Neutral Citation Number: [2012] IEHC 265

The High Court

Commercial

[2011 No. 1048P]

Between

Durkan New Homes

plaintiff

and

The Minister for the Environment Heritage and Local Government

defendant

Judgment of Mr Justice Charleton delivered on the 5th day of July 2012

1. In June 2006 a site owned by the State at Harcourt Terrace in Dublin consisting of a Garda station and the film censor's office, measuring 3540 m² or 0.874753 of an acre, was valued at €17.7 million. By December 2008, the value of that site had dropped to €9.6 million. In September 2010 the site was worth €3.8 million. In November 2011 a professional valuer made a statement for the purposes of this case putting the potential realisable sale price of the site at €3 million. When it came to the date of trial in June 2012, he revised his opinion to €2.8 million.

2. The plaintiff is a firm of housebuilders specialising in supplying the market for young couples who are buying their first home. The inflated values represented by the site at issue in this case at Harcourt Terrace were also reflected in house prices. To enable people to purchase a home, the defendant Minister started a number of schemes in August 2005 under an organisation called the Affordable Homes Partnership. All such schemes were ended in December 2010 when the Affordable Homes Partnership was dissolved. By legislation applicable at the earlier date, builders of housing estates were to supply some units to the public at discounted prices. The scheme in question here was one whereby the State exchanged pieces of land which were not needed on a barter transaction to builders who would supply a particular value of discounted homes to the public. This scheme involved careful evaluation. The site to be exchanged was professionally assessed as to what it was worth in the open market. The open market price of houses that would be exchanged for any such site was researched and a discount value was arrived at whereby they would be sold for less than the market price. The sum of such discount, as availed of by less well off couples, was multiplied by the number of houses sold at an undervalue to arrive at the price for which land would be exchanged. In a competitive market, the sale of sites by tender was usual. Durkan New Homes had a particular interest in purchasing the Harcourt Terrace site. Previously, on the basis of a competitive tender, it had purchased an adjoining site on which a butter testing station had once stood, on the basis of exchanging a discount on affordable homes. By having both sites together, the firm of builders hoped to achieve a greater density of development and more effective site access.

3. When tenders were requested by the State by July 2006 for the Harcourt Terrace site, Durkan New Homes made a handsome offer. This outstripped two rival bids. In exchange for the site to be transferred, the building firm offered to discount 215 houses and apartments in various parts of Dublin city by 47%. The Affordable Homes Partnership evaluated that tender as against the expected open market price of the site. It represented excellent value. The 215 houses and apartments discounted by 47% cost Durkan New Homes a return of €31,243,000 plus VAT. That is the main sum claimed in damages in this action. The State, through the Affordable Homes Partnership, accepted that tender. Because of various delays, the site at Harcourt Terrace which the State contracted to sell to Durkan New Homes was never conveyed.

4. The plaintiff firm of builders seeks the return of what was in effect the purchase price of the site. In essence, the defence to the action is that by entering into negotiations with the State to buy and lease back the site, an estoppel in respect of the strict legal rights under the contract of sale has arisen by convention. In consequence, it is argued that the question of damages does not arise and that there is no liability. Were that argument found to be incorrect, the State seeks to persuade the court that the true measure of damages is an assessment of the open-market cost of the site at various dates later to the acceptance of the tender; namely when the contract would have been completed had an enforcement notice been complied with, or as of today's date or at other suggested times. Fundamentally, on the issue of damages, it has been eloquently argued on behalf of the State that the principle applicable is that a plaintiff should not be put in a better position than if the contract had been performed. Therefore the value that would have resulted to Durkan New Homes had the contract for the sale of the land been performed is the measure of damages. This would place the value current as of the date of trial as the correct figure. In addition, an argument as to a penalty clause arrived at when this site could not be conveyed, due to the reluctance of the gardaí to leave the station at Harcourt Terrace, is in issue. The claim for the interest charges to the borrowings necessary to fund the purchase by Durkan New Homes must also be decided. Whether value added tax should be included as a measure of damages is also an issue. Finally, some items of special damage have been agreed in the event of a finding in favour of the plaintiff.

