Neutral Citation Number: [2009] IEHC 398

THE HIGH COURT

2008 9149 P

COMMERCIAL

BETWEEN/

WILLIAM DEVEREUX AND DECLAN DEVEREUX

PLAINTIFFS

AND

FRANCIS GOFF AND GOFF DEVELOPMENTS LTD.

DEFENDANTS

JUDGMENT of Mr. Justice John MacMenamin delivered on the 18th day of August, 2009.

1. On 12th July, 2005, the plaintiffs signed a form of agreement, the purpose of which was that, in defined circumstances, the plaintiffs would sell, and the first named defendant would purchase in trust, certain development property for a price to be determined in accordance with criteria contained in special and general conditions of that agreement. The lands consisted of 2.37 hectares per folio 2247R, and 5.56 hectares per folio 2250R, at Churchtown, near Rosslare, County Wexford. As is obvious, the agreement was made at a time when the state of the property market was very different from now. The agreement was countersigned by the first named defendant and returned to the plaintiffs' solicitor on or before the 12th September of the same year.

2. Having considered the relevant terms and the factual background, the judgment considers the true nature of the agreement, and whether it is now capable of enforcement by way of specific performance.

The relevant clauses of the agreement

3. The agreement included the following conditions, certain parts of which are here placed in emphasis as they identify the core interpretative issues, in particular, whether the agreement was optional, conditional and contingent on the fulfilment of conditions.

"7.

The sale is subject to the vendor applying for a grant of full planning permission of the lands on or before 30th September, 2005.

(a) The vendor will be responsible for all costs involved in the application for full planning permission ***but the purchaser shall be responsible for working drawings, certificates of compliance and all other aspects of compliance****. The vendor undertakes to consult with the purchaser regarding house types and road lay out on site.*

(b) In the event that full planning permission has not been granted within 18 months from the date of validation of the planning application, or has been refused, ***or is granted in terms not satisfactory to the purchaser****, the purchaser shall have the right to acquire the lands at the agreed price which is €5.3 million. In the alternative the parties may extend the said timescale by mutual consent.* ***The right/option referred to in this subparagraph*** *may be exercised by the purchaser* ***by giving notice in writing*** *within seven days of the refusal of planning permission or if the eighteen months has expired whichever is the earlier. In the event of the purchaser* ***notifying the vendor of his intention to purchase the property*** *in accordance with this subparagraph the sale should be closed 28 days from the date upon which the purchaser notifies the vendor.*

(c) In the event that the planning permission is refused ***or has been granted on terms not satisfactory to the purchaser*** *and the purchaser has not exercised his right under 7(b) above this contract shall be null and void and the contractual relationship between the parties be at an end."*

4. Special Condition 8 of the agreement provided as follows:-

"8.

(a) ***In the event*** *that planning permission is granted for 150 residential units the purchase price shall be €5.3 million.*

(b) ***In the event*** *that planning permission is granted for less than 150 residential units the price shall be reduced pro rata i.e. by €35,333.33 per unit.*

(c) ***In the event*** *that planning permission is granted for less than 140 units the* ***vendor*** *shall have the right to rescind this contract upon serving the appropriate notices and the matter shall be at an end subject only to the following:*

i. If as referred to above permission is granted for less than 140 units the purchaser shall, upon serving the

appropriate notice have the right to proceed to purchase the property for €4,946,666.20*.*

ii. In the event that planning permission is granted for more than 150 units the price would increase by €17,666.66 per unit above 150 units so that the said sum of €17,666.66 shall be added to the sum of €5.3 million for each residential unit above 150 for which permission has been obtained."

Clause 9 of the agreement provided:-

"9. *Closing*.

In the event that planning permission is granted on terms satisfactory to the purchaser which meets the criteria herein before referred to the sale shall be closed within two months from the date of the grant being made."

The case hinges on both fact and law. The true meaning of the contract and its effect will be considered subsequent to an outline of the evidence of the plaintiff's case.

A general chronology

5. The following general chronology is intended to set out the broad timeframe over the three year period from the making of this agreement from 2005 to the service of a completion notice on 4th July, 2008. At variance from condition 7, the vendors did not make application for permission on or before 30th September, 2005. In fact, no point is made as to extensions of the timescale which were by mutual consent. The application was ultimately made on 26th April, 2006, and was granted in favour of the plaintiffs on 15th May, 2007. At all times the Devereux brothers were identified as the applicants; Mr. Goff played an active role in the process however, as a potential developer and purchaser of the lands.

6. The agreement envisaged a number of contingencies. These included terms as to timescale, price, and the outcome of the planning permission. The pre-conditions in the agreement dealt with the rights or options of the parties dependent upon certain outcomes. For example, Condition 7(c) of the contract provided that if the purchaser had not exercised his right to purchase, and if the planning permission was granted on terms "not satisfactory to the purchaser", the contract should be null and void.

7. As matters transpired, the optimistic hopes of the parties as to the extent of the permission were not fulfilled. The planning permission allowed for the construction of not 150, but 130 homes only on the property.

8. The plaintiffs say Mr. Goff took on the task of framing and processing the planning application. They assert that, in accordance with the agreement, and permission having been granted, he or his company was obliged to purchase the property within two months of the date of issuing of the planning permission on 19th June 2007. Therefore they contend, in accordance with condition 9, there was a duty to complete on or before the 21st day of August 2007, for the sum of €4,593,333.40. They submit the sum of €5.3 million is to be reduced by €706,666.66 that is the total amount of difference between 150 and 130, i.e. 20 units at €35,333.33 each; per Condition 8(b). On 13th August, 2007, the plaintiff's solicitors wrote to the first named defendant's solicitor to this effect.

9. On 22nd August, 2007, the plaintiff's solicitors confirmed that requisitions had been raised and replied to, and that the closing day provided for in Special Condition 8 had expired. The detail of what occurred thereafter is explained later. Many months elapsed before a completion notice was served.

10. In fact, it was only on 9th May, 2008, the plaintiff's solicitors finally called upon the defendants to close the sale of the property failing which they would institute proceedings.

11. By letter dated 4th June, 2008, the first named defendant responded through his solicitors that he did not propose to proceed with the contract, on the basis that the planning permission in question had not been granted on terms that were "satisfactory to him" in accordance with Special Condition 7(c) of the agreement. The plaintiffs say that on the facts he was not entitled to rely on this condition. They contend that at all material times the planning permission granted on 15th May, 2007 was on terms which were acknowledged to be or must have been then satisfactory to the first named defendant, by virtue of his input into the application, and the evidence as to his conduct after the grant of such permission.

12. On 4th July, 2008 the plaintiff served a completion notice on the first named defendant, calling upon him to close the sale within a period of two months from that date. The defendant refused to complete the closing of the sale. The plaintiffs say that they have been at all stages ready willing and able to complete the contract.

13. By letter dated 15th August, 2008, the defendant's solicitors wrote to the plaintiff further indicating, *inter alia*, that the property had been purchased in trust for the second named defendant. The plaintiffs maintain that the agreement was one concluded with the first named defendant.

The defendants' case

14. The defendants' case derives largely from the provisions of Part V of the Planning and Development Acts 2000 – 2002. In simple terms the effect of Part V of the Act is to place upon land developers an obligation to transfer lands, property or monies to the local authority for the purposes of social and affordable housing. The value of such transfer is to be 20% of the development.

15. In fact, only as late as 2nd December, 2008, Wexford County Council informed the vendors as developers that in the absence of agreement with the developers they were requiring that, in default, 20% of the site itself should be reserved for such housing. No agreement had previously been arrived at between the developers, the County Council or Mr. Goff on the question.

16. It is probable this Part V requirement, could only have become critical when a commencement notice of development under the Planning legislation was actually served. Such a notice is served upon the Council to alert their inspectors to

ensure that planning requirements of the development are complied with. This never occurred. No development ever took place on the land. No commencement notice was served. Not even a site map identifying the area of the site proposed to be transferred was submitted to the County Council. But this is not to say the matter was at any point insignificant.

