

THE HIGH COURT

[2021] IEHC 690

[2021/121SP]

BETWEEN

IRISH CATTLE BREEDING FEDERATION LIMITED

PLAINTIFF

AND

VESPOLINA LIMITED

DEFENDANT

JUDGMENT OF Mr. Justice Twomey delivered on the 3rd day of November, 2021

SUMMARY

1. This is a case in which the plaintiff, Irish Cattle Breeding Federation Limited ("ICBF") entered an agreement to lease the upper floor of a property known as the Supernova building, in Ballincolling, County Cork for a period of 15 years. The property comprises part of the freehold of folio 110664F County Cork (the "Property"). This agreement was with the defendant, Vespolina Limited ("Vespolina"), which is the owner of the Property. However, ICBF claims that, as a result of a profit share agreement (the "Participation Agreement") between Paul Montgomery ("Mr. Montgomery") and Vespolina, Mr. Montgomery has an option to purchase the freehold in the Property or, failing that, a right of first refusal (i.e. a pre-emption right) on the sale of the freehold in the Property.
2. ICBF has sought the opinion of this Court as to whether the alleged option granted to Mr. Montgomery affects Vespolina's title to grant the lease to ICBF. This matter was heard by the Commercial Court because, *inter alia*, the annual rent on the building is €360,000 plus VAT plus service charge and as ICBF has spent approximately €800,000 on fitting out the Property, the total value of the dispute exceeds €1 million.
3. This Court concludes that the rights granted to Mr. Montgomery do not constitute an option on the part of Mr. Montgomery to purchase the Property and therefore his rights do not affect Vespolina's title to grant a lease.
4. This Court also concludes that the rights granted to Mr. Montgomery under the Participation Agreement amount to a pre-emption right (or right of first refusal) regarding the future sale of the freehold, which is not an equitable interest in the Property and as such it does not affect the entitlement of Vespolina, as the freeholder, to grant a leasehold interest out of the Property to ICBF.

BACKGROUND

5. This case arises from a Special Summons, issued by ICBF relating to an Agreement for Lease ("AFL") entered into by ICBF as tenant/grantee and Vespolina as landlord/grantor, on 6th December, 2019, and a separate Participation Agreement dated 18th August, 2018 between Vespolina and a third party, Mr. Montgomery, and the subsequent effect (if any) that this Participation Agreement has on the proposed lease between ICBF and Vespolina.
6. The Special Summons was issued pursuant to s. 55 Land and Conveyancing Law Reform Act 2009 which states:

“55.— (1) Any party to a contract for the sale or other disposition of land may apply to the court in a summary manner for an order determining a question relating to the contract.

(2) On such an application the court may make such order, including an order as to costs, as it thinks fit.

(3) A question in respect of which an application may be made under subsection (1) includes a question relating to any requisition, objection, claim for compensation or other question arising out of or connected with the contract, but does not include a question affecting the existence or validity of the contract.”

7. The Special Summons seeks the determination of this Court on the following questions:

(i) Does the option granted to Paul Montgomery by the Participation Agreement of the 18th of August 2018 affect the Defendant’s title in the Property to grant the Lease provided for in the Agreement for Lease to the Plaintiff?

(ii) Has the requisition relating to the option and inhibition raised by the Plaintiff been properly answered by the Defendant?

(iii) Has the Defendant as landlord/grantor established good and marketable title to grant the Lease out of the Property in accordance with the Agreement for Lease?

(iv) Is the Defendant required to obtain the consent of the option holder Paul Montgomery to the grant of the lease out of the Property to the Plaintiff?

(v) Or in the alternative to question 4, is the defendant required to otherwise secure the removal of the inhibition (pending) lodged by Paul Montgomery before completion?

(vi) Has the Defendant adequately explained the inhibition lodged by Paul Montgomery with the Property Registration Authority for registration on Folio 110664F County Cork being an act appearing on searches completed by the Plaintiff?

8. The lease for the Property detailed in the AFL (the “Lease”) was executed in May 2021 by ICBF and is awaiting completion on the part of Vespolina.

9. After the AFL had been entered into, ICBF carried out searches on the Property in May 2020 and became aware of an inhibition pending with the Property Registration Authority in relation to the Property that formed part of the subject matter of the Lease, lodged by Mr. Montgomery. This inhibition was lodged on foot of the Participation Agreement, entered into between Mr. Montgomery and Vespolina in August 2018.

10. The Participation Agreement was not disclosed to ICBF by Vespolina when it entered into the AFL.

11. ICBF, on becoming aware of the Participation Agreement in May 2020, communicated their concerns to Vespolina that the Participation Agreement between Vespolina and Mr. Montgomery affected ICBF's position under the AFL. In particular, ICBF was concerned as to whether Vespolina had good and marketable title to grant the Lease, considering the prior execution by Vespolina of the Participation Agreement with Mr. Montgomery. ICBF claimed that Clause 5 g. of the Participation Agreement (set out below) resulted in Mr. Montgomery having an option to purchase the Property, and thus impacted on the title of Vespolina to grant the Lease.
12. The correspondence between the parties also indicated that ICBF had concerns as to whether the consent of Mr. Montgomery needed to be obtained before the Lease was granted, or whether the inhibition application made by Mr. Montgomery (arising from his rights under the Participation Agreement), which was pending in the Property Registration Authority, had to be removed before the Lease could be granted.
13. Vespolina has denied that the Participation Agreement affects their ability, as the owner of the freehold in the Property, to grant the Lease out of that freehold to ICBF.

