Neutral Citation Number: [2011] IEHC 200

THE HIGH COURT

2009 6444 P

BETWEEN

MARY COLLINS

PLAINTIFF

AND

FRANK GLEESON, DECLAN GLEESON AND PATRICK JOSEPH

(OTHERWISE P.J.) GLEESON

DEFENDANTS

Judgment of Mr. Justice Feeney delivered on the 12th day of May, 2011.

1. The plaintiff's claim arises out of a contract for sale made on 15th March, 2007 whereby the plaintiff agreed to sell to the defendants part of the lands of Cloonglebe, Barony of Clanmaurice, County Kerry, being part of the lands comprised in Folio 9633 of the Register of Freeholds, Co. Kerry comprising 16.19 acres. The contract provided for a closing date of 15th March, 2009. The agreed consideration for the purchase of the said lands was €5m and it was also agreed that the defendants would construct for the plaintiff four houses at no cost to the plaintiff on part of the said lands and that the assurance(s) of the said houses was/were to be executed by the defendants to the plaintiff or the plaintiff's nominee on or before the 12th March, 2011, being two years after the agreed date of closing. Special condition 11 of the said contract provided, *inter alia*, that in the assurance of the said lands to the plaintiff, the defendants would charge that part of the said lands, identified and shown coloured blue on Plan No. 1 annexed to the contract, with a first legal charge in favour of the plaintiff for the sum of €600,000 as a security for the performance by the defendants of their obligations under special condition No. 11. It was also provided in the said contract that the transfer to the purchaser would reserve certain rights and easements for the benefit of the retained lands of the plaintiff and that there would be a grant of easements over the lands comprised in Folio KY31084F (the lands known as Banna Cottage) which lands were to be acquired by the defendants. Special condition No. 14 of the contract provided, that it was a condition of the sale that the defendants as purchasers should apply for planning permission and complete the construction on the lands purchased of the estate roads and utilities and services within two years of the date of the closing date or such other period as should be agreed to by the parties in writing. It was further provided in special condition No. 15 of the contract that the retained land of the plaintiff registered on Folio 9633 should be provided with access points to roads and connection points to utilities for water and other services from the lands the subject matter of the contract for sale.

2. The plaintiff issued a plenary summons on 15th July, 2009 wherein a claim for specific performance of the contract for sale of the 15th March, 2007 was made by the plaintiff against the defendants together with a claim for damages in addition to or in lieu of specific performance. By letter from the plaintiff's solicitors to the defendants' solicitors of 4th August, 2010, the plaintiff notified the defendants of her intention to elect for the remedy of damages in lieu of specific performance. The contract provided that the plaintiff as vendor was selling the lands in her capacity as beneficial owner and that the vendor was presently in the course of extracting probate to the will of the deceased registered owner, John Collins, (her husband) and that she should cause herself to be registered as full owner of the said lands prior to completion. The contract was conditional on the plaintiff being so registered and she was so registered on 18th July, 2008. It was also a term of said contract as set out in special condition No. 23 that the contract was conditional on the parties agreeing within two weeks from the date of the contract the format of the draft transfer referred to in special condition No. 12 and 13 and that that contract was to be furnished on closing. The format of the transfer of the said lands was agreed on 23rd May, 2008. By letter of that date the solicitors for the purchasers wrote to the solicitors for the vendor stating that their clients had now executed unconditional contracts for the purchase of the lands in question. It was also a term of the contract that it was a condition of the sale of the said land that the purchaser should apply for planning permission as provided for in special condition No. 14.

3. The defendants paid a deposit of €500,000 on 23rd March, 2007 when a transfer in that sum was transferred to the plaintiff's solicitors' client account. That deposit was released to the plaintiff pursuant to special condition No. 9 which provided that the deposit specified in the contract should be paid within four working days of the signing of the contract to the vendor's solicitors and should be released forthwith to the vendor by the vendor's solicitors. The purchasers, in signing the contract, were deemed to irrevocably authorise and direct the vendor's solicitors to release the deposit of €500,000 to the vendor. The contract agreed between the parties was subject to the Law Society of Ireland General Conditions of Sale and condition 40 of those Conditions provided for the service of a completion notice making time of the essence. The defendants did not complete the contract and by letter dated 20th May, 2009, from their solicitors purported to repudiate the contract. The plaintiff as vendor served a completion notice dated 23rd March, 2009 requiring the defendants as vendors to complete the sale within a period of twenty one days from the date of the service of that notice.

4. After the service of that notice the defendants purported to repudiate the contract by letter of 20th May, 2009 from their solicitors to the plaintiff's solicitors wherein it was stated on behalf of the purchasers that the purchasers were treating the contract for sale dated 15th March, 2007 as terminated by frustration and seeking a return of the deposit.

5. The plaintiff commenced these proceedings by plenary summons dated 15th July, 2009 and a statement of claim was delivered on 31st July, 2009. In the proceedings the plaintiff claimed specific performance of the contract of 15th March, 2007 and alternatively damages in addition to or in lieu of specific performance under Lord Cairns' Act or at common law. The defendants delivered a defence and counterclaim on 21st December, 2009 which denied the plaintiff's claim and further pleaded (at para. 8) that the contract became impossible to perform "by virtue of circumstances outside the control of the plaintiff and the defendants and has been terminated by frustration and/or by force majeure". The defendants repeated their defence and counterclaimed (at para. 12) that "it was a condition precedent to the contract that planning permission would be obtained for certain developments" and further pleaded (at para. 13) that "planning permission cannot now be obtained and the contract is therefore at an end" and also pleaded that further, or

in the alternative, (at para. 14) that "the contract cannot not now be performed by virtue of circumstances outside the control of the plaintiff and the defendants". The defendants pleaded (at para. 15) that the defendants' obligations under special conditions 11, 14 and 15 of the contract were no longer capable of being performed and the defendants claimed a return of the deposit. In the reply and defence to counterclaim of 7th April, 2010 the plaintiff joined issue with the matters pleaded in the defence and denied that the contract became impossible to perform or had been terminated by frustration and/or by force majeure and further denied that the contract became impossible to perform by virtue of circumstances outside the control of the plaintiff. The plaintiff further pleaded that the deposit was non-refundable.

6. In response to the defendants' counterclaim the plaintiff asserts that the contract the subject matter of the proceedings was not made conditional on the grant of planning permission. The Court will later deal with the terms of the contract. The evidence heard by the Court established that the first named defendant, acting on behalf of all defendants, was aware at the time that the defendants entered into the contract of the then position in relation to planning and zoning and, in particular, that a new waste water treatment plant for Ardfert would be required to enable planning to be obtained. The Court heard evidence that the first named defendant made enquiries with the local authority at the time that the defendants entered into the contract. In the contract a two year closing period was provided. The first defendant gave evidence that he had the hope and expectation that such waste water treatment works would be in place within that two year period. In evidence, the first named defendant acknowledged that, at the time that he signed the contract in March 2007, he was aware that the contract was not subject to planning permission but proceeded on the basis that he was fairly certain that such planning permission would be obtained within the two year period. On the 23rd May, 2008, the defendants' solicitors wrote that their clients (the defendants) approved the format of the draft transfer and stated that the defendants had now executed unconditional contracts. By that date the first named defendant acknowledged, in evidence, that he knew that there was likely to be a delay in the provision of the waste water treatment plant and that an agreement for an extension of the closing date would be required. The plaintiff's case is that the contract was not conditional on the grant of planning permission and that there was no common venture or common objects between the parties. The defendants contend that the contract must be considered as a whole and that the respective rights and duties of the parties to the contract must be ascertained from the entirety of the written terms of the contract. The defendants contend that since the plaintiff obtained considerable benefits under the contract, which were not confined to the purchase price but which were dependent upon planning permission being granted for the development of the lands, that it is therefore necessary for the Court to consider the contract and the special conditions in their entirety to properly construe the agreement between the parties.

