

THE HIGH COURT

[2011 No. 11279P]

BETWEEN

PAUL RYAN, ELLEN HEALY & BILLY HAYES

Plaintiff

AND

FÁS & BALLARK COMMUNITY TRADING CENTRE LIMITED

Defendants

JUDGMENT of Ms. Justice Murphy delivered the 30th day of November, 2015

1. The plaintiffs in these proceedings seek damages for misrepresentation; damages for negligent misstatement; and damages for negligence and breach of duty. In the alternative they seek a declaration that they were entitled to a legitimate expectation that the first named defendant would enter into a lease of Unit 31 Airways Industrial Estate, Swords Road, Dublin at an initial annual rent of €82,000 per annum from in or about September, 2009 and damages in respect of the breach of the said legitimate expectation. The Court proposed, and the parties agreed, that the Court would first consider the issue of negligence and thereafter, if necessary, proceed to consider the issue of legitimate expectation.

Background

2. The plaintiffs in these proceedings are trustees of a retirement benefit scheme operated by the first named plaintiff on behalf of the second and third named plaintiffs who were beneficial owners of the funds of the scheme. The first named defendant is a state body with responsibility for training and employment. The second named defendant, Ballark Community Trading Centre Limited ('Ballark') is a limited liability company engaged in the business of providing industrial training under the control, supervision and management of the first named defendant.

3. The second named defendant, Ballark, operated its community training schemes from a rented premises situated at Shanowen Road in Santry. Ballark was described by counsel for the plaintiffs at the outset of these proceedings as a "creature" of FÁS. Ballark Community Training Centre is one of a number of such centres located around the country which are wholly dependent and interdependent on FÁS and its successor. FÁS established a structure whereby each community training centre established itself as a limited liability company with a separate corporate identity. However Ballark was, at all times, wholly financially dependent on FÁS. The Board of Directors of Ballark operated on a voluntary, unpaid basis and consisted of well-meaning, often retired members of the local community who had an interest in contributing to the welfare of their local community by assisting in the development of the youth of the area. A representative of FÁS, who was not a member of the Board, would attend Board meetings to keep FÁS apprised of the operation of the company. At the time of the events giving rise to these proceedings, the FÁS representative assigned to Ballark was a Mr. Pat Murray, a Development Officer with FÁS. Ms. Grogan, the manager of Ballark, gave evidence that Ballark CTC had to bid for its budget each year which it received from FÁS. She stated that such budget was tightly controlled and that Ballark had no alternative source of funding such that they could not act without the approval of, and payment from, FÁS. They were conscious at all times of the need for prior approval from FÁS for any proposed action.

Evidence

4. The Court heard evidence from the following witnesses; Mr Paul Ryan, the first named plaintiff who is a professional trustee and, as such, is trustee of a pension scheme operated on behalf of the second named and third named plaintiffs. The second named plaintiff, Ms. Ellen Healy, is a woman in her late sixties who is a beneficial owner of the fund operated by the first named plaintiff. The third named plaintiff, Mr. Billy Hayes, is a 63 year old man who, at the time of the events giving rise to these proceedings, was managing director of a company called Pierce Healy Developments, which was owned by Mr. Hayes and the Healy family and which was engaged in the building trade. On behalf of FÁS the Court heard evidence from Mr. Frank Fagan who, at all material times, was Community Services Manager with FÁS and, as he informed the Court, in that capacity was responsible for all community training centres in Dublin. The Court also heard from Mr. Michael O'Riordan who took over the duties of Mr. Fagan in or around July 2008. Ms. Ann Grogan, manager of Ballark Community Training Centre, gave evidence to the Court on behalf of Ballark.

5. In late 2006, Ballark received notice from its landlord informing them that he did not intend to renew their lease agreement on the premises at Shanowen Road, Santry on the grounds that he intended to sell the property. Ms. Grogan of Ballark told the Court that they were permitted to remain on the premises in a caretaker capacity. A search for new premises began. Ballark's voluntary Board of Directors, in a meeting of 11th April, 2007, discussed the possibility of moving to an alternative premises at Unit 31 Airways Industrial Estate, Swords Road, Dublin ('the premises'). Mr. Pat Murray, the FÁS representative who attended the Board meetings of Ballark, noted that he had seen the premises and believed it to be ideal for their purposes. Ms. Grogan gave evidence that she believed that this building was suggested by Mr. Frank Fagan, the Community Services Manager, although she was not certain about this. Around this time Ms. Grogan viewed the premises at Airways Industrial Estate. Initially, Ballark hoped to lease the premises from its owner, with FÁS guaranteeing such a lease, or confirming funding for rent payments. However, the owner was not interested in leasing the premises, and instead expressed a desire to sell it. According to Ms. Grogan, at a Board meeting of Ballark on 9th May, 2007, the representative of FÁS, who was noted to be Mr. Frank Fagan, suggested that the Board of Ballark approach the bank with a view to securing the finance necessary to purchase the Airways unit. However the Chairman of the Board, Mr. Paddy Donegan, not surprisingly, being the Chairman of a Board of volunteers, was unwilling to take on such a responsibility. FÁS at that point was not prepared to provide the capital sum needed to purchase the building.

6. Contemporaneously with these events, in early 2007, the third named plaintiff, Mr. Billy Hayes, was engaged to perform maintenance work for Ballark in their original premises, his company having been successful in tendering for the relevant contract. In conversation with Ms. Grogan he was told that notice to vacate the premises had been served on Ballark by its landlord. She also told him that Ballark's Board of Directors and FÁS had identified an alternative premises at Airways Industrial Estate which it wished to lease. Ms. Grogan asked Mr. Hayes to inspect the premises and told him that the new premises would need refurbishment. Mr. Hayes was first of all mindful of the potential opportunities this might present for his building company. At Ms. Grogan's request, he

inspected the premises and reported to Ballark that it required significant work, including insulation and specialist treatment of an asbestos roof. Mr. Hayes further reported to Ballark that the premises were "rough" and advised them that there were other premises in the locality that were in better condition offering better value. Ms. Grogan explained to Mr. Hayes that Ballark had a specific interest in this particular premises because of its location beside a bus stop which would mean it could accommodate its trainees, many of whom used public transport.

7. On being told of Ballark's difficulties in relation to the purchase of the Airways premises by Ms. Grogan, Mr. Hayes suggested that he might be able to use money from his pension fund to purchase the premises for the purpose of leasing it to Ballark. Mr. Hayes gave evidence that he insisted that before doing so he would need a guarantee from FÁS. He was aware that Ballark's funding was entirely dependent on FÁS.

8. Mr. Hayes discussed the proposal with the second named plaintiff, Ms. Healy, his fellow beneficiary; and the first named plaintiff Mr. Ryan, the professional trustee of the pension scheme.

9. In early July 2007, Mr. Hayes confirmed to Ballark that, having spoken to his co-plaintiffs, he was prepared to use his pension fund to purchase the premises, which could then be leased to Ballark for €50,000 to €60,000 rent per annum without refurbishment, or for €100,000 rent per annum upon extensive refurbishment. His initial estimate for refurbishment was €400,000. The minutes of a special meeting of the Board, held on 17th July, 2007, note that Mr. Hayes stressed that this proposal was conditional on a commitment from FÁS to lease the premises for twenty to twenty five years, a caveat that was acknowledged by Ballark. Mr. Hayes, in his evidence, stated that he emphasised to the Board of Ballark that he was interested in the premises solely as a lease investment for his pension fund. He pointed out that there were similar units being sold for much lower prices in the vicinity at the time which he could have bought had he been interested in purchasing a unit for its own sake. He gave evidence that this was not a case of speculative investment, that neither he nor his company had ever been involved in property development and that although he had already used some of his pension fund to invest in a property this was a retail premises purchased to provide a secure rental income. His interest in purchasing the Airways Unit was similarly for the purposes of securing a rent roll into the future.

10. On the following day, the 18th July 2007, the details of Mr. Hayes' proposals were presented to Mr. Pat Murray of FÁS by Mr. Patrick Donegan, the chairperson of Ballark's Board of voluntary directors. This letter stated as follows:

"Dear Pat

Further to previous conversations etc. regarding new premises for our centre.

