Neutral Citation Number: [2007] IEHC 271

THE HIGH COURT

2007 385 SP

BETWEEN

BNY TRUST COMPANY (IRELAND) LIMITED AND ARK LIFE ASSURANCE COMPANY LIMITED

PLAINTIFFS

AND

TREASURY HOLDINGS

DEFENDANT

Judgment of Mr. Justice Clarke delivered on 5th July, 2007.

1. Introduction

1.1 The Northside Shopping Centre ("the Shopping Centre") is located at Kilmore, Coolock in Dublin. The freehold in the shopping centre is held by Percy Nominees Limited ("Percy") as trustees for a number of co-owners. As of 12th November, 1998 those co-owners were firstly Allied Irish Banks plc ("AIB") who held, in turn, as trustee for the Allied Irish Property Fund, secondly Ark Life Assurance Company Limited ("Ark") and thirdly a Peter Conlan ("Mr. Conlan"). There had, since the Shopping Centre was built, been a number of changes in the beneficial ownership of the freehold. However, each of the parties who, up to 1998, had held an interest in the beneficial freehold had been a party for whom AIB Investment Managers Limited ("AIBIM") had acted as property managers. However when Mr. Conlan came to own a beneficial interest in the Shopping Centre, that situation changed in that Mr. Conlan did not, in general terms, have his property managed by AIBIM. In those circumstances AIB, Ark, Mr. Conlan and AIBIM entered into what was described as a co-ownership agreement on the 12th November, 1998. These proceedings concern the construction of that agreement in the content of events which have happened.

1.2 Some of the changes in circumstance that have occurred subsequent to November 1998 are of importance to the issues which I have to decide. In particular Mr. Conlan has recently sold his beneficial interest to the defendant ("Treasury"). In addition the beneficial interest of the Allied Irish Property Fund came to be held through a different trustee, the first named plaintiff ("BNY").

1.3 Furthermore BNY (as such trustee) and Ark have entered into an agreement to sell their beneficial interests in the freehold to N1 Property Developments Limited ("N1"). N1 already has an interest in the Shopping Centre, being entitled to the interest of a lessee under a lease dated 12th October, 1976.

1.4 At its simplest Treasury contends that BNY and Ark were in breach of their obligations under the co-ownership agreement by entering into the relevant arrangements to sell their beneficial interest in the freehold to N1. As part of that case Treasury maintains that it is now entitled to the benefit of the same rights in the co-ownership agreement as were formerly vested in Mr. Conlan. With a view to resolving those issues BNY and Ark have brought these proceedings in which they seek declarations to the effect that their agreement with N1 is not in breach of the co-ownership agreement in all the circumstances of the case.

1.5 By way of completeness in relation to the general background, I should also note that there are in being separate proceedings between Treasury as plaintiff and N1, its principals, BNY, Ark, AIBIM and Percy, as defendants, in which Treasury maintains that an agreement was reached on 13th July, 2003 between Treasury on the one part and N1 and its principals on the other part, which provided for a joint development of the Shopping Centre. In those proceedings (Record No. [2007/3983P]) it is maintained by Treasury that the agreement reached between BNY and Ark on the one part and N1 on the other part for the purchase of the beneficial freehold interest of BNY and Ark in the Shopping Centre, amounts to a breach of those arrangements. Those proceedings also claim relief as against BNY, Ark and AIBIM. Insofar as there may be an overlap between some of the issues raised, in these proceedings, between Treasury on the one hand and BNY, Ark and AIBIM on the other hand, with the issues raised in these proceedings, then it is clear that such issues may be determined in these proceedings. However, insofar as the wider range of issues which exist between the parties to the other proceedings are concerned, same are not before me in these proceedings and are not relevant to the issues which I have to decide in these proceedings.

1.6 These proceedings are confined to questions which involve the proper interpretation of the co-ownership agreement. Finally, by way of background, it should be noted that the two principal operative clauses of the co-ownership agreement, with which I am concerned, are clauses 3 and 4. As originally constituted, these proceedings sought only declarations to the effect that the plaintiffs were not in breach of clause 3. However questions concerning a possible breach by the plaintiffs of their obligations under clause 4 were raised in the other proceedings. With that in mind, and with the agreement of the parties generally, the plaintiffs amended the summons in this case for the purposes of adding declaratory relief concerning clause 4.

1.7 In substance, therefore, these proceedings concern the proper interpretation of clauses 3 and 4 (in the light, where appropriate, of the other terms in the co-ownership agreement) and the determination of whether, on the basis of undisputed facts, and such proper interpretation, it can be said that the plaintiffs are, in any way, in breach of that agreement.

1.8 In order to have a proper understanding of the issues it is necessary to turn to the terms of the co-ownership agreement which I now do.

2. The Co-Ownership Agreement

2.1 Insofar as material to the issues which I have to decide there are a number of aspects of the co-ownership agreement, other than the key clauses 3 and 4, which need to be noted.

2.2 The parties are described as, firstly AIB (which is specified as acting as trustee "for and behalf of the Allied Irish Property Fund"), secondly Ark, thirdly Mr. Conlan, and fourthly AIBIM which is described as the "Manager". Immediately after setting out the names of those persons and bodies, those parties are designated as being "hereinafter collectively called "the Parties".

2.3 In the interpretation section of the agreement (s. 1) "Parties" is stated to mean "the parties listed at (1), (2) and (3) above" and it is further specified that a "Party" should mean "any one of them". The parties listed at (1), (2) and (3) are respectively AIB, Ark and Mr. Conlan. While it may not be of any great materiality to these proceedings, it is worthy of some note that there is an inconsistency in the use of terminology in the agreement in that the Parties as defined immediately after the listing of the names of those subscribing to the agreement appears to define the term by reference to all four subscribing entities whereas in the definition section the same word is defined as relating to only the first three (and thus excluding AIBIM).

2.4 Before leaving the interpretation section, I should also note that it contains a typical clause providing that words importing the singular number should import the plural and vice versa, and also contains a typical sole agreement clause. Clause 2 simply contains

recitals and does not appear to have any influence on the issues of construction with which I am concerned. Clause 5 contains certain general provisions, the only one of which that appears to be material being clause 5.2, which provides that the agreement shall be binding "upon each Party's successors and personal representatives (as the case may he (sic))."

