THE COURT OF APPEAL

CIVIL

UNAPPROVED

Neutral Citation Number [2021] IECA 98

[High Court Record No. 2017 No. 352 SP]

[Court of Appeal Record No. 2018 492]

Whelan J.

Pilkington J.

Humphreys J.

IN THE MATTER OF A CLAIM FOR COMPENSATION BY THE PLAINTIFF/APPLICANT IN RESPECT OF THE COMPULSORY ACQUISITION BY THE DEFENDANT/RESPONDENT OF A DERELICT SITE AT BODYKE IN THE COUNTY OF CLARE, MORE COMMONLY KNOWN AS *"MINOGUE'S PUB"*

THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT 1919

AND IN THE MATTER OF THE PROPERTY VALUES (ARBITRATIONS AND APPEALS) ACT 1960

AND IN THE MATTER OF THE ARBITRATION ACTS 1954 AND 1980

AND IN THE MATTER OF AN ARBITRATION UNDER THE DERELICT SITES ACT 1990

AND IN THE MATTER OF A VESTING ORDER DATED 16TH MAY, 2005

AND IN THE MATTER OF AN AWARD OF THE PROPERTY ARBITRATOR DATED 14TH APRIL, 2015

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 78 OF THE LAND CLAUSES CONSOLIDATION ACT 1845

BETWEEN

TERESA MINOGUE AS PERSONAL REPRESENTATIVE OF DENIS MINOGUE (DECEASED)

PLAINTIFF/APPELLANT

AND

CLARE COUNTY COUNCIL

DEFENDANT/RESPONDENT

JUDGMENT of Humphreys J. delivered on Monday the 29th day of March, 2021

1. The appeal concerns compensation for the compulsory acquisition of former licensed premises at Bodyke, a small village in East Clare best known for its role in resisting evictions by Colonel John O'Callaghan during the Irish Land War in June 1887. On a rather more modest scale, the present case also concerns the extent of the rights of a Bodyke tenant against the hypothetical rights of a freeholder whose title descends through the O'Callaghan estate itself and then through the Cullinans, another prominent Anglo-Irish landowner in the county.

2. The lands in question are located in the Townland of Coolready (Cúil Uí Riada) in the Electoral Division of Boherglass, in the Civil Parish of Kilnoe (or Kilno), in the Barony of Tulla Upper. They amount to 0.3618 acres in extent. The main building is a two storey structure consisting of the former "Minogue's Pub" and associated dwelling, fronting on to the R352 on two sides at a prominent 90 degree bend in the village, together with outbuildings and grounds. The claim for compensation here was originally brought by Mr. Denis Minogue Jr. (who I will refer to as "the deceased") and after his death was continued by Ms. Teresa Minogue, his personal representative ("the appellant").

3. A lease for lives renewable forever dated 16th February, 1784 is referred to as the basis of title for the property and several others in a footnote to the explanatory notes to the map of the Townland prepared in 1852 and discussed below. The lease is between Edmond O'Callaghan and John O'Callaghan and subject to a yearly rent of £400.

4. John O'Callaghan by his will dated 1st July, 1814 devised the lands amongst his children, and by a codicil dated 4th May, 1816, Lot 4 was devised to his son Edward.

5. The next document of title relied on was an indenture dated 23rd June, 1836 between Edward O'Callaghan, Esq. and Patrick Balton, Publican, which was contended to be the lease under which the deceased had held the property. It referred to a "house in the village of Beaudyke lately occupied by James Corbett" and another house of James Molony. The 1836 lease is an unusual document in that it is a lease for lives, but not one renewable forever. A memorial of this indenture was executed on 23rd June, 1836.

6. The Cullinan landholding first appears in the documents of title provided to the court in the form of a reference to a lease dated 1844 from Richard Stackpoole to Patrick M. Cullinan which primarily relates to lands at the market in Ennis.

7. As land reform in Ireland got underway in the mid-19th Century, an Incumbered Estates Court (recently referred to by Tim Murtagh as a "Victorian NAMA"

(beyond2022.ie)) was established under the Incumbered Estates Act 1848 (11 & 12 Vic. c. 48), replaced by the Incumbered Estates Act 1849 (12 & 13 Vic. c. 77).

8. An 1852 map of the townland of Coolready made by order of the Commissioners for the Sale of Incumbered Estates in Ireland, made by John Petty, shows the property at part of "Lot 4". It also shows the property as containing 2 houses adjoining each other, pretty much the only property that matches the description of two adjoining houses in the 1836 lease. The particulars of tenure and observations note the tenant as "Patt Balton", the yearly rent as £5 0s 0d and the quantity of land as 1 acre 1 rood and 11 perches. Gale days were 1st May and 1st November and the 1836 lease is referred to. The last renewal of the 1784 superior lease at the time of the 1852 Map was dated 19th April, 1845.

9. A memorial of an indenture dated 6th April, 1853 between Patrick Balton Jr. and Patrick Balton Sr. of the one part and Edward Stewart, Farmer, of the other part, was relied on. Again, this is referable to the two houses in the 1836 indenture.

10. A memorial of an indenture of conveyance dated 19th June, 1853 was produced between Mountifort Longfield LLD and Charles James Hargreave Esq., Commissioners for the Sale of Encumbered Estates in Ireland, of the one part, and Patrick Maxwell Cullinan M.D., who we met earlier in 1844, of the other part. There is an associated map and survey by Bartholomew Carrigg. The text is as follows:

> "A MEMORIAL of an Indenture of Conveyance bearing date the 19TH day of June One Thousand Eight Hundred and Fifty Three and made between Mountifort Longfield LLD and Charles James Hargreave Esquire two of the Commissioners for the sale of Incumbered Estates in Ireland of the one part and Patrick Maxwell Cullinan of Ennis in the County of Clare Medical Doctor of the other part. Reciting that by an Indenture of Lease dated the sixteenth day of February one thousand seven hundred and eighty four and made between Edmond O'Callaghan late of the City of Limerick but then of the

City of Dublin Esquire of the one part and John O'Callaghan of Coolready in the County of Clare gentleman of the other part, the said Edmond O'Callaghan did demise unto the said John O'Callaghan the Town and Lands of Clonmoher Coolready and Ichilahong, and also the Town and Lands of Knocklare and Knockbrack and the Town and Lands of Ballymacdonnell the Greater and Ballymacdonnell the lesser in the Barony of Tulla and County of Clare with the appurtenances, To Hold the same to the said John O'Callaghan his heirs and Assigns for the lives of the three Cestui que vies therein named and the survivors and survivor of them and for the lives of such persons as should from time to time for ever thereafter be added pursuant to the Covenant for perpetual renewal hereinafter contained at the yearly rent of Four hundred pounds of the late currency of Ireland equivalent to three hundred and sixty nine pounds four shillings and eight pence sterling payable half yearly on every first day of May and first day of November in each year and the said Indenture contained a Covenant on the part of the said Edmond O'Callaghan for perpetual renewal of the said Lease on payment of one pepper corn on the Execution of every such renewal and also Reciting that the last renewal of the said Lease was made by an Indenture which bears date the nineteenth of April one thousand eight hundred and forty five and made between Alexander Cody, Catherine Cody and Mary Power of the first part, Reverend Edward Joseph O'Reilly, Bridget O'Reilly, James John Bagot, Ellen Maria Bagot, the Honorable Thomas Browne and Catherine Browne of the second part, George O'Callaghan of the third part and John O'Callaghan of the fourth part, and such renewal is for the lives of John O'Callaghan, Robert O'Callaghan and Cornelius O'Callaghan and the survivor of them, the said Mountifort Longfield LLD and Charles James Hargreave Esquire D C two of the Commissioners for sale of Incumbered Estates in Ireland under the authority of an Act passed the thirteenth years of the Reign of Queen Victoria intitled 'An Act further

to facilitate the Sale and Transfer of Incumbered Estates in Ireland' in consideration of the sum of nine hundred pounds by Patrick Maxwell Cullinan of Ennis in the County of Clare Medical Doctor paid into the Bank of Ireland to their account to the credit of the Estate of James Moloney, Cornelius O'Callaghan, Robert O'Callaghan and Donatus O'Callaghan Minors by Mary O'Callaghan their mother and Guardian and John O'Callaghan Owners Exparte, Joseph Enright Petitioner did grant unto the said Patrick Maxwell Cullinan that part of the said Lands of Coolready otherwise Lurrighabawn and Beaudyke in the Barony of Tulla and County of Clare containing one hundred and eight acres one rood and nineteen perches statute measure or thereabouts (and excepting the sites of the Roman Catholic Chapel and National School which are not hereby conveyed) expressed to be demised by the said hereinbefore recited Lease and described in the maps thereunto annexed with the appurtenances. **TO HOLD** the same unto the said Patrick Maxwell Cullinan his heirs and Assigns for the lives of the said John O'Callaghan, Robert O'Callaghan and Cornelius O'Callaghan and the survivors and survivor of them and for the lives of all such other persons as should for ever thereafter be added pursuant to this Covenant therein contained for perpetual renewal, subject in conjunction with other part of said Lands of Coolready, Clonmoher Inchilahouge, Knocklare, Knockbrack, Ballymacdonnell the greater and Ballymacdonnell the Lesser to the aforesaid yearly rent of Four hundred pounds late currency equivalent to Three hundred and sixty nine pounds four shillings and eight pence created by the said Indenture but with the benefit of and liable to the provisions as to the said rent contained in the will of John O'Callaghan deceased dated the first July one thousand eight hundred and fourteen and the Codicil thereto dated fourth May one thousand eight hundred and sixteen whereby he devised the Lands of Coolready and Lurrighabawn as therein subject to the annual payment of one hundred pounds late

