Neutral Citation: [2013] IEHC 514

THE HIGH COURT

COMMERCIAL

[2013 No. 6119 P]

[2013 No. 91 COM]

BETWEEN

ESSO IRELAND LIMITED AND IRELAND ROC LIMITED

PLAINTIFFS

AND

NINE ONE ONE RETAIL LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 14th day of November, 2013

1. In these proceedings, the plaintiff seeks injunctive relief against the defendant arising out of the defendant's occupation of a number of garage premises pursuant to the terms of Operating Agreements and Licences (and in the case of one premises, a Concession Agreement) all of which the plaintiffs claim have now expired. The 32 business premises concerned are owned by the first named plaintiff (hereinafter "Esso") and operated under Licence by the second named plaintiff (hereinafter "IROC"), both companies incorporated in the State.

2. The defendant is a company, incorporated in the State and engaged in the business of providing food services.

3. The plaintiffs and the defendant agreed, by way of an undated Concession Agreement in 2001, to enter into an arrangement whereby the defendant would provide hot food facilities at the Esso service station at Sandford Road, Ranelagh, Dublin 6 (hereinafter the "Belmont Premises"). Similar arrangements were entered into relating to 31 further service stations owned and operated by the plaintiffs by way of an Operating Agreement dated 21st June, 2002 (hereinafter the "Operating Agreement"), together with 31 licences issued pursuant thereto.

4. The nature of the facilities provided is defined in the Operating Agreement as that of a "*food counter and equipment for the preparation and sale of hot and cold foods in Esso premises*". The facilities are operated under the brand name 'On the Run', with three different store types, referred to as 'Big Box', 'Medium Box' and 'Small Box' by reference to the size of the licensed areas within the premises. Common to all premises is a counter installed in the main floor of the service station where food is displayed and sold, as well as an area for food preparation, with larger premises also including associated seating. In all of the service stations, save the Belmont Premises, the plaintiffs provided the necessary equipment in the service stations including ovens, the food counter itself, refrigeration units and are responsible for maintenance of same.

5. The Operating Agreement was for a term of ten years, commencing on 21st June, 2002, while the Concession Agreement relating to the Belmont Premises, after an initial three-year term, continued on a rolling basis subject to termination by either party following a one-month notice period. In the absence of further agreement, the Operating Agreement was due to determine on 20th June, 2012. On 4th May, 2012, the parties executed a Supplemental Agreement, extending the term of the Operating Agreement for a further 12 months, which meant that the agreement would end on 20th June, 2013.

6. Under the terms of the Operating Agreement, the defendant pays "Operating Fees" including a Monthly Base Operating Fee and a percentage operating fee based upon the annual gross sales at the particular service station.

7. Between July and October 2012, the parties engaged in negotiations with a view to agreeing a further Operating Agreement. On 25th October, 2012, the plaintiffs issued a letter formally terminating negotiations between the parties. Accordingly, the extended term, pursuant to the Supplemental Agreement, ostensibly expired on 20th June, 2013. On 14th May 2013, the plaintiffs issued notice of termination of the Concession Agreement, also to expire on 20th June, 2013.

8. The defendant claims, for various reasons which will be addressed in depth *infra*, that the Operating Agreement has not been validly terminated, and has continued to operate the 'On the Run' food services as they had during the term of the Operating Agreement, as extended. The defendant also raises two separate counterclaims in damages for breach of contract.

9. These proceedings issued on 17th June, 2013 and were entered into the Commercial List on 18th June, 2013. The plaintiffs claim injunctive relief against the defendant on account of their alleged unlawful occupation of the garage premises which had previously been occupied on foot of the Concession Agreement, Operating Agreements and Licences. A claim for damages which had been pleaded by the plaintiffs was not maintained at trial. While the plaintiffs' application for an interlocutory injunction was refused by Kelly J. on 4th July, 2013 (on the basis, *inter alia*, that the inadequacy of damages as a remedy had not been established), he fixed the matter for an expedited hearing, given the nature of the dispute.

Legal Issues Arising

10. The defendant submits that it is in possession of a tenement and is entitled to claim a new tenancy pursuant to the Landlord & Tenant (Amendment) Act, 1980. The defendant asserts, further, that the plaintiffs have failed to give reasonable notice of the termination of the Operating Agreement and claims that a notice period of twelve months should be implied. The defendant also claims that the plaintiffs have been in breach of contract in failing in their purported obligation, under Clause 4.1 of the Operating Agreement to negotiate in good faith with the defendant with a view to entering a new contract.

