

**THE HIGH COURT**

[2021] IEHC 773

**High Court Record No: 2020/208 CA**

**Circuit Court Record No: 2018/3274**

**IN THE MATTER OF THE LANDLORD AND TENANT (AMENDMENT) ACT 1980**

**BETWEEN**

**BAZSONT LIMITED TRADING AS STARBUCKS (LIFFEY VALLEY)**

**PLAINTIFF/APPELLANT**

**AND**

**BVK HIGHSTREET RETAIL LIFFEY PROPERTY LIMITED**

**DEFENDANT/RESPONDENT**

**JUDGMENT of Mr. Justice Woulfe delivered on the 10th day of December, 2021**

**Introduction**

1. This is the appellant's appeal against the order of the Circuit Court (Her Honour Judge Linnane) made on the 16th November, 2020. By that order the learned Circuit Court judge dismissed an appeal against the County Registrar's refusal to direct discovery of two categories of documents sought by the appellant, and awarded costs in favour of the respondent.
2. These proceedings arise in the context of a landlord and tenant relationship in respect of Unit 21, Liffey Valley Shopping Centre ("the property"), and concern the appellant's claim for a new tenancy pursuant to the provisions of the Landlord and Tenant (Amendment) Act 1980 ("the 1980 Act") in respect of the property. It is necessary first to set out the pleadings in some detail, as they establish the context in which the relevance of the disputed categories must be considered.

**The Pleadings**

3. In the Civil Bill issued on the 31st May, 2018, the appellant pleads as follows. By a lease dated the 24th February, 2010 ("the 2010 lease"), the respondent's predecessors in title granted a five year commercial lease to the appellant's predecessor in title from the 1st January, 2010 in respect of the property subject to the covenants, conditions and stipulations contained therein. By an agreement dated the 24th February, 2010, ("the renunciation"), it was further agreed that upon the termination of the 2010 lease, the then tenant did renounce its entitlement to a new tenancy. It is claimed that the renunciation was expressly stated to be operative in respect of the termination of the 2010 lease, and that no other lease or tenancy was agreed to be the subject of the renunciation. The 2010 lease duly terminated on the 31st December, 2014, and as and from that date the then tenant held the property pursuant to a new yearly tenancy, and it is expressly pleaded that the yearly tenancy thereby created was not subject to the renunciation.
4. On the 4th July, 2016, the plaintiff's predecessor in title was granted a further lease in respect of the property for a term up to the 30th June, 2018. The 2016 lease was subject to the covenants and conditions contained in the 2010 lease with modifications, but it is claimed that this lease was not subject to the renunciation, which renunciation was not agreed to form part of this lease.

5. The appellant pleads that the respondent has refused to honour its right to a new tenancy under the 1980 Act, in circumstances where the property constitutes a tenement and has been in the occupation of the appellant and/or its predecessors in title for upwards of five years and has been continuously operated *bona fide* as a coffee shop business and a going concern. The appellant served a notice of intention to claim relief under the 1980 Act dated the 30th April, 2018, but by letter dated the 4th May, 2018, the respondent refused to honour the appellant's renewal rights and demanded vacant possession of the property on the 31st May, 2018. The appellant claims a declaration that it is entitled to a new tenancy in the property beginning on the 1st July, 2018, or such other date as the Court shall deem appropriate, and an order pursuant to s.18 of the 1980 Act fixing the terms of the new tenancy.
6. In its Defence and Counterclaim delivered on the 22nd March, 2019, the respondent admits certain of the basic facts regarding the 2010 lease and the renunciation. It denies the yearly tenancy as pleaded by the appellant, and the plea that any such yearly tenancy was not subject to the renunciation. As regards what was agreed on the 4th July, 2016, the respondent pleads that by a deed of variation made on or about that date, the parties thereto altered the terms of the 2010 lease, *inter alia*, in the following respects:
  - (i) the respondent's predecessors in title demised the property to the original tenant for the additional term as defined therein, which said term commenced on the expiration of the term as defined in the 2010 lease and expired on the 30th June, 2018, to the intent that the said lease should then be read and construed as if the additional term was set out in the 2010 lease;
  - (ii) either the landlord or the tenant might terminate the said lease at any time from the 1st October, 2016, upon the service of at least four months' prior written notice on the other party specifying the date on which the lease was to be terminated ("the option date"), and further that the tenant would give full vacant possession on the option date; and
  - (iii) the said lease would continue in full force and effect as modified by the deed of variation and would then be read and construed as though the amendments made by the said deed of variation were incorporated therein.
7. The respondent claims that, in the circumstances, at all material times the said deed of renunciation has remained extant, and in full force and effect, and that the original tenant, its successors and assigns, remain bound by same. It is denied that the appellant has any right to a new tenancy pursuant to the 1980 Act. In that regard the respondent pleads that on or about the 1st October, 2016, the appellant, in exercising the break option conferred by the lease as varied, gave notice that the lease would terminate on the 31st May, 2018. In circumstances where (i) the terms of the said lease terminated on the 31st May, 2018, by act of the appellant, and (ii) pursuant to the terms of the deed of renunciation, the original tenant, its successors and assigns (including the appellant herein), renounced any entitlement to a new tenancy in the property on the termination