currency portion of the aforesaid rent and devised as therein the residue of the said Lands so demised as aforesaid, subject to the annual payment of three hundred pounds of the late currency residue of the said rent so described […] as aforesaid and indemnified further as to the lands hereby conveyed from the payment of the aforesaid annual sum of one hundred pounds late currency by that other part of the said Lands at Coolready containing one hundred and seventy nine acres and ten perches statute measure or thereabouts which said last mentioned part of Coolready has been sold by the Commissioners subject to the payment of the aforesaid annual sum of one hundred pounds late currency in full indemnification of the Lands hereby conveyed, and subject to the performance of the Covenants Conditions and Clauses contained in the said Indenture on the part of the Grantee so far as they relate to the Lands thereby conveyed and subject to the Leases and Tenancies mentioned in the Schedule thereto, and subject also for such right of Turbary over the Bog on the premises thereby conveyed to and for the use and benefit of such persons as the same is granted in and by a certain Indenture of Lease dated the eighteenth of April one thousand eight hundred and thirty two from Edward O'Callaghan to Denis Sampson for the lives of Thomas Sampson, Carrol Nash and John O'Callaghan and for the life of such other persons as should be nominated by the said Denis Sampson his Executors Administrators and Assigns to be added to said demise on the death of the survivor of the said three lives and for the term of thirty years to be computed from the decease of the life so to be added of a certain other part of the Lands of Coolready containing one hundred and sixty three acres three roods and nineteen perches statute measure or thereabouts. Which said Deed as to the Execution thereof and this Memorial as to the signing and sealing hereof are respectively Witnessed by; Michael O'Loughlin of Merrion Square Esquire and John Fitzpatrick Cullinan Solicitor both of the City of Dublin. [Signatures]"

11. Valuation records of 1855 show Edmond Steward in occupation of map reference nos. 8 to 10 from Patrick Cullinan M.D. as immediate lessor. The property was described as "House, offices & land".

12. By 1891, Patrick Healy is described as occupier in Valuation Records.

13. Dr. Patrick Maxwell Cullinan died on 4th November, 1895 according to public domain information (clarelibrary.ie).

14. The sub-tenant's interest in the property at issue here was apparently the subject of a mislaid assignment from Patrick Healy to his wife Jane Healy in or about 1902, according to the latter's statutory declaration. She declares that Patrick Healy assigned the house in which they were living and premises at Bodyke and plot of land adjoining same to her in 1902 and that she continued in exclusive occupation as tenant down to December, 1932 when she assigned the property to her son Denis Healy.

15. Patrick Healy died on 25th September, 1907, as recorded on his headstone.

16. By 1913, the occupier according to valuation records is Jane Healy, holding from Patrick Cullinan's personal representatives.

17. Sir Frederick died in 1913, according to public domain information (bomford.net), which would explain how his widow Lady Elizabeth comes into the title from then onwards.

18. Strangely, there seem to be two assignments from Jane Healy to Denis Healy, in 1920 and 1932. The first is dated 28th May, 1920 and recites that Jane Healy held a yearly tenancy from Lady Elizabeth F.M. Cullinan of "the licensed house and premises with gardens attached consisting of 3 roods and 11 perches statute measure or thereabouts".

19. The second assignment from Jane Healy to Denis Healy is recited in the papers as apparently dated 28th December, 1932 which is consistent with and corroborates the 1933 assignment and the 1933 statutory declaration.

20. On 17th November, 1933, Jane Healy swore a statutory declaration regarding the lost assignment of 1902.

21. On 6th November, 1933, Denis Healy of Bodyke assigned his interest to his son-in-law Denis Minogue (Sr.) of Sheane, Scariff. By the assignment he conveyed his interest in the "dwelling house, shop and premises situated in the village of Bodyke with the plot or parcel of land adjoining said premises". Again the assignment refers to the premises as being held from Lady Elizabeth. The assignment recites an indenture of 28th December, 1932 between Jane Healy and Denis Healy rather than the 1920 assignment.

22. Jane Healy died on 19th November, 1935, according to her headstone.

23. An extract from Valuation Records in 1935 shows Denis Minogue in occupation of map reference 8, with Reps. Patrick M. Cullinan M.D. as the immediate lessor. The property is a licensed house, office and garden, of 0 acres 2 roods and 38 perches with a rateable valuation of £6 0s 0d.

24. A rental account was obtained in the estate of Lady Elizabeth Cullinan dated November, 1940 which was not before the High Court, and in respect of which this court granted leave to adduce additional evidence. Its provenance appears to be the papers of Michael McMahon, Auctioneer and Estate Agent, formerly held in the National Archives and subsequently transferred to Clare County Archives. It shows a sum of rent payable by Denis Minogue (Sr.) for the three years ending November 1940 amounting to £5 pounds, 5 shillings and 0d per year, the modern equivalent of €6.66. The precise description of the premises is not specified, but one can reasonably infer from the contents of the column headed "Denominations" that the premises were in Bodyke. The appellant places emphasis on the fact that the sum is less than the rateable valuation, thereby, satisfying one of the conditions for buying out the freehold.

25. Denis Minogue (Jr.) (the deceased) was born on 12th August, 1945, described variously in later papers as Denis Oliver Minogue and "Dennis" Minogue.

26. Lady Elizabeth Cullinan died in 1946.

27. Denis Healy died on 19th December, 1955, according to his gravestone in Kilnoe Cemetery.

28. On 14th August, 1972, Denis Minogue (Sr.) assigned his interest to his son Denis Oliver Minogue. Denis Minogue Sr. was to have sole use of his room on the premises and the general run of the house.

29. According to the fantastical-sounding tale deposed to by the deceased in his affidavit of title (which begins "I, Denis Minogue, Prisoner No. A4533AA, Ashfield Prison …"), he avers he held the title deeds to Minogue's Pub up to the early 1980s. He says that when the racehorse Shergar was kidnapped in February, 1983, he was approached by the Gardaí due to his alleged talent in managing horses and was invited to act as a go-between to receive the ransom money from the stud owners, hand it over, and collect the horse. To "guarantee my *bona fides*" he says he handed the deeds to Shergar's manager, Mr. Stan Cosgrove. What happened to any money entrusted to him is not recorded by him. He seems to have left the country not that long afterwards and also been subject to a *Mareva* injunction, so one can only surmise.

30. It is not altogether clear when the deceased left the country for the UK, but a letter dated 18th November, 2004 says he was living in England for the past 20 years, inferentially from 1984 onwards or thereabouts.

31. According to the deceased's solicitor's correspondence at a later date to the arbitrator, the deceased ran the pub up to 1988, although that may or may not be an exact date. For a brief period (which seems to have been at least between 28th August, 1988 up to 1st January, 1990), in a clear act of ownership the pub was leased to a Mr. Patrick Canty (see exhibits to

the affidavit of title of the deceased sworn 7th February, 2014 referred to at the transcript, p. 8, lines 15 to 21). The council suggests that this is relevant to whether the deceased was in continuous occupation for a period of 25 years preceding the vesting date.

32. The deceased's valuers, Martin & Rea, presented a précis of evidence to the arbitrator seeking to value the property as of June 2005. That document stated that it was the valuers' understanding that the ground floor was in use for many years, but had been idle for a period of up to fifteen years, so inferentially from in or about 1990, and that the first floor was used as a family residence and was also left unoccupied for some years.

33. The deceased's Shergar-related story continues by saying that he began a personal relationship with a Ms. Jane Tomkins (he says this was in 1990). He says that in April or May 1983 (the timelines are inconsistent - presumably he means 1990), Ms. Tomkins contacted Ms. Patricia Anne Sturdy, Solicitor, with a professional address in Sturdy & Sutherland Solicitors, Oxford. He got in touch with her to try to remove a *Mareva* injunction over monies in Barclays Bank. How he became the subject of a *Mareva* injunction wasn't explained, and nor did he clarify whether it had any relationship to his alleged role as trustee for ransom monies for Shergar. He says Ms. Sturdy asked him to hand over title deeds and that he did so. This story is on its face incomplete and confused.

34. The appellant also relies on a copy memorial of a contract for sale dated 1st June, 1990 between Monica Courtney Franklin Cullinan of Trebetherick, Wadebridge, Cornwall to Daniel Neylon of Ennis, witnessed by C. Bolt, Legal Executive, Manor House, Wadebridge and by Geraldine Thornton, Solicitor, Limerick. That document might have provided some leads had it been thought desirable to pursue them (there was a suggestion at one point that there was a difficulty identifying the solicitor for the Cullinan Estate - maybe this document might have been a help). That memorial refers to lands in the town of Ennis granted by lease of 10th October, 1844 from Richard Stackpoole to Patrick M. Cullinan as well as interests to

which other specific leases relate. The 1990 memorial shows the deceased as paying an annual rent of £5.25, the last payment being 20th November, 1975 and the amount outstanding being £34.12. While the rent is slightly more than the £5 5s 0d in the 1940 accounts, it is close enough to suggest a continuity of interest. This document was not before the High Court, and this court gave leave to adduce it as additional evidence.