We met with Billy Hayes from Pierce Healy Developments Ltd., who has given us a quote to refurbish the premises, based only on the plans. As we are not prepared to purchase the premises ourselves, Billy has expressed an interest in purchasing the premises and leasing it to us. He has come up with two possible options as follows –

- He will buy the building and lease it to us, as is, at a rent of €50,000 - €60,000 p.a.*
- He will buy the building and completely refurbish it and lease it to us at a rent in the region of €100,000.*

For either option he would require a commitment from FÁS for a 20 - 25 year lease.

His previous quotation for refurbishing was around €400,000 but this was based on the drawings only. However, having now inspected the premises he has informed us that as the walls are only single, they will need to be insulated with 35/38 ml D.B. rating. The roof will also need to be replaced with King Span insulated roofing.

I would appreciate a reply by return."

11. In a replying letter dated the 26th July, 2007, Mr. Frank Fagan, Community Services Manager with FÁS, confirmed that the aforementioned proposal had been discussed but did not disclose with whom. Mr. Fagan also noted:

"At present we are carrying out a review of our CTC structure in Dublin. This review will be completed by the end of July 2007 and decisions will be made on foot of this report. However we have insufficient capital building funds to commit to any large projects and major changes will depend on us receiving additional funds from government."

12. Mr. Fagan acknowledged in cross-examination, that the FÁS logo features prominently at the bottom of Mr. Donegan's letter of 18th July, 2007. His recollection is that this was as a result of a European requirement to display the FÁS logo in relation to projects funded by FÁS. He further stated that he viewed the request for a "reply by return" as requesting the giving of approval to Ballark to enter into a contract, rather than giving Mr. Hayes approval. However he acknowledged he was being asked to provide a commitment that could be given or shown to Mr. Hayes, that such a commitment was a significant thing, that it was a significant thing for Mr. Hayes and that Ms. Grogan and Mr. Donegan were concerned to ensure that FÁS would provide such a commitment to Mr. Hayes.

13. On 19th September, 2007, two months later, at a time when the review of the community training centre structure in Dublin was presumably complete, Mr. Fagan attended a special meeting with Ballark representatives. At this meeting, he explained that FÁS had no capital for building, but that it would be interested in allowing another person to purchase the premises and have them fit it out. Mr. Fagan added that the Airways premises was ideal as it could accommodate trainees from Swords. According to the minutes of that meeting, Mr. Fagan *"said Billy Hayes would be dealing with the Board and that FÁS would give a letter that we could take to him, the letter would be for a 25 year period and that there would be a buy out clause"*.

14. On 19th September, 2007, Mr. Fagan wrote two letters to Mr. Donegan, the chairman of Ballark. The first of those letters stated as follows:

"I would just like to inform you that FÁS are in agreement with the second scenario in this letter that Mr. Bill Hayes will buy the unit, completely refurbish it to the required specification and we will commit to an increased rent for a twenty year period as discussed at our meeting. This is subject to a maximum annual rent of €100,000. I would be grateful if your Board could now start to engage with Mr. Hayes in the development of a suitable lease on this unit. When the lease is prepared we will examine it in conjunction with you and agree a time scale for moving forward."

The second letter, which was intended by FÁS to be given to Mr. Hayes, was identical, save for the exclusion of the sentence: *"This is subject to a maximum annual rent of €100,000"*. This letter was intended to be furnished to the plaintiffs and, according to the

plaintiffs, represented the commitment from FÁS which they had expressly sought. That letter was given by Ballark to the plaintiff, and relying on this letter Mr. Hayes began the process of purchasing the premises. Mr. Hayes gave evidence that he understood the letter to be an instruction from FÁS that they were happy with the arrangement. Ms. Healy, the second named plaintiff, also gave evidence that she was shown the letter of 19th September, 2007 and that she would not have invested in the Airways property had it not been 100% guaranteed.

15. Mr. Fagan acknowledged under cross-examination that the letter was required by Mr. Hayes as a commitment that Ballark would engage in the lease. However, Mr. Fagan stated that, in his view, it was merely a commitment to move forward with negotiations in order to confirm final details, and he rejected the suggestion that it was a letter of comfort. His explanation of the letter was as follows:

"It would be a letter where we would be saying that we had an interest and where we were trying to keep the Ballark workshop going forward, that we were interested, not from a negative point of view but a positive point of view of moving forward the project, and we would be interested depending on funding that if the building was made available and fitted out, in those conditions that we would be willing to work in. It was in a position that suited us."

16. When questioned by counsel for Ballark, Mr. Fagan acknowledged that he could see where Ballark's understanding of the word "development" as meaning the purchase and fitting out of the property, had come from. He stated:

"My understanding of it, I didn't realise that, and as I say, I'm coming back at this from, you know, a number of years away from it, but what I would have been looking at is...the development to get it into a stage where ... I had something concrete to go on [...]"

I think, you know, it would have benefited from wording it differently but I didn't think there was a complete misunderstanding as the direction we were, you know, going by development between myself and Ballark."

17. Although he accepted that the letter could have been understood as a more final commitment Mr. Fagan stated that numerous discussions would have taken place with the board of Ballark which would have outlined that the intention of Mr. Fagan was to move the project to a stage where a concrete proposal could be submitted to FÁS for final approval. In the course of his examination in chief Mr. Fagan stated that he would expect that Ballark were aware of the need for final approval of the documentation in relation to the lease once it had been prepared since Ballark had been in operation for a number of years even before he took responsibility for it and Ballark would have always been aware that funding was dependent on government allocation on an annual basis. He also stated that he expected that this would be conveyed to Mr. Hayes through his discussions with Ballark. Mr. Fagan also maintained that FÁS's dealings in the project would have involved giving a commitment to Ballark and not to Mr. Hayes however he did accept that Mr. Donegan's letter to FÁS of 18th July, 2007 states that Mr. Hayes "would require a commitment from FÁS". Mr. Fagan suggested under cross-examination that although he could have phrased the letter more clearly, Ballark were also responsible for informing Mr. Hayes that the negotiations were at all times subject to final approval by FÁS and that at no stage would Ballark have been under the impression that such approval could be given by Mr. Fagan.

18. Mr. Fagan confirmed that the phrase "we will commit to an increased rent for a twenty year period as discussed at our meeting" referred to FÁS. However he contended that what this in fact meant was that FÁS would be seeking to commit to a rental period of twenty years with certain refurbishments or required specifications, subject to getting agreement on costs and conditions. He acknowledges however that this is not stated in the letter. He further acknowledged that the second letter was a specific and separate letter that he had signed to be given to Mr. Hayes by Ballark. However he insisted that the commitment was that FÁS were interested in moving forward with the project and, while he acknowledged that there was no statement to that effect, he stated that this was the commitment he gave to Ballark all along and at no stage would Ballark expect that he could give them a final commitment. When asked how Mr. Hayes was to know this, he responded: "through discussions with Ballark".

19. Upon receiving the letter of 19th September, 2007, the plaintiffs began negotiations with the owners of the premises to arrange for its purchase. Mr. Hayes confirmed in his evidence to the Court that an offer was placed on the premises in October 2007. On 11th November, 2007, an extraordinary meeting of Ballark's voluntary Board was held. During this meeting Mr. Donegan discussed Mr. Hayes' proposal to lease the premises to Ballark for €88,000 per annum (at a later stage, the precise timing of which is unclear, this proposal was reduced to €82,000 rent per annum). Mr. Donegan stated that a letter should be written to Mr. Fagan outlining Mr. Hayes' terms in order to confirm Mr. Fagan's agreement. Such a letter was written by Mr. Donegan on 12th November, 2007 in the course of which he stated:

"I refer to your letter of the 19th September and specifically to the second paragraph. Mr. Billy Hayes has now agreed to purchase the unit and completely refurbish it at a rent of €88,000. In line with your letter we now intend to proceed accordingly".

20. Mr. Fagan stated in cross-examination, that his understanding of the above was that Mr. Hayes had agreed with Ballark to purchase the centre and to move forward with the proposal relating to what it would cost Ballark to occupy the premises and what that would involve in terms of a financial commitment on the part of FÁS. In response to the Court's inquiry as to whether he had been shocked to discover that Mr. Hayes had purchased the Premises, Mr. Fagan responded:

"No. At all stages during that we would have been operating in good faith that we would, if somebody was offering us the building that they could develop and so on and so forth that all things going well that we would be able to increase the rent and take the building."

