Neutral Citation Number [2007] IEHC 251

THE HIGH COURT

RECORD NO. 2002/15800 P

BETWEEN

JAMES CUMMINS, MICHAEL HAYDEN

PLAINTIFFS

AND

SOUTH DUBLIN COUNTY COUNCIL

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 18th July, 2007.

The background and the relevant facts

1. In the 1990s the plaintiffs carried on the business of service station operators at various locations in the Dublin area under the name "Primo" through the medium of companies which featured the word "Primo" in the corporate name. One such service station was located at Belgard Square in Tallaght. It was held under a lease dated 4th February, 1993 from the defendant's predecessor, the County Council for the County of Dublin, to the plaintiffs which created a demise for the term of 250 years from 1st May, 1991. I will refer that lease as "the 1993 lease" and to the property thereby demised as "Square I". The plaintiffs created a sub-lease of Square I on 3rd July, 1995 in favour of their company, Primo Service Stations Limited, for the term of 35 years from 1st June, 1992. Trading commenced in November, 1992 and business was good. However, the plaintiffs felt that the forecourt and shop area were not adequate and were anxious to expand. In the context of exploring the possibilities of getting planning permission for expansion, the plaintiffs discovered that the defendant proposed re-aligning the road network in the immediate vicinity of the service station in a manner which would have had an adverse effect on the business of the service station. Following fruitless discussions with officials of the defendant with a view to protecting their interest, the plaintiffs and Primo Service Stations Limited initiated proceedings in this Court in 1999 (Record No. 1999 No. 5058 P), which I will refer to as the "1999 proceedings", against the defendant. The reliefs claimed in the plenary summons, which issued on 14th May, 1999, included a declaration that the carrying out of the proposed road works and road re-routing at or adjacent to Square I were, or were about to be, a breach of the covenant for quiet enjoyment in the 1993 lease and an injunction restraining the breaching of, or interference with, the quiet enjoyment of Square I by the plaintiffs.

2. Before any further step was taken by the plaintiffs in the 1999 proceedings, following meetings between officials of the defendant and plaintiffs in late 1999, the proceedings were compromised. The offer of compromise was set out in a letter of 6th December, 1999 from the defendant to the first named plaintiff, which set out the following proposals:

> (1) That the defendant would dispose of two plots of land measuring in total 1,543.362 sq. m. or thereabouts as depicted on a drawing furnished, the terms and conditions of the disposal to be subject to agreement and relevant statutory consents being obtained. The two plots of land, which I will refer to collectively as "Square II", adjoined Square I. As the accompanying drawing depicted, one of the plots was a strip of land 6 m. wide along the western side of Square II, which comprised approximately 501 sq. m. This area, which I will refer to as "the LUAS reservation", was an area which the defendant considered it would require if there was an extension of the LUAS line to the Oldbawn area of Tallaght, which, apparently, was an objective in the defendant's development plan at the time. The LUAS reservation extended along the re-routed Cookstown Road. The balance of Square II comprised a triangular area of approximately 1,042 sq. ft., which was bounded on the west by the LUAS reservation and on the east by Square I.
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> (2) That the proposed access to Square II as depicted on the accompanying drawing had been established in principle with the defendant's Roads Department, the access shown being from was to be the new Cookstown Road .
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> (3) That the defendant would make a contribution towards the legal costs of the plaintiffs in connection with the 1999 proceedings.
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> (4) That Primo Oil Company Limited, which I understand to be the plaintiffs' principal corporate vehicle although nothing turns on this, and which I will refer to as "the Company", should apply for planning permission for proposed redevelopment.
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> (5) That the Company would undertake that all legal proceedings would be terminated.

3. By letter dated 4th January, 2000 to the defendant, the plaintiffs and the Company accepted the proposals contained in the letter of 6th December, 1999 subject to certain conditions stipulated, namely:

> (a) that withdrawal of the legal proceedings was subject to, first, grant of acceptable planning permission for the proposed development, and, secondly, the disposal of Square II to the plaintiffs;
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> (b) that the defendant pay IR£4,500 towards the plaintiffs' legal costs; and
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> (c) that the LUAS reservation be included in the "lease", but with a reference to the fact that, should the LUAS plan go ahead on the reservation, then it would revert to the defendant, but also stating that, if a decision should be taken in the future not to proceed with the LUAS plan, the plaintiffs would be advised of that decision and development would be allowed on the strip, subject to proper planning procedures.

4. The defendant's response to those conditions was contained in a letter dated 4th February, 2000 from the Senior Administrative Officer in the Development Department in which gratitude was expressed for the proposal to withdraw all legal proceedings, thereby implicitly accepting the two conditions stipulated by the plaintiffs. It was confirmed that the sum of IR£4,500 would be payable and, indeed, that the paying order was available for collection. With regard to the LUAS reservation, it was stated as follows:

> "With regard to the 6 metre reservation for LUAS it is the Council's opinion that this piece of land should be transferred to you by way of licence for the simple reason that should the Council wish or need this land for the purposes of LUAS in the future it would not be necessary to amend the lease being granted for the principal plot. However, the undertaking that you wish to insert into the lease can be incorporated into the licence being granted for the LUAS reservation to you."

5. I have no doubt that the combined effect of those three letters was to create an agreement in principle between the defendant and the plaintiffs that Square II would be disposed of by the defendant in favour of the plaintiffs. While the detail was to be fleshed

out later, it seems to me that, subject to the defendant's particular requirements in relation to the LUAS reservation, the plaintiffs were entitled to, and on the basis of their discussions with the defendant's officials did, assume that the disposal would confer a substantial interest in Square II on them on a par with their leasehold interest in Square I. In relation to the LUAS reservation, it seems to me that, while the defendant had a preference for dealing with it by way of licence rather than by way of lease, it was accepting that it was being disposed of to the plaintiffs for an interest that would endure for a period commensurate with the duration of the plaintiffs' interest in the remainder of Square II but subject to the proviso that the defendant could resume possession in the event of it being required for the purposes of an extension to LUAS but not otherwise. What the defendant was to get in return was the withdrawal of the 1999 proceedings, which was clearly of crucial importance to the defendant because it is clear from the letter of 6th December, 1999 that the proposals contained in that letter were made so as to enable the defendant to secure government funding for the proposed Cookstown – Oldbawn Road Improvement Scheme.

