THE COURT OF APPEAL

CIVIL

UNAPPROVED

NO REDACTIONS NEEDED

Record Number: 2024/291

Neutral Citation Number [2026] IECA 157

Whelan J.
Binchy J.
Pilkington J.

BETWEEN/

GRADUAL INVESTMENTS LIMITED

PLAINTIFF/RESPONDENT

- AND –

DES KENNEDY

RESPONDENT/APPELLANT

<u>Judgment of Ms. Justice Máire Whelan delivered on the 31st day of July 2026</u>

1. This is an appeal against the judgment ([2024] IEHC 602) and orders of Mulcahy J. in the High Court wherein he held that Gradual Investments Limited ('the landlord') was entitled to recover against the defendant/appellant Mr. Kennedy ('the tenant') the sum of €200,791.78 together with interest thereon from 2nd July 2020 at a rate of 2% and also 50% of the landlord's costs of the proceedings, same to be adjudicated in default of agreement.

Background

2. The factual background is outlined in detail in the High Court judgment and is reprised herein only to the extent necessary. The tenant succeeded his mother about 50 years ago in operating a newsagents, grocer shop and post office in the village of Stepaside, County Dublin. The tenant entered into an Indenture of Lease dated 14th October 2008 ('the Lease') with the landlord's predecessor in title, Richmond Properties Limited ('Richmond'). Pursuant to same, Richmond demised to the tenant retail unit number 1 ('the Premises'), part of a commercial Shopping Centre development known as The Village, Stepaside, for the term of 35 years from 14th October 2008 at an initial rent of €137,000 (apparently later adjusted to €134,260) per annum ('the rent'), exclusive of VAT. The timing of this transaction could scarcely be less auspicious - from a tenant's perspective - occurring as it did within a month of the collapse into bankruptcy of Lehman Brothers at the tipping point whence the global economy toppled into the Economic Crisis.

3. The tenant subsequently fell into arrears with rent and Richmond experienced trading difficulties. On 27th April 2012 receivers were appointed over Richmond. In circumstances where a severe economic downturn had prevailed since the granting of the lease in October 2008, Richmond, acting through its receivers, concluded a side agreement, the First Abatement Agreement ('AA1') with the tenant, expressed to be supplemental to the lease. Between 27th April 2012 and 13th October 2018 two separate rent abatement agreements were concluded.

4. AA1 is dated 28th November 2013, seven months after the receivers' appointment and about three and a half months prior to sale of the entire Shopping Centre to Gradual. It provided that for the period from 27th April 2012 (the date the receivers were appointed) until 31st

December 2014 an abated rent of €80,000 per annum (plus VAT) ('the abated rent') was payable. The agreement also addressed outstanding historic arrears pre-dating the receivers' appointment. By the time Gradual acquired the lessor's interest from Richmond on 6th March 2014, further rent arrears of €49,800 had accrued. By letter dated 8th September 2014 Gradual agreed to accept the sum of €24,000 in discharge of the historic arrears payable in sixteen separate monthly instalments of €1,500, the final payment due by 31st December 2015. The parties treated this letter as a variation of AA1 ('the Variation Agreement' or 'VA'). The final instalment was paid late. The first ground of appeal is whether, as held by the High Court, this late payment rendered the Variation Agreement void and entitled the landlord to recover a further €25,800 in rent.

5. There was no *written* agreement between the parties to continue the abated level of rent for the year 2015. The tenant continued to pay the abated rent of €80,000 throughout 2015. The landlord continued to accept payments of rent by the tenant at the abated level in 2015 without issue and never, either orally or in writing, sought the higher rent reserved under the Lease. It never asserted either prior to the tenant's execution of a Second Abatement Agreement ('AA2') on 15th February 2016, or during the years of AA2's operation up to 13th October 2018, or thereafter until *circa* 2020 that there were rent arrears outstanding for 2015.

6. There is a dispute as to whether the landlord can now seek a further €57,000 rent under the lease for the year 2015, as the trial judge held, or whether rent abated under AA1 continued to apply in 2015. This is the second issue to be determined in this appeal.

7. AA2 is dated 18th December 2015. It was executed by the tenant on 15th February 2016 covering the period from 1st January 2016 to 13th October 2018. It provided for abated but incrementally increasing yearly rent payments: €90,000 for 2016, €95,000 for 2017, and €100,000 (*pro rata)* for 2018 up to 13th October 2018. The High Court held on three alternative bases that by reason of identified breaches of covenant by the tenant the said agreement was rendered void and the tenant is liable to pay full rent of €117,991.78 for that period under the Lease. The correctness of that finding is the third key aspect of the appeal.

Key terms of both rent abatement agreements

8. AA1 and AA2 were substantially similar in operative terms (save that the first also addressed pre-existing arrears). The key common provisos stated:

"PROVIDED ALWAYS THAT:

> *If;*
>
> *"(i) The Tenant is in default of any payments payable under the Lease (other than in respect of Rent) or in default of the abated rent and arrears payable in accordance with clause 1.1 and 1.2 of this side letter for a period of 7 (seven) days or more following receipt of written demand from the Landlord or on his behalf;"*

Proviso *(i)* arises for consideration by reason of the tenant's alleged default in payment of Service Charges during the term of AA2.

> *"(ii) Any of the covenants on the part of the Tenant whether set out in the Lease or this side letter shall not be observed or performed;*
>
> *(iii)…*
>
> *(iv) …*
>
> *Then and in any of the said cases, the terms of this side letter will immediately become null and void ab initio in which case the Landlord shall be entitled to pursue all monies owed under the Lease without reference to this side letter or the terms of the concession hereby granted."*

Proviso (*ii)* is engaged by reason of the tenant's alleged breaches of the repairing covenant and prohibition on alterations covenant in the 2008 Lease during term of AA2.

The landlord's pleaded case

9. At para. 28 of the Statement of Claim (delivered in July 2020), the landlord pleads an agreement of 31st July 2014 (apparently a Variation Agreement of September 2014) to pay €24,000 in 17 monthly instalments of €1,411.76 to be completed by December 2015 with failure to make the payments in time entitling the landlord to seek €25,800 with interest.

10. It is further pleaded that the landlord was entitled to recover the full balance of rent due under the Lease without reference to either AA1 or AA2 by reason that both had been rendered null and void *ab initio*. At para. 27 Gradual had claimed the sum of €274,221.29 plus interest of €235,770.71 as being additionally due. At para. 29 it is pleaded:

> *"The total sum due to the plaintiff including interest and including arrears of service charges is therefore €539, 364.27 with interest continuing to accrue at the prescribed rate"* (pleaded at para. 27 to be 1.75% per month).

11. The claim for 2015 rent arrears is pleaded thus:

> " 19. *By reason of the foregoing, the First Rent Abatement Agreement and the Second Rent Abatement Agreement are null and void ab initio and the Plaintiff is entitled to the payment of all monies due under the Lease without reference to the Abatement Agreements."* (*emphasis added*)
>
> *20. As a result of the said breaches of the Leases, breaches of covenant and Breaches of the AA1 and AA2, arrears of rent and interest thereon are due and owing by the Defendant to the Plaintiff." (emphasis added)*
>
> *"Particulars*
>
> *21. In the calendar years 2014 and 2015 the defendant paid the sum of €80,000 (excluding VAT) per annum under the first rent abatement agreement, but the sum of €137,000 (excluding VAT) per annum was payable in quarterly instalments under the*

> *lease. Accordingly, a shortfall of €57,000 (excluding VAT) arose in each of the calendar years 2014 <u>and 2015</u>". (emphasis added)*

Significantly, the pleaded basis for the tenant's alleged liability to pay a further €57,000 in rent for the year 2015 was exclusively anchored to alleged non-compliance with the terms of AA1. The pleadings were never amended. The claim in relation to alleged arrears for the year 2014 was dismissed by the High court and that determination was not appealed against. At trial, however, the landlord radically shifted its position asserting instead that the AA1 never governed the relationship for the year 2015, instead contending that the rent of €137,000 reserved under the 2008 lease had applied *automatically* for that year.

12. The Statement of Claim pleads breaches of AA2, includes (para. 14) that clause 3.3 of the Lease required the tenant to pay the Service Charge quarterly in advance in accordance with clause 8 of the Lease. It pleads that he *"repeatedly failed to discharge service charge payments on time or upon demand"* (para. 16). The claim as particularised contends a balance outstanding on 2nd July 2020 of €3,572.27 inclusive of debt collection costs. It is of note that at para. 18 it is pleaded that the tenant:

> "*… was in default of payments payable under the Lease <u>for a period of seven days or more following receipt of written demands on behalf of the Plaintiff to discharge same</u>*". (*emphasis added*)

The formulation *"...a period of 7 (seven days) or more..."* is found in the wording of the first proviso in both AA1 and AA2. The relevance of this claim in the context of this appeal is confined to arrears of Service Charge claimed as unpaid in breach of *proviso (i) of* AA2.

The High Court Judgment

Claim under AA1 rejected by High Court

13. The landlord's claim for €57,000, plus interest, under the AA1 was rejected by the trial judge. The landlord did not appeal against that finding.

The Claim under September 2014 variation agreement for €25,800

14. The High Court found:

> *"The variation to the AA1 evidenced in the plaintiff's agent's letter of 8 September 2014 did not permit the plaintiff to claim all rent foregone in the event of a failure to pay the arrears in time; a written demand for any sum due was a pre-condition to such a claim. However, it did permit the plaintiff to claim the balance of the arrears dealt with by that agreement in the event that the agreed amount was not paid by 31 December 2015 without any requirement for a prior written demand. The plaintiff is, therefore, prima facie, entitled to claim the sum of €25,800 is now due unless the defendant is able to establish some basis for barring such a claim."* (para. 73)

15. The High Court, rejecting the tenant's defences including those based on waiver and estoppel, held that his failure to pay the final instalment of €1,500 by 31st December 2015 breached the Variation Agreement and resulted in him being liable to pay a further €25,800 in rent plus interest. The tenant appeals that finding.

The Claim regarding rent arrears for 2015

16. The High Court held that the AA1 did not operate in 2015:

> *"Neither party gave any evidence suggesting that there was an express or even an implied agreement in place that the AA1 would continue through 2015, or of any other agreement by the plaintiff to accept a reduced rental payment for that period. In particular, the defendant has not pleaded, nor given any evidence regarding, the*

existence of an agreement, whether supported by consideration or otherwise, entitling him to pay a reduced rent during this period." (para. 74)

17. The High Court rejected the tenant's arguments that the true intention of the parties in 2015 was that the abated rent would continue or, *inter alia,* that the landlord was estopped or otherwise precluded in law or in equity from seeking the full balance of €57,000, plus interest under the Lease. The tenant appeals from that determination.

The Claim under AA2 of 18th December 2015

18. The trial judge observed of this agreement: *"It is not disputed that the defendant paid rent at the rates provided for in AA2, albeit that there is some complaint that the payments were not made in a timely manner, and that he resumed paying the rent reserved under the Lease when the period covered by AA2 expired."* (para. 7)

19. The landlord claimed that this agreement was breached on several pleaded bases and in consequence it was entitled to seek the full rent reserved under the Lease for the entire period covered by AA2 (1st January 2016 – 13th October 2018). The High Court held that the tenant had breached this agreement on three distinct bases:

- Breach of a restrictive user covenant (Covenant 4.12 of the lease) (para. 147)

- Breach of alterations covenant (Covenant 4.13 of the lease) (para. 146) and;

- Breach of service charges covenant (Covenant 8 of the lease) (para. 196(*iv)*).

The judge found that all three covenants had been breached during the term of AA2 and each operated to avoid AA2, thereby entitling the landlord to recover the full balance of rent reserved under the Lease calculated as €117,911.78, plus interest for term of AA2 (1st January, 2016 – 13 October 2018). The tenant appeals against that determination.

The Grounds of Appeal

20. There are 26 grounds of appeal directed towards three net issues for determination:

(i) Is the landlord entitled to a further sum of €25,800 in rent (plus VAT, interest and costs), in addition to all sums previously paid, by reason of late payment by the tenant of the final instalment under the 2014 variation agreement?

(ii) Is the landlord entitled to a further sum of €57,000 (plus VAT, interest and costs) in rent (in addition to the abated sum of €80,000 previously paid) for the year 2015?

(iii) Is the landlord entitled to recover a further sum €117,911.78 (plus VAT, interest and costs) by way of rent due under AA2?