21. In or around November 2007, during the course of the plaintiff's negotiations to purchase the property, an issue arose in relation to VAT liabilities on the proposed lease. In a letter dated 14th January, 2008, Ms. Grogan wrote to Mr. Fagan in this regard outlining as follows:

"I refer to our letter dated 12th November, 2007, re our new premises. We have now been advised by Mr. Mark McCann (auditor for Billy Hayes) that the rent of €88,000 per annum is net of VAT."

[...]

However a lease for less than 10 years does not require the VAT to be paid upfront. If Ballark entered a short-term lease of say 9 years 9 months, (provided this is acceptable to Billy Hayes), then VAT at 21% would be payable on each rent payment. This spreads out the payment of VAT over the term of the lease but the VAT payable is at the higher

21% rate.

We would ask FÁS to finance the VAT upfront or agree to the higher rent based on the second scenario."

22. It was stated at a meeting of the Board of Ballark on 16th January, 2008, at which Mr. Murray was present on behalf of FÁS, that Mr. Hayes was waiting for the "go ahead" to purchase the premises. However, according to the evidence of Mr. Hayes there was no suggestion at any point during this period that the sale would not go ahead and at this point he was dealing with auctioneers and solicitors regarding the purchase of the Airways premises.

23. On 19th February, 2008, in the absence of a reply from Mr. Fagan, Mr. Donegan again wrote to Mr. Fagan stating as follows:

"As this matter is long outstanding it is important that it be brought to finalisation and in the absence of a reply we assume that it is in order to proceed in accordance with our letter dated 12th November 2007".

24. The minutes of a meeting of the Board of Ballark held on 27th February, 2008, at which Mr. Murray was present on behalf of FÁS, record that Ms. Grogan read a letter from Mr. Hayes. Mr. Hayes gave evidence that he believed this letter was the undated letter included in the documents provided to the Court, which read as follows:

"I refer to discussion regarding the proposed purchase of 31 Airways Industrial Estate and the proposed letting on a long term lease of 25 years to Ballark Limited. The building will be substantially refurbished to a very high standard prior to the drawing up of the lease. The refurbishment will be done under the supervision of your architect.

It is intended to purchase the building in a partnership called Bell Partnership. This in turn will commission the refurbishment of the building and the creation of a 25 year lease in favour of Ballark Limited.

Under current legislation the creation of a long term lease would involve a very substantial Vat liability for Ballark Limited. However under proposed legislation the Vat will be charged at 21% of the yearly rent payable.

We have had discussion with the valuer appointed by Ballark Limited and he was of the opinion that the rental should be circa €82,000 plus Vat. However in our view this would not be sufficient to make the proposition viable for us in view of the amount of refurbishment needed. The rental figure that we proposed initially was €87,000.

We are at contract stage of purchasing and we would need a commitment that your company would take a long term lease on the lines as mentioned above."

25. On the 19th March, 2008, on the instructions of the Board, Ms Grogan met with Mr Fagan to resolve the VAT issue and by means of a manuscript response written on Ms. Grogan's letter of 14th January, Mr. Fagan stated:

"Ann – we will apply for the funding to go for a once off payment of VAT. If this is not available then we will go with the annual payment. Either way we will proceed with development."

Mr. Hayes gave evidence that having informed Ms. Grogan of his desire to obtain further confirmation that the project would go ahead and that FÁS would pay the necessary rent before he signed a contract, Ms. Grogan gave him a copy of Mr. Fagan's manuscript note. Mr. Hayes gave evidence that he viewed this note as Ballark being given the go ahead to proceed. In his evidence, Mr. Hayes states that he would not have proceeded with the purchase were it not for the letter of 19th September, 2007 along with the manuscript note of 19th March, 2008. Mr. Fagan, in his evidence to the Court, stated that his use of the term "development" in the manuscript note referred to the development of the project itself so that it could be progressed to a stage where it could be submitted to FÁS for final approval. Mr. Fagan also did not accept that the reference to "we" was a reference to FÁS. He stated in evidence: *"what I am saying here is we are leading with the development project going forward"*. Again he accepts that this is not specifically stated in the letter. He characterises this as a "weakness in the note". Mr. Fagan acknowledged that in hindsight, he did not have to provide this level of clarity in writing. He stated that what is missing from both the letter of 19th September and the note of 19th March is the phrase *"subject to funding being available"*.

26. Mr. Fagan acknowledged in cross-examination that at no stage was it set out that Mr. Hayes should be told to wait because further approval or further permission would have to be sought but stated that this would have been inferred in discussions and that, to a degree, it was Ballark's responsibility to communicate those caveats and qualifications to Mr. Hayes. He acknowledged however that looking back, he also had a responsibility for the wording used.

27. By letter dated 1st April, 2008, and addressed to Mr. Fagan, Mr. Donegan confirmed that Mr. Hayes had been formally instructed to proceed with the development of the premises in accordance with Mr. Fagan's conversation and instruction to Ms. Grogan on 19th March, 2008. Mr. Fagan agreed that this letter referred to him instructing Ms. Grogan to proceed with the development but again contended that development in this context meant development to a point where a final and written decision could be made. He again agreed that this was not stated in the letter but stated that this is what would have been implied to Ms. Grogan. In response to an inquiry from the Court, Mr. Fagan stated that he could not recall what his reaction was to being informed that Ballark had formally instructed Mr. Hayes to proceed with the development. When asked if he did not immediately contact Ballark to instruct them to hold off, he responded that he did not remember contacting them in those terms. He stated that he did not know what Mr. Hayes was going to do when he was told to proceed by Ballark because he could not remember the exact timing and sequencing of events and what the discussions were at that time. At a later stage of his cross-examination Mr. Fagan stated that he was not surprised when Mr. Hayes purchased the building as he would have looked at Mr. Hayes *"as a person who was looking as an opportunity for development"*. He acknowledged however that, having received a letter informing FÁS that Ballark had instructed Mr. Hayes to proceed with development, there was no *"shout stop"*, to use counsel for Ballark's expression, until the letter sent by Mr. O'Riordan in June 2009. The Court notes in this regard that a letter advising Ballark not to enter into a lease agreement was in fact sent by Mr. O'Riordan on 13th February, 2009. This was followed by a letter of 12th June, 2009 which advised Ballark that FÁS was not in a position to fund the relocation. Mr. Fagan also acknowledged that he was not aware of any other circumstance in his time dealing with Ballark, in which they had proceeded with transactions without prior approval from FÁS.

28. A similar question, in relation to the failure of FÁS to inform Ballark to halt any further development on the part of Mr. Hayes, was put to Mr. O'Riordan during the course of his cross-examination by counsel on behalf of Ballark. He responded as follows:

"I think because we were hopeful that we would get funding. Right. Ballark CTC was a very good CTC, it was very well-run, the Board was a very conscientious Board so we would have wanted to continue with it and a new premises it would

have been – even enhance the ability of them to provide training to young people and, I suppose, as officers of FÁS we done everything we could to see if that funding was available”.

29. In a second letter dated 2nd April, 2008, Mr. Donegan expressed to Mr. Fagan his *“hope that sufficient capital will be available for this project”*. Again Mr. Fagan gave evidence that he understood the use of the term “development” by Mr. Donegan, to refer to development of the project to a stage where it could be submitted for approval. Ms. Grogan, manager of Ballark, gave evidence confirming that the Board had formally told Mr. Hayes to proceed on the understanding that they had the authority of FÁS and that the Board never did “anything in that area” without such authority.

30. Thus, in early April 2008, a contract to purchase the premises for €760,000 was signed on behalf of the plaintiffs, the required deposit was paid and a closing date of July 2008 was agreed. The funds contained in the retirement benefit scheme in the name of Ms. Healy and Mr. Hayes were used for this purpose. The sale was completed in August 2008. Mr. Hayes gave evidence that, while he knew from the correspondence from FÁS that a lease would have to be negotiated, his understanding was that the main terms had been negotiated between him and Ms. Grogan, namely the period of the lease and the rent. These had been agreed by Ms. Grogan on the instructions of FÁS and, while he was aware that technicalities would have to be ironed out, as far as he was concerned the basic terms had been agreed and there was no conditional situation. He had bought the property on the basis that Ballark would lease it and that such lease would be guaranteed by FÁS.