ANALYSIS

14. Although there are six questions for this Court to answer, almost everything turns on the first question, namely whether the Participation Agreement, between Vespolina and Mr. Montgomery, affects Vespolina's title in the Property to grant the Lease.

Absence of Mr. Montgomery from these proceedings

15. Vespolina claim that ICBF made no attempt to join Mr. Montgomery to these proceedings, and that as ICBF is the plaintiff, it was for ICBF to seek to join Mr. Montgomery, if it felt that his participation in the proceedings was necessary or relevant.
16. However, ICBF has claimed that as Vespolina is party to the Participation Agreement with Mr. Montgomery, it was for Vespolina to seek to join Mr. Montgomery to the proceedings.
17. Of course, whether ICBF or Vespolina had sought to join Mr. Montgomery, this does not mean that Mr. Montgomery would have participated in these proceedings at all, or in any meaningful way, in which case this Court would be left answering the questions posed by ICBF, without any input from Mr. Montgomery, which is the current position.
18. Against this background, it is relevant to note that in its written submissions, ICBF has claimed that:

"this Court cannot *determine* (in the absence of [Mr. Montgomery]) whether he holds an Option or a mere pre-emption right." (Emphasis in the original)

19. However, despite making this submission, it is clear that ICBF nonetheless requires this Court to answer the questions posed and in particular, Question One, which asks the Court to make a determination on the effect of the Participation Agreement. In particular, ICBF is asking this Court, notwithstanding its submission that the Court cannot *determine* the effect of the Participation Agreement, to decide that its effect is such as to affect

Vespolina's title in the Property to grant the Lease, such that the consent of Mr. Montgomery is required to the grant of the Lease.

20. The only way in which this stance adopted by ICBF can, in his Court's view, be understood is that ICBF wishes this court to take a view on the meaning of the Participation Agreement, sufficient to enable this Court to decide whether Vespolina's title in the Property to grant the Lease is affected, *albeit* that this would not be a determinative view of the meaning of the Participation Agreement, *vis-à-vis* Mr. Montgomery, since he is not a party to these proceedings.
21. This conclusion is consistent with ICBF's emphasis on the word 'determine' in its legal submissions, since it appears to be saying that while the Court can take a view on the meaning of the Participation Agreement at this stage (in order to decide if at this juncture Vespolina can grant the Lease), it cannot determine definitively the meaning of the Participation Agreement without any input from Mr. Montgomery
22. Accordingly, and bearing in mind that ICBF knew in making this application before this Court that Mr. Montgomery was not party to these proceedings, and one must assume that ICBF did not issue these court proceedings in vain or with a view to wasting court time, this Court will answer the question posed by ICBF on the basis that this Court's view regarding the effect of the Participation Agreement is being sought in order to answer the questions posed by ICBF and it is not intended to be determinative as regards the rights between Mr. Montgomery and Vespolina *inter se*.

Effect of the Participation Agreement

23. It is common case that if Mr. Montgomery has been granted an option to acquire the Property under the terms of the Participation Agreement, rather than a pre-emption right on the sale by Vespolina of the Property, this will affect Vespolina's title in the Property to grant the Lease.
24. This is because an option gives rise to an equitable interest in land, while a pre-emption right does not. In this regard, both parties referred to the leading case on the differences between options and pre-emption rights, the case of *Pritchard v. Briggs* [1980] Ch. 388.

An option v a pre-emption right

25. In *Pritchard v. Briggs*, Templeman J. stated at para. 418:

"Rights of option and rights of pre-emption share one feature in common; each prescribes circumstances in which the relationship between the owner of the property which is the subject of the right and the holder of the right will become the relationship of vendor and purchaser. *In the case of an option, the evolution of the relationship of vendor and purchaser may depend on the fulfilment of certain specified conditions and will depend on the volition of the option holder.* If the option applies to land, the grant of the option creates a contingent equitable interest which, if registered as an estate contract, is binding on successors in title of the grantor and takes priority from the date of its registration. *In the case of a right of pre-emption, the evolution of the relationship of vendor and purchaser*

depends on the grantor, of his own volition, choosing to fulfil certain specified conditions and thus converting the pre-emption into an option. The grant of the right of pre-emption creates a *mere spes* which the grantor of the right may either frustrate by choosing not to fulfil the necessary conditions or may convert into an option and thus into equitable interest by fulfilling the conditions. An equitable interest thus created is protected by prior registration of the right of pre-emption as an estate contract but takes its priority from the date when the right of pre-emption becomes exercisable and the right is converted into an option and the equitable interest is then created. The holder of a right of pre-emption is in much the same position as a beneficiary under a will of a testator who is still alive, save that the holder of the right of pre-emption must hope for some future positive action by the grantor which will elevate his hope into an interest." (Emphasis added)