11. The plaintiff seeks an order directing that the defendant, its servants or agents vacate the premises, remove its equipment, and a permanent injunction restraining any further encroachment.

12. The facts arising in this case are largely agreed between the parties. The areas of dispute concern the interpretation of the Concession Agreement, the Operation Agreement and Licenses.

13. It seems to me, therefore, that the legal issues falling for consideration in this action are as follows:-

> (a) Did the Licences, issued pursuant to the Operating Agreement, create a relationship of landlord and tenant between the parties? If such a relationship exists, is the defendant entitled to assert the right to a new tenancy pursuant to the Landlord & Tenant (Amendment) Act, 1980?
>
> (b) Should a term be implied into the Operating Agreement and/or the Supplemental Agreement specifying a reasonable notice period?
>
> (c) Is Clause 4.1 of the Operating Agreement enforceable on its terms, insofar as it purports to impose a duty upon the plaintiffs to negotiate in good faith? If so, is the defendant entitled to damages and/or specific performance on foot of same?

The Defendant's Entitlement to a New Tenancy

14. Section 5(1) of the Landlord & Tenant (Amendment) Act, 1980 defines a "tenement" as follows:-

> *"In this Act 'tenement' means -*
>
> *(a) Premises complying with the following conditions:*
>
> *(i) they consist either of land covered wholly or partly by buildings or a defined portion of a building;*
>
> *(ii) if they consist of land covered in part only by buildings, the portion of the land not so covered is subsidiary and ancillary to the buildings;*
>
> *(iii) they are held by the occupier thereof under a lease or other contract of tenancy express or implied or arising by statute;*
>
> *(iv) such contract of tenancy is not a letting which is made and expressed to be made for the temporary convenience of the lessor or lessee and (if made after the passing of the Act of 1931) stating the nature of the temporary convenience; and*
>
> *(v) such contract of tenancy is not a letting made for or dependent on the continuance in any office, employment or appointment of the person taking the letting; or*
>
> *(b) premises to which section 14 or 15 applies."*

15. Section 16(1) of the 1980 Act states:-

> *"Subject to the provisions of this Act, where this Part applies to a tenement, the tenant shall be entitled to a new tenancy in the tenement beginning on the termination of his previous tenancy, and the new tenancy shall be on such terms as may be agreed upon between the tenant and the person or persons granting or joining in the grant of the new tenancy or, in default of agreement, as shall be fixed by the Court."*

16. Section 28 of the 1980 Act provides for the right of a tenant to continue in occupation pending a decision as follows:-

> *"Where an application is pending under this Part for a new tenancy or to fix the terms of a new tenancy and the pre-existing tenancy was terminated otherwise than by ejectment or surrender the tenant may, if he so desires, continue in occupation of the tenement from the termination of the tenancy until the application is determined by the Court, or in the event of an appeal, by the final appellate court, and the tenant shall while so continuing be subject to the terms (including the payment of rent) of such tenancy, but without prejudice to such recoupments and readjustments as may be necessary in the event of a new tenancy being granted to commence from such termination."*

17. Section 85 of the Landlord & Tenant (Amendment) Act, 1980 states:-

> *"So much of any contract, whether made before or after the commencement of this Act, as provides that any provision of this Act shall not apply in relation to a person, or that the application of any such provision shall be varied, modified or restricted in any way in relation to a person shall be void."*

It is clear that what is meant by *"contract"* in that section is a contract of tenancy.

18. The Circuit Court has exclusive jurisdiction under the 1980 Act to deal with claims for new tenancies. In the 1980 Act, "the Court" means the Circuit Court (Section 3). In the case of *Kenny Homes & Co. Limited v. Leonard*, Costello P. (High Court, Unreported, 11th December, 1987) held that the High Court could have jurisdiction where there was particular urgency in a case. The Supreme Court confirmed the reasoning of Costello P. on the preliminary issue. Costello P. had decided "*that because of the particular urgency in this case, the Court should not decline jurisdiction*". I am satisfied that in a case such as this, the court has power to decide the issues in dispute without first remitting the matter to the Circuit Court. The jurisdiction of the Circuit Court only arises in the event that I conclude the relationship between the parties is one of landlord and tenant.

