Neutral Citation Number: [2010] IEHC 152

THE HIGH COURT

2008 1923 P

BETWEEN/

THE LEOPARDSTOWN CLUB LIMITED

PLAINTIFF

AND

TEMPLEVILLE DEVELOPMENTS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice John Edwards delivered on the 29th day of January, 2010.

1. Introduction

1.1 This case concerns an application by the plaintiff to rectify a lease and a licence agreement, both entered into in 1998, between the plaintiff (as landlord / licensor) and the defendant (as tenant / licensee), respectively, and concerning part of the lands and premises comprised by the Leopardstown racecourse complex (hereinafter referred to as Leopardstown Racecourse).

1.2 The parties had entered an agreement in late December 1997 that was reflected in a Heads of Agreement document to which effect was required to be given by the drafting and execution of a number of conveyancing documents, including the 1998 Lease and the 1998 Licence.

1.3 The plaintiff contends that during the drafting of both the Lease and the Licence agreement, respectively, a phrase "and parking" became interpolated into a definition, viz the definition of "the New Site", contained on a copy of page one of the Heads of Agreement to which the principal draftsmen had recourse for reference purposes, with the result that the definition amended by the said interpolation was included in the draft of the 1998 Licence then under consideration, and in subsequent drafts of both the 1998 Lease and the 1998 Licence (with the interpolation now qualified as "and car parking"). This interpolation was subsequently construed at arbitration as having the effect of imposing on the plaintiff an obligation, on termination of the Licence, to demise to the defendant an area for car parking, amounting to circa 5.5 acres, something which the plaintiff contends was never intended by the parties, and which "mistake" it now seeks to rectify in the context of these proceedings.

1.4 The plaintiff seeks rectification on the basis of common mistake, alternatively on the basis of unilateral mistake.

1.5 In the course of a trial lasting 22 days the Court heard 12 days of evidence from witnesses called on behalf of the plaintiff. The defendant elected not to go into evidence and applied for a dismissal of the plaintiff's case. The Court must now rule.

2. Chronological background to the proceedings up to the date of execution of the 1998 Lease and Licence

2.1 Leopardstown Racecourse was founded in 1888 by a Captain Quin and certain others. It was modelled on Sandown Racecourse in England. From the outset the legal title to the lands and premises comprising the racecourse complex was, and continues to be, vested in a company called Leopardstown Club Limited, which is the plaintiff herein (hereinafter "Leopardstown" or "the plaintiff"). From 1888 until 1967 this company was wholly owned by a family called Clarke. However, by 1967 it was recognised by the Clarke family, at the head of which was then a Mr. Fred Clarke, that the inexorable expansion of Dublin southwards would eventually place Leopardstown Racecourse under pressure, and in particular that the owners would face pressure to make the land available for development purposes. This was prescient as evidence was given that today Leopardstown Racecourse is situate in an area which has become very built up. It is now the only racecourse within the M50. Accordingly, in 1967 the Clarke family sold the plaintiff company to the Racing Board, which was the national body charged, under the Racing Board and Racecourses Act, 1945, with control of the horseracing industry in Ireland at the time. The net effect of this sale was that Leopardstown Racecourse became the property of the State. Moreover, it has remained in State ownership from 1967 until the present day. However, the Racing Board no longer exists, due to a re-organisation in recent years of the way in which Irish racecourses and the Irish horse racing industry are promoted and controlled. The Racing Board was dissolved by s.69 of the Irish Horseracing Industry Act, 1994 (hereinafter the 1994 Act), and was effectively reconstituted under Part II of that Act as a new body to be known as the Irish Horse Racing Authority (hereinafter the I.H.A.). Section 70 of the 1994 Act provided for the transfer of the property and the liabilities of the Racing Board to the I.H.A. Then in 2001 the I.H.A. was in turn dissolved by s.6 of the Horse and Greyhound Racing Act of that year (hereinafter the 2001 Act) and, by virtue s.5 of the 2001 Act, a new body called Horse Racing Ireland (hereinafter H.R.I.) was founded which further reconfigured the framework within which Irish racecourses and the Irish horse racing industry are promoted and controlled.

2.2 This new body amalgamated some functions of the previous authority with those of the Turf Club, as was explained by Mr. Justice Frank Clarke (who is not related to the aforementioned Clarke family) a former director of the plaintiff company prior to his appointment as a Judge, in the course of giving evidence in this case. His evidence was to the effect that prior to the establishment of H.R.I. the I.H.A. was what might be called the horseracing "industry body" while the Turf Club was involved in aspects of horse racing administration as well as performing regulatory functions. Upon the establishment of H.R.I. the administrative functions then being carried out by the Turf Club were moved to the new body, H.R.I.

2.3 Section 70 of the 2001 Act provided for the transfer of the property and the liabilities of the I.H.A. to H.R.I. Accordingly, the plaintiff is now wholly owned by H.R.I. and, as the holder of the immediate legal title to the lands and premises comprising Leopardstown Racecourse, it manages those properties on a day to day basis for and on behalf of its owner.

2.4 It is necessary at this point to describe Leopardstown Racecourse, and the various uses to which it is put, in a little detail. The racecourse itself is used both for National Hunt Racing and for Flat Racing and it consisted, up until the development of the adjacent M 50 motorway, of a main track of roughly traditional racetrack shape (though slightly misshapen), oriented approximately on a north/south axis, with the turns to the north and south respectively, and the straights to the east and west respectively, and with a

secondary straight sprint track projecting from the western/south-western straight of the main track in pan handle fashion. This sprint track was used for five and six furlong races at Flat Racing meetings. The grandstand and other viewing stands, the parade ring, and most of the other buildings and car parks, forming part of the complex, were located on the outside of the main track and to the west or southwest of it.

2.5 As a consequence of the development of the M 50 motorway in the early part of this decade Dun Laoghaire-Rathdown County Council needed to acquire a certain portion of the Leopardstown Racecourse to the south west of the complex, and that occurred in circumstances that will be described in more detail in due course. It is sufficient at this stage to say that this resulted, among other things, in the loss of a portion of the existing sprint track and part of a grassed area known as the Ballyogan field. This necessitated some re-organisation by the plaintiff, both of the layout of the complex as a whole and of the activities carried on there.

2.6 Apart from horse racing during the various racing meets and festivals held at Leopardstown Racecourse throughout the year, the complex is also used for other activities. This arises because although Leopardstown Racecourse is quite a busy racecourse, comparatively speaking, it is still the case that on the majority of days in the year there is no racing. Accordingly, the managers of Leopardstown Racecourse have long been concerned to try to generate some additional return on the property apart from that generated by racing activities. To this end, and by virtue of various arrangements, there is a golf club within the curtilage of the main race track, a disco or nightclub is operated in some of the buildings in and around the grandstand area, a farmers' mart is held from time to time on other parts of the property, and certain other buildings and lands have been let to the defendant company, Templeville Developments Ltd, (hereinafter "Templeville" or "the defendant") for the purposes of running a sports and health centre that trades as "The Westwood Club." The 1998 Lease and 1998 Licence, which are at the centre of this case, relate to the latter of these non-racing activities. It is therefore necessary to consider the relevant history of dealings between the plaintiff and the defendant leading up to the specific arrangements entered into in 1998.

2.7 The beneficial owner of the defendant is a Mr Philip Smyth. He and his company, Templeville, have a history of dealings with Leopardstown going back to 1982. Prior to entering into the 1998 Lease, Leopardstown had demised certain lands and buildings to Templeville pursuant to a lease dated the 19th of November 1993 ('the 1993 Lease') and previously Templeville (and its predecessors in title) held two earlier leases in respect of lands and buildings at Leopardstown Racecourse which were granted in 1982 and 1987 respectively.

2.8 The 1993 Lease, dated the 19th day of November 1993, was between Leopardstown of the first part, Templeville of the second part and Philip Smyth and Kevin Tansey of the third part, and demised certain premises at Leopardstown Racecourse, Foxrock, Co. Dublin, edged and cross-hatched in green, edged red, cross hatched in red and cross-hatched in blue on Map No 1 annexed thereto and edged red on the First Floor Plan also annexed thereto, to Templeville from the 1st day of October 1993 for the residue of a term of thirty years from the 1st day of October 1986.

2.9 The 1993 Lease also granted Templeville certain ancillary rights over an additional area, (hereinafter referred to as "the Yellow Lands" or the "Yellow Area") cross-hatched in yellow on Map No 1 annexed thereto, in particular the right to use same (or such other adjacent areas as the Landlord might reasonably specify) on a non-exclusive basis for parking on non-race days only and the additional right to construct eighteen tennis courts thereon. Subsequent to the execution of the 1993 Lease, eleven tennis courts were constructed by Templeville on the Yellow Lands, seven of which were indoor tennis courts situate within a structure known as "Dome No. 2" and four of which were outdoor tennis courts. The 1993 Lease further contained a provision, in clause 6(9)(1)(c) thereof, stating (with respect to the Yellow Lands) that:

> "If the Landlord requires to take back this area for its own purposes, it hereby agrees to provide the Tenant with a suitable alternative area elsewhere in the car parks at Leopardstown."

2.10 By way of further explanation as to what exactly Dome No 2 is, it is necessary to state that the facilities provided by Templeville on the demised property for use by members of The Westwood Club include a gymnasium, a 25 metre swimming pool and a large number of tennis courts. Some of these facilities are outdoor facilities and certain of them are indoor facilities. A significant proportion of the indoor facilities are accommodated within two enormous inflatable and self supporting domes located at one end of the Ballyogan field. Dome No 2 refers to the later of these two domes to be erected (circa March 1996), and the one that was closest to what is now the M 50 motorway.

2.11 While the possibility of the proposed M 50 motorway encroaching on the Leopardstown Racecourse complex had been recognised for many years, the exact route of the motorway was only finalised in the late 1990s. By 1997, while the actual trajectory of the motorway was not known to the nearest inch, it was clear to all concerned that it was going to cut a fairly substantial swathe through the Ballyogan field. It was recognised by the majority on the board of Leopardstown, although a minority dissented, that rather than oppose the motorway it would be more beneficial to Leopardstown to negotiate an arrangement with Dun Laoghaire-Rathdown County Council. The rationale for this was that what Leopardstown needed most was land rather than money. Quite apart from inevitably losing its existing sprint track, the loss of parking facilities on the Ballyogan field had potentially very serious implications for Leopardstown. The Ballyogan field was the biggest car park that was in any way proximate to the enclosures and its loss would represent a huge set back for the racecourse. So Leopardstown needed to acquire more land, both for the purpose of reconfiguring the actual racecourse in some way so as to allow for the creation of a new sprint track, and also to at least replace, and ideally to add to, the amount of existing parking that was going to be lost. Indeed, as Mr. Justice Clarke explained in his evidence, it was considered "…vital to secure extra land in the vicinity of the course or else there was a reasonable risk it wouldn't continue to be viable as a racecourse." The thinking was that if Leopardstown lodged an objection and forced the local authority to go through a process of compulsory acquisition they were likely to end up with just a sum of money in compensation, fixed by an arbitrator, in accordance with their statutory entitlements. However, since the local authority was the owner of, or could procure, certain parcels of land that were adjacent, alternatively proximate, to the Leopardstown Racecourse; and because the local authority was thought to be sympathetic to the objective of facilitating the survival of the racecourse having regard to its significant public amenity value; the majority of the Leopardstown board considered that it might be possible to achieve a negotiated arrangement with the local authority involving, or which might include, a land swap. This is what Leopardstown was hoping for and, indeed, ultimately achieved.

2.12 Accordingly, in 1997 Leopardstown opened formal negotiations with the local authority. While they reported to the Board of Directors which oversaw the process, the actual negotiators were its then Chief Executive, Mr. John White, and the then Chairman of the Board of Directors, a Mr. Denis McCarthy. Further, to assist them in conducting their negotiations, Leopardstown retained the expert services of Mr. Terry Sudway, Chartered Surveyor, and he was involved from an early stage. Discussions revolved around swapping the required portion of the Ballyogan field for two parcels of land owned, or that were at least procurable, by the local authority. One was an area to the right (i.e. to the south east) of the existing main race track and somewhat to the north east of the existing sprint track. The second was a field on the other side of the proposed motorway known as "Cotter's field". Leopardstown

envisioned that if Cotter's field was successfully acquired it would be put to use as an overflow car-park. However, because it was on the other side of the proposed motorway a pedestrian footbridge across the motorway would have to be provided, and the need to make provision for this also formed part of the negotiations.

2.13 In or about the same time that all of this was going on Mr. Smyth's company, Templeville, was looking to expand its facilities at Leopardstown and to build some new buildings. In particular, Templeville was hoping to build an extension to its main building on a site located between that building and the race course itself, and also to build a new building to house a crèche to be known as the "Junior Club" on a triangular piece of ground which had been demised to it under the 1993 Lease and which ran along one side of Dome No 1.

2.14 In so far as the proposed extension was concerned, Templeville required the permission of Leopardstown because the proposed extension, although partly to be constructed on a tennis court in respect of which it had a leasehold interest, also straddled a strip of land owned by Leopardstown and over which Templeville had merely a right of way. This meant that if Templeville wanted to proceed with its plans it would have to negotiate with Leopardstown to obtain its consent and such additional legal interest as might be necessary. In so far as the proposed new building to be located on the triangular site was concerned, Leopardstown could only object to the proposed improvement if it had reasonable grounds for doing so. However, Leopardstown was nevertheless anxious to have an input in terms of the design of what was proposed.

2.15 It should be stated at this point that for some years prior to this, the relationship between Leopardstown, on the one hand, as landlord, and Mr. Smyth, and his company, Templeville, on the other hand, as tenants, had been a strained one. However, the inevitability of the negotiations that were going to have to take place if Templeville hoped to proceed with the proposed extension to its main building gave Leopardstown certain leverage, and Leopardstown thought it might be able to obtain an input into the design of the proposed Junior Club building if its willingness to co-operate in the matter of the negotiations about the proposed main building extension was understood to be conditional upon it being granted such an input. Further, it was felt that an opportunity now existed in the context of the engagement that was likely to take place on the issues just mentioned, to also settle once and for all a whole range of other disputes and issues that had otherwise arisen in one comprehensive, and hopefully unambiguous, agreement.

2.16 These disputes, the full list of which was outlined by Mr. John White in his evidence, and which it is unnecessary for the purposes of this judgment to set out, included a dispute in relation to a licence granted to Templeville to use the Tote Hall from time to time for aerobics classes, and another dispute in which High Court proceedings, record no 1997 No 53P, had been instituted by Leopardstown against Templeville concerning access through an airlock arrangement, which had proved impractical, to the seven indoor tennis courts under Dome No 2 for parking on race days. The evidence of Mr. White concerning the background to the latter dispute is important in as much as it clearly establishes that as far back as 1996 Leopardstown was under pressure to provide car parking for its customers on major race days close to the enclosures; that it was concerned to maximise that and was fully determined to enforce what it considered to be its legal entitlement to park cars on the seven indoor tennis courts within Dome No 2.

2.17 At any rate, on the 10th of February 2007 the Board of Leopardstown, having considered the multiple issues, both new and ongoing, between Leopardstown and Templeville, and a report prepared by its lawyers, instructed its General Manager, Mr. John White, to approach Mr. Smyth with a view to trying to reach a negotiated settlement on all issues. Mr. White then had a number of meetings with Mr. Smyth, while Mr. Peter Law of A & L Goodbody, Solicitors, representing Leopardstown, corresponded with Mr. Conor Halpenny of P.C.L. Halpenny & Son, Solicitors, representing Templeville. This culminated in Mr. Law and Mr. White preparing a draft of potential Heads of Agreement reflecting a possible deal that might be achievable between Templeville and Leopardstown if the Board were amenable to it, and a report, both of which were considered by the Board of Leopardstown at a meeting on the 16th of October 1997. The report suggested to the Board that if:

> *"the Board were to approve in principle a deal along the lines of the proposed Heads of Agreement, it is recommended that a Committee should be formed with authority to negotiate on behalf of the Board with a view to that Committee bringing a final proposal before the Board at its next meeting which the Committee would be prepared to recommend to the Board for acceptance."*

This led to the establishment of a committee consisting of Mr. Frank Clarke (as he then was), Mr. Denis McCarthy and Mr. John White (hereinafter the Committee). Their brief was to bring forward proposals for consideration by the Board at a future Board meeting.

2.18 By this time (the 16th of October 1997) significant progress had been made in the on-going negotiations between Leopardstown and Dun Laoghaire-Rathdown County Council. In return for ceding some 20 acres approximately to the local authority for the motorway project, Leopardstown were to receive approximately 56 acres of new land from the local authority, 10 acres of which was represented by Cotter's field on the far side of the motorway. The main items still to be agreed were compensation for loss of profits and disturbance.

2.19 After the Board meeting on the 16th of October 1997, and at the behest of the Committee, Mr. Law of A & L Goodbody, Solicitors, set about trying to set up a meeting with Philip Smyth and the representatives of Templeville in order to try to progress matters. A meeting was tentatively arranged between the solicitors for the 11th of November, 2007. However, although the Committee was keen to meet with Mr. Smyth and Templeville in the hope of progressing matters, Mr. Smyth and Templeville were reluctant to attend the tentatively arranged meeting unless they could be assured that the Committee, or the persons attending the meeting on behalf of Leopardstown, would have authority to conclude an agreement on behalf of Leopardstown and to bind Leopardstown to what was agreed.

2.20 The members of the Committee were aware that they didn't have the authority to bind Leopardstown and that their brief was to formulate and recommend proposals to the Board for the Board's consideration. In the course of his evidence Mr. Justice Clarke stated that this was made clear to Mr. Smyth and Templeville. Moreover, although the Board of Leopardstown was not under a positive obligation to get the fiat of the Board of the I.H.A. in respect of everything it wanted to do, in this particular instance, having regard to the long term implications for Leopardstown of any potential settlement deal, the Board of Leopardstown would insist that any deal that they might be prepared in principle to agree to should be subject to ratification by the Board of the I.H.A. Indeed, when he was first informed by Mr. Law of the assurances that Mr. Smyth and Templeville were seeking, Mr. Clarke remarked to him that Templeville "could not have reasonably expected this" (i.e. that the Committee would have authority to bind Leopardstown) bearing in mind that Leopardstown was owned by a semi-state body.

2.21 Mr. Justice Clarke also explained that there had been issues in the past over whether persons had authority or didn't have authority and could speak for Leopardstown, and there had been suggestions that arrangements had been made between Mr. Smyth and individual directors where those directors had taken "a more hands-on approach on various issues than might have been in accordance with normal corporate governance" Accordingly, both he (Mr. Clarke) and the chairman were very anxious that there be

absolute clarity about who could do a deal and who couldn't do a deal. Mr. Law was told that he could inform Mr. Halpenny that if the Committee made a recommendation to the Board, it was likely, but not certain, that the Board would accept the recommendation and run with it.

2.22 On the 7th of November 2007 Templeville furnished a one page proposed Heads of Agreement document (hereinafter the "first Heads of Agreement") directly to Mr. White. It was in the following terms:

"HEADS OF AGREEMENT

Leopardstown Club Ltd and Templeville Developments will enter into a new 35 year lease on the same terms and conditions as the present lease with the following exceptions: --

1. Templeville Developments will surrender their interest in the area hatched yellow in the present lease map provided: --

(a) A similar quantum of parking will be given in areas surrounding the Templeville property.

(b) That space for outdoor tennis will be provided on the Racecourse when redesigned.

(c) Outdoor Tennis will be allowed to continue on the four outdoor courts and on the space under the present tennis Dome on non-race days.

2 Templeville Developments will agree to move the indoor tennis facilities from the area hatched yellow onto an area of the racecourse adjacent to the original tennis Air Dome which is not part of the car parks mentioned in the existing lease. The costs attached to this movement will not be borne by Templeville Developments but will be borne as part of an arrangement between Leopardstown Club Ltd and Dun Laoghaire Corporation.

3. Templeville Developments will surrender all their rights in the Tote Building provided: --

(a) That they are allowed to use the toilets and have the exclusive use of the vacant area above the toilets.

(b) That they are allowed the use of the storage area behind the toilets.

(c) That the service road presently being built will be extended so that deliveries to Templeville can be made by this route.

(d) That they are allowed to use the Tote Building in accordance with the license until the extension at the front of the building is completed and thereafter that they are allowed to use the Tote at times when there are no functions being run either by Leopardstown Club or other license holder.

4. Templeville Developments will be allowed to tender for the catering contract to run the function areas on equal terms with all other contenders including Des Smyth and that should their tender be the highest from a financial point of view and all other areas of the contract being agreed that they would be awarded such contract.

5. Templeville Developments will be allowed forthwith to build their two proposed developments i.e. the junior area in the triangle in front of the first tennis structure and the development over the first tennis court in front of Templeville Developments building provided: --

(a) That Templeville will give exclusive use of the new bar area to Leopardstown Club when required by them on race days.

(b) That Templeville provide a new larger storage area and maintenance office in the building being built in the triangle area in front of the Racecourse for exclusive use of Leopardstown Club."

2.23 On the 10th of November Mr. Halpenny wrote two separate letters to Mr. Law. In the first letter he confirmed that his clients would not be attending the meeting arranged for the 11th of November as they had been informed that the Committee would not have the power to bind Leopardstown.

2.24 The second letter to Mr. Law enclosed a somewhat amended version of the document that had been sent to Mr. White (hereinafter the "second Heads of Agreement"), and Mr. Halpenny stated therein that the amendments had been made by him "for clarification purposes". Referring to the first Heads of Agreement, the letter confirmed that it outlined "what our client understands your client's requirements to be in this matter and indicating what our clients' requirements are also." The letter further requested that the Committee would consider the amended document and "that they then seek your client's authority and instructions from the full Board to enter into a Heads of Agreement along these lines with our client."

2.25 The amended document was indeed somewhat clearer in its terms but, apart from more precisely describing relevant areas, features and mapping documents, it was not very different in substance from the original, save to the extent that it added two additional matters as paragraphs 6 and 7 respectively. As paragraphs 1 to 5 of the new document are similar in substance to the original it is not necessary to recite them. However, for completeness I should set out the new paragraphs 6 and 7. These were in the following terms:

"6. That the right of way in favour of Leopardstown Club Ltd, marked yellow on the Lease Map No 1. be extinguished (as clearly it will become unusable when Templeville's extension is built). That Templeville be granted an emergency exit from the new extension out onto the racecourse, to be used in emergencies only.

7. That the present proceedings between the parties be discontinued."

2.26 The stand off over whether the parties would meet continued for some weeks but eventually Mr. Smyth and Templeville agreed to treat with the Committee representing Leopardstown on the basis that had been suggested by Mr. Clarke and conveyed to Mr. Halpenny by Mr. Law, and a meeting was arranged for the 24th of November 1997.

2.27 However, although it had not been possible to arrange a meeting *inter partes* for the 11th of November 1997, a meeting was held on that date at the offices of A & L Goodbody, Solicitors, which was attended by personnel representing Leopardstown only. The attendees were Mr. McCarthy, Mr. Clarke, Mr. White and Mr. Law. In the course of that meeting the draft Heads of Agreement sent directly to Mr. White were discussed, and at the trial herein Mr. White produced and identified his own copy of that document on which he had made manuscript notes at that meeting.

2.28 In the course of giving evidence in chief at the trial Mr. White was asked by Counsel for Leopardstown to comment on this document, and specifically to indicate what he had understood the phrase "a similar quantum of parking will be provided in the areas surrounding the Templeville property", and next to which he had written "ok" in handwriting, to mean. He replied:

> "A. It was quite easy to understand from my point of view. It was the accommodation of the parking requirements of Leopardstown – of Templeville's members- in Leopardstown in – in-in Leopardstown on non-racing days.
>
> Q. And did it have any relevance in relation to size?
>
> A. No, it was quite simply an accommodation of the parking requirements of the clients of Westwood. It has no reference whatsoever to acreage, foot print. It was simple accommodation of the parking requirements, which later on we will define what we offered."

2.29 Mr. Justice Clarke gave evidence in relation to his understanding of Templeville's requirement for a 'similar quantum of parking' as follows:

> "Q. Yes. And can I – the phrase 'a similar quantum of parking', obviously it means quantity in one sense, did you believe it to mean anything more terms of the nature of the right to park on other land?
>
> A. I didn't understand it to mean anything other than physical amount rather than the legal type of ownership that might be had.
>
> Q. I see. Now, I think on foot of that you were agreed in principle to –to what has been suggested, subject to further discussions with Templeville, is that right?
>
> A. Yes. ."

2.30 Further, Mr. Justice Clarke gave evidence as to what the understanding in relation to that was at the meeting on the 11th of November 1997:

> "Q. Yes. So there was a broad acceptance, if I can put it that way, on the Leopardstown side of the request for an alternative quantum of parking?
>
> A. Well, I would say there was a broad acceptance on Leopardstown's side that it would be reasonable that we would have to concede extra parking.
>
> Q. Yes?
>
> A. I mean, the very qualification in Mr. Law's note is that there was to be discussion on, amongst other things, 1A and 1A is the very bit that says 'quantum'.
>
> Q. Of course?
>
> A. So I couldn't read it as saying there was broad acceptance that there was necessarily going to be the same quantum."

2.31 Mr. Law also gave evidence as to his understanding of 'similar quantum':

> "Q. And was that your understanding of what a 'similar quantum of parking' meant?
>
> A. Well, at the time, I mean, I probably didn't give that much consideration, but my understanding was that the, the areas where Templeville were parking were car parks 1 and 2. I probably hadn't focused on the fact that this they also had the right to park cars on the area hatched yellow but my understanding was that they very rarely used that area to park cars. So I – I assumed we are talking about car parking spaces rather than areas of land."

2.32 It is appropriate at this point to digress from strict chronology being outlined to say that when asked to comment on the proposed Heads of Agreement in the course of his evidence Mr. Justice Clarke made a number of points, which included, *inter alia*, the following. First, the proposed new 35 year lease would provide Templeville with a significant extension of its term as lessee. Secondly, the interest in the area hatched yellow that Templeville would be surrendering did not represent a leasehold interest or any kind of demise. Rather, it was a non-exclusive right to park cars there on non race days. There was no exclusive right of occupation and therefore that interest, whatever it might be, could not be the subject of a lease. While lawyers might debate whether this entitlement constituted a licence, a bare licence or an easement it was certainly not a lease in so far as Leopardstown was concerned. Thirdly, in so far as the document referred to a space for outdoor tennis being provided "on the race course when redesigned", it was understood that the term "race course" was to be read as meaning the Leopardstown Racecourse campus and not the race track itself, the latter narrower meaning never having been in contemplation. Fourthly, up until the 19th of November 1997, he had believed that from Leopardstown's perspective the proposed term providing that "outdoor Tennis will be allowed to continue on the four outdoor courts and on the space under the present tennis Dome on non-race days" did not represent a problem, because it was thought that none of those facilities was likely to be affected by the trajectory of the motorway. However, on the 19th of November 1997 he was briefed by Mr. Law about a conversation that he (Mr. Law) had with Mr. Sudway two days earlier on the 17th of November, 1997. Mr. Sudway had informed Mr. Law that the configuration of the motorway might require Dome No 2 to be moved, after all. Fifth, clause 4 was likely to be problematic on the basis that Leopardstown was wholly owned by a public body. If they were going to offer a catering franchise they would have to behave as a public body rather than a private body in terms of awarding the franchise. Finally, clause 5A represented the gain of "a fairly attractive facility" from Leopardstown's perspective.

2.33 By way of further digression it should be stated that Mr. Law and Mr. Sudway both testified as to their recollection of the telephone conversation of the 17th of November, 1997. Moreover, they both agreed that the essentials of it were accurately

recorded in a telephone attendance note dictated by Mr. Law in the immediate aftermath of this conversation. The contents of this attendance note were put to Mr. Law for his verification and were thereby read into the record.

2.34 Before dealing with the substance of the conversation between Mr. Law and Mr. Sudway, the Court should record that an issue cropped up, from time to time during the case, as to how solicitors' attendances were properly to be used in the unfolding of the evidence. It is therefore appropriate that the Court should indicate its general approach to the reception of, and evaluation of, the evidence of witnesses who had minuted or recorded particular events or transactions, and in particular solicitors who had recorded attendances.

2.35 There was general recognition by counsel on both sides that solicitors' attendances, and like documents, fell into the category of memory refreshing documents. However, in a discussion concerning an attendance taken on a different occasion to the one that we are immediately concerned with, Mr. Michael McDowell S.C., who was appearing with Mr. MacCann S.C., for the plaintiff, urged upon the Court that "it would be completely impractical and would defeat the ends of justice" if the witness were to be required to recall all of the details contained in his attendance from memory.

2.36 On one view of it, a solicitor's attendance should not be allowed to be read into the record because it is arguably inadmissible both as hearsay and as offending against the rule against self corroboration. However, taking another view, and it is the Court's view, the contents of a solicitor's attendance note may in appropriate circumstances be put to the author thereof for verification and to be thereby read into the record under the guise of the witness giving evidence from a refreshed memory. Adopting this view the attendance is not to be regarded as evidence in its own right, and the fact of its existence can in no way corroborate the witness's testimony.

2.37 The Court finds support for its view in the following passage from Murphy on Evidence, 7th ed (Blackstone Press, 2000), of which I explicitly approve, and which I adopt as a correct statement of the law. Murphy states (at para 16.6.1):

> "Reference by a witness to a contemporaneous document may have one of two results. The first, termed 'present recollection revived', is that the document will succeed in refreshing the memory of the witness, enabling him to give oral evidence about the facts. The second, termed 'past recollection recorded' is that the document will be unsuccessful, so that the witness can, at best, say that the document was accurate when made, and that the events were fresh in his mind at that time. This may occur, for example, when the document is a record of routine transactions, and is one of many documents made by the witness, perhaps a considerable time in the past. In many cases there is no reason to distrust the record, even though the witness may no longer have any personal memory of the facts, as long as he can vouch for the reliability of the record. But American writers, from Wigmore on, have generally advocated dealing with these two results in different ways. In the case of present recollection revived, they would require the witness to give evidence from his refreshed memory, and accord the document no evidential value. This corresponds with the view of English law. In the case of past recollection recorded, however, they would permit the witness to read the relevant parts of the document by way of an exception to the rule against hearsay (though the document itself would not be admitted as an exhibit). On the face of it, this differs from the English approach, but the difference may be more apparent than real because, in practice, it is not unusual for judges to relax the strict rule, and permit a witness to read from the document under the guise of giving evidence from a refreshed memory. Such evidence is, of course, open to obvious comment, and may have relatively little weight.
>
> English law has perceived no need for such subtleties. At least since *Maugham v. Hubbard* (1828) 8 B & C 14, it has been established that even in the case of past recollection recorded, which Prof Cross termed 'reconstruction' of the events (Evidence, 5th ed., 233), the witness is treated as having personal knowledge of the events recorded in the document, provided that he can state that the document was made contemporaneously and was accurate when made. In *Maugham v. Hubbard* , a witness was shown an acknowledgement of a payment, signed by him, and thereupon testified that, although he had no recollection of having been paid a sum stated in it, he had no doubt that such was the case. This evidence was held to be sufficient to prove the payment, even though the acknowledgement was unstamped and therefore could not be sufficient without the parole evidence of the witness that the payment had in fact been made. Thus, at common law, whether the case is one of present recollection revived or of past recollection recorded, the witness may give evidence, having looked at the document; but the document is hearsay, and will not be admissible in its own right. Nonetheless, there are situations in which memory-refreshing documents may be admissible, at least for limited purposes, at the instance of the examiner-in-chief or the cross-examiner, according to the circumstances."

2.38 Returning to the particular attendance of Mr. Law under discussion, although in this instance, the witness did not assert a difficulty in remembering the details of his telephone conversation with Mr. Sudway such as to prevent him from giving evidence on the basis of 'present recollection revived' and a need to rely on 'past recollection recorded,' the Court did not see fit to intervene of its own motion to prevent his attendance being put to him and thereby read into the record because first, the defendant was not objecting to this process, and secondly, because Mr. Law was asserting the accuracy of his record without ostensible quibble or protest from counsel for the defendant.

2.39 As it happened, it later emerged from the manner in which Mr. Law was cross-examined about his attendance that the defendant also accepts its accuracy.

2.40 Returning now to the evidence, as the details of the conversation between Mr. Law and Mr. Sudway are important for the purpose of contextualising events occurring, and the actions of the parties, at this point in time I believe it is appropriate in all the circumstances to recite what occurred as recorded in Mr. Law's attendance. It states:

> "Attending on Terry Sudway when he rang. He said that John White had suggested that he telephone us. He said that he understood from the County Manager of Dun Laoghaire-Rathdown County Council that Philip Smyth was threatening to apply to the High Court restraining them from proceeding with the CPO on the grounds that he was an interested party and had not been served with notice. He confirmed that the proposed new motorway would infringe upon the area hatched in yellow on the map attached to the lease which was available to Philip Smyth for erecting tennis courts. He said that he had been unaware of Philip Smyth's interest until recently. He had always understood from Leopardstown that if necessary, they were entitled under the lease to relocate the Air Dome and tennis courts to another area in the car park. He queried whether Leopardstown should now serve notice on Philip Smyth of their intention to do so.
>
> We said that we understood that there was no area in the car park available for relocating Philip Smyth since these were all subject to the new motorway. He confirmed that this was the case. He said that in return for Leopardstown ceding this land to the County Council, the County Council were prepared to cede to them land at the Ballycorus Road end. We

pointed out that this was not yet Leopardstown's property and accordingly it would not be appropriate for them to advise Philip Smyth that they proposed to relocate him on this property. He agreed that no doubt Philip Smyth would argue that any such notice was not *bona fides* in that Leopardstown could not at the present time comply with this notice.

He said that there were two crucial dates. He said that the first date was the 24th of November 1997 which was the deadline for submitting objections to the proposed CPO. He said that Tuesday, 20th January had been fixed as the date for the public inquiry. He said that the position was very serious in that if Philip Smyth did manage to thwart the County Council, then Leopardstown's compensation package could ultimately be reduced from £18 million to £12 million.

We pointed out that Leopardstown were in the process of endeavouring to reach a compromise with Philip Smyth in relation to all outstanding issues and that it was proposed that it was a term of any ultimate agreement that Philip Smyth would agree to relocating the Air Dome and ceding back to Leopardstown the area cross hatched in yellow on the map attached to the lease. We said that obviously this was crucial as far as these negotiations were concerned. We said that we would advise John White/Frank Clarke of the position."

2.41 Returning to the chronology, the meeting of the 24th of November 1997 was attended by Mr. Denis McCarthy, Chairman, Mr. Frank Clarke S.C. and Mr. David Power, Directors, Mr. John White, General Manager and Mr. Peter Law, Solicitor, on behalf of Leopardstown. It was also attended by Mr. Philip Smyth, a Mr. Kieran Condell, Ms Sinead Watson, Manager of The Westwood Club and Mr. Conor Halpenny, Solicitor, on behalf of Templeville. According to Mr. Justice Clarke the meeting was constructive and cordial. The second Heads of Agreement were discussed and there were no major areas of dispute.

2.42 Following this meeting Mr. Law prepared a detailed attendance note concerning what had occurred which, he testified, accurately records what transpired at the meeting. Mr. Justice Clarke agreed that the attendance was accurate.

2.43 Once again, while production of this attendance by Mr. Law, other than for use by him as an *aide memoire* for the purpose of refreshing his memory (subject to being granted leave to do so by the Court), might have been objected to as hearsay and as offending against the rule against self corroboration; it was not in fact objected to on either basis. However, it may be mentioned in passing that it was in the context of a discussion about how this attendance might be used that Mr. McDowell S.C. made the remarks that the Court has earlier alluded to. In the circumstances the Court, in the exercise of its discretion, did not consider it appropriate to require the witness to give his evidence solely from memory refreshed on a strict "present memory revived" basis. Taking the view that it was unreasonable to expect a busy solicitor to recall all details of a lengthy meeting attended almost twelve years previously solely from memory, even on the basis of the witness having been afforded an opportunity to look at his contemporaneous or near contemporaneous record prior to testifying, I allowed the contents of the attendance to be put to the witness for his verification and thereby to be read into the record, not as evidence in itself, but rather under the guise of the witness giving evidence from a refreshed memory.

2.44 It is important to also record that a separate and different objection was raised by counsel for the defendant, Mr. Michael Collins S.C., at this point. This was an objection to an attempt by counsel for the plaintiff, Mr. Lyndon MacCann S.C., to get the witness to comment on the contents of a witness statement made by Mr. Halpenny, in the light of Mr. Law's testimony as refreshed by his attendance. This was in circumstances where the witness statement in question had been furnished to the plaintiff in the pre-trial exchange of documents but the defendant had not given any commitment to definitely call Mr. Halpenny, and had said that he was reserving his rights in that regard. The defendant's primary objection was that this was a stratagem on the part of the plaintiff to get aspects of Mr. Halpenny's statement into evidence by the back door. In support of his objection Counsel for the defendant sought to rely upon a ruling in the case of *Mooreview Developments Ltd & Others v. First Active plc & Ors.* (Unreported, High Court, Clarke J., 6th March, 2009), where a plaintiff had sought to place reliance on the contents of witness statements filed on behalf of the defendant in replying to an application by that defendant for a non-suit. Clarke J had ruled:

> "A statement of evidence intended to be given by a witness is no more than what its description states it to be. It is a statement that the party concerned anticipates that, if necessary, the named witness will give evidence along the lines of the content of the witness statement concerned. In the absence of any agreement by the parties in advance that all of the witness statements filed should be taken as evidence in chief, or a form of similar agreement which would turn a statement of intended evidence into an admitted statement of actual evidence, I do not believe that the plaintiff is entitled to place any reliance on defendants witness statements in circumstances such as arose in this case."

2.45 The Court upheld the defendant's objection and, following the approach of Clarke J in *Mooreview Developments Ltd & Others v. First Active plc & Ors.*, ruled that for the time being Mr. Halpenny's witness statement could not be referred to or relied upon.

2.46 Turning now to the substance of the meeting of the 24th of November 1997, Mr. Law's attendance records (*inter alia*):

> "The following points were discussed and agreed where stated:
>
> 1. It was agreed that Templeville Developments would surrender its interest in the area hatched yellow in the map attached to the lease subject to the following:
>
> > (i) a similar amount of parking would be provided in the remainder of area hatched in yellow not ceded to the Local Authority together with the area on the near side of the gate into the Dome area and possibly, the area in front of the stands which was in the process of being developed. Philip Smyth said he was prepared to take in effect what he could get.
>
> 2. Philip Smyth explained that the second Air Dome covered seven courts, some which were single courts. It was agreed therefore that if the new Air Dome was to include seven courts, provided Templeville had four outside courts, this was sufficient. Any further courts would be created by them at their own expense. It was recognised that Leopardstown had the right to use the tennis courts on race days for car parking.
>
> 3. As regards the relocation of the Air Dome, Philip Smyth said that he was not particularly fussed as to its new location. It was agreed that no-one could be definite at this stage as to where the new location would be. Frank Clarke said that clearly it was in Leopardstown's interest to ensure that the second Air Dome was as close as possible to the existing Air Dome and it may well be that they would not comply with the stipulation of ten feet referred to in paragraph 2 of the Draft Heads of Agreement. Philip Smyth said that he was not too concerned about this.
>
> As regards the costs and expense of moving the dome, Philip Smyth said he had been in discussion with the County Council and they had confirmed to him that they were prepared to underwrite this cost. This was confirmed by Frank

Clarke. It was agreed by all concerned whereas Philip Smyth had experience in erecting and taking down the Air Dome, it would be sensible for him to undertake this task. However, if the County Council wished to do it, it was agreed that Templeville would not be required to relocate the Air Dome until the site of the new location had been prepared. Philip Smyth confirmed that he would not claim any compensation for disturbance arising out of the requirement that he relocates the Air Dome provided that it is effected efficiently.

4. As regards 3 (a) / (c) of the draft Head of Agreement, this did not cause any difficulty. Philip Smyth said that it seemed to him that Leopardstown should use their best endeavours to persuade the County Council to build a slip road from the proposed new motorway, giving access to Leopardstown's complex for those persons travelling north. He said that the present plan provided for a very cumbersome route into the Leopardstown complex and this would no doubt result in car parking at the entrance becoming very crowded very quickly. Denis McCarthy said that they were in the process of taking this matter up with the County Council."

2.47 Paragraphs 5, 6, 7, & 8 of the attendance relate to discussions about, and agreements reached in relation to, continued (short term) use of the Tote Hall for aerobics, the tendering process in relation to the catering contract, competition between the proposed Leopardstown crèche and the proposed Westwood crèche, the proposed development over the tennis court to the front of the Club House, and a licence to be granted by Templeville to Leopardstown for the use of the bar area in the extension on race days. As the court is not centrally concerned with these aspects of the matter it is not necessary to recite these paragraphs.

2.48 Paragraphs 9, 10 and 11 were then in the following terms:

"9. Access on race days was discussed. It was agreed that this should be looked at again and should be included by way of a side letter. This side letter should be definitive as far as possible as to the positive position regarding access of Club members on race days. In turn, the prohibition in the Lease regarding the use by Club members of the Club on race days should be omitted from the Lease. On non race days the members would of course have an unfettered right of way to the Club House.

10. It was agreed that there should be an arbitration provision dealing not only with access on race days but also other matters arising out of the lease. This would be a far quicker and cheaper procedure than the parties having to go to Court.

11. It was agreed that the clause in the Lease entitling Leopardstown to relocate Westwood Club should remain."

2.49 Paragraph 12 of the attendance relates to discussions about a possible rent increase and paragraph 13 relates to discussions about a possible service charge. The court is not concerned with these matters. Finally then, paragraph 14 of the attendance is in the following terms:

"14. Philip Smyth said that pending the works being carried out by the County Council, they would of course like to continue to use the second Air Dome and the car parking on the area hatched in yellow in the map to the Lease. It was agreed that this could be done by a short term licence. It was agreed that those rights which would survive the motorway works should vest in the new Lease, including the area ear-marked for the new dome once it has been moved. However, those rights which are ultimately usurped by the motorway works should be vested back to Templeville by way of licence."

(Mr. Law was asked in the course of his evidence to explain what was meant by paragraph 14, and he stated:

"It was meant that the relocation of the new dome and the tennis courts would vest in Templeville by way of a lease and that the car parking that remained on the area hatched yellow would be by way of licence.")

2.50 Arising out of the meeting on the 24th of November, 1997 Mr. Halpenny produced a further and much more extensive document, described by Mr. Justice Clarke in his evidence as the "first large Heads of Agreement" (hereinafter the "third Heads of Agreement"). This was sent to Mr. Law under cover of a letter of the 27th of November, 1997 and Mr. Law duly forwarded it to Mr. Clarke for his consideration. As this was the template document on which all subsequent revisions were based it is appropriate at this point to set out those provisions relevant to the issues that the Court has to decide.

"HEADS OF AGREEMENT

1. Interpretations

'Leopardstown'	=	Leopardstown Club Limited
'Templeville'	=	Templeville Developments Limited
'The Old Lease'	=	Lease dated 19th November 1993 Leopardstown Club Limited to Templeville Developments Limited and Philip Smyth and Kevin Tansey.
'The New Lease'	=	The new Lease proposed to be granted by Leopardstown to Templeville in return for the surrender of the old lease and on foot of the altered terms and conditions, more particularly set out hereunder.
'The First Dome'	=	The tennis dome which was constructed first.

'The Second Dome'	=	The tennis dome which was constructed second and is situate on the area hatched yellow on Lease map No 1 attached to the old Lease.
'The Map'	=	Lease map No 1 attached to the old Lease.
'The C.P.O'	=	The proposed Compulsory Purchase of lands at Leopardstown by Dun Laoghaire Rathdown County Council.

Leopardstown and Templeville, after the benefit of legal advice and with the intention of creating legally binding contractual relations are entering into this 'Heads of Agreement' document for the purpose of resolving various outstanding matters and differences which have arisen between the said parties.

2. Area Hatched Yellow
It is noted that a part of the area hatched yellow on the map will be required by Dun Laoghaire Rathdown County Council, for its proposed South Eastern Motorway C.P.O. Under the old Lease Templeville is entitled to build 18 tennis courts on the area hatched yellow, 7 of which are already constructed under the second dome, 4 of which are already constructed as open air tennis courts and a further 7 of which still remain unconstructed. Templeville is also entitled to use the areas hatched yellow for car parking on non race days.

At the request of Leopardstown and to facilitate the construction of the new motorway, Templeville has agreed to an amended arrangement in respect of the above tennis and car parking facilities and Leopardstown has agreed to provide Templeville with a 'package' which will provide equivalent facilities as near as possible to the present location.

Templeville has agreed that the present tennis facilities and rights in respect of the area cross hatched in yellow on the map and the car parking rights on non race days may be relocated as set out herein

At this stage, Leopardstown cannot indicate precisely how much of the tennis facilities and Templeville's other rights may need to be relocated or precisely to what location the tennis facilities and rights are to be moved, but Leopardstown has agreed to provide a suitable site for such relocation, adjacent to the first dome. To enable relocation to take place in due course, Leopardstown hereby agrees:-

> (a) To demise to Templeville a site adjacent to the first dome to enable Templeville to relocate a second dome and the 7 indoor tennis courts therein and to indemnify Templeville in respect of the total cost involved in such relocation as is set out in 3 below.
>
> (b) If any or all of the existing 4 outdoor tennis courts adjoining the second dome have to be relocated as required by the construction of the motorway, Leopardstown will demise Templeville adjacent to the first dome or elsewhere, subject to Templeville's agreement, a site on which replacement outdoor tennis courts can be constructed by Templeville, and Leopardstown will indemnify Templeville in respect of the total cost involved in such relocation as set out in 3 below.
>
> (c) Templeville will retain its existing rights to have 18 tennis courts (including 7 covered by an air dome) as set out in the old Lease, it having already constructed 11 of such courts. In the event that the second air dome and the 7 indoor courts herein are relocated in whole or in part (at Leopardstown's expense) on the site which presently incorporates the second dome and the 4 adjoining outdoor courts, Leopardstown will demise to Templeville :-
>
> (i) A site adjacent to the first dome and will indemnify Templeville in respect of the construction thereon of the same number of tennis courts as may no longer be available to Templeville out of the total of 11 courts presently constructed and
>
> (ii) A site adjoining the site at 2(c)(i) above on which Templeville can construct, if it so wishes and at its own expense, 7 further outdoor courts.
>
> (d) Any of the existing 11 courts (4 outdoor and 7 presently covered by the second dome) which remain after the relocation mentioned above will be available to Templeville as outdoor tennis courts on non race days.

The matter of replacement of Templeville's existing car parking rights generally and following its surrender of the present parking rights under the old lease is dealt with at 4 below.

The provisions of paragraph 6(9)(1)(c) on page 26 of the old Lease shall specifically be incorporated into the new Lease to have application to the various tennis facilities referred to above."

2.51 Clause 2 also contains one further subparagraph relating to the preparation of maps and which it is unnecessary to recite, and then clause 3 deals with matters of indemnity and liability for the costs of the proposed relocations and associated works, and so on. Clause 4 is significant in the context of the issues that the Court has to decide and it is appropriate to recite it. It provides:

> "4. Lease, Licence and Demise
>
> A. The new lease shall permit Templeville to use and occupy:-
>
> (a) So much of the area as hatched yellow as is not affected by the C.P.O. for parking and for outdoor tennis courts on non-race days.
>
> (b) The area outlined in blue on the map, for parking,
>
> (c) The tarmacadamed area between the front of the grandstand and the race course, for parking on non-race days.

(d) Such other areas of car parking which may be required by the club to facilitate its members on non-race days.

Where open air tennis courts are used both for tennis and parking on race days, as Templeville has already financed and constructed those courts Leopardstown shall be responsible for damage, wear and tear caused by parking and Templeville shall be responsible for damage, wear and tear caused by tennis.

B. Leopardstown will also grant a licence to Templeville (to run from 1st January 1998) over the area hatched yellow on the map, for same to be used as it is currently used (i.e. for seven domed tennis courts and 4 open air tennis courts and for car parking on non race days).

This licence shall run concurrently with the new Lease from 1st January 1998 until such time as the domed tennis facilities and such of the 4 open air tennis courts as are necessary are relocated, as described above, and shall be a valid and subsisting licence in all respects (as if it had been a grant of a Lease), until the said relocation has been completed, notwithstanding that these documents confer rights and interests over the same area of land."

2.52 Clause 5 of the document deals with "Disturbance", clause 6 deals with the "Tote Hall", clause 7 deals with the "Service Road", clause 8 deals with Templeville's proposed "Developments", clause 9 deals with a "Licence back" from Templeville to Leopardstown of the bar in the proposed new extension on race days, clause 10 deals with the existing "Right of Way and [a] Demise" of that area to Templeville to facilitate the new extension., clause 12 deals with "Competing Interests", clause 13 deals with issues relating to "Access on race days", clause 14 deals with "Financial Matters", clause 15 deals with "Variations", clause 16 deals with "Sub-letting", clause 17 deals with "Miscellaneous" issues and, finally, clause 18 sets out a "Summary of Documentation" to be prepared to give effect to matters provided for in the Heads of Agreement once executed. The Court is not centrally concerned with any of these matters and it is therefore unnecessary to recite any of these clauses at this point.

2.53 It is appropriate to digress here to record that Mr. Justice Clarke was asked to comment on aspects of this document in the course of his evidence, and did so. The relevance of these comments, which for the moment have no particular context, will become apparent later in this chronology. He stated (with reference to subclauses 2 (b) and 2(c)(i) and (ii)) that he understood that the lands on which the replacement tennis courts were to be built were to be the subject of a demise from Leopardstown to Templeville, subject to a licence back to Leopardstown on race days. He further testified that, as regards the status of remainder of the Ballyogan field:

"My understanding of it was that we would have to give a demise of the tennis areas and that the remainder, being the parking areas, were to be dealt with in accordance with subsequent clauses and not on the basis of a demise."

2.54 Commenting on the provision in Clause 2 of the Heads of Agreement providing for the incorporation into the new Lease of paragraph 6(9)(1)(c) on page 26 of the old Lease, Mr. Justice Clarke stated:

"I didn't understand that to relate to a demise because it comes immediately after a provision dealing with car parking rights which I didn't understand to be a demise. So it was a shift of the area over which those car parking rights would be exercised."

2.55 Then, asked to comment on clause 4 A (a) of the Heads of Agreement, he stated:

"Well it didn't seem to me that that was consistent with a lease given that it wasn't exclusive possession or permanent possession."

2.56 When asked to comment on clause 4 A (c), Mr. Justice Clarke, having first confirmed that this area comprised the bookmakers ring and areas adjacent to it, stated:

"It certainly would have been a very strange phenomenon if we were giving a lease of that area."

2.57 When asked to comment on clause 4 A (d), the following exchange occurred between Counsel and Mr. Justice Clarke:

Q. ….what did you understand that to refer to?

A. That was parking rights; that if the first three areas were insufficient for the needs of Templeville, that we would provide them with other car parking rights on non race days.

Q. On areas used for car parking, is that it?

A. Yes.

Q. Now, stopping there. When you examined that, did that suggest to you that there was any proposal that there should be a 5.5 acre demise on top of all of that?

A. No.

Q. And just on that issue, would you -- Leopardstown was losing car parking space to the CPO process. What would the effect of 5.5 acres of further loss of car parking on race days be, can you tell the Court?

A. Well, as I already explained, car parking was tight. It seemed that the arrangements that were likely to be entered into with Dun Laoghaire /Rathdown would solve the problem, but to lose another 5 acres would effectively have put us back into position 1 with a significant shortfall on adequate car parking.

Q. Did you or any, to your knowledge, any of your fellow directors or executives of Leopardstown ever contemplate that outcome?

A. No.

Q. And, as far as you know, was it ever raised in your presence by anybody else?

A. When you say 'it', you mean?

Q. The concept of you giving a demise of 5.5 acres which would not be available to you on race days?

A. That was never raised in my presence and, to the best of my knowledge, never raised in the presence of anyone else in Leopardstown."

2.58 The witness then added that it was necessary to emphasise the premium nature, from Leopardstown's point of view, of parking in the areas under discussion and stated:

"....to lose a significant amount of land by demise in that area to Templeville would have been particularly disastrous from Leopardstown's point of view."

2.59 Returning again to the chronology of events, early on the morning of the 2nd of December 1997 a meeting was held to discuss the third Heads of Agreement. This meeting was attended by Peter Law and Frank Clarke on behalf of Leopardstown and by Philip Smyth, Kieran Condell and Conor Halpenny on behalf of Templeville. At this meeting, Frank Clarke suggested various amendments to the third Heads of Agreement and these were discussed. For the most part his suggested amendments were uncontroversial and were readily agreed to. The Court is really only concerned with the amendments proposed and agreed to in respect of clause 2 of the document. In that regard there is, once again, a helpful attendance note of Mr. Law which was produced and which both sides accept is accurate. This records:

"Frank Clarke suggested that in relation to paragraph 2, dealing with the area hatched in yellow, it would provide that Leopardstown would grant a Licence to Templeville to operate the dome and tennis courts. Subsequently they would serve a Notice on Templeville specifying where the dome and tennis courts were to be moved at the expiry date of the Notice. He said that this Notice would impose an obligation on Leopardstown to carry out the necessary works and would, at the same time, terminate the Licence. He said that a supplemental Deed would then be entered into between the parties increasing the demised area in the Lease to include the new site for the dome and tennis courts. This area would consist of an area with a dome containing seven courts, an area with a minimum of four outdoor courts and an area upon which Leopardstown were entitled to erect a further eleven outdoor courts. It was possible that part of this area would include part of the area hatched in yellow. It was agreed that a new map should be prepared for affixing to the Lease and that this map should be as simple as possible."

2.60 Before the meeting broke up it was agreed that since Peter Law was travelling to London at lunchtime on that day, Conor Halpenny should communicate directly with Frank Clarke pending Mr. Law's return, in order that matters might be progressed as quickly as possible.

2.61 Later on the same day and arising out of this meeting Mr. Halpenny produced an amended version of his document (hereinafter "the fourth Heads of Agreement"), and sent this directly to Mr. Clarke by fax. His covering letter stated:

"I believe that this incorporates all the suggested amendments, but if you think there is anything I have overlooked, please do not hesitate to telephone me."

2.62 The scheme of the fourth Heads of Agreement was somewhat altered as compared to the previous version. For the purposes of this judgment the Court is only concerned with clauses 1, 2 and 3 which are substituted for and replace clauses 1 to 4 inclusive of the third Heads of Agreement. (The fourth Heads of Agreement also contains a new clause 10 but that is of no relevance to the issues with which the Court is concerned. However, it should be noted that the various amendments did necessitate a renumbering of paragraphs in the remainder of the document. As a result it remains a 17 clause document but the clause numbers do not directly correlate as between the two versions.)

2.63 Clause 1, dealing with "interpretations", is in all respects identical to clause 1 in the previous version save for the following addition:

"'The area hatched yellow' = The area hatched yellow on the map attached to the old Lease"

2.64 The new clauses 2 and 3 (to the extent that they are relevant) are in the following terms:

"2. <u>Area Hatched Yellow and change of land process and surrender</u>

A It is noted that a part of the area hatched yellow on the map will be required by Dun Laoghaire Rathdown County Council, for its proposed South Eastern Motorway C.P.O.

Under the old Lease Templeville is entitled to build 18 tennis courts on the area hatched yellow, 7 of which are already constructed under the second dome, 4 of which are already constructed as open air tennis courts and a further 7 of which still remain unconstructed. Templeville is also entitled to use the areas hatched yellow for car parking on non race days.

At the request of Leopardstown and to facilitate the construction of the new motorway, Templeville has agreed to an amended arrangement in respect of the above tennis and car parking facilities and Leopardstown has agreed to provide Templeville with a 'package' which will provide equivalent facilities as near as possible to the present location.

Templeville has agreed that the present tennis facilities and rights in respect of the area cross hatched in yellow on the map and the car parking rights on non race days may be relocated as set out herein

At this stage, Leopardstown cannot indicate precisely how much of the tennis facilities and Templeville's other rights may need to be relocated or precisely to what location the tennis facilities and rights are to be moved, but Leopardstown has agreed to provide a suitable site for such relocation, adjacent to the first dome. To enable relocation to take place in due course, Leopardstown hereby agrees as follows:-

B. Leopardstown will grant a licence to Templeville (to run from 1st January 1998) over the area hatched yellow on the map, for same to be used as it is currently used (i.e. for seven domed tennis courts and for 4 open air tennis courts and for car parking on non-race days).

This licence shall run concurrently with the new Lease from 1st January 1998 until such time as the domed tennis facilities and such of the 4 open air tennis courts as are necessary are relocated, as described below, and shall be a valid and subsisting licence in all respects (as if it had been a grant of a Lease), until the said relocation has been completed, notwithstanding that these documents confer rights and interests over the same area of land.

C. At some date in the future, Leopardstown shall serve a notice on Templeville nominating a site ("the new site") more particularly described at E below to which it will call upon Templeville to relocate its second dome and tennis facilities and such of the 4 outdoor tennis courts as may be required to be relocated.

The said notice shall identify a reasonable period of time ("the notice period") during which this relocation is to take place and by which time it is to be completed. At the expiry of the notice period the following works and events shall have been completed or occurred: --

(i) The second tennis dome and tennis facilities together with such of the four outdoor tennis courts as may be required, will be relocated to the new site.

(ii) The permanent demise of the new site and such of the tennis courts on the area hatched yellow as survive the relocation shall be granted subject to licence back to Leopardstown for the use of all outdoor tennis courts (except for the one remaining to the front of the Westwood Clubhouse) for parking on race days.

(iii) A supplemental deed to give effect to (ii) above will be granted incorporating a revised map, clearly identifying the new location and arrangement.

(iv) The licence referred to at B above shall come to an end.

D. After the notice period Templeville's total tennis court entitlement on the area hatched yellow and on the new site shall continue to comprise of : --

(i) 7 indoor tennis courts situated under the newly relocated second dome,

(ii) A minimum of 4 completed outdoor tennis courts,

(iii) An entitlement to build further outdoor tennis courts to bring the total number of outdoor tennis courts to 11 (which number is to include such of the present tennis courts situate on the area hatched yellow, as survive the relocation of the second dome).

E. The new site shall be sufficient and adequate to replace such of Templeville's existing tennis facilities and rights as cannot be accommodated on the area hatched yellow, and in particular, the following criteria shall be met: --

(i) The new site shall be adjacent to the present location of the first dome,

(ii) The new site shall accommodate 7 indoor tennis courts, covered by the relocated second dome,

(iii) The new site shall accommodate such of the 4 outdoor tennis courts as may be required to be relocated,

(iv) The new site shall provide for further adequate space to accommodate a further 7 outdoor tennis courts to be built by Templeville at Templeville's expense, should it so wish, provided that the maximum number of outdoor tennis courts available to Templeville on the area hatched yellow and on the new site shall not exceed 18 (including the 7 covered by the second dome).

In choosing the new site, Leopardstown shall consult with Templeville in advance of serving the notice referred to above and shall use its best endeavours to include, as part of the above outdoor tennis court arrangements, as many of the existing tennis courts as are already situate on the area hatched yellow.

Any dispute relating to the location of the new site or the suitability of same shall be resolved between the parties by a single arbitrator.

F. (Not relevant)

G. The matter of replacement of Templeville's existing car parking rights generally and following its surrender of the present parking rights under the old lease is dealt with at 3 below.

The provisions of paragraph 6(9)(1)(c) on page 26 of the old Lease shall specifically be incorporated into the new Lease to have application to the various tennis facilities referred to above.

3. Lease, Licence and Demise and Car Parking

A. The New Lease shall contemplate the provision of a supplemental deed to demise to Templeville the new site and such of the area hatched yellow as survives the C. P. O. to give effect to the demise and rights following relocation and also to incorporate the revised arrangements in relation to rights, rights of way and entitlements.

The New Lease shall permit Templeville to use and occupy: --

(a) So much of the area hatched yellow as is not affected by the C.P.O. for parking and for outdoor tennis courts on non-race days.

(b) The area outlined in blue on the map, for parking,

(c) The tarmacadamed area between the front of the grandstand and the racecourse, for parking on non-race days.

(d) Such other areas of car parking which may be required by Templeville to facilitate its club members on non-race days,

as may be agreed by Leopardstown, such agreement not to be unreasonably withheld.

(e) On the days leading up to race days the aforesaid parking arrangements shall not interfere with the reasonable preparation of the racecourse or the conduct of the race meetings.

(f) In the event of a dispute in relation to car parking arrangements such disputes shall be resolved by a single arbitrator.

Where open air tennis courts are used both for tennis and parking on race days, as Templeville has already financed and constructed those courts Leopardstown shall be responsible for damage, wear and tear caused by parking and Templeville shall be responsible for damage, wear and tear caused by tennis."

2.65 On the following day, the 3rd of December, 1997, Mr. Clarke, having reviewed the fourth Heads of Agreement wrote to Mr. Halpenny setting out various matters that were of concern to him. His letter was in the following terms:

"Dear Mr. Halpenny,

Thank you very much for your fax of yesterday enclosing a copy of the amended Draft Heads of Agreement for further consideration and approval. There are just a few matters arising which I might address in the order in which they appear in your current draft. If you are happy with my suggestions you might incorporate them into the existing documents and let both myself and Peter Law have a copy of same. If there are any matters that you wish to discuss arising out of my suggestions, I should be in my office from approximately 2:15 until 4:30 this afternoon.

The matters are as follows:

1. Paragraph 2B:

I am concerned about the use of the words in parenthesis in the second paragraph i.e. "as if it had been a grant of a lease". As the area hatched yellow does not form part of the demised area in the current lease (though I agree its precise status is somewhat ambiguous) I would not like to have a phrase that seemed to imply an acceptance of an interest greater than a licence in those areas. I do not think that the relevant paragraph would be any the less strong if the matter in parenthesis were deleted.

2. Paragraphs 2 D and E:

Might I suggest that we define the new site as being the totality of the area, or areas, upon which the post-relocation tennis facilities are located. This would mean that the demise would consist after the extended demise contemplated in all of those areas. There would not be a demise of any remaining portions of the area hatched yellow which was not part of the designated area for the new site, but if there was any remaining area not absorbed by the motorway, and not contained in the new site, your clients would obviously retain parking rights in same under the terms of the agreement.

With that in mind, might I suggest the following changes:

Paragraph 2(D):

Delete the words 'the area hatched yellow, and on" on line two, and the word 'continue' on line three.

And at the end of paragraph (iii) but within the parenthesis add the words 'and the requirements of the motorway'.

Paragraph 2(E):

The preamble might read as follows:-

'The new site shall be sufficient and adequate to provide for the existing tennis facilities and rights which Templeville enjoys over the area hatched yellow and in particular, the following criteria shall be met'.

And then subparagraph (iii) might read:

'The new site shall accommodate not less than four outdoor tennis courts either in their current or unaltered location or in part one and in part the other'.

Sub-paragraph (iv) should have the words 'outdoor' deleted at the end of line 4 and the words 'area hatched yellow and only' deleted on the following lines.

The first paragraph on the next page should then have the words 'above outdoor tennis court arrangements' deleted and replaced by 'new site' and a further sentence added to that paragraph as follows:

'The new site may, therefore, consist of two or more parcels of land provided each is adjacent to the present location of the first dome'.

It seems to me that the above amendments would simply define the new site as the area which your clients are going to ultimately get for tennis courts, and leave the parking arrangements solely to be dealt with outside the demise by way of the specific provisions in that regard in Clause 3."

3. (Not relevant)

4. "Paragraph 3(A):

In the light of my suggestions concerning the demise, it would be appropriate to delete the words 'such of the area hatched yellow survives the C.P.O.' on the third line. This would provide, therefore, that the supplemental Deed will demise to Templeville the new site, but will also grant rights following re-location as further set out in that clause which, of course, includes a right to Templeville to use the balance of the area hatched yellow for parking.

Similarly, the words in Paragraph 3(A)(a) 'and for outdoor tennis courts' would be also deleted as the areas designated for outdoor tennis courts would be part of the new site and, thus, part of the demised lands."

5. (Not relevant)

6. (Not relevant)

"Otherwise the agreement seems to me to be in order.

Yours etc"

2.66 Later that same day Mr. Halpenny replied to Mr. Clarke by means of a faxed letter (copied to Mr. Law) in the following terms (*inter alia*):

"Dear Mr. Clarke,

Thank you for your fax of today's date.

I note the suggested amendments, all of which would appear to be in order. You will see that when I was preparing the "Heads of Agreement" document, I was contemplating that the new site would be a parcel of land entirely independent of the area hatched yellow and it was for this reason that I was proposing the new Lease would demise Templeville its tennis facilities over both the new site and over such of the area hatched yellow as is not affected by the C.P.O. I note your suggested amendments would give effect to the new site incorporating both a new parcel of land and such of the area hatched yellow whereon the current tennis courts exist and as is not affected by the CPO. I agree that your suggestions probably make the ultimate document drafting exercise more simple.

Accordingly, I have incorporated each of the amendments which you have suggested. I have also included "the new site" in the interpretations section of the 1st page merely for the purpose of clarity and I trust you approve of this further proviso."

