Neutral Citation Number: [2011] IEHC 210

THE HIGH COURT

2005 1657 P

BETWEEN

MOUNT KENNETT INVESTMENT COMPANY AND BY ORDER OF THE COURT GREENBAND INVESTMENTS

PLAINTIFFS

AND

PATRICK O'MEARA, ANTHONY FITZPATRICK AND JOHN TOBIN

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 9th of March, 2011

1. **Introduction**

1.1 This case arises out of a plan devised by a Mr. Paul O'Brien to develop a significant shopping centre in Clonmel, now known as "The Showgrounds". The shopping centre concerned is now in place and operational. However, two sets of significant proceedings have arisen out of what are said to have been separate breaches of contract by parties with whom Mr. O'Brien, and companies associated with him, entered into agreements connected with the development of the Showgrounds. These proceedings are one of those two cases. The other case is Greenband Investments v. Bruton & Ors [2008 No. 3677 P] which has been the subject of a previous judgment dated 30th January, 2009, ([2009] IEHC 67). There is also a further judgment delivered today in those latter proceedings. There is, however, no formal connection between the two sets of proceedings (the contracts which give rise to both proceedings are separate – the defendants are unconnected and there is little or no overlap between the specific facts which are relevant in the respective cases). Nevertheless, the general background to both proceedings is to be found in Mr. O'Brien's plans to develop the shopping centre in question. I propose setting out that general background in this judgment.

1.2 In any event, these proceedings stem from a contract entered into by the first named plaintiff ("Mount Kennett") with the defendants ("the Vendors" and separately "Mr. O'Meara", "Mr. Fitzpatrick" and "Mr. Tobin") for the purchase of the lands on which the Showgrounds shopping centre was ultimately built ("the showgrounds site"). There have already been two judgments in these proceedings. Mount Kennett maintained proceedings for specific performance of the contract in question against the Vendors. Those proceedings came on for hearing before Smyth J. and were the subject of a judgment given on the 21st November, 2007, ([2007] IEHC 420). For the reasons set out in that judgment Smyth J. determined that Mount Kennett was entitled to an order for specific performance of the relevant contract.

1.3 For reasons which it will be necessary to explore in more detail, the contract was not performed or, at least, was not performed in the way contemplated by the decree of specific performance. The problem which gave rise to the issues between the parties stemmed from the fact that the Vendors contracted to sell a fee simple interest in the showgrounds site to Mount Kennett. However, the Vendors, at the time when they entered into that contract, had only a contractual entitlement to purchase the property themselves, which contractual entitlement was conditional on the obtaining of consent from the Commissioners of Charitable Donations and Bequests for Ireland ("Charity Commissioners") to the sale in question. In those circumstances clearly the Vendors took a chance by agreeing, unconditionally, to sell a freehold at a time when they had no more than a conditional contract to buy in that freehold. It should also be noted that there was a significant leasehold interest in the property in question. That lease was held by Clonmel Leisure Group Ltd ("Clonmel Leisure") in which the Vendors had a significant interest but it is also of some note that there was a fourth shareholder in that company, a Mr. Buckley, which fact contributed to some of the difficulties which subsequently emerged. In any event, the Charity Commissioners ultimately refused to consent to the sale in question and the Vendors were, therefore, not in a position to complete. The specific performance proceedings to which I have already referred followed. For the reasons set out in his judgment, Smyth J. was satisfied that the Vendors had it within their capability to complete the sale for he was satisfied that the Charity Commissioners had no objection in principle to the sale in question, but were concerned that the amount being paid for the freehold interest was insufficient. As events proved there was considerable merit in the view taken by the Charity Commissioners on that question.

1.4 As a result of various transactions Mount Kennett became entitled to acquire the freehold directly from the owner who ultimately secured the consent of the Charity Commissioners. Mount Kennett (of which Mr. O'Brien is a director and a significant but not the only shareholder) sold its interest in its various contracts in respect of the showgrounds site to the second named plaintiff ("Greenband"). Mr. O'Brien is the beneficial owner and a director of Greenband. Greenband thus became entitled to have the freehold interest transferred to it. In addition, in circumstances which it will be necessary to explore in greater detail, the leasehold interest in the showgrounds site was assigned to Greenband. The sale of the freehold to Greenband also completed so that Greenband became the freehold owner.

1.5 Thereafter, Mount Kennett and Greenband sought to have these proceedings re-entered for the purposes of claiming damages under two broad headings. First, it was said that Greenband ultimately paid significantly more money to secure the freehold in the manner in which I have described than the original contract price. With some allowances and adjustments to which it will be necessary to refer, the first head of claim relates to that additional consideration.

1.6 Second, Greenband maintains that, as a result of the delay in getting in title to the property, the shopping centre itself was delayed by a year in its opening. A variety of claims under that heading are also maintained.

1.7 Finally, by way of introduction, it should be noted that the damages hearing initially commenced in March 2010. When counsel for Mount Kennett and Greenband had completed his opening, an application was made by counsel on behalf of Mr. Fitzpatrick (ultimately supported by counsel on behalf of the other Vendors) which sought to have the damages claim dismissed as being not maintainable in the light of the way the case progressed before Smyth J.. Separate argument was addressed relating to respectively damages for delay and damages in lieu of specific performance. For reasons set out in a judgment which I delivered (Unreported, High Court, Clarke J., 11th March, 2010), I came to the view that Mount Kennett and Greenband were not prevented from maintaining a claim for

damages for delay. The procedural history of the case from the time when Smyth J. delivered judgment to the initial commencement of the damages hearing is also addressed in that judgment. The respective counsel for the Vendors had also suggested that, in all the circumstances, and having regard to the way in which Greenband ultimately came to own the freehold, it was not open to Greenband to now seek damages in lieu of specific performance. I indicated in an ex tempore ruling at that time that any decision on that question would have to await a full hearing of all the evidence. That issue remains for decision and is dealt with in the course of this judgment.

1.8 Against that rather complicated background it is necessary to turn first to the issues which now fall to be decided.

2. **The Issues**

2.1 As noted above the issues fall into two broad categories. It should first be recalled that all of the contractual entitlements which Mount Kennett had under its contract with the Vendors were transferred to Greenband. The party that incurred the extra cost of acquiring the relevant lands was, therefore, Greenband. Likewise, any additional costs or losses attributable to the delay in title being acquired are losses of Greenband. No issue was raised at the hearing as to the appropriateness of damages being awarded directly to Greenband notwithstanding the fact that Greenband was not, itself, the contracting party with the Vendors.

2.2 In those circumstances I propose treating this claim as one in which any damages which may be considered appropriate will be awarded to Greenband as the party who suffered any relevant losses.

2.3 On that basis it can be said that Greenband claims both damages in lieu of specific performance and damages for delay in addition. It is necessary to divide the issues between those two broad categories.

2.4 So far as damages in lieu of specific performance is concerned there is, as has already been noted, a significant issue between the parties as to whether it is legally permissible for Greenband to now seek damages in lieu of specific performance in the light of the history both of these proceedings and the relevant transactions concerning the acquisition of the freehold. In substance, the Vendors say that Greenband cannot obtain damages in lieu of specific performance without having the decree of specific performance made by Smyth J. vacated. It is said that it would be inappropriate to vacate that order at this stage in the light of the history of events to date. Greenband argues that the order of specific performance has, in substance, been treated as ineffective since the damages claim was re-entered. To the extent that, contrary to that submission, it is considered necessary to now vacate the order of specific performance, Greenband argues that there is no reason in equity why the order should not now be vacated and whatever damages might be appropriate awarded.

2.5 Under this heading the issue is largely legal although it does, to an extent, turn on the precise sequence of events whereby Greenband came to acquire the fee simple.

2.6 There is no doubt but that Greenband actually ended up paying significantly more so as to acquire a fee simple title in the lands in question than had been the subject of the original contract. The price ultimately paid was €5,000,000. The contract price was €3,900,000. The starting point for Greenband's claim is that difference of €1,100,000. In addition, it is said that Greenband is entitled to the extra stamp duty that derived from that extra payment together with interest on both sums from the time when the monies were paid to date.

2.7 So far as delay damages are concerned, it is important to start by noting that Greenband's claim is predicated on an assertion that the delay in getting title ultimately led to a one year delay in the shopping centre opening. That fact is hotly contested. The first issue is as to whether, therefore, it can be said that the shopping centre was, in truth, delayed in its opening by reason of the delay in getting title.

2.8 However, as a first line of defence the Vendors place reliance on what is said to have been an agreement reached between Mr. O'Brien, acting on behalf of Mount Kennett and Greenband, and Mr. Fitzpatrick, acting on behalf of the Vendors, which is said to have been to the effect that Mount Kennett and Greenband agreed to waive any claim which they might have in respect of damages in return for an assignment of the leasehold interest in the showgrounds site from Clonmel Leisure. It will be necessary to refer to the circumstances in which that agreement is alleged to have been put in place in due course.

2.9 On the basis of its assertion of delay in opening the shopping centre Greenband alleges that it has suffered loss under three headings:-

> A. A loss of rent based on the fact that rent receipts would have begun to come in one year earlier if the shopping centre itself had been open one year earlier;
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> B. Losses said to be associated with the significantly worse economic environment when the shopping centre actually opened compared with when it is said it would have opened had the Vendors complied with their contractual obligations. On Greenband's case significant additional inducements in the form of extra rent free periods and contributions to fit out had to be given to tenants. While it is accepted that such inducements have always formed some part of the business of running a shopping centre, on Greenband's case the climate in which it had to attract tenants, by virtue of the contended for delay, was significantly worse leading to a very significant increase in the cost of such inducements. It is also suggested that, in many cases, the actual rent ultimately secured was, in fact, lower than could have been secured a year earlier.
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> C. It is said that, as a result of the same change in market conditions, it was necessary to incur additional expense in altering the configuration of quite a number of units within the shopping centre because, it is claimed, by the time the centre ultimately came to be let, the worsening economic situation had led to a reduction in the size of unit which tenants typically required.

2.10 Against those claims the Vendors put forward a number of defences. First, as already pointed out, there is a contest as to whether the underlying assumption behind all of the claims (that is a delay in opening the shopping centre) is valid. In addition, the Vendors make a case based on foreseeability and other similar grounds. It will be necessary to address the relevant legal principles in due course. It is clear that, at the time of the contract in question, the Vendors were unaware of the identity of the purchaser in that the contract was entered into "in trust". It is argued on behalf of Greenband that it was obvious that any purchaser was likely to seek a significant commercial development of the Showgrounds site. That does, indeed, seem likely. The lands in question had been rezoned and it is difficult to see how they could have had a value of anything remotely resembling the price paid unless commercial development was contemplated. However, there are legal questions as to the just how far it is appropriate for the court to go in

assessing consequential damages deriving from a potential development of property of a type which was not, in itself, known to the Vendors at the time the contract was entered into.

2.11 Third, the Vendors question the validity of many of the calculations put forward by Greenband under each of the three headings referred to. In particular there is a significant issue about the extent to which additional inducements would have to have been offered and as to the extent to which any redesigning of the individual units was caused by delay as opposed to what is asserted on behalf of the Vendors to be the normal toing and froing that occurs when a shopping centre actually comes to be let and the precise requirements of tenants become known.

2.12 In addition, it is accepted that some credits need to placed against any sums that might be found due under any or all of the headings to which I have just referred. First, it is accepted on behalf of Greenband that one of the consequences of the delay in completing the purchase was that it did not have to put up the purchase price (which, on the evidence, would have been largely funded by borrowing) for a significant period of time. There is no doubt that Greenband was at some saving under that heading for, at a minimum, it seems that, even on Greenband's case, there was a shorter period between actual acquisition and the opening of the shopping centre than would have been the case had the contract between Mount Kennett and the Vendors closed when it should have.

2.13 In addition, in the course of the hearing, Mr. O'Brien accepted that a consequence of the worsening economic conditions with which he was faced was that there was, in all likelihood, a reduction in the cost which he had to pay for constructing the shopping centre. In other words, there was a saving to Greenband in the form of a reduced building contract price which would not have been available had the development taken place a year earlier.