6. After 4th February, 2000 both sides acted on the basis of the agreement evidence by the three letters. On 31st May, 2000 the defendant received a planning application from the Company for the development of a new petrol station on Square II, which encroached to a certain extent, 5metres or 6 metres, on Square I. That application was processed in the usual way by the defendant's planning department. Eventually, on 26th October, 2000, notification of a decision to grant planning permission issued. There was obviously no appeal and the final grant issued on 8th December, 2000. The planning permission was subject to conditions, one of which was that the line of the LUAS reservation should be kept free from all development save that permitted under the planning permission. For reasons which will become apparent, the planning permission was never implemented. It has expired.

7. The defendant's officials also put in train the procedures for obtaining the necessary statutory sanction of the disposal, which was a resolution of the elected members of the defendant in accordance with s. 83 of the Local Government Act, 1946. It appears from the evidence that the relevant notices under s. 83 seeking a sanction of a disposal to the Company were given to the elected members on 29th September, 2000. At their meeting on 9th October, 2000 the elected members passed a resolution sanctioning the disposal to the Company. However, subsequently, the plaintiffs requested that the disposal be to them personally, as the 1993 lease was in their favour. A further resolution sanctioning a disposal to the plaintiffs, rather than to the Company, was passed by the elected members on 13th November, 2000. For the sake of clarity, I will refer to this resolution as "the operative resolution".

8. While a copy of the minute of the operative resolution has not been put before the court, it is common case that the text of the operative resolution is set out in the defendant's amended defence delivered on 24th July, 2003 and in the letter of 30th January, 2001 from the defendant's solicitors to the plaintiffs' solicitors referred to later. The terms of disposal provided for in the operative resolution were as follows:

> (1) That the defendant would dispose of Square II other than the LUAS reservation by way of 99-year lease at an annual rent of £10, payable on demand, with five-yearly rent reviews linked to the change in the Consumer Price Index in the intervening period.
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> (2) (a) That the defendant would grant a licence for a term of 4 years and 9 months at an annual rent of £10 payable on demand in respect of the LUAS reservation.
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> (b) That the licence should be by way of Temporary Convenience Lease under s. 75(4)(a) of the Local Government (Planning and Development) Act, 1963 (the Act of 1963).
>
> (c) That either party might terminate the letting on giving three months' notice in writing.
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> (d) That no compensation whatsoever should be payable by the defendant on the termination or expiration of the letting.
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> (e) That no buildings whatsoever should be erected on the LUAS reservation.
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> (3) That the proposed disposal and the granting of the licence were subject to the extinguishment of the public right of way under s. 73 of the Roads Act, 1993 over the lands. As I see it, the extinguishment of the public right of way was merely an aspect of giving the plaintiffs clear title on the disposal. In the event, the public right of way was extinguished and this provision is not really germane to the dispute between the parties.
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> (4) That Square II should be used for the purposes associated with the business of a petrol filling station and ancillary uses.
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> (5) That the defendant would grant vehicular access to the plaintiffs from Cookstown – Oldbawn Distributor Road Phase II, the precise location of the access to be subject to agreement with the defendant's Roads Department and subject to planning permission.

9. The other matters provided for in the operative resolution – the payment of IR£4,500 as a contribution to the plaintiffs' legal costs (which had been paid), the Company applying for planning permission (which was obtained shortly after the operative resolution was passed) and the withdrawal of the proceedings against the defendant – are not in controversy.

10. Having regard to the evidence, I think it probable that the plaintiffs were aware of the foregoing terms of the operative resolution on 17th November, 2000 and I so find. On that day the first plaintiff telephoned an official of the defendants' Development Department in relation to the approval of the grant of a licence for 4 years and 9 months in relation to the LUAS reservation and, in particular, the plaintiffs' legal advisors' concerns in relation to the lack of security of tenure which such arrangement would entail. In response to that telephone conversation, an administrative officer in the defendant's Development Department wrote to the first plaintiff on 17th November, 2000 in relation to the disposal by way of licence, stating as follows:

> "The Council is aware that there is a demand that 'Luas' be extended to West Tallaght and accordingly has decided to retain a reservation in the event that this will happen. This Luas reservation adjoining your property is being transferred to you on a temporary basis until such time as it will be required for Luas.
>
> If in the future a decision is made that the lands will not be required for Luas the Council will be prepared, subject to agreement on terms and the statutory approvals being obtained to dispose of the lands to you by way of lease.

> Should no decision on the future use of the lands be made by the time the Licence expires in 4 years and 9 months the Council will be prepared to enter into a new Licence Agreement with you to allow you to remain in occupation until the lands are required."

11. Notwithstanding what was provided for in the operative resolution in relation to the LUAS reservation, the plaintiffs took comfort from that letter. In my view, they were entitled to do so. The letter, which assured them use of the LUAS reservation until it was required for the purposes of a LUAS extension and a disposal of it by lease to them in the event that the defendant decided the lands were not required for the purposes of such extension, accorded with the agreement in principle which had been reached nine months earlier.