The letter was accompanied by the further amended draft Heads of Agreement (hereinafter the "fifth Heads of Agreement"). In addition to incorporating the amendments suggested by Mr. Clarke, the following additional definition was inserted in Clause 1:

"'The New Site'	=	A parcel or parcels of land, situate adjacent to the first dome, upon which Templeville's tennis facilities, which are currently located on the area hatched yellow, are to be relocated, by reason of the C.P.O., and including so much of the land upon which the second dome and 4 outdoor tennis courts are currently located, which is not required by the C.P.O."

2.68 Commenting on this addition in the course of his evidence, Mr. Justice Clarke stated:

[It's tennis related and] "that conformed exactly with my understanding, which was that the demise, the site was to be for the replacement tennis facilities, not for parking."

2.69 Mr. Halpenny had also, on his own initiative, interpolated the following paragraph into Clause 2A, immediately after the sentence reading "Templeville is also entitled to use the areas hatched yellow for car parking on non race days", and before the paragraph commencing "At the request of Leopardstown ……." :

"Leopardstown is entitled to take back this area for its own purposes provided it provides Templeville with a suitable alternative area elsewhere in the car parks at Leopardstown."

2.70 In relation to the fifth Heads of Agreement as a whole, Mr. Justice Clarke was asked, and he answered, as follows:

"Q. Was there anything in that agreement which triggered to you in your mind any suggestion that they were looking for a demise of car parking, of extensive car parking facilities by way of demise?

A. No. On the contrary. The fact that the amendments which I had put forward expressly on the basis of excluding a demise of car parking had been incorporated gave me the contrary impression."

2.71 Returning again to the chronology, having received the fifth Heads of Agreement document from Mr. Halpenny on the 3rd December 1997, Mr. Clarke then wrote to Mr. Law on the same day and, enclosing a copy of his correspondence with Mr. Halpenny, expressed the hope that this would "lead to a finalisation of the text". The letter continued:

"As Eric Brunker is going to be involved in drafting the lease, I would be grateful if you would ask him if there is anything in the text which might cause difficulties from a Landlord and Tenant conveyancing point of view, as it would be better to deal with it at this stage. I also believe from the context of my meeting with the Finance and Facilities Committee on Monday that the board may well want the terms of the Lease finalised before any permissions given in the Agreement are operative to avoid difficulties arising. With that in mind, you might let Eric know that there may be a requirement for an urgent drafting of the lease and given appropriate discussions to have the matter brought forward as quickly as possible."

2.72 Mr. Eric Brunker was at the time a partner of Mr. Law's in A & L Goodbody, Solicitors, and a specialist in Landlord and Tenant and Conveyancing Law. Mr. Justice Clarke stated in evidence before this Court that the reason for seeking to involve Mr. Brunker at this point was because, apart from two very minor matters that hadn't yet been agreed relating to traffic management and the proposed service charge respectively, "the substance of the agreement was there as of that date."

2.73 On the following day the 4th of December, 1997, Mr. Clarke (as he then was) sent a further letter to Mr. Law by fax setting out some afterthoughts that had occurred to him in relation to the fifth Heads of Agreement document. He suggested:

> "In Paragraph 2A, and in particular the third internal paragraph thereof, I feel there should be some reference to quiet the Board to our entitlement in the existing lease to require a movement, though it can be expressed in whatever terms makes sense."

2.74 In his evidence before this Court Mr. Justice Clarke explained that he was concerned that if there was no reference to that, the board might be unhappy with the arrangements. He also suggested to Mr. Law:

> "And in Paragraph 2C and, in particular, subparagraph (ii) the words 'and such of the tennis courts on the area hatched yellow as survive the relocation' should be deleted. This was an omission, on my part, of the points where the reference to the yellow area should be deleted given the new definition of the phrase 'new site'. However, in fairness to the tenant, a further sentence should be added 'The deed confirming the said permanent demise shall also provide for the additional replacement car parking rights referred to at Paragraph 3A hereafter'.

2.75 In his evidence Mr. Justice Clarke explained his reasons for the suggested addition as follows. He said:

> "It didn't seem to me that that was doing anything more than reiterating in the supplemental deed or the new deed the car parking rights that were in the original deed for the avoidance of doubt, given that there were then going to be two separate parcels of land, if you like, the original parcel and the secondary parcel, and I felt it was fair that there should be a reference to the car parking rights in both. Because if there wasn't, there would always be potentially an argument that the car parking rights only were appurtenant to the site which was demised by the deed to which they referred."

2.76 Finally, Mr. Clarke suggested to Mr. Law that the arbitration provisions in the document should be expanded to specify the mechanism for the submission of disputes to arbitration.

2.77 Having received Mr. Clarke's faxed letter, and being in agreement with it, Mr. Law in turn sent a letter by fax to Mr. Halpenny later on the same day passing on Mr. Clarke's suggestions. Mr. Halpenny replied by faxed letter, again on the same day, stating "I have incorporated the suggested amendments into the document" and enclosing "a copy of the document duly amended" (hereinafter the "sixth Heads of Agreement).

2.78 The evidence establishes that, as had been suggested, Mr. Law spoke with Mr. Brunker on the morning of the 4th of December and briefed him as to what was required of him. Later that day Mr. Law followed up his conversation by sending Mr. Brunker a memo, and he enclosed with that memo a copy of the sixth Heads of Agreement and the 1993 Lease. The memo, which was produced in evidence, advised Mr. Brunker, *inter alia*, that there was to be a meeting of Leopardstown's Board on the following day at 2.00pm and it suggested that he should "touch base" with Mr. Clarke before 1.00pm. The evidence does not establish whether Mr. Brunker in fact did so, but nothing turns on it.

2.79 The next event of significance was the meeting of the Board of Directors of Leopardstown on the 5th of December, 1997. Mr. Clarke was among the attendees. A minute of this meeting was produced in evidence and the relevant portions of it bear recitation. The first portion, which provides important contextual information, relates to the on-going negotiations between Leopardstown and Dun Laoghaire / Rathdown County Council. The second portion concerns Mr. Clarke's presentation of the sixth Heads of Agreement document to the Board and how the Board received it. The minute states:

> "REVIEW OF PROPOSED HEADS OF AGREEMENT - MOTORWAY
>
> The General Manager advised that the company only had until January 20th to withdraw its objection. Mr. Terry Sudway joined the meeting and presented the proposed Heads of Agreement. He advised that the Council were by and large willing to agree to the terms set out in Part 1 of the document but that no agreement had yet been reached on the items listed in Part 2.
>
> He advised that the measurement of the consequential loss was proving extremely difficult. It was the view of the Council that the land given to us more than compensated for any possible consequential loss. The Chairman pointed out that the extra land had little monetary value to Leopardstown and that the offer of £100,000 had been totally rejected by him on behalf of the Board.
>
> Mr. Sudway advised that, in his view, the County Council had bent over backwards to accommodate Leopardstown. He further advised that if Leopardstown objected a C.P.O. order would be confirmed and notice to treat served. This would mean that the Council could be on site in fourteen days leaving Leopardstown with an entitlement to assessment of open market value of the land with no regard to consequential losses or disturbance and the Council would have no obligation to give us any extra land. Mr. Sudway then left the meeting.
>
> While some members felt that, legally, it would be far better to deal with the Council on a negotiated basis rather than on a C.P.O. basis other directors felt that political pressure could be brought to bear on the situation. Following further discussion, serious concerns were expressed by the directors about noise and water pollution and the proximity of the road to the race track. It was agreed to ask a UK company, Freemans, to investigate the situation on behalf of Leopardstown to ensure that the race course would not be damaged in any way by the motorway. It was further agreed that the maximum initial spend on this should be £50,000. And it was also agreed to reimburse Mr. Mulhearn for his costs incurred to date with this company.
>
> REVIEW OF PROPOSED HEADS OF AGREEMENT – WESTWOOD
>
> Mr. Clarke presented revised Heads of Agreement between Leopardstown and Templeville Developments Limited which, he advised the Board, were being recommended for approval by the Finance and Facilities Committee.
>
> Mr. Scanlan suggested the wording of the final paragraph in Clause 3 could be tightened up and it was agreed that an appropriate formula could be devised to ensure an equitable apportionment of the appropriate repair cost to the tennis courts. It was also agreed that the rights granted to Templeville Limited to use the car parks should be non exclusive.

Noel Ryan pointed out that Clause 7 of the proposed Heads of Agreement appears to allow Philip Smyth the right to build on the land leased from Leopardstown and that these specific rights were not in the old lease. He said that the area in which Westwood was situated was prime racecourse property and he questioned the wisdom of allowing further building in this area as it could make it more difficult to relocate the Westwood operation in the future. He further advised that it might be possible in the future to move the Westwood operation to the building currently being used as the I.H.A. Headquarters and suggested that the company seek a deferral of some months in order to examine this issue.

Mr. Clarke advised that the proposed deal contained a certain amount of give and take and that it was not negotiated from a greenfield situation but rather use the existing lease as a starting point and the proposed deal had to be looked at in that light.

Mr. Clarke further advised that, if the proposed deal was not approved, there existed a danger that, given the volatility of the relationship with Philip Smyth, there could be serious repercussions in relation to the motorway and, in such circumstances, he could not take responsibility for same. He had not been advised of a desire to relocate Westwood, possibly in the I.H.A. building, and he was surprised at new information coming to the table at this stage given that he was the one who had been asked to negotiate a deal with Philip Smyth. Mr. Ryan made it clear that the possibility of using the I.H.A. building was just that, a possibility, and that the matter had only arisen in the last two weeks. It was, however, a critically important issue and it was agreed that the possibility of the I.H.A. vacating the present building deserved to be explored by the I.H.A. Finance and Strategy Committee.

Following further discussion the directors agreed to approve the proposed Heads of Agreement subject to I.H.A. board approval. It was further agreed that Frank Clarke would be responsible for negotiating and finalising the details of the documentation referred to in Clause 17 of the Heads of Agreement. It was further agreed to instruct our solicitors to write to Philip Smyth emphasizing that no building should be commenced prior to a new lease being formally signed by all parties.

The directors also suggested that given the urgency involved, this matter should be placed on the agenda for the next meeting both of the Finance and Strategy Committee and of the I.H.A. itself."

2.80 In giving evidence about this meeting Mr. Justice Clarke identified the Mr. Ryan referred to in the minute as being the Chief Executive of the I.H.A. and stated "it was normal for a number of the senior executives of the I.H.A. to attend certainly the more important Leopardstown board meetings."

2.81 Mr. Justice Clarke also expressed himself as not having been "best pleased by some of the developments at the meeting", particularly as he was aware that Mr. Smyth was expecting to be able to start building in January. He testified that:

> "I think I should say that I felt somewhat embarrassed at that time by the fact that we had suggested to Mr. Smyth that if we recommended the deal, it would get the rubber stamp, as it were, and it wasn't getting -- well it wasn't being turned down but it equally wasn't getting an immediate rubber stamp. So I did feel a little embarrassed by that."

2.82 Following the Board meeting on the 5th of December 1997, which was a Friday, Mr. White, General Manager of Leopardstown, appraised Mr. Law on the following Monday as to what had occurred and Mr. Law then telephoned Mr. Halpenny. On the following day, Tuesday the 9th of December 1997, Mr. Law faxed a letter to Mr. Halpenny in these terms:

> "As I advised you in our telephone conversation on Monday, the board did not formally approve the Heads of Agreement at the meeting last Friday. While I was not present at the meeting, and accordingly what I am saying to you is second-hand, I believe that there was definite agreement as regards the Heads of Agreement but that there were one or two issues which required further consideration. My clients and I are of course aware that time is of the essence so far as your clients are concerned and hopefully the outstanding issues will be resolved one way or the other very shortly.
>
> In the meantime, it is clearly not appropriate for your clients to undertake any construction works in respect of which they have not received our client's consent or approval. I understand that certain works were commenced yesterday and if these are construction works, they should cease immediately. You undertook to check the position with your clients and to advise them accordingly."

2.83 Then on the 12th of December, 1997 Mr. Halpenny wrote to Mr. Law in the following terms:

> "Our client had a meeting yesterday with Mr. Noel Ryan of the Irish Race Horse Authority (sic) and Mr. John White of Leopardstown Club Limited at the former's request.
>
> Mr. Ryan wished to explore with our client the possibility of relocating our client's facilities to a location elsewhere on the race course. These exploratory talks arise out of the possible long term planning of the Irish Race Horse Authority (sic) involving the present head office building, which is located on the race course and Mr. Ryan made it clear that he did not in any way wish to interfere with matters or issues which are being proposed through your office by Mr. Frank Clarke, S.C. and which are more particularly set out in the draft Heads of Agreement. These matters, he confirmed, will continue to finalisation through Mr. Clarke and through your office. A worthwhile exchange of views took place.
>
> During the meeting however, focus was directed on the maximisation of the use of all available facilities in the matter of racing and Mr. White was particularly anxious that maximum use possible of the proposed extension would be made by Leopardstown on race days - particularly for viewing racing. Our client was happy to positively respond to this view and pointed out that it would be possible to adapt the plans for this extension, to facilitate its use for viewing on race days.
>
> Our client undertook to prepare revised plans in this regard, which would incorporate the maximum amount of viewing areas and including a fourth floor which would now be possible, in the light of the requirement of a more robust structure, to accommodate race goers.
>
> The additional cost of construction would be borne by our client. The revised plans would be submitted to Leopardstown as soon as possible for approval and it was agreed that Mr. Smyth should immediately contact Mr. Crowley - Leopardstown's Architect, to progress this matter further.
>
> To avoid any delay in completing the Heads of Agreement, and in order to finalise the other matters therein, we have

drafted an amended Clause 7 which takes the above proposal into account, for your further consideration and approval. The modifications to Clause 7 are not significant, but simply made provision for the foregoing. We trust that this is the 'one or two issues' (not specifically mentioned) to which you referred in your letter of the 9th inst., which required further consideration.

Turning to the execution of the Heads of Agreement, we must emphasise that timing is of the essence from both of our clients' perspectives. The issue of the area cross hatched yellow must be quickly resolved from your client's point of view and our client is anxious to proceed with the proposed developments as soon as possible. Under the circumstances, perhaps you would let us know if there are any other matters which require consideration and, if so, perhaps you would suggest how these may be dealt with as soon as possible.

With regard to the long term matters referred to by Mr. Ryan at yesterday's meeting, it would seem that these issues are adequately addressed by virtue of the clause contained in the existing Lease, which no doubt would be carried forward into the new Lease, namely clause 6(ii)(a) on page 21. It would appear that Mr. Ryan was not aware of the existence of this clause when he requested yesterday's meeting.

Finally, our client had hoped that by now, one full week after your client's board meeting, you would be in a position to have your Heads of Agreement signed up by both parties and to have your client's approval on all matters therein.

It was everyone's understanding last week, after the various meetings that took place and after the various discussions and drafting and redrafting of the Heads of Agreement document that this agreement as is documented in said Heads of Agreement would be unreservedly recommended to the board by Mr. Clarke and Mr. Denis McCarthy. We presume that this took place, but we are somewhat disappointed to note that the final agreement has not yet been confirmed to us, one week later.

We would also point out that Mr. Smyth, who was intending to travel abroad this morning 12th inst, has now deferred his travel arrangements to next Wednesday 17th inst., in the expectation that a Heads of Agreement may be signed up by both parties.

Finally with regard to reference to construction works in your letter of 9th inst., our client confirms it has not and will not and undertakes not to carry out any construction work without your client's approval. The site for the proposed junior area is merely being levelled with infill from one of the outdoor tennis courts and which will require a retaining wall at ground level. Mr. White has welcomed the fact that our client will make this levelled site available to Leopardstown for car parking on Christmas race meetings, but you can rest assured that the construction work will not commence without your client's approval.

We would be grateful to hear from you as soon as possible in relation to this matter."

2.84 The letter enclosed, as indicated therein, a further draft of the proposed Heads of Agreement (hereinafter "the seventh Heads of Agreement") incorporating Mr. Halpenny's suggested amendments to clause 7.

2.85 While not a lot turns on it, for completeness it should be recorded that clause 6(ii)(a) on page 21 of the 1993 Lease was in the following terms:

"That if at any time the Landlord decides to demolish for the purpose of reconstruction the buildings or premises comprised within the areas edged in red and cross-hatched red and cross-hatched blue and repossess the area crosshatched in green the Landlord shall be at liberty to demolish the said buildings or premises having first at the expense of the Landlord erected a substantial or alternative building and laid down alternative Tennis Courts and an alternative Conservatory on a site with a good and marketable title within one mile of the demised premises suitable for the purposes required by the Tenant and of equal value to the value of the existing buildings within the area edged in red and the area cross-hatched red and cross-hatched blue at the time of demolition and the alternative Tennis Courts of equal value to the area's crosshatched in green.

PROVIDED ALWAYS that if the said alternative building and the said alternative Tennis Courts and Conservatory are erected more than 100 yards from the existing Air Dome (and tennis courts underneath) shown edged green on map No. 1 attached hereto and the proposed Air Dome and tennis courts to be erected on the area cross-hatched yellow on map No. 1 attached hereto, then the Landlord will at its own expense remove the said Air Domes and reconstruct same in a position which is near to the said alternative building and is over the said alternative Tennis Courts."

2.86 The chronology then moves to the 16th of December 1997, the day before the next scheduled meeting of the I.H.A.'s Strategy and Finance Committee, when Mr. Law received a phone call from Mr. Clarke requesting that he (Mr. Law) should write to him (Mr. Clarke) outlining the ramifications for Leopardstown in the event of the proposed agreement with Templeville not proceeding. Mr. Clarke took this step in aid of trying to persuade the Boards of Leopardstown and the I.H.A. of the wisdom and desirability of entering into the proposed agreement. Accordingly, by a letter of the same date Mr. Law wrote to Mr. Clarke in the following terms (*inter alia*):

"As you will appreciate, time is of the essence not only for Philip Smyth but also for Leopardstown. It is my view, that if an agreement is not reached with Philip Smyth, the ramifications for Leopardstown could be far-reaching. Not only would such issues as the use of the Tote Hall by Westwood for aerobics, access on race days, and relocation of the Air Dome be unresolved but the likelihood is that Philip Smyth would seek to disrupt any agreement which Leopardstown might ultimately reach with Dun Laoghaire / Rathdown County Council regarding the new motorway.

As you are aware, Philip Smyth contends that he has an interest in the area hatched yellow on the map attached to the Lease, a substantial part of which I understand is required by the County Council for the purposes of the new motorway. While we would not concede that he has any such interest, and would seek to rely upon the provision in the Lease entitling Leopardstown to take back to this area, subject to Westwood being provided with a suitable alternative area elsewhere in the car park, there must be a significant risk that any legal action taken by Philip Smyth to assert such a right would undermine any deal which Leopardstown might hope to reach with the County Council.

This does not mean to say that Philip Smyth has Leopardstown over a barrel, in that Leopardstown can also make life very difficult for Philip Smyth in the pursuit of his expansion plans. However, it seems to me that the deals which has been negotiated will be of significant benefit to both parties.

> I understand that the reason why no final decision has yet been made in relation to the Heads of Agreement is that the possibility of relocating Westwood to a location elsewhere on the racecourse has been raised. While this might ultimately be the solution, it would no doubt involve considerable time and cost. In the meantime, all the problems which I have outlined above would continue to exist. The present Lease does of course provide that if Leopardstown wish to demolish the Club for the purposes of reconstruction, they are at liberty to do so, subject to first having provided an alternative building and facilities similar to those presently existing within one mile of the racecourse. It is agreed that this provision will be carried forward into the new Lease, in the event of the Heads of Agreement being approved."

2.87 Mr. Clarke duly attended the I.H.A. Strategy and Finance Committee meeting on the 17th of December and reported to them on the situation in relation to Templeville.

2.88 Commenting on the status of the I.H.A. Strategy and Finance Committee at para. 67 of his witness statement, the contents of which he verified and adopted as part of his evidence in chief, Mr. Justice Clarke stated:

> "I was neither a member of the Board of I.H.A nor, therefore, of the Strategy and Finance Committee. However, my understanding is that it had a bigger role than normally would be expected. The Board of the I.H.A. delegated many issues to the Strategy and Finance Committee, which would deal with more detailed issues and concerns and ensure that the concerns expressed broadly by the Board were addressed. If the Strategy and Finance Committee approved an agreement, it was more than likely that the I.H.A Board would also approve that agreement."

2.89 The outcome was unsatisfactory from Mr. Clarke's perspective in that the Committee made it clear that the I.H.A. would not proceed unless all documents, to include a new draft lease, had been finalised and agreed.

2.90 Mr. Clarke then telephoned Mr. Law and, having advised him of the position, suggested that his firm should proceed to draft the relevant documentation. He further advised Mr. Law that the crucial date was January 20th 1998 as that was the date fixed for the commencement of a public inquiry concerning the new motorway, and that the I.H.A. was scheduled to have another Board meeting some days prior to that.

2.91 Mr. Law testified that he then contacted Mr. Halpenny by telephone and advised him of the position. According to Mr. Law:

> "He wasn't particularly happy, understandably, and said that they may well decide not to proceed with the Heads of Agreement, but I think he probably recognised that they probably had no alternative. I also offered if they would like to meet with me and/or Mr. Clarke, that we were available to meet."

2.92 Then, later on the same day, Mr. Law received a lengthy letter by fax from Mr. Clarke. In this letter of the 17th of December 1997 Mr. Clarke (i) confirmed the outcome of the I.H.A. Strategy and Finance Committee, (ii) confirmed that he was in a position "to give instructions, from the Leopardstown point of view to bring the matter forward by arranging for the completion of all necessary documentation in draft form", (iii) emphasised that "the Leopardstown Board is not in a position to enter into any legally binding commitment at this stage given that I.H.A. approval is required", (iv) set out the time frame within which outstanding matters had to be addressed, and (v) offered his detailed views as to what required to be done to progress matters. Among the suggestions offered by Mr. Clarke was the obtaining of an opinion of Senior Counsel. He stated:

> "… it would be useful if an Opinion were to be obtained from a suitable Senior Counsel who would set out his views on the arrangements entered into with particular reference to the current legal difficulties being encountered. There is a full understanding on the part of all concerned that the arrangement being entered into at the moment is not ideal, and would not be one which Leopardstown would be likely to enter into were it to be free of any existing contractual or other legal obligations. The factors which make the current arrangements necessary in the main stem from the range of doubtful issues which currently trouble the relationships between Leopardstown and Philip Smyth. An opinion which set out those issues, the difficulties involved in their resolution, the doubts about what the result would be if they were to go to Court, and also the length of time which matters could be tied up while those various matters will be litigated in Court, together with a comment on the extent to which any concessions contained in the current agreement may impair Leopardstown's long-term position would be useful."

2.93 On the following morning, the 18th of December, 1997 Mr. Law received a telephone call from Mr. Halpenny to alert him to the fact that a letter was about to be transmitted to him by fax that required to be responded to before close of business that day. Mr. Law indicated that he might have difficulty getting instructions within that time frame but that he would do his best.

2.94 The fax was duly received and expressed Mr. Halpenny's dismay at the recent turn of events. It posed a series of nine queries to which Mr. Halpenny required answers "in order to consider this matter further and in order to advise our client". In essence queries Nos 1 to 7 inclusive were primarily directed at trying to ascertain the likely duration of the hold-up. He also sought in query No 8 to ascertain if there were any circumstances in which Leopardstown would permit Templeville's builders to commence work on the proposed extension to the Westwood Clubhouse on their scheduled starting date of the 19th of January notwithstanding the hold-up. In query No 9 he suggested a timetable of deadlines to be met in addressing outstanding issues so "that all documentation be approved and ready for execution several days in advance of the Irish Horse Racing Authority's next meeting on 20th January 1998", and asked "Can you agree that Leopardstown Club Ltd will agree and use its best endeavours to adhere to such a timetable?"

2.95 Having considered Mr. Halpenny's fax, and having been unable to obtain instructions, Mr. Law telephoned Mr. Halpenny before close of business. He gave responses as best he could to the nine queries raised. His responses to queries No 8 and No 9, respectively, are recorded in an attendance produced by him in evidence as follows:

> "8. We said that we thought it possible that his clients could commence construction of the junior area on the 19th of January in that we understood that the board meeting at which this project would be considered would be held in advance of 19th January, bearing in mind that 20th January was the date fixed for the public enquiry concerning the motorway.... fixed for the public inquiry on the South Eastern Motorway.
>
> 9. We said that we were not in a position to agree any deadlines due to the fact that it would be EB [Eric Brunker] rather than us who would be preparing the appropriate legal documentation. However, we appreciated that time was of the essence and that obviously we would be impressing this upon EB."

2.96 I should digress at this stage to say that while Mr. Law was giving his evidence to this Court he was asked, and answered, an important question with respect to this telephone conversation, viz:

"Q. Now, in relation to that exchange between yourself and Mr. Halpenny, was there anything in your telephone conversation with him to suggest that the function to be performed by himself and Mr. Brunker in drafting the leases and licences, and so on, was to be other than to reflect the Heads of Agreement?

A. No, my understanding at that stage was that the agreement had, in effect, been reached, and that Eric Brunker's role going forward and Conor Halpenny's role going forward were to, in effect, draft and agree the documentation to effect the agreement reached."

2.97 Later that evening Mr. Law received yet another phonecall from Mr. Halpenny enquiring whether Frank Clarke and Noel Ryan could attend a meeting next day with himself and Kieran Condell. Mr. Law confirmed Mr. Clarke's likely availability but said that he thought Mr. Ryan would not be available. Mr. Law then contacted Mr. Clarke and briefed him on developments. Mr. Clarke confirmed his willingness to attend the proposed meeting and Mr. Law then telephoned Mr. Halpenny for the final time to confirm an arrangement in that regard.

2.98 On the following day the scheduled meeting was duly convened at the offices of A & L Goodbody, Solicitors, at 10.00 am. It was attended by Mr. Clarke and Mr. Law on behalf of Leopardstown and by Mr. Condell and Mr. Halpenny on behalf of Templeville. While at the outset Mr. Condell expressed disappointment on behalf of Templeville at the manner in which Leopardstown was perceived to have dealt with matters, the meeting moved beyond recriminations and was constructive. Assurances were proffered on behalf of Leopardstown that the urgency of the matter would be impressed on all concerned on Leopardstown's side, and Mr. Clarke agreed, *inter alia*, to meet with Mr. Brunker in early course, and if possible on Monday the 22nd of December. Although it is not recorded in his attendance of this meeting, Mr. Law testified that at the meeting he received from Mr. Halpenny a copy of the most recent version of the proposed Heads of Agreement (i.e. the seventh Heads of Agreement) signed by Mr. Smyth (hereinafter "the final Heads of Agreement") . He was asked:

"Q. Did you draw any inference from the fact that Heads of Agreement had been now signed by Mr. Smyth?"

And answered:

"A. Well, having been signed by Mr. Smyth, I assumed that he was agreeing to the terms of the Heads of Agreement on behalf of Templeville. As I said, the Leopardstown Board had approved, in principle, the Heads of Agreement, and we, you know, acting for Leopardstown, were proceeding on the basis that those were the Heads of Agreement that were ultimately going to be agreed, so, yes, I didn't consider there was going to be any renegotiation."

2.99 On the 22nd of December 1997 Mr. Clarke and Mr. Law met with Mr. Brunker. Mr. Brunker was informed at this meeting that Heads of Agreement had been concluded between Leopardstown and Templeville, which had been signed by Templeville but not Leopardstown. Mr. Brunker was instructed to prepare the documents required to implement and formalise in conveyancing form the provisions of the final Heads of Agreement. The high level of urgency about the matter was also explained to him.

2.100 Mr. Brunker outlined in the course of his evidence his understanding of what was required of him. He said:

"I was aware that there was already a lease in place in '93 with Templeville, and it was to revise that lease, bring a new lease into place and to put various agreements, licences into place which would deal with car parking and demise of a site for tennis courts. The licence in respect of car parking was extended to cover the entire of the car parking area within Leopardstown, rather than just a simple area around the tennis courts, and it spread it."

2.101 While considering the Heads of Agreement in examination in chief, Mr. Brunker gave evidence as follows:

"Q. [Counsel reads] '*Under the old lease, Templeville is entitled to build...Templeville has agreed that the present tennis facilities and rights in respect of the area crosshatched in yellow on the map and the car parking rights on non-race days may be relocated as... cannot indicate precisely how much the tennis facilities and Templeville's other rights may need to be relocated or precisely... are to be moved, but Leopardstown has agreed to provide a suitable site for such relocation adjacent to the first dome to enable relocation to take place in due course, Templeville agrees as follows...*'.

And just to pause there. Reading those particular, I suppose, recital clauses, really, which they are more than anything else, setting out the background, was there anything in your reading of those particular paragraphs to suggest to you that there was any acknowledgment by the parties that there was either an existing demise of car parking spaces or that there was to be a future demise of car parking spaces?

A. No, most certainly not. There is no indication within that section to suggest that there was, or could be, a demise of car parking spaces. It relates purely to tennis courts, as such.

Q. And --

A. Sorry, where it does relate to car parking, it's a similar package to be provided as was already there, not an improved package.

Q. And the package that there was already there, I think your evidence is that the package of licence rights --

A. Exactly. "

2.102 There was also discussion at this meeting on the 22nd of December concerning whether Mr. Brunker would draft the necessary new lease from scratch or whether he would adapt the old 1993 Lease. Mr. Brunker testified that he had a clear preference for the former option but, because of the time constraints and the fact that everyone was familiar with the 1993 Lease, it was decided and he was instructed to adapt the 1993 Lease to take account of the terms of the Heads of Agreement, a copy of which was furnished to him together with a copy of the 1993 Lease. Mr. Brunker stressed in evidence that he saw his function as a drafting one and not as a negotiating one. He stated: "The deal had been negotiated and I was to simply put it into document form."

That aspect of the matter was then left in the hands of Mr. Brunker who was to liaise and work with Mr. Halpenny towards producing the required documentation. To that end Mr. Brunker had a brief telephone conversation with Mr. Halpenny on the 23rd of December in the course of which Mr. Halpenny said he would be preparing the required maps and would forward them to Mr. Brunker. Then, by a letter of the 2nd of January, 1998, Mr. Halpenny forwarded a copy of the Improvement Notice related to the Junior Area on which

Templeville intended to construct a new building, as well as the promised maps and a draft summary of what he (Mr. Halpenny) felt should be contained in the parcel clauses of the draft Lease for the assistance of Mr. Brunker in drafting it. Mr. Brunker was asked about this when giving evidence before me:

> Q. "…was there anything within that that led you to believe, or which you would regard as suggesting, that there was to be a demise of car parking spaces to Templeville?
>
> A. No, most certainly not. We are dealing with rights all the time.
>
> Q. When you say "rights"?
>
> A. Rights to park cars. There is no -- no reference whatsoever to a demise in relation to car parking."

2.103 Moving next to the 5th of January, 1998 in terms of the chronology, Mr. Law, on that date, sent instructions to Mr. Hugh O'Neill S.C. asking him to provide his opinion on the issues identified by Mr. Clarke as relevant in his letter to Mr. Law of the 17th of December 1997.

2.104 On the same day Mr. Brunker had a lengthy meeting with Mr. Halpenny at the offices of P.C.L. Halpenny & Son, Solicitors, in Dun Laoghaire in order to progress the drafting process. In the course of giving evidence to this Court the following exchange took place between Mr. Brunker and Counsel for Leopardstown:

> Q. "And was there anything said to you by Mr. Halpenny during the course of that meeting to suggest that he had any understanding that the Heads of Agreement were to provide for a demise of car parking spaces?
>
> A. No, it ... certainly, nothing came up at that meeting, I am quite satisfied.
>
> Q. And was there anything said by him or intimated to you during the course of that meeting to suggest that even if the Heads of Agreement hadn't provided for a demise of car parking spaces, that there had either been some change in the agreement between the parties or some change in the riding instructions he had received from his client as to the type of car parking entitlements Templeville was to have?
>
> A. No, most certainly not. We were still working on the basis of the Heads of Agreement. There were to be no changes from the basic Heads.
>
> Q. And if there had been such a suggestion, would that have been recorded by you in your attendance?
>
> A. Most certainly, because, again, it wouldn't have been a drafting item that would have been dealt with at that stage; it would have been, most certainly, to my mind, a change of instructions, and, as such, would have, should have, been noted, and most certainly would have been raised with my client if there was to be a change in instructions."

2.105 On the 7th of January, 1998 Mr. Brunker forwarded first drafts of a new Lease (hereinafter the 1998 Lease) and a Licence Agreement relating to the hatched yellow area (hereinafter the 1998 Licence), and other draft documents (including a "Licence for Works" and a "Race Day Licence") to Mr. Halpenny and to Mr. Clarke. Further Mr. Brunker and Mr. Halpenny arranged to meet on the 9th of January, 1998 to review Mr. Brunker's first drafts of the 1998 Lease and the 1998 Licence.

2.106 It is appropriate at this point to digress again from the chronology in order to identify the main features of these first drafts of the 1998 Lease and the 1998 Licence, respectively, in so far as they may be relevant to the issues in this case.

2.107 Mr. Brunker's evidence was that in preparing a first draft of the 1998 Lease he used the 1993 Lease as a template and for the purpose of the demise inserted similar provisions to those relating to the demise contained in the 1993 Lease. The demise is described in the first draft of the 1998 Lease as follows:

> *" In consideration of the yearly rents, covenants and conditions hereinafter reserved and contained the Landlord HEREBY DEMISES unto the Tenant ALL THOSE part of the lands at Carmanhall and Leopardstown in the grounds of Leopardstown Race Course (hereinafter referred to as "Leopardstown") at Foxrock situate in the Barony of Rathdown and County of Dublin consisting of:*
>
> > *(i) the Tennis Courts which for the purposes of identification are more particularly delineated on Map No 1 annexed hereto and thereon edged green and crosshatched in green; and*
> >
> > *(ii) the Squash Courts, Swimming Pool and Gymnasium and appurtenances thereto belonging which for the purposes of identification are more particularly delineated on Map No 1 annexed hereto and thereon edged red;*
> >
> > *(iii) the additional plot of ground as shown on Map No 1 annexed hereto and thereon cross hatched in red (measuring 26M x 11.5M x 3.5M in height);*
> >
> > *(iv) the additional plot of ground shown on Map No 1 annexed hereto and thereon crosshatched in blue (measuring 11.7M x 4.3M);*
> >
> > *(v) the old Snooker Room on the First Floor and the appurtenances thereto belonging which for the purposes of identification is shown on the First Floor Plan annexed hereto all of which is edged in red.*
>
> *(hereinafter collectively called "the Demised Premises") …"*

2.108 Mr. Brunker dealt with car parking not by way of a demise but by way of a right or licence. He provided as follows:

> *"… and the right to park motor cars in such of the Car Parks within the areas edged blue on the said Map No 1 as may from time to time be agreed together with a right to park motor cars on non-race days within Leopardstown as may be designated by the Landlord from time to time as car parking areas…"*

2.109 In drafting the 1998 Licence Mr. Brunker had to provide first for a licence of the areas occupied by Templeville prior to any of the lands cross hatched in yellow being acquired by way of compulsory purchase order from Dun Laoghaire / Rathdown County Council. Secondly he had to provide for a future demise of "the new site". In relation to the first requirement (and following three brief recitals for the purpose of placing the transaction in context) clause 1 of his first draft of the 1998 Licence provided:

> *"1. In pursuance of the aforementioned agreement and in consideration of the covenants on the part of the Licensees hereinafter contained the Licensor hereby* ***LICENSES AND PERMITS*** *the Licensees to exercise the privilege of entering upon and having use of the part of the Licensor's premises specified in the First Schedule hereto (the 'Licensed Area') as tennis courts with the right of ingress egress and regress thereto and therefrom.*
>
> *TO HOLD the same unto the Licensees from the 1st day of January 1995 until terminated in accordance with the provisions and conditions hereinafter contained."*

The First Schedule of the Licence identified "the Licensed Area" as:

> ***"****FIRST SCHEDULE*
>
> *The part of the Licensor's premises situate at Leopardstown Racecourse as shown on the plan attached hereto and thereon crosshatched in yellow comprising four outdoor tennis courts and seven indoor tennis courts positioned under an air dome erected by the Licensees."*

2.110 Then in relation to the second requirement, namely drafting a mechanism for the nomination of the new site, Mr. Brunker followed and incorporated into the 1998 Licence (at clauses 4, 5 and 6 thereof) the terms of the final Heads of Agreement (as set forth at clause 2 C, 2 D & 2 E thereof). Accordingly, Clauses 4, 5 & 6, respectively, of the first draft of the 1998 Licence provided:

> *" The Licensor may during the term of the Lease serve notice on the Licensees nominating a site (hereinafter called "the new site") more particularly described below to which it may call upon the Licensee to relocate the dome with tennis facilities and the 4 outdoor tennis courts presently situate on the Licensed Area.*
>
> *The said notice shall identify a reasonable period of time ("the notice period") during which this relation is to take place and by which time it is to be completed. At the expiry of the notice period the following works and events shall have been completed or occurred: --*
>
> *(i) The tennis dome and tennis facilities together with such of the 4 outdoor tennis courts as may be required, will be relocated to the new site.*
>
> *(ii) The demise of the new site shall be granted by way of endorsement on the Lease to include the new site subject to a licence back to Leopardstown for the use of all outdoor tennis courts (except for the one remaining to the front of Westwood Clubhouse) for parking on race days.*
>
> *(iii) A supplemental deed to give effect to (ii) above will be granted incorporating a revised map, clearly identifying the new location and arrangement. This deed shall also provide for the additional and replacement car parking rights referred to herein.*
>
> *(iv) The within licence of the Licensed Area shall thereupon cease and come to an end.*
>
> *5. After the notice period the Licensees' total tennis court entitlement on the new site shall comprise of: --*
>
> *(i) 7 indoor tennis courts situated under the newly relocated air dome,*
>
> *(ii) A minimum of 4 completed outdoor tennis courts,*
>
> *(iii) An entitlement to build further outdoor tennis courts to bring the total number of outdoor tennis courts to 11 (which number is to include such of the present tennis courts situated on the Licensed Area, and survive the relocation of the air dome and the requirements of the planned motorway subject to compulsory Purchase Order.*
>
> *6. The new site shall be sufficient and adequate to place such of the Licensees' existing tennis facilities and rights which the Licensees enjoy over the Licensed Area, and in particular, the following criteria shall be met: --*
>
> *(i) The new site shall be adjacent to the Demised Premises,*
>
> *(ii) The new site shall accommodate 7 indoor tennis courts, covered by the relocated air dome,*
>
> *(iii) The new site shall accommodate not less than 4 outdoor tennis courts either in their current or altered location or in part, one, and in part, the other.*
>
> *(iv) The new site shall provide for further adequate space to accommodate a further 7 outdoor tennis courts to be built by the Licensees at the Licensees' expense, should it so wish, provided that the maximum number of tennis courts is available to the Licensee on the area hatched yellow and on the new site shall not exceed 18 (including the 7 covered by the second dome).*
>
> *In choosing the new site, the Licensor shall consult with the Licensees in advance of serving the notice referred to above and shall use its best endeavours to include, as part of the new site, as many of the existing tennis courts as our already situate on the Licensed area.*
>
> *The new site may, therefore, consist of two or more parcels of land provided each is adjacent to the Demised Premises.*
>
> *Any dispute relating to the location of the new site or the suitability of same shall be resolved between the parties by a*

single arbitrator in accordance with the provisions for arbitration hereinafter contained."

2.111 It is important to note that this first draft of the 1998 Licence contained no reference to car parking rights. Further neither the first draft of the 1998 Lease, nor the first draft of the 1998 Licence contained a definition of "the New Site".

2.112 Returning now to the chronology, on the 9th of January, 1998 Mr. Law wrote to Mr. Clarke advising him that he had briefed Mr. O'Neill S.C. seeking an Opinion and enclosing a copy of his "Case to Counsel" for Mr. Clarke's information. Also, on that day, Mr. Brunker and Mr. Halpenny met as scheduled to consider Mr. Brunker's first drafts.

2.113 The evidence relating to what occurred both in the lead up to this meeting and at this meeting is important, in the Court's view, because it was in the course of this meeting that the phrase "and parking" became interpolated into the definition of "the New Site", as contained on a copy of page one of the final Heads of Agreement, which copy was then being used for reference purposes by the principal draftsmen (Mr. Brunker and Mr. Halpenny), with the result that the definition, as amended by the said interpolation, was included in the draft of the 1998 Licence then under consideration, and in subsequent drafts (with the interpolation now qualified as "and car parking"). This interpolation was subsequently construed at arbitration as having the dramatic effect of imposing on the plaintiff an obligation, on termination of the Licence, to demise to the defendant an area for car parking (as well as for tennis), amounting to circa 5.5 acres, something which the plaintiff contends was never intended by the parties, and which "mistake" it now seeks to rectify in the context of these proceedings.

2.114 In advance of this meeting of the 9th of January, 1998 Mr. Halpenny had faxed marked-up copies of Mr. Brunker's initial drafts to Mr. Brunker suggesting various amendments, some of which were represented by manuscript alterations, or additions, to the original text and some of which were appended by way of riders. In particular the marked-up draft forwarded by Mr. Halpenny involved the insertion of a number of references to parking in the recitals to the Licence and included the definitions from the Final Heads of Agreement including the definition of "the New Site".

2.115 It is necessary to deal in some detail with Mr. Halpenny's suggested amendments to both the draft 1998 Lease and to the draft 1998 Licence in so far as they are material to the issues that this court will have to decide.

2.116 In relation to the draft Lease, at page 1 of the copy draft Lease, marked-up to reflect Mr. Halpenny's proposed amendments, Mr. Halpenny, in listing the definition clauses to be inserted in the draft Lease (and, in particular, the definition of the "New Site"), states, in a manuscript annotation, that the definitions are to be in accordance with the definitions contained in the Heads of Agreement. He states "*See Heads of Agreement*". It should be recalled that the definition of the "New Site" as contained in the Heads of Agreement was in the following terms:

"'The New Site'	=	A parcel or parcels of land, situate adjacent to the first dome, upon which Templeville's tennis facilities, which are currently located on the area hatched yellow, are to be relocated, by reason of the C.P.O., and including so much of the land upon which the second dome and 4 outdoor tennis courts are currently located, which is not required by the C.P.O."

2.117 Further, Mr. Halpenny also proposed deleting so much of Clause 1 as provided for the demise and for the car parking rights in the form in which Mr. Brunker had drafted it. He proposed substituting for that his Rider No 1 which had the effect, *inter alia*, of inserting into the draft 1998 Lease the provisions contained in Clause 3 A (a) to (d) of the final Heads of Agreement which, it will be recalled, had provided:

> "Lease, Licence and Demise and Car Parking
>
> A. The New Lease shall contemplate the provision of a supplemental deed to demise to Templeville the new site and such of the area hatched yellow as survives the C. P. O. to give effect to the demise and rights following relocation and also to incorporate the revised arrangements in relation to rights, rights of way and entitlements.
>
> The New Lease shall permit Templeville to use and occupy: --
>
> (a) So much of the area hatched yellow as is not affected by the C.P.O. for parking and for outdoor tennis courts on non-race days.
>
> (b) The area outlined in blue on the map, for parking,
>
> (c) The tarmacadamed area between the front of the grandstand and the racecourse, for parking on non-race days.
>
> (d) Such other areas of car parking which may be required by Templeville to facilitate its club members on non-race days, as may be agreed by Leopardstown, such agreement not to be unreasonably withheld."

Rider No 1 was in the following terms:

> *"1. In consideration of the yearly rents, covenants and conditions hereinafter reserved and contained the Landlord HEREBY DEMISES unto the Tenant ALL THOSE part of the lands at Carmanhall and Leopardstown in the grounds of Leopardstown Race Course (hereinafter referred to as "Leopardstown") at Foxrock situate in the Barony of Rathdown and County of Dublin consisting of:*
>
> *(i) …….*
>
> *(ii)…….*
>
> *(iii)…….*
>
> *(iv)……"*
>
> [(i) to(iv) inclusive were redrafted parcel descriptions in substitution for parcel descriptions (i) to (v) inclusive in Mr. Brunker's first draft. The Court is not concerned with these.]
>
> *(hereinafter collectively called "the Demised Premises")*
>
> ***TOGETHER WITH*** *…. (not relevant)*
>
> ***TOGETHER WITH*** *…. (not relevant)*
>
> ***TOGETHER WITH*** *…. (not relevant)*
>
> ***TOGETHER WITH*** *…. (not relevant)*
>
> ***TOGETHER WITH*** *…. (not relevant)*
>
> ***AND*** *…. (not relevant)*
>
> ***AND*** *the right to park motor cars and motor vehicles in car park 1 and car park 2, which for the purpose of identification are more particularly delineated on Map No. 1 annexed hereto and thereon edged orange,*
>
> ***TOGETHER WITH*** *the right to park motor cars and motor vehicles on non-race days in the area to the front of the main grandstand, which for the purpose of identification is more particularly delineated on Map No. 1 annexed hereto and thereon edged ( ),*
>
> ***TOGETHER WITH*** *the right to park motor cars and motor vehicles on race days in a suitably designated car park by the Landlord or car parks close to or adjacent to the main entrance to Leopardstown,*
>
> ***TOGETHER WITH*** *the right to park motor cars or motor vehicles on non-race days on the parcel of land, which for the purpose of identification is shown on Map No. 1 annexed hereto and thereon crosshatched in yellow, which does not form part of the new site and which is not affected by the CPO,*
>
> ***TOGETHER WITH*** *a right to park motor cars or motor vehicles on non-race days within Leopardstown in such other car parking areas as may be designated by the Landlord as such, from time to time"*

2.118 Mr. Brunker offered the following comments on this in answer to questions from Leopardstown's counsel:

> "Q. ….looking again at the vocabulary, I think that is reflective of the wording of the Heads of Agreement that you had been seeking to replicate?
>
> A. Yes, exactly. We are talking rights all the way through there.
>
> Q. Yes. Was there anything in that to suggest to you that what was, in fact, being proposed was a demise of spaces of parking?
>
> A. No, certainly not."

2.119 In relation to the draft Licence, Mr. Halpenny inserted in manuscript on page 1 of the copy draft Licence, marked-up to reflect his proposed amendments, the statement "DEFINITIONS / INTERPRETATIONS AS PER HEADS / LEASE", thereby clearly indicating that the definitions / interpretations to be contained in the Licence should conform to the definitions contained in the final Heads of Agreement and in the Lease.

2.120 Further, Mr. Halpenny proposed deleting Recital No 2 as drafted by Mr. Brunker and substituting therefor his Rider No 3. It is not necessary to recite this as it is taken virtually word for word from the terms of Clause 2 A of the final Heads of Agreement. Mr. Brunker was asked by his Counsel:

> "Q. Was there anything in this particular rider that set alarm bells ringing for you that perhaps, in fact, Templeville was looking for a demise of car parking spaces?

He answered:

> A. No, there is absolutely nothing in that that would suggest a potential demise. We are talking about car parking facilities with equivalent facilities to be substituted, yes."

2.121 Mr. Halpenny also suggested a minor amendment to Mr. Brunker's recital No 3 which had stated:

> *"3. The Licensor has further agreed to grant the lease of premises in addition to the Demised Premises in accordance with the terms hereinafter contained."*

2.122 The amendment proposed substituting "the New Site" for the word "premises". Commenting on this in his witness statement (the contents of which he verified at the commencement of his evidence at the trial herein) Mr. Brunker stated:

> "If there was an intention to demise an additional exclusive area for car parking, I believe that such an intention to demise of area for car parking would have been mentioned in this Recital by the use of the words 'and a further demise of car parking' or such similar words."

2.123 Mr. Halpenny also suggested numerous amendments to Clause 1 of the operative section of Mr. Brunker's first draft of the 1998 Licence. Mr. Halpenny's amended version was in the following terms:

> *" 1. In pursuance of the aforementioned agreement and in consideration of the covenants on the part of the Licensees hereinafter contained the Licensor hereby* ***LICENSES AND PERMITS*** *the Licensees to continue to exercise the rights and privileges of entering upon and having use occupation and enjoyment of the part of the Licensor's premises specified in the First Schedule hereto (the 'Licensed Area') the purposes of identification being the area hatched yellow on Map No 1 attached hereto and for the purposes set out in the First Schedule hereto with the right of ingress egress and regress thereto and therefrom.*
>
> *TO HOLD the same unto the Licensees from the 1st day of January 1995 until terminated in accordance with the provisions and conditions hereinafter contained, and if not so terminated, for the period of thirty five years from the 1st day of January 1998, at which time all rights contained in this Licence in favour of the Licensee shall convert into rights as if the* [sic: they] *were rights granted under a Lease"*

In addition Mr. Halpenny proposed amending the First Schedule to read:

> ***"****FIRST SCHEDULE*
>
> *The part of the Licensor's premises situate at Leopardstown Racecourse as shown on the plan attached hereto and thereon crosshatched in yellow partially comprising of four outdoor tennis courts and seven indoor tennis courts positioned under an air dome erected by the Licensee TOGETHER WITH the right to use, occupy and enjoy said tennis courts and tennis facilities TOGETHER WITH the right to park motor vehicles thereon (entire area) and the right to build a further seven outdoor tennis courts, TOGETHER WITH all vehicular and pedestrian rights of way is thereto thereover and therefrom."*

2.124 Mr. Brunker was asked in the course of his evidence:

> Q. What did you understand this particular manuscript amendment to be seeking to achieve?

He answered:

> A. It's quite simple. If the licence, if the CPO didn't go ahead, and that was always a potential, if it didn't happen, this licence agreement would continue side by side with the '98 lease, and, at the end of that period, it would disappear because there would be no rights under landlord and tenant legislation which the tenant/licensee, could avail of. It's not a tenement; it's a right to park cars, and so forth, and would terminate at the end of that period in that the tenant didn't have rights of renewal. And Mr. Halpenny, as I read it, was concerned that this should continue with the '98 lease which could be renewed under landlord and tenant legislation. It … he didn't want this to wither. And would continue as a licence for a further period. As long as the lease, the '98 lease, was there, this licence would likewise be there, and nothing further than that. It doesn't become a lease at the end of the 35 years. And that seemed to be an acceptable request by Mr. Halpenny."

2.125 Mr. Halpenny further suggested adding a new Clause 2 to the operative section of the Licence in the terms of his Rider No 4.

2.126 Rider No 4 provided:

> *"In further pursuance of the aforementioned agreement and in consideration of the covenants on the part of the Licensee hereinafter contained, the Licensor hereby agrees and binds itself, for itself, its successors and assigns to grant and demise unto the Licensee, by way of endorsement on the Lease, and demise over the new site, granting the rights, privileges and entitlements more particularly specified in the First Schedule hereto TO HOLD the same unto the Licensee from the days of the expiry of the notice period, hereinafter referred to, for a term of years equal to the residue of the term of years left to run under the Lease."*

2.127 Mr. Brunker was asked:

> "Q. Now, in looking at that particular rider, was there anything to suggest to you that what was being striven for was a demise of car parking spaces?"

He replied:

> "A. No, … the site was the tennis courts, and, in addition, there would be -- the rights and privileges which they enjoyed would go with that."

2.128 With reference to the manuscript suggested amendments to the First Schedule (which requires to be read in conjunction with Rider 4) he was asked:

> "Q. Now, looking at those particular manuscript amendments made by Mr. Halpenny, was there anything in them to suggest to you that what was being aimed for was a demise of car parking spaces?"

He replied:

> A. No. Again, we are back to rights to park cars, and nothing more than that.

2.129 Mr. Halpenny also proposed certain amendments to Clauses 4, 5 and 6 of Mr. Brunker's first draft of the 1998 Licence, which

deal with the nomination and the criteria for the new site. Mr. Brunker was asked:

> "Q. And in looking at the various other manuscript amendments made to that draft licence by Mr. Halpenny, was there anything in those amendments to suggest to you that in any way there was to be a change from what you understood the position as set out in the Heads of Agreement, that of a licence of car parking spaces, to a demise of car parking spaces?

He replied:

> A. No, quite certainly not. No suggestion whatsoever in relation to any of the amendments that I could see that would suggest a demise of car parking space."

2.130 Moreover, in his statement of evidence Mr. Brunker made a number of important points with respect to the amendments that were in fact made to Clauses 4, 5 and 6. He said (at paras 26.18 to 26.20):

> "26.18 …..if there had ever been an agreement to demise an exclusive additional area for car parking to Templeville, as Templeville now claims, the manner in which it was allegedly achieved is extremely unusual and is by no means the manner in which any such agreement would ordinarily be effected or reflected in documentation. I would have expected Conor Halpenny specifically to provide for same by way of amendments to these clauses and, in particular, he would have identified this agreement to demise car parking as one of the criteria for the new site to be inserted in Clause 6. I am reinforced in my assertions in this regard by the further amendments to Clause 4 made by Conor Halpenny where, in paragraph (ii) on page 7 of the Licence, he inserts in manuscript:
>
> *'(ii) The demise of the new site* ***as hereinbefore referred to****….*
>
> [Conor Halpenny's manuscript amendments are shown in bold and underlined.]
>
> 26.19 By this manuscript amendment, I understood that Conor Halpenny was confirming that the new site was as described by Clause 4 of the Licence, where "*the new site*" is specifically defined. Furthermore, at sub-clause 4 (iii) on page 8 of the Licence, Mr. Halpenny deleted the following wording concerning car parking rights:
>
> *'This deed shall also provide for the additional and replacement car parking rights referred to herein.'*
>
> 26.20 While I believe this deletion was entirely appropriate … if there was an intention to provide for a demise of an exclusive area for additional and replacement car parking, I would have expected that this sentence would not have been deleted but would have been amended to provide specifically for a demise of an additional area for car parking and the word '*rights*' in relation to car parking would have been deleted and replaced by words denoting a demise, …".

2.131 Turning now to the meeting of the 9th of January 1998 itself, it was put to Mr. Brunker and to Mr. Justice Clarke, respectively, in cross-examination, that both Mr. Clarke (as he then was) and Mr. Kieran Condell had also attended this meeting. It was further put that the fact that they had been present had been recorded by Mr. Halpenny in his attendance note of the meeting. Neither Mr. Brunker, nor Mr. Justice Clarke, recalled them as having attended. Moreover, Mr. Brunker's own note of the meeting makes no mention of it. However, when pressed, both Mr. Brunker and Mr. Justice Clarke, conceded the possibility that it may have been the case that they were there. Mr. Brunker said that:

> "…if Mr. Clarke was to attend, he wouldn't be there in the nature of agreeing drafting matters on the documentation; he would have been just in attendance if something came up."

2.132 Mr. Brunker further acknowledged that it would have been helpful if Mr. Clarke was there "if any items on the negotiations came up". Mr. Justice Clarke said in his witness statement (the contents of which he adopted and verified as part of his evidence in chief):

> "If I did attend this meeting, I would not have been actively involved in the drafting process and would only have been involved in significant material issues that varied the negotiated heads of agreement. I do not recall any discussion concerning such significant and material variations."
>
> Consistent with this, he said in the witness box:
>
> "I would have left technical questions of the precise way in which the lease should be drafted, as opposed to issues of substance, to Mr. Brunker. I have always been a believer in the principle that you shouldn't buy a dog and then bark yourself."

2.133 The Court accepts this evidence. While I am of the view that, as a matter of probability, Mr. Clarke and Mr. Condell were present at the meeting on the 9th of January, 2008, I am also satisfied that Mr. Clarke was not actively involved in the negotiations on how best to draft the 1998 Lease and the 1998 Licence, respectively, and that he and Mr. Condell were merely present on a contingent basis in case some point of substance should arise in relation to the proposed Heads of Agreement.

2.134 The following important evidence was given by Mr. Brunker when asked about the meeting of the 9th of January, 1998 by counsel for Leopardstown:

> "Q. Now, to the best of your recollection, was anything said to you or intimated to you by Mr. Halpenny during the course of that meeting to lead you to believe that there was to be a demise of car parking spaces to his client, Templeville?
>
> A. No, quite certainly not. I would have recalled that, I would have recorded that as being different from my instructions, so that would have been highlighted.
>
> Q. And was anything said by Mr. Halpenny to suggest that whatever may have been agreed in the Heads of Agreement, that his client was now looking for some new or altered deal in relation to car parking, or indeed any other aspect of the arrangements as set out in the Heads of Agreement?
>
> A. No, we were still working on the Heads of Agreement and reducing that into acceptable documents. There was no indication that there were any changes whatsoever from the Heads of Agreement.

> Q. And if there had been a suggestion made to you that there were to be changes in the Heads of Agreement, whether in respect of car parking or otherwise, what would your response have been?
>
> A. The response would be that I would have to seek my client's instructions on that point."

2.135 Mr. Brunker testified that another document, being a copy of the first page of the final Heads of Agreement with manuscript amendments thereto "was provided, prior to our meeting, by Conor to me, to assist in the general drafting of the documentation." This, as it turns out, was a crucial event in as much as one of the manuscript amendments, in what is inferred to be Mr. Halpenny's handwriting, interpolates the words "and parking" into the definition of the new site so that it then read:

> "'The New Site' = A parcel or parcels of land, situate adjacent to the first dome, upon which Templeville's tennis facilities **and parking**, which are currently located on the area hatched yellow, are to be relocated, by reason of the C.P.O., and including so much of the land upon which the second dome and 4 outdoor tennis courts are currently located, which is not required by the C.P.O."
>
> [Emphasis added].

2.136 Commenting on the manuscript amendments to this single page document generally, Mr. Brunker said in his statement of evidence (at para 29.2):

> "My understanding of the amendments was that they were in the nature of improving the drafting of the documents rather than materially altering the meaning of the clauses which were agreed in the Heads of Agreement."

2.137 In the course of his evidence in chief Mr. Brunker was questioned specifically about the manuscript amendment to the definition of the new site. He was asked:

> Q. Perhaps you can indicate, Mr. Brunker, what, if anything, was said by Mr. Halpenny in relation the inclusion of these words "and parking" in the definition of "the new site"?

And replied:

> A. Well, I can't honestly recall. I know that Conor was concerned that they would have similar appurtenant rights or licence to park cars, as that was still very relevant, and as the previous lease provided for a licence to park cars, he was concerned, as I read it, that a new lease ... would similarly have rights to park cars with it. And I saw that insertion just to ensure that there would be car parking rights with the new site."

2.138 He was cross-examined at some length on this by Mr. Donal O'Donnell S.C., for Templeville, and accepted that "this wasn't coming to you for the first time" because, on his understanding, if "the demised area could not be used for car parking, well, then, there was going to be car parking rights lost in respect of the land hatched yellow" and that "whatever was lost had to be found elsewhere" within the race course and lands owned by Leopardstown. For this reason Mr. Brunker regarded the manuscript amendment to the definition of the new site as confirming his understanding and as being consistent with what was contemplated by the agreement between the parties. Accordingly, he saw no problem with it at the time and incorporated it in a revised draft of both the Lease and the Licence that he issued on the 13th of January 1998, but with a qualification added thereto as result of an intervening telephone conversation with Mr. Halpenny, so that it now read "*and car parking*". Mr. Brunker testified that when his revised drafts (hereinafter the second draft Lease and the second draft Licence, respectively) were circulated amongst Leopardstown's people nobody suggested to him that the amendments were problematic, or that they were perceived as giving rise to a demise of car parking.

2.139 Meanwhile on the 12th of January 1998 Mr. Law received the Opinion of Mr. Hugh O'Neill S.C. and telephoned Mr. Clarke to advise him that it was to hand and to brief him on its contents. This document was exhibited before the Court and in his Opinion Mr. O'Neill stated, *inter alia*:

> "In summary, the Heads of Agreement provides that in return for permission being granted to Templeville to erect the extension to the front of the Clubhouse and the 'junior area' Leopardstown is entitled (at its own cost) to relocate the second dome and adjoining tennis courts to a suitable alternative site (as yet undefined) and to use on race days during limited hours Templeville's bar facilities. While it is difficult for me to express a view on the commercial sense of the Heads of Agreement, having regard to the desirability of being able to deal freely with the County Council and of resolving the existing matters in dispute (most of which I feel would not be decided in a Court of Law in Leopardstown's favour), it seems to me that the necessity for some agreement with Templeville speaks for itself. Moreover, it does not seem to me on the basis of the Heads of Agreement itself that there is anything in that Agreement which will affect Leopardstown's property interest or the operation of its race and golf courses to any greater extent than exists at present. …"

2.140 On the 14th of January Mr. Law sent a copy of Mr. O'Neill's Opinion to Mr. John White.

2.141 Mr. Halpenny replied by the letter of the 14th of January to Mr. Brunker's letter of the previous day, returning copies of the second draft Lease and the second draft Licence, respectively, with some further suggested amendments and riders added thereto in manuscript. His letter suggested that these amendments and riders, which Mr. Brunker acknowledges were relatively minor in substance, were for tidying-up purposes. That was also how Mr. Brunker saw them.

2.142 However, Mr. Brunker makes a fairly significant point in relation to the definitions contained in the second draft Licence and it is this. He and Mr. Halpenny as draftsmen concentrated primarily on the draft Lease document. While they did address themselves to the draft Licence as well it was considered to be as a secondary or ancillary document, so that the definitions contained in the second draft Licence were "cut and pasted" from the definitions contained in the draft Lease. That this is so is apparent from the introductory clause to the definitions section in the second draft Licence which states: "In this **Lease** the following terms shall have the respective meanings," etc, instead of saying "In this Licence" etc. [emphasis added]. This error was never in fact corrected and continued to appear in all subsequent drafts of the Licence and it also appears in the executed document.

2.143 By a further letter, also dated the 14th of January 1998, from Mr. Halpenny to Mr. Brunker, Mr. Halpenny communicated his client's wish to have a separate company execute the new Lease and Licence. As there was no provision under the final Heads of Agreement for such a substitution Mr. Brunker wrote to Mr. John White, General Manager of Leopardstown, seeking his instructions. Mr. White replied on the 15th of January 1998 with instructions that the Lease and Licence were to be taken by Templeville and not

by a new company. Mr. Brunker telephoned Mr. Halpenny on the same day to communicate Mr. White's response to him.

2.144 There were also several letters of the 15th of January 1998 from Mr. Halpenny to Mr. Brunker dealing with, or alternatively raising, various issues in an effort to further progress matters. One such letter dealt with mapping, another submitted a schedule of floor areas for the purposes of calculating the applicable service charges, and a third (transmitted by fax) submitted a draft Race Day Licence for Mr. Brunker's consideration.

2.145 On the 16th of January 1998 Mr. Brunker wrote to Mr. Halpenny returning a copy of his draft Race Day Licence annotated in manuscript with suggested amendments, in accordance with certain instructions received by Mr. Brunker from Mr. White.

2.146 Then on the 19th of January 1998 Mr. Halpenny wrote to Mr. Brunker concerning the Race Day Licence and the second draft Lease. As well as suggesting some further minor amendments to the draft Race Day Licence, he pointed out that an amendment, concerning access by his client on race days, which was agreed in relation to the first draft of the Lease had accidentally been omitted from the second draft Lease. He requested Mr. Brunker to insert the following wording in the third draft of the Lease: -

> "Access on race days and use of the demised premises on race days shall be unfettered, save as may be agreed between the Landlord and Tenant, in writing, from time to time."

2.147 Mr. Brunker was asked by Leopardstown's Counsel:

> Q. "When you received that letter, did you perceive any problems or difficulties with what was being suggested?"

And replied:

> A. "No, it was all in accordance with as my instructions, there was nothing in that of any fundamental difference."

2.148 It is not necessary for the purposes of this judgment to recite the details of this or of any subsequent draft of this document, save for one provision in respect of car parking arrangements. In essence the final document provided for use by Leopardstown of bar facilities on Templeville's premises on race days, as well as use of certain roofs and terraces on Templeville's premises as viewing areas on race days. It further provided:

> " Templeville further Licences and Permits Leopardstown during Race Days to use for car parking purposes only any or all of its outdoor tennis courts now built or to be built upon the Demised Premises or any further areas covered or to be covered by outdoor tennis courts which may hereafter be demised by Leopardstown to Templeville together with the right of access and regress over same to and from such outdoor tennis courts, (tennis Court No. 2 as shown on map No. 1 attached to the Lease, being excluded)."

2.149 The Race Day Licence further provided, *inter alia*, that on race days Templeville's customers should, within a period commencing four hours before the first race and finishing two hours after the last race, park their cars in a permanent designated car park (located some distance from the main complex) and that Templeville would provide a periodic shuttle bus service to enable them to travel from there to the Westwood Club premises and back again.

2.150 Mr. Brunker was asked:

> Q. "…in relation to the third or fourth draft Race Day Licence which incorporates some of the amendments that had been suggested by Mr. Halpenny, was there any intention on your part to provide for a demise of car parking spaces?"

He replied:

> A. "No."

2.151 It should also be stated that the reason the Race Day Licence was not finalised at that point, and for some time thereafter, was because the parties were at an impasse concerning a further clause that Leopardstown wanted to have included in it requiring the Westwood Club to close altogether on Leopardstown's two most important race days, namely St Stephen's Day and the Hennessy Gold Cup Day.