2.5 As previously indicated the meat of the agreement is to be found in clauses 3 and 4 which regulate the circumstances in which a sale of the interest of a party or parties may be effected. It is appropriate that I set out both clauses in full. They are in the following terms:-

> "3.1 In the event that one Party wishes to transfer his interest, then:-
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> (a) In such circumstances that Party (the "Selling Party") shall serve on the Manager a notice to this effect (the "Sale Notice"),
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> (b) If the Manager (after advising all the other Parties) has identified from among the other Parties a party or parties (the "Nominated Purchaser") who wishes to offer to purchase the Interest referred to in the Sale Notice it will so advise the Selling Party by serving (as agent of the Nominated Purchaser) on the Selling Party within three calendar months of the date of the Sale Notice a notice (the "Offer Notice") containing in full the terms on which the Nominated Purchaser wishes to acquire this Interest. If the Selling Party wishes to accept the offer contained in the Offer Notice, it will so advise the Nominated Purchaser by serving on the Manager (as agent of the Nominated Purchaser) within 28 days of the date of the Offer Notice a notice (the "Acceptance Notice") to that effect. On the date of service of the Acceptance Notice there will be constituted a binding contract between the Selling Party and the Nominated Purchaser for the transfer by the Selling Party of his Interest to the Nominated Purchaser on the terms contained in the Offer Notice.
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> (c) If the Manager does not serve an Offer Notice during the period specified above for serving such notices, or the Selling Party does not serve an Accepted Notice within the period specified above for serving such notices, then the Selling Party may at any time during the period of twelve months from the date of the Sale Notice (the "Transfer Period") market his interest with a view to securing an offer from an arms-length third party (the "Acquiring Period").
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> (d) If the Selling Party secures an offer from the Acquiring Party which is at or in excess of the offer contained in the Offer Notice (if any) then, subject to the other provisions of this clause 3 the Selling Party may transfer his interest to such the Acquiring Party at any time during the Transfer Period on the terms of such offer.
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> (e) If the offer contained by the Selling Party is below that contained in the Offer Notice (if any) but the Selling Party wishes nevertheless to accept it then the Selling Party may serve on the Manager a further notice (the "Further Sale Notice") containing full details of such lower offer. If the Manager (after advising all the other Parties) has identified from among the other Parties a party (the "Nominated Purchaser") who wishes to acquire the Interest of the Selling Party on the terms of the offer detailed in the Further Sales Notice it will so advise the Selling Party by serving (as agent of the Nominated Purchaser) on the Selling Party a notice (the "Acceptance Notice") to that effect within 28 days from the date of service of the Further Sale Notice. On the date of service of the Acceptance Notice there will be constituted a binding agreement for the sale by the Selling party to the Nominated Purchaser of his interest on the terms of the offer detailed in the Further Sale Notice.
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> (f) If the Manager does not serve an Acceptance Notice within the period specified above for serving such notices following receipt of the Further Sale Notice then the Selling Party may at any time during this Transfer Period, and subject to the other terms and conditions of this clause 3, transfer his Interest to the relevant third party (the "Acquiring Party").
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> (g) Save in the circumstances contemplated by clause 4.5, the procedure set out in this sub-clause 3.1 will be repeated whenever a Party wishes to transfer its interest.

3.2 The Selling Party shall use its reasonable endeavours to ensure that the Acquiring Party executes such documents as may be required by the remaining Parties and the Manager binding the Acquiring Party to the terms of this Supplemental Agreement, a Management Agreement with the Manager and a Declaration of Trust with the Trustee in the same or materially the same form as the Management Agreement and Declaration of Trust already entered into by the Selling Party.

3.3 The Manager hereby undertakes with the Parties that on production of such proper stamped evidence of the transfer of an Interest to a Nominated Purchaser or an Acquiring Party (as the case may be), as it may require, it will procure that the Trustee will execute a new declaration of trust in favour of such Nominated Purchaser or Acquiring Party (as the case may be).

4.1 AIB and Ark each agree with Mr. Conlan that if they wish to sell their Interests together they will first notify Mr. Conlan of such wish in writing and will afford him the opportunity of joining in such sale so that the Interests of all the Parties shall be sold jointly. If he wishes to join in such sale, Mr. Conlan shall so advise AIB and Ark in writing within 30 days of receiving such notice from AIB and Ark.

4.2 The arrangements for such a joint sale (including but not limited to the appointment of professional advisers and the incurring of advertising and other costs) shall be made where possible by agreement between the Parties and in default of agreement by the Manager.

4.3 The price at which the Property is to be sold shall be agreed between the Parties and no Party shall be obliged to sell its Interest at a price which is less than that which such Party considers fair and reasonable.

4.4 The agreed price received from the sale of the Property, after deduction of all costs associated with such sale which have either have agreed between the Parties or approved by the Manager shall, be shared between the Parties in the same shares as they share the rent receivable under the Lease.

4.5 If within 30 days after receiving notice from AIB and Ark of their wish to sell their respective Interests, Mr. Conlan has

not advised them in writing of his intention of joining in such sale, or if the price achieved is not acceptable to Mr. Conlan, then AIB and Ark shall be free to sell their Interests without further reference to Mr. Conlan at any time within one year."

2.6 As will be seen, clause 3 is concerned with what is to happen in the event that one Party wishes to transfer his interest. Clause 4 is concerned with circumstances where AIB and Ark wish to sell their interest together. The principal issue between the parties is as to whether clauses 3 and 4 are designed to deal with entirely separate circumstances (as contended for on behalf of the plaintiffs) or whether clause 3 is also applicable to circumstances where AIB and Ark wish to engage in a joint sale (as Treasury contends). Put another way, it is clear that clause 4 applies to circumstances where AIB and Ark wish to engage in a joint sale. The real question which arises is as to whether clause 3 also applies in those circumstances, so that AIB and Ark would be required, in that eventuality, to operate the process described in both clauses. The alternative argument is that, on a true construction of the agreement as a whole, clause 3 has no application in circumstances where AIB and Ark invoke clause 4.