2.14 It will be necessary to address the detail of the claims put forward and the evidence tendered for and against those claims in due course.

2.15 However, it seems to me to be appropriate to commence by setting out the general background history of the sequence of events which led to the development of the shopping centre at the Showgrounds site. I will also touch on some of the background to the separate contract entered into between Greenband and the trustees of the Irish Coursing Club for a small piece of land which was perceived as necessary for the development which contract is the subject of the proceedings in Greenband v. Bruton. I, therefore, turn to the general factual background.

3. **The Factual Background**

3.1 On the 28th January, 2005, the Vendors entered into an agreement for the sale of the freehold interest in the showgrounds site in Clonmel to Tom Pollard for the sum of €3,900,000. Tom Pollard signed the contract for sale "in trust" for Mount Kennett although the fact that it was Mount Kennett on whose behalf Mr. Pollard entered into the contract was not, at that stage, disclosed. Evidence was given of ordinary resolutions of both Mount Kennett and Greenband which provided that Mount Kennett conveyed its interest in the benefit of the relevant contract to Greenband on the 4th February, 2008, for the consideration of €500,000. The original contract between the Vendors and Mount Kennett stipulated a closing date of the 30th March, 2005. The Vendors did not hold the freehold title at the time of the contract. The Vendors did, however, as already noted, hold indirectly a leasehold interest in the property and had contracted with the Clonmel Horse Show and Agricultural Society Limited ("Show Society") for the sale of the freehold in the property. This sale was conditional on the consent of the Charity Commissioners, which was not ultimately forthcoming as per a letter dated on the 16th February, 2005.

3.2 In those circumstances the Vendors did not complete the contract and asserted in correspondence with Mount Kennett that the contract, although not so expressed on its face, was implicitly subject to a condition as to the consent of the Charity Commissioners, which condition was not fulfilled with the result that the contract was said to be at an end. Thereafter Mr. O'Brien adopted a two-fold approach in response. First Mount Kennett commenced proceedings in this Court on the 12th May, 2005 seeking to enforce Mount Kennett's rights under the agreement by way of specific performance or alternatively damages in lieu and damages for breach of contract arising out of delay. In addition to the proceedings Mr. O'Brien sought to open a dialogue with the Show Society with a view to purchasing the freehold directly from them. It was the intention to develop a substantial shopping centre on the property which had the benefit of a commercial zoning.

3.3 On the 1st September, 2006, Mount Kennett entered into a contract with the Show Society for the purchase of the freehold interest in the Showgrounds site for a price of €6,000,000. This agreement was conditional on the Show Society successfully procuring both the surrender of the leasehold interest in the property and the consent of the Charity Commissioners. Concurrently the Show Society contracted with the Vendors for the purchase of the leasehold for the price of €3,200,000 by agreement dated the 26th September, 2006. This agreement was also subject to conditions, in particular that the sale was conditional on the Show Society successfully completing the sale of its interest in the property to Mount Kennett within six months of the date of execution.

3.4 Mr. O'Brien gave evidence that it was brought to his attention sometime following the conclusion of both contracts that the Charity Commissioners were said not to be satisfied with the quantum of the proceeds of the sale that would ultimately benefit the Show Society and were, therefore, disinclined to accede to the application to approve. It was, Mr. O'Brien understood, indicated that were an extra one million euro to be paid for the freehold then the consent of the Charity Commissioners would be forthcoming. To this end, the parties engaged in a series of open correspondence in an effort to achieve a compromise that would be acceptable to the parties and more particularly to the Charity Commissioners. The result was a variation agreement signed on the 28th June, 2007, between the Show Society and Mount Kennett which amended the contract price downwards from €6,000,000 to €3,800,000 and which also removed the condition that the agreement was to be subject to the successful procurement of the surrender of the leasehold interest. This interest was instead to be sold by Clonmel Leisure and the Vendors directly to Mount Kennett for €1,400,000 as set out in an agreement also dated the 28th June, 2007. This revised transactional structure, had it completed, made provision for the Show Society to net an additional one million euro over that which would have been achieved out of the original contracts for sale. (3.8m as opposed to 2.8m being the difference between the €6m to be received and the €3.2m to be paid out under the previous arrangements.)

3.5 The Charity Commissioners, however, refused to consider a consent until a judgment had been delivered, as the matter was then before Smyth J. in this Court. This served to postpone matters until the issue of specific performance was determined in favour of Mount Kennett by Smyth J. in his judgment dated the 21st November, 2007. The issue of delay damages was not then dealt with and the consequences of those damages not then being dealt with and the question of whether such damages could, in those circumstances, still be claimed, was the matter on which I was already required to rule during the course of the current proceedings.

3.6 The judgment of Smyth J. inspired a second variation agreement between the Show Society and Mount Kennett dated the 12th

December, 2007. This agreement varied the contract price for the freehold upwards to €5,000,000 and removed the condition that the purchase was to be subject to the conclusion of the contract for the transfer of the leasehold interest. The consideration reflected an opinion on valuation by Lisney Auctioneers which valued the freehold at €6,000,000 minus €1,000,000 which took account of the value of the leasehold interest. By letters of the same date, solicitors for Mount Kennett and Greenband wrote to the Vendors offering to assign their interest in the second variation agreement to them so as to put them in a position to comply with the order for specific performance. The relevant letter noted that, in the event that the Vendors refused this offer, Mount Kennett would continue with the contract and would thereafter pursue the Vendors for the premium paid over that set out in the original contract dated 28th January, 2005. This offer was not taken up and Mount Kennett proceeded to nominate Greenband to complete the purchase of the freehold. It was Mr. Fitzpatrick's evidence that the reason the Vendors did not take up this offer was on the grounds that they did not have the financial resources available to take up the offer. The Vendors, in any event, procured that Clonmel Leisure assigned the leasehold interest in the property to Greenband by assignment dated the 29th February, 2008, for the sum of €1.00. The circumstances in which that transfer occurred is a matter of some controversy and forms the basis of the assertion by the Vendors to the effect that Mount Kennett and Greenband are now precluded from pursuing damages. It is important to recall that the three named defendants are shareholders in Clonmel Leisure but so is a Mr. Buckley who in the circumstances refused to grant his consent, insofar as it was necessary, to the assignment of the lease. As it transpired two directors of Clonmel Leisure signed the assignment on that company's behalf and, therefore, nothing of any great import now turns on the matter save to say that it goes some way to explaining some of the delay in effecting the assignment. The freehold interest followed by assurance dated the 24th April, 2008, which was based on an authorisation from the Charity Commissioners to the sale by the Show Society to Greenband.

3.7 During the time it took to secure the freehold interest, Mr. O'Brien says that Greenband was advised that it would be commercially imprudent to commence negotiating with prospective tenants, in particular those who might become anchor stores, while there was significant uncertainty regarding the issues of title to the property. Mr. O'Brien nevertheless liaised with his design and construction team and commenced the planning process. A decision to grant planning permission was made on the 1st February, 2007, by Clonmel Borough Council for the construction of what is now known as The Showgrounds shopping centre with the final grant of planning permission arriving on the 12th May, 2007. This followed a previously refused permission which resulted in the reduction in size of the development and preceded a number of amended permissions. Thereafter, Greenband began the process of seeking to secure an anchor tenant or tenants for the development. Mr. O'Brien gave evidence that he and Mr. Peter O'Meara, of Savills, who acted as agent for Greenband, concluded heads of terms with Marks & Spencer in or around July 2007 by which Marks & Spencer agreed to become the anchor tenant in the Showgrounds. A formal agreement was concluded on the 4th July, 2008.

3.8 The agreement with Marks & Spencer required a reconfiguration of the planned anchor unit which necessitated a further planning application. A final grant of planning permission issued on the 18th March, 2008. Greenband commenced preliminary site works in the same month with work beginning in earnest in April 2008. With construction completed, the Marks & Spenser portion of the centre, having been completed before the rest of the centre, opened sometime in August 2009, with the remainder of the Showgrounds opening on the 19th October, 2009. At that point the shopping centre had concluded a number of letting agreements with tenants and was 65% occupied in number and area. In passing it is appropriate to note that this development was the only centre to open in the country in that calendar year.

3.9 It is nevertheless Greenband's case that, but for the delay caused by the title difficulties, Greenband could have realistically secured an anchor tenant, obtained an appropriate planning permission consistent with the requirements of that tenant, completed construction and opened the centre sometime in autumn 2008. The effect of this alleged delay was that, it is said, Greenband was faced with negotiating with prospective tenants in a vastly different market in which greater concessions had to be made on lease terms than would otherwise have been the case.

3.10 It emerged during the course of the trial that the Show Society had sought to preclude Mr. O'Brien and his companies from pursuing any claim against the Vendors by making same a condition of the contract for the sale of the freehold interest. In the end no such condition was agreed to between the parties.

3.11 In addition, Mr. Fitzpatrick was questioned regarding a contract executed on the 14th November, 2008, between the Show Society, Clonmel Leisure, Mr. Pat Buckley and the Vendors. In essence the contract provided that the Show Society would pay €1,500,000 to the other parties "in full and final settlement of all matters between the society and all other parties". Mr. Fitzpatrick described the payment, which was divided into unequal shares among the four partners, as an "honour debt that the Society felt they owed" although he also suggested that the agreement may have been a way for the Show Society to protect itself from any potential actions by the Vendors and Mr. Buckley.

3.12 Against that general factual background, it is next necessary to turn to the specific issues which arise in these proceedings. Insofar as there are factual disputes, I propose dealing with same in the course of those sections of this judgment which deal with the issues to which the facts in question are relevant. On that basis, it is appropriate to turn to the first issue which is as to whether it is now permissible for Greenband to seek damages in lieu of specific performance. It will be recalled that an issue was raised at an early stage when this matter was first before the court as to whether Greenband were entitled to pursue such a claim. However, as already noted, I ruled in an ex tempore judgment on that occasion that the issues which arose under that heading should be deferred until all the evidence had been completed. It is, however, now appropriate to deal with that question.

4. **Damages in Lieu of Specific Performance**

4.1 The jurisprudence seems to be clear on at least some basic propositions relevant to the issues which arise under this heading. First, in the ordinary way, a party is not entitled as of right to have a decree of specific performance discharged and seek, instead, damages in lieu of specific performance. There is no doubt but that a party can pursue both reliefs up to and including the trial of an action concerning a contract for the sale of land. There may well be cases where the question of the appropriate remedy is left to the judge so that the plaintiff may indicate a desire to obtain an order for specific performance but may, as a fallback position, indicate that damages in lieu would be an appropriate alternative remedy in the event that the court was persuaded, for whatever reason, that there was a continuing valid and binding contract but that it was not considered appropriate to order specific performance. However, in that later eventuality no order for specific performance would be made and the court would proceed either to assess damages in lieu on the basis of evidence tendered at the hearing or defer the matter to a subsequent hearing.

4.2 However, where a party seeks an order for specific performance and it is granted, then the starting point has to be that that party has elected for specific performance rather than damages. However, it is equally clear that the court has a jurisdiction to discharge an order for specific performance and direct that damages in lieu should be assessed provided that it is, in all the circumstances, equitable so to do. As pointed out in Spry on *"Equitable Remedies"* (8th Ed. (2010)) at pp 319-321:-

> "The Termination, Variation and Enforcement of Orders of Specific Performance

An Order for specific performance may be dissolved or varied by the Court whenever it is just to do so. A number of circumstances may bring about this position, as may be seen from the following analysis.

First, an event may occur, such as supervening impossibility of performance, which either renders the order entirely inappropriate or which requires its modification.

Secondly, if the plaintiff has elected not to rescind in the light of the Defendant's breach, but has instead obtained an order of specific performance, a new or continued failure by the Defendant to carry out his obligations in an essential respect enables the Plaintiff to rescind the contract and to obtain a dissolution by the Courts of its order.