17. The defendants say that the plaintiffs had proposed that the Part V stipulation would be met by the provision of lands, sites, or completed houses, by the Devereuxs on land other than the subject of the sale. They say that the plaintiffs' proposals in this regard were never accepted by Wexford County Council. Mr. Goff says that he, but only as agent for the plaintiffs, sought to negotiate agreement with the Council on compliance, but that the Council were unwilling to negotiate on the issue, other than lands on the actual site. Thus, the defendants say, it was ultimately the plaintiffs' duty *qua* applicants for permission to negotiate settlement of the Part V obligation in accordance with the agreement. Between 12th July, 2005, the date the Devereuxs' signed the agreement and the service of the completion notice on 4th July 2008, they did not reach any agreement with the local authority. The defendants say that the intended manner of compliance with the Part V requirement was never identified, and therefore was never complied with.

18. The essential defence point therefore, is that the planning permission was never on terms "satisfactory to the defendants" in accordance with clause 7(c) of the agreement, as the mode of Part V compliance had not even been ascertained. Thus, on the basis of clause 9 of the agreement the defendants say the issuance of the planning permission in itself did not impose upon them as purchasers any contractual obligation to close the sale within two months or at any time.

The central evidential issues in the case

19. The central questions to be addressed in the evidence are:-

a) The plaintiffs' assertion that the first named defendant accepted the terms of the permission. They say the grant was 'satisfactory' to him and acknowledged to be so. They contend that Mr. Goff was not entitled to avoid the obligations contained in the agreement, and/or in the alternative, that both defendants were precluded by their conduct from claiming that the terms of the planning permission are not satisfactory to them.

b) The first defendant's contention that the planning permission was in fact never on terms 'satisfactory' to him or his company as purchasers. Francis Goff further contends (i) that he only acted as agent for Goff Developments Ltd.; and (ii) that the plaintiffs failed to discharge their contractual duty under clause 7(a) of the agreement to consult with the purchaser regarding house types and road lay out on site. Point (ii) above was withdrawn on the application of the defence.

The central legal questions to be addressed are:-

a) The plaintiffs' assertion that the agreement is a legally enforceable contract.

b) The defendants case that the agreement was both conditional, and an option agreement, the terms of which were never fulfilled. This turns on point c) following:

c) The consequences of the fact that the planning permission contained a condition requiring compliance with Part V of the Planning and Development Act 2000 as amended ("the 2000 Act"), the effect of which is discussed later in the judgment.

The resolution of the case, therefore, hinges on matters of evidence, and interpretation of the contract.

Withdrawal of one part of the defence

20. As mentioned earlier, the defendants originally pleaded they had never approved the application for permission made by the plaintiffs. On the morning of the hearing, their counsel indicated that he wished to withdraw their plea to this effect. The court acceded to this application. In fact it was crystal clear from the discovered correspondence, and from further material disclosed only during the hearing, that Mr. Goff, through an employee, had expressly approved the planning application. But the central question as to the defendants' 'satisfaction' with the terms of the permission actually obtained remained at the forefront of the case.

21. It is necessary first to outline the evidence more fully, so as to clearly identify whether as a matter of fact, the conditions of the contract were at any time fulfilled so as to permit of specific performance. For the purposes of this consideration, the judgment will identify the lands, as did the parties, in terms of acres, not hectares. One acre represents 0.4047 hectares. There is no issue as to the extent of the lands in suit.

22. The evidence presented to the court by both parties was not always internally consistent, was sometimes self contradictory, and conveyed the impression of parties dealing with an evolving situation where they both often acted in a manner inconsistent with what they now say were their legal rights and duties under the agreement.

The plaintiffs retain Mr. Barry Kehoe auctioneer to sell a 7.8 acre site

23. In or about 2004 the plaintiffs retained the services of Mr. Barry Kehoe, principal of Kehoe & Associates, auctioneers in Wexford town, to sell lands. Mr. Kehoe was the plaintiffs' main witness as to the negotiations, so at the outset the focus remains on him as a narrator as to most, but not all of the material events. He kept a detailed record of his involvement in the negotiations. The first meeting he had with the Devereuxs was on 25th February, 2004. This was on the subject of the sale of 7.8 acres, part, but not the entire, of the subject lands, which are near Rosslare Harbour in Co. Wexford.

24. In May 2004, Mr. Kehoe and the plaintiffs agreed that this smaller site would be offered for sale by private treaty quoting a price of €2 million, but subject to the purchaser obtaining planning permission.

25. Mr. Kehoe placed advertisements in the newspaper. He sent a notice to a number of persons who, he believed, might be interested in buying.

26. In June 2004, Francis Goff expressed an interest in these lands. Mr. Kehoe knew Mr. Goff for many years as being a significant developer and building contractor in the Wexford area.

Negotiations broaden to the full 20.8 acre site

27. Negotiations proceeded over a number of months. At a meeting on 4th August, 2004, Francis Goff made an initial offer; to purchase the 7.8 acres for the sum of €1.6 million, subject to planning permission being obtained for 50 units. He then also said that he wanted an option to purchase additionally 13 acres of the adjacent lands for the purposes of building approximately 100 more houses at a site price of €32,000 per site. It will be noted that when it came to the enlarged site, Mr. Goff's stipulation was for an option agreement.

28. Mr. Kehoe discussed the terms of the offers with the plaintiffs on 5th August, 2004. They felt the offer for the 7.8 acres was too low. But on 26th August, 2004, Mr. Goff offered €5.25 million, this time to purchase all of the subject lands, that is to say the 7.8 acres site and the additional 13 acres. This agreement was to be subject to planning permission being obtained for a minimum of 150 units with a *pro rata* reduction if less than that was achieved. The €5.25 million offer was ultimately increased to €5.3 million, and capped at that figure irrespective of the number of units for which planning permission was obtained.

29. The Devereux brothers were to apply for the permission. Thus they were in law the "developers" for that purpose. Despite the terms of the agreement, the evidence was in fact confused as to how, precisely, the responsibility for obtaining of planning permission, and for Part V compliance was to be allocated. Mr. Kehoe said he made it clear to Mr. Goff that the Part V "responsibility" was his. But the meaning of responsibility is ambiguous; was it the responsibility to negotiate, or the financial responsibility to pay for the Part V requirement? This ambiguity remained an issue, for it was certainly agreed that Francis Goff as an experienced developer would play an active role in the planning process. All parties accepted that planning drawings and time scales for planning applications would have to be agreed in advance of submission to Wexford County Council. It was unclear whether the purchaser at this point would be Goff Developments Ltd. or another one of Mr. Goff's companies.

30. On 3rd December, 2004, Mr. Kehoe wrote to the plaintiffs' solicitor Mr. Peter Redmond of M.J. O'Connor, outlining in broad terms the tentative agreement that had been reached. This letter subsequently formed the template for a draft agreement sent out by M.J. O'Connor solicitors to Garahy Breen & Co., Francis Goff's solicitors. Two points emerge from this correspondence. First, the 'land' in question was to be the entire 20.8 acre site; second, the ultimate purchase price was to be based on a number of contingencies; which in turn hinged on the terms of the planning permission. Remarkably the issue of Part V compliance was not specifically dealt with in the draft agreement.

31. Mr. Kehoe testified that it had been expressly agreed verbally that Francis Goff was to be 'responsible' for the Part V provision in any planning permission. He was certain that it had been discussed early in the negotiations. He confirmed this in a memo of a meeting with William Devereux on 7th September, 2005 which he then circulated both to Francis Goff and the two plaintiffs. Mr. Goff never disputed the contents of that memo. But the question remains as to what was the understanding of the parties as to the meaning of "responsibility". It was never resolved prior to this hearing.

32. Mr. Goff subsequently involved himself with the planning application. On 25th April, 2005 Mr. Kehoe wrote to Mr. Goff, noting that William Devereux was anxious that an architect be instructed. He set up a meeting with an architect, Mr. John Begley. There was much subsequent discussion about the terms of the planning application.

33. Matters dragged on. No contract was signed. Ultimately Mr. Kehoe wrote to Catherine O'Connor of M.J. O'Connor & Co., solicitors for the plaintiffs on 15th June, 2005, making suggestions about how the draft contract might be amended. Amended draft contracts were sent to Garahy Breen & Co. in the middle of June 2005.

The amended terms to the draft agreement

34. The amendments then made by the defendant's solicitors to these drafts are now pivotal to this case. Condition 7(b) was amended to allow the purchaser latitude to buy at a reduced price, if the planning permission was not 'satisfactory' to him. Condition 7(c) was amended by the addition, after the words "*is refused*", the following words: "*or has been granted on terms not satisfactory to the purchaser*". (See para. 3 of this judgment).