5. I propose to move on to these issues after first setting out a brief chronology.

Chronology

6. In 2005 Durkan New Homes successfully tendered for the purchase of the adjoining butter testing station site. The tender offer was to offer a discount to the public for 193 housing units, amounting to a total market saving to those purchasing of €15.7 million. A difficulty had arisen with stamp duty on the transaction. In July 2006 the Harcourt Terrace site was offered for sale by tender on the basis that offers were sought "for the delivery of a number of affordable units, as quickly as possible, on sites within the greater Dublin area with preference to those proposals which maximise the provision of affordable units in the Dublin metropolitan area." The advertisement specifically stated that the objective was to fund the provision of affordable housing units "by the exchange of the Harcourt Terrace site." The advertisement also states that cash offers would not be accepted. It warns that any offer "must represent a fair value for the site." By letter dated 19 July 2006, Durkan New Homes, and some people referred to in the case as the Durkan individuals, made a tender offer which competed with two other such offers. By letter dated 10 August 2006, the Affordable

Homes Partnership accepted the Durkan New Homes' tender. The letter confirms that the transfer of land at Harcourt Terrace was for the exchange of 215 residential units discounted from the market value, "representing a value for the exchange of €35,461,000 inclusive of VAT." By a document dated 24 of August 2007 a development agreement was then entered into between those sets of parties, the Affordable Homes Partnership representing the interests of the defendant Minister. Title to the land in question was held by the Commissioners of Public Works in Ireland. The Commissioners of Public Works in Ireland is also now referred to as the Office of Public Works or OPW. They hold the title for a much public land holding and in particular Garda stations. An agreement for sale between the Affordable Homes Partnership and Durkan New Homes was entered into on 7 December 2007 with a closing date for 31 December 2008. The special condition included at clause 21 is a provision for the payment of money in the event of non-completion within the contemplated time. There was no specific provision as to interest beyond a standard clause in the general conditions which places interest at 4% above the court rate, currently at 8%. Clause 40 of the contract deals with completion notices. This provides that if the sale is not completed by the closing date notice may be given by either party to complete the sale and that such notice is effective if that party is able, ready and willing to proceed. The term provided for completion in the contract is 28 days. The clause continues in the following terms:

> If the vendor does not comply with such a notice within the said period (or within any extension thereof which the purchaser may agree), then the purchaser may elect either to enforce against the vendor, without further notice, such rights and remedies as may be available to the purchaser at law or in equity or (without prejudice to any right of the purchaser to damages) to give notice to the vendor or requiring a return to the purchaser of all monies paid by him, whether by way of deposit or otherwise, on account of the purchase price.

7. By a separate agreement of 10 December 2007, Durkan New Homes sold some or all of that forthcoming interest to four people, three of whom were members of the Durkan family; previously referred to as the Durkan individuals. That agreement was not argued as being germane to the issues raised in this hearing. Later difficulties with the conveyance of the land focused upon whether there had been an agreement for sale incorporating a new corporate entity and a sub sale involving these individuals. No argument has been advanced, and in my view no rational argument could have been advanced, to the effect that the later insistence by the purchaser under contract which included these individuals on a sub sale and which avoided stamp duty entitled the vendor not to complete. From the time the tender was first advertised for, stamp duty was not to be payable. By a third party limited recourse mortgage of 13 December 2007 Allied Irish Bank gained an interest in the site through the individuals and through a separate mortgage of the same date in relation to the relevant corporate vehicle, Harcourt Terrace Limited. On 18 December 2008 a draft indenture involving a proposed deed of transfer to the corporate vehicle and the individuals was furnished to the Chief State Solicitor's Office. An amendment to that indenture was delivered by the Chief State Solicitor's Office which deleted the corporate vehicle was delivered on 27 May 2010. In the meanwhile there had been much discussion about the issue of a sale or sub sale.

8. On 19 August 2010, Durkan New Homes served a completion notice on the Affordable Homes Partnership. The site had yet to be conveyed by the Commissioners of Public Works in Ireland to the vendor; hence no sale to the purchaser Durkan New Homes. Another completion notice was in turn served by the Affordable Homes Partnership on 20 August 2010 to try to force the completion of the sale. That proved impossible, apparently, because the gardaí would not move.

9. Between the disappointment of the sale not closing on 31 December 2008 and the eventual disavowal of the contract and request for the return of the purchase price by Durkan New Homes on 15 October 2010, a situation is claimed to have arisen whereby an estoppel by convention renders that step under the written contract unenforceable. It was also on 15 October 2010 that the difficulties between the land owner and the vendor had been eventually sorted out, dissolving any difficulty as to stamp duty, sub sub sale and the individual purchasers. A brief statement of the law is therefore necessary.

