Neutral Citation Number: [2011] IEHC 276

THE HIGH COURT

COMMERCIAL

2010 2313 P

BETWEEN

DESMOND MURTAGH CONSTRUCTION LIMITED (IN RECEIVERSHIP) AND PATRICK MURTAGH, SUSAN WATTERS TOGETHER WITH THE PERSONAL REPRESENTATIVES OF DESMOND MURTAGH (DECEASED)

PLAINTIFFS

AND

BRENDAN HANNAN, OLIVER MALONE,

SEÁN MCGUIGAN AND JOHN OLWILL

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 28th day of July, 2011

Introduction
This is a claim for specific performance of 22 contracts for sale made between the defendants as purchaser and the late Desmond Murtagh (Mr. Murtagh) as vendor dated 30th November, 2007. Specific performance is also sought of 22 corresponding building agreements, made between the defendants, as employer and Desmond Murtagh Construction Limited (the Company) as contractor. All of these contracts were dated 30th November, 2007 and their subject matter were units 4, 7, 8, 10, 21, 24, 27, 30, 31, 32, 35, 36, 53, 54, 55, 56, 57, 58, 67, 68, 69 and 70 Castlemanor, Billis, Drumalee, Co. Cavan. The unit price for each unit was €82,000 which was payable together with the sum of €188,000 on foot of the building contract for each unit. Thus, there is an alleged total of €1,804,000 payable to the estate of Mr. Murtagh, deceased, for the sale of the units and a sum of €4,136,000 payable to the Company on foot of the building agreements for the construction of those units.

The contracts in suit represent the balance of an original 48 contracts for the purchase of the entire Castlemanor villas, such other contracts having already been completed.

The Parties
ACC Bank Plc appointed Kieran Wallace as receiver of the Company on 11th February, 2009.

Mr. Murtagh died on 5th June, 2009. Probate to his estate was extracted on 18th January, 2010, by his brother and sister who are the executors named in his Will. Mr. Murtagh's personal representatives authorised Mr. Wallace to make all decisions as might be required in respect of these proceedings.

The Defendants
The first defendant (Mr. Hannan) lived in Cavan for 32 years where he was manager of the ACC Bank. All of the other defendants were customers of that bank. In 2002, they formed a partnership which got involved in property purchase and development. It was known as the Hammo Partnership. The present case arises out of one of the partnership's ventures into property speculation and development.

In short, the Hammo Partnership purchased lands at Billis, Co. Cavan in 2005. The purchase price was €1.7m. Between that purchase price, the paying off of a Mr. Leddy who introduced them to the land and the obtaining of planning permission, the total expenditure which the Hammo Partnership made on these lands was of the order of €3m. Two years after its purchase, it put the lands on sale seeking €9m for it. That price was not achieved but the late Mr. Murtagh paid the partnership €7m for the land.

Not content with having more than doubled their money, the defendants, as members of the Hammo Partnership, sought to derive further fiscal benefits by entering into arrangements details of which I will examine presently. These arrangements were driven by tax avoidance motives.

The Arrangements
The contract under which Mr. Murtagh purchased the Billis lands was dated 8th January, 2007. Mr. Murtagh and the Company constructed a residential retirement complex known as Castlemanor Retirement Village on the lands.

By two further contracts which were also dated 8th January, 2007, it was agreed that the defendants would purchase back a total of 48 units when constructed in the development and that the Company would construct those units.

Subsequently, having regard to tax advice which was given to the defendants, these two composite contracts were replaced by individual contracts pertaining to each of the 48 units. All of these contracts bear the same date namely 30th November, 2007. Each of the 48 contracts comprised an individual contract for sale of the land by Mr. Murtagh to the defendants and a corresponding building agreement in which the Company was the contractor and the defendants the employer.

The closing dates in respect of the units which are in suit were as follows. Units 4, 7, 8, 10 and 35 had a closing date of 31st March, 2008. Units 21, 24, 27, 30, 31, 32 and 36 had a closing dated of 30th June, 2008. Units 53, 54, 55, 56, 57, 58, 59, 67, 68, 69 and 70 had a closing date of 31st October, 2008.

At the time when the contracts in suit were executed, the building work on the retirement village was far advanced and indeed was proceeding with speed. This was because the works had to be completed by a specific date in order to avail of the tax advantages. Despite the speed of the works, all parties agree that Mr. Murtagh was a good and competent builder and the work done by him and

the Company was of a high standard.

The Bond
When the original contracts of 8th January, 2007, regulated the relationship between the parties, it was agreed that the defendants would provide a €1,500,000 bond in respect of a deposit for the contract for sale and building agreement. That bond was to remain in place until the sales of all 48 units in the development closed.

On 8th March, 2007, a guarantee was executed between National Irish Bank Limited, the lending bank of the defendants and ACC Bank Plc, the lending bank of the Company and Mr. Murtagh. That instrument provided that in consideration of ACC Bank affording facilities to Mr. Murtagh, National Irish Bank guaranteed the payment on demand of a total sum of €1,500,000 provided that that demand could only be made by ACC Bank in the event that Mr. Murtagh had not paid that sum. This was a continuing guarantee which could be terminated by National Irish Bank on giving 90 days notice in writing to ACC Bank. This arrangement was arrived at between the parties and this bond acted as a substitute for the composite deposit monies due on foot of the contracts for sale and the building agreements.

When the 48 individual contracts of 30th November, 2007, replaced the earlier two contracts of January 2007, exchange of the individual contracts was carried out on the basis of that bond remaining in place in respect of the deposit for the 48 units.

For the sake of completeness, I ought to record that on 20th October, 2008, ACC Bank plc. demanded payment from National Irish Bank Limited of this sum of €1,500,000. The defendants through their solicitors P.J.F. McDwyer and Company by letter dated 24th October, 2008, instructed National Irish Bank that payment was not to be made on foot of the bond because "the amounts due and referred to in the said guarantee have already been discharged and paid to the ACC Bank Plc by Desmond Murtagh and therefore this guarantee has been satisfied in full".

Events Post-November 2007
Between December 2007 and the summer of 2008, 26 sales of the 48 units were completed. All 48 houses were substantially completed. The completion dates were staggered as indeed is the case in relation to the units which are in suit.

By July 2008, the plaintiffs were of the view that the defendants had become reluctant to close the remaining sales and so a completion notice was served dated 14th July, 2008, in respect of such of the units whose closing date had passed at that time.

The defendants contended that these completion notices were invalid because of an alleged agreement to withdraw the contracts in respect of which they were served and to replace them by other contracts. That contention had no substance, was disputed by the plaintiffs and was never pursued.