35. Condition 9 was also amended by the insertion of the words "*on terms satisfactory to the purchaser*" after the words "*is granted*", and also by the provision of a two months time limit from the date the grant of planning permission was made on the terms identified.

36. These were extremely important amendments. Self evidently, they expressed the purchasers' desire that the planning permission terms be "satisfactory" to him. By ordinary standards the effect of these amendments might be to give a substantial veto power to the purchaser as to whether he might proceed or not. The plaintiffs did not object to these amendments being embodied in the agreement, either then or later. They never said the amendments did not form part of the agreement. The amended agreement was signed, and some months later in September was countersigned by Mr. Goff.

37. On 30th November, 2005, a pre-planning application meeting took place between the two Devereux brothers, Mr. Kehoe, John Begley the architect, and Francis Goff. Mr. Begley outlined his thoughts on the development. He thought that about eight units per acre could be achieved. This would have allowed for 160 houses. He also identified the planners' requirements in terms of style of development. Mr. Begley does not appear to have been aware then or subsequently of any prior contact between the vendors and Wexford County Council. William Devereux had in fact met a Council Official, John Curran on the 12th July, 2005. This is dealt with later.

38. There was a discussion at the November meeting concerning the Council's requirement for some four acres, *i.e.* 20% from the site for Part V requirements. It was mooted that it might be possible to satisfy this need by using another 2.5 acre site which the Devereuxs owned at Kilrane Manor, and an additional 1.5 acres from the subject site. There was a detailed discussion concerning the type of houses to be applied for, and other more general planning issues. Following that meeting, on 12th December, 2005, Mr. Kehoe sent Francis Goff drawings from John Begley architects, but the

agreement did not address these issues.

39. It is remarkable that even then an issue with such serious consequences as Part V compliance appears to have been dealt with so obliquely by both sides to the agreement. Mr. Devereux later testified that he left the issue to Mr. Goff as he felt he had sold the lands on to him. This conclusion was not justified. Mr. Goff contends that the point was dealt with by the amendment to the contract. Neither side seems to have dealt with the matter fairly and squarely. One possible inference is that the parties were to a degree in self denial; alternatively perhaps they were seeking to enhance their respective negotiating position by the creation of a fait accompli once the permission issued from the local authority, when the pressure to agree would be higher. Perhaps they were under the illusion that the requirement would not be applied with rigour in their case. The mystery has not been explained.

40. On 19th December, 2005, Mr. Kehoe sent a memo to William Devereux. He confirmed that he had sent the drawings prepared by John Begley to Francis Goff and that the latter had indicated to him that they were acceptable. This approval in specific terms made by Mr. Goff's assistant, was such as would have rendered entirely unsustainable the case which he sought to make in relation to any alleged 'dissatisfaction' with the planning drawings.

41. Mr. Kehoe and Mr. Goff met again on 13th January, 2006. The latter asked Mr. Kehoe for confirmation that John Begley was finalising the planning application. He expressed his hope that the application could be submitted by mid February 2006 and hoped to be ready to start on the site by the end of that year.

42. Mr. Kehoe sent a further memo to Francis Goff on 18th January 2006, noting that William Devereux had had regular meetings with John Begley and had made good progress. John Begley had hoped to lodge a planning permission "within the next four weeks". Mr. Begley also said that he was going to let Francis Goff have the drawings for his opinion before they could be absolutely finalised.

43. On 26th January, 2006 Mr. Devereux sent Mr. Kehoe a breakdown of various house types and sizes for development including the number of units available in each house type. He asked Mr. Kehoe to forward this to Francis Goff for his comments and revert to him. Mr. Kehoe received a note to the effect that Francis Goff's assistant had telephoned his secretary and informed her that Mr. Goff was happy to proceed with the application. Mr. Kehoe immediately confirmed this with William Devereux on 27th January, 2006.

44. On 27th February, 2006, Mr. Begley wrote to the County Council outlining the Devereuxs' proposal to build 30 houses to satisfy Wexford County Council's Part V stipulation on the Kilrane Manor site. No concluded agreement was reached however. The planning application was not ultimately submitted until 24th April, 2006. Additional information was then sought by the planning department of Wexford County Council on 19th June, 2006. Ultimately, on 7th November, 2006, further information was provided by the architect John Begley, to the County Council. Francis Goff was deeply involved in preparing the response to this letter for further information. He liaised directly with John Begley concerning this matter. He accepted that on 1st November, 2006 he attended Mr. Devereux's office along with John Begley. He drafted the response.

'Responsibility' for Part V

45. Mr. Kehoe testified that the issue of "responsibility" for Part V always rested with Francis Goff. But precisely what this entailed was unclear. If this was to be a financial liability, it would have had a very significant bearing on the price of the lands to a developer. Furthermore, it was never clearly stated whether the conditions as to 'satisfaction' with planning permission meant that the terms of the Part V requirement would also have to be satisfactory to the purchaser. The outcome of this issue ultimately lay in the hands of the County Council. In the absence of agreement, the local authority itself would ultimately determine the nature and location of its requirement for social and affordable housing.

46. Mr. Kehoe referred in his evidence to a memorandum of 7th February, 2005 which had been copied to Mr. Goff. He said that if the Part V obligations were to be the responsibility of the plaintiffs this would have been part of the special conditions in the contract and would have been recorded in his correspondence to the solicitors when he instructed them on the agreement that had been reached. He said that a condition where Part V would be the responsibility of the vendors would have been highly unusual and that he had not previously been involved in such a deal. I accept his testimony, insofar as, with hindsight, the issue should have been specifically referred to and dealt with: it would have been one of the few conditions in the eventual planning permission which would have been the plaintiff's responsibility as opposed to that of the defendant. But "responsibility" and "satisfaction" are different things. For reasons unexplained the Part V question was not directly referred to in either the agreement or any subsequent agreement.

47. Clearly Mr. Goff assumed a great deal of continuing responsibility for Part V *compliance*. On 10th February, 2006, he and John Begley went to see Maeve O'Brien, an official of Wexford County Council. Various Part V options were considered. There were other meetings which by inadvertence or otherwise were not attended by all the necessary parties, that is the vendors and the purchasers. This went on over months. Mr. Kehoe testified that on 2nd October, 2006, Mr. Goff told him that he had sought advice from counsel who was an expert in Part V of the Act. Mr. Goff informed Mr. Kehoe that a further meeting had been set up with an official of Wexford County Council, Tanya van Dyk, for 13th October, 2006. John Begley was aware of this. Mr. Goff wanted either of the two Devereux brothers to attend.

48. According to Mr. Kehoe, Mr. Goff made some acknowledgement in October, 2006 that he would have to buy extra land from William and Declan Devereux, but said that there was no point in him making such a move until he saw what counsel was suggesting in relation to Part V. I am satisfied that this evidence supports the contention that, generally, Mr. Goff accepted there would have to be some financial adjustment to comply with the requirement. But the extent of this was never quantified. The County Council found it unsatisfactory that meetings involved Mr. Goff, but not the Devereux brothers. I am not satisfied that Mr. Goff at any time assumed any identified or identifiable responsibility for ultimate *financial* compliance with Part V requirements. Ultimately, planning permission was granted on 15th May, 2007. It contained a clear requirement that there should be compliance with the new requirements. These were related to the provisions of social and affordable housing on the site, in compliance with the new provisions. This relevant condition is described in the evidence of Mr. Curran.

49. A meeting took place with Council officials on the 28th August, 2007. Mr. Goff yet again attended as the "Developers Representative". They discussed another proposal to satisfy Part V requirements off site at another property at Kilmore Quay. The evidence of Mr. Curran, a Council official, on these meetings is referred to later.

50. I accept that, in a telephone conversation on 27th November, 2007, Francis Goff told Mr. Kehoe that he wanted to proceed with the deal and was not trying to get out of the contract to purchase. But, he said, the Part V issue was the responsibility of the plaintiffs. I accept Mr. Kehoe told him again that it had been clearly agreed at the start that the 'responsibility' for compliance with Part V was his. Mr. Kehoe reminded Mr. Goff that a memorandum to that effect had been sent to him in February, 2005. Mr. Goff stated in reply that "things had changed between the memo and the signing of the contract in July 2005".

