Neutral Citation Number: [2008] IEHC 99

THE HIGH COURT

2006 No. 1357 P
2006 No. 107 COM

BETWEEN

DROCARNE LIMITED

PLAINTIFF

AND
SEAMUS MURPHY PROPERTIES AND DEVELOPMENTS LIMITED

DEFENDANT

Judgment of Ms. Justice Finlay Geoghegan delivered the 17th day of April 2008

1. The plaintiff is a company owned as to two-thirds by Treasury Holdings, the developer, and as to one-third by Mr. Dermod Dwyer.

2. The defendant is a company owned by Mr. Seamus Murphy. Mr. Murphy is a successful businessman with extensive interests in lands in north County Dublin, and Counties Meath and Louth. His particular expertise appears to be in taking options over lands zoned for agricultural use and when rezoned, selling them on at a profit for development. By late 1999, the defendant had options over lands both to the west and east of the then proposed route of the M1 at a proposed interchange at Tullyallen Co. Louth.

3. Mr. Dwyer and Mr. Murphy were both clients of Mr. Louis Healy of Gore & Grimes, solicitors. They were introduced to each other in late 1999 or early 2000. Negotiations commenced in relation to a joint venture for the development of lands over which the defendant had options at Tullyallen ("the Tullyallen lands").

4. Negotiations continued throughout 2000. Mr. Ronan and Mr. Barrett of Treasury Holdings, in addition to Mr. Dwyer, were involved for the plaintiff and for the defendant, in addition to Mr. Murphy, Ms. Patricia Rooney, who is the chief executive of the defendant and also Mr. Murphy's partner in life. The plaintiff was advised and assisted by Messrs. Arthur Cox, solicitors, and the defendant by Gore & Grimes, solicitors. On 21st December, 2000, the plaintiff and defendant entered into the Master Development Agreement (the "MDA"). The MDA seeks to provide for the development of the Tullyallen lands in accordance with the terms and conditions set out therein.

5. In December, 2000, the Tullyallen lands remained zoned for agricultural use. Louth County Council had initiated two relevant planning reviews. The development of the Tullyallen lands was dependent upon a rezoning of the Tullyallen lands. This in turn was dependent upon a variation to the Louth County Development Plan and adoption of an Area Action Plan for the north Drogheda environs.

6. The Tullyallen lands were not rezoned until July, 2004 following the adoption of the Area Action Plan. A new Louth County Development Plan was finalised in 2003. This was later than anticipated in December, 2000.

7. On 11th January, 2006, the defendant indicated that it considered the MDA to be at an end and that it was no longer bound by the terms of same.

8. On 24th March, 2006, the plaintiff commenced these proceedings seeking specific performance of the MDA and/or damages.

9. The defence to the plaintiff's claim as pleaded was materially different in certain important respects to that pursued to the end of the hearing. The defendant pleaded that the plaintiff was not entitled to specific performance because, *inter alia*, it acted in fundamental breach of the MDA. Particulars of such fundamental breach were delivered on 14th November, 2006. Those particulars were of alleged failures by the plaintiff to take steps required by clauses 8.1 and 8.3 of the MDA all of which ought to have been taken, it was contended, long prior to January, 2005.They did not include any alleged breach of clause 8.4 of the MDA.

10. The defendant maintained such a defence up to and including the commencement of the trial. However, in the course of the hearing, counsel for the defendant informed the Court that it was no longer relying upon any alleged breach of the MDA prior to January, 2005. Further, Counsel for the defendant indicated, in response to clarification sought by the Court that the defendant was now contending that as of January, 2005, the MDA was alive and well and the plaintiff would have been entitled to an order for specific performance as of that date.

11. The departure from the pleadings was not only on the defendant's part. In the statement of claim delivered on 14th July, 2006, the plaintiff pleaded that it used it's best endeavours to comply with the terms of the MDA but that it had not been possible to progress the development in accordance with the timescales laid down, by reason of facts outside of the party's control. At the hearing it contended that the obligation to use best endeavours was not a general obligation but was confined, by clause 7.1, to the achievement of certain objectives by Key Dates. This became of little importance as the plaintiff was not relying on any alleged breach prior to January, 2005.

12. The defence pursued on behalf of the defendant is that the plaintiff is not entitled to an order for specific performance by reason of one or more of the following:

> (i) The plaintiff, as the person seeking an order for specific performance of the MDA, must satisfy the Court that it has complied with the material terms of the MDA. The defendant contends that as the plaintiff has not complied with a material term of the MDA, it is not entitled to specific performance. The alleged breach of the MDA since January, 2005 is in not applying for planning permission for the Overall Scheme Plan deemed to have been approved in January, 2005 in breach of clause 8.4.
>
> (ii) The plaintiff treated the MDA as discharged or at an end following the decision of An Bord Pleanála in relation to the factory retail outlet at Ballymascanlon and is now estopped from denying that it is at an end.
>
> (iii) The MDA was discharged in March, 2005 by application of the doctrine of frustration by reason of the decision of An Bord Pleanála to uphold the planning permission granted for the retail factory outlet at Ballymascanlon.

13. The particular breach of clause 8.4 of the MDA now relied upon was not pleaded or particularised by the defendant. Nevertheless, it did not appear that there was any specific prejudice to the plaintiff in my permitting the defendant to rely on it as part of the defence as there is no factual dispute that a planning application was not submitted and there is no dispute as to why this occurred.

The resolution of the issue primarily depends upon the proper construction of the MDA. As will appear, there is one factual issue relevant to this defence and the frustration relied upon where the plaintiff (by agreement of the defendant) was given permission to put part of the Louth County Council Development Plan 2003 into evidence after the formal end of the evidence in the proceedings.

14. The issues raised by the plaintiff's claim and the above defences include disputes as to the proper construction of certain clauses of the MDA and in particular clauses 8.3, 8.4 and 28. These, and the remaining issues, have to be considered in the context of the entire of the MDA and what had or had not taken place prior to January, 2005. Notwithstanding that the defendant is no longer contending that the plaintiff was in breach of the MDA in January, 2005, the then factual matrix in which both parties now consider the MDA to have been subsisting is relevant.

The Master Development Agreement

15. The MDA is in essence an agreement to develop the lands over which the defendant then held options at Tullyallen. The bones of the scheme as provided by the MDA are:

> (i) The plaintiff brings to the MDA its expertise as a developer (Recital B).
>
> (ii) The defendant brings to the MDA the lands over which it then held options (Recital A and Appendix 1).
>
> (iii) The joint objective of the parties is "to implement the development of the Scheme in accordance with the Overall Scheme Plan in order to maximise the return therefrom having regard to all the circumstances prevailing from time to time during the currency of this Agreement" (clause 2.1).
>
> (iv) The separate objective of the defendant is "to secure in the disposal of each Unit Site by means of the Ground Lease at a Ground Rent . ." (clause 2.2). This was stated to be the securing of an income stream to the defendant by the granting of ground leases. . The MDA provides for an Agreed Percentage of 17.5% of rents to the defendant.
>
> (v) The separate objective of the plaintiff may be summarised as providing and maintaining a high class development and maximising the return to it thereon (clause 2.3).
>
> (vi) The development in planning and design stage is at the plaintiff's expense (clause 8) as it is in the construction phase subject to an agreed contribution not exceeding 15% from the defendant (clause 9).
>
> (vii) The plaintiff only gets a propriety interest in the development on the grant of a ground lease of a unit which is normally at practical completion. (clause 11)
>
> (viii) Many of the steps to be taken by the plaintiff in the development have to be agreed by the defendant or failing agreement the MDA provides for determination by independent experts in relation to specific matters (e.g. clause 8.3). The MDA also seeks to provide a general mechanism for determining how the parties should deal with unforeseen obstacles to implementation of the MDA in accordance with its terms (clause 28).

16. The factual matrix in which the MDA must be construed includes that the development of the Tullyallen lands in accordance with the MDA was dependent upon a rezoning of the lands by Louth County Council. The zoning for lands to the west of the proposed M1 interchange raised very sensitive issues by reason of their proximity to the Boyne valley area. The rezoning in turn was dependent upon a variation to the Louth County Council Development Plan and/or the adoption of an appropriate Area Action Plan. By December, 2000 Louth County Council had initiated two planning reviews, one, a strategic review of the north Drogheda environs by the Strategic Planning Alliance and the other of the new and proposed interchanges on the M1 with their suitability for industrial and commercial uses. In each case, the reviews were with a view to preparing either an Area Action Plan and/or a variation of the Louth County Council Development Plan (see clause 8.2).The timescale envisaged for the variation to the Louth County Development Plan appears at the time of the MDA to have been in the order of two years (see clause 8.2).

17. The "Scheme" is defined in the MDA as "the scheme of development to be undertaken pursuant to this Agreement in accordance with the Overall Scheme Plan".

18. The Overall Scheme Plan is defined as "the master plan to be prepared by the Developer and to be approved by Murphy or otherwise agreed or determined pursuant to the provisions of clause 8.3 hereof".