of the said lease, it is asserted that the appellant is not entitled to a new tenancy, and the notice of intention to claim relief is null and void and of no effect.

8. The respondent also counterclaims on the basis of the above matters. It claims that having exercised the break option by the notice dated the 1st October, 2016, the appellant was obliged to yield up full vacant possession of the property on the 31st May, 2018. Notwithstanding demand, the appellant has continued to wrongfully withhold possession of the property, and the respondent counterclaims for, *inter alia*, an order for possession of the property, damages for breach of contract, and *mesne* rates in respect of the appellant's unlawful use and occupation of the premises.

### **The Request for Voluntary Discovery**

9. The procedure governing discovery in Circuit Court proceedings is set out in Order 32 of the Circuit Court Rules, and rule 1 of that Order provides, firstly, that a request in writing for voluntary discovery shall be made at least fourteen days prior to the issuing of any motion seeking an order for discovery.
10. By letter dated the 16th May, 2019, the appellant's solicitor sought discovery from the respondent under five categories. Only categories 3 and 4 are still in dispute and these categories, together with the reasons why each category was required to be discovered, were set out as follows:

#### **"Category 3**

All documents evidencing or relating to the 2010 Lease Renunciation allegedly applying to the 2016 Lease and/or Deed of Variation including but not limited to all communications between the Defendant and the Plaintiff and/or their Respective predecessors in title concerning the applicability of the Renunciation to the 2016 Lease.

#### **Reasons for Category**

The Plaintiff maintains that a new lease was agreed in July, 2016 while the Defendant maintains that a Deed of Variation of the 2010 Lease was made in or around that time. The Plaintiff's case is that the 2010 Lease Renunciation did not apply to the then new 2016 Lease and the Plaintiff is entitled to a new lease to the Property. The Defendant maintains that the 2016 Lease is subject to the 2010 Lease Renunciation.

The Plaintiff therefore seeks discovery of all relevant documentation concerning this issue in dispute relating to the applicability of the Renunciation to the 2016 Lease. Accordingly, the discovery sought in this category is clearly relevant and necessary for the determination of the within proceedings and the saving of costs.

#### **Category 4**

All documentation evidencing relating to and/or touching upon the legal assistance received by the Defendant or its alleged predecessors in title in connection with the 2016 Lease.

### **Reason**

The 2016 Lease, although creating a new letting to the Plaintiff and/or its predecessor, contains certain wording suggestive of an attempt to “backdate” the letting in an effort to seek to rely upon a then defunct Renunciation signed in connection with the 2010 Lease which had expired. The Renunciation fell away upon the expiry of the 2010 Lease and was incapable of resurrection, save perhaps by express agreement of the parties to do so. The documents sought will evidence whether the Defendant or its predecessors sought to re-ignite a then defunct Renunciation through the 2016 Lease purported “backdating” provisions. The Plaintiff is entitled to see the legal assistance received by the Defendant or its predecessor in order to seek to ascertain the rationale for the attempted backdating of the 2016 Lease in an attempt to re-ignite the then defunct 2010 Lease Renunciation.”