2.7 In addition the issue laterally added to these proceedings concerning compliance with clause 4 arises. I propose dealing with that argument separately, in that it will be necessary to go into the facts in somewhat more detail to explain the circumstances in which the dispute between the parties under that heading arises. I propose, however, to deal initially with the clause 3 argument. A brief recital of the relevant facts is sufficient to understand the circumstances in which that dispute arises.

3. Clause 3 – The Facts

3.1 As indicated earlier BNY is simply a new trustee (replacing AIB) on behalf of the Allied Irish Property Fund. It is not disputed but that BNY stands in the shoes of AIB in those circumstances.

3.2 Prior to the current disputed issues arising between the parties, Mr. Conlan had served a notice under clause 3 of his wish to transfer his interest. It should be noted, although it is not really relevant to the issues to which I have to decide in these proceedings, that the service of that notice operated against a backdrop of there being in place an offer from N1 for the purchase of the entire beneficial freehold interest which, it would appear, both BNY, AIB and Ark were minded to accept. It would appear that Mr. Conlan, correctly as it turns out, believed that he could do better than that offer. In the circumstances he served a sale notice under clause 3.1(a).

3.3 In accordance with clause 3.1(b) AIBIM identified Allied Irish Property Fund, acting through its trustee BNY, as being willing to purchase Mr. Conlan's interest. An Offer Notice specifying a purchase price of €18,050,000 for Mr. Conlan's share was served on 14th February, 2007. Mr. Conlan did not serve an Acceptance Notice under clause 3.1(e) within the 28 days specified in that clause. As a result of that development, Mr. Conlan became free, under the provisions of clause 3.1(f) and subject to the other terms and conditions of clause 3, to transfer his interest to a third party. In substance that meant that Mr. Conlan was free for a period of 12 months from the commencement of the process (that is the date of the original Sale Notice), to sell the property to a third party provided he secured a price which was (in accordance with clause 3.1(d)) "at or in excess of the offer contained in the Offer Notice".

3.4 That is, in fact, what happened. Mr. Conlan received a sufficient offer from Treasury and effected a sale to Treasury of his beneficial interest in the property. That sale was the subject of an agreement on 29th March, 2007 which completed on 5th April, 2007.

3.5 In parallel with those arrangements, BNY, Ark and Percy entered into two "put and call" option agreements with N1 and its principles on 14th February, 2007. The first put and call option related to the sale of the interest of both the Allied Irish Property Fund and Ark for a purchase price of €64,255,500.00. The second put and call option related to the sale by BNY to N1 and its principals of Mr. Conlan's interest, in the event that Mr. Conlan should serve an Acceptance Notice in relation to the Offer Notice. In simple terms BNY was agreeing that if it secured Mr. Conlan's interest on foot of the process already in train (under clause 4) it would bind itself to transfer that interest on to N1 and its principles.

3.6 Thereafter, on 20th March, 2007, BNY and Ark informed Mr. Conlan, pursuant to clause 4.1, that they wished to sell their interest together and gave Mr. Conlan the opportunity to join in such sale, as they were required to do under clause 4.1. Under clause 4.5 it is clear that Mr. Conlan then had a period of 30 days within which to advise BNY and Ark as to whether he wished to join in such sale. As it happens there was correspondence between the parties in early April arising out of Mr. Conlan's sale to Treasury. It will be necessary to turn to this correspondence in somewhat greater detail in relation to the clause 4 argument. However for the purposes of this issue it is of some marginal relevance to note that Mr. Conlan's solicitors confirmed, on 11th April, that Mr. Conlan would not be joining in the sale of their interest by BNY and Ark. In any event Mr. Conlan did not indicate a desire to engage in a joint sale within the 30 days specified in clause 4.5 and, thereafter, on 23rd April, 2007, BNY and Ark exercised their put option under the first option agreement so as to require N1 to purchase their interests in the Shopping Centre. The exercise of that option required completion of the sale within 28 days of the date of the exercise of the option which in the events that happened was by the 21st May, 2007. These proceedings intervened.

3.7 Correspondence was exchanged between solicitors for the parties to these proceedings in which many of the arguments addressed at the hearing before me were rehearsed. So far as the clause 3 issue is concerned, it does not, therefore, seem to me to be necessary to set out that correspondence at this stage.

3.8 Before going on to deal with the construction of the combined effect of clauses 3 and 4 some factual matters should be noted.

3.9 Firstly neither BNY nor Ark served any notices under clause 3. It is, of course, their case that they are not obliged so to do. That factual situation brings into clear relief the construction issue which I briefly identified earlier. BNY and Ark assert that once they decide on a joint sale, they are entitled to operate the provisions of clause 4 and that, having operated those provisions, they are then free to sell.

3.10 Treasury argues that the mere fact that BNY and Ark choose to engage in a joint sale does not remove from either or both of those parties an obligation to comply, in addition, with clause 3.

3.11 Before going on to a detailed consideration of the two competing constructions, I should note one further legal issue which did arise, in the earlier stages of these proceedings, but which was not pursued at trial. It is, of course, the case that Treasury was not a party to the co-ownership agreement. As will be noted, however, clause 3.2 provides that a party selling its interest under that clause (which Mr. Conlan did) was required to use its reasonable endeavours to ensure that the so called acquiring party (in this case Treasury) should execute all relevant documentation to ensure that the acquiring party was bound to the terms of the co-ownership agreement and certain other interlocking agreements concerning the management of the property. While it would not appear that any finalisation of such arrangements had occurred, prior to the disputes which give rise to these proceedings arising, it does seem to be the case that BNY and Ark requested confirmation from Mr. Conlan, and through him from Treasury, that Treasury would bind itself to

the co-ownership agreement. Such confirmation was forthcoming. While the formalities had not been completed, it does seem to me that the circumstances were such that Treasury had, in effect, become, or at least agreed to become, at the insistence of BNY and Ark, a party to the co-ownership agreement, in replacement for Mr. Conlan. Treasury is, therefore, entitled to place reliance on the terms of the agreement. In those circumstances it seems to me to have been quite correct for counsel on behalf of BNY and Ark not to pursue a line of argument which suggested that Treasury was not entitled to rely on the co-ownership agreement.