51. One possible inference from this remark is that Mr. Goff was referring to the change in the property market over that period. Another, is that the terms of the permission had not turned out as anticipated. A third, is that there had simply been no agreement on Part V compliance. A fourth is that the attitude of the County Council to such compliance had apparently substantially "hardened" between 2005 and late 2007, an issue which arises clearly from the evidence of Mr. Curran. Perhaps it was a combination of these or, perhaps other factors entirely. One striking feature about the evidence as tendered in this case is the apparent gaps in time between one event and the next. But then those were different times in the property market. The times were different. Perhaps the parties were engaged in other business. Perhaps the gaps are because of human recollection. But by any standard, this was a significant deal. I find it strange that the compliance issue was not apparently dealt with as a matter of priority in the way one would expect, by open discussion and agreement.

52. In November, 2007 Mr. Goff also complained to Mr. Kehoe that he would have to change the entire planning permission, because the house types were bad and that the lay-out was poor.

53. I think this remark was disingenuous. This was not his problem at all. His real point was how the requirement would be complied with, and more fundamentally I think, whether the deal any longer made sense financially.

54. Mr. Goff could not have expressed these particular reservations *bona fide* in November 2007, in light of the fact that he had expressed approval for these other planning issues at the time that the planning permission was submitted. I think these were excuses.

55. Further discussions took place between the parties in December, 2007. Some of these were "without prejudice". Early in 2008, in order to advance matters, Mr. Kehoe suggested to Francis Goff that the plaintiffs (as opposed to Mr. Goff) might bear the costs of the Part V requirement if he would complete the contract. Mr. Goff never answered that proposal.

56. I find it difficult to reconcile such evidence, given by the plaintiffs witness Mr. Kehoe, with the plaintiffs' overall case to the effect that the planning permission issue had been entirely resolved to the purchasers' satisfaction. Why would the Devereux brothers make this offer, if they had, through their solicitor, made a binding and enforceable contract with the defendants for the full sum? Clearly the market had changed. But the essence of a case for specific performance is that the terms of the contract sought to be enforced should be clear and identifiable in their essentials. This alternative offer is far more redolent of a contract still under negotiation, even three years after its inception.

The evidence of Peter Redmond, the vendor's solicitor

57. Peter Redmond, solicitor of M.J. O'Connor, the vendors' solicitors, testified on their behalf. I am satisfied that he was a candid and honest witness. But again his participation in events was rather limited.

58. Mr. Redmond testified that the sites in question had been purchased at different times by the plaintiffs. He was aware that his clients intended to apply for planning permission for the lands and to sell these lands on to a builder or developer. To this end they engaged Mr. Kehoe.

59. As Mr. Redmond himself pointed out, the terms and conditions relating to the sale of the lands were detailed. They depended upon the grant of planning permission. The original of the first draft contracts were sent to the defendant's solicitors on 16th September, 2004.

60. While negotiations took place between the Devereuxs and Mr. Goff, Mr. Redmond did not come into the picture again until 15th June, 2005, when Mr. Kehoe wrote to him giving details of a revised agreement. These were embodied in a revised contract for sale sent to Garahy Breen & Co., the defendants' solicitors. In a covering letter it was stated that the deadline for the return of the executed contracts was 24th June, 2005. However that deadline was not met due to a number of queries which Garahy Breen & Co. solicitors had, concerning the conditions upon which the lands had been purchased by the plaintiffs in May, 2004. In particular there was a concern about the time limits in the contract for the purchase of folio 2250 which originally had a time limit for the grant of planning permission. On 28th June, 2005 it was confirmed that the time limit for the application for planning permission had been extended.

61. Mr. Redmond testified that on 30th June, 2005, the purchasers' solicitors returned the draft contracts to M.J. O'Connor together with the cheque for the deposit which had ultimately been agreed at €25,000. The amendments had been made. The plaintiffs agreed to these changes without demur, and the contract was executed by the vendors and ultimately returned to the purchasers' solicitors on 12th July, 2005. This date is significant in the context of the evidence of the Council official Joe Curran. Mr. Curran testified that on that same date, the 12th July, 2005, he had a meeting with William Devereux to discuss in general outline the operation of Part V. This is dealt with later.

62. Mr. Redmond was clearly not instructed to raise any protest against the amendments to the agreement, the effect of which must have been clear. This was not a matter beyond the comprehension of lay people. Their effect was obvious. They were inserted in handwriting. There could be no question of any absence of clarity. Their meaning could have been understood by the vendors. If they had difficulties with these amendments they should not have signed the agreement. In the light of Mr. Curran's evidence, I think the vendors signed the agreement in full awareness of the Part V issue which remained unresolved.

63. Mr. Redmond was not directly involved in the planning matters but understood that the planning application had been submitted. He became aware that a notification of a decision on the planning permission was granted on 15th May, 2007 and the grant itself was issued on 26th June, 2007. This planning permission provided for the construction of 130 houses on the lands.

64. On 13th August, 2007 Mr. Redmond's firm received a letter from Garahy Breen & Co., noting that planning permission

had been issued. It specifically said the closing was to take place within two months of the issuing of planning "if same was satisfactory to the purchaser". He was not instructed to protest or object to the reiteration of this vital term. Garahy Breen & Co. said they would revert to M.J. O'Connor's in due course. Thereafter the normal conveyancing procedures involving the preparation of statutory declarations and undertakings and certificates took place. By 18th October, 2005 requisitions raised by Garahy Breen & Co. had been replied to and returned to M.J. O'Connors.

65. But prior to this, on 24th September, 2007, Garahy Breen & Co. had written an important letter to M.J. O'Connor. They identified three matters which remained outstanding before the sale was to proceed to closing. These were, first, that the Part V requirement needed to be completed with Wexford County Council as the Council was not satisfied with the arrangement suggested; second, that payment would have to be made in relation to other works carried out at Kilrane Manor for Francis Goff; and third, that there were monies outstanding and due to Mr. Liam O'Brien and Peter Carr of Kilrane. It is surely significant that at no stage was there any protest to any of the parties or to the reliance on those amendments.

66. The first point raised, as to the statutory requirement has been considered. The second is not material save by virtue of its existence simply as another "outstanding issue". It is necessary to deal with the third.

Mr. Goff's negotiations between Liam O'Beirne and Peter Carr, neighbouring landowners

67. Mr. Liam O'Beirne and Mr. Peter Carr owned lands adjoining the subject site. Issues as to the use of the lands had arisen between them and the Devereux brothers. The neighbours indicated that they intended to appeal the grant of permission to An Bord Pleanála. Mr. Goff personally met and engaged in negotiations with them. These negotiations involved an agreement to pay significant sums of money to them in order to assuage their apparent concerns. Ultimately an agreement was reached whereby they did not appeal. Mr. Goff has since been threatened with legal proceedings on foot of non-payment of the sums involved.

68. On 22nd May, 2007, Mr. Goff wrote the following letter to his solicitor John Garahy of Garahy Breen & Co.:-

> *"Re Planning Applicaton No. 20061441 @ Kilrane, Co. Wexford.*
>
> *Dear John,*
>
> *Further to recent correspondence I have now finalised an agreement with Mr. & Mrs. Liam O'Beirne of Churchtown, Kilrane, Co. Wexford so as to lift their objection to the above project and not to appeal to An Bord Pleanála. The following was agreed at a meeting in her* office on Friday night, 18th May.* (* The reference being presumably to the O'Beirnes' solicitor.*)*
>
> *That Mr. & Mrs. O'Beirne would be paid €100,000.00 (one hundred thousand euro) together with a right of way over the main road within the development and to lay storm water and foul sewer pipe (sic) to the centre of their boundary as they are the adjoining landowners. This right of way would be for residential development only should their lands become zoned and the appropriate planning permission granted.*
>
> *Mr. & Mrs. O'Beirne also agreed to talk with their neighbour Peter Carr and not to lodge an objection and suggested a €10,000.00 (ten thousand euro) payment and the cleaning out of a stream to the rear of his dwelling house.*
>
> *The above agreement is subject to the grant of permission being received and I instruct you to proceed to put this in legal format* ***immediately****. I will sign whatever undertaking is necessary and you might be good enough to contact the O'Beirne's solicitor, Mr. Liam Hipwell as I understand he is on holiday from tomorrow evening for two weeks. I will be on holidays from this evening until 5th June but this would need to be put in place before the final grant of permission is due which is 15th June. Please note that I have kept the Devereux brothers informed of the situation at all times."* (emphasis added.)