Further completion notices were served on 4th November, 2008.

In December 2008, controversy erupted on issues pertinent to the bond and the receiver was appointed to the Company in February 2009.

I mention these matters because throughout these various controversies no issue was raised by the defendants concerning any aspect of the planning permission granted in respect of the development or compliance with it.

In the light of the defences raised in this action and my findings later in this judgment, that is a matter of some significance.

The Planning Permission
Whilst a number of planning permissions were granted in respect of the development, the one which is pertinent to this case is that bearing register No. 05/162 dated 13th October, 2005.

The applicant for the permission was the fourth defendant (Mr. Olwill).

The permission was subject to 54 conditions, only a small number of which have any relevance to this case.

Condition No. 2 required the developer to make a contribution to the planning authority towards expenditure to be incurred by it in respect of public infrastructure and facilities benefiting development in the area of the authority. The sum specified was €296,220. That amount was discharged as the development went along and a balance remains due to Cavan County Council which the receiver of the Company has undertaken to pay. He is in funds to do so.

Condition No. 3 required the developer to lodge with Cavan County Council, a cash deposit or bond of an insurance company or other security to secure the provision and satisfactory completion of roads, footpaths, public lighting etc. The amount specified was the sum of €2,000 per unit. That bond was lodged and was called by Cavan County Council.

Condition No. 14 provided that the dwellings "may not be occupied until the new sanitary facilities have been constructed and tested in accordance with the Council's requirements".

It is condition 33 which has given rise to much of the controversy that I have to deal with. It provides as follows:-

> "The proposed 150mm diameter foul sewer from Billis Cross to Drumalee Cross to be increased to 300mm diameter. The applicant shall arrange a meeting with Cavan County Council prior to commencement of the development to agree the details and construction. This section of pipeline will be taken over by Cavan County Council after installation and testing."

Condition No. 34 ought to be mentioned. It provided:-

> "The proposed 100mm diameter foul sewer rising main from the pumping station to Billis Cross to be increased to 150mm diameter."

Finally, condition No. 35 required written confirmation "from the M+E contractor, Envirocare, that the pumping station has been installed as per their (sic) submitted specification and drawings with the exception of the capacity of the emergency overflow tank to be increased to 40 cubic meters. A copy of the commissioning certificate to be sent to Cavan County Council."

The road from Billis Cross to Drumalee Cross mentioned in condition 33 is a public road and a busy one at that. It is quite clear from the evidence that the carrying out of the work contemplated in condition No. 33 would require closure of that road or a large part of it for a number of months. That in turn would result in serious traffic disruption.

The Contracts
The format of the contracts governing each of the 22 properties in suit is the same. It consists of the contract for the sale of the land for €82,000 per unit and the building agreement for €188,000 per unit. As I have already pointed out there are staggered closing dates. 20 of the 48 units were to close in December 2007 with a further 8 on 31st March, 2008, 10 on 30th June, 2008 and 10 on 31st October, 2008.

The Building Agreement
The building agreement provides at recital VI that "'the works' shall mean the dwelling house and premises specified in the plans together with such necessary ancillary works and services as may be necessary to render the dwelling house and premises reasonably habitable when completed and comply with Health Service Executive specifications."

The covenant to build requires the Company for the contract price to build and completely finish in a good substantial and workmanlike manner and deliver to the employer the works on the site in accordance with the plans and subject to the conditions set out at numbers 1 to 22 annexed to the agreement. In fact, those works are complete.

I have been quoting from the special conditions but the building agreements are also governed by the Law Society of Ireland's Building Agreement (2001 edition) conditions. The only such condition which is relevant is No. 3 which reads:-

> "The contractor shall at his own expense conform to the provisions of any statute, by-law or regulation applicable for the time being and affecting the works on the site and shall give all necessary notices to and obtain all necessary sanctions of the local planning or any other authority in respect of the works and shall keep the employer indemnified against all fines, penalties, expenses and loss incurred by reason of any breach of any statute, by-law or regulation or the failure to give any such notice of a failure to obtain any such sanction."

The Agreements for Sale
The contracts for sale are governed by the Law Society of Ireland General Conditions (2001 edition) but are subject to a number of special conditions. The general conditions are to apply insofar as they are not altered or varied by the special conditions and in the event of any conflict between them the special conditions are to prevail (see special condition 2).

Special condition No. 10 is of central importance to this case. It provides as follows:-

> "On completion the vendor shall furnish the purchaser with an engineer's certificate of compliance with planning permission and building regulations together with a structural defects indemnity from the contractor in the building agreement for a period of six years for major defects and no objection, query or requisition raised regarding same shall be admitted and general condition 36 is hereby varied accordingly."

General condition 36 is headed "Development". It provides as follows:-

> "(a) Unless the Special Conditions contain a stipulation to the contrary, the Vendor warrants:
>
> (i) that there has been no Development of the Subject Property since the 1st day of October, 1964, for which Planning Permission or Building Bye-Law Approval was required by law
>
> or
>
> (ii) that all Planning Permissions and Building Bye-Law Approvals required by law for the Development of the Subject Property as at the Date of Sale were obtained (save in respect of matters of trifling materiality), and that, where implemented, the conditions thereof in relation to and specifically addressed to such Development were complied with substantially
>
> PROVIDED HOWEVER that the foregoing warranty shall not extend to (and the Vendor shall not be required to establish) the obtaining of approvals under the Building Bye-Laws or compliance with such Bye-Laws in respect of Development or works carried out prior to the 13th day of December, 1989 (this proviso being hereinafter in Condition 36 referred to as the 'Proviso')
>
> (b) unless the Special Conditions contain a stipulation to the contrary, the Vendor warrants in all cases where the provisions of the Building Control Act, 1990 or of any Regulation from time to time thereunder apply to the design or Development of the Subject Property or any part of the same or any activities in connection therewith, that there has been substantial compliance with the said provisions in so far as they pertained to such design, Development or activities
>
> (c) the warranties referred to in (a) and (b) of this Condition shall not extend to any breach of provisions contained in Planning Legislation, which breach has been remedied or is no longer continuing at the Date of Sale.
>
> (d) the Vendor shall prior to the Date of Sale make available to the Purchaser for inspection or furnish to the Purchaser copies of:–
>
> (i) all such Permissions and Approvals as are referred to in Condition 36(a) other than in the Proviso
>
> (ii) all Fire Safety Certificates and (if available) Commencement Notices issued under Regulations made pursuant to the Building Control Act, 1990, and referable to the Subject Property (such Permissions, Approvals and Certificates specified in this Condition 36(d) being hereinafter in Condition 36 referred to as the 'Consents') and
>
> (iii) (Save where Development is intended to be carried out between the Date of Sale and the date upon which the

Sale shall be completed) the documents referred to in Condition 36(e).