26. No cases contradicting this analysis were opened to the Court, albeit that ICBF point out that some legal commentators have criticised the decision insofar as it provides that a pre-emption right, unlike an option, does not give rise to an interest in land/equitable interest, see Daly and Rosenthal, *Barnsley's Land Options* (6th edn, Sweet and Maxwell 2016) at paras. 6.014 and 6.015.
27. Against this background of the difference between an option and a pre-emption right, ICBF's key claim in these proceedings is that the Participation Agreement created a

"prior option and equitable interest... for the benefit of [Mr. Montgomery] such that his prior consent to the granting of the Lease is required as a matter of title to be obtained by [Vespolina] in accordance with their completion obligations." (from para. 26 of grounding affidavit of Mr. Michael Doran, director of ICBF)
28. Thus, the first question to be addressed is whether the Participation Agreement grants Mr. Montgomery an option to purchase the Property, and thus an equitable interest, or merely a pre-emption right (in the event of the sale of the Property).
29. As is clear from *Pritchard v Briggs*, the key difference between an option and a pre-emption right is that with an option, the grantee of the right has, of his own volition, the right to buy the property. In contrast, with a pre-emption right, the grantee of the right, cannot of his own volition buy the property, but must wait to see if the relevant pre-condition, or trigger event, is satisfied (such as the grantor agreeing a price to sell the property, which then gives the grantee the right of first refusal on the sale of the property).

Does Mr. Montgomery have an option or a pre-emption right?

30. Accordingly, in this case, one must consider whether Mr. Montgomery can force the sale to him of the Property (an option) or whether it is only in the event of Vespolina deciding to sell the Property that Mr. Montgomery will be able to acquire the Property (a pre-emption right).

31. The rights granted to Mr. Montgomery to acquire the Property are set out in Clause 5 of the Participation Agreement. However, before considering the terms of that clause in detail, it is necessary to consider the other relevant terms of the Participation Agreement and the background to its execution.

Background to execution of Participation Agreement

32. The background to the execution of the Participation Agreement is provided on affidavit by Mr. John Buckley, who is a director of Vespolina. He states that originally Vespolina was owned in its entirety by Mr. Montgomery and he was the sole director of that company. He also avers that in that capacity, Mr. Montgomery came across the Property but could not finance its purchase. Accordingly, Mr. Montgomery reached agreement with Mr. Buckley, who acts on behalf of several investors, that the entire shareholding in Vespolina would be transferred to Mr. Buckley to be held on trust for those investors.
33. As a result of this transfer, and the investment thereby provided by those investors, Vespolina had the necessary finance to acquire the freehold in the Property, which it duly did. Mr. Buckley states that Mr. Montgomery never had any interest in the freehold in the Property and that a profit share agreement i.e. the Participation Agreement, was reached with him, in the event of the future sale of the Property by Vespolina, in recognition of the fact that it was Mr. Montgomery who sourced the Property.
34. The terms of the Participation Agreement appear consistent with this background provided by Mr. Buckley on affidavit, since firstly Recital A of the Participation Agreement provides that Mr. Montgomery did "*arrange for the acquisition the Property [..][by [Vespolina]*".
35. Secondly, pursuant to Clause 4 c. Mr. Montgomery undertakes to provide a surrender of the leasehold held by his company (Westport Point Sport & Leisure Ltd) over part of the Property, in the event that Vespolina requires vacant possession in order to sell the Property.

Mr. Montgomery confirms that Vespolina has good and marketable title to the Property

36. Significantly however, in the context of the key issue in these proceedings (of whether the Participation Agreement grants Mr. Montgomery rights which affect Vespolina's title to the Property to grant the Lease), Clause 3 provides that:
- "Prior to the release of funds to the new company the following documentation shall be furnished [...]
- (iii) *Confirmation from O'Flynn Exhams that the property has good marketable title, and post-completion of the purchase the title shall be vested in the company.*"
(Emphasis added)
37. From the perspective of this Court taking a view on the effect of the Participation Agreement, this is a significant clause. This is because it is expressly stated that Mr. Montgomery will (through his solicitors, *O'Flynn Exhams*) confirm that the Property has

good and marketable title, which is vested in the 'company', which defendant's counsel claimed (and which was not controverted by ICBF) refers to Vespolina.

38. Thus, on the one hand, ICBF is claiming in these proceedings that Vespolina does not have *good and marketable title* to the Property (such as to grant the Lease) by virtue of Mr. Montgomery's rights to the Property under the Participation Agreement, yet on the other hand, by its express terms, that same Participation Agreement requires Mr. Montgomery to confirm that Vespolina *has good and marketable title*.
39. This Clause 3 therefore favours Vespolina's interpretation of the Participation Agreement (that the Participation Agreement has no effect on the granting of the Lease), rather than ICBF's contention about the meaning of the Participation Agreement.