12. In January, 2001 the defendant instructed its solicitors to deal with the legal aspects of the disposal. On 30th January, 2001 the defendant's solicitors wrote to the plaintiffs' solicitors setting out what they understood to be the terms and conditions of the disposal, which, as I have already stated, replicated the provisions of the operative resolution of the elected members. By a further letter of 27th February, 2001, the defendant's solicitors confirmed that the disposal would be to the plaintiffs. Following receipt of that letter, the plaintiffs' solicitors confirmed that the terms and conditions set out in the letter of 30th January, 2001 were "in line" with what had been agreed between the parties. They were not. In my view, it is immaterial that the plaintiffs' solicitors did not raise the inconsistencies at that juncture. They had not yet been furnished with drafts of the proposed lease and the proposed licence.

13. At the end of November, 2000 the plaintiffs concluded a deal with Statoil Ireland Limited (Statoil) to sell their interest in the Company and the Primo assets to Statoil. The assets the subject of that transaction included Square I and the plaintiffs' interest in Square II and other properties in the Dublin area. The structure of the transaction was that the Company and the plaintiffs issued a letter of offer dated 30th November, 2000 to Statoil for the transfer of the assets at a price in excess of IR£3m. As regards Square I, the transaction was duly completed, in consequence of which a company in the Statoil group, Fareplay Merchant Services Limited, became lessees of Square I under a sub-lease carved out of the 1993 lease, which was dated 1st December, 2000 and was made between the plaintiffs of the one part and Fareplay Merchant Services Limited of the other part for a term of 99 years from 1st June, 1992. The manner in which that came about is not significant. What is significant is that, as a result, the interest in Square I which carried the right to possession was severed from whatever interest the plaintiffs had in Square II.

14. The provisions in the letter of offer in relation to Square II (clause 2.3) disclosed that the plaintiffs were negotiating terms with the defendant for the acquisition of Square II, partly by way of lease and partly by way of licence. I attach no weight to the use of the word "negotiating" in the letter of offer: in my view, agreement in principle had been reached between the plaintiffs and the defendant by February, 2000 and that agreement was clarified in the letter of 17th November, 2000. The letter of offer provided that the plaintiffs would use reasonable endeavours to complete the acquisition as soon as possible and, in the event of completion to the satisfaction of Statoil, the plaintiffs should offer to grant and Statoil should be entitled to accept a lease in the form set out in the Seventh Schedule to the letter of offer from such date as might be agreed and a licence on terms to be agreed as soon as reasonably practicable after the title had become available. It was further provided that, in the event of the licensed area being taken back or acquired by the plaintiffs or the defendant for any purpose other than pursuant to an order made under the Transport (Dublin Light Rail) (No. 2) Act, 1996 (the Act of 1996), the rent payable under the lease of Square II would be reduced by 28%. While, frankly, I do not understand the rationale for this provision, I do not consider it material to the resolution of the issues before the court. The letter of offer (clause 3.4(e)(ii)) also provided that Statoil's liability to pay IR£309,000 (€392,349.04) portion of the purchase price would only arise when the plaintiffs would have obtained title satisfactory to Statoil to Square II and have granted to Statoil a lease in the terms set out in the Seventh Schedule and a licence of the LUAS reservation. In the events which happened, Statoil's liability to pay that sum of IR£309,000 (€392.349.04) has not arisen. I will refer to this sum as the retained consideration.

15. The form of lease set out in the Seventh Schedule to the letter of offer provided for a term of 99 years from the date of the lease. In relation to rent it provided for –

> (i) a yearly rent of IR£20,890 (€26,524.83) for each of the first three years of the term;
>
> (ii) a yearly rent of IR£120,000 (€152,368.56) for each of the fourth and fifth years of the term;
>
> (iii) five-yearly rent reviews thereafter, the reviewed rent to be equal to the higher of the passing rent payable during the immediately preceding period increased by 25% or the open market rent determined on arbitration in the usual manner, subject to the proviso that the revised rent payable following any review date should never exceed the percentage increase in the Consumer Price Index over the five-year period immediately preceding the relevant review date multiplied by 1.25.

16. There was provision for a break on 35th anniversary of the date of the lease. I will refer to the proposed lease in this form as the Square II sub-lease.

17. William Fry were the solicitors acting for Statoil in the transaction with the plaintiffs. The correspondence which passed between William Fry and the plaintiffs' solicitors in relation to Square II after 30th January, 2001, when the plaintiffs' solicitor started dealing with the defendant's solicitors in relation to the title and legal aspects of the transaction between the plaintiffs and the defendant, was admitted in evidence without formal proof. What happened in practice was that the requirements of William Fry on behalf of Statoil were channelled through the plaintiffs' solicitors to the defendant's solicitors. It seems to me that this was a sensible way for the plaintiffs' solicitors to progress the two transactions. The comment of William Fry on the letter of 30th January, 2001 from the defendant's solicitors, which had been sent to them by the plaintiffs' solicitors, in a letter of 5th March, 2001 was that it essentially was a restatement of the terms and conditions set out in the notice to the elected members dated 29th September, 2001, which indicates to me that Statoil's agents were aware then of the terms of the approval. I would surmise that at the time the letter of offer, which apparently was drafted by William Fry, was executed Statoil was aware of what had transpired between the plaintiffs and the defendant. The clause in the letter of offer, Clause 2.3, dealing with Square II, to which I have referred earlier, suggests that this was so.

18. The first drafts of the lease and the licence to be granted by the defendant to the plaintiffs were furnished by the defendant's solicitors with their letter of 11th April, 2001. The plaintiffs' comments on the drafts, which were essentially the comments of William Fry on behalf of Statoil, were contained in a letter of 24th May, 2001 to the defendant's solicitors, who addressed the comments in a letter of 24th July, 2001 to the plaintiffs' solicitors. Revised drafts were furnished shortly thereafter. As between the plaintiffs and the defendant issues were raised in the correspondence, not only in relation to the drafts of the licence, but also in relation to the drafts of the lease. I propose considering the controversies which arose in relation to the draft licence, which were not resolved through the correspondence, first.

