellant argues that it is not a sufficient demand.

18. By letter dated 27 November 2020 the liquidator sought from the appellant payment of rent under the Underlease in accordance with a Statement of Account attached. This sought rent in the amount of €11,688.55 for the period 14 March 2014 - 15 August 2014 and thereafter rent of €30,473.71 per annum up to 31 December 2018, adding a note that the Superior Lease terminated on that date. The total claimed came to €164,057.10.

19. That demand in error did not include VAT, and the liquidator purported to correct this in a revised demand sent with a letter of 23 June 2021 with a Statement of Account that included on the last line a claim for VAT at 23% on rent from 14 March 2014 - 31 December 2018 in the sum of €33,354.92. I note that this Statement of Account also revised the figure of €30,473.71, incorrectly claimed in the earlier account for the period 16 August 2018 - 31 December 2018, to €11,438. The total now claimed was €178,376.31.

20. The second Statement of Account was defective in that it failed to provide a VAT number for the respondent and did not describe itself as a VAT invoice. This technical error was admitted by the liquidator in paragraph 9 of the affidavit which he swore on 18 May 2022, and he states:

> *"In order to correct the error in respect of the deficiency related to the absence of a sequential number, a valid VAT invoice was served on the 9 May 2022."*

That exhibited invoice at last appears to be regular and correctly calculated, and claims payment of rent for the period from 14 March 2014 - 31 December 2018 in the sum of €145,021.39 plus VAT of €33,354.92, making in total €178,376.31.

21. No payment was made on foot of these demands, and that led to the issue of the summary summons herein on 12 July 2021. The notice of motion seeking summary judgment issued on 7 December 2021. The exchange of affidavits ensued. By order made on 20 April 2023 (Owens J.) the liquidator was given liberty to amend the claim to make it in conformity with the corrected VAT invoice served on 9 May 2022.

22. The application for summary judgment was heard by Owens J. on 24 April 2023, and by his order made on that date and perfected on 9 May 2023 he ordered that the respondent recover from the appellant the sum of €158,747.81, with the balance claimed being sent for plenary hearing, and he granted the liquidator his costs.

Ex Tempore **Judgment of the High Court**

23. The trial judge considered that the liquidator could properly have claimed that part of the debt for six years up to the date of the SKA Management demand on 30 September 2020 was statute barred, but noted that he elected not to do so. This raised a question as to whether, as between SKA Management and the liquidator, the gales of rent under the Superior Lease for periods prior to 1 October 2014 should be treated as statute *barred* (and therefore

incapable of being *demanded*) having regard to the six year limitation period under the Statute of Limitations, 1957, with the knock on effect that the first two gales of rent due under the Underlease (1 April 2014 and 1 July 2014) should not be recoverable. While noting that a liquidator can, for the purposes of the Statute of Limitations, acknowledge a debt for rent, and while considering that the respondent was "*not obliged to run a point based on the Statute of Limitations for the benefit of*" the appellant, he nevertheless decided that the respondent should not be entitled to judgment in respect of two gales of rent due under the Underlease for the periods 1 April 2014 and 1 July 2014, and the VAT that those payments would attract. That element of the respondent's claim was sent for plenary hearing.

24. The trial judge noted that the rent due under the Underlease "*was not being collected on some sort of trustee basis*", but he nevertheless held that it was a debt due by a sub-tenant as rent where that sub-tenant had been put into possession and retained possession "*... albeit in the context of an arrangement which had broken down some years previously because SKA was off the register and no rent was being paid*". He then stated:

> *"It was up to Formpress and the Leinster Leader vis à vis their other contracting parties to their two separate contracts to put themselves in a position where they accumulated the reserves to be in a position to pay when the bill would eventually come to be settled.*
>
> *That would happen when SKA was revived and then the capacity to look for the arrears. Once a claim was made by SKA for what was due by the Leinster Leader to it, this triggered an obligation on Formpress to pay the Leinster Leader under the sublease."*

The trial judge rejected an argument that no demand for rent had been made by SKA Management, holding that under Clause 2.7:

> *"… Any request for payment by SKA was sufficient. The letter on behalf of SKA setting out the claim in the liquidation and indeed the accompanying particularisation of the sums due to SKA was a request for payment, albeit in the context of a liquidation".*

He considered:

"The purpose of the clause [2.7] in the sublease was obviously to meet the contingency that there would be a delay. In fact there was a very long delay of course in the restoration of SKA to the register and to specify that payment obligations would be postponed until it came to the point where it started chasing for the rent. There can be no issue of estoppel or some sort of unjust enrichment here. …

There was no commitment by Leinster Leader to use money received from Formpress to make payments to SKA. Leinster Leader was receiving rent as the landlord on foot of a sublease under which Formpress got possession of the premises in Dundalk. Any idea that because SKA was not paid by Leinster Leader that this will now end up getting a dividend in the winding-up means that Formpress should not have to pay the arrears of rent to Leinster Leader under the sublease or have its liability reduced to an equivalent of a potential dividend on the winding-up in favour of SKA would also be misconceived."

25. The trial judge also rejected an argument based on Clause 4.15.1 of the Superior Lease under which LLL agreed:

"Not to assign, sublet, part with or share the possession of the entirety of the Demised Premises without the prior written consent of the Landlord (which consent shall not be unreasonably withheld)".