11. By letter dated the 11th June, 2019 from the respondent’s solicitors, discovery of these two categories was refused on the following basis:

### **“Category 3**

In this category of discovery, you seek all documents evidencing or relating to the 2010 Lease Renunciation allegedly applying to the 2016 Lease and/or Deed of Variation, including but not limited to all communications between the Defendant and the Plaintiff and/or their respective predecessors concerning the applicability of the Renunciation to the 2016 Lease.

In the absence of any claim for rectification on the part of your client, any “communications...concerning the applicability of the Renunciation to the 2016 Lease” are not relevant to the interpretation of the Deed of Renunciation.

It is well established that the intentions of the parties to a contract are ascertained objectively and not by reference to their subjective understanding of what was agreed. As such, the relevant documents stand to be interpreted on their own and not by reference to communications outwith the terms of same.

You are already in possession of, *inter alia*, the Deed of Renunciation of 2010 and the Deed of Variation of 2016.

This category of discovery is refused.

### **Category 4**

In this category of discovery, you seek all documentation evidencing, relating to and/or touching upon the legal assistance received by the Defendant or its alleged predecessors in title in connection with the 2016 Lease.

The proffered reason as to why this discovery is sought is "to seek to ascertain the rationale for the attempted backdating of the 2016 Lease in an attempt to reignite the then defunct 2010 Lease Renunciation".

Leaving aside the appropriateness of you seeking discovery of legal assistance or advices received by our Client or its predecessors in title, for exactly the same reasons as set out above in respect of Category 3, this category of discovery is refused."

12. By letter dated the 27th June, 2019, the appellant's solicitors repeated their request for voluntary discovery in respect of categories 3 and 4. As regards the reasons why categories 3 and 4 were required, the letter stated as follows:

**"Category 3**

**Reasons**

We repeat the reasons previously articulated and add the following (for clarity this category applies to the servants and agents of the parties and their predecessors in title):

We do not at all accept that the documents sought under this category are not relevant to the interpretation of the 2016 Lease. The Deed of Renunciation applied to the 2010 Lease, Paragraph 5 of the Civil Bill expressly pleads that the 2010 Lease terminated on 31 December 2014 and that a yearly tenancy commenced thereafter. A lease which is superseded by any type of periodic tenancy cannot be varied. Our client's pleading at paragraph 5 of the Civil Bill is critical and has been fully traversed and put in issue at paragraph 7 of the defence as follows:

"Paragraph 5 of the Landlord and Tenant Civil Bill herein is denied as if set forth hereunder and traversed *seriatim*". The question of what kind of tenancy existed after the termination on 31 December 2014 is central and whether or not the 2010 Deed of Renunciation applies to the 2016 Lease appears on the pleadings to be the key issue in controversy in the proceedings. In this connection whether or not there was, as a matter of law and fact, a variation in 2016 of a 2010 lease which came to an end in 2014, will require to be determined by the Court. Obviously the factual matrix evidenced by and giving rise to documents will be of great assistance to the Court in the determination of the dispute between the parties. Purely by way of non-exhaustive example, communications and drafts of finalised documents will clearly be discoverable under this category. It is clear from *Smurfit Paribas Bank Limited* [1990] 1 I.R. 469 that the Court may consider instructions received from a client, and further instruction and clarification of instructions, given by a client to

solicitors, so as to enable drafting of documentation necessary to complete a proper transaction.

Our client's case, at issue in the pleadings, is that the 2010 Lease came to an end with finality. It could not be revived if there was a periodic tenancy thereafter which it is pleaded by the plaintiff there was. Examination of whether there was a periodic tenancy following the expiration of the 2010 Lease will involve the Court looking at the indicia of the relationship between Landlord and Tenant following the expiration of the 2010 Lease and the way it was communicated and treated thereafter. Evidence or acknowledgment of the fact of a periodic tenancy can exist both within the internal documents of a Landlord and its communications with third parties including instructions to its agents.

Accordingly, the request for the documentation set out in Category 3 of our client's request for voluntary discovery is repeated without variation.

#### **Category 4**

##### **Reasons**

We repeat the reasons at category 3 above and those previously articulated in correspondence.