Thirdly, there may be laches or acquiescence on the part of the Plaintiff, or some other equitable consideration may arise which renders continuance of the order unjust or which requires its amendment. So it was said b y O'Bryan J., 'but, in my opinion, the Court, in its equitable jurisdiction, would be as careful t preserve the equities between the parties as well after the decree as before it, and if the Plaintiff has been guilty after judgment of delays which now make it [in] equitable to make further orders for the purpose of specifically enforcing the contract, the Court, even after the decree, will refuse to aid her by making further ancillary orders'.

Different considerations arise in regard to hardship. Ordinarily the fact that after the making of an order circumstances arise in which performance will give rise to greater hardship than had been expected does not justify the dissolution or variation of the order. However, there is much to be said in principle for the view that if this greater hardship is such that the order would operate oppressively, the Court may in exceptional circumstances regard it as just that it be modified or dissolved, so that where appropriate the Plaintiff is confined to such other remedies as damages that are available.

Fourthly, different rules apply from time to time in different jurisdictions for the correction of orders made in error.

Fifthly, there is a general power in the Court to dissolve or vary an order of specific performance in accordance with equitable principles. So, for example, a modification or variation may be appropriate because the parties have subsequently terminated or varied their agreement. Again, an estoppel or other like consideration may have arisen, or some other circumstances may have occurred whereby the continuance of the order would give rise to injustice.

Until an order of specific performance is dissolved or terminated in a material respect it must be complied with, and a failure to comply may constitute contempt of Court. The order will where appropriate be enforced by the Court and here reference should be made to the procedures that are discussed hereunder in relation to the enforcement and injunctions."

4.3 Arising from that general position, two issues require determination on the facts of this case. It should be recalled that Smyth J. made an order for specific performance. There has been no formal discharge of that order. The question which arises, therefore, is as to whether it is now open to Greenband to seek damages in lieu of specific performance. In essence, two points are made by Greenband. First, it is said that the procedural history of this case amounts, in substance, if not in form, to a discharge of the order of specific performance. On that basis, it is said that it is unnecessary to obtain a formal discharge of the order of Smyth J.. Alternatively it is said that, if a formal order of discharge remains necessary, then it is equitable to make such an order in all the circumstances of this case. Both of those propositions are contested on behalf of the Vendors. I, therefore, turn to the first issue.

4.4 It will be recalled that Mount Kennett made an application to this Court seeking to have the proceedings re-entered and seeking to file an amended statement of claim. While that order was not consented to by the Vendors, no real opposition was put forward to the making of same. In that context, the contents of the proposed amendments to the statement of claim are, in my view, of some significant relevance. First, it was proposed to add Greenband as a co-plaintiff for it had become clear by that time that Greenband was the party who had become entitled to the interest of Mount Kennett in the relevant contract and further, that it was Greenband who had paid the consideration for the purchase of the freehold from the Show Society and, indeed, had constructed the shopping centre. Thus, any losses would be Greenband's losses.

4.5 But perhaps of greater importance to the issue with which I am currently concerned is the fact that it is clear from the proposed amended statement of claim that the claim for specific performance was then being asserted as being no longer of any relevance. The amended statement of claim sets out, in part, the following:

> "In further breach of the said Contract and in breach of the said Order the Defendants and each of them failed neglected and refused to specifically perform the said Contract save and except to the extent that on or about the 29th of February 2008 they procured the assignment to the Second Named Plaintiff […] of the Leasehold interest then held by Clonmel Leisure Group Limited in the property the subject matter of the proceedings and Order.
>
> By reason of the failure of the Defendants to sell the freehold interest in the said property to the First Named Plaintiff (and/or the Second Named Plaintiff) and in circumstances in which the First and/or Second Named Plaintiff intended to construct a substantial commercial development on the said lands (for which development planning permission had been granted by Clonmel Town Council) the Second Named Plaintiff purchased from Clonmel Horse Show and Agricultural Society Limited the freehold interest in the said property for €5,000,000 subject to a Contract made the 1st of September 2006 and varied the 12th of December 2007 which said Contract was completed on the 24th of April 2008.
>
> Furthermore by reason of the failure of the Defendants to complete the sale of the said property to the First Named Plaintiff and further by reason of the failure of the Defendants to comply with the Order of Mr. Justice Smyth for Specific Performance, the Plaintiffs and each of them have incurred loss damage and expense as set out […]."

In addition, the statement of claim, as amended, sets out details of the claim for damages in lieu. Of particular importance it should be noted that the original claim for specific performance has added to it in brackets the phrase "which no longer arises

4.6 It should also be recalled that no objection was taken to those amendments at the time nor was any suggestion made that there was anything inappropriate about Mount Kennett and/or Greenband now pursuing a claim for damages in lieu. No point was made in any of the defences filed on behalf of the Vendors which suggested that there was a barrier to the award of damages in lieu. Indeed, it was only when counsel for Mr. Fitzpatrick made an application to the court after the end of the opening of the case by counsel on behalf of Mount Kennett and Greenband, that any formal objection of the type now pursued was advanced. It does appear that some intimation of the fact that a point along those lines was going to be made was communicated between the parties a short number of days prior to the commencement of the hearing.

4.7 Against that factual background it is suggested on behalf of Greenband that the order permitting the proceedings to be re-

entered, allowing for the amendment of the statement of claim in the manner which I have described, and the progress of that claim up to the commencement of the hearing, amounted in substance to an acceptance by all parties (including the court) that the order for specific performance of Smyth J. was now defunct as being incapable of further effect. It must be recalled that the factual context in which the application to amend was made and the amended statement of claim was formulated was that Greenband had, in fact, acquired the freehold so that there was no longer any practical reality to the order for specific performance.

4.8 Nonetheless it seems to me that it remains the case that, as a matter of form, the order for specific performance needs to be discharged in order that damages in lieu of specific performance be awarded, for it would be wholly inappropriate for the court record to include, at the same time, an order requiring a party to specifically perform a contract and also an order requiring the same party to pay damages in lieu of specific performance. The two orders would be inconsistent. In those circumstances it seems to me to be necessary to consider whether it would now be equitable to permit the discharge of the order for specific performance made by Smyth J. and, therefore, to assess damages in lieu. However, it seems to me that the procedural history of the case to which I have referred forms a significant part of the relevant factual material by reference to which a decision as to whether such a course of action would be equitable should be made.

4.9 The other part of that relevant factual history concerns the dealings between the parties and the Show Society as a result of which Greenband came to be the fee simple owner. It is important to note a number of matters about that factual history. First, it is clear from the judgment of Smyth J. that the court was already aware, at the time that that judgment was delivered, of the fact that Mr. O'Brien had put in place contractual arrangements designed to secure his position in the event that problems in relation to the Vendors acquiring the fee simple title from the Show Society were not overcome so as to enable the Vendors to comply with the order of specific performance. It is true that the contractual arrangements of which Smyth J. would have been informed at that time evolved somewhat, in the manner which I have already described, before the contract for the purchase of the fee simple from the Show Society for the sum of €5m (which was the contract which actually led to a transfer of the fee simple) was put in place and secured the approval of the Charity Commissioners. However, this is not a case where Smyth J. was unaware of separate contracts having been entered into by Mr. O'Brien for the purposes of securing his position. Notwithstanding the existence of those contracts, Smyth J. considered it appropriate to order specific performance. No appeal was brought by the Vendors against that decision and it does not seem to me to be open, at this stage, to engage in what is, in substance, a collateral attack on that decision.

4.10 It is argued on behalf of each of the Vendors that it would now be inequitable to allow Greenband to secure damages in lieu of specific performance because, it is said, Greenband went its own way about acquiring the fee simple and, thus, precluded the Vendors from so doing and complying with the order of specific performance. However, the fact that Mount Kennett and/or Greenband had such fallback contracts in place was known to Smyth J. at the time when the order for specific performance was made. If the existence of those contracts was considered a barrier to enforcing the contract between Mount Kennett and the Vendors, then that is a point that could and should have been made at that time. The point having not been made at that time, it does not seem to me that any significant weight can be attached to it at this stage. The fact remains that the Vendors contracted to provide Mount Kennett with a fee simple for €3.9m. Mount Kennett ultimately had to pay €5m to secure the fee simple. The fact that Mount Kennett went about securing its position while the decree of specific performance remained in force might, on one view, raise questions about whether it was equitable to now allow damages in lieu to be awarded were it not for the fact that the court was well aware of similar moves by Mount Kennett to secure its position at the time when the case first came on for hearing before Smyth J.. It cannot, therefore, be argued that Greenband had elected to treat the contract as repudiated so as to involve the comments of Lord Wilberforce in Johnson v. Agnew [1979] All E.R. 889. If the actions of Greenband were to be treated as an acceptance of the contract being at an end then no order of specific performance could have been made. There can be no doubt but that Mount Kennett and/or Greenband would have been entitled to attempt to secure the freehold directly from the owners after there had been a failure to comply with the decree of specific performance. If a party is ordered to specifically perform a contract and fails to do so within the terms of the court's order, then it is clearly open to the other party to attempt to secure its position in whatever way it may be able so to do. It might, in an appropriate case, be open to argument that a party who "jumps the gun" by securing its position before the order for specific performance needed to be complied with, might impair its position in being able to claim damages in lieu for it could be said that such a party had effectively prevented the decree of specific performance from being complied with. However, given that, for the reasons which I have set out, the court was, at the time of making the decree of specific performance, aware of measures having already been put in place to secure Mount Kennett's position, it is difficult to see how that is a point of any great weight on the facts of this case. In addition, it must be recalled that Mount Kennett offered to the Vendors (by letter of the 12th December, 2007) the possibility of taking over the contract with the Show Society (which, it will be recalled, secured the consent of the Charity Commissioners unlike the contract previously entered into by the Vendors) but the Vendors declined or, perhaps, were unable so to do (it is suggested that the Vendors did not have sufficient funds).

4.11 In addition, it is clear that the Vendors were, themselves, parties to the negotiations and arrangements which led to many of those agreements. For example, the Vendors entered into an agreement on the 26th September, 2006, to sell the leasehold interest in the Showgrounds to the Show Society for €3.2m. This was part of a set of interlocking contracts to facilitate the acquisition of the freehold by Greenband. Those contracts were entered into after the hearing before, but before the judgment of, Smyth J.. The Vendors, therefore, acquiesced in arrangements to permit a transfer of the freehold to Greenband outside the framework of the contract which is at the heart of these proceedings.

4.12 That leads to the final question which arises under this heading. It is said that there is no, or no sufficient, evidence to justify a finding that Greenband had to pay €5m to secure the freehold. The fact that it paid that sum is clearly established. The argument, in substance, is as to whether there is evidence to justify the scale of that payment. The relevant evidence is the following. The first contract entered into directly between Mount Kennett/Greenband and the Show Society also failed to obtain the consent of the Charity Commissioners. Mr. O'Brien gave evidence that he secured a valuation of the property from Savills Lisney Auctioneers for his view was that it was unlikely that the Charity Commissioners would give consent without such a valuation such as would enable the Charity Commissioners to be satisfied that the Charity, that is the Show Society, was getting a proper price. As has been pointed out that valuation suggested that a fee simple interest was worth of the order of €6m, but that the existence of the leasehold interest in favour of Clonmel Leisure might reduce the value to some €5m. It would appear that Clonmel Leisure had a leasehold interest which was probably only of "significant nuisance" value only for it had a short term to run and there did not appear to be any rights of renewal. The evidence is, therefore, that Greenband presented to the Charity Commissioners a valuation from a reputable firm of valuers which persuaded the Charity Commissioners that a consideration of €5m was appropriate for the freehold subject to the lease. It will be recalled that a formal assignment of the lease for a nominal consideration actually occurred in circumstances which give rise to an issue between the parties to which it will be next necessary to turn.