3.12 So far as the clause 3 argument is concerned, therefore, the sole real issue is as to whether, on a proper construction of the agreement, BNY and Ark were required to go through the clause 3 process in the events that happened. Before turning to that issue, I need to address one aspect of the principles applicable to the construction of legal agreements.

4. Principles of Construction

4.1 It is, firstly, necessary to briefly address the general legal principles applicable to the construction of contractual terms such as those with which I am concerned. There was very little dispute between the parties as to the applicable principles. There has, of course, been a significant evolution in such principles in recent times. That evolution is often traced to *Reardon Smith Line Ltd v. Young Hansen-Tangen* (1976) 3 All ER 570. In the course of his speech in that case Lord Wilberforce said the following:-

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes a knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating … When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of the aim, or objective, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties … what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were."

4.2 That approach was adopted and applied by the courts in this jurisdiction and finds it most succinct statement in the judgment of Keane J. in *Kramer v. Arnold* [1997] 3 I.R. 43 at 55 in the following terms:-

> "In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances".

4.3 That passage was endorsed by the Supreme Court in *Igote Ltd v. Badsey Ltd* [2001] 4 I.R. 511 in which case the Supreme Court also made clear that it was inappropriate to have regard to the subjective intention of the parties as an aid to construction.

4.4 The appropriate principles have been the subject of further judicial comment in the United Kingdom. In a celebrated passage from *Antaios Compania Naviera SA v. Salen Rederierna AB* (1985) AC 191 at 201 Lord Diplock stated the following:-

> "(I)f detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense". A similar indication that the law generally favours a commercially sensible construction was identified by Lord Steyn in *Mannai Investment Company Ltd v. Eagle Star Assurance Company Ltd* (1997) 3 ALL ER 352."

4.5 The most definitive recent statement of the law in this jurisdiction is to be found in the judgment of the Supreme Court in *Analog Devices v. Zurich Insurance* [2005] 2 ILRM 131 where Geoghegan J. quoted with approval the principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* (1998) 1 WLR 896 at 912-913 in the following terms:-

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this expectation are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reasons, have used the wrong words or syntax: see *Mannai Investments Co Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.
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> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background hat something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201:
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> > "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be yield to business commonsense."

4.6 Subject to one point there was no dispute between the parties as to the principles which should be applied. It will be noted, from point 3 of the rules specified above, that there is an express exclusion from the admissible background of "the previous negotiations of the parties and their declarations of subjective intent". The stated basis for such an exclusion is that it is based on questions of practical policy. In relation to that issue, however, Treasury drew my attention to the decision of the New Zealand Court of Appeal in *Yoshimoto v. Canterbury Golf International* [2001] 1 NZLR 523 where Thomas J., speaking for the court, said the following:-

> "I would also reiterate that, for the purposes of this case, I am not seeking to entirely abrogate the rule that evidence of prior contractual negotiations is not receivable to ascertain the meaning of a contract. What I am suggesting is that the rule should not be treated as ? and rigid rule to the point where the court is called upon to impose an interpretation which does not accord with the parties actual intention. The objective basis would remain. But that basis would be enhanced by approaching the task of determining what the contract would convey to a reasonable person without artificially restricting the background knowledge available to the parties at the time when they completed the contract. Subject to the caution which I will shortly stress, that background knowledge should be able to include reference to matters that might otherwise come under the general heading of negotiations where such a reference would undoubtedly assist to ascertain the true meaning of the parties contract. Thus, in this case, the clause in the draft agreement and the deleted recital E would assist the reasonable person reading the words of the contract to determine what the parties intended clause 6.3 to mean, as distinct from their subjective intentions divorced from the wording used."

4.7 It would, therefore, appear that the courts in New Zealand are prepared, at least in some cases, to relax the prior negotiation exclusion, at least to the point of considering previous drafts of the disputed agreement. However it seems clear from the passage which I have quoted that no relaxation is permitted in New Zealand in respect of the subjective intention exclusion.

4.8 Insofar as it might be suggested that there should be some relaxation in the prior negotiation exclusion in this jurisdiction, it seems to me that I must approach this case on the basis of existing Irish authority. The well established line of jurisprudence in this jurisdiction, most recently affirmed by the Supreme Court in *Analog Devices*, makes clear that evidence of prior negotiation is not permissible. Therefore, even if I were of the view that some relaxation in that rule might be appropriate, I would not be free to give effect to such a relaxation.

4.9 Even if I were free to adopt such a relaxation, there are, in my view, very considerable difficulties with what is proposed. Even so far as the prior negotiation restriction is concerned there are strong policy reasons for its maintenance. The whole idea behind the approach adopted, in most common law countries, to the construction of written contracts, is that same should be objectively construed and, to as great an extent as possible, should not be dependent on potentially conflicting evidence as to surrounding events. Thus the sort of factual background against which a contract is to be construed is normally, at least in general terms, not in dispute. What precisely occurred in the detail of contractual negotiations is, almost invariably, only known to the parties and their advisors and is capable of very great dispute. Allowing evidence of such negotiations to influence the proper construction of a written contract has the great difficulty that the proper construction may be dependent, to a very large extent, in those circumstances, on the credibility of witnesses giving competing accounts of the course of the negotiations.

4.10 If any leeway were to be allowed, at all, it seems to me that it could only arise, as noted in *Yoshimoto*, in the context of prior drafts. Even then such leeway would need to be considered in the light of the facts of an individual case. There is a certain superficial attraction to placing reliance on prior drafts. Parties can, understandably, be frustrated, when a construction is, for example, sought to be placed on a contract as signed, which asserts that it has a meaning exactly the same as provided for in a former clause which was deliberately excluded by agreement. However even prior drafts have a context which is frequently to be found in the detail of the negotiations. It may very well be difficult to consider prior drafts without going into those negotiations and, thus, moving very far away from the objective construction of written legal instruments.

