Neutral Citation Number: 2006 IEHC 111

THE HIGH COURT

[1998 No. 856 P]

BETWEEN

TRIATIC LIMITED

PLAINTIFF

AND

THE COUNTY COUNCIL OF THE COUNTY OF CORK

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 31st March, 2006.

The factual background

1. The plaintiff was incorporated on 16th February, 1993 under the name Barevan Limited. Two brothers, James O'Brien and William O'Brien, own the entire share capital of the plaintiff and they are its sole directors. The claim being pursued in these proceedings arises out of dealings between the plaintiff and the defendant in relation to the proposed development and acquisition of Fort Camden at Crosshaven, County Cork in the mid-1990s. At the time, William O'Brien was working abroad and it was James O'Brien who primarily dealt with the defendant.

2. Fort Camden, which got its name from the Earl of Camden, the Lord Lieutenant of Ireland between 1795 and 1798, is described in an historical note which was put in evidence as being recognised internationally to be one of the world's finest remaining examples of a classical Coast Artillery Fort. After it was handed over to the Irish government in 1938, it was renamed Fort Meagher in honour of Thomas Francis Meagher. However, the evidence indicates that it continued to be known as Fort Camden locally. It was handed over by the Department of Defence in late 1988 to the defendant on the basis that the defendant would develop it for tourism and amenity purposes. What emerged on the evidence was that "handed over" meant that physical possession of the property was given to the defendant. The ownership remained in the State, a fact of which James O'Brien was unaware until 31st August, 1995.

3. The defendant, being unable to identify a suitable source of funding the development work, decided to seek private sector involvement. In September 1989, the defendant placed advertisements in a number of publications, including the Cork Examiner, announcing the availability of "serviced development sites" for industrial, commercial and tourism development at a number of locations in Cork, including Crosshaven. Fort Camden was not specifically mentioned. The advertisement elicited no response in relation to Crosshaven. Subsequently a French enterprise expressed interest but withdrew. The defendant's involvement with an Irish enterprise was somewhat more fruitful and on 7th April, 1993 the defendant issued a notification of decision to grant planning permission, subject to conditions, to Valcoast Limited to "convert and refurbish part of Fort Meagher (Camden) to a hostel, restaurant and lounge bar and ancillary activities". James O'Brien's involvement with the defendant in relation to Fort Camden commenced shortly after that.

4. In the Cork County Development Plan, 1996, which was published as a draft in 1994, the development of Fort Camden was addressed under the heading "Amenity & Tourism – Cork Harbour". It was stated that the Fort Camden development would help develop Crosshaven's tourist function; there were proposals at a fairly advanced stage to develop a substantial tourist hostel in the fort complex; and the possibility of developing water based activities at the lower levels would be examined in conjunction with its development as a stop-off point in the proposed harbour transport tourism initiative.

The plaintiff's involvement with the defendant

5. By agreement between the parties the documents discovered by the defendant were admitted in evidence without formal proof. The following outline of the involvement of James O'Brien and the plaintiff and their advisers with the defendant in relation to the development of Fort Camden is drawn from those documents and from the plaintiff's witnesses, namely: James O'Brien; William O'Brien; William Brady, an architect in the firm of W.H. Hill & Son, who was retained in connection with the plaintiff's project for Fort Camden in 1994; Peter Roberts, an accountant in the firm of V.F. Nathan & Company, which firm was engaged by the plaintiff in August, 1996 to secure investment for the Fort Camden project and to assist in the preparation of an outline proposal to be submitted to the defendant; Brendan Cunningham, a solicitor in the firm of Barry C. Galvin & Son, which acted for the plaintiff; and Ian O'Leary, a partner in the firm of O'Leary Lehane & Co., Accountants, who became involved in the plaintiff's project for Fort Camden at the beginning of March, 1995.

6. The plaintiff's involvement with the defendant in relation to Fort Camden evolved as follows:

· James O'Brien was made aware of the development potential of Fort Camden in July, 1993 by an administrative officer in the planning department of the defendant when he brought in proposals to the defendant in relation to a proposed development at Ringaskiddy, which never came to fruition. Mr. O'Brien's perception was that he was encouraged towards Fort Camden and, in particular, towards the development of the lower part of the fort, the wharfage, quays and such like. He visited the locus with officials of the planning department. At the time, planning permission had issued on foot of the notification of decision referred to earlier for the development of the upper part of the fort and agreement in principle had been reached between the Irish enterprise, which I will refer to as "Valcoast", and the defendant, under which Valcoast was to raise £500,000 under a business expansion scheme to fund the development, carry out the development and secure Bord Fáilte approval for the project and the defendant was to grant a 35-year lease to Valcoast. Although James O'Brien kept in contact with the planning department throughout the remainder of 1993, he made little or no progress in relation to getting involved in a project at Fort Camden.

· In late March, 1994, James O'Brien and his solicitor, Barry Galvin, had a meeting with the personnel behind Valcoast at which a suggestion that Mr. O'Brien would develop the lower part of Fort Camden, the waterfront, was well received. This was followed by a letter dated 21st April, 1994 from Valcoast to Mr. Galvin, which proposed discussions to examine the possibilities of a joint venture with James O'Brien "to acquire and develop [Fort Camden] outright". This letter disclosed that Valcoast was considering another location for a hostel project in Crosshaven because it perceived its efforts to make progress with the defendant were being frustrated by bureaucracy. Through his solicitors, James O'Brien responded that he would be interested in a joint venture.

· On 3rd June, 1994, the O'Briens, on behalf of the plaintiff, met with Brendan Kelleher, the Chief Planning Officer of the defendant, to discuss where they were in relation to Camden Fort. They were accompanied by their architect, Mr. Brady, and their solicitor, Mr. Cunningham. They learned that the defendant, which at one time was considering a heritage development within the Fort, was no longer interested in that project. A one-page document was presented to Mr.

Kelleher, which illustrated the type of development which the O'Briens considered might be accommodated at Camden Fort involving: a heritage trail, hotel, holiday cottages, self-catering apartments, craft shops and a picnic area at the upper level; and, in addition to fishing, boat hire, sailing, diving and water skiing at the lower level, a heritage trail, bar and restaurant, fishermen's cottages, and a fishing shop. Mr. Kelleher suggested that the plaintiff and Valcoast might discuss a joint development of the entire property and bring back a joint proposal to the defendant. However, it was emphasised by Mr. Kelleher that a heritage centre would have to be incorporated in the development. On the same day, an official of the defendant wrote to Valcoast seeking confirmation of its continued interest in the development of the Fort and enquiring whether its development proposals were being made jointly with James O'Brien. In response, the defendant was informed by Valcoast, by letter dated 24th June, 1994, that Valcoast had a continued interest in the development of Fort Camden and that the interest of James O'Brien would form part of the development plan. Agreement had already been reached whereby the architect for Valcoast, Stephen Hyde, in conjunction with the plaintiff's architect, Mr. Brady, would draw up a development plan for Camden Fort to be submitted to the planning department for consideration.