Estoppel by convention

10. Estoppel is a device in equity, which operates as a protection against defined legal rights, including legal defences, whereby a party to whom a clear representation has been made inviting reliance may be spared the unfairness of a retreat from that position by the representor. This form of estoppel is outlined in Treitel - The Law of Contract (13th Edition, Edwin Peel) at 3.094 as follows:

> Estoppel by convention may arise where both parties to a transaction "act on an assumed state of fact or law, the assumption being either shared by both or made by one and acquiesced in by the other". The parties are then precluded from denying the truth of that assumption, if it would be unjust or "unconscionable" to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any "clear and unequivocal" representation or promise. It can arise where the assumption was based on a mistake spontaneously made by the party relying on it, and acquiesced in by the other party, though the common assumption of the parties, objectively assessed, must itself be "unambiguous and unequivocal".

11. A clear example is provided in the decision of the Supreme Court in Courtney v McCarthy [2008] 2 IR 376, which was also a sale of land case. The plaintiff agreed to sell a site in Ennis, Co Clare to the defendant. The sale was due to close on a particular day but the purchaser's solicitor was out of town. An agreement was made to complete the sale on the following day but then an enquiry was made as to why the purchaser's solicitor had not turned up on the day designated by the contract for the closing and the purchaser was told that the sale had been called off. The purchaser was granted an order of specific performance on the basis that where a party made, by words or conduct, a clear and unambiguous promise or assurance to another party which was intended to affect legal relations between them and was to be acted on accordingly, if such action was taken to the detriment of that party, the party giving the promise or assurance would be estopped from reverting to the previous legal relations between them. Geoghegan J relied on the authority of Amalgamated Property Co v Texas Bank [1982] 1 QB 84. At pages 389-390 he set out the law as follows:

> The case related to a bank guarantee given by a company the validity of which was being disputed by the liquidator of that company. A question arose as to whether even if the guarantee was not valid an estoppel had arisen by virtue of the conduct of the company which precluded denial of the guarantee. Brandon L.J., though forming the view that the guarantee was in fact effective, went on to consider the estoppel question in the event that he was wrong. Two main arguments against the existence of the estoppel had been put forward in the High Court and the Court of Appeal. The first was that since the bank held its mistaken belief as a result of its own error alone and that the company had at most innocently acquiesced in that belief which it also held, there was no representation which could found an estoppel. The second argument was that the bank was seeking to use the estoppel not as a shield but as a sword and that that was not permitted by the law of estoppel. Brandon L.J. rejected both arguments. He expressed the view that the particular estoppel relied on was of the kind described in Spencer Bower and Turner, Estoppel by Representation, (3rd ed. 1977). at pp. 157 to 160 as "estoppel by convention". He cited the relevant passage of that work as follows:
>
> "This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis

> of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed."

In this particular case, both parties knew that the contract was lawfully rescinded and both parties accepted that that was to remain the position subject only to the proviso that both would act on the artificial assumption that the contract was still alive and enforceable if the sale was completed on a particular date and time.

Brandon L.J. then dealt with the second argument which, as I have already pointed out, was an argument which featured heavily in this case and particularly in the High Court. Counsel for the plaintiff argued strongly that estoppel here was being used as a sword and not a shield. But this is what Brandon L.J. had to say in relation to this alleged principle at pp. 131 to 132 of Amalgamated Property Co. v. Texas Bank [1982] 1 Q.B. 84:-

> "In my view much of the language used in connection with these concepts is no more than a matter of semantics. Let me consider the present case and suppose that the bank had brought an action against the plaintiffs before they went into liquidation to recover moneys owed by A.N.P.P. to Portsoken. In the statement of claim in such an action, the bank would have pleaded the contract of loan incorporating the guarantee, and averred that, on the true construction of the guarantee, the plaintiffs were bound to discharge the debt owed by A.N.P.P. to Portsoken. By their defence the plaintiffs would have pleaded that, on the true construction of the guarantee, the plaintiffs were only bound to discharge debts owed by A.N.P.P. to the bank, and not debts owed by A.N.P.P. to Portsoken. Then in their reply the bank would have pleaded that by reason of an estoppel arising from the matters discussed above, the plaintiffs were precluded from questioning the interpretation of the guarantee which both parties had, for the purpose of the transactions between them, assumed to be true.
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> In this way the bank, while still in form using the estoppel as a shield, would in substance be founding a cause of action on it. This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action, on which without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case."

As I have illustrated earlier in this judgment that is exactly the position which pertains in this case.