31. It had been agreed that the refurbishment of the premises to be carried out by the plaintiffs would be conducted in accordance with the defendants’ specification. To this end, Ballark contracted the architect’s firm of AJ Whittaker & Associates to draw the required plans and make the necessary planning application. By letter dated 22nd May, 2008, Mr. Donegan sought confirmation from Mr. Fagan that FÁS would underwrite the amount of €24,417 required by the commissioned architect. Mr. Fagan, in his evidence to the Court, acknowledged that the planning application was made by Ballark and noted that while Ballark did not have any interest in the premises, *“we had obviously agreed for the funding of the layout of it ... We would agree to the designs for the layout of it and that and so on and so forth”*. He acknowledged that the application was not made by the plaintiffs but also stressed that it was not made by FÁS. When asked by counsel for the plaintiff why Ballark would make an application if they didn’t have any interest in or were not planning to enter into a contract or lease in relation to premises, Mr. Fagan responded as follows:

“I don’t see it at that stage as Ballark were not planning to enter into anything, an agreement at all, but they would have been the ones with the main interest in moving the planning permission forward. They wanted a layout for the Community Training Workshop. They would have put forward the planning permission from Ballark that they would have been applying for it”.

32. By letter dated 11th July 2008, Mr. Donegan wrote to Mr. Fagan enclosing Ballark’s formal proposal for the relocation of their community and training centre to the Airways premises. On 28th July, 2008 the plaintiffs provided their consent for the architects engaged by Ballark to apply for planning permission in Ballark’s name.

33. On 20th August, 2008, Mr. Michael O Riordan, CSU Manager with FÁS who had taken over the duties of Mr. Fagan, because of Mr Fagan’s absence on sick leave, wrote a memo to the CSU Director, Gerard Gasparro, as follows:

“Following discussions with the landlord of the new building, it was agreed that the landlord would undertake necessary renovations to the new building and that the cost of the renovations would be recouped through the rent charged. An architect was engaged to draw up plans for the needs of the CTC in consultation with the Board of Management and Mr. Pat Murray, FÁS Community Development Officer.

The rent for the “new” CTC will be in the region of €88,000+vat per annum. The monies for the rent will be paid out of operational budget and not capital budget. It is envisaged that the new building will be ready for occupation in late 2008/early 2009.

By way of this memo I am seeking your approval to proceed with the course of action outlined above”.

Counsel for the plaintiff asked Mr. O’Riordan to explain his reference to a landlord given FÁS’s position that there was no tenancy or lease agreement in place. Mr. O’Riordan gave evidence that his reference to Mr. Hayes as the “landlord” was based on the position as it was reported to him and that he had not met Mr. Hayes at this time. Again he noted, in reference to the sentence *“it was agreed that the landlord would undertake necessary renovations”*, that he was merely reporting to Mr. Gasparro what had been reported to him but agreed that this was FÁS’s position, as had been reported to him, as to what was going on in Ballark.

34. On 17th September, 2008 the plaintiffs’ title to the Airways premises was recorded in the Land Registry. On 22nd October, 2008 Ms. Grogan wrote to Mr. O Riordan enclosing the estimated cost of the refit of the premises.

35. In January 2009, an application was made for planning permission, which was required to convert a rear fire escape into a main access door, which would allow bus users practical access to the premises. The application for planning permission included a draft site notice which commenced: *“We, Ballark Community Training Centre – funded by FÁS,”* and subsequently described the permission sought. Mr. Fagan suggested under cross-examination that Ballark were named on the draft site notice as they would have had the primary interest in progressing matters.

36. The minutes of a Board meeting of Ballark on the 4th February, 2009 record that verbal instruction had been received from FÁS to avoid signing a contract regarding the premises for the time being. On the foot of this instruction, Mr. Donegan wrote to Mr. O’Riordan by way of letter dated the 7th February, 2009 seeking Mr. O Riordan’s direction in this regard given that the “negotiations are at a very advanced stage”. Mr. Donegan further noted:

“We feel at this late stage, and considering that both ourselves and the builder Mr. Billy Hayes have written affirmation from FÁS; there should be no further delay in proceeding with this project.”

In cross-examination, in response to counsel for the plaintiffs’ inquiry as to whether Mr. O’Riordan, on behalf of FÁS, had taken issue with Mr. Donegan’s suggestion that FÁS had provided any such written affirmation, Mr. O’Riordan stated that he would have discussed with Mr. Donegan that there was no approval from the Board of FÁS for the budget that was being sought. In a replying letter, dated 13th February, 2009, Mr. O’Riordan advised Ballark *“not to enter into any lease agreement as FÁS does not yet have confirmation of its budget allocation for 2009.”* This letter also sought the exact amount of the proposed rent of the premises, details of the proposed lease and confirmation that the proposed rent was inclusive of all fit out costs.

37. The minutes of a special Board meeting of Ballark on 25th February 2009, at which Mr. Hayes was present, indicate that he was willing to wait in order to ascertain the outcome. On 9th March, 2009, Mr. Donegan wrote to Mr. O'Riordan informing him that the proposed rent was to be €88,000 per annum net of VAT, that the lease contained no breakout clause and that the proposed rent was inclusive of all fit out costs.

38. In a letter dated 11th June, 2009, Mr. Donegan of Ballark sought confirmation from Mr. O'Riordan of FÁS as to when the project would be in a position to proceed. By letter dated 12th June, 2009, Mr. O'Riordan replied as follows:

"I regret to inform you that due to current financial constraints FÁS are not in a position to fund the proposed relocation to a new premises. I will keep you informed as to any change in regards to this situation.

I would like to reiterate the advice in my letter of the 13th February 2009 to your self that the Board of Ballark CTC should not enter into any lease agreement regarding a move to new premises at this point in time".

Mr. O'Riordan stated in his evidence that the budget for 2009 would have been agreed in April or May. When asked by counsel for the plaintiffs what would have occurred had the lease been signed by Ballark in advance of its receipt of the letter of June 2009, Mr. O'Riordan responded *"I suppose we would have been committed"*. In the same month, planning permission was granted by Fingal County Council in respect of the refurbishment works with the date of the final grant of planning permission being the 26th August, 2009.

39. On 3rd July, 2009, Mr. Donegan wrote to Mr. Hayes enclosing a copy of Mr. O'Riordan's letter of 12th June, 2009 and informed Mr. Hayes that it was the intention of the Board to seek a meeting with Mr. Frank Donnelly, FÁS Director of Community Services and later Regional Director of FÁS, in this regard. On 6th July, 2009, Mr. Donegan wrote to Mr. Donnelly as follows:

"Regarding the last paragraph of Mr. O'Riordan's letter we have at all times consulted the relevant FÁS representatives before proceeding with matters relating to the relocation. Hence our serious concern at the content of the letter received from Mr. O'Riordan. As earlier stated in this letter we ask that by return you nominate a date and a venue for a meeting with our Board representatives".

Mr. O'Riordan agreed that the reading of this letter indicates that Ballark understood the position to be that at all times FÁS were 'on board' with the process of the purchase and development of the new premises by Mr. Hayes.

40. On 13th August, 2009 Mr. Hayes, with the assistance of Ms. Healy, wrote to Mr. Donegan stating as follows:

"We are in receipt of your letter and the enclosed copy of correspondence received by yourselves from Michael O'Riordan of FÁS Community Services, Dublin.

I am surprised and shocked by this letter which I received on 10th August after my return from annual holidays.

Background to the Building

Following lengthy discussions with the Board of Ballark and FÁS representatives I was instructed to buy the building and convert it into a specially designed training building (copy of letter enclosed). A rent of €82,000 p.a. for a twenty year period was agreed.

Based on this I immediately purchased the premises and Ballark engaged its own Architects. The planning permission has now been granted. Work is due to commence and a commencement notice needs to be served.

If we do not receive instructions to proceed with this project within the next 28 days, we will have no option but to seek legal redress. I also propose to commence issuing Ballark Community Trading Centre supported by FÁS with Rent demands every month as agreed."

Mr. Hayes enclosed an undated copy of a letter to Ms. Grogan relating to the project which appears to be the letter referred to above at paragraph 24 which Ms. Grogan read to the Board at their meeting on 27th February, 2008.