Accordingly, the request for the documentation set out in Category 4 of our client's request for Voluntary Discovery is repeated without variation."

13. By letter dated the 22nd July, 2019, the respondent's solicitors again refused discovery in respect of categories 3 and 4, and offered the following reasons for the repeated refusal in respect of these categories:

"As you have offered the same (additional) reasons for the discovery sought in Categories 3 [and] 4..., we propose to address same together.

In your letter of 27th June, 2019, you state that paragraph 5 of the Civil Bill expressly pleads that the 2010 Lease terminated on 31st December, 2014, and that a yearly tenancy commenced thereafter. Paragraph 5 of the Civil Bill provides as follows:

'The 2010 Lease duly terminated on 31 December, 2014, and the Renunciation no longer continued to bind the then tenant or its successors in title. As and from 31 December, 2014, the then tenant held the Property with the consent of the then landlord pursuant to a new yearly tenancy created upon the termination of the 2010 Lease ("the Yearly Tenancy"). For the avoidance of doubt, it is expressly pleaded that the Yearly Tenancy thereby created was not subject to the renunciation.'

You then refer to paragraph 7 of the Defence and Counterclaim, which provides:

'Paragraph 5 of the Landlord and Tenant Civil Bill herein is denied as if set forth and traversed *seriatim*.'

As such, the Plaintiff has been put on proof of the allegation that, as and from 31st December, 2014, the then tenant held the Property pursuant to a new yearly tenancy created upon the termination of the 2010 Lease.

In Category 3, you seek discovery of all documents evidencing or relating to the 2010 Lease Renunciation allegedly applying to the 2016 Deed of Variation, including but not limited to all communications between the Defendant and the Plaintiff and/or their respective predecessors concerning the applicability of the Renunciation to the Lease.

We fail to see how documents evidencing the application of the 2010 Renunciation to the 2010 Lease as varied by the Deed of Variation are in any way probative of or relevant to your allegation that a yearly tenancy was created upon the expiry of the original term granted by the 2010 Lease.

Accordingly, Category 3 is again refused.

In Category 4, you seek discovery of all documentation evidencing, relating to and/or touching upon the legal assistance received by the Defendant or its alleged predecessors in title in connection with the 2016 Deed of Variation.

Similarly, we fail to see how documents evidencing the legal assistance received by the Defendant or its predecessors in title in connection with the 2016 Deed are in any way probative of or relevant to the alleged creation of a yearly tenancy upon the expiry of the original term granted by the 2010 Lease.

Accordingly, category 4 is again refused."

14. By notice of motion issued on the 22nd August, 2019, the appellant applied to the County Registrar for an order directing the respondent to make discovery of the documents in categories 3 and 4. The grounding affidavit of Aidan Kirrane, solicitor for the appellant, sworn on that date, exhibited the relevant correspondence and averred that it is necessary for the fair prosecution and disposal of the proceedings that discovery be ordered in the terms sought. The respondent did not file any replying affidavit at that stage.
15. The motion came before the County Registrar on the 20th November, 2019, and she made an order refusing to grant discovery in terms of categories 3 and 4, and she reserved the respondent's costs.
16. The appellant appealed that order to the Circuit Court by notice of motion dated the 27th November, 2019. That notice of motion was grounded upon an affidavit of Mr. Kirrane sworn on that date, which again exhibited the relevant correspondence, and averred that the appellant will be disadvantaged and prejudiced without access to the documents

sought in categories 3 and 4. A replying affidavit on behalf of the respondent sworn by their solicitor, Gerard Rudden, was filed on the 13th February, 2020. Mr. Rudden stated that he made the affidavit for the purpose of putting certain documents before the Court, such as the 2010 lease, the deed of renunciation, the 2016 deed of variation etc. The parties also put in written submissions before the Circuit Court.

17. The appellant's appeal of the County Registrar's order came before Her Honour Judge Linnane on the 16th November, 2020. She again refused to grant an order for discovery in respect of categories 3 and 4, and she made an order for costs in favour of the respondent. The appellant appealed that order by notice of appeal dated the 24th November, 2020, and the appeal comes before me sitting as a judge of the High Court under Part IV of the Courts Act 1936, as amended, by way of a full rehearing but based on the affidavit evidence which was before the Circuit Court. I will address the issues arising shortly but it is necessary, firstly, to refer to the legal principles by reference to which an application like this for discovery falls to be determined.