26. Having observed that both the appellant and the respondent were aware that consent had not been obtained when they entered the Underlease, he stated:

"A landlord has the option of treating a breach of this type of provision as a breach of covenant in seeking to forfeit the head lease. No steps were taken in the case of either of these leases. More fundamentally, if I might make this point again, Formpress was estopped from using the absence of landlord consent under the head lease as grounds for refusing to pay rent or otherwise comply with its obligations under the subleases for the reasons set out at paragraph 9(11) of the First Edition of Handley's Estoppel by Conduct and Election*; that book was published in 2006 by Thompson, Sweet and Maxwell. This has always been the law, well recognised to be so and the changes made to Irish law in 1967 have not affected the underlying principles."*

The extract quoted by the trial judge from *Handley* is as follows (omitting the footnotes):

"A landlord and the tenant are estopped by convention, while the tenant is in possession, and thereafter for purposes relevant to his past possession, from denying that the landlord had an estate which would support the lease, and that the tenant had a right to possession as such. The estoppel is a legal incident of all leases and each party is estopped from setting up a title which would contradict that of the other, and from denying 'one of the ordinary incidents or obligations of the tenancy on the ground that the landlord had no legal estate.' The Court 'is not concerned with the question of whether the agreement creates an estate or other proprietary interest

which may be binding on third parties … it is the fact that the agreement is a lease which creates the proprietary interest … it is not the estoppel which creates the tenancy but the tenancy which creates the estoppel'.

The estoppel applies even when the defect in the landlord's title appears on the face of the lease or both parties are otherwise aware of it. The importance of mutuality is illustrated by Otago Harbour Board v Spedding *[(1886) 4 NZLR 272] where the landlord, which could not be estopped from setting up its statute to invalidate the lease, could not estop the tenant from doing so. The estoppel is eminently fair. As Martin B. [*Cuthbertson v Irving *(1859) 4 H&N 742, at 758] said:*

> *'This state of law … tends to maintain right and justice and the enforcement of contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is?'".*

The trial judge considered that that applied to obligations assumed by a tenant under a lease and that "*[i]t doesn't matter that the lease has been entered into in breach of a covenant against subletting*". The trial judge also rejected a consideration point that was raised by counsel for the appellant, observing that:

> *"The leases were under seal in any event, Formpress was given possession; of course there was consideration. Possession of land given on agreed terms in consideration of a rent constitutes consideration."*

27. The trial judge also addressed the VAT element. He noted the appellant's obligation to pay VAT "*on receipt of a valid VAT invoice*" under the Underlease, and that meant "*an*

invoice in a form which the Revenue would be prepared to accept as an invoice for the purpose of claiming a deductible input on a VAT return."

He considered that that element had been cured by the latest invoice, and the amendment to the summary summons which he had allowed.

28. The trial judge also noted that an argument made by the appellant that part of the VAT was statute barred as between the liquidator and the appellant was abandoned by the appellant during the course of the hearing before him. This appears to have been on the basis that the claim for rent under the Underlease did not accrue until it was demanded by the landlord (the liquidator), which event had occurred well within six years of the issue of the summary summons, regardless of which invoice was taken as constituting the demand required by Clause 1.1.

The Appeal

29. Although the Notice of Appeal sets out some nine grounds of appeal, and some sub-grounds, at the hearing counsel for the appellant confined his submissions to four grounds upon which he argued that the trial judge erred in finding no arguable or real or *bona fide* defence to that part of the claim in respect of which a judgment was entered. I propose to address these in turn.

30. Before doing so, it should be said that the well-established principles of law relating to when the court should grant summary judgment, or should send a claim, in whole or in part, to plenary hearing, were not in dispute in either court, and it is not necessary to restate them here at any length. They are the principles as enunciated by Hardiman J. in *Aer Rianta cpt v. Ryanair Ltd (No.1)* [2001] 4 I.R. 607, and McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1. The power to grant summary judgment should be exercised with "*discernible caution*" and the test is whether there is a "*fair and reasonable probability of*

the defendants having a real or bona fide defence". As McKechnie J. observed, "*where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues.*" As Hardiman J. expressed it the question is "*is it "very clear" that the defendant has no case?*". However "*mere assertion*" does not give amount to a *bona fide* defence. It was also accepted that the court can give judgment for part of the amount claimed and send the balance for plenary hearing where an arguable defence is demonstrated.

31. In the present appeal the facts are in large part not disputed, and the claim revolves around documentation that the court can consider and construe, so that the real issue is whether and to what extent the appellant may have an arguable defence in law. The principles applicable to the exercise of this court's appellate jurisdiction were also not in dispute, the onus being on the appellant to persuade the court that the trial judge erred in law or in fact.

(i) No valid demand by SKA Management

32. Counsel for the appellant argued that the effect of Clause 2.7(a) of the Underlease was that before the appellant could have any liability to pay rent there first had to be proof of a demand in writing of LLL/the liquidator by SKA Management as the landlord under the Superior Lease. Counsel contended that the "*Creditors proof of debt questionnaire*" dated 30 September 2020 and the accompanying "*Rental Statement 22nd September, 2020 - SKA Management Limited*" dated 29 September 2020 did not, individually or taken together, comply with the formality of the "*demand*" required by the Underlease.