35. A Valuation Record dated 17th December, 1999 shows Denis Minogue in occupation "in fee" with a rateable valuation of €15.87.

36. In January, 2003, the council became concerned about the derelict state of the property and engaged in discussions with the Minogue family, but the title of the deceased or any other family member was not established.

37. The council published a public advertisement of notice of intention to acquire the site compulsorily under the Derelict Sites Act 1990 on 27th August, 2004.

38. The deceased's solicitors wrote to the council on 23rd September, 2004 seeking information in this regard. The letter illustrates awareness on the deceased's part of the compulsory acquisition process as of that date, and is relied on by the council to highlight the deceased's failure to buy out the freehold despite such awareness. The notice provided for objections up to 1st October, 2004.

39. In or around 2005, the deceased was imprisoned in the UK following conviction, eventually being incarcerated in HMP Leyhill, Gloucester and HMP Bristol.

40. Following objections, the consent of An Bord Pleanála for the compulsory acquisition became necessary. The council wrote to the board on 29th October, 2004 setting out its views, including that Denis Minogue might have a possessory interest and that his spouse Teresa Minogue, the present appellant, might have certain rights. However, it was considered that she would not be in a position to establish title. Other claimants to title were dismissed as having no interest or at least none that the council was aware of. The board's

inspector reported in April 2005, noting that six different individuals (including four members of the Minogue family), were making various claims to title to the property.

41. The board directed on 3rd May, 2005 that the property should be compulsorily acquired and their consent was communicated to the deceased on 4th May, 2005. The vesting order was made on 16th May, 2005. Pursuant to s. 18(2) of the 1990 Act, the order operated to vest the site in the local authority in fee simple, free from encumbrances and all other interests. The vesting order took effect on 7th June, 2005 which is the relevant date for compensation purposes.

42. On 19th July, 2005, the deceased made the formal claim for compensation under s. 19 of the 1990 Act which triggered the process with which we are now concerned.

43. A historical search in the Valuation Office was produced as additional evidence by leave of this court showing the changes in rateable valuation of the premises. As of April 2008 the rateable valuation was €15.87. Assuming that the rent was around the £5 mark, this confirmed the appellant's point that the rent was less than the rateable valuation.

44. In 2009, Seamus Bane, MIPAV, valued the property at €200,000 as of the acquisition date assuming that the pub licence could not be renewed.

45. On 10th May, 2010, the deceased applied to the Reference Committee to determine the amount of compensation, on the basis that he had "the freehold interest subject to a fee farm grant in the subject lands" and subject to a £5stg yearly rent (see plaintiff's statement of claim 3rd December, 2013, tab 3, book of exhibits, affidavit of Sinéad Nunan).

46. Ms. Sturdy reappears in our story when the deceased's solicitor contacted her seeking title deeds. She had since been appointed as District Judge, Kingston-Upon-Thames County Court. The deceased's solicitor appears to have obtained some title deeds from her.

47. The Reference Committee nominated Mr. Michael Neary as property arbitrator on 17th September, 2013.

48. On 3rd December, 2013, the deceased delivered a "Statement of Claim" in the arbitration.

49. On 4th September, 2014 the council obtained an opinion on title which concluded that the deceased's title was not freehold as claimed, but was leasehold. That opinion includes the following very helpful explanatory background, at paras. 4.7 and 4.8, which is worth recording to contextualise the title here, which is not a simple case of landlord and tenant. Counsel wrote as follows: "In urban areas and in villages, titles in Ireland could be what are referred to as "pyramid titles" whereby there were various tiers or levels of title. A simple example would be a freehold owner granting a 999 year lease to a lessee, who grants a 99 year lease to an occupier. Here, there are three tiers in the level of title. A more complex example would be a freehold owner granting a fee farm grant, the fee farm grantee granting a sub-fee farm grant, the sub-fee farm grantee granting a 999 year lease, the 999 year leaseholder granting a 99 year lease, the 99 year leaseholder perhaps granting a yearly tenancy. Another example might be a freehold owner granting to a fee farm grantee who divides up the parcel of lands and grants various sections to lessees or yearly or other periodic tenants. Frequently, the person in occupation, particularly in the case of urban or village property, had the lowest estate or interest, in what may have been a pyramid of a number of tiers. The owner of a property such as a public house may hold under a fee farm grant or long lease for say 999 years, but one would normally expect, in the case of such a root of title, evidenc[e] of devolution of title by registered documents reciting the fee farm grant/ lease and conveying/ assigning an estate to the successors in title …".

50. The property arbitrator decided that questions of title were outside his jurisdiction and that he must act on the assumption that the title claimed was correct and that any dispute regarding the title would be determined in subsequent proceedings (see property arbitrator's letter of 17th September, 2014, tab 3, book of exhibits, affidavit of Sinéad Nunan).

51. On 8th September, 2014, the council replied to the statement of claim, which concludes that "the Respondent denies that the Applicant is entitled to any compensation in respect of the said compulsory acquisition by the Respondent" (para. 31).

52. The applicant issued a rejoinder to the council's reply on 22nd October, 2014 to the effect that without prejudice to the claim to be the freeholder, he was the party with the best claim on the property, due to long user and occupation and had a title convertible to freehold ownership.

53. On 6th November, 2014, the council asked the arbitrator to direct the deceased's solicitors to produce all documents furnished to the Land Registry on 3rd January, 1979 regarding Folio 2227F in order to evaluate the deceased's claim that he was the freeholder on the basis that the title to the site derived from the same root of title as that of adjoining property.

54. On 27th November, 2014, the arbitrator held a public sitting in Ennis. An issue had arisen as to whether the deceased could give evidence by video link from prison, but the arbitrator decided not to require him to do so.

55. On 8th January, 2015, the arbitrator wrote to the parties stating that he had determined that the application by the deceased was made within the statutory time frame.

56. On 14th April, 2015, the arbitrator made his award in the amount of €165,000 plus costs and expenses on a solicitor and client basis, together with a fee of €2,856.91 in accordance with the Acquisition of Land (Assessment of Compensation) Fees Rules 1999 (S.I. No. 115 of 1999), made under s. 3(6) of the Acquisition of Land (Assessment of Compensation) Act 1919.

57. On 16th September, 2016, the arbitrator issued a letter (at the request of the council), confirming that he had acted on the assumption that the title claimed was correct.

58. On 30th June, 2016, the deceased took proceedings to seek to enforce the arbitral award: *Minogue v. Clare County Council* [2016 No. 224 MCA]. The premise of those proceedings seem to have been that the deceased thought he was entitled to enforce the award as if it was made under the Arbitration Acts 1954 to 1998 or the Arbitration Act 2010. That logic was rejected by the council and eventually the proceedings were struck out on 23rd September, 2017. In the meantime, the council had obtained a further opinion on title on 4th September, 2016.

59. Following this, the council was not satisfied that the deceased had in fact proved the title claimed before the arbitrator, so in accordance with s. 19(5) of the Derelict Sites Act 1990 and s. 69 of the Lands Clauses Consolidation Act 1845, it paid the sum of €165,000 (not including interest) into court on 18th May, 2017. The statutory intention is that the owner's interest in the lands is converted into the monies lodged, and such monies must remain in court unless and until duly claimed by the owner, absent statutory provision to the contrary. Certainly the council can't get those monies back, having already got the title to the lands.

Procedural history and pleadings in the High Court

60. The special summons was issued on 21st August, 2017. The deceased sought the following reliefs:

(i). an order under s. 78 of the 1845 Act for payment out of the entire sum lodged;

(ii). an order consequent on that order or under s. 41 of the Arbitration Act 1954 or ss. 23 and 25 of the Arbitration Act 2010:

(a). seeking interest from the date of the award to the date of payment into court; and

(b). seeking the costs and expenses of the arbitration in accordance with the award;

(iii). interest at 8% pursuant to s. 26 of the Debtors (Ireland) Act 1840 as amended and at 2% pursuant to the Courts Act 1981 as varied by the Courts Act 1981 (Interest on Judgment Debts) Order 2016 (S.I. No. 624 of 2016);

(iv). an order consequent on the order at relief 2(b) that the costs of the arbitration would include researching and locating title documents, preparation of submissions and opinions, obtaining a power of attorney from the deceased and dealings with the Office of the Accountant of the Courts of Justice;

(v). further or other order; and

(vi). costs of the proceedings.

61. The summons was grounded upon an affidavit of Richard O'Hanrahan, Solicitor, sworn on 16th August, 2017 and filed on 21st August, 2017. The affidavit makes reference to extensive inquiries seeking documents of title.

62. The deceased died intestate in England on 15th January, 2018. There was no death certificate put before the court and nor was there a necessity for one as the appellant produced a valid grant of letters of administration intestate. The court was, however, given a Coroner's Certificate of the Fact of Death under reg. 9 of the Coroners (Investigations) Regulations 2013 (S.I. 2013 No. 1629). The deceased is named as "Dennis" rather than Denis Minogue. Place of death is 19 Cambridge Road, Bristol.