4.11 In any event, even if I felt free to depart from the well established principles of construction, it does not seem to me that the facts of this case would provide any basis for so departing. In that context it is important to note that what is sought to be offered by way of background evidence in this case, is the evidence of an individual who, at the time of the entering into of the co-ownership agreement, was a senior employee of AIB involved in the relevant negotiations but who is now an equally senior official of Treasury. He has put forward evidence both of his subjective interpretation of the contract (which is clearly inadmissible) and evidence of the fact that he gave instructions to solicitors (acting for AIB) as to the terms in which the contract should be drawn up. Even if the latitude adopted by the Court of Appeal of New Zealand were to be allowed, it does not seem to me that that later evidence could be admissible.

4.12 I should, therefore, record that I do not propose to place any reliance upon that evidence. I do so firstly because it seems to me that I am bound by the long line of authority (including Supreme Court authority) which excludes such evidence. Secondly I do so on the basis that, even if I were free to permit an appropriate evolution of the law in this jurisdiction along the lines of that adopted by the Court of Appeal in New Zealand in *Yoshimoto* and, which is by no means necessarily the case, felt it appropriate so to do, it does not seem to me that the evidence tendered on behalf of Treasury would be admissible, even on such an expanded basis.

4.13 It is therefore necessary to consider the proper construction of the co-owners agreement on the basis of considering what it says and in its context.

5. Application of Principles to the Clause 3 Argument

5.1 The competing arguments as to the proper construction of clause 3 have both the merit of simplicity. At their most basic they both, to an extent, start with a separate analysis of, respectively, clause 3 and clause 4 and seek, then, to interpret the overall effect of the agreement as a whole on clause 3.

5.2 The Treasury argument initially concentrates on clause 4. It points out that clause 4.1 entitles AIB and Ark (in its terms and BNY and Ark in the events that have happened) to give notice of an intention to engage in a joint sale provided that they offer Mr. Conlan an opportunity of joining in. The argument further notes that clauses 4.2, 4.3 and 4.4 are concerned solely with what is to happen in the event that Mr. Conlan does, at least initially, join in the process.

5.3 The argument then emphasises that clause 4.5 permits BNY and Ark to be free to sell without further reference to Mr. Conlan provided that Mr. Conlan has not advised, within 30 days, of his intention of joining in the sale process.

5.4 On that basis, it is said, clause 4, taken as a whole is clear in its terms. Mr. Conlan is to be given a chance to join in a sale but if he does not indicate a willingness so to do within 30 days, then BNY and Ark are free to sell for a period of a year.

5.5 On the basis of that argument, it is suggested on behalf of BNY and Ark that any interpretation of clause 3 which would require

either or both of AIB and Ark to serve a Sale Notice would make a nonsense of clause 4 and should, therefore, it is said, be rejected.

5.6 The competing argument put forward on behalf of Treasury relies on the fact that the provisions of clause 3.1 are said to arise "in the event that one Party wishes to transfer his interest". It is said, therefore, that clause 3 applies, in its terms, to any circumstances where a sale is contemplated by any party. On that basis it is contended that there is no warrant in the agreement for interpreting the provisions of clause 3 as being excluded in circumstances where BNY and Ark wish to engage in a joint sale.

5.7 Against that argument BNY and Ark put forward two replies. The first argument suggests that the use of the word "Party", in the singular and with a capital "P", denotes, by reference to the definition clause, a single party. In those circumstances, it is said that the agreement only contemplates clause 3 becoming operative where a single party rather than two or more parties is involved in the sale. The second argument concerns the interaction of clauses 3 and 4.

5.8 The first argument is countered, on behalf of Treasury, by drawing attention to that aspect of the interpretation clause which defines singular as involving plural and vice versa. It seems to me that it is logical to start an analysis of the merits of this aspect of the argument by considering the construction of clause 3 taken by itself. If, on a proper construction of clause 3, that clause does not govern circumstances where two or more parties are involved in a sale, then any question of its interaction with clause 4 does not arise.

5.9 A number of additional factors are relevant to the construction of clause 3 taken by itself. Firstly it does have to be noted, as already pointed out, that the agreement contemplates that any third party acquiring the interest of one or other of the existing parties to the co-ownership agreement, should become bound in to the terms of the co-ownership agreement. It does not, of course, follow that the entirety of the interest of a single existing party to the agreement must be transferred to a single acquiring party. Indeed the factual background to the history of the ownership of the beneficial interest in the Shopping Centre reveals that there were, over time, changes in the number of co-owners although those changes pre-dated the coming into existence of the co-ownership agreement of 1998. It seems to me that the agreement must, therefore, be construed against the background of the fact that it appears to have been intended to apply not just to the existing parties but to whatever set of co-owners might, in the future, come to own the property and, indeed, whatever number of such co-owners there might be. If, for example, Mr. Conlan were to have sold his interest not just to Treasury but, at least in part, to a fourth party, and if Treasury and the fourth party had both become bound to the co-ownership agreement, then there would have been four co-owners. In those circumstances the question arises as to whether there would be any logic in suggesting that any two parties could avoid the necessity of offering their share for sale to the other co-owners simply by engaging in a joint sale. It does not seem to me that such an eventuality would make commercial sense. Nor, indeed, does it seem to me that a literal construction of the contract really points in that direction.

5.10 I favour the argument of counsel for BNY and Ark that the specific reference in the definition section to "Party", in the manner in which it is set out, overrides the more general provision concerning the interpretation of single and plural terms. However, even if the word "Party", as it appears on the first line of para. 3.1, is held to relate only to a single party, it does not seem to me to really affect the overall construction of the clause. The fact that two parties may wish to transfer their interests at the same time does not mean that each individual party does not wish to transfer his interest. The question as to whether the word "Party" must be interpreted as being singular alone does not, therefore, seem to me to be relevant. Even if "Party" only means the singular, it does not prevent the clause applying separately to each of two parties who happen to wish to transfer their interest at the same time and as a result of a joint exercise.

5.11 Therefore, if clause 3 came to be construed by itself, I would be satisfied that it relates to a sale by any one or more party who happens, as of the relevant time, to be bound into the co-ownership agreement. It is, therefore, necessary to turn to the question of the interaction between clause 3 as so interpreted, and clause 4.