· Very little progress was made between the plaintiff and Valcoast through June to November, 1994. As a result of a contact he initiated with an official in the planning department of the defendant in late November, 1994, James O'Brien was informed by letter dated 2nd December, 1994 that if an integrated development proposal for the fort was not forthcoming from the plaintiff and Valcoast, the defendant was "minded to seek further proposals by way of public advertisement." Both the plaintiff and Valcoast were asked to revert to the defendant by 16th December, 1994. Arising out of that ultimatum, Valcoast informed the plaintiff that, due to the initial difficulties with the defendant in moving ahead with its proposal for Camden Fort, the project it had intended for Camden Fort had been moved to another location in Crosshaven and it was not then in a position to consider proceeding on Camden Fort. However, it remained interested in taking part in discussions with the plaintiff at a future date. It was made clear that it did not wish to hinder any proposal that the plaintiff might wish to independently submit. Valcoast wrote in similar terms to the defendant.

· The response of the plaintiff's solicitors to the letter of 2nd December, 1994 was to seek an option to purchase the property at an agreed price, meaning at a price to be agreed, the option to provide that the plaintiff would have a period of up to two years to put together the full development plan, carry out necessary surveys, arrange for the necessary financing and obtain the appropriate planning permissions from the defendant. It was made clear that what motivated this suggestion was that the plaintiff had already expended considerable monies in drawing up draft plans in respect of the development of the property, and it was anticipated that the cost of putting together a full development plan would be in the region of £50,000 to £60,000.

· Following further correspondence from the plaintiff's solicitors, representations made on its behalf by politicians, and a meeting between officials of the defendant, including the County Manager, and the O'Briens on 3rd March, 1995, by letter dated 10th March, 1995, James O'Brien was informed that the defendant was prepared "to deal exclusively" with him "in regard to the submission of a comprehensive development proposal for Fort Camden for a period of six months from the date of this letter". It was stated that if such a proposal was not progressed to the defendant's satisfaction by 8th September, 1995, the defendant would feel free to treat with other parties or to take such other action as it deemed appropriate.

· During the following six months, James O'Brien was involved in securing investors, progressing the plans for the development with the plaintiffs architect, and visiting heritage centres in Ireland and England to get ideas. There was a meeting with Council officials in mid March 1995 and there were two in June, one on site. On each occasion, professional advisors attended on behalf of the plaintiff. At a meeting in June, the plaintiffs architect was proposing a hotel for the upper portion of the Fort, but it is clear on the evidence that the Chief Planning Officer was not receptive to the idea.

· One of the issues which James O'Brien was pursuing with the defendants officials during this period was what the purchase price of the property would be. By letter dated 10th August, 1995, his solicitors were informed that the defendant's "asking price" for Fort Camden was £500,000.

· The O'Briens and the plaintiff's advisors, Mr. Brady, Mr. O'Leary and Mr. Cunningham and Liam Mullens, a former county engineer who had been retained by the plaintiff as a consulting engineer for the project, attended a meeting with the defendant's officials on 31st August, 1995. It was at that meeting that James O'Brien learned that the defendant did not, in fact, have title to Fort Camden. What the documents put in evidence indicate is that in November, 1988 the Department of Defence agreed to transfer Fort Camden, comprising 33.8 acres, to the defendant, but it was to retain a seven acre field adjoining the fort. In May, 1995, the Department of Defence indicated that it was prepared to transfer the seven acre field to the defendant, to be used in conjunction with Fort Camden as a tourist amenity, at the price of £50,000. The title to the Fort and 33.8 acres was to be transferred at the same time as the title to the seven acres. At the meeting of 31st August, 1995, the Council officials dropped a bombshell: the O'Briens and their advisors were told that the defendant had been notified by the Department of Defence, which in turn had received a direction from the Department of Finance, to the effect that the defendant would have to advertise the property for sale. The outcome of what appears from the evidence to have been a rather fractious meeting was twofold. First, it was agreed on the defendant's side that the possibility of not advertising would be investigated and the exclusivity clause contained in the letter of 10th March, 1995, would be extended for a further two-month period. Secondly, the plaintiff's proposal in relation to land use seemed to have found favour with the personnel on the defendant's side.

· Following that meeting, by letter dated 6th September, 1995 to the defendant, the plaintiff sought confirmation of the extension of the six-month period to 8th November, 1995, and also sought confirmation that no step would be taken by the defendant to deal with a third party in any manner relating to the property, without the prior written consent of the plaintiff. By letter dated 7th September, 1995, the defendant confirmed the extension of the six-month period by two months. However, in relation to the second point which the plaintiff had raised, the plaintiff was referred to the terms of the letter of 10th March, 1995 and, suggesting what the plaintiff sought appeared to be a significantly greater commitment from the defendant, the defendant indicated that it was not prepared to go beyond the terms already set out.

· By letter dated 25th October, 1995, the defendant informed the plaintiff that the extension of time to 8th November, 1995 had been given on the basis that, as of August, 1995, the defendant expected to have a number of issues about the Fort clarified with the Department of Defence well in advance of the November deadline. The relevant issues had not been clarified. Therefore the defendant was prepared to extend the period for a further three months or until the necessary clarifications were received from the Department, whichever was earlier.

· It is clear from the documents put in evidence that the issue on which the defendant was seeking clarification from the Department of Defence was the basis on which the defendant could involve a private developer in the development of the property it was acquiring from the Department of Defence, because, apparently, the conditions of sale as furnished by the Chief State Solicitor involved a special condition which inhibited this in some manner, which is not clear from the documents put in evidence. It is not necessary to record the various "twists and turns" which occurred in the interaction between the defendant, the Department of Defence and the Department of Finance and internally between the various organs of the defendant. Suffice it to say that, in putting the relevant evidence before the court in relation to the period before proceedings were threatened by the plaintiff, the defendant has been very open. The upshot was that it was recognised by all relevant parties that the responsibility for the decisions in relation to Fort Camden rested with the defendant. At a council meeting held on 12th February, 1996, the elected members of the defendant agreed to a proposal of the County Manager that, subject to no further developers showing an interest prior to the next council meeting, a proposal for the disposal of Fort Camden to the plaintiff would be put before the council on condition that the sale would be closed within three months. If any other party were to show an interest in purchasing the property prior to the next council meeting, or if the sale was not finalised within three months, the property was to be advertised for sale.

· In the meantime, the plaintiff accepted the three months' extension. James O'Brien's evidence was that he was awaiting the outcome of the clarification and he was endeavouring to keep the plaintiff's financial backers in place. Mr. O'Brien was aware of the outcome of the meeting on 12th February, 1996 and he was aware that no other party emerged.

· The next significant event was a meeting of the plaintiff's principals, the O'Briens, and its advisors, Mr. Mullins and Mr. O'Leary, with officials of the defendant, including the Chief Planning Officer, on 7th May, 1996. In the defendant's own minute of this meeting it was stated that the defendant had satisfied itself that it could deal exclusively with the plaintiff on the preparation of an overall development proposal for Fort Camden, and it was proposed to do so for a period of six months. A document headed "draft briefing document" was produced by the defendant's side and circulated for discussion. This document set out the terms of any disposal for development of Fort Camden by the defendant. The plaintiff's representatives indicated that the plaintiff's intention was to develop a hotel, holiday homes, restaurant, bar, marine activities and heritage developments. They were informed that that proposal would come within the "tourist amenity purposes" use stipulated in the briefing document. The defendant's asking price was still at £500,000. The council's minute records that the Chief Planning Officer stated that he was concerned about the reference to "hotel" in relation to the development components, where previous discussions had referred to the development of a "hostel". The minute records that he was assured that there had been no change in the plaintiff's plans in that regard. The evidence of James O'Brien was that, going back to 1995, what the plaintiff proposed was a hotel. The defendant's minute records an agreement that the plaintiff would submit an offer for the property and a development package, which would include a business plan with full details of projected trading accounts, profit and loss accounts, balance sheet, cash flow statements for the first five years including working capital requirements and how the latter would be financed, and development proposals which would form the subject of further discussions. The plaintiff sought a letter that the defendant would deal exclusively with the plaintiff for six months from the date of the meeting and the defendant agreed to furnish the same.