7. The defendants contend that it was a condition precedent to the contract that planning permission would be obtained for certain developments whilst the plaintiff contends that the contract was not conditional upon the grant of planning permission. The defendants argue that if the contract terms are read in their entirety and as a whole that it is clear that the performance of the contract was conditional on planning permission being obtained. The defendants rely upon the authority of *The Moorcock* (1889) 14 PD 64 and the statement of Bowen L.J. that "the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have". In relying on that statement the defendants contend that the transaction in this case, when taken as a whole, meant that the parties must have intended that it was necessary that planning permission be granted for the proposed development. However, it is clear that any implication which the law draws must not only have been the obvious intention of the parties and be necessary to give efficacy to the contract or transaction, thereby preventing a failure of consideration, but also that any implication which the Court draws cannot have been within the contemplation of either of the parties. Consideration of the terms of the contract identify that the contract is conditional on two matters. The first is that the plaintiff was required to be registered as the full owner of the property prior to completion and the second is that the contract was conditional on the parties agreeing within two weeks from the date of the contract the format of the draft transfer and that that agreed transfer was to be furnished on closing. Insofar as the terms of the contract addressed the issue of planning permission, the contract identified that it was a condition of sale of the sale of the said lands that the purchaser should apply for planning permission. There was no contractual obligation placed upon the vendor in relation to planning permission nor was there any agreement that planning permission was to be obtained prior to completion. Special condition 14 of the contract states:

> "It is a condition of the sale of the Sold Land that the purchaser shall apply for planning permission and shall completed (*sic*) the construction on the sold land of the estate roads and utilities and services within two years of the date of closing, or within such other period as shall be agreed to by the parties in writing."

The agreement contained in special condition 14 is not a condition in relation to obtaining planning permission and further insofar as that condition places an obligation on the purchasers to apply for planning permission, that obligation is not linked to closing date nor does it operate to prevent the coming into existence of a binding contract. It is also the case that the terms of special condition 14 allow and provide for a scheme or transaction which separates the closing date and the obligation to construct on the lands the estate roads, utilities and services, it being expressly provided that such construction does not have to occur until two years from the date of the closing. It was clearly envisaged by the parties that as of the date of the closing that the construction of the estate roads, utilities and services would not have been completed and that notwithstanding that fact, there was no restriction on the contract being completed. The contractual scheme provided for in the contract, read as a whole, was that the lack of planning permission as of the date of completion did not prevent the contract coming into existence. It is therefore the case that special condition 14 cannot be considered a planning condition in that it is clear from the terms of special condition 14 that the obligation to apply for planning permission was a contractual term and not a condition which prevented the coming into existence of a contract. Special condition 14 expressly provided that the sale was to close and did not either in its express terms or by reference to the contract as a whole provide a basis upon which either the vendor or the purchaser could rescind the agreement on the grounds of non-fulfilment of the condition. Special condition 14 is not a condition relating to the obtaining of planning permission nor was the obtaining of such permission linked to the closing date. The parties agreed a contract that could proceed to closing without planning permission. Both the contractual terms and the evidence heard by the Court make it clear that the requirement for there to be planning permission was not sought by either party or provided for in the contract. The contract cannot be said to give rise to the implication that planning permission was necessary to give efficacy to the contract when neither party contemplated that planning permission was necessary. The facts and circumstances necessary to give rise to an implication (as envisaged in *The Moorcock*) were not present. The Court is satisfied that a proper reading of the terms of the agreement between the parties is that special condition 14 does not prevent the coming into existence of a binding contract where there was no planning permission as of the date of closing. The contract allowed for the sale to close notwithstanding the absence of planning permission. The courts have on many occasions identified agreements where the terms used in the contracts created a condition precedent to the coming into existence of an effective and an enforceable contract of sale a requirement that planning permission be obtained. Those cases occur where the Court concludes that the words used in the contracts created an agreement that the obtaining of planning permission was a condition precedent thereby resulting in a situation that without planning permission there could be no enforceable contract. However, the wording of special condition 14 does not provide that the contract is conditional upon obtaining planning permission. The condition expressly deals with planning permission but does so on the basis that it was a condition of the sale that the purchasers shall apply for planning permission. To read condition 14 as requiring as a condition precedent the obtaining of planning permission would result in

the Court having to ignore the terms of the agreement between the parties. Special condition 14 contains the word "apply" and does not link the closing date to the obtaining of planning permission. As of the closing date, which was 13th March, 2009, the obligation which was on the defendants was to pay the balance of the purchase price, take the deed of transfer in the agreed format, the deed having been agreed by the letter of 23rd May, 2008. The agreed format included the reservation and grant of easements to the lands retained by the plaintiff vendor and included a charge over an area identified in blue on an agreed map of the lands to secure performance of the obligation to construct four houses for the plaintiff. Those matters did not have to be in place to enable the closing to take place.

8. The defendants contend that as of the date when the completion notice expired, the defendants were faced with a situation where they had the choice of completing the contract and facing further claims for unquantified damages in that there was no planning permission and that therefore the construction on the lands of roads, utilities and services within two years from the date of closing was impossible or of failing to complete the contract and facing the present proceedings. The Court is satisfied that a proper consideration of the terms of the contract identify a number of matters. First, the two year period provided for in special condition 14 ran from the date of closing on 5th March, 2009 and therefore did not expire until 15th March, 2011 and it is therefore clear that the terms agreed between the parties provided that the performance of special condition 14 post-dated the obligation on the parties to close. That position is further reinforced by the fact that the terms of special condition 14 refer to the possible extension by agreement of the two year period. Insofar as it is contended by the defendants that an overall reading of the contract requires special condition 14 to be read in the light of special condition 15, it is clear that it is the plaintiff vendor who is entitled to benefit under special condition 15 and is therefore entitled to waive such benefits as they are solely for her benefit. In those circumstances the defendants cannot rely on special condition 15, which is solely for the benefit of the plaintiff vendor, as the plaintiff is entitled to and can waive a condition inserted solely for her benefit. Secondly, the evidence heard by the Court, from the first named defendant, was that the defendants did not request the plaintiff to extend the time for making an application for planning permission. Thirdly, it is also the case that the evidence to the Court is that on 23rd May, 2008 the defendants' solicitors, writing on behalf of the defendants, confirmed that the defendants had executed unconditional contracts. The evidence also identified that such statement was acknowledged by the defendants in a subsequent telephone conversation. This Court is satisfied that the contract is not conditional upon the grant of planning permission to develop the lands and that as of the date of the service of the completion notice the contract was unconditional and was acknowledged and accepted as same by the defendants. It was not a condition precedent nor was there an implication that planning permission had been obtained. The evidence was that planning permission could not be obtained as of the date of closing and would be delayed by the delay in the provision of a waste water treatment plant for the area. The case now made by the defendants is incompatible with the defendants' own acknowledgement of the existence of an unconditional contract at a time when there was no planning permission.