2.152 The next scheduled meeting of the Board of the I.H.A. also took place on the 19th of January, 1998 and was attended by Mr. White and Mr. Clarke on behalf of Leopardstown. Mr. Sudway was also in attendance. They were not present for the full meeting but rather only attended for, and contributed to, the portion of the meeting dealing with the ongoing negotiations between Leopardstown and Dun Laoghaire / Rathdown County Council. Mr. Clarke had prepared and circulated a report by way of a briefing document in advance of the meeting. Mr. White told the Court that at the meeting the committee was updated on the current position regarding the Heads of Agreement with the County Council in relation to the new motorway and the related issue of the Lease with Philip Smyth and Templeville. He said that Mr. Clarke's report was listened to attentively and his briefing document was gone through in detail. Then following a discussion the committee agreed to recommend that a sub-committee consisting of the Chairman, Mr. Denis Brosnan, together with Messrs Clarke, Moloney and Ryan should be authorised to finalise arrangements on behalf of both Leopardstown and the I.H.A. Both Mr. White and Mr. Clarke left the meeting assured that, providing the Committee was satisfied that all outstanding items had been agreed, the I.H.A would approve the deal.

2.153 In his statement of evidence, adopted and verified as part of his evidence in chief, Mr. Justice Clarke further states with respect to this meeting:

> " … if I had been or become aware of an agreement negotiated between Leopardstown and Templeville to demise an exclusive area of car parking to Templeville, I would have advised the members of the Board of this in my presentation to them on the 19th of January 1998. Moreover, if I had been aware of any such agreement by Leopardstown in consideration of Templeville withdrawing its objection to the planned motorway or waiving any rights it may have had to compensation, then this agreement would have been specifically mentioned by me in my presentation to the Board."

2.154 On the following day, the 20th of January 1998, Mr. White telephoned Mr. Brunker to give him the good news that the I.H.A had given "the green light" to the motorway, and to say that as "a few small items on Westwood" remained unresolved a meeting should be convened with Templeville to clear up all outstanding issues. A meeting appears to have been arranged for the following day but it was later postponed to the 23rd of January, 1998.

2.155 Mr. Brunker also received correspondence on the 20th of January, 1998 from Mr. Crowley, Leopardstown's Architect, concerning his meetings with Templeville's Architect, Toal O'Muire, and nothing turns on that. He also wrote to Mr. Halpenny enclosing his third draft of the 1998 Lease (hereinafter the third draft Lease) incorporating Mr. Halpenny's recently suggested amendments.

2.156 Then on the 21st of January Mr. Brunker received a telephone call from Mr. White complaining that construction works were being carried out by Templeville, and this gave rise to a flurry of other phone calls and communications between interested parties. Leopardstown's concerns were conveyed to Mr. Halpenny by Mr. Brunker initially by telephone, and later in a letter written on Mr. White's instructions, which threatened injunctive proceedings.

2.157 In the meantime, and on the same day, 21st of January 1998, Mr. Halpenny wrote to Mr. Brunker stating:

> "The third draft Lease would appear to be in order and accordingly is approved for engrossment purposes"

Mr. Halpenny further requested that he be furnished with final copies of the other draft documents before the meeting.

2.158 On the evening of the 21st of January 1998 Leopardstown's Solicitors were still awaiting a response to their threat of injunctive proceedings. Mr. Brunker was out of the office for a time and the matter was pursued in his absence by his assistant Mr. Cathal de Barra. Mr. de Barra was unsuccessful in speaking with Mr. Halpenny before close of business at that date but left a message on P.C.L. Halpenny & Son's answering machine requesting Mr. Halpenny to call either himself or Mr. Brunker urgently.

2.159 On the following day, the 22nd of January, 1998 Mr. Halpenny telephone Mr. Brunker. Mr. Brunker's evidence in relation to that was:

> "Q. Perhaps you can just indicate to the Court the content of that particular telephone conversation?
>
> A. Mr. Halpenny rang me, and he said that he had met with his client, Philip Smyth, who considered that everything was agreed as in the Heads. And we said that this hadn't been signed, so was not agreed, on the basis that nothing was agreed until it was signed. The main problem was in relation to opening on Stephen's Day and Hennessy Gold Cup. It came down to that final item. We, or Leopardstown, were not happy with them opening on race days, and these were two big race days, but Mr. Halpenny had indicated that his client had difficulty with the concept of closing down on those particular race days.
>
> Q. Yes. Now, when you refer to everything not being agreed until they were signed, you seem to suggest to Mr. Halpenny that you were opening up the negotiations in relation to the Race Day Licence Agreement?
>
> A. No, we were still working on the basis of the Heads of Agreement, which so far as Leopardstown was concerned it hadn't been signed, but they had been settled, the Heads had all been settled. I think the idea would be that it couldn't be enforced under statute of fraud, it wouldn't be enforceable as such, but there was an agreement, but not an enforceable agreement, and until such time as they were actually signed because it had always been indicated to me that the I.H.A. had to throw their eye over the documents first before saying to Leopardstown 'Go ahead and sign'."

2.160 Following this telephone conversation, a letter was transmitted by fax from Mr. Halpenny addressed to Mr. Brunker in the following terms (*inter alia*):

> " I am instructed to propose that the present impasse between the parties be resolved by amending the Race Day Licence Agreement in accordance with my previously suggested amendments, subject to the following: --
>
> (a) That the agreement provides that our client will close the demised premises on St Stephen's Day, but that no requirement shall arise in relation to Hennessy Gold Cup Day,
>
> (b) That we receive an assurance that all documentation will be executed tomorrow afternoon in your office,
>
> (c) That no issue or adverse steps will be taken to prevent our client to continue with the building works, which are currently in train,
>
> (d) That the Licence in relation to the Tote Hall be incorporated into the Race Day Licence."

2.161 Mr. Brunker, accompanied by Mr. Law, then telephoned Mr. White and sought his views. Subsequently, Mr. Clarke was also telephoned and developments were discussed with him. Matters were left over to the meeting on the following day where it was hoped that progress could be made to resolve the impasse.

2.162 On the 23rd of January, 1998 the parties met at the offices of A & L Goodbody, Solicitors. The main meeting was preceded by a pre-meeting which was not attended by all of those who attended the main meeting. This pre-meeting served to focus or narrow the issues for discussion at the main meeting. The Leopardstown team at the main meeting was comprised of Frank Clarke S.C. (as he then was) in his capacity as a Director of Leopardstown; Pierce Moloney in his capacity as recently elected chairman of Leopardstown; Paddy Walsh in his capacity as the secretary of the I.H.A.; John White in his capacity as manager of Leopardstown; Eric Brunker, solicitor; Cathal De Barra, solicitor and David Crowley, architect. The Templeville team was comprised of Philip Smyth; Gene Kavanagh, a director of Templeville; Kieran Condell and Conor Halpenny, solicitor. Mr. De Barra recorded attendance notes or minutes concerning the proceedings at both meetings, and Mr. Justice Clarke, Mr. Brunker and Mr. White, have each respectively testified as to the accuracy of his notes. A range of outstanding issues was discussed and agreement was reached on all of them. The compromise reached on race day access on Hennessy Gold Cup Day was that Westwood would close between the hours of 11.00am and 5.30pm. Mr. Brunker was asked in the course of his evidence what had been discussed in the context of a matter minuted by Mr. De Barra in his attendance note concerning the main meeting under a heading entitled "Right to Park on Race Day Contract". He replied:

> "A. There was an area in the front that was, that was to be used - could be used for car parking, but Leopardstown were reluctant to have parking in that area right in front of the stand. I think that place was the orange hatched. And if I read out the attendance it might be better.
>
> > *'John White raised the issue of the orange hatched parking area. Mr. Smyth said it will hardly ever be used for parking. And John White concerned that this area could be used by Leopardstown. Lease now gives right to parking*

in car park 1 and 2 and area in front of the grandstand. Mr. Smyth suggested that the area only would be used for delivery rather than for parking.'

And that, I think, solved the problem there; that it wouldn't be generally used for car parking, but would only be for delivery purposes."

2.163 This was ostensibly the only reference of any sort, at either the pre-meeting or the main meeting, to car parking. However, a note made by Mr. White in the aftermath of the meeting does contain a cryptic bullet point reference to:

- *Dem of Land – 'Cars' Parking ".*

2.164 He was asked about this in cross-examination by Mr. O'Donnell S.C.:

"Q. It says 'Demise of lands, cars and parking", doesn't it?

A. Well, those three I take together. I didn't know that, in fact. The 'DMI' I presume means demise. I know that my tone went up a bit when Mr. Moloney gave away, was seemingly going to give away a demise of some of the toilets downstairs. This was unusual, just talking about service of parking cars in an area that was fundamental to Leopardstown on race days. I wondered what the implications were, that is all that meant.

Q. This is your note of the meeting of the 23rd January?

A. That's correct, yes.

Q. And you are noting the reference to demise of lands, cars and parking, isn't that right?

A. Yeah, I am taking it in conjunction with the three areas.

Q. So it is something that is obviously –

A. It triggered, it honestly triggered some kind of bell in my head, because it was the first time that I had seen Mr. Moloney particularly in action, and he rather quickly, I think decided to give a demise of a certain area of the toilets, of what my understanding of that would mean. It was a note to jog my memory when I got back to the office the next day and I saw the minutes, just to inquire into it."

2.165 Following this meeting the full suite of documents giving effect to the Heads of Agreement were either engrossed or were considered ready for engrossment (the evidence is a little unclear on this, but nothing turns on it). In any case the documents could not be executed that evening; this was because, before Leopardstown could execute them, they would need the approval of Mr. Denis Brosnan, the Chairman of the I.H.R.A, who was not in attendance at the meeting. The only other matter of significance is that Mr. Walsh's testimony, as refreshed by his attendance note, was to the effect that as:

"…Denis Brosnan was expected back in the country the next day, it was hoped that matters will be finalised on Monday, January 26th 1998. Eric Brunker advised that Philip Smyth should withdraw his objection to the motorway by 10:30 a.m. on the 26th, but it would not be difficult to obtain a 24-hour extension."

2.166 By a letter of the 26th of January 1998 Conor Halpenny returned the engrossed Lease, Licence, Licence for Works and Race Day Licence in duplicate and duly executed on behalf of Templeville, to Mr. Brunker. In his letter he noted that Mr. Brunker's clients, Leopardstown, were meeting that afternoon to execute the documentation. He requested Mr. Brunker to confirm to him by telephone that all the documentation had, in fact, been completed. The letter specifically stated:

"The particular importance of this confirmation is due to the fact that my client's Architect, who has been instructed to present an objection at the DunLaoghaire / Rathdown South Eastern Motorway public enquiry today, is applying for a one day adjournment to tomorrow and if all documentation is executed this afternoon, he will be instructed to withdraw his objections."

2.167 In questioning Mr. Brunker concerning this letter of the 26th of January, counsel for Leopardstown put it to him:

Q. "….and I think he was placing some particular importance on that confirmation, because the architect, who was instructed to present an objection to Dun Laoghaire Rathdown South Eastern Motorway Public Inquiry, had applied for a one day adjournment for all that to happen, for the execution of all the documentation.

A. Yes."

2.168 On the same day Cathal De Barra spoke by telephone to Paddy Walsh, Secretary of the I.H.A. who informed him that the documents could not be executed on behalf of Leopardstown until after a meeting of the Committee of the I.H.A. to be held on Wednesday 28th of January as Mr. Brosnan and the Committee wished to discuss and consider them. Mr. De Barra was asked to advise Mr. Halpenny of the position.

2.169 Further, on the 26th of January, 1998 Mr. De Barra sent copies of the engrossed suite of documents as executed on behalf of Templeville to Pierce Moloney, John White and Frank Clarke.

2.170 Finally, Mr. Halpenny wrote to Mr. Brunker by a letter of 26th of January 1998 requesting him to forward a copy of the Heads of Agreement signed by Mr. Smyth and Notice of Discontinuance in relation to Leopardstown's High Court proceedings against Templeville.

2.171 On the following day, 27th January 1998 Mr. De Barra duly conveyed to Mr. Halpenny by telephone the information that the documents would not be executed on behalf of Leopardstown until after the I.H.R.A Committee meeting on the 28th January. Conor Halpenny is recorded as having expressed his client's dissatisfaction with the position. Moreover, by a lengthy letter also dated the 27th of January 1998 from Mr. Halpenny to Mr. Brunker, Mr. Halpenny made a formal protest on behalf of Mr. Smyth and Templeville.

2.172 In this situation of somewhat strained relations there was a further brief exchange of correspondence between Mr. Brunker and

Mr. Halpenny on a point of detail concerning the number of tennis courts to be developed in circumstances where it was still uncertain as to how much land would remain after the C.P.O. As this does not bear on the issue of car parking the Court merely notes it in passing.

2.173 The Committee of the I.H.A. duly held its meeting on the morning of the 28th of January 1998. Following that meeting Mr. Walsh sent a letter by fax to Mr. Brunker in the following terms:

> "Dear Eric,
>
> The sub-committee which has been empowered by both the Leopardstown Board and the Authority to finalise arrangements in regard to the above lease met this morning to discuss the latest revised draft of same. Following this review they have agreed to sign the lease and related licenses subject strictly to the following conditions:
>
> 1. Lease should not be signed until letter received from Philip Smyth's solicitors confirming that he is objecting to the Motorway has been withdrawn.
>
> 2. Page 27 of the lease should be amended so that Clause 7(ii)(a) gives Leopardstown the right to relocate the Tenant at its discretion and not only if the 'Landlord decides to demolish…' etc.
>
> 3. Page 13 of the Licence to be amended so that Clause 7 (iv) states that the new site shall provide whatever number of tennis courts can be accommodated therein up to a maximum of seven and not 'adequate space to accommodate a further 7 outdoor tennis courts' as currently included.
>
> 4. Width of right of way on racecourse side to be defined. The defined width should be determined by its use by pedestrians only.
>
> 5. Page 3 of the Race Day Licence to be amended so that Clause 1 (b) includes the word 'exclusive' before the word 'use' in the first line thereof. The reference to access should also include Philip's agreement last Friday to providing access from the ground floor to the first-floor balcony within the demised Area.
>
> 6. All maps and drawings to be attached to the lease and/or licences to be prepared by David Crowley to the satisfaction of the sub-committee.
>
> 7. Page 5 of the Lease (or, if considered sufficient, the related map) to be amended so that the 50% of the area referred to in the fourth paragraph is calculated by dividing line from the front to the rear and not from side to side as at present.
>
> 8. Page 11 of the Licence (Clause 5 (ii)) and page 3 of the Race Day Licence (Clause 2) to be amended to remove the exclusion of 'the one remaining to the front of the Westwood Clubhouse' and 'tennis Court No 2 …' from same.
>
> 9. Page 5 of the Licence for Works to be amended so that the date in the fourth paragraph thereof reads 'June 1st, 1998' instead of 'April 1st, 1998'.
>
> 10. Page 5 of the lease (third paragraph) and the related drawings to be amended so that the use of said toilets is confined to an area that has no access into the Tote hall and that the access to same is by way of right-of-way (external) across the passageway between the ground floor of the new extension to the Clubhouse and the existing Grandstand. These toilets should also be included in the Race Day Licence for exclusive use by Leopardstown.
>
> 11. There may be a need, arising from the above amendments, to amend related cross-references or other clauses which might now be conflicting. I will leave such drafting amendments to your good self.
>
> I would be grateful if you could arrange to have the necessary amendments made as soon as possible. Assuming that Philip Smyth and his people are willing to give effect to all of the above points the sub-committee have agreed that the related legal documents can be signed immediately thereafter."

2.174 This letter was copied by Mr. Brunker to Mr. Halpenny, and on the 30th of January, 1998 Mr. Halpenny wrote to Mr. Brunker in robust terms expressing major disquiet and frustration at what had occurred. The letter, running as it does to four pages, is lengthy and detailed and there is no need to quote all of it. However, a flavour of the frustration articulated therein can be gleaned from the final four paragraphs, which state (*inter alia*):

> "The documents executed by my client on Friday 23rd inst., were finalised engrossments which were engrossed by you on foot of your clients instructions, following the final agreement which was reached at a meeting of Friday 23rd inst. It is now the case that my client has executed these final documents, which had been returned to you, but that your client has not yet executed same.
>
> This is the second occasion within the past two months that my client has executed finalised documents, approved of and agreed to by your client, on foot of agreements and commitments negotiated and which had been retained by your client, unexecuted by them.
>
> We consider what has happened to be a gross misrepresentation, a breach of contract and further a breach of any acceptable form of reasonable or professional behaviour. Your client firstly refused to execute a final heads of agreement document which had been negotiated by Frank Clarke on behalf of your client and they have now sought to substantially alter and amend final documents which have been agreed with Frank Clarke and Pierce Moloney, together with other advisers, including your client's designated architect David Crowley, who has already signed and approved the two developments and the plans thereto.
>
> In light of the 'goal post moving' which keeps occurring on the part of your client, I believe that before my client is asked to consider any further variations or alterations to the agreed and finalised documents, your client should execute all the documents as agreed …."

2.175 On the 30th of January 1998 Mr. Brunker also had a consultation with counsel specialising in intoxicating liquor licensing law who raised an issue concerning the interconnecting doors between the two properties. Mr. Brunker discussed the problem further with

Leopardstown's Architect, and concluded on the basis of the advice that he had received that the proposed Lease would need to be altered.

2.176 On the 2nd of February 1998, Mr. Brunker wrote to Mr. Halpenny and, having outlined the difficulty, stated:

> "I have been accordingly instructed to indicate to you that such access ways cannot be provided for in the proposed lease and that alternative arrangements must be made for any access doors on the upper floors.
>
> I appreciate that this is very late to be bringing this to your attention but I have only now been made aware of the precise problem. It would probably be best dealt with by our respective clients Architects meeting to determine the solution to this problem and perhaps you would let me have your comments."

2.177 Then, on the 4th of February, 1998 Mr. Brunker replied to Mr. Halpenny's letter of the 30th of January, 1998 stating (*inter alia*):

> " The firm commitment given by Mr. Clarke referred to in the second paragraph of the second page of your letter was to recommend to the board of Leopardstown Club Limited that they should proceed on the basis of the Heads of Agreement. Mr. Clarke was not in a position to undertake that the Heads of Agreement document would be entered into by Leopardstown Club Limited so that there was no dishonouring by our clients of any such commitment.
>
> It is accepted that the preparation of the various documents was conducted by our respective offices under great pressure but you will be aware that the reason for this was that the Irish Horseracing Authority insisted that the full package of the documents would be presented to it for its agreement and that it would not be giving prior agreement in principle until all documents had been prepared and presented to it. In fact, in your letter on page 3 at sub-paragraph (b) it was acknowledged by all parties including your clients that the documents still had to be passed to Mr. Denis Brosnan on behalf of the Irish Horseracing Authority. The assurances given to you and your clients were that copies of the documents will be presented to the Irish Horseracing Authority and in particular Mr. Denis Brosnan for his prior approval and subject to approval the documents would be executed by Leopardstown Club Limited. On that basis the documents were engrossed on the Friday and executed by your clients so as to avoid any delay in getting the necessary approval from the Irish Horseracing Authority."

2.178 However, if the intention behind this letter was that oil should be poured upon troubled waters it failed in that objective. On the contrary it seemingly aggravated the situation further and it prompted Mr. Halpenny on the 5th of February 1998 to write yet another lengthy (7 pages) and recriminatory letter to Mr. Brunker. It is unnecessary to quote from it at any length and it will suffice to mention two matters contained therein.

2.179 The first involves Mr. Halpenny's response at this stage to the various late demands for changes. In addition to recriminating on behalf of his client, Mr. Halpenny further complained:

> "Since the meeting of 23rd of January 1998 we have had three further indications of additional conditions and requirements sought on the part of your client, each of which have come from three different sources: --
>
> (a) Letter 27 January 1998 -- source -- John White
>
> (b) Letter 28th January 1998 -- source – I.H.A.
>
> (c) Letter 2nd February 1998 -- source-- unidentified licensing advisor."

2.180 He concluded with regard to this (several pages later):

> "It is totally disingenuous to state 'that approval has now been indicated' (whatever this is meant to mean) when as mentioned above we have received three further sets of requirements/conditions from three different sources, since the meeting on Friday 23rd January last -- a substantial issue being raised five days after the I.H.A.'s ' indication of approval'.
>
> I will now review these three sets of requirements and I will endeavour to discuss with my client and to take my instructions.
>
> I may require clarification from you on a number of the points raised, but some of these are so fundamental that it may require a further meeting to take place to deal with the same. If this is required I believe my client would only attend a meeting which is attended by principals who have the full authority to agree and commit your client."

2.181 The second matter arises in the context of Mr. Halpenny's recriminations on behalf of his client. At pages 4 and 5 of his letter of the 5th of February he states:

> "On the 19th of December 1997 a further meeting took place in your office, which was attended by Peter Law, Frank Clarke, Kieran Condell and myself and after expressing dissatisfaction and frustration at what had occurred and after apologising for same, Frank Clarke confirmed the following: --
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) That the finalised heads of agreement and the original Lease would be **the only two documents** used for preparing the new documentation and that no variations alterations would occur, nor were required by the I.H.A. at its board meeting of 17th December 1997, as envisaged by the heads of agreement document.
>
> Notwithstanding that my client wished, at this stage, to pull out of the deal, believing that he could never get a firm commitment from Leopardstown Club, on foot of the aforesaid representations and undertakings, my client was persuaded

to continue with this transaction.

Our respective firms were then instructed to prepare all the formal legal documentation **to give effect to what had been negotiated and agreed, as set out in the heads of agreement document. The terms of the existing lease were to remain unaltered save for amendments envisaged by the said heads of agreement document."** (Emphasis added).

2.182 The court is of the view that this is an important acknowledgement by Mr. Halpenny that the Heads of Agreement document constituted the negotiated agreement between the parties at that point in time. Moreover, Mr. Brunker when asked about this letter in the course of his evidence stated:

"They were my exact instructions."

2.183 On the 10th of February 1998 Mr. Halpenny wrote a six page letter to Mr. Brunker "in response to two of the specific issues which have been raised by the I.H.A. and you yourself in your letter of 2nd February 1998." These were (i) an issue relating to the requirement that Templeville should withdraw its objection to the motorway, and (ii) the liquor licensing difficulty, respectively. The letter further stated that "[a]n additional issue is being raised by my client as set out hereunder." This related to Clause 7 of the draft Race Day Licence and concerned Templeville's entitlement to tender for catering contracts. In relation to issue (i) the letter purported to suggest that it had never been previously mentioned or understood between the parties that Templeville would withdraw its objection to the motorway. Mr. Brunker strongly disagreed with that. Moreover, by virtue of Mr. Halpenny's own letter of the 26th of January 1998 it is clearly to be seen that Mr. Halpenny was incorrect. Further, the Court considers that it was fair comment to suggest, as Mr. Brunker does, that if there had been an agreement by Leopardstown to grant to Templeville an exclusive area for car parking by way of a demise in consideration of Templeville withdrawing its objection to the motorway one might have expected to see some mention of that in this letter. There is none. (There is a lengthy quotation from this letter in another context at para 9.163 supra.)

2.184 Mr. Brunker, in the course of his evidence, also commented on the other issues raised in Mr. Halpenny's letter of the 10th of February, but as nothing crucial turns on any of that it is unnecessary to recount his evidence in any detail. It is sufficient to state that some of the issues raised were meaningless to Mr. Brunker, others clearly required the taking of instructions, while others again accorded with his broad understanding of the agreement, such as the suggestion that, notwithstanding a commitment by Leopardstown to use its best endeavours to achieve the construction of a slip road from the motorway, Leopardstown had finalised a deal with the local authority which did not provide for the construction of a slip road. Asked about this, Mr. Brunker said:

"I think there is -- there was some form of a request that Leopardstown would endeavour to get a slip road which would be, which would be more convenient for users, but that there was no assurance that such a slip road would be available."

2.185 On the following day, the 11th of February 1998, Mr. Brunker met with Mr. Pierce Moloney to discuss the 11 points raised by the I.H.A. and how they might be addressed. Arising out of this meeting Mr. Brunker wrote to Mr. Moloney by a letter of the same date tendering certain advice and requesting up to date instructions prior to Mr. Brunker meeting again with Mr. Halpenny.

2.186 On the 16th of February 1998 Mr. Brunker met with Mr. Halpenny at the offices of P.C.L. Halpenny & Son, Solicitors to discuss the points raised in the I.H.A. letter. The Court regards the evidence as to what occurred at this meeting as important. Mr. Brunker was asked:

Q. And I think perhaps you focus in particular on item number 1?

A. Yes, again 1, which was probably the most important at that time, we wanted confirmation that the motorway objection would be withdrawn, and he said he would agree to this so far as Leopardstown had to give possession to the County Council -- insofar as Leopardstown had to give possession of lands to the County Council. And he wanted Leopardstown's commitment to endeavour to seek for that slip road, that this was quite important for their access.

Q. And then in relation to the car parking issue?

A. Which is number 8.

Q. Item 8.

A. And again, that item which dealt with that court for car parking could be again dealt with by a side letter.

Q. During the course of this meeting was anything said or intimated to you in relation to the possibility of an exclusive demise of some portion of the Leopardstown property to Templeville for car parking?

A. No, that never came up at that meeting. It hadn't been raised by I.H.A. in their letter, and we dealt with purely -- that meeting was purely to get over the items which had been raised by I.H.A., and there was no discussion whatsoever regarding a demise of car parking space.

Q. Throughout your negotiations were there ever any issues in relation to the extent of the car parking rights that were to be inferred on Templeville over and above what was recited in the Heads of Agreement?

A. No, it never came up, Judge. We dealt with the documentation as in the Heads of Agreement, and there was never any suggestion by either side that there would be a demise of car parking space."

2.187 On the 17th of February 1998 Mr. Brunker received a letter by fax from Mr. Halpenny. The first two paragraphs thereof stated:

"Further to our meeting yesterday, I note that the authority and power to agree all remaining outstanding issues (as detailed in letter dated the 28th of January 1998 from the I.H.A. and in your own letter of 2nd February 1998) together with the authority and power to bind Leopardstown Club Ltd and the I.H.A. and to execute all final documentation has been delegated to Mr. Pierce Moloney and Mr. Frank Clarke by Leopardstown Club Ltd and by the I.H.A..

On this understanding and on the understanding that the points raised in the aforesaid correspondence comprise of a definitive list of additional points raised by a client, our client is prepared, strictly without prejudice, to consider these

additional points in the light of our meeting yesterday."

2.188 The letter then went on to deal with specific items on the I.H.A.'s 11 point list. Mr. Brunker immediately forwarded Mr. Halpenny's letter to Mr. Moloney by a letter of the same date stating:

> "On the basis that the first paragraph of this letter sums up the present position it would appear that the outstanding items can be adequately dealt with and in particular between the respective architects."

2.189 Mr. Brunker was then away from work during late February and throughout March of 1998, and the file was dealt with in his absence by Cathal De Barra. Nothing of major significance occurred during this period and it is sufficient to note that the transaction continued to inch slowly towards a conclusion. Then on the 2nd of April 1998 Cathal De Barra wrote to Conor Halpenny concerning outstanding issues. There was nothing in that letter to indicate or suggest in any way that a possible demise of car parking space had been agreed between the parties. It did, however, *inter alia* assert a belief on Leopardstown's part that Mr. Halpenny had agreed in his letter of the 27th of January 1998 to furnish a side letter to A & L Goodbody clarifying Templeville's interpretation of clauses 6(iii) and 7(iv) of the Licence, and suggested a proposed wording for the side letter.

2.190 Mr. Brunker returned to work shortly thereafter. He was asked by counsel for Leopardstown:

> "Q. Well, upon your return to the office, was anything said to you to lead you to believe that car parking had become an issue in the interim?
>
> A. No, absolutely not."

2.191 Then, between the 3rd and the 8th of April 1998, further tensions developed between both sides, involving a further exchange of robust correspondence. This appears to have been precipitated by a fax sent by Cathal De Barra to Mr. Halpenny on the 3rd of April 1998. The letter commenced by asserting:

> "As you are aware, it is our client's view that no agreement is or is deemed to be in place between our respective clients in this matter. However, in order to finalise agreement on any outstanding issues, our client will be attending at this office next Tuesday morning to deal with the same. In view of this, we should be obliged if you would furnish us with any comments you may have arising from our letter of yesterday's date which sets out our clients understanding of matters to be agreed for completion purposes. "

2.192 The letter then went on to complain that Templeville had commenced to carry out certain works without Leopardstown's authority or agreement, and to require "all such works to be terminated until such time as final agreement has been reached and all relevant documentation has been executed by both parties."

2.193 This was replied to by Mr. Halpenny by a lengthy letter of the 6th of April 1998 asserting in strong terms Templeville's view that (i) an agreement was in place from as far back as the meeting held at the offices of A & L Goodbody, Solicitors, on the 23rd of January 1998 and (ii) denying that Templeville had commenced works without Leopardstown's authority or agreement, and pointing out, *inter alia*, that prior to the letter of the 3rd of April 1998 works had been underway for some two and a half months without Templeville having received any objection or complaint. The letter concluded:

> "Our client has not agreed to any change whatsoever to the agreements embodied in the Lease and Licenses and to refer to part of the contents of my letter of 27th of January as constituting an agreement is disingenuous to say the least. Please refer to the contents of this letter in full."

2.194 Mr. Halpenny's letter of the 6th of April 1998 was not received until the 8th of April 1998 and crossed with a letter from Mr. De Barra of the 7th of April 1998 to Mr. Halpenny suggesting "that the most expedient way to progress this matter would be to hold an 'on-site' meeting at Leopardstown between the Chairman of the Company and his advising team and your principal, Mr. Smyth, and his advising team."

2.195 On the 15th of April 1998, a meeting was held between the parties and their advisors at the offices of A & L Goodbody, Solicitors. Pierce Moloney of the I.H.A. also attended. According to the evidence of Mr. Brunker, who was among the Leopardstown advisors in attendance, there was no discussion concerning any change to the concept of car parking as previously agreed and reduced to writing, and in particular no discussion of a demise by Leopardstown of an exclusive area for car parking to Templeville in consideration of Templeville / Philip Smyth withdrawing objection to the motorway. Among the issues that were discussed was a desire on the part of Philip Smyth that cars should not be parked on tennis court number 2 on race days. The attendance note of Cathal De Barra, who also attended the meeting, records Pierce Moloney as having agreed to this. At the trial Mr. Brunker was asked by counsel for Leopardstown:

> "Q. … where would the logic be in discussing court number 2, wear and tear and that by having car parking, if, as is now suggested by the Defendants, there was a contractual entitlement to an exclusive demise of 5.5 acres?
>
> A. Well, there would be no logic to it to my way of thinking if they had a lease of extensive car parking area and had concern over … parking in one specific tennis court. It just didn't make sense. It wouldn't have made sense to me, no."

2.196 The remainder of the meeting was devoted to discussion of what Mr. Brunker characterised in his evidence as "peripheral items" that nevertheless required to be dealt with, such as storage space, licensing, use of toilets and so on.

2.197 On the 16th of April Mr. Halpenny wrote to Mr. Brunker expressing his client's dissatisfaction at what had transpired at the meeting on the previous day. Once again, the letter is lengthy, but the following paragraphs extracted therefrom convey the substance of it:

> "My client has asked me to express his dissatisfaction and concern at what transpired during our said meeting. It was hoped that this meeting would go some distance to resolve some of the major issues which have arisen at your client's instance since 23rd of January last. What in fact took place was a presentation of the further amendments to our client's agreement required by your client with proposals as to how my client would meet these requests, but without any recognition or consideration of the substantial consequences of these requests." ….
>
> "I would point out that, without prejudice, my client is willing to give full consideration to your client's requests, but only

on a 'give and take' basis. Our client receives yesterday's meeting as a 'take and take' approach on the part of your client and nothing was offered or given." ….

"As indicated above, my client is still willing to positively and constructively cooperate with your client in addressing the new issues which have been raised. But to do so, it is imperative for your client, to recognise that it must 'give and take' by attempting to compensate my client in a manner which is commensurate with the adverse consequences which stemmed from your client's requests." ….

"May I suggest that we convene a further meeting, hopefully early next week …."

"My client is concerned that Mr. Frank Clarke appears to be no longer involved in the negotiations. ….. The negotiations which concluded with an agreement last January were conducted over a two-month period with Mr. Clarke and he is the person on your side who is fully familiar with all the issues ….. It is not helpful to try and change major items in the existing agreement if the nominated negotiator, who negotiated this agreement and who understands how the various concessions were reached is no longer involved. …."

"Finally, we would emphasise again that any discussions" [etc] … "would be strictly without prejudice to my client's position and assertion that a binding and enforceable agreement was reached on 23rd January last, as documented in the four engrossed documents, which have been executed …."

2.198 Mr. Brunker gave evidence that he interpreted this letter as an expression of Mr. Halpenny's frustration at a perceived a lack of movement or progress towards getting the documents executed by Leopardstown. He added:

"I didn't think that there were items of major import being raised, but anything that was, such as the licensing, were issues that had to be dealt with, there was no way round them, it was a problem for both of us. So it wasn't, it wasn't a question of just ignoring these problems."

2.199 Two further meetings took place on the 22nd of April 1998, one at the offices of A & L Goodbody, Solicitors, and the second at Leopardstown Racecourse, at which some progress was made towards resolving the outstanding issues. It is not necessary to go into the details of these for the purposes of this judgment. However, one aspect of the discussions, namely discussions concerning the possible renewal of an expired option for Leopardstown to finance the shell construction of Templeville's new extension, will be alluded to later in this chronology and in its appropriate context.

2.200 However, on the 24th of April 1998 Mr. Halpenny wrote to Mr. Brunker and stated, with reference to the outcome of these meetings, that "it appears that agreement, in principle, has been reached in relation to most of the new issues." The letter went on to set out Mr. Halpenny's understanding as to what had been agreed in an eight-point itemised list. The letter contains no reference whatsoever to a demise for car parking, to car parking rights or, indeed, to car parking of any description or in any context.

2.201 Item 6 on Mr. Halpenny's list related to the written confirmation being sought by Leopardstown concerning the withdrawal of Templeville's objection to the motorway. In regard to that Mr. Halpenny stated:

"Letter for Dun Laoghaire / Rathdown County Council - as discussed, my client is happy to furnish such a letter, provided it does not compromise its rights to maintain any claim or objection for the slip road, for environmental issues and for landscaping and signage issues. I enclose draft of this letter, for your approval."

2.202 The draft letter, addressed to A & L Goodbody, Solicitors, was in the following terms:

"We refer to the above documentation, which is now being entered into between our respective clients and to your request that we write this letter for the benefit of Dun Laoghaire Rathdown County Council.

As solicitors for Templeville Developments Ltd., we hereby acknowledge that the execution of the aforesaid documentation by both Templeville Developments Ltd., and Leopardstown Club Ltd., has the effect of waiving any rights or entitlements that Templeville Developments Ltd may have to seek or claim compensation from Dun Laoghaire Rathdown County Council, by reason of the proposed south-east motorway scheme compulsory purchase order of part of the lands at Leopardstown, which lands include an area of land described in the aforesaid documentation as 'the area hatched yellow', over which Templeville Developments Ltd has certain rights and entitlements. In the circumstances, Templeville Developments Ltd hereby undertakes not to seek or claim such compensation from Dun Laoghaire Rathdown County Council arising out of the said proposed compulsory purchase order, provided that the new site which is to be proposed by Leopardstown Club Ltd, to accommodate Templeville Developments Ltd's proposed relocated tennis courts and tennis facilities, enjoys the benefit of all necessary planning permissions from Dun Laoghaire Rathdown County Council.

Provided always however, …." [provisos as previously flagged re construction of the slip road, environmental and signage issues, and landscaping issues.]

2.203 In the course of his evidence Mr. Brunker was asked by counsel for Leopardstown to comment on one important aspect of this draft letter. The exchange was as follows:

"Q. If I just pause there for a moment. There is a reference to tennis courts there, but there is no reference to car parking. Do you have any knowledge as to why reference is made only to tennis courts?

A. Well, this is in respect of the new site which I had always understood would refer to tennis courts only, and certainly the correspondence bore that out, and planning permission might have been appropriate for such tennis courts if they were to be placed elsewhere and hence that."

2.204 Elaborating on this somewhat in his statement of evidence, Mr. Brunker had pointed out that there is no mention in the description of the new site in this draft letter of an exclusive additional area for car parking by way of a demise or otherwise. He characterised this as "a glaring omission", if Templeville's claim of an agreement of a demise of an additional area for car parking to replace the part of the area hatched yellow lost to the CPO were true. The Court considers this to be fair comment.

2.205 Mr. Brunker confirmed in answer to counsel that a letter in the form proposed was duly sent at a later stage to Dun Laoghaire Rathdown County Council.

2.206 Then, on the 29th of April 1998 Mr. Brunker wrote to Mr. Halpenny in response to his letter of the 24th of April 1998. He prefaced this letter by seeking to put on the record his disagreement with Mr. Halpenny's suggestion that "the document[s] as executed by your client on the 23rd of January last are binding on my client's", stating that "it is for that reason that we have been meeting and discussing outstanding issues so as to arrive at a mutual consensus." He then went on to deal with each of Mr. Halpenny's eight points in turn, and in almost every case was in a position to confirm agreement. Moreover, he indicated approval of the draft letter discussed above.

2.207 There was only one significant item of disagreement and that involved Templeville's desire to have a formal commitment from Leopardstown that Templeville could run and operate the Bar to be used by Leopardstown on race days on a licence basis, such formal commitment to be given in a side letter (of which a draft was furnished by Mr. Halpenny). Leopardstown's position was that the most it was prepared to do would be to furnish Templeville with a letter acknowledging that it would consider favourably any applications by Templeville Developments Ltd to operate the bar facilities on race days. However, it was not prepared to give any further commitment than that.

2.208 The letter concluded:

> "Please confirm the above just as quickly as possible as my clients wish to have the documents completed without delay and will be available either tomorrow or Friday for this purpose."

2.209 On the 3rd of May 1998 Mr. Brunker telephoned Mr. Halpenny enquiring as to the position and Mr. Halpenny indicated to him that he was expecting to hear back that day from Mr. Kieran Condell. Then on the 5th of May 1998 Mr. Halpenny wrote to Mr. Brunker in reply to his letter of the 29th of April, 1998. In the first instance Mr. Halpenny re-asserted Templeville's claim that a binding and enforceable agreement had been concluded on the 23rd of January, 1998. Thereafter the letter dealt primarily with the disagreement as to who would run Templeville's new Bar on race days when it was to be used by Leopardstown. Mr. Halpenny set out his client's position on this in great detail, characterising it as "a proposal which really does stick in the throat of my client". He concluded:

> "Under these circumstances, and it is with great regret that my client must lay down this ultimatum. Unless your client is prepared to agree to the principle outlined in the suggested draft side letter (or one that is similar and that may be agreed between our respective firms) my client believes it is left with no alternative but to withdraw the offer of the use of this bar (and viewing balcony) from your client. …. I would therefore ask your client to reconsider its position …."

2.210 The issuance of this ultimatum caused Mr. Brunker to write to Mr. Moloney on the 6th of May, 1998 seeking instructions, which in turn resulted in the convening of a meeting on the 11th of May at the offices of A & L Goodbody, Solicitors, attended by Mr. Brunker, Mr. Moloney, Mr. Clarke and Mr. Law.

2.211 In the meantime Mr. Brunker sent an interim or "holding" reply to Mr. Halpenny on the 8th of April 1998, pointing out that the Agreement had been drafted on the basis that Leopardstown would have exclusive use of the Bar facilities on race days, and insisting that "until such time as all outstanding matters have been resolved your clients must forthwith cease any further works as our clients cannot be deemed to have consented to these works until final agreement has been reached."

2.212 At the meeting on the 11th of May, the impasse was discussed and the merits of various options perceived as being open to Leopardstown, including a possible application to the High Court for injunctive relief, were debated. It was agreed that the best strategy would be for A & L Goodbody to write a further letter to P.C.L. Halpenny & Son advising them that unless their clients ceased works by midday on the following Friday (15th May, 1998) their instructions were to issue the appropriate proceedings for the purposes of obtaining injunctive relief. Further, once that letter had been dispatched, it was envisaged that Mr. Conor Halpenny would then be telephoned and spoken to on a "without prejudice" basis with a view to exploring a possible compromise.

2.213 This strategy seems to have yielded results in as much as a meeting was convened at the offices of A & L Goodbody, Solicitors, on the 14th of May, 1998. Leopardstown were represented by Mr. Moloney and Mr. Law (with Mr. Clarke arriving late and while the meeting was already under way), and Templeville were represented by Mr. Condell and Mr. Halpenny. This meeting yielded an ostensible compromise on the use and running of the new Bar premises on race days. I characterise it as an ostensible compromise because Kieran Condell had stated clearly at the outset of the meeting that neither he nor Mr. Halpenny had authority to bind Templeville and that they would have to brief Mr. Smyth in respect of the discussions. It was implicit in this that Mr. Smyth would have to ratify any provisional commitments given in respect of proposals arising from the discussions. Briefly, the proposed compromise involving restricting the access of ordinary racegoers to that portion of the new premises known as "the Member's Bar", with the remaining portion, known as "the Member's Lounge", being made available to Leopardstown for corporate entertainment purposes only. Further, it was proposed that Templeville would enter into a franchise agreement with Leopardstown to run the bars in the new premises on race days. Mr. Halpenny undertook to prepare a draft franchise agreement. Other outstanding issues, including some architectural and design and construction issues, were then discussed and a further meeting was scheduled for Monday 18th of May 1998 with Mr. Brunker undertaking to provide engrossed documents incorporating the latest amendments to Mr. Halpenny in advance of the meeting.

2.214 On the 15th of May 1998 Mr. Halpenny wrote to Mr. Brunker arising out of the meeting on the previous day. First, he asserted that:

> " While I reserve the right to reply in detail to your client's recent threats to issue proceedings, in light of the fact that both parties are still moving forward to reach consensus I will defer commenting on this recent development until a later date."

2.215 Then, in relation to the ostensible compromise deal on the use and running of the new Bar premises on race days, he stated:

> "... I wish to emphasise that I and Kieran Condell have not yet had an opportunity to sit down and discuss any of these matters with Philip Smyth, who is out of town attending a family funeral and in the circumstances these further discussions are being advanced without instructions, let alone authority to bind.
>
> You must therefore appreciate that we are to an extent 'going out on a limb' to advance these discussions within the very short timeframe available."

2.216 Mr. Halpenny concluded by enclosing his draft of the proposed franchise agreement, which he stated he would be prepared to recommend to his client. He further suggested that the Race Day Licence would require some consequential amendments and he enclosed a draft of his proposed amendments to clause 1 of that document.

2.217 On Monday the 18th of May 1998 a meeting took place at the offices of A & L Goodbody, Solicitors, attended by Mr. Moloney, Mr. Law, Mr. Clarke and Mr. Brunker, on behalf of Leopardstown, and by Mr. Smyth, Mr. Condell and Mr. Halpenny on behalf of Templeville. This appears to have been a constructive meeting at which the compromise provisionally agreed on the 14th was firmed up on. The draft franchise agreement was discussed and certain amendments to it were agreed, including the addition of an arbitration clause to enable major disputes to be submitted to arbitration should they arise, and the addition of a price restriction clause. Agreement was also reached on certain outstanding architectural and licensing issues. All of this required a certain level of amendments to the existing suite of documents. On the following day (Tuesday, 19th May 1998) Mr. Law sent Mr. Brunker a detailed memorandum itemising what needed to be done in that regard. He concluded by stating:

> "It is hoped that a meeting can take place on Thursday afternoon when all documentation will be executed by both parties"

2.218 On Thursday the 21st of May 1998 a meeting took place at the offices of A & L Goodbody, Solicitors, attended by Mr. Moloney, Mr. Clarke and Mr. Brunker, on behalf of Leopardstown, and by Mr. Condell and Mr. Halpenny on behalf of Templeville. The final version of the suite of documents was presented to the parties by Mr. Brunker. For reasons that will become apparent momentarily, Templeville's representatives indicated an unwillingness to sign the documents there and then, and insisted on being afforded an opportunity to discuss them with Mr. Smyth that evening.

2.219 On the 22nd of May 1998, Mr. Brunker on the instructions of Mr. Moloney, sent a fax to Mr. Halpenny requesting:

> "that you confirm that same [the suite of documents] have been executed together with the Franchise Agreement prepared by yourself and are available for exchange by 4.30 this evening when a board meeting of the I.H.A will be held. Our clients have also requested us to confirm that on exchange of documents Leopardstown Club Ltd will exercise its option to pay for the cost of the building of the shell construction."

2.220 To put the last sentence of this letter in context it is necessary to record that the agreement between the parties arising out of their discussions on the 23rd of January 1998 had provided, *inter alia*, that Leopardstown should have an option, to be exercised on or before the 1st of April 1998, to finance the shell construction of Templeville's new extension. The option as agreed was incorporated in the original suite of documents that were executed by Templeville only. However, the 1st of April 1998 came and went without the option being exercised and accordingly it lapsed. The primary evidence before the Court as to what happened next is contained in a lengthy letter faxed from Mr. Halpenny to Mr. Brunker dated 22nd of May 1998 in reply to Mr. Brunker's earlier fax of the same date. In the course of that letter Mr. Halpenny sought to address the putative exercise by Leopardstown of "*its option to pay for the cost of the building of the shell construction.*"

2.221 Mr. Halpenny began by reciting in great detail the history of this aspect to the parties' complex dealings. Rather than recite this part of his letter (which runs to four out of 5 pages) the Court will endeavour to summarize it. He began by describing the background to, and the granting of, the original option that expired on the 1st of April 1998. He then recounts how during the meeting that took place on the 22nd of April 1998 at the offices of A & L Goodbody, Solicitors, Mr. Moloney requested a renewal of the option. There were complex negotiations on this request, which he describes at length. Mr. Halpenny was extremely concerned about the possible taxation implications for Templeville of agreeing to the request, and in particular was worried that Templeville might lose the benefit of capital allowances. Consequently, he was felt unable and was unwilling to advise Mr. Smyth that it was safe to enter into any further commitment in that regard, pending receipt of advice from a professional tax advisor.

2.222 He describes how it was eventually agreed that Templeville Developments Ltd. could grant a new option to Leopardstown that was subject to a proviso that protected Templeville Developments Ltd. in relation to unfavourable tax implications.

2.223 Correspondence then ensued between Mr. Halpenny and Mr. Brunker in the course of which they attempted to agree an acceptable form of wording for the option. A form of words was agreed between the Solicitors on the 29th of April 1998 (although an issue arose later as to whether Mr. Brunker had authority from Mr. Moloney to bind Leopardstown) granting an option to Leopardstown subject to a proviso in favour of Templeville which was in the following terms " *provided always however that in making such grant or otherwise the Landlord shall not interfere with or jeopardise any tax allowances, capital allowances or tax reliefs that the Tenant may otherwise be entitled to claim or receive had the said grant or otherwise not been made*" (hereinafter the tax proviso).

2.224 Then at the meeting on the 18th of May 1998 Mr. Moloney raised a series of new concerns about the option and, while Mr. Halpenny describes these in some detail, he characterises them in general terms as being "of a landlord and tenant nature". It is not necessary to go into the detail of these concerns. It is sufficient to state that during the meeting on the 18th of May it was agreed that both sides would look at a formula of words which would protect each of their respective interests.

2.225 Further correspondence then ensued between Mr. Halpenny and Mr. Brunker in an effort to agree an amended form of wording for the option that would meet both sides' requirements. The solicitors appear to have agreed on a form of words on the 19th of May 1998 but Mr. Moloney was not prepared to ratify it. It seems that, notwithstanding the agreement arrived at on the 29th of April between the solicitors, Mr. Moloney wanted the tax proviso excluded from the option agreement. Mr. Halpenny was informed of this by Mr. Brunker at the meeting on the 21st of May and he was also informed that for this reason the engrossed final documents (the relevant one being the Licence for Works) excluded the tax proviso from the option. This was what prompted Templeville's representatives to refuse to execute the documents at the meeting on the 21st of May, 1998 and to insist on being allowed to consult with Mr. Smyth that evening.

2.226 Having set out the history of the parties dealings on this aspect of the transaction, as seen from his perspective, Mr. Halpenny then continued:

> "It is now clear that your client wishes to change and move back from the agreement (on this specific issue) which was reached on the 22nd of April last. This latest change has already emerged in the last two days, and for the first time on the 19th inst. This is clearly another instance of a further change or an afterthought which has been produced by your client at an advanced stage of this transaction.
>
> The anomaly about this whole situation is that your client is insisting on negotiating with my client, while still threatening an injunction. The threat before the injunction was first made on the 12th of May when the difficulty arose in relation to the use of the bar on race days. This difficulty, which was identified by your office as 'the one item which appears to be blocking progress' has since been resolved and the franchise agreement governing same has since been approved by the respective parties. Instead of relaxing the threat of the injunction, your client has now chosen to attach this threat to the current problem relating to the draft option. This threat of an injunction is clearly being used by your client as a

means of forcing my client's hand to accept further changes. I do not believe this is an acceptable way to conduct negotiations, nor a bone fide use of a remedy such as an injunction.

The irony of this latest development is that your client is threatening to injunct my client from continuing with the construction of a building which your client wants to finance and intends to use on race days.

Notwithstanding all of this, it is our wish that a conclusion be reached which gives both parties what they want. Certainly my client is anxious to reach a solution. My client's tax advisor is Mr. … [A, a named individual] and I understand that your client's tax adviser is Mr. … [B, another named individual]. We have already instructed Mr. [A] to consider the issues at hand and he is … in a position to take up discussions with Mr. [B]."

2.227 It seems that Mr. Halpenny's suggestion met with approval on Leopardstown's side. Templeville's primary concern had been to protect its capital allowances. However, at quite a late stage another tax issue became apparent. Mr. Brunker explained in the course of his evidence that:

"in addition to capital allowances we realised that there was a VAT aspect to the granting of the lease and it was judiciously agreed between the two firms of solicitors that the accountants would deal with that aspect. So matters were put on a hold until the VAT was settled."

2.228 On the 27th of May 1998 Mr. Halpenny wrote to Mr. Brunker noting that the tax advisors would attempt to reach a solution to the taxation issues surrounding the financing option.

2.229 On the 4th of June 1998 Mr. Brunker telephoned Mr. Moloney who had in the meantime met with, and spoken to, Philip Smyth. Mr. Brunker was instructed that the parties had agreed that a payment of IR£1.5 million would be made by Leopardstown towards the works to be carried out by Templeville, that the existing rent would be increased by IR£150,000 and that the aggregate figure was to be index linked every five years.

2.230 According to Mr. Brunker's evidence "a reference to the service charge" also came up in that conversation. In the course of Mr. Brunker giving evidence in chief about this the following exchange, which the court regards as important, took place:

"Q. So did the service charge extend to the internal and external areas?

A. The service charge related to the external facilities being provided; namely driveways, lighting, water, cleaning, that type of thing.

Q. And if Templeville were getting a demise of 5.5 acres, as it is contended for, would that have any impact on the calculation of the service charge?

A. Well, it would if one takes into account how the service charge was to be calculated within the lease.

Q. So explain what you mean by that?

A. Well, basically the service charge, as in normal transactions where you have a letting of part of a property, the service charge would normally be split on a pro rata basis as to size to size; if you have half the property, you will pay 50% of the service charge. The lease provides that the service charge would be calculated in proportion to the area of the demised premises to the area of the buildings in the -- in Leopardstown. So, that if you take into calculation an area of, it has been told to me that it could be 5.5 acres, it would be a disproportionate payment that Templeville could suffer. And it wouldn't be a reasonable proportion if you had to take into account a 5 plus acreage site. For the benefits they would get to that. And if there was to be a demise, there should have been some discount. There was already a discount in relation to the domes, but there should be a discount in relation to any extra areas demised."

2.231 It is clear to the Court from this and other evidence relating to the service charge that the service charge actually provided for in the documents as drafted was not consistent with Templeville's contention that there was to be a demise of an area for car parking of circa 5.5 acres.

2.232 Mr. Brunker was further instructed by Mr. Moloney that Philip Smyth would personally guarantee the rent for one year. Finally, he was told that the documents would be signed at 4.30pm the next day, the 5th of June, 1998.

2.233 There were some phone calls as well as some faxed correspondence between Mr. Brunker and Mr. Halpenny on the 5th of June for the purpose of finalising the relevant documentation, and then at a meeting held at the offices of A & L Goodbody, Solicitors, attended by Mr. Brunker, Mr. Moloney and Mr. Walsh on behalf of Leopardstown, and by Mr. Condell, Mr. Halpenny and Mr. Smyth on behalf of Templeville, the final amendments were approved and agreed. Further, it was agreed that the documents would be signed but held in escrow pending a resolution of the VAT issue. The documents, as amended by hand, were then signed and sealed by both parties and were held by Mr. Brunker in escrow. The VAT issue was ultimately resolved and on the 10th of December 1998 Mr. Brunker met with Mr. Halpenny and the documents held in escrow were exchanged.

3. The Arbitration Proceedings

3.1 A dispute subsequently arose between the parties as to the construction of the 1998 Licence. The dispute centred on whether the Licence when properly construed (having regard in particular to the wording "and parking", which was inserted into the definition of New Site at the meeting of the 9th January 1998, and other changes made at the same time) imposed an obligation on Leopardstown to include in the area to be demised to Templeville (as part of the New Site provided for under the Licence) an area of the size of the part of the Yellow Lands that were lost to the motorway for Templeville's exclusive use. The dispute was ultimately referred to arbitration.

3.2 In the said arbitration proceedings, the Arbitrator, Paul Gardiner SC, held that the effect of these provisions was to impose on Leopardstown an obligation, on termination of the Licence, to demise to Templeville as part of the New Site an area for car parking comprising approximately 5.5 acres as replacement for its licence to park cars on non-race days in any part of the Yellow Lands acquired by Dun Laoghaire-Rathdown County Council in connection with the South Eastern Motorway CPO.

3.3 In his Award, the Arbitrator stated the following:

"The New Site and the Offers of the New Site

I am of the view that it may well be very unlikely that Leopardstown intended to provide by way of endorsement on the 1998 Lease a demise to Templeville of an area of 5.5 acres for car parking.

Mr. O'Donnell S.C. for Templeville did not rebut the contentions of Mr. Gordon S.C. to the effect that such an entitlement in Templeville would run entirely contrary to the manner in which car parking was dealt with in the Lease, including the entitlement in Templeville to a Licence to car park in the Yellow Area not affected by the CPO and not comprising part of the new site.

It seems to me that the provisions of the side letters, and in particular that which deals with the possibility that there will be insufficient land for the construction of the 7 to be constructed outdoor tennis courts is persuasive that what the parties may have had in mind was that Templeville would obtain a demise of its tennis facilities (just as it had in respect of Dome No. 1) and that its car parking rights would be maintained by Licence in such of the Yellow Area as was not required for the construction of the 7 outdoor tennis courts (along with the relocation of Dome No. 2 and the other 4 outdoor courts) and, by necessary implication it seems to me, would otherwise be extinguished.

Given that Templeville did not use the field behind Dome No. 2 for car parking in any meaningful way and certainly had no use of 5.5 acres, it seems to me to be doubtful that Templeville would have intended to obtain a demise of a car park which would facilitate 880 car spaces, even if that would have to have been located in the in track area and thus might have given rise to access from the Foxrock gate.

It appears unlikely that the Lease would have provided for a Licence over the surviving Yellow Area and that the Licence would provide expressly that that right should survive the termination of the Licence by the demise of the New Site, if there was also to be a demise of 5.5 acres.

However, although it appears to me to be at least as unlikely as not that the parties never intended such a conclusion, I am significantly troubled by the wording in the Licence and in particular:

(a) Recital 2 to the Licence records an agreement for the relocation of tennis 'and car parking facilities'.

(b) Recital 3 refers to a Lease of the New Site 'in addition to the Demised Premises'.

(c) The whole object of the Licence was to provide Templeville with a package which would provide 'equivalent' facilities.

(d) Clause 1 of the Licence permits the continued use and occupation of the Yellow Area as had been the case under the 1993 Lease.

(e) If the SEM had not been built, then 35 years after 1st January, 1998 the rights would have converted into a Lease and the Lease would undoubtedly have covered the 5.5 acres along with the area for the tennis courts.

(f) Leopardstown agreed to grant a demise over the new site which was defined as meaning a parcel or parcels of land situate adjacent to Dome No. 1 upon which the tenants' tennis facilities and car parking which are at the date hereof located on said Yellow Area are to be relocated by reason of the CPO.

(g) The demise of the new site was to contain the rights, privileges and entitlements specified in the First Schedule which explicitly provides for the tennis courts and 'the right to park motor vehicles thereon (entire area) ... .'

In the result, and not without hesitation, I conclude that the area of the New Site is to include 5.5 acres for car parking."

4. Other evidence

4.1 There was evidence from a number of the plaintiff's witnesses concerning what were the pre-existing parking entitlements of Templeville under the 1993 lease, and what parking was in fact availed of by them both in terms of area and user. It is not necessary to deal with this evidence in great detail in this judgment. It is accepted that Templeville patrons had the right to park motor cars in such of the car parks within the area edged in blue on map No 1 attached to the 1993 Lease as might from time to time be agreed. In practical terms this consisted of car parks Nos 1 and 2 respectively, close to the main cluster of buildings. In addition, Templeville's patrons had the non-exclusive right to park on non race days on the area marked yellow on the same map, in effect on the Ballyogan field. There was evidence that the latter facility was not much availed of as it is rough ground and patrons had a general preference for parking in the various other and better surfaced car parks also available to them, and which were in any event closer to the main cluster of buildings. This was particularly true in winter when the Ballyogan field could be wet and muddy. Mr. White's evidence was that he regarded the Ballyogan field as an overflow car parking facility on non race days for Templeville patrons and that during his time as General Manager this field was rarely, if ever, used for parking by Westwood members. The Court accepts his evidence on this.

4.2 As previously alluded to, Mr. Brunker was cross-examined in some detail by Mr. O'Donnell S.C. As specific parts of this cross-examination are specifically relied on by the defendant it is appropriate to rehearse them at this point.

4.3 On day 13 at p.66 of the transcript the following exchange occurred at a point where Mr. O'Donnell S.C. had just taken Mr. Brunker through the terms of "Rider No 3" (being one of the proposed amendments to Mr. Brunker's first draft of the 1998 Licence as faxed to Mr. Brunker by Mr. Halpenny in advance of their meeting on the 9th of January, 1998):

Q. So I take it that it was unremarkable to you, unexceptional, something that you were happy with?

A. Absolutely, oh, yes.

Q. Happy it was obviously

A. Yes.

Q. Not something I think that you needed to take instructions, explicit instructions, on?

A. No, it followed with my instructions.

Q. Yes, it was consistent with your instructions?

A. Yes.

Q. It was achieving what had been intended in the Heads of Agreement, isn't that right?

A. Yes, yes.

4.4 Further, Mr. Brunker was cross-examined as to his understanding of what Templeville was entitled to in terms of replacement parking and what was meant by "a similar quantum of parking". On day 13 at p.75 the following exchange took place:

"Q. But if you look, just -- what -- those car parking rights had to be the same as those which had existed under the 1993 lease, isn't that right?

A. Yes.

Q. Same extent, isn't that right?

A. Yes, which was a licence.

Q. Yes. But same extent in terms of they had to be of the same nature and extent?

A. Of the same nature, yes, which would be licence rather than a -- and a demise.

Q. But physically, they also had to be of the same nature, they had to have the same –

A. You mean quantum?

Q. Yes.

A. That was my understanding, yes."

4.5 It is also necessary to refer to parts of the extensive cross-examination of Mr. White by Mr. O'Donnell S.C. Some aspects of it have already been covered in setting out the essential chronology of events. However, in addition, on day 8 of the trial, Mr. White conceded in answer to counsel that Mr. Smyth was "a hard person to negotiate with". He also said of him that he "would have pushed it to the limit in relation to many things" and would have "broken the rules in a few areas."

4.6 Mr. White was also extensively cross-examined, as were Mr. Justice Clarke and Mr. Law (though to a lesser extent) in relation to whether Leopardstown ever considered "in-field" parking and a redesign of the racecourse.

4.7 Mr. White was asked:

"Q. But wasn't it always the case, Mr. White, that if you didn't get that car parking [the reference is to the "Cotter's field car park on the other side of the motorway], that the next option was going to have to be to at least consider and probably do infield car parking?

A. It would be an extreme possibility. Any good executive has a plan B and a plan C and maybe a plan D.

Q. And it was always plan B, wasn't it?

A. Not necessarily."

4.8 Mr. White conceded that he had had a casual conversation with Mr. Smyth at some point in or about the end of 1998 or the beginning of 1999 in the course of which the possibility of in-field car parking was discussed. It was suggested to him that this conversation had occurred towards the end of 1997 but Mr. White was adamant that it was a year or more later than that. Further, he accepted that he had suggested to the Board of Leopardstown at a meeting in 1999 that they should consider in-field car parking and an under track access tunnel at a cost of c. £500,000. Moreover, he also acknowledged that in his second indicative statement to the arbitration he had said:

"The possibility of having to introduce parking inside the race track was ever only just that -- a possibility. It was an ultimate fallback position if every other alternative failed. It was only ever contemplated in any remotely serious way when it became clear that the County Council would not be in a position to acquire lands on the other side of the motorway (which I understand was around March 2000) and the Ford Leopardstown was certain that it was going to be able to acquire the land itself. I believe that I indicated to the board of Leopardstown in January 1999 that parking inside the race track might have to be considered."

Asked why he had made such a suggestion the Board as far back as of January 1999 when there was no issue with Cotter's field until March 2000, he said:

"There had to be some hints. I don't know why. Maybe you could ask Mr. Sudway."

4.9 It was put to Mr. White that the real reason why he had done this was that he had discovered that he and Leopardstown "were in terrible trouble", in the following circumstances:

"Q. If Mr. Smyth stood on his rights under the 1993 lease alone, Mr. Sudway and Mr. Law were agreed he could not be accommodated within the Leopardstown complex, and therefore you could not move him from the area hatched yellow. And if you couldn't move him from the area hatched yellow, he ought to have been notified of the CPO, and the failure to

do so, the oversight in that regard, would lead, could lead, to the collapse of the CPO and a deal that had been done with the County Council. And that was, I suggest you, terrible trouble.

A. No. I think we have gone through this already. I mean, I repeat again, we are talking about the quantum again. And my understanding of it again, and my experience as General Manager walking the site, knowing what went on, that the Ballyogan field was very rarely used, and to replace what has been taken by the motorway cutting through it, I felt we were well capable of doing that.

Q And you okayed Mr. Smyth's request for a similar quantum of car parking because it came with him giving up his rights over the land hatched yellow, which was going to solve your problem of the CPO and with Mr. Sudway and the County Council?

A. Yeah, that is my understanding."

Q. And in fact, you knew that what Mr. Smyth was looking for during these negotiations was the same amount of car parking physically, isn't that right?

A. Not physically. The same amount -- to be able to accommodate the requirements of his patrons in the years ahead.

….

Q That Mr. Smyth, who had got you over a barrel, to use Mr. Law's words, simply gave it away by the Heads of Agreement he sent in on the 10th of November?

A. I don't think he -- I really don't think he had us over a barrel. I don't think that is fair. I don't think that is fair at all. Again, I can tell you what I felt, and what was being discussed and the documentation and with my experience, Your Honour, that there were four elements to the alternative car parking. We went through them again. Car park 17 (?), you say he had it before. Car parks 1 and 2, underneath the grandstand area, the crescent car park, and then any other such car parks that he may require in the whole campus of Leopardstown.

Q. And you knew Mr. Smyth was always seeking to put his rights on a more solid footing, as it were, to have a demise where he could rather than -- with perhaps a licence back, rather than to have a licence simpliciter, isn't that right?

A. I would accept that, and certainly I –

Q. And that is what is referred to in your note of the 23rd of January?

A. I would be scared in any respects of giving him a demise in any area, unless it is totally legally documented and –

Q. But you knew that is what Mr. Smyth was looking for?

A. What?

Q. At any given time what he was looking for was to put his rights on the footing of a lease rather than a licence, per se, if he could?

A. The only, the only area of a lease in the 1998 agreement or a demise, if you like to call it, was broadly speaking the 18 tennis courts, dome plus courts, and everything else was on an, in my opinion, probably a non-exclusive licence.

Q. They went from being licensed under the 1993 agreement being demise of the 1998 agreement, isn't that correct?

A. You are telling me that – what?

Q. The tennis courts, the right to, isn't that right?

A. That's correct, yes."

4.10 Finally, it should be stated that on day 11 of the trial, Mr. Walsh, who was in the course of being cross-examined by Mr. O'Donnell S.C., for Templeville, was asked about the minutes of a meeting of the Board of Leopardstown, taken by a Ms Joan O'Connor, a former President of the Royal Institute of Architects of Ireland and the principal of a firm called Interactive Project Managers who was in attendance, at which the Board of Leopardstown had discussed a document entitled "Leopardstown Racecourse - Masterplan, Report and Drawings" prepared by Arup Consulting Engineers. Ms O'Connor's firm had been retained by Leopardstown to do the planning, from Leopardstown's point of view, of the reorganisation of the campus in the light of what was happening vis-á-vis the motorway. Both documents were tendered to the witness for his comments. They indicated, *inter alia*, there had been some costing of the possible construction of car tunnels under the track to the in-field portion of the racecourse campus. However, as Mr. Walsh pointed out, while this was an option that was looked at, it never came on to the agenda for implementation and never would "until the Cotter's field was off the agenda, or possibly off the agenda."

