Neutral Citation [2012] IEHC 601

THE HIGH COURT

[2005 No. 3374 P]

BETWEEN

THE MINISTER FOR COMMUNICATIONS, MARINE AND NATURAL RESOURCES

PLAINTIFF

AND

FIGARY WATERSPORTS DEVELOPMENT COMPANY LIMITED

DEFENDANT

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 19th day of January 2012

1. This is the second judgment given in this case. The first, delivered on the 3rd September 2010, "the main judgment", which dealt with the issues as pleaded and pursued at trial, left over certain matters which resulted therefrom, so that the parties could have an opportunity of making further submissions thereon. That having now been availed of, this judgment deals with these outstanding matters. First however, a brief word about the background, so as to contextualise this decision.

2. By Indenture dated the 261h April 1993 ("the lease"), the Plaintiff demised an area of foreshore, comprising ten hectares or thereabouts, situated at Fahan, County Donegal, upon which the Defendant was obliged to construct a marina and thereafter to operate that facility as such. The term was 99 years from the 1st January 1993, and the marina was to be constructed in accordance with the terms and conditions therein specified, in particular those set out in the second schedule thereto. The project from its commencement to where it is now, has been besieged with the utmost difficulty, so much so that it remains far from completed to this day.

3. The Plaintiff alleges that from the outset the Defendant has been in breach of multiple provisions of the lease, including its obligation, (i) to complete the construction of the marina within the required timeframe or at all, and (ii) to pay and discharge the reserved rent; in fact no rent was paid until May 2006 with the result that, if the Statute of Limitations had not prevented recovery prior to 1st January 1999, there would be outstanding, up to 31st December 2011, above all just credits, a sum of about €250,000. In these proceedings, he sought many reliefs including a decree of possession of the demised area, relying in that regard upon a Notice of Forfeiture dated the 12th June 1998, or, in the alternative, on to the provisions of s. 52 of the Landlord and Tenant Law Amendment (Ireland) Act 1860 ("the 1860 Act" or "Deasy's Act").

4. The Defendant, for its part, denies any breach. It asserts, on a variety of grounds, that the historic rent should be remitted or waived, at least in part, and counter-sues on the basis that the Plaintiffs unreasonable actions, decisions and demands, constitute a breach of both covenant and contract and give rise to a claim in misrepresentation. It claims that these interventions have frustrated and prevented progress on the construction and/or completion of the marina. In addition, it has sought damages for the Plaintiffs failure to process an application for grant aid under an EU scheme called "Interreg IIIA"; a programme which ran from 2000 to 2006. At para. 141 of the main judgment, I have described the parties' relationship as being "a somewhat fraught one", a phrase which entirely understates what that relationship eventually deteriorated into. At this junction, however, there is no purpose in further describing it. I rest by repeating that fault has existed on both sides.

5. In the main judgment, the following principal issues in dispute between the parties were dealt with in the manner as presently indicated:

i. Claim for Possession: Forfeiture Notice: S. 52 of Deasy's Act:

(A) The Court held that the Plaintiff could not rely upon the Forfeiture Notice and that the lease remained "active". If incorrect in this regard, however, it would grant relief against forfeiture under s. 14(2) of the Conveyancing Act 1881.

(B) The Court, however, concluded that howsoever measured, at least one year's rent remained in arrears prior to action, thus invoking s. 52 of the 1860 Act. Notwithstanding, for the reasons specified, it would also grant relief against forfeiture under this heading.

ii. Unreasonable withholding of consent and/or insistence upon the imposition of unreasonable conditions - by the Plaintiff:

The issues arising under this heading are related to the following five matters:

(A) *Removal of dredged material*:-

The Court held that the Plaintiffs refusal to allow the removal and stockpiling of sand, and "*its course of dealing with the Defendant in relation thereto*", was unreasonable and that the Defendant was entitled to "such damages as are appropriate in the circumstances and resulting therefrom". (Para. 144 of the main judgment).

(B) *Performance Bond*:-

The Court held that the imposition of two of the three requirements, insisted upon by the Plaintiff so that a bond could be put in place, was unreasonable; these conditions were that such bond would be payable on demand and that even in a bond fide dispute situation, no recourse could be had to arbitration. It also held however, that the third requirement, namely, the provision of a Schedule of Works, was not unreasonable. (Para. 149 op. cit.).