4.13 However, having regard to all of the evidence, I am satisfied that it was reasonable for Greenband to agree to pay €5m for the freehold. It is clear that offers which would have given the Show Society lesser amounts were rejected by the Charity Commissioners. Whether some sum less than €5m (but obviously greater than the €2.8m rejected by the Charity Commissioners – it should be recalled that the Commissioners never ruled on the €3.8m offer) could have been put forward which would, nonetheless, have met with the

Charity Commissioners' approval is, perhaps, debatable. However, the process was already long drawn out. It must be recalled that the background to all of this was that the Vendors had contracted to provide Mount Kennett with a fee simple interest some considerable time earlier. The Vendors had failed to deliver on their contract. In those circumstances the only obligation on Mount Kennett, and/or Greenband having taken over Mount Kennett's contractual entitlements, was to act reasonably. In the circumstances of the history of attempting to obtain Charity Commissioner consent, the valuation which Mr. O'Brien procured from Lisneys, the fact that the matter had dragged on for a considerable period of time, and all other relevant factors, it does not seem to me to be appropriate to characterise Greenband's action in paying €5m as being unreasonable.

4.14 It follows that, for the reasons which I have sought to analyse, it is appropriate to now discharge formally the order of specific performance made by Smyth J.. In so doing, I have taken into account the procedural history which I have analysed earlier which gives very little equity to the Vendors, having regard to the way in which they have approached the case, in resisting an application so to do. I have, in addition, taken into account the circumstances surrounding the acquisition by Greenband of the freehold and the reasons (which I have already set out) why I have come to the view that that sequence of events does not render it inequitable to now discharge the order of specific performance. It is, therefore, subject to the question of whether Mr. O'Brien agreed to waive damages (which will be dealt with in the next section of this judgment) appropriate to award Greenband damages in lieu of specific performance.

4.15 In terms of the damages which should be award in lieu, it seems to me that the claim made by Greenband is correct. Greenband had to pay an additional €1.1m to secure the freehold. Secondly, Greenband had to pay an additional sum of stamp duty in the amount of €99,000. Greenband has been out that money since the closure of the sale and is, in principle, entitled to interest on the total of €1.199m from [dates]the 24th April, 2008, to [dates]date. The evidence establishes that the amount of bank interest on that sum actually paid by Greenband is [amount] €148,893 up to the trial (11th January 2011). Prima facie Greenband is entitled, under the heading of 'Damages in lieu of Specific Performance', therefore, to the sum of [ ]€1,347,893 together with updated interest on the same basis from the 12th January, 2011 to date. There is one further point that arises. In the events that happened, Greenband only acquired the property some considerable time after it would have, had the original contract gone through. There is a sense, therefore, at least on one view, that Greenband had a saving by not having to be out its money (most of which would have been borrowed) for that period. However, that question seems to me to be inextricably linked with the claim for delay damages and I propose dealing with it, therefore, in that section of this judgment that addresses the question of delay damages. However, before moving on to the question of delay damages, it is necessary to deal with the specific issue which arises out of what Mr. Fitzpatrick alleges was an agreement between him and Mr. O'Brien which was to the effect that, in return for Clonmel Leisure assigning the leasehold interest to Greenband, Mr. O'Brien agreed on behalf of Mount Kennett and Greenband not to pursue a claim for damages. I turn to that issue.

5. **Was there an Agreement to Waive Damages?**

5.1 There is a direct conflict of evidence between Mr. O'Brien and Mr. Fitzpatrick on what occurred at a meeting when an executed assignment of the relevant leasehold interest was handed over. By way of background to that meeting, it should be noted that Greenband was in a position, at that time, where it seemed likely that it was going to be able to acquire the freehold from the Show Society with the consent of the Charity Commissioners. It also needs to be recalled that the original contract between the Vendors and Mount Kennett suggested that the lease in favour of Clonmel Leisure had actually been surrendered as at the time of the contract. It should be recalled that Clonmel Leisure was a company involving not only the three Vendors, but also the Mr. Buckley to whom reference has already been made. Precisely how it came about that the Vendors were able to sign a contract which stated that lease had already been surrendered did not become clear in the course of the evidence. Whether the lease had, in fact, been surrendered, or whether the Vendors signed up to a contract which was false in suggesting that it had been surrendered, was not clear. Whether it would have been possible to surrender the lease without Mr. Buckley's agreement, and if not, what Mr. Buckley's position was, were again matters that were not clear. In any event, it became clear at or around the relevant time that it was likely that Greenband would ultimately achieve a conveyance of the fee simple from the Show Society, but Mr. O'Brien was, understandably, anxious to deal with the situation in relation to the leasehold interest in advance of that. In those circumstances, a suggestion emerged that the leasehold interest would be assigned by Clonmel Leisure to Greenband for a nominal sum so that the leasehold interest might ultimately merge in the freehold when both interests came to be held by Greenband.

5.2 Correspondence was written by Mr. O'Brien to the Vendors in which it was suggested that, in return for such an assignment, Mr. O'Brien would procure that neither Mount Kennett nor Greenband would pursue any claim for damages for delay, provided that the Vendors were to compensate him for the additional price which he had to pay for the fee simple and pay the costs already incurred in these proceedings. Thus, in substance, the offer was that what has now become damages in lieu of specific performance would be paid, the leasehold would be assigned, but the delay damages would be abandoned. The relevant correspondence contains an account of what was said to be the delay damages as at that time. Evidence was given on behalf of the Vendors which suggests that the offer in question was not practicable from their perspective because they did not have the funds to pay the sum of in excess of €1m which would have been required to compensate Mount Kennett/Greenband for the extra purchase price which was then to be paid to the Show Society.

5.3 It is also clear that some difficulties were being encountered by the Vendors, having regard to the position of Mr. Buckley who was, after all, a significant shareholder in Clonmel Leisure. It was the Vendors who had agreed to sell the freehold interest, free of the lease, and entered into a contract which purported to say that the leasehold interest had been surrendered. Where Mr. Buckley stood in all this, not being a contracting party, but having a significant shareholder's interest in the lease, is not at all clear. It will be necessary to return to the arrangements for the payment of a very substantial sum by the Show Society to the Vendors and Mr. Buckley in due course. However, for present purposes, it is sufficient to note that an executed deed of assignment of the leasehold interest was produced and brought by Mr. Fitzpatrick to the meeting with Mr. O'Brien to which I have referred. It is common case that the executed assignment was handed over at that meeting. It is as to the terms on which it was handed over that the dispute exists.

5.4 Mr. Fitzpatrick says that it was agreed by Mr. O'Brien that, in return for handing over the executed assignment of the leasehold interest, all damages would be abandoned although it was accepted that the obligation to pay costs was to remain. Mr. Fitzpatrick's evidence was that he expected the costs to be about €300,000. Mr. O'Brien says that Mr. Fitzpatrick simply asked him to "go easy on the damages". In one sense, both accounts are somewhat surprising. Given that Mr. O'Brien had already offered to settle matters on the basis of abandoning any claim for delay damages provided the leasehold assignment was handed over, it would be surprising if Mr. Fitzpatrick were prepared to hand the assignment over but still leave all claims for damages potentially outstanding (including the delay damages). It is, of course, the case that the Vendors, generally, appeared to feel that they could not accept Mr. O'Brien's offer because they did not have the money to pay the damages in lieu, but even allowing for that point, it would be surprising if a party who already had an offer to limit the damages to damages in lieu, would give away the only bargaining chip which they had (viz the leasehold interest) without getting something in return, particularly when an offer of getting something quite substantial (that is, an abandonment of delay damages) was already on the table. On the other hand, it is surprising that, if an agreement along the lines suggested by Mr. Fitzpatrick actually was arrived at during the relevant meeting, no contemporaneous correspondence setting out

that agreement follows. While it is the case, as is pointed out in my previous judgment in this matter, that there appears to have been a falling out between the Vendors, such that each of them is now separately represented, at the relevant time, there appeared to be no such disputes. One of the Vendors was an experienced solicitor who had acted as solicitor in the transaction. If Mr. Fitzpatrick had entered into an agreement of the type suggested, then it seems inconceivable that he would not have reported that to Mr. Tobin. If he had reported it to Mr. Tobin, it is highly surprising that such an important concession was not the subject of some contemporaneous correspondence.

5.5 It should also be noted that it does not appear that Mr. O'Brien (himself a solicitor) pursued in correspondence the question of delay damages for quite a period after the meeting in question. It is suggested on behalf of the Vendors that that is evidence of the fact that Mr. O'Brien had agreed not to pursue the damages concerned.

5.6 In the light of those considerations, and also having regard to the evidence given by both Mr. Fitzpatrick and Mr. O'Brien, I have come to the view, on the balance of probabilities, that no agreement as alleged was reached. In that regard, I do not conclude that Mr. Fitzpatrick has given deliberately false evidence. Rather, it seems to me that the conversation between Mr. Fitzpatrick and Mr. O'Brien was something along the lines of that suggested by Mr. O'Brien, such that the question of damages not being pursued or pursued vigorously was raised, but was not the subject of anything that could be described as a formal and binding agreement between the parties. I have come to the view that Mr. Fitzpatrick himself now believes that a more concrete arrangement was entered into, rather than the, perhaps, aspirational discussion which, I am satisfied, actually occurred. In those circumstances, it does not seem to me that there is a binding arrangement between the parties such as would preclude Greenband from pursuing damages including delay damages. It is, therefore, necessary to turn to the question of those delay damages. As pointed out earlier, a fundamental element of all of the claim for delay damages is the contention on the part of Greenband that, were it not for the breach of contract on the part of the Vendors and the consequent delay in acquiring title to the Showgrounds, Greenband would have been in a position to open the shopping centre one year earlier. I turn to that question.

6. **Would the Shopping Centre have opened Earlier?**

6.1 The starting point for a consideration of this question is the undoubted fact that Greenband did not have title to the Showgrounds for a period of 37 months (being the time between the completion date of the 2005 contract which was the 30th March, 2005 and the actual transfer on the 24th April, 2008) [insert] after the time when the contract between the parties should have been completed. It is a fact, therefore, that Greenband suffered that delay in having title and that the delay in question was due to breach of contract on the part of the Vendors. The question which arises is as to whether, in fact, the delay in obtaining title delayed, in turn, the opening of the shopping centre.

6.2 On the evidence, it seems clear that there were two critical questions that needed to be resolved before work could begin on the construction of the shopping centre. As a matter of commercial necessity it was vital that a suitable anchor tenant be acquired. All of the evidence suggested that the availability of an anchor tenant would have been essential to proceed with the development, for, without an anchor tenant, it would be extremely difficult to obtain other tenants, and without both an anchor and the reasonable prospect of other tenants which would follow on from a suitable anchor, it would not be possible to borrow the monies necessary for development.

6.3 Second, it is obvious that a suitable planning permission had to be in place. There is, however, an interaction between the two points. Obviously, in the case of any shopping centre, the precise development that is likely to ultimately go ahead will be one which will be dependent on the scale and nature of the requirements of the anchor tenant. While there might be a broad understanding of what anchor tenants in general might require, it seems clear that it would be necessary to fine-tune any planning permission to meet the precise requirements of an actual anchor tenant. This could happen in one of two ways. The anchor tenant might be in place prior to the planning application (or at least at a sufficiently early stage of the planning application that adjustments could be made to reflect the anchor tenant's precise requirements). Alternatively, if a planning permission had already been obtained, it would be necessary to apply for and obtain a variation on that planning permission to reflect whatever the specific needs of the anchor tenant were.

6.4 The actual sequence of events which occurred were the subject of detailed evidence, but they can, in my view, be fairly summarised as follows. Immediately after agreeing to purchase, Mr. O'Brien engaged Mr. ------ Peter O'Meara of Savilles in Cork to assist in the project. Some early tentative approaches were made to Dunnes Stores, who, at that time, were perceived as a possible and highly desirable anchor tenant. Dunnes already had a presence in Clonmel and were engaged, during the period with which I am concerned, in a process of obtaining their own planning permission to redevelop a site not far from the Showgrounds. However, there was some hope that Dunnes might be interested, as an alternative, in moving to the Showgrounds and becoming its anchor tenant.