(e) the Vendor shall, on or prior to completion of the Sale, furnish to the Purchaser

(i) written confirmation from the Local Authority of compliance with all conditions involving financial contributions or the furnishing of bonds in any such Consents (other than those referred to in the Proviso)

PROVIDED HOWEVER that where

the Development authorised by such Consents relates to a residential housing estate of which the Development of the Subject Property forms part

and

such Consents relate to the initial construction of a building on the Subject Property

written confirmation from the Local Authority that the roads and services abutting on the Subject Property have been taken in charge by it shall be accepted as satisfactory evidence of compliance with such conditions, unless the said confirmation discloses a requirement for payment of outstanding moneys

(ii) a Certificate or Opinion by an Architect or an Engineer (or other professionally qualified person competent so to certify or opine) confirming that, in relation to such Consents (save those referred to in the Proviso)

– the same relate to the Subject Property

– (where applicable) the design of the buildings on the Subject Property is in substantial compliance with the Building Control Act, 1990 and the Regulations made thereunder

– the Development of the Subject Property has been carried out in substantial compliance with such Consents

– all conditions (other than financial conditions) of such Consents have been complied with substantially

and

– in the event of the Subject Property forming part of a larger development, all conditions (other than financial conditions) of such Consents which relate to the overall development have been complied with substantially so far as was reasonably possible in the context of such development as at the date of such Certificate or Opinion

(f)

(i) where the Vendor has furnished Certificates or Opinions pursuant to Condition 36(e), the Vendor shall have no liability on foot of the warranties expressed in Condition 36(a) or 36(b) or either of them in respect of any matter with regard to which such Certificate or Opinion is erroneous or inaccurate, unless the Vendor was aware at the Date of Sale that the same contained any material error or inaccuracy

(ii) if, subsequent to the Date of Sale and prior to the completion thereof, it is established that any such Certificate or Opinion is erroneous or inaccurate, then, if the Vendor fails to show

that before the Date of Sale the Purchaser was aware of the error or inaccuracy

or

that same is no longer relevant or material

or

that same does not prejudicially affect the value of the Subject Property

the Purchaser may by notice given to the Vendor rescind the Sale."

Having regard to the wording of special condition No. 10, it is clear that it varies condition 36 of the general conditions. The purchaser has agreed to be furnished with the engineer's certificate of compliance in lieu of the entitlements under general condition No. 36. The purchaser's entitlement is therefore to obtain the certificate of compliance which is referred to in special condition No. 10.

The format of that certificate of compliance was disclosed in advance to the defendants. It was contained in the Booklet of Title. The certificate which was ultimately issued in each case was in the format contained in that booklet. Thus, from the outset, the defendants were aware, not merely that they were varying their entitlements under general condition No. 36 and were receiving instead the certificate of compliance contemplated in special condition No. 10, but they had sight of the format of that certificate in advance of becoming contractually bound.

The Certificate of Compliance

In each case, the Certificate of Compliance was issued by David McCormack (Mr. McCormack), an architect of the firm of David McCormack & Company, which practices in Cavan. Special condition No. 10 called for an Engineer's Certificate but in fact the certificate was issued by Mr. McCormack. Nothing turns on this point.

Mr. McCormack qualified as an architect in 1992 and has been in independent private practice since 1993. The certificate recites that he was the architect retained by the company in respect of the development. The Certificate also recites that the plans and other particulars, on foot of which Planning Permission 05/162 was granted, had been inspected by Mr. McCormack's firm.

Each certificate then recites the grant of Permission 05/162 as well as Permission 07/1658 dated 24th October, 2007, relating to the retention and continuation for the repositioning and layout of seventy retirement homes previously approved under planning reference 05/162 at Billis in Cavan.

The certificate goes on to provide that the relevant works and the services thereof had been designed in substantial conformity with the building regulations made pursuant to the Building Control Act 1990. It also recites, as was the fact, that a commencement notice of intention to undertake the relevant works was duly given on 14th December, 2006, and that that notice contained or was accompanied by the information and particulars prescribed by the Building Control Regulations 1991. Mr. McCormack certifies that he made periodic inspection of the relevant works during the construction thereof and that in his opinion the construction of same complied substantially with the grant of permission and substantially with all of the building regulations applicable thereto.

Paragraph number 10 of the certificate reads as follows:-

> "The conditions of the permission referred to at paragraph 5 relating to the estate of which the relevant works form part, have been substantially complied with insofar as is reasonably possible at this stage of the development of such estate BUT this paragraph is not to be taken as extending to conditions for the payment of financial contributions or the giving of security for satisfactory completion, compliance with which is not within my competence to certify."

Clause No. 11 of the certificate reads:-

> "Take notice that this certificate is issued solely with a view to providing evidence for title purposes of the compliance of the relevant works with the requirements of planning legislation and of the Building Control Act 1990 and the regulations thereunder. Except insofar as it relates to compliance with the said requirements and regulations, it is not a report or survey on the physical condition or on the structure of the relevant works, nor does it warrant, represent or take into account any of the following matters:-
>
> (a) The accuracy of dimensions in general, save where arising out of the conditions of the permission/approval or the building regulations aforesaid.
>
> (b) Matters in respect of private rights and obligations.
>
> (c) Matters of financial contribution.
>
> (d) Development of the relevant works which may occur after the date of issue of this certificate."

The final part of the certificate certifies Mr. McCormack's familiarity with the lands in question and the scheme of development in suit.

The Pleadings
The statement of claim is straightforward. It asserts the existence of the contracts for sale and the building contracts and gives detail of their prices and their respective closing dates. It also alleges the service of the completion notices which I have already referred to and alleges breach of contract on the part of the defendant and proceeds to pray for an order of specific performance.

In the defence and counterclaim it is admitted that the defendants entered into the contracts for sale and the building agreements in suit.

The defendants allege that the following were terms of the agreements between the parties:-

> (a) that the units would be built in accordance with the requirements of the local authority;
>
> (b) that the units would be reasonably habitable when constructed;
>
> (c) that the sewers, water mains and other services would be constructed and laid as soon as practicable to a standard acceptable to the local authority;
>
> (d) that the conditions of the planning permission for the construction of the units would be complied with substantially;
>
> (e) that the plaintiffs would furnish to the defendants an appropriate certificate of compliance with planning permission as provided for in special condition 10 of the contract for sale;
>
> (f) that in the event that the certificate of compliance was erroneous or inaccurate, the defendants were entitled by notice to the plaintiffs to rescind the sale; and
>
> (g) on completion, the plaintiffs were required to provide the defendants with a structural defects indemnity for a period of six years in respect of major defects.