19. Under Clause 1 of the Licences it was agreed as follows:-

"[IROC] agrees to permit the Licensee to use:

(a) The premises described in the Schedule A hererto (hereinafter called the Food Service Facility") together with the use of (i) staff facilities which are to be provided by Esso/[IROC] which shall contain a toilet, hand basin and two clothes lockers in compliance with food hygiene regulations and (ii) access to the Food Service Facility 24 hours a day and if access is not possible Esso/[IROC] must provide a secure receptacle constructed to the required specifications of the Operator in order to store the delivery.

(b) The equipment and furniture thereon set out in an inventory in Schedule B attached hereto agreed between [IROC] and the Licensee (which equipment and furniture and all additions or substitutions is hereinafter called "the equipment") is identified by the signature on the said inventory on behalf of the Licensee and of a representative of [IROC] both on its own behalf and on behalf of Esso."

20. Under Clause 2(a) of the Licences it was agreed as follows:-

"This Licence shall commence on the [ ] day of [ ] and continue (subject as hereinafter provided) for a period of time to coincide with the term of the Operating Agreement."

21. Under Clause 4 of each Licence it was agreed as follows:-

"(a) This Licence is personal to the Licensee and is not assignable.

(b) Nothing in this Licence is intended to have the effect of giving exclusive possession of the Food Service Facility to the licensee or of creating any tenancy between Ireland ROC Limited and the Licensee. Accordingly Ireland ROC Limited continue to have a right of possession. Although Ireland Roc Limited's entitlement to possession is a general entitlement it would be its intention to exercise this right, save in exceptional circumstances, for the following stated purposes only:-

(i) the inspection of the Food Service Facility and state of repair thereof;

(ii) the erection and display of signs notices and advertisements and the removal and replacement thereof;

(iii) the carrying out of repairs, maintenance, decoration or other works to the Food Service Facility.

(c) This agreement is not intended to create the relationship of Landlord and Tenant and the Licensee acknowledges that the premises remain vested in the possession of Ireland ROC Limited."

22. Finally, as noted above, under Clause 7 it was agreed:-

"The Licence is subject to the terms of the Operating Agreement and without prejudice to the foregoing may be terminated during its currency for any of the reasons set out in Clause 8 of the Operating Agreement and in any event this Licence will automatically terminate in the event of termination of the Operating Agreement."

23. In determining whether an agreement is a licence or a tenancy, the Court has to look at the true nature of the agreement rather than the label given to it by the parties. Thus, in *Smith v. Irish Rail* (Unreported, High Court, 9th October 2002), Peart J. held an agreement which, on its face, was described as a 10-year licence was, as a matter of law, a tenancy. In the proceedings, the applicant claimed a new tenancy under s. 21 of the Landlord and Tenant (Amendment) Act 1980. The premises consisted of a shop premises at the Tara Street DART Station from which the applicant ran a news agency business. There were a large number of clauses in the agreement which were consistent with a tenancy rather than a licence. Peart J., in concluding that the agreement constituted a tenancy rather than a licence, and in distinguishing cases such as *National Maternity Hospital v. McGouran* [1994] 1 ILRM 521, stated as follows at p.22:-

"It is in essence a matter of law. For a tenancy to exist, there is no doubt that exclusive possession of the premises is a pre-requisite, but, as Mr. Gaffney pointed out in his submissions, the fact that there is exclusive possession does not preclude the agreement from being a licence. But in this case, it is the fact of exclusive possession which removes the case from the ambit of the McGouran case, which found on the facts of that case that a mere licence existed. "

24. The Court accepted that when the applicant took possession of the premises, he fitted them out as a newsagent's shop. He was not required to give a set of keys to CIE. No cleaning services were supplied to the premises by CIE and it was accepted that CIE had never had to come into the premises for the purpose of repair. The Court accepted the evidence of the applicant that he was left alone for ten years by CIE apart from the occasions when he was called upon to desist from leaving rubbish on the station concourse and in relation to the parking of cars. The Court held that in all respects, this was a self-contained business, save that the applicant and his staff were able to avail of toilet facilities within the station complex. In that case, Peart J. also looked at other factors and said at p. 23:-

"Other features of the Agreement such as the payment of 'a Licence Fee' and being for a fixed period of ten years, the use of expressions such as licensor, licensee, license fee and licence, do not of themselves confine the Agreement to being a licence. For example, the fact that the annual payment is referred to as 'a Licence Fee' does not mean that it cannot be regarded as a rent simply because it bears a different label."