63. On 11th July, 2018, a grant of letters of administration intestate was issued to Teresa Minogue, the appellant, as widow of "Dennis (*sic*) Oliver Minogue" described as "late of 19 Cambridge Road, Bristol, England (formerly of Minogue's Pub Bodyke").

64. A replying affidavit of Sinéad Nunan, Solicitor for the council, was sworn on 9th October, 2018 and filed on 10th October, 2018. Among other things, that stated that it hadn't been possible to locate solicitors for the Cullinan estate to establish whether the appellant's

claim was disputed. It also suggested that it would be appropriate to do so given the notice procedures in the legislation regarding purchase of ground rents.

65. There was a change of position between the issue of proceedings and the hearing in the High Court in that the application made at the oral hearing in the High Court was not for payment out of the entire sum of €165,000 lodged as sought in the special summons, but payment out of €144,375 on the basis of reserving one-eighth of the funds for the reversionary interest. The appellant changed position again on the hearing of the appeal and sought to reinstate the claim to be entitled to the full freehold interest.

Hearing in the High Court

66. This matter was listed as No. 28 in the Chancery 2 List on a Monday, on 3rd December, 2018. The parties approached it as a short matter on the basis that it wasn't being actively objected to by the council, which was instead merely putting the onus on the appellant to prove title (a stance it has repeated on appeal). The procedure, as I understand it, is that if a matter in the Chancery List is going to take more than half an hour, it is deemed unsuitable for a Monday and is listed to fix a stand-alone date at a later stage.

67. The position as matters evolved was that the major difficulties for the appellant emerged from the court itself, rather than from the other side. Firstly, the appellant's paperwork was found not to be in order (transcript p. 2, lines 20 to 21, Judge: "Look I'll have to hand back this book and it will stand because I don't know where the exhibits are").

68. When the matter was mentioned again, the judge then asked as to the amount of the rent and the rateable valuation and identified that what the appellant had had was "an entitlement to apply" for enlargement of the leasehold interest rather than a vested right under the ground rents legislation (transcript p. 4, lines 3 and 4).

69. There was then quite a complex exchange where the judge asked to have clarification as to what the actual rent under the lease was and there was no immediately straightforward

reply to that query, which in fairness may reflect the complexity of the matter itself. Counsel submitted that it was quite an involved title, and I can certainly agree with her about that.

70. Ultimately counsel referred to an indenture dated 23rd June, 1836 which, as noted above, was contended to be the lease under which the deceased had held the property. The judge rejected that on the basis that she didn't think that it had been established that this referred to the same property (transcript p. 7, lines 17 to 24). The judge made the point that the appellant could produce neither a lease specifying a rent nor receipts for the rent, and then went on to point out that the appellant was putting herself forward as being the freehold owner "notwithstanding that you have not made an application … until that process is gone through, you are not the freeholder owner and you're asking me to treat you as such" (transcript p. 9, lines 17 to 21).

71. Counsel replied on the basis that the deceased had been precluded from upgrading title by virtue of the compulsory purchase process. The judge said that there must have been a notice prior to that "so that you were on red alert" and "[i]f you wanted to collect all the money out of this, you needed to enlarge your title into a fee simple" (transcript p. 9, lines 26 to 29).

72. Counsel replied that it would be "very unfair if a tenant was entitled to buy out the fee simple under the Ground Rents Act, the property was compulsorily acquired before he did so. I would have thought that his interest and entitlement under the Ground Rents Act would be something which the Court would have to take into account in deciding payment out of the compensation" (transcript p. 10, lines 5 to 9).

73. The judge said that that was not what was happening, but that what was happening was that the appellant was not going to be treated as the freeholder, since she didn't go through the acquisition procedure. When counsel asked that surely the court would be entitled to see whether the application would have succeeded the judge asked for authority on

that point. Counsel replied that "we're not asking to be treated as the freehold owner as such. We're simply asking that our statutory rights be taken into account for the purpose of valuing our tenancy interest" (transcript p. 11, lines 4 to 6). The judge replied that "there [are] many applications that were processed and defeated unexpectedly because of the nature of the title that would be produced, for example, proof, the landlord on notice that they erected the permanent buildings. Regardless, that would defeat your entitlement" (transcript p. 11, lines 15 to 19).

74. The judge then asked about the purchase priced under "s. 7 of the 1983 Act [*recte*, 1984 Act]" (transcript p. 12, lines 1 to 2), and counsel replied that the purchase price would normally be one-eighth of the market value of the property.

75. The matter was then adjourned over lunch and when it resumed counsel said, "[a]nd I was wondering, you mentioned the issue of rent receipts, I was wondering if it would be possible to adjourn this application to see if we can find evidence of rent receipts. And possibly, also, if you want us to put in advertisements, I'm in your hands in relation to that." The judge didn't seek the other side's views on the adjournment application, but, notwithstanding that the points needing to be addressed emanated without notice from the court itself rather than the other side, responded to it in this manner:

> Judge: "I don't propose adjourning it any further."
>
> Counsel for the applicant: "Very well Judge."
>
> Judge: "Having embarked on it to this extent…" (transcript p. 13, lines 18 to 20).

76. The judge then asked what the position was (in terms of valuation) on the basis of the deceased having been a yearly tenant. Counsel then said that, independently of the ground rents legislation, the deceased would have had rights under the Landlord and Tenant (Amendment) Act 1980 to a new tenancy on the basis of having been in occupation for twenty years. The judge then asked the respondent how would the entitlement to a portion of

the money lodged be assessed on such a basis (transcript p. 14, lines 13 and 14). Counsel for the respondent then replied on that point saying, "I don't know, Judge, is the answer to the question you've asked me."

77. The respondent's counsel then noted that the arbitrator had proceeded under the assumption that the deceased would be able to adduce the title alleged and said that the council had not counterclaimed seeking to quash the award of the arbitrator and have the matter remitted for the purposes of another arbitral exercise. The judge suggested that that might not suit either side and counsel for the respondent said "[w]ell, it wouldn't really, Judge, no". (transcript p. 14, line 31). The judge then asked counsel for the applicant whether they had valuations and he replied "[w]e have no valuations specifically on the entitlement of the yearly tenancy. Our basis is on the understanding that we would have an entitlement to a buy [out] of the ground rents, although we accept that we haven't done that. So, we don't have a specific valuation on the point, we can get one if necessary if it would be of assistance to the Court and…" (transcript p. 14, lines 33 and 34 and p. 15, lines 1 to 3). The judge did not ask the respondent's views on that suggestion of an adjournment, but again, and notwithstanding that the new basis of valuation had been introduced by the court and not, on notice, by the other side, intervened as follows:

> Judge: "No, you've come to today with how you are at" [*sic*].
>
> Counsel for the applicant: "Yes."
>
> Judge: "And that is it ..."

Judgment in the High Court

78. The *ex tempore* judgment was given in a somewhat back and forth manner with elements of dialogue with counsel on individual aspects of the ruling, as would not be in any way unusual for an *ex tempore* judgment, particularly in a Monday list. Accordingly, the rulings appear at various places in the transcript.

79. An application was first made to amend the title of the proceedings to substitute the personal representative by consent. The judge did not give a verbal response to that, insofar as what appears on the transcript is concerned, but a decision to allow the amendment is reflected in the order.

80. On the methodology of calculating compensation, the judge essentially accepted that the deceased had been a yearly tenant and valued the interest on that basis, and on the basis of having a right to renew, albeit not to enlarge, the interest. She did not agree that she should have regard to the possible entitlement to enlarge the interest for two reasons.

81. Firstly, that it possibly could be defeated depending on the attitude of the freeholder; and secondly, that the deceased had not in fact exercised that interest prior to the compulsory acquisition.

82. As noted above, the judge refused to allow an adjournment to allow evidence of rent receipts to be produced. She also refused to adjourn the matter to allow valuation evidence and provided her own valuation without any evidence in that regard.

83. The judge's ruling on the valuation proceeded by inquiring, "before I give my figure which is not based on any actuarial evidence or valuation evidence - the parties were happy to come without any of that - which then is a matter of guestimate by an individual, either the parties themselves through their lawyers, or the Court to decide" (transcript p. 15, lines 27 to 30), whether the parties were prepared to agree a figure. That didn't seem to be the case, so the judge valued the appellant's interest in the following way, having referred to the relevant circumstances: "[w]ell, bearing those matters in mind and doing the best I can with the limited information I have, I will order a payment out in favour of the applicant of the sum of €50,000 in respect of the applicant's interest in the property" (transcript p. 16, lines 33 and 34 and p. 17, line 1).

Order of the High Court

84. The order was made on 3rd December, 2018, perfected on 17th December, 2018 and amended under the slip rule O. 28, r. 11 RSC on 19th December, 2018. As noted above it included an order by consent that the title be amended to substitute Teresa Minogue as personal representative of Denis Minogue (deceased) as the plaintiff. As regards the relief sought in the special indorsement of claim, the position was as follows:

(i). instead of an order under s. 78 of the 1845 Act for the payment out of €165,000 she made an order for the payment out of €50,000 with a direction to produce an up to date certificate of funds;

(ii). as regards interest and costs:

(a). the claim for interest from the date of the award to the date of payment into court was withdrawn by consent;

(b). the claim for costs and expenses of the arbitration in accordance with the award was made by consent and para. 6(b) and 7 of the arbitrator's award were affirmed;

(iii). the claim for interest under the Debtors (Ireland) Act 1840 and the Courts Act 1981 was withdrawn by consent;

(iv). the claim for an order consequent on the order at para. 2(b) that the costs of the arbitration would include researching and locating title documents, preparing submissions and opinions, obtaining a power of attorney and dealings with the Office of the Accountant of the Courts of Justice was adjourned for further mention at a later date;

(v). as regards the claim for further or other order, no specific order was made beyond what is stated above; and

(vi). the claim for the costs of the proceedings was also adjourned for mention to a later date.