19. As appears at the date of the MDA, the Overall Scheme Plan had not been prepared, approved, agreed or determined. The MDA is therefore, in essence, an agreement with certain shared objectives to carry out an undetermined development. It is an agreement which attempts to set out the procedures by which the actual development to be carried out will be drawn up, prepared and agreed between the parties or in the absence of agreement, how it will be determined and how it will be implemented. The initial procedures as provided for in the MDA were as follows: the plaintiff was to ensure that the Preliminary Scheme Plan was prepared for discussion between the parties within six months of the MDA (clause 8.1). The MDA is silent as to what was to be contained in the Preliminary Scheme Plan. By contrast, the MDA contains relatively detailed provisions in relation to the preparation, agreement or other determination of the Overall Scheme Plan. Clause 8.3 provides: -

> "The Developer covenants with Murphy to prepare the Overall Scheme Plan within 6 months from the date of approval by Murphy of the Preliminary Scheme Plan such approval not to be unreasonably withheld or delayed for the development of the Lands. The parties agree that the Overall Scheme Plan shall optimise the development potential of the Lands consistent with the County Louth Development Plan and/or the Draft County Louth Development Plan with a view to meeting perceived market demand for the potential owners and/or occupiers of the various parts of the Lands. The parties acknowledge that the Overall Scheme Plan must be reasonably consistent with the County Louth Development Plan. The Overall Scheme Plan shall provide for the development of the Lands in a manner reasonably consistent with the objectives set out in the County Louth Development Plan. The Developer shall consult with Murphy in relation to the form and content of the Overall Scheme Plan during the course of its preparation. The Developer shall use all reasonable endeavours to submit the Overall Scheme Plan for the final approval of Murphy by the relevant Key Date. Murphy shall furnish his approval or rejection of the Overall Scheme Plan within 14 days after submission of same by the Developer to Murphy and where Murphy objects to the Overall Scheme Plan he shall do so in writing within the said 14 day period and shall also state the component or components to which it objects, the reasons therefore and Murphy's alternative proposal (if appropriate), all in reasonable detail. Where no such notice of rejection is received by the Developer from Murphy within the said 14 day period the said Overall Scheme Plan shall be deemed approved by Murphy. In the event of an objection being made by Murphy the parties shall endeavour within 14 days of the objection having been made to

> resolve such objections on an amicable basis having regard to the provisions of this clause 8.3. If following the said period of 14 days a resolution has not been achieved between the parties, the Developer and Murphy shall jointly endeavour to agree upon the terms and conditions of an architectural competition to design the Overall Scheme Plan and to agree upon a list of architects to be invited to participate in such competition. In the event of the parties failing to agree upon the said terms and conditions of the said architectural competition (which shall in any event incorporate an obligation on the part of the participants to adopt the land uses permitted for the Lands as designated by the Planning Authority) or the list of architects to be invited to participate in the said competition or on the winner of such competition either party may refer to the determination of same to the Independent Architect. The Independent Architect shall be entitled to request oral or written submissions by or on behalf of the parties and shall give his decision within the earlier of (i) 1 month of being requested to act where no such submissions are sought and (ii) where written or oral submissions are sought by the Independent Architect 14 days after the date on which the Independent Architect stipulates not being longer than 30 days on which the said written and/or oral submissions must be given to the Independent Architect. The scheme submitted by the winning architect (whether agreed or determined) shall then constitute the Overall Scheme Plan or by agreement of the Developer and Murphy (such agreement not to be unreasonably withheld or delayed by either party requested to so agree). Where the relevant Area Action Plan and /or variation of the Louth County Development Plan is in conflict with the Overall Scheme Plan, the parties agree to make such amendments to the Overall Scheme Plan as are appropriate in order to make the same comply with the said Area Action Plan and/or the variation to the Louth County Development Plan. The preceding provisions concerning approval by Murphy of the Overall Scheme Plan shall apply to any such variation".

20. Notwithstanding the more detailed provisions, there remain some uncertainties. The Overall Scheme Plan is to be "reasonably consistent with the County Louth Development Plan" and to provide for the development of the lands "in a manner reasonably consistent with the objectives set out in the County Louth Development Plan". It is not clear whether that provision refers to the County Louth Development Plan in existence at the date of the MDA or subsequent to the envisaged variation. As the then existing zoning was agricultural, it appears more likely to have been the latter. However, having regard to the envisaged timescale for the preparation of the Overall Scheme Plan (6 months after approval of Preliminary Scheme Plan) and that for the adoption of a variation as set out in clause 8.2 i.e. 31st December, 2002, it appears as if the MDA envisaged the preparation of an Overall Scheme Plan in advance of the variation to the County Louth Development Plan. There is also provision for amendment to the Overall Scheme Plan where it not consistent with the County Louth Development Plan in the final section of clause 8.3 above. I will return to this provision later in the judgment as there is dispute about its meaning.

21. The Overall Scheme Plan was in fact not prepared until after rezoning of the Tullyallen lands following the adoption of the Louth County Council Development Plan 2003 and the Area Action Plan in July, 2004. As the defendant is not pursuing any alleged breach by the plaintiff of its obligations under clause 8.3 prior to January, 2005 it is not necessary to resolve all of the above uncertainties in the meaning of clause 8.3 . I will return to certain of these later in the judgment.

22. Subsequent to approval of the Overall Scheme Plan, the next step envisaged is the submission by the plaintiff of all or part of the Overall Scheme Plan to the planning authority for planning permission. Clause 8.4 provides:-

> "The Developer shall use all reasonable endeavours, subject to its approval by Murphy or its determination by the Independent Architect, to submit all or part of the Overall Scheme Plan to the Planning Authority for Planning Permission by the relevant date specified for such submission in the Key Dates *PROVIDED ALWAYS* that in the event of the approval of the Overall Scheme Plan being delayed on account of a failure of the parties to agree upon same, the said relevant date so specified in the Key Dates shall be extended accordingly".

23. The relevant Key Date for making the planning application is at paragraph 3 of Appendix 2. This provides:-

> "3 months from the later of (i) date of final approval of the Overall Scheme Plan or (ii) the date on which the Lands are rezoned for commercial purposes, or the adoption of an Area Action Plan by the relevant statutory authority which is not subject to Judicial Review proceedings by a third party or if they are so subject the same has been determined upholding such re-zoning or Area Action Plan".

24. Clause 7.1 contains a general provision that the parties use their "Best Endeavours" to achieve the objectives set opposite the respective dates in the key dates. 'Best endeavours' is defined but 'reasonable endeavours' is not defined in the MDA.

25. The MDA then contains relatively detailed provisions in relation to the actual carrying out of the development, the disposal of sites by way of ground leases, provision for a management company and other ancillary provisions. The only relevance of these provisions to the issues which have to be decided herein is to observe that in many clauses there are provisions for agreement of certain matters between the parties or failing agreement, the determination by a relevant independent third party.

26. There are three further aspects of the MDA which appear relevant to the issues to be determined. Firstly, the MDA is to remain in being for a long period. The "Term" of the MDA is defined as the period of twelve years "commencing and computed in accordance with clause 4 and any extensions thereof as provided for in this Agreement". Clause 4 provides that the term shall be calculated from the date which is two months and one day after the date on which the plaintiff obtains a planning permission in respect of the Overall Scheme Plan on terms and conditions reasonably satisfactory to it and where no Judicial Review proceedings are instituted (with certain detailed provisions for extensions in the event of Judicial Review proceeding). That commencement date is itself a date which is not envisaged to occur for many years after the parties entered into the MDA

27. Secondly, the defendant is given an express right to terminate the agreement in clause 31 but only in two sets of circumstances; the financial failure of the plaintiff or a failure to achieve Key Dates 6 and/or 7 for other than Market Conditions (as defined). Clause 7.2 contains very detailed provisions for the extension of the Key Dates at paragraphs 6 and 7 of Appendix 2 . Those dates relate to the date for construction of a minimum of 100,000 sq.ft. and completion of twenty per cent of the infrastructural works in respect of the entire site and the date for completion of the scheme. There are no similar provisions in relation to either the extension of the Key Dates for approval of the Overall Scheme Plan or the lodging of planning permission or any right to terminate the MDA for any default in relation thereto.

28. Thirdly, the parties at clause 28 agreed as follows:-.

> "The parties acknowledge that in achieving the objectives set out in clauses 2 hereof they shall act bona fide towards one another and give to each other all assistance which would be reasonably required for the purpose of the implementation of this Agreement and completion of the Scheme. If for any reason full effect cannot be given to any

term, condition or provision of this Agreement then the parties shall negotiate in good faith in order to agree the terms of a mutually acceptable variation of or alternative provision to the term, condition or provision in question. Where such variation or alternative provision cannot be agreed upon the parties shall submit to the decision of the relevant Independent Expert appropriate to the dispute in question. If the relevant Independent Expert is not so stipulated and the parties cannot agree on which Independent Expert is appropriate to determine the dispute then each party's stance on the issue in question shall be set out in a Case for Counsel for an Opinion from such Senior Counsel as the parties may agree upon or failing agreement within 7 days to be nominated on the application of either party in writing by the President or next available officer for the time being of the Law Society of Ireland and the Opinion of such Senior Counsel shall be final and binding upon the parties. The parties agree that failure to implement a provision of this Agreement or the invalidity, illegality or unenforceability of any provision hereof shall not affect or impair the continuation in force of the remainder of this Agreement."