5.12 The only provision of the agreement which gives any assistance in relation to the interaction between clauses 3 and 4 is clause 3.1(g). That clause provides that the clause 3.1 procedure is to be repeated whenever a party wishes to transfer its interest "save in the circumstances contemplated by clause 4.5". It is, indeed, a pity that the agreement does not make it expressly clear as to whether clause 3 is to have any application at all in the circumstances contemplated by clause 4 as a whole. It needs to be noted that the circumstances contemplated in clause 4.5 are circumstances where Mr. Conlan, having been given notice of a joint intention on the part of AIB and Ark to sell, does not advise in writing of his intention of joining in the sale. Therefore, on its terms, clause 3.1(g) does not kick in until such time as Mr. Conlan had declined, by implication, to engage in a joint sale. It might well be said, in those circumstances, that clause 3.1(g) contemplates that the provisions of clause 3 generally are to apply, at least up to the time when Mr. Conlan failed to notify an intention of joining in a joint sale within 30 days. On that basis clause 3.1(g) might be said to lead towards a construction which required that a "Sale Notice" had to be served, at the beginning of the process, by BNY and Ark, in that the only leeway given on compliance with clause 3.1 occurs after Mr. Conlan has failed to give notice of intention to engage in a joint sale.

5.13 The counter argument suggests that a proper construction of clause 3.1 as a whole does not place an absolute obligation on any party to serve a "Sale Notice". On the basis of that argument the consequence of not serving a "Sale Notice" is, of course, that the party concerned cannot effect a sale at all. A "Sale Notice", on the basis of that argument, is, in effect, a condition precedent to a party being able to effect a transfer at all. On the basis of that argument a notice under clause 4 can be served without having to also serve a sale notice under clause 3. Thereafter, and in the event that Mr. Conlan does not indicate a willingness to join in, and after the lapse of 30 days, BNY and Ark are, by virtue of clause 3.1(g), free to go ahead with a sale without serving a sale notice under clause 3.

5.14 This latter argument does, it seems to me, require that the provisions of clause 3.1(a), which specifies that the selling party shall "serve a Sale Notice", would be require to be given a somewhat strained meaning.

5.15 However BNY and Ark argue that any other meaning requires that a much more strained construction has to be placed on clause 4. This argument, in turn, requires a consideration of what would, in practice, happen in the event that, as Treasury argues, there was an obligation on BNY and Ark to commence both of the clause 3 and clause 4 processes at the same time. In that eventuality it is clear that, considering clause 4 by itself, BNY and Ark would be free to sell after 30 days provided that Mr. Conlan did not give an indication of willingness to engage in a joint sale. On the other hand the parallel process under clause 3 would operate to defeat, it is said, the clear terms of para. 4.5. Under clause 3.1(b) the manager (i.e. AIBIM) has three months to identify a possible purchaser who can, within that period of three months, serve an Offer Notice. The selling party has a further period of 28 days from the date of the Offer Notice to serve an Acceptance Notice. It is only when that process has completed without an agreement for sale (either because no Offer Notice is served within three months or, such a notice being served, an Acceptance Notice is not served within a further period of 28 days), that the selling party becomes free to sell. On that basis it is argued on behalf of BNY and Ark that requiring either or both of them to also serve a clause 3 notice along with invoking the clause 4 process would make a nonsense of

the entirety of the terms of clause 4.

5.16 In response to that argument counsel on behalf of Treasury, rather ingeniously, postulated a set of circumstances where it was possible that some effect might be given to the freedom conferred under clause 4 notwithstanding the application of an obligation to go through the clause 3 process as well. The circumstances identified in his example are based upon the fact that the clause 3 process expires one year after the beginning of the process i.e. after the service of the Sale Notice. On the other hand the clause 4 process does not terminate until one year after the expiry of the 30 day period during which Mr. Conlan had an opportunity to express an intention of engaging in a joint sale. In those circumstances counsel for Treasury, correctly, so far as it goes, points out that there might be window of opportunity in the thirteenth month after the process begins when, in certain circumstances, freedom to sell might arise under clause 4.5.

5.17 While the argument put forward is technically correct, it does seem to me to involve a most unusual and strained set of circumstances. It also pays little regard to the fact that AIB and Ark are given full freedom to sell under clause 4.5, unconstrained as to price, whereas a selling party under clause 3 only has a freedom to sell at or above the offer price placed on the table by a co-owner. It would, again, make a nonsense of the "unencumbered as to price" freedom expressly conferred by clause 4.5, if that process had to run in tandem with the "constrained as to price" freedom to sell under clause 3.

5.18 In all the circumstances it seems to me that it does much less damage to that aspect of the terms of the agreement when taken as a whole, to construe it broadly in the manner contended for on behalf of BNY and Ark as opposed to the manner contended for on behalf of Treasury. While, as I have indicated, it requires an element of straining of the word "shall" in clause 3.1(a) to adopt the construction contended for on behalf of the plaintiffs that, in my view, pales into insignificance in comparison with the damage which requires to be caused to the clear terms of clause 4.5, in the event that the construction contended for on behalf of Treasury were to prevail. On balance, therefore, a literal approach, coupled with the requirement to give the agreement business common sense, broadly favours the construction contended for on behalf of the plaintiffs. A consideration of the overall context of the agreement does nothing to displace that interpretation. It must be remembered that up to the time of the co-ownership agreement coming into existence, AIB and Ark were entirely free to dispose of their interest as they willed. In addition, all of the parties who were co-owners up to that time were, it would appear, institutional type investors who, as it happened, were happy to have their property interests managed by entities within the AIB group. In that context Mr. Conlan has to be seen as something of an outsider. In those circumstances it is, in my view, reasonable to view clause 4 as having been included for two purposes. Firstly to retain the entitlement of the AIB and associated interests to engage in a sale if they wished, but also to give, in that eventuality, Mr. Conlan some protection in being entitled to insist on a joint sale.

5.19 That this latter aspect of the agreement could, possibly, confer a benefit on Mr. Conlan can be seen by the following example. Mr. Conlan is entitled, under clause 4, to become a party to a joint sale. While he cannot be forced either to engage in the process or to accept the results of the process, he is, nonetheless, entitled to insist on being a party if he wishes. In those circumstances BNY and Ark are unable to avail of clause 4 without giving Mr. Conlan an opportunity to jointly share in a collective sale of the entire beneficial interest. If AIB and Ark do not afford Mr. Conlan that opportunity under clause 4, then the only way in which either or both of them can effect a sale of the property is by going through the clause 3 procedures.