The defence alleges that the plaintiffs are not in a position to provide a valid certificate of compliance in circumstances where the planning permission authorising the construction of the scheme has not been complied with. In particular, condition 33 of planning permission 05/162 which requires the construction of the foul sewer to be constructed from Billis Cross to Drumalee Cross and to have the necessary details agreed with regard to the construction before the commencement of development has allegedly not been complied with.

The defence also alleges that conditions 34 and 35 have not been complied with. In said circumstances it is contended that the plaintiffs were not in a position to provide the appropriate certificate of compliance and that therefore the contract cannot be completed and the defendants are entitled to rescind it.

It is also alleged that the failure to comply with the terms and conditions of the planning permission prevent the use of the dwellings as such and that they are not habitable contrary to the terms of the building agreement. The defendants also contend that the plaintiffs cannot in equity compel them to complete the contract in circumstances where to do so would involve the defendants in a transaction in relation to a development which amounts to an unlawful development having regard to the provisions of s. 150 of the Planning and Development Act 2000, as amended.

The defence also contends that condition No. 14 has not been complied with.

The defence alleges that, insofar as the plaintiffs have provided a purported certificate of compliance, it is inaccurate and erroneous. These pleas are, in large measure, repeated in a counterclaim which, in addition, alleges that on 18th March, 2010 (subsequent to the issue of these proceedings), the defendants served notice, as they were entitled to do, both under the general law and pursuant to clause 35(b)(iii) and (iv), clause 36(e)(ii) and clause 36(f)(i) and (ii) of the general conditions of sale that they were rescinding the sale. A declaration that the contract has been rescinded is prayed for.

The Issues
There are two core issues for determination.

The first is, does the production by the plaintiffs of Mr. McCormack's certificate in accordance with special condition 10 discharge their contractual obligations to the defendants thus entitling them to specific performance?

If the answer to that question is in the affirmative then the plaintiffs say that much, if not all, of the defendants' contentions disappear.

If the answer is in the negative then the question arises as to whether Mr. McCormack's certificate is correct. That involves a consideration of much evidence which was tendered over many days. It involves a consideration of whether or not it can be said that conditions No. 14 and 33 of the planning permission have been complied with. If not, does that render the certificate incorrect? It also may require an assessment of the defendants' state of knowledge of all this.

Counsel for the plaintiff expressly acknowledged that no issue concerning compliance with condition No. 34 was being raised.

First Issue
Special condition No. 10 requires the plaintiff to furnish the defendants with the engineer's certificate of compliance with planning permission and building regulations together with a structural defects indemnity from the contractor and "no objection, query or requisition raised regarding same shall be admitted and general condition 36 is hereby varied accordingly".

This special condition varies and takes precedence over general condition 36. In its terms, it disentitles the defendants from making any objection, query or requisition concerning the certificate and its contents. Thus they are not entitled either before or after closing the sale to any further investigation. Instead, having varied their entitlements under general condition 36, they must now be, it is said, satisfied and accept the certificate which has been issued.

There is no dispute but that such a certificate exists in the case of each of the contracts in suit and Mr. McCormack has stood over his certificate in the witness box. The plaintiffs contend that that is an end of the matter. Having contracted for such a certificate and having received it, it is not open to the defendants to question its validity as a basis for refusing to perform their contractual obligations. If the defendants are correct in contending that the certificate is defective, their remedy is against Mr. McCormack and not the vendors, say the plaintiffs.

A number of arguments are made by the defendants against these propositions and I will endeavour to deal with each of them in turn. Before doing so, however, it is important to bear in mind that para. 10 of Mr. McCormack's certificate is to the effect that there has been substantial compliance insofar as is reasonably possible with the various conditions of permission 05/162. In that regard, it is common case that the foul sewer contemplated in condition 33 has never in fact been built. I will deal with the reasons for that in due course and the consequences that it has for this litigation. However, I should say that the evidence satisfies me that the failure to comply with this condition is not as a result of any culpable default on the part of the plaintiffs.

Discussion
As to the case that Mr. McCormack's certificate issued pursuant to special condition 10 is all that is required to be handed over on closing, the following arguments are made.

The first argument which is made by the defendants is that in matters of title, a restrictive condition requiring the purchaser to accept what the vendor knows to be incorrect can be disregarded. If Mr. McCormack's certificate can be regarded as touching on a matter of title and is incorrect, it can be disregarded.

Reliance is placed by the defendants upon two passages contained at paras. 5.008 and 5.011 of *Emmett and Farrand on Title* (2010) and the cases cited therein.

Paragraph 5.008 reads in part as follows:-

> "Conditions of Sale
>
> In the light of the above complexities, a vendor may wish to insert a condition in the contract dealing with any defect in his title, designed to "safeguard himself against any undue trouble to which he might be put by inquiries about facts which took place some time ago" (Simonds J. in *Re Holmes* [1944] Ch 53 at 57; see also *Becker v. Partridge* [1966] 2 QB 157 at 171 – 172). If so, the rule is that the condition must not mislead the purchaser in any way. (*Re Banister* [1879] 12 Ch D 131). The vendor will only be able to rely on the condition if he has made a sufficiently full disclosure to enable the purchaser to consider and determine whether it is worth his while to accept the particular defective title by entering into the contract (*Re Haedicke & Lipski's Contract* [1901] 2 Ch 666)."

Paragraph 5.011 states :-

> "Purchaser to Assume that a State of Facts Exists-
>
> A condition requiring a purchaser to assume that what the vendor knows is not true can be disregarded on the ground that it is misleading, and the vendor cannot enforce specific performance (*Re Sandbach & Edmundson's Contract* [1891] 1 Ch 99). This is also so if the vendor knows only that what has to be assumed may not be true (*Wilson v. Thomas* [1958] 1 WLR 422, where the state of facts to be assumed depended on the proper construction, with the aid of extrinsic evidence of a latent ambiguity in a will). But the condition would not be considered misleading if the vendor believed it to be true what he asked the purchaser to assume, although his belief was untrue and unsupported by evidence (ibid). The utmost that can be asked of a purchaser is that he shall assume something of which the vendor knows nothing. It follows

> that if the vendor knows, or from the state of his title ought to know, that what he asked the purchaser to assume is not correct, the condition would be misleading (*Re Banister* [1879] 12 Ch D 131: *Beyfus v. Lodge* [1925] Ch 350."