Position achieved by January 2005

29. In late 2003/early 2004, agreement was reached that two plots of the lands known as "the Berrill and Byrne Options" be released from the MDA on condition that the defendant pay €50,000 to the plaintiff on the disposal of each.

30. The plaintiff and defendant made submissions to Louth County Council in relation to the zoning of the Tullyallen lands. In July, 2004 Louth County Council approved the Local Area Plan for the north Drogheda environs prepared by Strategic Planning Alliance. In the Local Area Plan, the lands subject to the MDA to the west of the Tullyallen M1 interchange were zoned for tourism related facilities and developments. These were stated to include "hotels, tourist accommodation, as part of an integrated tourism complex and facilities, visitor facilities, interpretative centre, motorway service facilities, tourist retail outlets, restaurant, public house, tourist information, parking, cycle hire and other ancillary commercial and leisure facilities that support the development of the Boyne Valley for tourism". The Tullyallen lands to the east of the interchange were zoned for residential and industrial uses.

31. In August, 2004 Murray O'Laoire, architects, on the instructions of the plaintiff, commenced preparing what was referred to as a "master plan" for the Tullyallen lands. Whilst the Local Area Plan did not require a master plan for the Tullyallen lands the planning officials had indicated one would be required. There were discussions between the plaintiff and the defendant in relation to the proposals in the autumn of 2004.

32. In August, 2004 Dundalk Town Council granted planning permission for a factory retail outlet project at Ballymascanlon to a third party.

33. In early November, 2004 a presentation of the scheme drawn up by Murray O'Laoire, architects, for the lands at Tullyallen was given to Mr. Murphy and Ms. Rooney. At a meeting held at the Expresso Bar they expressed oral agreement with the proposals. The proposals were for tourist and leisure facilities which included a factory retail outlet centre to the west of the motorway and a residential development to the east of the motorway.

34. By an email sent on 12th November, 2004, by Ms. Rooney, agreement was expressed by her on behalf of herself and Mr. Murphy with what she describes as "the first draft proposals for the Tullyallen roundabout". Agreement was given to the development of those proposals for presentation to the Local Authority.

35. In November, 2004 the defendant completed the purchase of the Tullyallen lands (other than the Byrne and Berrill lands) at a cost of approximately €16 million.

36. In early December, 2004 Mr Murphy and Ms Rooney went with representatives of the plaintiff to view two factory retail outlet centres in the UK.

37. On 16th December, 2004, there was a meeting with planning officials of Louth County Council to present to them the proposals. On the following day (17th December), Mr. Sean O'Laoire (of Murray O'Laoire) received a phone call from the Senior Planner present to clarify the position in relation to the retail element of the proposals. The official confirmed that the County retail strategy permitted only one out of town outlet-type retail facility and that such permission had been granted in Dundalk but was currently under review by An Bord Pleanála. He warned that should the permission be confirmed by An Bord Pleanála that such use could not be considered at the Tullyallen site.

38. By letter dated 14th January, 2005, the solicitor for the plaintiff wrote to the solicitor for the defendant enclosing a letter from the plaintiff to the defendant in the following terms:-

> **"Re: Master Development Agreement dated 21st December 2000 ("Agreement")**
>
> Dear Sirs
>
> We now attach the Overall Scheme Plan for the purposes of the Agreement and shall be obliged for your formal confirmation that this Overall Scheme Plan is now agreed for the purposes of clause 8.3 of the Agreement. For the avoidance of doubt, the parties acknowledge that the Overall Scheme Plan encompasses the Preliminary Scheme Plan as required by clause 8.3 of the Agreement.
>
> This letter is submitted in duplicate. Please countersign the duplicate to signify your agreement with its terms and return the duplicate to us.
>
> Yours faithfully"

39. The document enclosed as the Overall Scheme Plan was in diagrammatic form showing the types of development to be carried out on different portions of the Tullyallen lands. It is not now in dispute that the document represented the then proposals which had been presented in detail to the defendant in November, 2004 and was capable of being an "Overall Scheme Plan" for the purposes of the MDA..

40. The solicitor for the defendant sent a formal acknowledgement confirming that he was taking his "client's instructions" on 17th January, 2005. The requested confirmation was not received. Neither was an objection received as provided for by clause 8.3 of the MDA. As no Notice of Rejection was received from the defendant within fourteen days, in accordance with clause 8.3 of the MDA, the Overall Scheme Plan was deemed approved by the defendant. The intention of clause 8.3 appears to be that such deemed approval

occurs at the expiry of the fourteen days for objections. At earliest, this was 28th January, 2005.

41. It is relevant to note that while there now appears consensus between the parties that there was an Overall Scheme Plan either approved or deemed approved by the end of January, 2005 no such position was expressly taken by either party in 2005. The plaintiff did not follow up the letter of 14 January, 2005, (in the absence of a substantive response) with an assertion that the Overall Scheme Plan was now deemed approved in accordance with clause 8.3 of the MDA. The defendant maintained during the summer of 2005 that the plaintiff had not complied with clause 8.3 in relation to an Overall Scheme Plan. This lack of clarity as to the then status of an Overall Scheme Plan under the MDA coloured the subsequent dealings between the parties.

Alleged breach of contract for failure to lodge planning application

42. The events subsequent to January, 2005 are best considered in the context of the issues which have to be determined in this judgment. The defendant is correct in its submission that the plaintiff must have complied with the material terms of the MDA to be entitled to an order of specific performance. As, on the facts herein, the defendant now accepts that the MDA was alive and well and capable of being enforced in January, 2005, the Court is not concerned with any alleged breach by the plaintiff prior to that date. The only alleged breach of the terms of the MDA subsequent to January, 2005 is the admitted failure by the plaintiff to lodge an application for planning permission for the Overall Scheme Plan deemed approved in January, 2005.

43. Clause 8.4 of the MDA obliges the plaintiff to "use all reasonable endeavours" to submit all or part of the Overall Scheme Plan to the planning authority for planning permission by the relevant Key Date. The relevant Key Date for the making of a planning application, as appears from the extract from Appendix 2 set out above, is three months from the later of the date of final approval of the Overall Scheme Plan or two other dates which, on the facts, predated that date.

44. There was a lack of clarity in the evidence of witnesses, both of the plaintiff and the defendant, as to the nature of the approvals given by or on behalf of the defendant to the then proposals, both orally in November 2004 and in the email from Ms. Rooney of 12th November, 2004. There were differing views as to whether the proposals were a Preliminary Scheme Plan or an Overall Scheme Plan for the purposes of the MDA. The defendant never suggested, in response to the letter of 14th January 2005 seeking approval for the Overall Scheme Plan in accordance with clause 8.3 of the MDA, that approval had already been given.

45. On the facts, I conclude that there was no formal approval by the defendant of the Overall Scheme Plan for the purposes of the MDA and hence the Overall Scheme Plan was deemed approved at the earliest on 28th January, 2005, pursuant to clause 8.3, in the absence of a notice of rejection within 14 days. Accordingly, the plaintiff, in accordance with clause 8.4, became obliged to use "all reasonable endeavours" to submit all or part of the Overall Scheme Plan for planning approval within three months of 28th January, 2005 i.e. on or before 28th April, 2005. It is undisputed that no such planning application was lodged.

46. The reason for which no such planning application was lodged was that the Overall Scheme Plan deemed approved in January, 2005 included amongst the tourism/leisure developments on the west side of the interchange at Tullyallen, a retail factory outlet. The County Louth, published, Retail Strategy or Guidelines permitted of only one out of town outlet-type retail facility. Permission had been given by Dundalk Town Council in August 2004, for such an outlet close to the Ballymascanlon interchange on the M1. The plaintiff in particular, through Mr Barrett, appears to have been confident that the decision would be reversed on appeal. However, on 27th February, 2005, An Bord Pleanála upheld the permission. The plaintiff contends that by reason of the decision of An Bord Pleanála planning permission could not be obtained for the Overall Scheme Plan as then proposed and deemed approved. There is no dispute that this was the factual position.

47. The parties became aware of the decision of An Bord Pleanála on or about 3rd March, 2005. A meeting was called for 30th March, 2005, attended by Mr. Dwyer and Mr. Barrett and two other executives of Treasury Holdings, Mr. Twohig and Mr. Tincknell, on behalf of the plaintiff, and Mr. Murphy and Ms. Rooney on behalf of the defendant. On the evidence given in relation to that meeting and the contemporaneous notes prepared by Mr. Twohig and Ms. Rooney, I have concluded that there was a general acceptance at that meeting by all present that then Overall Scheme Plan deemed approved, could not now proceed with the inclusion of a factory retail outlet.