No express right reserved to Mr. Montgomery to veto grant of a lease

40. It is also relevant to observe that whatever rights are expressly reserved to Mr. Montgomery regarding the sale of the Property and his share of the profits therefrom (considered in detail below), Mr. Montgomery has not had reserved to him any express right regarding the grant of any leases over the property by the freeholder, Vespolina. In this context, it is relevant to note that the existence of any lease over the Property, and the negative effect that it could have on the freeholder's rights, was clearly in the minds of Mr. Montgomery and Vespolina, since there is a specific reference to a lease in the Participation Agreement.
41. However, this reference is not to a right to grant a future lease of the Property by Vespolina (to ICBF or any other party), which ICBF claim is compromised by the Participation Agreement. Rather the only reference to a lease (and the negative effect a lease might have on the freeholder's rights) is to the pre-existing lease of part of the Property to Mr. Montgomery's company, and a reference to the fact that this might prevent a future sale of the freehold with vacant possession. This is because, as already noted, Clause 4 c. provides Vespolina with the right to force the surrender of that pre-existing lease.
42. Thus, although Mr. Montgomery may have been alive to the negative effect that a lease (such as the lease granted to his company) might have on the sale of the freehold (which he might be purchasing in future years under the option/pre-emption right in Clause 5), it is relevant to note that he is not granted in the Participation Agreement any express right to veto the grant of a lease. The only reference to a lease is, not *his right to veto a lease*, but rather his obligation to surrender his company's lease. In this Court's view, this militates against a finding that Mr. Montgomery's consent is required to a grant of a lease out of the freehold, as claimed by ICBF.
43. Indeed, it was not argued by ICBF, nor indeed in this Court's view would such an argument have been plausible, that a term should be implied into the Participation Agreement that Mr. Montgomery's consent is required to the grant of any lease out of the freehold of the Property.

44. This is because it is difficult to see how the right of Mr. Montgomery to acquire the freehold under Clause 5 (whether an option or a pre-emption right) could be said to require an implied term (requiring Mr. Montgomery's consent to a lease) in order to give the Participation Agreement business efficacy. As noted by the Court of Appeal in *Pagnell Ltd v. OCE Ireland* [2015] IECA 40 at para. 21 (per Hogan J.), for a term to be implied into an agreement, it must be required to give the agreement business efficacy. It seems clear, and indeed the contrary was not suggested by counsel for ICBF, that Mr. Montgomery's right to acquire the freehold is not lacking in business efficacy, in the absence of an implied term that he can veto any grant of a lease out of that freehold.

Clause 5 - profit-sharing and right of Mr. Montgomery to purchase the Property

45. The focus of the Participation Agreement is the sharing of a profit, between Mr. Montgomery and Vespolina, on the sale of the Property. This is set out in Clause 5 which states:

"In the event of a sale / disposal of the property the proceeds of sale will be discharged as follows:

- Full return of investors' money / full discharge of the loan (This will cover all funds advanced to purchase the property including all costs).
- All rent as set out above in paragraph 4.B.
- All surplus funds available after discharge of the costs as set out above will be calculated and split as follows;
- The surplus funds available shall be the net amount out of the sale of the property after deduction of to calculate the surplus funds available the following shall be deducted:

The above costs, and the costs below:

- All costs on purchase.
- All costs on sale.
- Security and other legal costs involved.
- Ongoing maintenance costs of the company (where appropriate).

The Split shall be as follows;

- The first million surplus after discharge of all these costs shall be split on a 50-50 basis in a tax efficient manner.
 - The balance of the surplus funds over €1 million shall be split on a 40/60 basis in a tax efficient manner. (40% in favour of [Vespolina])
- d. The parties hereby agree that the property will be placed on the market with Niall Cahalane auctioneer of Cahalane Skuse Auctioneers Cook St, Cork as soon as possible either after the purchase of the property is fully completed. It is the express intention of all parties that this property would be disposed of in full by the 20th day of December 2018.

- e. [Vespolina] hereby acknowledge that [Mr. Montgomery] has a right to 50 % of the net proceeds as set out above, and has a 50% interest in the surplus funds on the first million, and 60% thereafter. Any funds so accruing to him will be held in Trust and to his order pending distribution of same to him.
- f. The parties hereby agree that the Solicitors acting on the purchase shall be Conor Lupton of O'Flynn Exhams Solicitors 58 South Mall, Cork.
- g. In the event that the property is disposed on the open market, but either party is not satisfied with the sale price achieved on the open market, that party can within a period of 7 days from the date of achieving that sale terms from the Auctioneer to be appointed as per the Terms of Agreement, buy out the other party's interest on the following terms:
- If [Mr. Montgomery] wishes to accept the sale price, [Vespolina] will have an entitlement to purchase [Mr. Montgomery] interest by discharging the profit due to him as per the terms of this Agreement as calculated above in this clause 5 clause.
 - In the event that [Vespolina] wishes to accept the sale price, [Mr. Montgomery] will have an entitlement to purchase [Vespolina's] interest by discharging all costs of funding, costs of interest, all costs of purchase etc, and refinancing the property in full discharging all costs as set out in paragraph 5 above, and in addition discharging the profit due to [Vespolina] as per the terms this clause 5."