### **The Applicable Legal Principles**

18. In *Promontoria (Aran) Limited v. Sheehy* [2020] IECA 104, Haughton J. set out a very useful summary of the legal principles governing the jurisdiction to grant discovery, which I gratefully adopt. He first referred to the issue of discretion as follows:

"29. Although the principles relating to discovery are well established it remains the case that in granting discovery and framing the terms of discovery the court retains a discretion. Accordingly, as the subject of this appeal is essentially discretionary, the correct approach to it is that set out by the Supreme Court in *Lismore Builders Limited (in receivership) v. Bank of Ireland Finance Limited* [2013] IESC 6, where MacMenamin J. stated:

'(4) Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental. This is clear from the judgment of Geoghegan J. in *Desmond v. MGN* [2009] 1 I.R. 737.'

More recently this approach was reinforced by Clarke C.J. in *Tobin v. Minister for Defence* [2019] IESC 57, where he set out the principles relating to discovery and then stated:

'7.27 As the application of the above principles is one for judges dealing with the preparation of cases and since issues as to relevance, necessity and proportionality involving adjudication based on a detailed understanding of the case, in general decisions as to discovery should involve a significant measure of appreciation by any appellate court reviewing a decision at first instance...[W]here an order made on a consideration of affidavit evidence and pleadings is appealed, the burden of demonstrating as a probability that the decision is wrong rests on the appellant from the original High Court order; see *Ryanair Limited v. Biligfleuge de GmbH* [2015] IESC 11, at paras. 5-8.'



19. Haughton J. then referred to the provisions of Order 31, r. 12 of the Rules of the Superior Courts which provides that the Court may order discovery if it is satisfied that the categories of documents sought by the moving party are both relevant and necessary for the fair disposal of the action or for saving costs. The equivalent provision in the Circuit Court is Order 32 of the Circuit Court Rules, which provides that the Court may direct any party to make discovery of documents which are or have been in its possession or power, relating to any matter in question in the proceedings, and the judge may either refuse or adjourn the application, if satisfied that discovery is not necessary, or not necessary at that stage of the proceedings.

20. Haughton J. then continued as follows:

"31. The definition of relevance is contained in the well-worn judgment of Brett L.J. in *Compagnie Financiere Commerciale du Pacifique v. Peruvian Guano* [1882] 11 Q.B.D. 55, at pp. 62-63, applied in this jurisdiction in *Sterling-Winthrop Group Limited v. Farbenfabriken Bayer A.G.* [1967] IR 97, and authoritatively adopted by Murray J. speaking for the Supreme Court in *Framus v. CRH* [2004] 2 I.R. 20:

'The parties also refer to the oft cited statement of Brett L.J...to the effect that "every document [relating] to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance its own case or to damage the case of his adversary" shall be discovered.'

The test "reasonable to suppose contains information" was substituted by a heightened test of probability by McCracken J. in *Hannon v. Commissioner of Public Works* [2001] IEHC 59 in the following terms:

'(1) The court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility the documents may be relevant.'

This was adopted by Clarke J. in *Hartside Limited v. Heineken Ireland Limited* [2010] IEHC 3, at para. 5.1.

At pp. 63-65 Brett L.J. went on to state that in order to determine whether documents were relevant and had to be discovered,

'It is necessary to consider what are the questions in the action: the court must look not only at the statement of claim in the plaintiff's case but also at the statement of defence and the defendants case.'

32. In *Keating v. RTE* [2013] IESC 22, the Supreme Court confirmed that the moving party must "disclose some information upon which the plea is based". It is well established that it is not permissible to make an unsubstantiated assertion and then

call for discovery of documents hoping that this will unearth documents which would provide a basis for a case – a principle made clear in *Carlow/Kilkenny Radio Limited v. Broadcasting Commission* [2004] 1 ILRM 161.