The plaintiffs contend that these authorities and the propositions advanced by them do not assist the defendants in their defence of these proceedings.

First, it is said that a purchaser is entitled to agree to a very restrictive special condition and that in such circumstances, the principles set out above do not apply. They rely on a passage from Farrell's *Irish Law of Specific Performance* [1994] where at para. 974, the author wrote:-

> "In a vendor's action for specific performance it is a good defence to show that he has no title unless the purchaser has unwisely agreed to a very restrictive special condition."

At para. 978, the author continued:-

> "Formal contracts usually contain some restrictions on the right of the purchaser to investigate title. It is obvious that under an "open" contract the purchaser is entitled to a full investigation of title and no less obvious that the right to a full investigation may be cut down by conditions of sale. It has been said that 'a purchaser may preclude himself by agreement from making any inquiry as to title and specific performance may be enforced against him."

Thus it is argued that the points made by the defendants by reference to the quotations from *Emmett and Farrand* are subject to the overarching principle of freedom of contract and that they are entitled to agree what they wish. In the present case, it is said that special condition No. 10 means what it says and should be given effect to.

In agreeing to special condition No. 10 it is argued, both parties committed to obtaining the services of Mr. McCormack to provide a professional opinion in respect of planning matters. If Mr. McCormack is wrong then remedies are available to the defendants but not as against the plaintiffs.

A second line of objection to the defendant's arguments in this regard is mooted by reference to the fact that the extracts from *Emmett and Farrand* deal only with defects in title. The plaintiffs contend that planning does not go to title. In that regard, they cite a dictum from Keane J. in *Doolan v. Murray* (21st December, 1993) where he said:-

> "The objection, moreover, taken by the plaintiff at this stage to the replies all relate to alleged non-disclosure of planning matters. Although requisitions in relation to such matters are raised today as a matter of course, they are not in the strict sense requisitions on title and, even if the plaintiff's contention that they were inadequate in the present case is well founded, and she had been in a position to rely on them at the appropriate time, i.e. before the sale was completed, it is unlikely that their allegedly inadequate nature would have afforded her any grounds for rescinding the contract."

Quite apart from that dictum, the plaintiffs contend that in the same edition of *Emmett and Farrand* relied upon by the defendants, there is contained at para. 4.025, the following statement:-

> "User of property –
>
> Is this an aspect of quality or of title? There is some authority supporting an implied obligation on the part of a vendor to disclose planning restrictions (see per Harman J. in *Sidney v. Buddery* [1949] 1 P. & C.R. 34; but cp. *Mitchell v. Beacon Estates (Finsbury Park) Limited* ibid 32). Thus Graham J. after saying that the value of the land would be affected, stated 'Non-disclosure of the position in respect of planning permission might therefore in some circumstances give rise to a misrepresentation' (*Sinclair-Hill v. Southcott* [1973] 266 E.G. 1399 at p 1401). This authority may be better explained not as indicating an extension of a vendor's duty of disclosure of latent defects in title but merely as illustrating that misrepresentations can be made by conduct as well as words…. Otherwise, it would appear to be in conflict with the general principle that it is the business of the purchaser:-
>
> > 'If he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purposes for which he wants to use them, whether that fitness depends on the state of their structure or the state of the law or any other relevant circumstances' (per Devlin J. in *Edler v. Auerbach* [1950] 1 KB 359 at 374). This statement of the law enjoys the express approval of the Court of Appeal (*Hill v. Harris* [1965] 2 QB 601, concerning a head lease covenant) but is still not applicable where there has been a positive misrepresentation as to user *(Laurence v. Lexcourt Holdings Limited* [1978] 1 WLR 1128 at 1134)'."

Accordingly, it is contended that special condition 10 ought to be construed of reference to the normal rules of construction and that it means what it says. It is not referable to matters of title and was within the competence of parties to these commercial arrangements to so provide. It was designed to ensure certainty and it did so.

The plaintiffs contend that even if there are special rules which would disentitle the plaintiffs to rely on special condition 10 requiring the defendants to assume what the plaintiffs knew not to be true, such special rule is of no assistance to the defendants. This is so for a number of reasons.

First, the certificate envisaged in special condition 10 was to certify substantial compliance "insofar as is reasonably possible at this stage of the development". Thus, both parties were aware the certificate would merely be as to compliance at the stage of the development on the date of the certificate. The condition did not require the defendants to assume anything that the plaintiffs knew to be untrue. There was no reason why the plaintiffs would believe that such a certificate could not be and would not be given in good faith.

The defendants also make the case that special condition 10 provides a variation to general condition 36. In its terms that is correct but what is the effect of that in practical terms?

General condition 36(a)(ii) provides a general warranty that all planning permissions required by law for the development of the subject property as of the date of sale were obtained and that, where implemented, the conditions were complied with substantially.

Special condition 36(e) provides that the vendor shall, on or prior to completion of the sale, furnish to the purchaser a certificate or

opinion by an architect or an engineer. General condition 36(e)(ii) sets out what that certificate or opinion ought to contain. The prescribed certificate is in a somewhat different form to the one provided in the present case.

General condition 36(f)(i) provides that where the vendor has furnished certificates pursuant to condition 36(e), the vendor shall have no liability on foot of the warranties expressed in condition 36(a) of 36(b) or either of them in respect of any matter with regard to which said certificate or opinion is erroneous or inaccurate unless the vendor was aware at the date of sale that the same contained any material, error or inaccuracy. Thus, it is clear that where the vendor furnishes a certificate pursuant to condition 36(e), he has no liability on foot of it unless he was aware at the date of the sale that the certificate contained a material inaccuracy, so it is argued that even under general condition 36, the defendants' rights following delivery of the certificate are limited. Once a certificate is provided under general condition 36(f)(i), no further warranty is made in respect of its contents unless the condition provided for in 36(f)(i) is applicable.

General condition 36(f)(ii) deals with the situation in which subsequent to the date of sale but prior to completion, it is ascertained that there is an inaccuracy in the certificate. In such circumstances, if the vendor fails to show that before the date of sale the purchaser is aware of the error or inaccuracy or that the same is no longer relevant or material or that the same does not prejudicially affect the value of the subject property, the purchaser made, by notice given to the vendor, rescind the sale.

The plaintiffs argue that even if they are incorrect in their contention that special condition 10 has to be viewed, in effect, as overriding in a general way what is contained in general condition 36 nonetheless, the line of defence sought to be made by reference to the above quoted provisions of general condition 36 are of no avail.