The commercial effect of this clause seems clear, namely to provide for a split between Mr. Montgomery and Vespolina, of any profit resulting from the sale of the Property (i.e. after discharge of all costs), initially on a 50-50 basis for the first €1 million and thereafter on a 60/40 basis in favour of Mr. Montgomery.

46. The Participation Agreement does however contemplate the possibility that either Mr. Montgomery (or Vespolina) might not be happy with the proposed sale price and thus the possibility that Mr. Montgomery might be entitled to acquire the Property from Vespolina, instead of selling it to a third party (or that Vespolina might be entitled to acquire Mr. Montgomery's interest).
47. It is in this context therefore that the question arises as to whether Mr. Montgomery has an option or a pre-emption right over the sale of the Property, which turns on whether Vespolina is, or is not, obliged to sell the Property to Mr. Montgomery, or to put it in the language of *Pritchard v. Briggs*, whether Mr. Montgomery can of his own volition acquire the Property, or does he depend on the volition of Vespolina?

Is Vespolina obliged to sell the Property?

48. Particular reliance is placed by ICBF on Clause 5 to support its view that Vespolina is obliged to sell the Property and therefore that Mr. Montgomery's rights consists of an option, rather than a pre-emption right.

49. However, it seems to this Court that the terms of Clause 5 do not support such an interpretation. In particular, it is to be noted that the clause opens with the expression "*[i]n the event of a sale*", which on any interpretation of this expression, clearly contemplates the other eventuality, namely the possibility that the Property might not be sold. This thus supports the conclusion that Vespolina is not obliged to sell the Property.
50. For its part, ICBF suggests that Clause 5 d. in particular amounts to an obligation to sell the Property, yet it seems clear to this Court that the obligation therein is simply to place the Property "*on the market*", which is not an obligation to sell the Property. It is also to be noted from the wording of Clause 5 d. that it is merely the "*intention*" of the parties that the Property would be disposed of in full by 20th December, 2018. Again, this militates against a finding that Vespolina is obliged to sell the property.
51. Indeed, this interpretation of Clause 5 d. is borne out by the affidavit of Mr. Buckley, which is not controverted by ICBF, since he states that the Property was put on the market and an offer was received in October 2018. Mr. Montgomery was initially enthusiastic about the offer, however he resiled from that position in July 2019 and the Property was ultimately not sold.
52. ICBF also rely upon the wording of Clause 5 g. to claim that Vespolina is obliged to sell the Property, such that the rights of Mr. Montgomery amount to an option rather than a pre-emption right. However, Clause 5 g. also begins with the words "*[i]n the event that the Property is disposed of*", thus once again indicating that there is a possibility that the Property would not be sold, and thus that there was no obligation upon Vespolina to sell the Property.
53. Then one must consider the two scenarios outlined in Clause 5 g. itself.
54. The first deals with a situation in which Mr. Montgomery is happy with the proposed sale price, but Vespolina is not, in which case Vespolina is entitled to purchase Mr. Montgomery's interest. Accordingly, it is of limited relevance to these proceedings, since one is dealing with the sale of Mr. Montgomery's interest to Vespolina, rather than the future purchase of the Property by Mr. Montgomery, which is the key issue in this case.
55. However, ICBF sought to emphasise the use of the term "*interest*" in the first scenario and thus suggested that this supported the view that Mr. Montgomery has an equitable interest in the Property, such as to require his consent to the grant of a lease out of the freehold of the Property. However, it is clear that this "*interest*" which Mr. Montgomery has, is not an interest in the Property. Rather this "*interest*" is clearly the financial entitlement of Mr. Montgomery to a share of the profits, if any, on a sale of the Property. This is clear because this interest is said to be purchased by the mere discharge by Vespolina of the profit due to Mr. Montgomery under Clause 5 g.
56. The second scenario under Clause 5 g. is the key one (since it deals with the purchase by Mr. Montgomery of the Property) and it arises where Vespolina is happy with the proposed sale price but Mr. Montgomery is not. In this situation, Mr. Montgomery is

entitled to purchase Vespolina's interest in the Property, which clearly is Vespolina's ownership interest in the Property (since under Clause 3(iii) Vespolina is acquiring good and marketable title to the Property).

57. To purchase this interest, Mr. Montgomery must discharge all the funding and other costs, as well as Vespolina's share of the profits (once account is taken of Mr. Montgomery's share of those profits). Particular reliance is placed by ICBF on this second scenario to support its claim that Mr. Montgomery has an option, rather than a pre-emption right, because at this stage, it is clear that Vespolina has to sell the Property to Mr. Montgomery.
58. However, as previously noted the key issue is whether the Participation Agreement obliges Vespolina to sell the Property or whether this right, on the part of Mr. Montgomery to buy the Property, arises of the volition of Vespolina.
59. Once again, it is relevant to note that the opening words of this bullet point are that "[i]n the event that [Vespolina] wishes to accept the sale price", thus indicating quite clearly that there is the possibility that Vespolina would exercise its right not to accept the sale price, in which case it is not obliged to sell the Property. It cannot therefore be said that the entitlement of Mr. Montgomery to purchase the Property under this second scenario arises of Mr. Montgomery's volition, since it only arises if, and only if, Vespolina choose to accept the sale price.