25. It is clear, therefore, that the court will have to look at the true nature of the Concession Agreement, the Operating Agreement and the Licences to determine whether or not the defendant held the premises on foot of a contract of tenancy giving rise to rights under the 1980 Act.

What Notice was required to terminate the Operating Agreement?

26. The Operating Agreement was for a term of ten years, commencing on 21st June, 2002, and ending on 20th June, 2012. Clause 4.1 of the Operating Agreement provides as follows:

"The term of this Agreement shall be 10 years from the date hereof. Any Licence granted in pursuance of Clause 3.A.1 shall be for a term ending on the last day of the term of this Agreement. Each party shall notify the other before the

end of the ninth year of this Agreement of its intention to negotiate a new Agreement or not, as the case may be. In the event of the parties entering into negotiations in relation to a new Agreement, both parties shall negotiate in good faith with a view to entering into the Contract."

27. On 4th May, 2012, following negotiations, the parties entered in to a Supplemental Agreement, Clause 2.1 of which provides:

> *"For the purpose of Clause 4.1 of the Operating Agreement, the term is hereby extended for a period of 12 months from 21st June 2012."*

Clause 3.2 of the Supplemental Agreement stated:

> *"Save, as varied by the terms of this Agreement, the terms and conditions of the Operating Agreement shall continue to apply."*

33. In paragraph 6 of the defence in counterclaim, the defendant contends that there should be a term "*. . . implied in the contract that in the event of the parties not reaching agreement following negotiation, a reasonable notice of time certain ought to be given prior to the start of the ultimate year of the term or if negotiations proceed into the ultimate year that a full year's notice certain be given to allow a proper wind-down of operations and disengagement with existing suppliers and staff, and indeed the continued personal obligations of the Principal*." The defendant argues that such a clause should be implied to give business efficacy to the contract between the parties.

28. The law is quite clear on this topic. For a term to be implied, it must not just be reasonable but also necessary to give business efficacy to the contract, and be capable of formulation with reasonable precision.

29. Clause 4 of each Licence Agreement provides:-

> *"This Licence is subject to the terms of the Operating Agreement and without prejudice to the foregoing may be terminated during its currency for any of the reasons set out in Clause 8 of the Operating Agreement and in any event, this Licence will automatically terminate in the event of termination of the Operating Agreement."*

Accordingly, the plaintiff claims that each of the 31 Licence Agreements expired at midnight on 20th June, 2013, being the time of expiration of the Operating Agreement (as extended). With regard to the Concession Agreement for the Belmont Facility, the defendant was permitted to operate for a three-year period commencing on 23rd April, 2001, which was terminable by either party on the giving of not less than one calendar month's written notice expiring on any day. By letter dated 14th May, 2013, the defendant was notified that the plaintiffs were exercising their right to terminate the Concession Agreement as and from midnight on 20th June, 2013. In the circumstances, the plaintiff argues that the Concession Agreement also expired as and from that time.

30. The defendant contends that having regard to the relationship between the parties and the facts of this case that the plaintiff should give twelve months notice of termination of the Operating Agreement and that it has not yet done so. It argues that if there are two possible constructions as to the meaning of the terms of the Agreement on this issue, that the court is entitled to prefer the construction which is most consistent with business commonsense. In this case, I must first decide whether or not the Agreements provided for a period of notice and if that notice period was complied with. If there was no notice period provided, I have to decide whether or not a reasonable period of notice should have been given and, if so, what that period should be.

31. The evidence clearly established that before the initial term of the Operating Agreement and Licence expired on 21st July, 2012, an extension of one year up to 20th June, 2012, was agreed. In my view, the position from that point on was, that unless further agreement could be reached, the Licence Agreement and Operating Agreement would terminate on 20th June, 2013. By letter dated 14th May, 2013, the defendant was notified that the plaintiffs were exercising their right to terminate the Concession Agreement as and from midnight on 20th June, 2013, which brought the termination of that agreement into conformity with the others. On 25th October, 2012, some months prior to such date, the plaintiffs issued a letter formally terminating negotiations between the parties. There can have been no doubt that, from that time on, the plaintiffs did not intend to renew the Operating Agreements, Licences or the Concession Agreement.