19. The fundamental issue which arose between the plaintiffs and the defendant in relation to the draft licence was its duration, which turned on two issues: renewability on the expiration of the term of 4 years and 9 months provided for; and the circumstances in which the defendant could terminate. The draft licence was expressed to be a temporary convenience letting "for the period of 4 years and 9 months … until such time as the Council requires the premises for its Statutory Purposes …". It was provided that the tenancy should absolutely determine on either party giving the other three months' notice in writing. The plaintiffs' solicitors stipulated the following requirements in relation to those provisions:

> (1) That the licence should endure until possession was required by the defendant "for the purpose of development pursuant to an order made under the Act of 1996" and that the right of the defendant to terminate should only arise in the event of such an order being made.
>
> (2) There being no provision for the extension of the licence beyond the period of 4 years and 9 months, that the plaintiffs acquire a long-term interest in the LUAS reservation, subject only to the ability of the defendant to terminate on the making of an order under the Act of 1996, the plaintiffs' solicitors suggesting that the licence should provide that the term would be extended for successive periods of 4 years and 9 months, subject to the defendant's right to terminate if an order was made.

20. An ancillary point arose in relation to a provision that the LUAS reservation should be used in conjunction with adjoining premises and clarity was sought as to whether the adjoining premises encompassed Square I and the remainder of Square II or the remainder of Square II only.

21. The response of the defendant's solicitors in their letter of 24th July, 2001 was that the amendments sought by the plaintiffs to the draft licence would not be made. The right to terminate would not be limited to the making of an order under the Act of 1996. When the term of 4 years and 9 months expired, the situation would be reviewed and, if the lands were not immediately required, the defendant would be prepared to consider entering into a "new short-term licence agreement". It was clarified that the LUAS reservation had to be used in conjunction with Square I and the remainder of Square II.

22. It is hardly surprising that William Fry did not find that response satisfactory. In a letter of 3rd August, 2001 to the plaintiffs' solicitors they pointed out that it had already been understood commercially that the only reason the defendant might require the LUAS reservation was for the purpose of the making of a light rail order, as was clearly stated in the defendant's letter of 4th February, 2000. The defendant's willingness to consider another short-term licence on the expiration of the term of 4 years and 9 months would not work commercially for Statoil, as it required a long-term interest subject only to the right of the defendant to terminate in the event of a light rail order being made. It was suggested that the licence should be either for an indefinite period or, alternatively, should contain provisions for the term to be extended for successive periods of 4 years and 9 months subject to the ability of the defendant to terminate on three months notice in the event of a light rail order being made.

23. By letter dated 9th August, 2001 the plaintiffs' solicitors informed the defendant's solicitors that the agreement between the parties was that the licence would continue until such time as the defendant required the LUAS reservation for development pursuant to an order under the Act of 1996, that the licence should reflect this and that it should be renewable indefinitely until such time as a light rail order was made. Contemporaneously, in a letter of 10th August, 2001, the matter was taken up directly by the first plaintiff with the Development Department of the defendant. By reference to the letter of 17th November, 2000, the first plaintiff requested the following amendments to the licence: that it provide that the licence would continue until such time as the LUAS reservation was required in connection with the LUAS; that there be included a provision that, if the LUAS reservation was not required for LUAS, the defendant would, subject to agreement on terms and the statutory approvals being obtained, dispose of the LUAS reservation to the plaintiffs by way of lease; and that, should no LUAS order be made, at the expiry of the term of 4 years and 9 months the defendant would enter into a new licence to allow the plaintiffs to remain in occupation until the land was required. The first plaintiff also sought clarity that the provision of the licence in relation to use in conjunction with adjoining property and the provision restricting alienation would relate to Square II only.

24. The defendant's response to the first plaintiff's letter was a letter dated 12th October, 2001 from the Development Department, in which it was stated that the provisions sought in the letter of 10th August, 2001 would not be included in the licence but the defendant would be prepared "to enter into a short-term licence agreement", the duration of which was not specified, on the expiration of the term of 4 years and 9 months. As regards the restriction on use and alienation, the response was that the requirement related only to the portion of Square II being disposed of by way of lease, not the area to be licensed, that is to say the LUAS reservation, of which the defendant was retaining ownership. That response did not answer the question which had been posed. The issue was whether the use and possession of Square II was restricted by reference to the use and possession of Square I. It is clear from the letter of 12th October, 2001 that the defendant by then had become aware of the interest of Statoil in Square I.

25. There followed a letter dated 23rd October, 2001 from the defendant's solicitors to the plaintiffs' solicitors stating as follows:

> "We are now instructed that it is not proposed to include in the licence agreement the provision sought by you in your letter of 9th August last or in earlier correspondence regarding the same matter.
>
> However, the Council is on record as confirming that it is prepared to enter into a new licence agreement when the existing one expires in four years and nine months in the event that the land is not immediately required. Our Clients are not prepared to put the matter any further."

26. Despite subsequent meetings with the plaintiffs, the defendant did not move from the position adopted in the letter of 12th October, 2001. The evidence of the first plaintiff was that the position of the defendant's officials was that they were not prepared to bring the matter back to the elected members of the defendant and have the whole matter revisited.

27. It is hardly surprising that William Fry persisted in the view that the documentation furnished by the defendant was not acceptable.

28. After these proceedings were commenced by a plenary summons, which issued on 10th December, 2002, William Fry, by letter of 26th November, 2003, informed the plaintiffs' solicitors that, as regards Square II, the forms of the proposed lease and licence were not acceptable to Statoil, that the lease was not in the form prescribed in the letter of offer and that the terms of the licence had not been agreed. Obviously the terms of the lease of Square II, other than the LUAS reservation, which the defendant would grant to the plaintiffs had to be such as would allow the plaintiffs to grant Statoil a lease on the terms set out in the Seventh Schedule to the letter of offer: *nemo dat quod non habet*.