The grounds of appeal assert, inter alia:

- The High Court erred in finding that the landlord was not estopped from negating any express/implied Rent Abatement Agreements 1st January 2014 - 13th October 2018. (*Ground 1*)

- The High Court erred in finding that the tenant failed to comply with the VA of September 2014 regarding arrears which had arisen under AA1. (*Ground 2)*

- The High Court erred in failing to find that sums due under the VA (€25,800) were waived by the landlord either expressly, impliedly or by subsequent conduct in entering into AA2. (*Ground 3)*

- The High Court erred in failing to find that the landlord expressly, impliedly or by subsequent conduct *including their failure to seek payment of the difference between the rent reserved in the lease and the amount paid by the tenant as rent for 2015 or by entering into AA2 on 15th February 2016, had waived €57,000 rent otherwise payable in 2015. (Ground 4)*

- The High Court erred in failing to find that the landlord expressly/impliedly/by subsequent conduct waived alleged breaches of AA2 so same can't ground a claim AA2 is void *ab initio*. (*Ground 5*)

- The High Court erred in not applying "*de minimus non curat lex*" to asserted breaches of AA2 where any such breach caused the landlord no loss. *(Ground 6)*

- Having found at para. 42 that the abatement agreements were "*...spent once the payment obligations had been discharged*" the High Court erred in not dismissing the claim for €505,101.09 "*…where no abatement was in effect after 12 October 2018". (Ground 7)*

- The High Court erred in law and the exercise of the equitable jurisdiction in finding (para. 57) that the second proviso in AA2 was *"self executing". (Ground 8)*

- The High Court failed to properly apply the correct principles of contractual construction to AA2 "*in its context as a variation to a Lease." (Ground 9)*

- The High Court failed to attach appropriate weight to conduct of landlord's agent (Mr Birmingham) attending the demised premises during AA2, *subsequent* to alleged breaches later complained of where they raised no material issue and did not assert that tenant had breached AA2. *(Ground 10)*

- The High Court erred in failing to find that Gradual's agent had expressly waived purported breaches of the alterations clause by consent given by letter 14th March 2017 and/or Gradual's director waived any consequence after being made aware of the said works. *(Ground 11)*

- The High Court erred in finding (para. 113) that "*floor area in front of the wine shelves was… used for the sale of wine within the meaning of the covenant*" as the landlord's surveyor had agreed that the said floor area was <u>also</u> used for circulation to other areas of shop. *(Ground 12)*

- Inappropriate weight was given to tenant's dealings with the Management Company in relation to alleged breaches of Service Charge covenant. *(Ground 13)*

- The High Court erred in asserting (para. 144) that the tenant's plea of Estoppel was *"... premised on his proposition that there was no 'evidence of substantive breach of any covenants in the Lease'". (Ground 14)*

- The High Court erred (para. 147) in failing to exclude all consideration of alleged closure of Landlord's nearby Wine Shop. *(Ground 15)*

- The High court erred in finding (para. 156) no evidence of unambiguous representations made to the tenant to ground an estoppel or waiver that the abatement agreements were performed and that no adverse consequences for the tenant would arise. *(Ground 16)*

- The High Court erred (para. 156) in assessment of the reliance which the tenant placed on Gradual's representations. *(Ground 17)*

- The Court erred in finding (para. 158) that the tenant "*gave no evidence of reliance on any of the matters which are said to ground an estoppel or waiver*" as per *Barge Inn*. *(Ground 18)*

- The High Court judge erred (para. 142) in interpreting Section 43 Deasy's Act and in failing to exercise his equitable jurisdiction in relation thereto. *(Ground 19)*

- The High Court failed (para. 169) to attach appropriate weight to the representation by landlord's agent in March 2017 that tenant was not in breach of *any* term of the Lease or Abatement Agreement and the tenant's understanding of same. *(Ground 20)*

- The High Court failed to fix the landlord with knowledge of the condition of the premises and compliance with the Lease Terms by reason of Mr Birmingham's inspection in March 2017. *(Ground 21)*

- The High Court erred in finding (paras. 169/170) Mr Birmingham's waiver in 2017 of purported breaches of the Lease was effective as regards the Lease but ineffective as regards AA2. *(Ground 22)*

- The High Court erred in failing to exercise its equitable jurisdiction in light of aspects of the evidence including his finding (para. 184) that it was "likely correct" that the landlord's action was motivated by the tenant's 2019 request in to assign his leasehold interest. *(Ground 23)*

- The High Court erred in holding that the Rule in Pinnel's case applied. The doctrine of Promissory Estoppel is an exception and ought to have been applied. *(Ground 24)*

- The High Court failed to exercise its equitable jurisdiction by preventing Gradual from resiling from its stated position in the Abatement Agreements. *(Ground 25)*
- The High Court erred in giving the award of €200,791.98 plus interest. Same was a windfall sum. *(Ground 26)*

The tenant's key arguments

21. The tenant in 2008 had taken the demise as "*a complete shell*" and over the years had invested about €780,000 in fitting it out as a retail premises (paras. 55-59 of submissions). The tenant argued in the context of construing the agreements between the parties that this court ought to have regard to all the available information to determine "*what it is a reasonable person would consider [the parties] had agreed*" (paras. 72-74 subs.). On the first issue he contends that the High Court erred in holding that the landlord was entitled to recover a further €25,800 (plus interest) for non-compliance with the Variation Agreement.

22. Secondly, he contends that the High Court erred in holding that there was no rent abatement agreement in operation between the parties for 2015 or that landlord is entitled to now recover a further €57,000 plus VAT, interest and costs as alleged underpayment of 2015 rent. Reliance was placed on an email sent on 10th February 2016 to the tenant by Peter Buckley, the landlord's agent, which "*clearly represented*" that as of that date the outstanding liability of the tenant for rent was €1,500 (appellant's subs. paras. 11, 12 and 44). The tenant contended that Mr Buckley's email of 10th February 2016 satisfies s. 43 of *Deasy's Act* as a binding waiver and dispensation in respect of *both* the Variation Agreement and AA1 and is evidence that the email was intended to and did operate between the parties to implicitly acknowledge that abated rent of €80,000 continued for 2015. Such, it was also argued, was the landlord's own pleaded case at para. 21 of the Statement of Claim.

23. The Judge's finding that the landlord remained free *"to claim the balance of the arrears dealt with by that agreement in the event that the agreed amount was not paid by 31 December 2015 without any requirement for a prior written demand*" (para. 73) was said to be at odds with the correspondence including the said email and the stance of the landlord towards the tenant in relation to arrears up until service of the Statement of Claim in July 2020.

24. Thirdly, it is contended that the High Court erred in holding that AA2 was rendered void for breaches of various covenants (restricting renovations/user and service-charge payments) and in awarding €117,991.78 plus VAT, interest and costs to the landlord on that basis. In respect of alleged non-compliance with the covenant to pay service charges, reliance was placed on the terms of warning letters received by the tenant from the landlord's agent, Mr Birmingham, including in October 2017, January and March 2018 representing that non-payment of a specified amount in rent "*…will be deemed to be a breach of the abatement letter…"* (paras. 46-51 appellant's submissions). No letter in like terms was sent by the landlord regarding late payment of service charges. It is to be observed that letters received from the landlord's agent, Indigo, regarding service charges are not consistent with a communication that non-compliance with which is intended to effect complete termination of an agreement and the established law is considered in detail below. As regards breaches of repairs/alterations covenants under AA2 the tenant grounds an estoppel claim, *inter alia,* on the basis that "… *Mr. Birmingham was clear in his evidence that neither he nor the Respondent were dissatisfied with the works, and it was inferred that no future issue would arise."* (tenant's subs. para. 46). It was argued that the first suggestion by the landlord of any breach of AA2 was on 31st January 2020 - about sixteen months after the said agreement had expired - when a solicitor's letter asserted the tenant had "*defaulted under the terms of the Agreement"* and demanded €505,101.09. The tenant had placed reliance both on AA2 throughout its operative term from 1st January 2016 – 13th October 2018 *"and all other representations made by or on behalf of the respondent"* (para. 60 subs).

25. The Abatement Agreements, the tenant submitted, were not *solely* for the tenant's benefit as the High Court had considered but were advantageous to the landlord also. In what was framed by the tenant as *Braganza*[1]-type arguments (paras. 77-80) it was submitted that "*As rent abatement encourages a tenant to continue with a lease which on the face of it makes no economic sense, it cannot be offered frivolously or, worse still, withdrawn capriciously or retrospectively or otherwise than with unimpeachable bona fides"* tenant's subs. (para. 80).

26. The tenant argued, "*non-performance of a covenant has to be decided by reference to the Lease and Clause 4.10 of the lease describes a complete scheme for dealing with what the landlord perceives as a breach…*" (para. 105 subs). He contended, in relation to alterations/user covenants that the judge erred in construing AA2 to infer that "*a breach of the Lease was a breach of AA2"* as no notice was ever served on him as mandated by Clause 4.10 of the Lease. The High Court's finding that avoidance of AA2 was *"self-executing"* was said to defy "*business common sense"* (para. 108). In light of *High Trees*[2] and *The Barge Inn*[3] decisions it would be "*manifestly inequitable to treat AA2 as null and void ab initio"*.

The landlord's key arguments

27. The landlord contends that nothing bars its right to recover a further €25,800 claimed for breach of the 2014 Variation Agreement in respect of historic arrears together with €57,800 sought (in addition to abated rent of €80,000 paid at the time by the tenant) for the year 2015 (subs. para.18 and 23). It concedes that it accepted the rent in 2015 at the abated level from the tenant: "*…the Appellant continued to pay rent at the abated level applicable under the First Abatement Agreement without objection at the time from the Respondent."* (subs. para. 9). It

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[1] *Braganza v. B.P. Shipping Limited*, [2015] UKSC 17, [2015] 1 WLR 1661
[2] *Central London Property Trust v High Trees House* [1947] K.B. 130
[3] *The Barge Inn Ltd v Quinn Hospitality Ireland Operations Ltd* [2013] IEHC 387

argues that the trial judge held that the tenant gave no evidence of reliance to ground an estoppel or waiver (subs. including paras. 17 and 23). Gradual submitted that the tenant gave no evidence that he relied on the 10th February 2016 email to mean that either 2014 or 2015 "*arrears*" were waived (subs. para. 80).

28. Gradual contended that the trial judge was correct (paras. 52 and 53 of judgment) both in his analysis that as regards termination of AA2 for breaches of covenants under the *second* proviso, Clause 4.10 of the lease;

> "*… does not oblige the landlord to serve a notice in the case of such a breach: it is not an entitlement of the tenant.*"

and also correct in his observations at para. 54 of the judgment that:

> *"…the second proviso can be contrasted with the first proviso which, for the reasons given above, I have concluded does expressly provide that there must be a prior written demand for a failure to comply to have any effect. The inclusion of that express requirement in the first proviso, with no equivalent in the second, makes clear that it is a failure to perform a covenant simpliciter which triggers the second proviso, not a failure to perform following a written request to comply with the contractual obligations or make good a prior failure so to do."*

29. Gradual contends that the High Court was correct in holding (paras. 57/58), that AA2 was "*self-executing*" (subs. para 30). It was aware that the appellant was carrying out alterations "*but did not take any step to investigate the scope of the works*" (subs. para 40). The trial judge was said to be correct (para. 156) in concluding that it was impossible to discern any step which the tenant took in reliance on a representation from the landlord, less still a step to his detriment (subs para. 42). The tenant, it was argued, has not made out an entitlement to rely on waiver or promissory estoppel in light of the decision in *The Barge Inn Ltd v Quinn* (subs. paras. 72 – 78). Failure to pay the service charges within 7 days "*of demands for same"* rendered AA2 *"*void *ab initio*" "*this is the beginning and end of the appeal insofar as it relates to AA2…*" (subs. para. 86).

Issues for determination in this appeal

30. The appeal grounds identified and elaborated at para. 20 above encompass three discrete time periods (pre-6th March 2014, the calendar year 2015 and 1st January 2016 – 13th October 2018) and (arguably) three separate agreements (the Variation Agreement of 6th September 2014, the AA1 (which Gradual denies operated in 2015) and AA2). The High Court's analysis and conclusions also engage a consideration of key disputed factual and legal aspects including:

(i) Is the landlord estopped on any basis, including by communications/conduct or silence in February 2016, from now claiming €25,800 additional rent (plus VAT, interest and costs) for alleged breach of the 2014 Variation Agreement?

(ii) Did the landlord waive (within s. 43 of Deasy's Act) any entitlement to now claim €25,800 (plus VAT, interest and costs) for alleged breach of the 2014 VA?

(iii) Is the landlord estopped from denying that the abated rent of €80,000 under AA1 applied for the calendar year 2015 and from now claiming a further €57,000 (plus VAT, interest and costs)?

(iv) Did the landlord establish that the tenant was as a matter of law "*in default of any payments under the Lease"* within the strict meaning of Proviso *(i)* of AA2 in relation to payment of Service Charges under the 2008 Lease (Clause 3.3)?

(v) As a matter of law, was a valid "*written demand*" ever served on the tenant as to a breach of Proviso *(i)* AA2 for non-payment of Service Charges under the Lease as would render the AA2 void *ab initio*?

(vi) Did any letter from Indigo amount to a valid "*written demand*" under Proviso 1 of AA2 such that non-compliance with same rendered the AA2 void *ab initio*?