6.5 When problems began to emerge in relation to title i.e. when Mr. O'Brien became aware of the difficulties which the Vendors were having in obtaining the consent of the Charity Commissioners, it is Mr. O'Brien's evidence that he did not consider it appropriate to engage in a significant pursuit of an anchor tenant, for he felt, in conjunction with Mr. O'Meara, that it would not be possible to come to a final deal with an anchor tenant as long as fundamental title problems remained in place. For that reason, it is said that the question of a possible anchor tenant was put on hold.

6.6 However, the planning process continued. An application for a very significant planning permission was made. That application was ultimately rejected by the planning authority as being over-bulky. A second application for a less obtrusive development followed. That application was granted.

6.7 The question of securing an anchor tenant was revisited at a later stage. The time at which that occurred is of some relevance. Marks & Spencers ultimately became the anchor tenant. Approaches were made to Marks & Spencers before the title problem had been sorted, but, it seems, at a time when some progress had been made in that regard, for, it will be recalled, Mr. O'Brien had put in place direct separate contracts for the purchase of the showground site which, at various stages, improved the prospects of ultimately securing title.

6.8 On behalf of Greenband an approximate timeline was put forward as being a realistic estimate of what would, in fact, have happened, had Greenband obtained title, as expected. It was suggested that, if the contract closed by the end of March 2005, an anchor tenant could have been secured within six months, i.e. September 2005. On that basis it was assumed that a planning application reflecting the anchor tenant's requirements could have been lodged by January 2006 with a decision issued by December 2006. Shopping centres by their nature benefit from optimum opening times, namely the Easter and Autumn times of the year. As such given that the development required a thirteen month construction time it was suggested that the Showgrounds could easily have been completed and opened by late Autumn/early October 2008

6.9 On that basis, it is suggested that the shopping centre would have opened approximately one year earlier than it did. As already noted the evidence was to the effect that, in general terms, it is considered desirable to open shopping centres either in the autumn so that they can commence to trade and avail of the build up to the Christmas season or in the Spring. Realistically, therefore, there seems to be three possibilities. If title had been made on time it is necessary to consider whether, as Greenband asserts, the shopping centre might have opened the previous autumn or one year earlier than it actually did. An alternative possibility is that the shopping centre might have opened in the Spring of 2009 being approximately six months earlier than its actual opening. The final possibility is that, in all the circumstances, the delay in getting title did not, in truth, alter the opening date of the Showground centre.

6.10 It seems to me that there are two key issues that need to be considered in addressing this question. The first in time is to identify what the chances were, in the event of having title by March 2005, of Greenband securing an anchor tenant significantly earlier than it actually secured Marks & Spencers. In that context, it is necessary to have regard to the fact that there are a relatively small number of potential anchor tenants for a shopping centre such as the Showgrounds. While there was some dispute between the relevant experts, it seems clear that there are a very small number of large retailers who might have been considered as possible anchor tenants for such a centre. There are, of course, a number of ways in which the position of an anchor tenant or tenants can be dealt with. Certain retailers offer only a traditional supermarket service. Others (such as Dunnes) provide a wider service and can offer both a traditional supermarket service and a clothing or fashion outlet. Still others may be more on the clothing or fashion end. It is, of course, possible that two complimentary anchors might be secured, one of whom might concentrate on a pure supermarket business with the other on the fashion side. But in whatever combination the number of potential players is limited.

6.11 It follows that acquiring an anchor tenant is not the same thing as selling a property in a market where there are a large number of potential purchasers. Securing an anchor tenant depends on one of a relatively small number of large commercial entities being interested in the proposed development. As an example of the kind of considerations that might affect the decision of any particular anchor tenant, it is only necessary to address the position of both Marks & Spencers and Dunnes Stores being the two entities which were actually involved in the Showground situation. As it transpired it was necessary to significantly reduce the size of the unit which Marks & Spencer actually took compared with the unit that had been earmarked for an anchor tenant in the original planning permission obtained by Greenband. The reasons for this was, on the evidence, that Marks & Spencers have a model which limits the size of unit which they are interested in opening in a town of the size of Clonmel and in an area such as Clonmel and its hinterland. Likewise, the position of Dunnes was clearly heavily influenced by the fact that Dunnes already had a presence in Clonmel and had the real prospect and were pursuing the possibility of redeveloping their own site.

6.12 Thus, it follows that any individual potential anchor tenant may just not be interested for a whole variety of reasons. The anchor tenant may not have any expansion plans at all at a particular point in time. Even if the potential anchor has expansion plans, its then current programme may not involve the area in question for a variety of geographical reasons or may be very prescriptive as to the type of store which it might consider opening in that area. There may be problems in attracting anchor tenants based on their type of business. A promoter of a shopping centre may be lucky in securing a major multiple such as Dunnes which might provide a range of services. If it does not, then it may have to persuade someone to open a food store but might, in that context, have difficulty in securing such an agreement unless there were also a significant fashion multiple in the same centre. These and doubtless many other factors make the question of anticipating whether an anchor will in fact emerge and, if so, the timing of such emergence, a matter of very considerable difficulty.

6.13 Both Mr. O'Brien and Mr. O'Meara expressed confidence in the assertion that they could have secured an anchor within the timeframe indicated above had the title problems not been there. It is possible that they may be correct. But it also needs to be taken into account that no particular potential anchor was identified. Dunnes ultimately went on to redevelop their own site and maintain a shopping centre just up the road. It is, perhaps, possible that, had the Showgrounds been fully available earlier, Dunnes might have been persuaded to go there but it is, frankly, a matter of pure speculation as to whether that might have happened. It is possible that Marks & Spencers could have been secured earlier had the Showgrounds been available with good title. .That must also, of course, be possible but it is, again, little more than speculation to decide whether, had it been possible to make an approach (say) eighteen months earlier, Marks & Spencers might have been interested or might have been interested in any shorter timeframe than ultimately occurred. The question of whether any of the other multiples, whether alone or in combination, might have been interested is again a matter of pure speculation. The evidence suggests that some contact was made, when the title position appeared to be improving, with other potential anchors. There is little to suggest that any of those other potential anchors had any great interest in the Showgrounds. The possibility that any such other anchors might have been persuaded to sign up to the Showgrounds earlier than Marks & Spencers had title been in order remains just that, a possibility.

6.14 First, it is important to recollect that I am now concerned with a hypothetical event. What would have happened had Greenband had title on time.? It is inevitable that any such question will involve some degree of speculation. Any case in which a court is required to assess damages based on something having happened which did not, in fact, happen necessarily involves such speculation. However, the extent to which it is possible to form a reasonably concrete view on what was likely to have happened will inevitably vary from case to case. For reasons set out in Lett v. Wexford Borough Council [2007] IEHC 195(REF), I am satisfied that the first port of call should be to attempt to estimate the various possibilities and attribute an appropriate weighting to them. However, an exercise such as that which I engaged in Lett is dependent on it being realistically possible for the court to make such an assessment.

6.15 There will be cases where there may be two or three possibilities and where the court can make a realistic assessment of the likelihood of each of them occurring. There will also be cases where the likely outcome on a hypothetical basis will be across a range where it will be possible to form a fair view somewhere in the middle of that range. However, there will also be cases where it is just not possible, on the evidence, because of the interaction of a whole range of factors, to form any detailed and analytical assessment of what might hypothetically have happened.

6.16 In certain cases, the number of factors which influence events may be limited. A court may, for example, be called on to estimate the likelihood of otherwise of a person embarking on a particular course of action in the hypothetical situation that they had been properly advised. While such a decision will obviously involve some degree of speculation, it is at least one single question based on attempting to reconstruct the likely factors that the person concerned would have taken into account in making the relevant decision. However, other hypothetical situations will involve a range of separate decisions made at different points in time. Each of those decisions may, potentially, be influenced by a number of factors. In turn, the second or subsequent decisions which might need to be made in a course of dealing are likely to be influenced by the outcome of earlier decisions in the same process.

6.17 To take but a single example derived from the facts of this case, it is clear that, in the events that happened, Greenband applied for a planning permission which turned out to be of little benefit to it and, indeed, resulted in a refusal. I say little benefit for it must remain the case that Greenband learned something from that first, refused, planning application which may have been of assistance

to it in formulating its successful applications. If Greenband had title on time would it nonetheless have pursued that original planning application in the hope of securing Dunnes or someone like Dunnes? What then would have happened if Marks & Spencers came along as a potential anchor in the middle of that process. Would the application have been withdrawn. If the application had nonetheless gone ahead and been refused, would there in fact have been any great saving in time. The number of interlocking factors which have the potential to affect a judgment on what might have happened in a case such as this are large. The above is simply an indication of some of them.

6.18 In my view, a point can be reached, in an attempt to analyse the range of eventualities that might have occurred in the event that wrongdoing had not taken place, where it frankly becomes impossible to approach the question on a rigorous analytical basis, for the number of hypotheses becomes so large that the range of possible outcomes, and the likelihood of any one or other of them having occurred, itself becomes so large that a precise analysis becomes impossible. In such cases, it seems to me that the appropriate course of action for the court to adopt is to refrain from engaging in a complex mathematical exercise which can only give the appearance of the damages being capable of being calculated in such a way when it is not really possible so to do. Rather, in those circumstances, the court should award a global sum that has regard to the prospects of the relevant plaintiff having had a financial gain and the scale of such gain, but also pays proper regard to the fact that any such gain was necessarily problematic. By analogy with the approach which the court sometimes adopts in the calculation of damages for personal injuries, there will be cases where it is possible to calculate financial loss on a relatively rigorous basis having regard to evidence (including if necessary expert evidence) as to the income lost as a result of a particular injury and the capitalisation of that income (if necessary by reference to actuarial evidence). There will, however, be other cases where such an exercise is just not possible. It seems to me that in the calculation of consequential loss in a commercial setting similar considerations apply. There will be cases where it is possible to calculate those damages on a fairly precise basis even if it may be necessary to value two or three different scenarios and give a weighting to each. However, there will also be cases where such an exercise is just not possible.

6.19 It seems to me that the question of whether the shopping centre in this case would have opened earlier is one which is not really capable of detailed analysis. Having regard to all the evidence, I have come to the view that there was some prospect that, had title been available to Greenband when it should have been, Greenband might have been able to secure an opening of the shopping centre at an earlier stage. Greenband certainly lost (or at a minimum had impaired) the opportunity of being able to seek to open the shopping centre earlier. It can only be speculative to assess whether, had it been afforded that opportunity, it would have succeeded and, if so, whether it would have succeeded by opening earlier by six or twelve months.

6.20 It seems to me that this is, therefore, in reality, a loss of opportunity case. The damages need to be assessed on the basis that Greenband lost the possibility of being able to open earlier but that it is far from certain that an earlier opening could in fact have been achieved. There are just too many factors which would have come into play. I have already analysed the problems that might well have been encountered in securing an anchor tenant at an earlier stage. There just might not have been an interested anchor tenant available at the relevant time. Even if there was some delay (beyond the timescale advanced on behalf of Greenband) in securing an anchor tenant then that could, in turn, have fed in to the planning process. It will be recalled that what actually occurred was that a planning application was originally put in at a time when no particular anchor tenant was in mind (save, perhaps, to the extent that it might have been hoped that Dunnes might have come on board). That planning application was refused and a further planning application followed. A further variation was required when Marks & Spencers came on board. Precisely how such a planning timeline would have been affected by a somewhat earlier emergence of an anchor tenant is very difficult to estimate. As noted earlier, would Greenband have gone for the more bulky scheme even if it had an anchor tenant or the prospect of one. Might that have depended on who the prospective anchor was? What would the effect on an anchor tenant have been of a refusal of the planning permission? Even if the anchor tenant remained on board, what delays would have occurred in reconfiguring the planning application. It does not necessarily follow that an earlier availability of an anchor tenant would necessarily have allowed the development to get underway any quicker because the interaction between the planning process and the specific requirements of both the anchor tenant concerned and the Greenband's plans for the overall shopping centre are necessarily complex.