33. Counsel submitted that the need for a formal written demand under Clause 2.7(a) of the Underlease was supported by the wording of Clause 6.8.1 of the Superior Lease, which was a provision incorporated into the Underlease. That subclause provides:

"6.8 ***Notices***

6.8.1 Any demand or notice required to be made, given to, or served on the Tenant under this Lease is duly and validly made, given or served if addressed to the Tenant (or, if the Tenant comprises more than one person, then to any of them) and delivered personally, or sent by prepaid registered or recorded delivery mail, or sent by telex or telegraphic facsimile transmission addressed (in the case of a company) to its registered office or (whether a company or individual) to its last known address, or to the Demised Premises;"

34. Counsel submitted that the inference to be drawn from Clause 6.8.1 of the Superior Lease was that the demand required by Clause 2.7(a) of the Underlease must conform with Clause 6.8.1 of the Superior Lease and therefore must be in writing. Counsel therefore argued that a verbal demand, such as that made by the liquidator of Mr. Kirk the director of SKA Management on 30 September 2020, was not sufficient.

Discussion

35. In my view this does not give rise to an arguable defence, for a number of reasons. Firstly the phrase "*has been demanded*" in Clause 2.7(a) of the Underlease is not qualified by any express requirement that the demand be in writing, or evidenced in writing. There is no definition of "*demand*" or "*demanded*" in the Underlease or in the Superior Lease, and accordingly the phrase "*has been demanded*" falls to be construed in accordance with its natural and ordinary meaning. The liquidator at paragraph 3 of the affidavit which he swore on 24 April 2023 avers that he received "*an oral demand for rent due and owing*" from Mr. Kirk on 30 September 2020 and that he was "*personally served with a demand for rent by*

Mr. Kirk who furnished …" him with the rental statement and the creditors proof of debt. This is uncontroverted evidence of an oral demand accompanied by a documented claim.

36. Nor does Clause 6.8.1 of the Superior Lease assist the appellant, even if it is accepted (as I do) that Clause 6.8 in its entirety is to be read into the Underlease, and Clause 2.7(a) then falls to be construed in the context of Clause 6.8.1. That provision is clearly permissive and evidentiary – it allows a demand or other notice required to be made under the Superior Lease (or Underlease) to be served by personal delivery, or prepaid registered post or recorded delivery mail, or by fax to the registered office or last known address, or to the demised premises. If that is done then service on the tenant "*… is duly and validly made, given or served*". It is in this sense "*directory*" in nature rather than "*mandatory*", a distinction that was explained by the U.K. Court of Appeal in *Yates Building Co. Ltd v. R.J. Pulleyn & sons (York) Ltd* [1976] 1 EGLR 157 where Lord Denning held that:

> *"…a mandatory provision must be fulfilled exactly according to the letter, whereas a directory provision is satisfied if it is in substance according to the general intent…".*

37. Nor, in my view can it lead to an inference that the rent to be demanded of the landlord by the Superior Landlord as referred to in Clause 2.7(a) cannot be demanded verbally, and must be the subject of a written demand. Such an inference in effect invites the court to add in the words "*in writing*" after the word "*demanded*". This goes a step too far in asking the court to construe a contract document such as the Underlease by the addition of words which it is not necessary to add in. It is also contradicted by the drafters' express use of the phrase "*written request*" in Clause 2.8 of the Underlease, as indicating the method by which the tenant can seek evidence of the onward payment of rental monies received by the landlord to the Superior Landlord; such wording is not adopted in Clause 2.7.

38. Even if this argument was stateable I would not give leave to defend because in my view the documents presented by SKA Management to the liquidator on 30 September 2020, when considered in the round, do constitute a written demand for payment of rent by the respondent. The *Rental Statement* sets out rent claimed to be due for the period from 2001 to 2019 and clearly includes the periods/gales in respect of which rent is claimed by the liquidator from the appellant pursuant to the Underlease in these proceedings. It is a statement that shows the rent due, totalling €559,747.39, and one credit for a payment of rent on 4 October 2000 in the sum of €7,618.43. There can be no question but that this document sets out what SKA Management claims is rent due by the respondent in respect of the Property on foot of the Superior Lease.

39. Further the "*Creditors proof of debt questionnaire*" names SKA Management as "*creditor*" and states the "*[t]otal amount of claim including any Value Added Tax …*" at the date of the liquidator's appointment. Item six on this document in print asks for:

> *"Details of any documents by reference to which the debt may be substantiated. (Please note that the liquidator may at his discretion call for any document or evidence to substantiate the claim)".*

No doubt is left in the reader's mind but that this document is evidencing a debt due by the company in liquidation, LLL, to the named creditor. The response column refers to the *Rental Statement* "*as attached*". If anything else were required, question 10 on the form asks "*How was the debt incurred (tick as appropriate)*" and the answer is "*rent*", and in response to the next question "*when was the debt incurred*" the dates are given 16 August 2000 - 31 December 2018. The document is signed by Mr. Kirk "*for SKA Management Ltd*" and dated 30 September 2020.

40. The argument that these documents read in the round do not constitute a written demand by SKA Management of the respondent for the arrears of rent due under the Superior Lease is untenable.

41. The trial judge was therefore correct to reject the argument that the documents presented and signed on 30 September 2020 did not amount to a demand by SKA Management for the purposes of Clause 2.7(a), and in finding that "*[a]ny request for payment by SKA was sufficient*", and that "*[t]he letter on behalf of SKA setting out the claim in the liquidation and indeed the accompanying particularisation of the sums due to SKA also was a request for payment, albeit in the context of a liquidation*" (Transcript, p. 3, lines 21-31).