12. I am not convinced, however, that estoppel by convention is applicable in the circumstances of this case.

13. In early 2009, Neil Durkan, of Durkan New Homes, met with John O'Connor of the Affordable Homes Partnership and John McMahon of the Commissioners of Public Works. At that meeting Mr McMahon indicated that both the Garda station and the film censor's office were still occupied. He explained that the alternative Garda station on Kevin Street, to which the existing station was to be relocated, had not yet been completed. That site on Kevin Street is in an area of archaeological interest which created delays. A number of other issues emerged, including contamination of the site, which required to be resolved before construction could commence. The initial works on the site, at the total cost of €4.2 million were completed in October 2008, after which construction was to take place and for which a construction contract was agreed in June 2010. That has since been cancelled, I understand, because the contractor failed to give certain undertakings sought. It has not again been put out for tender. In 2009, as there was no immediate space for the gardaí to move into, Mr McMahon expressed the view that while temporary accommodation could be sourced, the preference was to remain in occupation of the Garda station for the moment. Vacation was not possible at that juncture, otherwise then by means of an emergency evacuation. Neil Durkan was asked if there might be some interest in granting a lease in the site to the Commissioners of Public Works for the purposes of accommodating the gardaí. Negotiations commenced in respect of a lease.

14. By the end of the summer 2009, there was agreement in principle on the outline terms of that lease. Later, in October 2009, Durkan New Homes obtained consent from AIB Bank, as its banker, to enter into a lease on those terms. This consent was not in writing. It was not an unqualified consent. One of the pre-conditions was that the lease contains no onerous conditions or that there would be nothing in the lease that could prejudice the security that AIB had taken over the site or under the contract. The solicitors for Durkan New Homes issued a draft lease in November 2009 and again in January 2010. By January 2010 no response had been received. The lease had been formally issued to the Chief State Solicitor's Office, who, in turn, had issued it to Eversheds, solicitors for the Affordable Homes Partnership. In February 2010 Neil Durkan contacted Mr O'Connor for an update by email. In that communication he expressed his frustration that no formal response had been received to the lease. Mr O'Connor, for his part, said that he would endeavour to get some feedback on the state of play. A meeting took place between the solicitors for Durkan New Homes, the Chief State Solicitor's Office and Eversheds in May 2010 to discuss a number of outstanding issues in respect of the lease. It was then made clear by the vendors that it would not be acceptable for the lease to be issued in the name of the corporate vehicle that Durkan New Homes had contemplated as being the co-party in the eventual conveyances, namely Harcourt Terrace Limited. Serious issues regarding the insurance of the building and its reinstatement in the event, for example, of a fire, were also discussed. Durkan New Homes took the view that as it was to be a short term letting, it would be extremely unusual for the landlord to agree to rebuild the building in the event that it was damaged by fire. On the other hand, the Commissioners of Public Works had an issue that as the buildings were quite old, should the lease extend to three or even five years, there was the possibility of dilapidations. Finally, there was an issue over guaranteeing the rent until the end of 2011, which the Chief State Solicitor's Office had rejected.

15. Once Durkan New Homes had decided the identity of the corporate vehicle that was to carry out the development of the Harcourt Terrace site, namely Harcourt Terrace Limited, it sought to have the site transferred into its name. This proposal was rejected by the Chief State Solicitor's Office and it was decided to have the site instead transferred into the names of four individuals associated with Durkan New Homes, who would hold the site on trust for Harcourt Terrace Limited. In tandem, that issue arose with the question regarding the inclusion of Harcourt Terrace Limited's name in the proposed lease. In May 2009, a formal response was received from the Chief State Solicitor's Office to the draft deed for the transfer of the Harcourt Terrace site which the solicitors for Durkan New Homes had provided in December 2008. That deed provided that the Commissioners of Public Works would transfer the site to the Affordable Homes Partnership who would transfer it on to Durkan New Homes and then finally a transfer on to the Durkan individuals. The Chief State Solicitor's Office objected to the final transfer. Instead, it was proposed that the Commissioners for Public Works would transfer to the Affordable Homes Partnership who would in turn transfer the site jointly to Durkan New Homes and the Durkan individuals in their sole names. This raised an implication that Durkan New Homes would be liable for stamp duty on any subsequent transfer of the site to the Durkan individuals. That potential stamp duty liability was in excess of €2 million. This clashed with the expectation of the purchasers as the tender documentation had provided that stamp duty would not be payable on the transaction. Furthermore, Durkan New Homes maintained that its draft deed was in accordance with the terms of the contract concluded between

the parties. The difficulty appears to have arisen due to a difference between the contract between the Commissioners for Public Works and the Affordable Homes Partnership on the one hand and that between the Affordable Homes Partnership and the plaintiff on the other. In order to effectively address the stamp duty concern, there was a proposal that a submission be made to the Revenue authorities so that the Revenue Commissioners would make a ruling on the matter.