48. At that meeting, the plaintiff's representatives introduced a concept then entitled "Best of Ireland Specialist Retail Centre" to replace the factory retail outlet in the Overall Scheme Plan. The concept was of a multi-tenanted development of Irish manufacturers and producers headed by anchor tenants such as Avoca, John Rocha, Blarney Woollen Mills, Kilkenny Design Centre, etc. The plaintiff appears to have been trying to introduce a retail concept which would be permissible under the tourist retail zoning and not in conflict with the Louth retail strategy which precluded a second factory retail outlet in the county. I find that at that meeting there was acceptance on behalf of the defendant that the plaintiff should pursue the revised proposals and report back to Mr Murphy and Ms Rooney. A further meeting was to be held within a month.

49. By letter dated 29th April, 2005, a copy of the brochure was sent to Mr. Murphy and Ms. Rooney and their questions invited and opinions sought as to how the brochure might be improved. Mr. Twohig, in the same letter, reported that meetings had been held with some leading Irish designers but that others were still to be met and suggested a meeting be left over until that had been done. An email response was sent by Ms. Rooney saying they had no objection to the course proposed.

50. A further meeting between representatives of the plaintiff and Mr. Murphy and Ms. Rooney, on behalf of the defendant, was held on 29th June, 2005. Prior to the meeting, Mr. Murphy and Ms. Rooney were given a note prepared by Mr. Twohig entitled "Development Project Update - Site at Tullyallen, County Louth, 21st June, 2005". This records further meetings held with proposed tenants for the intended Best of Ireland Specialist Retail Centre. It also records the commencement of design work for both the western part of the site and the residential site to the east of the motorway. It recommends a planning application be prepared in the near future.

51. At the meeting on 29th June, Mr. Murphy appears to have raised for the first time the preparation of a separate planning application for the residential development on the eastern side of the motorway. He made the understandable point that he had now expended approximately €16 million on the acquisition of the lands and that the residential development to the east could go ahead independently of the tourism development on the western side of the motorway.

52. As will become apparent from the subsequent events, the parties never agreed upon a variation to the Overall Scheme Plan deemed approved in January, 2005. The plaintiff sought approval to a revised Overall Scheme plan by letter of 5th July, 2005, but it is not contended that any such formal approval was ever given. The alleged breach of the MDA is that the plaintiff failed to submit the Overall Scheme Plan deemed approved in January, 2005 with the factory retail outlet for planning permission. It was never asserted on behalf of the defendant in the summer and autumn of 2005 that this should be done. Further, no such breach was asserted or particularised in the pleadings or replies to particulars in advance of the hearing of this action.

53. I have concluded that the MDA does not impose an obligation on the plaintiff to lodge an application for planning permission for an Overall Scheme Plan in circumstances where it had become apparent before the Key Date that any such application was doomed to failure. The Key Date was 28th April, 2005. The obligation in clause 8.4 is to "use all reasonable endeavours" to lodge such a planning application on or before the Key Date. "Reasonable endeavours" is not defined for the purposes of the MDA.

54. In clause 7.1 the parties agree to use "Best Endeavours " to achieve the objectives set opposite the respective Key Dates. "Best Endeavours" is defined in clause 1.1 as meaning:

> "An obligation to act in a diligent, efficient and prudent manner and devoting such resources as a diligent, efficient and experienced property owner/property developer would having regard to all the circumstances prevailing, undertake to achieve the relevant objective".

55. I accept the submission made by Counsel for the plaintiff that a "reasonable endeavours" obligation must be at least one step down from a "Best Endeavours" obligation in the MDA and that therefore the obligation under clause 8.4 must be something less than the obligation in accordance with the definition of "Best Endeavours". Whilst clause 7.1 in its general application includes the Key Date by which the planning application should be lodged, as clause 8.4 is a particular clause relating to the planning application it appears probable that the reasonable endeavours obligation applies.

56. The purpose of lodging a planning application is to obtain planning permission. The relevant objective of lodging a planning application for the Overall Scheme Plan is to obtain planning permission for the Overall Scheme Plan. In circumstances where it had indisputably become apparent that planning permission could not be obtained for the then Overall Scheme Plan, it appears to me, that the MDA could not be construed as including, as part of an obligation to use either reasonable or best endeavours to lodge a planning application by the Key Date, an obligation to devote time, resources and expenditure to preparing and lodging an application which was doomed to failure. In evidence any such application was referred to correctly in my view as a "futile application". Common sense says no diligent or experienced property owner or developer would devote resources to preparing and lodging a futile planning application.

57. On the contrary, it appears to me that the steps taken by the plaintiff subsequent to 3rd March 2005 were consistent with an obligation to use reasonable or best endeavours to lodge a planning application by the Key Date. It appears to me to have been essential in accordance with the scheme envisaged by the MDA, that there be an Overall Scheme Plan which was consistent with the planning objectives of Louth County Council and the Louth County Council Development Plan 2003 prior to an application for planning permission. Following the decision of An Bord Pleanála in relation to the Ballymascanlon project, this required an alteration to the retail element of the then Overall Scheme Plan.

58. Part of the defendant's submission that the plaintiff was in breach of its obligations under clause 8.4 in failing to lodge the "futile" planning application, is based upon its contention that the MDA did not permit amendment of the Overall Scheme Plan in the factual circumstances which pertained after the An Bord Pleanála decision in February, 2005. For the reasons set out later in the judgment I have concluded that the provisions for amendment of the Overall Scheme Plan in clause 8.3 then applied. The plaintiff sought approval from the defendant for an Overall Scheme Plan (which was a variation of the Overall Scheme Plan deemed approved in January, 2005). Such approval was not forthcoming in the context of the MDA.

59. Accordingly, I have concluded that the plaintiff was not in breach of its obligations under clause 8.4 of the MDA in failing to lodge a planning application for planning permission for the Overall Scheme Plan deemed approved in January 2005 prior to the relevant Key Date (28th April 2005).

Attitude of plaintiff after March, 2005

60. The defendant contends that subsequent to the final decision on the Ballymascanlon project, that the plaintiff treated the MDA as at an end. It relies on this factual position, both as a separate ground for opposing the plaintiff's entitlement to an order for specific performance and in support of its submission that the MDA was discharged by reason of frustration.

61. The relevant significant events between March and the meeting of 29th June, 2005 are set out above. I find that in that period the plaintiff did not consider the MDA to be at an end. On the contrary, it sought to prepare a revision to the retail element of the Overall Scheme Plan for which it had sought approval in January 2005 pursuant to clause 8.3 of the MDA.

62. There are two relatively contemporaneous notes of the meeting of 29th June, 2005: one prepared by Mr. Twohig and one prepared, at least within four to five weeks, by Ms. Rooney. I have also had the benefit of evidence from many of the participants at the meeting.

63. I find that the plaintiff, through its representatives present, did not indicate at that meeting that it accepted the MDA to be at an end nor are any of the statements made or actions taken or proposed to be taken, consistent with such a position. There was uncertainty amongst its representatives about the plaintiff's legal position under the MDA. However, this related to a concern that the Key Dates in relation to the preparation of the Preliminary Scheme Plan and Overall Scheme Plan had not been met rather than any perceived inability to proceed with a varied Overall Scheme Plan under the MDA. This uncertainty has also to be viewed in the context of earlier exchanges in 2003, at the time of the negotiations relating to the Byrne and Berrill lands, when the plaintiff sought and was refused express confirmation of extension of certain of the Key Dates and the failure of the defendant to substantively respond to the requested confirmations in the letter of 14th January 2005.

64. It appears to me that there is a clear distinction between the plaintiff's uncertainty as to its position, having regard to allegations made by the defendant that it was in breach of the MDA by reason of its failure to meet Key Dates in relation to the preparation of a Preliminary Scheme Plan, and the Overall Scheme Plan and an acknowledgement by the plaintiff that the MDA was at an end.

65. The defendant again repeated the allegation that the plaintiff was in breach of the MDA by having missed Key Dates through Ms. Rooney at the meeting of 29th June, 2005. Notwithstanding that statement, in so far as is relevant I am satisfied that the impression given by Ms. Rooney at that meeting was that the defendant would proceed with the project under the MDA but that the plaintiff would have to trust the defendant's commitment to the MDA.

66. The next relevant step taken by the plaintiff was the letter of 5th July, 2005 sent by Mr. Barrett on behalf of the plaintiff to Mr. Murphy and Ms. Rooney. With that letter he enclosed an Overall Scheme Plan (with the revisions then made in relation to the tourist retail element) and sought "your formal confirmation by way of signature, on the copy of this letter and its return, that this is now the Overall Scheme Plan as agreed for the purposes of clause 8.3 of the Agreement". The defendant was also asked to confirm by such signature its agreement "that the Overall Scheme Plan encompasses the Preliminary Scheme Plan as required by clause 8.1 of

the Agreement".

67. This letter is consistent with the plaintiff continuing to operate the terms of the MDA and inconsistent with any acceptance by it that the MDA was then at an end.