69. Clearly this letter provided that Goff Developments Ltd would pay the sum of €100,000, (one hundred thousand euro) to the O'Beirnes, which payment was to be paid on the issue of notification of grant of planning permission. But the agreement was subject to the grant of permission being received. This differed from the terms between the plaintiffs and the defendants where the issue of the defendants' "satisfaction" was a clear proviso.

70. The agreement made with Mr. & Mrs. O'Beirne also included a stipulation for penalty interest at the rate of €32.87 per day from the seventh day after the date of issue of the grant of planning permission otherwise penalty interest would accrue at the rate of 12% per annum on a daily accrual basis. This was reflected in a letter from Liam Hipwell & Co., solicitors to Garahy Breen & Co. dated 9th October, 2007, by which time permission had issued. There Mr. Hipwell on behalf of the O'Beirne's indicated that he awaited payment of the sum of €100,000.00 together with the accumulated interest from the date of the grant of the planning permission, that is to say 22nd June, 2007. At the time of writing of that letter the interest applicable was €3,352.74. Mr. Goff did not reply. Hipwell & Co. sent a further reminder on 7th January, 2008 demanding the sum together with the accumulated interest thereon which by then was €6,311.04.

71. This letter of 7th January was forwarded to Mr. Goff by covering letter of 9th January from his solicitors which stated simply:-

> *"Dear Francis,*
>
> *I enclose herewith letter received from Liam Hipwell & Co., Solicitors and you note that they are requesting the payment €100,000.00 and also the interest."*

As late as 21st January, 2009, Mr. Goff received another letter from the Carr's requiring payment of the sum due to them of €10,000.00 which was then eighteen months overdue for payment.

72. Mr. Goff was an experienced builder. The agreements entered into with the two potential objectors were very close in time to the grant of planning permission. He was not a stranger to the planning and development process. It might be thought he would not have entered into these non-contingent and unconditional arrangements if he had then been "dissatisfied" with the terms of the planning permission. But he said he did so as agent for the vendors. But there is one further factor which to my mind remained unanswered. If neither the vendors nor the purchasers had ever actually reached a final agreement with the local authority on the terms of the Part V issue, or who was to be responsible for it in every sense, how could the purchaser be "satisfied"? Furthermore there was now a further issue; the payment due to Mr. Liam O'Brien and Mr. Peter Carr. This was a further matter where the ultimate payer had yet to be identified. One is left to infer that, this, too, was to be part of some further process of negotiation between vendors and purchasers.

Further steps towards completion taken in 2008

73. A number of months passed. It was only that on 9th May, 2008, Mr. Redmond wrote to Garahy Breen & Co. saying that the contract closing date had long since expired, and that interest had accrued on the balance of the purchase monies. He called on the defendants to complete the transaction failing which proceedings would be instituted in the Commercial Court. He received a holding letter from Garahy Breen & Co. on 13th May, 2008. The question that underlies all this is why did the plaintiffs delay until then – if they considered their 2005 agreement was legally enforceable? It is again unclear what happened in the meantime. There is no evidence that the local authority ever deviated from its requirement.

74. By letter of 4th June, 2008 Garahy Breen & Co. wrote to M.J. O'Connor's stating that the defendant did not propose proceeding with the contract. Referring to Condition 7(c) of the contract, the letter read in part:-

> *"…The reason why he does not propose to proceed is because the planning permission has not been granted on terms that are satisfactory to him in accordance with paragraph C."*

They asked for the deposit to be returned. On 5th June, 2008, M.J. O'Connor wrote to Garahy Breen & Co. indicating that they did not accept that the defendant was entitled not to proceed with the contract and refusing to return the deposit. On 4th July, 2008 a notice to complete was served under the contract. Again the defendants' issue of 'dissatisfaction' went uncontested in correspondence.

The evidence of John Begley, Architect

75. John Begley the architect retained for the project was appointed by the Devereuxs in July 2004. He had a series of meetings with them. Between May 2005 and June/July of that year, house type drawings were prepared and pre-planning submissions were also put in place. Between September and October 2005 the design was revised to take into account that which arose at the pre-planning meeting. The planning application was ultimately lodged with Wexford County Council on 26th October, 2006. Mr. Begley testified as to the considerable extent to which Francis Goff had been involved with and been consulted, concerning the number of units and the design of the houses. Mr. Goff at that point expressed no concern in relation to any of these issues.

76. Mr. Begley's testimony was that the details in relation to Part V were dealt with exclusively by Mr. Goff or Goff Developments and he was instructed directly by them as to the wording of the answers or questions raised in the request for further information from Wexford County Council which related to Part V. On 8th November, 2006, this reply to further information was submitted to the planning authority. The draft reply was provided to Mr. Begley by Goff Developments.

77. On 5th December, 2006 the planning authority requested clarification of the further information submitted. Between the months of December 2006 and April 2007, Mr. Begley prepared the reply to clarifications requested by the planning authority in conjunction with Francis Goff and William Devereux. He held numerous meetings with both parties to formulate a response to the issues which arose which included the garden size, house design and storm water drainage. The contents of the reply to Wexford County Council was agreed by both parties prior to the submission. He submitted further information on 18th April 2007. On 15th May 2007, the County Council issued notification of the decision to grant planning permission. After the full grant and permission issued from the planning authority on 22nd June 2007, Mr. Begley's role diminished.

The evidence of William Devereux

78. In the earlier part of his evidence Mr. William Devereux testified that between 2005 and 2007 Francis Goff had told him more than once that he was prepared to proceed with this purchase for an agreed amended sum of €4,946,666.20. He claimed then that, on a number of occasions, the first defendant indicated to him that he was satisfied with the planning conditions as issued.

79. But a number of other issues ultimately emerged from his evidence. The first is that in 2006, the plaintiffs had sought advice as to the range of *options* available to both sides inherent in the agreement. Mr. Kehoe advised them. This was reflected in an attendance written by the auctioneer on 19th October 2006. This attendance clearly referred to the purchasers and the vendors' *options* in a range of contingencies dependent on the ultimate terms of planning permission. Mr. Kehoe specifically referred his clients to the fact that there was no timescale in the agreement wherein the purchaser might agree whether the terms of the permission were 'satisfactory' or not. Mr. Devereux received very similar advice from his solicitors as to the notice of agreement in the same period of time.

80. Later in his evidence, Mr. Devereux accepted that, as and from October, 2007 he was aware, first, that Part V compliance had not been satisfied and second; that within that time period from October on to December, 2007 Mr. Goff identified the issue of such compliance as an obstacle to completion. In fact, Mr. Devereux finally actually accepted in evidence that Mr. Goff had never expressed himself satisfied with the Part V condition in the planning permission. He also testified that he had previously engaged in further discussions with Mr. Goff, whereby additional land adjoining the site would be available to Mr. Goff to fit the Part V requirements. He said "as long as it was purchased from me I was happy with that".

81. I find it impossible to reconcile all this testimony with the plaintiffs' assertion that this was a complete 'done deal'; or that Mr. Goff was 'satisfied' with the permission, still less with the contention that Part V compliance, in all senses, was

Mr. Goff's sole responsibility. Mr. Devereux was not naïve or uninformed with regard to the Part V issue when he and his brother signed the agreement. He knew that it was part of the equation. This will show from the evidence of Joe Curran, Mr. Devereux was alive to the relevance of the compliance issue from the date of inception of the agreement. The question remained unresolved. No one who had spoken to Mr. Curran, even about the general outlines of the new provision, could have been unaware that this could present a real obstacle to completion of the agreement – if in fact it was not part of the agreement already.

82. Prior to dealing with Mr. Curran's evidence it is necessary to pause in order to identify the true breadth of the contingencies which might arise from a planning condition requiring such compliance.

Part V of the Act of 2000 as amended in 2002

83. For this, it is sufficient to outline the general effect of Part V. Any vendor or purchaser who received even an outline of the following should have been immediately aware of its materiality to any planning application.

84. The relevant provisions are contained in ss. 94 to 96 of the Planning and Development Act 2000 as amended by s. 3 of the Planning and Development (Amendment) Act 2002. They are lengthy. It will be sufficient to set out the effect rather than the detailed provisions of the legislation insofar as it could have effected the agreement. In so describing the potential effect of the legislation I refrain from making any finding as to what precisely Mr. Curran told Mr. Devereux or Mr. Goff on any subsequent occasion. Mr. Curran said that he merely gave Mr. Devereux a general outline of how the new Act operated. The purpose of this part of the judgment is to describe the range of potential planning and legal effects which Part V compliance might have on the performance of the agreement.