16. The lease negotiations took place between Neil Durkan, Mr O'Connor, Mr McMahon and Mr O'Loughlin, who was a property negotiator/real estate agent with HWBC appointed as agent for the Affordable Homes Partnership and the Commissioners of Public Works. At that point the Affordable Homes Partnership and the Commissioners had agreed to act in concert with one another. The proposed rental fee under the lease for the Harcourt Terrace site was €600,000 per annum. That figure was to be back dated to the 1 January 2009 irrespective of when the lease was ultimately executed. It was part of the terms of the lease negotiations that any rental fee would involve an element which would allow for any claim under clause 21 of the special conditions to the contract for sale to be surrendered. The terms of the lease were close to final completion bar a number of discrete issues by the 25 August 2010, when the solicitors for Durkan New Homes sent a draft lease to the Chief State Solicitor's Office with a cover letter headed "strictly without prejudice, subject to letting agreement, letting agreement denied". Because there was no agreement to transfer the site, the lease could not be concluded for the simple reason that Durkan New Homes, or any other entity, could not grant a lease as a landlord if it did not hold the necessary title to the site. There was also an issue as to whom the site was to be transferred. Correspondence continued through the summer of 2010 between the solicitors for Durkan New Homes and the Chief State Solicitor's Office. The Chief State Solicitor, however, maintained her position in respect of the lease and the deed of transfer through June until September 2010. That attitude only softened after the expiry of the completion notice in October 2010. Mr O'Connor had informed Mr McMahon on the 27 July 2010 of the possibility that a completion notice might be served and the implications in that eventuality.

17. A letter of demand was then sent on behalf of Durkan New Homes dated the 16 August 2010, which sought the recovery of "all payments due to [Durkan New Homes] pursuant to the contracts for sale with [the Affordable Homes Partnership]". The completion notice was then served by Durkan New Homes on the 19 August 2010. In evidence, Neil Durkan explained that by that stage there was a considerable degree of frustration, especially regarding what were seen as onerous terms in the lease. The difficulty first was that the inclusion of Harcourt Terrace Limited was rejected in the proposed conveyance. The second was a query over the insurances which would be taken out in respect of the building on entry into a lease and by whom. In the normal course, the Commissioners of Public Works do not insure its buildings; preferring instead to take the risks that any of its buildings might face. The seriousness of the situation and the lack of equivocation involved from the point of view of the argument as to estoppel by convention is illustrated in an e-mail sent by John O'Connor on 6 September 2010:

> On foot of discussions ... on the Wednesday I contacted Neil Durkan ... I requested that Durkan New Homes would withdraw the completion notice served on the Affordable Homes Partnership. This would in turn allow the Affordable Homes Partnership to withdraw the completion notice on the [Commissioners of Public Works]. Neil Durkan said that the directors of Durkan New Homes are not in a position to withdraw the notice as they would be acting improperly as directors having regard to the handling of the matter with legal due diligence. They are under very considerable pressure from AIB Bank who provided the lending for the Harcourt Terrace site. AIB would not consent to them withdrawing the completion notice. He stated that AIB's legal department are now involved. He also stated that the loan was due to transfer to [the National Asset Management Agency] shortly and that is why AIB is taking a particularly hard line. He stressed that the transaction had to be completed right away. I asked Neil Durkan to agree to a minimum period before instigating legal proceedings. He said he had not discussed with their solicitor the issue of instigating proceedings in the event that the title transfer and contract was not completed by 17 September as they expected it to be completed. He said he would talk to their solicitor but again stressed that the bank was also involved in any decision.

18. The final query was in relation to the reinstatement issue. The completion notice expired on the 17 September 2010. It was not extended. There was no correspondence received by Durkan New Homes during the completion period. However, Neil Durkan noted that there was no sense from anybody that Durkan New Homes was not entitled to serve such a notice. Mr O'Connor made two requests that the completion notice be withdrawn, which were rejected by Neil Durkan. In turn, the fact that the Affordable Homes Partnership had served a similar completion notice on the Commissioners of Public Works only emerged on discovery. That completion notice was served so as to seek to protect the Affordable Homes Partnership's position. A meeting took place on the 28 September 2010 between the Commissioners for Public Works , Affordable Homes Partnership and the Department of the Environment at which the issue of the transfer deed was discussed and resolved. The Commissioners of Public Works changed its position for the reason that the Affordable Homes Partnership had agreed to provide an indemnity in relation to any potential stamp duty liability. There was a suggestion that Mr. O'Connor contacted Neil Durkan on either the 29 or 30 September 2010 by telephone to inform him that the Commissioners of Public Works was now willing to complete the transfer in the manner requested by Durkan New Homes. Neil Durkan did not recall this conversation, but neither did he dispute that it took place. There was a conversation between the parties' solicitors on the 8 October 2010 which was followed on the 15 October 2010 by a letter written on behalf of the Commissioners of Public Works to Durkan New Homes communicating that they had resiled from their position in relation to the sub-sale and the inclusion of the transfer to the Durkan individuals in the deed of transfer for the site. That letter crossed with a letter from solicitors for Durkan New Homes demanding payment of the monies paid under the tender by way of the discount given as the selling price. There was also telephone communication between the solicitors on that day which may go some way to explaining why the letters crossed. The letter sent on behalf of Durkan New Homes was the first occasion that it had sought the repayment of the discount provided under the tender contract.