68. The first response from the defendant was a letter dated 18th July, 2005, expressed to come from Mr. Murphy and which, it became clear in evidence, was drafted by Ms. Rooney. That letter addressed to Mr. Barrett was in the following terms:-

> "July 18, 2005
>
> **Re: Tullyallen Development Project**
>
> Dear Richard,
>
> Thank you for yours of 5th July, 2005 delivered by courier. Our apologies for not responding more swiftly, however, we are within the time frame as per the agreement.
>
> We agree that much progress was indeed made over the last two meetings by your team in their research of the amended proposals. We also understand that this amendment was necessary following the success of the Ballymascanlon Project in securing approval at appeal and as you had not anticipated this it did rather skew your plans, thereby causing further delay.
>
> Whilst we must point out that it is not our intention to withhold any reasonable consents to aid progress in the development and we have at all times been accessible and available when called upon by you to meet, we are not inclined to sign the letter you forwarded in it's present form.
>
> Specifically paragraph three of your letter seeking agreement that the present situation satisfies Clause 8.1 of the agreement and also Clause 8.3 we would have issue with.
>
> We agree that we were given an update of the research and progress made since our previous meeting we would point out that this was in tone and content a fairly casual conversational meeting and we were unaware that we were being sought to give formal approval of the Overall Scheme Plan at this point.
>
> Had this been advised to us prior to our arrival we would have sought more detailed and specific information from those people representing your company at the meeting and would have taken a proper minute of the meeting itself.
>
> However, no doubt we can iron out any issues at our next meeting and we are sure that in the interim you will continue to employ your best endeavours to progress this project as we are some five years now since the signing of the Agreement.
>
> Yours sincerely,
>
> _____
>
> Seamus Murphy"

69. I find from the terms of this letter that the defendant understood the plaintiff's letter of 5th July, 2005, to be one written pursuant to the terms of the MDA. The reference to "the time frame as per the agreement" in the first paragraph appears to be a reference to the fourteen day period in clause 8.3 in which the defendant might indicate its objection to an Overall Scheme Plan. Insofar as relevant, that letter does not appear to indicate that the defendant then considered the MDA to be at an end.

70. However, that letter was then followed by a further letter expressed to be from Mr. Murphy to Mr. Barrett dated 3rd August, 2005. The evidence is that this letter was drafted by the defendant's solicitor. That letter stated:-

> "**RE: PROPOSED TULLYALLEN DEVELOPMENT PROJECT**
>
> Dear Richard,
>
> The correspondence in relation to this matter refers.
>
> Arising from this somewhat intermittent correspondence, and the various inconclusive meetings which have taken place over the past five years, culminating in the meeting of the 29th of June, and your subsequent letter of the 5th July, I have been giving considerable thought to the entire issue surrounding the current situation.
>
> From my perspective the Agreement of the 21st of December, 2000 is no longer operational, due to the fact that none of the targets, or the key dates in relation to those targets, have been achieved. Not only that, but I now find myself in a serious situation where I have been obliged to make a very substantial financial commitment amounting to €16m, where, even at this late stage, there is no guarantee that any return will be achieved in the foreseeable future. Almost five years down the road since discussions were first initiated nothing has been achieved, save considerable actual financial input by me, with no positive outcome in sight. Clearly, the agreement, such as it was, has been frustrated by these excessive delays, which is all the more apparent by your acceptance of this fact in the presentation, at various intervals, of a number of proposed Variation Agreements.
>
> Obviously, the original proposal of a factory outlet/retail park has now been rendered impossible by virtue of the permission obtained for the same thing at Ballymascanlon Roundabout a little further north from my sites, in Dundalk. This was the guiding rationale behind the original agreement, on the basis that should such a development be achieved the spin-offs would render the balance of the lands viable for development.
>
> In the circumstances I take the view that as the agreed development cannot now be achieved, the agreement itself is no longer viable. Even as late as the meeting of the 29th of June there was still no meaningful presentation. In that regard I feel that your statement in your letter of the 5th July that "it is my understanding of the meeting that this scheme was to

your approval" is somewhat disingenuous, as there was no proper scheme put forward, nor was there any suggestion that I had approved of same, as there was nothing to approve of.

I am still willing to consider any realistic proposals which you may have for some portion of the lands, but in view of my exceptionally heavy financial commitments, with no realistic prospect of discharging these on the basis of what we have discussed over the past five years, any proposals must, of necessity, be restricted to a realistic section of those lands, with an immediate prospect of a return in the near future.

I trust you will appreciate the position in which I find myself, albeit with regret, but I have little option but to adopt this course in the present circumstances.

Yours sincerely

_____

Seamus Murphy"

71. This letter indicates that the defendant now considered the MDA to be at an end.

72. The plaintiff's reaction to this letter was to issue a direction that no further work on the project should take place until "this is sorted out". A meeting was then arranged between the persons considered to be the principals i.e. Mr. Barrett, Mr. Ronan and Mr. Dwyer and Mr. Murphy and Ms. Rooney. That meeting took place in the Great Southern Hotel at the airport on 17th August, 2005.

73. There is considerable dispute as to precisely what took place at that meeting. Much of this centred upon a document which had been prepared by Ms. Rooney for the purpose of the meeting and as to whether this was handed over and/or read out in part or in full.

74. It appears unnecessary to resolve these factual disputes. I find that the document was read out at least in part by Ms. Rooney. In so stating, I am not finding and do not intend to find that it was not read out in full. It may have been. The heading and opening two paragraphs of that document are as follows:-

"Proposed Heads of Agreement

for

a New Agreement Relating to a Joint Venture for Development of the Tullyallen Roundabout

between

Seamus Murphy and Drocarne (Treasury Holdings)

As a result of the failure of the original agreement between the parties to achieve the objectives set out in that agreement particularly the failure of Drocarne as the developer and in order to address the changed circumstances and potential development opportunities without further delaying and damaging the landowner (Seamus Murphy's) opportunity to realise a return on his substantial investment we propose that a new agreement be drawn up on the following basis:

> The original agreement between the parties Seamus Murphy (the landowner) and Drocarne (also referred to herein as Treasury Holdings) is defunct by virtue of failure to perform in accordance with agreed key dates and these Heads of Agreement are proposed to form the framework for a properly drawn up NEW agreement between the parties, not a supplement or variation to the original agreement."

75. I am satisfied that at that meeting Ms. Rooney, by reading part or all of the document, made clear to the plaintiff's representatives that the defendant then considered the MDA to be at an end. This position was consistent with the letter of 3rd August, 2005, already sent and received. The reason for which it is unnecessary to resolve the factual dispute as to whether it was all or part of the document is that the only relevant fact I need to decide from that meeting is whether or not the plaintiff's representatives at that meeting accepted the defendant's contention that the MDA was then at an end. I find that they did not for the following reasons.

76. At the meeting, having listened to Ms. Rooney, it is agreed that the representatives of the plaintiff withdrew from the meeting. They then returned with a proposal which in commercial terms was to decouple the development of the residential lands to the east of the M1 motorway from the development of the tourist amenity lands to the west of the motorway. This was stated to meet what the plaintiff's representatives understood to be the then primary concern of the defendant, namely to achieve as soon as possible a cash flow which would enable it pay off the acquisition cost of the Tullyallen lands of approximately €16 million. I am satisfied that the proposal put forward, which following discussion found favour with Mr Murphy and Ms Rooney, is that as set out by Mr. Barrett in his email of 19th August, 2005 to Ms. Rooney. That email was in the following terms:-

> **"Subject: Tullyallen**
>
> Hi Patricia
>
> Further to the very useful meeting we had with you and Seamus yesterday at the Great Southern Hotel, I now set out what (subject to the legal agreements to be drawn up reflecting this) we all talked about. This e-mail is not meant to be binding or infer anything, just set out bullet points for you to agree to for the purposes of drafting legal agreements which
>
> (1) Seamus and Patricia wish to have as much as possible of the acquisition debt of all of the lands paid off through sales cashflows. Once that has been achieved, they are content to take a longer term view of the balance of the lands.
>
> (2) The previously projected rate of cashflow needs to be speeded up.

(3) Treasury understand this and have responded with the following proposal:

(i) Remove Site C (residential development site to the east of the motorway) in the Master Development Agreement ("MDA") from the MDA and place it within a second development agreement between the parties. (This site is marked "Site 2 B" on the enclosed map.

(ii) Proceed to appoint a different architect for this area so that the 2 different firms can progress on the 2 areas of land simultaneously. This ensures quickest possible development. The architects to be suggested will be high density experts (O'Mahony Pike or similar-just waiting to find out which of the top 4 firms in this field have good working relations with the planners and current projects in Drogheda).

(iii) Retention of Area B on yesterday's Fingal Planning Consultants map (enclosed) as the achievement of residential there is dependent on integration with the tourist planning permission.

(iv) Murphys to approve the Scheme Plan for the existing MDA lands asap and also the papers given to them yesterday.