32. In those circumstances, it is clear that these agreements would have run their course by 20th June, 2013, and the defendant knew or ought to have known that that was the case. However, the defendant asserts that it was entitled to a further period of notice beyond that date. I do not agree. An extension of one year had been granted and it was clear that in the course of that year, the parties had reached an impasse in their negotiations. The agreements lapsed by effluxion of time. In those circumstances, it was not necessary for the plaintiffs to serve formal notice once they had made it clear to the defendants that they were not going to extend the Agreements further. In any event, they gave notice on 25th October, 2012, concerning the Licence and Operating Agreement which seems to me to be quite sufficient, having regard to the surrounding circumstances, where it was clear that the parties had not reached any agreement for a further extension of the relationship. So far as the Concession Agreement is concerned, the required one month's notice was given on 14th May, 2013. The letter of 25th October, 2012, terminating negotiations between the parties was sufficient notice to the defendant that the other agreements would not be renewed. If the defendant had been allowed to remain on beyond 20th June, 2013, without objection, then, I think, an arguable case could be made for a period of notice to be implied, although, it seems to me, that that period would be well short of the one year contended for by the defendant. But that is not what happened in this case.

Duty to Negotiate in Good Faith

33. I must now consider the defendant's assertion that the various arrangements imposed on the parties a binding duty to negotiate in good faith, and that this duty has been breached. Clause 4.1 of the Operating Agreement provides as follows, *inter alia*:-

> *"In the event of the parties entering into negotiations in relation to a new agreement, both parties shall negotiate in good faith with a view to entering into the Contract."*

33. The defendant, while acknowledging that negotiations did take place for a further extension of the term of the Operating Agreement, claims that the plaintiffs lacked good faith in their engagement with it. This assertion is supported by the claim that the plaintiffs had made overtures towards third parties in relation to the provision of hot food services at their service stations in advance of entering into negotiations with the defendant.

34. The law is well summarised in the case of *Triatic Limited v. The County Council of the County of Cork* [2007] 3 I.R. 57, wherein at p. 79 (para. 67) Laffoy J. considered the speech of Lord Ackner in *Walford v. Miles* [1992] 2 A.C. 128:-

"He distinguished an agreement to negotiate in good faith from an agreement to use best endeavours and continued (at p. 138):-

> *"The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. The uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering improved terms. [Counsel for Walford], of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question — how is a vendor ever to know that he is entitled to withdraw from negotiations? How is the court to police such an 'agreement'? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content."*

35. Referring to *Rooney v. Byrne* [1933] I.R. 609, and *Fluid Power Technology Company v. Sperry (Ireland) Limited* (Unreported, High Court, Costello J., 22nd February, 1985), Laffoy J. stated at p. 82 that:-

> *"In each of those cases, the court was concerned with a situation in which a contract existed. In the first, the contract was for the purchase of a house subject to the purchaser getting a mortgage. It was held that the purchaser was bound to make reasonable efforts to secure the necessary advance. The second concerned the exercise of a power to terminate a distributorship agreement in the context of an application for an interlocutory injunction. Costello J. held that the plaintiff, which was seeking the interlocutory injunction, had made out a fair case that there was an implied obligation to exercise the termination power in a bona fide manner, which he explained as meaning:*
>
> > *'… that when they give reasons for termination these reasons must not be spurious ones, but it also means that if they honestly believe them to be valid, then even if they are subsequently proved to have been wrong the notice is valid. So, if honestly dissatisfied with the plaintiffs as distributors, this would mean that the notice of termination could be given.'"*

36. Laffoy J., at p. 82, also addressed the case of *Petromec Inc. & Ors. v. Petroleo Brasileiro SA Petrobras & Ors.* [2005] EWCA Civ 891 in the following terms:-

> *"As was pointed out by Mance L.J. in his judgment in that case, at para. 120, the Court of Appeal was bound by the decision of the House of Lords for what it decided. He pointed out that the main distinction between Walford v. Miles and the Petromec case was that in the former there was no concluded agreement, since everything was 'subject to contract', and there was, moreover, no express agreement to negotiate in good faith. The comments of Mance L.J. in Petromec, which were clearly obiter, concerned the enforcement of an express provision in the contract under consideration, whereby the other contracting party agreed to negotiate certain extra costs with Petromec 'in good faith'. Having quoted the last three sentences in the first quotation from Walford v. Miles set out above, Mance L.J. stated as follows (at para. 121):*
>
> > *'That shows the difference from the present case. Clause 12.3 of the Supervision Agreement is not a bare agreement to negotiate. It is not irrelevant that it is an express obligation which is part of a complex agreement drafted by City of London solicitors … It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has 'no legal content' to use Lord Ackner's phrase would be for the law deliberately to defeat the reasonable expectations of honest men . . .'"*

The latter phrase was an adopted reference to the title of a lecture delivered by Lord Steyn on 24th October, 1966 (113 LQR 433 (1977)) in which, at p. 439, Lord Steyn expressed the hope that the House of Lords might reconsider *Walford v. Miles* with the benefit of fuller argument.