(ii) Statute of Limitations

42. Section 28 of the Statute of Limitations, 1957 provides:

> *"28.– No action shall be brought or distress made to recover arrears of a conventional rent or damages in respect thereof after the expiration of six years from the date on which the arrears became due."*

43. Counsel for the appellant did <u>not</u> argue that the respondent was statute barred from claiming rent pursuant to the Underlease from the appellant. This presumably was because the definition of "*annual rent*" at Clause 1.1 of the Underlease, read in combination with Clause 2.7(a), meant that the appellant had no obligation to pay any rent unless first served with a demand from the landlord, following which the obligation was to pay the rent demanded within seven days. As there was no demand for rent made by the liquidator until 27 November 2020 the cause of action to recover rent did not accrue (at the earliest) until that date, and accordingly the claim pleaded in the summary summons which issued on 12 July 2021 was not statute barred.

44. Rather the appellant claimed that the liquidator owed a duty to the appellant not to admit as proven in the liquidation those gales of rent in respect of which any claim by SKA Management against the liquidator would have been statute barred. It was submitted that where a liquidator has an unanswerable defence to a claim for payment, such monies are not properly "*payable*" by the company, as there is no enforceable legal obligation to make the payment, and by extension the liquidator could not use the SKA Management demand as the foundation for seeking the equivalent rent due pursuant to the Underlease.

45. In their written submissions the appellant relied on *Re Art Reproduction Co. Limited* [1951] 2 All E.R. 984 where Wynn-Parry J. held that it is not open to a liquidator to discharge a debt that was statute barred at the commencement of the winding up (unless all contributories consent), and the application of a similar principle to administrations in *Re Leyland Printing (in Administration)* [2010] All E.R. (D.) 114.

46. From a reading of the Transcript in the High Court it appears that the trial judge, while doubting this was a good point (Transcript p. 2, lines 29-30), nevertheless treated it as a "*possible defence*" and on that basis declined to give judgment in respect of two gales of rent falling due under the Superior Lease on 1 April and 1 July 2014 on the basis that these *"fell due more than six years prior to the SKA request for payment"* (see Transcript p. 4, lines 27-31). As there was no cross-appeal in relation to this it is not necessary to consider the caselaw relied on by the appellant, and the only real issue was whether the *possible defence* identified by the trial judge should have extended beyond those two gales of rent and to the further gale of rent due on 1 October 2014 and indeed subsequent gales.

Discussion

47. This in my view requires consideration of precisely when the respondent *admitted* the entirety of the SKA Management rental claim, because that is the date upon which, it might

be argued, the liquidator was in breach of the duty owed to other creditors (or contributories) to raise a defence that the SKA Management claim was, in part, statute barred.

48. No affidavit evidence addresses the precise point in time at which the liquidator decided to admit the entire claim, and not to rely on the Statute of Limitations against SKA Management, or the date upon which that was communicated to SKA Management. The "*Creditors proof of debt questionnaire*" contains details of the claim, but the section at the bottom of this document "*for use by the liquidator only*", which might have expressed the liquidator's view or decision as to whether the claim was admitted, is not filled in, and the *Rental Statement* itself does not provide such information.

49. What is exhibited is the respondent's letter of 27 November 2020 addressed to the appellant and seeking payment of the arrears of rent from 28 March 2014 to 31 December 2018. In my view it may be inferred from this that at some point in the period 30 September 2020 to 27 November 2020, inclusive, the liquidator decided to admit the claim of SKA Management.

50. The only issue therefore is whether the appellant's argument could apply to the gale of rent falling due on 1 October 2014 by the respondent to SKA Management, and hence to the gale of rent falling due on 1 October 2014 by the appellant to LLL pursuant the Underlease. The trial judge appears to have excluded the October gale of rent on the basis that it was due less than six years before the meeting between the liquidator and Mr. Kirk on 30 September 2020 – which it was, by one day.

51. However, the liquidator did not assist the court in indicating the date upon which he actually *admitted* the debt due to SKA Management. If it was 30 September 2020, he does not say so, and, if it was, then it is surprising that this was not written into the section of the *Creditors Proof of Debt Questionnaire* provided "*[f]or use by the liquidator only*". It is perhaps inherently unlikely that such a large claim, most of it on its face statute barred, would

be admitted by a prudent liquidator at a face-to-face meeting on the day the claim is made. The best that can be said on the evidence is to infer from the letter of 27 November 2020 that it had been admitted by that date. In my view it should be open to the appellant at trial to raise a Statute of Limitations defence in relation to the gale of rent due pursuant to the Underlease on 1 October 2014, as well as the earlier two gales of rent.

(iii) Estoppel – no consent of SKA Management to Underlease

52. Counsel for the appellant submitted that the Underlease was entered into without the consent of SKA Management, the Superior Lessor, and contrary to Clause 4.15.1 of the Superior Lease which prohibited assignment and subletting "*without the prior written consent of the Landlord (which consent shall not be unreasonably withheld)*". It was contended that the trial judge erred in finding that the appellant was "*estopped from using the absence of landlord consent under the Head Lease as grounds for refusing to pay rent or otherwise comply with its obligations under the sublease*", in reliance on the passage which the trial judge quoted from Handley, *Estoppel by Conduct and Election* (1st ed., Sweet & Maxwell, 2006) which I have set out earlier in this judgment. Whilst acknowledging that the general statement of principle relied on by the trial judge was true, it was submitted that the estoppel stems from possession, and that different considerations apply when the unauthorised subtenant is no longer in possession.