Procedural history in the Court of Appeal

85. The notice of appeal was filed on 20th December, 2018. The respondent's notice was filed on 9th January, 2019.

86. In advance of the directions hearing, the appellant indicated by letter dated 11th January, 2019 that she was going to seek to amend the notice of appeal in order to ask for costs, but did not in fact do so. It was indicated that the appellant would seek to adduce further evidence. The council sought to progress the question of the DAR.

87. The directions hearing took place on 22nd February, 2019. A hearing date was fixed and 12 weeks for submissions directed with 12 weeks for a reply.

88. On 13th May, 2019, the appellant's solicitors wrote to the council's solicitors indicating that they had requested the DAR and that an extension of time for submissions was sought.

89. I should record at this point in the chronology that the deceased's long-standing solicitor, Mr. Richard R. O'Hanrahan, died on 25th December, 2019 having put in heroic work for the deceased both before, during and after the compulsory acquisition. While, on the Mosaic template, he did not himself see the conclusion of the story, hopefully the present judgment will stand as a modest memorial to his exceptional efforts in the case.

90. On 4th December, 2020, the appellant, having obtained the DAR, sent the unapproved version to the council and also sent it for approval to the trial judge.

91. On 18th December, 2020, the appellant wrote to the council seeking consent to adduce additional evidence. On 22nd December, 2020 the council asked for a notice of motion and affidavit. This was sent on 23rd December, 2020.

92. On 22nd January, 2021, the appellant's motion to adduce new evidence was heard by this Court (Costello J.) who on that date granted the relief sought with costs reserved. The specific documents insofar as relevant are referred to above.

93. On 28th January, 2021, the solicitor for the respondent requested the written submissions and sent the form to the solicitor for the appellant to obtain an updated certificate of funds. The certificate was sent back on the same date.

94. The appellant's submissions were then delivered dated 1st February, 2021 and were replied to by the respondent.

95. While some material that was before the High Court was omitted from the books as not relevant, the court thought the position might be otherwise and requested the appellant to provide that material on 15th February, 2021. The appellant's solicitors responded promptly and filed additional books on 17th February, 2021. The appeal was heard on Friday 19th February, 2021.

Grounds of appeal

96. The grounds of appeal can be summarised as contending that the judge erred as follows:

(i). in failing to value the deceased's interest at the amount claimed (grounds 1, 2(v) and (vi));

(ii). in regarding the basis of valuation advanced by the appellant as being precluded by the failure to actually buy out the freehold prior to the compulsory acquisition (ground 2(iv));

(iii). in failing to value the deceased's interest as having been that of a person entitled to buy out the freehold (grounds 1, 2, 4 and 5);

(iv). in valuing the deceased's interest on the basis of having been a yearly tenancy without expert evidence as to its value on that basis (ground 3); and

(v). in failing to adjourn the proceedings to allow such evidence (ground 3).

Grounds of opposition in respondent's notice

97. The essential position taken in opposition to the appeal is that it is a matter for the appellant to establish to the satisfaction of the court the entitlement to the sum claimed. The respondent's notice does not contend that the trial judge did not err. It says that it is up to the appellant to show this, and that the council adopts a neutral stance on whether the deceased not having availed of the statutory procedure to enlarge her interest was relevant or not. The respondent's notice goes on to say that if the court decides that the trial judge *was* correct in deciding not to treat the interest as being one to be valued on the basis of its susceptibility to being enlarged, it was not disputed that the judge valued a compensation "in the absence of relevant expert valuation evidence dealing with that specific question and without adjourning the proceedings for such valuation evidence to be adduced". The respondent then suggests that it is a matter for the court to assess whether the judge did err in the valuation exercise "having regard to the manner by which she arrived at the aforesaid figure." The respondent also sought to bring a number of factual matters to the attention of the court.

Appellant's submissions

98. At the core of the appellant's submissions is the contention that the reversionary interest became statute barred by virtue of the parol nature of the tenancy due to non-payment of rent and that the deceased thereby had acquired the freehold reversionary title by adverse possession. Alternatively, if the deceased's interest was deemed to be leasehold only, it is submitted that the appellant is entitled to full compensation for such an interest; and that the compensation would not be full compensation if it did not take into account the entitlement vested in the deceased on the relevant date to enlarge that leasehold interest to a freehold interest pursuant to the Landlord and Tenant (Amendment) Act 1978, as amended. The submissions go through the statutory criteria for enlargement of such an interest and contend that the appellant has demonstrated satisfaction of all of those criteria.

Respondent's submissions

99. The respondent's submissions repeat the essential point made in the respondent's notice, which is that the onus is on the appellant to establish title and that the respondent's interest is to ensure only that the appellant is paid no more and no less than the value of the interest of the original plaintiff as of the date of the compulsory acquisition. The respondent's submissions note a number of potential facts possibly adverse to the appellant including the evidence of non-occupation during a time at which occupation was an essential proof in terms of the entitlement to enlarge the interest and also failure to notify possible interested parties. In particular, it was suggested that the 1990 memorial, which was adduced as additional evidence, itself provided the identity of another interested party.

Standard of appellate review

100. While it is difficult to summarise the myriad of ways in which the standard of appellate review has been phrased in an equally bewildering myriad of different situations, and at the risk of a certain amount of hopefully acceptable simplification, one can view the standard of appellate review as falling on a spectrum from a highly deferential approach giving very significant weight to the views of the trial judge, to a situation where the appellate court is somewhat deferential to the trial court's assessment, to a category of re-evaluative situations where deference does not apply and the appellate court simply forms its own view. One could endeavour to summarise these as follows:

(i). **Highly deferential review** includes the following situations:

(a). Where findings of primary fact are made based on oral evidence and where inferences are drawn depending on findings that are based on oral evidence. An appellate court will only interfere with such findings in very limited circumstances (*Northern Bank Finance v. Charleton* [1979] I.R. 149 at 193 *per* Henchy J., *Hay v. O'Grady* [1992] 1 I.R. 210).

(b). Case management directions may also fall under this heading: as Clarke J. (Denham C.J. and Hardiman J. concurring), pointed out in *Dowling v. Minister for Finance* [2012] IESC 32 (Unreported, Supreme Court, 24th May, 2012), there is no reality to the achievement of case management benefits if appellate courts were "on anything remotely resembling a regular basis" to entertain appeals against such directions and accordingly a high threshold of irremediable prejudice must be shown.

(ii). **Somewhat deferential review** applies where the appellate court gives due weight and consideration to the views and findings of the trial court, but is not bound by them to the same extent as would be the case in relation to for example the evaluation of live witnesses generally. This category includes the following:

(a). The assessment of competing oral expert evidence. Charleton J. in *James Elliot Construction Ltd. v. Irish Asphalt Ltd.* [2011] IEHC 269 (Unreported, High Court, 25th May, 2011), pointed out that such evaluation was more amenable to analysis on the basis of the logic of the positions adopted than is the case with normal live evaluation of witnesses.

(b). As regards findings based on affidavit evidence, a somewhat deferential approach should be taken (*Ryanair Ltd. v. Billigfluege.de GmbH* [2015] IESC 11 (Unreported, Supreme Court, Charleton J. (Hardiman, McKechnie, Clarke and MacMenamin JJ. concurring), 19th February, 2015) and *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 46, [2018] 2 I.R. 1); although it must be recognised that an

appellate body is not in any worse position than the trial court to evaluate affidavits and form its own view, albeit after having afforded due weight to the views of the trial court.

(c). An appellate court can form its own view on secondary findings of fact that are not dependent on oral evidence such as inferences from admitted facts or those proven otherwise than by way of oral testimony: *per* McCarthy J. in *Hay v. O'Grady.* The basis for this is also that its competence to do so is no less than that of the tribunal of fact (see also *Northern Bank Finance per* Henchy J. at p. 192). Having said that, it would be inconsistent if an appeal court was completely at large on inferences from admitted facts but had to be very deferential to the trial judge's assessment of affidavits. Both are best viewed as falling into the somewhat deferential bracket, because treating them differently would not make sense.

(d). As regards the assessment of damages, while an appellate court is free to substitute its own assessment, considerable weight will be given to the assessment by the trial judge (*Lett & Co. Ltd. v. Wexford Borough Council* [2012] IESC 14, [2012] 2 I.R. 198 at 264 [52] *per* O'Donnell J.).

(e). As regards discretionary decision, weight will be given to the decision of the trial judge, but an appellate court will be untrammelled by an *a priori* rule that it cannot interfere unless some error of principle is disclosed: *per* Irvine J. (Peart and Hogan JJ. concurring), in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 (Unreported, Court of Appeal, 19th February, 2015); *per* McMenamin

J. (Denham C.J. and Hardiman J. concurring), in *Lismore Builders Ltd. v. Bank of Ireland Finance Ltd.* [2013] IESC 6 (Unreported, Supreme Court, 8th February, 2012).