(C) *Schedule of Works*:-

The Court held that the decisions of the Plaintiff in refusing to approve a Schedule of Works were not unreasonable; rather in failing to provide such a schedule, the Defendant was in breach of covenant. (Paras. 152 and 153 op. cit.). Approval ultimately was given in August 2005.

(D) *Planning Permission*:-

The Court's conclusion in this regard was that the issues arising under this heading were not independently causative in any material way to the reliefs sought by either party. (Para. 154 *op. cit.).*

(E) *The adequacy o[the Breakwater:-*

The Court's conclusion in this regard was similar to that arrived at on the planning issues. (Para. 155. op. cit.).

iii. Trespass/Encroachment:

The Court concluded that sections of the partially constructed marina extend beyond the lease boundary and accordingly, the Defendant has encroached or otherwise trespassed on the foreshore to that extent. (Para. 157 *op. cit*.).

iv. The Interreg IIIA Scheme:

The Court concluded that the Plaintiff was in breach of statutory duty in this regard and that as a result the Defendant lost a chance of obtaining a grant referable to the marina under the scheme. It measured damages in the amount of "*€1,045,000.00 [sic.]*" as compensation. (Para. 193 *op. cit*.). (See also para. 22 of this judgment).

6. In light of these findings, I said at paras. 195 and 196 of the main judgment that:

> "195. *... I will await further submissions on the precise orders to be made, including what further terms (if any) it may be appropriate to impose as a condition of granting relief against forfeiture, and secondly, since the award of special damages in favour of the Defendant arises out of the landlord and tenant relationship of the parties and the Interreg IIIA scheme, what terms and conditions (if any) it may be appropriate to impress upon such award*.
>
> *196. I also reserve to a later date the issue of general damages in relation to the Plaintiff's unreasonable withholding of consent and breach of statutory duty and in relation to the Defendant's trespass, or breaches of covenant. "*

It was in response to these observations that further submissions were made which, in turn, give rise to this second judgment.

Submissions:

Defendant's Submissions:-

7. Two sets of submissions were received from the Defendant, the first on the 28th January 2011 and the second at the Court's invitation on the 5th September 2011. The Defendant's submissions of the 28th January 2011, which heavily concentrated on the question of costs, are somewhat unclear as to what precisely its position is with regard to the question of damages. It is however clear (see para.43) that whilst it was not pursuing a claim for general damages on the Interreg matter, it was so doing in relation to the dredged material and bond issues, both of which I will come back to in a moment. What was even more unclear was its position with regard to the question of special damages, save that it was claiming for the loss of the commercial value of the sand, which it asserts it could have disposed of but for the Plaintiff's wrongdoing. Having alleged that the Plaintiff's conduct on both issues very significantly delayed the marina project, the Defendant, at para. 31 of the submissions, went on to state:

> *"Yet it appears that the Court has decided, in light, it seems, of its award of damages in respect of the loss of a chance limb of the Counterclaim, not to award the Defendant any special damages in respect of its claim for loss of earnings. "*

(See also paras. 34 and 35). Although this submission left the position in a state of uncertainty, the September 2011 submissions clarified that the Defendant is seeking special damages based on loss of earnings as evidenced by the two reports of McCambridge Duffy.

8. There is no doubt but that the Defendant is claiming an award for general damages on the sand and bond issues. In its January submissions it puts forth this claim on the basis that the company's business and trading reputation has been severely damaged on account of the wrongdoing as so established. In support, it submits that this Court is entitled to have regard to the Plaintiffs repeated assertions of bad faith, exaggeration, lack of candour, and breach of planning laws by or on behalf of the defendant; yet such allegations were wholly unsupported at trial and were not in fact even put to the relevant witnesses. As a result, the Defendant says that it is entitled to "*a measure of general damages, based upon the evidence at trial or, alternatively, at large*".

9. In addition, it claims that both Mr. John McDaid, being the general manager of the Defendant, and Ms. Nancy Doherty, being the other person most intimately involved in the company's dealings with the Plaintiff, suffered extreme frustration, inconvenience and stress as a result of the Plaintiffs unreasonable conduct, with the result that the Defendant is entitled to damages in this regard. However no legal basis has been referred to as grounding this claim.