Conclusion regarding whether an option or pre-emption

60. When one considers all of the foregoing terms of the Participation Agreement, it seems clear to this Court that the rights of Mr. Montgomery under the Participation Agreement do not constitute an option, since they are predicated on the decision of Vespolina to sell the Property, which it is not obliged to do. It is for this reason, that this Court concludes, for the purposes of answering Question One put to it by ICBF in these proceedings, that the rights of Mr. Montgomery under the Participation Agreement constitute a pre-emption right (*albeit* that this Court is not making a definitive finding in the absence of evidence from Mr. Montgomery, but is only making a finding for the purposes of answering the question posed to it by ICBF).

Even if a pre-emption right, does that right affect Vespolina's title to grant the Lease?

61. However, this is not the end of the matter, as ICBF claim that even if Mr. Montgomery's rights are determined to amount to a pre-emption right, his pre-emption right under the Participation Agreement conflicts with ICBF's own pre-emption rights under the Lease. For this reason, ICBF claims any such pre-emption right nonetheless affects Vespolina's title in the Property to grant the Lease to ICBF.
62. In this regard, under the Lease, ICBF is granted a pre-emption right on the sale of the Property. Clause 6.9.1 of the Lease provides as follows:

"In the event of the Landlord at any time proposing to dispose of its interest in the Building or any part of it ("*the Property*") whether by way of sale of the freehold or any Superior Leasehold interest or otherwise, including a sale of shares or other

change in control in the Landlord, the Landlord must first offer to sell the Property to the Tenant for the purchase price offered by any potential purchaser or lessee and on such other terms and conditions as are no less favourable than those proposed by such potential purchaser or lessee (including without limitation timeframes, level of deposit, special conditions etc) ("*Offer Terms*") and must in this regard immediately upon receipt forward all detail of any such Offer Terms received by the Landlord to the Tenant together with any updated or altered details in respect of the Landlord's title to the property and any other further updated information as shall be required in accordance with prudent conveyancing standards. The Tenant shall in each case have 2 months from receiving notification in writing and all details of the Offer Terms and full details of the Landlord's title from the Landlord to elect to purchase the Property on the Offer Terms ("*Notice Period*")."

63. However, there is a carve out in relation to this pre-emption right contained in Clause 6.9.6 which provides that ICBF will not have a pre-emption right in respect of the following transactions involving the Property:

"Provided always that any transfer of ownership or change in control in the Landlord amongst the current shareholders and investors in the Landlord will not constitute a change of control or a trigger event for the purpose of this clause 6.9. On the execution of this Lease a list of the investor and shareholders in the Landlord (being not more than 10 in number) will be furnished to the Tenant clearly identifying:

- The current shareholders in the Landlord.
- The investors/participants in the Landlord who funded the purchase and development of the Buildings and conversion works."

64. Uncontroverted submissions were made regarding the background to this *pre-emption right* on the part of ICBF, namely that, while negotiating the Lease of the Property, ICBF was negotiating with Vespolina for an option to buy the Property. However, these negotiations were unsuccessful and instead the parties agreed on a pre-emption right whereby ICBF would have in effect a right of first refusal on the sale by Vespolina of the Property.
65. Clause 6.9.1 provides that if Vespolina proposes to dispose of its interest in the Property, including a sale of shares or other change in control in Vespolina, Vespolina must first offer to sell the Property to ICBF. However, the carveout in Clause 6.9.6 from this pre-emption right means Vespolina would not have to give a right of first refusal to ICBF in certain circumstances. Clause 6.9.6 provides that any transfer of ownership or change in control in Vespolina amongst the current shareholders and investors will not constitute a change of control or a trigger event for the purposes of Clause 6.9.1. For this purpose, a list of the investors and shareholders was to be provided to ICBF. Vespolina state that Mr. Montgomery is one of these investors/shareholders.