37. Laffoy J concluded:-

> *"For my part, I find the reasoning of Lord Ackner persuasive, particularly when applied to the facts of this case, in which the dealings and negotiations between the plaintiff and the defendant, the ultimate objective of which was to achieve agreement on terms for the development, subject to planning permission, and the acquisition by the plaintiff of Fort Camden, which the defendant could recommend to the elected members of the defendant, involved a considerably greater element of complexity, and, consequently, more scope for uncertainty than negotiations for the purchase of the shares of a company and a leasehold property or the purchase of a house."*

38. I similarly find Lord Ackner's reasoning to be persuasive, given the facts before the court. Again, in this case, there is no subsisting concluded agreement. The parties agreed to furnish notice of an intent to negotiate, or otherwise, and if appropriate to hold negotiations "*in good faith*" with a view to agreeing a new arrangement between them. This is a matter entirely separate from the termination of the Operating Agreement by operation of its terms. I conclude that Clause 4.1 is insufficiently precise for this court to hold it to be enforceable, insofar as it stipulates that "*both parties shall negotiate in good faith*." The court cannot interpose its opinion of what constitutes "*good faith*" in the context of "*the adversarial position of the parties*", both legitimately pursuing their business interests.

39. A distinction must be drawn, as Lord Ackner did, between cases where the parties reached an agreement to employ best endeavours, such as *Rooney v. Byrne*, where the parameters of the contractual duties may be readily discernible to the court, and a duty to negotiate in good faith, which will almost inevitably lack precision and certainty. It should be added, also, that even where the clause falls into the former category, the court must embark upon a "*fact specific*" examination of its content in adjudicating upon

its enforceability.

40. It is not necessary for the determination of the case before me to express a view as to whether an express agreement to negotiate "*in good faith*" is always "*devoid of legal content*" in Lord Ackner's phrase. I would observe, however, that Mance LJ, in holding that *Walford v. Miles* need not be construed as entailing a "*blanket unenforceability*" of any such clause, concluded at para 117 that any loss arising from breach of the express duty to negotiate in good faith in that case would be "*ascertainable with comparative ease*". That is not the case here.

41. But whether I am right or wrong in my conclusions on the law on this issue, the evidence in this case discloses a serious and purposeful engagement between the parties over an extended period of time, notwithstanding their failure to reach an agreement. In my view, it cannot be said that there was any neglect or want of *bona fides* on the part of the plaintiffs. It was simply a case that the parties could not reach consensus and thus negotiations terminated. Such engagement as did take place between the plaintiffs and third parties could not constitute a breach of the purported duty to negotiate in good faith, even if it were the case that such duty was deemed to be enforceable and interpreted in the most generous conceivable terms.

Does the Defendant have a Right to a New Tenancy?
42. I have already discussed the legal aspects surrounding the defendant's entitlement to a new tenancy at paras. 14 to 25 above. I now look at the facts in this case to see whether, in fact, a tenancy existed as the defendant claims. In the absence of an existing tenancy, no right to claim a new tenancy would arise.

43. The Operating Agreement provided that it would be for a fixed term and that at the expiration of the term, the defendant would vacate the premises. Neither the Operating Agreement nor the Licence provided for exclusive possession by the defendant of the premises or any part thereof. Furthermore, the defendant did not, in fact, have exclusive possession of the licensed area or any part thereof. The defendant was permitted to use the garage premises to provide a food service for a period of time coinciding with the Operating Agreement, in consideration of which the defendant agreed to pay the second named plaintiff a monthly base operating fee and a percentage operating fee as provided for in the Licence.

44. The Licence Agreement clearly stated that no relationship of landlord and tenant existed or was intended to be created between the parties. While that does not, of itself, establish that there was no landlord and tenant relationship, the evidence in this case does not establish that the attributes of a tenancy agreement existed. The court should be slow to look behind the clear terms negotiated by the parties at arm's length and in circumstances where each was legally represented. The terms of the Operating Agreement and Licence could not have been clearer.