5. Documents and Evidential Issues relating to documents

5.1 In support of the plaintiff's claim for rectification based upon unilateral mistake, counsel for the plaintiff asks the Court to have regard, *inter alia*, to what is contained in four particular documents that were proffered to various of the plaintiff's witnesses, either in the course of examination in chief, or during cross-examination, for their commentary. The documents in question are:

(1) A letter from Templeville's Architect Toal O'Muire recording a minute of a meeting with officials from Dun Laoghaire / Rathdown County Council held on the 4th of November, 1997 and attended by himself and Philip Smyth, on behalf of Templeville;

(2) Mr. Halpenny's attendance note concerning what occurred at the meeting of the 24th of November, 1997

(3) Mr. Smyth's witness statement in these proceedings

(4) Mr. Smyth's witness statement in the arbitration proceedings

5.2 In some instances the Court is asked to have regard to the truth of the contents of the particular document. In other instances the Court is asked to have regard to the fact of what is contained in the document (as opposed to the truth of its contents) as being important circumstantial evidence in the case, which, it is urged, when taken with other evidence in the case, would justify the Court in inferring that Templeville knew or suspected that Leopardstown, when executing the 1998 Lease and the 1998 Licence, did not intend a demise of a replacement area for car parking, and, further, that in the circumstances of the case Templeville acted unconscionably.

5.3 It is, of course, true that circumstantial evidence has as much of a role to play in civil litigation as in criminal litigation, and the same rules apply. In *Thomas v. Jones* [1921] 1 K.B. 22 (a paternity suit) Atkins L.J. explained the operation of circumstantial evidence as follows at p. 48:

> "Evidence of independent facts, each of them in itself insufficient to prove the main fact, may yet, either by their cumulative weight or still more by their connection of one with the other as links in a chain, prove the principal fact to be established"

5.4 After quoting the passage just recited, Declan McGrath in his work entitled *Evidence* (Round Hall, 2005), comments (at para 1-12):

> "Thus, circumstantial evidence consists of a number of items of oral, documentary or real evidence that, when taken together, tend to establish a fact in issue."

5.5 Counsel for the defendant contends that the documents in question are not themselves in evidence and he vehemently opposes the suggestion that the Court may have regard to them in any way whatsoever. In this regard, the Court is faced with an interesting evidential conundrum and it is this. Where a cross-examiner purports to question a witness about the contents of an identified and as yet unproven document, which is not the witness's document, and his opponent does not object to him doing so but instead demands that the document should be proffered to his witness, and the document is then duly proffered, is the document then in evidence such that it can be relied upon by both sides? Mr. Collins S.C. says "No"; Mr. McDowell S.C. says "Yes".

5.6 It was argued by Mr. Collins S.C., *inter alia*, that:

> "Fundamentally a document is only deemed to be in evidence and is only admissible if the author of the document has been called to prove it. If an attempt is made to rely upon a document, the author of which is not called to prove it, it is hearsay evidence and unless it comes under one of the exceptions to the hearsay evidence rule it is not admissible".
>
> (Transcript, Day 18, p 3.)

For convenience, the Court will hereinafter refer to this as Mr. Collins's first proposition.

5.7 Further, Mr. Collins submitted that if a document, which is not the witness's document, is put to a witness in cross examination for his comments the witness may either agree or disagree with the contents of the document. However, neither the document itself nor the contents of the document are in evidence. The evidence that the Court receives, and is entitled to rely upon, is the witness's agreement or disagreement, as the case may be, with the propositions said to be contained in the document. A document cannot go into evidence until it is proven. An unproven document proffered to a witness in cross-examination is nothing more than potential evidence. Mr. Collins submits if it is not ultimately proven then what was never more than potential evidence simply falls away, and the document is to be regarded as never having become actual evidence in the case. Again for convenience, the Court will hereinafter refer to this as Mr. Collins's second proposition.

5.8 The Court, after careful reflection, considers that these submissions represent a somewhat imperfect and incomplete analysis. I will deal with the reasons why I hold this view a little later on in this section of my judgment.

5.9 However, before doing so I wish to make a number of preliminary points. First, there is a distinction to be drawn between whether a document is receivable as evidence, and whether it is admissible in evidence. Further, much depends on the purpose for which it is sought to adduce the document as evidence and, consequently, on the evidential status of the document. A document can be relied upon in various ways, and its evidential status depends on the manner in which it is proposed to rely upon it. Depending on the purpose for which it is introduced, its status may be that of real evidence, that of original evidence or that of testimonial evidence, and different rules apply in terms of what needs to be proven in order for the evidence falling into these different categories to be receivable, and, if receivable, to the admissibility of such evidence.

5.10 Part of the problem is that the rules of evidence, although they are in most instances intended to apply in the same way to evidence in civil litigation as in criminal litigation, tend in practice to be less rigidly applied in civil litigation. This may be due to the lower standard of proof required in civil litigation, a desire on the part of many lawyers and, indeed, judges, to efficiently dispose of cases and not to get bogged down in evidential or procedural wrangling, and to certain other factors. Then, from time to time, a case is encountered which of necessity requires one or other party to insist on a strict application of the rules. However, when this arises there is sometimes a lack of "sure footedness" as to what are the rules.

5.11 It may therefore be useful to rehearse some of the rules as to how, and the means by which, a document may be used as evidence in civil litigation. However, it is beyond both the needs and, indeed, the scope of this judgment for the Court to attempt a comprehensive review of the applicable rules, and what follows hereinafter does not purport to be comprehensive. It must also be borne in mind that there are exceptions to, or qualifications of, many of the relevant rules, and in some instances there are particular nuances that may require to be appreciated for the proper application of the rule.

Use of a Document as Real Evidence

5.12 In general, real evidence is evidence that the Court or other tribunal of fact can scrutinise or examine for itself. If a document is tendered in evidence as a material object, regardless of the words contained in it, for instance to show the bare fact of its existence, the substance of which it is made (whether parchment or paper) or the condition that it is in (whether crumpled or torn or perhaps in the case of stolen banknotes stained with dye), it constitutes real evidence. It is an exhibit in the case and, as stated, generally speaks for itself. It can be, and is intended to be, examined by the Court or tribunal of fact which will sometimes have the assistance of testimony from a properly credentialed expert as to how the physical features of the particular exhibit may be interpreted.

Use of a Document as Original Evidence

5.13 Where a document is produced by a party who proposes to rely upon the statements it contains, not as evidence of their truth by way of an exception to the hearsay rule, but to show for some legitimate purpose that the statements (whether or not they be true) were in fact made, then the document is properly to be characterised as non-hearsay original evidence (otherwise original evidence). The circumstances in which a document may be produced as original evidence are many. Some important examples are: (a) where the making of a statement contained in the document is a fact in issue. A clear example of this would be in the case of an alleged libel. The plaintiff in such a case will want to rely upon the defamatory document, e.g. a newspaper, not just as a physical thing but also upon its contents. However, he will certainly not be relying upon the truth of the contents because his whole case is that they are false and misleading. (b) To establish the literacy of the author of the document. (c) To establish the state of mind of the recipient of a statement contained in the document. (d) Where the document contains a statement using words said to have a particular legal effect. (e) To establish the falsity of a statement contained in the document. (f) Where a statement contained in the document provides circumstantial evidence. (See in particular *Evidence* by Declan McGrath (Thomson Round Hall, 2005) paras 5-17 to 5-28 inclusive under the heading "Non-Hearsay Statements").

Use of a Document as Testimonial Evidence

5.14 Where a document is produced by a party who proposes to rely upon the statements it contains as evidence of their truth by way of an exception to the hearsay rule, then the document is properly to be characterised as admissible hearsay testimonial evidence (otherwise testimonial evidence).

5.15 Documents introduced as testimonial evidence are subject to the general rules of admissibility, and particularly the hearsay rule and the opinion evidence rule. In this regard:

> (i) the hearsay rule serves to exclude any document which it is sought to rely on as evidence of the truth of its contents unless those contents come within one of the exceptions to the hearsay rule;
>
> (ii) if the document contains an expression of opinion by a non-expert it will not be admissible.

5.16 Counsel is correct in suggesting that the hearsay rule prevents many documents from being relied upon in evidence in their own right, because in most instances the party introducing a document will be seeking to rely upon the truth of its contents, in other words to use the document as testimonial evidence. There are of course exceptions to the hearsay rule, such as when a document constitutes a declaration against interest, and in certain other situations, which may allow a document containing hearsay to be used as testimonial evidence, but the general rule is as stated by counsel. However, the situation is entirely different where the document is being introduced not as testimonial evidence but as original evidence because the hearsay rule has no application to original evidence.

Receivability of Documents as Evidence – Necessary Proofs

5.17 One of the few remaining vestiges of the so-called "best evidence rule" is the "primary evidence rule" which must, in general, be satisfied in relation to a document produced in civil litigation before it will be receivable (as opposed to admissible) as evidence. This rule has largely been abrogated in criminal litigation by s.30 of the Criminal Evidence Act, 1992 but it still applies in civil litigation (save in cases concerning the welfare of children coming within the scope of s. 26 of the Children Act, 1997, and also in cases where the parties have agreed that documents provided on discovery are to be taken as *prima facie* evidence of their contents in the hands of an opponent on the so-called *Bula/Fyffes* concessionary basis or have otherwise agreed that the rule should not apply).

5.18 The primary evidence rule, and the main exceptions thereto, were explained by O'Flaherty J in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 (at p. 518) as follows:

> "The best evidence rule operates in this sphere to the extent that the party seeking to rely on the contents of a document must adduce primary evidence of those contents, *i.e.* the original document in question. The contents of a document may be proved by secondary evidence if the original has been destroyed or cannot be found after due search. Similarly, such contents may be proved by secondary evidence if production of the original is physically or legally impossible."

The primary evidence rule applies in the case of a document adduced either as original evidence or as testimonial evidence. However, it was made clear in *Attorney General v. Kyle* [1933] I.R. 15 (at 18) that where it is sought to prove the mere fact of a document's existence, rather than its contents, the rule does not apply. Accordingly, it does not apply where the evidential status of the document is that of real evidence as opposed to original evidence or testimonial evidence.

5.19 It is also the case that, in most instances, before the contents of a document can be received in evidence the party seeking to adduce it must prove the authenticity of the document. This generally involves proving that it was written or signed by the person by whom it purports to have been written or signed. This can be done by calling the author of the document, or a person who was present when the document was created and who witnessed its execution. Sometimes it can be done by means of reliance on common law or statutory presumptions e.g., the presumption of due execution where the document is 30 years old and comes from "proper custody". Also, the maxim *omnia praesumuntur rite et solemniter esse acta* gives rise to a rebuttable presumption that a public document has been properly executed on production of an admissible copy. In other instances, proof of due execution is excused under common law or by statute e.g., documents coming within the provisions of the Bankers' Books Evidence Acts. Another example would be the use in litigation of so-called "Admiralty Charts" to prove maritime boundaries. By virtue of The Maritime Jurisdiction Act, 1959, (Charts) Order, 1959 (S.I. No 174 of 1959) a party may produce a chart published by the Admiralty without calling the hydrographer who surveyed the waters in question and drew the chart. In yet other cases due execution may have been proven, in the case of a handwritten document, or a document executed by means of a personal signature, by the adduction of opinion evidence from a handwriting expert or a person familiar with the handwriting in question or the signature of the person. Finally, in the case of certain documents proof of due execution may require evidence of attestation e.g., in the case of a document purporting to be a last will and testament the party adducing it will have to prove due attestation in accordance with statutory requirements.

5.20 It should also be stated that in civil litigation the standard to which (i) the contents of a document must be proven, and (ii) due execution must be proven, is proof on the balance of probabilities.

Use of Documents in Evidence in Chief

5.21 I have already touched on this earlier in this judgment, but it bears re-stating, that the general rule is that a witness may not self-corroborate by means of a document made or verified by him/herself. However the witness may, while giving evidence, refresh his/her memory by reference to any document which was made or verified by the witness, contemporaneously or near contemporaneously with the events to which it relates. The archetype is, of course, the police officer's notebook. In the present case we are perhaps more concerned with self-generated attendances or minutes, and this Court has already indicated its approach to these. However, and as previously stated, in general a memory refreshing document will not be admissible in chief.

5.22 Apart from memory refreshing documents the witness may also have previously made a statement or statements, perhaps as a statement of the evidence intended to be given by him (or her) at the trial of the action (prepared and served in accordance with the Rules of the Superior Courts as applicable to the Commercial Court), or perhaps in another context altogether. These documents are not admissible as evidence in themselves, though their contents may be adopted and verified by the witness as part of his or her evidence in chief. That was done in the present case by most, if not all, of the plaintiff's witnesses. However, in most cases (exceptions being to rebut a suggestion of recent fabrication, or to impeach a witness who has turned hostile) the contents of a previous statement made by the witness cannot be adduced as evidence in its own right. Moreover, in no circumstances can it be used for the purpose of corroborating the witness's testimony. Indeed, in the absence of a specific relevance connected with credibility, a previous statement by a witness generally adds little or nothing to the evidence of that witness. In the very few instances in which they become admissible as evidence in their own right at common law, such statements are admitted because, for one reason or another, they become relevant to that issue (see Murphy *op cit* at para 16.6.2).

5.23 As far as documents created or authored by a person other than the witness under examination are concerned, these may not be adduced and proffered to a witness for his comments in the course of evidence in chief unless they are properly receivable in evidence at that point (i.e. both their contents and due execution can be proven by the witness or have already been proven) and they are otherwise admissible, e.g., they are not hearsay because they are to be used as original evidence rather than as testimonial evidence.

Use of Documents in Cross – Examination

5.24 A witness may be cross-examined for any purpose on a document produced earlier by him or her in the course of evidence in chief, whether that document has been adduced for refreshment of memory or for some other purpose. Moreover, and to this end, where the document has in fact been used for refreshment of memory the opposing party is entitled to first inspect the document. Where a document has been used by the witness for refreshment of memory the witness may be cross-examined with regard to any part of the document that has been used for that purpose, without making the document evidence for the party calling the witness. If, however, cross-examination takes place on other parts of the document, the rule is that the party calling the witness is entitled to then put the document in evidence as part of his case – *Gregory v. Tavernor* (1833) 6 Car & P 280; *Senat v. Senat* [1965] P 172 and *Owen v. Edwards* (1983) 77 Cr App R 191.

5.25 As regards previous written statements of the witness being cross-examined (other than documents that have been used for memory refreshment) the common law rule is as follows. It is open to a cross-examiner to put to a witness his previous inconsistent statement but, if the statement be in writing, the witness must first be shown the document before he can be asked whether he had said something different on another occasion. Further, if the document is then proved, the statement having been denied by the witness, it must be made evidence as part of the cross-examiner's case.

5.26 As regards a document in the possession of a cross-examiner other than (i) a previous written statement of the witness inconsistent with present testimony, or (ii) a document that has been used to refresh memory, it must in every case be capable of being received if its contents are going to be referred to in any way. Regardless of whether or not a document is admissible (either as non-hearsay or admissible hearsay) it cannot be admitted unless it is first made receivable.

5.27 A document is not capable of being received in evidence at all unless it has first been proven in terms of its content and due execution. This may or not have already occurred. If the document has already been proven then the cross-examiner may, subject to issues of admissibility, proceed without more to question the witness about the document. However, the mere fact that a cross-examiner seeks to make use of a document in cross-examination does not make it receivable in evidence at the instance of the cross-examiner. If a document placed in the hands of a witness has not yet been proven, and the cross-examiner wishes to refer to its nature or contents, then he must either adduce the necessary evidence at that point (if necessary by standing the witness down temporarily with the leave of the court to enable that to be done) or else continue subject to an express (or more usually an implied) undertaking to do so later. If, having given, or having been deemed to have given, such an undertaking he fails to prove the document subsequently there will inevitably, and in the interests of justice, be consequences for his case.

5.28 A receivable document is either admissible in itself, in which case it may be put in evidence and cross-examined upon in its own right, or inadmissible (usually on the ground of hearsay) in itself. Unless a receivable document is also admissible only very limited use may be made of it. Inadmissible evidence cannot be made admissible simply by its use in cross-examination. Again, the most that can be done with an inadmissible document is to ask the witness to look at the document and, without describing the nature or contents of the document to the court, to invite the witness to consider whether he or she wishes to give any further or different evidence. (This formula, when employed in jury trials, is sometimes known as the *Phipson formula*, in respect of which there is more below.) If a witness, on being shown a document, asserts or admits that its contents are true, then those contents which he or she so adopts become part of his evidence. But the contents of an inadmissible document cannot be made evidence unless they are so adopted. In this instance the evidence admitted and received by the court is the witness's testimony, not the document which remains inadmissible as evidence in its own right. In particular, where the witness is referred to part only of a document and adopts or admits to the truth of that part, such adoption or admission extends only to that part. No evidence may be led from the witness as to the contents of the remainder of the document and no regard whatever may be had to the actual document itself which is not admissible in evidence.

5.29 Documents in the possession of the opponent of the cross-examiner are subject to a special rule. At common law, if the cross-examiner calls for and inspects in court a document in the possession of his opponent or his opponent's witness, then the cross-examiner is bound to put the document in evidence as part of the cross-examiner's case.

5.30 We come then to the particular conundrum previously alluded to. It may be helpful at this point to outline counsels' respective submissions on this difficult question.

5.31 Mr. Collins S.C. for Templeville argued that if counsel wishes to put a document to a witness in cross-examination which is not the witness's document (and assuming for the sake of argument that his case requires reliance upon the truth of the document's contents), he may do so in the following way. He may say, "Mr. Murphy, have a look at that letter from Mr. Smith. Do you agree or

disagree with what it purports to record?" If the witness indicates that he accepts as true what the document purports to record then his testimony that the contents of the document are true may be relied upon, and the tribunal of fact, whether a judge or a jury, is obviously entitled to learn of and to know, what be the particular contents of the document that the witness is agreeing to or accepting. However, Mr. Collins S.C. submits, the document itself is not in evidence. It is the witness's testimony that constitutes the relevant evidence. Conversely, if the witness disagrees with what the document purports to record then nothing at all is admitted in evidence, he has not adopted any of the contents of the document as true and the document itself is still not in evidence at all.

Although Mr. Collins S.C. did not specifically address how the matter would be approached in circumstances where the cross-examiner did not intend to rely upon the truth of that which the document purported to record, but merely on the fact of its contents, it seems to me, if I correctly understand the logic of his argument, that in those circumstances it would be appropriate for counsel to broach the matter with the witness slightly differently, and to say: "Mr. Murphy, I have a document here that purports to emanate from Mr. Jones. Have a look at it and tell me do you agree or disagree that it emanates from that source. If so, can you indicate what are the purported contents of that document?" If the witness indicates that he accepts the document as emanating from the purported source, he may then state in evidence what it is that the document purports to record. However, once again, according to the logic of Mr. Collins argument, the document itself is not in evidence. It is the witness's testimony that constitutes the relevant evidence.

5.32 In summary, therefore, the logic of Mr. Collins's position is that cross-examination by a defendant of a witness for the plaintiff as to a document, which is not the witness's document, has no purpose and effect (save to the extent that the witness is prepared to accept and/or adopt the contents of the document) unless and until, when he comes to call his own evidence, he calls the author of the document to say "yes, that is my document". At that point the document itself may be relied upon as evidence in its own right. But if the defendant, having cross-examined on a document, does not himself prove the document in the course of his case then the document, and any cross examination upon it, is worthless (save to the extent that the witness accepted something in it), and is of no evidential value at all.

5.33 Mr. Collins further submitted that the same is true, conversely, in the plaintiff's case. When a plaintiff has finished his case, he has called all of his witnesses and he has proved all of his documents. If, then, he comes to cross examine a defence witness and wants to ask that witness about a document which he has not proved he is required, according to the so-called "*Phipson Rule*", to show the document to the witness, without identifying it or reading out anything that it contains, and to say "read that, do you agree with that or some part of it?" The witness can say whether he agrees or disagrees with it. If he does agree with it, or some part of it, his testimony as to that agreement becomes the evidence. But the document itself is not to be regarded as in evidence, unless its authenticity and contents have previously been proven, and it is admissible for the purpose for which it is being adduced e.g., it contains hearsay admissible under an exception to the hearsay rule, and it does not offend against any of the other rules of evidence.

5.34 Among other cases, Mr. Collins S.C. has relied upon *Snowden v. Branson* [1999] E.W.C.A. Civ. 1777 (Unreported, Court of Appeal Civil Division, England and Wales, 6 July, 1999), as being, *inter alia*, a recent authority that reiterates the proposition, which this Court has already acknowledged earlier in this judgment as being correct, that a document which is inadmissible cannot be made admissible simply because it is put to an accused in cross-examination. Further, the operation of the so-called *Phipson Rule* (or the *Phipson formula* as it is sometimes called) was also succinctly described by Otton L.J. in the same passage in his judgment in the English Court of Appeal decision in Snowden v. Branson, as contains the last mentioned principle. Although it seems to the Court that the *Phipson Rule* is of somewhat peripheral relevance, it may nonetheless be useful in all the circumstances to quote the relevant passage.

5.35 *Snowden v. Branson* concerned an appeal by an unsuccessful plaintiff to the Court of Appeal against the jury's verdict in a libel case. One of the grounds of appeal involved a serious complaint by counsel for the plaintiff about the manner in which some documents were introduced and used by leading counsel for the defendant, and in particular that the *Phipson Rule* had been disregarded. At an early stage in his judgment Otten L.J stated:

> "The principle involved is stated in Phipson on Evidence 14th Edition at 12-18: 'If a document written by some other person is put to a defendant and the defendant accepts what the document purports to record as true, the contents of the document become evidence against him, but if the defendant refuses to accept as true what the document purports to record the contents of the document cannot be evidence against him …. A document which is inadmissible cannot be made admissible simply because it is put to an accused in cross-examination. Further, it is improper for counsel, in cross-examination, to describe to the jury the nature of a document inadmissible in evidence, which he holds in his hand, while asking the witness to look at it and then say whether he still adheres to his answer. The proper way is for counsel to put the document into the hands of the witness and without describing it at all simply to ask, 'look at that piece of paper: do you still adhere to your answer?' (The 'Phipson formula')."

5.36 Although the plaintiff's appeal in *Snowden v. Branson* was actually dismissed, Otton, with whom Waller L.J and Kennedy L.J agreed, was critical of the manner in which the cross-examination as to documents was conducted and said:

> " … I have come to the conclusion that, in the heat of battle, the *Phipson formula* was not as rigorously observed as it should have been and there was a breach of the formula both literally and in spirit.
>
> None of the three documents to which objection was taken was ruled admissible. Before the ruling was made Leading Counsel did not hand the document to the witness, and without describing it, allow the witness to read it and then ask him whether he still adhered to the answer. On each occasion material parts of the document were identified in the presence of the jury. Mr. Ferguson was not always given a fair warning that the document was about to be referred to and he was not given a fair opportunity to raise objection without embarrassment. The Judge on at least one occasion was not given a fair or adequate opportunity to rule on admissibility or to give directions.
>
> I regret to say that I am left with a sense of unease and as a result of these not insignificant irregularities the jury might well have got the impression that there existed a document worthy of credit but which contradicted Mr. Snowden and that the document was sufficiently adverse that Mr. Ferguson was anxious to keep it away from the jury. Moreover, the Judge was placed in a position when he might have been perceived by the jury to be withholding information from them. This situation could and would have been avoided if the Phipson formula had been more strictly observed."

5.37 Mr. Collins S.C. has argued that the so called *Phipson Rule*, is intended to ensure fair play where the tribunal of fact is a jury and he suggests that strict adherence to it is not required where the tribunal of fact is a judge who is well capable, by virtue of his training and experience, of excluding non-evidential or inadmissible material from his mind. In those circumstances, he has expressed confidence that if this Court is with him with respect to his submission, the Court will be able to exclude the relevant documents from

its mind on the basis that they were not in evidence at all.

5.38 Mr. Collins concluded his submission on the issues raised by contending that to proffer a document to a witness in the circumstances at issue is actually no different from counsel putting to a witness in cross-examination that "my client will say in X evidence, do you agree or disagree and what do you say?" He says that if, upon calling his own witness, that witness should fail to say X, then any purported conflict between the propositions that were put in the cross-examination and what his opponent's witness said falls away. It falls away because the witness failed to 'swear up', as it is colloquially put, to what counsel had put to his opponent's witness in cross examination. Whatever about the situation at a trial before a jury, it is the exact same with respect to a document proffered to a witness in cross-examination and not ultimately proven. Mr. Collins submits what was never more than potential evidence simply falls away and that the document is to be regarded as never having become actual evidence in the case.

5.39 Mr. McDowell S.C. for Leopardstown argued in favour of the proposition, namely, that where a cross-examiner purports to question a witness about a document, which is not the witness's document, and does so in circumstances in which he has proffered the document to the witness upon the insistence of his opponent, he must, by virtue of having so proffering it, be deemed to have placed it in evidence such that it can be relied upon by both parties. Mr. McDowell's case in that regard is that the law is quite clear that counsel may not cross-examine a witness by reference to the contents of a document, in circumstances where he has been required by counsel for the party calling the witness to tender the document to the witness, without having so tendered it. If the document is so tendered, he may then proceed to cross-examine but (subject to admissibility issues such as hearsay) the document is to be regarded as being properly in evidence.

5.40 In the course of his argument, Mr. McDowell referred to the guidelines for cross-examining on documents laid down by the House of Lords in 1820 in Queen Caroline's case, namely *The Queen's Case* (1820) 2 Brod & B 284; 129 E.R. 976 (H.L.) and in particular to the so-called "rule in *The Queen's Case*". It may be recalled that in this famous case King George IV of England had brought proceedings against his Queen alleging adultery. Mr. McDowell referred the Court to extracts both from the judgment of Abbott C.J. in *The Queen's Case* as reported by Broderick and Bingham, and also from a commentary on that judgment contained in *The Law of Evidence in Canada* by Sopinka, Lederman and Bryant. The commentary is helpful because the judgment itself is sometimes difficult to follow due the outmoded style of expression and the somewhat archaic language employed.

5.41 In his judgment in *The Queen's Case* Abbott C.J. stated at p. 290/978:

> " The counsel were called in, and were informed, that when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits he wrote that letter, the witness cannot be examined, whether he did or did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, enquire are or are not made therein; but that the letter itself must be read as the evidence, to manifest that such statements are or are not contained therein; and, further, that it is the opinion of the House, that, in the regular course of proceeding, the letter ought to be read after the counsel cross-examining shall have opened his case; but that the House will, upon the request of such counsel, stating that it is expedient for the purpose of his more effectually, in the course of his cross-examination, propounding further questions necessary for the interest of his client, permit such letter to be read, subject to all the consequences of having such letter considered as part of his evidence."

5.42 Sopinka, Lederman and Bryant have commented as follows on *The Queen's Case*:

> "§16.116 Guidelines for cross examining on documents were laid down in the House of Lords in 1820 in Queen Caroline's case. In that case, a witness who was called for the Crown was cross examined as to the contents of a letter that she had allegedly written to her sister. Objection was taken by the Attorney General to this line of cross examination, and it was insisted that the letter had to be admitted into evidence before any use could be made of it by way of cross examination. The court took the opportunity to consider the whole question of cross examination on documents and laid down the principle that a witness could not be cross examined on his or her own document, unless that document was first shown to him or that the cross examiner was obliged to tender it into evidence. The rule that the examiner must show the document to the witness before questioning him or her about its contents appears to have been erroneously derived from the best evidence rule which required the production of the original document where it is tendered for the purpose of proving its contents. It is apparent, however, that the document is not being tendered for this purpose at all. Counsel is putting it forth to discredit the witness in anticipation that the witness will deny knowledge of writing the document or deny the truth of its contents. Moreover, the best evidence rule was established to ensure that the trier of fact had before him or her the most trustworthy and primary evidence available. It was not created so that the witness would have the best possible proof of the contents of the document. The rule served as a great impediment to cross examining counsel who could not lay an appropriate foundation for effective confrontation. Accordingly, Wigmore denounced it as a rule, 'which for unsoundness of principle, impropriety of policy, and practical inconvenience in trials committed the most notable mistake that can be found among the rulings on the present subject'. Requiring counsel to produce the document to the witness for his or her inspection prior to cross examining him or her on it afforded the witness an opportunity to escape the grasp of contradiction. McCormick described it as follows:
>
> 'Thus, in vain is the potential trap laid before the eyes of the bird. While reading the [document] the witness will be warned by what he sees not to deny it and will quickly weave a new web of explanation.'
>
> §16.117. Opposition to the rule grew in intensity until 1854 when Parliament abrogated it and enacted legislation providing that 'a witness may be cross examined as to previous statements made by him in writing or reduced to writing, relative to the subject of the cause, without such writing being shown to him … [Common Law Procedure Act, 1854, 17 & 18 Vict., c 125, s.24]. Similar provisions were incorporated in the *Canada Evidence Act* and the provincial Evidence Acts. If, however, the cross examiner intends to prove the document for the purpose of contradiction, compliance with other procedures must be followed, and these are discussed in the next section of this chapter. Although the legislation dispensed with the necessity of showing the writing to the witness, it also implied that it need not be read to the witness either, nor produced subsequently, unless counsel intended to contradict the witness by proving the document."
>
> "§16.119 The legislation which abrogated the rule in *The Queen's Case* relates only to the cross examination of the author of the document. No mention is made by about cross examining a witness on a document that was written or prepared by another. It would appear that in such circumstances the principles enunciated in *The Queen's Case* must be adhered to. Accordingly if counsel wishes to cross examine the witness upon such a document, counsel would first have to prove the other person's statement by proper means or undertake to prove it, notwithstanding that the object of such questioning is merely to test the witness's credibility, and not to prove the truth of the contents of the document. The rule in *The Queen's Case* prohibits the use of such a document which has not been put in evidence or which counsel cannot

undertake to prove in due course. In this context the rule prevents any surreptitious attempt to adduce evidence on the basis of a written document without putting in the document itself".

5.43 Furthermore, the following exchange took place between Mr. McDowell and the Court towards the conclusion of his submission on this issue:

> "MR. MCDOWELL: ….. If you propose to examine a witness by reference to a document, it is improper to do so unless the document is admissible or unless [upon] the matter being put to counsel on that side [he] says 'I have no objection'. In other words, you can't put a third party document to a witness without either an implied undertaking that you are going to prove it yourself or, alternatively, at the request of [opposing counsel] -- Mr. MacCann or myself in this case, [who]say, 'we want this tendered to the witness'.
>
> MR. JUSTICE EDWARDS: But it is also improper to ask leading questions. I mean, what does 'improper' mean in terms of the consequences?
>
> MR. McDOWELL: No, it's irregular if challenged, Judge, but there is nothing irregular about a leading question if I say to Mr. Collins 'the witness may be led,' I can't then afterwards say 'Oh, those were all leading questions and the trial is unsatisfactory'.
>
> MR. JUSTICE EDWARDS: That is the reason I asked the question.
>
> MR. McDOWELL: Yes. So that if Mr. Ferguson [the plaintiff's counsel in Snowden v. Branson, a case relied upon by Mr. Collins S.C.] had said 'this is a third party's statement, I object to it,' Mr. Carmen [the defendant's counsel in *Snowden v. Branson*] would then have been forced to say, 'well, I will prove it, I am undertaking to the Court to prove it and I must now be allowed to proceed a la *The Queen's Case* now to cross examine the witness about it, I will prove it in due course.' But if, as was the case here, Judge, he is found … cross examining the witness about a document and if the Plaintiff's counsel, as happened here, says this document should be tendered to the witness, then they have a choice: either I am not going to tender it to the witness and I will move on to another subject, or I will do so …
>
> MR. JUSTICE EDWARDS: But it goes into evidence.
>
> MR. McDOWELL: and it goes into evidence at that point, Judge. And in my submission, Judge, if that were not the law, then it would be the case that you could put material from your own side to a witness and then effectively take it back by electing not to give evidence, which is what Mr. Collins claims is the outcome of the *Phipson formula*. And we say the *Phipson formula* does not apply where counsel for the plaintiff, witnessing an examination of his witnesses by the defendants, says 'this document is going to be referred to in cross examination, it must be tendered to the witness,' and it is tendered. At that point it is [in] evidence and it cannot be pulled back and it can be used as part of the plaintiff's case. And I just offer to the Court the example of could it possibly be otherwise, in the context of [an] engineer's report, put to the plaintiff in [a] Circuit Court case anywhere in Ireland, could it possibly be the case that, it being shown that the tyres on the car were bald, counsel for the defence would say, 'well, I am not giving evidence, so that is gone,' which is the logic that Mr. Collins is so skillfully asking the Court to adopt. 'Oops, bald tyres, sorry, I am not giving evidence, and that is it, I don't propose going further with this.'
>
> MR. JUSTICE EDWARDS: Or the hospital casualty report which has "C_2H_50H+++" written on it.
>
> MR. McDOWELL: Exactly. I mean, it's precisely that, Judge. The Plaintiff didn't say 'I object to the witness being cross examined about the memorandum on the 4th of November or what is in Mr. Halpenny's note or what is in Mr. Smyth's, either of Mr. Smyth's statements.' What the Plaintiff['s] counsel said [was], 'if the witness is going to be cross examined about it, it must be tendered to him,' and Mr. Collins and Mr. O'Donnell [were] then put [on] their election 'No, I don't want to go any further with this. I am holding back to keep my powder dry for a really radical non-suit proposal where this will not be in evidence,' or, alternatively 'No, I am handing it to the witness,' in which case it's part of the evidence in the case. In my submission, Judge, that is I mean, Mr. Collins very carefully argues the contrary, but he is arguing it on the basis of a number of authorities here, all of which are cases where … the person whose witnesses were confronted with documents used in these ways, was, afterwards, objecting to the result in the case by reference to the wrongful introduction or use of material by way of cross examination or the like, and that is the difference. Here, we said 'if you want to cross examine, you must tender,' and instead of saying 'right, we will leave that area of cross examination,' they say 'we will tender,' and now they bitterly regret, perhaps, that they didn't just say 'well, we will shelve the documents and we won't put them in evidence.' And that applies, Judge, to each of the documents in this case." [Material in square brackets represents editing of the transcript by the Court.]

5.44 As previously indicated, this Court regards Mr. Collins S.C.'s analysis as somewhat imperfect and incomplete. It does so for a number of reasons.

5.45 As regards the first proposition, the Court simply believes it to be incorrect. It ostensibly confuses the concepts of receivability and admissibility, respectively, and conflates the two. Whether a document is hearsay or is not hearsay has nothing to do with whether the author has been called to prove it. The contents of a document introduced as testimonial evidence will still be hearsay even if the author is called to prove it. They are the recorded words of a person who is in a position to give first hand evidence of that which he has recorded. The correct approach is to separate out and deal individually with issues of receivability, on the one hand, and issues of admissibility, on the other hand. In many cases, but subject to what I have to say below, a document will not be receivable in evidence unless the author has been called to prove it. That having been said, even if a document is receivable, it may or may not be admissible. However, the converse does not obtain. Issues of admissibility do not fall for consideration at all if a document is not capable of being received in evidence by reason of inadequate proof.

5.46 As regards the defendant's second proposition, it seems to the Court that this proposition, while correct as far as it goes, does not address all possible situations, and in particular, the conundrum previously alluded to. It offers little assistance in defining the circumstances in which a document is to be regarded as having been "tendered" in evidence by a cross-examiner, and it does not directly address or, in the view of the Court adequately deal with, the question as to what is the position where a cross examiner puts a question to a witness concerning a document which is not yet proven and his or her opponent, rather than objecting to the question in the circumstances, calls upon the cross-examiner to produce the document and place it before the witness, which duly happens, and the witness is then asked questions about the contents of the document. If Mr. Collins's second proposition were a complete answer to the issue raised he would be able, in effect, to cherry pick material from a document, favourable to his client, and

with which the witness under cross-examination might be likely to agree, and then put it to that witness for his agreement without any risk of it being placed in its full or proper context, or that the generator of the document might be exposed to a forensic questioning with respect to those aspects of the document with which the witness does not agree. In reply to Mr. Collins's argument Mr. McDowell S.C. suggested, I believe correctly, that:

> "He can't say 'I put it to the witness, and if my attesting witness doesn't turn up, I am taking it back' or 'if I don't give attesting evidence, I am taking it back'" (transcript day 20, p.167 , l. 24 -27)

5.47 Another way of putting is to say, using the old adage, that "he cannot have his cake and eat it".

5.48 The Court believes that if it were possible to do that with impunity it could give rise to significant unfairness and lead to injustice. The rules of evidence exist to ensure fairness *inter partes*.

5.49 The Court is satisfied that to the extent that the rule in *The Queen's Case* has not been abrogated by statute it remains the law in this jurisdiction just as it does in Canada.

5.50 However, the nub of the particular problem that has arisen in the present case seems to me to be a lack of clarity as to the following issue: when is a document to be regarded as having been tendered in evidence?

5.51 At its most basic a document is an inanimate object incapable of offering itself in evidence. Neither mere allusion to the document, nor the mere physical production of the document, has of itself the effect of tendering it in evidence. A document is tendered in evidence by a party if, by virtue of his conduct, that party is to be regarded as seeking to rely upon the document as evidence in its own right, whether as real, original or testimonial evidence, and the relevant document is physically present in court and is before, or is in the hands of, a witness who is being questioned about it. Moreover, as we have seen, any party against whose interest it is sought to produce a document is entitled to insist, as one of the last remaining vestiges of the best evidence rule, that the trier of fact has before him, or her, the most trustworthy and primary evidence possible. He is entitled to say "I object! This document has not been proven. The witness should not answer any questions about it unless and until it is proven". In that event the party seeking to introduce the document has a choice. He may desist from pursuing the matter and move on to something else; alternatively he may seek to proceed. If he does seek to proceed he can do so in one of two ways. The most usual practice is that the cross-examiner continues to question the witness but does so subject to an undertaking (which if not proffered expressly will certainly be implied in the circumstances) that he will adduce the necessary proofs later on. Alternatively, he can seek to prove the document there and then by requesting the leave of the Court to stand down the witness temporarily so as to facilitate the adduction of the necessary evidence. One way or the other the party introducing the document must, if required to do so, prove that it really is that which it purports to be, i.e., he must prove both due execution and content. If the cross-examiner has proceeded on foot of an undertaking to prove the document later, and fails to do so, adverse consequences will arise for him in terms of his case. This is consistent with the approach that was adopted in *The Queen's Case*. As to the potential adverse consequences, first, his client will not be able to rely upon the document. A judge sitting alone will have no regard to the document in his deliberations. If a judge is sitting with a jury then the judge will either warn the jury in strong terms that they must not have regard to the document as it does not constitute evidence, or, if he considers that the risk of prejudice is so great that no warning will suffice, he may declare a mistrial. Secondly, depending on the circumstances, there might also be other consequences e.g. an award of costs against the offending party, or against counsel personally, to mark the court's displeasure.

5.52 Of course, in any adversarial system of justice, it is always open to one party to make admissions or concessions to the other party. Accordingly, the party against whose interest the document is being produced may either admit that the document is authentic and thereby agree to its production, alternatively call for the document to be produced by his opponent in which case he will be deemed to have waived the requirement for his opponent to adduce formal proof. Thus, where a cross examiner puts a question to a witness concerning a document which is not yet proven and his or her opponent, rather than objecting to the question in the circumstances, calls upon the cross-examiner to produce the document and place it before the witness, the cross-examiner is again faced with a choice. Both sides clearly wish to rely upon the document. He has a judgment call to make. Is it of more benefit to him to have the document in evidence than not to have it in evidence? Depending on what he decides he must do one of two things. He must either desist from pursuing the matter further and move on to something else, or alternatively he may proceed and cross-examine on the document. However, if he does so it is then in evidence and may be relied upon by both sides.

5.53 Further, a document does not have to be placed in evidence for some use to be made of it in cross-examination. However, if it is not placed in evidence only very limited use may be made of it. Thus a document may be placed in the hands of a witness without any indication being given as to its nature or contents and the witness may be asked questions based on its contents but not referring to its contents. So the witness may be asked to look at the document and to say whether he accepts that what the document purports to record is true. If the witness indicates his acceptance then, at that point (subject to any issue as to admissibility, e.g. hearsay), the document and its contents become evidence in the case and may be referred to without restriction. They are then available to be considered in conjunction with the witness's oral testimony that the contents of the document are true. However, if the defendant indicates that he does not accept that what the document purports to record is true then the contents of the document cannot be adduced in evidence unless and until the document is proven (or an undertaking is given to do so later), or the requirement has been waived. Notwithstanding this considerable restriction the witness may still, of course, be asked further questions based on the document's contents but not referring to its contents. For example, where a witness has testified that he was out of the country from the 5th to the 7th of July in a particular year, and the cross-examiner places in his hands a document constituting the minutes of a business meeting held in Cork at 4.00pm on the 6th of July recording him both as having been in attendance at that meeting and as having actively participated, the witness may be asked: "I want you to look at the piece of paper in your hands and to think carefully before you answer the next question. Do you still say that you were out of the country from the 5th to the 7th of July or do you wish to revise your earlier testimony?" However if, while the document is before, or in the hands of, the witness, the cross-examiner makes reference of any sort to either the nature of the document or to the contents of the document he may by his conduct be regarded as having proffered the document to the witness for his comments, and accordingly to be tendering the document in evidence. It is improper for Counsel to do so (unless invited to do so by his opponent) if he is either unable or unwilling to prove the document, alternatively if the contents of the document are inadmissible, or if it may be inadmissible in circumstances where either his opponent has not had advance notice of the intended user and a fair opportunity to object, or the judge has not been given a fair or adequate opportunity to rule on admissibility or to give directions.

5.54 The *Phipson formula* relates to the admissibility of evidence. Admissibility is about lawfulness. Evidence is only admitted for the Court's consideration if it is lawful to do so. The *Phipson formula* allows only very limited use to be made of a document which is either inadmissible, or which has not yet been ruled admissible, particularly in a trial before a jury. The reason for this is that the rules of evidence exist in the interests of justice and fairness of procedures and a court will not lightly countenance a cynical and/or strategic circumvention of them.

5.55 Strictly speaking, the *Phipson formula* was formulated to regulate the use of inadmissible documentary evidence in cross-examination and it is not concerned with the receivability of evidence. Receivability is not about lawfulness, it is about adequacy of proof as to the nature of the supposed evidence. However, although the *Phipson formula* is primarily concerned with restricting the use to which inadmissible documents may be put in cross-examination the general approach recommended is, it seems to this court, equally valid and to be commended with respect to the use of controversial or potentially controversial documents not yet proven.

6. Application of principles to the controversial documents in question

(1) The Toal O'Muire minute of the meeting of the 4th of November 1997

6.1 The major reference to this document occurred on day 9 of the trial when Mr. Donal O'Donnell S.C. sought to introduce it in the course of cross-examining Mr. White. Mr. White had given evidence in chief to the effect that he believed or understood that in late 1997 Mr. Smyth had a reasonably good appreciation of the potential implications of the proposed C.P.O. for Leopardstown Racecourse and, in particular, the Ballyogan field. He was being very expertly cross-examined about this and Mr. McDowell. S.C. in his submissions has suggested (on day 18 at p85/86 of the transcript), I think fairly, that some of the objectives of Mr. O'Donnell cross-examination were to establish that Templeville didn't know the exact line of the motorway, didn't know exactly how Leopardstown was going to be affected by it and that:

> "..., since everything was vague, two consequences followed: Number one, that the whole course might have to be redesigned and, therefore everything was up for grabs; and number two, that insofar as a 5.5. acre demise of car parking was in contemplation, that wasn't as ridiculous as it seemed since nobody knew what amount of land would be covered by it" [i.e., the C.P.O.]

6.2 In the course of cross-examining Mr. White Mr. O'Donnell S.C. had suggested to him that Mr. Smyth didn't know anything about the way that the sprint track was to be re-designed, and Mr. White had replied "I am not so certain about that, but…" It was then put to him:

> "Q. He wasn't told that at a meeting of the 4th of November when he went to the County Council, isn't that right? You have seen the document in relation to that?
>
> A. I have had a glance at the document.
>
> Q. There is no reference there to the acquisition of the land at Cotter's field, isn't that right?"

6.3 The reference to "Cotter's field" was an error by Mr. O'Donnell S.C., which he acknowledged and apologised for moments later. He had meant to refer to the land on the northern side of the motorway and to the eastern side of the existing Leopardstown campus that was ultimately acquired for re-modelling the sprint track. This was clarified and the witness was asked:

> "Q. Do you see anything in that memo that tells Mr. Smyth that land to the right hand side and on the northern side of the motorway is being acquired and being provided for the re-modelling of the sprint track."

6.4 The question was not properly answered due to some on-going confusion on the witness's part arising out of the original reference to Cotter's field. Accordingly, it was then put to him that there was no indication in the document that Mr. Smyth had been shown a relevant map. The witness agreed. It was then put to him that the document merely indicated "*What it was proposed to construct was the following: a new six-furlong straight".* The witness replied "Yes, OK". This was then followed by some sparring between the witness and counsel, but ultimately a clear question was put to which a clear answer was received:

> Q. …. and if you didn't know that there was additional land being acquired on the northern side of the motorway which had allowed you to extend out behind -- outside the circular racetrack, it would be entirely reasonable to think that you are going to have to remodel the six furlong straight within the current racetrack, isn't that right, by straightening out the bends and by the –
>
> A. No, I can't accept that at all."

6.5 Despite a number of supplementary questions on this the witness stood his ground and was adamant in his answers. He variously stated:

> " I was one thousand percent clear, as was [sic] the directors and other people, that we would not be touching the race track, chase race track, and we suffered enough by losing the sprint track."

And,

> "I am not being difficult about this, and I apologise, Judge, but the racecourse was not being moved. It was the hallowed ground of 120 acres. That part of the racecourse was never being tampered with, the race track"

6.6 It is necessary to deal in the first instance with purported reliance on the document by the party who introduced it, namely the defendant, and then to deal with the purported reliance upon it by the other party, namely the plaintiff. The Court is satisfied from the transcript evidence just quoted that at the time that Mr. White was first asked about the document by Mr. O'Donnell the witness had it before him, or it was in his hands. That this is so is clearly to be inferred from the question asked in the present tense that begins "Do you see anything in that memo ... etc". The witness was not specifically asked to consider the document globally and to indicate if he agreed or disagreed with it. Rather certain characteristics of the document were put to him and for the most part he agreed with these, e.g., that there was no indication in the document that Mr. Smyth had been shown a relevant map, and that the document merely indicated "*What it was proposed to construct was the following: a new six-furlong straight".* However, he also disagreed with some suggested interpretations of the document. The cross -examination of Mr. White concerning this document was not specifically objected to on behalf of the plaintiff. Neither did Mr. O'Donnell S.C. volunteer any express undertaking to prove the document later. However, a concession was made by Mr. O'Donnell shortly after introducing the document that "if Mr. McDowell or Mr. Farren want to refer to any other part of that" they could do so, which concession was neither rejected nor disclaimed by the plaintiff.

6.7 The plaintiff also seeks to rely on the Toal O'Muire minute in support of its case. Moreover, it wishes to rely on parts of that document other than the specific parts of it put to Mr. White by Mr. O'Donnell S.C. The plaintiff contends that this document provides

evidence of the extent of Mr. Smyth's (and hence Templeville's) knowledge of the C.P.O and its implications for both Leopardstown and Templeville. The plaintiff seeks to rely upon it (i) for the purpose of corroborating, or demonstrating consistency with, other aspects of Mr. White's testimony and (ii) to demonstrate inconsistency with, and therefore to undermine, the suggested level of knowledge on the part of Mr. Smyth as put to the plaintiff's witnesses in the course of their cross-examination.

6.8 The Court is satisfied in all the circumstances, and particularly having regard to the concession made, to deem the plaintiff as having accepted an invitation from the defendant to waive its entitlement to insist on formal proof, and to view the document as having been tendered in evidence by Mr. O'Donnell with the plaintiff's agreement in circumstances entitling both parties to rely upon it subject to any issues as to admissibility.

6.9 As both sides seek to rely on the document not just as original evidence but as testimonial evidence the Court must also be satisfied as to its admissibility. Although not objected to as hearsay the document is patently inadmissible as constituting hearsay, and, as has been pointed out, inadmissible evidence cannot be made admissible simply by its use in cross-examination. Nevertheless, the Court has a discretion to overlook the hearsay nature of the document in circumstances where, effectively, both parties have sought (though in different ways) to rely upon it, and where no objection was raised to the obvious hearsay nature of it at the time of its introduction. In all the circumstances of the case the Court is prepared to exercise its discretion in favour of admitting the evidence notwithstanding the hearsay nature of it, and to take the document into account in its deliberations.

(2) Mr. Halpenny's attendance note re the meeting on 24/11/1997

6.10 This document was first introduced on day 4 of the trial by Mr. Collins S.C. representing the defendant, in the course of his cross-examination of Mr. Peter Law as to what occurred at the meeting on the 24th of November, 1997. At a certain point (p. 93, Q 338) it was put to Mr. Law:

> Q. "…. obviously, from the questions that were asked the other day, you have looked at Mr. Halpenny's attendance note in respect of that meeting?
>
> A. I have indeed.
>
> Q. And does he identify in that attendance note a dome along the lines that you have outlined saying that they would give up their rights in return for the tarmaced area in front of the stand and the crescent shaped area?
>
> A. I can't recall whether it specifically states in that attendance note that it was agreed but certainly the areas that were discussed –
>
> Mr. MacCann: Judge, I think if the attendance note is now going to be referred to by Mr. Collins and put this witness, in fairness, the witness should have it before him to peruse the contents of that attendance of Mr. Halpenny's.
>
> Mr. Collins: I have no difficulty with that, Judge.

6.11 The document was then placed before Mr. Law and was clearly tendered and made receivable in evidence for the benefit of both parties at that point.

6.12 Mr. Law was then cross-examined and re-examined in relation to the following passage(s) from Mr. Halpenny's attendance:

> "In relation to point number 1, Philip Smyth explained that if part of the area hatched yellow was purchased by Dun Laoghaire / Rathdown County Council for the motorway, then Templeville will lose land over which it has rights to play tennis, build tennis courts and park cars. If the dome and the four existing outdoor tennis courts were to be relocated, and if parking in this area is diminished, parking will have to be made available to Templeville in other areas. He pinpointed these areas as being the area to the top left hand side of the area hatched yellow, the existing car park outlined in blue for which Templeville had already car parking, and the area to the front of the Grandstand. This was to be accommodated in any new lease arrangement."

In the course of re-examining Mr. Law, Mr. MacCann SC elicited the following:

> "Q. The reference to car parking rights is, I think, identified on the second page of that attendance, the portion you have read out a few moments ago under cross-examination. Can you find anything in that attendance which, in your opinion, materially contradicts your own summary of what you say was agreed on the 24th of November in relation to car parking?
>
> A. No. I mean I think he's attendance notes and my attendance notes accord largely with one another."

6.13 Mr. Halpenny's attendance note, if it is being relied upon on the basis that its contents are true, is patently hearsay and *prima facie* inadmissible. Notwithstanding this, the defendant claims that so much of the contents of the document as were agreed and adopted by Mr. Law are in evidence by virtue of Mr. Law's testimony and that he can rely upon that. However, the plaintiff wishes to refer to other parts of the document that were not put to Mr. Law or to any other witness, and to do so for variety of purposes. The defendant objects that he cannot do so as the material constitutes inadmissible hearsay. It is appropriate to examine the purposes for which the plaintiff wishes to refer to Mr. Halpenny's attendance.

6.14 First, the plaintiff wishes to show that certain claims about this meeting alleged to have been made by Mr. Smyth (and assuming for the moment that the fact of Mr. Smyth having made such claims is capable of being adequately proven) are not recorded, or corroborated, in any shape or form in Mr. Halpenny's attendance (or for that matter in Mr. Law's attendance). The document would be admissible as original evidence for this purpose providing that the plaintiff is in a position to point the Court to admissible evidence that such claims were made by Mr. Smyth.

6.15 Secondly, the plaintiff invites the court to compare Mr. Halpenny's account of what occurred at the meeting of the 24th of November 1997 with accounts of the same meeting said to have been given by Mr. Smyth (and again assuming for the moment that the giving of such accounts by Mr. Smyth can be adequately proven) for the purpose of showing "a deceptive intent" on the part of Mr. Smyth. It does not seem to the Court that the document has any value as original evidence in this context in as much as it does not advance the plaintiff's case one whit to merely prove that there are inconsistencies between an account or accounts of the meeting given by Mr. Halpenny on the one hand and Mr. Smyth on the other hand. Either of them, or indeed both of them, could be genuinely mistaken in their beliefs as what occurred. For the document to advance the plaintiff's case of deceptive intent it seems to

the Court that the plaintiff would have to rely on the truth of its contents. To rely on ostensible inconsistencies between what is stated in Mr. Halpenny's attendance on the one hand, and what Mr. Smyth may have recorded elsewhere about the meeting, as proof of, or as one of a number of circumstances tending to prove, deceptive intent by Mr. Smyth, the plaintiff must be taken as asserting the truth of the contents of Mr. Halpenny's attendance, and therefore to be relying on the document as testimonial evidence. The plaintiff can only do so if he can persuade the Court to overrule the defendant's objection and to exercise its discretion to admit the document in evidence, notwithstanding that it contains hearsay.

6.16 It is clear that the contents of Mr. Halpenny's attendance are hearsay. However, at the time of its introduction in evidence no objection was raised by the plaintiff. Moreover it would have been obvious to the defendant at the time of tendering the document that it contained hearsay. It seems to the Court that in the circumstances the defendant, although its Counsel attempts to do so, cannot now be heard to complain that the document contains hearsay. It was open to the defendant to employ the *Phipson formula* and not to tender the document in evidence. If the defendant had employed the *Phipson formula* in introducing the document, and having placed it before the witness without either identifying the nature or content of the document, had then asked Mr. Law to look at it and to state if he agreed with any parts of it, and the witness had indicated a level of agreement, then the defendant would have been perfectly entitled to say that only those matters agreed to by Mr. Law were in evidence (by virtue of Mr. Law's testimony), and that anything else that might be contained in the document is inadmissible as hearsay. However, the defendant's counsel did not employ that approach. The document was tendered by him in evidence (and I think it matters not that he may not have realised that he was doing so) in circumstances where he knew it was hearsay, and the other side were not objecting. He cannot complain about it now. Moreover, it is not possible to tender part only of a document in evidence. Unless the physical document tendered has been redacted on an agreed basis it either all goes in or none of it goes in. In the present case the whole unredacted document was, notwithstanding the hearsay nature of it, tendered in evidence by the defendant and was not objected to by the plaintiff. The defendant must accept the consequences for his case of having done that. In all the circumstances the Court is satisfied to exercise its discretion in favour of admitting the document as testimonial evidence notwithstanding the hearsay nature of it, and to take the document into account in its deliberations.

(3) Mr. Smyth's witness statement in these proceedings

6.17 Mr. Smyth's witness statement in these proceedings was first alluded to on day 4 of the trial by Mr. Law, in reply to a question asked of him by the defendant's counsel Mr. Collins S.C. in the course of his cross-examination of Mr. Law. The witness was then specifically referred to the document in the following circumstances:

> "Q. Yes. There is a suggestion made, I think in the submissions that have been put in on behalf of Leopardstown, to the effect that there was some formal agreement or that Mr. Smyth is maintaining that there was some formal agreement in relation to a demise of car parking at that particular meeting. And just to be clear, Mr. Smith's evidence, if he gives evidence, will be to the effect that he referred to his facilities, by which he meant car parking and tennis courts, and that he wanted some permanence in relation to those facilities, he wanted a lease, a demise, he doesn't recall the exact wording that he used but that was the gist of what he wanted?
>
> A. I understood from reading Mr. Smith's witness statement that he said that or contends that it was agreed at this meeting that he would get demised car parking.
>
> Q. Well perhaps if you just have a look at Mr. Smith's witness statement, if you have that book to hand, Mr. Law. Paragraph 27 of Mr. Smith's statement. Is it do you have that?
>
> A. I do indeed.
>
> Q. And I'll read it for the record.
>
> 'Referring to point No. 1.'
>
> that's the similar quantum of parking to be provided in the area surrounding the Templeville property as in the heads of ...."
>
> …. [Discussion with Judge edited out].
>
> " 'I explained that if part of the area hatched yellow would be acquired by the county council for the purpose of the motorway Templeville would lose land over which it was entitled to take ... build additional tennis courts and to park cars. If the seven dome tennis courts, dome No 2. And four existing outdoor tennis courts needed to be relocated and if parking in this area was to be reduced Leopardstown would have to replace these facilities in other areas surrounding Templeville's premises'.
>
> You wouldn't disagree, I think, with anything so far?
>
> A. Un un.
>
> Q. 'Dealing specifically with the issue of replacement parking, I pointed out that a similar quantum of parking would need to be provided to Templeville in other areas surrounding its premises'.
>
> You don't disagree with that?
>
> A. Yes.
>
> Q. 'By way of illustration I identified a number of possible areas that could be used to make up the similar quantum. These are areas included in the area on the map attached to the 1993 lease appearing on the top left hand side of the area marked yellow, the existing car parking areas outlined in blue on the said map, known as car parks number 1 and 2 and the areas in front of the grandstand. Templeville was already entitled to park in car parks numbers 1 and 2. I have pointed out that the replacement tennis courts for dome No. 2 would have to be positioned as close as possible to dome No. 1 which could be on the old race track when it was moved as part of the contemplated redesign'.
>
> And I don't think you disagree with anything there?

A. No. I mean, I note what he says in relation to car parking accords with my evidence in my witness statement.

Q. Yes. 'I state that these facilities.' and that's what he was talking about 'Both parking and tennis courts, would need to be demised to Templeville in the new lease in the interests of protecting Templeville's long term plans and facilities'. Now, Mr. Smyth doesn't recall the exact words that he used but he was saying that the 'facilities' that you were discussing, by which he meant car parking and tennis courts, and he doesn't recall whether he expressly redefined 'facilities' as car parking and tennis courts but that's what he meant, that he wanted that permanently relocated, demised, leased, he doesn't recall the words he used, but that was the gist of what he was be looking for?

A. Well, as I said, I don't recall that being said. If Mr. Smyth said that's what he said, you know, it's difficult for me to dispute that. But if he, if he had said that they were looking that he was looking for a demise in relation to parking I am certain that would have caused alarm bells to ring.

Q. Yes, you see Mr. Smyth says

A. And there would have been some record of that discussion in my attendance.

Q. Mr. Smyth doesn't say that car parking was taken out as an isolated issue and that there was some separate discussion on the car parking and a demise of car parking, that's not what he says he is going to say. He is going to say that he was talking about the three facilities which were in the - which were referred to in the heads of agreement, the car parking being the first of them, and the tennis courts; and they were the two facilities that were under discussion, and that what he wanted was that he would get some form of demise or a lease, permanence in terms of whatever might, whatever relocation might occur in relation to those facilities?

A. Well, as I have said, I cannot recall that and I would repeat again that if he had said anything specific about demise of car parking that would have caused alarm bells to ring.

Q. Yes, I understand that?

A. And that would have been recorded in my attendance.

Q. Yes. But you see I am not saying that he said specifically demise of car parking on its own?

A. I appreciate that's what, you know, he may have said, 'facilities'.

Q. All right. In fact, as we discussed earlier, there is there was to be, certainly, a demise at least of the tennis facilities?

A. That's correct."

(See transcript, day 4, pp 31 – 35)

6.18 The first thing to be said is that while it would have been open to the plaintiff to have objected to the introduction of this statement, either on the grounds that it had not been proven, or on the grounds that it contained hearsay, or on both grounds, the plaintiff did not do so. Secondly, the defendant did not employ the *Phipson formula*, or perhaps a variation thereof - given that the witness was obviously intimately familiar with the document, to elicit from the witness those matters with which he was in agreement without actually putting the document in evidence. On the contrary, the procedure adopted by the defendant's counsel was to put the document in evidence with the ostensible agreement of the plaintiff and then to put passages from the document to the witness, most of which the witness was prepared to agree with, but some of which he was not prepared to agree with. Any doubts that the Court might have entertained as to whether this document was in fact tendered in evidence are dispelled by what happened later on the same day when the witness was re-examined by Mr. MacCann S.C. on behalf of the plaintiff. He commenced:

Q. Mr. Law, could I ask you to turn to the Witness Statement of Mr. Smyth, which was opened in part to you by Mr. Collins this morning. If I could ask you to turn in particular to internal page 9 of that. Do you have that, Mr. Law?

A. I do indeed, yes.

Q. If I could ask you to turn, in the first instance, to paragraph 25 of that Witness Statement and Mr. Smyth proposes to say... 'It would appear that a negotiating meeting took place on the 24th November 1997. In attendance was Denis McCarthy president of Leopardstown, Frank Clarke SC, vice president of Leopardstown, David Power, director of Leopardstown, John White, manager of Leopardstown, Peter Law. I was present...' so Mr. Smyth was at the meeting 'With me were Ciaran Condell who advises Templeville on a wide variety of commercial matters; Sinead Watson, manager of Westwood Club and Conor Halpenny. Mr. Halpenny has given an account of this meeting in his Witness Statement with which I agree. During this meeting I refer to the draft Heads of Agreement which is in front of us, in particular point number 1 which stated that "Templeville would surrender its interests in the area hatched yellow provided..." Then he quotes from the Draft Heads of Agreement as they pertained at that point in time.

Now, Mr. Smyth has said that he stands over and agrees with Mr. Halpenny's summary of what happened in the meeting of the 24th November.' Have you had an opportunity to consider Mr. Halpenny's Witness Statement?

A. Yes, I have.

Q. Do you have it in front of you?

A. Yes, I do.

Q. Now, subject to correction by Mr. Collins, it would appear that the reference to that, the reference to the meeting of the 24th November is to be found at internal page 28 at paragraph 46, which says 'It seems to be accepted by Leopardstown that Templeville's proposals in the first Draft Heads of Agreement as discussed at the meeting of the 24th November were, in principle, acceptable to it and represented a basis to continue progress in the negotiations. Having reviewed the statements of Leopardstown, I am unclear when it is that Leopardstown maintain that Mr. Smyth decided to waive his demand for a similar quantum of car parking and at the same time waive his compensation, a waiver which, as

far as I am concerned, never occurred.'

Is there anything in that particular statement which you can identify as being an assertion by Mr. Halpenny that there was an agreement or even an agreement in principle at that meeting that there was to be a demise of car parking rights from Leopardstown to Templeville?

A. No.

Q. Are you aware of any other provision or any other paragraph or statement within Mr. Halpenny's Witness Statement which amounts to an assertion that at that meeting of the 24th November there was an agreement that there would be a demise of car parking rights from Leopardstown to Templeville such as to exclude Leopardstown from such car parking rights?

A. I don't believe there was any such assertion concerning that statement."

6.19 The Court regards it as being of considerable significance that Counsel for the defendant raised no objection to Mr. MacCann S.C. referring to a part of Mr. Smyth's statement to which the witness had not been referred in the course of cross-examination. If counsel for the defendant did not believe that the document had been tendered in evidence during cross-examination this was the time for him to object and to say so. He did not do so, rather he allowed Mr. MacCann S.C. to re-examine the witness by reference to new material, ostensibly relevant to matters on which the witness had been cross-examined, contained in Mr. Smyth's statement - something which Mr. MacCann S.C. could not have done unless the document was in fact in evidence.

6.20 It is appropriate to now consider the additional use that the plaintiff now wishes to make of this document. The plaintiff invites the Court to have regard to this document as original evidence, rather than as testamentary evidence. Far from relying on the truth of the contents of this document, the plaintiff contends that it represents "a carefully crafted departure from the contemporaneous note prepared by his own Solicitor" and contains falsehoods that were calculated to deceive. The plaintiff invites the Court to have regard to the fact that a statement was made by Mr. Smyth in the terms in which it was made as a piece of circumstantial evidence; further, to consider that particular piece of circumstantial evidence in conjunction with other circumstantial evidence, as well as with the evidence of the plaintiff's own witnesses, and to infer deceptive intent, dishonesty and unconscionable behaviour on the part of Mr. Smyth. Because the plaintiff seeks to rely on the document as original evidence hearsay is not an issue.

6.21 The Court does not, in the circumstances in which this document was introduced and placed in evidence, consider that there is any impediment to the plaintiff seeking to rely upon it in the manner proposed.

(4) Mr. Smyth's witness statement in the arbitration proceedings

6.22 The circumstances in which this document was introduced were as follows. On the morning of day 6 of the trial, before Mr. Justice Clarke resumed his evidence in chief, Mr. McDowell S.C., with the leave of the Court, interposed a short witness, namely, Mr. Raymond Horan, Company Secretary of Leopardstown Club Limited, who testified that, acting in that capacity, he received the document in question from the defendant's solicitors for use in the arbitration proceedings before Mr. Gardiner. It seems that Mr. Horan's evidence may not in fact have been necessary, because as soon as Mr. Collins realised the purpose for which Mr. Horan was being called he indicated, in the following circumstances, that formal proof was not required:

"MR. McDOWELL:	Mr. Raymond Horan, please.
MR. COLLINS:	It's okay, it's a proven witness statement, Judge, and there is no objection at all about it. I wasn't aware of that, Judge.
MR. JUSTICE EDWARDS:	Well, on an *ex abundante cautela* basis you can call this man if you want to call him …
MR. McDOWELL:	Well, I'd better just call him."

