

THE HIGH COURT

2008 3677 P

BETWEEN

GREENBAND INVESTMENTS

PLAINTIFF

AND

MATTHEW BRUTON, DENIS WALSH AND PATRICK HOLOHAN

DEFENDANTS

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

1. Introduction

1.1 In this case, the plaintiff, ("Greenband") sues the defendants ("the Trustees") in their capacity as trustees of the Irish Coursing Club ("ICC"). For reasons set out in an earlier judgment in this case ("the previous judgment") (*Greenband Investments v. Bruton & Ors* [2009] IEHC 67) I came to the view that there was an enforceable contract between Greenband and the ICC for the sale of a small strip of land for €100,000. Specific performance of that contract was ordered and that aspect of the case is now under appeal to the Supreme Court.

1.2 However, Greenband maintains that the delay which it encountered in securing rights over the strip of land in question resulting from breach of contract by the ICC in failing to complete the relevant sale has given rise to very substantial losses. At the hearing which gave rise to the previous judgment it was agreed by all concerned, and accepted by me, that it would be appropriate to leave over any question of damages. The issue of the damages to which Greenband may be entitled has now, however, been heard, and this judgment is directed to the issues which arise.

1.3 The general circumstances surrounding the contract are set out in the previous judgment. I will shortly address the facts insofar as they are relevant to the issues which I now have to decide. However, in simple terms, it is said on behalf of Greenband that the strip of land concerned was necessary to enable Greenband to proceed with a significant commercial development, being a shopping centre, on a site known as the Showgrounds in Clonmel ("the Showgrounds"). It is said that the purpose behind the purchase of the strip of land which is at issue was twofold. First, the planning permission for the Showgrounds development required the relocation of certain services under the strip of land in question. Second, the financial success of the development depended on there being an anchor tenant. Marks & Spencer had been secured as such anchor tenant and an agreement entered into with that company. The relevant agreement provided for a service access to Marks & Spencer. It is said that, without the strip of land in question, or some equivalent method of access, it would not have been possible for Greenband to comply with its obligations to Marks & Spencer, which, in turn, was likely to have led to Marks & Spencer not going through with their agreement to be anchor tenant with, in further turn, disastrous consequences for the viability of the shopping centre development.

1.4 As it happens, this is the second judgment delivered today in respect of issues relating to breach of contract bearing on the Showgrounds Shopping Centre. In *Mount Kennett and Another v. O'Meara and Others* (Unreported, High Court, Clarke J., 9th March, 2011), I have set out a detailed background to the development of the Showgrounds Shopping Centre.

1.5 Against that background it is appropriate to turn to the issues which arise.

2. The Issues

2.1 While the ICC has appealed against the order for specific performance which I have made in these proceedings, for the purposes of this hearing, it is, of course, quite properly accepted by the ICC that I must proceed on the basis that the previous judgment was correct and that the ICC are in breach of contract. It also needs to be noted that, as part of the terms on which a stay was granted to the ICC, pending appeal, Greenband has, in practice, the use of the strip of land at present. The case must, therefore, be considered on the basis that Greenband have had, in practice, their contractual rights from the time of the earlier trial. If the ICC should succeed on appeal, then, of course, it will be determined that there was no breach of the contract in the first place. If the ICC should fail in their appeal, then the lands will become owned by Greenband, but much of the practical benefit of being able to use the lands in the way in which Greenband required, would have been available to Greenband since the earlier trial. In substance, therefore, the immediate consequence for Greenband of the breach of contract by the ICC in relation to the agreement in question is that Greenband did not have the relevant lands available to it for the period between when the contract should have closed and the time when the terms on which a stay, pending appeal to the Supreme Court, were imposed.

2.2 In simple terms, Greenband's case is that it was faced, during that period, with the real possibility of the shopping centre project unravelling. Greenband argues that, in those circumstances, it was reasonable for it to seek to acquire an alternative piece of land in order to meet its obligations in respect of planning permission and, most particularly, to provide service access for Marks & Spencer. In that context, it is said that it was necessary to put in place a realistic basis on which Marks & Spencer could be assured that they would have 24-hour service access in order that Marks & Spencer remain with the project.

2.3 It is clear that a large commercial building, some short distance away from the strip of land which is the subject matter of these proceedings, became available at the relevant time. Greenband purchased that site. To place the relevant purchase in context, it is necessary to note that Greenband also owned other lands, known as the Galloping Field, which were in the area in question. To enable anyone reading this judgment to better understand the various landholdings in the area, I annexe hereto, as Annexe A, a map showing the position of the various pieces of land that are referred to in the judgment. As is clear from that map, the site which was purchased (referred to as the Barlo Radiators site) provided the potential of access from the main road to the back of that site and through the Galloping Field lands already owned by Greenband, on to the Showgrounds site. There is no doubt, therefore, that the purchase of the Barlo Radiators site provided an adequate solution to the problem which Greenband had in meeting its obligations to provide a service access to Marks & Spencer.

2.4 In essence, the case made by Greenband is that it was necessary for it to purchase the Barlo Radiators site in order to mitigate the damages which might otherwise have arisen if, as a result of the ICC's breach of contract, Marks & Spencer had departed the scene and the shopping centre project as a whole had collapsed. The claim is not, therefore, strictly speaking, a claim for damages or even consequential damages arising directly out of the breach. Rather, the claim is for monies which are said to have been properly expended in mitigating loss.