· Following that meeting the following occurred:

- On 8th May 1995, the plaintiff's solicitors wrote to the County Solicitor seeking various documents referred to in the draft briefing document, for example, a draft lease, a draft licence and so forth. This letter was headed "subject to contract/contract denied". The response from the County Solicitor, which was dated 13th May, 1996, was that she had received no instructions in the matter.

- By letter dated 4th July, 1996, which was headed "without prejudice/subject to contract", the defendant formally confirmed to the plaintiff that for a period of six months from the date of the meeting of 7th May, 1996, the defendant would deal exclusively with the plaintiff in regard to the submission of a comprehensive tourism/amenity development proposal for Fort Camden. By a further letter dated 16th August, 1996, which was also headed "without prejudice/subject to contract", the defendant reminded the plaintiff that the exclusivity period would expire on 6th November, 1996. In a response dated 21st August, 1996, James O'Brien, on behalf of the plaintiff, informed the defendant that he was confident that a proposal would be before the defendant within the time allowed. He requested a response to the plaintiff's solicitor's letter dated 8th May, 1996.

- On 9th September, 1996, the plaintiff's architect, Mr. Brady, furnished to the defendant two drawings showing the plaintiff's proposals for the Fort along the lines which had been previously discussed to the Chief Planning Officer. Mr. Brady recognised that the proposals were subject to planning permission but, due to the size of the development, he sought the Chief Planning Officer's views. By letter dated 4th October, 1996 from the defendant, which was headed "without prejudice/subject to contract", the plaintiff was informed that the proposals were "regarded as generally acceptable subject to further elaboration on the leisure centre and its relationship to the existing buildings". It was intimated that the defendant required substantial detail on the costings for the development, the proposed financial package and an indicative works programme. The plaintiff was again reminded that the exclusivity period would expire on 6th November, 1996 and was informed that consideration of extending it could only be contemplated on receipt of the required data.

- On 4th November, 1996, a document entitled "Proposal for the development of Fort Camden by Triatic Limited" prepared by V.F. Nathan & Company, Chartered Accountants, was submitted to the defendant.

· Obviously, James O'Brien was unaware at the time of how the plaintiff's proposal was received by the defendant. The documents put in evidence disclose that the Chief Planning Officer found it very disappointing and, apart from the lack of details, he was concerned about the central emphasis on a one hundred bedroom hotel and whether it would be compatible with the overriding objective of retaining the heritage quality of the site. He listed other matters which had not been addressed or costed, for example, sewage disposal and treatment, water storage and distribution, and interpretative material in relation to the heritage element. An ad hoc group within the defendant known as the Fort Camden Development Advisory Group met on 9th December, 1996 to analyse the proposal submitted by V.F. Nathan & Company and found it inadequate. They recommended that the plaintiff be advised that the defendant would re-advertise in the public press seeking alternative development proposals. However, another internal group, the Planning Team, which met on 9th January, 1997, were of the view that, if the plaintiff were to revert to a hostel rather than a hotel as part of

the proposed development package, discussions could continue.

· At the invitation of the defendant, the plaintiff's representatives and advisers, including its accountants, its solicitor, its architect, and its engineers attended a meeting on 3rd February, 1997. Contemporaneously with that meeting the plaintiff's solicitors were informed that, as the plaintiff's proposal was incomplete, it would be premature for the defendant to provide contracts at that stage. Most of the difficulties which the defendant's representatives perceived were addressed at the meeting. The matter was left on the basis that it would have to be discussed with the County Manager and put before the elected members and it was anticipated that this would take approximately one month.

· A further meeting took place between representatives of the defendant and Mr. O'Brien and the plaintiff's engineer on 5th March, 1997. The defendant sought greater detail in relation to the hotel component before the matter was put before the elected members. The outcome was that it was agreed that the Chief Planning Officer and the plaintiff's architect would meet to deal with the issues which had been raised. The evidence of James O'Brien was that his understanding from the meeting of 5th March, 1997 was that, from a planning point of view, the hotel component could be included without difficulty.

· The next meeting between the plaintiff's representatives and the defendant's representatives took place on 28th May, 1997. The purpose of the meeting was to update the plaintiff's representatives on progress since the meeting on 5th March, 1997. The plaintiff's representatives were informed that the Chief Planning Officer had recommended that an assessment "similar to an EIS" be undertaken with a view to assessing the impact the proposed hotel would have on the site and on the infrastructure of the area. The defendants own minute discloses that James O'Brien was astounded at this proposal. Mr. O'Brien's evidence was that the plaintiff had no option but to agree to the defendant's proposal.

· In mid-July 1997, the defendant retained CAAS Environmental Services Ltd. (CAAS) to carry out "an EIS type appraisal" of the proposal to build a 100 bedroom hotel at Fort Camden. The report of CAAS was submitted in August, 1997. It was considered at a meeting of the Planning Team on 20th August, 1997 and the minute of that meeting records that the conclusions from the appraisal were "favourable towards the concept of encouraging a hotel type development". However, the Planning Team concluded that the inclusion of the hotel was a fundamental change and, accordingly, the defendant should be advised that it would be prudent to re-advertise, seeking new proposals incorporating a hotel, and that the plaintiff should be advised of the need to re-advertise. The decision of the defendant to re-advertise was conveyed to James O'Brien by telephone on 22nd August, 1997.

· The information was conveyed formally by letter dated 9th September, 1997.

· At a meeting of the Development Committee of the defendant on 17th October, 1997, the Deputy County Manager reported to the committee of elected members on the then current position in relation to Fort Camden. A proposal was put to continue negotiations with the plaintiff. However, the decision of the meeting was that the matter be adjourned until the opinion of senior counsel could be obtained on the position of the defendant vis-à-vis the plaintiff and, in particular, on the following issues: whether there was a contractual obligation on the defendant's part to deal exclusively with the plaintiff; if the defendant should decide to continue dealing exclusively with the plaintiff, whether this could give rise to liability for non-compliance with public procurement procedures; and whether the defendant could decide to revalue Fort Camden and deal exclusively with the plaintiff on the basis of a revised valuation.

· On 17th November, 1997, the plaintiff's solicitors wrote to the County Solicitor outlining their understanding that it was proposed to re-advertise Fort Camden. An undertaking was sought that the defendant would not re-advertise the property and would not place the property for sale without having completed negotiations with the plaintiff. An application for interlocutory injunction was threatened, if the undertaking was not forthcoming within seven days. By letter dated 24th November, 1997, the Acting County Solicitor informed the plaintiff's solicitors that the plaintiff had made no decision to re-advertise the property and did not then presently intend to do so. Mr. Cunningham's evidence was that it was hoped that the defendant would re-engage with the plaintiff. The defendant did not re-engage with the plaintiff.

7. It was against that background that the plenary summons in these proceedings was issued on 22nd January, 1998. In the intervening eight years, no steps have been taken by the defendant to re-advertise for proposals for the development or disposal of Fort Camden.