6.23 The Court is completely satisfied that no issue arises either as to due execution or as to the contents of the document in question, in the light of Mr. Horan's evidence and, more particularly, Mr. Collins S.C.'s indication that the document was being accepted as "proven" and that "there is no objection at all about it". After Mr. Horan had concluded his brief evidence, Mr. Justice Clarke then returned to the witness box to continue giving evidence in chief, under examination by Mr. McDowell S.C. He was being asked about the events in the period from October to December 1997 and, in the course of this, Mr. McDowell S.C. sought to refer him to Mr. Smyth's statement in the arbitration proceedings. This gave rise to the following exchanges:

"Q.	During that period are you aware of any suggestion that there would be in field car parking of any kind whatsoever coming from Templeville?
A.	No.
Q.	In this context could I ask you to examine the matter, the matter which was - the statement - or witness statement - of Philip Smith which was proposed - or which was dealt with by Mr. Horan a few minutes ago?
A.	Yes. I think I have a copy of it here.
MR. COLLINS:	Again, Judge, I am not clear as to how this comes in.
MR. McDOWELL:	Well, that's not an objection, Judge."

(Transcript, day 6, p.27)

"MR. JUSTICE EDWARDS:	Well, he is very clearly making an objection to you --
MR. McDOWELL:	-- on relevance or something of that kind.
MR. JUSTICE EDWARDS:	Yes, yes.
MR. McDOWELL:	But in my submission, Judge, he is clearly wrong in this respect; his - the evidence before the Court now is that his client delivered this statement for the purposes of an arbitration before Mr., before Mr. Gardiner.
MR. JUSTICE EDWARDS:	That is so.
MR. McDOWELL:	In it there is an explanation of these events.
MR. JUSTICE EDWARDS:	Yes.
MR. McDOWELL:	And this, this was proffered to us --

MR. JUSTICE EDWARDS:	-- Yes --
MR. McDOWELL:	-- In the course of that arbitration.
MR. JUSTICE EDWARDS:	You are not introducing the document as proof of its contents?
MR. McDOWELL:	-- As evidence of its truth. I am producing the document as evidence of its untruth, as a matter of fact, Judge. But I am entitled to put the explanations that have been offered and the sequence of events that have been suggested, at any stage, either in an arbitration or in a drink over - over - over --
MR. JUSTICE EDWARDS:	-- Yes --
MR. McDOWELL:	-- A conversation over a drink to my own witness, if it - if it came to the other side.
MR. JUSTICE EDWARDS:	I think that's legitimate and I am going to allow it.
MR. COLLINS:	That's point that I differ; to his own witness. I can see him putting it to my witness but how does he prove - how does - how can this witness prove anything in relation to it? He can't.
MR. JUSTICE EDWARDS:	He can't prove - sorry - he can indicate his view - that is, his view - with respect to the events or matters that are covered in the statement of Mr. Smyth. He can't express a view, for example, as to the correctness or incorrectness of what Mr. Smyth may have said but he can express his view as to, factually, what is the position. In other words, this can be used to direct him to a particular event or a particular remark or a particular context and then the witness can give his evidence as to what he believes is the position.
MR. COLLINS:	Yes
MR. JUSTICE EDWARDS:	On that.
MR. COLLINS:	Well, I think the easiest way to deal with it is this, Judge; I am maintaining my objection for the record but Mr. McDowell, in light of what your Lordship has said, can do what he --
JUDGE:	-- Yes. Well, I'm allowing it."

6.24 Mr. Justice Clarke was then referred to various parts of Mr. Smyth's statement in the arbitration proceedings and, the context having been identified in that way in each instance, he then gave evidence as to the position based upon his own recollection of the relevant events.

6.25 The Court is quite satisfied that the plaintiff's Counsel, by his conduct on day 6, evinced a clear intention to rely upon the document as evidence in its own right as original evidence. Moreover, the relevant document was physically present in court and was in the hands of the witness who was specifically referred to parts of it. There was no objection to its introduction on the grounds of receivability. Neither was there any objection on the grounds of hearsay, presumably because of Mr. McDowell S.C.'s statement that he was not relying on the truth of its contents, i.e., he wanted to rely upon it as original evidence rather than as testimonial evidence. There was an objection to the introduction of the document effectively on the grounds of relevance, but that objection was overruled. In the circumstances the Court is quite satisfied that Mr. Smyth's statement in the arbitration was properly introduced in evidence, and that it can be relied upon by the plaintiff as original evidence in support of the claim for rectification based upon unilateral mistake.

The contents of the four controversial documents

6.26 Although the Court has ruled that the plaintiff is entitled in one way or another to rely upon (i) the Toal O'Muire minute; (ii) Mr. Halpenny's attendance note concerning what occurred at the meeting of the 24th of November, 1997; (iii) Mr. Smyth's witness statement in these proceedings and (iv) Mr. Smyth's witness statement in the arbitration proceedings, it is not proposed to review these four documents individually or, save in the case of the Toal O'Muire minute, to quote extensively from them in the course of this judgment as they are too lengthy. The Court has nevertheless considered them in detail in the course of its deliberations.

6.27 Moreover, the nature of the reliance that is being placed upon these four documents, and the basis for that, is clearly stated in the plaintiff's legal submissions which the Court will comprehensively review. Similarly, the defendants' responses are clearly set out in their responding submissions which will also be reviewed.

The Toal O'Muire Minute

6.28 The Court has considered the minute taken by Toal O'Muire of O'Muire Smyth, Architects, of a meeting held at the offices of Dun Laoghaire / Rathdown County Council on the 4th of November 1997 in its entirety, and has regard to the various references that were made to it in the course of the trial. For the purposes of this judgment, the following extracts from it appear to be of particular relevance to matters at issue in this case: paras 2, 6,7, 9 & 10 respectively.

6.29 The following abbreviations are used: JDT – Mr. J.D. Taylor, Deputy Engineer, Dun Laoghaire / Rathdown County Council; JMcD – Mr. John McDaid, Senior Engineer, Roads Dept, Dun Laoghaire / Rathdown County Council; P.S. - Mr. Philip Smyth, Templeville Developments; K.C.- Kieran Condell, Templeville Developments; TOM - Toal O'Muire of O'Muire Smyth, Architects and OMS - O'Muire Smyth, Architects.

> "2. PS reiterated that it is not the intention of Westwood Club to adopt a negative approach to the motorway, which they see as having potential for access to [?……]. He said that his main objective is to secure slip road access which would allow the proposed bridge across the motorway, linking to the proposed overflow racecourse car park, to be used to link from the tops of slip roads in both directions. JMcD said that there is absolutely no chance that the County Council could allow such a proposal on the following grounds:

• it would be unacceptable in principle, given the legal status of the motorway proposal it has now published;

• it would be unacceptable for technical reasons, because of the proximity of the Cabinteely interchange which is too close; and

• there is insufficient land within the CPO area to allow such slip roads to be constructed: the total length of the slip road including the deceleration area is approximately 400 m, in each direction; and this cannot be reduced irrespective of the volume of traffic. Furthermore, a slip road must discharge onto a public road rather than onto private ground as PS had suggested. (TOM queried the slip road off the Clonee bypass into the Blanchardstown Shopping Centre: J MCD said that the Clonee bypass is not to motorway standard)."

"6. PS/KC explained that they were unsure what the county council knows about the leasehold interest of Templeville Developments Ltd in the Leopardstown lands, including the site of the proposed motorway. PS said that their solicitors, P.C.L. Halpenny, had written to the County Council in parallel with the correspondence with OMS, and have enclosed a copy of their lease map. JDT said that, while the OMS letter to Mr. Willie Murray had been passed to him, he had not seen the P.C.L. Halpenny letter. He expressed surprise that the P.C.L. Halpenny letter had been acknowledged."

JDT/JMcD said that they had contacted a total of 410 owners, i.e. all parties with registered interests affected by the proposed Compulsory Purchase Order (CPO). JMcD said that the Motorway Order will fall if the County Council has not contacted any registered interest. PS said that he will arrange to send a copy of the lease map to JDT/JMcD.

"7. OMS/PS asked about the timing of the proposed works been agreed between the County Council and the Racing Board. JDT confirmed that these works will need planning permission, and that construction is some time off. JMcD said that the issue of rebuilding the newer tennis court dome was not finally resolved: the Racing Board had indicated that this issue, along with the right to build additional outdoor tennis courts, "could be dealt with"; i.e. by the Racing Board directly with Templeville Developments Ltd without direct involvement of the County Council. JMcD and PS agreed that there could be hazard from outdoor courts close to the motorway in relation to tennis balls occasionally being hit on to the motorway and distracting drivers."

"9. TOM queried the extent of the road "take" on drawing PR2-PS-05C as tabled by JMcD; in particular in relation to the road shown extending from the proposed Cabinteely Interchange up to the tennis domes. JMcD confirmed that the "take" does not extend along that road where it is proposed to be dealt with in the racecourse lands; i.e. between the racecourse stream and the tennis domes. Instead, it is proposed that this link road would be built on land in the continuing ownership of the Racing Board.

TOM queried whether the road could be built along the side of the motorway, as far as the proposed overbridge; at which point an attractive entrance could be created which would provide some greater sense of arrival than if the road runs (as proposed) between the two tennis domes. JMcD replied that, apart from the "sweep" requested by the Racing Board to facilitate traffic getting onto the overbridge, the only other consideration (and a minor one at that) was the wish to avoid building the road across the high tension cable running between the road and the proposed motorway. PS also pointed out that the Racing Board had already invested (perhaps wrongly) in the main entrance from the Leopardstown roadside, and maybe blinded to the potential of the proposed entrance from Cabinteely."

"10. PS queried what would be involved in the likely compensation package for the Racing Board. JDT explained that it is proposed to construct the following at the expense of Dun Laoghaire / Rathdown County Council:

• A new six-furlong straight

• New stables to replace the existing which will be demolished to make way for that straight;

• Remodelling of the golf course, which will involve a tunnel serving a number of purposes; a link to 2 no. holes on the golf course which will be separate from the other 16; but mainly to allow horses get from the newly built stables to the parade ring.

JDT said that it will be open to the Racing Board to obtain financial compensation to a cost which would allow them to build the above, and spend the money on completely other purposes."

Drawing LRC/08/02

6.30 Finally, and to conclude this segment on controversial documents, some mention should also be made of a drawing labelled LRC/08/02 (exhibited with the witness statement of Mr. Justice Clarke as FC25 and identified and put in evidence by him on Day 2 in the course of his evidence in chief) to which various witnesses have referred.

6.31 This drawing was prepared in August 1997 by the firm of M.C. O'Sullivan, Consulting Engineers who were, Mr. Justice Clarke confirmed, Consulting Engineers to Dun Laoghaire Rathdown County Council. It is characterised on its face as a "preliminary design". However, it indicates clearly the proposed route of the motorway, as of that time, and also of a roadway to be built from the Carrickmines Interchange up to the tennis domes on the Leopardstown campus and, in fact, shows that proposed roadway threading its way through the gap between Dome No 1 and Dome No 2. The significance of this drawing is that it was in the public domain and Leopardstown relies upon it as evidence, *inter alia*, that while the final alignment of the proposed motorway had not been decided down to the last metre or yard, Templeville would, nevertheless, have been well aware in the autumn of 1997 of the likely implications of it both for the Ballyogan field and for the tennis domes.

6.32 That concludes the Court's review of the evidence. However, before examining and reviewing the parties' respective cases in the light of the evidence, it is necessary to deal with their submissions on the law

7. The Law

The Application for a Non Suit

7.1 At the end of the plaintiff's case the defendant applied for a non-suit and in doing so indicated that in the event of a refusal of that application the defendant would not be going into evidence.

7.2 There is no dispute between the parties as to how the Court should approach this application. They are agreed that the position is as set out in a five paragraph statement of the applicable principles contained in the judgment of Finlay C.J. in the Supreme Court case of *O'Toole v. Heavey* [1993] 2 I.R 544 at 546-547 (and in particular para 3): The leaned Chief Justice said:

> "The position would appear to me to be as follows.
>
> 1. If an action is brought either in tort or contract against one defendant only, and if at the conclusion of the evidence for the plaintiff the defendant applies for a dismiss, then it seems appropriate that the trial judge should inquire from the defendant as to whether in the event of a refusal of that application the defendant would intend to go into evidence.
>
> 2. If, as occurred in the present case, the indication given by counsel in making the application is that, if refused, his client intends to go into evidence, then, it seems to me that the issue which has been raised as a matter of law before the trial judge is to reach a decision as to whether the plaintiff has made out a *prima facie* case. This would be consistent with the procedure which would be appropriate in a case where such an application was made and the case was being tried with a jury. In that instance the judge would be required to consider whether on the evidence the plaintiff had submitted, it would be open to a jury, if no other evidence was given, or if they accepted that evidence, even though contradicted in its material facts, to enter a verdict for the plaintiff.
>
> 3. If upon applying for a non-suit at the conclusion of the plaintiff's case, in a case where one defendant only has been sued, it is indicated that the defendant does not intend, if the application is refused, to go into evidence, then, in effect, the learned trial judge is being asked to determine the following question, which is: having regard to his view of the evidence of the plaintiff, whether the plaintiff has (that being the only evidence before him) established as a matter of probability the facts necessary to support a verdict in his favour. Unless he is so satisfied, he must dismiss the action; if he is so satisfied it appears to me that he must give judgment for the plaintiff."

(Paragraphs 4 and 5, respectively are not quoted as they deal with circumstances (i) where a defendant indicates an intention to go into evidence on the issue of quantum only, and (ii) cases involving multiple defendants, neither of which are relevant to the present case.)

7.3 It seems clear that in the present case the plaintiff must satisfy the Court that it has established as a matter of probability the facts necessary to support a verdict in its favour. If the Court is not so satisfied it will be obliged to dismiss the plaintiff's claim.

The Law on Common Mistake

7.4 Both parties have supplied the Court with extensive and, indeed, excellent written submissions on the law. Both refer to all of the leading authorities in this jurisdiction, as well referring extensively to relevant decisions of the superior courts in the neighbouring jurisdictions. While the parties' respective submissions contain differences of emphasis, there are really no substantive differences between them, save to the extent that the defendant's submissions rely in part upon, and to that extent rest with, a judgment of the Court of Appeal in England in *Chartbrook Ltd v. Persimmon Homes* [2008] E.W.C.A. Civ. 183; [2008] 2 All E.R. (Comm.) 387. However, on the 1st of July 2009 the House of Lords reversed the decision of the Court of Appeal, see *Chartbrook Ltd v. Persimmon Homes* [2009] U.K.H.L. 38; [2009] 1 A.C. 1101; [2009] 3 W.L.R. 267.

7.5 On account of the application for a non-suit, the defendant's counsel had to go first in presenting closing arguments to this Court, and it seems the decision of the House of Lords in *Chartbrook* was not available to them in time for inclusion in the final written submissions on behalf of the defendant. However, the report ("hot off the presses" so to speak) was available in time for inclusion in the plaintiff's final written submissions, and it is referred to extensively therein.

7.6 While the Court would have been happy to adopt the summary of the law proffered by either side (updated in the case of the defendant's summary to take account of the House of Lords decision in *Chartbrook*) I propose for the purposes of this judgment to adopt (with necessary editing) that proffered by the plaintiff because (i) it contains a somewhat more extensive review of the relevant authorities than does the summary proffered by the defendant and (ii) it is, as has been indicated, slightly more up to date in that it does take account of the decision of the House of Lords in *Chartbrook*.

7.7 The starting point is that both parties accept the principles governing rectification for common mistake as laid down by Lowry L.C.J. in *Rooney & McParland v. Carlin* [1981] N.I. 138, 146 and by Griffin J. in *Irish Life Assurance Co. Ltd. v. Dublin Land Securities Ltd.* [1989] I.R. 253, 263. These make clear that the basic requirements for rectification for common mistake are as follows:

> i) a common intention evidenced by an outward expression of accord
>
> ii) relating to the particular matter in respect of which rectification is sought
>
> iii) continuing up to the date of execution of the document which it is sought to rectify; and
>
> iv) which is not reflected in this document.

7.8 It was originally thought that rectification could only be granted for common mistake where there was an antecedent legally binding contract, dealing with all matters in issue between the parties, which was inaccurately represented in the instrument sought to be rectified.

7.9 This is no longer the case. It is now well established that a common continuing intention, evidenced by an outward expression of accord, is all that is required for rectification for common mistake. There is no requirement that this outward expression of accord has been embodied in a legally binding contract. Nor is it necessary, that all matters between the parties have been agreed at the time of the outward expression of accord provided that there is a common intention on the particular provision or aspect of the agreement in respect of which rectification is being sought.

7.10 The principle that an antecedent binding and concluded contract is not a pre-requisite to rectification for common mistake was first articulated by Clauson J. in *Shipley Urban District Council v. Bradford Corporation* [1936] Ch. 375 in which he held that, if necessary, he would have been prepared to remedy an instrument of agreement entered into between the parties on the 6th May

1912 to give effect to the concurrent intention of the parties as evidenced by a prior provisional agreement drawn up and signed by them on the 4th April 1912 despite the fact that this prior agreement, not having been under their seals, was not legally binding and despite the fact that the parties had decided to add into the final agreement an arbitration clause not present in the provisional agreement

7.11 Clauson J found that, had it been necessary for him to decide on the rectification point (which it ultimately was not because he interpreted the final agreement of 6th May 1912 in favour of the plaintiffs) he would

> "have felt bound to hold that the proof in the present case that the concurrent intention of the parties was, at the moment of execution, to contract on the footing of the 540l being a sum per annum and the 450,000 Gallons a yield per diem would have made it necessary (but for my construing the instrument as I have construed it) to rectify the instrument so as to accord with that concurrent intention, notwithstanding that the parties can be bound only by their respective seals" (at p. 398 of the report).

7.12 This decision was subsequently followed by Simonds J. in *Crane v. Hegeman-Harris Co. Inc*. [1939] 1 All E.R. 662; [1971] 1 W.L.R. 1390. In this case rectification of a building agreement of the 23rd October 1935 was sought by the defendants on the basis that this agreement did not reflect the true consensus of the parties thereto as reflected by previous discussions and correspondence between them. Simonds J stated that

> "Before I consider the facts and come to a conclusion whether the defendants are right in their contention, I am clear that I must follow the decision of Clauson J., as he then was, in *Shipley Urban District Council v. Bradford Corporation*, the point of which is that, in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal contract was executed, no concluded and binding contract between the parties." (At p. 664 of the report).

7.13 On the facts of the case, Simonds J. stated that

> "I find, then, upon all the evidence that it is impossible to come to the conclusion that the plaintiff did not concur, on 19 September, and thenceforward until the execution of the contract on 23 October, in his remuneration being subject to overrun. How exactly it was minded to phrase that provision is a thing which I think is not really material. It is of course true that for the purposes of rectification, one must find that which was specifically intended, but the exact form of words in which the common intention was framed appears to me to be immaterial as long as in substance and in detail their intention is to be ascertained." (At p. 669 of the report).

7.14 In this particular case the application for rectification had only been made by the defendants after the question of the construction of the agreement had been submitted to rectification. Simonds J. did not see this as a bar to rectification, and took the view that in the circumstances the defendants were entitled to have the agreement rectified to bring it into conformity with the parties' intentions.

7.15 *Crane v. Hegeman-Harris* was approved by the Court of Appeal in *Joscelyne v. Nissen* [1970] 2 Q.B. 86, subject to the qualification that an outward expression of common continuing intention must be shown. The plaintiff in *Joscelyne v. Nissen*, the owner of a car hire business, and his wife shared a house with the defendant, their daughter. In 1963 the plaintiff's wife was taken ill and the plaintiff, being unable to carry on the business, discussed a scheme with the defendant whereby he would make over the business to her in return for which she would pay certain household expenses, including gas, electricity and coal bills. On June 18, 1964, the parties signed an agreement transferring the business, clause 6 of which provided that *"[The defendant] shall discharge all expenses in connection with the whole premises ... and shall indemnify [the plaintiff] from and against any claim arising in respect of the same."*

7.16 After signing the agreement, the defendant paid several of the household bills but following a dispute with the plaintiff she stopped paying them, contending that the agreement did not on its true construction provide for payment of the household expenses. The plaintiff brought an action claiming a declaration that she should pay, *inter alia*, the gas coal and electricity bills and, alternatively, that the agreement should be rectified to include a provision to that effect.

7.17 It was not disputed by the defendant that at an early stage in the negotiations it was agreed between her and the plaintiff in conversation that these particular items should be paid for by her and that they continued in this expressed accord thereafter while negotiating on other aspects of the agreement. The defendant, however, relied on the language of the agreement ultimately entered into and argued that the absence of any prior concluded agreement between the parties should preclude any claim to rectification by the plaintiff.

7.18 The Court of Appeal in *Joscelyne v. Nissen*, in a judgment delivered by Russell L.J., held that that it was not necessary to find a complete concluded contract antecedent to the agreement sought to be rectified; that a court had jurisdiction to rectify an agreement if there was a common continuing intention in regard to a particular provision of the agreement, but that an outward expression of accord and convincing proof that the concluded instrument did not represent the parties' common intention were required.

7.19 The defendant, in arguing that a prior concluded agreement was necessary, had sought to rely on the following dictum of Denning L.J. in *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd.* [1953] 2 Q.B. 450 at p. 461:

> "Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties — into their intentions — any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice. [It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable at law (see

Shipley Urban District Council v. Bradford Corporation [1936] Ch. 375) but, formalities apart, there must have been a concluded contract]. There is a passage in *Crane v. Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662, 664 which suggests that a continuing common intention alone will suffice; but I am clearly of opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn around and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they agreed something different: see *Lovell & Christmas v. Wall*, per Lord Cozens-Hardy M.R., and per Buckley L.J. (1911) 104 L.T. 85, 88, 93, but not that they intended something different."

7.20 Russell L.J., considering what was said in *Rose v. Pim* [1953] 2 Q.B. 450 said at p.97:—

> "The decision in our judgment does not assert or reinstate the view that an antecedent complete concluded contract is required for rectification: it only shows that prior accord on a term or the meaning of a phrase to be used must have been outwardly expressed or communicated between the parties."

And at p. 98:

> "In our judgment the law is as expounded by Simonds J. in *Crane's* case with the qualification that some outward expression of accord is required. We do not wish to attempt to state in any different phrases that with which we entirely agree, except to say that it is in our view better to use only the phrase "convincing proof" without echoing an old-fashioned word such as "irrefragable" and without importing from the criminal law the phrase "beyond all reasonable doubt." Remembering always the strong burden of proof that lies on the shoulders of those seeking rectification, and that the requisite accord and continuance of accord of intention may be the more difficult to establish if a complete antecedent concluded contract be not shown, it would be a sorry state of affairs if when that burden is discharged a party to a written contract could, on discovery that the written language chosen for the document did not on its true construction reflect the accord of the parties on a particular point, take advantage of the fact."

What was required for the purposes of rectification was

> "antecedent expressed accord on a point adhered to in intention by the parties to the subsequent written contract"

7.21 *Joscelyne v. Nissen* is an example of a case where at the date of outward expression of accord on the point on which rectification was sought other issues remained to be agreed to between the parties. It is clear from this case that this did not present a bar to rectification, provided that the parties' common intention as to the particular matter or item in respect of which rectification was sought was not affected by these other negotiations.

7.22 *Joscelyne v. Nissen* is also relevant in that it was a case where rectification was granted in a situation where the words of a document, although consciously agreed to by the parties, did not reflect their prior intention because of a mistake as to interpretation. This aspect of *Joscelyne* was highlighted by Brightman J. in *Re Butlin's Settlement Trusts* [1976] Ch. 251 in which he stated at p. 260 that:

> "Furthermore, rectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction. In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention: see *Jervis v. Howle and Talke Colliery Co. Ltd*. [1937] Ch. 67; *Whiteside v. Whiteside* [1950] Ch. 65, 74 and *Joscelyne v. Nissen* [1970] 2 Q.B. 86, 98"

7.23 This dictum of Brightman J., as subsequently approved by Lawrence Collins J. in *A.M.P. (U.K.) p.l.c. v. Barker* [2001] P.L.R. 77, was adopted into Irish law by Kelly J in *Irish Pensions Trust Limited v. Central Remedial Clinic* [2006] 2 I.R. 126 in which he expressly relied on the above principle to allow rectification of a pension scheme to reflect the common intention of the parties thereto in a situation where the words of the scheme had been purposely used but it was mistakenly considered that they bore a different meaning as a matter of true construction.

7.24 *Butlins, Barker and Irish Pensions Trust* all involved rectification of voluntary settlements. However, that the principle *in Butlins* extends to rectification for bilateral agreements is shown by *Joscelyne* itself and also by the judgments of Peter Gibson LJ in *Swainland Builders Limited v. Freehold Properties Limited* [2002] 2 E.G.L.R. 71, and Lord Hoffman in *Chartbrook v. Persimmon Homes* [2009] U.K.H.L. 38; [2009] 1 A.C. 1101; [2009] 3 W.L.R. 267 discussed below, both of which cases involved rectification of bilateral agreements where words in a document were purposely used but as a matter of true construction did not reflect the parties' prior intention.

7.25 The view, that a prior outward expression of common intention was sufficient for rectification, was confirmed by the judgment of Lowry L.C.J. in *Rooney & McParland v. Carlin* [1981] N.I. 138, in which he stated that, before a court would order rectification of a written contract on the ground of common (therein described as "mutual") mistake:

> 1. There must be a concluded agreement antecedent to the instrument which is sought to be rectified; but
>
> 2. The antecedent agreement need not be binding in law . . . nor need it be in writing: such incidents merely help to discharge the heavy burden of proof; and
>
> 3. A complete antecedent concluded contract is not required, so long as there is prior accord on a term of a proposed agreement, outwardly expressed and communicated between the parties, as in *Joscelyne v. Nissen*.

7.26 On the facts of the case (which involved an application for rectification of a settlement agreement for the transfer of property to include in the transfer an additional field) it was held there was no such prior accord, neither party having been aware of the existence of the field at the date of execution of the document in respect of which rectification was being sought. However, it is clear from the judgment of Lowry L.C.J. that if the parties, having had knowledge of the existence of the field and directed their minds to it during negotiations, had previously verbally agreed to include it or exclude it, he would have been prepared to give rectification to give effect to that intention.

7.27 The principles laid down in the above cases were approved by the Supreme Court in the leading Irish case on rectification, *Irish*

Life Assurance Company Limited v. Dublin Land Securities Limited [1989] I.R. 252. In this case the plaintiff vendor contended, *inter alia*, that a contract for sale of land did not reflect the true intention of the parties insofar as it purported to include certain properties which the parties had not intended should be included. Griffin J., delivering the judgment of the Supreme Court, set out the law on rectification for common mistake as follows (at pp. 261-263):

> "It was formerly considered that the court could not rectify a document in writing unless it was preceded by a concluded oral contract. In taking this view, Kenny J. in *Lucey v. Laurel Construction Co. Ltd* (Unreported, High Court, 18th December, 1970) cited with approval what was said by Denning L.J. (as he then was) in *Rose v. Pim* [1953] 2 Q.B. 450 at p. 461:
>
> 'Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties — into their intentions — any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice. [It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable at law (see *Shipley Urban District Council v. Bradford Corporation* [1936] Ch. 375) but, formalities apart, there must have been a concluded contract]. There is a passage in *Crane v. Hegeman-Harris Co. Inc*. [1939] 1 All E.R. 662,664 which suggests that a continuing common intention alone will suffice; but I am clearly of opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn around and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they agreed something different: see *Lovell & Christmas v. Wall*, per Lord Cozens-Hardy M.R., and per Buckley L.J. (1911) 104 L.T. 85, 88, 93, but not that they intended something different.'
>
> Two things need to be noted — the emphasis was Denning L.J.'s; and the sentence inside square brackets was inadvertently omitted from the quotation by Kenny J., presumably in transcription.
>
> Kenny J. does not appear to have been referred to *Joscelyne v. Nissen* [1970] 2 Q.B. 86, a decision of the Court of Appeal reported some months before *Lucey v. Laurel Construction Ltd.* (Unreported, High Court, 18th December, 1970). In *Joscelyne v. Nissen* [1970] 2 Q.B. 86 the judgment was delivered by Russell L.J. and was the judgment of the court. In giving judgment he reviewed what he himself described as "the train of this undoubtedly formidable array of judicial opinion" from the decision of *MacKenzie v. Coulson* (1869) L.R. 8 Eq. 368 (one hundred years earlier) onwards. Amongst the cases considered was *Crane v. Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662 decided by Simonds J. Buckley L.J. at p. 95 (*inter alia*) cited the following passage from the judgment of Simonds J. at p. 664 of [1939] 1 All E.R.:—
>
> 'I am clear that I must follow the decision of Clauson J., as he then was, in *Shipley Urban District Council v. Bradford Corpn*. [1936] 1 Ch. 375, the point of which is that, in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties . . . .
>
> Secondly, I want to say this upon the principle of the jurisdiction. It is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. That is particularly the case where one finds prolonged negotiations between the parties eventually assuming the shape of a formal instrument in which they have been advised by their respective skilled legal advisers. The assumption is very strong in such a case that the instrument does represent their real intention, and it must be only upon proof which Lord Eldon, I think, in a somewhat picturesque phrase described as 'irrefragable' that the court can act, I would rather, I think, say that the court can only act if it is satisfied beyond all reasonable doubt that the instrument does not represent their common intention, and is further satisfied as to what their common intention was. For let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was.'
>
> In *Joscelyne v. Nissen* [1970] 2 Q.B. 86 Russell L.J. in considering what was said in *Rose v. Pim* [1953] 2 Q.B. 450 said at p.97:—
>
> 'The decision in our judgment does not assert or reinstate the view that an antecedent complete concluded contract is required for rectification: it only shows that prior accord on a term or the meaning of a phrase to be used must have been outwardly expressed or communicated between the parties.'
>
> He then referred to the passage from the judgment of Denning L.J. already cited, and said:—
>
> 'In so far as this passage might be taken to suggest that an antecedent complete concluded contract is necessary it would be in conflict with the views of both courts in *Crane v. Hegeman-Harris* [1939] 1 All E.R. 662 and is not supported by the other judgments' (those of Singleton L.J. and Morris L.J. who were the other members of the Court in *Rose v. Pim* [1953] 2 Q.B. 450).
>
> And at p. 98 he said:—
>
> 'In our judgment the law is as expounded by Simonds J. in *Crane's* case with the qualification that some outward expression of accord is required. We do not wish to attempt to state in any different phrases that with which we entirely agree, except to say that it is in our view better to use only the phrase" convincing proof" without echoing an old fashioned word such as "irrefragable" and without importing from the criminal law the phrase "beyond all reasonable doubt".'

In *Rooney and McParland Ltd. v. Carlin* [1981] N.I. 138 at p. 146 Lord Lowry L.C.J. summarised the principles clarified by Russell L.J. in the following terms:—

'1. There must be a concluded agreement antecedent to the instrument which is sought to be rectified; but

2. The antecedent agreement need not be binding in law (for example, it need not be under seal if made by a public authority or in writing and signed by the party if relating to a sale of land) nor need it be in writing: such incidents merely help to discharge the heavy burden of proof; and

3. A complete antecedent concluded contract is not required, so long as there was prior accord on a term of a proposed agreement, outwardly expressed and communicated between the parties, as in *Joscelyne v. Nissen* .'

Like the learned trial judge, I would adopt what was said by Russell L.J. and Lord Lowry L.C.J. as representing the law on the subject in question in this jurisdiction."

7.28 The Supreme Court in *Irish Life Assurance v. Dublin Land Securities* endorses the view that rectification for common mistake does not require a complete antecedent concluded agreement on every point. What is necessary for such rectification, as distilled by Griffin J. from the authorities cited above, is that there be

"convincing proof, reflected in some outward expression of accord, that the contract in writing did not represent the common continuing intention of the parties on which the court can act, and whether the plaintiff can positively show what that common intention was in relation to the provisions which the appellant says were intended to exclude the vacant lands at Palmerstown."

7.29 On the facts of the particular case, because there had been no prior express discussion in relation to the exclusion of the property alleged to have been intended to be excluded, Griffin J could not grant rectification on the basis of common mistake. However it is clear from his judgment that if there had been a clear outward expression of accord evidencing the parties' common intention to exclude the lands in question from the sale, he would have granted rectification.

7.30 Moreover, that the principles outlined continue to form the basis of rectification for common mistake in the neighbouring jurisdiction is confirmed by the recent judgment of the Court of Appeal in *Swainland Builders Limited v. Freehold Properties Limited* [2002] 2 E.G.L.R. 71. The Court, in a judgment delivered by Peter Gibson L.J., ordered rectification of a transfer of land so as to provide for the grant to the transferor of long leases in portion of the property transferred. The judge accepted that it had been common intention of the parties that the land in question would ultimately be held under long leases by the transferor or its nominees. In his view once this common intention was clear, the fact that no clear agreement had been reached by the parties as to how that common intention would be effected did not preclude rectification.

7.31 The conditions to be satisfied, if the court were to order rectification in a case where it was alleged that there was a mistake common to both parties, were laid down by Peter Gibson L.J. as follows (at p. 74):

"The party seeking rectification must show that:

i) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;

ii) there was an outward expression of accord;

iii) the intention continued at the time of the execution of the instrument sought to be rectified;

iv) by mistake the instrument did not reflect that common intention."

Peter Gibson L.J. also added the further additional points:

"(1) The standard of proof required if the court is to order rectification is the ordinary standard of the balance of probabilities. 'But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself': *Thomas Bates and Sons Ltd v. Wyndham's (Lingerie) Ltd* [1981] 1 ILR 505 at page 521 per Brightman LJ.

(2) Whilst it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if in substance and in detail the common intention can be ascertained: *Cooperative Insurance Society Ltd v. Centremoor Ltd* [1983] 2 EGLR 52 at page 54, per Dillon LJ, with whom Kerr and Eveleigh LJJ agreed.

(3) The fact that a party intends a particular form of words in the mistaken belief that it is achieving his intention does not prevent the court giving effect to the true common intention: see *Centremoor* at page 55 A–B and *Re Butlin's Settlement Trusts* [1976] Ch 251 at page 260 per Brightman J."

Summary of applicable principles and further commentary

7.32 The plaintiff urges, and the Court accepts, that the following principles on rectification for common mistake may be distilled from the authorities:

1. Complete antecedent concluded agreement is not necessary – outward expression of accord on the particular matter in respect of which rectification is sought is all that is required.

7.33 All that is required for the purposes of rectification for common mistake is an outward expression of accord, which does not have to be contained in a legally binding agreement. In addition it is not necessary that agreement has been reached on all points provided that the particular issue in respect of which rectification is sought was agreed and evidenced as specified above, and, to the extent that the term "concluded agreement" is still relevant at all in the context of rectification for common mistake, it should not be understood as meaning either a legally binding agreement or as requiring agreement between the parties on all matters subsequently contained in the document sought to be rectified other than the particular matter in respect of which rectification is sought [see

point 2. below]

7.34 Such outward expression of common intention may be found in a prior provisional agreement between the parties as in *Shipley*. It may also be found in correspondence between the parties as in *Crane v. Hegeman Harris*. Alternatively it may be found in prior oral discussions as in *Joscelyne v. Nissen*. Cases in which rectification for common mistake have been rejected, such as *Lowry* and *Irish Life*, are cases where no express consideration of the particular issue in respect of which rectification was sought ever took place between the parties, either orally or in written documentation or correspondence.

> *2. Outward expression of accord need relate only to the particular point or matter in respect of which rectification is sought; subsequent negotiations on other points do not preclude rectification*

7.35 It is not necessary that the outward expression of accord is an expression of accord in relation to all matters subsequently contained in the document in respect of which rectification is sought. It is sufficient that it is an outward expression of accord on the particular matter in relation to which rectification is sought. The argument that there must have been a complete antecedent concluded agreement was rejected in *Joscelyne v. Nissen* (where the common expression of accord on the matter in respect of which rectification was sought came very early on in the negotiations, when other aspects of the deal had yet to be agreed). A similar approach was taken in *Shipley* where some re-negotiation took place (albeit not on the matter in respect of which rectification was sought) between the prior provisional agreement and the agreement ultimately concluded. The principle, that a complete antecedent concluded agreement is not required, and that it is sufficient if there is agreement, evidenced by an outward expression of accord, on the particular point in respect of which rectification is sought, was affirmed by Lowry L.C.J. in *Rooney*, by the Supreme Court in *Irish Life* and by Peter Gibson L.J. in *Swainland*, the relevant extracts from which have already been cited above. As such, the fact that various aspects of a deal not relevant to the matter in respect of which rectification was sought fell to be subsequently re-negotiated between the parties does not present a bar to rectification provided that there was no outward change in their common intention on the point in respect of which rectification is sought.

> *3. Once a common intention has been articulated, subsequent discussions or lack of same as to the precise method of implementing that common intention, do not preclude rectification on the basis of that common intention.*

7.36 As recognised in *Swainland*, there may be different ways of achieving a common intention and the fact that the parties, while having articulated a common intention, had not come to a final view as to how that intention should be implemented, or had adjusted slightly the way in which same was to be implemented, does not indicate a cessation or change in that common intention.

> *4. Objective test of common intention - once a common intention has been articulated, a subsequent change in intention by one of the parties does not preclude rectification for common intention where such change in intention has not been clearly communicated to the other party*.

7.37 This is illustrated by the dictum of Denning L.J. in *Rose v. Pim* [1953] 2 Q.B. 450, referred to above (at p. 461):

> "in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract. You look at their outward acts, i.e., at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document. But nothing less will suffice."

7.38 As stated by Mustill J. in *The Olympic Pride* [1980] 2 Lloyd's Rep. 67 (at p. 72):

> "The prior transaction [justifying rectification for common mistake] may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must be objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter….."

7.39 A similar approach was taken by Hudson J. in *Re Streamline Fashions Pty Ltd*. [1976] V.R. 463:

> "The common intention which it is necessary to establish as a basis for rectification is an intention that has been manifested in the words or conduct of the parties and not merely an intention which was not disclosed in the course of the negotiations."

7.40 The requirement, that common intention be determined objectively, means that a subjective change of mind on the part of one party, following a common expression of outward accord, cannot be regarded, unless clearly communicated in a manner identifiable to the reasonable observer, as negating the prior common intention evidenced by this outward expression of accord. As stated by Marcus Smith in a recent article in the Law Quarterly Review entitled "*Rectification of contracts for common mistake: Joscelyne v Nissen, and subjective states of mind*" (2007) 123 L.Q.R. 116 at 132, dealing with the objective test of common intention:

> "It would be most odd if a party could show a manifest prior agreement which (objectively speaking) continued and was incorrectly reflected in the final contract, only to be defeated by the un-communicated subjective change of mind of the other party…Once a common intention has been objectively established, the intention will continue even if one of the parties changes his mind and only if the ending of the consensus is objectively manifest, will the intention cease to continue."

7.41 This analysis is supported by cases such as *Monaghan County Council v. Vaughan* [1948] I.R. 306; *Nolan v. Graves* [1946] 1 I.R. 376 and *Daniel Nolan v. Maria Nolan* (1958) 92 I.L.T.R 94 in which rectification was granted for mutual (now common) mistake against a party who was subjectively aware, at the date of execution of a document, that that document did not reflect a prior agreement reached by it with the party seeking rectification. These cases may be classified as examples of unilateral mistake on the basis that the party against whom rectification was granted was actually aware of the mistake. However, they could also be characterised as cases where there was nothing in the parties' conduct, looked at objectively, justifying an inference of intention to depart from the prior common intention outwardly expressed by them.

7.42 In *Monaghan County Council v. Vaughan* [1948] I.R. 306 (which could also be explained as an example of the objective test of common intention, outlined above) the plaintiffs, who were the owners of a ruined building which they wished to have demolished and removed from its site, caused an advertisement to be inserted in a newspaper inviting tenders for the work, and subsequently accepted, in writing, a written tender submitted by the defendant.

7.43 The intention of the plaintiffs in inserting the advertisement and accepting the tender, was that the defendant should pay to the plaintiffs a sum of £1,200 in return for the concession granted to him whereby, in consideration of his removing the debris and clearing the site, he should have the right of disposal for his own benefit of the material so to be removed by him.

7.44 However both the advertisement and the tender were ambiguous in terms, and after the conclusion of the work the defendant contended that the effect of the agreement between the parties was, and had in fact been intended by him to be, that he should be paid the sum of £1,200 by the plaintiffs, and not that he should pay that sum to the plaintiffs, in respect of the work so carried out.

7.45 The Court granted an order for rectification of the agreement so as to make clear that the defendant was obliged to pay the sum of £1,200 on the basis that it was originally orally agreed between the parties that the defendant should pay this sum and that the defendant saw the error into which the County Council had fallen when the contract was read over to him and decided to take advantage of it.

7.46 Dixon J. referred to the following extract from Lord Birkenhead in *United States v. Motor Trucks Ltd*. [1924] A.C. 196. 200 and 201, (at p 316):

> "And indeed the power of the Court to rectify mutual mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing. Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such agreement has been inaccurately represented in the instrument. When this is proved, either party may claim, in spite of the Statute of Frauds, that the instrument on which the other insists does not represent the real agreement. The statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction of the Court to rectify being outside the prohibition of the statute."

Dixon J stated that he found it impossible "to see any difference in principle" between that case and the one before him.

7.47 A similar approach was taken in two subsequent cases: *Nolan v. Graves* [1946] 1 I.R. 376 and *Daniel Nolan v. Maria Nolan* (1958) 92 I.L.T.R 94. In Nolan v. Graves the price of lands for which the plaintiff had bid £5,550 at public auction was mistakenly described in the subsequent memorandum of agreement as £4,450. The plaintiff's application for rectification of the memorandum by substituting the figure £5,550 for the figure £4,550 was successful on the basis that the figure £4,550 was inserted in the memorandum by mistake, and that the defendant was aware of the mistake and endeavoured to take advantage of it.

7.48 *Daniel Nolan v. Maria Nolan* (1958) 92 I.L.T.R 94 involved a separation deed which provided that the plaintiff should pay to the defendant "such sum as will after the deduction of income tax at the standard rate amount to the sum of £15 per week." The plaintiff alleged that due to the insertion of the words "at the standard rate", the separation deed did not correctly embody the prior agreement between the parties which was that he should pay to the defendant £15 per week and that any refunds of income tax obtained by the defendant should be his property.

7.49 The Court ordered that the deed should be rectified to express correctly this prior oral agreement, stating as follows:

> "The basis of the decision in *Monaghan County Council v. Vaughan* was that if there were a mistake in a document, in that it did not express the agreement between the parties and one party was not aware of that circumstance while the other party was aware of it, then that was a case of mutual mistake. The party who knew that the expression of the agreement was incorrect could not allege that there was not a mutual mistake because the other party was not aware of that mistake. What happened here came close to misrepresentation or estoppel Mrs. Nolan knew what the agreement was between herself and her husband and what was intended to be recorded in the separation deed. She knew when the alteration was made that the deed might not then correctly express the agreement, nevertheless she decided that she would have the alteration made and, if she could, take advantage of the legal consequences. In those circumstances she could not now be heard to say that there was not a mutual mistake. To hold otherwise would come close to permitting fraud."

7.50 As it was a little obscure on the authorities what the effect of the absence or presence of the additional words was, the judge did not propose to deal with the clause by altering it. He felt the safest course to adopt was the addition of a proviso to the effect that it was the true meaning and intent of the deed that the wife should apply for whatever refunds she might be entitled to and account to her husband therefor when obtained. The exact form of the proviso could be worked out between Counsel and should be embodied in the Order. In that way the deed could be read with the Order and a supplementary deed was unnecessary.

7.51 The objective test of common intention recently received judicial endorsement by the House of Lords in *Chartbrook Ltd. v. Persimmon Homes* [2009] U.K.H.L. 38; [2009] 1 A.C. 1101; [2009] 3 W.L.R. 267.

7.52 In 2001, Persimmon entered into an Agreement with Chartbrook for a mixed commercial and residential redevelopment of a property owned by Chartbrook in Wandsworth. The final price payable by Persimmon was based on a formula which provided for an additional payment based on the profit made on the sale of the residential flats.

7.53 Persimmon intended that the additional payment would be the greater of 23.4% of the net proceeds of the flats or a minimum guaranteed payment based upon £76.34 per square foot. Unfortunately, however, their solicitor drafted the Agreement on the basis that the additional payment would not be the greater of these 2 sums but the total of them. Rather extraordinarily, neither Persimmon nor their solicitor spotted this error at the time and it only came to light some time after the Agreement had been completed. Instead of being liable to pay £5,580,000 Persimmon was liable under the formula as drafted to pay £9,168,000.

7.54 It was Persimmon's primary case that it was clear what had actually been negotiated and the Court could construe the Agreement to give sense to what the parties had actually intended. Their fallback position was that it was open to the Court anyway to rectify the Agreement as a clear mistake had been made and Chartbrook could not take advantage of it. Both arguments failed at first instance. Chartbrook successfully argued that the formula used in the Agreement was clear and could not be corrected and that rectification was not possible as they had not known of Persimmon's mistake.

7.55 What was extraordinary about this case was that all the documentation in relation to the negotiations prior to the actual drafting of the Agreement supported Persimmon's case and it was readily apparent that Persimmon only intended to pay the greater of the two sums, not both of them. Persimmon relied heavily on the fact that the lower amount was termed as a minimum guaranteed payment as this evidenced that this amount was only to be payable if the share of the profit fell below this figure.

7.56 The Court of Appeal had to consider whether it could rely on the documentation in relation to the negotiations as an aid to construction of the Agreement. These negotiations left very little doubt that Persimmon's construction was intended. However, after a careful review of the authorities, the Court confirmed that evidence as to prior negotiations is not usually admissible and that reliance could not be placed upon the pre-contract material notwithstanding it so strongly supported Persimmon's case. Whilst one of the Judges was of the clear view that the wording of the Agreement could be amended to support Persimmon's construction as the wording used made no commercial sense, the other two Judges disagreed. They held there was nothing unclear or ambiguous in the wording used and the Court could not re-write the Agreement even though it was improbable that Persimmon intended to agree to a formula in these terms.

7.57 This left Persimmon having to rely on rectification but the problem they faced in this respect was that the Judge at first instance had been impressed by Chartbrook's witnesses and, notwithstanding it was difficult to understand how they did not spot the error, he accepted their evidence that they subjectively believed that Persimmon were intending to offer a double payment. Briggs J., at first instance and the Court of Appeal accordingly rejected the option of rectification for unilateral mistake on the basis of lack of knowledge/unconscionability on the part of Chartbrook. The Court of Appeal judgment in particular has been discussed in detail in Templeville's closing submissions.

7.58 The question of whether or not there could be rectification on the basis that the agreement executed did not reflect the parties' common intention does not appear to have been seriously pursued by Persimmon at the Court of Appeal stage. This appears to have been due to the mistaken understanding that common intention, for the purposes of rectification for common mistake, meant subjective common intention.

7.59 However in a decision delivered on the 1st July 2009, the House of Lords overturned the ruling of the Court of Appeal, on the basis that both Briggs J. and the Court of Appeal had misconstrued the contract; on a correct interpretation it supported Persimmon's interpretation.

7.60 However the majority of the House of Lords also stated, obiter, that if they had not found for Persimmon on the construction point, they would have been prepared to grant rectification for common mistake on the basis that the agreement failed to reflect the parties' objectively determined common intention. The fact that this objective common intention was no longer subjectively shared by Chartbrook at the date of execution of the agreement sought to be rectified was irrelevant.

7.61 The leading speech on the rectification issue was that of Lord Hoffman (with whom the other members of the House of Lords agreed). He held that *Joscelyne v. Nissen* [1970] 2 Q.B. 86 extended the availability of rectification to cases where there had not been any enforceable prior agreement. He specifically approved the principles of rectification laid down by Peter Gibson LJ in *Swainland*.

7.62 The crucial significance of Lord Hoffman's speech, however, is that it represents an express judicial endorsement, by the House of Lords, of the objective test of common intention laid down in *Rose v. Pim* and *The Olympic Pride* (discussed above). He makes clear that in considering the question of common intention for the purposes of rectification, the question is not what the parties actually intended, but rather what an objective observer would have thought the parties' intentions were. Evidence as to what terms a party subjectively understood to have been agreed could be significant in a case where the prior consensus was based on oral exchanges or conduct, but where the prior consensus was expressed entirely in writing such evidence was likely to carry very little weight.

7.63 In this case, because of the refusal of the Court of Appeal and the House of Lords to overrule the finding of fact in relation to Chartbrook's intention made by the trial judge, Persimmon was not in a position to show that there was a subjective common intention between the parties on the point in relation to which they sought rectification. However, Persimmon successfully argued that intention, for the purpose of common intention, was objective rather than subjective in nature and accordingly a subjective deviation on the part of Chartbrook from the outward expression of accord reached between them, not communicated to Persimmon and not perceptible to an outward observer, should not preclude them from getting rectification for common mistake.

7.64 The argument of Persimmon's counsel, as summarised by Lord Hoffman, was that rectification required a mistake about whether the written instrument correctly reflected the prior consensus, not whether it accorded with what the party in question believed that consensus to have been. In accordance with the general approach of English law, the terms of the prior consensus were what a reasonable observer would have understood them to be and not what one or even both of the parties believed them to be. In this case an outward expression of consensus was set out in the May letter, which made it clear that the terms were to be as contended for by Persimmon. If the definition in the final agreement did not have that meaning, it was not in accordance with the prior consensus and if Chartbrook's directors believed that it was, then they, like the representatives of Persimmon, were mistaken.

7.65 This argument was accepted by Lord Hoffman. His comments in relation to the objective test of common intention, and on rectification for common mistake generally, are sufficiently important to merit quoting in full here. He stated as follows (at paras 59 to 66):

> "59. Until the decision of the Court of Appeal in *Joscelyne v. Nissen* [1970] 2 Q.B. 86 there was a view, based upon *dicta* in nineteenth and early twentieth century cases, that rectification was available only if there had been a concluded antecedent contract with which the instrument did not conform. In *Lovell and Christmas Ltd v. Wall* (1911) 104 LT 85, 88 Sir Herbert Cozens-Hardy MR. said that rectification "may be regarded as a branch of the doctrine of specific performance". It presupposed a prior contract and required proof that, by a common mistake, the final completed agreement as executed failed to give proper effect to the prior contract. In *Joscelyne's* case the Court of Appeal declared itself puzzled by the reference to specific performance, but I think it is clear enough that the Master of the Rolls had in mind a contractual obligation to execute a lease, conveyance, settlement or similar instrument, giving rise to a specifically enforceable obligation to do so. A failure to execute a document giving effect to the terms of the agreement would be a breach of that obligation and the court, in rectifying the instrument, would be specifically performing the agreement. Since the decision in *Joscelyne's* case extended the availability of rectification to cases in which there had been no enforceable prior agreement, specific performance is plainly an inadequate explanation of the doctrine. But for present purposes the significance of cases like *Lovell and Christmas Ltd v. Wall* (1911) 104 LT 85 is that the terms of the contract to which the subsequent instrument must conform must be objectively determined in the same way as any other contract. Thus the common mistake must necessarily be as to whether the instrument conformed to those terms and not to what one or other of the parties believed those terms to have been.
>
> 60. Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the "common continuing intention" were to be an objective fact if it amounted to an enforceable

contract but a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be. Perhaps the clearest statement is by Denning LJ in *Frederick E Rose (London) Ltd v. William H Pim Jnr & Co Ltd* [1953] 2 Q.B. 450, 461:

'Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties - into their intentions - any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.'

61. Likewise in *Etablissements Georges et Paul Levy v. Adderley Navigation Co Panama SA (The Olympic Pride)* [1980] 2 Lloyd's Rep 67, 72, Mustill J said:

'The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must have been objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter.'

62. An example of the application of this objective ascertainment of the terms of the prior transaction is *George Cohen Sons & Co Ltd v. Docks and Inland Waterways Executive* (1950) 84 Lloyd's Rep 97 in which a landlord negotiating a new lease proposed to the tenant that 'the terms and conditions contained in the present lease to be embodied in the new lease where applicable.' The tenant accepted this offer, but the new lease as executed made the tenant liable for repairs which under the old lease had been the responsibility of the landlord. In answer to a claim for rectification, the landlord said that the new lease was in accordance with what he had understood to be the effect of his offer. The Court of Appeal said that this was irrelevant. What mattered was the objective meaning of what the landlord had written. Sir Raymond Evershed MR. said, at p 107:

'If the defendants did misconstrue [the letter] that is unfortunate for them, but at least they cannot be heard to say that their letter was intended to mean anything other than that which the words convey to the reader as a piece of ordinary English.'

63. As against these authorities, there are two cases upon which Mr. Miles relied. The first is *Britoil plc v. Hunt Overseas Oil Inc* [1994] CLC 561, in which the Court of Appeal by a majority (Glidewell and Hobhouse LJJ, Hoffmann LJ dissenting) refused to rectify an agreement which was alleged not to be in accordance with what had previously been agreed in summary heads of agreement. Hobhouse LJ, who gave the majority judgment, affirmed the decision of Saville J, who said that the defendants had failed to establish that there was a prior common agreement or intention in terms that the court could ascertain or (which is probably another way of saying the same thing) that the definitive agreement failed to reflect that prior agreement. In other words, the language of the heads of agreement was too uncertain to satisfy the requirement stated by Denning LJ in Rose's case that one should be able to "predicate with certainty what their contract was". Hobhouse LJ noted that Saville J 'did not base himself upon any consideration of the evidence as to the actual state of mind of the parties' and in my opinion the case lends no support to the view that a party must be mistaken as to whether the document reflects what he subjectively believes the agreement to have been.

64. The other case is the decision of Laddie J in *Cambridge Antibody Technology Ltd v. Abbott Biotechnology Ltd* [2005] FSR 590, in which he rejected a submission that evidence of the subjective state of mind of one of the parties contained in statements which had not been communicated to the other party ("crossed the line") was inadmissible. In my opinion, Laddie J was quite right not to exclude such evidence, but that is not inconsistent with an objective approach to what the terms of the prior consensus were. Unless itself a binding contract, the prior consensus is, by definition, not contained in a document which the parties have agreed is to be the sole memorial of their agreement. It may be oral or in writing and, even if the latter, subject to later variation. In such a case, if I may quote what I said in *Carmichael v. National Power plc* [1999] 1 WLR 2042, 2050 - 2051:

'The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done.'

65. In a case in which the prior consensus was based wholly or in part on oral exchanges or conduct, such evidence may be significant. A party may have had a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief. Evidence of subsequent conduct may also have some evidential value. On the other hand, where the prior consensus is expressed entirely in writing, (as in *George Cohen Sons & Co Ltd v. Docks and Inland Waterways Executive* (1950) 84 Lloyd's Rep 97) such evidence is likely to carry very little weight. But I do not think that it is inadmissible.

66. In this case there was no suggestion that the prior consensus was based on anything other than the May letter. It is agreed that the terms of that letter were accepted by Chartbrook and no one gave evidence of any subsequent discussions which might have suggested an intention to depart from them. It follows that (on the assumption that the judge was right in his construction of the ARP definition) both parties were mistaken in thinking that it reflected their prior consensus and Persimmon was entitled to rectification."

7.66 Baroness Hale in the same case who, like all the other members of the House approved Lord Hoffman's analysis, in the context of rectification for common mistake, stated as follows (at para 100):

"Negotiations where there was no such consensus are indeed "unhelpful". But negotiations where consensus was reached are very helpful indeed. If the language in the eventual contract does not reflect that consensus, then unless there has been a later variation of it, the formal contract should be rectified to reflect it. It makes little sense if the test for construing their prior consensus is different from the objective test for construing their eventual contract."

7.67 It seems to this Court that the speeches of Lord Hoffman and his fellow Law Lords, in so far as they endorse the application of the objective test of common intention to cases where rectification is sought on the basis of common mistake, display compelling logic. I approve of them in that regard and consider that the objective test of common intention also represents the law in this

jurisdiction.

> *5. The appropriate standard of proof, in relation to rectification for common (and indeed unilateral mistake) is proof on the balance of probabilities.*

7.68 An examination of the authorities makes clear that the standard of proof in rectification cases is the same as in other cases, namely the balance of probabilities, subject to the qualification that where (as in the case of unilateral mistake) issues of fraud or concealment arise, or where (in the case of common mistake) a party seeks to depart from a written document executed by it, cogent evidence may have to be adduced to satisfy the requirement of proof on the balance of probabilities.

7.69 Brightman L.J. in *Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd*. [1981] 1 W.L.R. 505 explained this principle as follows (at p. 521):

> "The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties".

7.70 He further went on to state that:

> "[t]he standard of proof is no different in a case of so-called unilateral mistake such as the present. The mistake in the instant case was unilateral and not mutual only because the tenants became aware of the implications of the review clause on the eve of the execution of the new lease. That consideration, as it seems to me, leads to no different conclusion in relation to the standard of proof required in a rectification action."

7.71 Buckley L.J. in the same case took a similar view (at p. 514):

> "Mr. Nugee has said that there is no evidence as to what Mr. Bates' intention was, and he stressed that in cases of rectification a high standard of proof is required by the court. Indeed, in some cases the standard has been equated with the criminal standard of proof "beyond all reasonable doubt." I think that the use of a variety of formulations to express the degree of certainty with which a particular fact must be established in civil proceedings is not very helpful and may, indeed, be confusing. The requisite degree of cogency of proof will vary with the nature of the facts to be established and the circumstances of the case. I would say that in civil proceedings a fact must be proved with that degree of certainty which justice requires in the circumstances of the particular case. In every case the balance of probability must be discharged, but in some cases that balance may be more easily tipped than in others."

7.72 Buckley L.J. referred to the statement of Denning L.J. in *Hornal v. Neuberger Products Limited* [1957] 1 Q.B. 247, 258 to the effect that

> "[t]he more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law."

7.73 He then stated:

> "[t]hat, in my judgment, encapsulates the law about the standard of proof required in civil proceedings applicable to all civil proceedings, and as applicable to cases of rectification as to any other kind of civil action."

7.74 Keane J. giving judgment in the High Court in *Irish Life Assurance Company Ltd. v. Dublin Land Securities Ltd.* [1986] 1 I.R. 332 took issue with a statement of Pennycuick J. in *Roberts (A) & Co. Ltd. v. Leicestershire County Council* [1961] Ch. 555 as to the standard of proof in rectification cases. Pennycuick J had said:

> "It is well established that a party claiming rectification must prove his facts beyond reasonable doubt, and I think this high standard of proof must equally apply where the claim is based on the principle indicated above." (The principle of equitable estoppel).

Commenting on this Keane J. said (at p 351):

> "It may be that this passage puts the burden of proof on the plaintiff at too high a level (see the observations of Brightman L.J. in *Bates (Thomas) & Son v. Wyndham's Lingerie* [1981] 1 W.L.R. 505 at p. 521)"

7.75 This Court is satisfied on the basis of the authorities that have been opened to it that the standard of proof in rectification cases, whether rectification for common mistake or unilateral mistake, is proof on the balance of probabilities. However, if the circumstances which need to be proved in order for the claim to succeed, are inherently unlikely, it will be necessary for the claimant to adduce particularly cogent evidence as to the existence of those circumstances before a court will be satisfied to act. But the test is still proof on the balance of probabilities, which is the civil standard of proof.

7.76 The way in which the civil standard of proof operates in cases like this is well illustrated in the following quotation from the speech of Lord Hoffman in *Secretary of State for the Home Department v. Rehman* [2003] 1 A.C. 153, 155. The learned Law Lord said:

"a high 'civil balance of probabilities' is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by law is the criminal standard. But as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse Standard of Proof)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not".

7.77 In the case of rectification for common mistake, clear evidence of continuing outward expression of accord must be shown.

The Law on Unilateral Mistake

7.78 The original position of Equity was that rectification was only available for common or mutual mistake and not for unilateral mistake.

7.79 *Monaghan County Council v. Vaughan* [1948] I.R. 306 and *Daniel Nolan v. Maria Nolan* (1958) 92 I.L.T.R 94 in which rectification was granted for mutual (now common) mistake against a party who was aware, at the date of execution of a document, that that document did not reflect a prior agreement reached by it with the party seeking rectification, are sometimes classified as unilateral mistake cases. However the basis on which relief was granted in these cases was common or "mutual" mistake. In neither case had the party who was aware of the mistake communicated their change of intention to the other side and it may be that these cases are more accurately classified as examples of rectification for common mistake on the basis that there was nothing in the parties' conduct, looked at objectively, justifying an inference of intention to depart from the prior common intention outwardly expressed by them.

7.80 The judgment of Pennycuick J in *Roberts (A.) & Co. Ltd. v. Leicestershire County Council* [1961] Ch. 555 was a significant step forward in relation to rescission for unilateral mistake insofar as for the first time a separate and distinct jurisdiction to rescind where one party only was mistaken was judicially recognised.

7.81 In *Roberts* the plaintiff submitted a tender to the defendant council for a construction project. The tender specified 18 months as the period for completion of the works. Shortly afterwards, the defendant wrote a letter that contained an unequivocal acceptance of the tender. However, the letter failed to draw attention to the fact that the officers of the defendant had earlier resolved that the period for completion to be inserted in the proposed written contract should be 30 months, not 18 months. This was a material departure from the terms of the tender because the price for a 30-month construction period would have been higher.

7.82 When the written contract was eventually received and executed by the plaintiff's directors they did not notice that the specified date for completion was 30 September 1956, not 30 September 1955. Furthermore, various discussions between the parties prior to the defendant executing the contract drew the latter's attention to the fact that the plaintiff was still proceeding on the basis of an 18-month completion.

7.83 Pennycuick J. granted rectification of the contract on the basis of the following principle stated in Snell's *Principles of Equity*:

> "By what appears to be a species of equitable estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common."

7.84 Significantly, the learned judge observed that, on the basis of this principle, knowledge on the part of the defendant that the plaintiff was executing the contract under a mistake was sufficient without the need to establish "*any particular degree of obliquity*" or dishonesty on the part of the defendant.

7.85 Kenny J. in *Lucey v. Laurel Construction* (Unreported, High Court, Kenny J., 18 December 1970) clearly had the decision in Roberts in mind when he stated that

> "the Court has jurisdiction to rectify a written agreement made between parties only when either there is a mutual mistake made by the two parties in the drafting of a written agreement which is to give effect to a prior oral agreement or when one party sees a mistake in the written agreement and when he knows that the other party has not seen it and then signs the document knowing that it contains a mistake."

7.86 The jurisdiction to rectify for unilateral mistake was confirmed in *Riverlate Properties Ltd. v. Paul* [1975] Ch. 133. In this case the plaintiff lessor sought rectification of a lease that it mistakenly believed imposed an obligation on the lessee to share the cost of exterior repairs. Although the plaintiff's claim was ultimately rejected because the evidence failed to establish that the mistake was shared by or known to the lessee, let alone that she was in any way responsible for it, the case clearly recognises that a mistake may provide grounds for rectification even where not shared by the other party where the situation is such as to involve that other party in "a degree of sharp practice".

7.87 Rectification for unilateral mistake fell to be considered in *Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd.* [1981] 1 W.L.R. 505 which concerned a lease of factory premises providing for rent reviews at the end of the fifth and tenth years of the term and stating that the rent payable during the review periods was to be agreed between the parties. This clause was defective since it failed to include the machinery that was to apply in default of agreement.

7.88 The lease had initially been negotiated pursuant to a renewal clause in the previous lease that provided for arbitration in the event that the parties could not agree the rent for the new term. It was found that it had been the common intention of the parties until just before the signing of the new lease that a similar arbitration clause should apply to rent reviews. The lessee then noticed the omission but failed to draw it to the lessor's attention.

7.89 It was held by the Court of Appeal that the lessor was entitled to rectification. According to Buckley L.J., it sufficed that

> "the conduct of the defendant [was] such as to make it inequitable that he should be allowed to object to the rectification of the document"

Although conceding that this might imply "some measure of 'sharp practice'", Buckley L.J. preferred to view the doctrine as "one which depends on the equity of the position", describing the requirements for rectification in cases of unilateral mistake as follows (at p. 517):

> "First, that one party A erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake."

7.90 Accordingly where the requirement of continuing common intention, outwardly expressed, is not satisfied, there may still be rectification for unilateral mistake in certain circumstances. Rectification for unilateral mistake differs from rectification for common mistake insofar as it is granted, not in order to give effect to a prior agreement of the parties, but rather, on the basis of an estoppel arising as a result of unconscionable behaviour by the non-mistaken party.

7.91 However the learned High Court judge felt it was unnecessary to consider such fine distinctions any further, because it was clear in the case before him that Mr. Frederick was not aware that a mistake was being made in the execution of the contract. Accordingly there was neither "sharp practice" on his part nor anything in his conduct either prior to, or at the time of, the execution of the contract which rendered it unconscionable for him to take his stand on the contract as executed by both parties. Keane J. contrasted the facts of the case before him with those in *Roberts* where

> "there was the clearest evidence that the defendant, through its officer, executed the contract in the knowledge that it contained a term which the plaintiff never intended to include and refrained from drawing its attention to it." (at p. 351 of the report)

7.92 Griffin J., delivering the judgment of the Supreme Court on appeal in this case, further considered the law on rectification. Although recognising that, as a general rule, the courts only rectify an agreement in writing where there has been a shared mistake, - i.e. where it fails to record the intention of both parties, Griffin J went on to cite *Lucey, Roberts and Riverlate Properties,* respectively, as authority for the proposition that a party who has entered into a written agreement by mistake will also be entitled to rectification if he establishes by convincing evidence that the other party, with knowledge of such intention and mistake, nevertheless concluded the agreement where the knowledge was such as to involve him in a degree of "sharp practice".