2.5 Two broad sets of issues seem to arise. First, it is said on behalf of the ICC that the purchase of the Barlo Radiators site was not (or, at the very least, was not exclusively) for the purposes of providing access to the Showgrounds in replacement for the site which had been contracted to be purchased from the ICC. In particular, in that context, the ICC argues that the availability of a significant access through the Barlo Radiators site provided Greenband with an increased opportunity to exploit the Galloping Field lands. The first set of issues which arise relate, therefore, to the question of whether it can truly be said that the purchase of the Barlo Radiators site was for the purposes of solving the problem that had arisen by virtue of the ICC's breach of contract. In addition, and to the extent that it might be held that the purpose of the purchase of the Barlo Radiators site was partly to solve those problems, but partly, also, because it made sense in its own terms, then the question also arises as to what the legal consequences for the calculation of damages in those circumstances might be.

2.6 The second set of issues concerns the proper approach to the calculation of damages in the unusual circumstances of this case. Even assuming that I am satisfied that the entire or significantly dominant purpose for the purchase of the Barlo Radiators site was to provide a replacement access for the access which, in substance, Greenband had contracted with the ICC that it should get, further questions arise. Without being exhaustive, it is necessary to note that part of the problem in assessing damages today stems from the undoubted fact that there has been a very significant fall indeed in property prices. If property prices had remained stable, or, indeed, increased, then the approach to the assessment of damages would be relatively straightforward. Taking part of the Barlo Radiators site to build an access road would, undoubtedly, have the effect of reducing the value of the site as a whole. However, subject to the issue already noted as to the possible enhancement of the value of the Galloping Field by virtue of the availability of access through the Barlo Radiators site, that reduction in value, as of the time of the purchase of the Barlo Radiators site, would seem to be the appropriate way for assessing damages. However, the matter is significantly complicated by the fact that the remainder of the Barlo Radiators site is, on any view, significantly less valuable today than it was when purchased. On Greenband's case, it is entitled to damages calculated on the basis that it now holds lands which it did not need and would not have acquired were it not for the ICC's breach of contract, and where the lands in question are now significantly less valuable than the price paid for them, irrespective of any allocation of lands to provide an access route. In a sense, it would seem that Greenband's claim is, therefore, for consequential losses arising out of actions taken to mitigate.

2.7 The matter is again further complicated by the fact that the whole question of access to the various developments in that part of Clonmel in which the Showgrounds is situated, has been the subject of significant evolution within the timeframe between the ICC contract with Greenband and the hearing of the action as to damage. Indeed, the matter seemed to be still developing while the case was at hearing, and it is to be anticipated that there may well be further developments in the future. The net consequence of all of that is that it seems highly likely that an entirely different means of accessing the rear of the Showgrounds site will be developed in the form of an access from a roundabout to be constructed near the entrance into the Dunnes Stores site, with a roadway running along the Galloping Field, close to its boundary with the various properties fronting onto the existing roadway. While it will be necessary to deal with questions arising out of that proposal in more detail, there appears now to be every chance that, due to the events that have happened, both the ICC strip of land and the Barlo Radiators site, will, at the end of the day, be redundant as significant means of access, either to the existing Showgrounds Shopping Centre, or to any developments which might, in the future, be contemplated for the Galloping Field, including what appears to be a possible second phase of the shopping centre already constructed. As might be imagined, there are significant issues, both as to the proper approach and as to calculation, which derive from those complications.

2.8 Finally, it should be noted that there are some other heads of damage claimed by Greenband which derive from the fact that Greenband had plans to buy yet another piece of land, being the existing Greyhound Track, whose location is behind the Showgrounds site, and can again be seen in more detail on the map annexed to this judgment. In essence, Greenband says that it had a good chance of acquiring that site from its owners, Bord na gCon. It is said that Greenband made, to its detriment, some alterations in the configuration of the existing shopping centre built at the Showgrounds to that end. It is said that the ICC's breach of contract led to the money so expended being wasted for it was argued that the absence of access through the ICC lands made it impossible for Greenband to progress its plan to acquire the Greyhound Track. A claim is made in respect of those monies together with professional fees incurred in planning the alterations in question and in devising a connection between the Showgrounds shopping centre and the proposed phase 2 on the Greyhound Track.

2.9 Against that general description of the issues which arise, it is next necessary to turn to the facts.

3. The Factual Background

3.1 At the start of the hearing counsel for the ICC raised two matters concerning the factual background as set out in the previous judgment. The first was the issue of the ownership of the Clonmel Greyhound Stadium, which is situated behind the Showgrounds shopping centre and beside the Galloping Field. The Greyhound Track, as it is also known, is not in fact owned by the ICC. It is owned by Bord na gCon, although it is currently subject to a lease in favour of the Davis Road Greyhound Stadium Plc. The second issue that was flagged was the nature of the right of way that attaches to the ICC access road. The ICC argued that the relevant right of way does not benefit the Galloping Field as the dominant tenement. Instead it was submitted that the right of way attaches to the section of property which lies between the ICC headquarters, the Sporting Press and the Galloping Field, in an area that is otherwise known as "Casey's Field". The import of both of these matters will become clearer later in this judgment.

3.2 At this point it is useful to get a picture of the physical area to which the events the subject of these proceedings, and other related proceedings on which a judgment was also to be delivered today, relate. The area in question is located in Clonmel, east of the town centre and along the northern bank of the river Suir. On its northern side the area fronts onto the Davis Road. For the sake of convenience, the area may be divided into and described in three sections. When viewed from a southern perspective the eastern section constitutes the Showgrounds site on the Davis Road with the Greyhound Stadium immediately behind and bordering the river. In the central section, in broad terms and from east to west there are properties known as the ICC headquarters, the Barlo Motors site, the Barlo Radiators site and the Mart site, all of which run along the Davis Road. The Galloping Field sits behind all four along the river. The western section is composed solely of a site owned by and run as a Dunnes Stores. For greater detail on the precise configuration of the various holdings in the area reference should be made to the map annexed.