This argument runs as follows. Condition 36(e)(ii) is, it is said, entirely excluded because it provides for a particular form of certification to be given. Special condition 10 provides for a different form of certificate and they cannot stand together.

Condition 36(f)(ii) is also excluded because that relates to the situation in which the certificate is furnished prior to completion whilst general condition 10 makes it clear that that will not happen. Accordingly, condition 36(f)(ii) is of no relevance.

It is also argued that condition 36(f)(i), is of no relevance. It, in any event, provides that there is to be no liability on foot of a certificate once provided. Special condition 10 expands upon that and says there is to be no objection or no query or no requisition in relation to the certificate. It is said that special condition 10 alters by exclusion the provisions of general condition 36(f)(i).

General condition 36(a) is, it is argued, also excluded.

Thus, it is said, that on any view of the matter, there is no defence available to the defendants having regard to what is contained in special condition 10.

The plaintiffs say that, in essence, the argument of the defendants is that special condition 10 has to be given a meaning different from its ordinary meaning and that that is not appropriate.

View
In my view, the contentions made by the plaintiffs are correct. Special condition 10 means what it says. The parties contracted for the form of certification which is envisaged by it and if that certificate proved to be incorrect then the remedy is not against the vendors but against the certifier.

Even if that view is incorrect, I am of opinion that there is much force in the plaintiff's contentions concerning the exclusion of the various entitlements which the defendants might otherwise have pursuant to general condition 36. They are effectively excluded when one juxtaposes the provisions of special condition 10 with general condition 36.

However, I do not propose to go into any greater detail in expressing my views on this matter because, lest I am wrong in the view which I have formed, I am going to consider the merits of the matter by reference to the evidence which I heard. Thus, although the conclusion which I have reached at this juncture would be sufficient to dispose of the litigation, I will consider all other elements of the case.

Second Issue
The resolution of this issue requires consideration of whether the certificate produced by Mr. McCormack is substantially correct. It also requires consideration of the state of knowledge of the defendants in relation to the central issue in this case. That issue relates to the failure to install the sewer which is contemplated at condition 33 of the planning permission. There is also a secondary issue of lesser importance concerning an alleged failure to comply with condition 14 of the planning permission.

Condition 33
It is common case that condition No. 33 has not been complied with. In a few moments, I will explore why that is so.

I am quite satisfied on the evidence that the reason why condition 33 has not been complied with is not due to any fault or failure on the part of the plaintiffs.

Mr. Murtagh was at all times willing to install the sewer and was anxious to do so. He expressed a willingness and a desire to install the sewer himself. Cavan County Council was against that because it took the view that he did not have the necessary expertise. Its officials wished to have a specialist firm engaged. I am satisfied that even if a specialist firm had been engaged, there was no realistic possibility of the sewer being built because of Cavan County Council's clear preference that it should not be installed until such time as that Council was in a position to install a water main along the same stretch of road. Such an approach made perfect sense. Major disruption to traffic over a lengthy period was going to be experienced during the time of installation of the sewer. The road would have to be closed for that time. There was no sense in installing the sewer other than concurrently with the installation of the water main which Cavan County Council had been planning for a long time.

In a few moments, I will consider the evidence tendered by officials of Cavan County Council who, it will be apparent, were hamstrung in their efforts to install the water main as a result of a failure on the part of the Department of the Environment to provide promised funding so to do.

Despite Mr. Murtagh's willingness to comply with condition 33, there was no practical or realistic ability on his part to do so without the agreement of Cavan County Council and that was not forthcoming at any time.

The matter was put succinctly by Mr. McCormack in his evidence where he said (day one, question 258):-

> "Question 258: I am going to put it to you that there was nothing preventing your client in 2007 from building this sewer. It may have been the preferred option of the Council to have both done at the same time, but don't you agree that if your client wanted to do it he could have done it?
>
> Answer: No, my client expressed a willingness and a desire to do the sewer himself and the Council specifically stated that he was not allowed to do it because his firm hadn't got the necessary expertise and that they would need a specialist firm to be engaged should they want to go down that route, but that, however, their preference at the time was to wait on the water main.
>
> Question 259: Alright, we'll take that stage by stage. The first thing that the Council were saying to Mr. Murtagh and his company, I gather, was that they didn't think he had the competence to do the work?
>
> Answer: Yes. Well, he expressed a desire to do the works himself.
>
> Question 260: They said 'well, in relation to construction we want somebody competent to do it'. But that wasn't saying that if they got somebody competent to do it, it couldn't have been done.
>
> Answer 260: They expressed the preference to carrying it out in conjunction with the water main should a contractor be appointed, an independent contractor. That was their preference.
>
> Question 261: That was their preference. Firstly, they would like an independent contractor. And, secondly, their preference, to stop disruption and things, would be that it would be done at the same time, isn't that right?
>
> Answer: Commonsense would dictate, yes, rather than closing the road.
>
> Question: There was nothing in any of that to prevent your client from doing what he was required to do under the planning permission.
>
> Answer: Other than commonsense by all parties and closing a road for up to months and then reopening it a few months later."

Instead of installing the new sewer, there was a temporary connection made for which permission was given by Cavan County Council. Prior to that, a camera survey was carried out so as to determine the condition of the exiting sewer. Permission for the connection was given by Mr. Vincent Craig of Cavan County Council. At that time, Cavan County Council believed that monies from the Department of the Environment for the building of the water main were "imminent". If such monies had been forthcoming, the two pieces of work could have been done together.

The evidence of Mr. Treacy, who had many dealings with officials of Cavan County Council in relation to this matter, is clear that the preference of that Council was that the water main and the sewer would be installed together.

The issue was copperfastened by the evidence given by Mr. Traynor, senior executive engineer with Cavan County Council. From his evidence, it is possible to recount the saga of the water main and the sewer envisaged in condition 33.

The Water Main Saga

As I have indicated, for very good reasons, Cavan County Council was not happy that the sewer should be installed other than in conjunction with the water main which it has wished to install for years. Mr. Gaynor produced drawings with a cross-section and an overall view on calculations for the installation of the sewer but there was no reality in it proceeding, absent the approval of the Council. The line of the sewer would be evident from the manholes already on the road. Over a number of years, Cavan County Council believed that funding would be available to it so as to carry out this work. In 2007, some funds were made available by the Department of the Environment but it did not include funds for this particular water main. This meant that the Cavan County Council officials had to go back to the Department to try and obtain funding for it. Cavan County Council was continually making application to the Department of the Environment and submitting to it what it believed were the requisite documents so as to trigger payment of the funds which it believed it had secured for the water main. But every time it submitted the documents, it was asked for additional information from the Department. The position of the County Council was accurately described by Mr. Traynor as "frustrating".