(vii) Was the trial judge correct in his construction of proviso *(ii)* of AA2 and in finding the said proviso was "*self-executing*" in the event of breaches of restrictive user/alterations covenants under the Lease such that Gradual was entitled to rely on same to avoid AA2?

(viii) Is the landlord estopped by conduct, representation or in equity from now seeking to avoid AA2 on grounds of breach, non-observance or non-performance of the restrictive user, alterations or service charges covenant thereunder?

(ix) Did the landlord waive (within s. 43 of Deasy's Act) breaches of alterations (Clause 4.13.2) and/or the restrictive user covenants (Clause 4.12 of Lease)?

(x) Did the landlord validly waive (within s. 43 of Deasy's Act) the time obligation for payment of service charges under the AA2?

(xi) Separately, but only if the position remains unclear after consideration of issues (i)-(x) above, whether the tenant has established as a matter of law that the landlord is otherwise precluded from purporting to exercise its discretion to enforce the strict terms of the VA or AA1/AA2? Was there evidence that Gradual had from 2014 – 13th October 2018, as the tenant contended, "*encouraged*" the *"tenant to continue with a lease which on the face of it makes no economic sense".* Further whether the abatement agreements were *"offered frivolously or, worse still, withdrawn capriciously or retrospectively or otherwise than with unimpeachable bona fide..."* as the tenant asserted. Only if, after applying a rationality test, Gradual is found to have stepped outside its contractual powers could a court interfere with its exercise of a discretionary decision to enforce contractual entitlements. As outlined below, I do not find that this issue falls to be determined in this appeal as while alluded to by the appellant the point was not fully argued nor were the authorities opened in the High Court. This issue will be determined in a future case.

The Law

Construction of the contract

31. Determination of the key issues in the instant appeal hinges on the construction of any agreement governing the relationship at relevant times:

(i) A variation agreement (VA) dated 8th September 2014 which modified the AA1 and adjusted the payment timeframe thereunder for certain arrears of abated rent which had accrued prior to 6th March 2014.

(ii) Whichever agreement is found to govern the rental payments for the calendar year 2015: The landlord contends that the 2008 Lease applied at an annual rent of €137,000. The tenant asserts that the terms of AA1 (executed on 28th November 2013) also applied in 2015. Under same the annual abated rent was €80,000 which he discharged in full for 2015 and the landlord accepted without demur.

(iii) AA2 (dated 18th December 2015) was executed by the tenant on 16th February 2016 operated from 1st January 2016-13th October 2018 providing for abated and annually stepped rental payment. Rent then reverted to terms of Lease.

32. The landlord alone was responsible for the drafting of all the agreements. They appear to have been presented to the tenant on a "*take it or leave it*" basis. As such any ambiguities capable of more than one meaning are to be resolved against the landlord.[4]

Contemporaneous understanding – the factual matrix

33. The Supreme Court in *EMO Oil Limited v. Sun Alliance and London Insurance Company* [2009] IESC 2 (Kearns J.) adopted the principle adumbrated by Lord Wilberforce in *Reardon Smith Line Limited v. Yngevar Hansen-Tangen* [1976] 3 All E.R. 570 that:

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[4] *King v Ulster Bank Ireland Limited* [2013] IEHC 250, para. 25, Cooke J.

"No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the surrounding circumstances, but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, *the background, the context, the market in which the parties are operating. When one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties. What the court must do must be to place itself in thought in the same factual matrix in that in which the parties were."*

Relevant context in this case included the economic crash which coincided with the grant of the lease, the existence of AA1 prior to Gradual's acquisition of the landlord's interest from the receivers of the insolvent vendor in 2014, the fact that the tenant prior to execution of AA2 in February 2016 supplied audited accounts of his business to the landlord to confirm that he could not guarantee that the business could sustain ongoing rent increases, the obvious commercial desirability for the landlord at the time both of avoiding termination of the 2008 Lease whether by forfeiture or otherwise and having the unit trade and rent paid.

34. In Woodfall *"Landlord and Tenant"* Westlaw Books, Thomson Reuters, (1994), Volume 1, [11.007] on the approach to construction of covenants and leases, the authors observe:

"The object to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations which each assumed by the contractual words in which they sought to express them. For this purpose, however, the intention of the parties must be objectively ascertained, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. The actual intention of the parties is irrelevant; a court of

construction can only give effect to what it perceives as the actual intention of the parties 'if that intention appears from a fair interpretation of the words which they have used against the factual background known to them at or before the date of the lease, including it's genesis and objective aim'[5]."

35. In *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffmann identified the aim of contractual interpretation as being to ascertain the meaning which the contract would convey to a reasonable person who had all relevant background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the making of the contract, an approach adopted by the Supreme Court in *Analog Devices v. Zurich Insurance Company* [2005] 1 IR 274.

36. In *King v Ulster Bank Ireland Limited* [2013] IEHC 250, at para. 25 Cooke J. concisely adumbrated the essential principles governing the construction of contracts, noting:

"(i) The starting point in the construction of any written agreement where its meaning is in dispute is the actual text of the provision in question;

(ii) The task of the Court is to ascertain objectively the intention of the parties by reference to the meaning to be taken from the words they have used.

(iii) The meaning should be assessed by reference to the language employed, but taking into account the surrounding circumstances including the purpose and context of the contract as known to the parties at the time - the so-called 'factual matrix'.

(iv) The content of earlier negotiations and declarations by the persons concerned as to what their intention had been are irrelevant.

[5] Citing Nourse L.J. in *Philpots (Woking) v Surrey Conveyancers* [1986] 1 E.G.L.R. 97

(v) The Court should ask itself what the reasonable person possessed of relevant information as to the surrounding circumstances would understand the parties to have meant by the words in which they have expressed their agreement.

(vi) Where the wording used is capable of more than one meaning, that which gives commercial sense in the context of the contractual purpose should be preferred.

(vii) Where the wording is ambiguous and capable of more than one meaning, the provision should be construed against the interest of the party responsible for the drafting and presentation of the document."

"The text and the context"

37. Clarke J. in *The Law Society of Ireland v. The Motor Insurers' Bureau of Ireland* [2017] IESC 31 emphasised the importance of *"text in context"* construction as follows:

> *"Perhaps it is fair to say that the main underlying principle is that a document governing legal rights and obligations should be interpreted by the courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context."* (para. 10.5)

38. In *The Law Society v. MIBI* O'Donnell J. (as he then was) in his judgment noted the separate consideration of the text and context noting the evolutionary developments:

> *"These principles represent a significant staging point in the development of what might be described as a modern approach to the interpretation of contracts, a development which, as the principles recognise, has not necessarily reached its terminus."* (para. 8)

Regarding "*context*", at para. 12 he emphasised that the court engaged in the task of contractual interpretation *"…must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement."* He emphasised that the court ought to consider that in the context of construction the hypothetical reasonable person is understood *"… not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate."*

39. The legal principles to be applied by the Court in construing these provisions have not been seriously disputed in the submissions and arguments nor is it contested that, as Clarke J. observed in *Stapleyside Company v. Carrigdonn Retail Limited* [2015] IESC 60 at 6.3, *"Those principles of interpretation (the 'text in context' method) apply to no lesser extent in the field of property documentation."*

40. In *Jackie Greene Construction Ltd v Irish Nationwide Building Society* [2019] IESC 2 at para. 5.4 Clarke C.J. re-iterated the distinct centrality of both to contractual interpretation:

> *"As is clear from those authorities it is important to give due recognition both to the text of any document creating legal rights and obligations and to the context in which the words used in the measure concerned were chosen. To fail to give adequate weight to the words is to ignore, or downplay, the fact that those were the words that were chosen to define the relevant legal arrangement. To fail to give adequate weight to context is to ignore the fact that all language is inevitably interpreted by reasonable persons in the light of the context in which the language is used."*

Ascertaining the "presumed intention" of the parties

41. In *Brushfield Limited v. Arachas Corporate Brokers Limited* [2021] IEHC 263, ([2022] Lloyd's Reports IR 638), McDonald J. having reviewed key Irish and English authorities with commendable clarity distilled the principles applicable to the construction of contracts in general (and insurance contracts in particular) observing at para. 110, (a) – (g):-

"*The following principles emerge from those authorities:-*

(a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;

(b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;

(c) The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;

(d) For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person.

(e) A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document.… in order to ascertain the meaning of words used in a contract, it is necessary

to consider the contract as a whole and it is also necessary to consider the relevant factual and legal context…;

(f) While a court will not readily accept that the parties have made linguistic mistakes in the language they have chosen to express themselves, there may be occasions where it is clear from the context that something has gone wrong with the language….;

(g) As O'Donnell J. made clear in the MIBI case, in interpreting a contract, it is wrong to focus purely on the terms in dispute. Any contract must be read as a whole and it would be wrong to approach the interpretation of a contract solely through the prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell J. said:-

> *"It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later.""*

Circumstances and intention of parties at key dates gleaned from words and conduct

42. The Supreme Court has made clear that in construing the true import of agreements between landlords and tenants courts will be astute to carry out its own assessment of the circumstances surrounding conclusion of same. *Wylie*[6] observes of a court's approach when considering an agreement between a landlord and tenant in particular circumstances:

> *"If the agreement has been put in writing the court will obviously scrutinise its terms,*[7] *but… those terms will not necessarily determine the matter. If there is no written agreement the true nature of the agreement must be found from the words and conduct of the parties as evidenced in court.*[8]*"*

43. In *Irish Shell & BP Ltd v. Costello Ltd (No 2)* [1984] IR 511, Henchy J. observed:

[6] 'Wylie on *Landlord & Tenant Law',* (Bloomsbury 4th edn, (2022)) [2.27]
[7] Citing *Gatien Motor Co Ltd v Continental Oil Co of Ireland Ltd* [1979] IR 406
[8] Citing *Bellew v Bellew* [1982] IR 447

> "*In all cases it is a question of what the parties intended, and it is not permissible to apply an objective test which would impute to the parties an intention which they never had.*" *(p. 517)*

The 2014 Variation Agreement and both Abatement Agreements were in writing. No *written* agreement governs abatement in 2015 therefore conduct, including silence, is relevant.

Silence

44. The appellant contends that the statement contained in an email from the landlord's agent dated 10th February 2016 (the email) to which he responded by letter on 15th February 2016 setting out his understanding of the import and terms of the email as to the obligations of the parties and enclosing a cheque for €1,500 and the executed AA2 gives rise, in the circumstances, to an estoppel by representation. This is asserted to be so because of the landlord's subsequent silence. It never responded to the said letter or disputed its terms. The issue is whether the terms of the email when considered firstly, in light of the tenant's stated understanding of its import (as set out in his letter of 15th February) and, secondly, in light of the landlord's silence thereafter in failing to indicate to the tenant that after the payment of €1,500 further arrears remained due, affected the rights and obligations of either party as to liability for any rent arrears. Silence as constituting conduct giving rise to an estoppel by representation is raised by the appellant. It is relevant in establishing the true contemporaneous agreement and understanding of the parties as to whether any arrears of rent for either 2014 or 2015 existed when the tenant executed AA2 on 16th February 2016. In every case the significance of silence falls to be considered in the context in which it occurs. In *Doolan v. Murray* High Court, unreported 21st December 1993, Keane J. citing *Cheshire, Fifoot and Furmston's Law of Contract* held that in exceptional circumstances, the general law may treat silence as a representation where an affirmative duty to speak arises. The circumstances where this duty arises were considered by the Supreme Court in *O'Donnell v. Truck and Machinery Sales* [1998] 4 IR 191 where O'Flaherty J. stated:

> *"A duty of disclosure will arise, for example, where silence would distort a positive representation that has been made, or where material facts come to the notice of the party which falsify a representation previously made.*" (p. 202)

As Collins J. observes in *Ace Autobody v. Motorpark* [2026] IESC 9 at para. 93;

> *"In the absence of a duty to speak, silence is not generally to be regarded as a representation: Chitty on Contracts (34th ed; 2021) (Vol 1) ("Chitty") §6-100; Feltham et al (eds) Spencer Bower: Reliance-Based Estoppel (5th ed; 2017) ("Spencer Bower") §1.90 and following. The true position therefore is that silence may amount to a representation in certain circumstances: the issue will in every case be fact-sensitive."*

Silence in this case arises not in isolation but in the context of the landlord's prior email (10th February 2016) coupled with the tenant's written response (15th February 2016) as factors and statements relevant to establishing the contemporaneous understanding of the present rights and obligations of the parties as to whether any arrears of rent for either 2014 or 2015 were outstanding at the time when the tenant executed AA2 in February 2016.