5.20 In conclusion, on this aspect of the case, it seems to me that either of the constructions put forward require doing some damage to a literal interpretation of the contract. However the argument put forward on behalf of BNY and Ark seems to me to do much less damage to such a construction and also to be, if anything, more consistent with what might be expected having regard to the factual background. In all the circumstances it seems to me that clause 3 and clause 4 provide for two independent and separate processes which are to be regarded, under the contract, as mutually exclusive. In those circumstances I am satisfied that the contract, taken as a whole, has to be construed in a manner which entitles BNY and Ark, in principle, to invoke clause 4 without, at the same time, serving a sale notice under clause 3. If, therefore, BNY and Ark have properly invoked the clause 4 process, then it follows that there has not been any breach by BNY and Ark of clause 3 by failing to serve a Sale Notice and it follows that BNY and Ark would be entitled to declarations to that effect. On that basis it is necessary to turn to the clause 4 argument. I turn first to the issues and the relevant facts.

6. Clause 4 – Issues and Facts

6.1 The factual basis for Treasury's contention that there has been a failure to properly invoke clause 4 stems from the undoubted fact that prior to the service by BNY and Ark of their notice in accordance with clause 4.1, those parties had, as it happens, already entered into the two "put and call" options which I have identified. In those circumstances, it is said that BNY and Ark were not, as of the date of the service of the clause 4 notice, free to engage in a joint sale and that, on that basis, the clause 4 notice must be taken to be invalid.

6.2 The first response on behalf of BNY and Ark is to suggest that, by virtue of the fact that the put and call option did not, without the service by one or other party of an appropriate notice, create contractual relations, there was no breach of clause 4. In addition it is argued that even if there was such a breach of clause 4, any breach is now irrelevant by virtue of the fact that Mr. Conlan, or Treasury to the extent that they are entitled to rely on Mr. Conlan's rights, did not indicate a desire to engage in a joint sale under clause 4 within the 30 day period specified in clause 4.5. In those circumstances, it is said, no reliance can now be placed on any alleged breach of clause 4 because the consequences of any such breach are spent. In addition BNY and Ark question the entitlement of Treasury to place any reliance on any such breach.

6.3 So far as the facts are concerned it is necessary to deal briefly with the sequence of events that occured between the parties subsequent to the acquisition by Treasury of Mr. Conlan's interest. On 2nd April solicitors on behalf of BNY and Ark wrote to Mr. Conlan's Solicitors noting their understanding that Mr. Conlan had agreed to sell his interest in the Shopping Centre and asking for confirmation as to the steps which Mr. Conlan proposed taking to comply with his obligations to sign up the purchaser to the co-owners agreement. The letter also sought confirmation that it was not Mr. Conlan's intention to join with BNY and Ark in the sale of their interests. The next letter in sequence was a response to the letter to which I have just referred, which came from solicitors acting on behalf of Treasury, who confirmed that their client had agreed to purchase the interests of Mr. Conlan and also sought the necessary information so as to enable Treasury to execute the relevant documentation to bind it into the co-ownership arrangements generally.

6.4 It would appear that the solicitor dealing with the matter on behalf of AIB and Ark was on holidays and a holding letter ensued. Thereafter, on the 23rd April, 2007, solicitors for Treasury raised the clause 3 argument and also noted the understanding of their clients that BNY and Ark had "purported to enter into a contract to sell their interest in the property to N1 Property Developments Limited and/or Brian O'Farrell … notwithstanding the obligation …" to comply with clause 3.1. It will be recalled that the clause 4 notice served by those parties on Mr. Conlan had been served on 20th March, 2007. The 30 day period had, therefore, elapsed prior to the letter of 23rd April, 2007.

Against that factual background it is necessary to turn to the clause 4 issues.

7. The Clause 4 Issues

7.1 As indicated earlier, the first issue which arises concerns the obligations of BNY and Ark under clause 4 and whether the entering into by those parties of the put and call options concerned, at the time when they did, might be inconsistent with those obligations.

7.2 The first question concerns the nature of the obligations which arise under clause 4. Clause 4.1, it seems to me, necessarily implies that Mr. Conlan will be informed under that clause at the beginning of the process. It uses the term "will firstly notify Mr. Conlan". Clause 4.2 deals with the arrangements for a joint sale including the imposition, in default of agreement, of a regime in respect of such arrangements by the manager (AIBIM). Clause 4.2 would, therefore, be meaningless unless all parties were free to pursue whatever form of offer for sale was agreed or imposed.

7.3 In those circumstances it seems to me that clause 4 necessarily implies that BNY and Ark, in order to be able to serve a valid notice under clause 4.1, must, at the time when they serve such notice, be contractually free to offer the property for sale generally. In the circumstances I am satisfied that a notice served under clause 4.1, which was served at a time when there were already in existence binding contractual relations which would have prevented BNY and Ark from engaging in an open sale of the property, would be invalid.

7.4 The next question which, therefore, arises concerns the contractual status of the put and call option which had already been entered into, prior to the service of the clause 4 notice, by BNY and Ark. It is said, on behalf of BNY and Ark, and it is correct insofar as it goes, that a put and call option is not the same thing as a contract for sale. It does have to be said, however, that the difference is more as to form than as to substance. The reality is that even where a contract for sale is in place, it does require one or other of the parties, in practice, to pursue a closure of that sale for such closure to, in fact, occur. If both parties let matters lie, then it becomes entirely possible that the contract will, in time, become devoid of any practical legal effect. Similarly where there is a put and call option in place which, in effect, allows either party to insist on contractual relations coming into being (by the simple expedient of serving a notice exercising one or other of the options) then it follows that either side can insist on a sale going ahead.

7.5 As a matter of substance, therefore, the net effect of there being in place a put and call option in respect of the sale of a property is that either side can insist on the sale going ahead. That is exactly the same situation as arises when there is a contract for sale in being.