29. Issues which William Fry had with the provisions of the first draft of the lease were addressed in the letter of 24th May, 2001 from the plaintiffs' solicitors to the defendant's solicitors. While all of these issues were not dealt with by the defendant's solicitors to the satisfaction of William Fry, having considered the relevant correspondence, notwithstanding what was stated in the letter of 26th November, 2003, I think it probable that, if the fundamental issue in relation to the LUAS reservation could have been overcome, the remaining issues in relation to the draft lease would have been resolved. To illustrate why I have reached this conclusion, I will take one example. In the letter dated 24th May, 2001 the plaintiffs' solicitors raised the question of the right of way, pedestrian and vehicular, from the Cookstown-Oldbawn distributor road to the part of Square II which was to be demised, which was not addressed in the draft lease. The same point was addressed in the first plaintiff's letter of 10th August, 2001, where it was pointed out that the right of way should be incorporated in the lease and that it should provide for access and exit over the LUAS reservation in the event of the LUAS project going ahead. Eventually in the letter dated 12th October, 2001 from the Development Department of the defendant, it was stated that the access as proposed in the planning application to which the decision dated 26th October, 2000 to grant permission related was acceptable to the defendant. While the issue of the right of way generated quite a lot of correspondence, it seems to me that there could be no question but that the defendant was contractually obliged to grant the right sought to the plaintiffs. In any event, the evidence shows that, in the development of the Cookstown and Oldbawn distributor road, provision has been made on the ground for the pavement along the LUAS reservation being dished at the relevant points of access and egress.

30. While the conclusion which I have reached that, as a matter of probability, the issues raised in relation to the draft lease would have been resolved, is based on a consideration of the documentation put in evidence, including the relevant correspondence, there was evidence from Padraig Grimes, who was the retail director of Statoil in 2000 and who was directly involved in the transaction between the plaintiffs and Statoil, that the sticking point was the inability of the plaintiffs to get a long-term interest in the LUAS reservation. Statoil required some form of renewability of the licence of the LUAS reservation which would give rise to a long-term interest. I accept that evidence.

31. The letter of 26th November, 2003 from William Fry was in response to letters from the plaintiffs' solicitors, the tenor of which was that it was in connection with these proceedings that the plaintiffs' solicitors required William Fry to specify the basis on which they contended that the documentation furnished by the defendant was unacceptable. The letter of 26th November, 2003 is the last item of correspondence in relation to the Statoil transaction which has been put before the court. There is no evidence that the agreement in relation to Square II embodied in the letter of offer has been terminated. On the evidence, it is not possible to reach any conclusion as to the status of that agreement and, of course, it would be improper to do so in the absence of Statoil.

32. The court heard both plaintiffs, whose evidence was consistent with the documentation generated in relation to the transaction with the defendant and the transaction with Statoil. I find, on the evidence, that, even if the plaintiffs did not have the deal with Statoil, they would have rejected the draft licence proffered by the defendant as it did not accord with the agreement they had reached with the defendant. In my view, as a matter of common sense and commercial sense, the provisions of clause 2(a) to (e) of the operative resolution were unlikely to be accepted by any prudent businessman. As I will outline later, they also involved an element of legal confusion.

33. There was also evidence from the Transport Planning Manager of the Railway Procurement Authority (RPA). The evidence was that the RPA has no plan to develop a spur from the LUAS Red Line along the corridor which traverses the LUAS reservation, at any rate prior to 2015.

34. No evidence was adduced by the defendant.

The plaintiffs' claim and the defendant's defence as pleaded

35. The primary relief the plaintiffs seek in their amended statement of claim is specific performance of an agreement effected in writing in the correspondence dated 6th December, 1999, 4th January, 2000 and 4th February, 2000, and in other correspondence (which evidenced the substitution of the plaintiffs as disponees instead of the company), encompassing the provision of a licence to use the LUAS reservation for a period of 4 years and 9 months (and renewable for similar periods thereafter), and, in the event that the LUAS reservation is not required for development as part of a LUAS route, a provision that it be transferred to the plaintiffs by way of long lease. In the alternative, the plaintiffs seek an injunction restraining the defendants from cutting across the legitimate expectation of the plaintiffs to be entitled to the renewability of the LUAS reservation. A claim for damages for breach of contract is also included.

36. The plaintiffs' contractual claim, as pleaded, is based on an agreement effected in writing by the correspondence dated 6th December, 1999, 4th January, 2000 and 4th February, 2000. The claim based on legitimate expectation is based on the assertion that, on the faith of the warranties and representations of the defendant pleaded earlier, which I understand to mean in the correspondence referred to, and in the letter of 17th November, 2000, the plaintiff had a legitimate expectation that the defendant would act upon them and that the plaintiffs relied on them. It is pleaded that the defendants have been in breach of their warranties and that they are estopped or precluded from going back on the terms of the representations, or cutting across the plaintiffs' legitimate or reasonable expectations.

37. In its amended defence the defendant admits that the plaintiffs and the defendant effected an agreement following the correspondence pleaded by the plaintiffs, but its contention is that the terms of the agreement were as provided for in the operative resolution, the full terms of which are set out, including the provisions in relation to the LUAS reservation, which I have recorded earlier, at (2)(a) to (e). In its defence the defendant expressly asserts that it is under no obligation to commit itself to the renewal of the licence in relation to the LUAS reservation and asserts its entitlement to terminate the licence on three months notice should it so wish. The defendant traverses the plaintiffs' claim based on estoppel and legitimate expectation.

38. The broad thrust of the defendant's defence is that it was not in breach of contract and that it was, and is, prepared to fulfil the terms of its agreement with the plaintiffs. The primary area of dispute on the pleadings centres on what were the terms of the agreement between the parties in relation to the LUAS reservation.