(4) The revised timescales for the 2 agreements will be as follows:

Event	Time	Current Agreement	New Agreement
Produce Residential Preliminary Scheme Plan	4 weeks Hereof		✓
Produce Residential Overall Scheme Plan	6 weeks from Approval of Preliminary Scheme Plan		✓
Date for Making Planning Application for Residential	8 Weeks from Approval of Overall Scheme Plan		✓
Date by which the Developer shall endeavour to achieve Planning Permission	12 months from the date for making the planning application		✓
Produce and approve Tourism Preliminary Scheme Plan	Now	✓	
Approve Tourism Overall Scheme Plan	See Clause 8.3 (6 months from Approval of Preliminary Scheme Plan	✓	
Date for Making Planning Application of the Tourism Sites	3 months from date of final approval of the Overall Scheme Plan	✓	
Date by which the Developer shall endeavour to achieve Planning Permission	12 months from the date for making the planning application	✓	

Ok BY YOU BOTH? Please confirm and we'll get going immediately and make a few quid out of this. I think we can beat the timescales set out above in practice."

77. The above proposals do not evidence an acknowledgement by the plaintiff that the MDA is at an end. They do evidence agreement to a significant amendment or variation to the terms of the existing MDA, namely the removal from it of the lands to the east of the motorway zoned for residential development. They also include other more minor variations as to the timescale for the steps to be taken under the existing MDA in relation to the balance of the lands. The proposals in the table make express reference to the "current agreement" which can only refer to the MDA and to its clauses. The proposals recorded in the email are only consistent with the plaintiff's position that the MDA continued in being and its agreement to make variations thereto and willingness to enter into a new agreement in relation to the lands to be taken out of the existing MDA.

78. By an email sent on 31st August, 2005, Ms. Rooney stated:-

"Richard

Thank you for the summary, yes we agree that those are the points agreed broadly and the basis upon which we are happy to proceed. My apologies for the delay in the response you are already aware of the reasons. We (Seamus and I) are reviewing the papers you gave us and presume that the next step is to arrange a meeting to approve the MDA I await hearing from you.

Regards

Patricia"

79. Whilst the reference in the latter email to a meeting "to approve the MDA" may be considered as ambiguous, there can be no doubt that the email from Mr. Barrett to which broad agreement was given, referred expressly to "2 agreements" and made express references to the "Current Agreement" and "New Agreement" in the table. It does not appear to me that there is any basis upon which Mr Barrett's email of 19th August, could be construed, other than as evidencing intention that the existing MDA would continue with the exclusion of the lands to the east and a revised timetable for the steps to be taken. I am not concerned as to whether the parties reached agreement. I am only determining the issue as to whether the plaintiff's representatives accepted the MDA was at an end by the broad agreement reached at the meeting of 17th August, 2005. I find they did not.

80. On 26th September, 2005, Mr. Williams, the in-house lawyer of Treasury Holdings, sent to Mr. Murphy and Ms. Rooney, draft documents to implement the revised arrangements between the plaintiff and the defendant. These included:

> (a) A supplemental agreement to the Master Development Agreement of December 2005 relating to the exclusion of certain lands and the revised timescale.
>
> (b) A letter confirming approval of the Overall Scheme Plan and providing acceptance that the Key Date schedule has been satisfied to date in relation to the existing MDA.
>
> (c) A shorter form development agreement in relation to the residential site.

81. The plaintiff then proposed that the party to that agreement would be a wholly owned subsidiary of the plaintiff.

82. Those documents are again only consistent with the plaintiff contending for the continuation of the MDA albeit subject to the variations to which it believed there was broad agreement.

83. No substantive response was ever received to those draft documents. Some meetings and contacts took place particularly between Mr. Dwyer and Mr. Murphy in the autumn of 2005. The defendant seeks to rely *inter alia* on a set of minutes prepared by Murphy O'Laoire of 22nd September, 2005, insofar as it refers to a "new" agreement and also refers to the defendant having "withdrawn" and "having re-engaged" on a different basis. It does not appear to me that those minutes can be relied upon to contradict the contemporaneous recording in the email of 19th August, 2005, of what was agreed at the meeting of 17th August, 2005, (and to which broad agreement was given) and the subsequent agreements prepared and sent out to implement such broad agreement. If, as now contended by the defendant, the agreement reached on 17th August, 2005, was that there be an entirely new agreement and there was an acknowledgement that the existing MDA was at an end, one would have expected to see an immediate response to Mr. Williams' letter of 26th September, 2005, to that effect.

84. Accordingly, I have concluded that the plaintiff did not, at any material time in 2005, or prior to the commencement of proceedings accept or acknowledge that the MDA was at an end. It did indicate willingness to agree to a significant variation to the MDA at the meeting of 17th August 2005.

85. At the meeting of 11th January, 2006, the defendant, through its solicitor Mr. Healy, orally informed the plaintiff that it no longer considered itself bound by the MDA.

Variation of overall scheme plan

86. Central to the plaintiff's contention that the MDA has been discharged on grounds of frustration by reason of the admitted inability to proceed with the Overall Scheme Plan deemed approved in January 2005, is the contention that the MDA does not permit of any variation to an Overall Scheme Plan in the factual circumstances applicable herein. This issue is also relevant as already stated to the alleged breach by the plaintiff of clause 8.4 of the MDA. It appears appropriate to consider this issue prior to the defence of frustration.

87. The defendants appear to me correct in their submission that the MDA envisages one Overall Scheme Plan and the development of the scheme in accordance with that Overall Scheme Plan. That appears to me to follow from the joint objective of the agreement as set out in clause 2.1 and a number of the subsequent detailed provisions.

88. However, the defendants do not appear to me correct in their submission that the MDA does not envisage or provide a mechanism for variation to or revision of an Overall Scheme Plan which is deemed approved or agreed in the factual circumstances pertaining herein. My reasons for this conclusion are as follows.

89. The MDA expressly provides for amendment to an approved Overall Scheme Plan in two circumstances, one of which is relevant namely that envisaged in clause 8.3. Also clause 28 provides a relevant mechanism for dealing with obstacles to implementing the MDA for which there is no express provision.

90. The final sentences of clause 8.3 provides:-

> "Where the relevant Area Action Plan and /or variation of the Louth County Development Plan is in conflict with the Overall Scheme Plan the parties agree to make such amendments to the Overall Scheme Plan as are appropriate in order to make the same comply with the said Area Action Plan and/or the variation to the Louth County Development Plan. The preceding provisions concerning approval by Murphy of the Overall Scheme Plan shall apply to any such variation."

91. The plaintiff submits that following the An Bord Pleanála decision granting planning permission for the factory outlet at Ballymascanlon that the Louth County Council Development Plan 2003 was in conflict with the Overall Scheme Plan with the factory retail outlet and hence the parties are obliged by the above provision in clause 8.3 to amend the Overall Scheme Plan to make it comply with the Louth County Council Development Plan 2003. The defendant makes two objections to this submission: firstly, that the proper construction of clause 8.3 is that the amendment only arises if the Overall Scheme Plan is agreed after the adoption of the variation to the County development Plan or the Area Action Plan and not where it is agreed or deemed approved afterwards and secondly, that the plaintiff had not discharged the onus of proving that the Louth County Council Development Plan 2003 was in conflict with the Overall Scheme Plan with the factory retail outlet. Whilst the MDA refers to a variation to the County Development Plan the evidence was that a new Development Plan was adopted in 2003 and that is what is treated as the variation for the purposes of the MDA. Nothing turns on that difference.

92. The amendment provisions in clause 8.3 are not expressly confined to circumstances where the Overall Scheme Plan was approved prior to variation of the Louth County Development Plan. However, the MDA appears to envisage in some clauses an Overall Scheme Plan in a time frame shorter than the anticipated variation to the County Development Plan and consequent rezoning.

Nevertheless, clause 8.3 in the early part relating to preparation of the Overall Scheme Plan states;-

> "The parties acknowledge that the Overall Scheme Plan must be reasonably consistent with the County Louth Development Plan. The Overall Scheme Plan shall provide for the development of the Lands in a manner reasonably consistent with the objectives set out in the County Louth Development Plan."

93. It is common case that a variation was required to the County Development Plan in existence in 2000 to permit development of the Tullyallen lands. If, as required by the above, the Overall Scheme Plan when prepared had to be reasonably consistent with the County Louth Development Plan then this would have had to be done after variation. Thus it does not appear to me that the MDA should be construed as definitely requiring preparation of the Overall Scheme Plan prior to variation of the County Louth Development Plan.

94. The purpose of the requirements in clause 8.3 of consistency with the relevant County Development Plan and Area Action Plan is clear. It is the intent of the MDA that planning permission be obtained from Louth County Council for the Overall Scheme Plan and within a reasonable time frame. In practical terms, this requires the Overall Scheme Plan to be consistent with the Area Action Plan and the then current Louth County Development Plan.

95. Such construction of the MDA is reinforced by the provisions of clause 8.4. In that clause, the defendant has agreed that where the planning authority requests modifications to any of the applications for planning permission, that reasonable variations may be made thereto for the purpose of achieving approval from the planning authority for a scheme "which is reasonably consistent with the Overall Scheme Plan." Further, the MDA does not envisage planning permission not being obtained for the Overall Scheme Plan or a scheme reasonably consistent with it. Clause 8.4 in its final section provides that in the event of further refusals by the planning authority, that the parties agree that;-

> "…one or more further applications (as the particular case may require) shall be prepared and lodged with the planning authority to accommodate the objections of the planning authority with a view to securing a planning permission . . . for a Scheme that is reasonably acceptable to the planning authority and which is reasonably consistent with the Overall Scheme Plan".