7.6 The only difference between the two situations is that, in the case of a put and call option, it is necessary that one or other party take a positive step (in the form of the service of an appropriate notice to exercise the option) in order for matters to go forward. In the case of a contract of sale no such positive step is required although, as I have pointed out, the absence of any party taking any practical steps to move towards completion may, in time, lead to the contract becoming unenforceable in practice. The extent to which even this, almost theoretical, level of difference between a put and call option on the one hand and a contract for sale on the other hand, may be of any substance can, of course, depend on the terms of the put and call option. If it is limited as to time, then the absence of a positive act by either party within the time specified will lead to an end being brought to any contractual entitlements.

7.7 Whatever may be the legal niceties as to the distinction between the two forms of arrangements, the reality is that as soon as BNY and Ark had entered into the put and call option with N1 and its principals, BNY and Ark were no longer free to engage in any form of sale of the property to any party other than N1 and its principals. It is clear from the terms of the put and call option concerned that N1 and its principles were entitled to insist on a sale of the interest of BNY and Ark by the simple expedient of exercising the option.

7.8 In those circumstances it does not seem to me that it was open to BNY and Ark to seek to invoke clause 4.1 at a time when they were not free to engage in a sale to any entity other than N1 and its principals. In those circumstances BNY and Ark have not "first" notified Mr. Conlan and had put themselves in a position where they could not comply with any meaningful arrangements that might be agreed or determined under clause 4.2. It is true to state that the second "put and call" option entered into would have allowed Mr. Conlan to join, in practice, in the sale that already been agreed to N1 and its principles. However it does not seem to me that clause 4 contemplates that the clause can operate in circumstances where BNY and Ark had already entered into the agreement concerned before starting the process even though they may allow Mr. Conlan to join in the sale already agreed. It contemplates that Mr. Conlan will be told before the sale process reaches a stage where any binding arrangements are entered into and that Mr. Conlan be given an opportunity to engage in that process.

7.9 In all the circumstances I am, therefore, satisfied that the service of the clause 4 notice by BNY and Ark was invalid. That leads in turn to two further issues raised by the plaintiffs. They are as follows:-

> (a) whether Treasury, not being a party specified in clause 4.1 (i.e. not being Mr. Conlan) is entitled to place any reliance on the invalidity of the clause 4 notice; and
>
> (b) whether it is now possible for Treasury to place reliance upon the invalidity of the clause 4 notice given that neither Mr. Conlan, nor Treasury, indicated a wish to join in the process within the time specified in clause 4.5.

7.10 In relation to the first of those issues it was argued on behalf of BNY and Ark that the use of the individual names of the parties in clause 4.1 means that that clause was, as it were, personal to those parties and should not apply to any successors. That is, obviously, a question of construction. However it does not seem to me to be relevant. The case made on behalf of Treasury is that the clause 4 notice is invalid. In those circumstances, it is said, that any protection given by the invocation of clause 4 against the necessity to comply with clause 3, in the event of a sale, does not arise. There is no doubt, in my view, and for the reasons which I have already set out, that Treasury are, in principle, entitled to invoke clause 3. In those circumstances it seems to me that, irrespective of whether clause 4, in itself, applies in circumstances where Mr. Conlan is no longer a co-owner, Treasury are entitled to argue that the clause 4 notice is invalid and that it follows that the ouster of the obligation on BNY and Ark to comply with clause 3 has not, in fact, occurred.

7.11 A similar conclusion, it seems to me, arises under the second heading of the arguments put forward by BNY and Ark. It is, of course, the case that neither Mr. Conlan nor Treasury (if relevant) purported to exercise any entitlement to engage in a joint sale within the 30 day period specified in clause 4.5. However that fact, of itself, does not, it seems to me, answer the question concerning the validity of the clause 4 notice itself. If the clause 4 notice is invalid then it follows that the entitlement of BNY and Ark to be absolved from what would otherwise be their obligations to comply with clause 3.1, (by invoking the clause 4 process) do not arise.

7.12 If the issues concerned solely an entitlement of Mr. Conlan or Treasury to sue for breach of contract in relation to the alleged failure to properly comply with clause 4, then either or both of the issues of defence raised by BNY and Ark might well arise. Those issues do not, it seems to me, in any way operate as an estoppel which would prevent Treasury from raising the absence of a proper exercise of clause 4, as a means of asserting that clause 4 cannot, on the facts of this case, be invoked to assert that the basic obligation under clause 3 does not still subsist. In my view, therefore, the fact that BNY and Ark purported to invoke clause 4 at a time when they had already deprived themselves of freedom to act, renders the purported invocation of the clause 4 process invalid. In those circumstances it seems to me that, in the events that have happened, BNY and Ark are not entitled to rely on clause 4 as a means for avoiding what would, otherwise, be their obligations under clause 3.

7.13 As I have interpreted both clauses the whole point of clause 4 (from Mr. Conlan's perspective) is that he is entitled either to be permitted to engage in an open joint sale in a manner agreed or imposed under clause 4.2 or is entitled to have a Sale Notice served on him under clause 3.1. It is for that reason, and only that reason, that, in my view the proper invocation of clause 4 removes any obligation under clause 3. The obligation to afford Mr. Conlan his entitlements to joint sale is, therefore, the price to be paid by BNY and Ark for avoiding the obligation which would otherwise arise under clause 3.1 to serve a Sale Notice. For the reasons which I have analysed BNY and Ark did not, properly, pay that price. Indeed purporting to invoke clause 4 where they were not free to engage in an open joint sale was, in my view, not far short of disingenuous. Not having paid the price to avoid clause 3, BNY and Ark are, in my view, still obliged to comply with its terms.

8. Conclusions

8.1 In those circumstances I am satisfied that BNY and Ark were obliged, if they wished to sell to N1 and its principals, to either invoke clause 4 before entering into binding arrangements or to serve a Sale Notice. Not having done either they are now obliged, if they wish to go ahead with a sale, to serve a Sale Notice on Treasury and are, in my view, obliged to comply fully with their obligations under clause 3 in respect of any such notice.

8.2 I will hear counsel further as to the precise form of declaratory orders which I should make in the light of these findings.