39. Looking more closely at the defendant's position on the pleadings as to what was agreed between the parties in relation to the LUAS reservation, the defendant denies the contention of the plaintiffs in the amended statement of claim that the plaintiffs were to be entitled to renewable licences until the LUAS reservation was required for LUAS. As I have said, the defendant asserts that the agreement in relation to LUAS was in the terms set out in the operative resolution at 2(a) to (e). In the amended defence the defendant pleads that it will rely on the contents of the letter of 17th November, 2000 in support of its pleas, which I understand to mean its assertion as to the terms agreed in relation to the LUAS reservation. Prior to the delivery of the amended defence, the defendant's solicitors wrote to the plaintiffs' solicitors on 5th June, 2003 referring to the plea in its defence, which was subsequently repeated in the amended defence, to the effect that at all material times the defendant had complied fully with the terms of the

agreement and had not been in breach thereof, stating as follows:

> "… we … wish to confirm instructions received this month that the defendant has always been willing, and continues to be, to comply with the agreement as to a licence which was referred to in a letter … dated 17th November, 2000 and confirmed by a letter from [the defendant's solicitors] dated 23rd October, 2001."

40. As I have already found, the letter of 17th November, 2000 accorded with the agreement in principle between the parties. However, clauses 2(a) to (e) of the operative resolution and the drafts of the licence agreement furnished by the defendant's solicitors were fundamentally at variance with it, as was the express assertion in the amended defence that the defendant was not obliged to renew the licence and could terminate it on three months notice should it so wish. In short, there is an inherent inconsistency in the defendant's reliance on the letter of 17th November, 2000.

41. A subsidiary point arises on the pleadings in relation to the letter of 17th November, 2000. In the amended statement of claim, the plaintiffs plead that no statutory consent under s. 83 of the Local Government Act, 1946 (the Act of 1946) was necessary for the granting of a licence on the terms which were agreed between the parties and assert that this was reflected in the letter of 17th November, 2000. The matters pleaded in the relevant paragraph of the amended statement of claim (para. 3) are admitted by the defendant in the amended defence. This raises the question whether it is accepted by the defendant that statutory approval of the elected members to a licence for 4 years and 9 months which is renewable indefinitely is not necessary. That question is somewhat academic in the light of the observations later in relation to the form of the "licence" proffered by the defendant.

42. In their amended statement of claim the plaintiffs pleaded that at all material times it was agreed and understood between the parties that the agreement for lease and the agreement for licence were indivisible parts of the entire agreement between the plaintiffs and the defendant. This is denied by the defendant in its amended defence. In my view, the plaintiffs' plea was unnecessary. Such agreement as was entered into between the parties was a single agreement relating to the entirety of Square II, but with, within the agreement, provision for "de-coupling" the LUAS reservation in the circumstances provided for in it.

Conclusions on the contractual claim

43. It is common case that there was an agreement between the parties in relation to Square II, but there is a dispute as to some of the terms agreed. The nub of that dispute, on the basis of the pleadings and on the basis of the evidence, is the different positions taken by each side as to what was agreed in relation to the LUAS reservation. Whether there has been a breach of contract turns on whose position represents what was actually agreed. If the defendant's position does not, then there has been a breach. What was agreed is a question of fact.

44. I have already set out my view as to what the position was as of 4th February, 2000. There was an agreement in principle for the disposal of Square II. As regards the LUAS reservation, the agreement was that the plaintiffs would get an interest in it, albeit by way of licence, which would endure for as long as its interest in the remainder of Square II, but subject to the right of the defendant to resume the strip if it was required in connection with the extension of the LUAS. In my view, it was implicit in the letter of 4th February, 2000 that the "paperwork", the formal licence agreement, would reflect that agreement. Spelling out in the licence agreement what terms were agreed in relation to the LUAS reservation was the only way in which what was referred to as "the undertaking" in the letter of 4th February, 2000 could be incorporated in the licence agreement in a meaningful way.

45. However, when the agreement came to be formalised, and in particular, when the matter was put before the elected members, the terms which had been agreed in relation to the LUAS reservation were simply ignored. The terms put before the elected members in clause 2(a) to (e) of the statutory notice were fundamentally at variance with what had been agreed, as evidenced by the correspondence, in that, first, there was no provision for continuation of the licence beyond 4 years and 9 months and, secondly, a provision was included which would have allowed the defendant to terminate at any time on three months notice for any reason or for no reason at all. Such provisions were wholly inconsistent with an agreement for the disposal of two adjoining plots of land for redevelopment purposes and, more significantly, they were inconsistent with what had actually been agreed between the parties.

46. In the letter of 17th November, 2000 the defendant went some way to acknowledging what had been agreed in relation to the LUAS reservation, in that it recognised that the agreement in relation to resumption of that strip by the defendant was predicated on it being required by the defendant for the purposes of an extension to LUAS. It also recognised that, on the expiry of the term of 4 years and 9 months, the licence would be renewed so as to allow the plaintiffs to remain in occupation until the strip was required. However, it did not expressly follow through on what was implicit in the letter of 4th February, 2000 – that the substance of the agreement in relation to the LUAS reservation would be formalised in the licence agreement. To that extent, while it may have been perceived by the plaintiffs and their advisers as a "comfort", it fell short of what was agreed.

47. However, the comfort given by the letter of 17th November, 2000 was ephemeral. The draft licences furnished by the solicitors for the defendant in 2001 reverted to the position represented by clause 2(a) to (e) of the operative resolution. The defendant refused to yield on the fundamental issues of the renewability of the licence and the circumstances in which it could be terminated by the defendant, despite the plaintiffs' reasonable requests, through their solicitors and directly. The defendant's final position, as set out in its letter of 12th October, 2001 and reiterated in its solicitors' letter of 23rd October, 2001, in my view, was wholly inconsistent with what was agreed between the parties, as evidenced in the correspondence. It is difficult to comprehend how the defendant could have expected that the position it adopted, that it could terminate the licence on three months notice effectively at will and that it would meet its obligations to the plaintiffs by an informal commitment to enter into a short-term licence, would be acceptable to the plaintiffs, given what had been agreed in early 2000.