(iii). **Non-deferential review** arises where the appellate court simply forms its own view of the matter at issue. Examples include the following:

(a). Obviously, all questions of law are re-evaluated by the appellate court. The trial court is either right or wrong on legal questions, and there is no room for curial deference in that regard. For this purposes, questions of law includes both those of substantive law and of whether the procedure and process adopted below was correct in legal terms.

(b). Any appeal by way of re-hearing (for example from the Circuit to the High Court) proceeds on a *de novo* re-evaluation of all factual or other issues, and the concept of curial deference doesn't apply (see *Mulcahy v. Cork City Council* [2020] IEHC 547, [2020] 10 JIC 2104 (Unreported, High Court, 21st October,2020), paras. 22 and 23).

101. In the present case, insofar as concerns the trial judge's view of the law regarding the relevance of the asserted entitlement to buy out the freehold to the assessment of compensation, that is a purely legal question so this court is adopting a re-evaluative approach on that point. As regards the refusal of an adjournment, the legal correctness of the procedure adopted in making that decision is a question of law for re-evaluation. Insofar as the merits of that refusal were concerned, this court must adopt a somewhat deferential approach. Likewise, regarding the assessment of compensation, the legal correctness of the judge's methodology is a matter for this court's own assessment; and insofar as the merits of the valuation are concerned, the court must adopt a somewhat deferential approach.

New issues on appeal

102. As noted above, the appellant here has sought to make the argument that, in light of the new evidence uncovered subsequent to the High Court hearing, the estate of the deceased is entitled to the full monies lodged, which claim raises a new issue that was not argued in the High Court.

103. This raises the question of the scope of the court's jurisdiction on appeal. Normally an appellate forum won't go too far beyond the issue decided below. The main reason for restraint in that regard is because to decide any new question on appeal would be deciding it on an essentially first-instance basis, which at the level of broad principle is not the normal constitutional role of appellate courts in our system.

104. Having said that, there will be exceptions and countervailing considerations. Maybe the most common one is that appellate courts as a matter of course allow new authorities to be relied on, even decisive ones. The presupposition of this approach is that strict adherence to the requirement of holding a party to the four corners of what was argued below has to be balanced against ensuring that the result is legally and factually correct and that justice is ultimately done as far as possible as between the parties.

105. It is a short step from allowing reliance to be placed on new authorities to allowing reliance to be placed on further, other or new statutory provisions, which may open up new avenues to reversing or upholding the decision below. The main thing is that the appellate court strikes the right balance, in the interests of justice, between ensuring that parties make their points properly at first instance as against allowing some latitude for positions to evolve subsequently, where this is reasonable and just. Much depends on the impact on other parties and on the orderly processing of the proceedings.

106. While older authorities referred to the introduction of new issues on appeal only in exceptional circumstances, O'Donnell J. in *Lough Swilly Shellfish Growers Co-Op Society Ltd v. Bradley* [2013] 1 I.R. 227 at 245 supported what Delaney & McGrath call "a certain

degree of flexibility" (*Civil Procedure*, 4th ed., (Dublin, Round Hall, 2018), para. 23-181), depending on where on a spectrum of cases the application arose, and particularly where the new issue did not cut across the way in which evidence was dealt with below.

107. As Clarke J. (Murray and MacMenamin JJ. concurring), noted in *Koger Inc. v. O'Donnell* [2013] IESC 28 (Unreported, Supreme Court, 18th June, 2013), at para. 7.7, letting parties revisit tactical decisions on appeal would be a recipe for "procedural chaos and serious injustice". In *Ambrose v. Shevlin* [2015] IESC 10 (Unreported, Supreme Court, Clarke J. (O'Donnell and Charleton JJ. concurring), 5th February, 2015) and *Moylist Construction Ltd. v. Doheny* [2016] IESC 9, [2016] 2 I.R. 283, Clarke J. emphasised the theme of balancing the relevant factors, and the spectrum of cases referred to by O'Donnell J.

108. Considering the application of those cases here, it must be noted firstly that the fact that the appellant originally sought the full interest and then scaled back the claim to seven-eighths of the monies would normally be an obstacle to reviving the full claim now (see comment of O'Donnell J. in *Lough Swilly* regarding reviving withdrawn claims). As against that, there are a number of very significant countervailing considerations:

(i). the original hearing in the High Court was a summary affair - as mentioned it was No. 28 in a Monday list and was dealt with *ex tempore*;

(ii). the matter proceeded entirely on affidavit in the High Court, and there is no question of revisiting the way in which oral evidence was dealt with or assessed, or of retrospectively cutting across any cross-examination;

(iii). the respondent adopted a generally neutral stance in the High Court;

(iv). accordingly the matter is not a normal *inter partes* application;

(v). the appellant twice sought and was refused adjournments to explore further evidential avenues;

(vi). the respondent has maintained a generally neutral stance in this court;

(vii). this court has already granted the appellant's motion seeking to introduce new documents and has given leave to adduce the very further evidence on which the new issue is grounded;

(viii). that order was made by this court without any great objection from the respondent;

(ix). the new issue can readily be determined on the materials before the court and there is no necessity to remit anything back to the High Court for a new trial;

(x). one also has to have regard to the fact that the council has paid the full price into court and is not going to be getting that money back one way or the other because it already has the land; consequently, there is no particular prejudice to the council in allowing the appellant to argue for a more expanded interest than was contended for at the oral hearing in the High Court; and

(xi). finally, the difference is relatively marginal in the sense that the interest now being contended for is eight-eighths of the monies, whereas at the oral hearing in the High Court it was seven-eighths of the monies.

109. In all those circumstances, if one envisages a spectrum of cases ranging from where an appellate court could take a permissive approach to the introduction of new issues, on the one hand, to where the court would take a restrictive approach, on the other, it seems to me that the new issue here falls about as far on the permissive end of the spectrum as one could imagine. In all the circumstances, I would favour permitting the appellant to pursue that new issue of adverse possession on this appeal in the interests of justice.

The adverse possession claim

110. Turning then to the claim that the deceased should be treated as the freeholder based on adverse possession, s. 17(2) of the Statute of Limitations 1957 provides: *"*(a) A tenancy from year to year or other period, without a lease in writing, shall, for the purposes of this

Act, be deemed to be determined at the expiration of the first year or other period. (b) The right of action of a person entitled to land subject to a tenancy from year to year or other period, without a lease in writing, shall be deemed to have accrued at the date of the determination of the tenancy, unless any rent or other periodic payment has subsequently been received in respect of the tenancy, in which case the right of action shall be deemed to have accrued on the date of the last receipt of rent or other periodic payment."

111. The requirements for this section to operate to create a freehold title by adverse possession are as follows:

(i). the tenancy must be from year to year or other period;

(ii). there must be no lease in writing (see *Sauerzweig v. Feeney* [1986] I.R. 224);

(iii). the right of action of the person entitled to the land must have accrued on a particular date by virtue of a last payment of rent;

(iv). the occupier must then have adversely possessed the land for a period of 12 years from that date, which involves actual possession, without proceedings being brought (see s. 18(1) of the 1957 Statute);

(v). there must also have been *animus possidendi* (see *Dunne v. Irish Rail and Córas Iompair Éireann* [2016] IESC 47, [2016] 3 I.R. 167); and finally

(vi). the 12 year period must not have been interrupted by acknowledgement, an act of possession by the landlord, or otherwise.

112. Firstly, as regards the duration of the tenancy, even if the deceased's predecessor in title was the grantee of the non-renewable 1836 lease for lives, that lease has on any view of human biology long since expired and thereafter the tenancy was treated as annual.

113. Secondly, this is consistent with there being no lease in writing on the balance of probabilities. Certainly no such lease is mentioned in the various assignments of the tenancy which strongly implies that there was no such written lease in circumstances where there is

no probative evidence whatsoever to suggest overholding took place on foot of the 1836 instrument *simpliciter*.

114. Thirdly, as regards the accrual of the right of action, it should be noted that while s. 17(2)(b) is phrased in terms that "the right of action shall be deemed to have accrued on the date of the last receipt of rent or other periodic payment", the "receipt" of the rent in this sense means receipt by the expiry of the period for which rent was paid, or if you want to put it another way, fully and irrecoverably received by the expiry of that period. Only at that point does the purpose of the payment fully come to fruition, the consideration stand fully provided and the rent itself become irrevocably received in the fullest sense.

115. The alternative argument would mean that time begins to run against every landlord in the State in any parol tenancy every time rent is actually paid in the normal performance of the contract of tenancy and without any default either then or possibly ever. That would be an unlikely result. One could push it to absurd conclusions - suppose one had a renewable verbal tenancy for 13 years, where rent was to be paid in full in advance every 13 years. Before the first term of the tenancy had expired, the tenant could assert a right to the freehold.