53. Counsel relied on an extract from *Wylie on Irish Landlord and Tenant Law* (4th ed., Bloomsbury Professional, 2022). In paragraph 365 the author states:

> *"365. Secondly, the long-established rule is that the estoppel binding the tenant stems from his having taken possession of the land, as Johnston J. explained in Levingston v Somers*[2]*: -*

[2] [1941] IR 183 at p. 205.

> *'In the whole armoury of the law there is no weapon that is oftener resorted to by litigants than the principle that a tenant cannot be allowed to dispute the title of the landlord under whom he holds. The position of a tenant of land under such circumstances is an illustration of the familiar rule of law that one cannot approbate and reprobate at one and the same moment - he cannot seek to have the advantage of the possession and use of the land and at the same time strive to show that the person who has admitted him as tenant has not title to the land when the latter brings proceedings against him in the assertion of his rights as landlord.'*

In fact in that case which involved a lease for 500 years granted by a receiver under a power of attorney, which was invalid by reason of revocation of the power by the donor's death, the lessee was held by a majority of the Supreme Court not to be estopped when he was out of possession from denying the landlord's title. Thirdly, though a tenant is estopped from denying his landlord's title to put him in possession, it has been held many times that a tenant is not estopped from claiming that the landlord's title has ended subsequent to the purported grant to the tenant. As Murnaghan J. put it in the Levingston case:

> *'It seems to me that the reason for this is that once the lessor's own title has expired, the lessee becomes liable in trespass to the true owner, and it would be unjust while he is in fact so liable to bind him by estoppel to pay rent to his lessor as well.'*

Thus, in those circumstances, as Murnaghan J. indicated, the tenant can refuse to pay any further rent to his purported landlord and can insist on paying it to the person who has become entitled to the landlord's interest. Fourthly, there are

numerous authorities applying the doctrine of estoppel where the purported lease is void because of some technical failure, e.g., a lack of consent to the grant obtained from a third party or breach of formalities for the grant in question, but the tenant has nevertheless gone into possession and paid the rent. On the other hand, where the tenant destroys the basis for the estoppel by giving up possession and denying liability for rent or other obligations under a void lease, an estoppel can no longer be held against him - 'estoppel cannot circumvent illegality'. Lastly, it is clear that the doctrine of estoppel may be applied to parties to arrangements other than a purported tenancy agreement, e.g., a caretaker's agreement."

54. Counsel submitted that the sublease was void because it had not received the prior consent of the Superior Lessor, and that an estoppel could not be held against him at least from the date upon which the appellant vacated the property on 31 August 2017.

Discussion

55. There are fundamental difficulties with this suggested partial defence having regard to Clause 15.1 of the Underlease.

56. In Clause 15.1 the appellant specifically acknowledged that LLL had not applied for, and SKA Management had not given, consent to the grant of the Underlease. The reason for this was plain – SKA Management stood struck off the Register, and only once restored to the Register would it be in a position to grant retrospective consent. That the appellant was aware of this state of affairs in 2014 is easily inferred from the very unusual terms under which no rent had to be paid until rent had first been demanded of LLL by SKA Management pursuant to the Superior Lease.

57. I accept as correct the submission by counsel for the liquidator that any breach of the Superior Lease was a matter between SKA Management and the respondent, and that at most

the failure to comply with the covenant against subletting without the consent of the Superior Lessor rendered the Underlease *voidable*, rather than void. SKA Management on restoration to the Register had the option of affirming the Underlease, or treating it as void. SKA Management in the rental statement at *Note 4* observed that no landlord's consent was obtained for the Underlease, but, neither in that document nor elsewhere, is there any evidence to suggest that SKA Management treated the Underlease as void.

58. It seems to me that the decision in *Levingston*, where the Supreme Court decided that the tenant was not estopped when out of possession from showing that the landlord's title had expired, applied to the particular circumstances of that case in which the lessor could no longer show good title and the lessee's occupation exposed him to liability to the true owner in damages for trespass. It did not address a situation where, as here, there is no change in landlord, and the subtenant expressly acknowledges the absence of consent to sublet.

59. The reliance on Wylie for disapplication of estoppel when the tenant is out of possession is also misconceived because of the author's observation that "*where the tenant destroys the basis for the estoppel by giving up possession and denying liability for rent or other obligations*" applies only "*under a void lease*", whereas the Underlease in issue here was merely *voidable*.

60. Secondly, I have recited earlier the extract from *Handley* relied on by the trial judge. The first sentence of this states:

> *"A landlord and the tenant are estopped by convention, while the tenant is in possession, and thereafter for purposes relevant to his past possession,*[34] *from denying that the landlord had an estate which would support the lease, and that the tenant had a right to possession as such."* [Emphasis added]

61. The authority relied upon by the author in footnote 34 for the statement to which I have added emphasis is *Industrial Properties (Barton Hill) Limited v. Associated Electrical Industries Limited* [1977] QB 580 (Court of Appeal), which concerned a departed tenant's liability for dilapidations. The tenant, following notice to determine the lease at the end of the first seven years, had given up possession of the premises which were in a worse condition than when it had entered. The landlord claimed damages for breach of covenant to repair the premises. After submitting to judgment for damages to be assessed the tenant discovered that the plaintiff company was not the freeholder, and contended that since they had gone out of possession they could deny the plaintiff's title and their liability on the covenant. This was rejected at first instance and that decision was upheld by the Court of Appeal on the basis that the tenant was estopped during the currency of the lease from disputing the lessor's title and that this estoppel continued to operate after the expiry of the lease. Lord Denning M.R., in his judgment stated at page 599:

> *"The doctrine of tenancy by estoppel has proved of good service and should not be whittled down. It should apply in all cases as between landlord and tenant - no matter whether the tenant is still in possession or gone out of possession - so long as he is not confronted with an adverse claim by a third person to the property."*

62. I am persuaded that that is an authority that the Irish courts would follow in the present case. To hold otherwise would conflict with the broad concept of estoppel that a person who has made a representation to another that that other person has acted upon, to their detriment, should not be permitted to resile from that representation. The appellant in entering into the Underlease, including Clause 15.1, expressly acknowledged that LLL had not obtained the Superior Lessor's consent, and expressly represented and agreed that it would pay rent for its possession of the property pursuant to the terms of Underlease notwithstanding the

absence of such consent. This was reinforced by the appellant's entry into possession, and enjoyment of possession at least until 31 August 2017. It is not altered by the fact that the appellant vacated on that date, and the trial judge cannot be faulted for describing this as *abandonment* of the property. The appellant is therefore estopped from relying on the absence of Superior Lessor consent in order to challenge LLL/the liquidator's title to sublet, or to challenge the liquidator's entitlement to recover rent pursuant to the Underlease.

(iv) Mitigation of Loss

63. Counsel for the appellant contended that under Irish law the respondent had a duty to act reasonably to re-let the property after 31 August 2017 and thereby mitigate its loss. He relied on two authorities for this proposition.

64. The first of these is *Parol Limited & Anor v. Superquinn* [2011] IEHC 119, a supplemental decision of Clarke J. (as he then was) assessing damages. In his earlier judgment in the case Clarke J. had held that the closure in 2009 of a Superquinn supermarket in a shopping centre in Dundalk was in breach of the terms of the lease which had required that it be kept open until 2019. His supplemental judgment concerned the assessment of damages due to the plaintiff, Parol Limited ("Parol"). The closure resulted in Parol collecting less rent (€250,000 instead of €700,000) off five other tenanted units over a two-year period prior to the date of the supplemental judgment; the court was also required to consider prospective losses. Clarke J. stated:

> *"5.3 The first general question that I need to address is, therefore, to assess Parol's efforts to collect rent. Clearly any unreasonable failure on the part of Parol to actually collect rent due to it cannot form the basis for a claim in damages against Friends First and, through them, Superquinn. Parol has a duty to mitigate its loss. Parol has an obligation to attempt to collect as much rent as it can."*

On the facts Clarke J. found that Parol was faced with a situation where, if it insisted on payment of the rent in full, the tenants would have been driven out of business. He was satisfied that:

> *"... the actions taken by Parol in making concessions to those tenants over the last two years were reasonable in all the circumstances." (paragraph 5.5).*

65. Counsel also referred the court to *Young v. Lamb (No. 2)* [2001] NSWSC 1014, a decision of Austin J. in the Supreme Court of New South Wales. The case concerned a lease for a period of three years, terminating on 31 October 1998, and it included an option for renewal for a further three years. By a letter dated 22 July 1998 the defendants had validly exercised the option to renew the lease. A new lease was submitted, but by letter dated 21 September 1998 the defendant's solicitors advised that the lessee would not be "*proceeding with the new lease*", and the draft lease was returned. The plaintiff's solicitors gave notice that the return of the lease constituted a repudiation of the contract to renew, which the plaintiff accepted, and the plaintiff obtained vacant possession of the premises on 1 December 1998. Under the heading "*Measure of Damages*" Austin J. stated:

> *"[9] The exercise of the option gave rise to a binding agreement for a lease between the plaintiff and the defendants: Re Eastdoro PTY Ltd (No. 2) [1990] 1 Qd R 424, 429. Ordinary principles of the law of contract, including principles with respect to repudiation, apply to leases: Progressive Mailing House v Tabali PTY Ltd [1985] 157 CLR 17, 29 per Mason J. Where a contract has been validly repudiated and the innocent party accepts the repudiation, that party has a right to recover damages for breach of contract, assessed in accordance with ordinary contractual principles. Those principles include the principles with respect to mitigation of damages: Buchanan v Byrnes [1983] 3 CLR 179. Where the lessee has repudiated,*

damages are awarded to the lessor to compensate him for loss of the benefit of the lessee's covenants to pay rent and outgoings: Progressive Mailing, at 55 (per Deane J.) and 47 (per Brennan J.). The entitlement to damages is from the date of breach - in this case, 1 December 1998, the day the defendants gave vacant possession: see Nangus PTY Ltd v Charles Donovan PTY Ltd [1990] VR 184, 188."

66. Later in his judgment Austin J. stated:

"[29] Where a tenant fails to pay rent in breach of the lease, and the landlord fails to mitigate his loss by re-letting the premises, damages for loss of rent should be assessed on the basis that the landlord would have been able, if he acted reasonably, to re-let the premises at a realistic monthly rental after a reasonable period for re-letting had expired. That is, damages should be the difference between the rent payable under lease, and the realistic rental that the landlord would have received had he mitigated his loss: Marshall v Mackintosh [1898] 78 LT 750."

67. Counsel therefore contended that it was at least arguable that there was no rent recoverable for the period after 31 August 2017 up to 31 December 2018, on the basis that the respondent did not take reasonable steps to re-let the property in order to minimise the loss of rent. Counsel referred the court to the plea at paragraph 5 of the Summary Summons which states:

"5. By letter dated 17 October 2017 solicitors for the Head Landlord wrote to the Plaintiff and noted that the Defendant had vacated the Premises without notice, no response was given to this letter and by letter dated 24 July 2018 the Head Landlord made clear that, in the absence of a surrender, the Lease remained in full force and effect."