6.21 While there are some cases which are capable of relatively precise calculation, it does not seem to me that this is one of them. It seems to me to be appropriate, therefore, to approach this case on the basis of a lost opportunity. In passing I should note that it does not seem to me that the questions concerning an access strip of land necessary to the development (which issues are at the heart of Greenband v. Bruton & Ors) really effect the question. These issues and other issues in relation to the acquisition of additional small plots necessary to complete the development were dealt with quickly by Mr. O'Brien when they actually arose. I do, therefore, not feel that those issues would have had any significant material effect on any other hypothetical timeline.

6.22 Having conducted that analysis it seems to me that it is next necessary to turn to the question of whether any losses attributable to delay were foreseeable.

7. **Foreseeability and Remoteness**

7.1 The starting point for a consideration of forseeability in this case has to be to note two matters. First, the Vendors had secured a rezoning of the Showground site for commercial development and the price which underlay the contract was consistent only with the site being valued for some type of commercial development. To the extent that it is relevant it is necessary, therefore, to approach the question of forseeability on the basis that the property was sold as a commercial development site. In that context it does not seem to me that *Diamond v. Campbell Jones & Ors* [1961] Ch. 22 is relevant. In *Diamond* Buckley J. said the following:-

> "I cannot believe, however, that Lord Wright, in the passages which I have read from the Monarch Steamship Co. case, meant that anyone entering into a contract must be treated as having constructive notice of the nature of the other party's business, or of its probable bearing on the loss which that other party might suffer in consequence of a breach of contract. In some cases the nature or the subject-matter of a contract or of its terms may be such as to make it clear that one of the parties is entering into the contract for the purpose of a particular business, and the circumstances may be such that the court will infer that the other party must have appreciated that this was so. It seems to me, however, that this can rarely be the case where the contract is for the sale of land. The vendor of a shop equipped for use as a butcher's shop would not, in my judgment, be justified by that circumstance alone in assuming, and ought not to be treated as knowing, that the purchaser would intend use it for the business of a butcher rather than that of a baker or candlestick-maker, at any rate in the absence of covenants or other forms of restriction confining its use to the butcher's business. Special circumstances are necessary to justify imputing to a vendor of land a knowledge that the purchaser intends to use it in any particular manner."

It seems to me that all the circumstances make it appropriate to impute a commercial development use in this case. It is not, however, appropriate to impute knowledge of the specific type of commercial development that Mr. O'Brien had in mind.

This is because the Vendors were unaware, at the time of the sale, of the identity of the purchaser, for the property was purchased in trust for an unidentified entity. No specific planning permission had been applied for let alone obtained. It was not, therefore, known to the Vendors that the purchaser wished to develop a shopping centre on the site. Having regard to all of the authorities , including *Ratcliffe v. Evans* [1982] 2 Q.B. 524, *Chaplin v. Hicks* [1911] 2 K.B. 786, *Biggin v. Permanite* [1951] 2 K.B. 1951 and *Duffy v. Ridley* [2008] 4 I.R. 282 amongst others, it seems to me that it would, in those circumstances, be inappropriate to engage in a detailed analysis of the precise losses which might be said to have flowed from the development of the Showgrounds in the manner in which Mr. O'Brien planned as opposed to losses which might be considered as being likely to flow from a delay in a general commercial development. The Vendors were unaware of the particular form of commercial development that might be considered. I am satisfied that it was foreseeable that a delay in completion would be likely to give rise to losses which might reasonably be expected to flow from delay in starting and completing any commercial development. On the other hand I am not satisfied that it was foreseeable that the particular and exact losses that flowed from a plan on the part of Mr. O'Brien, which plan was unknown to the Vendors and was not the only type of development that might have been contemplated by any potential purchaser, would occur. In this regard it is appropriate to refer to the case of *Victoria Laundry v. Newman* [1949] 2 K.B. 528.

7.2 In that case the particular losses which it would appear were actually incurred by the plaintiff, but which were attributable to a more lucrative form of activity, were not allowed. However, the ordinary losses that might be expected to flow from the normal operation of the dry cleaning venture in question (perhaps slightly enhanced to reflect the possibility of some of the more lucrative work) were allowed. Asquith L.J. stated the general principles in *Victoria Laundry* in the following terms:-

> "(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights have been observed: this purpose, if relentlessly pursed, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,
>
> (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
>
> (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
>
> (4) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in Hadley v. Baxendale. But to this knowledge, which a contract-breaker is assumed to posses whether he actually possess it or not, there may have to be added in a particular case knowledge which he actually possess, of special circumstances outside the "ordinary course of things", of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.
>
> (5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result
>
> (6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee that it was likely so to result. It is indeed enough…if the loss (or some other factor without which it would not have occurred) is a "serious possibility" or a "real danger". For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy."

A like approach seems to me to be appropriate in this case.

7.3 How then should one approach the question of damages. Any commercial development is likely to involve the developer renting the units (whether offices, retail or a combination of both). It is, of course, also possible that a developer might have included some residential development and, if that be so, it might well be that those units would be sold. Any development will, of course, require significant capital expenditure on its construction and will also require the servicing of any borrowings necessary to pay for that construction and also to discharge the purchase price. The anticipated loss from being delayed in the commencement of a commercial development is that the developer may be at the loss of the net profit (being the difference between the rent roll and the cost of servicing the borrowings) for whatever period is the subject of a delay. In addition, and to the extent that some sales might have taken place, the developer may be at a loss in that the profits attributable to such sales will be delayed. However, in circumstances where there is no significant deterioration in the relevant market, it is unlikely that any very significant long term losses will be attributable to units sold. If the payment of the purchase price and the incurring of the development expenditure is itself delayed then, other than the fact that the developer may have had the profits available to him from a slightly earlier stage, no real loss will be incurred.

7.4 That leads to the question of losses which might be said to be directly attributable to adverse market movements. Obviously, on Greenband's case, much of the losses in this case which are attributed to delay arise under that heading. It is, in my view, foreseeable that a delay in providing title to a commercial development site may cause a party losses by virtue of adverse movements in the market for commercial property generally. It does not seem to me to be appropriate to assess damages in this case by reference to the specific losses attributable to delay in relation to the Showgrounds Shopping Centre for it was not foreseeable that that particular type of development was necessarily going to occur. However, it does seem to me to be appropriate to have some regard to the fact that;

> A. Delay does place a development on risk that market conditions may move so as to make the development less attractive or deprive the developer of an opportunity to maximise profits in relation to timing the development so as to come on stream at an advantageous point in any cycle; and
>
> B. On the facts of this case the delay did, in fact, impair the ability of Greenband to maximise its profits. It is likely that any other commercial development which was attempted by any purchaser of these lands would have been afflicted, at least to some extent, by problems in the market place if it was, in fact, delayed in being brought to fruition at the time in question in this case, that is in the latter part of the last decade when there was such a significant change in market conditions.

7.5 While the precise figures for other types of commercial development might not be exactly the same as those which apply in the case of the Showgrounds, it seems to me that it was foreseeable that, at the relevant time, any realistic commercial development on the site could have been expected to secure a rental income of somewhere between €2m and €3.5m per annum, but would have incurred development costs which (when added to the purchase costs) would need to have been serviced by the payment of interest of the order of €1.25m to €1.75m per annum. Those figures have regard to what actually occurred in relation to the shopping centre but also take account of the likelihood that other types of development might have different costs and returns. In addition, it seems to me to be appropriate to discount any rental figure by 20% to reflect the risk that any development might not be fully let. In those circumstances it seems to me that it was foreseeable that a delay in the commencement of a commercial development might well have given rise to losses of the order of between €350,000 and €1m per annum.

7.6 In assessing damages it is necessary to have regard to the findings which I have already made concerning the possibility of the specific shopping centre development being on stream earlier if title had been made on time. However, it does not seem to me that a great deal of weight should be attached to that point in the light of the overall approach to the assessment of delay damages which I have adopted. The reason for there being considerable doubt and thus speculation about whether a shopping centre could have been operational a year earlier stems from considerations particularly applicable to the retail market and the necessity to obtain an anchor tenant. Those considerations would not necessarily apply in every form of commercial development or apply to the same extent in other types of commercial development. The delay in making title was, after all, of the order of three years. In those circumstances the sort of foreseeable commercial development which any reasonable person must have assumed would have been the reason for the purchase of the Showground site, must equally have been foreseeably delayed by at least a year give or take. While the range of possible losses that might attend such a delay could vary enormously depending on the precise type of development chosen, the relative capital costs and rental returns, the ease of getting tenants whether of offices or retail space and a range of other factors, it seems to me for the reasons which I have already identified that it is realistic to place a sum of €500,000 on the net loss attributable to loss of profit by reason of the loss of opportunity in having a commercial development operational at an earlier time, which loss was foreseeable as arising out of any likely form of commercial development.

7.7 Having taken that approach it does not seem to me to be necessary to make a deduction for the specific saving in building costs which Mr. O'Brien conceded would actually have occurred in this case, for that saving is specific to his shopping centre model for calculating damages. In coming to an overall figure I have, however, erred towards the bottom of the range to reflect the possibility that any development might have become cheaper as a result of delay.

7.8 To the sum already identified should be added a further sum to reflect the fact that the delay also would foreseeably run the risk of impairing Greenband's ability to maximise its opportunities in the light of market movements. It seems to me that the losses actually attributable to market conditions in the case of the Showgrounds are not necessarily a particularly good guide to the general losses that might be attributable to some delay in bringing a non specific commercial development on stream, as the calculations are very specific to the conditions applying in the letting market for retail units at the time in question. In all the circumstances, and having regard to the scale of the likely development that might have been expected at the Showgrounds, it seems to me that something of the order of three to six months rent (but assuming that any development runs the risk that it might not be fully let) is appropriate. On the basis of the broad range of figures noted earlier it seems to me that a sum of €600,000 should be allowed under this heading. (Six months rent at the mid point of the range referred to earlier comes to €1.375m. Three months rent on the same basis comes to €687,500. Discounting both by 20% gives figures of €1.1m and €550,000 respectively. I have again erred towards the lower end of the range to reflect possible savings in building costs).

7.9 In summary, therefore, it seems to me that I should award the total sum of €1.1m for damages for delay. However lest I be wrong in the overall view which I have taken as to the proper approach to the calculation of delay damages in this case, I propose setting out findings which would be relevant to calculating the amount of damages which are actually attributable to delay. In that regard it is important to recall that, in order for losses to be properly allowed as damages, those losses must meet two criteria. First the losses must actually have occurred. Second, it must be foreseeable that loss of that type (although not necessarily of that amount) could have arisen. It is, of course, possible to have either one without the other. It might have been foreseeable that losses under a particular heading might flow but, whether due to good luck or appropriate mitigation, the relevant losses may not in fact flow at all. In those circumstances no damages under that heading are allowed. Likewise losses may in fact have occurred but it may not have been foreseeable that losses of that type could have occurred. In those circumstances, also, no damages under the relevant heading will be allowed. Even where, therefore, it is more appropriate to adopt a general approach to the calculation of damages (for the reasons which I have already analysed) it is important to be satisfied that the amount so awarded is realistic, having regard to an appropriate assessment of the losses actually incurred in the case in question. As will become clear, nothing in the assessment which I am about to conduct would legitimately lead to a different view as to the appropriate damages to award under the delay heading. I therefore turn to that assessment.

8. **The Actual Losses**

8.1 Under this heading it is necessary to consider the precise claim put forward on behalf of Greenband in respect of delay damages. As already pointed out, I have come to the view that the approach which underlay that claim was incorrect on two bases. First, it did not seem to me that the assessment of the actual consequences which flowed from the delay in Greenband acquiring title to the relevant lands was capable of the sort of detailed analysis which formed the basis of Greenband's claim. Second, I was not satisfied, for the reasons already analysed, that many aspects of the claim as thus formulated were foreseeable. However, lest I be wrong, I propose analysing the claim as made on the assumption that damages of the type asserted were foreseeable and on the basis of making the best estimate possible of the damages which arise under each heading notwithstanding the difficulties of analysis to which I have already referred.