116. Admittedly Hogan J. in *Dooley v. Flaherty* [2014] IEHC 528 (Unreported, High Court, 18th November, 2014), worked off the date of actual payment, but the point wasn't argued and wouldn't have made any difference in that case. On the other hand, at para. 40, Hogan J. said that "time would have been running in [the tenant's] favour from the point he ceased paying rent", which is the crucial point and with which I entirely agree. The tenant stops paying rent on the day his rent payment is due and is not provided. It is only at that point (and not on the earlier date when he paid for the period thus just expired) at which time runs.

117. Such an approach of looking at the effective date rather than the date of the act itself is consistent, by analogy, with the view of Meenan J. in *Byrne v. Dublin County*

Council [2018] IEHC 597 (Unreported, High Court, 22nd March, 2018), para. 27 that time ran from the expiry of a notice to quit rather than its service.

118. The key document here is really the 1990 memorial which indicates that as of that date, the last rent paid by the deceased was in 1975. The gale days were in May and November, so assuming that the period for which the last rent payment was made expired in 1976 at the latest, then a twelve-year period running from that date would have expired in 1988. That is before the superior interest was ostensibly acquired by Mr. Neylon.

119. Fourthly, as regards actual possession, while it's true that the deceased did sub-let the property and then left for England, he was in receipt of such rents and profits if any as were attached to the lands. Sub-letting the property is perfectly consistent with maintaining possession of it for the purposes of ongoing adverse possession. He did leave furniture and other items in the house at all times.

120. Fifthly, as regards *animus possidendi*, in some circumstances that may be inferred from merely ceasing to pay rent, but here the deceased did more than simply stop paying rent. He also regarded himself and to an extent held himself out as the freeholder. As noted above he was recorded in valuation records as holding the land in fee, and he repeatedly asserted to be the freeholder in his correspondence with the council.

121. And sixthly, there is no evidence of any claim or demand, interruption or act of possession by any party claiming to be the holder of the superior interest.

122. On the evidence before this court, I am of the view that on the balance of probabilities the deceased met the criteria to establish *animus possidendi* and acquisition of the freehold reversionary title by adverse possession and, therefore, should be treated as having the title of the freeholder for the purposes of compensation. Accordingly, in my view, the appellant is, on the basis of the totality of the evidence adduced and arguments advanced in the course of this appeal, entitled to an order for payment out of the entire sum lodged.

Alternative scenario I - yearly tenancy with a possible right to buy out the freehold

123. Assuming *arguendo* that I am wrong about the foregoing, I will deal with the alternative scenarios that arise if the deceased should be treated just as a leaseholder.

124. The first scenario is to ask whether the deceased had a right to enlarge the interest to a freehold interest and if so whether that putative right should have been factored in to the compensation. The High Court considered that question and answered negatively.

125. The second scenario, which I will come to later in this judgment, is to look at the situation if such a right should not be factored in.

126. Coming then to the first question addressed in the High Court, the starting point must be that the natural right to private property recognised in Article 43 of the Constitution requires that a dispossessed owner should receive no more and no less than the total loss which he or she sustains as a result of any compulsory acquisition (see the judgment of the Supreme Court in *Dublin Corporation v. Underwood* [1997] 1 I.R. 69). The right underlying that principle has since been reinforced by the incorporation of art. 1 of protocol 1 of the ECHR by the European Convention on Human Rights Act 2003 (see for example *Sporrong and Lönnroth v. Sweden*, Application Nos. 7151/75 and 7152/25 (European Court of Human Rights, 23rd September, 1982), *Skibińsca v. Poland*, Application No. 52589/99 (European Court of Human Rights, 14th November, 2006)).

127. In the present case, the High Court approached the question of the quantum of compensation for the compulsory acquisition of a leasehold interest by declining to factor in the appellant's claim to have an entitlement to buy out the freehold. That was for two reasons: that such an approach was precluded by the possibility (as opposed to the probability), that the enlargement claim might be defeated (even though the freeholder had not made any claim for compensation); and by the failure of the original plaintiff to actually exercise the right to enlarge his interest in advance of the compulsory acquisition by service

of the statutory notice (despite the submission that such non-exercise would not prevent that entitlement from being reflected in the market value of his interest). The net result was that the appellant was awarded a sum significantly less than that value that would have been awarded had the statutory right to enlarge the leasehold interest been held applicable and factored in.

128. The trial judge was, in fairness to her, quite right when she made the point that in some cases what might seem at first sight to be a right to enlarge can be defeated by various factors particularly proof that the buildings on the land were erected by the holder of the superior interest (see s. 15(1)(e) of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978). However, the mere hypothetical *possibility* of an interest being defeated in certain circumstances is not enough to justify disregarding it. The standard of proof is the balance of probabilities. That is true across the board in the civil law context: see for example the one of the most-followed asylum law decisions on the standard of proof, that of O'Regan J. in *O.N. v. Refugee Appeals Tribunal* [2017] IEHC 13 (Unreported, High Court, 17th January, 2017), applied by O'Regan J. in *M.G. v. Refugee Appeals Tribunal* [2017] IEHC 94 (Unreported, High Court, 21st February, 2017) and followed by Keane J. in *W.H. v. The International Protection Tribunal* [2019] IEHC 297 (Unreported, High Court, 9th May, 2019) and *N.N. v. Minister for Justice and Equality* [2017] IEHC 99 (Unreported, 15th February, 2017), and by me in *M.E.O. (Nigeria) v. The International Protection Appeals Tribunal; U.O. (Nigeria) v. The International Protection Appeals Tribunal* [2018] IEHC 782, [2018] 12 JIC 0714 (Unreported, High Court, 7th December, 2018), *M.E.O. (Nigeria) v. The International Protection Appeals Tribunal; U.O. (Nigeria) v. The International Protection Appeals Tribunal (No .2)* [2019] IEHC 146, [2019] 2 JIC 2512 (Unreported, High Court, 25th February, 2019) and *M.S. (Bangladesh) v. International Protection Appeals Tribunal* [2019] IEHC 786, [2019] 11 JIC 1208 (Unreported, High Court, 12th November, 2019). At para. 15

of *M.E.O. (No. 1)* I said that "it is not up to the court to make up the burden of proof as it goes along. That is a matter of general overarching law." At para. 5 of *M.S. (Bangladesh)* I also commented that "[m]ore or less anything could 'possibly be true'".

129. Unfortunately, I think that while the judge's intimate knowledge of the legislation here threw up various possibilities of problems that might befall an enlargement application, those problems, whether taken individually or together, don't reach the threshold of a *probability* that the application would fail, but only a *possibility*.

130. Section 15(1)(e) of the 1978 Act itself provides that it shall be presumed until the contrary is proved that the permanent buildings were not erected by the owner of the superior interest, and the contrary certainly wasn't proved. So that the mere possibility that a superior rights holder might have come into the equation and argued the matter isn't really the point.

131. Equally off the point, unfortunately, is the trial judge's view that it was disqualifying that the deceased hadn't in fact exercised this statutory right before the vesting date despite having a notice of the pending compulsory acquisition and despite failing to explain why he did not buy out the freehold. Even assuming *arguendo* that the deceased had plenty of time to buy out the freehold and failed to do so without any rational explanation whatsoever, that doesn't matter because it doesn't go to the issue. The issue is what the market value of his interest was on the vesting date. Only by compensating the appellant for that market value can the process be deemed to comply with the appellant's constitutional right to private property and her ECHR right to her possessions. Clearly that market value would have been influenced by the possibility of enlarging the interest if there was such a possibility.

132. That said, I am not taking from the validity of the points made by the trial judge in the sense that firstly, it is certainly true that the deceased didn't exercise the statutory right prior to vesting; secondly, it is also true that he had a certain amount of notice of the process; and thirdly, it is also valid to observe that had he attempted to buy out that interest and notify the

freeholder (on the assumption that there was a freeholder to notify), there might have been counter-arguments put up. Without in any way disputing those propositions as reasonable statements, they don't provide a basis for the approach actually adopted which was to disregard the statutory right to buy out the freehold. Essentially, those points just don't matter. The question is what, on the balance of probabilities, was the value of the deceased's interest on the vesting day.

133. As regards whether the criteria to buy out the freehold were met, it seems to me on the particular facts here and applying the standard of proof of the balance of probabilities, it is more likely than not that the deceased would have been able to successfully exercise the right to buy out the freehold assuming as stated above that he was not to be treated as the freeholder anyway. The only major argument put up against that was that by sub-letting the property and going to England the deceased broke his possession, but I would reject that on the same basis as I rejected it for the purposes of the adverse possession argument. A tenant remains in legal possession even if sub-letting or absent unless he can be said to have abandoned the property or where his beneficial ownership and right to occupation and possession is otherwise displaced which is not the case here.

134. It was agreed by the parties that if the right to buy out the freehold was to be factored in, it should be valued as if it fell within s. 7(4) of the Landlord and Tenant (Amendment) Act 1984 and thus, the appropriate compensation would be seven-eighths of the money lodged. As the parties didn't make an issue of that point I don't think I need to consider whether s. 7(5) of the 1984 Act would have applied.

Alternative scenario II - entitlement to new lease only

135. Assuming *arguendo* that I am wrong about all of the foregoing, I should consider the position on the basis of the stance taken by the trial judge, that is on the assumption that the deceased had only a right to a new lease under Part II of the Landlord and Tenant

(Amendment) Act 1980. As noted above, the trial judge valued the deceased's interest on that hypothesis as being worth €50,000 and in the course of doing so acted without evidence and also having refused an adjournment to permit evidence. Those two aspects raise related, but quite distinct, questions.