45. Silence is of particular relevance in this case in light of the contents of the landlord's agent's email of 10th February 2016 which, *inter alia*, stated "*You will pay the last payment of the arrears €1500 by cheque. Cheque to be with me by 16th February"* concerning the discharge of rent arrears. The tenant's express understanding of the email is stated in his response of 15th February 2016[9], "*Cheque enclosed herewith for €1,500 this clears all rent arrears to date."* It is a fact that the landlord remained silent deciding not to correct the tenant's

[9] Which the landlord's director Mr Dualta Moore acknowledged had been received (Transcript Day 2 p.26, line 28)

explicit understanding at the point of the tenant signing up to the obligations of AA2. The burden rests with the tenant to establish that he is entitled to treat the landlord's silence and inaction from receipt of the letter of 15th February 2016 up to the institution of High Court proceedings on 27th February 2020 as giving rise to an implied representation that the contents of the tenant's letter and its attachments represented the existing rights and obligations of the parties as of that date. If the tenant can show that he altered his position to his detriment on the faith of the combined representations expressed in the email and implied by the silence of the landlord post 15th February 2016, then the landlord as representor is estopped from thereafter setting up a claim inconsistent with its stance in the February 2016 email and silence and inaction on receipt of the letter of 15th February 2016.

46. The original representation emanated from the express terms of the landlord's 10th February email. Thus, on the facts this is not a *mere silence* representation case. Did the landlord's silence on receipt of the 15th February 2016 letter and failure to disabuse the tenant of the latter's clearly stated understanding of the email, render Gradual answerable in law for the tenant's understanding that all arrears were discharged by his payment? Whether the landlord had a legal duty to respond is primarily a question of fact and dependant on the context. The context as of 15th February 2016 was that in light of the explicit contents of the email coupled with the terms and attached documents being tendered (cheque and executed agreement) the relevant circumstances included the fact that that the tenant, who is a postmaster and not a lawyer, was engaging directly with the landlord and not through a solicitor. Gradual by choosing not to respond to the 15th February tenant's letter setting out his understanding of the import of the landlord's 10th February email, became responsible to the tenant for his reliance on that interpretation.

47. On the basis of the evidence which was before the High Court it is clear that in light of the sequence of events and the clear language of the 20th February email and 15th February

2016 letter from the tenant to the landlord's agent, the circumstances which obtained in this case were such that the landlord's silence and failure to ever respond to the tenant's letter of 15th February 2016 amounted to conduct consistent only to a positive representation by Gradual that the tenant had discharged all arrears then due and outstanding by the tenant to the landlord by payment of the cheque for €1,500 as sought. In the circumstances of this case, where the tenant was not represented by legally but dealt directly with the landlord's agent there was an obligation on Gradual to respond to the tenant if it wished to contradict his clearly stated understanding that the payment of €1,500 was effective to discharge all arrears up to end of 2015. It was evident to Gradual from the letter what exact impression and understanding the 10th February email from the landlord's agent had given the tenant. Gradual's continuing silence was responsible for the tenant's ongoing belief that arrears predating the end of 2015 had been discharged based on his stated understanding of the Agent's 10th February 2016 email. The burden rests with the tenant to show that such reliance was detrimental to him.

Penalty – Whether any abatement agreement is unenforceable as a penalty

48. It is to be noted that the vogue for side letters effecting variations to the terms of a lease has become prevalent since the Economic Crash and particularly so during the Covid-19 Pandemic. Typically, they encompass an obligation to pay a higher rent in the event of a breach of the terms of the side letter and/or lease. Arising from a series of decisions including *SHB Realisations (formerly BHS Ltd*) [2018] 2 BCLC 654 and *Vivienne Westwood Ltd. v. Conduit Street Development Ltd.* [2017] EWHC 350 (Ch) 2017 L & TR 23 which held by applying the principles set out by the UK Supreme Court in *Cavendish Square Holdings BV v. Makdessi* [2016] AC 1172 that such a side agreement was capable of being (and, on the facts, was) a penalty clause and thus unenforceable. In reaching that conclusion the English High Court, (Mr Fancourt QC) was particularly persuaded (para. 63) by evidence that the clause operated to increase the rent by the same amount, irrespective of how significant or insignificant the breach. It will be recalled that in *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, [2016] 2 All ER 519 the law on penalties was reviewed and authoritatively re-stated for the United Kingdom. The UK Supreme Court confirmed that a contractual term can be unenforceable as a penalty if it operates on a breach of contract and satisfies the relevant test, which the members of that court adumbrated thus:

> *"The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation"* (para [32], per Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC, with whom Lord Carnwath JSC and Lord Clarke of Story-cum-Ebony JSC agreed) and;
>
> *"What is necessary in each case is to consider, first, whether any (and, if so, what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable"* (para [152] per Lord Mance JSC, with whom Lord Clarke and Lord Toulson JSC agreed) and;
>
> "… *the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract*"" (para [255], per Lord Hodge JSC, with whom Lord Clarke and Lord Toulson agreed).

Whether any term or terms in the various abatement agreements considered in this case operated as a penalty was not argued in this court or in the High court. The issue will fall to be determined in a case where it is fully argued.

49. Although the appellant asserts that the High Court erred in not applying the "*de minimus non curat lex*" principle to asserted breaches of AA2 where no such breach had caused the landlord any loss (Ground of Appeal 6), regrettably no cogent arguments on the proportionality/ *de minimus/* penalty issues or the relevance of the recent English Jurisprudence were advanced nor did the High Court judge advert to same and these issues remain to be determined on a future occasion.

Supreme Court of Judicature Act (Ireland) 1877

50. Counsel on behalf of the tenant contended that albeit that the case commenced as a common law suit the tenant was entitled to all defences in law and equity (*inter alia* grounds 1,8,19,23,25) by virtue of the *Supreme Court of Judicature (Ireland) Act, 1877* (the 1877 Act). He contended that the landlord in its pleadings having sought declarations that the AA1 and AA2 were void *ab initio* thereby invoked this equitable jurisdiction (p. 12 Transcript of Hearing 10th April 2025).

51. The House of Lords in *United Scientific Holdings Limited v. Burnley Borough Council* [1978] AC 904 considered the issue of whether time was "*of the essence*" for service of notices (the case concerned rent review). The pleadings in the *United Scientific* cases had not sought any specific equitable relief. Notwithstanding that significant fact the House of Lords held it appropriate to emphasise the assimilated approach to the issue of delay adopted by the courts following the implementation of the English Judicature Act in 1873 (broadly equivalent to the 1877 Act) - as restated in s. 41 of the Law of Property Act (England and Wales) 1925. For sundry reasons s. 41 was held inapplicable to the facts in *United Scientific,* but the principles outlined in the decision are far reaching and relevant to the instant facts.

52. Of particular note in *United Scientific* are the observations of Lord Diplock that by the time the Judicature Act came into operation a time stipulation was not regarded as a "*condition precedent*" at common law if a "*failure to perform that promise punctually did not deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract*." Lord Diplock in his judgment appeared to characterise the provision as illustrating a presumption capable of being applied in the construction of any contract. In *United Scientific* both Lord Diplock and Lord Salmon were of the view that the best way of eliminating uncertainty in construing a term concerning time or the consequences of non-compliance with a specified time limit in any contract was to expressly state in the contract if any stipulation rendered time "*of the essence*". Lord Salmon observed:

> *"Such clauses could easily be drafted so that they state expressly whether time is or is not to be treated as of the essence. So drafted they would present no difficulty. .... If, e.g., the parties to the present appeals had expressly stated whether or not they intended the provisos as to time in the rent revision clauses to be of the essence, there would have been no litigation between them let alone litigation fought up to your Lordship's House for the purpose of deciding what the rent revision clause means."*

53. In the context of s. 28(7) of the Irish 1877 Act the observations of Lord Diplock are informative - he noted at p.928:

> *"I will not take up time in repeating here what I myself said in the Hong Kong Fir case, except to point out that by 1873:*
>
> *(i) Stipulations as to the time at which a party was to perform a promise on his part were among the contractual stipulations which were* ***not*** *regarded as "conditions precedent" if his failure to perform that promise punctually did not deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract;* (emphasis added)
>
> *(ii) When the delay by one party in performing a particular promise punctually had become so prolonged as to deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract, it did discharge that other*

party from the obligation to continue to perform any of his own promises which as yet were unperformed.

54. *United Scientific* was approved by the Supreme Court in *Hynes Limited v. Independent Newspapers* [1980] IR 204 where Kenny J. cited Diplock L.J. with approval, noting that the position in Ireland pre-1877 was similar and the presumption that, in general, time would not be of the essence was established in this jurisdiction since at least *Lennon v. Napier* (1802) 2 Sch. and Lef. 682. He remarked, at p. 221, that he regarded the decision in *United Scientific* as *"... a restoration of a fundamental equitable principle which, unfortunately, has tended to be ignored in many recent decisions."*

55. It would appear that the trial judge effectively proceeded on the *assumption* that time stipulations in the various agreements were to be deemed to be "*of the essence*". Regrettably, given the above-mentioned jurisprudence, the terms of AA2 and the Lease the question of whether any prerequisite steps were to be taken by the landlord before being entitled to exercise its discretion to treat AA2 as terminated – for alleged breaches of *either* Proviso (i) or (ii) – is not properly interrogated. The factual matrix warranted that the (unargued) issue whether time had been made *of the essence* ought to have been addressed as a material aspect of the assessment whether the landlord was entitled in the exercise of its discretion to treat AA2 as void *ab initio* under either proviso. The High Court appears to have focussed instead (*viz*. para 57) on "*self-execution"* and the word *"immediately"* in the Agreements.

Whether AA2 was "*self-executing*"

56. The High Court concluded (para. 57) that the presence of the word "*immediately*" in the proviso of AA2 rendered the clause "*self-executing*". This was said by the High Court (para. 58) to mean that "…*failure by the Defendant to honour its terms automatically rendered the 2016 AA void, as a consequence of which the defendant ceased to have any entitlement to rely on the concessions in the agreement*." Reliance was placed on a High Court decision *Gradual* *v. Grant* [2024] IEHC 398 which also concerned this landlord. Gradual submit that the High Court was correct in law to find that *Proviso (ii)* in AA2 was self-executing contending that this finding "*derives from an exercise of contractual interpretation and did not engage the equitable jurisdiction of the High Court"*. Reliance is also placed on *Gradual v. Grant* (Resps. Subs. including para. 58-61). The respondent appears implicitly to confine the assertion of self-execution to *Proviso (ii)* alone.

57. A construction of *provisos (i) and (ii)* of AA2 in the context of the entire agreement leads to a conclusion that there was no persuasive basis for reaching the conclusion that either sub-clause was "*self-executing*" such that, as the High Court found (citing *Grant*): *"failure by the defendant to honour its terms automatically rendered the 2016 AA void"* (para. 58). As regards *Proviso (i)*, it is self-evidently and explicitly not self-executing. On the contrary, by its terms it was incumbent on Gradual to serve a valid 7-day "*written demand*" on the tenant before the landlord could move to assert that any actionable breach had occurred for non-payment of the Service Charges.

58. That requirement is incompatible with "*self-execution*". What constitutes a valid "*written notice*" in this context has been the subject of extensive jurisprudence, outlined below. It is only if at least one of the notice(s) proven to have been served by the landlord in respect of Service Charges under *proviso (i)* is effective in law that it could be held that its service rendered AA2 "*void ab initio*" for late payment of Service Charges.

59. As regards *Proviso (ii)*, the intention of the parties can be gleaned from the words used in that sub-clause. If there is any ambiguity it is relevant that the landlord alone drafted same. It is only engaged if "…*(ii) any of the covenants on the part of the Tenant whether set out in the Lease or in this Side Letter shall not be observed or performed"*. There are no covenants set out "*in this side letter*". What then is encompassed by the words "…*the covenants on the part of the tenant…set out in the Lease shall not be observed or performed*" as regards the restrictive user covenant (4.12) and the alterations covenant (4.13.2)? The principles on construction of a contract set out above govern the construction of the lease as well as AA2.

60. Whether covenants 4.12 and 4.13.2 were observed or performed by the tenant falls to be determined by reference to the Lease, as the tenant correctly argued (Subs. para. 105 *et seq*). Part 4 governs the "*Tenant's Covenants*". AA2 does not alter, amend, suspend or vary the operation of any sub-clause in Part 4 of the Lease. As Part 4 makes clear whether or not a particular covenant (4.12, 4.13.2 or otherwise) has been *"observed or performed*" by the tenant falls to be objectively determined in accordance with the terms of the Lease including Part 4 itself. The landlord (a significant commercial enterprise) drafted AA2 without input from the tenant (a shopkeeper who apparently engaged with the landlord directly in relation to AA2 and earlier Abatement Agreements). Breach of the user or alterations covenant is therefore determined by reference primarily to the Lease which remains unmodified and unamended by *Proviso (ii)*. Clause 4.10 of the Lease could have been deleted/varied/altered/amended by Gradual in *Proviso (ii)* of AA2 but it was not. It is contractually integral to the process of determining whether any particular covenant coming within *Proviso (ii)* of AA2 has not been *"observed or performed*". The Lease must be construed in accordance with the language employed and what a reasonable person would consider they had agreed would constitute a valid determination that a breach or non-compliance with the tenant's user or alterations covenants (tenant's subs. 71-79) (*Ground of Appeal 8*). It contractually sets out the notice procedure to be followed by the landlord where a breach by the tenant of any covenant in Part 4 is alleged. As the authorities make clear, it is not open to Gradual to extrapolate the text of the User and Alterations covenants in the Lease to the exclusion of other relevant provisions of the lease and in particular Clause 4.10.