48. At that point, October, 2001, that the defendant was not willing to complete the agreement, which it admits it entered into, in accordance with the terms which I have found had been agreed in relation to the LUAS reservation was manifest and the defendant was in breach of contract. As the defendant has not moved from that position, in my view, the plaintiff is entitled to specific performance of the agreement including the terms agreed in relation to the LUAS reservation. The plaintiffs are also entitled to damages for any loss which has resulted from that breach.

49. As I have stated, the defendant in its amended defence admits the matters pleaded in para. 3 of the plaintiffs' amended statement of claim, which include an assertion that no consent under s. 83 of the Act of 1946 was necessary for the granting by the defendant of a licence to the plaintiffs on the terms which were in fact agreed between the parties. Section 83(1) has effect in relation to a "proposed disposal (not being by demise for a term not exceeding one year) of land which is held by a local authority and which is not required for the purposes of their powers and duties". Put another way, compliance with s. 83 is only necessary where there is a disposal of land which vests in the disponee an interest greater than a demise for a term exceeding one year, that is to say, an outright disposal in fee simple or by way of assignment of a leasehold interest for more than one year or the creation of a lease for more than one year. The operative resolution, as I have recorded, provided that the licence of the LUAS reservation should

be by temporary convenience lease under s. 75(4)(a) of the Act of 1963, which provides as follows:

> "Where, as respects any land acquired for the purposes of or appropriated under this Act by a planning authority, the authority consider that they will not require the use of the land for any of their functions for a particular period, the authority may grant a lease of the land for that period or any less period and the lease shall be expressed as a lease granted for the purposes of this sub-section."

50. Paragraph (b) of s. 75(4) disapplies certain landlord and tenant legislation, which gives tenants statutory rights, in relation to "a lease granted as aforesaid for the purposes of this sub-section".

51. In the drafts of the licence of the LUAS reservation furnished to the plaintiffs' solicitors, in accordance with the operative resolution, the licence agreement was expressed to be made for the temporary convenience of the plaintiffs and the defendant and for the purposes of s. 75(4) of the Act of 1963, following which it was provided that the defendant let and the plaintiffs took the LUAS reservation for a period of 4 years and 9 months. While this point was not canvassed at the hearing, I cannot ignore the fact that the operative resolution and the drafts confuse two concepts: the concept of a lease or letting, which involves the disposal of an interest in land, and the concept of a licence, which does not. *Prima facie*, an agreement in the form of either draft would create a demise for 4 years and 9 months of the LUAS reservation, not a mere licence to use it for that period. Aside from the fact that it is not clear whether Square II was acquired for the purposes of, or appropriated under, the Act of 1963 so that s. 75(4) could be invoked in relation to it, its invocation in relation to an intended licence was wholly misconceived. To make matters worse what was proffered was, *prima facie*, a lease not a licence.

52. It is not for the court to say how the parties should properly give effect to their agreement. It is a matter for the defendant to produce a document which provides what was actually agreed between the parties and to procure such, if any, statutory approval as is necessary to fulfil the agreement. It is for the plaintiffs to be satisfied with a form of the document and title matters, including the procurement of any necessary statutory approval.

Claim for damages for breach of contract

53. The plaintiffs adduced the evidence of Declan Stone, Chartered Surveyor, of Colliers Jackson-Stops to support their claim for damages for breach of contract.

54. The defendant did not seek particulars of the loss which the plaintiffs allege they incurred but some particulars were volunteered by the plaintiffs' solicitors in their letters dated 7th June, 2007 and 22nd June, 2007. It was in the letter of 7th June, 2007 that the Statoil transaction first featured in the pleadings. Full particulars of the losses based on Mr. Stone's valuation were not furnished to the defendant's solicitors prior to the commencement of the hearing in this Court on 26th June, 2007. The reaction of the solicitors for the defendant to the particulars furnished prior to the commencement of the hearing, which was contained in the solicitors' letter of 25th June, 2007, was that the plaintiffs were being put on formal proof of their claim to include all special damages. No valuation evidence was adduced on behalf of the defendant at the hearing.

55. As I understand the plaintiffs' case in relation to quantification of damages, broadly speaking, it is that the measure of its loss depends on whether, the agreement with the defendant having been completed in accordance with its terms, Statoil, or Statoil's successor in title to the interest in Square I created by the lease dated 1st December, 2000, Topaz Ireland, completes the transaction in relation to Square II embodied in the letter of offer or does not. In relation to the two alternative scenarios which may arise, the position as advanced by the plaintiffs appears to be as follows:

> A. If the transaction with Statoil is completed, the plaintiffs will have been at the loss of the use of the retained consideration (€392,349.04) and of the rental they would have received under the Square II sub-lease if completion of the transaction with the defendant had not been delayed by reason of the defendant's breach of contract. They will also be at the loss of any difference between the capital value of the sub-lessor's interest in consequence of the Square II sub-lease commencing in 2007 rather than when it would have commenced but for the defendant's breach of contract, which they suggest would have been in February, 2001.
>
> B. If the transaction with Statoil is not completed, the plaintiffs will be at the loss of the retained consideration (€392,349.04) and the loss of the rental stream it would have received under the Square II sub-lease up to the date of the quantification of the damages and the loss of the use of that money up to that date. They will also be at the loss of the capital value of the future rental stream under the Square II sub-lease until the break clause would have become operative. Allowance must be given, however, for the capital value of the plaintiffs' interest in Square II, but on the basis of its potential use in circumstances that it is segregated from Square I in terms of ownership and development potential.