41. The minutes of a special meeting of the Board of Ballark on 24th August, 2009, at which Mr. Donnelly, FÁS Director of Community Services, and Mr. O'Riordan were present, indicate that FÁS representatives intimated that the "letter of comfort" that Mr. Hayes had received from Mr. Fagan on behalf of FÁS was of little consequence. Mr. Fagan, in his evidence, disagreed with the classification of the letter as a letter of comfort. He acknowledged however that there had been no obligation on him to provide such an expression of commitment or comfort to Mr. Hayes. He acknowledged that the decision to write such letter was a voluntary decision made to move the project to a stage where FÁS could obtain costing. Mr. O'Riordan in his evidence, stated that he did not recall using the term "letter of comfort" but accepted that he had made no attempt to correct what he considered to be an error or inaccuracy as recorded in the minutes of the meeting. In relation to the assertion that the letter was "of little consequence" Mr. O'Riordan noted that he thought Mr. Hayes was "a speculator taking a punt". Mr. Donnelly, Director of Community Services and later Regional Director, who appears to have been materially involved in the termination of the project was not called to give evidence.

42. On 7th September, 2009, Mr. Donegan forwarded Mr. Hayes' correspondence of 13th August, 2009 to Mr. Donnelly, Regional Director of FÁS. On 9th September, 2009, Mr. Donnelly appears to have written a manuscript note on his copy of the letter which stated:

"1. File

2. Copy Mr. O'Riordan

3. Copy legal services

Please review all correspondence with F. Fagan and let me have an opinion."

Mr. O'Riordan gave evidence that he would have looked at the file and expressed to Mr. Donnelly that he did not think FÁS had an agreement with Mr. Hayes.

43. On the same date, Mr. O'Riordan wrote to Mr. Michael Bowden, manager of legal services at FÁS as follows:

"Attached please find a letter from the Board of Ballark CTC to Frank Donnelly re a letter they received from Mr Billy Hayes in relation to the proposed relocation of Ballark CTC to a new site.

Due to the current lack of funding the proposed relocation will not now proceed.

I would appreciate if you could provide me with a draft of a response for the Board of Ballark CTC in relation to this matter and also a draft letter of response for the Board of Ballark to Mr. Billy Hayes."

Mr. O'Riordan confirmed that it took some time for such a draft response to be furnished and stated that he was not aware that during this time Ballark had met with Mr. Hayes who had requested a meeting with FÁS. Neither was he aware that Mr. Hayes had indicated that he would be happy to have FÁS purchase the building from him for the price he had paid for it.

44. On 11th September, 2009 Mr. O'Riordan prepared an internal memo relating to the situation. This noted as follows:

"The Board of the CTC had some discussions with a developer, Mr. Billy Hayes. As a consequence of these discussions Mr. Hayes purchased the building with the intention of it be developed (sic) into a CTC with a possible rent of €82,000 per year (net of VAT). This was verbally agreed with the Board of the CTC and Mr. Hayes. The rent was to include the fitting out of the building as well."

Mr. O'Riordan confirmed in evidence that the above is consistent with the evidence of Mr. Hayes and that the position that he recorded was, as he understood it, that what caused Mr. Hayes to purchase the building was the discussions. He noted that he prepared the memo using the information in the FÁS file in relation to Ballark which must have included Mr. Hayes' letter of 13th August, 2009.

45. A letter to Mr. Donnelly, Regional Director of FÁS, dated the 14th September, 2009, signed by Mr. Donegan explained the situation as follows:

"A copy of the FÁS letter dated 19th September was furnished to Mr. Hayes and on foot of the commitment in that letter he purchased the property, obtained details of our refurbishment requirements. The necessary planning and other permissions and consents were applied for, all of which now have issued."

Mr. Donegan further stated:

"Please note that in the event of Mr. Hayes taking any action against BCTC as a result of FÁS's failure to continue with the project, we wish to be assured that the Board's interest is protected by FÁS."

46. On 2nd November, 2009, Mr. Hayes requested a meeting with the board of Ballark. On 9th November, 2009, Mr. O'Riordan wrote to Mr. Michael Bowden, the manager of FÁS's legal services division seeking a draft response which could be furnished to Ballark's Board and to Mr. Hayes and enclosing copies of relevant correspondence relating to the matter.

47. At a special Board meeting of Ballark held on 19th November, 2009, Mr. Hayes asked the Board of Ballark to write to FÁS requesting that the building be purchased by them for the amount paid for. According to the minutes of this meeting, Mr. Hayes indicated that he would be satisfied with such an outcome and would not take further action should this request prove successful. Mr. Donegan put this proposal to the Regional Director Mr. Donnelly by way of letter dated 20th November, 2009 in which he also informed Mr. Donnelly that Mr. Hayes would be amenable to meet with FÁS to discuss the matter. In a replying letter dated 10th January 2010, Mr. Donnelly stated:

"As it is not an option for FÁS to purchase Mr. Hayes's building there is little point in meeting to discuss this. In any event FÁS's contractual relationship is with Ballark CTC and not Mr. Hayes."

48. Mr. Hayes gave evidence that by late November 2009 he understood from his discussions with Ballark that there was no possibility of FÁS purchasing the unit and by around February 2010 he understood that there was no prospect of a deal with FÁS. He states that the premises was put up for sale in 2009, and as of yet, he has had no success in selling or leasing the premises. Mr. Hayes first instructed a solicitor in relation to the matter in December 2009 but he continued to hope that the proposal to merge the Ballymun and Ballark community training centres might result in fresh interest in leasing the premises. On 5th May, 2011 the solicitors acting for the plaintiff wrote for the first time to the defendants. A plenary summons was issued by the plaintiffs' solicitors on 8th December, 2011.

Submissions of the Parties

49. The plaintiffs' claim is one in tort for damages for misrepresentation, negligent misstatement, negligence and breach of duty and further or in the alternative a claim for damages based on breach of the plaintiffs' legitimate expectation. However the plaintiffs submit that the key to determining the justice of the instant case is not in examining the category into which the defendants' statements fall but in considering the immediate consequences of the statements. The first named defendant submits however that the letter of 19th September, 2007, upon which the plaintiffs primarily rely gives support to the continuation of negotiations and does not constitute a representation that FÁS will unequivocally enter into or support a lease. It submits that what the plaintiffs seek to do is to elevate the purported representation to the status of an enforceable agreement for lease. The first named defendant further submits that even if the letter constituted an unequivocal representation that FÁS would enter into or support a lease, that representation would be incapable of giving rise to a claim based on either legitimate expectation or negligent misrepresentation since it is well settled that an agreement to agree as a matter of law is unenforceable. The first named defendant cites the decision of Laffoy J. in *Triatic Limited v. Cork County Council* [2007] 3 IR 57 as authority for this proposition and submits that if an agreement to agree is unenforceable, a fortiori, a representation to like effect is incapable of grounding a cause of action. The Court in this regard notes that the statement of Lord Akner in *Walford v. Miles* [1992] 2 AC 128 as cited by Laffoy J. in *Triatic Limited v. Cork County Council* [2007] 3 IR 57 to the effect that "the reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty" is later qualified by the statement that "each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations".

50. The second named defendant adopts the submissions made on the part of the first named defendant. However it further submits that the second named defendant never acted in its own right, nor could it have, such that the totality of the case falls within the law of agency. Therefore the second named defendant argues that on the basis of the principle pursuant to which an agent who acts

for a disclosed principal may bind that principal, FÁS, as principal, becomes vicariously liable for the agent's actions. The second named defendant argues that it was evident it acted as an agent for FÁS and in this regard places particular reliance on the fact that the letter of 19th September, 2007 appeared on FÁS headed paper and on the fact that all of the correspondence which passed between the parties had the FÁS logo appearing on either the top or bottom of it. On that basis, the second named defendant submits that if the Court does find that an enforceable agreement existed it should not find against the second named defendant but should instead find that they were acting as agents on behalf of the first named defendant. The plaintiffs however seek to have any order as to damages which might be made by the Court, made jointly and severally.

51. The plaintiffs have submitted that although they fit the parameters for legitimate expectation, in their view, the principles of negligent misstatement should be ample to deal with their claims. As such, the Court proposes to deal with the plaintiffs' claim for negligent misstatement, misrepresentation, negligence and breach of duty in the first instance before proceeding to consider, if necessary, the plaintiffs' claim on the basis legitimate expectation.