3.3 Mr. Paul O'Brien, who is a director of and shareholder in Greenband, set about promoting a large shopping centre development in Clonmel. He is also involved in a number of related companies, including *Mount Kennett* Investment Company, an unlimited company ("*Mount Kennett*"). On the 28th January, 2005, *Mount Kennett* entered into an agreement to purchase the freehold title to the

Showgrounds site. This agreement was the subject litigation in *Mount Kennett Investment Company and another v. O'Meara and others* [2007] IEHC 420. In any event, Greenband eventually acquired the freehold title to the site on the 24th April, 2008. Mr. O'Brien also negotiated the purchase of the Galloping Field site from a Mr. Daniel Casey and his wife Eileen for €4,200,000, which purchase completed on the 25th October, 2007.

3.4 Although Mr. O'Brien, being a solicitor and having worked previously on the title to the properties, was assured by Mr. Casey that the Galloping Field title included the ownership of the access from the Davis Road, which for present purposes is known as the "ICC Road", following an investigation of the title documents it transpired that the Mr. Casey did not in fact own the access road, rather he merely enjoyed a right of way over it. The extent of this right, as mentioned to earlier, was the subject of some dispute between the parties. Greenband, with Mr. Casey's (albeit misconceived) consent applied for a planning permission from the Clonmel Borough Council for the development of the Showgrounds which incorporated the ICC Road. Accordingly, the permission which was granted on the 6th, May 2007, included a condition at number 22 that two large foul and water sewer pipes, which were to be relocated from the Showgrounds site, would instead travel in a north to south direction, effectively going down to the river, along the ICC Road. It was Mr. O'Brien's evidence that control of the ICC Road would both accommodate the development's service road access requirements and the relocation of the existing pipes. The Galloping Field is also served by a narrow right of way over the Mart site. However, it has never been contended that this route was viable as an access road to facilitate either traffic or services.

3.5 In September 2007, representatives of the Davis Road Stadium Plc. approached Mr. O'Brien in order to discuss the possibility that Greenband might purchase the Greyhound Stadium with part of the transaction to include the provision of a green-field site on which a new stadium could be constructed. One such site which was mooted was in Powerstown, Clonmel although the possibility of constructing a greyhound track on part of the Galloping Field site was also raised. Mr. O'Brien gave evidence that the attraction of acquiring the Greyhound Stadium as the location of an extended Showgrounds shopping centre, or second phase, was manifest. In the course of his negotiations, Mr. O'Brien, along with partners of his (including a Mr. John Costello), approached Mr. Jerry Desmond, then Chief Executive of the ICC, in order to discuss the proposals to relocate the greyhound track. Borda gCon ultimately placed the project up for tender. While Mr. O'Brien expressed an interest in tendering, he did not in fact submit one and it would appear that the proposal never came to anything. It is understood that Borda gCon subsequently received planning permission to redevelop the present site but the present status of this is unknown.

3.6 Discussions which became negotiations continued between Greenband and the ICC. Greenband submitted an offer for the purchase of the ICC headquarters along with the Sporting Press building which is immediately behind it, some 0.7 acres in total including the access road. This offer, by way of letter dated the 31st January, 2008, proposed a purchase price of €1,500,000 which was grounded on two valuations from auctioneers. The offer was not accepted. In any event, Greenband then proceeded to explore the possibility of purchasing a section of the ICC site, namely the access road. This was carried out through Tom Pollard, an auctioneer, acting on behalf of the ICC.

3.7 In passing, for the purposes of understanding the broader timeline, it is noted that Smyth J. delivered a judgment on the 11th December, 2007, which granted Mr. O'Brien's company, *Mount Kennett*, an order of specific performance for the contract of sale of the Showgrounds site.

3.8 The situation regarding the ICC Road was, as already noted, the subject of the previous judgment which I delivered on the 30th January, 2009. In short, I found that Messrs. O'Brien and Pollard had concluded a valid agreement for the sale of the freehold interest over the access road for a consideration of €100,000 and subject to conditions that the ICC retain a right of way and that a traffic plan be provided to facilitate the ICC for the duration of any works to be carried out on the site. This agreement was evidenced by a letter dated the 10th March, 2008, from Mr. Pollard to Mr. Nicholas Shee, solicitor for the ICC. In addition, I found that the ICC, notwithstanding any issues over Mr. Pollard's authority to act as agent, were estopped by conduct from denying the existence of the contract for a number of reasons, including the fact that Greenband had expended significant sums of money in commencing work on the Access Road and that the ICC were aware of such expenditure. This decision has been appealed by the ICC and is presently awaiting a hearing by the Supreme Court.

3.9 On the 28th April, 2008, Mr. Shee, for the ICC, wrote to Mr. O'Brien advising him that the ICC had decided not to proceed with the sale of the access road and, therefore, were returning the deposit cheque. Mr. O'Brien thereafter sought to complete the transfer but when it was not forthcoming he initiated proceedings by plenary summons dated the 7th May, 2008.

3.10 On the 23rd June, 2008, Mr. O'Brien met with a number of representatives of the ICC at the offices of Keane solicitors in Galway. At this meeting a number of issues were discussed, in particular the ICC's view on any acquisition of its headquarters and surrounding land. Mr. Divilly, for the ICC, expressed the view that the ICC would only consider bringing an offer to its members for approval if it was for a figure of no less than €4,900,000. This figure, it was said, was non-negotiable. Mr. O'Brien gave evidence that, in light of this situation, he began to explore other options on the Davis Road, which included the Barlo Radiators site.