56. At the hearing, counsel for the plaintiffs acknowledged that the plaintiffs were not in a position to quantify the plaintiffs' actual loss until it is known whether the loss has to be quantified in accordance with scenario A or scenario B. He submitted that the quantification of damages be adjourned until it is clear which scenario is to apply. That is what I propose to do, but I have some comments to make generally and specifically in relation to Mr. Stone's evidence.

57. The plaintiffs should have been in a position to prove, and should have proved the status of the agreement with Statoil the actual loss they will incur at the trial of the action. Moreover, they should have put the defendant on notice of the basis of their claim for damages well in advance of the hearing. In my view, it is not appropriate at this juncture to make any assumption that, if it transpires that the Statoil transaction is not completed, the loss which accrues to the plaintiffs from the occurrence of that eventuality will have resulted from the defendant's breach of contract. It would be inappropriate to express any view which might have implications in relation to a transaction which involved a party who was not before the court.

58. Turning to Mr. Stone's evidence, in his valuation report and in his evidence, he essentially performed two exercises. The first was to assess the present value of the rental stream which the Square II sub-lease would have yielded on two bases: if its term had commenced on 1st February, 2001; and if its term had commenced on Mr. Stone's chosen valuation date, 25th June, 2007, which was the day before the hearing commenced. The second was to value Square II on the basis that the transaction with Statoil would not be completed.

59. In relation to the first exercise, Mr. Stone came up with the following figures:

> (a) If the Square II sub-lease had commenced on 1st February, 2001, by 25th June, 2007 the plaintiffs, as sub-lessors, would have received rent totalling €649,912.96.

(b) If the Square II sub-lease had commenced on 1st February, 2001 the value of the future rental stream at 25th June, 2007 would be €3,310,000.

(c) If the Square II sub-lease commenced on 25th June, 2007 the value of the future rental stream at that date would be €2,330,000.

(d) The difference as of 25th June, 2007 of the market value of the sub-lessor's interest under the Square II sub-lease if the term were to commence on 25th June, 2007 rather than 1st February, 2001 would be €980,000 (i.e. the difference between the figures at (b) and (c)).

60. In carrying out those valuations, Mr. Stone made a number of assumptions and judgments, on which I comment as follows:

(i) In relation to the operation of the rent review provisions in the Square II sub-lease, he assumed that the minimum uplift of 25% would be operative at the first and each subsequent review date. This was a reasonable assumption and rendered the valuation, to a large extent, an arithmetical exercise.

(ii) He based his capitalisation of the future rental stream on a yield of 6%, which he described as being conservative. In the absence of any evidence to the contrary, I must assume that he adopted a reasonable and proper approach in so doing.

(iii) Obviously Mr. Stone's choice of 1st February, 2001 as representing the date on which the term of the Square II sub-lease would have commenced, if the transaction with Statoil had been completed on time, was on the basis of instructions he received from the plaintiffs' solicitors. The date of completion of the transaction in relation to Square II was left open ended in the letter of offer. I do not think it reasonable to imply that the agreement between the plaintiffs and Statoil was that it would be completed as early as 1st February, 2001 in view of what was outstanding as between the plaintiffs and the defendant in relation to Square II when the letter of offer was executed. I think it probable that the parties envisaged a later completion date, and I think it is reasonable to infer that they would have had in mind that 30th November, 2001 would give reasonable time for completion.

61. When it becomes apparent on what basis the plaintiffs' claim for damages is to be assessed, the first exercise conducted by Mr. Stone may have to be repeated. If so, I would suggest that it be repeated on the basis that the term of the Square II sub-lease would have commenced on 1st December, 2001 had the transaction with Statoil been completed on time. There is no reason, given the nature of the exercise, why the parties should not agree the figures so as to avoid escalation of legal costs. While on the topic of saving legal costs, counsel for the plaintiffs submitted that the appropriate manner of compensating the plaintiffs for loss of use of money it would have received but for the breach of contract is by awarding interest at the court rate. I did not understand counsel for the defendant to demur on this. I would suggest that the parties agree the relevant figures.

62. In relation to the second exercise performed by Mr. Stone, he valued Square II on the basis that the plaintiffs have a long leasehold interest in it commencing on 25th June, 2007 at a nominal rent, without the benefit of the Statoil transaction but on the assumption that it has development potential as a car lot/park with access from Cookstown Road. He put a value of €350,000 on Square II on that basis. He also did the same exercise on the assumption that there would be no access from Cookstown Road and that the plaintiffs would have to negotiate access rights over Square I. The figure he came up with was €260,000, which was a reduction of 25% on the figure of €350,000, which he acknowledged was "unscientific". In any event, in my view, that last valuation is immaterial because the defendant undoubtedly agreed that the plaintiffs would have access to Square II from Cookstown Road.

63. As the defendant did not adduce any valuation evidence, I consider that the assessment of damages must be based on Mr. Stone's evidence.

Claim based on estoppel/legitimate expectation

64. Being satisfied that the plaintiffs have a claim in contract, it is unnecessary to consider whether, in the absence of the finding of an agreement between the parties, the plaintiffs could maintain a claim based on estoppel by representation or legitimate expectation and, if so, the nature of the remedy to which they would be entitled. The plaintiffs advanced that alternative basis of claim as a "fall-back". As they have not had to rely on it, I consider that it would not be appropriate to express any view on it.

Order

65. At this juncture, I propose making an order for specific performance in the terms of para. (a) of the plaintiffs' amended statement of claim. I propose adjourning the proceedings to enable the transaction between the defendant and the plaintiffs to be completed and to enable the plaintiffs to address their contractual position vis-à-vis Statoil. The matter will be re-listed to deal with the claim for damages when it becomes clear whether the transaction between the plaintiffs and Statoil will be completed.

66. I propose listing the matter for mention only on Thursday, 1st November, 2007, to review the situation.