9. The defendants plead that the contract became impossible to perform by virtue of circumstances outside the control of both the plaintiff and the defendants and has been terminated by frustration and/or by force majeure. They further rely on a claim that the obligations under special conditions No. 11, 14 and 15 were not capable of being performed. The documents which were available to the Court and which were admitted in evidence together with the oral testimony heard by the Court established a number of matters relevant to those contentions by the defendants, namely:

> (1) The contract was freely entered into by the parties with both the plaintiff and the defendants being in receipt of independent legal advice. The terms set forth in the contract documents were agreed between the parties following detailed negotiations.
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> (2) All parties were aware that the lands were being purchased by the defendants for the purposes of carrying out a development and that central to the envisaged scheme was that the defendants intended to use the lands comprised in Folio KY31084F of the County of Kerry known as "Banna Cottage" as a means of providing access to the lands which were being purchased. At the time of the negotiations and at the date of the contract on 15th March, 2007 the first named defendant, his wife and mother-in-law were the registered owners of Banna Cottage.
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> (3) The defendants were involved in the construction industry as builders and also had acted as developers and had done a number of developments including working with other builders and had done so for a period in excess of ten years. The first named defendant had over ten years experience as a builder/developer and the second named defendant is a quantity surveyor and the third named defendant was originally a carpenter and had later worked as a developer and had been involved in the purchase of lands for development.
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> (4) The defendants were aware of the planning situation and zoning in respect of the lands identified in the contract and the adjoining lands. In particular, the defendants knew that the lands the subject matter of the contract did not have planning permission and that to obtain any planning permission would require that the existing water treatment facilities including the sewer system for Ardfert Village would have to be updated. That project would need to be completed or nearly completed prior to there being any possibility of obtaining planning permission.
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> (5) The defendants were interested in purchasing the portion of the plaintiff's lands which it was envisaged would receive planning and not any other lands. The defendants never raised or mentioned any requirement that the contract be subject to planning permission.
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> (6) All parties knew that planning permission would be required and that it was up to the defendants to seek and obtain the relevant planning permission.
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> (7) When the defendants entered into the contract on 15th March, 2007 they were aware of the planning and zoning of the lands in the contract. They were also aware that the proposed new treatment plant for Ardfert was not yet ready to proceed and that neither the land nor planning necessary to allow such development had been obtained. The first named defendant gave evidence that when he signed the contract in March 2007 he was aware that the contract was not subject to planning permission but he was fairly satisfied, from information he had received from Kerry County Council, that planning permission could be obtained within a two year period as the treatment plant would have progressed to a sufficient extent during that period to enable planning permission to be granted.
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> (8) The contract provided that the plaintiff was selling as vendor in her capacity as the beneficial owner and that the vendor was presently in the course of extracting probate to the will of her deceased husband, John Collins, and the contract also provided that the plaintiff should cause herself to be registered as full owner of the lands prior to completion. The contract was conditional on the plaintiff being so registered. The plaintiff was registered as full owner of the said lands on the 18th July, 2008.

(9) The contract provided, in special condition No. 23, that the contract was conditional on the parties agreeing within two weeks from the date of the contract the format of the draft transfer referred to in special conditions No. 12 and 13 and that such contract was to be furnished at closing. The terms of the transfer were agreed on the 23rd May, 2008.

The defendants' solicitors wrote by letter of 23rd May, 2008 stating that the defendants had now executed unconditional contracts for the purchase of the lands in question.

(10) It was a term of the contract and it was a condition of the sale of the lands that the defendants would apply for planning permission as provided for in special condition No. 14.

(11) In relation to the proposed upgrading of the water treatment and sewerage facilities in Ardfert Village, the evidence was that the defendants had discussions with personnel in Kerry County Council concerning that proposal. The Council had initiated the public consultation procedure under Part 8 of the Planning and Development Regulations 2001 by public advertisement dated 10th October, 2002 which was for the development of waste water treatment works at Ardfert consisting of a new waste treatment plant to be located beside the existing plant. There was an objection to that proposal from the landowner on whose land it was proposed to locate the new waste treatment plant made during 2002. As of the date of the contract on 15th March, 2007 limited progress had been made in relation to the arrangements and statutory requirements for the construction of an upgraded waste treatment facility. In the local area development plan for Ardfert which was adopted in December 2006 it was stated:

> "The existing foul and surface water sewerage system is at capacity and future development will not be favourably considered until a new waste water treatment scheme is constructed ….. The Council is awaiting approval from the Department of Environment to appoint consultants to prepare a preliminary report for a waste water scheme. The lack of waste water treatment and surface water drainage capacity will continue to limit development over a significant portion of the life span of this plan."

(12) The two-year period for closing provided for in the contract was the period identified by the defendants, following discussions between the defendants' architect and the local authority, as being the likely period that it would take to have commenced and substantially completed the construction of the updated treatment facilities. The plaintiff was not involved in the identification of the two-year period. It was the defendants who requested a closing date of two years based upon their belief that within the two-year period they would have had time to have applied for and obtained planning permission.

(13) The Council commenced the process in relation to obtaining planning permission for an upgraded waste treatment facility by public advertisement on the 26th July, 2007. There was an objection by the landowner which was made on 13th September, 2007. The Council adopted a Part 8 proposal under the Planning and Development Regulations 2001 on 26th November, 2007. The Council commenced a compulsory purchase procedure pursuant to the proposal on 11th February, 2008. A submission in relation to the Compulsory Purchase Order was made by the landowner's engineers to An Bord Pleanála on 25th March, 2008. During the first half of 2008 the first named defendant and his architect had discussions with Council personnel in relation to the progress of the proposed upgraded treatment facility.

(14) On 13th May, 2008, some ten days prior to the letter of 23rd May, 2008, the defendants were informed that a planning application for the lands the subject matter of the contract would not be acceptable to the Roads and Services Department of the County Council due to the position which then existed in respect of the proposed waste water treatment plant.

(15) On 23rd May, 2008 the defendants approved the form of transfer and executed unconditional contracts for the purchase of the lands.

(16) As of 23rd May, 2008 the defendants requested the plaintiff to agree to an extension for twelve months on the completion date provided for in the contract that is until the date of 12th March, 2010.

(17) On 3rd October, 2008, An Bord Pleanála postponed the oral hearing which was due to take place in respect of the Compulsory Purchase Order and directed the Council to prepare an environmental impact assessment.