Mr. Traynor made it clear that it was definitely the preferred option of Cavan County Council that the sewer should not be installed other than in conjunction with the installation of the new water main.

Cavan County Council at all times wished to install this water main and the only thing that prevented it from so doing was the failure on the part of the Department of the Environment to provide it with the necessary funds. Such funds had been promised and the County Council believed had been secured by it and their payment was "imminent". The funds were never, in fact, made available.

At the conclusion of the cross-examination of Mr. Gaynor, I asked the following questions:

> "Question: Mr. Justice Kelly: Would I be correct in this description, that insofar as condition 33 was concerned, at all times, the developer and his engineer gave an indication that they wished to comply with that and the only reason that they didn't was because of the preferred option on the part of Cavan County Council that they should not do so until such time as the new sewer could be put in at the same time as the new water main?
>
> Answer: Correct.
>
> Question: Mr. Justice Kelly: And that if anything, you were being put under pressure to provide information as to when that might happen?
>
> Answer: Continually.
>
> Question: Mr. Justice Kelly: Continually, and it reached the stage where you were actually embarrassed by being asked those questions because you were operating on the basis that funds were about to be made available and on each occasion that proved to be fruitless, there were no funds?

Answer: I'll never use the word 'imminent' again.

Question: Mr. Justice Kelly: So that's the position that obtained throughout, so Cavan County Council were putting no pressure on to have this work done because the temporary arrangement was working satisfactorily and the nightmare that would be involved in a double road opening was such as make it prudent to wait until such time as the funds for the water main became available and then do the two together?

Answer: You see, Judge, Cavan County Council were never aware that there was an issue in relation to this. We had never been informed by anybody that this was going to affect anything other than the sewer. So we were of the opinion that the contractor was obliging us by waiting, but we were never aware that it was creating any problems for the contractor or his development."

Conclusions on Condition 33
I am quite satisfied on the evidence that the only reason why the sewer was not installed in accordance with condition 33 was because of the requirements of Cavan County Council that it should be delayed until such time as it could be installed at the same time as the proposed water main. Not merely were the plaintiffs conscious of their obligation to install the sewer, but it is clear from the County Council evidence that they were continually endeavouring to engage with the County Council to enable that work to be carried out. Although Mr. Murtagh has died and the company is in receivership, the receiver has undertaken to make up any shortfall between the money available on foot of the bond and the cost of carrying out these works. I am satisfied that the works will be done once the County Council agrees that that should happen.

In the circumstances, I am satisfied that the certificate which was issued by Mr. McCormack that there had been substantial compliance with condition 33 "insofar as it is reasonably possible at this stage of development" is correct.

Condition 14
This condition required that the dwelling should not be occupied until the new sanitary facilities were constructed and tested in accordance with the Council's requirements. The plaintiffs contend that this condition is met once the internal sanitary facilities on the estate have been connected to the outside and constructed and tested in accordance with the requirements of the Council. The defendants say that this should be given a much wider interpretation and that it concerns itself not merely with the internal sanitary facilities, but extends outside the site to the main sewer.

I am satisfied the defendants are incorrect in this assertion. I am of opinion that condition No. 14 deals exclusively with the sanitary facilities in the estate and does not concern itself with matters outside the development project. I am fortified in that view by the evidence given on behalf of Cavan County Council. That is the body that is charged with ensuring compliance with the planning permission.

In the course of his evidence, Mr. Connaughton, a senior engineer with the Council said, concerning condition No. 14 (day 7, question 140):

"And as far as Cavan County Council is concerned, there is no problem with 14.

Answer: Not that we are aware of, no.

141 Question: Is that because, as far as you're concerned, its connected up to the public sewers and it works?

Answer: Well, I mean, yes, that's correct. As far as we're aware, the system, the temporary arrangement is working satisfactorily, and if we were to take action against condition 33, we wouldn't rely on condition 14."

Whilst the view of the County Council is not determinative of the issue, I am quite satisfied that its interpretation, as voiced by it's officials who gave evidence, of what is covered by condition 14 is correct. The more expanded view urged upon me by the defendants is not.

It follows that I am satisfied that Mr. McCormack's certificate insofar as condition 14 is concerned is also substantially correct.

Unlawful Development
In their defence, the defendants plead that the development as it stands is unlawful because of the failure to comply with condition 33 of the permission.

I do not accept that this is so. Any risk of proceedings under the planning legislation by reference to condition 33 or for that matter condition 14 is without substance. It is a phantom.

Mr. Connaughton dealt with the matter in his evidence immediately after his answer to Question 141 on the seventh day of the trial which I have already reproduced. Here is what he said:-

"Mr. Justice Kelly: And when you speak about taking action about condition 33, I take it there isn't any question of any action being taken about that?

Answer: Not at this moment, Your Honour, no.

Mr. Justice Kelly: Nor could there be, isn't that so, because all the developer has done is to comply with your wishes in that regard?

Answer: I'll defer to your judgment, Your Honour.

Mr. Justice Kelly: Well, no, it is a question I am asking you. You expressed a preference that he should not proceed with the work and he didn't.

Answer: That's correct, yes, but…(interjection)

Mr. Justice Kelly: Sorry, do you want to say something else?

Answer: Yes, My Lord. I mean, now or if we didn't in future wish to take action, the condition is quite clear, but not up to May 2009. We wouldn't have been in a position to – we wouldn't have wanted to take action. There was no reason for us to.

Mr. Justice Kelly: And you wouldn't have any case to make in that regard because he would have a perfect answer, in the sense that he would say 'you asked me not to proceed with the work and I complied with your wishes'.

Answer: That would be true, Your Honour, yes.

Question 142: Mr. McCullough: And in truth, that remains the position. There was a blip in 2009, but in fact it remains the position to date? You've heard others give evidence to that effect?

Answer: Yes, that's right."

I am satisfied that the defendant's contention based upon s. 150 of the Planning and Development Act 2000, as amended, is incorrect.

Lest I am incorrect in the conclusions which I have drawn to date, I now turn to consider the defendants' state of knowledge concerning the non-installation of the sewer contemplated in condition 33.

The Defendants' Knowledge
The plaintiffs contend that at all material times, the defendants were aware of the position concerning the non-compliance with condition 33 of the planning permission. If that be so, the plaintiffs argue that the defendants cannot succeed in their counterclaim for rescission. Actual knowledge of the alleged defect is, it is contended, fatal to the defendants' case.