The plaintiff's claim as pleaded

8. In its statement of claim delivered on 22nd April, 1998 the plaintiff asserted two alternative bases for its claim for declaratory relief, injunctive relief and damages.

9. The first was that the plaintiff had, and was entitled to, the legitimate expectation that the defendant would not, *inter alia*, advertise for or seek out potential purchasers, other than the plaintiff, for, or sell or otherwise alienate or deal with Fort Camden –

(a) pending its *bona fide* consideration of the plaintiff's proposal for the purchase and development of the lands,

(b) pending its *bona fide* completion of negotiations with the plaintiff in respect of the plaintiff's proposal,

(c) pending its *bona fide* completion of an assessment of whether or not it might or should properly contract with the plaintiff for the sale of the lands to the plaintiff,

(d) on the basis of the plaintiff's proposals or any near or substantially similar variation of such proposals for the construction of a hotel on the lands,

(e) on the basis of any tender documentation incorporating the proposals referred to at (d) or any of them.

10. The second basis was that the factual circumstances were such as to constitute a contract between the plaintiff and the defendant in the terms of the legitimate expectations pleaded.

11. It was alleged that by its expressed intention to re-advertise Fort Camden with a view to securing tenders for the purchase and development thereof from persons other than the plaintiff, the defendant had acted wrongfully, unlawfully, in breach of contract and contrary to and in a manner inconsistent with the plaintiff's legitimate expectations.

12. The declaratory relief which the plaintiff claimed were declarations that –

> (a) the plaintiff had and was entitled to the legitimate expectations in the terms pleaded,
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> (b) that the defendant was estopped from acting in any manner contrary to or inconsistent with the plaintiff's legitimate expectations or any of them, and
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> (c) that it would be unconscionable of the defendant to act or omit to act in any manner contrary to or inconsistent with the plaintiff's legitimate expectations.

13. The claim for damages encompassed damages for breach of contract, breach of collateral contract and failure to respect the plaintiff's legitimate expectations.

14. The defendant delivered a full defence to the plaintiff's claim as pleaded. It denied that the plaintiff had or was entitled to the legitimate expectations pleaded by the plaintiff. It denied that the defendant ever contracted with the plaintiff. It also denied that the circumstances as pleaded in the statement of claim were such as to constitute a contract between the plaintiff and the defendant in terms of the legitimate expectations pleaded. The defendant asserted that the doctrine of legitimate expectation does not apply and has no application to the facts, matters or circumstances of this case or to any of the reliefs claimed by the plaintiff and that it does not extend to and cannot form the basis for the granting of the reliefs claimed.

The hearing

15. The hearing commenced on 4th October, 2005. There was no stenographer present and, consequently, there is no transcript available of the hearing on that morning, although there was a stenographer present for the hearing in the afternoon. Accordingly, I am basing my observations of what occurred when the case was being opened by counsel for the plaintiff on my own note, which I believe to be an accurate note.

16. In opening the case, counsel for the plaintiff indicated that the claim which was being pursued was for damages for breach of legitimate expectation. It was indicated that, while there was also a claim for breach of contract, it was accepted by the plaintiff that there was no concluded contract and that claim was not being pursued. In particular, it was stated that the paragraph of the statement of claim in which it was alleged that the circumstances therein set out were such as to constitute a contract in the terms of the legitimate expectations pleaded was not being relied on. In relation to the paragraph of the prayer in the statement of claim in which damages were sought, my understanding was that damages were being claimed only for failure to respect the plaintiff's legitimate expectations.

17. When all of the pleadings had been opened, in response to my question as to what the legal basis of the claim was, counsel for the plaintiff stated that the defendant is a public body. The plaintiff was relying on the decision of this Court (McCracken J.) in *Abrahamson v. The Law Society of Ireland* [1996] 2 I.L.R.M. 481. He formulated the basis of the plaintiff's claim as follows:

> Having been induced to embark on the project on the basis of an exclusive arrangement and the defendant advancing it as being a development objective, it was to be expected that the defendant would deal with the plaintiff in a certain way; that it would treat the plaintiff fairly and not in a manner which was one of capriciously breaking off negotiations when the plaintiff had expended money.
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> The defendant had changed the "ground rules" in 1997. It moved from a situation where the plaintiff had an exclusive arrangement with the defendant for four years and was allowed to spend significant resources, of which the defendant knew. The defendant "changed the goal posts". The plaintiff had a legitimate expectation to be dealt with on an exclusive basis. [If the defendant resiled and the plaintiff had expended sums to the benefit of the defendant] the plaintiff was entitled to reimbursement, having been induced to act to its detriment.

18. Counsel intimated that while McCracken J. had referred to the remedy of damages being available, what the plaintiff was claiming was reimbursement of expenditure it was induced to incur on foot of the legitimate expectation that it would be treated on an agreed basis by the defendant. The plaintiff was not seeking damages for loss of profits. Counsel adopted the *obiter dictum* of Fennelly J. in *Glencar Exploration Plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 at p. 162, to which I will return, as setting out what it is necessary to establish in order to succeed in a case based on failure of a public authority to respect legitimate expectations.

19. The plaintiff's case was heard over three days. In relation to the quantum of the damages which it was contended the plaintiff should receive, evidence was adduced by the plaintiff to support an award in the region of €270,000, made up of sums in the region of €79,000 due to the plaintiff's professional advisers and sums in the region of €191,000 claimed by the O'Briens in respect of their time and expenses incurred.

20. At the end of the plaintiff's case, counsel for the defendant applied for a direction. He indicated to the court that the defendant did not intend to go into evidence. That being the case, the agreed position was that, following the decision of the Supreme Court in *O'Toole v. Heavey* [1993] 2 I.R. 544, the question for the court is whether the plaintiff has established as a matter of probability the facts necessary to support a finding in its favour. If it has, judgment should be entered in its favour; if it has not, the action should be dismissed.

21. The hearing was then adjourned to enable the parties to prepare and exchange written submissions, the defendant in support of its application for a direction and the plaintiff in response to the application.

22. When the hearing resumed, both parties furnished comprehensive written submissions to the court, which were supplemented by oral submissions.

23. Because of the course the hearing took, I consider it prudent to outline the submissions made on behalf of the parties in greater detail than might otherwise be the case.

The defendant's submissions

24. In its written submissions the defendant proceeded on the basis that the plaintiff had indicated that it was not pursuing its claim based on contract. The defendant focused on its undertaking "to deal exclusively" with the plaintiff in regard to the submission of a comprehensive development for Fort Camden for a limited period, which initially had been given in the letter of 10th March, 1995, the duration of which it was acknowledged had been extended from time to time. The effect of the undertaking and the position of the plaintiff vis-à-vis the defendant arising from their dealings inter se were analysed as follows:

(1) It was submitted that the context in which the undertaking "to deal exclusively" was entered into was relevant in considering the nature and extent of any expectation which the plaintiff could have arising from it, the following factors being emphasised:

(a) That the plaintiff's proposal was a continuation of the proposal of Valcoast, so that the exclusive right was granted in a context in which both parties already had an understanding of the type of proposal which would be submitted by the plaintiff, namely, a proposal which encompassed a hostel, not a hotel. I am not satisfied that that proposition accords with the evidence. In my view, it is clear on the evidence that, although the Chief Planning Officer had and expressed misgivings about a proposal which encompassed a hotel, neither the plaintiff's principals nor its advisers considered the plaintiff restricted to a hostel, rather than a hotel, either before the meeting on 3rd March, 1995, which resulted in the letter of 10th March, 1995, or subsequently in their dealings with the defendant.