(18) In 2007, funding had been identified for the proposed water treatment facility in Ardfert as part of the water services investment programme 2007 to 2009.

(19) On 22nd September, 2008, Kerry County Council received a letter from An Bord Pleanála indicating that an environmental impact study (E.I.S.) would be required as it was viewed that the development was subject to an environmental impact assessment (E.I.A.). As a result of that letter, the Compulsory Purchase Order procedure was put in abeyance and the Council considered whether or not to seek judicial review in relation to An Bord Pleanála's determination that the development was subject to an E.I.A. and required an E.I.S.

(20) In December 2008, the Council determined that they would not challenge the requirement made for an E.I.S. by means of judicial review and that the Council would proceed to carry out an E.I.S. That study was concluded in May of 2010. At that time it was envisaged that the upgraded waste treatment facilities will not be complete until mid to late 2014. The compulsory purchase process in respect of the site for the waste treatment plant is not complete and is ongoing.

(21) The content and format of the deed of transfer was approved by the parties. Special condition No. 23 of the contract provided, *inter alia*, the reservation of easements over the lands the subject matter of the contract for the benefit of the retained land for all services and roads within twenty one years together with easements for the benefit of the retained land over Banna Cottage: it was also agreed that there be covenants by the purchasers for the completion of services to the retained lands and provision for extension of time by agreement to comply with such covenants and assents to registration of burdens on the lands. That resulted in an agreement that the easements would take effect on the closing of the sale with execution of the transfer and registration of the burdens on the Folio to be opened in respect of the lands the subject matter of the contract.

(22) The evidence to the court established that on or about 23rd May, 2008, when the defendants became aware that

there would be a delay in obtaining planning permission, that an extension of time for closing was sought. The evidence establishes that there were negotiations between the parties to provide for such extension of time but that the terms requested by the plaintiff for her to agree to an extension were terms which the defendants were not in a position to meet. No agreement was reached between the parties in relation to an extension of time.

(23) The defendants did not close the contract, notwithstanding that they had executed unconditional contracts to purchase the said lands prior to the agreed closing date of 12th March, 2009. In the absence of an agreement to extend the closing date the plaintiff, through her solicitor, called upon the defendants to complete the contract no later than 12th March, 2009. On 23rd March, 2009 the plaintiff sent a completion notice to the defendants indicating that the plaintiff as vendor was ready, willing and able to complete the sale in accordance with the conditions contained in the memorandum of agreement dated 15th March, 2007, and further, giving notice that the plaintiff, as vendor, required the sale to be completed in accordance with the conditions in the agreement. The notice called upon the purchasers to complete the sale within a period of 28 days after the date of service.

(24) The defendants did not complete the sale and on 20th May, 2009 the defendants' solicitors wrote to the plaintiff's solicitors indicating that the defendants were treating the contract of sale dated 15th March, 2007 as terminated by frustration and calling for the return of the deposit.

10. The factors which the defendants identify as being external events which resulted in the defendants being unable to complete the contract and which are claimed to be events not within the control of any of the parties and which the defendants claim could be categorised as force majeure, frustration or simply as external events not within the contemplation of the parties at the date of the execution of the contract were:

(1) It was envisaged by Kerry County Council's personnel and by the defendants that the upgraded waste water treatment facility would be in operation by 2010 when the contract was agreed on 15th March, 2007. Subsequent to the contract being agreed, An Bord Pleanála sought to impose a condition that an E.I.A. would have to be carried out and that when faced with that requirement the local authority were placed in a position of either having to seek a judicial review of the decision of An Bord Pleanála or to comply with the condition and to prepare an E.I.S. When the local authority made a decision to proceed with the preparation of the E.I.S., such decision had the consequences of delaying the date upon which the defendants could obtain planning permission; and

(2) an external event occurred which gave rise to frustration in that the response of the plaintiff to the defendants' request for an extension of time was rejected and no extension was agreed and that the rejection of the defendants' request relating to an extension of time and the failure of the plaintiff to agree terms for such an extension constituted a further event that made compliance with the contract impossible.

11. The doctrine of frustration was considered by the Supreme Court in the case of *Neville & Sons. Ltd. v. Guardian Builders Ltd*. [1995] 1 ILRM 1 where the Supreme Court identified principles relating to the basis upon which a Court could hold that frustration occurred resulting in the Court having the power to declare that a contract to be at an end. In the course of the judgment of the Supreme Court, Blayney J. quoted with approval from a number of passages in the House of Lords decision in *National Carriers Ltd. v. Panalpina (Northern) Ltd.* [1981] AC 675. Blayney J. identified (at p. 7) the circumstances in which frustration takes place as being defined by Lord Simon in his speech in the *National Carriers Ltd.* case (at p. 700):

"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

Blayney J. went on (at p. 7) to quote with approval from the speech of Lord Roskill, where he analysed the circumstances in which frustration occurs (at p. 717):

"There must have been by reason of some supervening event some such fundamental change of circumstances as to enable the court to say: 'this was not the bargain which these parties made and their bargain must be treated as at an end' - a view which Lord Radcliffe himself tersely summarised in a quotation of five words from the Aeneid : *'non haec in foedera veni'*."

Blayney J. giving the judgment of the Supreme Court went on (at p. 7 and 8) to identify a statement in the speech of Lord Wilberforce in the *National Carriers* case as being a correct statement of the principles with regard to the basis on which in the circumstances in which frustration occurs, such that the Court has power to declare that the contract is at an end and quoted:

"Various theories have been expressed as to its justification in law [i.e. the doctrine of frustration]: as a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands, as an implied term, as a matter of construction of the contract, as related to removal of the foundation of the contract, as a total failure of consideration. It is not necessary to attempt selection of any one of these as the true basis: my own view would be that they shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration. One could see, in relation to the present contract, that it could provisionally be said to be appropriate to refer to an implied term, in view of the grant of the right of way, or to removal of the foundation of the contract - viz. use as a warehouse.

In any event, the doctrine can now be stated generally as part of the law of contract; as all judicially evolved doctrines it is, and ought to be, flexible and capable of new applications."

From the Supreme Court judgment in the *Neville & Sons Ltd*. case, it can be identified that the frustration of a contract takes place when a supervening event occurs without the default of either party and for which the contract makes no sufficient provision. That event must so significantly change the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated at the time when the contract was entered into that a Court must be satisfied that it would be unjust to hold the parties to the contract terms in the light of the new circumstances and in such a case the law declares that both parties be discharged from the further performance of the contract and the Court can declare the contract to be at an end. The Supreme Court also identified that the doctrine of frustration was flexible and capable of new applications in suitable circumstances. In applying the doctrine of frustration, the Court proceeds on the basis that the entire of the contract normally is discharged when frustration

occurs and the Court must consider whether facts have been established to support a claim of frustration. The Court must consider whether or not the party seeking to invoke frustration has established that something occurred after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or alternatively transformed the obligation to perform into a radically different obligation from that undertaken at the time that the contract was made.