8.2 It will be recalled that the underlying basis of Greenband's claim under this heading was an assertion that the shopping centre would have opened one year earlier had it not been for the Vendors' breach of contract. As has also been pointed out that issue was hotly contested. Any assessment of delay damages requires a view to be taken on that question even though, for the reasons already analysed, it seemed to me that it was highly speculative to form any view on the topic.

8.3 The second aspect of the claim requires an evaluation of the consequences of such a one year delay under a range of headings. The proper approach to the assessment of damages under many of those headings was contested. It will be necessary to address them in turn. However, as pointed out the starting point has to be to reach a view as to the likelihood of the shopping centre having, in fact, opened one year earlier in the absence of a breach of contract on the part of the Vendors.

When would the Shopping Centre have Opened?

8.4 I have already analysed in some detail the principal factors which would have impacted on the chances of the shopping centre

opening a year earlier. The first important question is as to whether it would have been possible to secure an anchor tenant at any time earlier than the time when Marks & Spencer were actually secured. The second major issue involves a consideration of how the planning process might have been affected by an anchor tenant coming on stream somewhat earlier. The precise time within which an anchor tenant might have been acquired is not, of course, a matter which can be approached with any degree of specificity. As pointed out earlier, there are only a small number of potential anchor tenants available and their precise requirements of and interest in a shopping centre to be built in Clonmel at the material time is inevitably a question on which it is only possible to speculate.

8.5 As has also been noted there were, in reality, three possibilities as to what might have happened had title been available on time. The first is that the shopping centre would, in fact, have opened a year earlier. The second is that the shopping centre might have been able to open in the only other relevant window of opportunity available (being the Spring period of 2009) which would have led to an opening approximately six months earlier than in fact happened. Third, it might have been that there would have been no material change in the opening time. In assessing the relative likelihood of each of those three possibilities, I have taken into account the fact that the timeline put forward on behalf of Greenband was not particularly strict in the sense that there could have been some slippage from that timeline without affecting the overall goal of opening the shopping centre one year earlier. On the other hand I have also taken into account the fact that there was very little real evidence of anchor tenants anxious to take up space in the shopping centre at the time in question. The absence of such evidence may, of course, simply be capable of being put down to the fact that, for the reasons advanced by Mr. O'Brien (that he did not want to secure an anchor tenant when he did not have title) no real effort to secure a tenant was expended.

8.6 In order to conduct the exercise with which I am currently engaged it is, of course, necessary to attempt to put a figure on each of the three possibilities. Doing the best I can and with the very strong caveat that, for the reasons already analysed, I am concerned that this is an overly speculative exercise, if required I would assess the chances of the shopping centre having come on stream one year earlier at 35%, six months earlier at 20% and at much the same time at 45%. As will be clear from the views which I have expressed, the exercise leading to those estimations is far from an exact science.

8.7 It is next necessary to turn to the detailed heads of loss put forward by Greenband in respect of a one year delay in opening the shopping centre. I turn to that question.

The Heads of Loss Claimed

8.8 Greenband made its claim under seven headings as follows:-

	ITEM	TOTAL €
1.	Loss of 12 months' rental income	€1,543,867
2.	Inducement to Marks & Spencer – rent not payable	€368,352
3.	Reductions in rent to other tenants in year one	€521,587
4.	Additional landlord contributions and other costs, including fit-out and subdivision costs in year 1.	Approx €2,583,523
5.	Additional free rent periods	Approx €1,142,469
6.	Credit for reduction in construction costs	(€526,000)
	TOTAL	**€5,633,798**

8.9 It is necessary to say a little about how each of the relevant heads of loss are asserted.

8.10 Under the first heading, Greenband took the figure for the rent on the entire shopping centre for a one year period but gave credit for a saving which it was accepted would have occurred in relation to the funding of interest on monies spent on construction. It will be necessary to look at both sides of that equation before coming to a conclusion as to the proper sum to be allowed under that heading.

8.11 Under the second heading it is important to note that the original agreement entered into by Greenband with Marks & Spencer (in July, 2008) provided that no rent would be payable by Marks & Spencer until a tenant was secured for what was then contemplated as being a second anchor unit in the shopping centre. Ultimately, no such second anchor tenant was secured and the space originally intended as the second anchor unit was subdivided into three separate units. The sum claimed under this heading is the rent forfeited until such time as Marks & Spencer became liable to pay rent on foot of a revised agreement deriving from the circumstances which I have just addressed.

8.12 The third heading relates to sums said to have been lost by reason of the reduction in rent payable by tenants other than Marks & Spencer. It seems to me to be more appropriate to consider this heading in conjunction with heading one. In truth, both questions relate to the loss of rental income to date; that is the loss of rent that might be said to flow from the possibility that the shopping centre might have opened either twelve or six months earlier. That general question encompasses the fact that no rent at all was earned for the respective relevant periods together with questions as to what the rent actually would have been had the centre opened twelve or six months earlier.

8.13 The fourth and fifth headings relate to what are said to have been the consequences flowing from the different market place in which it became necessary to attempt to secure tenants of the premises by virtue of a one year delay in opening the shopping centre. It was common case between the expert valuers called on both sides that part of the negotiation with takes place between potential tenants of a shopping centre and the landlord will involve the possibility of some form of assistance or inducement to the relevant tenant. Typically such inducements may involve a rent free period being allowed, a contribution being made by the landlord to fit out, or other financial contributions being made. On Greenband's case the market conditions in which it was ultimately necessary to let the premises had worsened very considerably in the one year which had elapsed from the time when it is said that the shopping centre would have been able to open in the absence of a breach of contract on the part of the Vendors. In addition, it is said that a consequence of the same market change was that the typical size of units which tenants would wish to secure were smaller and

that, as a consequence, additional reconfiguration of many units was necessitated to make them of a size suitable for the then prevailing market conditions.

8.14 Finally, in the course of cross examination, it was accepted by Mr. O'Brien that he would have obtained the benefit of a reduction in the construction cost referable to the same delay, for market conditions in the construction sector had also deteriorated. Mr. Higgins (a quantity surveyor called on behalf of Greenband) estimated the amount that would have been saved on that basis at €526,000.00 on the assumption of the timeline proposed by Greenband in relation to when the relevant construction contract would have gone out to tender. I did not understand the Vendors to disagree with that figure. In that context, it is necessary to look at each of the relevant headings. I, therefore, turn to the question of the claim in respect of loss of rental income.

Loss of Rental Income

8.15 The underlying assumption under this heading is that the shopping centre has, by virtue of a one year delay, lost an equivalent of one year's rent in respect of each unit. I find it difficult to accept that that is an appropriate assumption. When the shopping centre actually opened it had an occupancy level of 65 %. There was limited evidence from which I could conclude that the shopping centre would have achieved a significantly higher level of occupancy had it opened one year earlier. It is, of course, possible that more lettings (or lettings taking greater space) might have occurred in the better conditions which prevailed a year earlier. That is a point to which I will return. However, it also needs to be noted that further lettings have taken place since the shopping centre actually opened. It is very hard to see how it could be suggested that any such additional lettings would have been significantly delayed by virtue of the later opening of the shopping centre. It is, of course, possible that some tenants may want to wait and see how a shopping centre does before committing themselves. However, there are still a number of units which are un-let. The shopping centre has been up and running for some time. If someone decides to take up a unit today, it is very difficult to see how the letting of that unit could have been affected by the fact that the shopping centre opened one year later than it might otherwise have done. Subject to the question of whether a somewhat greater degree of letting might have taken place had Greenband started a year earlier, I am not satisfied that it is appropriate to approach the loss of a year's rent on any basis other than in respect of those units which were actually let.

8.16 It is accepted on behalf of Greenband that as against the sum to be allowed for loss of rent must be credited a saving in interest for, in order to earn that rent, the shopping centre would have to have been built a year earlier and interest would have had to have been paid on the cost of acquisition and construction for that year. In addition, it seems to me that there is a further interest cost that would need to have been borne. The scenario on which Greenband's damages claim for delay is predicated is one in which the Vendors completed on time and the shopping centre opened one year earlier than did in fact occur. If that had, in fact, happened then Greenband would, of course, have had to have paid the full cost of acquiring the site three years earlier than happened when Greenband actually completed the acquisition from the Show Society. However, on the basis of the case made by Greenband, the centre would only have opened one year earlier. Greenband would have been required to pay interest on the acquisition cost for two extra years because of that. Put another way, if the Vendors had complied with their contractual obligations and the shopping centre had, as Greenband asserts, opened one year earlier, then Greenband would have had to have paid interest on the purchase price for two years longer than it, in fact, had to.

8.17 It is very difficult to estimate precisely what would have happened in relation to rent had the shopping centre been marketed a year earlier. It is possible that some additional units might have been let. It is possible that slightly better terms as to rent might have been secured. On the other hand, if tenants ended up agreeing to pay what turned out to be unsustainable rents, then that would have brought its own difficulties. The Court is more than familiar with many cases in recent times when landlords have had to make concessions to tenants in relation to rent for, in the absence of such concessions, it was legitimately feared that the tenant concerned would go out of business. In many cases landlords have taken the view that a reduced rent is preferable to no rent at all. Likewise, tenants who signed up in the more robust market which existed a year earlier might not all have survived.

8.18 In all the circumstances it seems to me that had the shopping centre opened one year earlier, Greenband would have received approximately €2.65m in additional rent to date. That figure takes into account the fact that it is highly likely that all tenants who ultimately took space would have done so a year earlier and would, therefore, have paid rent for an extra year. In addition, I have taken into account the possibility that there might have been higher rents obtained from some tenants, at least some of which additional rents could have been sustained, and that there might have been some additional lettings. In order to put that figure into context it is necessary to note that the total rent roll, at full rent, payable in respect of those units which had been let by the time the shopping centre opened was €1,859,011.00. However, part of the difficulty in estimating what would have happened had the shopping centre opened a year earlier can be seen from the following figures. The total rent that was estimated, as of March, 2007, for the development as a whole (as then planned) was €3,079,867.00. As a result of the revision of the shopping centre layout plan, necessitated by Marks & Spencer coming on board with a reduced anchor unit (and consequently a larger number of smaller units being in place), the estimated rent went up to €3,833,946.00. The rent estimated as being available on the basis of a full letting of the entire shopping centre in its current configuration fell, as of November 2009, to €2,976,469.00 and, as of January, 2011, to €2,558,280.00. There is a very real difficulty in determining which of those figures is truly the appropriate base on which to estimate the rent that would have been paid had the shopping centre opened a year earlier. Would the anchor tenant have been Marks & Spencer? If so, then the shopping centre would undoubtedly have had to have been reconfigured but the question might well be asked as to whether it would have been possible to secure Marks & Spencer a year earlier. If the anchor tenant was another major multiple, then would its requirements have been the same as Marks & Spencer and, if not, what form of configuration would have resulted from such an anchor tenant coming on stream. Given the significant difference in the overall rental roll anticipated which resulted from the reconfiguration caused by Marks & Spencer's requirements, it is clear that a range of different possible outcomes might have been anticipated depending on the precise requirements of whatever anchor tenant might have come on stream.

8.19 Against the sum of €2.65m it seems to me to be necessary to credit approximately €2,000,000.00 for additional interest reflecting both the two further years, for which the cost of acquisition would need to have been funded, and an approximation of the interest cost that Greenband would have had to have borne in paying interest on the borrowings needed to pay for the costs of construction. That figure needs to be seen in the context of the fact that the interest on construction costs at the time in question was estimated as running at something of the order of €135,000.00 per month (as per a letter of the 19th February, 2008, from Greenband's solicitors to the Vendors' solicitors) or €1.62m for a year. Furthermore, having to carry the cost of acquisition (€3.9m) for an additional two years would itself have been likely to have incurred interest costs of close to €400,000.00.