Negligent Misstatement, Misrepresentation, Negligence and Breach of Duty

52. The plaintiffs argue that while in certain circumstances the torts of misrepresentation, negligent misstatement, negligence and breach of duty can clearly be distinguished from one another in provenance and effect, there is no requirement for such an inquiry in the circumstances of the present case. The plaintiffs submit that the essential elements of negligent misrepresentation and negligent misstatement are present in this case in that a representation or statement has been made by the defendants; the party making the representation was aware that the party to whom it was made would rely on that representation or statement; the party to whom the representation or statement was made has actually or reasonably relied on it by acting to his detriment and the representation or statement was false and made negligently.

53. The plaintiffs also acknowledge, as stated in *White v. Jones* [1995] 2 AC 207, that in order for a duty of care to arise in such circumstances some form of special relationship must exist between the parties. In this respect, the plaintiffs cite *Wildgust v. Bank of Ireland* [2006] 1 IR 1 in which Kearns J. in the Supreme Court, in summarising the law regarding negligent misstatement, quoted from Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 as follows:

"The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advisor's information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances, the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the plaintiff for the very purpose for which he did in the event rely on it."

54. The plaintiffs further refer to the case of *Walsh v Jones Lang Lasalle* [2009] 4 IR 401 in which Geoghegan J made the following observation on the circumstances in which a special relationship can be deemed to exist between the plaintiff and defendant so as to satisfy the requirement of proximity in such cases, at p. 576:

"In Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 the only relationship alleged was the relationship between the inquirer and the person giving the information. Hence, the emphasis on reliance by the inquirer. It is, however, a small extension of this, and justified in my view by later caselaw, that where a person who is not the inquirer is damaged as a consequence of the wrong answer and where the existence of such a person and the reasonable foreseeability of such damage ought to have been present in the mind of the person giving the information, there was a special relationship with that person also which gave rise to a duty of care."

In the same case, Kearns J indicated as follows at p. 603:

"I favour an interpretation, or adaptation if needs be, of the Hedley Byrne & Co Ltd v Heller & Partners Ltd principles which would include more than just the person to whom the negligent misstatement is addressed. The 'proximity' test in respect of a negligent misstatement must go further than that and include persons in a limited and identifiable class when the maker of the statement can reasonably expect, in the context of a particular inquiry, that reliance will be placed thereon by such person or persons to act or not act in a particular manner in relation to that transaction."

55. Thus, the plaintiffs submit that the case of *Hedley Byrne v. Heller & Partners* and the more recent Irish case of *Walsh v Jones Lang Lasalle*, serve as authority for the proposition that general statements made to intended customers or "to whom it may concern" may result in liability for negligent misstatement such that the proximity requirement in the instant case is satisfied.

56. The plaintiffs also submit, in relation to the application of the "special relationship" aspect in the context of the liability of State bodies, that while the authorities stress that liability may not exist where a public body is carrying out a statutory function absent misfeasance, where a public body voluntarily assumes responsibility for the giving of specific advice or making certain statements, then the test for proximity will be met. In this regard the plaintiffs refer to the case of *Bates and Moore v. Minister for Agriculture* [2011] IEHC 429 in which Laffoy J. held:

"If a plaintiff can establish negligence against a public authority or the State, in reliance on the Hedley Byrne principles, which were first recognised in this jurisdiction almost half a century ago, without having to call in aid the fact that the defendant body may have been exercising a statutory power or function when the alleged civil wrong was perpetrated, in my view, the position of the plaintiff is no different to that of a plaintiff who invokes private law duties in relation to occupiers' liability or employers' liability against a public body defendant."

57. Applying this to the instant case the plaintiffs submit that the representation of Mr. Fagan given in the letter of September 2007 was the immediate impetus for the plaintiffs' negotiations to purchase the Airways premises. Notwithstanding the very clear terms of the September 2007 representation, as the time for executing a contract on the premises drew nearer, Mr. Hayes sought final comfort from the second named defendant in January 2008, following clarification of the VAT issue. In a handwritten statement of 19th March, 2008 Mr. Fagan confirmed that "either way we will proceed with the development" and approximately two weeks later the contract was signed and the plaintiffs were committed to paying €760,000 plus purchase costs in acquiring the premises. Thus, the plaintiffs submit that they satisfy all necessary criteria for being a person or class of persons for whom it was reasonable to rely on the representation. The plaintiffs note that the letter of 19th September, 2007 was prepared by FÁS for furnishing to plaintiffs such that it would be unreasonable for FÁS to claim that it should not have been relied upon.

58. The plaintiffs further contend that FÁS was under no obligation whatsoever to provide any representation to the plaintiffs. There

was no statutory nexus between the plaintiffs and FÁS such that FÁS were executing a statutory function. FÁS, they assert, made the representations voluntarily as a party who, in practice, funded the second named defendant and who knew it would be paying the rent to the plaintiffs. The plaintiffs accept that had FÁS declined to make such representations they would have no right to complain about or review such a position.

59. The first named defendant submits in this regard however that the statement is a statement of future intention and point to the remarks of McDermott, *Contract Law*, (Dublin, 2001) at paragraph 13.14:

"The Courts are slow to reach this conclusion and it had been said that the proposition that a statement of intention may be a statement of fact 'should not be used as a general solvent to transform one type of assurance with another: the distinction is a real one and requires to be respected' (British Airways Board v. Taylor [1976] All ER 65 at 68 per Lord Wilberforce). The reason for this caution is because:

i. It is difficult to be sufficiently sure about a person's intention to reach a conclusion that in many cases will be tantamount to a finding of fraud; and

ii. The law starts from the premise that a representation is different from a promise. The latter should be enforced only if it is part of a contract and something for which the enforcer has given consideration."

The first named defendant further submits, citing *Edgington v. Fitzmaurice* (1885) 29 Ch Div 459 as authority, that a statement of future intention is only actionable as a negligent misstatement if at the time it was made the maker did not believe it to be true. The first named defendant submits that the uncontested evidence of Mr. Fagan is that when he issued the letter of 19th September, 2007 and when he wrote the note on the manuscript in March 2008, he believed that the project was capable of being processed. The economic crisis which led to a reduction in budget could not have been in the contemplation of FÁS or Mr. Fagan at the time of the statements and, as such, the first named defendant submits that there is no misstatement.

60. The first named defendant further submits that leaving aside the scope of the representation it is clear that in fact the plaintiffs had contracted to purchase the property long before any of the terms of the proposed lease had been agreed. Thus, the first named defendant contends that apart from anything else, the purported representation can only be a representation to enter into a lease or support a lease for an undefined term at an unascertainable rent on terms to be negotiated subject to the completion of unidentified refurbishment work. The first named defendant argues that to place reliance on such representation defies logic and credibility.

61. The plaintiff, in response, submits that although not every term of the proposed lease had been agreed, Ms. Grogan, in her evidence, confirmed that she was satisfied that the agreement was for a twenty year lease at €82,000 per annum with five yearly rent reviews and no break option. The plaintiffs submit that such a representation goes far further than being an indication of future intent or action. They contend that the fact that FÁS knew such statement would be relied or acted upon places it in a category of representations which are actionable if false.

Decision of the Court

62. In 2007, the defendants, FÁS and Ballark, faced with a notice to quit from their premises at Shanowen Road in Santry, identified an alternative premises which would be suitable to the needs of Ballark and which would allow for the expansion of FÁS services to encompass the Swords area as well as the Santry area. The premises identified by both defendants as suitable was a unit at 31 Airways Industrial Estate. The owner of that building was not prepared to lease it but was prepared to sell it. Though the location of the building was ideal, being on a bus route which would allow easy access, the condition of the premises was poor and it was clear that it would require considerable refurbishment to allow it to operate as a training centre. At the time, FÁS did not have the capital funds available to finance the purchase and refurbishment of the premises. FÁS suggested to Ballark that the company take out a mortgage to buy and refurbish the premises. Had this invitation been taken up, it would undoubtedly have been the case that FÁS would have been required to guarantee the repayment of the mortgage. Ballark, with its Board of voluntary, unpaid members was, understandably, reluctant to assume such a burden and so matters were at an impasse. By happenstance, at that time in 2007, the third named plaintiff's company Pierce Healy Developments were carrying out maintenance work at Ballark's property in Santry. The third plaintiff was made aware of the situation relating to the proposed new premises by Ms. Grogan, the manager of Ballark. The Court fully accepts the evidence of Mr. Hayes in respect of his dealings with Ballark and FÁS. He struck the Court as an honest, reliable witness whose evidence is furthermore corroborated by the correspondence which passed between FÁS and Ballark and between him and Ballark. His evidence is also corroborated by the evidence of the manager of Ballark, Ms. Grogan, as to how he came to purchase the premises at Unit 31 Airways Industrial Estate and by the minutes of meetings of the Board of Ballark. Both in his evidence and in his dealings with FÁS and Ballark Mr. Hayes comes across as a reasonable and prudent man and not as he was rather dismissively described by Mr O'Riordan from FÁS as "*a speculator taking a punt*".