The principles identified in the Supreme Court were followed and applied by this Court in the unreported judgment of Ms. Justice Finlay Geoghegan delivered on 17th April, 2008, in *Drocarne Ltd. v. Seamus Murphy Properties and Developments Ltd*. Ms. Justice Finlay Geoghegan where she held (at p. 49):

> "It appears to me that that the same essential principle underlies the authorities cited with approval by Blayney J. and those referred to in Treitel (Treitel: *Frustration and Fforce Majeure*, 2nd Ed., (Thompson Sweet and Maxwell, 2004) at par. 2-064 (at pp. 67 and 68)) in its explanation in terms of frustration of the adventure. The Court in each is referred back to an examination of the agreement or bargain made between the parties at the time they entered into the contract alleged to be now discharged on the ground of frustration and a comparison between such agreement or bargain or its then performance and any future performance of the contact in the altered circumstances. There is no difference in the temporal approach of the two sets of authorities. The Court must compare the contract or position of the parties at the time the contact was entered into with that if there were to be performance of the contract after the allegedly frustrating event."

That is an approach which this Court will adopt and follow. This Court will look at and compare the contract or position of the parties on the two alternative dates identified by the defendants as the dates when 'frustrating events' allegedly occurred and consider the question as to whether the original contract could have been performed as of either or both of these dates.

An earlier Court decision of this Court is also of assistance in considering the issue of frustration. That case is referred to in the section of John Farrell's textbook *Irish Law of Specific Performance* dealing with the issue of frustration. At p. 264, paragraph 9.59, Farrell identified that the doctrine of frustration had developed substantially since 1863 and "doubts about it have been largely removed" by a recent court decision in a specific performance case (i.e. the *Neville and Sons Ltd* case). Farrell identified that in that case the Court approved the following passage from the speech of Lord Simon in *National Carriers v. Panalpina Ltd.*". The passage identified was the passage quoted earlier in this judgment at p. 20). The author of the textbook went on to identify that the Supreme Court had approved the approach identified in the *National Carriers* case in the case of *Neville & Sons v. Guardian Builders Ltd*. and later in the text (at p. 267, para. 9.61) the author identified that the approach of McWilliam J. in the case of *McGuill v. Aer Lingus Teoranta* (Unreported judgment of the High Court of McWilliam J. delivered 3rd October, 1983) seemed compatible with the Supreme Court decision in the Neville & Sons Ltd. case. The portion of the judgment of the High Court in the *McGuill v. Aer Lingus Teo*. case referred to was the summary made by McWilliam J. having considered the authorities (at p. 13 of the unreported judgment) where he stated:

> "… the following principles appear to apply when considering a claim that a contract has been frustrated.
>
> 1. A party may bind himself by an absolute contract to perform something which subsequently becomes impossible.
>
> 2. Frustration occurs when, without default of either party, a contractual obligation has become incapable of being performed.
>
> 3. The circumstances alleged to occasion frustration should be strictly scrutinised and the doctrine is not to be lightly applied.
>
> 4. Where the circumstances alleged to cause the frustration have arisen from the act or default of one of the parties, that party cannot rely on the doctrine.
>
> 5. All the circumstances of the contract should also be strictly scrutinised.
>
> 6. The event must be an unexpected event.
>
> 7. If one party anticipated or should have anticipated the possibility of the event which is alleged to cause the frustration and did not incorporate a clause in the contract to deal with it, he should not be permitted to rely on the happening of the event as causing frustration."

This Court is satisfied that the seven principles identified by McWilliam J. in the *McGuill* case, suitably adapted to the facts of this case, represent a correct approach to the issue as to whether the contract herein has been frustrated. This Court is satisfied that the principles identified by McWilliam J. are consistent with the approach set out by the Supreme Court in the *Neville & Sons Ltd*. case.

12. Based upon the principles identified above, this Court is satisfied that the evidence establishes that the defendants have failed to identify circumstances or make out a case that the adventure was frustrated. As of the date identified in the completion notice for the completion of the contract which was twenty eight days after the 23rd March, 2009, the plaintiff was ready, willing and able to complete the contract and could as of that date have complied with all the requirements which were placed on her under the contract. The plaintiff had title to the lands and had been registered as full owner of the lands and by that date the defendants had executed unconditional contracts for the purchase of the lands having accepted the draft transfer. The two year period provided for in special condition No. 14 had not expired. While special condition No. 14 referred to a possible extension of the agreed date it is clear that such extension required agreement. The performance of special condition No. 14 post-dated the obligations which were to be fulfilled on closing and also post-dated the date identified in the forfeiture notice. Insofar as special condition No. 14 might be said to be read by reference to special condition No. 15, such an approach would result in a situation where the matters set out were matters for the benefit of the plaintiff and not the defendants. The plaintiff was entitled to waive the benefit of special condition No. 15 which was solely for her benefit. The evidence established that the defendants acknowledged that the contract was unconditional on the 23rd May, 2008 and which was prior to the date identified in the completion notice.

13. One of the matters which the Court is required to address in considering whether or not frustration has been established is the identification and proof of frustration of the adventure as claimed by the defendants. In considering that matter, on the facts of this case, the Court must consider whether or not that the defendants have established that the parties to the contract were engaged in a common adventure or common objects which were frustrated. This Court is satisfied that the facts establish that it cannot be said that the request by the local authority for an E.I.S. could be categorised as a fundamental change of circumstances. It is not

possible to categorise such a request as a fundamental change of circumstances. The facts establish that when the bargain was made there was no requirement for there to be planning permission nor was there any reference to the Ardfert waste water treatment works. The facts identify that the situation which existed was that the parties did not bargain for nor was it agreed that the two year closing date provided for in the contract was to be linked to or dependent upon the completion of the Ardfert waste water treatment plant. The identification of the likely time period for the construction of the plant was made by the defendants and they chose to bargain based upon that judgment. The bargain sought was to provide for a two-year closing and that was agreed. The basis upon which that time period was chosen and identified by the defendants was not as a result of any discussions between the parties. That period was sought by the defendants and granted by the plaintiff. The defendants exercised their judgment that two years would be a sufficient time period for them to obtain planning permission and chose to take the risk that the time might not be sufficient. The facts established in evidence were that the plaintiff never addressed or contemplated the time period necessary for the completion of the works on the Ardfert waste water treatment plant. It was the defendants who considered that issue and determined, on the information available to them, that they should seek and request a bargain from the plaintiff that allowed for a two year closing date. In considering all the circumstances of the contract this Court must have regard to the fact that planning permission was expressly considered by the parties and dealt with, in an agreed format, whereby the defendants agreed that they would apply for planning permission. The clear implication of that agreement was that the parties did not consider it necessary to insert a term that the contract be subject to planning permission and that the risk of obtaining planning permission rested on the defendants. The defendants in effect are seeking to rewrite the contract to make the contract subject to planning permission. For this Court to hold, on the facts before it, that the contract is frustrated by the fact that planning permission cannot be obtained within the time period envisaged by the defendants, and completion of the waste water treatment works at Ardfert have been delayed and that therefore the common adventure between the plaintiff and the defendants is frustrated and that the contract between the plaintiff and the defendants is at an end would in effect require this Court to rewrite the contract. It is not for the Court to insert a term that the contract was subject to the defendants obtaining planning permission for the lands when the defendants were aware of the need for planning permission choose not to make or seek to make the contract subject to the grant of permission. If this Court were to hold that the contract was subject to planning permission, it would require the Court to ignore the terms agreed between the parties and would result in a situation where the terms of the contract are not being strictly scrutinised by the Court.