7.93 Griffin J. held further that the question to be addressed in that case was whether there was convincing proof, reflected in some outward expression of accord, that the contract in writing did not represent the common continuing intention of the parties on which the court can act, and whether the plaintiff can positively show what that common intention was in relation to the provisions which the appellant says were intended to exclude the vacant lands at Palmerstown.

7.94 On the facts of the case, Griffin J. held that there was no common or mutual mistake insofar as the defendant did not share the intention of the plaintiff that the properties would be excluded. The situation was instead one of unilateral mistake. However there was no knowledge or sharp practice on the part of the defendant so as to entitle the Court to grant rectification for unilateral mistake.

7.95 The jurisdiction of the courts to grant rectification for unilateral mistake was considered by the Irish courts in *Irish Life Assurance Company Limited v. Dublin Land Securities Limited* [1986] I.R. 332 (H.C.); [1989] I.R. 252 (S.C.). In this case the plaintiff vendor contended that a contract for sale had been entered into by mistake and did not reflect its true intention insofar as it purported to include certain properties at Palmerstown which the plaintiff had not intended should be included. The plaintiff instituted proceedings in the High Court seeking rectification of the contract so as to exclude the Palmerstown properties and an order of specific performance of the contract as so rectified.

7.96 Although it had not been pleaded by the parties, Keane J. in the High Court went on to consider the doctrine of unilateral mistake, stating that although *Gun v. McCarthy* (1884) 13 L.R. Ir. 304 indicated that the only remedy for such mistake was rescission, later authority suggested that rectification might be granted for unilateral mistake if there had been some element of fraud or "sharp practice" on the part of the person against whom the relief is sought; or, to put it at its lowest, where it would be inequitable in the circumstances to allow that person to retain a benefit derived from the mistake.

7.97 Keane J. indicated that knowledge of mistake on the part of the other party would be sufficient to justify rectification, stating (at p. 353) that:

> "It is perhaps somewhat over fastidious to shrink from applying the description of 'sharp practice' to the conduct of a party who recognises that the other party to the contract is executing it under a mistake which can only be detrimental to him and deliberately suppresses his recognition of that fact."

7.98 The subsequent judgment of Costello J. in *O'Neill v. Ryan (No. 3)* [1992] 1 I.R. 166 is noteworthy for the approval, by Costello J., of the term "common mistake" as used to refer to a mistake shared by both parties, and the term "unilateral mistake" as used to refer to the mistake of one party only. This is the terminology that has been adopted by all recent Irish and United Kingdom decisions and as such has been followed for the purposes of this judgment. The term "mutual mistake" used in many earlier decisions to refer to shared or common mistake is here given a different meaning to refer to a situation where, objectively viewed, there is no contract because the parties are not *ad idem.*

7.99 On the question of rectification, Costello J. stated (at p. 185) that

> "the court will… grant relief by way of rectification where the parties have reached an agreement but where an error is made in giving effect to the parties' common intention in its written agreement. The general rule is that where there is a common shared mistake in that the written agreement fails to record the intention of both parties the court will order its rectification."

In relation to rectification for unilateral mistake, Costello J stated further that

> "Rectification may also be ordered when a party has entered into a written agreement by mistake if he establishes that the other party with knowledge of the mistake concluded that agreement (see *Irish Life Assurance Co. Ltd. v. Dublin Land Securities Ltd* [1989] I.R. 253, 260 and *Monaghan County Council v. Vaughan* [1948] I.R. 306, 312)"

7.100 One issue that arises is the degree of unconscionability required to justify rectification for unilateral mistake. It is clear from the cases previously cited that knowledge of the mistake by the non-mistaken party is sufficient in that regard.

7.101 The English courts in *Commission for the New Towns v. Cooper (Great Britain) Ltd*. [1995] Ch. 259 considered the meaning of "knowledge" for this purpose. In that case the document in respect of which rectification was sought was an agreement which had been entered into between the parties to settle a long-standing dispute. The terms of the agreement conferred certain valuable rights on the defendant that were not intended by the plaintiff. Indeed, the plaintiff had not given the slightest thought to those rights. The defendant deliberately engineered the situation and set a cunning trap that the plaintiff fell into. By means of various misleading statements, and creation of a smokescreen, it sought to divert the plaintiff's attention from the fact that the language

used in the agreement was wide enough to confer the rights in question and, indeed, that the real objective was to secure them. In these broad circumstances, the Court of Appeal held, *inter alia*, that it was just and equitable to rectify the contract so that it reflected the terms that the plaintiff intended to accept.

7.102 Apart from holding that actual knowledge extended to wilfully shutting one's eyes to the obvious ("turning a blind eye" or "Nelsonian" knowledge), and wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make, it was suggested that actual knowledge on the part of the non-mistaken party was not an essential pre-condition to the availability of rectification for unilateral mistake.

7.103 Stuart-Smith L.J., with whom Evans and Farquharson L.JJ. agreed, stated (at p.280) that:

> " [W]ere it necessary to do so in this case, I would hold that where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from discovering the mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects, that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A's conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract; that is sufficient for rescission. But it may also not be unjust or inequitable to insist that the contract be performed according to B's understanding, where that was the meaning that A intended that B should put upon it."

7.104 Evans L.J. in a separate judgment regarded rectification for unilateral mistake as permissible where the non-mistaken party's conduct was unconscionable and went

> "beyond the boundaries of fair dealing even in an arm's length commercial negotiation."

7.105 These principles were affirmed by the Court of Appeal in *George Wimpey U.K. Ltd. v. V.I. Construction Ltd.* [2005] E.W.C.A. Civ.; [2005] B.L.R. 135 in which an appeal against an order for rectification on the basis of unilateral mistake was allowed on the basis that the trial judge had erred in holding the defendant to have acted dishonestly. At para. 47 of his judgment, Peter Gibson L.J. stated that: "convincing evidence that VIC shut its eyes to the obvious or wilfully and recklessly failed to do what an honest and reasonable person would have done in the circumstances, and it would not be inequitable to allow VIC to resist the claim for rectification" would have entitled the plaintiff to rectification on the basis of unilateral mistake.

7.106 I am satisfied on the authorities that where the conduct of the non-mistaken party goes beyond the boundaries of fair dealing and is unconscionable it is open to the Court to grant rectification, even in the case of an arm's length commercial transaction where the parties have been legally represented in the course of their negotiations. Examples are to be found in the cases of *Monaghan County Council v. Vaughan* [1948] I.R. 306; *Commission for the New Towns v. Cooper (Great Britain) Ltd*. [1995] Ch. 259; *Roberts (A.) & Co. Ltd. v. Leicestershire County Council* [1961] Ch. 555; *Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd*. [1981] 1 W.L.R. 505; *Littman v. Aspen Oil* [2005] E.W.C.A. Civ. 1579 and *Coles v. William Hill Organisation* [1999] L. & T.R 14.

7.107 In *Littman v. Aspen Oil* [2005] E.W.C.A. Civ. 1579 the claimant landlords and the defendant tenant had agreed in principle to enter into a five-year lease that was to contain a mutual right to break after three years. No limitation on either party's right to break was discussed let alone agreed. Nevertheless, the landlords' solicitor set about drafting a clause that made the tenant's right to break conditional upon due performance of all its covenants under the lease. Unfortunately, the clause in the draft lease contained an obvious mistake that rendered it a commercial nonsense. Read literally, it made the landlords' right to break conditional on the tenant's performance of its covenants. The tenant's solicitor recognised the mistake but, most unwisely as it transpired, decided to say nothing at all on the matter since the clause, as drafted, "could do his clients no harm". Viewing the clause as a " try on", he decided to adopt what one might call a " tit-for-tat" response. He accepted the clause "not only knowing that [the landlords' solicitor] had made a mistake but also what she had really meant."

7.108 When the tenant later purported to terminate the lease pursuant to the break clause, the landlords disputed its right to do so because it was in breach of obligations under the lease.

7.109 Jacob L.J., with whom May L.J. agreed, held that, assuming the break clause had to be construed literally, the landlords were entitled to rectification on the ground of known unilateral mistake. The four requirements laid down by Buckley L.J. in *Thomas Bates* were satisfied and his Lordship could: -

> "see no legitimate reason not to regard this attempt to take advantage of an obvious drafting error as inequitable" (para 19)

In addition, he thought that:-

> "in reality [the tenant's solicitor's] conduct amounted to an agreement--by accepting the clause knowing what the other side thought it meant, he was accepting just that and equity should not allow him to resile" (at para 24)

7.110 Similar principles were applied in *Coles v. William Hill Organisation* [1999] L.&T.R. 14 to allow rectification for unilateral mistake in another arms length commercial transaction, where a landlord and tenant were supposed to be extending a lease on the same terms and the landlord's solicitor mistakenly included a break clause operable by the tenant which the tenant's solicitor noticed but chose not to mention.

8. The Defendant's Case - Submissions:

8.1 The defendant (Templeville) having applied for a non-suit at the end of the plaintiff's (i.e. Leopardstown's) case, seeks a order that the plaintiff's case should be dismissed, and does so in circumstances where it has elected not to go into evidence in the event that the application is refused. The defendant submits that it is entitled to "*a dismiss*" because the plaintiff has not established as a matter of probability the facts necessary to support a verdict in its favour. The defendant went first in presenting its submissions to the Court because it is the moving party in the application for a non-suit. The plaintiff then replied, and the defendant made some further submissions by way of rejoinder. It is proposed to follow the same order for the purposes of this judgment and to consider the moving party's (i.e. the defendant's) case first of all, followed by the respondent's (i.e. the plaintiff's) case.

8.2 The defendant has filed detailed written submissions and has sought to amplify these in oral argument. The Court will attempt to summarize the defendant's main arguments.

8.3 In the first instance the defendant makes a number of important preliminary points (some of which are further developed later on).

Preliminary Points.

Rectification of a carefully negotiated document is unusual

8.4 The defendant observes that rectification of an agreement carefully negotiated with legal assistance over a long period of time is particularly unusual. The defendant says that where it is clear that any agreement is to be embodied in a formal executed document (or documents) both parties are normally fully aware and intend that the negotiated and executed documents are to be binding, and they are equally anxious to avoid any agreement coming into existence other than what is combined in those documents. It was submitted that the true intention on the Leopardstown/I.H.A. side was that of any party to a formally negotiated contract: to agree and be bound by the terms of a carefully negotiated document. It was further submitted that far from establishing a case for rectification, the case is a classic example of why the law is so slow to attempt to read the minds and intentions of negotiators, lawyers and clients and is only prepared to treat what the parties finally subscribed to in writing as what must be taken to represent their intention.

Plaintiff has failed to say which theory of rectification he relies upon

8.5 The point is made that the factual circumstances supporting rectification on the grounds of mutual mistake are very different from those supporting rectification on the grounds of unilateral mistake. The defendant argues that while the plaintiff is quite entitled to plead the case in the alternative, now that the evidence has been given, it is incumbent upon the plaintiff to say which theory of rectification it now seeks to rely upon. The plaintiff has failed to do so.

The plaintiff bears a heavy burden of proof – need for convincing evidence

8.6 The defendant stresses that the plaintiff bears a heavy onus of proof. This is particularly so where the documentation is executed following prolonged negotiations with the benefit of legal advice.

8.7 It is argued (without prejudice to the point made under the immediately preceding subheading) that if the plaintiff is to succeed on the grounds of common mistake it must satisfy the three requirements specified by Lowry L.C.J. in *Rooney & McParland v. Carlin* and approved by Keane J. in *Irish Life Assurance Company Ltd. v. Dublin Land Securities Ltd.*, and, further, establish by convincing evidence:

(i) The common intention of the parties;

(ii) That the said intention was continuing;

(iii) Outward expression of accord of the alleged common intention;

(iv) That the contract in writing did not represent the continuing common intention.

8.8 If, on the other hand, the plaintiff is to succeed on the basis of unilateral mistake, it must provide convincing proof that it was mistaken and that the defendant concluded the agreement with knowledge of the mistake. An additional burden to be discharged is that of providing, by means of convincing evidence, sufficient proof to establish that as a matter of probability the defendant's knowledge of the mistake was such as to justify a finding of fraud, "sharp practice" or unconscionability amounting to dishonesty.

8.9 The defendant contends that the plaintiff has not discharged the burden of proof upon it under either heading.

Equity does not rectify an agreement, only an instrument**.**

8.10 As a predicate to the point to be made under the next subheading, the defendant stresses the proposition that equity does not rectify an agreement, only an instrument. It draws the Court's attention to *Snell's Equity*, (13th ed), wherein it is stated at para. 43-01:

> "If by mistake a written instrument does not accord with the true agreement between the parties, equity has the power to reform, or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself, but a mistake in the way in which the transaction has been expressed in writing. Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of the contract"

Accordingly, one can only rectify an agreement so that it accords with the true agreement between the parties.

Party seeking rectification must state what was the true agreement

8.11 The defendant asserts that a party seeking rectification is required to specifically state what the alleged agreement between the parties was in respect of the relevant issue. The Court is referred to Bullen & Leake, *Precedents of Pleadings*, (13th ed.). The learned authors of this widely respected work state the following with respect to the pleading of a claim for rectification:

> "The pleading should state with clarity what the actual agreement concluded between the parties was or the true intention of the parties at the time of execution of the written agreement or other document, and in what respects this agreement or document does not embody or accord with such actual agreement or the true intentions of the parties. The mistake relied on should be clearly stated, showing its nature, character or extent."

8.12 The defendant alleges that the plaintiff has been, and remains, unable to state what was the alleged true agreement between the parties. Further, it has failed to establish a common understanding as to what this supposed alternative agreement was even as between its own witnesses. The defendant says it is not enough for the plaintiff to say what the parties did not intend. It is incumbent on the plaintiff to say what they did intend. The defendant says the plaintiff has never done so, and because there never was any concluded antecedent agreement it is, and always will be, unable to do so.

Effect of proposed rectification unclear

8.13 The plaintiff seeks to effect rectification by inserting the following clause into the Licence:

> "Nothing in this Licence shall be construed as obliging Leopardstown Club Limited to provide a demise of any area for car

parking as a replacement for Templeville Development Limited's licence to park cars in any part of the area hatched yellow on Map No. 1 attached hereto".

8.14 The defendant contends that this negative declaration handed up to the Court at the opening of the case by Leopardstown is not, by its very nature, an articulation of any alternative "true" agreement. Further, the defendant asks: is Leopardstown asking the Court to revise the agreements so that Templeville has car parking rights (rather than a leasehold interest) as a replacement to its entitlement to park cars in the entire of the area hatched yellow? Or is it instead seeking that the agreements be amended to limit Templeville's car parking entitlements to those set out in the 1998 Lease? The defendant says it is unclear as to which it is, but that if the latter construction is correct then the effect of it would be to confer benefits on Leopardstown that it neither contemplated nor agreed in June 1998. The defendant asserts that it is inherently objectionable that Leopardstown has not attempted to identify the amendments necessary to give rise to whatever rectification it seeks. The defendant contends that the plaintiff is asking the Court to become the ultimate draftsman in relation to the agreements – contrary to established practice for very legitimate reasons.

He who comes to Equity must come with clean hands

8.15 The defendant says that insofar as it purports to deprive Templeville of car parking rights equivalent to those under the 1993 Lease, the claim is unstateable. Even assuming that the Court was satisfied that Leopardstown did not intend to demise land to Templeville, Leopardstown is not entitled to claim that car parking rights are less in quantum than those under the 1993 Lease. This is so as relief by way of rectification is an equitable remedy which is in the discretion of the Court. Discretionary factors are relevant to the exercise of this jurisdiction including the absence of clean hands. It is submitted that if a party has exaggerated its mistake, relief ought to be refused in the exercise of that discretion. The defendant asserts that there has been such exaggeration. According to the defendant, Leopardstown (on one version of its evidence) contends that Templeville's rights are limited as set out in the 1998 Lease. The defendant says that this is plainly contradictory to the evidence of the drafter of the Licence (Mr. Brunker). He understood Templeville to have car parking rights over an area equivalent to the area hatched yellow. If Leopardstown contends that the extent of Templeville's car parking rights (irrespective of their nature) are less than the area hatched yellow, it is now seeking to obtain a benefit that it did not itself envisage arising upon the execution of the documentation. Such a result is plainly inequitable. The defendant further respectfully submits that it is also a nonsensical result because it presumes that Templeville would have been satisfied with something less than it had under the 1993 Lease notwithstanding the loss of part of the area hatched yellow.

The Court should draw inferences adverse to the plaintiff

8.16 The defendant maintains that the plaintiff has failed to adduce evidence in respect of two critical matters (i) Leopardstown's intention on the date of execution of the Licence and (ii) the intention of the I.H.A. as of that date. The defendant submits that on account of this alleged failure the Court ought to draw inferences in that regard adverse to the plaintiff.

8.17 The defendant submits that the circumstances in which a Court may draw such inferences was addressed by Laffoy J. in *Fyffes p.l.c. v. DCC & Ors*, (Unreported, Laffoy J., 21 December, 2005). She approved the principles set out in *Wisniewski v. Central Manchester Health Authority*, [1998] Lloyd's Med. Rep, 223 where Brooks L.J. summarised them as follows:

> "From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call witnesses.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

The Defendant's Core or Principal Submissions – Common Mistake

8.18 The defendant's core or principal submissions as to why the plaintiff has not established as a matter of probability the facts necessary to support a verdict in its favour may be summarized as follows: (1) The plaintiff has failed to identify by convincing proof the mistake /mistakes allegedly made; (2) The plaintiff has failed to demonstrate a concluded agreement and to establish any outward expression of accord; (3) The plaintiff has failed to identify the alleged "true" antecedent agreement; (4) The plaintiff is unable to clearly demonstrate its own intention, never mind any alleged common intention; (5) the plaintiff has failed to positively show a continuing common intention; (6) the draft Heads of Agreement and the 1998 Licence are entirely consistent with an intention to demise car parking; and (7) the Licence accurately represents Templeville's intention.

8.19 It is proposed to deal in some detail with the submissions under these sub-headings. However, it is worth remarking that as there is considerable overlap between them, and some overlap with the preliminary points already made, the Court intends to eschew unnecessary repetition.

Failure to identify by convincing proof the mistake /mistakes allegedly made

8.20 The defendant contends that in reviewing Leopardstown's alleged mistake, a number of matters ought to be considered. First, Leopardstown was legally advised at all stages in negotiations. In fact, not only was all documentation reviewed by Leopardstown, it was similarly reviewed by the I.H.A. Secondly, there was a difficult relationship between the parties. Hugh O'Neill S.C. noted that *'quite a number of areas of dispute have arisen despite the fact that the Lease ...was executed a mere four years ago'*. He concluded that having regard to the *'history of dealings between the parties to date it seems quite likely that further disputes will arise'*. The defendant says that one must assume that against such a background, Leopardstown would scrutinise the written documentation carefully. They say that, presumably, it did so, as did A&L Goodbody and the I.H.A. Notwithstanding that Templeville signed the documentation on 23 January 1998, Leopardstown failed to do so until 5 June 1998 and only after it negotiated a series of further concessions from Templeville. It therefore had more than ample time to consider the documents and seek any necessary clarification and/or amendments and indeed did so in a number of respects. The defendant says that given the express definition of the 'New Site' and indeed the terms of the Licence itself, it is difficult for it to accept that Leopardstown did not agree to the demise of the New Site. Certainly, Leopardstown agreed to it in the wording of the document it signed and neither Mr. Halpenny nor Mr. Smyth had any reason to doubt that this was the case.

8.21 As the Arbitrator has found, the Licence provides for a demise of car parking. The defendant submits that if Leopardstown failed to understand the consequences of the agreement it executed (upon advice), that is not a matter which can or should be visited on Templeville. If Leopardstown made a mistake in respect of the definition of the 'New Site' or Templeville's car parking entitlements, it is clear from the decision of the Arbitrator that it was mistaken in respect of many other provisions in the Licence. However, the defendant does not accept that the plaintiff was mistaken and urges upon the Court that the plaintiff has failed to produce convincing proof of any mistake. Further, it is the defendant's case, that whatever about the plaintiff being mistaken (which it does not accept), there was no mistake on its part, and therefore there was certainly no common mistake.

8.22 The defendant has sought to review briefly, for the benefit of the Court, Leopardstown's contention that it made a mistake in relation to the addition of the term 'parking' to the definition of the 'New Site' made on 9 January 1998. While Mr. Halpenny marked the initial change, it was in fact Mr. Brunker who made the change to the documentation. The defendant contends that it must be presumed that, in so doing, the amendment was considered and scrutinised. Indeed, it was reviewed by Leopardstown, its legal team and subsequently by the I.H.A. This is not a case where a change was made by a party and not alerted to another. There is no suggestion of suppression in the within proceedings. Leopardstown itself inserted the addition into the draft documentation. In fact, Mr. Brunker further clarified the term to include the word 'car'. Again, says the defendant, one must assume that this issue was considered by Leopardstown and Mr. Halpenny was fully entitled to assume that it had been so considered. Mr. Brunker has stated in his evidence to the Court, that he considered that the purpose of the insertion was "just to ensure that there would be car parking rights with the new site" Therefore, the defendant says, it appears that a further 'mistake' is alleged by Leopardstown – that when Mr. Brunker took Mr. Halpenny's word "parking" and changed it to "car parking", he intended to, but did not change it to "car parking rights." There is no evidence that Mr. Halpenny knew anything about these internal thought processes of Mr. Brunker, nor could he have done so.

8.23 The defendant says that although Leopardstown now contends that it was never its intention to grant a demise of car parking rights, there is evidence to suggest that Templeville agreed with this alleged intention. It is therefore submitted that that is sufficient in itself to address plaintiff's claim based on common mistake.

Failure to identify the true agreement and to establish outward expression of accord

8.24 The defendant says that that the evidence establishes that as of 24 November 1997, Leopardstown did not believe that it had a concluded agreement. It says that while it was clear that the parties were amenable to reach a compromise, a process of refinement was required whereby any agreement would be reduced to writing. The evidence makes plain that Leopardstown did not believe itself legally bound in respect of any arrangements with Templeville, as of November 1997. A drafting exercise was required which would involve consideration of the precise requirements of both parties. This would highlight, of necessity, differences between the parties. Leopardstown could not reasonably have believed following the meeting of 24 November 1997 that the matters in issue were finally concluded. While progress was made at the meeting to allow the drafting process to commence, that was a process which would highlight difficulties and raise further issues for negotiation between the parties. It could only be on the culmination of that process that a *'concluded agreement'* be reached. In truth, the process continued until 5 June 1998 and the defendant says that at no stage can it be suggested that a concluded agreement was reached prior to that point.

8.25 The defendant submits that the most telling evidence that a concluded agreement was not reached on 24 November 1997 is from Leopardstown's own witnesses. It says that, on the evidence of Mr. Justice Clarke and Mr. Law, Templeville agreed on 24 November 1997 to limit its car parking rights to specified areas. However, as of June 1998 (and indeed January 1998), Mr. Brunker was in no doubt that he understood Templeville to be entitled to car parking rights equivalent to that lost in the area hatched yellow. If Leopardstown's evidence is accepted, there was a change in the agreement in respect of car parking between November and January 1998.

8.26 The defendant contends that when one considers the negotiations between the parties, it is clear that they were on-going until June 1998. Each party, but particularly Leopardstown, felt at liberty to re-open issues and raise new matters. There was no finality. It was by no means certain that any agreement would ultimately be concluded between them. Accordingly, the defendant contends that the plaintiff has failed to identify any "true" agreement concerning the provisions in controversy antecedent to the execution of the 1998 Licence, and has further failed to establish an outward expression of accord.

8.27 The defendant believes that Leopardstown may seek to claim such an agreement and outward expression of accord on the basis of the final Heads of Agreement. The defendant submits that, insofar as this is the case, it is misconceived for the following reasons:

8.28 First, the final Heads of Agreement contains no such provision such as that which the plaintiff now seeks to have inserted in the Licence by way of rectification. Secondly, and even more fundamentally, Leopardstown is now seeking to accord to the final Heads of Agreement a status which it refused to so confer when the final Heads of Agreement was drafted and/signed by Templeville. Leopardstown never executed the final Heads of Agreement. Following execution of the final Heads of Agreement by Templeville on the 17th of December 1997, Leopardstown refused to recognize it as binding. The defendant submits that in these circumstances, it is more than surprising that Leopardstown would now seek to rely at all upon the final Heads of Agreement. Though not a matter for Templeville, the final Heads of Agreement actually allows for a demise of car parking contrary to Leopardstown's assertions.

8.29 The defendant further says that, insofar as the plaintiff now asserts that the final Heads of Agreement represents an outward expression of accord or a continuing common intention, this represents a *volte face* from the approach previously adopted by it. The defendant says that it is clear from contemporaneous correspondence that Leopardstown refused to acknowledge the final Heads of Agreement as being final or as having been "finalised". By way of illustration only, the defendant refers to the letter dated 4 February 1998 from A & L Goodbody to P.C.L. Halpenny (previously quoted); a further letter dated 2 April 1998, from A& L Goodbody to P.C.L. Halpenny, marked *'subject to Lease - Lease denied'* (previously referred to but not actually quoted), that stated:

> "I would suggest that, in order to finalise all matters, a meeting should be held between us tomorrow, if possible. I believe it might also be appropriate that our clients' respective Architects also attend such a meeting, to clarify any changes in the new plans and maps which should be reflected in the Lease and Licence documentation (emphasis supplied)";

the letter dated 3 April 1998, from A & L Goodbody to P.C.L. Halpenny (previously quoted); the letter dated 29 April 1998, from A & L Goodbody to P.C.L. Halpenny (previously quoted); and a letter dated 25 May 1998, from A & L Goodbody to P.C.L. Halpenny (not previously referred to or quoted) which stated:

> "…Our client's insistence that your clients immediately cease the building works which they have undertaken is not wholly

unreasonable, in that our clients have never formally consented to the carrying out of those works. No legally binding agreement was reached or concluded on 23rd January 1998, as alleged by you. At the meeting on 23rd January 1998 your clients were advised that before the documentation could be executed by our clients, it was necessary for them to procure the approval of the Irish Horseracing Authority. This approval was not forthcoming as various issues were raised by the authority, which required further discussion with you. These discussions have been ongoing since January.

The reason why our clients have delayed in seeking to prevent your clients from continuing with the buildings works, and have not acted on foot of earlier demands that your clients cease those works, is that they had anticipated that the issues raised by the Irish Horseracing Authority could be resolved and a full and final agreement reached. However, at this point in time, it appears it is not possible to reach final agreement…. (emphasis supplied)".

8.30 The defendant submits that it is clear that, contrary to the case now sought to be made by Leopardstown, it did not regard the final Heads of Agreement as binding on it and at no point did Leopardstown regard the parties as having reached agreement until the documents were actually executed in June 1998.

8.31 The defendant further says that the following factors are illustrative of the fact that Leopardstown cannot sustain an argument that the final Heads of Agreement represented its expression of accord (let alone that of Templeville).

(i) The final Heads of Agreement were never signed by Leopardstown.

(ii) It does not appear that the final Heads of Agreement were ever furnished to the Board of Directors of Leopardstown or the I.H.A.

(iii) While the sixth Heads of Agreement was before the Board of Leopardstown on 5th December 1997, this was not approved by the Board. There was no unconditional agreement to the sixth Heads of Agreement. Instead, the minutes of the meeting of 5 December 1997 record that *'the Directors agreed to approve the proposed Heads of Agreement subject to I.H.A. approval'* which in the event was not forthcoming. Furthermore, this is not the Heads of Agreement upon which Leopardstown now appears to rely. Instead, it is the final Heads of Agreement to which Leopardstown refers.

(iv) On 17 December, 1997 (the date that Templeville signed the final Heads of Agreement), the matter was before the Strategy and Finance Committee of the I.H.A. However, it did not approve any heads of agreement and made it clear that the I.H.A would not proceed unless all documents had been finalized and agreed. The defendant says that it is noteworthy that reference was made to matters to be agreed, and that this is contrary to Leopardstown's assertions that the final draft Heads of Agreement was evidence of accord.

(v) There was further discussion concerning relevant issues, and an agreement was reached on some of them, subsequent to the preparation and execution by Templeville of the final draft Heads of Agreement, e.g. at the meeting held at the offices of A & L Goodbody on the 23rd of January 1998. Moreover certain matters were addressed in a manner inconsistent with the final Heads of Agreement. For example, it was agreed that Leopardstown would retain the option to build and/or fund the development. This, in turn, resulted in protracted negotiations between the parties. It was contrary to the final Heads of Agreement. Equally, it was 'agreed' that the *'tarmacadam areas in front of the stand should not be used for car parking except for delivery purposes'*. Again, this was at variance with the express wording of the final Heads of Agreement. The defendant submits that insofar as it is contended that the final Heads of agreement represented a concluded agreement in respect of car parking, plainly this cannot be so.

(vi) Not only did Leopardstown refuse to sign the said Heads of Agreement but the I.H.A. following review of the documentation signed by Templeville, made the signing of the Lease and Licence subject to 11 conditions.

(vii) Even assuming that the final draft Heads of Agreement represented an outward expression of accord (which cannot be sustainable), it cannot represent evidence of a *continuing* intention given that negotiations continued until 5 June 1998.

(viii) At no time, from 17 December 1997 until 5 June 1998, did Leopardstown assert that the final Heads of Agreement represented a final and/or binding agreement. In fact, it contended the opposite was the case. The documentation before the Court is replete with reference to Leopardstown's contention, in 1997/1998, that *nothing was agreed until everything is agreed*.

Failure to identify the alleged "true" antecedent agreement

8.32 The defendant maintains that an instrument can only be rectified in accordance with the true agreement, and accordingly that agreement must be articulated. The defendant submits that Leopardstown has failed to do so and that, on this basic point alone, the rectification sought ought to be refused.

8.33 Moreover, and without prejudice to the generality of this assertion, the defendant says that Leopardstown has, in particular, failed to specify what it alleges the agreement was in relation to Templeville's car parking rights. Equally, it is silent as to what Templeville's entitlements were for surrendering its interest in the area hatched yellow. The defendant makes clear, for the avoidance of doubt, that it (Templeville) understood that it was to receive a demise of car parking (*inter alia*), as is reflected in the Licence.

8.34 The defendant contends that Leopardstown's refusal to particularise the agreement that it alleges was made is startling given the heavy onus on a party seeking rectification. It further submits that it is entirely inappropriate for a party seeking, what it characterises as "the drastic remedy of rectification", to refuse to do so, and that it is fatal to the plaintiff's claim.

8.35 It was submitted that the onus is upon the party seeking rectification to establish what it alleges was the common intention. It is not sufficient to simply state that there was no agreement for a demise of car parking. Even if that was so (which is strenuously denied by Templeville), it is but part of a picture. The defendant posits the question: what exactly does Leopardstown say were its intentions in respect of car parking? It says that the plaintiff is singularly silent in that regard.

8.36 Indeed, as the defendant has pointed out, Templeville raised particulars on the Statement of Claim delivered by Leopardstown. The defendant characterises the Replies delivered by Leopardstown as "surprising" in light of the nature of an application for rectification. The defendant says it is clear that a party seeking rectification must precisely identify the alleged agreement (the

defendant's emphasis), and it cites the decision in *Irish Life Assurance Co. Ltd. v. Dublin Land Securities Ltd.* in support of this. To illustrate its point the defendant has drawn the Court's attention to the way in which the plaintiff dealt with requests for particulars in respect of just one aspect of the claim. In the defendants said Request for Particulars, the following particulars were sought as item no 9 on its list:

> "Arising out of paragraph 9 of the Statement of Claim provide full and detailed particulars of what was the Plaintiff's intention as regards car parking rights to be provided to the Defendant in each of the (i) Lease and (ii) Licences, including [(a)-(s)...].
>
> Leopardstown replied as follows:
>
> "The Requests herein do not arise out of Paragraph 9 of the Statement of Claim and, in any event, the issues raised herein are matters for cross-examination and are not matters for particulars."

8.37 The defendant submits that this represents a fundamental misunderstanding on the part of Leopardstown. Not only does the issue of its "intention in respect of car parking rights to be provided" in the Lease and Licence, respectively, arise from the Statement of Claim, it most certainly is not a matter solely for cross examination. It is necessary for any party seeking rectification of an alleged agreement to specify exactly what it says the agreement was. The defendant says that "remarkably", Leopardstown appears loath to do so. The defendant has submitted that it is not open to a plaintiff to attempt to prove its case on the basis that it will wait for the defendant to be called and then cross-examine the defendant. The onus is on the plaintiff to establish its case through the evidence which it calls.

8.38 Further, at item no. 15 on its list in the same document, Templeville also sought the following particulars:

> "Further arising out of paragraph 10 of the Statement of Claim, specify precisely to what car parking rights the Plaintiff believed that Templeville was entitled."

Leopardstown purported to reply as follows:

> "The issue raised herein does not arise out of paragraph 10 of the Statement of Claim and, in any event, is not a matter for particulars".

8.39 The defendant maintains that it was entirely inappropriate for a party in the plaintiff's position to adopt "such an evasive and equivocal approach to basic questions" regarding Leopardstown's actual intentions in respect of Templeville's car parking entitlements.

Plaintiff's inability to clearly demonstrate its own intention

8.40 The defendant submits that the failure to articulate the alleged true agreement poses a more fundamental difficulty for Leopardstown. Leopardstown has failed to demonstrate its own intention. The defendant says that this represents an insuperable difficulty for Leopardstown and, it is submitted, for the Court. They posit the question, how can a Court rectify an agreement when faced with varying and inconsistent assertions of intention on the part of the Plaintiff? The defendants contend that it is apparent from the testimony of Leopardstown's witnesses that they were mistaken as to each others' intention, but that they did not recognise that they were so mistaken.

8.41 It is the defendant's case that no coherent intention has been established by Leopardstown. The defendant submits that there is on the evidence, if accepted, an internal conflict between Leopardstown's agents as to its intention regarding car parking entitlements. Consequently, the plaintiff has failed to demonstrate that Leopardstown itself (the defendant's emphasis) held a specific intention as to the car parking rights to be granted under the Licence. Having failed to establish its own intention, it cannot establish a common intention with Templeville. Varying accounts have been given as to the rights granted to Templeville under the 1998 Licence in respect of car parking. On one hand, certain witnesses contend that the only entitlement to car parking was that as set out in the 1998 Lease (significantly less than the rights enjoyed by Templeville under the 1993 Lease). Equally, evidence has been given that in drafting the Licence and 1998 Lease, it was Leopardstown's intention to give Templeville car parking equivalent to that lost by virtue of the CPO. The defendant says that in truth, the only intention upon which Leopardstown's witnesses can be said to have agreed was the intention to execute, and be bound by, the documents, which occurred in June 1998.

8.42 The defendant points to the fact that Mr. Justice Clarke and Mr. Law both gave evidence that they understood that pursuant to the Licence (and draft Heads of Agreement) that Templeville was only granted car parking rights in certain specified car parks as set out in the 1998 Lease. (The defendant also asserts that there was a further internal conflict on Leopardstown's part as to when Templeville allegedly agreed to this diminution in its entitlements. This is dealt with further below.) According to the defendant it is equally clear that this was not the understanding of Mr. Brunker who drafted the Licence and 1998 Lease. While initially Mr. Brunker seemed to accept (as Templeville contends) that Templeville is entitled to car parking in the new site commensurate to that lost under the 1993 Lease, he later appeared to retreat from this position. The defendant says that while Mr. Brunker's evidence as to whether the 'New Site' itself was to contain car parking varied, he made it clear beyond question that his understanding at all times was that Templeville was to get car parking under the Licence equivalent to its car parking facilities as under the 1993 Lease. He consistently maintained that this was so.

8.43 The defendant says that it is clear from Mr. Brunker's testimony that in drafting the Licence he intended that it would provide Templeville with car parking rights equivalent to those enjoyed in the area hatched yellow. He also confirmed that this was in accordance with the draft Heads of Agreement as he understood them. The defendant points out that Mr. Brunker, in his evidence, consistently stated that the Licence as drafted reflected the provisions of the Heads of Agreement. He gave evidence that the documents drafted by him were based on the Heads of Agreement and the 1993 Lease as he understood them.

8.44 Accordingly, says the defendant, it is apparent that Leopardstown did not itself have a concluded intention in respect of the car parking rights to be provided by the Licence. Mr. Brunker, who drafted the Licence, clearly had one understanding. It appears that a different understanding may have been held by some witnesses (though they were all less involved than Mr. Brunker throughout 1998). The defendant says that the plaintiff's representatives have given varying evidence as to its alleged intention. That being the case, Leopardstown cannot contend that it itself had a specified intention in respect of car parking rights, still less that it shared a common intention with Templeville. The defendant says that it appears implicit that an internal dissonance between various Leopardstown agents may have been an issue of ongoing concern to Leopardstown. It points out that, in that regard, Mr. Law wrote to Mr. White on 31 October, 1997 in advance of the first meeting between representatives of Leopardstown and Templeville stating that '*It is imperative that we are clear in our own minds as to what we are hoping to achieve by this meeting.*' According to the defendant, if Leopardstown's evidence is to be accepted, the only reasonable conclusion is that this imperative was not realised.

8.45 As indicated above the defendant also maintains that there is a lack of clarity as to when it is alleged that Templeville allegedly agreed to waive its entitlement to car parking equivalent to that of the area hatched yellow and instead to accept only the car parking rights set forth in the 1998 Lease. The defendant says that it is not necessary for this Court to adjudicate upon this issue in light of the evidence of Mr. Brunker. However, it also maintains that this disconnect is indicative of the conflicting approach adopted by Leopardstown. Its consequences ought not to be visited upon Templeville. This conflict revolves around the issue of *'quantum'* and the various accounts of the meeting of 24 November 1997. The first draft 'Heads of Agreement' provided by Mr. Smyth to Mr. White sought at clause 1(a) *'a similar quantum of parking will be given in areas surrounding the Templeville property'*.

8.46 It was contended on behalf of Leopardstown, that Templeville agreed that it would accept specified areas of car parking as set forth in the 1998 Lease instead of similar quantum as provided for in the 1993 Lease. There is however an internal conflict in Leopardstown's evidence as to when this supposed concession or agreement was made by Templeville. The defendant draws the particular attention of the Court to the evidence given by Mr. White, Mr. Justice Clarke and Mr. Law, respectively, concerning what they understood a *'similar quantum'* to mean. The relevant quotations appear earlier in this judgment at paras 2.28 to 2.31.

8.47 Further, an internal meeting of Leopardstown personnel took place on 11 November 1997. The defendant contends that it was ostensibly agreed by Leopardstown itself that it would provide at least similar quantum of parking to Templeville. However, on Mr. White's evidence, he appears to have already formed the view that Templeville would only receive car parking sufficient for its needs. The defendant says that Mr. Law and Mr. Justice Clarke appeared to suggest in evidence that on 24 November 1997, Templeville agreed to relinquish any entitlement to a similar quantum of parking. The defendant submits that on the basis of the attendance note of Mr. Law, this does not appear to be the case. It says that Mr. Law very fairly acknowledged that he did not have an independent memory of these meetings and was relying on his attendance notes. However, according to the defendant, it is plain that it was agreed that a *'similar quantum of parking'* would be provided.

8.48 The defendant submits that even more fundamentally, it is entirely implausible that Mr. Smyth, who Leopardstown contends it viewed as an experienced negotiator, would relinquish such rights as he enjoyed for inferior rights. Mr. White gave evidence that Mr. Smyth *'would have pushed it to the limit in relation to many things' and that he was 'a hard person to negotiate with'*. The defendant says it is wholly unrealistic to believe that Templeville would accept diminished entitlements, particularly given the acknowledged superior bargaining position it enjoyed in November 1997. It was crucial for Leopardstown that Templeville relinquish its rights to the area hatched yellow. The defendant maintains that it is inconceivable that Templeville would do so for lesser rights than it enjoyed under the 1993 Lease. This is especially so given that it appears that Leopardstown was open to maintain such rights and, in fact, to "*concede extra parking*" (per the testimony of Mr. Justice Clarke concerning the meeting of the 11th of November 1997).

8.49 The defendant submits that if Leopardstown truly believed that Mr. Smyth surrendered Templeville's rights to the area hatched yellow for the inferior rights set out in the Lease, this was naive at best. It was absolutely inconsistent with Leopardstown's stated previous negotiation history with him and his acknowledged superior bargaining position that he would so act. He effectively had Leopardstown *'over a barrel'*. Without his consent to move from the area hatched yellow, the very attractive deal negotiated with Dun Laoghaire/ Rathdown County Council was in peril. This, in turn, jeopardised the very existence of Leopardstown. It appears that Leopardstown attended the meeting of 24 November cognisant that it would likely concede extra parking. The defendant says that against that backdrop, Leopardstown cannot conceivably have believed that Templeville without demur waived its car parking rights in the area hatched yellow. If Leopardstown truly believed that it was so, it must have been clear to it that Mr. Smyth was mistaken in so doing. (Of course, the defendant denies that any such agreement was reached.)

8.50 Finally, says the defendant, in light of the evidence of Mr. Brunker, it is clear that he believed that Templeville was to enjoy car parking rights (rather than a leasehold interest) equivalent to those enjoyed in the area hatched yellow.

Failure to positively show a continuing common intention

8.51 The defendant submits that it is for Leopardstown to establish by convincing proof that it is entitled to rectification. It says that Leopardstown has not identified what it alleges was the agreement/continuing common intention between the parties despite twelve days of evidence. The defendant says this cannot be done as on the plaintiff's own evidence it appears that its intention was contradictory, although it does not appear to have recognised this contradiction. There is no evidence that at some moment both parties were *ad idem* as to what Templeville was to get by way of recompense for the car parking lost to the CPO, that such agreement continued up to the date of signing the agreement and that the written licence did not reflect that (ex hypothesi) agreement. In those circumstances, Leopardstown cannot succeed in an action for rectification.

8.52 The defendant says that Leopardstown's attempt to call evidence to demonstrate a continuing common intention of the parties has only demonstrated that there was no clear intention on Leopardstown's side in relation to car parking. The defendant says this should not be surprising. There was a change of personnel (Mr. Clarke to Mr. Moloney), a change of lawyers (Mr. Law to Mr. Brunker) and most importantly the change created by the intervention of the I.H.A. and its determination to approve all the terms of the agreement before execution.

8.53 According to the defendant, not only has the plaintiff failed to establish a common and continuing agreement between Leopardstown and Templeville different to what is contained in the written agreements, but it has failed to establish a common understanding as to what this supposed alternative agreement was, even as between their own witnesses. They ask how, if that is so, could Templeville have been aware that Leopardstown was mistaken in any way?

8.54 The defendant contends that Leopardstown's witnesses have been examined mantra-like as to whether it was their intention to grant a demise of an area for car parking to the exclusive use of Templeville. It has been submitted consistently on behalf of Leopardstown that it did not so intend. The defendant says that that, of course, begs the true question. The relevant issue is what was the parties' continuing common intention in respect of Templeville's entitlement to car parking pursuant to the Licence. To say that there was no intention to demise an area for car parking is to give an incomplete answer. It is to ignore what was the precise intention (and agreement) in relation to car parking. The defendant submits that if Leopardstown claims that Templeville was to get something other than what is in the written agreements by way of recompense for the loss of car parking on the area hatched yellow, Leopardstown has to establish by convincing evidence what it says the alternative "true" agreement was. Not only has Leopardstown not established this in evidence, it has not even articulated what it claims the alternative "true" agreement was.

8.55 The defendant submits that it is a singular feature of these proceedings that Leopardstown is silent as to its intention regarding car parking. More stark is the absence of evidence as to its intention on the date of execution of the documentation (June 1998). Witness after witness has given evidence as to what he did not intend. That evidence relates, in the main, to the period from November 1997- January 1998 (with the exception of Mr. Brunker). According to the defendant, no positive assertion has been made as to the plaintiff's intention on signing the documentation. The defendant has submitted that this gap is fatal to an action for

rectification.

8.56 The defendant says that Leopardstown has chosen to focus on the period to 19 December 1997 (and to a lesser extent to 23 January 1998). However, it says, that is to disregard a fundamental requirement for rectification i.e., the intention (and agreement) as of the date of execution (the defendant's emphasis). The defendant submits that Leopardstown cannot itself elect to limit its evidence as it purports to do. It contends that given the heavy onus on a party seeking rectification, it is more than surprising that evidence as to this necessary pre-condition has not been provided.

8.57 The defendant asserts that another lacuna is the absence of evidence in respect of the I.H.A.'s intention. The defendant says that it is clear that from December 1997 no agreement could be concluded without its consent. Yet what did it view as Templeville's car parking entitlements in June 1998? The defendant submits that the Court has not been provided with any information in relation to this.

8.58 The evidence establishes, according to the defendant, that Messrs. Clarke, Law and White represented Leopardstown until December 1997. Thereafter, from January 1998, Messrs. Brunker and Moloney conducted further negotiations and finalisation of the relevant documents. The defendant says that it is clear from documents exhibited by Mr. Walsh (Exhibit 'PW2 - Minutes of Board of Leopardstown of 5 February, 1998, 5 May 1998, 7 July, 1998; Minutes of I.H.A. of 19 January 1998, 20 April 1998, 19 May 1998, 29 June 1998; Minutes of Finance and Strategy Committee of 19 January 1998, 23 February 1998, 20 April 1998) that it was Mr. Moloney who led negotiations and updated the Board of Directors of Leopardstown, the I.H.A and the Finance and Strategy Committee in relation to negotiations. Mr. Justice Clarke in his witness statement, which he adopted as part of his evidence in chief, stated as follows:

> "At this I.H.A. Board meeting on the 19th January 1998, Mr. Pierce Moloney was also appointed as the Chairman of Leopardstown and, thereafter, he led the negotiations on behalf of Leopardstown with Templeville." [Emphasis supplied].

The defendant says that it is also clear from the evidence that it was Messrs. Brunker and Moloney who primarily reviewed the documentation now sought to be rectified.

8.59 The defendant says the following matters are noteworthy:

> - Drafts of the documentation were sent to Mr. Law. He gave evidence that he does not recall giving them detailed consideration as *'Eric was involved in the drafting of documents and obviously liaising quite closely with Frank Clarke'*. (transcript, day 4, p79)
>
> - In fact, Mr. Clarke gave evidence that he did not consider the documentation in detail because he assumed *'they had done what they were meant to do'*. He saw his role in January 1997 as all but finished and Mr. Moloney took over from that time. (the defendant's emphasis) (transcript, day 6, p53)
>
> - Mr. White gave evidence that he read the documentation but thought it *'very much a legal thing'* (transcript, day 8, p38). He gave further evidence that while he was updated as to progress of negotiations in April 1998, his role *'was coming to an end, in that it was really the legal people and Pierce Moloney was driving it'* (transcript, day 7, p 68).

8.60 The defendant points out that it was Mr. Moloney and Mr. Walsh alone who attended on behalf of Leopardstown on 5 June, 1998. Further, it was Mr. Moloney who signed the documentation now sought to be rectified.

8.61 The defendant submits that insofar as any evidence is before the Court of Leopardstown's intention as of 5 June, 1998, it is from Mr. Brunker. He appears to be the only person with direct knowledge of negotiations with Templeville at June 1998. The other parties (who gave evidence) were no longer centrally involved. Mr. Moloney, the party who was leading the negotiations, was identified as a relevant witness by Leopardstown. A statement of proposed evidence was proffered. Yet, no evidence has been called from him. The burden is on Leopardstown to show by convincing evidence that there was a continuing common intention (the defendant's emphasis). It was submitted that the absence of evidence as to its own intention, let alone Templeville's, on 5 June, 1998 is glaring. The defendant says that the absence of Mr. Moloney cannot be explained on the basis that other witnesses gave evidence as to Leopardstown's intentions in June 1998. They could not do so as they were no longer directly involved in negotiations (with the exception of Mr. Brunker). The defendant says that Mr. Moloney's absence is all the more notable as he was a member of the Board of the I.H.A. and submits that given his central role it was incumbent on Leopardstown to call him.

The Heads of Agreement and the 1998 Licence are entirely consistent with an intention to demise car parking

8.62 The defendant submits that under the 1993 Lease, Templeville was granted various rights of way and entitlements to park in various areas at Leopardstown. These included:

> "the right to park motor cars in such of the car parks within the areas edged blue on the said Map No. 1, as may from time to time be agreed, together with a right *to park motor cars on non race days within the areas cross-hatched in yellow* on the said map No.1 (or such other adjacent areas as the landlord may specify)".

8.63 The defendant says that in both the draft Heads of Agreement furnished by Templeville to John White, Leopardstown and by P.C.L. Halpenny to A & L Goodbody on 7 November 1997 and 10 November 1997, Templeville proposes that it would surrender its *'interests in the area hatched yellow'* subject to three provisos:

> "(a) A similar quantum of parking will be provided in the areas surrounding Templeville property;
>
> (b) That space for outdoor tennis will be provided on the racecourse when redesigned;
>
> (c) Outdoor tennis will be allowed to continue on the four outdoor tennis courts and on the area under the present (second) tennis dome, both being areas comprised in the area hatched yellow, on non race days." [Emphasis supplied].

8.64 The defendant believes and submits that Templeville's proposal is clear – it required a *'similar quantum of parking'* i.e. an amount equal to the area hatched yellow which it would lose on foot of the CPO (the size of which loss was quite unknown to either party at the time).

8.65 The defendant has further submitted that a reference to providing a "similar quantum of car parking" is quite inconsistent with

the concept of an area of car parking sufficient to meet Templeville's car parking needs, which appears to be how Mr. Law interpreted this phrase.

8.66 The defendant says that it is noteworthy that as far as Leopardstown was concerned it was (and apparently is still) unclear as to the status of Templeville's entitlements in the area hatched yellow. By letter dated 3 December 1997, Mr. Frank Clarke SC (as he then was) wrote to P.C.L. Halpenny as follows:

> "I am concerned about the use of the words in parenthesis in the second paragraph, i.e., 'as if it had been a grant of part of a lease'. As the area hatched yellow does not form part of the demised area in the current lease (though I agree that its precise status is somewhat ambiguous) I would not like to have a phrase that seemed to imply an acceptance of an interest greater than a licence in those areas. I do not think that the relevant paragraph would be any the less strong if the matter in parenthesis were deleted". [Emphasis supplied].

8.67 Subsequently, Mr. Clarke S.C. (as he then was) wrote to Mr. Law, on 4 December 1997, in relation to paragraph 2(C) and said, *inter alia*, the following:

> "...However, in fairness to the tenant, a further sentence should be added:
>
> 'The Deed confirming the said permanent demise shall also provide for the additional and replacement car parking rights referred to at paragraph 3(A) hereafter'."

8.68 Indeed, the fifth draft Heads of Agreement document notes, *inter alia*, at paragraph 2(A) as follows:

> "...Templeville is also entitled to use the area hatched yellow for car parking on race days.
>
> Leopardstown is entitled to take back this area for its own purposes provided it provides Templeville with a suitable alternative area elsewhere in the car parks at Leopardstown.
>
> At the request of Leopardstown and to facilitate the construction of the new motorway, Templeville has agreed to an amended arrangement in respect of the above tennis and car parking facilities and Leopardstown has agreed to provide Templeville with a 'package' which will provide equivalent facilities as near as possible to the present location". [Emphasis supplied].

8.69 The defendant points out that this terminology appeared in all drafts of the Heads of Agreement save the first Heads of Agreement, and says its meaning must be clear.

8.70 The defendant has also pointed to Paragraph 2E of the fifth draft Heads of Agreement which provided:

> "The New Site shall be sufficient and adequate to replace such of Templeville's existing tennis facilities and rights, which Templeville enjoys over the area hatched yellow...."

And to Paragraph 2C of the fifth draft Heads of Agreement which provided:

> "(ii) The permanent demise of the new site shall be granted subject to a Licence back to Leopardstown for the use of all outdoor tennis courts (except for the ones remaining to the front of the Westwood clubhouse) for parking on race days.
>
> (iii) A supplemental deed to give effect to (ii) above will be granted incorporating a revised map, clearly identifying the new location and arrangement. This deed shall also provide for the additional and replacement car parking rights referred to in 3". [Emphasis supplied].

8.71 The defendant says it was thus quite clear that the new site was going to be demised to Templeville. Furthermore, the new site was to be big enough to provide for Templeville's existing tennis facilities (i.e. the domes and the outdoor courts) and rights (i.e. its car parking rights). Part of its existing tennis facilities (Dome No. 2 and the right to build 18 tennis courts on the area hatched yellow) were previously held by way of licence only. This was now going to be changed to a demise. No distinction was drawn by Leopardstown between one sort of licence rights (tennis) which were to be converted into a demise and another set of licence rights (car parking) which were, as now claimed, not to be so converted. The defendant says they were both part of the "package" and they were both stated to be part of the new site which was to be "sufficient and adequate to replace such of Templeville's existing tennis facilities and rights which Templeville enjoys over the area hatched yellow …". This new site, which was to accommodate both of these rights (tennis and car parking) was to be demised to Templeville.

8.72 The defendant has further referred to Clause 3 of the fifth draft Heads of Agreement which is entitled *'Lease, Licence and Demise and car parking'* and says it is worth considering.

"Lease, Licence and Demise and Car Parking

> A. The New Lease shall contemplate the provision of a supplemental deed to demise to Templeville the new site to give effect to the demise and rights following relocation and also to incorporate the revised arrangements in relation to rights, rights of way and entitlements.
>
> The New Lease shall permit Templeville to use and occupy:
>
> (a) so much of the area hatched yellow which does not form part of the new site and as is not affected by the CPO, for parking on non race days.
>
> (b) The area outlined in blue on the map, for parking,
>
> (c) The tarmacadamed area between the front of the grandstand and the race course, for parking on non-race days.
>
> (d) Such other areas of car parking which may be required by Templeville to facilitate its club members on non-race days, as may be agreed by Leopardstown, such agreement not to be unreasonably withheld.

(e) On the days leading up to the race days the aforesaid parking arrangements shall not interfere with the reasonable preparation of the race course or the conduct of race meetings.

(f) In the event of a dispute in relation to car parking arrangements such disputes shall be resolved by a single arbitrator.

Where open air tennis courts are used both for tennis and parking on race days, as Templeville has already financed and constructed those courts Leopardstown shall be responsible for damage, wear and tear caused by parking and Templeville shall be responsible for damage, wear and tear caused by tennis". [Emphasis supplied].

8.73 The defendant makes the point that the first paragraph references a *supplemental deed*. As noted above, clause 2C(iii) envisages that *additional and replacement car parking rights* will be provided thereby. The second paragraph of Clause 3 refers to the *new Lease*. The defendant says this is the 1998 Lease and refers to parking rights in fact provided in the 1998 Lease. It submits that these cannot represent the *additional and replacement car parking rights* referenced in clause 2(C)(iii). The defendant reminds the Court of Mr. Brunker's understanding of the reference in Clause 2C(iii) to "*additional and replacement car parking rights*". In giving evidence in respect of the first draft of the Licence Mr. Brunker said:

> "No, I would have to say not – there is in the – I think it was anticipated, this being very much a first draft following the Heads of Agreement, it anticipated, as I say, replacement car parking rather than demising car parking, but replacing – they had a right to park within this special area crosshatched yellow, and that would be what they lost, and it would be endeavoured that it would be replaced of equal car parking rights."
> (see transcript, day 12, pp. 27-28).

8.74 The defendant says it is clear that the car parking rights provided in the 1998 Lease do not represent *additional and replacement car parking rights*. Under the 1993 Lease, Templeville's parking entitlements were set out as follows:

- The right to park motor cars in such of the car parks within the areas edged blue on the said map. (These are the areas which became known as car park 1 and car park 2.)

- A right to park motor cars on non race days within the areas cross hatched in yellow on Map no. 1. (This is the same area as the area cross hatched in yellow in the 1998 Lease and Licence.)

- Or such other adjacent areas as the Landlord may reasonably specify.

The parking entitlements set out in the 1998 Lease are as follows:

- Car park 1 and car park 2 which for the purposes of identification are more particularly delineated on map No. 1 annexed hereto and thereon edged orange. (These are the areas referred to in the 1993 Lease as edged in blue.)

- For delivery purposes only on non race days in the area to the front of the main Grandstand, which for the purposes of identification is more particularly delineated on Map No. 1 annexed hereto and thereon edged and cross hatched in orange. (The defendant emphasises that this entitlement was only in respect of a small area and to park <u>for delivery purposes</u>.)

- In a suitably designated by the landlord car park or car parks close to or adjacent to the main entrance to Leopardstown. (This was to be made available to Templeville for the purposes of facilitating the operation of the shuttle bus service arrangement on race days.)

- The parcel of land, which for the purpose of identification is shown on Map No. 1 annexed hereto and thereon cross hatched in yellow, which does not form part of the New Site and which is not affected by the CPO. (This is part of the area hatched yellow referred to in the 1993 Lease.)

- Such other car parking areas as may be designated by the landlord as such, from time to time. (This is the same car parking area(s) identified in the 1993 Lease and described as *'or on such other adjacent areas as the Landlord may reasonably specify'.)*

8.75 The defendant submits that the parking entitlements set out in the 1998 Lease with the exception of the facility for deliveries to the front of the Grandstand essentially replicated the parking areas identified in the 1993 Lease. There was nothing of an *'additional and replacement'* nature. Given the extent of Templeville's car parking entitlements in the entirety of the area hatched yellow, it is inconceivable that these would be surrendered for nothing more than the mere right to park for delivery purposes in front of the Grandstand.

8.76 Turning now to the Licence itself, Leopardstown's claim, as the defendant perceives it, is essentially that on 9 January 1998, Mr. Halpenny proposed a definition of the 'New Site' which had the effect of obliging Leopardstown to grant a demise of car parking. The defendant says it is plain from the Licence (and the Arbitrator's award) that this wording alone does not provide a demise. The defendant says it is also clear from the Licence that Templeville is to be provided with car parking equivalent to what they were losing in the area hatched yellow (as was also understood by Mr. Brunker). All of these provisions would require to be amended (or deleted) if Leopardstown's contention (on one variation) that Templeville's car parking was limited to that set out in the Lease is accepted.

8.77 The defendant then urges the Court to consider the following provisions of the Licence. "The New Site" is defined as follows:

> "Means a parcel or parcels of land situate adjacent to Dome No. 1 upon which the Tenants tennis facilities and <u>car parking</u> which are at the date hereof located on the said area hatched yellow are to be relocated by reason of the C.P.O., which parcel or parcels may or may not include part of the area cross hatched in yellow on Map No. 1;"

8.78 The recitals then provide, *inter alia*, as follows:

> "At the request of Licensor and to facilitate the construction of the new motorway, the Licensee has agreed to an amended arrangement in respect of the above tennis and <u>car parking facilities</u> and the Licensor has agreed to provide the Licensee with a "<u>package</u>" which will provide <u>equivalent facilities</u> as near as possible to the present location.
>
> The Licensee has agreed that the present tennis facilities <u>and rights</u> in respect of the area cross hatched in yellow on the

map and the car parking rights on non race days may be relocated as set out herein.

At this stage, the Licensor cannot indicate precisely how much of the tennis facilities and the Licensee's other rights may need to be relocated or precisely to what location the tennis facilities and rights are to be moved, but the Licensor has agreed to provide a suitable site for such relocation, adjacent to the first dome. To enable relocation to take place in due course, the Licensor has agreed to grant the Licensee a right to the use of the portion of the Licensor's property herein after mentioned."

[The defendant's emphasis].

8.79 Clause 1 provides *inter alia*, as follows:

"In pursuance of the aforementioned agreement and in consideration of the covenants on the part of the Licensees hereinafter contained the Licensor hereby LICENSES AND PERMITS the Licensees to continue to exercise the rights and privileges of entering upon and having use occupation and enjoyment of the part of the Licensor's premises specified in the First Schedule hereto (the "Licensed Area") for the purposes of identification being the area hatched yellow on map No. 1 attached hereto and for the purposes set out in the First Schedule hereto with the right of ingress egress and regress thereto and therefrom.

TO HOLD the same unto the Licensees from the 1st day of January 1989 until terminated in accordance with the provisions and conditions hereinafter contained, and if not so terminated, for the period of the thirty five years from the 1st day of January 1998, at which time all rights contained in this License in favour of the Licensee shall convert into rights as if they were granted under a Lease.

[The defendant's emphasis].

8.80 Clause 2 provides as follows:

"In further pursuance of the aforementioned agreement and in consideration of the covenants on the part of the Licensee hereinafter contained, the Licensor hereby agrees and binds itself, for itself, its successors and assigns to grant and demise unto the Licensee, by way of endorsement on the Lease, a demise over the new site, granting the rights, privileges and entitlements more particularly specified in the First Schedule hereto TO HOLD the same unto the Licensee from the date of the expiry of the notice period, hereinafter referred to, for a term of years equal to the residue of the term of years left to run under the Lease."

[The defendant's emphasis].

8.81 Clause 7 provides, *inter alia*, as follows:

"The new site shall be sufficient and adequate to replace such of the Licensees' existing tennis facilities and rights which the Licensees enjoy over the Licensed Area, and in particular, the following criteria shall be met...."

[The defendant's emphasis].

8.82 The *First Schedule*, provides:

"The part of the Licensor's premises situate at Leopardstown Racecourse as shown on Map No. 1 attached hereto and thereon crosshatched in yellow partially comprising of four outdoor tennis courts and seven indoor tennis courts positioned under dome No. 2 erected by the Licensees, together with the right to use, occupy and enjoy said tennis courts and tennis facilities together with the right to park motor vehicles thereon (entire area) and the right to build a further seven outdoor tennis courts, together with all vehicular and pedestrian rights of way thereto thereover and therefrom."

[The defendant's emphasis].

8.83 The defendant says that the underlined text clearly indicates that the Licence was to provide for car parking entitlements – whether they be by way of lease/licence is in dispute between the parties. The defendant submits that what is plain is that Leopardstown believed that it would provide car parking rights, although it is conceded that on one version of its evidence, this is now disputed. The defendant says that it is the combination of those provisions, not just the change in the definition of the 'New Site', that provide for a demise of car parking to Templeville. The defendant emphasises that on Leopardstown's evidence, these were considered not only by Leopardstown and its legal advisors but also by the Finance and Strategy Committee of the I.H.A. and the I.H.A. itself. The defendant submits that if Leopardstown did not understand the effect of these clauses, this mistake should not be visited on Templeville. There was no "common mistake".

The Licence actually represents Templeville's Intention

8.84 In the course of its submissions the defendant was at pains to expressly assert, for the avoidance of doubt, that Templeville's intention was as evidenced by the Licence Agreement, namely, that it was entitled to a demise of the new site which was to include car parking.

8.85 The defendant says it is well-established that execution of documentation is *prima facie* indicative of a party's intention. The Licence represents Templeville's intention and indeed is the only evidence of Templeville's intention before the Court. Templeville elected not to call evidence. It was made clear from the outset that Templeville reserved its right to make an application for a direction. It was at all times open to Leopardstown to take such actions as it thought necessary in light of that possibility. The defendant says it could, for example, have chosen to call Mr. Smyth or Mr. Halpenny. It did not do so. Therefore, the only evidence of Templeville's intention is the documentation, as executed.

8.86 The defendant further says that contrary to Leopardstown's assertions, Templeville's understanding is also supported on the evidence of Leopardstown. While Leopardstown has sought to contend that a demise of car parking rights equivalent to those enjoyed in the area hatched yellow was an absurd proposition, the defendant says this is not borne out on Leopardstown's evidence. The defendant submits that the plaintiff has overstated the issue considerably and 'protested too much'.

8.87 The defendant points out that it is accepted by Leopardstown that there is no difficulty in principle with a demise of car parking to Templeville subject to a licence back on race days. In fact, the defendant says, a demise with a licence back is equivalent to a licence for practical purposes, as far as Leopardstown is concerned. Mr. Justice Clarke gave evidence to that effect (see transcript, day 6, p. 65). The defendant says that Leopardstown clearly had no difficulty giving Templeville car parking rights over the 'area hatched yellow'. The defendant says that given, as is accepted by Leopardstown, that there is little practical difference between a lease with a licence back and a licence, it appears that if a mistake was made, it was that no provision was made for a licence back on race days and not the demise of the lands. The defendant submits that Templeville's understanding that it is to receive a demise of car parking is supported by the note prepared by Mr. White of the meeting of 23 January 1998 which contains, it will be recalled, the following *'Dem of Land – 'Cars' 'Parking'*. The defendant says that Mr. White's note in so far as it records a demise of car parking is consistent with the Licence as understood by Templeville, and is at odds with Leopardstown's contention that a demise of car parking was never contemplated by it.

8.88 The defendant contends that Templeville's understanding that it was entitled to an area of car parking equivalent to the area hatched yellow also appears to have been held by Leopardstown (though by way of licence rather than lease).

8.89 Lastly, the defendant refers to the evidence given in relation to whether Leopardstown considered 'in-field' parking and a redesign of the racecourse. The defendant says that it was obviously a matter of great sensitivity to certain of Leopardstown's witnesses. It was strongly contended by some that this was never considered as an option. However, the defendant says that it is clear from the evidence that it was considered at least on three occasions: (i) in or around 1996/1997 (per Mr. Justice Clarke); (ii) at board level in January 1999 (Mr. White); and then (iii) end 1999/2000. The defendant says that, in truth, this is not a relevant issue save insofar as it shows that it was reasonable for a party not privy to negotiations with the Council (or the precise plans) to believe that either through redesign of the racecourse proper or through in-field parking there would be additional car parking spaces available adjacent to the dome to replace those lost on the area hatched yellow.