(b) That the defendant was constrained by certain public procurement obligations in relation to the sale of Fort Camden of which the plaintiff must be taken to have been aware, including the *Department of Finance Guidelines on Public Procurement* promulgated in 1994. It was submitted on behalf of the plaintiff that there is no evidence before the court in relation to the public procurement requirements. Apart from that, it is pertinent to ask why, in its letter of 10th August, 1995, the defendant intimated to the plaintiff's solicitors that the "asking price" for Fort Camden was £500,000. At that stage the defendant had obtained a valuation from Hamilton Osborne King, Estate Agents, Auctioneers & Valuers, which was not put in evidence. However, the evidence indicates that the valuer had been furnished with a copy of the plan submitted by the plaintiff's architect, Mr. Brady, at a meeting on 22nd June, 1995, so that the valuer would have been aware that a hotel was in contemplation by the plaintiff, even if the Chief Planning Officer was not receptive of the idea. It is clear on the evidence that the Department of Defence requirements, which became obvious in the summer of 1995, gave rise to concerns on the part of the defendant's officials and compliance with the State's public procurement requirements was also a concern.

(c) That the approval of the elected members of the defendant was necessary to any disposal of Fort Camden. That was undoubtedly the case and it was something which was known to the plaintiff's principals. The plaintiff is not claiming, and could not claim, that it had a contract to acquire Fort Camden.

(d) That the defendant, as a local authority, must act in the public interest. That is undoubtedly the case and it is to be assumed that it is something to which the defendant's officials gave consideration in their dealings with the plaintiff.

(e) That the County Development Plan for South Cork which was published in draft form in 1994 and adopted in 1996, envisaged a hostel development at Fort Camden. That is undoubtedly the case. However, it is clear on the evidence that the dealings between the plaintiff and the defendant proceeded on the basis that the plaintiff would have to submit an application for planning permission.

(f) That the title to Fort Camden would be subject to certain conditions which would be imposed by the Department of Defence, including a requirement that the lands were to be used for "tourist/amenity" purposes.

> By way of general observation, I would comment that the extent to which the factors at (b) to (f) above constrained the defendant in its dealing with the plaintiff was, or should have been, known to the defendant's officials who were dealing with the plaintiff in March, 1995 and thereafter and that it must be assumed that it was taken account of in the defendant's dealings with the plaintiff. In the absence of evidence to the contrary, it is to be assumed that the defendant's officials considered that the defendant was not breaching any statute, rule or principle which governed its conduct in such dealings.

(2) On the core issue as to the proper construction of the undertaking given in the letter of 10th March, 1995, it was submitted on behalf of the defendant that it amounted to an undertaking that the defendant would not engage with or assist any other party with regard to the submission of a proposal for the development of Fort Camden, but that it did not go so far as to amount to an exclusive entitlement to make such a proposal. Put another way, the exclusivity related to "dealing", rather than to the exclusive right to submit a proposal, it was suggested. In my view, that submission is not correct. The wording of the letter is clear and unambiguous. The defendant was telling the plaintiff that the plaintiff would have an exclusive right to submit a comprehensive development proposal for Fort Camden during the period stipulated. However, the defendant is correct in submitting that the exclusivity was not open ended and that it did not extend to an exclusive right to deal until the completion of any negotiations, as claimed in the statement of claim, whenever that would be. Further, the defendant's submission that the undertaking connoted a significant discretionary element on the part of the defendant, in that the exclusivity would come to an end where the defendant considered that the plaintiff's proposal was not progressing to its satisfaction, is correct.

(3) In relation to the legal nature of what transpired between the parties after the right to deal exclusively was granted by the defendant to the plaintiff, it was submitted on behalf of the defendant that the parties were involved in a process of negotiations and that effectively what the plaintiff is claiming is that the legitimate expectations arose from the course of the negotiations. The law does not impose a duty to negotiate in good faith, it was submitted, and there are strong policy reasons why a court ought not extend the law on legitimate expectation to the conduct of negotiations. I will return to this issue later.

(4) In any event, any legitimate expectation which the plaintiffs could have had regarding its dealing with the defendant has been honoured and satisfied by the defendant. That is illustrated by any one of the following factors or a combination thereof:

(a) That the defendant dealt exclusively with the plaintiff until 6th November, 1996.

(b) That, despite being given more than ample opportunity to progress its proposal, the plaintiff did not produce comprehensive proposals and, in particular, the business plan submitted did not contain an offer price for Fort Camden. There is no doubt that detail was absent in relation to the business plan proposal and the actual development proposal, as the plaintiff's witnesses acknowledged.

(c) That the proposal was in fact considered by the defendant and it was considered to be inadequate.

(d) That, given that the plaintiff made a very significant alteration to the proposal envisaged in March, 1995 in including a hotel rather than a hostel in the proposal, the plaintiff could not have had an expectation that the defendant would continue to deal exclusively with it. This change, it was submitted, brought into focus the defendant's public procurement obligations, which require transparency and competition in the award of contracts. It was also submitted that the scale and location of the hotel, which became apparent in November, 1996, was significant and that the location raised questions as to whether the requirement of the Department of Defence that the land be used for "tourist/amenity" purposes would be fulfilled. I agree with counsel for the plaintiff that there is not before the court evidence to support that last submission.

(e) That the court should have regard to the fact that the defendant had committed considerable time and resources in its dealing with the plaintiff, with the end result that the plaintiff produced a deficient proposal, so that it would be unfair and inappropriate to find that the defendant was bound to continue to deal exclusively with the plaintiff.

(5) Even if the plaintiff had a legitimate expectation that the defendant would not re-advertise for development proposals for Fort Camden, which the plaintiff did not admit, the defendant was entitled to reverse such expectation having regard to the circumstances of the case. In developing this argument, it was submitted that, even if the defendant had represented by its communications or its conduct that it would continue to exclusively deal with the plaintiff, it was objectively justified in resiling from that position because the fundamental change arising from the inclusion of a hotel in the plaintiff's proposal justified re-advertising to ensure that the defendant fulfilled its public duties of transparency and open competition in the sale of Fort Camden. In this context there was a suggestion that the inclusion of the hotel arguably amounted to a material contravention of the development plan. Even if that was the case, in my view, it was immaterial; as I have said, it was always envisaged that the plaintiff would have to obtain planning permission for the development.

It was further submitted that, if the plaintiff did have a legitimate expectation that the defendant would not seek to re-advertise, that merely entitled the plaintiff to a fair hearing, not to substantive relief. The plaintiff had been afforded ample opportunity to make its case. It was also submitted that it is not open to the court to compel the defendant to breach its public obligations, in particular its public procurement obligations. On this point I agree with counsel for the plaintiff that there is no evidence before the court that, by continuing to deal with the plaintiff on the basis it had been dealing hitherto, the defendant would have breached any statutory obligation, rule or principle. Counsel for the defendant did not pursue an argument advanced in its written submission that the defendant was not performing a public function in its dealings with the plaintiff, acknowledging, properly in my view, that it was a public function. However, the argument advanced that, because of the discretionary nature of the function, it could not give rise to a legitimate expectation, in my view, is not tenable.