85. Insofar as material, the provisions impose a requirement on an applicant for planning permission to develop houses on land, to enter into an agreement with the planning authority to transfer part of the land, or to enter some other arrangement in order to satisfy social and affordable housing requirements. Section 3 of the Planning and Development (Amendment) Act 2002 inserted a new section 96 in the Act of 2000 to replace the original. The principal change under the new s. 96 was to provide a greater range of options to the type of agreement which might be entered into. The provisions apply to any application to develop houses on land within an area where a development plan objective requires that a specified percentage of the land zoned solely for residential use or for a mixture of residential and other uses be made available for social and affordable housing. The subject lands were such an area.

86. But it is significant that the amending provision contained in the Act of 2002 altered the original subsection 2 by providing that the planning authority "shall" as opposed to "may" require as a condition of a grant of permission that the applicant enter into an agreement. Matters were thus made much clearer. The range of discretion was diminished, the question was as to how, rather than whether, compliance would be required. Guidelines to the operation of the provisions provided that the planning authority should seek to negotiate an agreement on the transfer at the earliest possible stage in any pre-planning discussions. The intention to make an agreement should be written into the planning permission as a condition in general terms, and both the authority and the developer should have a common understanding of the nature of the agreement when the decision to grant permission is made. It was further provided that the objective should be to finalise an agreement, at the latest, within two months of the grant of permission.

87. As and from the coming into effect of the 2002 amendment, the requirement was mandatory therefore. The contents of the conditions might be arrived at as a result of an agreement as opposed to a planning condition unilaterally imposed under s. 34 of the Act of 2000. Additionally, the provisions outlined a mechanism of referral to An Bord Pleanála or an arbitrator where the terms could not be agreed. Unfortunately the provisions of the Act do not clarify whether the condition is a condition precedent before permission is granted, or whether some form of 'agreement to agree' might be sufficient. Equally, while the provisions might give no guidance as to when such agreement legally takes effect, the better view is that the agreement only legally takes effect when the permission is sought to be implemented by the commencement of works. The provisions give no clear guidance on the terms of the agreement. The agreement is only activated once the permission is sought to be implemented. The Act does not provide either as to when such payment is due such as requiring development to have been completed. These matters are apparently to be negotiated between the parties. The Act is silent as to whether a developer can compel the planning authority to enter into an arrangement other than the transfer of land.

88. Part V compliance was, therefore, no insignificant question. For the parties, it was something of a Pandora's Box. The range of outcomes was uncertain. It was hardly a matter which should be left in abeyance for some eleventh hour collateral deal after the grant of permission.

The evidence of Joe Curran

89. Joe Curran was at the time an official in the Housing Section of Wexford County Council. The evidence he gave is of particular importance. He was at the time the Administrative Officer in the Housing Section. He was the only Council official to testify, and the Court has not therefore had the benefit of evidence from any other official. His section of the Council dealt with compliance. He said implementation of Part V proceeded in a phased or graduated way in Wexford. By the end of 2006 or beginning of 2007 it had become 'embedded' to use his own term. Without agreement as to such compliance in principle, a planning application would be invalidated. He stated that his first involvement with this particular site commenced on 12th July, 2005 when he met with William Devereux.

90. I pause here to point out the double significance of this date. First, to reiterate, the 12th July, 2005, was the date upon which the plaintiffs as vendors signed the contract. Second, it predated by a year and a half the point by which the compliance requirement had become 'embedded', that is the end of 2006. By the time the permission was granted in May, 2007, therefore, the rigour of implementation had altered significantly. One would imagine that such implementation process would be fraught with pressures and problems.

91. While there was no written record of the July 2005 meeting, Mr. Curran stated that its purpose was that anyone with an interest in land who had a proposal to develop it might enquire what the effect of Part V might be and the potential requirements of the County Council from such developer on lodging a planning application.

92. In this context Mr. Curran's testimony as to the letters written by John Begley, architect, to the County Council are particularly relevant. On 5th April, 2006 the County Council received a letter from the architect saying that in regard to

compliance with Part V of the Act of 2000:-

> *"The details of the method of compliance are currently being negotiated with the housing department of Wexford County Council."*

93. On 7th November, 2006, in response to a request for further information from the Planning Department of Wexford County Council, Mr. Begley wrote at Mr. Goff's instigation:-

> *"…Negotiations have taken place between Joe Curran and Maeve O'Brien, Housing Section, Wexford County Council. They have expressed a requirement for land in the area rather than housing units which the applicant is prepared to enter for the percentage required. The area is marked on the site plan. We have been instructed that the housing section negotiations regarding Part V are temporarily on hold in all areas…"* This was adopted by Mr. Goff.

94. The Devereuxs' did not inform Wexford County Council or Mr. Cooney about the existence of a contract on 12th July, 2005 at the information meeting. It is unclear when, precisely, the local authority became aware of the agreement. It was unaware for a period of years. Why the County Council was not informed of the agreement has not been explained. It is quite clear that by the time the planning permission issued Part V the application of the legislation was well entrenched.

95. Mr. Cooney testified that the next meeting which took place was on 29th November, 2005. The Devereuxs were represented on this occasion by Mr. Goff. Also in attendance were Mr. Goff's secretary and another businessman who dealt with an issue related to another development site along with Mr. Goff.

96. By that stage Mr. Curran considered that Mr. Goff was pretty well 'tuned in' to the requirements of Part V. He understood that that defendant had been asked to negotiate or deal with Part V on behalf of William Devereux. The Council note recorded that the local authority's first preference was for four acres from the site itself. Its second preference was lands at Kilmore to fulfil the obligations at Kilrane. Mr. Curran testified that because the local authority had a greater need for housing in Kilmore Quay than in the Kilrane/Rosslare Harbour area, it would have favoured a deal whereby land or houses in Kilmore Quay could have been transferred to the local authority under the auspices of the Act of 2000. So far as the County Council was concerned, to move from the subject site would involve a requirement on the local authority acceding an equivalent value of approximately 20% of the subject site itself.

97. Mr. Curran said that on the date of the application itself, 21st February, 2006 a further meeting took place. There Maeve O'Brien, an official of the County Council indicated that the local authority would prefer delivery of land as opposed to units and that it was for the developer to forward a proposal for the delivery of the land. Mr. Curran said the County Council had "nailed its colours to the mast" on the issue. While it was rare at that time that a deal would be done within the eight week period, such agreement might be possible if agreement in principle had been arrived at between the developer and the local authority.

98. The planning permission ultimately granted provided at condition No.10:-

> *"10. Prior to commencement of the development the developer* ***shall enter into an agreement with the planning authority pursuant to Part V of the Planning and Development Act 2000 and Part II of the Planning and Development (Amendment) Act 2002 relating to the provision of social and affordable housing on the site****. Details of the legal agreement regarding same shall be finalised by the local authority within eight weeks of the date of notification of grant of planning permission…"*

99. On 28th August, 2007, as earlier outlined, yet a further meeting took place with the local authority, where there was discussion of the proposal to satisfy Part V liability offsite at Kilmore Quay. Mr. Curran was to meet Francis Goff on the site and he (Joe Curran) indicated that if the proposal fell down the default situation would be triggered, i.e. the requirement for provision of 20% of the subject site. Mr. Curran testified that on 11th April, 2008 the local authority received a letter from a public representative to the Director of Housing wherein it was suggested that the Devereuxs proposed to make available to the County Council a parcel of fully serviced land adjoining the site in which the permission had been granted or two houses in Bridgetown.

100. I cannot see how this letter, any more than Mr. Kehoe's evidence as to a similar offer in the same year is consistent with the Devereuxs' case that they had completed a certain contractual agreement with the defendants.

101. Following that, in Mr. Curran's words, "nothing happened". It was in those circumstances that the County Council wrote on 2nd December, 2008. The other letter said that as no agreement in respect of Part V compliance had been reached it required that 20% of the subject site be reserved for social and affordable housing. There the matter rested.