8.20 In those circumstances it seems to me that the appropriate amount to assess for the loss of rental on the basis of the premises not opening one year earlier is €650,000.00. On the basis of a six month earlier opening it seems likely that the relevant figure would be approximately half that or €312,500.00. It is next necessary to turn to the Marks & Spencer loss.

The Marks & Spencer Loss

8.21 There is no doubt but that Greenband is at a loss for the sum claimed in the sense that it is out that sum compared to the amount which it might have expected to obtain from Marks & Spencer. The question, however, is as to what would have happened had the shopping centre opened a year earlier? Would a second anchor have come on stream, thus triggering Marks & Spencer's obligation to pay rent immediately or at a much earlier stage? Alternatively would it, in any event, have been necessary to redesign the shopping centre and renegotiate terms with Marks & Spencer so that there would have been a significant delay in the relevant space being let anyway resulting in all or part of the Marks & Spencer rent not becoming due? It seems to me that the only way in which one could assess damages under this heading is to provide a sum to reflect the possibility (and I would put it no higher than that) that it might have been possible to procure an obligation on the part of Marks & Spencer to commence paying rent some time earlier had the shopping centre opened a year earlier. It would seem to me to be appropriate to allow a sum of €100,000.00 under this heading. A six month delay would, on the same basis, have resulted in a loss of €50,000.00 under this heading.

8.22 As already pointed out, the claim under heading three has already been incorporated in the claim under heading one. It is, therefore, next necessary to turn to the landlord inducements including fit out costs.

Landlord Inducements

8.23 Very detailed evidence was given on behalf of Greenband as to the precise level of inducements that were actually incurred in the form of rent free periods, contributions to fit out and the like. The real question is as to the extent to which similar inducements might have been required had the shopping centre been opened a year earlier. Mr. O'Meara, who gave evidence on behalf of Greenband, indicated that, in his view, the total cost of concessions in relation to rent free periods and fit out was typically of the order of an equivalent of three to six months rent in total until things began to change radically between 2008 and 2009. Mr. Goode, who gave evidence on behalf of the Vendors, suggested that the precise terms likely to be achieved were very much a question of case by case negotiation and that it was difficult to adopt any hard and fast rule. For example, Mr. Goode noted that any shopping centre requires a mix of tenants for its success so that, from a landlord's perspective, desirable tenants who may bring an appropriate brand name and fill an important part of the mix required, may be able to negotiate more advantageous terms than other tenants whose presence, while desirable, may not be considered as being quite so strategic.

8.24 On the other hand it does have to be noted that the total sums which actually had to be conceded by Greenband under both of these headings were very significant indeed. On any view, the amount of payments made or rent forgone comes to a significant number of millions of euro. For similar reasons to those which I have already addressed in respect of the loss of rental income claim in relation to units which were not, in fact, let when the shopping centre opened, it does not seem to me that the claim under this heading can extend beyond those units which were actually let in or around the time when the Showgrounds opened its doors. I also accept Mr. Goode's evidence that the precise terms as to inducements which it might have been necessary to make available in order to secure tenants a year earlier is somewhat harder to estimate than was conceded by Mr. O'Meara. It is, nonetheless, difficult to escape the conclusion that Greenband was faced with much more difficult trading conditions in attempting to secure tenants by reason of the hypothetical one year delay in opening its doors. On all of the evidence it seems to me that those trading conditions led to a significant increase in the amount of inducements which had to be provided, which I estimate at €2.75m.

8.25 In order to put that figure in context it should be noted that a detailed calculation was carried out by Mr. O'Meara which specified the total amount of inducements actually given for the shopping centre as a whole (whether by way of contribution to fit out, the provision of rent free periods, or other adjustments such as rental terms which were based on turnover and the like). The amount was divided as and between inducements and rent free periods with the respective sums being €3,085,628.60 and €1,250,679.60. I have already indicated that, on the hypothesis that the shopping centre had opened a year earlier, it might have been that some additional units would have been able to open. However, I have taken account of the rent that might hypothetically have been paid by such tenants in calculating the loss of rent aspect of the claim. Those units do not, therefore, fall for consideration under this heading as well.

8.26 The question of the additional costs that would have arisen under these headings arising from a scenario where the shopping centre would, in any event, only have opened six months earlier is again hard to estimate. There can be little doubt, on the evidence, that the market was changing radically at the time in question. The very significant inducements which had to be paid to tenants are, on any view, a long way beyond those which would have been required a year earlier. Precisely how much of that change would have occurred in respectively the first and second halves of the year in question is hard to gauge. The competing scenarios are openings in respectively September 2008, Spring 2009 and September/October, 2009. Obviously in each case the period when the marketing of units to the relevant tenants would have occurred would have been somewhat earlier. On the hypothesis of the shopping centre opening in September, 2008 then marketing would have occurred in the early and middle parts of that year which was before the major impact of the credit crunch and the collapse of the Lehman Brothers came into play. On the other hand, a hypothetical case of a shopping centre opening the Spring of 2009 would have led to a significant amount of the finalisation of tenants' contracts occurring in the latter part of 2008 and the earlier part of 2009. It is difficult to avoid the conclusion that a more than proportionate part of the dis-improvement of conditions in the market place would have occurred by that time. In the circumstances it seems to me to be appropriate, under this heading, to hold that the additional inducements that had to be offered over and above those which would have occurred in the event that the shopping centre would have opened six months earlier was of the order of €1m. It is next necessary to turn to subdivision costs.

Subdivision Costs

8.27 I have already set out the basis for the claim under this heading. It is possible that some additional subdivision was required by reason of the changed trading conditions with which Greenband was faced when it actually began to let units as opposed to the conditions prevailing a year earlier. However, I am not satisfied that most of the subdivision costs claimed are causally connected with the delay of one year in the opening of the shopping centre. It seems clear that the precise fine tuning of the types of units that tenants may require will inevitably lead to a reorganisation of many units. It is possible that that process was made the more difficult by the changed trading conditions which might well have led tenants to seek smaller units. However, much of that fine tuning would, in my view, on the evidence, have occurred anyway. The amount said to have been expended on subdivision is €591,250.00. I am satisfied that that amount was, in fact, expended. However, for the reasons which I have sought to analyse, it does not appear to me that the majority of that expenditure is causally connected to any breach of contract on the part of the Vendors. In the circumstances, and on the hypothesis of a one year earlier opening, it would not seem to me to be appropriate to allow a sum above €150,000.00 under this heading. For like reasons to those analysed in respect of inducements, I am satisfied that less than half of that sum should be allowed on the basis of a hypothetical six month earlier opening, for a larger amount of the deterioration in market conditions which might be said to have led to the need for subdivision would have occurred in any event under that hypothesis. So far as the six month hypothesis is concerned, I would only allow a sum of €60,000.00.

Construction Costs

8.28 As already indicated there was agreement between the parties that, on the basis of the one year hypothesis, a saving of €526,000.00 would have to have been allowed to reflect the cheaper construction costs that would have been applicable at that time. On the basis of a six month hypothesis quite different considerations apply. The evidence as to the changes in construction costs was based on tables produced by the Society of Chartered Surveyors. That evidence suggests that construction costs peaked in the second half of 2006 and the first half of 2007, but began to fall thereafter. The allowance in relation to the twelve month hypothesis was calculated on the basis of the figures provided by the Society. It is not possible to be certain as to when a putative contract might have gone to tender in the scenario which would have led to the shopping centre opening the spring of 2009. It seems reasonable to assume that the contract price would have been agreed in the latter part of 2007. While the market for construction contracts had begun to weaken by that time it is likely that there would not have been a very significant reduction in the price that would have to have been paid in that scenario compared with the price that would have to have been paid on the twelve month scenario. In the circumstances it seems to me to be appropriate to make an allowance of €150,000.00 in calculating the losses attributable to the six month scenario.

Conclusions

8.29 On the basis of allowing each of the sums referred to above but deducting the agreed sum in respect of reduced construction costs, it seems to me that the total losses attributable to a one year delay in opening are €3,124,000.00. It also follows that the losses attributable to a six month delay in opening would be €1,272,500.00. It further follows that the appropriate approach to damages should be to award 35% of €3,124,000.00 together with 20% of €1,272,500.00 making a total of €1,347,900.00. As this is far from an exact science, I would round that figure to €1.35m.

8.30 If I am wrong in the approach to damages identified earlier in this judgment and if I had, therefore, gone on to assess damages on the basis of the model put forward on behalf of Greenband I would, therefore, have awarded the sum of €1.35m as damages for delay.

9. **Some Further Comments**

9.1 The findings which I have already made are sufficient to determine the issues of damages which arise in this case. However, it seems to me to be necessary to make a number of additional comments. These stem from the strange arrangement entered into between the Show Society, the Vendors, and Mr. Buckley to which reference has already been made. It will be recalled that the Show Society is a charity and required the consent of the Charity Commissioners to the sale of the Showgrounds to any party. The Charity Commissioners approved of a sale in the sum of €5m to Greenband. It appears that, thereafter, the Show Society paid out a sum of €1.5m to the Vendors and Mr. Buckley on foot of a handwritten document which expresses that sum to be paid in relation to unspecified claims. The basis of the payment was said in evidence to be on foot of an "honour debt".

9.2 There are a number of disturbing features to that payment. The first is that it was made at all. As pointed out the Show Society is a charity and is not entitled to use its money except for purposes associated with its charitable objects. If the Show Society had a genuine liability to third parties (or if there was an argument about that) then the Show Society was, of course, entitled to meet its liabilities or buy off the risk that it might have those liabilities. A genuine payment in settlement of a claim or even in settlement of a disputed claim is entirely unobjectionable. However, it is difficult to see what claim any of the Vendors or Mr. Buckley or, indeed, Clonmel Leisure, could have had against the Show Society. The original contract entered into by the Show Society with the Vendors was clearly subject to Charity Commissioners consent which consent was not forthcoming. There appears to have been some suggestion that Clonmel Leisure had its position impaired relating to the value of its leasehold interest because of certain other actions which it took. It is not necessary to go into those actions for the purposes of this judgment. Suffice it to say that there is nothing in the evidence or materials before me which suggested that the Show Society had done anything that might create a liability from it to Clonmel Leisure.

9.3 That leads to the second surprising feature of the payment of €1.5m. All bar a nominal part of it was paid to the individual shareholders in Clonmel Leisure being the Vendors and Mr. Buckley. It is difficult to see what conceivable basis there could have been for suggesting that the Show Society owed any money to those individuals. Even if there is information not available to me from which it might be inferred that Clonmel Leisure had some sort of claim or arguable claim against the Show Society, then that might justify a payment to Clonmel Leisure but not a payment directly to its shareholders. The only arrangement which the shareholders seem to have had with the Show Society was the contract between the Vendors and the Show Society which was subject to Charity Commissioners consent.

9.4 There is a real question to be answered, therefore, as to whether it was appropriate for a charity such as the Show Society to pay over any money at all. There is also a serious question as to whether any monies that might legitimately have been paid should not properly have been paid to Clonmel Leisure.

9.5 I am, of course, mindful of the fact that not all of the relevant information may have been placed before the court for it may not have been considered to be pertinent to the issues which I have to decide. However, having regard to the potential difficulties which the evidence has disclosed, it seems to me that it is appropriate that I send a copy of this judgment to the Charity Commissioners to consider whether any further inquiries should be made and any further action taken.

10. **Conclusions**

10.1 It seems to me, therefore, that it is appropriate to discharge the existing order of specific performance made by Smyth J. and to award damages in lieu. For the reasons already set out, I am satisfied that it is appropriate to award €1,347,893.00 together with updated interest from the 12th January, 2011, to date under that heading.

10.2 For the reasons also set out, I am satisfied that damages in the sum of €1.1m should be awarded for delay damages. The total will, therefore, be €2,447,893.00 together with whatever sum may be calculated in respect of the updated interest to which I have referred.