10. The Defendant particularised with more exactness it claims for damages in relation to these issues, in its September submissions. It has claimed IR£7,500 with regards to the Bond issue, which it contends is the amount thrown away on obtaining the Bond which it put in place. In relation to the loss associated with the sand, the Defendant claims the sum of €889,000 as representing its sell-on value. It is said that this figure is based on the evidence tendered at trial, in particular that of John McDaid, and John McHale, and also on certain other evidence of a documentary nature. Such evidence, in this regard, it contends, is uncontested.

11. The Defendant submits that in determining the level of general damages for the conduct of the Plaintiff to which it is entitled, regard should be had to the fact that the Court did not award special damages for loss of earnings, purportedly "*in light ... of its award of damage in respect of the loss of a chance [sic.] limb of the counterclaim.* " This adds to the uncertainty of its position on the damages question. For the avoidance of doubt, it should be stated that such is a misunderstanding of the Court's position: it was not in fact the Court's intention to reject "*per se*", the claim for loss of earnings at the substantive hearing, merely to leave the matter over, in light of its findings and any further submissions thereon. The question of whether the Defendant is entitled to special or general damages for both the breach of covenant I unreasonable withholding of consent, and in relation to the Interreg grant will

therefore be dealt with in this judgment.

12. Finally, the Defendant states that there is no basis for awarding any damages to the Plaintiff arising out of the Court's findings with regard to the Schedule of Works and the Encroachment issue.

The Plaintiff's Submissions:-

13. The Plaintiff has filed three sets of written submissions, dated the 2nd February 2011, the 22nd March 2011 and the 19th September 2011, the latter received in early October 2011. The March submissions, purportedly, were in response to the Defendant's first submissions, but in reality an opportunity was taken to recast the original February submissions. Accordingly, both can be viewed as one and thus must be considered when identifying the Plaintiff's position on the relevant issues. The submissions, dated the 19th September 2011, were made in response to the Defendant's submissions of the 5th September 2011.

14. Under the heading 'Relief against Forfeiture', the Plaintiff seeks rent for the period from 1st January 1999 to 31st December 2011, allowing credit for sums paid, and seeks interest thereon at the rate of 8%. It cites from *Crofter Properties Limited v. Genport Limited* [2002] 4 I.R. 73 a comment that forfeiture "*should not be unconditionally granted*": it relies on this to support its interest rate claim and quotes a further passage from the High Court decision of McCracken J. in that regard. Secondly, it seeks to have inserted into the lease a new clause which requires, *inter alia*, additional drawings and a further Schedule of Works; these to be presented to and approved by the Plaintiff prior "to the commencement of the lease". Thirdly, it wants an order that all further works on the marina should be carried out under the supervision of marine consultants such as Arup, Consulting Engineers.

15. On the trespass issue, the precise area of encroachment suggested by the Plaintiff is uncertain. The area identified in the relevant submissions is 0.43 hectares. However, at the first hearing the Minister lead evidence, which is summarised and accepted in the main judgment, which indicated that the encroached area was in fact 0.484 hectares. For the purposes of this judgment I will therefore proceed on the basis that the area in question is the latter. Apart from the area, the Plaintiff estimates that such trespass commenced on the 1st January 2003. His preferred way in which this wrongdoing should be remedied is that this Court should direct the Minister for Finance to grant a demise of the area in question to the Defendant on the same terms and conditions, applied *pro rata*, as contained in the existing lease. It seeks *mesne rates* from the date of encroachment to the date of this demise and thereafter an appropriate increase in the lease rent, the measurement or amount of which is again somewhat confusing. (See para. 82 *et seq., infra*.). It also seeks interest at 8% *per annum* on the amount representing *mesne rates*.