3.11 In April, 2008 Greenband acquired the freehold to the Showgrounds site. Although heads of terms had been agreed in 2007, Greenband signed a formal arrangement whereby Marks and Spencer agreed to become the shopping centre's anchor tenant on the 4th July, 2008. It was a condition of this agreement that Greenband, as landlord through one of its related companies, acquired a sufficient interest in the ICC Road so as to be in a position to provide an access road to the rear of the shopping centre which Mark and Spenser could thereafter use to receive deliveries and the like.

3.12 Mr. O'Brien met with the Barlo Family regarding a possible agreement that would allow access through the Barlo Motors site. To avoid any confusion I should note at this point that the Barlo Radiators site, while it was at one stage within the ownership of the Barlo family, had long since been acquired by the Quinn Group and as such, although adjacent, the Barlo Motors and Barlo Radiators sites were separately owned and controlled. Greenband ultimately acquired the Barlo Radiators site from the Quinn Group for €4,000,000. The contract for sale was signed on the 11th September, 2008, and a deposit paid over. Mr. O'Brien explained the apparent haste with which this agreement was concluded by noting that there had been a third party negotiating with the Quinn Group and he was concerned that, if he did not act quickly, somebody else would acquire the site. From his perspective, the purchase price was considerably above market value although this is a matter of some dispute between the parties. While the contract was signed in September, 2008 it was varied on a number of occasions for the purposes of extending the completion date. The sale closed on the 29th October, 2010. The intervening period cost the plaintiff an "extension interest" of between 5-6% on the balance of the purchase price.

3.13 The purchase of the Barlo Radiators site facilitated Greenband in a number of ways. First, it afforded the scope to construct an alternative road access route to service the Showgrounds. Second, this new route was accepted by Marks and Spenser as satisfying the access condition of their agreement for lease. Third, it provided the opportunity to extend the shopping centre in the direction of Dunnes Stores through the Galloping Field. It was accepted in evidence that, irregardless of whether the ICC Road contract was

completed, in order to develop a phase two development on the Galloping Field, Greenband would have required an alternative additional access road.

3.14 Mr. O'Brien thereafter came to an agreement with the Barlo family for what was in effect a land swap arrangement. In exchange for the transfer of part of the rear of their site at Barlo Motors which bordered the Galloping Field site and which would provide a wider and straighter nexus with the Showgrounds site, the Barlo family received a cash payment along with a portion of the Barlo Radiators site which had the effect of extending their original site eastwards and providing them with greater road frontage onto the Davis Road. This arrangement is reflected across a number of contracts which were executed between October and November 2008. Some, though not all, of those agreements have been completed.

3.15 Situated on the Barlo Radiators site is a large warehouse, or indeed a series of warehouses. For any access road to be built through the site, these warehouses would naturally have to be demolished. A problem arose, however, in that the buildings require decontamination as asbestos and other contaminants were found to be present. The cost of this work also formed a part of Greenband's claim for damages in these proceedings. As things turned out it was subsequently unnecessary to demolish the warehouse due to developments with the planning authority.

3.16 Greenband commenced construction on the Showgrounds site in April 2008 and then opened the shopping centre on the 19th October, 2009, with the Marks and Spenser portion having opened sometime in August 2009.

3.17 The status quo with respect to the ICC Road, which was ordered by this court on the 7th April, 2009, is that, on the undertaking of Greenband to make good any damages which may be found to have been suffered by the ICC, a number of injunctions were granted. These are threefold. First, the ICC is restrained from preventing Greenband, or its tenants, from exercising a right to use the roadway for access purposes. Second, the ICC is restrained from preventing Greenband, its tenants or the Office of Public Works from having access to the existing services under the road for maintenance or repair purposes. Third, the ICC is restrained from preventing any works necessary to resurface the roadway.

3.18 Planning permission for phase two of the development, which incorporated a cinema and theatre, although accepted by the Clonmel Borough Council in April, 2009 was ultimately refused by An Bord Pleanála in September 2009. Mr. O'Brien explained that, in advance of permission issuing, he had a meeting with the planners wherein they noted that any permission which was to utilise the Barlo Radiators Site would be temporary only. The reason for this is that the council would prefer to see a consolidated access road which incorporated a roundabout and which would service any phase two development along with the Mart site and Dunnes Stores. It is understood that Aldi were interested in acquiring the Mart site for the purposes of constructing a retail store. The roundabout was envisaged to be located at the corner of the Mart site and Dunnes Stores. It was for this purpose that Mr. O'Brien purchased a service station site on the opposite side of the roadway to facilitate the infrastructure plan. The relevant contract is dated the 11th June, 2009. At present there is a subsequent planning application pending before the planning authority. Accordingly, as things stand, depending on planning, Mr. O'Brien may have a roadway but it may not be through the Barlo Radiators site. Mr. O'Brien concluded agreements with both the owners of the Mart site, referred to as "Stokes" and with Aldi as prospective owners. The import of these agreements was that either way Greenband would be entitled to put in an access road over the Mart site over which he would enjoy a right of way.

3.19 In the course of the hearing counsel for Greenband advised the court that the planning permission for the roundabout and spur at the eastern end of the site to afford access had been granted. That is to say, a notice of intention to grant crystallised into an actual grant of permission following the expiry of the period in which to appeal, without any such being lodged. Furthermore, a planning permission was granted to allow access from the Mart site to the Galloping Field.