33. With regard to necessity, Fennelly J. in *Ryanair Plc v. Aer Rianta CPT* [2003] 4 I.R. 264 held that the crucial question is whether discovery is necessary for “disposing fairly of the cause or matter”, but the applicant does not have to show that they are “absolutely necessary”. At p. 277 Fennelly J. stated the court should –

‘...consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confined categories of documents sought to what is genuinely necessary for the fairness of litigation. It may have regard, of course, to alternative means of proof which are open to the applicant.’

34. As Clarke C.J. observed in *Tobin* –

‘6.3 Arising from this analysis, the principle of proportionality has been developed in the jurisprudence of this Court as a relevant factor in assessing whether discovery should be ordered...

6.4 The principle of proportionality has subsequently become an important criterion employed by the courts in order to avoid the imposition of excessive burdens on parties to litigation as a result of wide ranging orders for discovery.’”

### **The Issues on Appeal**

21. Both parties furnished amended written submissions, the appellant’s dated the 15th June 2021, and the respondent’s the 16th June, 2021, which helpfully summarise their arguments as to why the Court should direct or refuse discovery in respect of categories 3 and 4. I now propose dealing with each of these categories in turn, against the backdrop of the applicable legal principles as set out above, having first summarised the relevant submissions of the parties.

### **Category 3: Submissions on Appeal**

22. As regards category 3, the appellant relied on a number of authorities which suggest that it is necessary to examine the substance of landlord-tenant relationships in order to determine their true legal characteristics, and that this did not just depend on the label which the parties put on the relationship. It cited dicta of the High Court in *Board of Management of St. Patrick’s School v. Eoghan Ó Neachtain Limited* [2018] IEHC 128, to the effect that in such cases “the courts will look beyond the express wording of agreements to determine the intention of the parties”. It also cited the decision of the High Court in *Smith v. CIE* [2002] IEHC 103, where Peart J. appears to have considered not only the terms of the relevant agreement itself, but also the “negotiations and correspondence which preceded it”.
23. As regards the introduction of extrinsic evidence of the meaning of a contract more generally, the appellant submitted that, even according to general principles of contract

law, the Court can look at the factual matrix surrounding the formal legal relationship between the parties, which may require consideration of the pre-contractual negotiations between the parties and the advice and communications between the parties and their agents/advisers. It cited the decision of the High Court in *Ringsend Property Limited v. Donatex Limited* [2009] IEHC 568, where Kelly J. appeared to allow for the introduction of evidence as to “the matrix of surrounding fact” in a case where a term of the contract was ambiguous. It was submitted that, in the instant case, the 2016 lease is ambiguous in not dealing clearly with its relationship to the expired 2010 lease and to the renunciation. Overall it is submitted that the admissibility of any of the documents sought in category 3 is a matter for the trial judge hearing the action, and should not be dealt with in the application herein.

24. In reply on category 3, the respondent relied strongly on the decision of the Supreme Court in *Analog Devices v. Zurich Insurance Company* [2005] 1 I.R. 274 (“*Analog*”), to the effect that, in construing contractual provisions, the Court had to give effect to the intentions of the parties, such intentions to be obtained objectively from the words used, taking into account the surrounding circumstances or factual matrix. In giving the judgment of the Court, Geoghegan J. accepted the principle that the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent, and they are admissible only in an action for rectification. The respondent submitted that evidence of pre-contractual negotiations is normally excluded, and that evidence of post-contractual conduct is also not admissible. Whether the 2010 deed of renunciation is extant following the execution of the 2016 deed of variation is a matter of contractual interpretation of the 2010 lease, the 2010 deed of renunciation, and the 2016 deed of variation. Communications between the defendant and the plaintiff, and/or their respective predecessors in title, concerning the applicability of the 2010 deed of renunciation following the execution of the 2016 deed of variation, are irrelevant to and not necessary for determining whether the 2010 deed of renunciation remains extant.