19. The film censor's office was relocated in mid-2009 to its present offices in Smithfield. As of the date of this judgment the Harcourt Terrace Garda Station has only been partially vacated. A number of operations have been transferred to the Irishtown and Pearse Street stations but an assurance, to whoever might be prepared to accept it, has been given that the gardaí will have completed all operations and vacated the site by the end of 2012.

20. Neil Durkan was subjected to a searching cross-examination by counsel for the defendants. I quote from transcript for the second day of the hearing:

> Question: I mean your contractual entitlement was to have a transfer of property to the Durkan individuals. There was no contractual entitlement on your part, and never asserted at this stage, for the Commissioners for Public Works to transfer to Harcourt Terrace Limited, isn't that correct? Answer: When the deed was prepared in 2008 it was sent over in the name of ... the individuals. We had sought to include Harcourt Terrace Limited on the deed, which was refused. And the reason this was in draft with the names and the option of possibly the company as well was because we didn't know who ultimately the landlord was going to be because the Chief State Solicitor's Office was actually refusing the inclusion of the individuals as a separate transferee.
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> Question: But this was not a problem that had any bearing on the lease, Mr Durkan, it was a problem in relation to the

transfer of the property, but the lease could be taken from who ever held the legal interest in the property, isn't that correct? Answer: That's not my understanding.

Question: Well, I think that's so, Mister Durkan, and that's what is reflected here? Answer: I'm not a solicitor, but the Chief State Solicitor's Office was insisting that is the deed be taken in [the name of] Durkan New Homes and the individuals, where the contract had provided for the deed to be taken in the names of Durkan New Homes and then onto the individuals. That, in turn, could have been passed to Harcourt Terrace Limited by the individuals, but the landlord was not certain at that stage.

Question: No, and that's why the draft is in the form it is in. If there had been a conveyance to the Durkan individuals they could have ... ? Answer: It was drafted for that reason. And as referred to here, there was also the issue of the repairing clause.

Question: In relation to that, Mr Durkan, I think that was really just simply an administrative matter. As was common, the repairing clause would be based on a condition survey? Answer: There was a survey to be done, which we hadn't sight of.

Question: And it had been done and it was furnished within days of this draft lease? Answer: This lease had not been finalised, for the reason that we did not know who the ultimate landlord was going to be. There was the issue of the repairing. And, ultimately, because the terms of the lease had differed from what we had originally agreed in 2009, we still had to go back and get further bank consent on it. So we hadn't got bank consent and I think that is made clear there as well [in the letter of 25 August 2010], as I understand it.

21. I accept the evidence of Neil Durkan that, as he put it, he and his company had never "led anyone up the garden path". Mr Durkan's evidence was objectively reliable. A situation of clear peril to the completion of the contract existed from at least June 2010, thereby withdrawing any issue that the parties were negotiating for a lease under a mutually understood suspension of their legal rights. The lack of agreement on fundamental issues undermines any suggestion of an unequivocal understanding, much less a commercial agreement for a lease subject only to some minor terms being sorted out. The continual reiteration in correspondence that there was no contract for a lease would be completely overturned were a court to take the view that an estoppel could arise. While there was an impetus from all parties towards a lease, that impetus was upset in circumstances about which no complaint can be made when, after a more than reasonable time, the reference by Durkan New Homes to the contract of sale of Harcourt Terrace alerted everybody that that mutual understanding could no longer be relied on. In so acting, Durkan New Homes acted within their rights. In so far as there is a conflict in the evidence, I am disposed to accept the evidence of Neil Durkan in the context of the entirety of the testimony and correspondence in this case.

22. The rejection of the contract by Durkan New Homes and the claim for damages was therefore valid. I turn to the issue of damages.