61. There was no evidence that the landlord ever served any such notice on the tenant whether between 1st January 2016 – 13th October 2018 or otherwise. A reasonable person possessed of all relevant information and in particular having sight of the Lease and AA2, documents which central to the factual matrix in this case, would have readily understood that Clause 4.10 continued in full force and effect and was not varied or suspended by AA2, *proviso (ii)*.

62. The landlord's failure to comply with the requirements of Clause 4.10 of the Lease is fatal to any claim based on breach of a covenant within the second proviso. The landlord's suggestion that 4.10 only applied where the landlord sought to forfeit the lease is not supported by the lease itself. The tenant's arguments (subs. para. 91 *et seq.*) are persuasive in this regard. It follows that alleged breaches of either the restrictive user covenant and/or the alterations covenant cannot form a valid legal basis for the claim that AA2 was rendered null and void *ab initio*. The notion that that sub-clause was or could have been construed as "*self-executing*" so as to preclude a proper consideration of relevant Lease terms is incorrect and no sound authority was identified for such a proposition. This is separate to the issue of estoppel considered below.

"*immediately*" and the Service Charges covenant under *proviso (i)* of AA2

63. The High Court held that use of the word "*immediately*" in AA2 rendered it "*self-executing"* (paras. 56, 57 High Court judgment). The Court held that the word "*immediately*" in AA2 *"simply means that the relevant clause is self-executing"* (para. 57). The *Service Charge Notices* were considered at paras. 117 – 132 of the judgment. The tenant asserts that inappropriate weight was given to tenant's dealings with Indigo the Management Company in relation to alleged breaches of Service Charge Covenant (Ground of Appeal 13).

64. Mr Moore's evidence is that he first discovered delays in service charge payments in "late 2019" (para. 122 of judgment), long after AA2 had expired – which suggests the notices served by Indigo were merely *pro forma* and certainly not intended or understood by the sender to operate to validly exercise the landlord's discretion to render AA2 *void ab initio*. The High Court considered the notices served by the landlord's agent Indigo (paras.122-127). The tenant disputed the validity of those notices; *"It is further denied that the said reminder notices* *amount to a written demand from the Plaintiff such as to render the Rent Abatement Agreement null and void."*[10]

65. The general principle is that notices to unilaterally exercise a contractual discretion to determine a contract must be unambiguous and unequivocal and leave the recipient in no doubt as to the contractual right being invoked, the steps to be taken by the recipient to prevent same and the consequence of failure to comply. The legal position was considered by Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749:

> "*Making due allowances for contextual differences, such notices [under a break clause in a lease] belong to the general class of unilateral notices served under contractual rights reserved, eg notices to quit, notices to determine licences and notices to complete: Delta Vale Properties Ltd v Mills [1990] 1 WLR 445, 454E-G. To those examples may be added notices under charterparties, contracts of affreightment, and so forth. Even if such notices under contractual rights reserved contain errors they may be valid if they are <u>'sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate</u>:' ...Delta case at p 454E-G, per Slade LJ ... That test postulates that <u>the reasonable recipient is left in no doubt that the right reserved is being exercised</u>. It acknowledges the importance of such notices. The application of that test is principled and cannot cause any injustice to a recipient of the notice*." (emphasis added) (p. 768)

Whilst *Mannai* is a decision of the courts of England & Wales its reasoning is persuasive.

Essential terms of a valid notice to enforce rights under a contract

66. The minimum requirements for a valid notice fixing time to perform an act, non-compliance with which is intended to effect complete termination of an agreement are well settled in the jurisprudence of the English Courts such as *Re Olympia & York Canary Wharf*

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[10] Defence para.16

Ltd (No.2) Bear Sterns International Ltd v. Adamson & Ors. [1993] B.C.C. 159 where Morritt J., having considered the authorities, observed:

> "*What is required is that the notice should state clearly what the other party is required to do and the consequence if he fails…"* (p. 170)

Such decisions are obviously not binding in this jurisdiction. But the overall reasoning is persuasive, and the approach adopted in them commends itself in this case as the approach that ought to have been adopted by the High Court.

67. The law is summarised in *Chitty on Contracts 13th Edn.* (Vol 1), paras [21– 011] – [21 - 019]. The authorities were considered in *Dalkia Utilities Services Plc v. Celltech International Ltd* [2006] 1 Lloyd's Rep 599, para. 131 by Christopher Clarke J. and by Sir Terence Etherton in *Urban I (Blonk Street) Ltd v. Ayres* [2014] 1 WLR 756, CA. who stated at para. 44;

> *"A valid notice is one which calls on the contract-breaker to perform within a reasonable period, specifying exactly what it is that party must do and what consequences will follow (that is to say, exercise of the right to terminate) if he or she fails to do so: In re Olympia & York Canary Wharf Ltd (No 2) [1993] BCC 159, 169C–F citing Behzadi v Shaftesbury Hotels Ltd [1992] Ch 1, [1991] 2 All ER 477, 12B–E."*

The covenant to pay Service Charges – was any valid "*notice*" served

68. I conclude that no "*valid written demand*" was served regarding Service Charges under *proviso (i)* for the following reasons;

- The evidence of the landlord's principal, Mr Moore, (judgment. Para. 122) was that delays in payment of service charge were first discovered by the landlord in late 2019.
- There was no evidence that Indigo ever knew of the existence of AA2 still less that it purported or was ever instructed to serve a notice on the tenant under *proviso (i)* of AA2.

- There was no evidence that Gradual ever formed the intention during the currency of AA2 to exercise its discretion to terminate same for breach of the *proviso (i).*
- Notices served were *pro forma* routine notices none of which make any reference to AA2 or any of its terms.
- No notice relied on by the High Court (i) stated clearly what the tenant was required to do ***and*** (ii) the consequences of failure to comply within the time specified.
- The consequence of non-compliance was framed in a manner inconsistent with the proposition that AA2 had been rendered void *ab initio* or self-execution - rather it stated that payment would "*avoid legal action".*
- Notices adduced in evidence deploy language incompatible with a "*valid written demand*" by alluding to the option of negotiating "*an agreeable payment schedule*".
- The conduct of the landlord in subsequent written communications implicitly representing that AA2 continued to be operative is not irrelevant also.
- No notice made *any* reference to the consequences now contended for.

It follows that no notice sent by Indigo in relation to service charges constituted an effective "*written demand"* within *proviso (i)* of AA2 capable of rendering it *"null and void ab initio"*. Since the rights of the landlord under AA2 were discretionary in nature, failure to clearly state either that any letter was being served as a "*written demand*" pursuant to *proviso (i)* of AA2 or to refer to the consequence if the tenant failed to pay within time was a fundamental omission. The trial judge fell into error in concluding otherwise.

Waiver s. 43 of Deasy's Act

69. Section 43 of Deasy's Act provides:

"Where any lease made after the commencement of this Act shall contain or imply any condition, covenant, or agreement to be observed or performed on the part of the tenant,

no act hereafter done or suffered by the landlord shall be deemed to be a dispensation with such condition, covenant, or agreement, or a waiver of the benefit of the same in respect of any breach thereof, unless such dispensation or waiver shall be signified by the landlord or his authorized agent in writing under his hand."

70. With regard to the ambit of the wording of section 43, as the High Court noted (para. 142) the position as outlined in the decision in *Crofter Properties Limited v. Genport Limited* (High Court, Unreported March 1996) p. 41, where McCracken J. rejected the *obiter* remarks of Palles CB in *Foott v. Benn* [1884] 18 ILTR 90 observing:

> *"The wording of the section is quite clear, and relates to 'any breach thereof', which I think can only be reasonably interpreted as meaning that there cannot be a waiver of any specific breach unless the waiver is in writing."*

I am satisfied that the analysis of McCracken J. in *Crofter* is correct and insofar as *Foott v. Benn* suggests otherwise it is not good law. Kenneth E.L. Deale in *"The Law of Landlord and Tenant in the Republic of Ireland"* [The Incorporated Council of Law Reporting for Ireland (1968)] observes of section 43:

> *"... The language of this section seems sufficiently explicit to protect the landlord who does not signify dispensation or waiver in writing, but until the matter is authoritatively decided the doubt will remain."*

Wylie[11] observes of section 43 at [24.27]:

> *"There is, however, one major limitation to the operation of the doctrine of waiver in Ireland as was recognised in the McIlvenny case* ([1931] N.I. 161 at 173-175, 185 and

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[11] Wylie (*opus cit.)* cites as authorities McCracken J. in *Crofter Properties Limited* p.41 also *Hafeez v. CPM Consulting Limited* [2020] IEHC 536 and *Craigdarragh Trading Company Limited v. Doherty* [1989] N.I. 218 at 230 (Murray J.)

186-187.) *and that is that under s.43 of Deasy's Act a waiver is ineffective between landlord and tenant unless it is signified by the landlord or his authorised agent "in writing under his hand" in the case of a lease granted after 1860. ... it may be, however, that if the facts of a case disclose a situation in which it would be unconscionable for the landlord to insist on the formality of a written consent or written waiver the law will allow a tenant's equity to prevail by estoppel or otherwise." (emphasis added)*

71. Waiver is variously invoked by the appellant at grounds of appeal 3,4,5,8,11,16,18,19, and 22. As regards the 2014 VA it is contended that the payment of €25,800 now being sought expressly waived by the 10th February, 2016 email. Further, that the sum of €57,000 now claimed in respect of outstanding 2015 rent was also expressly waived by the 10th February, 2016 email. It is contended the High Court erred in finding purported breaches of the alterations covenant resulted in AA2 being avoided and had not been expressly/implicitly waived by the landlord's subsequent conduct. Any breaches of the alterations covenant had been waived by the letter of 14th March 2017 from the landlord's agent, it was argued.

72. As regards statutory waiver the landlord contends compliance with s. 43 of Deasy's Act is not established by the tenant. There are key distinctions between waiver by contract, waiver by election and waiver by estoppel - the latter can be characterised as promissory estoppel or perhaps more aptly equitable forbearance and is considered separately hereafter.

73. In my view it is not necessary to reach any finding with regard to waiver in regard to alleged breaches of the renovations covenant to determine this appeal. As found above reliance by the landlord on alleged breaches of either the renovations or user covenants in AA2, *proviso (ii),* as grounds to claim AA2 is void are precluded for non-compliance with clause 4.10 of the Lease. Alternatively, the landlord is estopped by its conduct from reliance on same.

74. Since "*representations*" "*detriment*" "*reliance*" and "*unconscionability*" are factors to be assessed both in relation to claims of waiver and promissory estoppel these will be considered together hereafter in respect of both the 2014 VA and 2015 aspects of the claim.

Promissory Estoppel

75. The appellant's contentions included, *inter alia*, that the various rent abatement agreements had caused him *"... to continue with a lease which on the face of it makes no economic sense"*[12]. The Irish authority on promissory estoppel of central relevance is *Barge Inn v Quinn Hospitality Ltd* [2013] IEHC 387 where Laffoy J. distilled key elements as;

> *"(a) the pre-existing legal relationship between the parties;*
>
> *(b) An unambiguous representation;*
>
> *(c) reliance by the promisee (and possibly detriment);*
>
> *(d) some element of unfairness or unconscionability;*
>
> *(e) that the estoppel is not being used as a cause of action, but as a defence; and*
>
> *(f) that the remedy is a matter for the court."*

The High Court's application (paras.135, 258 *et seq.)* of the *Barge Inn* principles is considered further below.

<u>*Representations to ground promissory estoppel*</u>

76. The level of clarity required for a representation to ground a claim of promissory estoppel is not definitively settled. While the test outlined in *McDermott* states that the representation needs to be '*clear and unambiguous'* the authors then consider Irish authorities which demonstrate that both '*convention*' and '*common understanding*' can serve to ground a

[12] Appellant's Submissions *(para.80).*

representation in estoppel claims[13]. Similarly, *Chitty* explains that the requirement for a clear and unambiguous representation does not mean that it must be express[14]. Representations can be implied. Chitty emphasises, for instance, that failure to object to a known defect or deficiency within a reasonable time of its discovery may be regarded as an unequivocal indication of the injured party's intention not to insist on their strict legal rights[15]. This principle is highly germane in light of the landlord's failure to respond to the tenant's letter of 15th February 2016.

77. This accords with the approach taken by the Supreme Court (Griffin J.) in *Doran v Thomson & Sons Ltd* [1978] IR 223 at p.230 which reiterated that estoppel can occur;

> *"Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has acted on it, altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and may be restrained in equity from acting inconsistently with such promise or assurance"*.