45. The defendant argues that because it had a food preparation area in each garage which was accessible by a door containing an access code. It thereby had exclusive possession of that part of the premises. However, the evidence established that the reason for the security in that part of the premises was for the purpose of food hygiene and to protect the personal belongings of staff working on the premises. The defendant had access to all areas of the garage including the licensed areas, and in order to enter the licensed areas, the defendant was required to enter through the main store entrance in each garage. Outside the main customer opening hours, the defendant required the plaintiffs' permission to access the food service facilities. If night-time deliveries were being made to the garages, the defendant would have to make arrangements with the plaintiffs to ensure access for delivery. The area of each garage licensed to the defendant was part of an open-plan shop floor, being part of the premises being operated as a filling station and garage. The facts of this case are quite different to those in *Irish Shell and BP Ltd. v. John Costello Ltd.* [1981] ILRM 66.

46. There are no facts surrounding the defendant's occupation of the premises which would entitle the court to say this is a tenancy agreement, in circumstances where they have both agreed that no landlord and tenant relationship shall arise. The facts in this case completely accord with the nature of the relationship as stated by the parties in their written agreement. In the circumstances, I hold that there was no tenancy agreement and it follows that the defendant is not entitled to claim a new tenancy under the Landlord and Tenant (Amendment) Act 1980.

Is the Defendant Entitled to Recover for Historic Losses?
47. The defendant counterclaims against the plaintiffs for losses in respect of the period from November 2004 to October 2009 in the sum of €857,644.56, which it submits should be recoverable under the terms of Clause 2.9 of the Operating Agreement. The defendant further asserts that it is entitled to compensation on the basis that the plaintiffs have failed to discharge advertising costs which should have been set aside for that purpose from the annual fee paid to the plaintiffs under the Operating Agreement. The defendant claims that the annual fee paid to the plaintiffs, being 14.5% of gross sales, should, in fact, be taken as comprising 10% for rent, 3% for depreciation for shop fit-outs and 1.5% for advertising. The defendant claims that the plaintiffs have spent, at most, €150,000 in the 11-year duration of the Operating Agreement and claims damages in the sum of €602,063. These claims are described as the "historic losses".

48. The entitlement to compensation for monies paid by the defendant to the plaintiffs and which should have been ring-fenced for advertising is not apparent from the terms of the Operating Agreement. There was no requirement in the agreement that the monies paid by way of annual fee be applied to any particular purpose. Clause 5.1 of the Operating Agreement sets out the operating fees to be payable, comprising a "Monthly Base Operating Fee" to be fixed by way of the Licence Agreement relating to the particular premises, together with a "Percentage Operating Fee" amounting to 14.5% of annual gross sales above a specified level. There is no indication of any agreement to apply these fees towards any particular purpose.

49. Further, Clause 16.2 of the Operating Agreement sets out the following:

> *"No representations or statements other than those expressly set forth in this agreement have been relied on by the parties in entering into this agreement. No modification or amendment of the terms of this agreement shall be effective unless reduced to writing and signed by authorised representatives of each party."*

50. The Supplemental Agreement contains an entire agreement clause in the following terms:-

> *"This agreement, including the Schedules appended to it, contains the entire agreement and understanding between the parties with respect to the subject matter."*

51. In my view, the defendant has failed to show any reason why these clauses should not be taken as conclusive evidence of the terms of the agreement between the parties. Even in the absence of the exclusionary clauses in the Operating Agreement and Supplemental Agreement, the ordinary operation of the Parol Evidence Rule confines the court to an examination of the terms of the contract as formalised in the written agreement. There is no basis in these agreements for concluding that the parties agreed any

apportionment of the annual fee towards particular purposes. Accordingly, the defendant's claim on this point fails.

52. Turning to the question of recovery pursuant to Clause 2.9 of the Operating Agreement referred to by the parties as the "loss-making store clause", this term provides for the establishment of a Management Committee, consisting of two representatives of the plaintiffs and two representatives of the defendant, with the following stipulations with regard to the eventuality of certain premises being loss-making:

> *"In the event that the Management Committee decides to continue to continue in an Esso Premises where the operation of the Food Service Facility is loss making [IROC] will pay a contribution to [Nine One One] towards the on site costs such to render the on site operation break-even. In the event of a dispute as to whether the operation of a Food Service Facility is loss making or not, the matter shall be referred to and settled by the Management Committee."*

53. Clause 2.9 goes on to set out, *inter alia*, the method of calculation of profit or loss, and those costs that may legitimately be included, granting the casting vote on the Management Committee to the plaintiffs' representative and setting out an appeals mechanism in respect of its decisions to the Chairperson of the first named plaintiff. It is common case that the defendant received contributions towards loss-making premises in the period between 2010 and 2013, pursuant to the operation of Clause 2.9. The plaintiffs assert that the Management Committee at this time provided "further assistance", including allowances under costs headings not included in Clause 2.9 as a gesture of goodwill and without any admission of liability, in the context of the ongoing relationship between the parties.