(6) The plaintiff submitted that, by its nature, legitimate expectation is an equitable doctrine and that, as such, any relief granted by the court is discretionary. In this case, it was submitted that no relief should be granted for the following reasons:

(a) delay on the part of the plaintiff in prosecuting the proceedings;

(b) the existence of these proceedings has had a "chilling" effect, in consequence of which Fort Camden has never been developed;

(c) the proceedings were premature because the plaintiff was informed that it would get seven days' notice prior to any re-advertising by the defendant; and

(d) it was only when the case was opened that it was disclosed by the plaintiff that it was not pursuing injunctive relief, which it was submitted manifested a position which is entirely inconsistent with the plaintiff's claim for legitimate expectation and calls in question the plaintiff's *bona fides*.

The plaintiff's submissions in reply

25. Counsel for the plaintiff submitted that the court was entitled to draw the inference on the evidence that the defendant did not act *bona fide* in the course of its dealings with the plaintiff. Ascribing the inclusion of the hotel in the development plan as being a fundamental change in September, 1997 as a justification for disengaging from the negotiations with the plaintiff was spurious, it was submitted, given that a hotel featured in the plans produced by Mr. Brady from May, 1995 onwards. The complaint that the proposal lacked comprehensiveness and, in particular, the complaint of lack of financial information in the business plan, it was submitted, was not evinced as a reason for disengaging at the time and it was suggested that reliance on this factor was also spurious and disingenuous.

26. As to the basis of the claim, the plaintiff advanced not only the doctrine of legitimate expectation but reverted to the contention that there was a breach of contract or of a collateral contract. Counsel for the defendant, understandably in my view, vehemently objected to that course.

27. The contract or collateral contract contended for by the plaintiff was effectively an open-ended contract in the terms of the letter of 10th March, 1995, in other words, a contract by the defendant to deal exclusively with the plaintiff in relation to the submission of a comprehensive development proposal for Fort Camden. There was necessarily implied in that contract, it was argued, a term that the defendant was not entitled to arbitrarily resile from its commitment to treat with the plaintiff as it purported to do by the letter of 9th September, 1997. What gave rise to that necessary implication, it was argued, was that the plaintiff could derive no benefit, despite considerable input in terms of time and money and engagement of professional expertise, except by bringing the project to fruition. Having regard to the manner in which the contract or collateral contract was operated by the parties, it was an implied term thereof that the defendant would treat reasonably and fairly with the plaintiff "as the exclusive tenderor" and, provided all reasonable requests of the defendant were met, the arrangement would proceed to fruition in the form of a formal contract. Furthermore, as a matter of law, there was an obligation on the defendant to deal with the plaintiff in good faith.

28. Insofar as the plaintiff's claim was founded on the doctrine of legitimate expectation, the plaintiff continued to rely on the obiter dictum of Fennelly J. in the *Glencar* case and asserted that the evidence established:

(1) that the defendant had made a statement and had adopted positions amounting to a promise or representation that it would deal with the plaintiff exclusively, not require public advertisement, and, if the plaintiff put forward plans according to its reasonable requirements, would continue negotiations with it;

(2) the representation was conveyed directly to the plaintiff, which acted on the faith of the representation to its detriment and incurred considerable expense of which the defendant would have been aware; and

(3) the representation created an expectation that the defendant would abide by it and would not seek to resile from it on spurious grounds.

29. The representation which the plaintiff asserted grounded the claim of legitimate expectation is, in substance, the same as the contract or collateral contract contended for: in plain language, that the negotiations between the parties would continue until a deal was done, in other words, until there was a concluded contract for the development by, and the sale to, the plaintiff by the defendant of Fort Camden. I surmise that the reason the plaintiff has reverted to reliance on the contract/contractual collateral contract basis of the claim is because of the observations of Kelly J. at first instance in the *Glencar* case, in which, in a passage quoted in the plaintiff's written submission he states:

> "The existence of a legitimate expectation was not established by the applicants; but even if it had been, damages would not be available in the absence of a subsisting contractual or equivalent relationship between the parties."

The law: contract to negotiate in good faith?

30. Although, as I have stated, counsel for the defendant vehemently objected to the plaintiff seeking to rely on a contract or a collateral contract in its final submissions, the issue as to whether a contract of the type asserted by the plaintiff could, as a matter of law, exist was addressed in the defendant's written submission and it was submitted that it could not. Therefore, I consider it proper to determine the issue.

31. The authority primarily relied on by the defendant was the decision of the House of Lords in *Walford v. Miles* [1992] 2 A.C. 128. The facts in that case were that in January, 1987 negotiations commenced between Walford, as purchaser, and Miles, as vendor, for the acquisition of a company and certain property, which was let to the company, from which it carried on a photographic processing business. On 17th March, 1987 Miles orally agreed to deal with Walford exclusively and to terminate any negotiations then current between Miles and any other competing purchaser, provided Walford furnished within three days a "letter of comfort" from his bankers confirming that the necessary financial resources were available to complete the purchase. The "letter of comfort" was furnished on the following day. It was not disputed that the discussion on 17th March was subject to contract. On 25th March, Miles ended negotiations which had been ongoing with a third party. However, on 27th March, Miles decided not to proceed with the negotiations to sell to Walford. The shares in the company and the property were eventually sold to the third party. The action by Walford was for damages for breach of contract and misrepresentation.

32. The case as pleaded is set out in the speech of Lord Ackner (at p. 134). The consideration for the oral agreement was twofold: Walford agreeing to continue negotiations; and the provision of the letter of comfort. The oral agreement as originally pleaded was that Miles would terminate any negotiations with any third party or consideration of any alternative with a view to concluding an agreement with Walford and further that, even if he received a satisfactory proposal from any third party prior to the close of business on 25th March, he would not deal with that third party or give consideration to any alternative. Lord Ackner described the agreement as pleaded as purporting to be what is known as a "lock-out" agreement, providing Walford with an exclusive opportunity to try and come to terms with Miles, but without expressly providing any duration for such opportunity. The statement of claim was amended to include an additional plea that it was a term of the collateral agreement necessarily to be implied to give business efficiency to it that, so long as Miles continued to desire to sell the property and shares, Miles would continue to negotiate in good faith with Walford. This was characterised by Lord Ackner as an allegation that Miles was "locked-in" to dealing with Walford for an unspecified period.

33. In considering the validity of the agreement alleged by Walford in the amended statement of claim, Lord Ackner made the point (at p. 137) that what had been orally agreed on 17th March was "subject to contract", so that the parties were still in negotiation even in relation to those matters, and there were many other matters which still had to be considered and agreed. He distinguished an agreement to negotiate in good faith from an agreement to use best endeavours and continued (at p. 138):

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

34. Lord Ackner then went on to consider the validity of the agreement as originally pleaded, that is to say, without the additional allegation that it was an implied term that Miles would continue to negotiate in good faith with Walford. He made the following observations about a 'lock-out' agreement (at p.139):

> "There is clearly no reason in the English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B agrees for a specified period of time, not to negotiate with anyone except A in relation to the sale of his property. There are often good commercial reasons why A should desire to obtain such an agreement from B. B's property, which A contemplates purchasing, may be such as to require the expenditure of not inconsiderable time and money before A is in a position to assess what he is prepared to offer for its purchase or whether he wishes to make any

> offer at all. A may well consider that he is not prepared to run the risk of expending such time and money unless there is a worthwhile prospect, should he desire to make an offer to purchase, of B, not only then still owning the property, but of being prepared to consider his offer. A may wish to guard against the risk that, while he is investigating the wisdom of offering to buy B's property, B may have already disposed of it or, alternatively, may be so advanced in negotiations with a third party as to be unwilling, or for all practical purposes unable, to negotiate with A. But I stress that this is a negative agreement – B by agreeing not to negotiation for a fixed period with a third party, locks himself out of such negotiations. He has in no legal sense locked himself *into* negotiations with A. What A has achieved is an exclusive opportunity, for a fixed period, to try and come to terms with B, an opportunity for which he has, unless he makes his agreement under seal, to give good consideration. I therefore cannot accept [Walford's counsel's] proposition, which was the essential reason for his amending paragraph 5 of the statement of claim by the addition of the implied term, that without a positive obligation on B to negotiate with A, the lock-out agreement would be futile."