63. Having been told that FÁS and Ballark were interested in leasing this particular premises, Mr. Hayes was prepared to invest a considerable sum from his pension fund in acquiring and refurbishing the premises. Knowing that Ballark had no funds or assets of its own, he, very prudently, stipulated that before expending his pension funds in purchasing and refurbishing the premises he required a commitment from FÁS that they would lease the premises for twenty to twenty five years at a rent of €50,000 - €60,000 per annum without refurbishment or at a rent in the region of €100,000 with complete refurbishment. A letter to this effect was sent by Mr. Donegan, Chairman of the Board of Ballark, to FÁS on 18th July, 2007. A response was received from Mr. Fagan noting that Ballark's proposal had been discussed but not disclosing with whom. Mr. Fagan stated that the CTC structure in Dublin was under review which would be completed by the end of that month. Two months later, on 19th September 2007, Mr. Fagan attended a special meeting with Ballark representatives at which he explained that FÁS had no capital for building but were interested in having another person purchase and refurbish the premises for them. On the same day Mr. Fagan of FÁS sent two letters to Mr. Donegan, chairman of Ballark. The letter, which is set out in full at paragraph 14 above, stated that FÁS were in agreement with the second option set out in Mr. Donegan's letter of 18th July, that Mr. Hayes would buy the unit, completely refurbish it to the required specification and "*we will commit to an increased rent for a 20 year period as discussed at our meeting*". The letter to Mr. Donegan stated that the commitment was subject to a maximum annual rent of €100,000. A second letter, in the same terms, but without any reference to the maximum rent, was provided to Mr. Donegan for transmission to Mr. Hayes. All parties, save for Mr. Fagan of FÁS, viewed this letter as a commitment from FÁS that in the event that Mr. Hayes expended money on the premises by way of purchase and refurbishment that they would rent it for twenty years. This was the view of Ms. Grogan, the manager of Ballark. It was also the view of the late Mr. Donegan, Chairman of the Board and it was the view of Mr. Hayes and his co-plaintiffs to whom the second version of the letter was provided. Mr. Hayes has given evidence, and the Court accepts his evidence, that acting on the basis of this representation from FÁS, and not otherwise, he began negotiations for the purchase of the premises. Mr. Fagan's explanation that this was a mere stage in a negotiation is not borne out by the evidence of Ms. Grogan, the manager of Ballark, nor by the ensuing correspondence, nor by the conduct of the parties.

64. It appears to the Court that the essential elements of the deal were in place once this letter was sent, i.e. that if Mr. Hayes bought the premises and refurbished it, FÁS would commit to twenty year lease at a maximum rent of €100,000 per annum. An offer was placed on the premises in October 2007 and there were discussions about the annual rent. Following this, at an extraordinary meeting on 11th November, 2007, Mr. Donegan wrote again to Mr. Fagan in respect of the rent which was then proposed of €88,000 per annum, later reduced to €82,000. Such a letter was written by Mr. Donegan on 12th November, 2007 in the course of which Mr. Donegan stated:

"I refer to your letter of the 19th September and specifically to the second paragraph. Mr. Billy Hayes has now agreed to purchase the unit and completely refurbish it at a rent of €88,000. In line with your letter we now intend to proceed accordingly".

65. This letter clearly indicates that in line with the commitment given earlier, the plaintiff now intended to proceed with the purchase based on such commitment. No response to this letter was received by Ballark from FÁS.

66. The next issue which arose was the payment of VAT on the rental property. By this stage, in correspondence, Ballark were actually referring to the premises purchased by Mr Hayes as *"our new premises"* (see the letter of 14th January, 2008). The discussion concerned the most favourable options for the payment of VAT and whether this should be done upfront or on a yearly basis. Mr. Fagan did not answer this letter either and he certainly did not suggest that discussion of a lease was in anyway premature. On 19th February, 2008, Mr. Donegan, the Chairman of the Board, wrote once more to Mr. Fagan, reminding him of the importance of finalising matters and noting that since he had not replied to the letter relating to VAT the board were proceeding in the manner outlined in their letter of 12th November, namely that Mr. Hayes had agreed to purchase the building and lease it at a rent of €88,000 per annum. At a further meeting on 27th February, 2008, at which there was a FÁS attendee, it was noted that a reply had yet to be received from Mr. Fagan in relation to the letter of 14th January, 2008 concerning VAT rates. On the instructions of the Board, Ms. Grogan continued to pursue the matter with Mr. Fagan and on 19th March, 2008, following a conversation with Ms. Grogan, Mr. Fagan wrote a manuscript note on her letter of 14th January, 2008, as follows:

"Ann – we will apply for the funding to go for a once off payment of VAT. If this is not available then we will go with the annual payment. Either way we will proceed with development."

That assurance was conveyed by Ms. Grogan to Mr. Hayes and in further reliance thereon, Ballark provided a formal instruction to Mr. Hayes to proceed with the development. Mr. Hayes did so and completed the purchase of the premises for €760,000. A closing date of July 2008 was agreed. The money came from the retirement benefit scheme. The sale was completed in August 2008.

67. Thereafter planning was sought, in the name of Ballark, the cost of which was underwritten by FÁS. Mr. Fagan took sick leave in July 2008 and was replaced by Mr. Michael O'Riordan. Matters proceeded apace until 13th February, 2009, when Ballark were advised by Mr. Fagan's successor, Mr. O'Riordan, not to enter into any lease agreement as FÁS had yet to finalise its budget allocation for 2008-2009.

68. The facts of this case are on all fours with the scenario outlined by Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 and quoted by Keams J. in his summary of the law on negligent misstatement in *Wildgust v. Bank of Ireland* [2006] 1 IR 1:

"The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advisor's information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction and contemplation. In these circumstances, the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the plaintiff for the very purpose for which he did in the event rely on it."

69. FÁS furnished a letter on 19th September, 2007 which contained confirmation that if Mr. Hayes purchased the building, FÁS would commit to renting it. FÁS was therefore clearly aware of the nature of the transaction which the plaintiff had in contemplation. FÁS knew that such confirmation would be communicated to Mr. Hayes and, in fact, in this case, provided a copy of the letter for that very purpose. Based on the letter of Mr. Donegan, seeking such confirmation, FÁS knew or ought to have known it was very likely that the plaintiff would rely on such confirmation in deciding whether or not to purchase the premises. Neither the letter of the 19th September 2007 nor the manuscript note of the 19th March 2008 contains any disclaimer or caveat of any kind. The confirmation given on behalf of FÁS is not expressed to be *"subject to approval"* nor *"subject to funding"*. It is a clear unambiguous statement that if Mr Hayes bought and refurbished the premises Ballark would lease it. Had any caveat been included in either the letter of the 19th September, 2007 or the manuscript note of the 19th March, 2008, the Court is quite satisfied that Mr. Hayes would never have purchased the building.

70. FÁS submits that in its dealings with the plaintiffs and the second named defendant it was at all times essentially engaged in discussions which might have led to a contract being concluded. The Court in this regard notes that the statement of Lord Akner in *Walford v. Miles* [1992] 2 AC 128 as cited by Laffoy J. in *Triatic Limited v. Cork County Council* [2007] 3 IR 57 to the effect that *"the reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty"* is later qualified by the statement that *"each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations"*. It appears to the Court, that on the facts of this case, this was not an ongoing negotiation but rather a commitment to rent with the term of the lease and the maximum rent agreed and other details to be ironed out. However, accepting for the moment Mr Frank Fagan's evidence that in his mind he was negotiating, merely moving the project along to see if approval could be obtained, then the provision by him of an unconditional commitment to rent in the event that Mr Hayes purchased the unit is the essence of negligence and took the position beyond negotiation and into the realm of misrepresentation. In the circumstances of this case, the Court has no hesitation in holding that FÁS had a duty of care to Mr Hayes, that it was in breach of that duty and that as a consequence the plaintiffs have suffered loss and damage. In circumstances where FÁS misled Mr Hayes into the purchase of a building which he would not have otherwise bought to hold otherwise would be unconscionable.