136. As regards the refusal of the adjournment, I do have every sympathy for the trial judge in seeking to deal with the matter efficiently. Too often in our system, efficiency is given far too low a value as against super-elaborate procedures for the most Rolls-Royce standard of academically perfect legal due process.

137. The system overall would probably benefit from some modest recalibration to give greater weight to the needs of efficiency, because that impacts in a hidden way downstream on other litigants who essentially have to pay the price of delay caused by over-elaborate procedures in any individual case. That being said, however, efficiency is not an end in itself, but ultimately must be in the service of justice. Other procedural requirements must be viewed from the same light. To that extent, it respectfully seems to me that for example Hedigan J. was mistaken in referring in the judicial review context to "the overarching requirement of promptness" (*Fleury v. Minister for Agriculture, Food and Rural Development* [2012] IEHC 543 (Unreported, High Court, 12th December, 2012), para. 2(7)). Promptness, efficiency and such like are not the overarching requirements. Rather, justice is.

138. Modest and all as the adjournment application procedure is, the interests of justice do come in to the analysis very strongly. Among the major factors to be considered are:

(i). whether the party seeking the adjournment has already had adequate previous opportunities to deal with the matter and in particular had the benefit of previous adjournments;

(ii). the lateness of any step sought to be taken by a party;

(iii). the possibility of the adjournment being tactical;

(iv). the extent of real prejudice to the other side;

(v). the views and position of the other side more generally;

(vi). the amount of time that had been allocated to the matter and the extent if any of disruption to the orderly conduct of business by the court;

(vii). the extent of dislocation and inconvenience to other litigants by time of the court being unnecessarily absorbed - in that regard there is a huge difference between a case that will take one or more days or even a substantial portion of a day and a short matter listed on a Monday; and

(viii). all other relevant circumstances.

139. Like many things, adjournment applications lie on a spectrum, from the abusive, tactical or disruptive to the modest and non-prejudicial. At one end of the spectrum, in *Kavanagh v. McLaughlin* [2015] IESC 27, [2015] 3 I.R. 555, Clarke J. noted that "on the morning of the appeal when the Court assembled, counsel (who had not previously been instructed in the case) appeared on behalf of the McLaughlins and indicated that he felt in some difficulty, by reason of the lateness of his instructions in the case, in being able to adequately present his clients' case" (para. 6). The court rejected the suggestion that the matter should be adjourned. The key reason for doing so was articulated by Clarke J. as being that, "[w]hile a party is more than free to change its legal representation, it cannot do so in circumstances which affect the run of the case or, at least, cannot do so without taking a significant risk that the court will not be sympathetic to an adjournment where that course of action would sufficiently affect the orderly conduct of the court's business (to the detriment of other litigants) and might also prejudice the interests of other parties to the case" (para. 7).

140. Viewing the matter here in the light of the foregoing considerations, the position is as follows:

(i). The appellant does not have any kind of history or track record of previous adjournments, whether tactical or otherwise.

(ii). The various matters on which adjournments were sought and refused were ones that emanated without warning or notice from the court itself and not from the other side.

(iii). Accordingly it would have been entirely reasonable and proper for the parties to have expected the court to have allowed time to deal with them.

(iv). An adjournment would not have caused a significant problem for the council. As counsel for the appellant put it in oral submissions, "it would have been to no one's disadvantage if the matter had gone back."

(v). No such objection was articulated on behalf of the council.

(vi). Indeed their views were not even sought by the trial judge when she summarily rejected both adjournment applications.

(vii). As regards impact on other litigants, this would have been minimal to non-existent given that this item was only one of at least 28 matters in a lengthy Monday list. Consequently, there was no question of losing a court day, for example, in adjourning it.

(viii). It is notable that the trial judge gave no reasons at all for refusing an adjournment to seek a valuation report.

(ix). Her only reason for refusing the first adjournment application in relation to evidence of rent and possible advertising was that she had, "embarked on it to this extent". I do have every sympathy for the trial judge under that heading. Some people can pick up a matter again after an interval of time and almost photographically take it up exactly where they left off. Other people have to gently limber up and gradually get going the hard-won momentum so

> frustratingly lost by the adjournment. I am certainly one of the latter, so I totally understand that it can be highly inconvenient for the court (assuming one amongst the second type) to have a matter adjourned. But one cannot be unduly influenced by one's own convenience in that regard. As I say, the overriding consideration is that of justice.

141. In the light of these considerations, the jurisdiction to adjourn could only have properly been exercised one way. The interests of justice were overwhelmingly in favour of an adjournment. Accordingly, the adjournment application must be regarded as having been dealt with on the wrong legal basis. This is not a case of a discretionary decision to which we should show deference. One can only pay tribute to the notable equanimity and stoicism of junior counsel as appears from the transcript in her having to absorb such a situation.

142. Turning then to the quantification of compensation, I also have some sympathy for the trial judge. It is not the case that everything a court does has to be backed up by evidence to the nth degree, and there is room in the system for common sense, experience and educated estimation. As Kearns P. said in *Taaffe v. McMahon* [2011] IEHC 408 (Unreported, High Court, 28th October, 2011), in the context of the jurisdiction to measure costs: "there are many simple and uncomplicated cases which lend themselves to easy assessment of costs in terms of work done, time taken and effort expended. The kind of case under consideration here falls very much into that category. If the trial judge feels that he is capable of making an educated estimate of what is fair on a measurement of costs, why should he not proceed to measure a sum for costs if the alternative is a lengthy, protracted and costly taxation?"

143. That was however a relatively straightforward case. In *Landers v. Dixon* [2015] IECA 155, [2015] 1 I.R. 707, Hogan J. for this court reversed a decision of Barrett J. measuring costs which "could not, accordingly, be said to represent the type of simple and straightforward case which Kearns P. had in mind in *Taaffe*. Nor did the trial judge have

available to him the material which would have enabled him to make the appropriate assessment of the appropriate gross sum in the manner which he did" (para. 19). He went on to say at para. 20 that "[a]t a minimum, Barrett J. should first have indicated his inclination to deal with costs by measuring them himself. He should then have afforded the parties, but particularly the party who would most likely be adversely affected by his intended departure from the normal order, (i.e. an order that costs follow the event and that the same be taxed in default of agreement), an opportunity to make brief submissions and place before the court any material relevant to the exercise of his discretion."

144. Applying that approach by analogy, the trial judge in the present case certainly complied with the first limb of that test. As stated above, I don't think she can be said to have satisfied the second limb, namely to give the parties an appropriate opportunity to introduce relevant material. But if she had done that, nothing has been put before this court to suggest that her figure, which she modestly called a "guesstimate", wasn't in fact a reasonable one. If for example the parties had said they didn't want to introduce valuations, I wouldn't see any huge problem with the trial judge bringing her considerable experience of this area to bear on coming up with an educated assessment of the likely value of the interest (on the assumptions concerned). An assessment drawn from one's educated experience is not the same thing as just plucking a figure out of the air, although it's all too easy to portray it as such.

Proposed order

145. Before concluding I should emphasise in fairness to the trial judge that the outcome is not simply a question of proposing a different order from the one made below. In this appeal, the court has already granted a motion to adduce additional evidence, and now has been given highly pertinent material that was not in evidence in the High Court. On the basis of that new

material, a new submission seeking the full interest was advanced, which I propose that the court should accept, but which was not in fact made in the court below.

146. For the reasons set out above, the order I propose is:

(i). that the appeal be allowed and the order under s. 78 of the Lands Clauses Consolidation Act 1845 made by the High Court be set aside; and

(ii). that, in lieu of that order, there be an order under s. 78 of the Lands Clauses Consolidation Act 1845 for a payment out to the appellant of the monies currently representing the full sum of €165,000 lodged by the respondent under s. 76 of the 1845 Act, allowing for any interest and charges.

Proposed provisional order as to costs

147. Section 19(5) of the Derelict Sites Act 1990 provides: "Where money is paid into Court under section 69 of the Lands Clauses Consolidation Act, 1845, as applied by this section, by the local authority, no costs shall be payable by that authority to any person in respect of any proceedings for the investment, payment of income, or payment of capital of such money."

148. Having regard to that provision, the order as to costs that I would provisionally propose is as follows:

(i). in the light of s. 19(5), the appellant has conceded in the course of the hearing of this appeal that there is to be no order for costs against the respondent council, so I would propose no order as to costs in this court including no order as to any reserved costs;

(ii). similarly there should be no order as to costs including any reserved costs in the High Court, in lieu of any order of the High Court making provision otherwise in relation to costs; and

(iii). since the appellant brought the action and pursued this appeal in her capacity as Legal Personal Representative of the deceased tenant, and since doing so was necessitated in the due administration of his estate, I would propose that the court declare for clarity that the costs of the appellant in the High Court and in this court are recoverable out of the deceased's estate on a solicitor and client basis.

149. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within 14 days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the requesting party may be liable for the additional costs of such hearing. In default of receipt of such application, I would propose that an order in the terms outlined above be made.

Views of other members of the court

150. In circumstances where this judgment is being delivered electronically, Whelan and Pilkington JJ. have authorised me to record their agreement with it.