Griffin J. also noted:

> *"The representation, promise, or assurance must be clear and unambiguous to found such an estoppel… But this does not mean that the representation must be one positively incapable of more than one possible interpretation. Where, however, more than one construction is possible, the meaning relied upon must clearly emerge in the context and circumstances of the case, although in other circumstances the same words might*

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[13] McDermott & McDermott, 'Contract Law' (2nd Edn), [3.133]

[14] Paul S. Davies, '*Chitty on Contracts*', (34 Edn, Vol.1, Thomson Reuters, 2021) [6.098]

[15] Ibid, [6.099] citing *Hazel v Akhtar* [2001] EWCA Civ 1883 – Where a landlord continued to tolerate late payments of rent.

possibly have borne a different construction. In addition, the party relying on the representation must show that the representation was reasonably understood by him in a sense materially inconsistent with the allegation against which the estoppel is attempted to be set up."(emphasis added)

Estoppel and €25,800 claimed by the Landlord under 2014 VA

78. As regards the plea of estoppel against the claim for arrears under the 2014 VA, the tenant gave no direct evidence that the representations on which he placed reliance had in fact induced him to continue with an uneconomic lease or that he would have otherwise taken steps to avail of the personal insolvency regime, bankruptcy or sought to surrender or otherwise sought to re-negotiate the terms of the lease. The fact of reliance on the landlord's representations was established with regard to the 2014 VA but the tenant's evidence fell short of establishing that he was induced to act in a manner which prejudicially affected his interests and that he can show a resulting detriment which would make it unjust and inequitable for Gradual to now seek to resile from their previously stated position or insist on their strict legal rights.

Estoppel – rent of € 57,000 claimed for 2015

79. It was evident that the landlord continued to accept rent at the abated level during 2015 without any issue. Had the position been otherwise, given the voluminous documentation sent by the landlord and its agents concerning rent payment and other covenants, particularly the tranche put before the High Court and this Court in the material entitled Book 3 "Booklet of High Court Documents" during 2014 – 2019 period, it is reasonable to infer that had the landlord considered that the rent level under the lease applied from 1st January 2015 it would have sought the arrears and/or communicated throughout 2015 that an insufficient sum was being paid by way of rent each month.

80. If, as the landlord now contends, the rent under the lease (€134,260 plus VAT) resumed and was payable in 2015, it would reasonably be expected that the landlord would seek the arrears particularly in the "..*letter of 1st October and…subsequent meetings and discussions*" and that any such arrears would be referred to in the AA2 letter of December 18th 2015. There was no evidence that it ever did so.

81. In its letter of 4th January 2016 the landlord demands acceptance of AA2 by 8th January 2016 and states "…*after that date the offer will be withdrawn, no further offer will be made and the full rent as per the lease* ***will*** *be due and payable*." Logically, if "*the full rent as per the lease"* had been the passing rent since 1st January 2015 as the landlord alleges, this threat to seek to claim rent at the level reserved under the lease would make no sense.

82. The tenor of the landlord's communications in January and February, 2016 was directed towards getting the tenant to discharge rent arrears *prior* to execution of AA2. This is to be inferred from the explicit wording of point 2 in the email of 10th February 2016 from the landlord's agent, Peter Buckley to the tenant.

83. It made no commercial sense for the landlord to gratuitously propose to the tenant an unsought rent abatement in the 18th December 2015 if the *actual* level of rent then operative was the much higher rate reserved under the Lease. The factual matrix, the evidence and logic all suggest that what the landlord was endeavouring to do in December 2015 was to get the struggling tenant to sign up to an **increased** level of abated rental payments. The landlord's conduct amounted to a representation to that effect. Gradual's subsequent change in stance appears to be entirely opportunistic.

84. The surrounding circumstances lead to a conclusion that as of December 2015 the landlord itself was operating on the basis that AA1 had continued to operate throughout that year. The lower rent continued to be paid by mutual assent rather than on foot of any express representation or promise by the landlord. As such the ingredients arguably add up to an estoppel by convention as much as a promissory estoppel. Estoppel by convention or estoppel by representation were not argued or considered by the High Court. Estoppel by convention was first applied by the English Court of Appeal in *Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd ("Amalgamated Investment")* [1982] QB 84. Lord Denning, citing the Australian decision in *Grundt*, observed:

> *"…the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them, and are bound by it... it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract—when it would be inequitable to do so, having regard to dealings which have taken place between the parties…" (p.121)*
>
> *"When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake makes no difference—on which they have conducted the dealings between them—neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands." (p.122)*

85. In *Courtney v. McCarthy* [2008] 2 IR 376 the Supreme Court recognised that representations in estoppel can arise by virtue of convention between the parties. *Ulster Investment Bank Limited v. Rockrohan Estate Limited* [2015] IESC 17, [2015] 4 IR 37 confirms that estoppel by convention, derived from the common assumption/s of the parties, is part of our law. MacMenamin J. defined estoppel by convention in *Gibbons v. Doherty & ADT Investments* [2020] IESC 72 thus:

> "*101. In estoppel by convention, where one party, A, conducts him- or herself toward the other party, B, so as to lead B to believe that a particular state of affairs exists as to a legal relationship between them, even if erroneous as to law or fact, A will not be permitted to thereafter resile from the position he or she adopted, or the conduct in which he or she engaged, so as to go back on the assumption which A created in B's*

mind. It matters not whether the parties reached that understanding due to misrepresentation, inadvertence or mistake."

86. *Chitty on Contracts Vol.1 General Principles (34th Edn)* at [6.116-119] defines '*estoppel by convention*' as where both parties to a transaction "*act on an assumed state of facts*" where the assumption is shared by both parties or where it is held by one and acquiesced in by the other. *Chitty* usefully distils *Tinkler v. Revenue and Customs Commissioners* [2021] UKSC 39, which had built on the principles outlined by Briggs J. in *Revenue Commissioners v. Benchdollar Ltd,* [2010] 1 All E R 174, and stated the relevant factors to be considered. In the instant case the label does not much matter. They are overlapping categories subject to the application of the common principles of reliance-based estoppel.

Was Detriment established in relation to 2015 Rent?

87. By email entitled *"Phone Conversation"* of 10th February 2016 16:39, the landlord's agent Peter Buckley modified the offer materially including the timeline for execution:

"Des,

Further to our phone conversation my understanding is as follows:

1. You will sign and return the abatement letter of 18th December 2015 (attached) to me by 16th February.

2. You will pay the last payment of the arrears €1500 by cheque. Cheque to be with me by 16th February.

3. You will pay February rent of €9,225 (€7,500 plus VAT) by 26th February.

4. Weekly rental payments will commence from 4th March.

Please confirm that this is correct."

88. If, as was asserted, and found by the High Court, on the date of the letter of 10th February 2016, arrears due and owing were not €1,500 but rather two distinct sums on foot of two separate liabilities for €25,800 (under the Variation Agreement) and €57,000 (shortfall for 2015) totalling €82,800 then the statement in the said letter made no sense.

89. The tenant's counsel raised various arguments both in the High Court and in the course of this appeal contending that detriment was established by the evidence and to be inferred from the circumstances including by virtue of the fact that the appellant had continued with the lease. It was suggested that the landlord was conferred with the benefit of the continuation of a lease for which there was otherwise no market at that time. The landlord was said to be estopped from seeking to recover alleged arrears in respect of the Variation Agreement or the year 2015, it was contended. The trial judge was said by the tenant to have fallen into material error in his assessment of the evidence as to detriment and that his consequent conclusions were that detriment was not established was said to be erroneous.

90. It appears that the tenant was an inarticulate witness. In regard to *detriment,* the appellant, through his counsel, further argued that the rent abatement agreements had caused him *"... to continue with a lease which on the face of it makes no economic sense"*[16]. Counsel contended that Gradual was estopped from now claiming that the various rent abatement agreements had been rendered void or (in the case of the year 2015) never applied at all such that it was now entitled to the full levels of rent reserved under the 2008 Lease.

91. Beginning at para. 133 of the judgment, Mulcahy J. addresses the question of whether the tenant can rely on the doctrine of promissory estoppel or waiver in respect of these periods. In approaching this, he adopts the foundational test for promissory estoppel as laid out in *Barge Inn v Quinn Hospitality Ltd* [2013] IEHC 387 thus;

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[16] Appellant's Submissions *(para.80).*

> *"(a) the pre-existing legal relationship between the parties;*
>
> *(b) An unambiguous representation;*
>
> *(c) reliance by the promisee (and possibly detriment);*
>
> *(d) some element of unfairness or unconscionability;*
>
> *(e) that the estoppel is not being used as a cause of action, but as a defence; and*
>
> *(f) that the remedy is a matter for the court."*

This iteration of the test is referenced in McDermott & McDermott[17]. It does not, however, constitute an exhaustive adumbration of the scope of the doctrine of reliance-based estoppel.[18]

Unambiguous Representations

92. The High Court held that while there was undoubtedly a pre-existing legal relationship between the parties, and that estoppel would be a shield in these circumstances, the tenant's estoppel claim failed due to a lack of evidence that the plaintiff made '*unambiguous representations*' in relation to the unabated arrears for the year 2015 **and** for acquiescence to breaches of AA2. Similarly, he concludes that there was insufficient evidence that the defendant had relied on any such representation to his '*detriment*'.

93. The authorities suggest that failure to object to a known defect or deficiency within reasonable time of its discovery may be regarded as an unequivocal indication of the injured party's intention not to insist on their strict legal rights[19]. The Supreme Court in *Doran v Thompson*, cited above (para. 73), outlines the correct approach.

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[17] Paul A. McDermott, *'Contract law'* (1st edn, Butterworths Ireland, 2001) p.137-138

[18] The extensive legal research of Mr. Graham Doran, LL.B., Judicial Assistant in this regard is acknowledged.

[19] Ibid, [6.099] citing *Hazel v Akhtar* [2001] EWCA Civ 1883

94. *Chitty* clarifies that the promise grounding a claim of estoppel does not need to form the whole inducement for the promisee's actions, it simply must be one of the reasons. Similarly, it states that;

> *"Where the promisee has, after the promise, conducted themselves in the way intended by the promisor, it will be up to the promisor to establish that this conduct was not induced by the promise."*[20]

Detriment and whether the burden shifted

95. The reasoning of the trial judge as to *detriment* is set out at para. 74:

> *"Given the discussions that had taken place in 2015 regarding arrears and the parties' negotiations regarding a second abatement agreement without any reference to a shortfall in rent for 2015, in truth, it would have taken little to persuade me that there was an agreement in place to continue the first abatement agreement up to 2015. However, neither party gave any evidence suggesting that there was an express or even an implied agreement in place that the first abatement agreement would continue through 2015, or of any other agreement by the plaintiff to accept a reduced rental payment for that period. In particular, the defendant has not pleaded, nor given any evidence regarding, the existence of an agreement, whether supported by consideration or otherwise, entitling him to pay a reduced rent during this period"*

96. In light of the arguments advanced by the appellant in relation to arrears claimed under the VA (€24,700) and in respect of the year 2015 (€57,000), I am not satisfied that either estoppel or waiver defences avail the appellant as a basis for reversing either.

97. As regards estoppel/waiver in the context of AA2 with particular reference to the renovations/alterations covenants, the trial judge considered that the burden fell on the tenant to show that the later significant financial expenses for the renovation works were carried out

[20] Paul S. Davies, '*Chitty on Contracts'*, (34 Edn, Vol.1, Thomson Reuters, 2021) [6.101]

in reliance on the plaintiffs' representations. It is noteworthy that the authorities indicate a more nuanced approach[21] and in a case such as the present the landlord must show that alteration in the tenant's position was not impacted by the culpably uncorrected belief of the tenant induced by the landlord's silence in response to his letter of 15th February 2016 as well as any representations it made. The bar for '*detriment*' in these circumstances is relatively low.

98. Thus, even if the email from the landlord's agent of 10th February 2016 was ambiguous, the fact that the landlord never disputed the tenant's understanding of it as communicated by him by letter on 15th February 2016 was highly material and this ought to have been properly addressed by the High Court. *Doran v. Thompson* accords with the approach described in *Chitty* that while representations must be '*clear and unambiguous*' to ground a claim of estoppel, it does not mean that they cannot be unspoken or implied.