68. Although the letter of 17 October 2017 was not put in evidence, counsel submitted that this plea by the respondent was in effect an admission that the respondent was aware, at least by 17 October 2017, that the property had been vacated, and at least thereafter efforts should have been made to re-let the premises in order to minimise the respondent's losses.

69. Counsel fairly brought to the court's attention a decision of the UK Court of Appeal in *Reichman v. Beveridge and Gauntlett* [2006] EWCA Civ 1659, where it was held that where the landlord opted not to treat the tenants' breach as repudiatory, and instead treated the tenancy as continuing, the obligation to re-let in mitigation of loss did not arise in law. Counsel submitted that this was not the legal position in this jurisdiction having regard to the decision of Clarke J. in *Parol Limited* and the decision of Austin J. in *Young v. Lamb.*

70. Counsel for the respondents countered that under Irish law where there is a claim for arrears of rent there is no obligation on the landlord to mitigate loss – unlike in a claim for damages for breach of contract. The court was referred to an extract from *Wylie on Irish Landlord and Tenant Law* (4th ed., Bloomsbury Publishing, 2022) under the heading "*action for rent*" where the author states:

> *"[12.03] … The result is that, if the tenant fails to pay the rent as agreed, he is in breach of his contract with the landlord, who has, therefore, a right of action for the debt owed."*

This sentence is supported by footnote 15 which states:

> *"As it is an action for a debt and not for damages for breach of contract, it would appear that the doctrine of mitigation of loss (which might otherwise require the landlord to minimise the loss of rent by evicting the tenant and re-letting as quickly as possible) does not apply: see Reichman v Beveridge [2006] EWCA Civ 1659. This*

would be given statutory recognition by Head 41(3) of the Landlord and Tenant Law Reform Bill 2011."

The court was not made aware of any new legislative provision in the field of landlord and tenant affecting this issue.

71. In *Reichman* the defendants were solicitors who had ceased to practice as such in February 2003, and vacated their premises, but failed to pay the rent due in March 2003 and thereafter. Mr. Gauntlett argued that principles of contract law, including the obligation to mitigate losses, should apply to the consequences of a breach of a tenant's covenant to pay rent, and he relied on a passage from the judgment of Bollen J. in the Supreme Court of Australia in *Vickers v. Stichtenoth Investments Pty Ltd* (1989) 52 SASR 90 at 100:

"There is no reason why in modern times mitigation of damage should not apply. It is an ordinary principle of contract law. With modern leases the law should recognise the importance of the contractual aspect of a lease. Why should not a landlord faced with abandonment take steps to try to reduce his loss? Why should a vendor of tomatoes faced with refusal to take delivery by his purchaser suffer if he does not sell if he can to another purchaser and yet a quiescent and immobile landlord not suffer if he fails to seek another tenant? Modern ideas say that there is no reason for this anomaly."

72. It is important to note that the claim was in respect of arrears of rent, seeking only a monetary judgment for sums due, and the plaintiffs, although aware that the defendants had ceased practice and vacated the premises, had not forfeited the lease.

73. Lloyd LJ (with whom Auld and Rix LJJ agreed) reviewed the UK and Commonwealth case law. He encapsulates the issue in the following passages:

"18. Mr Gauntlett's proposition has to be that, if the landlord terminates the tenancy and takes steps to re-let, and if the sums payable to him as a result are less than those that would have been payable during the period of the lease after the date on which he took possession, he can recover that loss by way of damages from the tenant. Otherwise damages would not be an adequate remedy for the loss caused, as compared with the landlord's position if he held the tenant to the lease and sued for the rent as it fell due.

19. Once the landlord has taken possession he cannot recover rent under the lease. The question is whether he can recover damages for the loss of the future rent, which would have to be on the basis that it was loss caused by the tenant's breach of contract. There is no English case which decides that the landlord can recover damages of this kind. There is at least one English decision to the contrary, but it is of some antiquity. In Canada and Australia, however, the highest courts have decided that such damages can be recovered."

In paragraph 30 Lloyd LJ states:

"30. The important point is whether it could be said that a landlord was acting wholly unreasonably in failing to take steps to find an alternative tenant to whom to let in place of the defaulting tenant, rather than leaving the lease in place and suing for the rent as it falls due. That is to be considered against the background of the rights and obligations under the lease. If the lease remains in force, the landlord is entitled to the rent and other sums falling due. …"

He continued:

"32. No attempt has been made in any previous English case of which I am aware to establish that it would be wholly unreasonable for the landlord to hold the tenant to the lease, though the point was raised indirectly in one case."

Having looked at the Australian case law, Lloyd LJ concluded:

"39. Mr Gauntlett urged on us a modern approach to the relationship between landlord and tenant, focussing on principles of contract law, and a policy approach which would not leave premises empty, after the tenants had abandoned them and while the landlord waited for the end of the lease, so as to avoid the waste of useful space and to ensure that property is put to beneficial use. ...

40. Leaving aside policy issues of that kind, it seems to me that Mr Gauntlett's submissions fail to take account of the present state of English law as to the consequences of the premature termination of a tenancy, or of the very limited scope for the intervention of equity as explained in White and Carter *and subsequent cases. Having regard to the way in which that has been explored and explained in the cases, in particular* The Odenfeld *..., it seems to me impossible to say that a tenant could successfully invoke equity in that way. ...*

41. It is also to be noted that it is for the party in breach to establish that the innocent party's conduct is wholly unreasonable and that damages would be an adequate remedy. ...