96. The failure of the plaintiff to obtain planning permission for the Overall Scheme Plan or a scheme which is reasonably consistent with the Overall Scheme Plan is not stated by the MDA to be a ground upon which the defendant may terminate the MDA.

97. There is nothing in the MDA which either precludes or is inconsistent with a variation to an Overall Scheme Plan subsequent to its approval in circumstances where it becomes apparent that such Overall Scheme Plan, is not then consistent with the relevant Louth County Development Plan with the probable or definitive consequence that it will not obtain planning permission from Louth County Council. On the contrary, the MDA, particularly in clause 8.4, envisages variations being made to the scheme for which planning approval is being sought albeit in a context where such variations are reasonably consistent with the Overall Scheme Plan until such time as there is a scheme which obtains planning permission.

98. Accordingly, in the absence of an express provision confining the amendment provision in clause 8.3 to circumstances where the Overall Scheme Plan is agreed or deemed adopted prior to the variation to (or as happened, adoption of new) Louth County Development Plan, it does not appear to me consistent with the remaining provisions of the MDA to construe it as being so confined. Hence on the construction of clause 8.3, I have concluded that the amendment provision is not confined to a situation where the Overall Scheme Plan is drawn up or agreed before the Area Action Plan or variation to the County Development Plan.

99. The next issue is whether the plaintiff had adduced evidence which establishes on the balance of probabilities that in March, 2005 the Louth County Development Plan 2003 was inconsistent with the Overall Scheme Plan deemed approved in January, 2005 which included the factory retail outlet.

100. Mr. Kearon, the former county engineer with Louth County Council and now in private practice was called by the plaintiff. During cross examination he gave evidence that retail consultants were retained by the County Council to prepare a retail strategy for County Louth as a whole and that their report was now effectively the retail strategy for County Louth which would be considered as part of the overall proper planning and development of the area in the context of a planning application. It was then put to him by counsel for the defendant:-

> "It is in that retail strategy that one finds the statement about one factory outlet, isn't that correct?"

101. To which he replied:-

> "That is correct. I think it was also in the County Development Plan but I couldn't be certain of that. I would have to look up the County Development Plan."

102. Mr. Kearon was not asked by either party to look up the County Development Plan.

103. When during the closing submissions, counsel for the defendant contended that the plaintiff had not proved as a fact that the retail strategy of one factory outlet for County Louth formed part of the County Development Plan, counsel for the plaintiff, without objection from the defendant, was given permission by me to put into evidence an extract from the Louth County Council Development Plan 2003. It appeared appropriate to permit this, albeit late in the proceedings, by reason of the absence of any objection and the fact that the contention that there was no power to vary the Overall Scheme Plan arose at a late stage in the proceedings and never put to plaintiff's witnesses who had given evidence of the variation proposed in the summer of 2005. No such objection had been made by the defendant in 2005.

104. The Louth County Council Development Plan 2003 refers at para. 7.7.2 under a heading of "Retail Strategy for County Louth" to the Retail Planning Guidelines for planning authorities issued under s.28 of the Planning and Development Act 2000 and the Retail Study for County Louth produced in 2001 as required by the Guidelines. It then sets out the recommendation of the study which include that:-

> "a factory outlet centre should be located in County Louth".

105. It then states:-

> "The retail objectives and policies as set out below are derived from those recommended in the retail study."

106. The plan sets out at para. 7.7.3 its Strategic Objectives for retail and then at para. 7.7.4 states that having regard to the strategic objective and the Louth Retail Strategy it will be the policy of the council (*inter alia*:-:

> "To facilitate the provision of a factory outlet centre in the county. The assessment of any application for a factory outlet centre will be carried out in accordance with the principles of sustainable development, the Retail Planning Guidelines 2000 and the Louth Retail Strategy 2002."

107. I find that the policy of Louth County Council, as stated in the Development Plan 2003, is for "a factory outlet centre" in the County. Accordingly, in March, 2005 by reason of the decision of An Bord Pleanála to grant planning permission for a factory outlet centre at Ballymascanlon, County Louth (which decision was not sought to be judicially reviewed and hence a final decision) the Overall Scheme Plan deemed approved in January, 2005, which included a factory outlet centre also to be in Co Louth, was not consistent with the Louth County Development Plan 2003.

108. Hence, I have concluded that subsequent to March, 2005 the amendment provisions in clause 8.3 applied to the Overall Scheme Plan deemed approved in January, 2005 on the facts established herein.

109. It is also relevant to state, that if I am incorrect in the above conclusion, that I have concluded that clause 28 would have then applied to the factual circumstances which pertained following the decision of An Bord Pleanála in February 2005. The Overall Scheme Plan deemed accepted by the defendant was one for which it was then agreed planning permission could not be obtained from Louth County Council. The combined effect of clauses 8.4 and 8.7 of the MDA effectively require the plaintiff to use its reasonable endeavours to lodge a planning application and its best endeavours to procure a planning permission from the planning authority for the Overall Scheme Plan within a period of eighteen months from the date of the application. If the then Overall Scheme Plan is not one for which planning permission could be obtained, then it would appear that those factual circumstances are such that clause 28 applies. As appears from the terms of this clause set out above, it provides *inter alia*:-

> "if for any reason full effect cannot be given to any term, condition or provision of this Agreement then the parties shall negotiate in good faith in order to agree the terms of a mutually acceptable variation or of alternative provision to the term, condition or provision in question".

110. The clause goes on to provide that if such variation or alternative provision cannot be agreed upon, that the parties must submit the decision to the relevant independent expert and then default provisions in the event that that person cannot be agreed upon.

111. The only submission made on behalf of the defendant against the then application of clause 28 to the facts herein after March, 2005 is that when properly construed it only applies to the completion of the scheme in accordance with the Overall Scheme Plan and does not apply at any earlier point in time in the procedures envisaged by the MDA. I do not consider there is any basis for so construing clause 28. The relevant provision applies whenever "full effect cannot be given to any term . . ." of the MDA.

112. If clause 28 rather than the amendment provision in clause 8.3 applied then the parties were bound to negotiate and a variation to the Overall Scheme Plan is within the type of variation which might be agreed or in default, determined by a relevant expert to resolve the obstacle to giving full effect to the terms which require the plaintiff to use its reasonable endeavours to lodge a planning application and its best endeavours to procure a planning permission from the planning authority for the Overall Scheme Plan.

Frustration

113. The defendant contends that the MDA has been discharged by application of the doctrine of frustration by reason of the permission granted by An Bord Pleanála for the Ballymascanlon factory retail outlet in February, 2005 as such decision rendered impossible the implementation of a scheme in accordance with the Overall Scheme Plan deemed approved in January, 2005 as planning permission would not be obtainable for same (by reason of inclusion of a factory retail outlet scheme) from Louth County Council.

114. It is not in dispute that after the An Bord Pleanála decision, planning permission would not have been obtained for the Overall Scheme Plan of January, 2005 as it included a factory outlet retail scheme. The defendant correctly points out that the plaintiff itself relies upon the decision in relation to the Ballymascanlon project as an unforeseen event which justifies it not lodging an application for planning permission for the Overall Scheme Plan of January, 2005.

115. The legal issue which this Court has to determine is whether the MDA should be considered as discharged on the ground of frustration by reason of the development of the Overall Scheme Plan deemed approved in January, 2005 becoming impossible.

116. The plaintiff relies upon the relevant statement of principle in *Chitty on Contracts, Volume 1, General Principles*, 29th Ed., (London Sweet and Maxwell, 2004), par.23-001(at p.1311) that:-

> "A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract".

117. The principles which should be applied in this jurisdiction in relation to the frustration of contracts were considered by the Supreme Court in *Neville & Sons Ltd. v. Guardian Builders Ltd*. [1995] 1 I.L.R.M.1. The defendant submits that the relevant principles are as stated by Blayney J. at p.7 where he said:-

> "It is necessary first, therefore, to determine what are the principles which should be applied in relation to the doctrine of the frustration of contracts.
>
> I am satisfied that this issue in effect falls into two separate sub-questions. The first being the necessity to define the circumstances in which frustration takes place and the second being to determine the basis on which, if those circumstances do occur, the court has power to declare that the contract is at an end.
>
> The circumstances in which frustration takes place were defined as follows by Lord Simon in his speech in *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] AC 675 at p.700F:
>
> 'Frustration of a contract takes place when there supervenes an event (without default of either party and for

> which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerous-ness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.'
>
> In the same case Lord Roskill in his speech analysed the circumstances in which frustration occurs in terms which I am satisfied are virtually identical in their effect where at p.717D he stated as follows:
>
> 'There must have been by reason of some supervening event some such fundamental change of circumstances as to enable the court to say; 'this was not the bargain which these parties made and their bargain must be treated as at an end' - a view which Lord Radcliffe himself tersely summarised in a quotation of five words from the *Aeneid: non haec in foedera veni*.'
>
> I am satisfied that these two quotations from the decision of the House of Lords represent a correct statement of the principles of law applicable to frustration in our law and I am prepared to adopt them as being a correct statement of principle."