16. The Plaintiff submits that the Defendant is not entitled to any damages arising out of the Court's findings with regard to the dredged material and performance bond on a number of grounds. Firstly, he claims as a matter of law that no cause of action arises for the unreasonable withholding of consent. He relies on the Supreme Court's judgment of *Meagher & Anor v. Luke J Healy Pharmacy Limited* [2010] 3 IR 743, and the cases recited therein, as authority for this proposition. Secondly, he asserts that the Defendant has failed to mitigate its losses and/or has been guilty of contributory negligence, up to the maximum of 100%, in respect of any losses arising from such unreasonable withholding. By reference to the performance bond, he says that the Defendant's failure to submit a proper Schedule of Works superseded any consequences flowing from the Court's finding that, in requiring payment on demand and in refusing recourse to arbitration, the Plaintiff had acted unreasonably. By reference to the dredged material, it says that, had the Defendant disclosed to the Plaintiff the fact that one proposed carrier had a licence, "*the matter would have been at an end*". Furthermore, he claims that the Defendant could have removed the material, notwithstanding the impugned prohibition and/or should have had recourse to law seeking appropriate declarations in that regard.

17. In relation to the specific sum claimed in the Defendant's September submissions with regards to the sand, the Plaintiff argues that:

> i) damages under this heading was not sought in the pleadings;
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> ii) prior to its most recent submissions, which were filed subsequent to the main judgment, no such claim for damages was made under this heading;
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> iii) from such judgment, it is clear that there is no mention of any evidence or case having been made with regards to any lost opportunity to sell the sand; and,
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> iv) the evidence relied upon by the Defendant to seek to establish the amount sought was:-
>
> a. taken out of context, and
>
> b. hearsay.

Furthermore, no evidence was put forth during the hearing as to either the current value of the sand or the Defendant's inability to sell it. In all of those circumstances the claim should be rejected as it has not been properly put before the court and as, in any event, no reliable evidence has been tendered in support of such claim.

18. In the context of the court's findings on the unreasonable withholding of consent and/or on the placement of unreasonable conditions, the Plaintiff summarised his position at page 5 of the first submission, where it is stated:

> *" ...In all the circumstances of the case, in so far as any unreasonableness on the part of the Plaintiff has been identified by the Court, there was also co-extensive intransigence on the part of the Defendant, and failure to provide appropriate drawings and plans etc. which impeded the completion of the marina to a standard acceptable to the Plaintiff: this amounted to contributory negligence on the part of the Defendant, and as it is not possible to determine the extent of the relative wrongdoing of the Plaintiff and the Defendant in this aspect of the case it is submitted that the acts or omissions of the respective parties cancel each other out leaving no liability for damages on the part of the Plaintiff for alleged breach of covenant. "*

19. Arising out of the counterclaim the Plaintiff submits that even if the Defendant is entitled to pursue a special damage claim arising therefrom, the evidential reports upon which it is based, namely, those of McCambridge Duffy, supported by the spoken evidence of Mr. Duffy, the author, considerably overlap one claim with another with the result that the maximum figure cannot exceed €2,876,065.00. This sum, which is referred to in the report of the 15th May 2009, related to loss of earnings for the period of 2002 to 2011 resulting from the unreasonable withholding of consent by the Plaintiff. Another report by McCambridge Duffy, dated the 8th

May 2009, related to the alleged loss of earnings arising from the breach of statutory duty and provided a figure for the period of 2005 to 2011 of€1,558,221.00. It goes on to criticise the assumptions and methodology employed by Mr. Duffy, accountant, and in further highlighting the inadequacy of his approach, the Plaintiff refers to the evidence of its expert witness, Mr. Kieran Wallace of KPMG, who said, "*this is the first instance that I am unable to assist the Court in preparing an alternative calculation of loss suffered by the Defendant*".

20. Under the heading of general damages, the Plaintiff denies that the Defendant's business reputation has in any way been damaged by the findings made against it, in the main judgment; rather, he points to the evidence that the partially completed marina is full, thus demonstrating that the Defendant's business and trading reputation has been entirely preserved. Finally, in this regard the Plaintiff distinguishes the decision of *Emerald Meats Limited v. Minister for Agriculture, Ireland and the Attorney General*, [2007] IEHC 331 from the present case, *inter alia*, in that the Defendant herein did not act proactively in seeking to review the decisions of the Plaintiff; rather, it waited and later sought to have them impugned. The Plaintiff further notes in its latest submission that, unlike *Emerald Meats*, this is not a case where "*substantial damage*" has been proven but quantum is imprecise. In this case, the Defendant has entirely failed to provide any reliable evidence that any substantial damage was done to it as a result of the Plaintiffs actions.