35. On the facts of the case, Lord Ackner considered that the agreement as originally pleaded lacked one of the essential characteristics of a basic valid lock-out agreement, in that it did not specify for how long it was to last. Because of that deficiency it lacked the necessary certainty and was unenforceable.

36. The defendant cited an English authority in which a lock-out agreement was enforced: *Pitt v. PHH Asset Management Limited* [1993] 4 All E.R. 961. There, in a classic gazumping scenario, the Court of Appeal enforced against the defendant vendor an agreement by the defendant vendor to sell the property to the plaintiff for £200,000 and not to consider any further offers provided the plaintiff exchanged contracts within two weeks of receipt of a draft contract, in circumstances where the court considered the plaintiff had given consideration in withdrawing a threat to seek injunctive relief against the defendant and in committing to a time limit of two weeks for exchange of contracts.

37. In response to the defendant's submissions, counsel for the plaintiff submitted that the court should not regard the decision of the House of Lords in *Walford v. Miles* as a persuasive authority. In any event, it was suggested, it is distinguishable on the facts, in that in the instant case the court is not concerned with a bare agreement to negotiate; through the course of dealings between the parties, the matter has progressed beyond that stage.

38. The plaintiff referred the court to the helpful commentary on good faith and fair dealing in a contractual context in McDermott on *Contract Law* (Butterworths, 2001)at paras. 7.41 to 7.44 inclusive. In particular, reference was made to the two Irish cases referred to in the commentary as examples of the Irish courts being prepared to enforce an express or implied obligation to use reasonable efforts to achieve some stipulated result: *Rooney v. Byrne* [1933] I.R. 609; and *Fluid Power Technology Company v. Sperry (Ireland) Limited* (Unreported, High Court, Costello J., 22nd February, 1985). In each of those cases, the court was concerned with a situation in which a contract existed. In the first, the contract was for the purchase of a house subject to the purchaser getting a mortgage. It was held that the purchaser was bound to make reasonable efforts to secure the necessary advance. The second concerned the exercise of a power to terminate a distributorship agreement in the context of an application for an interlocutory injunction. Costello J. held that the plaintiff, which was seeking the interlocutory injunction, had made out a fair case that there was an implied obligation to exercise the termination power in a *bona fide* manner, which he explained as meaning:

> "… that when they give reasons for termination these reasons must not be spurious ones, but it also means that if they honestly believe them to be valid, then even if they are subsequently proved to have been wrong the notice is valid. So, if honestly dissatisfied with the plaintiffs as distributors, this would mean that the notice of termination could be given."

39. A New Zealand authority, *Livingstone v. Roskilly* [1992] 3 NZLR 230, in which Thomas J. stated that he would not "exclude from our common law the concept that, in general, the parties to a contract must act in good faith in making and carrying out the contract", which is referred to in McDermott, was also relied on by counsel for the plaintiff. It was submitted that the court should apply that dictum rather than following the approach adopted in Walford v. Miles. Like the Irish authorities cited by the plaintiff, that dictum is concerned with the implication of the concept of good faith and fair dealing on the part of the parties to an existing contractual relationship. No authority has been cited in which that concept was applied to negotiations, although McDermott does refer to extra-judicial and academic comment on the topic.

40. Counsel for the plaintiff also referred the court to a decision of the Court of Appeal of England and Wales in which *Walford v. Miles* was considered: *Petromec Inc. & Ors. v. Petroleo Brasileiro SA Petrobras & Ors.* [2005] EWCA Civ 891. As was pointed out by Mance L.J. in his judgment in that case (at para. 120), the Court of Appeal was bound by the decision of the House of Lords for what it decided. He pointed out that the main distinction between Walford v. Miles and the *Petromec* case was that in the former there was no concluded agreement, since everything was "subject to contract", and there was, moreover, no express agreement to negotiate in good faith. The comments of Mance L.J. in *Petromec*, which were clearly *obiter*, concerned the enforcement of an express provision in the contract under consideration, whereby the other contracting party agreed to negotiate certain extra costs with Petromec "in good faith". Having quoted the last three sentences in the first quotation from *Walford v. Miles* set out above, Mance L.J. stated as follows (at para. 121):

> "That shows the difference from the present case. Clause 12.3 of the Supervision Agreement is not a bare agreement to negotiate. It is not irrelevant that it is an express obligation which is part of a complex agreement drafted by City of London solicitors … It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has 'no legal content' to use Lord Ackner's phrase would be for the law deliberately to defeat the reasonable expectations of honest men, to adapt slightly the title of Lord Steyn's … lecture delivered … on 24th October, 1996 (113 LQR 433 (1977)). At p. 439 Lord Steyn hoped that the House of Lords might reconsider *Walford v. Miles* with the benefit of fuller argument."

41. For my part, I find the reasoning of Lord Ackner persuasive, particularly when applied to the facts of this case, in which the dealings and negotiations between the plaintiff and the defendant, the ultimate objective of which was to achieve agreement on terms for the development, subject to planning permission, and the acquisition by the plaintiff of Fort Camden, which the defendant could recommend to the elected members of the defendant, involved a considerably greater element of complexity, and, consequently, more scope for uncertainty than negotiations for the purchase of the shares of a company and a leasehold property or the purchase of a house. The fact that one of the parties to the dealings in this case was a public authority does not give rise to any special consideration in the context of the law of contract.

42. As I have already stated, I do not accept the defendant's interpretation of the effect of the undertaking given in the letter of 10th March, 1995. While the issue of what, if any, consideration was given by the plaintiff for that undertaking was not addressed, it can be assumed that consideration was given, in that the plaintiff was prepared to commit time and resources to preparing and submitting a development proposal. On that basis, I am prepared to find that between March, 1995 and November, 1996 there was a

contractual relationship between the defendant and the plaintiff created by the letter of 10th March, 1995 and the subsequent extensions of the exclusivity period. That agreement was in the nature of what Lord Ackner described as a "lock-out" agreement. What the plaintiff achieved under it was an exclusive opportunity for the extended period to submit a comprehensive development proposal for Fort Camden. The defendant complied with its obligations under that agreement. It dealt exclusively with the plaintiff in relation to the development of Fort Camden up to the expiry of the exclusivity period. It accepted and considered the development proposal presented to it by the plaintiff. In my view, on the evidence, it did so in a *bona fide* manner. The defendant's contractual obligations terminated on the expiry of the exclusivity period.