The case against Ballark

71. In defending itself against the plaintiff's claim, FÁS have sought to attribute blame for any misunderstanding as to the nature of the commitment given to the plaintiffs to the second defendant, Ballark. Mr Fagan suggested to the Court that Ballark was at all times aware of the provisional nature of the commitment, that it was ultimately subject to approval and that it was for Ballark to make this clear to the plaintiffs. This is simply not true. Ballark, like Mr Hayes, took the commitment given by FÁS at face value, relied on it, and proceeded accordingly. The evidence of Ms Grogan and the correspondence of the late Mr Donegan, Chairman of the Board and the

minutes of Board meetings set out above make this abundantly clear. When FÁS reneged on its commitment in June 2009, Mr Donegan on behalf of the Board sought an indemnity in respect of Mr. Hayes' claim from FÁS. In the circumstances of this case, it was the least that he might have expected. The attitude of FÁS in seeking to blame Ballark for their negligence strikes the Court as being particularly mealy mouthed. Here we have a state agency delivering its services through a voluntary board of individuals who are giving their services out of a sense of commitment to their community. They are careful, conscientious and prudent individuals. At every stage of the process they checked and double checked their authority with FÁS. To suggest, as FÁS have done in the course of these proceedings, that Ballark had a responsibility for the ineptitude of FÁS is frankly unacceptable. It is not edifying to see a state agency attempt to use a voluntary board as a shield against its negligence. It appears to the Court that the Board and staff of Ballark were as much casualties of the negligence of FÁS, as the plaintiff. While in their case it fortunately does not appear to have resulted in loss or damage, undoubtedly the actions and reactions of FÁS to unfolding events is likely to have caused them embarrassment and anxiety. In the circumstances of this case, the Court therefore is of the opinion that no negligence or breach of duty has been established against Ballark.

72. Having regard to the Court's findings on the issue of negligence, it is not necessary for the Court to proceed to consider the issue of legitimate expectation, however the Court observes that the private law remedy of promissory estoppel might have been more appropriate to the facts of this case.

Damages

73. The plaintiffs have essentially framed their claim so as to restore them to the position they were in prior to the negligent misstatement/misrepresentation of the first defendant. They claim a loss of €760,000 in respect of the purchase of the premises and a loss of €78,360 in respect of purchase costs. They deduct from such loss the sum of €145,000 which represents the agreed market value of the property as of April 2015, leaving a total of €693,360. In addition, the plaintiffs claim interest which would have been earned on the total sum expended up to the date of hearing. They point to the evidence from Mr. Hayes and Mr. Ryan to the effect that there was no alternative property in which the pension fund would have been invested so that instead the funds would have been earning deposit interest, tax free, as cash. Mr. Ryan gave evidence which was not controverted, that such funds attracted interest of over 4% from 2008 to 2013, and of about 2.5% since 2013. Based on a capital sum of €838,360 (i.e. the €760,000 expended on the premises plus the €78,360 in respect of purchase costs) the plaintiffs put forward interests claims of €33,534 per annum for the years 2008 to 2013 and of €16,767 per annum for the years 2014 and 2015 giving an interest total of €201,204 and a total claim therefore of €894,564.

74. The first named defendant submits that, as was held in ACC Bank v. Johnston [2010] 4 IR 605, the proper date for the assessment of damages is the date upon which the wrong was committed unless such an assessment creates an injustice. The first named defendant submits that the wrong in the present case, if there was a wrong, occurred when FÁS stated that monies were not available to fund the proposal in June 2009 or, at the latest, when it became clear in late 2009 that no compromise was possible. While the first named defendant acknowledges that the plaintiffs were unable to sell the property the price being sought was the original purchase price which was well above the market value and would have served to dissuade potential purchasers and points to the fact that the plaintiffs preferred option if they could not sell at that price was simply to hold onto the premises. In this regard the first named defendant relies on the evidence of Mr. Hayes where he stated "we were hoping to get what we paid for it, but we knew we weren't going to do that ... We would have sold it if we had got the right offer". The first named defendant further notes the following statement of Mr. Hayes:

"It was purely, purely for the lease. I would not have bought the building under any circumstances and I actually made that clear to the Board. At the time they were building new units across the road, which were half the price that I paid for that. I could have got two units if I was interested in units for what I paid for that unit".

In reliance on this statement the first named defendant submits that the plaintiffs, on their own admission, paid over the odds for the property and that this was confirmed by the evidence of Mr. Devlin, a valuer engaged by the defendant who valued the property at €480,000 as of April 2008. The first named defendant further submits that it is significant that the plaintiffs saw fit not to contest Mr. Devlin's valuations by expert evidence even though the valuers for the respective parties met and disclosed their valuations. The first named defendant therefore argues that it cannot be held liable for the decision of the plaintiffs to pay an excessive purchase price for the property.

75. The first named defendant also notes that although the plaintiffs engaged solicitors in 2009 it was only in May 2011 that a letter of complaint was written. The defendant therefore submits that the plaintiffs have delayed the prosecution of the action and by doing so have put themselves in a more favourable position. The defendant argues that this is not conduct that the Court should condone by permitting the plaintiffs to increase the level of damages.

76. The plaintiffs submit that the first named defendant's arguments regarding overpayment are irrelevant given that the purchase price paid by Mr. Hayes was one negotiated in the open market. In addition they submit that given that Mr. Hayes signed the contract on 4th April, 2008 on foot of an express instruction to proceed from Ballark, as evidenced by the letter of 1st April, 2008, it is not proper to argue that Mr. Hayes overpaid for the premises.

77. Insofar as there is any suggestion that the plaintiffs failed to mitigate their loss, they note that Mr. Hayes tried extremely hard to get FÁS to buy the building from him and that offer was not taken up. The plaintiffs thus submit that it is not open to the defendant to criticise the plaintiffs for not mitigating their loss when it was all times open to the defendants to do so.

Decision as to Damages

78. At the time of the commitments given by FÁS to Ballark for transmission to Mr Hayes, both FÁS and Ballark were aware of the price being sought for the unit. Before the third named plaintiff, Mr Hayes, ever came on the scene, both defendants had investigated the possibility of one or other of them purchasing the Unit for use by Ballark. FÁS were not in a position to advance the capital needed and Ballark understandably were not prepared to take on responsibility for a mortgage. When Mr Hayes came on the scene, the premises which the defendants required had already been decided. The defendants declined Mr Hayes advice at the time that other units in the estate were available, cheaper and better value. In these circumstances it is not open to FÁS to complain about the price paid in the open market for the Unit which they and Ballark had specifically required. The Court therefore proposes to allow the plaintiffs claim for the purchase price of €760,000 together with purchase costs of €78,360, less the current value of the unit which was agreed as being €145,000 as of April 2015, giving a total sum of €693,360. In addition the plaintiffs claim loss of interest on the total sum expended of €838,360 on the grounds that absent this 'opportunity' provided by FÁS their funds would have remained in cash and earned interest at the rate of at least 4% between 2008 and 2013 and 2.5% between 2013 and the present. The evidence as to these rates was not challenged, but the defendants maintained that the plaintiffs had been dilatory in bringing their claim and should not be allowed to profit from their delay. The Court notes that while Mr. Hayes, on his own evidence, became aware that there was no prospect of a deal with FÁS in or around February 2010, it was only in May 2011 that a letter of complaint was written to FÁS

by the plaintiffs' legal advisors and these proceedings were not instituted until December 2011. The Court is willing to allow sometime to Mr Hayes and his co-plaintiffs to consider their options and to live in hope that FAS might ultimately honour its commitments, but it appears to the Court that after six months or so from the date upon which FÁS unambiguously reneged on its earlier commitments, the plaintiffs needed to act or else to forego interest on their loss. In the circumstances, the Court proposes to disallow the interest claimed from the 1st July, 2010 to the date of the issuing of these proceedings. The Court therefore proposes to award the plaintiffs the sum of €894,564 less the interest attributable to the period 1st July, 2010 to the date of issue of the proceedings.