54. The defendant asserts that, in 2010, it raised the question of its purported entitlement to compensation for "historic losses" pursuant to Clause 2.9, and claims to have been asked by representatives of the plaintiffs at this time to waive this claim in return for a 3% reduction to the Operating Fees, which offer was declined. It is admitted by the defendant, however, that no formal claim was lodged in this regard until 11th May, 2012. The first named plaintiff, by way of letter dated 12th October, 2012, stated its position with regard to the losses claimed by the defendant for the period between November 2004 to October 2009, as being that Clause 2.9 does not provide for the settlement of "historic claims", its purpose being "*to manage loss-making sites in real time*".

55. Nevertheless, following this request, the plaintiffs made an initial offer of €200,000 to the defendant in settlement of these claims, which offer was subsequently increased to €250,000, stated to be "*on a without prejudice basis and as a gesture of goodwill and to facilitate our ongoing operational relationship*". Although this sum was not accepted on the terms on which it was offered, the parties agreed that evidence of the offer could be canvassed in the course of the trial.

56. The question of the defendant's entitlement to recover monies pursuant to Clause 2.9 is a matter of contractual interpretation. The question is whether the term is capable of operating retrospectively or is intended only to apply contemporaneously on the assessment by the Management Committee in the broader context of reaching a decision to continue the operation of hot food services in a premises where it is loss-making.

57. The rules of contractual interpretation are well-established, having been recited by the Supreme Court in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274, where the court adopted Lord Hoffman's formulation in *I.C.S. v. West Bromwich B.S.* [1998] 1 WLR 896.

58. Applying these principles to the matter before the court, it is clear that Clause 2.9 must be interpreted as envisaging a contemporaneous appraisal of the operating situation on an ongoing basis, and the payment of monies to the defendant pursuant that appraisal. The business context in which the Management Committee may authorise a contribution is where it has *"decide(d) to continue to operate in an Esso Premises where the operation of the Food Service Facility is loss-making".* This choice of words leads to the unavoidable conclusion that Clause 2.9 was designed as a forward-facing provision rather than one to be applied retrospectively.

59. Indeed, it appears that this clause was operated in this fashion in the period from 2010 to 2013, with the Management Board reviews being held with increasing frequency over this time. It seems to me that the defendant, in furnishing a significant number of claims to the plaintiffs in May 2012, anything up to eight years after the fact, has circumvented the core role of the Management Committee in assessing whether the premises is, in fact, loss-making, and taking appropriate steps to ameliorate further losses. In the absence of such a determination, there is no basis upon which a contribution could be made. Furthermore, the defendant did not appeal the Management Committee's refusal to pay out, pursuant to the provisions of Clause 2.9 of the Operating Agreement, nor did it seek to invoke the arbitration clause contained therein.

Conclusion

60. In summary, having carefully considered the terms of the various arrangements entered into by the parties, I conclude, for the foregoing reasons, that the defendant is not entitled to assert a tenancy, nor is it appropriate in the circumstances for the court to hold that it is entitled to an additional or extended notice period in relation to the plaintiffs' termination of the Operating Agreement.

61. The duty to negotiate in good faith contained at Clause 4.1 is not enforceable in the manner contended for by the defendant. Furthermore, the defendant has not demonstrated any want of good faith on the part of the plaintiffs. Accordingly, there has been no breach of Clause 4.1 and no relief will be granted, either in damages or by way of specific performance.

62. The defendant is not entitled to damages for breach of contract on the basis of the purported failure of the plaintiffs to apply monies comprising part of the fees paid by it pursuant to the arrangement between the parties towards advertising. Nor is the defendant entitled to damages for breach of Clause 2.9 of the Operating Agreement.

I will therefore give the plaintiffs the injunctive relief which they seek and I will dismiss the counterclaim.