In considering the issue of frustration, this Court must address the question as to whether or not the matters identified by the defendants could be identified as a fundamental change of circumstances which were not within the contemplation of the parties. This Court is satisfied that the evidence establishes that it cannot be said that at the time that the contracts were executed on the 15th March, 2007 that it was not reasonably foreseeable that the development of the contract lands might be delayed by a delay in the development and construction of the waste water treatment plant. All parties knew that planning permission could not be granted until the new waste water treatment plant was either constructed or nearing finalisation and that planning permission had not be obtained for such construction. Whilst the defendants might have believed and expected that planning permission would be obtained and the works carried out within the two year period, it cannot be said, given the nature of planning permission and the entitlement of third parties to intervene, that the parties did not have within their contemplation the possibility that the planning process might be delayed. The concept of something being contemplated includes the situation where a party has in mind the possibility that an event might occur. The evidence makes it clear that such a possibility was present and that the defendants must have been aware that such delay might occur. The events which the defendants seek to rely upon as frustrating events were matters known to the defendants at the time of the contract and none of the matters relied upon are supervening events as identified by the Supreme Court in the *William Neville* case and by the High Court in the *Drocarne Ltd.* and *McGuill* cases. The facts also establish that it was open to the defendants up to 23rd May, 2008 when they agreed and executed unconditional contracts to have withdrawn from the contract or sought to have agreed a special condition in relation to planning permission. What occurred on the 23rd May, 2008 was that the defendants completed an unconditional contract. By that date there was no doubt but that the defendants must have contemplated that planning permission would not be obtained by the closing date. The evidence is that on the same date, that is 23rd May, 2008, the defendants sought to obtain the plaintiff's agreement to extend the closing date. When all the circumstances of the contract are taken into account and strictly scrutinised it cannot be said that the defendants have identified circumstances giving rise to an occasion of frustration. The circumstances alleged to occasion frustration require to be strictly scrutinised and the doctrine is not to be applied lightly. In this case the facts are such that the defendants cannot claim that a delay in the two year period envisaged for obtaining planning permission could be said to have been outside the contemplation of the parties. The evidence establishes that whilst the defendants might not have anticipated, as of the date of the contract, that planning permission would not be obtained by the closing date there is no doubt that the facts establish that the defendants must have anticipated the possibility that such planning permission would not be obtained by that date. The defendants might have believed that delay would not arise but the possibility of delay was present and must have been a possibility.

The evidence establishes that none of the frustrating events identified by the defendants were such that the defendants were prevented from complying with the contract on the closing date. The obligations as of that date were to furnish the balance of the agreed purchase price, to take the deed of transfer in the format which had been agreed, and to put in place the charge over the section of the contract lands coloured blue to secure the performance of the obligation to provide four houses to the plaintiff. Planning permission for the proposed development was not required to enable the defendants to comply with those obligations as of the 15th March, 2009. As pointed out earlier in this judgment the plaintiff had an entitlement to enforce, charge or waive her rights in relation to the provision of services and access to the retained lands and/or to agree to extensions of time for works as of the closing date of 15th March, 2009. That remained the position as of the date identified in the forfeiture notice. The evidence establishes that the plaintiff was not asked to agree extensions of time for such works and the defendants cannot rely on an obligation owed to the plaintiff which the plaintiff had an entitlement to vary or waive, as the basis for claiming that the contract is frustrated.

A second event identified by the defendants in support of the claim of frustration is that an external event occurred giving rise to frustration when the plaintiff failed to agree to the defendants' request for an extension of time. This Court is satisfied that there is no basis to that claim. In the first instance, for such a claim to succeed there would in effect need to be an obligation on the plaintiff to comply with the defendants' request. The defendants contend that the rejection of their proposal and the failure to agree terms for an extension of time constituted a further event which made compliance with the contract impossible. This Court cannot read into the bargain between the parties, an obligation on one of the parties to conclude an agreement to extend time. The event relied upon by the defendants cannot be said to be an external event. The service of the completion notice which was provided for in the contract is not an event which can give rise to frustration. That follows from the fact that the service of a completion notice is provided for within the contract and is within the terms of the bargain agreed between the parties. The defendants have not identified an event outside the contractual entitlements of the parties. The Court is satisfied that the defendants cannot rely as an event of frustration on an occurrence which is expressly provided for in the contract. The failure on the part of the plaintiff to agree to an extension of time is not an act or default on the part of the plaintiff which gives rise to frustration. Further, the failure to agree an extension cannot be said to have been an unexpected event as it was open to the plaintiff to accept or refuse the defendants' proposal for an extension of time.

14. The defendants identified two alternative potential frustration dates in support of their defence and counterclaim. The first of

those dates, was 13th May, 2008, which was the date when the first named defendant became aware, following discussions with the representatives of the County Council, that a planning application for the lands would not be acceptable to the Roads and Services Department of the Council. The second date identified is 3rd October, 2008, which is the date upon which a decision was taken by An Bord Pleanála to postpone the oral hearing in respect of the Compulsory Purchase Order and to direct the Council to prepare an EIS for the site of the intended waste water treatment facility. It is fundamental to a claim, alleging frustration, that the supervening event relied upon must be unexpected and of such a fundamental nature as to cause the Court to be in a position to identify that the position which existed was not the bargain which the parties made. Earlier in this judgment, at para. 9, the Court has identified matters which were either admitted in evidence or established by evidence. In considering the facts as to whether the frustrating event relied upon by the defendants could be deemed to be unexpected, the Court has particular regard to the fact that it was known by the defendants, from the contents of the Local Area Development Plan for Ardfert, which had been adopted in December 2006, that an updated water and sewage treatment facility would be required, and that absent that facility, development would be limited. The defendants entered into the contract, on the basis that they were aware that before any planning permission could be obtained, that the process of acquiring, planning, developing and constructing the waste water treatment plant would have to be complete or nearly complete, prior to obtaining any planning permission. When the contract was signed on 15th March, 2007, the defendants knew of the Local Area Development Plan. The process of developing a plant was both complex, time consuming and prone to technical difficulties and delay. The Council had yet to commence that process. Any planning applications resulting in planning permission, would not occur until the completion or near completion of the waste water treatment plant. By 13th May, 2008, it was clear that there would be delays in the planning, development and completion of the waste water treatment facility. By 23rd May, 2008, which is the date upon which the defendants approved the format of the draft transfer, thereby rendering the contract unconditional, the factual position was that the County Council had been unable to compete the purchase of the site. Negotiations with the landowner had been unsuccessful and the Council had issued CPO proceedings, and the landowner, through her engineer, had made a submission to An Bord Pleanála in relation to the CPO. It was clear that any planning application for the lands, the subject matter of these proceedings, as of that date, would not be acceptable to the Road and Services Department of the County Council. None of those events could be described as a supervening event causing frustration. The matters relied upon by the defendants as supervening frustrating events were either known to the defendants at the time that they entered into the contract, or events which were reasonably foreseeable. None of the events relied upon prevented the performance of the post-contract obligations contained in the contract. On the date that the defendants elected to make the contract unconditional, that is, 23rd May, 2008, they did so at a time when they knew that the site for the waste treatment plant had not been secured and that a considerable period of time would pass before the site could be purchased and planning permission obtained and the development completed. The defendants were aware that any planning permission that they might obtain on the lands in question would be delayed until the completion or near completion of the waste water treatment plant. As of 23rd May, 2008, the defendants were aware that the date for the completion or near completion of the waste water treatment facility would take a number of years, and that such date could not be predicted with any accuracy. Up to 23rd May, 2008, it was open to the defendants to withdraw from the contract. However, the defendants chose to make the contract unconditional and binding and did so in the full knowledge of the facts which existed as of that date. The fact that the defendants were aware that the obtaining of planning permission would be delayed beyond the date initially envisaged by them is confirmed by the fact that they sought to renegotiate the closing date on 23rd May, 2008.