**Category 3: Decision**

25. As set out above, category 3 seeks discovery of all documents relating to the 2010 lease renunciation allegedly applying to the 2016 lease and/or deed of variation. The first requirement in Order 32 of the Circuit Court Rules is that the documents sought must be documents “relating to any matter in question” in the proceedings. In the present case the matter of the alleged application of the 2010 renunciation to what the appellant describes as the 2016 lease, i.e. the 2010 lease as purportedly altered or modified by the 2016 deed of variation after the expiration of the five-year term of the 2010 lease, is clearly a central matter in question between the parties. The appellant says that the renunciation was spent on the termination of the 2010 lease; the respondent says that the renunciation has remained extant and in full force and effect viz-a-viz the 2010 lease, as extended by the 2016 deed of variation. In my view, the documents sought in category 3 are clearly documents relating to that matter in question.
26. The more difficult issue is the second requirement in Order 32, that the Court should be satisfied that such discovery is “necessary”, which I take to mean necessary for disposing

fairly of the matter, as per the similar rule in the Rules of the Superior Courts. The respondent argues strongly that this matter in question, as to the applicability or otherwise of the 2010 renunciation, comes down solely to a matter of contractual interpretation of three documents as described above. As per para. 24 above, it submits that the general principles of contractual interpretation are well settled in Ireland following the *Analog* decision, and that the Courts have made it clear that these principles apply equally to the interpretation of commercial leases and that no special rules of interpretation apply.

27. In *Analog*, the Supreme Court held that, in construing contractual provisions, the Court had to give effect to the intentions of the parties, such intentions to be obtained objectively from the words used, taking into account the surrounding circumstances or factual matrix. The law excludes for the admissible background the previous negotiations of the parties and their declarations of subjective intent, which are admissible only in an action for rectification. While the exclusion of pre-contractual negotiations has been clear and consistent before and since *Analog*, in my opinion what has not been so clear and consistent is the extent to which the Courts will receive oral evidence as to the "factual matrix" in which a written agreement was concluded, so as to explain or interpret the terms of the agreement. One situation where this does appear to occur is where a clause in a contract is ambiguous, a situation which was recognised by the High Court in the *Ringsend Property Limited* case, a case which post-dated *Analog*.
28. In the present case it is arguable that there is an ambiguity in the 2010 deed of renunciation whereby the then tenant renounced any potential statutory entitlement to a new tenancy in the premises "on the termination of the lease". In the circumstances of this case, did the parties intend this to cover the termination of the 2010 lease on the expiry of the original five-year term, or alternatively the termination of the lease on the expiry of the additional term *per* the deed of variation?
29. It seems to me that the documents in category 3 could be seen as forming part of the "factual matrix", and such evidence could be deemed admissible by the trial judge at the trial of the action herein. I accept the appellant's submission that the question of the extent to which any of those documents are in fact admissible is one for the Court hearing the case, subject to the authorities and principles governing the admissibility of extrinsic evidence.
30. I am therefore prepared to grant discovery of the documents in category 3, subject to some adjustment of the scope of the category, having regard to the principles of necessity and proportionality. As set out earlier, in the *Ryanair* case Fennelly J. stated that the Court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of litigation. The documents sought in category 3 are described as "including but not limited to all communications between the defendant and the plaintiff and/or their respective predecessors in title concerning the applicability of the renunciation to the 2016 lease". While it appears possible that some such communications could form part of the factual matrix, it is clear from the decision of the

Supreme Court in *Analog* that any such communications which amount to pre-contractual negotiations are excluded from the admissible background.

31. I am satisfied, therefore, that discovery of all such communications is not necessary for the fair disposal of the matter. I am also satisfied to order same would not be proportionate, as it would impose an excessive burden on the respondent as a result of an overly-wide ranging order for discovery. For those reasons I will add the following rider to the end of the wording of this category in respect of which I will order discovery:

“other than any communications in the nature of pre-contractual negotiations which led to the 2016 deed of variation.”