118. He went on further to state at p8 that:-

> " What has to be determined is whether there were in the present case circumstances such as those outlined in the speeches of Lord Simon and Lord Roskill in the case of *National Carriers Ltd v. Panalpina (Northern) Ltd*. Did an event supervene which so significantly changed the nature of the understanding obligations of Guardian from what the parties could reasonably have contemplated at the time the licence agreement was entered into? Or was there by some supervening event some such fundamental change of circumstances that the court could say, 'this is not the bargain that these parties made and their bargain must be treated as at an end'? In my opinion the answer to both these questions is no".

119. The defendant submits that in applying such principles to the facts herein, I should take into account the approach of the English courts in considering the "frustration of the adventure or of the commercial or practical purpose of the contract". The defendant referred to the explanation of this concept in Treitel, *Frustration and Force Majeure*, 2nd Ed., (Thompson Sweet and Maxwell, 2004) at par.2-046 (at pp.67 and 68) where it states:-

> "It makes sense to say that a contract may be frustrated by frustration of the adventure; but to say that a contract is frustrated by frustration of contract makes no sense, or is mere repetition. Most commonly, 'frustration of the adventure' refers to cases in which performance has not become permanently impossible, but has been merely affected by temporary obstacles which are later removed: for example, by temporary requisition or temporary delay to the arrival of a ship. The point is well put in a definition of 'frustration of the adventure' by Bailhache J. as 'the happening of some unforeseen delay . . . of such a character as that by it the fulfilment of the contract in the only ways in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects that both parties to the contract had in view when the contract was made . . .'; this definition was later approved in the Court of Appeal though the actual decision in which it was given was reversed. Delay may not be the only illustration of 'frustration of the adventure', but the phrase is generally used to refer to cases of discharge where the impossibility which supervenes is either not total or not permanent."

120. It appears to me that the same essential principle underlies the authorities cited with approval by Blayney J. and those referred to in Treitel in its explanation in terms of frustration of the adventure. The Court in each is referred back to an examination of the agreement or bargain made between the parties at the time they entered into the contract alleged to be now discharged on the ground of frustration and a comparison between such agreement or bargain or its then performance and any future performance of the contact in the altered circumstances. There is no difference in the temporal approach of the two sets of authorities. The Court must compare the contract or position of the parties at the time the contact was entered into with that if there were to be performance of the contract after the allegedly frustrating event.

121. The only difference between the two approaches appears to be in what the Court should examine at the two dates. In *National Carriers Ltd v. Panalpina (Northern) Ltd* Lord Simon makes the comparison by reference to obligations or rights of the parties under the contract at the time it was entered into and the outstanding obligations and rights if they were to be held to its performance in the altered circumstances. Lord Roskill compares the bargain made (presumably as evidenced by the contact) and what it would be if performed in the altered circumstances. In the decisions referred to by Treitel, many appear to compare the performance intended by the contract when made or what was intended, or as termed "the adventure" with that which would be achieved by the performance of the contract in the altered circumstances. As put by Bailhache J. in *Admiral Shipping Company, Limited v. Weidner, Hopkins & Co* [1916] 1 K.B. 429 at 437 the court must consider whether the fulfilment of the contract in the altered circumstances:-

> "will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract…".

122. Whether the Court should consider the alleged frustration in terms of changed obligations or rights for the parties; change of bargain or change in what will be achieved by the performance of the contract in the altered circumstances seems to depend on the facts of the case. In some instances this may be different ways of considering very similar questions.

123. Applying the above principles to the facts found in these proceedings the questions which this Court should now consider appear to be:

> · whether, notwithstanding the admitted inability to develop or implement the Overall Scheme Plan (with the factory retail outlet) deemed approved in January, 2005 the Court should now hold that if the MDA continued to be performed with a varied Overall Scheme Plan, this would mean that the plaintiff and defendant cannot now accomplish the object or objects that the parties had when they entered into the MDA in December 2000;or
>
> · as put by Blayney J. does the inability to develop or implement the Overall Scheme Plan (with the factory retail outlet) deemed approved in January, 2005 mean that the future performance of the MDA with a varied Overall Scheme Plan is not the bargain which the plaintiff and defendant made when they entered into the MDA in December, 2000.

124. It does not appear to me that the alternative question put by Blayney J. namely, whether this event so significantly changes the nature of the outstanding obligations imposed on the defendant, is relevant to the facts herein.

125. At the time the parties entered into the MDA there was no agreement as to the nature of the Overall Scheme Plan for the proposed development. The defendant asserts that a factory outlet scheme was in contemplation from the outset. I am not satisfied that they have so established on the facts herein. It does not appear to me that the facts proved in evidence support anything more than that it was a possible element of a development which had been referred to on one or two occasions. .

126. The essence of the MDA entered into by the parties was that it was an agreement for an as yet unspecified and undefined form of development. The fact that the parties have been prevented from developing a scheme which includes a factory retail outlet, does not appear to me to prevent the parties from accomplishing either their joint or separate objectives as recorded in clause 2 of the MDA. These were the objects which they had in view at the time they entered into the MDA. There is no evidence to suggest otherwise. Those objectives do not include the development of a scheme which necessarily includes a factory retail outlet.

127. A similar analysis leads to the conclusion that the development of a scheme, which of necessity included a factory retail outlet, did not form part of the bargain between the parties when they entered into the MDA. Hence, the inability to develop a scheme with a factory retail outlet does not result in a fundamental change such that the parties bargain made in December, 2000 is at an end.

128. The alternative basis upon which the defendant contends that continued performance of the MDA would not fulfil the objects of the parties to the MDA in December, 2000 or that there has been a fundamental change in the bargain, is that the MDA envisages the development of the scheme in accordance with the Overall Scheme Plan deemed approved in January, 2005 and that the there is no provision for amendment to or variation of the Overall Scheme Plan once approved on the facts which arose herein in March, 2005.

129. In the earlier part of this judgment I have analysed the relevant provisions of the MDA in relation to a variation of the Overall Scheme Plan deemed approved in January, 2005 and for the reasons set out reached a conclusion that the MDA provides in clause 8.3 for variation to the Overall Scheme Plan in the circumstances which arose following the An Bord Pleanála decision relating to the factory outlet scheme at Ballymascanlon. . I have also concluded that if the amendment provision in clause 8.3 did not apply, that clause 28 applied on the facts herein and bound the parties to negotiate and enabled them inter alia to agree on a variation to the Overall Scheme Plan.

130. Accordingly, I have concluded that;

> · notwithstanding the admitted inability to develop or implement the Overall Scheme Plan (with the factory retail outlet) deemed approved January, 2005 the continued performance of the MDA, with an amended Overall Scheme Plan (without a factory retail outlet), does not mean that the plaintiff and defendant cannot now accomplish the object or objects that the parties had when they entered into the MDA in December, 2000;and
>
> · the inability to develop or implement the Overall Scheme Plan with a factory retail outlet does not mean that the performance of the MDA with a variation to the Overall Scheme Plan is not the bargain which the plaintiff and defendant made when they entered into the MDA in December, 2000.

131. In referring above to a varied or amended Overall Scheme Plan I am of course referring to one which is consistent with the objectives of the parties as set out in the MDA. The defendant did not contend that the variation to the retail element of the Overall Scheme Plan proposed in the summer of 2005 was not consistent with its objectives for the MDA.

132. Hence I have concluded that the MDA did not terminate by reason of frustration following the permission granted by An Bord Pleanála for the Ballymascanlon factory retail outlet in February, 2005.

Relief

133. In accordance with the above findings and conclusions, it follows and the Court now holds that, the MDA entered into in December 2000 remains in force between the parties (save in respect of the Byrne and Berrill lands).

134. The plaintiff, as its primary relief, has sought an order for the specific performance of the MDA. The defendant made no submission in the course of the hearing against the granting of an order for specific performance of the MDA as originally entered into (save in respect of the Byrne and Berrill lands) in the event that the Court found that the MDA remains in force between the parties.

135. As these are adversarial proceedings and the plaintiff has sought an order for specific performance as its primary relief and not waived that claim, and the defendant has made no submissions against the Court exercising its discretion to grant an order for specific performance in the event that the MDA was held not to have come to an end, it appears that the Court should now grant the relief sought by the plaintiff and make an order for specific performance of the MDA.

136. I wish to add that the making of an order for specific performance of the MDA entered into in December 2000 (save in respect of the Byrne and Berrill lands) does not of course preclude the parties from agreeing to a variation of the MDA. The plaintiff already indicated a willingness to do so in August 2005 to meet the then financial concerns of the defendant following the purchase of the lands. I t is to be hoped that once this litigation is over that the parties will be able to reach agreement on any appropriate variations.

137. The decision to grant an order for specific performance precludes the necessity of considering any aspect of the plaintiff's claim for damages. Counsel for the plaintiff clarified in the course of the hearing that it was not seeking any damages if such an order were granted.