On 3rd October, 2008, the oral hearing before An Bord Pleanála was postponed and An Bord Pleanála directed the County Council to prepare and EIS in respect of the intended development. Whilst that particular event might not have been contemplated by the defendants, it is clear from the evidence, and in particular from the evidence of Michael McMahon of the County Council, that the development of a facility such as the waste water treatment facility, was always subject to what he identified as "imponderables". The determination by An Bord Pleanála to direct the Council to prepare an EIS is not an event of the type or category of a "supervening event" as contemplated in the decisions in the *National Carriers* and *Neville & Sons Ltd*. cases. The obligations which were on the defendants as of the closing date were to furnish the purchase price, take the Deed of Transfer in the agreed text and to put in place a charge over the section of the lands coloured blue on the contract map to secure the performance of the obligations to provide four houses to the plaintiff. It was not the case that as of the closing date, that there was a contractual term that planning permission be in place, nor was it the case that planning permission for the proposed development was required to comply with the contractual obligations on the defendants, as purchasers, as of 15th March, 2009. Insofar as the defendants seek to rely on an inability to provide four houses or to comply with their contractual obligations to access and service the retained lands, the position, as of the date upon which the contract was to be completed, that is, 15th March, 2009, was that those requirements did not arise as of that date and did not require to be carried out until 15th March, 2011. Further, had the defendants put in place the charge over the lands which they were obliged to do on closing, it was open to the plaintiff to enforce that charge or to waive her rights or to agree extensions of time for the completion of such works. The plaintiff was not requested to extend such time, and further, as pointed out earlier in this judgment, the Court is satisfied that the defendants cannot rely on an obligation owed to the plaintiff as an act of frustration, which was an obligation which the plaintiff could vary or waive, and which was for her sole benefit.

15. In light of the findings and conclusions above, this Court is satisfied that the contract which the plaintiff relies upon was a contract which was not conditional upon the grant of planning permission, and as of the date of closing, there was nothing to prevent the defendants from complying with their contractual obligations. The Court is also satisfied that any potential delay in compliance with post-completion obligations did not and could not amount to a frustrating event and that the defendants cannot, in any event, rely on any delay in obligations owed to the plaintiff. The Court is satisfied that the evidence establishes that the delay upon which the defendants seek to rely was reasonably foreseeable in all the circumstances, and therefore could not be a frustrating event, giving rise to frustration/or force majeure. The evidence establishes that there was no supervening event which could be said to result in a fundamental change from the circumstances which existed on the date upon which the contract was made, or such as to prevent the defendants from closing the sale on the agreed closing date. The authorities establish that the doctrine of frustration is to be viewed critically, and that any event sought to be relied upon by a party seeking to avoid a contract, on the grounds of frustration; must be carefully and strictly scrutinised. Having considered the events relied upon by the defendants, this Court is satisfied that they have failed to establish any event which could be said to result in a fundamental change of circumstances such as prevented the defendants from closing the sale on the agreed closing date. For the reasons set out above, this Court is satisfied that as of the date of closing, the contract was not impossible to perform, and further, that there had not been a change of circumstances or intervening frustrating events which caused the contract to be terminated, either by frustration or by force majeure.

16. The plaintiff has opted for the remedy of damages in lieu of specific performance. As the Court is satisfied that the plaintiff is entitled to succeed in her claim and that the defendants' counterclaim must fail in that the defendants are not entitled to a declaration that the contract is at an end or that the contract has been terminated by frustration and/or force majeure or by circumstances outside control of the plaintiff and the defendants. The defendants' counterclaim is dismissed.

17. The remaining issue to be considered by the Court is the question of damages. Since the damages which the Court proposes to award in favour of the plaintiff include allowance for the retention of the sum paid as a deposit, the Court does not have to consider the separate issue as to whether or not the plaintiff was entitled to retain the deposit or whether or not there was any legal

obligation at law on the plaintiff to repay the deposit. Based upon the findings herein before set out this Court is satisfied that the Court has jurisdiction to award specific performance and that as of the date of closing the plaintiff was ready, willing and able to proceed. In the light of the election made by the plaintiff, to seek damages rather than specific performance, the Court will proceed to award damages to the plaintiff being satisfied that it is both within jurisdiction and equitable to award damages to the plaintiff. In assessing the quantum of damages the Court has considered it equitable to do so as of the date upon which the plaintiff elected for damages in lieu of the specific performance. That election was made by letter dated 4th August 2010 and that is the date at which the Court will assess the damages due to the plaintiff. The Supreme Court in the case of *Duffy v. Ridley Properties Limited* [2008] 4 I.R. 282 held that damages in lieu of specific performance could only be granted where the Court would have had jurisdiction to grant a degree of specific performance and then went on to hold that whilst the general rule as to damages in breach of contract was that such damages were to be assessed as of the date of breach that it was open to a court in awarding damages in lieu of specific performance to fix a date other than the date of breach or the date of judgment. In this case the Court is satisfied that it would have had jurisdiction to grant a decree of specific performance and that it is both correct and fair to the parties to identify the date of election as being the appropriate date upon which to assess the damages and to do so by reference to the value of the lands on that date. Finnegan J. in the course of the judgment of the Court in *Duffy v. Ridley Properties Ltd*. identified the general common law rule as to damages at para 63 p. 311 in the following terms:-

> "The general common law rule as to damages for breach of contract is that where a party sustains a loss by reason for breach of contract, he is, so far as money can do it, to be placed in the same situation with regard to damages, as if the contract had been performed. The general rule accordingly was that damage should be assessed as of the date of the breach. Thus in a contract for the sale of generic goods should the seller fail to deliver, the buyer can at once spend his money in purchasing the like goods from another and can recover any increase to price as damages. In *Worth v. Tyler* [1974] 1 Ch. 30, the Court considered the position in relation to the contracts of the sale of land. In that case the contract price was £6,000 and the value of the house at the date of breach was £7,500. At the date of hearing the value of the house was £11,500. McGarry J. at p.57 in reference to these circumstance said:- 'How, then it may be asked, would the award today of £1,500 damages place them in the same situation as if the contract had been performed? The result that would have been produced by paying £1,500 damages at the date of breach can today be produced only by paying £5,500 damages which in each case is the return of the deposit. On facts such as these, the general rule of assessing damages as of the date of breach seems to defeat the general principle, rather than to carry it out'.