21. Finally in this regard, the Plaintiff notes that despite directions of the court that further material and information with regards to the McCambridge Duffy reports be provided to the Plaintiff "*which might have shed some light on the claim*" for loss of earnings, this has not been done. Such failings bring the Defendant's position entirely outside that of the Plaintiff in *Emerald*. Ultimately the evidence for loss presented by the Defendant was entirely unsatisfactory and incomplete with regards to the basis of the claim, the calculation of the alleged loss of earnings and/or missed trading opportunities; the deficiency, therefore, is not just a matter of imprecise quantum.

Determination:

Award of Damages for Breach of Statutory Duty in the Main Judgment:
22. It has been indicated in the Defendant's submissions that the amount awarded under this heading in the main judgment was incorrectly stated as being €1,045,000, when in fact it should, being expressed to be 50% of €3,090,070, have been €1,545,000. From the manner in which the court dealt with this issue it is clear that this submission is correct. I entirely reject the Plaintiffs attempts to try and rationalise the incorrect figure, as by no process referable to the evidence, or the Court's approach to it, can that be done. I therefore agree with this correction and accordingly would amend the reference in the main judgment to reflect this; such was merely a typographical error.

Damages for Breach of Covenant I Unreasonable Withholding of Consent:
23. Turning to the first issue; does the Court's finding on the issues of dredged material and performance bond give rise to a cause of action sounding in damages in favour of the Defendant? In this context it should be noted that at trial and in the main judgment, the breach of covenant issue was dealt with by reference to the unreasonable withholding of consent and/or the placement of unreasonable conditions on such consent. Moreover the Court proceeded on the basis that each relevant covenant could be viewed as if the proviso "*... such consent not to be unreasonably withheld …*" applied to it. Such an approach was not objected to by either party.

24. As a matter of legal principle, the Plaintiff says that no cause of action sounds in damages and relies, effectively, upon *Meagher & Anor v. Luke J Healy Pharmacy Limited*, Supreme Court [2010] 3 IR 743 ("*Meagher*") in this regard. In that case the High Court had held that the lessor had unreasonably withheld consent to an assignment of the lease in question, and had granted damages because of that. On appeal, the Supreme Court found, as a matter of general application, that a lessee has no action in damages against a lessor for the unreasonable withholding of consent to assign unless such action also breached an express covenant by the lessor in that regard.

25. Before looking at the decision of Finnegan J., speaking for the Supreme Court, the precise wording of the individual covenant in each of the cases referred to in that judgement should be noted:

> (a) That the lessee shall not assign " *...without the consent in writing of [lessor], such consent not being arbitrarily withheld...*" (Treloar & Bigge [1874] L.R. 9 Ex.Ch. 151) ("*Trealoar*"): this is the fundamental decision on the point;
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> (b) That the lessee will not assign " *...without the previous consent in writing of the lessors... but so that such consent shall not be unreasonably withheld ...* " (*Rendell v. Roberts & Stacey Limited* (1960) 175 E.G. 265; [1960] E.G.D. 161);
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> (c) That the lessee will not assign without the consent in writing of the lessor, "*such consent not to be unreasonably withheld*" (*Rose & Anor v. Gossman* (1966) 201 EG 767; [1966] E.G.D. 103);
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> (d) That the lessee agrees "*not to assign ... without the previous consent in writing of the lessor first had and obtained*." (*Meagher*);

(e) That "The plaintiffs covenant with the defendant that they will not assign

> *... without the previous consent in writing of the lessor, but the lessor covenants with the company not unreasonably to withhold such consent in the case of a respectable and responsible assignee or under-tenant. " (Ideal Film Renting Company Limited v. Neilsen* [1921] 1 Ch. 575) (emphasis added).

26. These authorities show that the phrase "*such consent not to be unreasonably withheld*", contained within a covenant such as those referred to at subparas. (a), (b), (c) and (d) above, is only a qualification on the lessee's covenant; it is a provision qualifying that covenant and it acts as a limitation or curtailment on the tenant's obligations thereunder. It entitles a tenant to assign or sublet without consent if such consent is being unreasonably withheld. However, and crucially, such proviso imposes no positive obligation on the landlord and thus any unreasonable withholding of such consent by him cannot ground a claim in damages.