Penalty clause

23. Parties entering onto a contract are always aware that it may be broken. Since parties are free to contract on the basis of any consideration and for any purpose, other than what is illegal, it is also within their rights to genuinely pre-estimate what loss would occur in the event of a breach. A damages clause within a contract is to be upheld by the courts as having equal validity to any other term of the contract as thereby the parties are shown to contemplate and agree on their future losses. The difficult question of quantification is therefore removed from any future dispute as to the effect of a breach. What parties are not allowed to do however is to terrorise against a breach of contract through a clause disguised as a damages clause but which considerably overloads the party in breach with a liability to pay that is unrelated to what the contemplation of the parties genuinely would be as to loss.

24. In Irish Telephone Rentals v Irish Civil Service Building Society [1992] 2 IR 525, [1991] ILRM 880, at issue was a clause which operated to manifestly discourage the dissolution of a contract for the hire of a telephone system by frontloading an unconscionable portion of the rent on the occurrence of that event. Costello J stated the relevant principle at pp. 536-537 as follows:

> The courts have evolved various rules for considering whether a stipulated sum is a penalty or a genuine pre-estimate. That which is relevant to the present case is that stated by Lord Dunedin in Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Ltd. [1915] AC 79 at p. 87:

It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

The application of this principle is to be seen in the majority decision of the Court of Appeal in England in Robophone Facilities Ltd. v. Blank [1966] 1 W.L.R. 1428 in which the court considered a contract for the hiring of a telephone-answering machine for a seven year period which was repudiated before the hiring began. The hiring agreement contained a clause which made provision in the event of premature termination for the payment of agreed liquidated damages equal to fifty per cent of the total of the rentals due. In deciding that the sum of fifty per cent was a genuine pre-estimate of loss and not a penalty Lord Diplock examined what would be recoverable by way of damages assessed on common law principles and concluded that because 50 per cent of the gross rent would not produce a figure which was "extravagantly greater" than those damages the clause was enforceable.

25. The principles set out by Lord Dunedin in Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 at 87 continue to be applied and do not need to be quoted again here. In Treitel - The Law of Contract (13th Edition, Edwin Peel) at 20.131 the question of construction of clauses with an apparently penal element is helpfully considered as follows:

> A clause is penal if it provides for "a payment of money stipulated as in terrorem of the offending party", or, as it has been put more recently, if the contractual function of the clause is "deterrent rather than compensatory". If, on the other hand, the clause is a "genuine" attempt by the parties to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. This is so even though the stipulated sum is not precisely equivalent to the injured party's loss. The question of whether a clause is penal depends on its construction and on the surrounding circumstances at the time of contracting (not at the time of breach). In answering this question, the fact that the payment is described in the contract as a "penalty" or as "liquidated damages" may be relevant, but it is doubtful whether much, if any, weight should be attached to it. Clauses in identical terms may be held penal or not, according to the subject matter of the contracts and to the circumstances in which the contracts were made. It seems that a clause may be severed so as to exclude any penal element.

26. In issue here is clause 21 of the special conditions of sale. The correspondence surrounding this clause is consistent in tenor: the

clause is described as a penalty. It provides as follows:

In the event that the transferor is not in a position to complete this transaction and give vacant possession of the subject property to the acquirer on the closing date then the transferor shall pay to the acquirer or the following:

> (A) from 1 January 2009 to the earlier of 28 February 2009 or the date of the actual transfer of the subject property to the acquirer or with vacant possession, the sum of €20,000 per week or parts thereof.
>
> (B) From 1 March 2009 to the earlier of 30 April 2009 or the date of the actual transfer of the subject property to the acquirer with vacant possession, the sum of €30,000 per week or parts thereof.
>
> (C) For any delay extending beyond 30 April 2009 the sum payable shall be increased to €50,000 per week or parts thereof during that period until the day of actual transfer of the subject property with vacant possession to the acquirer.

27. Notwithstanding the attempts to justify this clause, nothing points to it being a genuine pre-estimate of loss. There is no basis upon which €2.6 million per year could be the basis of damages under clause (C) for not being allowed to proceed with the completion of this contract. With the catastrophic inflation of property prices that characterised the Irish economy in the years 2000-2008, the subsequent collapse in price might be argued to justify this enormous sum. Whereas property inflation might have been within the contemplation of the parties, it is certain that deflation was not. A comparison of interest charges on borrowings equivalent to the discounted price of the homes and apartments sold in exchange for the Harcourt Terrace site, at €31,243,000 plus VAT, yields figures of around €1.3 million for one year, a figure which this sum vastly exceeds. The clause is therefore a penalty clause and will be struck down. It cannot be part of the assessment of damages.