3.20 In his evidence, Mr. O'Brien noted that he would now be obliged to explore the possibility of renegotiating the Barlo Motors contract so as to pay them a sum of money rather than to complete the exchange of land as originally envisaged which would also involve demolishing the warehouse and constructing the access road. It is a condition of the Barlo Motors contract that Greenband makes provision for an access road and services onto their property and the demolition of the warehouse.

3.21 Against that general background it is now necessary to turn to the issues. As noted earlier one of the key considerations in this case is the dispute between the parties as to the extent to which the purchase of the Barlo Radiators site was in fact directed solely or substantially towards resolving the problems which had been encountered by virtue of the breach of contract by ICC. I now turn to that issue.

4. The Reason for the Purchase of Barlo Radiators

4.1 It is clear on all the evidence that Greenband investigated a number of possible ways of dealing with the problem which had emerged in respect of the ICC Road. As has been noted already, the problem was twofold. First, it was necessary to deal with the planning permission. Second, it was necessary to provide access for Marks & Spencer. In fact, as was pointed out in the previous judgment, works were carried out on the ICC Road and the relevant services did not, ultimately, turn out to be a problem which required being resolved in any other fashion. However, the question of access for Marks & Spencer remained a significant problem.

4.2 It would seem that some consideration was given to the possibility of obtaining access through the Barlo Motor site. However, I am satisfied on the evidence that this proved impractical because of the configuration of that site. Second, the possibility of access through a public car park was explored. However, I am again satisfied that access in that way was not practicable. With the exception of the Barlo Radiators site, the one area of possible access, which was the subject of detailed evidence and dispute at the hearing before me, concerned the possibility that it might have proved possible to provide access within the Showgrounds site for Marks & Spencer.

4.3 The evidence establishes that detailed investigations were carried out, including modelling the way in which the large sort of vehicles that would be used for delivery to Marks & Spencer might be able to travel. The plan that was explored would have involved Marks & Spencer vehicles exiting the developed Showgrounds Shopping Centre through the car park at the front of the centre as it faces out onto the Davis Road. The evidence suggests that Mr. O'Brien was advised that such a means of providing access to Marks & Spencer would be unsatisfactory. It would appear that Marks & Spencer were entitled to, and could and would insist on, twenty four hour access to their stores. Thus, lorries engaged in delivery would be required to exit through the car park while the shopping centre was in general operation. There did not appear to be any physical feature of the possible access internal to the Showgrounds site which would make it impossible for such a lorry to leave the site in the manner contemplated. The difficulty centred around the fact that lorries would have to go through the car park at a time when the shopping centre was in ordinary operation and where there would be customer cars coming and going, and parking in the car park together with pedestrians, and those who had already parked their cars, using the area to walk into the shopping centre itself.

4.4 First, it does seem clear that discussions were held with the planning authority to determine whether that means of access would be satisfactory. It seems clear that, in order to utilise access for Marks & Spencer in the way contemplated, a revision to the relevant planning permission would have been required for the planning permission contemplated the use of the ICC Road. No revised planning application was actually submitted but the evidence suggests that discussions were held with the planning authority which were positive. It seems unlikely in practice that a suitable planning application would have been refused although that possibility cannot be ruled out given that no formal application was, in fact, made. There was no evidence as to Marks & Spencer position.

4.5 It seems to me that the appropriate conclusion to reach is that that form of internal access would have been physically possible although it would have presented real difficulties in managing the car park and the entry and exit to it in a way that would convenience Marks & Spencer in their deliveries while not inconveniencing customers of the shopping centre. It was probable, though not certain, that appropriate planning could have been obtained. It is at least possible that Marks & Spencer might have been happy with the arrangement. However, when Mr. O'Brien was advised that the proposed exit for Marks & Spencer deliveries through the car park would not be a satisfactory solution from a traffic management point of view, it would appear that no further attempts to pursue that course of action were adopted so that the precise position that would have been taken by the planning authority and, indeed, Marks & Spencer is unknown.

4.6 The second significant factor to be taken into account in assessing the purpose for the purchase of the Barlo Radiators site is the advantage which that site was likely to give to Mr. O'Brien and his companies in the context of any possible development of the Galloping Field. As already noted it was accepted by all concerned that the ICC Road would have provided insufficient access for a large scale development on the Galloping Field. It does appear that a limited development on the Galloping Field (whether comprising a phase 2 of the shopping centre or otherwise) would have been possible. Indeed, in that context, it is important to note Mr. O'Brien's evidence concerning his original plan to develop a phase 2 on the Greyhound Track. In relation to that later plan it would appear that what was in contemplation was using the existing exits and entries onto the Davis Road coupled with roof car parking. On that basis, it is said, a phase 2 on the Greyhound Track would not have required any additional access.

4.7 There can be little doubt, therefore, that the availability of the Barlo Radiators site had the potential to enhance the value of the Galloping Field by providing as much access to the Galloping Field as would have been required for any scale of development on those lands. There were, therefore, undoubtedly independent attractions to the acquisition of the Barlo Radiators site beyond the need to provide replacement access for the ICC Road. In that context it is also important to note Mr. O'Brien's evidence. Mr. O'Brien expressed the view that it would have been his intention to deal with access to the Galloping Field "in his own time". In other words, the suggestion was that there was no immediate need to provide access to the Galloping Field for a development on the Galloping Field was not an immediate priority. This aspect of the issue raises one of the many difficulties that occur in attempting to determine what hypothetically would have happened in the event that a breach of contract by the ICC did not occur. Would Mr. O'Brien have purchased the Barlo Radiators site even if he had the ICC Road? There must be some realistic possibility that he would. It is at least possible that the advantages for potential development of the Galloping Field would have outweighed any perceived disadvantage in purchasing the Barlo Radiators site at above the market price. Mr. O'Brien never, of course, had to make that decision. He was confronted with the possibility of acquiring the Barlo Radiators site at a time when the problems in relation to the ICC Road were already on his plate. He never, therefore, in the real world, had to ask himself the question as to whether it made sense to buy Barlo Radiators for the purposes of increasing his options in relation to his land holdings in the area generally.