#### **Category 4: Submissions on Appeal**

32. As regards category 4, in their amended written submissions the appellants submitted that “a question for the court will be” whether the 2016 deed of variation “was intended by the landlord, *sub silentio*, to avoid business equity”, in circumstances where it provided for an additional term to a lease which had expired and where the tenant had continued in occupation and had paid rent subsequently for a substantial period.
33. As regards the suggested question for the Court, the appellant refers to s. 85 of the 1980 Act which provides that so much of any contract as provides that any provision of the 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. The appellant cites the case of *Bank of Ireland v. Fitzmaurice* [1989] ILRM 452, where the High Court held that a multiplier clause for calculating rent was intended to exercise a compelling pressure on the tenant to surrender his tenancy, in order to escape liability for the increased rent. Lardner J. regarded the clause as a provision which, in effect, restricted the application of the 1980 Act as regards the right to a new tenancy, and it was therefore void applying s.85. The appellant submitted that similarly in this case the Court is entitled to examine the respondent’s intention in defining the additional term under the deed of variation, and the appellant was entitled to obtain discovery of documents relevant to whether what was intended was an avoidance of a tenant’s statutory rights in breach of s.85.
34. In replying on category 4, the respondent rejects the appellant’s submission that Lardner J. in *Fitzmaurice* conducted an exercise of “looking through” executed documents so as to identify the underlying motivation of the landlord. The respondent submits that Lardner J. rather looked at the terms of the lease itself, and the effect of the multiplier clause, which express clause he was satisfied was designed to circumvent the 1980 Act.
35. As regards the anti-avoidance provision in s.85(1) of the 1980 Act, the respondent points out that s. 85(2) now provides that subs (1) does not apply to a renunciation referred to in subpara. (iia) of s.17(1)(a) of the Act. That latter provision provides that a tenant shall not be entitled to a new business tenancy if “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”. As

such, s.17(1)(a)(iiia) facilitates the contracting out of new tenancy rights in respect of a business premises, and a renunciation in this manner is expressly excluded from the scope of s.85 of the 1980 Act. The respondent submits that, if extant, the 2010 deed of renunciation cannot amount to an impermissible effort to circumvent s.85 of the 1980 Act. Whether that deed is extant, following the execution of the 2016 deed of variation, is a matter of contractual interpretation and the motivation of the then landlord is irrelevant to that question.

#### **Category 4: Decision**

36. As regards category 4, consisting of documents relating to the legal assistance received in connection with the 2016 lease, again the first requirement is that the documents sought must be documents "relating to any matter in question" in the proceedings. As summarised above, the appellant submits that documents relating to the legal assistance received are relevant to a matter in question herein, i.e. a question as to whether the 2016 deed of variation was intended to avoid the tenant's rights, in breach of s.85 of the 1980 Act.
37. It is well established, going all the way back to the *Peruvian Guano* case in 1882, that in order to determine whether documents are relevant to a matter in question in the action, it is necessary to consider what are the matters in question arising by looking at the pleadings of both parties in the case. The difficulty for the appellant, in my view, is that the Civil Bill does not contain any plea regarding the matter suggested by them. While it is pleaded that the 2016 lease was not subject to the renunciation, there is no plea that if the renunciation is extant, then the 2016 deed or part of it is void by virtue of s. 85 of the 1980 Act.
38. Given that such a matter was not pleaded by the appellant, it is no surprise that same is not traversed or put in issue in the Defence, and therefore on the basis of the pleadings to date there is no such matter in question in this action. It follows that the documents sought in category 4 cannot relate to any matter in question herein, and discovery of this category must be refused on the basis of this threshold requirement.
39. Even if I were wrong as to relevance alone being decisive, I would not be satisfied that discovery of this category is necessary or proportionate. In that regard, I accept the submission made by counsel for the respondent that it is generally the effect of the document which is relevant for the purposes of s. 85 of the 1980 Act, and not intention or motivation, leaving over the question of whether there might ever be exceptional circumstances to depart from that general principle.

#### **Conclusion**

40. In conclusion, therefore, I would allow the appeal in part and order discovery of the documents in category 3, subject to the amendment to the wording of this category as set out in para. 31 above.
41. Having regard to the outcome of this appeal, the Court invites the parties to deliver written submissions on the issue of costs if they cannot agree same. In that event, and taking into account the upcoming vacation period intervening, the appellant will have a

period of up to Friday 14th January, 2022 to deliver written submissions not exceeding 1,500 words, and the respondent will have up to Friday the 28th January, 2022 to respond, again not exceeding 1,500 words.