42. ... I have come to the ... conclusion ... namely that, on the present state of English law, the contention which Mr Gauntlett wishes to advance by way of defence on quantum is not open to him. I do not decide whether or not repudiation plays any, and if so what, part in the English law of landlord and tenant. That is not directly in

issue before us, and it would be wrong to decide it unnecessarily. There is, however, no case in English law that shows that a landlord can recover damages from a former tenant in respect of loss of future rent after termination, and there is at least one case which decides that he cannot. In those circumstances, either damages are not an adequate remedy for the landlord, or at least the landlord would be acting reasonably in taking the view that he should not terminate the lease because he may well not be able to recover such damages. In principle, moreover, if the landlord chooses to regard it as up to the tenant to propose an assignee, sub-tenant or, if he wishes, a substitute tenant under a new tenancy, rather than take the initiative himself, that is not unreasonable, still less wholly unreasonable."

Discussion

74. The issue thus raised is whether under Irish law a right of action to recover rent cannot be met by a defence of non-mitigation of damage, unlike an action for damages for breach of covenant after termination of the tenancy and resumption of possession by a landlord, where such a defence can be raised. Within this is a question as to the rationale for treating the two types of action differently assuming that the landlord due to a tenant abandoning possession (as in the present appeal) or by determination of the tenancy is in a position to resume possession and re-let.

75. It is common case that there is no Irish authority directly on point. It seems to me that in *Parol* Clarke J. was concerned with a claim to damages for breach of covenant rather than an action for recovery rent *simpliciter*. Having said this it may be that his *dictum* foreshadows a more expansive or "*modern*" application of the duty to mitigate loss in landlord and tenant cases. While the English authorities reviewed in *Reichman*, and the decision in that case, are persuasive, they are not the law in this jurisdiction and there is at least an argument, based on authorities from other Commonwealth jurisdictions (including

Young v. Lamb and other authorities reviewed by Lloyd LJ in *Reichman)*, that could lead a court at plenary hearing to take the view that there is a duty on a landlord, where the tenant abandons possession, to take possession and re-let in order to minimise losses.

76. It is not for this court to express a view on this issue – rather it is a legal issue that should be addressed at a plenary hearing at which all relevant caselaw can be considered and full argument made.

77. It will also be fact dependant. For present purposes I find this issue arguable in relation to the gales of rent arising after 1 October 2017 i.e., in relation to the gales due on 1 January 2018, 1 April 2018, 1 July 2018 and 1 October 2018. It is conceivable that at a plenary hearing the appellant could adduce evidence that would persuade a trial judge that if the respondent had resumed possession in late 2017 the property could have been re-let for year 2018, but of course the liquidator may adduce evidence that persuades the court otherwise or that the notional rent would be less than the appellant's expert suggests might have been achieved. If the trial judge is persuaded of the appellant's argument on the legal point it follows that some or all of the notional rent for 2018 should be deducted from the rent claimed. In my view such a possible defence cannot apply to the gale of rent due for 1 October 2017 because the appellant did not vacate until 31 August 2017, and there is no evidence that the respondent became aware of this prior to 17 October 2017, and it would be unreasonable to expect that this commercial property could have been repossessed and re-let by the liquidator before 1 January 2018.

Conclusion

78. I would therefore allow this appeal in part and refer to plenary hearing -

(a) the gales of rent claimed under the Underlease for the periods 1 April 2014 and 1 July 2014 (as did the trial judge) and in addition the gale of rent due on

1 October 2014, on the basis that there is an argument that the liquidator owed a duty to the appellant not to admit equivalent rentals due under the Superior Lease as due and owing by the respondent to SKA Management on the basis that they would have been statute barred; and

(b) the four gales of rent claimed in respect of the year 2018 on the basis that, the appellant having vacated the property on 31 August 2017, the LLL/the liquidator had a duty in law to mitigate losses by retaking possession, terminating the Underlease, and re-letting in year 2018.

79. The total claim for arrears of rent including VAT from 14 March 2014 to 31 December 2018 is in the sum of €178,376.31. One gale of rent is IR£6,000, which equates to €7,618.42. Seven gales of rent therefore amounts to €53,328.94. VAT on this at 23% is €12,265.65, and adding the two together gives a total of €65,594.59. This represents that part of the total claim that should be remitted for plenary hearing. That sum then falls to be deducted from the total claimed, thus:

Total claim	€178, 376.31
Less Sum remitted for plenary hearing	(€65,594.59)
Balance in respect of which there will be judgment	€112,781.72

80. I would therefore substitute for the order of the High Court an order that the respondent recover against the defendant the sum of €112,781.72, and that the balance of the sum claimed do stand adjourned for plenary hearing. I would however invite the parties to agree that the calculations just given are correct (particularly as it seemed to me that the calculations made by the trial judge and set out in page 5 of the Transcript are not correct).

Order and Costs

81. I would invite the parties to agree the calculations, and also what costs orders should be made, and any stays on those orders. In the event that the parties do not reach agreement within 14 days from electronic delivery of this judgment the appellant's solicitors should so notify the Court of Appeal office and a short hearing will be arranged.

Woulfe and Faherty JJ have indicated their agreement with this judgment and the orders proposed.