27. This form of wording can be contrasted with the type of covenant mentioned at sub-para. (e) (*supra*.), being that contained in *Ideal Film Renting Company Limited v. Neilsen* [1921] 1 Ch. 575 where, in addition to the lessee entering into a covenant, the lessor also did so (see the underlined passage); it was a breach of this positive obligation which grounded the claim in damages. This distinction is critical, for without such a covenant, no damages claim is possible.

28. Before leaving the case last-mentioned, it is worth noting that a submission to the effect that the form of wording used in *Rendell v. Roberts & Stacey Limited* (1960) 175 E.G. 265, " *...but so that such consent shall not be unreasonably withheld* ... " (emphasis

added) was sufficient to distinguish that covenant from the type used in *Treloar* and *Rose & Anor v. Gossman* (1966) 201 EG 767, was rejected by the trial judge, Salmon J. Therefore of the variables mentioned at para. 25, only that at sub-para. (e) sounded in damages.

29. This summary of the law was approved by the Supreme Court in *Meagher*. It is therefore binding on this court. If it was otherwise, and if the interpretation of the covenant at play in this case, was not regulated by such a distinguished line of authority, I would be supportive of Lord Denning's comments in *Rose*, where if untouched by authority, he would have held that with a *Trealoar* covenant the landlord had also "promised" in the manner above-mentioned. But authority has prevailed and the law, at least for now, is what I have stated it to be.

30. Finnegan J. in *Meagher* went on to consider whether this statement of the law had been changed by the provisions of s. 66(1) of the Landlord and Tenant (Amendment) Act 1980 (the "1980 Act"). He held that such provision did not give rise to any right of action in damages by reason of a lessor's unreasonableness in the context of the type of covenant mentioned. Consequently, the common law position remained unaffected by s. 66 of the 1980 Act.

31. In this case, the Plaintiff submits that the reasoning adopted in *Meagher* applies to both the dredged material issue and the performance bond issue. Therefore, if the Defendant had considered that consent had been unreasonably withheld, it should have proceeded without such consent or else issued proceedings seeking an appropriate declaration to that effect. Otherwise, however, it was not entitled to damages, as in essence there has been no breach of covenant by the Plaintiff.

32. Clause 10 of the Lease in the instant case states that the lessee is under an obligation:

> *"To obtain the prior written consent of the lessor for the excavation, removal and stockpiling of beach material and the lessor shall specifY the terms and conditions under which such excavation, removal and stockpiling will be permissible. "*

33. Clause 12 deals with the provision of a bond, if required. However, for the reasons explained in the main judgment, the conditional requirement to produce this type of bond, which could be described as a "restorative bond", was superseded by the agreement reached on the 19th May 2000, whereby the Defendant was obliged to produce "*a performance bond of suitable duration and which specifies the cover of all the work set out in the Schedule of Works*", which bond must be agreed. It is by reference to this modification that the Court's finding on the bond issue must be viewed.

34. The first point which arises on this submission is whether or not the principles of law set out in *Meagher* apply: if they do not, no further discussion on this point of law is required; if they do, the relevant clause must then be construed to see whether it is a *Treloar* type provision only or whether it also imposes a positive obligation on the landlord; because if it does, it is clearly outside the type of covenant covered by the authorities above cited.

35. The 1993 Lease undoubtedly establishes a landlord and tenant relationship between the parties, but the legal structure by which such relationship is established should be noted. The lease, in several material respects, is quite unlike the typical agreement which exists for the letting of a house, premises, business or commercial, or other such similar type structure. In the instant case the subject matter of the demise, being foreshore, could never be classified as a premises or structure and certainly not as a "tenement". Consequently, statutory provisions such as those contained in the 1980 Act and referred to in *Meagher*, could not apply. In addition, it can be said that there are two core objectives of the lease: first, to build and construct to specified standards and in accordance with specified conditions, a marina with marina facilities; and, second, when so complete, to operate that marina, as such. Many of the obligations imposed on the lessee under the lease would be much more at home in a building contract than they would be in a letting agreement. When in such agreement would one find requirements such as; to provide pedestrian access to the site and public access to breakwaters, to get approval for the number of berths that might be provided, to obtain consent with regard to the dredged material, to provide a bond in the manner indicated; simply to name but a few? The answer is obvious. Therefore, these obligations can properly be allocated to the construction side of the lease. Several other covenants, such as, (i) not to assign, underlet or part with possession, (Cl.13); (ii), not to commit or suffer waste to be done (CI. 15); and, (iii) to keep the demised premises in good repair (CI. 17), are all similar to provisions that might be expected in a normal letting agreement, and in this case, are more related to the development when constructed and operational. Such covenants can therefore be properly allocated to the letting or operational side of the lease.