43. What happened after November, 1996 was that, while the defendant considered the development proposal submitted by the plaintiff to be inadequate, on the initiative of the defendant, a new phase of negotiation commenced on 3rd February, 1997. In essence, the plaintiff's case is that there was an agreement to continue those negotiations until they would come to fruition in the form of a formal contract, which, as a matter of law, can only mean until the defendant's officials were prepared to recommend the agreed terms for the development, subject to planning permission, and the acquisition of Fort Camden by the plaintiff to the elected members. I have no doubt that, if a finding could be made on the evidence that there was such an agreement, it would be unenforceable for lack of certainty.

44. To take what, perhaps, would have been the simplest component of the transaction, the acquisition price, as an example, one is entitled to ask how a court could be expected to decide the point at which the negotiations on that component had come to fruition. By September, 1997, the point which had been reached in relation to the acquisition price was that the defendant had indicated an asking price of £500,000 some two years earlier. The plaintiff had neither indicated that the asking price was acceptable to it, nor had it made a counter offer. Although very little was offered by way of analysis of this aspect of the case, what happened in 1997 is that the plaintiff had adopted the position that there had been an agreement, that the defendant was in breach, and that the plaintiff was entitled to elect to enforce the agreement or consider that it was discharged from further performance. It was only at the hearing that the plaintiff elected to terminate the alleged agreement. The breach alleged is that the defendant was not entitled to disengage other than for *bona fide* and valid reasons and none such existed. But, if the dealings between the parties had not taken the turn they took in September, 1997 and negotiations had continued, and if the parties were unable to reach consensus on the acquisition price, how could it be said that one or other party could not withdraw? If the defendant persisted in an asking price of £500,000, and the plaintiff considered that the property was worth only half that price, would the plaintiff not have been entitled to withdraw? If there was to be a contract on the lines suggested by the plaintiff, both contracting parties would have to be locked into it. If either party withdrew because it considered the acquisition price proposed by the other to be unsatisfactory, to adopt the terminology of Lord Ackner, how could a court be expected to decide whether a proper reason existed for termination? Given that on the plaintiff's case an obligation to deal in good faith is to be implied in the alleged agreement, which must be assumed to bind both contracting parties, a subjective, rather than an objective approach would be required in making that decision. In my view the court would be faced with an impossible task.

45. Accordingly, I find that from February, 1997 onwards, the plaintiff and the defendant were merely in negotiations and no contractual relationship existed between them.

46. For completeness, I should record that, in any event, I am not satisfied that it has been established on the evidence that the defendant failed to act in a *bona fide* manner in September, 1997, if one applies the test set out in the passage from the judgment of Costello J. in the *Fluid Power Technology Company* case quoted above. Even though the defendant did not go into evidence to explain its position, I do not think that it would be appropriate to find a lack of honesty on the part of the defendant's officials.

Legitimate expectation

47. The formulation of the doctrine of legitimate expectation advanced by the plaintiff, as I have stated, was the *obiter dictum* of Fennelly J. in the *Glencar* case in the following terms (at p. 162):

> "In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or a representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of public interest including the principle that freedom to exercise properly a statutory power is to be respected …"

48. Counsel for the defendant accepted that formulation but emphasised its provisional nature and what he described as the overarching public interest saver.

49. The plaintiff also relied on the decision of this Court (McCracken J.) in the *Abrahamson* case as authority for the proposition that an award of damages is the appropriate relief for the defendant's alleged failure to respect the plaintiff's legitimate expectation. The decision of this Court (Hamilton P.) in *Duggan v. An Taoiseach & Ors.* [1989] 1 I.L.R.M. 710 was cited as a case in which an award of damages was made for breach of the applicants' legitimate expectations.

50. It seems to me that the plaintiff's claim based on legitimate expectation founders on the first precondition identified by Fennelly J. in the *Glencar* case. The core issue is whether the evidence establishes that the defendant promised or represented to the plaintiff that it would continue to deal exclusively with the plaintiff until a contract for the development and acquisition of Fort Camden by the plaintiff was concluded. As a matter of law, if there was a representation, it could be no more than a representation to recommend, subject to planning permission, agreed terms to the elected members of the defendant. In my view, the evidence does not establish that any such representation was given.

51. The letter of 10th March, 1995 undoubtedly contained a promise by the defendant that the plaintiff would have the exclusive right to submit a comprehensive development proposal for Fort Camden within the stipulated period, and that period was extended from time to time, so that the promise endured until November, 1996. The defendant accepted, and considered, the development proposal submitted by the plaintiff. Neither the letter of 10th March, 1995 nor any other representation made by, or conduct on the part of, the defendant is open to the interpretation that the defendant was promising that it would continue to deal with the plaintiff beyond the stipulated exclusivity period irrespective of the defendant's assessment of the development proposal submitted. On the

contrary, from the outset the defendant expressly reserved the right to treat with other prospective developers and purchasers if the submission was not to its satisfaction. On the evidence, the submission made by the plaintiff within the exclusivity period was not to its satisfaction. Notwithstanding that, it renewed its dealings with the plaintiff in February, 1997. However, in my view, there was no representation made, or promise given, by the defendant at that stage that it would continue to deal exclusively with the plaintiff until both sides came to an agreement.

52. It is instructive to consider whether, if the dealings between the parties had not taken the turn they took in September, 1997, the plaintiff would be entitled to an order of mandamus or a mandatory injunction to compel the defendant to bring the dealing between the parties to a point which would be permissible in law, namely, to agree in terms, subject to planning permission, for recommendation to the elected members. It seems to me that the very same problems which prevent giving recognition to the existence of an enforceable contract between the parties would prevent the court from making an order of *mandamus* or a mandatory injunction, particularly, the lack of certainty.

53. As I have indicated in outlining the defendant's submissions, the defendant submitted that there are strong policy reasons why the court should not extend the law on legitimate expectation to the conduct of negotiations. It was submitted that to do so would lead to considerable uncertainty. That is so. It would also interfere with the free flow of negotiations in general. That may be so; it would inevitably lead to lack of predictability. But it seems to me that the most problematic outcome would be the virtual impossibility and the futility of the court's position. If the plaintiff had pursued its claim for injunctive relief and the court were to order that the defendant could not withdraw from its dealings with the plaintiff, what would that achieve? I think the answer is nothing. In reality, a court cannot effectively order litigants or negotiating parties to agree the terms of a complex property development and acquisition transaction.

54. In my view, there is a large grain of truth in the suggestion made on behalf of the defendant that in this case the plaintiff is seeking to extend the notion of legitimate expectation to insulate it from the ordinary commercial risks which are inherent in negotiations. Counsel for the defendant referred to the following passage from the judgment of the European Court of Human Rights in *Pine Valley Developments Limited v. Ireland* [1992] 14 EHRR 319:

> "The applicants were engaged on a commercial venture which, by its very nature, involved an element of risk and they were aware not only of the zoning plan but also of the opposition of the local authority, Dublin County Council, to any departure from it. This being so, the court does not consider that the annulment of the permission without any remedial action being taken in their favour can be regarded as a disproportionate measure."

55. While the principle to which that quotation relates was not in point in this case, that passage is a useful reminder that the dealings between the parties in this case were essentially commercial in nature and that the doctrine of legitimate expectation could only come into play because one of the parties in the commercial negotiations was a public body.

56. For the foregoing reasons, I have come to the conclusion that the plaintiff has not made out a case on legitimate expectation.

Decision
57. The plaintiff's claim is dismissed.