102. It is clear from Mr. Curran's evidence that the Devereuxs were prepared to leave the negotiation to Mr. Goff. However the local authority found this difficult in the circumstance where Mr. Goff found it necessary to revert to the Devereuxs. Mr Devereux felt he had 'sold' the lands to Mr. Goff and this was all his responsibility. All the parties never seemed to have met in the same room in order to negotiate a final agreement. This is surprising. As a matter of fact, even on the plaintiffs' case, the purchasers and vendors never reached an agreement as to how they either jointly or individually would comply with the County Council requirements.

103. Mr. Curran was cross examined in relation to a letter which was of considerable significance although it was never sent. It was drafted by the Devereuxs' solicitors, dated the 11th April, 2008, and addressed to the Planning Department of Wexford County Council. It said in part:-

> *"It is our client's proposal that* ***their obligations under the permission*** *could be best met by making available to the County Council a section of land which adjoins the property in question and is of course therefore located at Killinick…"*

104. The letter suggested that sixteen sites in that area would have a value in the order of €1 million which would be in full satisfaction of their client's then obligations under Part V of the Act.

105. The fact that this draft was never sent does not detract from its significance and from the clear terms as to the plaintiff's ultimate stance as to where by then they considered *legal* responsibility for the issue of compliance might ultimately lie. It will be recollected that Condition 10 of the planning permission placed the onus on the *developer*. Pursuant to s. 96(2) of the Act a planning authority may require as a condition of a grant of permission that the applicant, or any other person with an interest in the land to which the application relates enters into an agreement with that authority concerning the development for housing of land to which a housing strategy objective applies in accordance with s. 95(1)(b) of the Act of 2000.

106. The issue of compliance was a complex one involving a wide variety of options available to the local authority in order to ensure compliance. This was not a small detail. In the absence of agreement the default condition could be activated in default. To all appearances, the question here was simply "left hanging" without there being any explicit reference to it in the agreement, when all the parties knew or should have known it was an integral part of the permission with significant consequences. In the absence of any other explanation, I find this bizarre. The evidence is silent as to how, or in what manner, it was thought in 2005, the issue might be surmounted. One clear inference from the evidence now is that by 2008, the vendors felt that compliance might be achieved not by Mr. Goff, but by themselves assuming their own apparent legal responsibilities as developers.

A consideration of certain aspects of Mr. Goff's evidence

107. The general outline of Mr. Goff's evidence has already been identified in consideration of the plaintiffs' case. His cause was not advanced by the quality of his testimony. He says the permission was never to his satisfaction. He testified that in 2004 or 2005 he knew little about Part V. I do not accept this. In fact even in his written witness statement he said the first thing he discussed when he talked to Mr. Kehoe in 2004 was precisely that subject. In oral evidence he said that in October 2004 and thereafter he spoke to Mr. Kehoe in relation to the Part V requirement and that under no circumstances would he accept responsibility for it.

108. I do not accept Mr. Goff's testimony either, that as of February, 2006, he did not know of the provisions of the Act of 2000. A minute of a meeting which took place with the County Council housing department on 21st February, 2006 indicates that Mr. Goff was well aware of the option which Wexford County Council was pursuing, that is to say that they wished for land and not housing units.

109. It is noteworthy that when it came to an amendment of the contract Mr. Goff instructed his solicitor, Julie Breen, also of Garahy Breen & Co., to "push out the closing date" into a period of two months if a satisfactory grant of permission was obtained. His reason for doing this was that he felt that, if planning was granted, the County Council would have a condition that the applicant would be legally bound to enter into a Part V agreement within two months of the grant of permission. There would then be no condition in the contract rendering the contract specifically contingent on the purchaser being satisfied in relation to the Part V stipulation. This clearly showed a knowledge of how the legislation operated.

110. Mr. Goff denied he had responsibility for planning compliance in the agreement. This is inconsistent with the clear evidence that he assumed responsibility for achieving such compliance. I found Mr. Goff's testimony on this issue also evasive and unsatisfactory. While the Devereuxs might indeed have been the *applicants* for the planning permission I think that Mr. Goff himself acted as though the responsibility of bringing about *compliance* lay with him. This conclusion is reinforced by the role which Mr. Goff and his company played in the provision of the further information to Wexford County Council in response to their notice for further information dated 19th June, 2006, and furnished on the 7th November, 2006. It has been quoted earlier in this judgment.

111. This response *apparently* satisfied Wexford County Council, but only sufficient for a grant of permission. No further queries were raised by the authority prior to grant of permission. Thus, Mr. Goff may have felt the concern which he had in relation to the Part V issue was (so far as the council was concerned) put out of the equation. But any such belief was unjustified. The matter was merely put into abeyance. It was not resolved. There remained the issue as to how the requirement would be complied with, when, and by whom. This re-emerged in stark form when the permission was granted. Even if Mr. Goff took on responsibility for the input to the application, this did not necessitate that he would be 'satisfied' with the outcome.

112. It is undisputed that the notification of permission was issued on 17th May, 2007. Mr. Goff stated that he was away on holidays at that point. He testified that he did not see it until 6th June when he got back from holiday. There was no evidence as to whether or not he was aware of its contents in the meantime. In this context in the instruction letter which he wrote to his solicitors regarding the Carr/O'Beirne negotiations Mr. Goff referred to the final grant issuing sometime in June. It is true that between 5th June and August of 2007, neither Mr. Goff, nor his solicitors expressed any explicit dissatisfaction with the planning permission. The letter from Garahy Breen & Co. to P. & J. O'Connor on 13th August, 2007, made no reference to the point. But the further letter from Garahy Breen & Co. to M. J. O'Connor's on 25th September, 2007, clearly reflected the lack of consensus with Wexford County Council with regard to Part V compliance. In my view such compliance was a necessary element of the planning permission.

113. Mr. Goff testified that neither he nor his company were by the time of the hearing ready willing or able to complete the sale. His business is still in operation however. But on one issue he was clear – he was never satisfied with the permission. He said he ultimately became dissatisfied in March or April, 2008. However, the evidence does not show that at any prior point to that time he was actually 'satisfied'. If he had been, he presumably would have completed the agreement, such as it was.

Deficiencies in the defendants' discovery

114. Mr. Goff's credibility was not assisted by the fact that there was a deficiency in his discovery. When this was remedied it showed that a number of emails and other memoranda demonstrated the substantial input from Mr. Goff and his company in relation to the planning compliance issue. Mr. Goff was not forthcoming about the reason for the deficiencies in the discovery. He did not, in a timely manner, instruct his solicitors and counsel that material documentation had been omitted. This fact only emerged in the course of the hearing. The deficiency was a matter within

Mr. Goff's knowledge for a minimum period of three weeks prior to the hearing. The documents which were omitted from the discovery were material in that they demonstrated the extent of Mr. Goff's involvement with the planning application process. An issue as to costs may arise from this point.

Consideration of the conditions in the agreement in the light of the evidence

115. However, ultimately, the outcome of this case must be determined by looking objectively to the evidence, and to the nature of the agreement itself, with a view to whether its terms are capable of enforcement by order of specific performance. Were the purchasers conditions ever satisfied? On the evidence I find that the answer to that question is no. In the circumstances of ongoing uncertainty outlined earlier, I find that Mr. Goff never actually did express his satisfaction with the entire planning permission as granted. Mr. Devereux ultimately so conceded in his own evidence. The full term and consequences of the permission had never sufficiently been identified. The deal, such as it was, was, as a matter of fact not then capable of specific performance. Thus, despite the criticisms which I have made of the defendant, I find the plaintiffs' claim must fail on the evidence.

Interpretation of the Agreement

116. Having dealt with the findings on the evidence I now turn to the true interpretation of the agreement. The document should speak for itself.

Was this an option agreement?

117. Wylie, *Irish Conveyancing Law*, 3rd Ed., (Tottel Publishing, 2005) at para. 8.03 refers to an option to purchase as an:-

> *"arrangement whereby the owner of property is committed to selling it to the person given the option, if that person chooses to exercise it."*

The learned author points out that until the latter exercises his rights there is no contract for the sale of land. A purchaser may choose never to exercise it; but the owner is bound by the contract creating the option to the extent that he may not dispose of the property so as to deprive the option holder of his right. I find that the conditions 7 to 9 of the agreement are consistent only with the agreement being in fact an option, subject to conditions as to satisfaction with planning permission from the purchaser's standpoint.

118. The planning permission was for 130 units. The contract did not specifically allow for the circumstance which arose where there was a *lacuna* in regard to Part V compliance and where, in fact, the vendors tried in 2008 to mend the situation. But this does not detract from the effect of the conditions as amended in the contract.