4.8 In considering this question it must also be noted that Mr. O'Brien's own evidence was to the effect that it was necessary to secure a quick purchase in relation to the Barlo Radiators site because there was another potential purchaser in the wings. The fact remains, therefore, that Mr. O'Brien would have been faced with a choice between buying the Barlo Radiators site or running a very real risk that it would have gone to a third party and become unavailable to him as possible access to the Galloping Field. As the evidence in relation to the other possibilities that were considered for providing access to satisfy Marks & Spencer demonstrates, there were not too many options available. While the option which now seems to be favoured by the planning authority (i.e. the roadway operating off a roundabout to be constructed near the entrance to Dunnes) came on the scene sometime soon afterwards, that does not take away from the fact that Mr. O'Brien would have had only a brief window of opportunity in which to consider whether or not to buy the Barlo Radiators site.

4.9 Having regard both to the abandonment of the "internal solution" to Marks & Spencer access at a time when it seemed that it was at least feasible if difficult in implementation, and having regard to all of the factors which I have sought to analyse concerning the independent attraction of the Barlo Radiators site as an enhancement to the value of Mr. O'Brien's property holdings in the area in general, I have come to the view that it is probable although not certain that Mr. O'Brien would have acquired the Barlo Radiators site even if the ICC Road had been conveyed by the ICC to Greenband in accordance with the contract entered into between those parties. I will go on to discuss the consequences of that finding in early course. However, it is appropriate to now turn to an analysis of the losses claim put forward on behalf of Greenband.

5. Greenband's Alleged Losses

5.1 By the time the hearing commenced Greenband's claim for losses had been through a number of iterations. I propose only to address the claim as presented at the hearing. The first item of claim was based on an estimated premium for the Barlow Radiators site over market value which was said to be €2.8m together with the stamp duty on the entire purchase price being 6% of €4m or €240,000. It was said that the entire stamp duty should be payable because, on Greenband's case, were it not for the ICC's breach of contract, no purchase would have been necessary.

5.2 There then followed a series of claims which related to the project concerning a possible extension of the shopping centre into the Greyhound Track. These sums included costs of works done in contemplation of such an extension and professional fees said to have been wasted on that project. The balance of the claim related to professional fees incurred in relation to plans to divert services through the Barlo Radiators site and also alternative plans to relocate some services from under the ICC Road back to the Showgrounds site together with professional fees said to have been incurred in planning for a variety of rearrangements said to have been necessitated by the ICC's breach of contract.

5.3 There was a significant dispute between the expert valuers called as to the extent of the premium (if any) paid for the Barlo Radiators site. I will return to that issue in early course. However, a major further issue arose from the contention put forward on behalf of the ICC that, in truth, any such premium (even on the basis of the amount asserted by Greenband) was more than outweighed by a corresponding increase in the value of the Galloping Field by virtue of the enhanced access to those lands that the Barlo Radiators site carried with it.

5.4 Leaving aside, for the moment, those claims which relate to professional fees, it seems to me that a difficult question requires to be answered in relation to the premium allegedly paid for the Barlo Radiators site. First, it is necessary to have regard to my finding that it was probable that Mr. O'Brien would have acquired the Barlo Radiators site in any event even though such an eventuality was

far from certain. Second, it is necessary to have regard to the fact that a significant reason for coming to that conclusion derived from the fact that the availability of the Barlo Radiators site would have significantly enhanced the value of the Galloping Field.

5.5 In the course of giving judgment earlier today in *Mount Kennett & Anor v. O'Meara & Ors* (Unreported, High Court, Clarke J., 9th March, 2011), a case to which reference has already been made, I had occasion to analyse the circumstances in which the calculation of damages for breach of contract in a commercial context are in some cases, in truth, capable of a truly analytical approach. For the reasons set out in that judgment I was not satisfied, on the facts of that case, that the damages claimed in those proceedings were capable of a truly analytical approach. A significant part of the reasoning which led to that conclusion was the large number of separate and interdependent factors which had the potential to have a bearing on the ultimate outcome. In the circumstances it seemed to me that it was impossible to take anything other than a very general view of what would have happened absent the wrongdoing in that case.

5.6 It seems to me that similar considerations apply in these proceedings. I have already addressed the question of whether it was likely that Mr. O'Brien would have acquired the Barlo Radiators site in any event. But the position which now exists on the ground is one which has been altered radically again by virtue of the current thinking of the planning authority as to how access to the Galloping Field and the rear of the Showgrounds site is now to be achieved. It is no longer clear whether any access through the Barlo Radiators site will be needed. Indeed, it seems more likely than not that no such access will be required. However, the reason why that is so stems from a whole range of other factors such as the fact that the planning authority now favours the roadway which I have already described. In addition, it has, through Mr. O'Brien's industry, proved possible to acquire other material lands (including the service station, part of which can be made available for the roundabout at the entrance to Dunnes Stores which is a necessary part of the plan). Further, various contracts have been entered into for land swaps with Barlo Motors (some of which may now, it would appear, need to be renegotiated). In addition, there are arrangements with Aldi and the owners of the Mart site to facilitate the roadways in question. It has proved to be a very fluid situation. Precisely what would have happened on the ground if the ICC had complied with their contractual obligations now involves so many separate hypotheses about so many different, and sometimes interconnected, facts that it is truly impossible to engage in any rational analysis that attempts to say where all parties would now be had the ICC complied with their contractual obligations.