The Defendant's Core or Principal Submissions – Unilateral Mistake

8.90 The defendant has submitted that in order to establish unilateral mistake, Leopardstown must establish that it entered into the 1998 Licence and the 1998 Lease under a mistake and that Templeville with knowledge of its intention and mistake concluded the agreement. The knowledge must be such as to have amounted to fraud, "sharp practice" and unconscionable behaviour such that, in effect, dishonesty is required.

8.91 The defendant submitted that any claim for rectification based on unilateral mistake must fail on the same basis as that in relation to common mistake. It contends that, once again, it is necessary to posit the question: what mistake does Leopardstown contend it made? The defendant again points out that there is an inherent conflict between the evidence of Mr. Brunker, and that of Mr. Law and Mr. Justice Clarke in relation to the car parking entitlements to be given to Templeville. It asks rhetorically: if Leopardstown did not itself know it had made a mistake, how could Templeville be aware?

8.92 The defendant submits that Leopardstown's difficulties in establishing common mistake are equally relevant here. To establish a mistake, one must establish how one was mistaken. How did the agreement differ from the true agreement between the parties? Leopardstown cannot establish its own intention as regards Templeville's car parking rights. Therefore, it cannot possibly contend that its agreement with Templeville was other than as set out in the Licence and Lease. The defendant points out that on the evidence of Mr. Brunker, he conducted negotiations and drafting on the basis that Templeville was to obtain car parking rights equivalent to those under the 1993 Lease. Templeville understood that it was to receive a demise of those car parking entitlements. However, says the defendant, Mr. Law and Mr. Justice Clarke do not appear to be *ad idem* with Mr. Brunker. The defendant again asks rhetorically: how could Templeville be aware of Leopardstown's own internal mistakes?

8.93 The defendant says that it is also important to bear in mind that Leopardstown was legally represented and advised at all times. It appears that a total of four solicitors advised it in respect of the documentation.

8.94 The defendant further submits that the requisite degree of knowledge has not been established by Leopardstown nor is capable of being established on the evidence that has been adduced. The defendant submits that a useful starting point is the Statement of Claim. Clause 11, provides *inter alia*, as follows:

> "(iii) On or about the 9th day of January, 1998, the defendant's solicitors inserted into the first draft of the Lease and Licence a number of definitions including a definition of *'the New Site'*, which were expressly stated by the defendant's solicitors to correspond with those used in the Heads of Agreement and also inserted into the Recitals and First Schedule to the Licence a number of references to car parking rights and facilities. In fact, the said definition of 'the New Site' deviated from the definition of *'the New Site'* used in the Heads of Agreement insofar as it contained the additional words '*and parking'*.
>
> (iv) These changes were of great benefit to the defendant and a considerable detriment to the plaintiff since they had the effect (as subsequently found by the Arbitrator) that the plaintiff was obliged to grant a demise of an area for car parking. They were however never discussed between the parties and their significance in this regard was not noticed either by the plaintiff or its then solicitors who transcribed them into subsequent drafts in the belief, which continued to be held by them at the date of execution of the Lease and Licence, that there was to be no demise of any area for car parking."

8.95 The defendant points to the fact that Leopardstown's case is based primarily on the insertion of the words 'and parking' into the Licence. The case as pleaded focuses on the meeting of 9 January 1998. The defendant contends that it is clear from the evidence of Mr. Brunker that the amendments made on 9 January 1998 were clarifications consistent with his understanding of his instructions and with the Heads of Agreement. In support of this, the Court is invited to examine the sequence of events on 9 January 1998.

8.96 The defendant says that it is now accepted by Leopardstown that Mr. Clarke S.C. (as he then was), Mr. Brunker, Mr. Condell and Mr. Halpenny attended the meeting. Witnesses on behalf of Leopardstown do not actually recall Mr. Clarke S.C.'s attendance. However, and as the defendant points out, it is clear from Leopardstown's own documentation that it was anticipated that he be in attendance. (This is a reference to an attendance of Mr. Law dated 7 January 1998 which records that " *…We said that we thought that Frank Clarke would be available to attend such a meeting …".* This document was put to Mr. Law, who acknowledged it, by Mr. Collins S.C. in the course of his cross-examination (transcript, day 4, p.74)).

8.97 Further, the Court's attention is drawn to the fact that Mr. Brunker gave evidence that certain documentation was faxed to him on 9 January 1998 by Mr. Halpenny containing handwritten changes (together with five typed riders). Those changes also envisage and are consistent with a demise of an area for car parking under the Licence.

8.98 The defendant points out that Mr. Brunker confirmed in evidence that he was satisfied that he looked through these proposed amendments prior to the meeting. He further confirmed that he considered the proposed amendments were consistent with his instructions and he understood them to achieve what was intended in the Heads of Agreement (transcript, day 13, pp. 65-83). It is these changes together with the definition of the 'New Site' that provide for a demise of car parking. The defendant says that it is noteworthy that Mr. Brunker understood that these amendments were contemplated by the Heads of Agreement. While he understood that they were to provide a licence of an area equivalent to that enjoyed under the 1993 Lease, Templeville understood that it was to create leasehold rights.

8.99 The defendant further points out that Mr. Brunker, in the course of his evidence, appeared to suggest that he had a note of the meeting of 9 January 1998. However, no such note was provided to Templeville on discovery. In addition, Mr. Brunker gave evidence that he had a subsequent telephone conversation with Mr. Halpenny where Mr. Halpenny suggested that the word 'car' be added to the definition. The defendant points out that this was not averted to in the witness statement provided by him nor is there any attendance of this alleged telephone call. The defendant submits that in the circumstances the overwhelming probability is that this addition was introduced by Mr. Brunker/A & L Goodbody as a clarification in the drafts of 13 January 1998.

8.100 The defendant respectfully submits that Leopardstown's evidence in respect of the meeting of 9 January 1998 is of little evidential value, given that Mr. Brunker's memory of the meeting is at best incomplete and Mr. Justice Clarke cannot recall the meeting at all. On Mr. Brunker's evidence, the meeting went on for 'several hours'. He indicated his understanding of the rights to be granted to Templeville under the Licence and the draft Heads of Agreement as follows:

> "Q. And if, on your understanding, the demised area could not be used for car parking, well, then, there was going to be car parking rights lost in respect of the land hatched yellow, because in the land hatched yellow you had both the right to play tennis and park on a given piece of land, isn't that right?
>
> A. Except that there could be complimentary parking, as I understood it, elsewhere within the race course and lands as owned by --
>
> Q. In other words, you would have to find the full amount of space—
>
> A. Yes, yes.
>
> Q. --Elsewhere—
>
> A. Yes, I accept that.
>
> Q. In relation to—and you understood that to be the intention?
>
> A. Exactly, yes, Judge.
>
> Q. <u>That, as I say, whatever was lost had to be found elsewhere</u>?
>
> A. Yes." [Defendant's emphasis].
>
> (Transcript, day 13, p.79).

8.101 The defendant emphasizes that Mr. Brunker gave evidence that at the meeting he received the Heads of Agreement and the words *'and parking'* handwritten thereon. During cross-examination in relation to that amendment (to which the Court has alluded earlier at para 2.138 of this judgment) the following exchange occurred:

> "Q. I think you said yesterday that you understood that to mean that Mr. Halpenny was keen to ensure –*'just to ensure that there would be car parking rights within the new site*.'
>
> A. That was my understanding.
>
> Q. And that is something that you already would have deduced from the discussion we have just had?
>
> A. Yes, exactly.
>
> Q. So that wasn't coming to you for the first time when this document
>
> A. No, no, it didn't.
>
> Q. It confirms—
>
> A. It confirmed what my understanding was.
>
> Q. In a sense, it's for consistency?
>
> A. Exactly.
>
> Q. With what was contemplated by the agreement itself?
>
> A. Exactly.
>
> Q. <u>Not being sprung on you for the first time at the meeting</u>?
>
> A. No, no. that is why I didn't have any problem with that –
>
> Q. With that document, per se?
>
> A –with the item, yes.

Q. In one sense, that document – that item—the definition for it goes no further than the meaning—

A. Exactly, yes.

Q. – -of the words already agreed, isn't that right—

A. Yes, Judge." [Defendant's emphasis].

(Transcript, day 13, p. 80).

8.102 The defendant says that it is clear that the changes proposed at, and actually made by Mr. Brunker following, the meeting of 9 January 1998, were made transparently. Mr. Brunker understood them to be in accordance with the draft Heads of Agreement – as did Templeville. He understood that Templeville was to obtain a licence to park cars equivalent to its right to park in the area hatched yellow. Templeville understood that it was to have a lease of those areas. Insofar as there was any misunderstanding between the parties it was in respect of the nature of the rights to be provided. The defendant submits that Templeville's understanding that the Licence was to provide a demise of car parking was not an unreasonable expectation, and the Court is again referred to the evidence of Mr. Justice Clarke set out at paras 2.29 and 2.30 above.

8.103 The defendant says that it is clear that the changes proposed by Mr. Halpenny were made openly and transparently and discussed thoroughly. Unlike cases where rectification was ordered on the grounds of unilateral mistake, no suggestion can be made that Templeville sought to divert Leopardstown's attention from any of the changes or to 'slip in' any changes. No suggestion of dishonesty on the part of Templeville can be made. It cannot be said that Templeville made a false or misleading statement. It cannot be suggested that there was any lack of frankness or candour still less unconscionable behaviour sufficient to ground an action for rectification. Mr. Brunker described the meeting as a positive one without malice. In fact, no witness has criticised Mr. Halpenny in respect of his conduct. No suggestion has been made that he acted otherwise than in a professional manner. Mr. Brunker recalled a good relationship and a professional one. No expert witness was called by Leopardstown to opine on the transaction.

8.104 The defendant contends that it is clear from Leopardstown's evidence that Mr. Halpenny acted openly and transparently throughout the negotiation process. It says that unlike cases where unilateral mistake has been found, no assertion is made (or could be made) that he '*put up a smokescreen'*. The opposite appears to be the case. By letter dated 16th April 1998, he was anxious when Mr. Clarke S.C. no longer appeared involved in the matter and recommended his continued involvement. Equally, an attendance of Mr. de Barra of 3 April 1998 includes the following:

> "CH said, it would not be possible to hammer out issues before tues. am as too many new matters had arisen. He felt that a meeting would be required between principals and he would prefer EB to be here given his intricate involvement in the deal. CdB pointed out that the pressure appeared to be that Templeville was stepping up works." [Defendant's emphasis].

The defendant says that this is not consistent with an intention to obscure and/or obfuscate issues. It submits that in order to find that Templeville had knowledge such that unilateral mistake is established, it would be necessary to impute bad faith to Templeville. Again, the defendant says there is no basis for doing so on the evidence of Leopardstown. In the defendant's submission the evidence in fact establishes a professional relationship, which was conducted openly and frankly. And, of course, the issue of Templeville's knowledge cannot arise given Leopardstown's failure to establish any mistake.

8.105 The defendant urges that it would be inappropriate for the Court to infer knowledge on the part of Templeville sufficient to constitute fraud, "sharp practice" or unconscionability. The defendant says there is no basis for doing so on the basis of Leopardstown's evidence.

8.106 The defendant says that if this Court accepts that Leopardstown did not have a defined intention regarding Templeville's car parking entitlements, this disentitles it to any relief. It submits that what is plain beyond question is that Leopardstown intended to enter into an agreement in relation to Templeville's car parking rights as did Templeville. Having done so, and Templeville having relinquished its rights to the area hatched yellow on the basis of that agreement, Leopardstown must be bound by the Licence as executed.

9. The Plaintiff' Case – Submissions:
9.1 The plaintiff has also filed detailed written submissions and has sought to amplify these in oral argument. As it has done with those of the defendant, the Court will now attempt to summarize the plaintiff's main arguments.

The Plaintiff's Core or Principal Submissions – Common Mistake
9.2 The plaintiff's approach has been to focus on particular aspects of the matter that it believes are of particular relevance in relation to the question of whether or not there is common and/or unilateral mistake sufficient to justify rectification. Then it seeks to address the arguments relied upon by the defendant.

9.3 The aspects of the matter on which it has particularly focussed are as follows

1. The terms of the 1993 Lease.

2. Templeville's knowledge of the CPO and its implications for Leopardstown and Templeville in particular as evidenced by the meeting of the 4th November 1997 between Templeville and the County Council.

3. The meeting of the 24th November 1997 between Leopardstown and Templeville and, in particular, the significance of Philip Smyth's conflicting witness statements in the arbitration proceedings and in these proceedings.

4. Draft Heads of Agreement prepared after the meeting on the 24th November 1997 and in particular the final Heads executed by Templeville in December 1997.

5. The meeting of 9th January 1998 and the changes introduced at that meeting.

6. The period from the 9th January 1998 to the date of execution of the final Lease and Licence (identical in terms to the 2nd draft Licence) in June 1998 and, in particular, the evidence in correspondence following the 9th January that **both parties** were operating on the principles as set out in the Heads of Agreement that Templeville should receive ancillary rights only and not a demise.

7. Philip Smyth's failure to give evidence or call witnesses in these proceedings.

It is necessary to deal with each of these aspects of the matter in some detail.

The 1993 Lease - No area demised to Templeville for its exclusive use for parking

9.4 The plaintiff points out that under the terms of the 1993 Lease, Templeville had non-exclusive parking rights only in the Yellow Lands and had such rights only on non-race days. There was no area demised to Templeville for its exclusive use for parking. The plaintiff has submitted that this should be the Court's starting point in considering the intention of the parties as to their parking rights. Further, it should be noted that the parties agreed that the 1993 Lease should be the template for the new Lease which was to be drafted as far as possible on the same basis.

9.5 Under the 1993 Lease, the following areas were demised to Templeville:

> *(i) The Tennis Courts which for the purpose of identification are more particularly delineated on the Map No. 1 annexed hereto and thereon edged green and cross hatched in green and*
>
> *(ii) The Squash Courts, Swimming Pool and Gymnasium and the appurtenances thereto belonging which for the purpose of identification are more particularly delineated on the Map No. 1 annexed hereto and thereon edged red.*
>
> *(iii) The additional plot of ground shown on Map No. 1 annexed hereto and thereon cross hatched in red (measuring 26M X 11.5M X 3.5M in height).*
>
> *(iv) The additional plot of ground shown on Map No. 1 annexed hereto and thereon cross hatched in blue (measuring 11.7M X 4.3M).*
>
> *(v) The old Snooker Room on the First Floor and the appurtenances thereto belonging which for the purpose of identification is shown on the First Floor Plan annexed hereto all of which is edged in red.*

(hereinafter collectively called "the Demised Premises").

9.6 The plaintiff emphasises that the areas demised by the 1993 Lease did **not** include the Yellow Area. In addition to the demise of the Demised Premises under the 1993 Lease, the 1993 Lease provided for the following ancillary rights over areas including the Yellow Area not included within the Demised Premises:

> *… together with a right-of-way for the Tenant and its licensees invitees servants and agents with or without passenger or goods vehicles at all times to pass and repass to and from the public road and along such of the roadways avenues and passages as may be prescribed by the Landlord as are for the time being used by the public attending Race Meetings together with a pedestrian right of way over the areas coloured yellow on the said Map No. 1* ***and the right to park motor cars in such of the Car Parks within the areas edged blue on the said Map No. 1 as may from time to time be agreed together with a right to park motor cars on non-race days within the areas cross hatched in yellow on the said Map No. 1 (or on such other adjacent areas as the Landlord may reasonably specify) …*** *[The plaintiff's emphasis].*

9.7 The plaintiff contends that it is plain to see that there were two distinct sets of car parking rights granted by the 1993 Lease

> (i) The right to park in such of the car parks within the areas edged blue as may from time to time be agreed.
>
> (ii) The right to park on non-race days within the yellow area OR such other adjacent areas as Leopardstown might reasonably specify.

9.8 Further, the plaintiff submits that the car parking rights given to Templeville over the Yellow Area were:

> (a) non-exclusive in nature;
>
> (b) confined to non-race days only;
>
> (c) could be relocated to such adjacent areas as Leopardstown might reasonably specify.

9.9 The plaintiff points out that evidence has been given that the Yellow Area was an overflow car park and little used by the defendant following the 1993 Lease.

9.10 The plaintiff submits that the loss of the Yellow Area for parking as a result of the Motorway was in fact of little or no real relevance to Templeville. In contrast, the loss of the Yellow Area for parking for Leopardstown was going to be a real catastrophe for Leopardstown if the parking could not be replaced.

Meeting of 4th November 1997 between Templeville and Dun Laoghaire / Rathdown County Council

9.11 The plaintiff maintains that the evidence of Mr. John White, to the effect that he was clear in his own mind that Mr. Smyth had a general picture of the implications of the CPO for the Ballyogan Field and Leopardstown Racecourse, is corroborated by the contents of the minute of the meeting on the 4th of November 1997.

Discussion of possible slip road access shows knowledge of Cotter's Field and overpass

9.12 The plaintiff submits that the minute of the meeting of 4th November 1997 shows that Mr. Smyth stated (at paragraph 2) that he did not intend to "*adopt a negative approach to the motorway*" which he saw as having potential for access to his club. He stated that his main objective was to secure slip road access which would allow the proposed bridge across the motorway linking to the proposed overflow racecourse car park to be used to link from the top of slip roads in both directions. The plaintiff says it is clear that he was informed on the 4th of November, 1997, by the County Council that there was "*absolutely no chance that the County Council could allow such a proposal*" on the grounds set out at paragraph 2 of the minute. The plaintiff believes that from the foregoing, it can be deduced that, contrary to the impression given by questioning of Leopardstown's witnesses, Templeville was well aware on the 4th of November (and indeed prior to that date) that there was to be an overpass constructed over the motorway leading to an overflow car park at Cotter's Field.

Mr. Smyth's claim of a leasehold interest in the CPO lands

9.13 The plaintiff further contends that it is clear from paragraph 6 of the minute of the meeting that Mr. Smyth had at that time represented to the Council that he had a "*leasehold interest*" "*in the Leopardstown lands, including the site of the proposed motorway*". The plaintiff says this was not true. In this regard, the plaintiff considers it is noteworthy that he did not offer to provide the County Council, at that point, with the lease which would show that his interest in the relevant portion of the land was merely a licence, but decided himself to supply the County Council with only the map attached to the lease, *as distinct from the lease itself*.

Mr. Smyth's knowledge of a take of at least five acres

9.14 The plaintiff has submitted that it is also clear from paragraph 7 of the minute that Mr. Smyth fully understood, as of the 4th of November, that there was a possibility that Dome No. 2 might have to be removed and rebuilt. The Court's attention was drawn to paragraph 9 of the minute which the plaintiff says clearly shows that Mr. Smyth had a very clear understanding of the fact that the motorway CPO involved taking a very substantial portion of the "*Yellow Area*". In particular, it has been submitted that he knew that the route of the roadway from the Cabinteely Interchange (otherwise referred to as the "Carrickmines Interchange") up to the tennis domes was proposed to be built on lands which would remain within the race course. His architect actually proposed that it could be re-routed so as to travel along the side of the motorway up as far as the proposed over-bridge. The plaintiff submits that he was also aware that, at that point, the road back from the Cabinteely Interchange was proposed to run *between the two tennis domes*. The plaintiff maintains that the argument by Templeville against the road back from Carrickmines being routed between the two domes, and in favour of its being routed parallel to the motorway back to the flyover-bridge, could not have happened without Templeville having a very clear appreciation of the likely order of land to be lost in the Yellow Area.

9.15 The plaintiff submits that it is clear, from the foregoing, that the participants in the meeting had a very clear picture, based on a study of a detailed County Council drawing on which the motorway and the service road leading back from the Carrickmines Interchange was shown, concerning the general likely effect of the motorway on the Ballyogan Field. The plaintiff says that while they could not be 100% certain about the exact implications for Dome No. 2, that there was a clear, general understanding on the part of Mr. Smyth, his adviser, Mr. Condell, and the architect as to the likely take from the Ballyogan Field involved in the CPO process.

9.16 In these circumstances, the plaintiff has submitted that cross-examination of Leopardstown's witnesses along the lines that Mr. Smyth was kept in the dark by Leopardstown on foot of a policy of absolute confidentiality, is very wide of the mark. It contends that while it is true that neither Leopardstown nor Templeville could peg out the exact line of the CPO take, or state to the nearest metre the exact boundary of the remainder of the Yellow Area with the CPO take, the overwhelming probability is that both Leopardstown and Templeville, as a result of their separate discussions with the County Council, separately knew very well that the extent of the Yellow Area to be lost to the motorway was likely to be at least five acres

9.17 Furthermore, the plaintiff urges that if the Court has regard to the plan set out in Drawing LRC/08/02, to which various witnesses made reference, it must conclude that Mr. Smyth, his architect and his adviser, were well aware that it was proposed, at that point, that the road back from the Carrickmines interchange would follow a line which would bring it between Dome No 1 and Dome No 2 as relocated.

9.18 In these circumstances, the Court is respectfully asked to distinguish between what the plaintiff characterises as "the true proposition" viz, that the exact line of the motorway remained unclear and that its exact consequence for Dome No. 2 remained unclear, on the one hand, and "the untrue contention" that Templeville had no awareness of the order of the likely impact on the Yellow Area at the time when it negotiated the Heads of Agreement, on the other hand.

No basis for any belief that in-field car parking would be available

9.19 The plaintiff asserts that the fact that the road marked 10 in drawing LRC/08/02 was likely to go between the two domes (even after the relocation of Dome No. 2), also puts paid to a claim made on behalf of Mr. Smyth in his witness statement to the Arbitrator that he considered that there would be infield car parking available as a result of the building of the motorway and that he therefore caused his solicitor to seek different wording from that which had been provided in the Heads of Agreement to obtain for himself a demise (as distinct from a licence) over a car parking facility to be located inside the racing circuit.

9.20 The plaintiff emphasises that the minute contains no mention at all of a proposal for infield car parking or for public access to the racecourse from Foxrock. Further, it is made clear (in particular at paragraph 10) that the tunnel (shown at No. 15 on drawing LRC/08/02 and described as "*proposed horse/golf underpass under six furlong straight*") was not for any purpose other than to allow non-vehicular movement under the proposed new six furlong straight. There is no suggestion in the minute of tunnel vehicular access to the inside of the racecourse from Foxrock or from the main stand complex at Leopardstown and there was no basis in the record of the meeting for anybody present to believe that any such proposal was being contemplated at that time.

***Implication of C.P.O. for Templeville – Templeville's alleged bargaining power*.**

9.21 Moreover, the plaintiff says, while Templeville has sought to claim that, as a result of the CPO, it had extensive bargaining power *vis-à-vis* Leopardstown, that is plainly not in fact the case. First, in terms of Templeville's objectives, it wanted to extend its premises extensively in order to meet its perceived competition and it specifically needed Leopardstown's consent thereto. The plaintiff submits that it is clear from the evidence of Mr. Justice Clarke and Mr. White, for example, that this was a major driving force for Templeville. In addition, as ultimately transpired to be the case, Templeville was very interested in having Leopardstown finance the extension.

9.22 Secondly, the plaintiff submits that the evidence establishes, e.g., through the testimony of Terry Sudway, that Templeville had no interest in the Yellow Lands that were going to be lost to the CPO sufficient to enable it to claim any form of compensation. If the negotiations with the County Council did not result in an agreement between Leopardstown and the County Council and the part of the Yellow Lands needed for the motorway were taken by CPO, Templeville would have lost all its rights in that part of the Yellow Lands and would have had no rights to financial compensation from either Leopardstown and the County Council. Thus, it was as much, if not more, in Templeville's interests that an agreement would be reached between Leopardstown and the County Council as it was in Leopardstown's interests.

<u>Meeting of 24th of November 1997 between Leopardstown and Templeville</u>

Assertion made by Mr. Smyth in his witness statement

9.23 For the purposes of these rectification proceedings, Mr. Smyth recently prepared a witness statement which reads as follows in relation to the issue of car parking at the meeting of 24th November, 1997:

> *27. " … Dealing specifically with the issues of replacement parking, I pointed out that a similar quantum of parking would need to be provided to Templeville in other areas* ***surrounding its premises. By way of illustration****, I identified a number of* ***possible*** *areas that could be used to make up* ***this similar quantum****. These areas included the area on the map attached to the 1993 lease appearing on the top left hand side of the Yellow Area, the existing car parking areas outlined in blue on the said map (known as car parks 1 and 2) and the area to the front of the grandstand. (Templeville was already entitled to park in the car parks No. 1 and No. 2.) I pointed out that the replacement tennis courts in Dome No. 2 would have to be positioned as close as possible to Dome No. 1* ***which could be on the old racetrack when it was moved as part of the contemplated redesign. I stated that these facilities, both parking and tennis courts, would need to be demised to Templeville in a new lease*** *– in the interests of protecting Templeville's long term plans and facilities."*
>
> *"28. As I outlined* ***these requests*** *Mr. Clarke indicated that they did not seem unreasonable or words to that effect and that he did not have a problem with what I was proposing. The other representatives of Leopardstown, Denis McCarthy, David Power and John White, all indicated their approval." [The plaintiff's emphasis].*

Mr. Smyth's assertion unsupported by contemporaneous accounts including his own solicitor's account.

9.24 There are two contemporaneous accounts of the meeting of the 24th of November 1997. Both of them are attendances by solicitors – Mr. Peter Law and Mr. Conor Halpenny, respectively. In Mr. Law's note, the issue of car parking and the Yellow Area is dealt with at paragraphs 1, 2 and 3. In Mr. Halpenny's note, the same matter is dealt with in the first three paragraphs of page 2. Towards the end of the meeting, the same matters were again discussed and an account of that discussion is to be seen at paragraph 14 of Mr. Law's note and in the last two paragraphs on page 8 and the first paragraph of page 9 of Mr. Halpenny's note.

9.25 The claim made by Mr. Smyth in paragraph 27, just quoted above, *viz*. that he stated "*that these facilities, both parking and tennis courts, would need to be demised to Templeville in a new lease*" is not recorded in any shape or form either in Mr. Law's memorandum of the meeting or in the account of the meeting taken by Mr. Halpenny.

9.26 The plaintiff says there is no corroboration in either note of the suggestion that the three areas pinpointed by Mr. Smyth as the areas in which parking would have to be made available to Templeville were "*by way of illustration*". There is no corroboration for his claim that he "*pointed out that the replacement tennis courts in Dome No. 2 could be located 'on the old racetrack'*". There is no corroboration for his claimed statement that "*both parking and tennis courts … would need to be demised to Templeville in the new lease"*. There is no corroboration of his claim that all of these propositions were assented to by Mr. Clarke or by all of the other representatives of Leopardstown as is suggested in paragraph 28 of his Witness Statement. There is no corroboration for the suggestion that when the meeting reconvened Mr. Clarke confirmed that *the then draft Heads of Agreement* document was acceptable to them and that he would recommend that draft to the Board at the forthcoming meeting.

Other aspects of Mr. Halpenny's note

9.27 The Court's attention is also drawn by the plaintiff to some other aspects of Mr. Halpenny's note of the meeting which related to Point No. 2 on the agenda. The paragraph reads:

> *"On Point No. 2, Frank Clarke indicated that there was no problem with this point, except that they were concerned at tying themselves down to a measurement of ten feet. I suggested that the words 'as close as is possible' or 'as close as is practicable' be used and he concurred with this suggestion."*

The plaintiff submitted to the Court that this was a covert attempt by Mr. Smyth to prevent the construction of a roadway between the two domes, a matter of which Mr. Smyth was aware arising out of his recent meeting with the County Council on the 4th of November 1997, to which meeting no reference was made.

9.28 The Court's attention was also drawn to the next paragraph which reads:

> *"Denis McCarthy commented that talks had taken place with Dun Laoghaire Rathdown County Council who had indicated that they will be paying for the relocation of the dome and that if Templeville cede that part of the Yellow Area to Leopardstown, then Templeville will lose any rights it had in relation to this area. Kieran Condell pointed out that all Templeville would be losing would be its CPO rights, but it would not be losing its environmental rights and it would be reserving its position in this regard."*

The Court was asked to compare this statement with the claim made about CPO rights in the letter from Templeville's Solicitor to Mr. Brunker on the 10th of February 1998, which is considered more fully hereafter.

A careful comparison of the two accounts shows a deceptive intent

9.29 The plaintiff submits that an examination of paragraph 27 of Mr. Smyth's Witness Statement in this case shows it to be a carefully crafted departure from the contemporaneous note prepared by his own solicitor in respect of the meeting of the 24th November 1997. The first sentence of paragraph 27 reads:

> *"27. Referring to point No. 1, I explained that if part of the Yellow Area was to be acquired by the County Council, for the purpose of the Motorway, Templeville would lose lands over which it was entitled to play tennis, build additional courts and to park cars."*

9.30 The first paragraph of page 2 of Mr. Halpenny's note of the meeting on the 24th of November, 1997, reads as follows:

> *"In relation to point No. 1, Philip Smyth explained that if part of the Yellow Area is purchased by Dun Laoghaire Rathdown County Council for the Motorway, then Templeville will lose land over which it has rights to play tennis, build tennis courts and park cars."*

9.31 The plaintiff contends that it is clear that Mr. Smyth in preparing his Witness Statement is at this point relying absolutely on Mr. Halpenny's note. However, the next sentence of paragraph 27 reads:

> *"If the seven domed tennis courts (Dome No. 2) and if the four existing outdoor tennis courts needed to be relocated, and if parking in the area was to be reduced, Leopardstown would have to replace those facilities in other areas* ***surrounding Templeville's premises."***
> [The plaintiff's emphasis].

9.32 Mr. Halpenny's note, by contrast, of what was said at the meeting was:

> *"If the dome and four existing outdoor tennis courts were to be relocated and if parking in this area is to be diminished, parking will have to be made available to Templeville in other areas".*
> [The plaintiff's emphasis].

9.33 Later in paragraph 27, it reads:

> ***"By way of illustration****, I identified a number* ***of possible*** *areas that could be used* ***to make up this similar quantum****. These included the area on the map attached to the 1993 lease appearing on the top left hand corner of the Yellow Area, the existing car parking areas outlined in blue on the said map (known as car parks No. 1 and No. 2) and the area to the front of the grandstand." [The plaintiff's emphasis].*

9.34 However the corresponding record in Mr. Halpenny's note reads as follows:

> *"He pinpointed these areas as being the area to the top left hand side of the Yellow Area, the existing car parks outlined in blue over which Templeville already has demised car parking and the area to the front of the grandstand."*

9.35 Mr. Smyth's recently made Witness Statement continues:

> *"I pointed out that the replacement tennis domes in Dome No. 2 would have to be repositioned as close as possible to Dome No. 1* ***which could be on the old race track,*** *when it was moved as part of the contemplated redesign****. I stated that these facilities, both parking and tennis courts, would need to be demised to Templeville in a new lease – in the interests of protecting Templeville's long term plans and facilities.****" [The plaintiff's emphasis].*

9.36 Mr. Halpenny's note, by total contrast, continues as follows:

> *" … This would have to* ***be accommodated*** *in any new lease arrangement."*
>
> *"Furthermore, a right will have to be granted to Templeville to build another 11 outdoor tennis courts on the adjoining lands, if our building rights in relation to these 11 courts are extinguished.*
>
> *It was also discussed that if the new location of the dome happens to be situate on one or two of the existing outdoor tennis courts thereby resulting in the loss of these outdoor tennis courts, then Philip Smyth indicated that he would not be unduly perturbed by this provided that an alternative two courts were built. He pointed out that at the end of the day he did not want to be left without any of the courts which he already has and he wants to have the right to build the remaining seven courts at his own expense if required. Frank Clarke indicated that Leopardstown would have no difficulty with these proposals, recognising that it was their requirement to have the dome moved."*
>
> [The plaintiff's emphasis].

9.37 The plaintiff submits that again, in this regard, there is a gross and deliberate difference between what appears at the last paragraph of page 7 of Mr. Halpenny's contemporaneous note to the effect:

> *"Approximately ten minutes later we were invited back in and Frank Clarke confirmed* ***that the matters which had been discussed and agreed appeared to be acceptable*** *to them and they would recommend this to the Board and the forthcoming meeting"*
> [The plaintiff's emphasis].

and the claim made 11 years later at paragraph 29 of Mr. Smyth's Witness Statement to the following effect:

> *"When the meeting reconvened, Mr. Clarke confirmed that* ***the draft Heads of Agreement*** *document was acceptable to them and they would recommend this to the Board at the forthcoming meeting."*
> [The plaintiff's emphasis].

9.38 The plaintiff contends that the difference in meaning is stark and very important. It says that the fact that the relevant paragraphs of Mr. Smyth's statement are based on corresponding paragraphs in Mr. Halpenny's note is obvious, as is the fact that his witness statement has attempted to radically alter the meaning of those paragraphs to convey to the Court the impression that the Leopardstown representatives at the meeting were informed of and agreed to the granting of a demise of car parking to replace the 5.5 acres being lost to the CPO process in "*areas surrounding its premises*".

9.39 The plaintiff has submitted that the series of departures in Mr. Smyth's Witness Statement from what Mr. Halpenny had carefully noted to be his position as stated at the meeting on the 24th of November, 1997, is no accident. The plaintiff has further submitted that the differences which emerge between these accounts of the meeting of the 24th of November 1997, are contrived and mendacious. It says they are intended to buttress a claim by Mr. Smyth that he understood from that meeting that he had secured the agreement of Leopardstown's representatives to a demise of land in or around Templeville's facility for car parking to replace a similar quantum of lost car parking space in the yellow area. The plaintiff contends that these disparities are not merely incredible on their face, but also explain in large measure the unwillingness of Mr. Smyth to offer any evidence in these proceedings.

9.40 The Court is also reminded that Templeville did not seriously attempt to put any point of difference between paragraph 27 of Mr. Smyth's statement and the relevant paragraphs of Mr. Halpenny's note to any of Leopardstown's witnesses as being a true account of what happened. On the contrary, says the plaintiff, the transcript (*inter alia*, 20th May 2009, Page 30:Line 29, Page 31:Line 3, Page 31:Line 29, Page 33:Line 1 – 12) shows that, on Mr. Smyth's instructions, the claim that there had been an agreement that

both parking and tennis courts would need to be demised to Templeville in a new lease was abandoned in favour of some vague reference to permanence. There is no reference in either Solicitors' note to permanence either. Moreover, says the plaintiff, there is clear evidence that no agreement to a demise of the "lost" car parking was either sought or obtained. On page 8 of Mr. Halpenny's note, the following appears:

> *"In relation to the Yellow Area, the licence will be granted in relation to this area, pending the relocation of the dome. It was agreed that the rights that survived the motorway which Templeville currently holds, would remain in the new lease* ***and the rights which are affected by the motorway would be covered by a licence****." [The plaintiff's emphasis].*

9.41 The plaintiff maintains that even if any credibility is attached to this claim made in writing for the purpose of these proceedings, it would mean that Mr. Smyth was actually suggesting that he understood that he had secured agreement to the fairly startling proposition that the area in front of the grandstand (i.e. between the grandstand and the racecourse used by bookmakers and the public on race days) was to be the subject matter of a demise to him. Not merely that, but it was to be the subject matter of a demise without even a licence back to Leopardstown on race days.

9.42 The plaintiff has respectfully submitted to this Court that the account given in Mr. Smyth's Witness Statement to this Court of the meeting of the 24th of November and, in particular, his claim that the representatives of Leopardstown calmly accepted his suggestion that the area between the grandstand and the racecourse should be the subject matter of a demise to him is simply not worthy of belief. It says it is particularly remarkable when one considers that Mr. David Power, the major shareholder in Paddy Power, and the leading on-course bookmaker, with what would, as per the evidence of Mr. Justice Clarke on day 6, be generally considered as the best pitch, was in attendance and allegedly acquiesced to the surrender of that pitch.

9.43 The plaintiff suggests that notwithstanding that these stark claims were made at paragraphs 27 and 28 of Mr. Smyth's Witness Statement to this Court, he then instructed his counsel to water down that claim and it was put in a tentative and weak way by counsel in cross-examination, abandoning the words "*demise or lease*" and substituting for it a vague suggestion that Mr. Smyth had sought some degree of permanency for the arrangements he was proposing.

9.44 The plaintiff has submitted that notwithstanding what it characterises as "that mendacious claim and the subsequent retreat from it directed by Mr. Smyth, in cross-examination", Templeville nonetheless maintained the line that it was the understanding of Mr. Smyth on foot of the meeting of the 24th of November that he was to receive a demise of all the land required for car parking in substitution to the licensed areas in the yellow area.

<u>Mr. Smyth's account of the events of 24th November 1997 in his witness statement in these proceedings conflicts directly with his account of events as given in his arbitration witness statement</u>

9.45 The plaintiff submits that the logical implication of the claim that a demise was agreed on the 24th of November 1997 is that Mr. Smyth must have also believed that the Heads of Agreement document signed by him on 17th December 1997 was also designed to provide for such a demise of a large area of land for car parking. This completely conflicts with the case previously put by Mr. Smyth in a witness statement signed by him on the 8th of February 2007 provided to Leopardstown and to the arbitrator, Paul Gardiner S.C., in the arbitration between Leopardstown and Templeville.

9.46 The attention of the Court is drawn to paragraph 38 of the statement which reads as follows:

> *"38. During our numerous meetings John White and I discussed the matter of car parking generally, and the fact that there was no specific information as to the extent of land which might be required for the Motorway, and the various options which Leopardstown might have to consider in this regard. John White referred to the probability that Leopardstown would have to do what a large number of other racecourses were doing about car parking – namely, use the land within the racecourse for car parking. Access could be via a tunnel under the racecourse. (The concept of tunnels under the racetrack is not new at Leopardstown.) As the racecourse was probably going to be redesigned, depending on the effect of the South Eastern Motorway, all of this seemed entirely feasible. It was this observation which prompted me to instruct my Solicitor to ensure that the new site would also include car parking lost to the CPO and ensure that this land would be closest land available near Dome No. 1 – the nearest dome to the racetrack****. This involved a change in the definition of 'The New Site' from what was in the draft Heads of Agreement****, to that which was put into the subsequent drafts of the lease and licence by Leopardstown's Solicitor, Messrs. A & L Goodbody, and in the executed form of those documents."*

9.47 The plaintiff contends that the significance of Paragraph 38 is as follows. It is a written explanation (to the truth of which Mr. Smyth subsequently swore) of the genesis of the difference between the clear meaning of the Heads of Agreement document which had been signed by Mr. Smyth on the 17th of December 1997 (which made no provision whatsoever for a demise of car parking to Templeville) and the *"definition of The New Site" "which was put into the subsequent draft of the lease and licence"*.

9.48 The plaintiff says it is a solemn and attested claim that Mr. Smyth explicitly instructed his Solicitors to change the definition of "*The New Site*" from what was in the draft Heads of Agreement to that which appears in the lease and licence. It amounts to a clear admission that Mr. Smyth had, subsequent to his signing the "*Heads of Agreement*" document, decided that a change from what was apparently agreed in that document would be required in order to *"ensure that The New Site would also include car parking lost to the CPO".*

9.49 The plaintiff says it is an explanation as to why the Heads of Agreement, which obviously does not provide for any demise of land for car parking, was considered, on reflection by Mr. Smyth, to be inadequate, and why a very radical change (i.e. a demise of the land to be used for car parking) was to be inserted at his instance into the lease and licence agreement. The Court was respectfully asked to consider whether that version was ever put to Mr. White in any substantial way in the course of his cross-examination. The plaintiff submits, correctly in the Court's view, that it was not put in any substantial way.

9.50 As already set out above, Mr. Smyth in his Witness Statement in the present proceedings deals with the matter as follows:

> *"35. The matter then moved on to negotiations between the Solicitors for the purpose of drawing up the formal documentation as required by the IHA before they would give their consent. I was conscious from my discussions with Mr. White that it was likely that the racecourse was going to be redesigned and a seven furlong straight was going to be moved and that it was possible that Leopardstown would locate car parking within the racetrack. Kieran Condell and Conor Halpenny were dealing with the matter on my behalf and I told them to make sure that the formal agreements reflected the fact that The New Site, to be demised to Templeville, would include the tennis courts and car parking and*

that it would be the closest land available to Dome No. 1 (which is the dome nearest to the racetrack). I was not present at the meeting of the 9th of January 1998 which took place between Kieran Condell and Conor Halpenny for Templeville, and Eric Brunker and Frank Clarke for Leopardstown. I believe I was abroad at this time. However, subsequent to the meeting, Mr. Condell telephoned me and assured me that negotiations were proceeding smoothly and in particular that there was no problem about the fact that the definition of The New Site, to be demised to Templeville, was to include both tennis courts and car parking."

9.51 The plaintiff submits that the common elements of these two paragraphs are obvious. However, they differ in this respect. In 2007 in the course of the arbitration proceedings (for the purposes of which the intentions of the parties were not relevant in the way that they are for rectification proceedings), Mr. Smyth openly acknowledged the instruction to his solicitors, to seek a demise of land for car parking as part of the new site, came *after* the execution of the Final Heads of Agreement. The plaintiff says that if what Mr. Smyth stated at that time were true this would completely give the lie to Mr. Smyth's assertion, in his statement delivered in these proceedings, that such demise had been agreed at the meeting of the 24th November 1997. However, as the Court understands it, the plaintiff is not asserting the truth of the contents of either document. It will be recalled that in the case of the arbitration statement it was specifically stated by Counsel that the plaintiff was in fact relying on the untruth of it. As the Court understands it the plaintiff regards it as sufficient to draw the Court's attention to the fact of what each statement respectively contains, the circumstances in which the statements were made, and the seemingly irreconcilable differences between them.

A highly misleading re-writing of the record by Mr. Smyth

9.52 The plaintiff says that it would appear from the Witness Statement delivered by Mr. Smyth in these proceedings that the prior claim made in the arbitration proceedings, that a realisation on the part of Mr. Smyth that "*in field car parking*" might be available inspired him to seek a *change* in what was provided for in the Heads of Agreement to obtain a demise of such lands, is completely abandoned.

9.53 The plaintiff contends that in its place is put a wholly incredible claim that the outcome of the meeting of the 24th of November was an explicit agreement to a demise of land for car parking which logically implies that all of the subsequent drafts of the Heads of Agreement drafted by Mr. Smyth's solicitors and furnished by them for approval by Leopardstown (including the final Heads as executed by Mr. Smyth) always envisaged such a demise of land for car parking but somehow failed to mention it.

9.54 The plaintiff points out that the attendance notes, however, do confirm that Conor Halpenny agreed to submit a redraft of the Heads of Agreement to incorporate what had been agreed between the parties that day. The urgency of so doing, that they could be agreed and approved between the two parties and in particular by the Board of Leopardstown on the 5th December 1997, was also agreed. It is urged that in that context the Heads of Agreement submitted to Frank Clarke S.C. on the 2nd of December 1997, his reply dated the 3rd of December 1997, and Mr. Halpenny's rejoinder fully accepting Mr. Clarke's amendments (also dated the 3rd of December 1997) speak for themselves.

9.55 In the circumstances the plaintiff invites the Court when it has considered all the evidence to draw the inference that there was a highly misleading re-writing of the record by Mr. Smyth.

If unilateral mistake is considered, Mr. Smyth's actions in identifying parking locations at the meeting of 24th November 1997 was misleading.

9.56 The plaintiff submits that if it had **not** been Templeville's intention to get a demise of any area for car parking on the 24/11/97 and that is what Mr. Smyth and Mr. Halpenny had understood that Leopardstown and Templeville had agreed, Mr. Smyth's pinpointing the four areas for parking which he did is perfectly understandable and unremarkable. Indeed, it may be regarded as evidence of the common intention of the parties to provide parking rights in these areas by way of licence, as contended for by Leopardstown

9.57 However, it is Leopardstown's case that the alleged intention of Templeville to get a demise of any area for car parking on the 24th November 1997 has been conclusively disproved as set out above. Moreover, it has been submitted that if, on the 24th November 1997, Templeville had understood that Leopardstown had agreed to give a demise of an area for car parking, which is what Templeville appear to be claiming, the following situation is clear from the evidence with respect to the four areas pinpointed:

1. It was not reasonably believable that Leopardstown would have agreed to demise any of the areas but it was self-evidently inconceivable that Leopardstown would have agreed to demise either:

a. the area in front of the grandstand, where the bookmakers' pitches are and where race goers watch the races from on race days; or

b. all four areas combined so that all the available parking in and around the racecourse grandstands, the best parking for race goers on race days, would only be available to Templeville and would no longer be available to Leopardstown on race days.

2. Templeville had to have known that. It would simply not be credible for Templeville to claim otherwise.

3. By pinpointing these areas, knowing that Leopardstown could not conceivably be considering the demise of same, Mr. Smyth deliberately misled Leopardstown regarding his intention when pinpointing those areas. If his intention was to obtain a demise of these areas, his pinpointing of same could only be to mislead Leopardstown to believe that he was not intending a demise.

4. Mr. Smyth's actions in this regard were self-evidently *mala fide* and amounted to "sharp practice", at the very least.

<u>The Heads of Agreement (as prepared after the meeting of 24th November 1997, as accepted by the Board of Leopardstown subject to approval by the Board of the I.H.A. and as executed by Mr. Smyth on 17th December 1997.</u>

9.58 The plaintiff submits that following the meeting of the 24th of November 1997, between representatives of Leopardstown and Templeville and their legal advisors (a lengthy note of which was taken by Mr. Law and separately by Mr. Halpenny), Mr. Halpenny was, by agreement between the parties, requested to draw up a formal Heads of Agreement between the parties to embody their agreement. He subsequently presented a number of versions of the Heads of Agreement, as adapted by him, and ultimately Philip Smyth signed a version of it on the 17th of December 1997, which Heads of Agreement were given to Leopardstown's representatives on the 19th of December 1997 (Mr. Smyth having left the country).

9.59 The plaintiff also points to the evidence that on Friday the 5th of December 1997, Mr. Clarke brought a (slightly earlier) version of the same document (the differences between the two documents have no relevance to these proceedings) to the Board of Leopardstown which accepted the terms of the Heads of Agreement subject to approval by the Board of the I.H.A., its parent body.

Common intention as evidenced by Heads of Agreement

9.60 The plaintiff has submitted that as and from the second draft Heads of the 27th November 1997, it is obvious from Clause 1 of the Heads of Agreement document that Mr. Smyth and his lawyers, who drafted the document, hoped that the document itself would become a binding legal document in its own right. That clause includes the following paragraph:

> "Leopardstown and Templeville, after the benefit of legal advice and with the intention of creating legally binding contractual relations are entering into this 'Heads of Agreement' document for the purpose of resolving various outstanding matters and differences which have arisen between the said parties."

9.61 The plaintiff says it is equally clear that Leopardstown though agreeing to its terms (subject to I.H.A. approval), was not willing to accord the Heads of Agreement the status of a legally binding contract. The plaintiff submits that the Heads of Agreement as sent to Mr. Brunker, was nonetheless an "*outward expression*" of agreed terms which the parties intended their lawyers to embody in written instruments which would be executed as enforceable legal agreements.

9.62 The plaintiff submits that as of the 4th draft, Clause 1 of the Heads of Agreement dealing with "*Interpretations*" defined "*the New Site*" as:

> "A parcel or parcels of land, situate adjacent to the first dome upon which Templeville's tennis facilities which are currently located on the Yellow Area are to be relocated by reason of the CPO, and including so much of the land upon which the second dome and four tennis courts are currently located which is not required for the CPO."

9.63 This, it asks the Court to note, was Mr. Halpenny's draft. The plaintiff says it was wholly incompatible with a demise of 5.5 acres for car parking as part of the new site.

9.64 Clauses 2 C of the Heads of Agreement has been recited earlier in this judgment at para 2.64, but as the plaintiff wishes to emphasise some aspects of it, it is necessary to do so again. It provided as follows:

> "C. At some date in the future, Leopardstown shall serve a notice on Templeville nominating a site ('the new site') more particularly described at E below to which it will call upon Templeville **to relocate its second dome and tennis facilities and such of the 4 outdoor tennis courts as may be required to be relocated**.
>
> [The plaintiff's emphasis].
>
> The said notice shall identify a reasonable period of time ('the notice period') during which this relocation is to take place and by which time it is to be completed. At the expiry of the notice period the following works and events shall have been completed or occurred:-
>
> (i) The second tennis dome and tennis facilities together with such of the 4 outdoor tennis courts as may be required, will be relocated to the new site.
>
> **(ii) The permanent demise of the new site shall be granted subject to a licence back to Leopardstown for the use of the all out door tennis courts (except for the one remaining to the front of the Westwood Clubhouse) for parking on race days**.
>
> [The plaintiff's emphasis].
>
> (iii) A supplemental deed to give effect to (ii) above will be granted incorporating a revised map, clearly identifying the new location and arrangement. This deed shall also provide for the additional and replacement car parking rights referred to in 3.
>
> (iv) The licence referred to at B above shall come to an end."

9.65 The Court's attention was also drawn to Clauses 2 D & 2 E, respectively, of the Heads of Agreement which have also been recited earlier in this judgment at para 2.64.

9.66 Clause 2 G of the Heads of Agreement provides as follows:

> "The matter of **replacement of Templeville's existing car parking rights generally and following its surrender of the present car parking rights** under the old lease is dealt with at 3 below."
>
> [The plaintiff's emphasis].

9.67 Again, the Court was reminded of the terms of Clause 3 of the Heads of Agreement, which is recited earlier in this judgment at para 2.64.

9.68 Clause 12 of the Heads of Agreement which has not been recited heretofore (although it is referred to at para 2.52 as clause 13 in the third Heads of Agreement - and later renumbered as clause 12 in the fourth Heads of Agreement) provided as follows:

> "12. Access On Race Days
>
> The prohibition contained in the old lease relating to access to the Westwood Club on race days (together with the side letter which governs same) shall not be repeated in the New Lease.
>
> Access to the Westwood Club generally shall be unfettered, save as hereinafter provided.
>
> Access to the Westwood Club on race days shall be in accordance with the terms and conditions attached hereto (to be supplied by John White and approved by Templeville).
>
> An arbitration clause shall be incorporated in the New Lease to resolve any difficulties which may arise in relation to access on race days."

9.69 The Court's attention was also drawn to one aspect of Clause 14 of the Heads of Agreement, which has also not been recited heretofore It provided as follows:

> "Furthermore, unless otherwise indicated the terms and provisions of this 'Heads of Agreement' shall be incorporated into the New Lease and/or in the proposed licences to be granted."

9.70 Clause 16(d) of the Heads of Agreement, which again has not been previously recited, provides as follows:

> "(d) It is acknowledged and agreed between the parties that this 'Heads of Agreement' and the new documentation intended to be entered into shall form the basis of 'a fresh start' for both parties and the differences which have arisen in the past and which have been canvassed in detail in correspondence shall be considered to be hereby resolved and waived by each party."

9.71 Clause 17, which has not been previously recited, provides as follows:

> "17. Summary of Documentation
>
> The following documentation will be prepared in format and wording to be approved by the legal advisors to Leopardstown and Templeville:
>
> (a) The New Lease,
>
> (b) The licence referred to at 2(b) above for the domed tennis facilities and four tennis courts,
>
> (c) A licence for the tote hall to the 30th of April 1998, a letter from A & L Goodbody will probably suffice,
>
> (d) The licence back in relation to the bar on race days,
>
> (e) The document referred to at 12, to be prepared by John White, if not already attached hereto."

No demise of land for car parking contemplated by Heads of Agreement

9.72 The plaintiff submits that as a matter of ordinary construction and plain common sense the "*Heads of Agreement*" document clearly is an "*outward expression*" of an agreement between the parties that the New Site to be demised to Templeville consisted of a parcel or parcels of land sufficient to accommodate the maximum number of tennis courts and the dome provided for under the agreement, and, furthermore, that the rights in respect of car parking were to be by licence only in accordance with Clause 3 and not to be in the nature of a demise of the land over which the car parking rights were to be exercised.

9.73 The plaintiff further submits that on no reasonable, objective construction of the Heads of Agreement document as furnished to Leopardstown by Templeville's solicitors, as considered by the Board of Leopardstown on the 5th of December 1997, or as signed by Philip Smyth on the 17th of December, could it be argued that it provided for a demise of a very considerable area of land (the approximate size of which was known to the parties at the time and which we now know to be 5.5 acres) as part of the New Site immediately adjacent to the first dome ***in addition to*** the car parking rights provided at Clause 3(a) – (d).

Meaning of phrase "tennis facilities and rights"

9.74 The plaintiff urges that an attempt is made in Templeville's submissions to advance what the plaintiff characterises as "the very contrived argument" that the term "*rights*" as it appears in the phrase "*tennis facilities and rights*" can only mean, and must be read as meaning "*car parking rights*". The plaintiff has submitted that this wholly ignores the fact that the phrase is in fact "*existing tennis facilities and rights*" when used in relation to the Yellow Area. The plaintiff says that Templeville *had existing tennis facilities* in the Yellow Area but it *also had separate* and existing *tennis rights* in the Yellow Area – namely the right to construct extra tennis courts there *in addition* to its "*existing tennis facilities*".

9.75 The plaintiff contends that Templeville's argument is clearly wrong. It submitted that the unconstructed tennis courts which Templeville had "*rights*" to construct could by no stretch of language or imagination be described as, referred to as, or understood as meaning the "*existing tennis facilities*", or be included in that term. The plaintiff has submitted that there is no clearer or more obvious interpretation of the term "*rights*" when used in that context than the rights Templeville had to construct extra tennis courts on the Yellow Area.

The Opinion of Hugh O'Neill S.C.

9.76 The plaintiff also draws attention to the interpretation given by Hugh O'Neill S.C., to the Heads of Agreement. At page 9 of his Opinion provided to Leopardstown in January 1998 concerning issues between Leopardstown and Templeville and exhibited in the Witness Statement of Frank Clarke, Mr. O'Neill makes the following comments on the Heads of Agreement:

> *"In summary, the Heads of Agreement, provides that in return for permission being granted to Templeville to erect the extension to the front of the Clubhouse and the "junior area"* ***Leopardstown is entitled (at its own cost) to relocate the second dome and adjoining tennis courts to a suitable alternative site (as yet undefined)*** *and to use on race days during limited hours Templeville's bar facilities. While it is difficult for me to express a view on the commercial sense of the Heads of Agreement, having regard to the desirability of being able to deal freely with the County Council and of resolving the existing matters in dispute (most of which I feel would not be decided in a Court of Law in Leopardstown's favour), it seems to me that the necessity for some agreement with Templeville speaks for itself.* ***Moreover, it does not seem to me on the basis of the Heads of Agreement itself that there is anything in that Agreement which will affect Leopardstown's property interest or the operation of its race and golf courses to any greater extent that exists at present****." [The plaintiff's emphasis].*

9.77 The plaintiff says that it is clear from the above and in particular the statement of Mr. O'Neill that there was nothing in the agreement that would affect Leopardstown's interests or the operation of the race course and the golf course to any great extent and that he did not read the Heads of Agreement as entitling Templeville to a demise of an exclusive area or areas for car parking.

9.78 Of course, the proper construction of the Heads of Agreement is a matter for this Court in the last analysis, but as there was no objection to the introduction in evidence of Mr. O'Neill's Opinion the Court was disposed to receive, and will consider, this evidence *de*

bene esse.

The Clarke letter of 3rd December 1997 and its acceptance

9.79 The plaintiff has referred the Court, on the question as to whether there was any doubt in relation to the terms of agreement on this issue, to the fax sent by Frank Clarke S.C., on the 3rd of December 1997, to Conor Halpenny, Templeville's Solicitor, setting out a number of proposed amendments and stating:

> "…
>
> <u>*Paragraph 2B*</u>
>
> *I am concerned about the use of the words in parenthesis in the second paragraph i.e. 'as if it had been a grant of lease'. As the Yellow Area does not form part of the demised area in the current lease (though I agree its precise status is somewhat ambiguous) I would not like to have a phrase that seemed to imply an acceptance of an interest greater than a licence in those areas. I do not think that the relevant paragraph would be any the less strong if the matter in parenthesis were deleted.*
>
> […]
>
> *It seems to me that the above amendments would simply define the New Site as the area which your clients are going to ultimately get for tennis courts,* ***and leave parking arrangements solely to be dealt with outside the demise*** *by way of the specific provisions in that regard in Clause 3."* [The plaintiff's emphasis].

9.80 Further, it is pointed out that P.C.L. Halpenny and Son responded stating the following:

> ***"I note the suggested amendments, all of which would appear to be in order****. You will see that when I was preparing the 'Heads of Agreement' document, I was contemplating that 'the new site' would be a parcel of land entirely independent of the Yellow Area and it was for this reason that I was proposing that the New Lease would demise Templeville its tennis facilities over both the new site and such of the Yellow Area as is not affected by the CPO. I note your suggested amendments would give effect to the new site incorporating both the new parcel of land and such of the Yellow Area whereon the current tennis courts exist and as is not affected by the CPO.* ***I agree that your suggestions probably make the ultimate document drafting exercise more simple. Accordingly, I have incorporated each of the amendments which you have suggested****. I have also included 'the new site' in the interpretation section on the first page, merely for the purpose of clarity and I trust you approve of this further proviso.*
> [The plaintiff's emphasis].
> *Of course if you have any query on this point or if you wish to discuss an alternative wording please do not hesitate to telephone me."*

9.81 The plaintiff has submitted that in these circumstances, and bearing in mind that Templeville's Solicitors had been present at the meeting on the 24th of November 1997, nine days previously, it is abundantly clear that the parties had agreed that the car parking facilities which were being provided for in *lieu* of the lost car parking licensed rights over the Yellow Area were not to be granted by way of demise but were to be granted by way of licence.

9.82 The plaintiff has further submitted that this correspondence also undermines the assertion of Philip Smyth in his Statement of Evidence in these proceedings, that an agreement for a demise of car parking was reached at the meeting of the 24th November 1997. The plaintiff says that if Mr. Halpenny had understood that the agreement of the 24th of November was an agreement for a demise of land in addition to the areas specified in the Heads of Agreement to accommodate the lost car parking rights previously held by way of licence, he would surely have immediately objected in the strongest possible terms to the fax he received from Mr. Clarke and would have pointed out that Mr. Clarke was proposing a very major reduction in what had already been agreed on the 24th of November. At a minimum he would have taken the opportunity to avail of Mr. Clarke's offer to discuss the suggestions.

9.83 Instead, says the plaintiff, it would appear that Mr. Halpenny advanced a totally different reason for having offered the ambiguous wording which Mr. Clarke addressed in his letter. Furthermore, Mr. Halpenny accepted and incorporated all of Mr. Clarke's amendments without demur or objection or protest of any kind whatsoever. The plaintiff asserts that Mr. Smyth's contention in his Witness Statement in these proceedings in relation to the meeting of the 24th November, in respect of which he has chosen not to give evidence, has already been shown to be mendacious insofar as it does not correspond either with his own solicitor's note of the meeting, or with his earlier statement in the Arbitration. The plaintiff says that this mendacity is further underlined by this exchange of correspondence between Mr. Clarke and Mr. Halpenny on the 3rd December 1997.

9.84 Moreover, the plaintiff has respectfully submitted that, if this Honourable Court ultimately comes to consider the question of unilateral mistake, this exchange of correspondence has particular significance. The plaintiff says that if it had been the case (as Mr. Smyth now claims in the within proceedings) that it was understood by Templeville that the parties had agreed at the meeting of the 24th November 1997 that there would be a demise of an area for car parking, the response of Templeville's solicitors to Mr. Clarke's explicit articulation of Leopardstown's understanding that parking was "*solely to be dealt with outside the demise"* can only be explained in terms that are unfavourable to Templeville.

9.85 The plaintiff maintains that on the basis of Mr. Clarke's letter, Templeville cannot claim that it did not know the position and understanding of Leopardstown that parking was "*solely to be dealt with outside the demise*". It says that if Templeville believed otherwise, Templeville's solicitors' response was, at best, misleading. The plaintiff submitted that, in the context of issues relevant to unilateral mistake, such response would, at the very least, render it unconscionable to allow Templeville to resist rectification for unilateral mistake.

Overwhelming evidence of outward accord on a licence approach

to the replacement car parking issue

9.86 In these circumstances, the plaintiff invites this Court to conclude that there is overwhelming evidence that as of the 24th of November and ensuing days Leopardstown and Templeville had come to an agreement, the "*outward expression*" of which is to be

found in the text of the Heads of Agreement (and, indeed, in the exchange of correspondence between Mr. Clarke and Mr. Halpenny on the 3rd December 1997), that the "*New Site*" was to be confined to tennis facilities and that Templeville was to receive car parking rights only by way of licence as provided for in Clause 3 of the Heads of Agreement, and not by way of lease or demise of any of the lands referred to in Clause 3.

9.87 The plaintiff has further submitted that this agreement in relation to the car parking rights of Templeville on the Leopardstown campus and, in particular, the clear agreement that the rights would be by way of licence and not by way of demise of any of the lands over which they were exercised amounted to a "*continuing common understanding*" which had been given outward expression in the form of the Heads of Agreement document, and that there is overwhelming evidence that no attempt was made to question, vary or renegotiate or set aside that common understanding and agreement at any point up to the 9th of January 1998.

9.88 The plaintiff says that by signing the Heads of Agreement on the 17th of December and by authorising his solicitors to deliver the signed Heads of Agreement on the 19th of December 1997, Mr. Philip Smyth, on behalf of Templeville, must be taken as formally indicating that there was such a "*common understanding*" that the alternative car parking arrangements were to be provided by way of licence (and not by way of demise), and in accordance with Clause 3 of the Heads of Agreement, that the Heads of Agreement represented, as far as Templeville was concerned, an "*outward expression*" of that common understanding. The plaintiff submits that he was, in addition, expressing agreement by Templeville that the lease and licence agreement contemplated by the Heads of Agreement which he had signed would embody those terms (as provided for in Clause 14).

9.89 The plaintiff notes that Templeville, in the section of its closing submissions headed "*Concluded Agreement*", appears to assert that the Heads of Agreement are not relevant from the point of view of rectification for common mistake because they were never executed by Leopardstown and in any case could not have been executed by Leopardstown without the approval of the I.H.A.. The plaintiff says that ostensibly this assertion conflicts directly with the law as cited by Templeville earlier in the same submissions, which makes clear that all that is required for the purposes of rectification for common mistake is an outward expression of accord, which does not have to be contained in a complete concluded and legally binding agreement. The fact that Leopardstown required the consent of the I.H.A. to execute the Heads of Agreement did not preclude it from forming a common intention prior to receiving such consent. The party with whom Templeville was entering into an agreement was Leopardstown and not the I.H.A. Any issue of consent from the latter was a matter for Leopardstown and not Templeville.

9.90 It has been suggested by the defendant that there was no concluded agreement between Leopardstown and Templeville capable of rectification because a number of matters were still the subject of active negotiation after the 9th of January, when the words "*and parking*" were inserted into the definition of the "New Site" in the draft licence agreement. The plaintiff submits that none of these matters (which are dealt with below) in any way cuts across the accord or agreement between the parties as embodied, by way of outward expression, in the Heads of Agreement (as approved by Leopardstown on the 5th of December and as signed by Philip Smyth on the 17th of December 1997) which made full and comprehensive provision by way of licence (and not by demise) for replacement car parking rights for Templeville in respect of the rights lost in the Yellow Area by reason of the CPO process.

9.91 The plaintiff contends that Templeville's argument in this regard ignores all the case law authority which is to the opposite effect. It was submitted that in the cases of *Joscelyne v. Nissen and Rooney and McParland Limited v. Carlin*, the Courts of England and Wales and of Northern Ireland, respectively, concluded that it was:

> *"not necessary to have a concluded contract antecedent to the written agreement: it was enough if there was a common continuing intention in regard to a particular provision of the agreement … but [that] an outward expression of accord, as well as convincing proof that the concluded instrument did not represent the parties' common intention, was required."*

9.92 In particular, it can be said that a complete antecedent concluded contract is not required, so long as there was prior accord on a term of a proposed agreement, outwardly expressed and communicated between the parties. The plaintiff submits, correctly in my view, that this test was expressly approved in Ireland by the High Court and the Supreme Court in *Irish Life Assurance Company Limited v. Dublin Land Securities*.

The "similar quantum" issue

9.93 The plaintiff has submitted that Templeville has attempted to create a false issue in these proceedings based on the contention that there is disagreement as between the witnesses who testified on behalf of Leopardstown on the "*similar quantum"* issue. Leopardstown submits that this issue is a distraction and irrelevant to the central issues between the parties.

9.94 The plaintiff says the genesis of the "*similar quantum*" issue is the use of that phrase at Clause 1 of a draft Heads of Agreement document *prepared personally by Philip Smyth* and subsequently amended by his solicitors. The evidence is that the matters raised in Clause 1 of those draft Heads of Agreement were discussed at a meeting attended by Templeville, Leopardstown and their legal advisors on the 24th of November, 1997. However, on the 27th of November, 1997, Templeville's Solicitor forwarded the first of a number of drafts of the "*Heads of Agreement*" document which they said "*accurately reflects the consensus of agreement reached last Monday"* and, furthermore, stated in their covering letter that they believed "*that the various other matters incorporated in this draft Heads of Agreement were agreed principally between Mr. Smyth and Mr. Clarke*".