He considered the terms of s. 2 of the Chancery Amendment Act, 1858 which provides as follows:-

> "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct".

In the course of his judgment at p. 58, McGeary J. said:-

> "Of the wording of the section, the power 'to award damages to the party injured… in substitution for such… specific performance' at least envisages that the damages awarded will in fact constitute a true substitute for specific performance. Furthermore, the section in speaking of the time when the Court is making its decision to award damages in substitution for specific performance, so that it is at that moment that the damages must be a substitute. The fact that a different amount of damages would have been a substitute if the order had been made at the time of the breach must surely be irrelevant… a choice between the inadequate and the equivalent seems to me to be no real choice at all".

He concluded at p. 60:-

> "In my judgment, therefore, if under Lord Cairn's Act (i.e. the Chancery Amendment Act 1858) damages are awarded in substitution for a specific performance, the Court has jurisdiction to award such damages as will put the plaintiff into as good a position as if the contract had been performed, even if to do so means awarding damages assessed by reference to a period subsequent to date of the breach".

Finnegan J. went on at para. 76, p.315 to hold:-

> "Where specific performances is refused and damages for loss of bargain awarded in lieu, the difference in value as of the date of judgment and the date of contract as the measure of loss requires a judgment to arrive at the correct measure of damages. The object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered. The question to be asked is what the plaintiffs lost and not and what the defendant ought fairly and reasonably have to pay… It was held that a purchaser awarded damages in lieu of specific performance cannot claim his conveyancing costs as these would have been occurred if the contract had been completed: no such claim was made here. For this, however, it logically follows that the vendor could claim to deduct from the damages, costs, expenses and stamp duty which the purchaser would have paid had the transaction been completed: see the Court of Appeal decision in *Ridley v. DeGeerts* [1945] 2 All E.R. 654."

On the facts of this case a true substitute for specific performance of the contract and a process of assessing damages that would result in the plaintiff being placed in the same position as if the contract were completed can be achieved by a calculation made by reference to the agreed contract price as opposed to the market value of the lands as of the date of election. The plaintiff has lost the benefit of the contract price but has retained the lands which are worth less than the value provided for in the contract. By carrying out a calculation where the value of the lands, as of the date of election, is deducted from the contract price a figure is identified for damages, as of that date, that places the plaintiff in the same position as if the contract was completed and which puts the plaintiff in as good a position as if the contract were completed. There is no dispute but that if the contract had been completed the plaintiff would have received the total price of €5M inclusive of the €500,000 deposit. It is also the case that under the terms of the contract the plaintiff would have been entitled at some future date to receive four houses and to have provided free of charge services to lands retained by the plaintiff. In this case the plaintiff was the vendor and therefore if the contract had been performed the plaintiff as vendor would have incurred legal costs and other out of pocket expenses. That expenditure would have been necessary to ensure that the contract was completed and that the purchase price was obtained. In those circumstances in assessing the measure of damages in this case the Court is satisfied that since the plaintiff was a vendor who would have had to have incurred legal costs and expenses in having the contract performed that no allowance, in damages, should be made for such expenditure. The Court in seeking to place the plaintiff in the same position as if the contract had been performed must do so on the basis that the plaintiff is not entitled in assessing the damages to include the plaintiff's expenditure on legal costs and expenses which would have

been incurred in completing the contract. The plaintiff as vendor is left with the lands and her position is not to be equated with a purchaser who was granted damages in lieu of specific performance. The damages to which the plaintiff is entitled are damages payable by the defendants which can be fairly and reasonably considered as either arising naturally, that is according to the usual course of things, from such breach of contract itself or such as may be reasonably supposed to be in the contemplation of the parties at the time that they entered into the contract. (See *Hedley v. Backsingdale* [1854] 9 EX CH 341. When the parties in this case entered into the contract it was contemplated by both parties and was reasonably foreseeable that to complete the sale the plaintiff would have to incur legal costs and expenses which would be borne by her. Therefore in assessing damages on the basis that the plaintiff would have benefited from the full consideration of €5M, the position is that such sum could only have been obtained if the plaintiff had incurred the legal costs and expenses. Therefore in assessing the measure of damages, the Court will make no allowance for the plaintiff's legal costs and expenses.

If the contract had been completed, the plaintiff would have received the full considerations of €5M inclusive of the deposit of €500,000. The plaintiff has been left with the lands and therefore the market value of those lands must be deducted from that sum. The only evidence in relation to valuation was given by an expert witness called on behalf of the plaintiff. That testimony was not contradicted. That witness estimated the current market value as of November 2010, and she indicated that valuation as being the same market value as of the 4th August, 2010. The value she placed on the lands was in the region of €400,000. In assessing the damages the court will deduct the sum of €400,000 from €5M which results in a figure of €4,600,000. That sum is the sum which the plaintiff has, in effect lost. If the contract had been performed the plaintiff would also have had the benefit of four town houses being provided to her free of charge. The uncontested evidence in relation to the value of those houses as of November 2010 was that the four town houses were worth a total of €480,000. The Court will proceed in assessing damages on the basis that the total value of the four town houses as of November 2010 was the same as the value of those houses would have been as of March 2011 which is the date upon which such houses were to have been made available to the plaintiff. In calculating and assessing the damages to which the plaintiff is entitled, the Court will add to the €4,600,000 the sum of €480,000 which results in a figure of €5,080,000.

The plaintiff also sought to have included within the assessment of damages a sum to take account of the diminution in the value of the retained lands of the holding claimed to arise from the lack of easements, services and access from the contract lands and to the public road via Banna Cottage. The figure of €80,000 was identified in respect of that claim. Having considered the evidence of Margaret Kelleher, the valuer called on behalf of the plaintiff, the Court is of the view that the claim in relation to diminution in value of the retained lands is so uncertain and speculative that no figure should be included in respect of such head of damage. Given that the lands the subject matter of these proceedings have not received planning permission and that without planning permission and the development of those lands no services or road access could be provided to the retained lands and given that the evidence established that even if the contract was concluded that development would not have taken place on the sold lands due to the alteration in the financial and economic situation within the country any future benefit to the retained lands as a result of easements, services or access to the public road is so distant in time and so uncertain that the award of damages in respect of such loss would not be justified.

In the light of the above considerations this Court determines that the plaintiff is entitled to an award of €4,580,000 damages as of the 4th August 2010 which calculation is based upon the plaintiff being entitled to retain the full deposit of €500,000 and further that the plaintiff is entitled to interest at the court's rate from the 4th August 2010 on the sum of €4,580,000 to the date of judgment. The Court will grant the plaintiff judgment in the said sum.