5.7 In substance, the position in which Greenband now finds itself is that it bought the Barlo Radiators site at a time when it seems clear that that site significantly enhanced the value of Galloping Field. However, the intervening collapse in the property market now means that the added value today to the Galloping Field site would be very significantly reduced even if access to it was going to come through the Barlo Radiators site. The likelihood of the kind of large scale development on the Galloping Field that might be facilitated by a significant access through the Barlo Radiators site is now very small for the near or medium term. In addition, as things stand today, it seems unlikely that the ownership of the Barlo Radiators site adds very much to the value of the Galloping Field. However, the reason for all of that being so is because of the collapse of the property market rather than anything else.

5.8 In all the circumstances it does not seem to me to be appropriate to assess the damages to which Greenband is entitled on the basis of attempting the impossible, by trying to calculate the range of situations that might exist on the ground today had the ICC not been guilty of breach of contract and, indeed, estimating what may happen into the future. How will the land swap with Barlo Motors (involving part of the Barlo Radiators site) ultimately work out? How will the access to the rear of the Showgrounds finally be put in place? What type of development will ultimately be put in place as a phase 2 of the shopping centre and how might that be facilitated by the availability of Barlo Radiators?

5.9 First, it is, for the reasons which I have sought to analyse, in my view probable that Greenband would have acquired the Barlo Radiators site anyway. In those circumstances its situation on the ground would be exactly the same as it is today. However, there is no doubt that the breach of contract by the ICC placed Greenband in a difficult situation. The need to accommodate an access road for Marks & Spencer was certainly a factor which bore on Mr. O'Brien's decision to acquire the Barlo Radiators site. The additional pressure that was placed on him to conclude a deal with Barlo Radiators from that circumstance is something that needs to be properly taken into account in the assessment of damages. While there were undoubtedly attractions to acquiring the Barlo Radiators site as a stand alone venture, it remains the case that, as in any potentially beneficial deal, it only is a good deal when the price is right. It seems to me to be likely that the added pressure brought on Mr. O'Brien to solve the problems associated with the Marks & Spencer access led to him having to be less concerned with whether the price for Barlo Radiators was right. Assessing what might have happened in the absence of a breach of contract by the ICC is not an exact science for the reasons which I have already sought to analyse. However, I am satisfied that it is appropriate to allow something to Greenband for the fact that the ICC's breach of contract placed it in a position where it was not able to assess the possible purchase of the Barlo Radiators site on a stand alone basis, but rather had to factor in the need to solve the Marks & Spencer access problem.

5.10 As pointed out earlier, in truth, much of the calculations put forward by Greenband amount to an assessment of consequences following on from mitigation. On Greenband's case the purchase of Barlo Radiators was mitigation. However, the current outcome of the purchase of Barlo Radiators is a result of a whole series of interlocking and complex consequences, not only of that acquisition but also of other factors on the ground such as the current plans to develop a phase 2 of the Showgrounds Centre, the planning authority's view on roadways, the deals done with other parties and the like. Those matters are not capable of rigorous analysis.

5.11 In the judgment delivered earlier today in *Mount Kennett*, I also had to consider the extent to which some of the damages claimed in those proceedings were foreseeable. It is true, as already noted, that what is claimed in these proceedings are not truly consequential damages deriving directly from the ICC's breach of contract. Rather, the claim is for the consequences which flow from an attempt to mitigate the original direct loss attributable to the ICC breach of contract (being the absence of the relevant access). It is, of course, the case that the courts are reluctant to impose an unduly harsh level of scrutiny on the actions taken by injured parties to mitigate their losses. The situation which required mitigation is not of the relevant party's own making, but rather stems from wrongdoing on the other side. Parties faced with the consequences of such wrongdoing often have difficult choices to make. The fact that the choice made might, with the benefit of hindsight, have made matters worse rather than better, is not, of itself, a reason for not treating the actions taken as proper mitigation, provided that the choices made appeared reasonable in all the circumstances prevailing at the time the choice in question was, in fact, made. However, it seems to me that the jurisprudence in respect of foreseeability, which I had occasion to analyse in *Mount Kennett*, must be equally applicable to consequential damage arising out of an act of mitigation. If a particular consequence deriving directly from a breach of contract may not give rise to claimable damages on the basis of foreseeability, it seems to logically follow that similar principles apply to a claim which looks at the consequence of an attempt to mitigate.

5.12 It was clearly foreseeable that, in the event that the ICC were to be guilty of breach of contract, Greenband would have to seek an alternative means of access to the shopping centre development. Indeed, it was the very fact of the ICC's view of Greenband's need for such access that led to the very substantial demands for payment made by the ICC at the meeting on 23rd June, 2008, at which a figure of €4.9 million was demanded. While the fact that Greenband would be required to provide for an

alternative access was, therefore, undoubtedly foreseeable, as was the fact that that alternative access might be expensive, it does not seem to me to follow that the very complex situation, which now pertains on the ground was, in itself, foreseeable. That Greenband might have to pay a premium to secure access as a means of mitigating its loss was undoubtedly foreseeable. That that premium might also go somewhat towards enhancing the value of the Galloping Field would have been known to all relevant parties at the time. It is what happened thereafter that causes the difficulty. I have already set out the reasons why it seems to me to be bordering on pure speculation to attempt to assess precisely what would have happened had the ICC not been in breach of contract. Beyond the cost of acquiring an alternative access and the immediate financial consequences of such acquisition I am not satisfied that any other aspect of the current state of affairs is foreseeable.