99. The salient "*context and circumstances*" included that the tenant had supplied his trading accounts to the landlord who was thus aware of the financial difficulties being experienced by him. It was the landlord who was pushing to secure execution of AA2 by the tenant at the time (from December 2015-February 2016) and when the correspondence in that time-frame is read in sequence "*the meaning relied upon*" by the tenant and explicitly set-out in his letter of 15th February 2016 does *"clearly emerge in the context and circumstances",* to use the language deployed by Griffin J. in the Supreme Court in *Doran*. The trial judge is critical of the deficits in the tenant's oral evidence particularly as to *reliance* and *detriment*. The tenant might have been clearer in his evidence and appears to have been inarticulate and lacking in urbanity, but his testimony was not the only evidence before the court on this particular issue. The promise by Gradual stated in the 10th February 2016 email (as reinforced by the landlord's silence from

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[21] Chitty on Contracts (36th edn, Vol.1 (2026)) at [7.079] where the authors note; *"Where a promise has been made which is capable of inducing detrimental reliance, and which is in fact followed by such reliance, the question may arise whether the reliance was actually induced by the promise. The burden on this issue is on the promisor: that is, it is up to the promisor, in order to escape liability, to show that the promisee would have done the acts in question anyway (even if the promise had not been made)."*

and after receipt of 15th February letter) as understood by and set out in the tenant's letter of 15th February 2016 can readily be inferred to have been relied upon by the tenant from the fact that the cheque for €1,500 and the executed AA2 were remitted with the letter. In my view it was clearly open to the trial judge on the totality of the evidence to reasonably conclude that the promise by Gradual had a direct material influence on the conduct of the tenant in inducing him to execute AA2. Looked at another way, did the evidence support an inference that if the email of 10th February had **not** been sent by the landlord, the tenant would still have signed AA2 – as the High court judge appears to have inferred? There was simply no evidence that the tenant would have executed AA2 anyway even if he had never received the 10th February 2016 email. The surrounding evidence showed that the tenant had held out and resisted signing AA2 from mid December 2015 despite strongly worded emails in early January 2016.

100. I respectfully disagree with the trial judge's conclusions regarding reliance (para. 156). The estoppel plea of the tenant in relation to the sums sought under AA2 is made out in my view. The landlord's failure to counter the belief of the tenant as expressed in his letter of 15th February 2016 amounts in equity to a sufficient representation that no further arrears remained due at that time thereby inducing the tenant to execute AA2. Since the appellant can clearly point to expenditure incurred at his own expense thereafter and carried out as part of renovation of the demise at a time when he reasonably believed that there were no arrears outstanding, same amounts to evidence of detrimental reliance by the tenant on that representation. In consequence, the burden then shifted to the landlord to establish that the said detrimental reliance and expenditure would have been carried out regardless of its representations that the full rent under the lease was not due at the time for the year 2015 or under the VA. The trial judge was mistaken in his assessment of detriment and insufficient weight was given to the doctrine of *unconscionability* as it related to this element of the estoppel claim. In consequence the landlord was estopped in equity from invoking any breaches of the alterations and/or user covenants to seek the full unabated rent for this period. The tenant did establish estoppel in respect of the claim under AA2.

The Rule in Pinnel's Case and Estoppel

101. Notwithstanding the above determinations in respect of the VA and 2015 claims it is noteworthy that an aspect of the tenant's estoppel defence in relation the 2015 rent claim is that he asserts that he acted in reliance of Gradual's representations by paying the abated rent for that year. This was rejected by the High Court (para. 35) by reference to the judgment of Laffoy J. in *Barge Inn* to the effect that it was beyond doubt that the rule in '*Pinnel's Case*' reflects the law in Ireland. From this the judge goes on to conclude that such cannot constitute "*reliance*" as to ground a claim of estoppel. At para. 160 he states:

> *"Even had the plaintiff represented to the defendant that it would accept a lesser sum, there is no basis, in equity or otherwise, for suggesting that, simply by paying less than the sum required by the Lease, the defendant acted in reliance on such a representation: it cannot be the case that a defendant simply by paying less than a contract requires can contend that a plaintiff is estopped from demanding what the contract requires. That is the clear implication of the rule in Pinnel's Case."*

It is worth recalling however that the balance of the quotation from Laffoy J. in *Barge Inn* explicitly stated at para. 62:

> *"… the application of the doctrine of promissory estoppel may obviate an inequitable outcome to which the application of the rule in Pinnel's case would otherwise give rise. As Arden L.J. stated, albeit obiter, apropos of the doctrine of promissory estoppel in her judgment in the Court of Appeal of England and Wales in Collier v. P. & M.J. Wright (Holdings) Ltd. [2008] 1 WLR 643 (at p. 659):*
>
> > *"This part of our law originated in the brilliant obiter dictum of Denning J in the High Trees case [1947] KB 130. To a significant degree it achieves in*

> *practical terms the recommendation of the Law Revision Committee chaired by Lord Wright MR in 1937."*

Laffoy J. observed;

> *"The recommendation of the Law Revision Committee referred to in that passage was to reverse the rule in Pinnel 's Case by statute, but the recommendation has not been implemented in the U.K."*[22].

102. For what it is worth, *McDermott* suggests this observation means that estoppel *can* circumvent the rule in Pinnel's Case[23]. The tenant does not dispute the principle of Pinnel's Case but rather asserts his detrimental reliance (Grounds of Appeal 17,18 etc.) establishes that the requirements for promissory or reliance-based estoppel are made out – particularly that there is evidence before the court consistent with detrimental reliance or the tenant having altered his position to his detriment where on balance same occurred on the faith of Gradual's representations. In *MWB Business Exchange Centres Ltd v. Rock Advertising Ltd* [2018] UKSC 24 Sumption JSC. determined the appeal without the necessity of dealing with the issue of consideration or whether a Variation Agreement was supported by consideration, where it was shown to have brought "*practical advantages*" to the promisor. The appeal was decided on other grounds. He considered the Rule in *Foakes v. Beer* (1884) *9 App Cas 605* that part-payment of a debt does not amount to consideration for discharging the entire was "*probably ripe for re-examination*". The current status of *Pinnel's Case* and *Foakes v Beer* were not the subject of argument in this appeal and I make no findings on this issue which will fall to be determined in a future case.

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[22] [2013] IEHC 387, [62]
[23] McDermott, '*Contract law'* (2nd Edn), [3.161]

103. Arguably, in this case there was evidence before the High Court that the tenant had given "*good consideration*" for AA2 – if the High Court was prepared to accept the pleaded and argued position of the landlord that in executing the Abatement Agreement he had given up protections and rights under the Lease. The evidence as to the terms of the Abatement Agreements demonstrate that there were ample "*added benefits*" to Gradual in having the tenant execute same. Several procedural rights of the tenant under the Lease were being abridged, removed or varied albeit on a temporary basis for the duration of the abatement agreement. If, as Gradual contended and the High Court accepted, AA2 had precluded the tenant from the vital protection of Clause 4.10 of the Lease surely same would have amounted to "*good consideration*". The landlord's pleaded claim and legal arguments assert that breaches of covenants other than for payments could be enforced without any notice whatsoever or obligation to comply with the core protections afforded the tenant by Clause 4.10 of the 2008 Lease which, if correct, would have cleanly take this case out of the Rule in Pinnel's case and the Foakes v Beer jurisprudence.

Unconscionability

104. The trial judge does not fully engage with or determine the issue of unconscionability adopting a somewhat narrow test, asserting that:

> *"the consideration of unfairness or unconscionability arises only after the other criteria have been established"* (para. 155)

It is doubtful that this definitively represents the current state of the law on estoppel as far as unconscionability is concerned. It is well settled that equitable jurisdiction serves the discretion of the court in preventing potentially unconscionable outcomes which can arise from strict adherence to rigid formulae. In relation to promissory estoppel, *Biehler* has identified an alternative approach as involving a '*shift towards a test of unconscionability'*[24]. She identifies

[24] See, Hilary Biehler, *'Equity and the Law of Trusts in Ireland'* (7th Edn, Roundhall 2020) p.945-956

a series of England and Wales authorities stemming from *Taylors Fashions v. Liverpool Victoria Trustees* [1982] QB 133 as followed in *Gillet v. Holt* [2001] Ch 210. The latter was cited with approval by the Irish Supreme Court in *CF v. JDF* [2005] 4 IR 154, [2005] IESC 45. Biehler also cites *McMahon v. Kerry County Council* [1984] ILRM 419 as suggestive of a broader equitable jurisdiction for courts to estop a party from resiling from a representation where a failure to do so would be '*unconscionable*' in the circumstances. Estoppel by representation is founded on a statement of fact, or mixed fact or law which bars the representor from acting inconsistently with same or making assertions "*that stand… in the way of some right claimed by the person entitled to the benefit of the estoppel*" in the language of Lord Scott in *Cobbe v. Yeomans Row,* [2008] 1 WLR 1752, Para. 14. Burrows JSC in *Tinkler* at pp.913/914 illustrates current thinking as to the centrality of unconscionable conduct and the weight to be attached both to delay in asserting strict legal rights, and the level of the claimant's knowledge or awareness of the other's error where estoppel is invoked:

> *"64. What about unconscionability? This was mentioned as part of the fifth of Briggs J's principles in Benchdollar; and in other leaner formulations—such as that of Lord Steyn in The Indian Endurance —it has been put forward as playing an even more central role. In most cases, in line with Briggs J's statement of principles, unconscionability is unlikely to add anything once the other elements of estoppel by convention have been established and, in particular, where it has been established that the estoppel raiser has detrimentally relied on the common assumption. However, one can certainly envisage exceptional cases where unconscionability may have a useful additional role to play. For example, even if all the other elements of estoppel by convention can be made out, fraudulent conduct by the estoppel raiser would rule out estoppel by convention (see, by analogy, D & C Builders Ltd v Rees [1966] 2 QB 617*

in which duress by the promisee in inducing the promise ruled out promissory estoppel). But such examples are likely to be rare..."

Perhaps one of the clearest expositions of the role of *unconscionability* in estoppel claims is to be found in *Cobbe* where Robert Walker L.J. found it played "*...a very important part in the doctrine of equitable estoppel in unifying and confirming, as it were, the other elements."*

The interest claim

105. The landlord's Statement of Claim sought €274,221.29 in underpayment of rent together with interest on same pursuant to the Lease, in the sum of €235,770.71. The interest was calculated by Gradual on the basis that interest accrued from the time that the full reserved rent would have fallen due under the 2008 Lease.

106. As the High Court judgment noted;

"At the hearing of the action, the plaintiff reduced its claim in relation to interest, seeking only interest accruing from the date of its demand letter sent on 31 January 2020. The re-calculated interest claim presented was for €74,848.67." (High Court judgment para. 19)

The tenant's defence pleaded that the interest clause in the 2008 was unenforceable as a penalty. The High Court observed at para. 190 that:

"*... the UK Supreme Court has recent re-stated the test for when a clause should be deemed unenforceable as a penalty clause in Cavendish Square Holding BV v El Makdessi [2016] 2 All ER 519. Rather than focus on whether the clause is a genuine pre-estimate of loss, the court considered that the proper focus should be on whether the clause imposed a proportionate detriment in relation to any legitimate interest of the injured party."*

The High Court judge at paras. 191/192/193, citing Heslin J. in an earlier *Gradual* case, noted:

> *"Heslin J concluded that interest at the s. 1080 TCA rate was equivalent to approximately 14% per annum and this was, in all the circumstances, a penal rate and therefore unenforceable. There is no basis for contending otherwise in this case, whether one applies the test set out in the Irish jurisprudence or the more recent UK Supreme Court formulation. Whether the re-formulation adopted in the UK is warranted here does not, therefore, need to be decided in this case."*

He further remarked that:

> *"In Grant, Heslin J concluded that the consequence of such a finding is for the court to fix a commercially appropriate rate in place of the unenforceable rate. In so doing, he relied on the fact that in Pat O'Donnell the Supreme Court remitted the matter to the High Court for the purpose of having the appropriate rate of interest assessed. I am bound to say that it seems to me that simply replacing a penalty rate with a commercially appropriate rate is to let the party who fixed the penalty rate "off the hook". If the consequence of the improper imposition of a penalty rate in a contract is that, in effect, the rate that should have been applied, an appropriate commercial rate, is substituted, there will be no incentive to be careful to avoid imposing a penalty rate."*

At para. 193 he noted:

> "*…counsel for the plaintiff suggested that, if I was minded to follow the decision in Grant, the court should apply the Commercial Late Payments Act rate (ECB base rate plus 1%) or the Courts Act 1981 rate. The Courts Act rate is currently 2% which is likely to be lower than even the lowest estimate of a commercially realistic rate. In light of my reservations about the plaintiff's entitlement to claim interest at all, I propose*

acceding to the plaintiff's suggestion of applying the Courts Act rate in the interest of saving time and additional cost."

107. The High Court further opined at paras. 194/195 on the issue of interest:

"As noted above, the plaintiff initially claimed interest on the basis that it accrued from the time that the rent now due as a result of the abatement agreements being rendered void would have originally been due. The defendant argued that the provisions of the Lease provided that interest only became due on any sum "demanded in writing and payable under this lease". The plaintiff appeared to accept this proposition and provided an alternative interest calculation based on interest accruing from the date of its demand letter dated 31 January 2020".

"Although I accept the plaintiff's proposition that, in principle, a demand remains a valid demand even if an incorrect amount is claimed in the demand (see, for instance, Flynn v. National Asset Loan Management Ltd [2014] IEHC 408), it seems to me that the demand for €505,101.09 included in the letter of 31 January 2020 without any indication that the amount was inclusive of interest, despite the absence of a prior demand, could not be a sufficient basis to trigger an entitlement to claim interest. Not until the plaintiff delivered its statement of claim on 2 July 2020 did it make a separate claim for monies due under the Lease and interest on those sums. It appears to me, therefore, that interest should be calculated from that date."