66. On this basis, Vespolina claims that in a situation in which Mr. Montgomery acquires control and ownership of the Property (pursuant to his pre-emption rights in the Participation Agreement), this does not in fact constitute a trigger event such as to give rise to pre-emption rights for ICBF under the Lease.
67. In this way, Vespolina argues that there is in fact no competition or conflict between the pre-emption rights of ICBF under the Lease on the one hand and the pre-emption rights of Mr. Montgomery under the Participation Agreement, on the other hand. In effect, Vespolina is claiming that ICBF's pre-emption right is subordinate to Mr. Montgomery's pre-emption right and that this was agreed by ICBF when it signed those terms in the Lease.
68. However, for its part, ICBF claims that all that Clause 6.9.6 is concerned with is a change of ownership in Vespolina or a change of control in Vespolina among the shareholders/investors in Vespolina as at the date of the Lease (and thus excludes, it says, Mr. Montgomery). In contrast, Vespolina claims that "any transfer of ownership" in the first line of Clause 6.9.6 refers to a change in ownership of the Property and not just in Vespolina.
69. ICBF relies on its interpretation of Clause 6.9.6 to say that the carve out does not relate to a transfer of the ownership *of the Property* from Vespolina to Mr. Montgomery, but rather a transfer of ownership *in Vespolina*. On this basis, ICBF claims that an offer of first refusal on the sale of the Property to Mr. Montgomery, if it were to occur, would be a breach of ICBF's right to be given first refusal on any future sale of the Property.
70. However, it is important in all of this not to lose sight of what this Special Summons is concerned with, namely whether Vespolina has sufficient title in the Property to grant the Lease.
71. Clearly, Vespolina would not have title to grant the Lease if Vespolina was not the registered owner of the freehold to the Property or indeed if the consent of Mr. Montgomery was expressly required to the grant of a Lease, neither of which is the case.
72. The question of whether Mr. Montgomery's pre-emption right trumps that of ICBF, if (and only if) there is a future sale of the Property, is not a matter that goes to the question of whether Vespolina can carve a leasehold interest out of the freehold (or indeed whether ICBF will get possession of the Property for the 15 years for which it has bargained).
73. It seems clear to this Court that irrespective of the meaning of 'any transfer of ownership' in Clause 6.9.6 and the alleged competing pre-emption rights on the sale of the freehold in the Property, Vespolina can grant a leasehold interest of 15 years carved out of that freehold to ICBF and that ICBF will be entitled to possession of the Property on that basis.
74. If during the course of that 15 year Lease, the freehold is put up for sale, this Court cannot see how this will affect ICBF's leasehold title at that stage, or its entitlement to occupy the Property. Therefore, this Court cannot see how these alleged competing pre-

emption rights over the future sale of the freehold in the Property affects Vespolina's title in the Property to grant the Lease.

75. If, at some future stage, it were to transpire that Vespolina is purporting to sell the Property to Mr. Montgomery, or has sold it to him, despite ICBF's alleged superior pre-emption right, then ICBF may decide to pursue a claim for damages against Vespolina, on the basis that it does not accept Vespolina's interpretation of Clause 6.9.6. (pursuant to which Vespolina alleges that ICBF's pre-emption right is subordinate to Mr. Montgomery's).
76. For all the foregoing reasons, this Court concludes that Mr. Montgomery's rights under the Participation Agreement amount to a pre-emption right, yet even if that pre-emption right conflicts with the pre-emption right of ICBF (which question this Court does not have to decide), this does not affect Vespolina's title in the Property to grant the Lease.
77. Finally in this regard, it is relevant to note that ICBF has instituted separate plenary proceedings in the High Court against Vespolina in which it claims damages in respect of, inter alia, the failure of Vespolina to disclose Mr. Montgomery's pre-emption right under the Participation Agreement prior to the execution by ICBF of the Lease (containing its pre-emption right). While not in any way determinative of this Court's conclusion, it is nonetheless relevant to note that in those proceedings ICBF expressly contemplates that this Court would not regard the alleged competing pre-emption rights as having any effect on the title of Vespolina to grant the Lease. This is because at para. 17 of the amended Statement of Claim dated 6 September, 2021, ICBF states:

"[...] if the Commercial Court determines that the said pending inhibition does not in fact affect [Vespolina's] title, the right granted to [Mr. Montgomery] in the Participation Agreement (be it an Option or as [Vespolina] asserts a right of Pre-Emption) nevertheless adversely affects and conflicts with the right of pre-emption granted to [ICBF] by [Vespolina] in the Agreement for Lease and draft Lease at Cause 6.9 therein."

78. In conclusion therefore, the answer to Question One is that Mr. Montgomery's rights under the Participation Agreement do not constitute an option, but a pre-emption right, and as such, even if they were held to compete with ICBF's pre-emption right, it does not impact upon Vespolina's title to grant the Lease.

Question Two

79. The second question is whether the requisition relating to the option and inhibition raised by ICBF has been properly answered by Vespolina?
80. Requisition 13.4 raised by ICBF on the 13th May, 2019 states:

"The purchaser will make appropriate searches to include but not limited to the Registry of Deeds, Land Registry, Judgements (High Court Register of Judgments and Incumbrancers affecting Real Estate), Bankruptcy, Register of EU Personal Insolvencies, Register of Debt Relief Notices, Register of Protective Certificates,

Register of Debt Settlement Arrangements, Register of Personal Insolvency Arrangements, Bills of Sale, Sheriff's Office, Revenue Sheriff's Office, Sheriff's/ Receiver of Fines Office, Companies Office, and Planning Office and any acts appearing on any such search must be explained and /or discharged (where applicable) by the Vendor prior to or on closing."

81. In answer to that requisition on the same date (13th May, 2019) Vespolina stated "*Noted. Land Registry title*". At the time of this reply there was no inhibition on the folio (or pending inhibition) in relation to the Participation Agreement and accordingly that requisition was initially answered correctly.
82. Furthermore, as is clear from the answer to Question One, this Court has concluded that the Participation Agreement does not affect Vespolina's title in the Property to grant the Lease. Accordingly, the existence of the Participation Agreement and the application by Mr. Montgomery to register an inhibition based on that Participation Agreement (which was subsequent to the foregoing reply to requisitions) does not alter the answer to this question. This is because the pending inhibition, since it does not affect Vespolina's title to grant the Lease, does not need to be explained by Vespolina in completing the execution of that Lease.
83. Thus, the answer to the second question is that Vespolina correctly answered the requisition raised by ICBF.