In *Emmett and Farrand*, at para. 5.009, the following is to be found:-

> "Although there is an express representation by the vendor, the purchaser would not be entitled to take advantage of it if it can be shown that he well aware of the real facts of the case (*Ecclesfield v. Londonderry* [1876] 4 Ch D 693; *Smith v. Chadwick* [1884] 9 App Cas 187) or that he stated in terms or showed clearly by his conduct that he did not rely on the representation (*Redgrave v. Hurd* [1881] 20 Ch D 1)."

I accept that to be an accurate statement of the legal position. It follows that even in cases where there is an express warranty pertaining to title, a purchaser cannot rely on a defect in such title if he was aware of it at all material times. One cannot be misled by a misrepresentation if one knows the true position.

I therefore turn to attempt to ascertain what the state of knowledge of the defendants was concerning the failure to comply with condition 33.

I have already dealt with the general background by which the defendants became involved in this transaction. They were the original purchasers of the lands. One of their number on behalf of the Hammo Partnership applied for planning permission in respect of it. They sold the lands to the plaintiffs and then contracted to buy them back as already described in this judgment.

The defendants were well acquainted with the lands and they also had a number of other ventures into speculative land development. They knew their way around the planning process and had an eye to taxation considerations when involving themselves in land and property development.

With the exception of Mr. Hannon, all of the defendants were resident in the general area of the development. Mr. Hannon in more recent years has been living in Dublin. But each of the defendants had interests in property in the Cavan area and of course, a very definite interest in this development.

There is no dispute but that the vast bulk of the works on this development were completed by November 2007. I have already pointed out the deadline that had to be met in order to enable the defendants to avail themselves of the tax reliefs applicable to it. I have also pointed out how the contractual arrangements changed to the issue of individual contracts for each unit on foot of tax planning advice.

I have also pointed out the extent of the disruption that would be involved by the installation of the sewer in accordance with condition 33. It is, in my view, unlikely that the defendants were unaware of the fact that the sewer had never been installed.

I have reached this conclusion from a consideration of the evidence given by the defendants.

I do not propose to add to an already lengthy judgment by setting out extensive extracts from the defendants' respective evidence but will mention just a few.

Mr. Olwill gave evidence on seventh day of the trial. He made it clear that he knew the sewer had to be installed and that that would be a major piece of work involving road closure. I found his responses to questions in cross examination on this aspect of the matter (from Question 282 onwards) unconvincing.

Mr. McGuigan who was cross examined on the following day was no more convincing on the topic.

Mr. Malone also gave evidence on the eighth day. He was a frequent traveller on the road where the sewer was to be installed (Question 318). Having accepted that if somebody was installing a major sewer installation, it would be obvious (Question 323 and following). He indicated that he did not know that the sewer was supposed to be installed (Question 326). The answer to those questions and his testimony following them failed to convince me that he was unaware of the necessity to have the sewer installed. Once aware of it, its non-installation would have been clear to him.

Mr. Hannon in the course of his evidence confirmed the very considerable experience which he and his fellow defendants had in respect of property development and the planning process associated with it. As he was living in Dublin throughout the relevant period, he had less familiarity with the area on a day-to-day basis. In addition, he gave evidence that he was not particularly involved

in the planning process. His direct knowledge was, therefore, probably less than any of the other defendants on this topic but he was, of course, an important member of the partnership.

In general, I did not find the evidence of the defendants on the topic of their alleged lack of knowledge of the sewer not being built convincing. They are canny men and I do not believe that they were completely candid with the court. As a matter of probability I find that they were aware at all relevant times that the sewer had never been completed.

I believe they were also aware of why that was so. I believe that they have been searching for a legal excuse to avoid their obligations under this contract for some time. Finally, they happened upon one which they thought they could rely upon successfully. That was the failure to comply with condition 33.

That they were casting around in search of a legal excuse to avoid their obligations is exemplified by the unimpressive situation which developed midway through 2008. There, the defendants claimed in correspondence from their solicitor that they had entered into an alternative agreement with Mr. Murtagh. It was said that Mr. Murtagh was willing to discard the contracts in suit and to replace them by contracts for the purchase of nineteen houses. That proposition was challenged head on in correspondence by Mr. Murtagh's solicitor. The matter was then not pursued further. There was, in my view, no basis for the defendants' assertion. It was a stratagem to try and avoid contractual obligations. When it failed they sought to rely on the non-compliance with condition 33.

The evidence satisfies me that these defendants knew at all times that the sewer had not been completed and their late-in-the-day reliance upon that fact as a means of escaping their obligations is without merit.

Specific Performance
The relief claimed is equitable relief. I am satisfied that the plaintiffs are not in breach of any obligation owed to the defendants. But that is not to say that there are not obligations still to be fulfilled. Insofar as any of them involve the payment of monies, I am satisfied to accept the undertaking of the receiver to discharge such obligations when required. I am also satisfied that he is in funds to do so.

The receiver also accepts that there is an obligation on him to comply with condition 33. He is willing to do so and has the necessary funds available to him. There is little prospect of the condition being met until such time as Cavan County Council gives permission and that will come only in circumstances where it is put in funds by the Department of the Environment to install the water main.

I am of opinion that the plaintiffs are not disentitled to an order for specific performance in these circumstances.

In *Spry on Equitable Remedies* (8th edition, 2010), the partial enforcement of contracts is dealt with at p. 111. The author says:-

> "Specific performance is not ordered against the defendant if by reason of the non-specific enforceability of an obligation of the plaintiff the order would operate unjustly. However a number of different positions arise. In the first place, the plaintiff may overcome the material objection by performing the obligation in question before the time of the making of the order of the court, or the defendant may in some circumstances be sufficiently protected by a conditional order or by a special term inserted in the order. Secondly, on the proper construction of the contract, obligations of the defendant may be independent of the performance of the relevant non-specifically enforceable term, and if so specific performance of those obligations may be obtained, provided that special considerations such as hardship do not render this course unjust. So the non-specifically enforceable term may be an inessential term rather than an essential term, that is to say, the intention of the parties may be such that the obligation of the defendant to perform the remainder of the agreement is not conditional or dependent on the absence of a breach of the term in question."

In my view, no injustice is done to the defendants if specific performance is ordered provided that the order expressly recites the undertaking of the receiver to ensure that condition No. 33 is complied with when called upon to do so by Cavan County Council and to fund such compliance insofar as it is not met by the proceeds of the bond.

Result
The plaintiffs are entitled to succeed and specific performance will be decreed. I will discuss the precise terms of that order with counsel.