Damages

28. In the light of the letter dated 10 August 2006 from the Affordable Homes Partnership confirming the acceptance of the tender from Durkan New Homes any argument that damages in this case are at large is untenable. When a contract is broken damages is always open as a remedy, provided loss has been occasioned by the breach. In contrast, in equitable claims for specific performance or restitution such remedies depend upon discretion and the proof of particular conditions. The purpose of damages is compensatory. It is not to make the claimant's overall position better than it would have been out of the contract not been broken: as thereby commercial law would intrude the application of criminal-like penalties into private affairs. Where the subject matter of the contract is one of sale, the primary recourse for the analysis of damages has always to be the price which the parties agreed to pay. That is their bargain and that is what must be enforced. There can be no question of the court being entitled to rewrite a bargain in the light of what the court feels is appropriate, or in accordance with the movement in values for the real property or goods in question. Regrettably, over the last four years, every court in Ireland has had to enforce debts based upon contracts to purchase land which experience has now shown represented speculation and not value as to price. In a similar way, bank debts have had to be enforced for borrowings that fuelled these inflated values. In none of those instances was a court ever entitled to substitute its own view as to what a fair bargain might be considered to be on reflection.

29. It is correct that clause 40 of the general conditions of contract does not generally contemplate that the purchaser will have paid the entirety of the purchase price or have given money's worth equivalent to that full purchase price at the time of entering a contract. Normally, only a deposit will be paid. As of the time of this contract, however, the equivalent of every sum due had been discharged by Durkan New Homes. A contract is to be construed in accordance with the factual matrix in which it occurs. It is not to be construed as an exercise in legal parsing divorced from the reality of what was in contemplation between the parties; Irish Bank Resolution Corporation v Cambourne Investments Inc, Century City Limited and Peter Curistan [2012] IEHC 262. By the time this contract was signed, €31,243,000 had been discounted by Durkan New Homes from the sale of 215 houses to the benefit of the scheme organised by the State. This was to be exchanged for the Harcourt Terrace site. That is therefore the true measure of damages. In the written argument, questions are raised as to the appropriate payee, which question is not touched upon herein, and as to the range of obligations as between the parties who would eventually have entered into this contract had dispatch been exercised on the part of the defendant. These arguments are an ingenious effort to avoid the inevitable result that this sum of money must be awarded as against the defendant in favour of the plaintiff. That sum was the purchase price. As plaintiff, Durkan New Homes paid in full. As the contract was broken, that money must be returned. This contract is no different to any other in that regard.

30. No question as to value added tax arises. As the discount was offered, no one paid value added tax on the full amount, but only on the discounted amount. No liability arises to VAT as against the plaintiff and the defendant is therefore not obliged to bear that burden and neither is Durkan New Homes as a matter of law.

31. In addition, the sum of the special damages has been agreed between the parties at €562,539 in the event of a liability finding against the defendant.

32. Finally, there is the issue of compensation in respect of borrowing to fund the sums that would otherwise have been available to Durkan New Homes had the houses been sold at full value. In that regard it is prudent to mention that this company reached a peak of house sales over the years 2005-2007. There is no evidence that had the houses not been discounted that they would not have been sold at full market value. That evidence would, in any event, have been irrelevant as the price was set through voluntary agreement between the parties to the contract. What would have happened had Durkan New Homes come into possession of the Harcourt Terrace site? The intention was to develop office accommodation. What the result of that would have been has rightly not been considered in evidence. In July 2007, planning permission was granted for the development proposed by Durkan New Homes by the local planning authority. That was appealed to An Bord Pleanála and that permission was overturned. A new application, based on a different scheme, was made to the planning authority in Dublin in November 2008 and was granted. An appeal in favour of the applicant was only decided in November 2009. This contract was terminated when the completion notice expired on 17 September 2010. There was therefore a ten month loss of interest, since that is the only time between the formation of the contract and the determination thereof that the borrowing was wasted in the futile payment of interest. Since, helpfully, general figures have been provided, from which an exact calculation may be made upon this finding of fact.

Result

33. The defendant agreed and accepted €31,243,000 for the Harcourt Terrace site. The payment of this sum through discount on the sale of 215 homes cannot render that sum anything other than repayable as a liquidated sum. Unusually in a contract of sale of land, at the time of entering into the agreement the entirety of that sum had been paid by the plaintiff Durkan New Homes and had been accepted by the defendant as representing value for the purchase of the site. The Court cannot make any finding in favour of the carefully constructed argument against the repayment of that money. In addition €562,539 has been agreed as special damages. Finally, there will be a ten month interest charge from the time of the grant of planning permission on the site up to the disappointment of the plaintiff in the performance of the contract by the non-fulfilment of the completion notice of 19 August 2010

upon the expiry of the 28 days under the contract on 17 September 2010; that amounts to €782,491.