The court concluded at para. 196 (viii):

"The interest provision in the Lease is a penalty clause. Subject to further argument, the Courts Act rate of 2% should be substituted for the interest rate set out in the Lease. Interest shall be calculated from the date of delivery of the plaintiff's statement of claim, 2 July 2020."

108. The tenant contends that The High Court erred in giving the award of €200,791.98 plus interest. Same was a windfall sum. The landlord did *not* cross appeal the finding of the High Court that the interest provision in the lease was a penalty clause.

109. The net effect of the High Court's stance was to let the landlord "*off the hook*", free to repeat the actions that led the Court to strike down the contractual interest clause as a penalty in the first place. In doing so it deviated from the consequence of its own analysis without any principled explanation particularly where the judge had noted earlier that "*... simply replacing a penalty rate with a commercially appropriate rate is to let the party who fixed the penalty rate "off the hook". If the consequence of the improper imposition of a penalty rate in a contract is that, in effect, the rate that should have been applied, an appropriate commercial rate, is substituted, there will be no incentive to be careful to avoid imposing a penalty rate."*

Principles governing statutory interest

110. This court should generally be reluctant to interfere with the exercise of statutory discretion. In *Reaney v. Interlink Ireland Ltd* [2018] IESC 13 O'Donnell J. (as he then was) in the course of his judgment for the Supreme Court conducted a detailed analysis of the exercise of judicial discretion in the context of s. 22 Courts Act 1981. The case was an appeal from a decision of the Court of Appeal [2016] IECA 238 which in turn had reviewed and reversed earlier High Court decisions of Gilligan J. [2012] IEHC 606 and [2012] IEHC 609. O'Donnell J. observed:

> "(i) *Interest under the Courts Act 1981 should be awarded when a court concludes that the amount it is awarding is clear cut, could, and should, have been paid earlier;*
>
> *(ii) Where a claim is difficult and requires assessment and determination, it may be appropriate not to award interest.""*

O'Donnell J. considered the limited jurisprudence on s. 22 including *Mellowhide v Barry* [1983] ILRM 152 and alluded to a misplaced "*... perception that in general, in commercial* *cases, interest should follow. However, it is apparent from the full judgment, and in particular the reference to the "facts and merits of the case" that in fact Finlay P. considered that the discretion was much more wide-ranging*". He also cited the decision of McCracken J. in *Concorde Engineering v. Bus Átha Cliath* [1995] 3 IR 212 as illustrating *"… the breadth of the discretion which the court considered could properly be exercised in such cases."*

111. It is relevant that the 1981 Act, s. 22(2)(b) specifically precludes the award of interest where interest is *payable* under a contract. In fact, interest was expressly provided for under the Lease by a term struck down as unlawful being a penalty the landlord had maintained throughout that it was "*payable*" by the tenant. The landlord was unable to recover it by reason of its own conduct in setting the interest rate at such an unconscionable level, (pleaded at para. 27 of the Statement of Claim to be 1.75% *per month*) that it was found to constitute a penalty.

112. The sum of interest originally claimed was €235,770.71, clearly an extortionate figure and as such a penalty as the court found. The High Court erred in attaching insufficient weight to the fact that the landlord steadfastly pursued a penal interest sum throughout the litigation – as demonstrated by paras. 25 - 29 of the Statement of Claim. The High Court's approach in fixing the 2nd July 2020 as the date from which court rate of interest should accrue was not sufficiently reasoned. It disregards the fact that the landlord had maintained that the interest was recoverable on an exorbitant penal basis for years after service of the Statement of Claim. The position being maintained by the landlord was that "*interest was payable as of right*" within the meaning of s22(2)(b). This continued until the penal interest clause was ultimately struck down by the High Court and was an oppressive stance by the landlord.

113. If the Courts Act interest is to be awarded on a routine basis to landlord's who seek to impose interest rates found to be exorbitant and irrecoverable as a penalty, care is to be taken to ensure that such an approach does not unwittingly encourage, enable or approve a consequence-free mechanism for landlords who hold tenants to penal terms or circumvent the legislature's intention provided in s22(2)(b). Once the clause was found to be a penalty on the facts of this case particularly in light of the inherently extravagant nature of the interest claim as pleaded and pursued no valid basis was made out to warrant the intervention of the court to award statutory interest on a "*fall-back*" basis. Ground 26 of the appellant's claim accordingly succeeds and the interest award should be set aside. For the above reasons the exercise of the trial judge's discretion in awarding court rate of interest is reviewable and ought to be set aside.

114. Once the contractual interest clause was established as being in the nature of a penalty it was unenforceable. On the facts of this case and in light of the "*representations*" of the landlord outlined above and *reliance* placed by the tenant on the said representations in February 2016 (including the email of 10th February 2016 when taken with the tenant's response of 15th February 2016 and the landlord's subsequent silences as outlined in detail above) it was erroneous and unreasonable for the court to effectively intervene to amend the parties' bargain for the benefit of the landlord by the exercise of its discretion so as to ameliorate the consequences of the landlord's own unconscionable conduct in imposing such a term on the tenant in the first place which resulted in the tenant having to litigate to have the interest clause struck down as a penalty. This warrants a reversal of the trial judge's exercise of the statutory discretion review and re-exercise of that discretion by this court. The ambit of issues to be considered in the exercise of such discretion was also usefully considered by Mackechnie J. in *First Active plc v. Brian Cunningham* [2018] IESC 11. I respectfully adopt its reasoning.

115. In my view the landlord is not entitled to any interest in the instant case primarily for the core reason identified by Mulcahy J. at para. 192 of his judgment. The landlord only resiled from that exorbitant claim years later at the commencement of the hearing. Although the tenant did not offer oral testimony sufficient to establish *detriment* as required evidentially in respect of the 2014 and 2015 aspects of the claim, there was clear evidence both of "*representations*" arising explicitly and implicitly from the communications and other conduct of the landlord particularly in January and February 2016 and conduct on the part of the tenant consistent with "*detrimental reliance*" on same by his subsequent significant expenditures which indicate that a "*substitution*" approach to the penal rate of interest sought by the landlord and granted by the Court is in this instance contrary to the public interest. Such an approach is not in the public interest as it risks encouraging landlords to attempt to contractually impose penal rates of interest without risk and in the confidence that where a tenant successfully challenges same, the landlord can still recover interest at the statutory or court rate entirely inappropriate. Furthermore, The conduct of Gradual including the 10th February 2016 email and failure to candidly respond to the tenant's letter of 15th February 2016, coupled with the excessive delay in disclosing its hand to the tenant over many years are salient factors which can and must be taken into account in assessing its claim to statutory interest and strongly predispose towards a refusal of same as being most fitting in light of the evidence and the facts of this case. The evidence warrants accordingly that the High Court order as to Courts Act rate of interest be set aside. The landlord's conduct and the above factors warrants that there be no interest awarded.

Conclusions

116. The grounds of appeal advanced in relation to estoppel fail in so far as they relate to the €25,800 sought under the 2014 VA and the €57,000 rent for the calendar year 2015. In both instances the landlord and its agents had made representations by way of their silence and conduct which would have reasonably indicated to the tenant that they would not be insisting on their strict legal rights to the unabated rent for those periods. However, the trial judge correctly identified that the appellant has failed to advance sufficient evidence that they had in fact relied on said representations to their detriment as required under the test in *High Trees*.

117. The evidence, including the silence on the part of the landlord in February 2016, is consistent with the landlord encouraging the tenant to enter into AA2 at a time when the landlord was aware from the tenant's letter that the latter's decision to execute AA2 was based on the material belief that he was free from rent arrears. Relevant circumstances included the fact that that the tenant, a postmaster, was engaging directly with the landlord and its agents and not through a solicitor. This underscores the asymmetrical nature of this contractual relationship and is a material distinguishing factor from the norm. Gradual by choosing not to respond to the 15th February tenant's letter setting out his understanding of the import of the landlord's 10th February email, became responsible to the tenant for his reliance on that interpretation.

118. The estoppel claim in relation to the sums sought under AA2 carries significantly more weight than those in respect of the earlier VA or 2015 arrears. The landlord's failure to counter the belief of the tenant as clearly expressed in the letter of February 2016 falls to be seen as a sufficient representation that no further arrears remained due at that time when the tenant was being prevailed upon to execute AA2. Since the appellant can point to extensive expenditure incurred in renovations of the unit as evidence of detrimental reliance on that representation the burden then shifted to the landlord to establish that this detrimental reliance and expenditure would have been carried out regardless of its representations that the full rent under the Lease was not due at the time. There was sufficient evidence before the High Court that the tenant incurred significant expenditures on renovations which was consistent with *"detrimental reliance*" by him, in the *Barge Inn* sense, on the continuing validity of AA2. The trial judge was mistaken in his assessment of detriment and insufficient weight was given to the doctrine of unconscionability as it related to this element of the estoppel claim in regard to AA2. As such the landlord was estopped from invoking any breaches of the alterations and user covenants to seek the full unabated rent for this period.

119. As regards the landlord's reliance on alleged non-compliance with the Service Charge payments covenant as a basis for treating AA2 as void, that claim fails. No evidence was adduced of a valid *"unambiguous and unequivocal*" notice ever being served by the landlord or Indigo as would meet the necessary legal requirements for a notice to unilaterally exercise a contractual discretion to determine a contract and render AA2 void *ab initio* for non-compliance with *proviso (i)* of AA2. The threshold as set out in *Mannai* and earlier decisions and by Sir Terence Etherton in *Urban I (Blonk Street) Ltd v. Ayres* [2014] 1 WLR 756, CA reflects long established commercial norms clearly applicable here. It is absurd to suggest that any Indigo notice adduced in evidence had the effect in the words of Lord Slade *"…that the reasonable recipient is left in no doubt that the right reserved is being exercised".* The landlord thus cannot rely on claims based on alleged delayed payment of Service Charges because the Indigo Notices are not valid in law for that purpose. The High Court erred in concluding otherwise.

120. Entirely separately, as discussed above the said covenants had not been breached by virtue of the fact that no valid notice was served under Clause 4.10 of the lease.

121. The landlord's failure to comply with the requirements of Clause 4.10 of the Lease defeats its suggestion that a breach of covenant under either provisos *(i) or (ii)* of AA2 rendered AA2 void. Clause 4.10 of the Lease cannot be read to apply only to circumstances where the landlord seeks to forfeit the lease and neither of the provisos of AA2 can be read as being 'self-executing' when a breach occurs. The execution of *Proviso (i)* was a discretionary right of the landlord and their failure to outline and clearly state that any correspondence acted as a "*written demand*" in relation to Service Charges is fatal to any suggestion that the tenant was in breach of their obligations.

122. As regards *Proviso (ii)* the intention of the parties must be gleaned from the wording of the sub-clause and the failure to include or outline the covenants which could render AA2 void therein means that reliance must be placed on the wording and terms of the covenants within the Lease itself. In those circumstances it is not open to the landlord to extrapolate the text of the alteration and user covenants from the Lease the exclusion of the other relevant provisions of the lease including Clause 4.10.

123. There is no need to come to a determination on the issue of waiver pursuant to S. 43 of Deasy's Act where I have already determined that the landlord is estopped from insisting on its strict legal rights in relation to AA2 and that same was not rendered void due to the landlord's failure to comply with the notice requirements under Clause 4.10 of the Lease.

124. The current status of *Pinnel's Case* and *Foakes v Beer* were not the subject of argument in this appeal and I make no finding on this issue which will be determined in a future case.

125. The ground of appeal in relation to the interest laterally sought at trial by the landlord on the rent dating back to the supposed date of the breaches is also successful. For the reasons set out above the exercise of the trial judge's discretion in awarding the court rate of interest ought to be set aside. The extravagant penal sum of interest originally and persistently unconscionably claimed as being in effect "*payable as of right*" by virtue of the Lease/Abatement Agreements up to and including the hearing was €235,770.71. The High court correctly found same operated as a penalty and was not recoverable. On the facts of this case the statutory discretion in s. 22 of the Courts Act, 1981 (as amended) ought not be exercised.

126. The sums payable to the landlord are €25,800 due for the period of the VA together with the sum of €57,000 for the year 2015 - in total €82,800, without interest.

Costs

127. My preliminary view is that the appellant is entitled to 75% of his costs in the High Court and likewise 75% in regard to this appeal to be assessed in default of agreement. If either party contends for a different order as to costs, written submissions (no longer than 2,000 words) are to be provided (to the court of appeal office and the other party to this appeal) within 14 days from the date of delivery of this judgment identifying all grounds and arguments being relied upon. A response may be filed of like length within a further 14 days thereafter. Thereafter the court will make its determination thereon.

128. Pilkington J. has confirmed her agreement with the within judgment.