9.95 The plaintiff points out that that document drafted by Mr. Halpenny simply *never* used the term "*similar quantum*" but provided for a demise to Templeville of a site adjacent to the first dome to enable Templeville to relocate the second dome and the seven indoor tennis courts therein as set out in Clause 2(a), (b) and (c). Clause 2 of the agreement stated that:

> *"The matter of* ***replacement*** *of Templeville's existing car parking rights* ***generally and following its surrender of the present parking rights*** *under the old lease is dealt with at 4 below". [The plaintiff's emphasis].*

9.96 The attention of the Court was drawn to the term "*replacement*" and the phrase "*generally and following the surrender of the present car parking rights"*. The plaintiff submitted that the meaning is obvious and unambiguous. What was provided in Clause 4 was (i) intended to replace or substitute for Templeville's existing car parking rights and was (ii) intended to deal with *both* the immediate situation and with the post CPO situation. The plaintiff says that the clause simply does not admit of a construction that would give Templeville a demise of a further and additional area after the CPO took away 5.5 acres of the Yellow Area.

9.97 The Court is further asked to note that clause 4, in turn, was the subject matter of a discussion between Mr. Clarke and Mr. Halpenny leading to a letter of the 2nd of December 1997, from Mr. Halpenny to Mr. Clarke enclosing a revised "*Heads of Agreement".* Moreover, it was submitted, following a further exchange of correspondence with Mr. Clarke on the 3rd of December, 1997, in which

the text of the draft Heads of Agreement was specifically amended by Mr. Halpenny to incorporate a definition of the term "*New Site*" in a manner which confined it to being a site for tennis facilities and which left "*the parking arrangements solely to be dealt with outside the demise by way of the specific provisions in that regard in Clause 3",* Mr. Halpenny provided a Heads of Agreement document which fully complied with that intention and was never in any respect altered until the 9th of January.

The plaintiff contends that this provision, which was incorporated in the versions of the Heads of Agreement considered by the Board of Leopardstown and signed by Philip Smyth on the 17th of December, respectively, made absolutely no mention of the notion of "*similar quantum*" or of "*equal quantum*". It provided, in Clause 3 (as Clause 4 now became), for a right under licence to use the areas of land specified in Clause 3(a) to (d) for car parking. In fact, Clause 3(d) had the effect of making available to Templeville, for the very first time, by way of licence "*such other areas of car parking which may be required by Templeville to facilitate its members on non race days*". The plaintiff says that Clause 3(d) clearly comprehended the use by Templeville of car parking areas for its club members' needs on non-race days.

9.98 The plaintiff has submitted that, as a matter of fact, in terms of quantum, Clause 3 gave Templeville for the first time a licence to use many thousands of car parking spaces in the Leopardstown campus. It says that, as is evident from the car parks identified on the M.C. O'Sullivan drawing referred to extensively during the hearings (even leaving aside the new car parks over the bridge and at Carrickmines), the available car parking spaces ran to 2,368. To this has to be added the parking in Car Parks 1 and 2, and the crescent shaped car park, which would hold approximately 250 cars, and the parking in the remainder of the Yellow Lands. Taking the car parks into account, the total parking spaces run to many thousands of car parking spaces. In terms of quantum of car parking spaces, the effect of Clause 3 of the Heads of Agreement document far exceeds the quantum of spaces that were available to Templeville's customers in the portion of the Yellow Area which was taken under the CPO. Accordingly, says the plaintiff, the argument as to whether "*similar quantum*" was or was not provided or intended to be provided is completely spurious.

9.99 The plaintiff contends that the Heads of Agreement as signed by Philip Smyth and in the form approved by the Board of Leopardstown is the outward expression of a very clear and unambiguous agreement to confer on Templeville, by way of licence and not by way of demise, those car parking rights. It further contends that as a matter of fact, these areas were intended to, and did, far exceed the "*quantum*" of the previous car parking rights held by Templeville under licence as provided for in the 1993 Lease on the Yellow Area.

9.100 The Court is asked to note, and to draw such inferences from it as may be appropriate, that no Templeville witness gave any evidence disputing Leopardstown's contention that it had been agreed on the 24th of November of 1997 that the areas referred to in Clause 3(a) to (d) were to be available to the customers of Templeville for parking by way of licence. That clearly was the ordinary and natural meaning of the provisions of Clause 1, Clause 2G and Clause 3 of the Heads of Agreement document as signed by Philip Smyth and in form approved by the Board of Leopardstown on the 5th of December.

9.101 Further, the plaintiff points to questions put in cross-examination to Leopardstown witnesses which, it contends, attempted to conflate the issue as to whether a demise was intended with the "*similar quantum*" issue, and says that these were misconceived. The plaintiff says the overwhelming evidence from Leopardstown, and disputed by none of its witnesses, was to the effect that the parties had agreed that the car parking rights in the areas being lost to the CPO would be "*replaced*" (the term chosen by Mr. Halpenny) by the car parking rights provided for in Clause 3 of the Heads of Agreement and that those rights would be given by way of licence over and not in any way by way of a demise of the areas where the parking rights might be exercised.

9.102 The plaintiff further points out that no Leopardstown witness, either in evidence in chief or in cross-examination, advanced a view other than that the parties had agreed to a demise of a "New Site" (confined to replacement tennis facilities and rights) and that the new lease and any lease of a "*New Site*" would enjoy "*replacement"* car parking rights by way of licence (and not by way of demise) in the areas specified in Clause 3 of the Heads of Agreement document.

The significance of the Heads of Agreement for Leopardstown's claim

9.103 In the context of its claim for rectification for common mistake, it is the plaintiff's case that the Heads of Agreement document as considered by the Board of Leopardstown on the 5th of December, 1997, and as signed by Mr. Smyth on behalf of Templeville on the 17th of December, 1997, constitutes an outward expression communicated between the two parties of a prior accord on a term of a proposed agreement (the licence agreement which was eventually executed on the 5th of June 1998) relating to the replacement of Templeville's car parking rights in the portion of the Yellow Area on the map attached to the 1993 Lease which was to be lost to the motorway project by virtue of the CPO.

9.104 Further, it is the plaintiff's case that on the basis of the evidence before this Court, it has been established on the overwhelming balance of probabilities that the Licence as construed by the Arbitrator does not reflect that common accord and, therefore Leopardstown is entitled to have the 1998 Licence and Lease rectified accordingly.

9.105 From the point of view of the alternative claim for rectification for unilateral mistake, it is also the plaintiff's case that no reasonable lawyer who believed that his client's instructions were to obtain a demise of an area of land of approximately 5 acres, in addition to the areas mentioned at clause 3 of the Heads, could have believed that the Heads of Agreement document (proffered by him for signature in the hope that Leopardstown would sign it and thereby create "*legally binding contractual relations*" with that effect or if signed by Leopardstown) would have been so interpreted.

9.106 Furthermore, the plaintiff submits that even if such an interpretation could conceivably have been put on the document, Templeville was fully aware, in light of the exchange of correspondence between Mr. Clarke and Mr. Halpenny on the 3rd December 1997, that no such interpretation was being put on that document by Leopardstown.

Implementation of Heads of Agreement to be a collaborative effort

9.107 The plaintiff contends that all of the evidence suggests that the parties deputed to Mr. Brunker and Mr. Halpenny the urgent task of working collaboratively to embody the matters agreed in the Heads of Agreement in a set of formal documents set out at Clause 17 of the Heads of Agreement. This task was expressed as to its scope by the mandate contained in Clause 14. Neither solicitor was given any authority to substantially vary or re-open or renegotiate the Heads of Agreement during the drafting process. Both of them knew that was their mandate and function. Both solicitors clearly dealt with each other as collaborators. To Mr. Brunker fell the task of drafting the written texts. Mr. Halpenny was to provide the maps. However, Mr. Halpenny also provided "assistance" in the form of a letter dated 2nd January 1998 enclosing draft "parcels" for the lease.

<u>Changes introduced at the meeting of the 9th of January 1998</u>

9.108 The plaintiff says that it is clear from the evidence that on the 9th of January 1998, Eric Brunker, and it appears Frank Clarke, met Mr. Halpenny (Mr. Smyth was out of the country at the time apparently) for a collaborative drafting session. It says there is no suggestion that the meeting was held for the purpose of re-negotiating the Heads of Agreement. Prior to the meeting Mr. Halpenny furnished to Mr. Brunker a number of proposed amendments to the licence agreement. Among the amendments furnished by him (either prior to or at the meeting) was a manuscript interpolation in the definition of the New Site of the words "*and parking*" in the phrase "*upon which Templeville's tennis facilities which are currently located on the Yellow Area are to be relocated by reason of the CPO*", so that it reads: "*upon which Templeville's tennis facilities and parking which are currently located on the Yellow Area are to be relocated*".

Changes implemented at meeting created a demise and the consequences thereof

9.109 The evidence establishes that the changes to the licence agreement approved at the meeting of the 9th January were incorporated into the 2nd and all subsequent drafts of that licence, including the executed version. The construction of the licence agreement decided upon by the Arbitrator in his award is to the effect that Templeville, in addition to all of the car parking areas mentioned in the Lease of 1998, is entitled to a demise of 5.5 acres of land (car parking for approximately 880 vehicles) on lands at the heart of the Leopardstown complex immediately adjacent to the domed tennis courts.

9.110 The plaintiff draws the Court's attention to paragraph 116 of Mr. Smyth's Arbitration Witness Statement wherein he elaborates on the consequences of such a demise as follows:

> *"As Leopardstown is well aware the only other land adjacent to Dome No. 1 is within the racetrack. This area was discussed at length during the negotiations. Within the racetrack there is a half moon shaped area of land which was used for temporary stables. This area is easily identified from the maps available. … Vehicular access would be via the Foxrock entrance which would be extremely convenient to Foxrock residents and golfers alike, without them having to enter via the Leopardstown Road entrance or the M50/Carrickmines Interchange entrance. … by preventing Templeville having a demise for parking within the racecourse, Leopardstown is preventing Templeville from attracting these potential members."*

9.111 At paragraph 117 of Mr. Smyth's Arbitration Witness Statement he states, in relation to the car parking areas inside the racecourse, that Templeville "*requests the arbitrator to direct a demise of these areas so that Templeville and Leopardstown develop and benefit from the agreements entered into over eight years ago."*

9.112 That such a demise would entail the construction of tunnels to give access to these car parks on race days (there being no licence back to Leopardstown on race days) is evident, says the plaintiff, from the claim made at paragraph 38 of the same statement by Mr. Smyth:

> *"Access could be via a tunnel under the racetrack. (The concept of tunnels under the racetrack is not new at Leopardstown). As the racecourse is probably going to be redesigned, depending on the effect of the South-eastern Motorway, all of this seems entirely feasible. It was this observation which prompted me to instruct my solicitor to ensure that the New Site would also include car parking lost to the CPO, and ensure that this land would be the closest land available near Dome No. 1 – the nearest dome to the racetrack. This involved a change in the definition of New Site from what was in the draft Heads of Agreement to that which was put into the subsequent drafts of the lease and licence by Leopardstown solicitors, Messrs. A & L Goodbody and in the executed form of those documents."*

9.113 The plaintiff submits that it is further apparent from paragraphs 46 and 47 of the same statement that these consequences, in turn, are viewed by Templeville for the purposes of the submission as giving them the right of entry from Foxrock Village. The claim is made in those paragraphs that this was the purpose and intent of Mr. Smyth in seeking an alteration of the definition of "*New Site*" from that which was provided in the Heads of Agreement.

9.114 The plaintiff points out that this demise is in addition to the very extensive ancillary car parking rights to park in other Leopardstown car parks contained in the 1998 Lease and set out as follows:

> (i) The right to park motor cars and motor vehicles in car park 1 and car park 2 delineated on Map No 1 and edged orange (which are the same car parks edged blue on Map No 1 annexed to the 1993 Lease);
>
> (ii) The right to park motor cars and motor vehicles for delivery purposes only on non-race days in the area to the front of the main grandstand also delineated on Map No 1 and edged and cross-hatched in orange;
>
> (iii) The right to park motor cars and motor vehicles on race days in a suitable car park or car parks designated by the Landlord close to or adjacent to the main entrance to Leopardstown;
>
> (iv) The right to park motor cars and motor vehicles on non-race days on the parcel of land shown on Map No 1 and thereon cross-hatched in yellow, which does not form a part of the new site and which is not affected by the CPO;
>
> (v) The right to park motor cars and motor vehicles on non-race days within Leopardstown in such other car parking areas as may be designated by the Landlord as such, from time to time;

9.115 The plaintiff says that this is recognised by Mr. Smyth at paragraphs 46 and 47 of his Arbitration Witness Statement where he states that the New Site would:

> *"include the car parking lost to the CPO and all the tennis courts",*

and that he had also secured the right to park in all of the car parks in Leopardstown including the right to park in the residual Yellow Area which was not part of the CPO take and that he would have:

> *"the benefits of having three points of entry and parking to Westwood Club",*

namely

> *"the entrance from Leopardstown Road, a new entrance from the M50 plus an entrance from Foxrock Village."*

9.116 The plaintiff points out that Templeville has tried to argue that the replacement car parking rights under the 1998 Lease are

less extensive than the ancillary car parking rights granted to Templeville by the 1993 Lease and discussed above. However, says the plaintiff, in point of fact the car parking rights under the 1998 Lease are significantly more extensive than those rights (including the right to park on the Yellow Area) granted to Templeville under the 1993 Lease. First, as regards parking on race days, there is a requirement in the Race Day Licence which gives a right to park in a suitably designated car park close to or adjacent to the main entrance to Leopardstown. Secondly, as regards parking on non-race days there is a right to park in such other car parking areas as may be designated by the Landlord as such, from time to time. This allows Templeville to park in any of the areas within Leopardstown designated for the parking of cars, allowing it access to a significantly greater number of car parking spaces than was the case under the 1993 Lease.

Context against which change introduced

9.117 The plaintiff maintains that the change in question represented a radical restructuring of the agreement as previously in existence between the parties. It refers in this regard to the very clear provisions in the Heads of Agreement as discussed in the immediately previous section, which the meeting of the 9th January was intended to implement. The plaintiff also refers to the correspondence between Mr. Clarke and Mr. Halpenny in the course of drafting the Heads of Agreement (discussed hereafter).

No express discussion of purpose and effect of the words "and parking"

9.118 The plaintiff argues that it has not been suggested in cross-examination or otherwise that there was any substantive discussion of either the purpose and effect of the interpolation of the words "*and parking*" or the other references to parking inserted in the 2nd draft following the meeting of the 9th January all of which had been requested by Mr. Halpenny. In particular, it was never suggested to Mr. Brunker that he had a mandate to negotiate any significant departure from what was contained in the Heads of Agreement. Moreover, Mr. Brunker was not contradicted or questioned in his assertion that if he had become aware of any proposal which was significantly at variance with the terms of the Heads of Agreement on which he and Mr. Halpenny were collaboratively working, he would have drawn his client's attention to such a proposed change and obtained his client's instructions thereon.

9.119 The plaintiff has invited the Court to draw the inference not merely on the balance of probabilities, but on the basis of overwhelming probability, that there was never any discussion of any kind whatsoever between Mr. Halpenny and Mr. Brunker or between Mr. Halpenny, Mr. Brunker and Mr. Clarke in which Mr. Halpenny imparted either to Mr. Brunker or to Mr. Clarke that he was, by inserting the words "*and parking*" in the definition of "*New Site*" in the licence agreement, proposing to them for their consideration a radical departure from the common understanding between the parties as embodied in the Heads of Agreement document – namely that in addition to all the parking facilities to be afforded to Templeville under the 1998 Lease, as specified in Clause 3 of the Heads of Agreement, a further and very extensive area which must have been known to all of the parties to be of the order of at least five acres (and which we now know to be 5.5 acres) at the heart of the race course was now to be included in the new site and demised to Templeville in accordance with the terms of the 1998 Licence.

Consequences for Leopardstown of a demise

9.120 The plaintiff has submitted that the consequences for Leopardstown of the radical change effected at the meeting of 9th January 1998 - none of which could ever have flown from the Heads of Agreement as signed by Mr. Smyth on the 17th of December 1997 - may be summarised as follows:

> (i) The giving of 5.5 acres of land at the very heart of the Leopardstown complex on an exclusive basis to Templeville without any licence back.
>
> (ii) There is no evidence of any rent for such a valuable demise.
>
> (iii) The loss of that land for the golf course, necessitating the complete redesign of the golf course.
>
> (iv) The loss of all of that land for use by Leopardstown and the other tenants at Leopardstown for any purpose whatsoever.
>
> (v) The commencement of in-field car parking on race days, which would be a new departure and, bizarrely, would be for Templeville's patrons alone.
>
> (vi) The construction of a network of tunnels from Foxrock or other access points into the in-field area and from the in-field area to the grandstand area at Leopardstown's expense.
>
> (vii) The creation of a third means of access (possibly not governed by the race day licence) for Templeville customers.
>
> (viii) The likely capacity of Templeville to apply for further developments on the lands in question on the basis that they would be appurtenant to the tenement consisting of the buildings at Leopardstown and would be subject to statutory change of user provisions pursuant to the Landlord and Tenant Acts.

9.121 The plaintiff urges upon the Court that the consequences of agreeing to a demise, as claimed by Templeville, (in other words, the consequences of non-rectification) are so self-evidently catastrophic that no reasonable person could have believed the parties to be departing from their outward expression of accord in such a radical and (to Leopardstown) calamitous way without express discussion. In this regard, the consequences for Leopardstown of a demise may be considered as corroborating the clear direct evidence of a prior accord, outwardly expressed, in relation to the parties' continuing agreement on Templeville's parking rights. Such consequences also counter decisively any claim that Templeville might make that it believed that Leopardstown was agreeing to a demise, being such that it is inconceivable that Leopardstown agreed to same or that Templeville could have believed that Leopardstown so agreed. The said consequences also add significantly to the equity favouring the granting of relief to Leopardstown. The contrasting absence of any significant detrimental consequences for Templeville of granting the rectification relief sought are equally clear and persuasive in Leopardstown's favour.

Absence of a licence back

9.122 The plaintiff maintains that a clear indicator that Templeville could not have believed that it had secured the agreement of Leopardstown to a demise of a large area (now quantified at 5.5 acres) for car parking is the manifest absence of any reference, express or implied, direct or oblique, to a "*licence-back*" of any such car parking facilities on race days either in the Lease, the Licence (as drafted or as executed), or in the Heads of Agreement document. If Templeville were really explicitly asking for a demise of this order of acreage for car parking and were really seeking that the land in question would have to be situate adjacent to its existing facilities at the heart of the racecourse, the logical implication of such a request would be that Leopardstown was to carve

out such an area at the heart of the racecourse for use as a car park by Templeville's customers. If there were any honest belief that such a proposal was being canvassed, considered or agreed, it would follow, as a logical necessity in the context of the agreed provision in respect of the use of tennis courts on a licence-back basis on race days, that Leopardstown would seek a licence-back in respect of such a huge area of car parking at the heart of the racecourse complex. To agree to one and to ignore the other would be a nonsense.

9.123 The plaintiff has submitted that contrary to what is stated in Templeville's closing submission, it is not Leopardstown's case that there ought to have been or ought now to be a licence back to Leopardstown in respect of the land allegedly demised. The plaintiff says it is not complaining that there is no such licence back. Nor is it implying that there can or should be a licence back by way of rectification. On the contrary, the plaintiff relies on the absence of any such licence back as further demonstrating that there was never any agreement to create a demise of land for car parking. It also contends that the absence of a licence back confirms that Templeville could never have had any honest belief that Leopardstown had on 9th January 1997 agreed to a demise of a large area of land for car parking.

9.124 It is common case that on the 24th of November 1997 it was agreed that Mr. John White would, in the following days, meet with and discuss with Templeville's representative the issue of access to the racecourse by Templeville's customers on racing days. Mr. White gave evidence (and was not contradicted on this) that he had such a meeting on the 3rd of December, and that the terms of an agreement in relation to race day access for Templeville customers were finalised between him and Ms. Sinead Watson of Templeville. He testified that it had been agreed that on the race days where access was to be restricted, patrons of Templeville were to be permitted to park their cars at the car park at the edge of the campus and to be given a shuttle bus service to Templeville's premises. The plaintiff submits that to negotiate and agree to such an arrangement was manifestly inconsistent with any honest understanding on the part of Templeville that it had already secured Leopardstown's agreement to the creation of an area of the order of 5.5. acres at the heart of the complex for use by its customers on all days (including race days) as car parking space and on a basis which excluded the use thereof by Leopardstown at any time as of right.

Way in which demise created

9.125 The plaintiff submits that a further matter which falls for consideration is the way in which such a significant change was effected. The body of the Licence contains specific detailed provisions dealing with the demise of tennis courts. It was submitted that a competent solicitor intending a demise of an area for car parking on behalf of his client in the genuine belief that same was agreed between the parties would have inserted into the body of the licence an equivalent provision dealing with the area allegedly intended to be demised for car parking. Instead, this was not done, and the amendments of the 9th January, 1998, allegedly intended to give rise to a demise of car parking, were vague and covert at best. The Court is entitled to take judicial notice of the fact that a demise of land is an issue of considerable importance and the drafting of same is an important, detailed and complicated exercise. This is particularly true where the demise has unusual features e.g. it is a future demise of an area of land the extent of which, although generally known, cannot be determined with absolute precision. One would have expected that a demise of car parking would have justified more, rather than less, detail than given to the demise of the tennis facilities.

Absence of any rent in consideration for the demise

9.126 The plaintiff makes the further point that there is no provision for the payment of any additional rent in consideration of the demise. It posits the following rhetorical question: given the absence of any amendment to the rent on the 9th January 1997, how could Templeville possibly have thought that Leopardstown would effectively "gift" them, without discussion, 5.5 acres of prime Leopardstown land for their exclusive use and occupation?

Spurious and conflicting explanations put forward

9.127 The plaintiff submits that the known facts beg serious questions as to the state of knowledge and belief of Mr. Smyth and Mr. Halpenny as of the 9th January 1998. It maintains that this is exacerbated by the fact that, as stated above, two mutually contradictory explanations have already been given by Templeville in relation to this issue.

9.128 The earlier of these explanations, provided by Templeville in its statement in the Arbitration proceedings, is that the change was introduced by Mr. Halpenny on the instructions of Mr. Smyth who had decided after the execution of the Heads of Agreement to seek a demise of car parking, in the belief that infield car parking was available.

9.129 The plaintiff says that the overwhelming evidence from the Leopardstown witnesses concerning this matter (all of which is entirely corroborated by the documentary evidence of their dealings with the County Council) shows that there was no consideration or possibility at all at that point of infield car parking. Mr. Smyth's instructions to cross-examine Mr. White and other witnesses in relation to infield car parking reflect a further desire on the part of Mr. Smyth to muddy the waters and to lend entirely bogus plausibility to his claim that it was reasonable for him to assume that Leopardstown would grant a demise of an extensive area of land, including infield car parking, to Templeville at the time.

9.130 The Court has been urged to conclude that the real purpose of claiming that a demise of infield car parking was a reasonable possibility is to remove the otherwise wholly implausible character from the claim that Leopardstown was agreeing to demise a large area of land of the order of 5.5 acres in the immediate vicinity of Templeville's premises outside of the track.

9.131 The second explanation is that given by Mr. Smyth in his Statement in these proceedings, namely that he believed as a result of the meeting of the 24th November that Leopardstown was agreeing to a demise. The plaintiff says that this "utterly spurious explanation" (as the plaintiff would characterise it), in respect of which no evidence has been called and which is entirely inconsistent both with the arbitration statement, the Heads of Agreement and correspondence between the parties following the 24th November, has already been dismantled in detail above.

9.132 The plaintiff points out that as Mr. Smyth has elected not to give evidence he has avoided putting himself in a position where he would have to explain the inconsistencies between these two explanations.

Overwhelming inferences supporting rectification for common mistake

9.133 The plaintiff's case is that no reasonable person could have regarded the amendments proposed by Templeville at the meeting of the 9th January 1998, and Leopardstown's subsequent acceptance of those amendments, incorporation of same into successive drafts of the Lease and Licence and subsequent execution of same, as effecting a change in the clear common expression of accord contained in the Heads of Agreement executed by Philip Smyth on the 17th December, 1997 and approved subject to I.H.A. confirmation by the Leopardstown Board in the same month where:

(i) this common expression of accord was reached following extensive discussions between the parties in which Leopardstown had made clear in no uncertain terms that it did not intend a demise,

(ii) the meeting in which the amendments were proposed was intended as a collaborative drafting effort for the purposes of implementing the common intention of accord discussed above,

(iii) the amendments effected a radical (and, from Leopardstown's point of view, catastrophic) change in the common expression of accord not necessarily self-evident on their face,

(iv) at no time was there any communication by Templeville of the fact that the amendments were intended to effect such or indeed any change,

(v) Templeville's conduct after the 9th January, as outlined in the next section, persistently affirming the very common accord alleged by them to have been departed from on the 9th January 1998.

9.134 The plaintiff contends that in the circumstances, the overwhelming inference to be drawn is that Leopardstown is entitled to rectification for common mistake on the basis that the Lease and Licence do not reflect the prior common intention of the parties, evidenced by an outward expression of accord, and not departed from (in the objective sense) prior to execution of same.

Overwhelming inferences supporting rectification for unilateral mistake

9.135 The plaintiff has submitted that in the event that the Court decides that Leopardstown is not entitled to rectification for common mistake, then relief should be granted on the basis of unilateral mistake, on the basis that the following matters lead to the inexorable conclusion that Templeville knew or suspected that Leopardstown, when executing the Lease and Licence, did not intend a demise of a replacement area for car parking and/or acted unconscionably:

(i) the extensive discussions between the parties in which Leopardstown had made clear in no uncertain terms that it did not intend a demise culminating in the Heads of Agreement deliberately executed by Philip Smyth on the 17th December 1997,

(ii) the collaborative nature of the meeting of the 9th January 1998 as discussed above,

(iii) the radical change (and, from Leopardstown's point of view, catastrophic) change effected by the amendments introduced at the meeting,

(iv) Leopardstown's complete failure, by the overwhelming weight of its evidence, to appreciate that the amendments effected this change,

(v) the fact that Templeville failed to draw this change to Leopardstown's attention despite the fact that it was not necessarily self-evident on the face of the amendments,

(vi) the calamitous consequences which would be and which Templeville knew would be suffered by Leopardstown as a consequence of the change,

(vii) the very great benefit for Templeville which would flow, and which Templeville would have known to flow, from such change,

(viii) the opaque way in which the amendments effected a demise and in particular their failure to mirror those other provisions of the Licence relating to the demise of the tennis court area agreed and known to have been agreed between the parties,

(ix) Leopardstown's failure to discuss the question of rent for, location of, or licence back in relation to the replacement car parking area and the obvious conclusion to be drawn from same, namely that Leopardstown did not intend a demise,

(x) the fact that by Mr. Smyth's admission the only feasible location for the replacement area was infield, when it was known to him at the time of executing the Lease and Licence that infield car parking was not on Leopardstown's agenda,

(xi) the two differing stories told by Mr. Smyth in his witness statements as regards his alleged decision to seek such a demise, both of which have been conclusively disproved by Leopardstown's evidence,

(xii) Templeville's conduct after the 9th January, as outlined in the next section, persistently affirming the position as set out in discussions previous to the 9th January and radically conflicting with the change introduced thereon,

(xiii) the failure of Mr. Smyth or indeed Mr. Halpenny to give evidence as to their knowledge and intention in a situation where both of them have furnished prior statements of such evidence and portions of same have been put to Leopardstown's witnesses in cross-examination,

(xiv) the failure of Mr. Smyth, in particular, to give evidence having particular resonance as discussed.

9.136 In particular, and without prejudice to the foregoing, the plaintiff has further submitted that not merely as a matter of probability, but as a matter of certainty, Templeville could not have entertained an honest belief at any time that Leopardstown was agreeable to an exclusive demise of that order of area of land for the car parking purposes of Templeville's customers on all days including race days and on an exclusive basis. It is respectfully submitted that, on the basis of all the evidence before this Court, the overwhelming probability is that no one involved in the discussions between Leopardstown and Templeville could have come to an honest belief held in good faith that Leopardstown would agree to part with such valuable car parking land at the centre of its operation on an exclusive basis and on terms which would deny its availability to Leopardstown for the use of race goers on race days. In conclusion, the Court is respectfully asked to consider whether this was the deal that anybody who gave instructions for the drafting of the Heads of Agreement to his own Solicitors could possibly have understood Leopardstown to be making.

9.137 The plaintiff says that if at that time Templeville and its Solicitors actually intended a demise from the amendments introduced on the 9th January 1998, they must have known that the radically different consequences which flowed from the amendment they had proposed were wholly unknown to and misunderstood by Leopardstown and its lawyers. It was submitted that it must have been

glaringly obvious to Mr. Halpenny that Mr. Brunker could not have understood that the amendment was to have the outcome that an area of approximately five acres immediately adjacent to Dome No. 1 was to be demised to Templeville, if only because, although the Lease and Licence contemplated the use of the tennis courts which were to be constructed as car parking by Leopardstown on race days, no similar provision was made, or offered, or asked for by Leopardstown, in respect of the massive area of car parking which Templeville alleges is to be demised to it for use on all days (including race days). The complete failure to accommodate in any way the exclusive demise of circa five acres for car parking on race days at the location in question in the terms of the Race Day Licence which was still being drafted at the time, cannot be ignored. It is scarcely credible that the subsequent agreement of the text of the Race Day Licence could have ignored such a demise unless a conscious decision was made not to draw Leopardstown's attention to the matter. The same applies to the terms of the letter of the 10th of February sent to Mr. Brunker discussed below.

9.138 The plaintiff has submitted that, given that it is common case that Mr. Brunker and Mr. Halpenny were given the mandate to embody the terms of agreement arrived at on the 24th of November, 1997, and as refined in the period prior to their signature by Mr. Smyth on the 17th of December, in the documents to be collaboratively drafted between them, it follows that Templeville, and in particular, Mr. Smyth, must have appreciated that on the 9th of January, 1998:

> (i) Leopardstown had never contemplated or agreed, and would never contemplate or agree, to such an exclusive demise, and,
>
> (ii) that any drafting changes made to the drafts prepared by Mr. Eric Brunker as part of a collaborative drafting exercise involving Templeville's Solicitor, could not have been based on an underlying understanding or agreement by Leopardstown to effect such an exclusive demise.

9.139 The plaintiff has further respectfully submitted that, where two Solicitors are acting collaboratively under a clear mandate to give expression to terms agreed, where one of them proposes unilaterally to abandon that role and to consider himself free to propose amendments which radically subvert the common project, and where he does that on his client's instructions based (as paragraph 38 of Mr. Smyth's Arbitration Witness Statement suggests), on an appreciation that the terms jointly mandated to be incorporated in agreed documents are no longer satisfactory, he is under a clear professional and ethical obligation to bring the purpose of the amendment specifically to the attention and understanding of the other Solicitor, especially when that other Solicitor is solely operating on the basis of a joint mandate to put into formal legal instruments without amendment or deletion of the terms of the Heads of Agreement document on the basis stated at clause 14 of the Heads of Agreement.

9.140 The plaintiff contends that Mr. Halpenny, having specifically agreed to and made the amendments specified by Mr. Clarke on the 3rd of December, and having incorporated them into the Heads of Agreement for the reasons stated by Mr. Clarke, was, if he now deliberately set out to obtain a demise of land in the order of five acres in the location in question, wholly reversing and setting at nought the purpose and effect of the amendments to which he had agreed and which he told Mr. Clarke a month earlier would make the drafting of the lease and licence agreement much simpler. The plaintiff has submitted that if Mr. Halpenny, knowing that the amendment he proposed would have such a radically different outcome from the document unamended and knowing that it would confer a massive advantage on his own client and a corresponding massive disadvantage on Mr. Brunker's client, chose not to alert Mr. Brunker to its purpose and consequence, he acted, at the very least, in an unprofessional and unconscionable manner. He had ceased to act collaboratively on the implementation of the Heads of Agreement and had, instead, adopted the role of adversary by stealth. The plaintiff has further urged that to engage in this unconscionable behaviour and sharp practice would fall far below the standard which the High Court requires to be met by Solicitors who are officers of the High Court in the discharge of their duties with members of the public and with fellow members of the Solicitors profession.

9.141 The plaintiff contends that the claimed consequences of the amendment to the definition of "*The New Site*" must have been known to Templeville's lawyers. There is no honest or *bona fide* way of reconciling the clear imperative for maximizing Leopardstown's car parking capacity (evidenced by the arrangements in relation to the use of tennis courts on race days for that purpose) with a simultaneous willingness by Leopardstown to consider and/or agree a proposal that an area of the order of 5.5 acres adjacent to the same facilities would be carved out for the exclusive use of Templeville's customers, even on race days. It would have been obvious to Templeville on even the most cursory examination of the issue, that no responsible State company which was concerned with car parking facilities at its racecourse would agree to carve out in the order of 5.5 acres for that purpose and to surrender that area to a lessee rent free and without insisting that, on race days, such land which had a premium value for such a purpose would be available to patrons of the racecourse.

Period from 9th January 1998 to the execution of agreements in June 1998

No change of intention regarding parking rights

9.142 The plaintiff contends that the evidence shows that the change made in the Licence document on 9th January 1998, was never consciously revisited between the parties thereafter. Accordingly, while there were several other issues in contention between the parties after that date and up to 5th June 1998, the questions as to whether there was to be a demise of ca. 5.5 acres of car parking to Templeville was never in any form, express or implied, raised or considered as between the parties.

9.143 The plaintiff says that although Templeville has tried to assert that discussions between the parties, which took place between January and June 1998, constituted a departure from the principles in relation to car parking laid down in the Heads of Agreement, this is demonstrably not the case.

The relocation issue

9.144 The plaintiff alludes, in particular, to the reference made by Templeville in cross-examination and in their submissions to the raising by Mr. Noel Ryan of the I.H.A. of the possibility that the entire Westwood operation would be relocated at the site of the I.H.A. building near the entrance of the Leopardstown Racecourse. The plaintiff submits that this argument is wholly devoid of substance.

9.145 The Court has been directed to the letter from P. C. L. Halpenny to A & L Goodbody for the attention of Mr. Peter Law dated 12th of December, 1997. It refers to Mr. Ryan's wish to explore the possibility of relocating Templeville's facilities to a location elsewhere on the racecourse. Templeville's Solicitors stated and acknowledged that Mr. Ryan:

> *"made it clear that he did not in any way wish to interfere with the matters or issues which are being proposed through your office by Mr. Frank Clarke S.C. and which are more particularly set out in the draft Heads of Agreement. These*

matters, he confirmed, will continue to finalisation through Mr. Clarke and through your office. A worthwhile exchange of views took place."

9.146 The plaintiff says it is abundantly clear from the foregoing that the issue floated by Mr. Ryan of relocating the Templeville complex to another place on the racecourse was expressly acknowledged not to cut across the agreement between the parties, as is also made clear from the first paragraph on the last page of that letter. Indeed, the plaintiff submits, it is clear from the letter that Templeville expressly represented to Leopardstown through its lawyers that the matters raised by Mr. Ryan did not affect the matters already agreed between the parties as set out in the Heads of Agreement.

Race day licence

9.147 The plaintiff points out that it was also been suggested to Mr. Walsh in cross-examination that the Race Day Licence had not been concluded at the relevant time. The plaintiff responds that the un-contradicted evidence of Mr. White was that he and Ms. Sinead Watson had agreed, subject to drafting, the terms of the Race Day Licence relating to access and car parking at a meeting on the 3rd of December 1997 and that the terms of their agreement were embodied in the Race Day Licence, which was circulated in January 1998.

Leopardstown's option to finance works

9.148 Likewise, the plaintiff says, it was suggested that the request of Leopardstown to have an option to fund the costs of the construction of the extensions to the Westwood complex and to rentalise same showed that there was no concluded agreement between the parties at the time that the option was suggested and prior to the parties agreeing to the insertion of the option in the Race Day Licence.

9.149 The plaintiff responds that this argument ignores the clear and authoritative case law which acknowledges that the accord or agreement between the parties to a document to be rectified need not be comprehensive but must exist in relation to the term in respect of which the rectification is sought, of which accord or agreement there must be an outward expression communicated between the parties.

9.150 The plaintiff maintains that there is clear evidence that the financing of the Templeville extension by Leopardstown was by no means a new matter or a repudiation of the Heads of Agreement but, on the contrary, that Templeville had expressly indicated its agreement to such a means of financing the extension at the meeting of the 24th of November (as is recorded in the notes of that meeting exhibited at JW9) and, indeed, had been requesting such financial assistance by Leopardstown for 11 months previously.

The area in front of the grandstand

9.151 The plaintiff submits that while the parties revisited on the 23rd January 1998 the specification of the area in front of the Grandstand as an area in which Templeville's customers might park their cars on non-race days, and, to that extent, that aspect of the agreement embodied in the Heads of Agreement was subsequently varied by mutual agreement, the following points must be made:

1. The variation by mutual agreement did not concern the issue as to what was to be contained in the "*New Site*".

2. It was never suggested that this modification was made in contemplation of or in consideration of the change made independently in the draft licence at the drafting meeting on 9th January 1998.

3. The modification was made later than 9th January at a meeting of the 23rd of January 1998.

4. No evidence suggests that it would *not* have been made without the change made on 9th January and there is no reason to believe that the two issues - the purpose of the area in question and whether there was to be a demise or a licence of the specified car parking areas – are, or were regarded as, connected.

5. The evidence of Mr. White suggests that the modification was a matter of relative indifference to Templeville for reasons of control of access and this indifference is reflected in the note of the meeting of 23rd January (Exhibit 39 of E Brunker) as follows:

> "***JW*** *raised issue of orange-hatched parking area.* ***PS*** *It will hardly ever be used for parking.* ***JW*** *concerned this area could be used by Leopardstown. Lease now gives right to park in carpark ½ and area in front of grandstand* ***PS*** *suggested that area only be used for delivery rather than car parking."*

6. The wording of the draft Lease was also in fact somewhat more generous to Templeville in that it removed the "reasonableness" and arbitration conditions over use by Templeville customers of not just the Grandstand area parking but of all Leopardstown car parks.

9.152 The plaintiff submitted that there is absolutely no reason to infer from the evidence the possibility that Leopardstown's understanding changed from that of 9th January, 1998, or that there was ever any awareness whatsoever that Templeville had secured such a demise. All of the witnesses for Leopardstown who gave evidence on this issue testified that they never believed that such a demise had been sought or agreed to. Nor was it suggested to any of them that they had a different understanding at any point after 9th January, 1998, or that they had any reason after that date to come to such an understanding. Accordingly, so says the plaintiff, there is absolutely no reason to believe or suspect or to infer from the evidence that the understanding of Leopardstown, its individual board members, its staff, or legal advisors on this issue varied in any way from the time when the Heads of Agreement were approved, or may have done so.

Correspondence post 9th January 1998 is consistent with no change from Heads of Agreement

9.153 The plaintiff says that on the contrary not only did Leopardstown's intention not vary from the Heads of Agreement but correspondence from Templeville's during the period 9th January 1998 to June 1998 (after it allegedly inserted the amendments of the 9th January 1998 with the intention of and in the belief that they inserted a demise) was itself entirely consistent with the Heads of Agreement.

9.154 The plaintiff submits that this is evidenced in the correspondence between Eric Brunker and Conor Halpenny between the dates of 9th January 1998 and the 5th June 1998, where Conor Halpenny consistently refers to the Heads of Agreement as if they were to

be treated as the agreement itself.

9.155 In a letter to Eric Brunker dated the 16th January 1998, Mr. Halpenny referred to the Heads of Agreement, in the context of the tender for the catering contract, and requested that paragraph 16 (f) of the Heads of Agreement be *'incorporated into one of the documents.'*

9.156 On the 19th January 1998, Conor Halpenny again wrote to Eric Brunker, in relation to the Race Day Licence. He stated, at note B, that unfettered access had been agreed in the Heads of Agreement and he therefore requested the removal of any restrictions in the document. The plaintiff says this is a further indication that the key terms had been agreed between the parties in the Heads of Agreement, and same was to form the basis of the final documents.

9.157 On the 30th January 1998, Mr. Halpenny again wrote to Eric Brunker, and stated that the previous December Frank Clarke SC had given a *"firm commitment to the effect that the Heads of Agreement document would be entered into by your client (Leopardstown) and that your client would commit itself to same."* Mr. Brunker replied on the 4th February and pointed out that the *'firm commitment'* given by Frank Clarke as quoted above was a commitment to recommend to the Board of Leopardstown that they should proceed on the basis of the Heads of Agreement. Mr. Halpenny replied on the 5th February 1998 at page 5, section (e) that at the meeting on 19th December 1997, Frank Clarke confirmed that the finalised Heads of Agreement and the original lease would be *the only two documents used for preparing the new documentation* and that no variations or alterations would occur, nor were required by the I.H.A. at its Board meeting of 17th December 1997, save as envisaged by the Heads of Agreement document. He went on to state that:

> *"Our respective firms were then instructed to prepare all the formal legal documentation to give effect to what had been negotiated and agreed, as set out in the Heads of Agreement document. The terms of the existing Lease were to remain unaltered save for amendments envisaged by the said Heads of Agreement document."*

9.158 Therefore, says the plaintiff, what was negotiated and agreed, and the essence of the agreement itself, and the terms that were to form the basis of the legally binding agreement were those contained in the Heads of Agreement.

9.159 It has been pointed out by the plaintiff that while negotiations continued between the parties in order to iron out smaller issues, the main terms remained those as agreed in the Heads of Agreement. The plaintiff says this was accepted by Conor Halpenny in his letter dated 6th April 1998 where he stated that final agreement had been reached, on the basis of the Heads of Agreement, on the 23rd January 1998. This fact was again asserted by Mr. Halpenny in a letter dated 5th May 1998 wherein he stated

> *"…the agreement of 23rd January 1998 which was conducted on foot of the agreed Heads of Agreement document was reached…."*
> [The plaintiff's emphasis].

9.160 The plaintiff says that in all of this correspondence, the term Heads of Agreement and terms such as 'final agreement' and 'concluded agreement' were used interchangeably, suggesting that in the minds of both parties, they were one and the same, with the exception of certain specific issues which were dealt with subsequently and on which the parties reached mutual agreement. The plaintiff says it is, therefore, entirely disingenuous of Templeville to now claim that terms were not agreed in the final Heads of Agreement, as signed by Philip Smyth on the 17th December 1998.

Templeville's Solicitors' letter of 10th February 1998 – misleading re racecourse

9.161 The plaintiff submits that it is remarkable that the issue of an agreed demise was never mentioned in any shape or form by Templeville during the period January to June 1998 or indeed when the executed documents were later held in escrow. This is especially so in the context of the wholly incompatible terms negotiated during this period in respect of the Race Day Licence and the terms of the letter sent by Templeville to Mr. Brunker (see below).

9.162 The plaintiff points out that in the course of the evidence it transpired that the Solicitors for Templeville wrote a letter on the 10th of February, 1998, to Mr. Eric Brunker of A & L Goodbody, Solicitors. The plaintiff says it should be noted that this letter was written within 33 days of the day on which Templeville now contends that they secured Leopardstown's agreement for a demise of a very substantial area of land for its exclusive use as car parking at the heart of the Leopardstown complex which land would, if Templeville's contention is correct, be available to it and its customers on all days including race days for car parking in conjunction with the use of Templeville's facilities at Leopardstown.

9.163 The relevant portions of the letter are set out hereunder:

> *"Since my previous correspondence, Mr. Kieran Condell has now had an opportunity to speak to Mr. Philip Smyth and has advised him in relation to the recent developments, which occurred after Mr. Smyth left the country. Mr. Smyth has expressed grave disappointment and concern at what has now transpired and has asked me to respond, as hereinafter set out, and obtain clarification from your client, in relation to the matters set out below.*
>
> *<u>Objection to motorway – Point No. 1 in letter 28th January 1998 from Irish Horse Racing Authority</u>*
>
> *The proposal which is now being made, namely that my client should withdraw its objection to the motorway, has never even been mentioned before this time, let alone agreed during the earlier negotiations. My client has requested that I outline the background to this issue.*
>
> *At no time, during what we believe to have been lengthy and detailed discussions, did either Leopardstown Club or Dun Laoghaire Rathdown County Council have any contact with or make any approach to Westwood Club Limited or Templeville Developments Limited about the motorway, about the impact on my client's rights and entitlements or about any requirements or suggestions which it may wish to make on the matter* ***– It was only when the motorway plan was unveiled to the public and after the necessary statutory notices were served (Westwood and Templeville not having been served) that my client became aware of the impact which the said motorway would have on its facilities, on its business and, particularly on access to its club premises for existing and future members travelling from the north western direction, by car. In this regard a similar affect would also be suffered by your client's race goers.***
>
> ***In order for such motorists to access the race course via the front entrance, they will be required to drive through three roundabouts before reaching the main entrance. Then, due to inadequate car parking for a number***

of reasons, they will drive over the new overpass into the overflow car park. Apart from the frustration which race goers will experience in driving over a motorway from which they will have exited some time previously, this cumbersome means of access to Leopardstown Race Course will obviously cause considerable time delays and contribute to traffic jams within the race course*. In the alternative, a small slip road from the motorway onto the race course will enable a race goer access to the overflow car park within minutes.* ***The absence of such a slip road and this cumbersome means of access also has a serious impact on my client and its members, who will be subjected to the same inconvenience and frustrations****.*

Mr. Philip Smyth spoke to Mr. Denis McCarthy concerning the above (inter alia), which at Mr. McCarthy's request he set out in writing. At a subsequent meeting Mr. McCarthy informed Mr. Smyth that Leopardstown Club intended to object to the motorway and he encouraged Mr. Smyth to do likewise. Before doing so however, Mr. Smyth and his advisors attended meetings with Dun Laoghaire Rathdown County Council, but no positive response was received from the County Council. Mr. Smyth therefore instructed his legal advisors, including Counsel, a Road Engineer Consultant and his Architect to lodge a formal objection to the motorway scheme.

This was all done in advance of the meeting of the 24th November 1997 between our respective clients, at which the heads of agreement were discussed and agreed*. At this same meeting, Mr. Smyth mentioned to Mr. McCarthy, in the presence of everyone who was in attendance (including your Mr. Peter Law) that he had heard a rumour that Leopardstown Club was in the course of finalising an agreement with Dun Laoghaire Rathdown County Council, part of which it had undertaken to 'deliver Mr. Smyth's head on a plate', which Mr. Smyth explained as meaning that Leopardstown Club would ensure that Mr. Smyth would not object nor would be able to obtain any of his requirements, which he had previously outlined, directly to the County Council.*

This suggestion by Mr. Smyth was vehemently denied both by Mr. McCarthy and by Mr. John White and to re-assure Mr. Smyth, Frank Clarke agreed to the inclusion in the heads of agreement, a clause whereby Leopardstown would use its best endeavours to achieve the construction of a slip road from the motorway, as part of its overall agreement with Dun Laoghaire Rathdown County Council (See 16 (a)).

Mr. Smyth has now been informed that an overall agreement has been reached between Leopardstown and Dun Laoghaire Rathdown County Council, which has been valued at approximately nine million pounds and that your client has withdrawn its objection without the benefit of a signed written agreement. Mr. Smyth has further been informed that Dun Laoghaire Rathdown County Council is claiming that the deal is dependent upon your client ensuring that my client has no objection to the motorway and will achieve none of its requirements which it has been seeking, including the said slip road.

We are instructed to enquire from you and from your client as to whether or not the foregoing is correct. Mr. Smyth requires the full disclosure of all matters discussed and agreed between your client and Dun Laoghaire Rathdown County Council which relate to or which affect our client, its present rights and entitlements and the affect which the motorway will have on its business, both from an operational point of view and from an environmental point of view. ***Mr. Smyth also wishes to know how your client intends to and expects to be able to honour the aforementioned section of the heads of agreement, which has been incorporated into the race day licence at clause No. 13."*** [The plaintiff's emphasis].

9.164 The plaintiff says it is now contended that the client on whose instructions the letter was sent believed that he had negotiated and secured agreement to the demise of a very substantial area as an exclusive car park in the heart of the Leopardstown campus. The plaintiff asks rhetorically is it conceivable in the circumstances that Templeville could possibly refer to "*such motorists*", particularised as "*existing and future members* (of the Westwood Club) *travelling from the north-western direction by car*" as being "*required to drive through three roundabouts before reaching the main entrance*" and then "*due to inadequate car parking for a number of reasons, they will drive over the new overpass into the overflow car park"?*

9.165 The plaintiff submits that in light of the claim now made that Mr. Smyth understood that he was being provided with his own exclusive car park (consisting of an area of 5.5 acres immediately adjacent to his client's facilities), the question arises as to whether any person or company with that understanding could have written that letter describing the inconvenience to Westwood members of the use of the overpass and the overflow car park in the context of the motorway being built. It has respectfully submitted submission that this letter, in the terms in which it was sent, could not have been written in good faith by a person or company which believed that it had within the previous month negotiated for and been granted such an exclusive car park immediately beside its facility. The plaintiff says this, in turn, raises the question as to how such a letter could have been written in the light of the claims now made on behalf of Templeville.

9.166 The plaintiff urges that the simple and straight-forward explanation for such a letter being written is that Templeville, and Mr. Smyth in particular, did not believe as of the 10th of February, 1998, that they had concluded an agreement for the demise to them on an exclusive basis of 5.5 acres of car parking immediately adjacent to Templeville's buildings at Leopardstown (or any area of land of the same order). If Templeville, and Mr. Smyth in particular, believed that he had negotiated an agreement to that effect, he would necessarily have written a very different letter, and certainly not a letter which complained bitterly about the inconvenience to his client of having to use the overpass and the overflow car park on the other side of the motorway. He would surely have written about the access of his members to the *new car park* using the wished-for slip road from the motorway.

9.167 The plaintiff further submits that the only alternative (and somewhat more sinister) explanation for the letter being sent on the 10th of February, 1998, in that form, is that Templeville believed that the amendments it had secured to Mr. Brunker's drafting had either secured for Templeville such a demise (or had created a basis for arguing at some future date for such a demise) and that Templeville had directed that a letter should be sent making no reference to any such demise and creating an entirely different impression in the minds of the reader so that the reader would not be alerted in any way to the possibility that such a demise had been secured or was being provided for.

9.168 The plaintiff has submitted that one thing is very clear – namely that the letter of the 10th of February, 1998, could not have been written unless Templeville either did not understand itself to have such a demise or else was taking very elaborate steps to conceal from Leopardstown the possibility that the terms of the agreement relating to car parking (which had been finalised in the preceding weeks) made provision for such a demise. This in turn raises a very strong inference that either Templeville did not believe that it had secured a demise of and car parking (let alone of the order previously mentioned) or, else, believing that it might have done so, was dishonestly and unconscionably concealing that belief from Mr. Brunker in the hope that he would not revisit the terms of the licence relating to car parking that had been agreed some weeks previously.

Letters of the 5th of June 1998

9.169 The plaintiff submits that two other documents also executed on the 5th June 1998 negate any intention to grant a demise of car parking on the part of Templeville.

9.170 First, a side letter furnished on this date entitled "*New Lease and and ancillary licence documents"* contains an agreement by Templeville to a reduction in the number of tennis courts on the new site where Leopardstown finds it "***impossible to deliver sufficient land to"*** Templeville to enable Templeville to construct the further 7 outdoor tennis courts provided for in the 1993 Lease and in the 1998 Licence. The plaintiff submitted that, if Leopardstown had a difficulty in relation to land for tennis courts, then, by definition, it would have had a problem with a large tract of land for a demise of car parking, if that issue was of any concern to anyone. The plaintiff says the patent complete absence of any concern in that regard on anybody's part makes it clear that the demise of an area for car parking was not on anyone's mind. It submitted that this yet again points inexorably to only one possible conclusion. There had been no intention or agreement to demise any area for car parking.

9.171 Secondly, a further side letter furnished on this date, entitled "*Granting of new Lease and ancillary licence documents*" contains a waiver of any right that might exist to seek compensation by reason of the CPO. The waiver states that "*Templeville Developments Ltd. hereby undertakes not to seek or claim such compensation from Dun Laoghaire Rathdown County Council arising out of the said proposed compulsory purchase purchase (sic) order,* ***provided that the new site which is to be proposed by Leopardstown Club Ltd., to accommodate Templeville Developments Ltd's proposed relocated tennis courts and tennis facilities,*** *enjoys the benefit of all necessary planning permissions from Dun Laoghaire Rathdown County Council."*

[The plaintiff's emphasis].

9.172 This letter of waiver contains no reference whatsoever to car parking rights, and the plaintiff says such reference is notable in its absence, in particular, where the facilities to be included in the new site are specified. The plaintiff maintains that this is a further indication that there had been no intention or agreement to demise any area for car parking.

9.173 The plaintiff contends this is entirely consistent with the views expressed by the Arbitrator in his Award:

> "It seems to me that the provisions of the side letters, and in particular that which deals with the possibility that there will be insufficient land for the construction of the 7 to be constructed outdoor tennis courts is persuasive that **what the parties may have had in mind was that Templeville would obtain a demise of its tennis facilities (just as it had in respect of Dome No. 1) and that its car parking rights would be maintained by Licence** in such of the Yellow Area as was not required for the construction of the 7 outdoor tennis courts (along with the relocation of Dome No. 2 and the other 4 outdoor courts) and, by necessary implication it seems to me, would otherwise be extinguished."
>
> [The plaintiff's emphasis].

Delay

9.174 The plaintiff points out that it was not for several years after the execution of the Lease and Licence that any claim to a demise of car parking was made by Templeville. It says that in the circumstances the argument that Templeville executed the Lease and Licence in the belief that both parties were intending such a demise does not hold up either in the light of the parties' conduct either prior or subsequent to that meeting.

9.175 Templeville has alleged delay on the part of Leopardstown as a defence to these proceedings. The plaintiff submits that given:

i. the delay on the part of Templeville itself in asserting a right to a demise,

ii. the fact that terms of the Lease and Licence were by no means clear and required adjudication by an Arbitrator,

iii. the fact that the obligation to provide the "*New Site*" did not arise immediately on the execution of the Licence and was conditional on further matters occurring,

iv. the fact that proceedings for rectification were brought immediately following that Arbitrator's adverse determination, and

v. the fact that no prejudice has been suffered by Templeville as a consequence of the delay,

there is no basis for any defence on the part of Templeville based on delay on the part of Leopardstown.

John White's manuscript note of 23rd January 1998 – Dem of Land

9.176 The plaintiff says that insofar as Templeville seeks to rely on John White's manuscript note of the meeting on the 23rd of January 1998 (see para 2.163 ante), in which the words "Dem of land" appear, this completely ignores the remainder of the same note from which it is abundantly clear that no demise was contemplated or intended. The Court's attention is drawn to the end of the same note which the plaintiff claims is entirely inconsistent with any claim that a demise of car parking was contemplated or intended.

<u>Failure of Philip Smyth / Templeville to give evidence and inferences to be drawn</u>

Court may draw adverse inferences

9.177 In this case, Mr. Philip Smyth has decided that he should not testify. These are not criminal proceedings and the plaintiff submits that such a decision has, for the reasons set out below, very considerable legal implications. Lest it be said that Mr. Smyth, in deciding that he should not offer any evidence or expose himself to cross-examination, was acting "*within his rights*", the plaintiff asks the Court to note that in civil cases, as opposed to criminal cases, there is no rule precluding adverse inferences from being drawn from the failure of a defendant to offer evidence.

9.178 The plaintiff submits that on the contrary, there is an abundance of authority for the proposition that a Court can and should, in appropriate circumstances, view the failure of a defendant to offer any evidence and to submit to cross-examination thereon, as corroborating and strengthening a plaintiff's case against them.

9.179 The Plaintiff also relies on the decision of Kelly J. *Smart Mobile Limited v. Commission for Communications Regulation and Another* [2006] I.E.H.C. 338, in which the Court had regard to the statement of proposed evidence of a witness who were not called

to testify, when assessing the inferences that may be drawn from such failure.

No need for evidence from Pierce Moloney

9.179 The plaintiff seeks to respond to the calling of attention by Templeville in its closing submissions to the fact that Leopardstown did not call evidence Mr. Pierce Moloney to give evidence by contending that, on the evidence as heard, it was not necessary to call Mr. Moloney insofar as Mr. White and Mr. Justice Clarke gave full evidence of Leopardstown's intention up to the 5th June 1998 and it was never credibly put by Counsel for Templeville that Leopardstown's understanding changed after the 5th December 1997, being the date on which Mr. Moloney's tenure commenced.

10. The Court's Decision

10.1 The Court has considered all of the admissible evidence in the case, both oral and documentary. The only witnesses called were witnesses on behalf of the plaintiff and these were robustly cross-examined on behalf of the defendant. In general I found the plaintiff's witnesses to be impressive and consider that they stood their ground under cross – examination.

10.2 Following a careful review of all of the evidence the Court has no hesitation in concluding, and regards the evidence in that regard as both convincing and compelling, that at the meeting of the 24th of November 1997 the negotiators reached a large measure of agreement and accord *inter se*, including agreement and accord on the critical issues with which the Court is concerned in these proceedings i.e., that a "*New Site*" would be demised to Templeville consisting of a parcel or parcels of land sufficient to accommodate the maximum number of tennis courts and the dome, and that Templeville would also receive rights in respect of car parking by way of licence only to replace car parking lost to the C.P.O. The Court is satisfied that there was sufficient agreement to enable a process of drafting of Heads of Agreement to reflect that agreement to commence in earnest. Various drafts were produced in the days and weeks subsequent to that, culminating in the final Heads of Agreement which were executed by Philip Smyth on behalf of Templeville on the 17th of December, 1997, a slightly earlier version of which (containing no material differences as far as the issue of car parking and car parking rights was concerned) had been approved by the Board of Leopardstown on the 5th of December 1997 subject to the approval of the I.H.A. The Court believes that the plaintiff is right in contending that the need for Leopardstown to obtain the approval of the I.H.A. was a matter between it and the I.H.A., and that this did not preclude Leopardstown from reaching agreement and accord with Templeville. It may have inhibited Leopardstown from entering into a legally binding contract until such approval was forthcoming but, as the plaintiff has correctly pointed out, the Supreme Court in *Irish Life Assurance Co. Ltd. v. Dublin Land Securities Ltd.*, approving the statements of principle enunciated in *Joscelyne v. Nissen* and in *Rooney and McParland Ltd. v. Carlin*, has held that a complete antecedent concluded contract is not required, so long as there is prior accord on a term of a proposed agreement outwardly expressed and communicated between the parties.

10.3 The Court finds both as a fact and as a matter of law that the final Heads of Agreement constituted the outward expression and communication between the parties of their prior accord on the critical issues just mentioned at paragraph 10.2 above.

10.4 Moreover, the Court is completely satisfied that the common intention that existed, and which is outwardly expressed in the final Heads of Agreement document, continued uninterrupted until the 1998 Lease and Licence were executed on the 5th of June 1998. In the Court's view the evidence in support of that is very strong. The behaviour of the parties, so well rehearsed by the plaintiff in its submissions, was so entirely consistent with the continuation of the common intention asserted by the plaintiff, and so inconsistent with the suggestion that Templeville believed it was getting a demise of *c.*5.5 acres for parking, as to thoroughly satisfy the Court that the plaintiff is correct. The Court would not go so far with the plaintiff as to agree that the evidence is "overwhelming", but it is certainly sufficiently compelling and convincing as to satisfy the Court that there was a continuing common intention, outwardly expressed, from the formation of the accord until the execution of the Lease and Licence documents, not merely on the balance of probabilities but on the basis that it was highly probable.

10.5 Moreover, as it is clear from the finding of the Arbitrator, Paul Gardiner S.C., that the Licence as executed, incorporating as it does the interpolated words "and car parking" in the definition of the "*New Site*", imposes on Leopardstown an obligation, on termination of the Licence, to demise to the defendant an area for car parking, amounting to *c*.5.5 acres, the Court has no hesitation in concluding that the Licence document does not properly reflect the continuing common intention of the parties and that it was executed by them under a common mistake.

10.6 The Court has not been impressed with the arguments advanced by the defendant and it is appropriate to deal specifically with its core or principal contentions.

10.7 After considerable reflection, and an extensive review of the evidence, the Court finds that it cannot agree with the defendant that there was no agreement amongst the Leopardstown personnel as to their intention, never mind having a common intention with Templeville. The evidence does not bear this out, and the Court finds itself in agreement with the plaintiff's submission that the disagreements between the plaintiff's witnesses were more perceived than real. In particular, the evidence does bear out the plaintiff's contention that Mr. Brunker had no brief to, and never attempted to, alter, re-negotiate, amend or interfere in any way with the agreement reflected in the Heads of Agreement document. The evidence from Leopardstown, and disputed by none of its witnesses, was all one way, and to the effect that the parties had agreed that the car parking rights in the areas being lost to the CPO would be "*replaced*" (the term chosen by Mr. Halpenny) by the car parking rights provided for in Clause 3 of the Heads of Agreement and that those rights would be given by way of licence over, and not in any way by way of a demise of, the areas where the parking rights might be exercised.

10.8 Moreover, as the plaintiff has points out, no Leopardstown witness, either in evidence in chief or in cross-examination, advanced a view other than that the parties had agreed to a demise of a "*New Site*" (confined to replacement tennis facilities and rights) and that the new lease and any lease of a "*New Site*" would enjoy "*replacement*" car parking rights by way of licence (and not by way of demise) in the areas specified in Clause 3 of the Heads of Agreement document.

10.9 It is quite clear from the evidence that Templeville was going to receive more than enough replacement parking for its needs, and as far as the Court is concerned the "similar quantum" argument is misconceived.

10.10 Having considered all of the evidence, I am also satisfied that although certain further matters were negotiated and agreed subsequent to December 1997 and before the execution of the 1998 Lease and Licence in June of 1998, this is not a relevant consideration. The Court is satisfied that none of the subsequent negotiations or agreements affected or impinged in any significant way upon the accord arrived at by the parties in November/December 1997 with respect to Templeville getting replacement car parking rights by way of licence only and not by way of demise, which accord continued uninterrupted up until the execution of the 1998 Lease and Licence.

10.11 The Court is satisfied that while the possibility of resorting to "in-field" parking, and redesigning the racecourse to accommodate this, was examined briefly by Leopardstown from time to time, the overwhelming thrust of the evidence was that it was never very seriously contemplated. The evidence establishes that although this idea was never entirely ruled out there was absolutely no appetite within Leopardstown for such radical changes. The idea was always unpalatable to Leopardstown but was nevertheless sensibly acknowledged to be a possible contingency of last resort. In the words of Mr. White, it was "the ultimate fallback position if every other alternative failed." However, the point was never reached where serious consideration had to be given to resorting to in-field parking and re-designing of the race track to accommodate this, and Mr. Smyth would have had no basis for believing that it was being seriously considered.

10.12 The Court is satisfied that the consequences for Leopardstown of the suggested demise of car parking were so far reaching as to be unthinkable from their point of view. The Court is completely satisfied that Mr. Smyth would have known this and that at no time could he have believed that Leopardstown was seriously contemplating it. Although the defendant makes the point that the plaintiff was legally represented at all stages, the import of the interpolation that took place on the 9th of January may not have been immediately obvious even to experienced conveyancers, and the Court is satisfied that it was not immediately adverted to by either Mr. Brunker or by Mr. Halpenny. Moreover, the Court is satisfied, on the balance of probabilities, based upon the behaviour of the parties and the correspondence in the interval between the 9th of January 1998 and the 5th of June 1998, that it was not adverted to by either side before the 1998 Lease, Licence and related documents were executed.

10.13 While it is unclear as to exactly when post the 5th of June 1998 Mr. Smyth adverted to the common mistake, and sought to exploit it, the Court is satisfied that he has sought to exploit it and that he has done so in a most cynical, unethical and reprehensible way.

10.14 The Court is unimpressed with the contention on behalf of the defendant that it was incumbent on the plaintiff to elect as between seeking rectification for common mistake and rectification for unilateral mistake once the evidence had closed. No authority was cited for this proposition and the Court is satisfied that the plaintiff was entitled to advance a case based upon common mistake as it has done, but simultaneously claim in the alternative an entitlement to relief based on unilateral mistake. As the Court has found common mistake the issue is academic at the end of the day.

10.15 The Court rejects the argument of the defendant that the plaintiff has failed to prove what the alternative "true" agreement was. The Court is satisfied that the plaintiff has proven a sufficient level of agreement and accord on the critical issues previously adverted to. Moreover, *Nolan v. Graves* [1946] 1 I.R. 376 provides clear authority that the Court may grant rectification in the form sought by the plaintiff.

11. Conclusion

11.1 The Court is satisfied that the plaintiff has discharged the burden of proof upon it and that it is has established by convincing evidence on the balance of probabilities that the parties entered into an agreement on the critical issues hereinbefore mentioned, which agreement was outwardly expressed in the final Heads of Agreement document, and that the parties common intention as expressed in that agreement continued up until the 5th of June 1998 when the 1998 Lease, Licence and related documents were executed, and that by reason of a common mistake the suite of documents executed on that date, but in particular the 1998 Licence, failed to reflect accurately the common intention of the parties.

11.2 In all the circumstances the Court must dismiss the defendant's application for a non-suit.

11.3 Further, the Court is disposed in the interests of justice and equity to rectify the 1998 Licence in the manner proposed by the plaintiff and, should it be necessary, to permit consequential amendments to the related documents in the circumstances.

11.4 The Court will hear the submissions of counsel as to the exact form of the Order.