5.13 It is, however, necessary to reach some assessment as to the extent of the premium actually paid for the Barlo Radiators site as a stand alone project. It is difficult to form any clear view as to the value that the Barlo Radiators site, on that basis, might have had at the relevant time. Neither valuer was able to point to any particularly close comparator. All of the valuations are complicated by the presence of asbestos which would need to be removed at significant expense if any use other than its then existing use were to be made of the site. Doing the best I can, I have come to the view that, looked at as a stand alone enterprise, the Barlo Radiators site was possibly worth something of the order of €2m to €2.5m at the time in question. A premium was paid, therefore, of something of the order of €1.5m to €2m. However, for the reasons which I have already sought to analyse, I am satisfied that a significant part of the motivation behind the purchase was to enhance the value of the Galloping Field.

5.14 It seems to me that any premium actually paid must be discounted to have proper regard to the fact that, as I have already held, it was probable that Barlo Radiators would have been acquired in any event and that it was perceived that Barlo Radiators would enhance the value of the Galloping Field. In all the circumstances, it seems to me that I should award a sum of €500,000 under this heading. Having regard to my finding concerning the likelihood of the acquisition of Barlo Radiators in any event, it does not seem to me to be appropriate to allow anything in respect of stamp duty.

5.15 Evidence was given as to the interest which Greenband had to pay in relation to a delay in the closing of the Barlo Radiators contract. On the basis of the full price of the Barlo Radiators site, it would appear that interest in the sum of €398,071.22 was incurred. As I have allowed 12½% of the full price as damages, it seems to me to be appropriate to add a sum of €50,000 to cover the fact that Greenband has paid interest in the period between its contract to buy the Barlo Radiators site and today. Even if the sale had closed, as originally expected, Greenband would have had a liability for bank interest in much the same amount. To the extent that it is possible that Barlo Radiators might not have been acquired and to the extent that it is possible that the added pressure brought about by the ICC's breach of contract led to Greenband paying extra (beyond the premium that it was likely to have paid in any event to enhance the value of the Galloping Field) it seems to me that it is appropriate to allow that interest.

5.16 It is next necessary to turn to the claims relating to works done and professional fees incurred in connection with a possible extension of the Showgrounds shopping centre into the Greyhound Track site.

6. The Greyhound Track Site

6.1 It must be recalled that Bord na gCon is the freehold owner of that site and a public body which is required, under public procurement rules, to enter into significant contracts only after an appropriate public procurement process. The extent to which Bord na gCon as freehold owner and/or Davis Road Greyhound Stadium Ltd as a lessee would have been the effective seller was not totally clear on the evidence. Whether, and on what terms, Greenband might have had a realistic chance of acquiring the Greyhound Racing Track is highly speculative and in light of the public procurement requirement on Bord na gCon, even more so than might exist in relation to a private party. In those circumstances, it does not appear to me to be appropriate to allow any of the sums claimed under this heading. Greenband took its chances when incurring the relevant expenditure.

6.2 However, it does seem to me that it is appropriate to allow a small sum to reflect the loss of opportunity in relation to the Greyhound Track site which Greenband suffered by reason of not having the ICC Road on time. I propose assessing damages under this heading in the sum of €50,000. It is next necessary to turn to the remaining heads of damage.

7. The Remaining Heads of Damage

7.1 The remaining heads of damage are concerned with professional fees incurred in relation to work done concerning plans for various alternatives considered because the ICC Road was not acquired on time. There can be little doubt that, had the ICC complied with its contractual obligations, much of the professional work under these headings would not have been required. It would not have been necessary to devise plans to divert the services either through the Barlo Radiators site or back to the Showground site. It would not have been necessary to form any plans to bring an alternative service road via the Barlo Radiators site except, perhaps, that some of that work might have been necessary in any event had it been desired to use the Barlo Radiators site as a possible access to the Galloping Field. For the reasons already analysed, I am satisfied that that was a real possibility. Finally, it would not have been necessary to attempt to design the alternative internal traffic arrangement to which reference has already been made.

7.2 The principal complaint which is made under each of the relevant headings on behalf of the ICC is that the fees charged appear to be very high in circumstances where the likely value of any of the relevant contracts might have been small and where it would appear that, at least in many cases, the fees have not yet been paid. I accept the evidence given by the ICC's expert that it is likely in practice that professionals involved in planning possible works around a significant development actually underway are unlikely to charge the amount that might be determined by applying appropriate hourly rates to each item of work. The total sums claimed under each of the four relevant headings are respectively €33,553, €31,035, €14,355 and €8,967 making a total of just short of €88,000. I propose allowing €40,000 under this heading to reflect both the fact that there was a real prospect that some of the relevant work on access through the Barlo Radiators site would have been done in any event and to reflect the fact that the true real cost to Greenband of the professional works concerned was likely to have been significantly mitigated in the event that negotiations had taken place in the context of the professionals being involved in a major project from which significant professional fees would be paid. Given that it would appear that much of those fees have not, in fact, been paid, it seems to me not to be appropriate to allow interest on any of those sums.

8. Conclusions

8.1 In the circumstances, it seems to me that Greenband is entitled to the following damages:-

A. General damages associated with the possibility that the Barlo Radiators site would not have been acquired in any event or that more was paid for it by virtue of the pressure placed upon Greenband as a result of the ICC's breach of contract - €500,000

B. Interest on that sum - €50,000

C. Loss of opportunity in respect of the Greyhound Stadium - €50,000

D. Increased professional fees related to planning alternatives to the ICC Road - €40,000

I, therefore, propose awarding damages in the total sum of €640,000.