Question Three

84. This question is whether Vespolina has, as landlord/grantor, established good and marketable title to grant the Lease out of the Property in accordance with the Agreement for Lease?
85. There was some debate between the parties as to whether a landlord has to establish *prima facie* title or good and marketable title, in connection with leasehold title of 15 years. However, in Wylie and Woods, *Irish Conveyancing Law* (4th ed) at para 5.12, it is stated:

"For many years there were severe statutory restrictions on a tenant's right to investigate the landlord's title and these were largely unaffected by the Law Society's *Conditions of Sale*. However, as far back as 1980, the Law Society Of Ireland's Conveyancing Committee recommended that where the client was taking a lease of commercial property for a period in excess of three years it would be prudent for a tenant's solicitor to obtain *prime facie* evidence of the landlord's title and to make some pre-contract enquiries[....] The 1990 *Pre-Lease Enquiries* were later reviewed and a new set was established in February 2001. The *Pre-Lease Enquiries* required *prime facie* evidence of the landlord's title to grant the lease."
(Footnotes omitted)

86. It is important to note that there is no suggestion by ICBF that Vespolina is not registered as full owner of the absolute title to the Property.

87. Accordingly, it seems clear to this Court that, in light of this Court's conclusion that the Participation Agreement does not affect Vespolina's title to the Property to grant the Lease, the provision in this instance by Vespolina of a land registry folio vouching its registration as full owner of the absolute title to the Property is sufficient evidence of it having title to grant the Lease (whether one terms that prima facie evidence of title or good and marketable title).
88. In this regard, Vespolina also satisfies what ICBF's own expert (Mr. Michael Walsh, solicitor of *Byrne Wallace*) states is required for a lessor to satisfy title:

"Title is evidence of the ownership of a person to an estate in property; and in the context of a leasing transaction, it means that the party purporting to be the proposed landlord is the sole party entitled to grant the proposed lease and all easements rights and privileges to be conferred on the proposed tenant."

89. Thus, the answer to Question Three is yes.

Question Four

90. This question is whether Vespolina is required to obtain the consent of Mr. Montgomery to the grant of the Lease out of the Property to ICBF?
91. In light of this Court's answer to Question One, it is clear that the Participation Agreement grants Mr. Montgomery merely a right of pre-emption and not an option and so, in reliance on *Pritchard v. Briggs*, this does not grant Mr. Montgomery an equitable interest in the Property which would restrict Vespolina's right to grant the Lease. Accordingly, Mr. Montgomery has no basis for claiming that his consent is required for the grant of the Lease out of the freehold of that Property. Accordingly, the answer to this question is no.

Question Five

92. This question asks, whether, in the alternative, Vespolina is required to secure the removal of the inhibition (pending) before completion under the Agreement for Lease.
93. This Court has concluded, in its reply to Question One, that the Participation Agreement does not affect Vespolina's title in the Property to grant the Lease and, in reply to Question Four, that the consent of Mr. Montgomery is not required to the grant of the Lease.
94. It follows that an inhibition, which is allegedly based on the non-existent right of Mr. Montgomery to consent to the Lease, does not require to be removed by Vespolina before completing that Lease. Thus, the answer to this question is no.
95. In any event the purpose of registering an inhibition in relation to a right over land is to prevent

"the *registration* of any disposition that would defeat or postpone the right or prejudice it in any way." (Emphasis added) (see para 37.01 of Deeney, *Registration of Deeds and Title in Ireland*, Bloomsbury Professional 2014.)

96. The Lease in this case is for less than 21 years and it is common case amongst ICBF's expert and Vespolina's expert (Mr. Ronan McLoughlin, solicitor of DAC Beachcroft) that as such it is not a registerable interest.
97. It follows therefore that even if the inhibition is registered it would not have any effect on the granting of the Lease. This is because the purpose of the inhibition is to protect against the risk of the right (which is subject to the inhibition, i.e. in this case Mr. Montgomery's pre-emption right) being defeated by *registration* of any disposition. However, in this case, any such dispositions, i.e. the Lease, is not required to be registered. Thus, the answer to this question is no, Vespolina is not required to secure the removal of the inhibition as part of its completion of the Lease.

Question Six

98. This question asks whether Vespolina has adequately explained the inhibition lodged by Mr. Montgomery with the Property Registration Authority?
99. In view of this Court's answer to Question Five, it is clear that the inhibition (pending) does not affect Vespolina's title in the Property to grant the Lease, which conclusion this Court reached by considering the express terms of that agreement. Accordingly, it seems clear that the provision of the Participation Agreement to ICBF by Vespolina (which occurred during the course of this dispute) adequately explains to ICBF the inhibition application. Accordingly, the answer to this question is yes.

CONCLUSION

100. For the foregoing reasons, this Court concludes that the Participation Agreement does not affect Vespolina's title in the Property to grant the Lease to ICBF and it answers the remaining questions as set out above.
101. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).