119. Were they relevant or admissible as an aid to interpretation, the terms of the plaintiffs' solicitors draft letter of 11th April, 2008, would be simply irreconcilable with the case they now seek to make. It would be inconsistent to assert that on the one hand Part V compliance was the purchaser's responsibility, and that Mr. Goff was satisfied with the terms of the planning permission; and on the other hand in April, 2008 to even draft a letter wherein the plaintiffs accept that legal responsibility for Part V compliance lay with themselves. Mr. Devereux's concession would be conclusive. But even a simple interpretation of the terms in themselves, demonstrates the fragility of the plaintiffs' case.

120. Under Condition 7 the purchaser had the right not to proceed in the following circumstances.

> (a) where the planning permission was refused.
>
> (b) where it had been granted on terms not satisfactory to him and he had not exercised his right under Condition 7(b) of the contract.

In such circumstance Condition 7(c) provided that the contract was null and void and the contractual relationship between the parties ended. This gave the purchaser the option whether to proceed.

121. Condition 8 deals with the *vendor's* right to rescission in the event that permission was granted for less than 140 units. In such circumstance the *vendors* could rescind by serving the appropriate notices, subject to a right of the *purchaser* upon serving the appropriate notice to proceed to purchase the property for €4.9 million. But the purchaser never served such a notice. These were all options.

122. It seems to me that the "contract" was actually an option agreement. It gave latitude to the vendor and purchaser to proceed or not to proceed on certain contingencies.

123. Were it material evidence on the issue of interpretation, Mr. Kehoe's evidence is particularly relevant. When Mr. Goff came to consider buying the larger area, Mr. Kehoe stated the defendant wanted an *option* to purchase the adjacent lands for the purpose of building approximately 100 houses. I do not think this position ever altered.

124. Condition 9 deals with closing. It again provides that, in the event of planning permission being granted on terms "satisfactory to the purchaser", which meet the criteria before referred to, he might proceed. Again, I am driven to conclude that this was in fact an option agreement.

125. I do not think that any relevant provisions of the contract are ambiguous. Neither Condition 7, 8 or 9 can be read against the purchaser (see *Kramer v. Arnold* [1997] 3.I.R. 43). In my view the terms of the agreement were unambiguous. But this does not assess the vendors' case.

Was the agreement enforceable in law?

126. An agreement may be subject to an implied term of reasonableness as to performance. Mr. Goff delayed. I think he was less than candid in saying that the only reason for this was solely because of his dissatisfaction with the planning permission. But the delay was on both sides. In my view this was because both parties were aware that a large issue had

been unresolved. What actually arose was what is termed colloquially as a "Mexican stand off". Both parties could move neither forward nor back. Between the inception and conclusion of this negotiation the property market in this State had undoubtedly moved from boom to near standstill. But this was not the only obstacle to performance. The condition "satisfactory to the purchaser", even if confined within the parameters of the planning permission was pivotal. It was more vital still, when seen in the context of the range of possibilities that might arise by application of Part V of the Act of 2000. To be enforceable the agreement was contingent on there being a permission the terms of which were certain, compliant with law and capable of completion. The contingency must be "crystallised". Otherwise the agreement would be so uncertain as to be unenforceable. The proviso in the amendment gave the purchaser latitude which he exploited to the full. But the contingency of satisfaction was never fulfilled. It is not the function of the court to determine whether the purchaser acted honourably, but to consider the evidence and interpret the contract. In fact I would go further and find the parties never achieved consensus on an essential term of the agreement. This is clearly inferable from the correspondence. If there was a complete agreement, why did the Devereuxs' not object when Mr. Goff's solicitor wrote that the Part V requirements were not fulfilled and that their client was not satisfied with the planning permission? I cannot conclude that the contract properly interpreted was enforceable.

127. While the agreements entered into between the defendant and Mr. O'Brien and Mr. Carr might be capable of being portrayed as affirmation or part performance, the evidence did not establish whether Mr. Goff was here acting for himself or as agent for the plaintiffs who did not enjoy good relations with the neighbours. None of the three issues which remained outstanding and identified in Garahy Breen's letter of 24th September, 2007 were ever actually resolved. The relevance or materiality of these issues to performance of the agreement was never disputed by the purchaser. Months dragged by. It was only on 9th May, 2008, that the Devereuxs' solicitors wrote to Garahy Breen & Co. calling on Mr. Goff to complete the transaction. The notice to complete was served only on 4th July, 2008, more than a year after the grant of planning permission. The delay begs the question: why delay if there was an enforceable contract? The conduct of the parties shows the absence of certain and identified terms.

The need for contractual certainty on terms relating to planning permission

128. There are of course numerous authorities as to contracts being 'subject to planning permission'. But the following persuasive authorities illustrate the necessity for completeness and certainty in conditions of sale relating to planning permission.

129. In *Hargreaves Transport v. Lynch* [1969] 1 WLR the Court of Appeal held that a condition as to planning for use as a transport depot was not satisfied by obtaining outline permission. Denning M.R. observed at p. 219 of the report:-

> *"…. Whilst I agree that in planning law **outline** permission is **the** permission, nevertheless I do not think that it is the permission required by Condition 9 of the contract. The contract must be construed sensibly. The purchasers wanted a planning permission which would enable them to erect buildings and use them for their transport business. An outline permission was quite insufficient for that purpose. They could not turn a sod or lay a brick until the details were approved. In order to make the condition work sensibly it must mean that the purchasers are to receive detailed permission from the planning authority so as to be able to use the site as a transport depot and to develop it by putting buildings on it. This law is confirmed by the subsequent conduct of the parties which is always I think a legitimate thing to take into account …"*

130. Here the planning permission was useless without a concluded Part V agreement. Without such agreement there could be no planning permission and the agreement as such could not in any case be completed. Work could not begin. The vendors knew that the purchaser was concerned as to how Part V was to be satisfied – even if he was using this partly as a ploy, having regard to the rapidly deteriorating state of the market then. It was reasonably within the contemplation of the parties that the manner of compliance would have a direct bearing on whether or not the development could, or would proceed. The agreement as a whole was conditional on the satisfaction of the purchaser. The option was based on the fulfilment of a prior condition which had not been fulfilled. It is not said that the purchaser "disabled" himself or prevailed on the Council to prevent consensus. The condition was not complied with by the completion date, within a reasonable time thereafter, or ever.

131. This was not a situation where a planning permission contained an inconsequential condition now relied on to resist performance. The issue here undoubtedly had real consequence. It was unresolved between the parties even at the time of this hearing. While the defendant may indeed have expressed to Mr. Devereux his intention to proceed with the contract, this could only be seen in the context of the fact that the requirement would have to be satisfied, if not by him then by the plaintiffs/vendors. If the vendors felt they had a complete agreement they could have moved earlier on it. But they did not and their inaction for a period of one year after the grant of the planning permission is as eloquent as the terms of the agreement itself. When they sought completion – even if the agreement had been a true contract and not a conditional option agreement, the conditions for completion had not been fulfilled.

132. Even as late as 11th April, 2008, the plaintiff's solicitors were writing to the planning department of Wexford County Council outlining yet further proposals for possible compliance. The manner of such compliance was never agreed between the vendors as applicants for the planning permission and the County Council.

Was the agreement also conditional?

133. Without full planning compliance there could be no complete permission. In the absence of such permission the purchaser could never express his "satisfaction" because the terms of that permission were *inchoate*. Mr. Goff said he ultimately became dissatisfied with the Part V condition in March or April 2008. It has not been shown that he ever expressed that he was actually positively satisfied with the terms of the permission. Mr. Devereux conceded the point. The test of such satisfaction must be seen in the light of the agreement. If the agreement was conditional and optional, the purchaser's satisfaction could be demonstrated by approval and completion of the agreement; proof of satisfaction would arise from performance of the sale. Ultimately the issue here is not who was responsible for planning permission *compliance* - the question was rather, whether all the conditions of the permission were satisfactory to the purchaser. There were three sides to this; the vendors, the purchasers - and the County Council. When completion was sought there was no certainty on the manner of Part V compliance. The purchaser was not, and could not have been satisfied.

134. I must dismiss the claim for specific performance. It has been accepted that in the absence of an order the plaintiffs

are not entitled to any other form of relief. I will hear submissions on the issue of costs arising from the findings in this judgment.