36. Given this particular relationship between the parties, it is my view that the decision in *Meagher* has no application to the covenants or conditions dealing with the dredged material or making provision for the Bond. Firstly, in all of the cases which have established the line of authority followed in *Meagher*, the subject matter of the demise was a premises or a building or part thereof. Contrast these with foreshore. Secondly at least one reading of *Meagher* implies that the nature of the demised premises must be a "tenement", before being captured by the rule, as otherwise there was never a possibility of the common law position being altered by s. 66 of the 1980 Act (para. 30 supra.). On the other hand, however, it seems most likely that the premises in question was in fact a "tenement", to which s. 66 of the 1980 Act, would apply in any event. Therefore, the Supreme Court's consideration of this statutory provision should not necessarily be taken as intending to restrict the type of premises to which the *Treloar* principle would cover. Given the nature of the demise in the instant case, however a resolution of this point is not required.

37. Thirdly, the covenant in each of the cases cited, apart from *Ideal Film Renting Company Ltd. v. Neilson* [1921] 1 Ch. 575, was one not to "*... assign, transfer, underlet or part with possession [or some combination thereof] of the demise premises*", without the consent of the lessor, so expressed or expressed in similar terms. No other covenant, even within a landlord and tenant setting, has attracted such interpretation, nor have I seen any suggestion to that effect. Personally I would see no justification for so doing. Therefore, for the above reasons, I would reject the Plaintiff's submission in this regard. Consequently if a damages claim is otherwise available, it is not prohibited by *Meagher*.

38. Even if I am incorrect in this analysis, I would disapply *Meagher* for another reason, which is at least implicit in the main judgment. It will be recalled that a breach of a positive covenant on the part of a lessor is beyond the reach of the rule followed in that case. Therefore, the issue becomes one of construction; indeed because of this, the classification made at para. 35 supra. is probably unnecessary, as in the final analysis all covenants must be interpreted to determine whether, for their breach, a cause of action in damages lie. In *Meagher* a finding was made that consent was unreasonably withheld; however the nature of the "consent" element, in the instant case, is clearly distinguishable from that ultimately ruled upon in *Meagher* (para. 25(d) *supra*.). The consent requirement in Clause 10 of the lease, dealing with the dredged material, was not merely not to unreasonably withhold consent; it also incorporated a specific covenant, affirmative in nature, on the part of the Plaintiff who "*shall specify the terms and conditions under which such excavation, removal and stockpiling will be permissible*". As noted by Finnegan J., in Meagher, there is nothing in principle to prevent parties to a lease from including a positive covenant on the part of the lessor, the breach of which would give to the lessee a right in damages; indeed as was the situation with the covenant in *Ideal Film Renting Co. Ltd* Clause 10, in my opinion,

includes such a covenant on the part of the Plaintiff; breach of which in principle is therefore actionable in damages.

39. The position of the Bond, although clearly aligned with that of the dredged material in the submissions, is also clearly distinguishable from the situation considered in *Meagher*, albeit in quite different terms. Clause 12 placed the Defendant under a positive obligation to provide a bond if called upon to do so, and it was so called upon. The nature of Clause 12 is of an entirely different type to that contemplated in *Meagher*; that case is therefore of little application with regards to Clause 12.

40. As found in the main judgment, the Plaintiff imposed terms and conditions upon the provision of that bond which effectively rendered it impossible for the Defendant to comply with that covenant. However, in contrast to the covenant relating to the dredge material, I am not satisfied that the consequences of such imposition, even if some delay resulted, gives rise to any entitlement in damages. As found by the Court it was of course implicit in the relevant clause or agreement that the Plaintiff would not unduly frustrate the provision of the bond; therefore in circumstances where the Defendant was technically in breach, for failing to obtain the Bond, the Plaintiff could not rely on that breach to ground a claim either in damages or otherwise; *ex turpi causa, non oritur actio*. Furthermore, in light of the Defendant's failure to provide a Schedule of Works I can see that no damage arose from the Plaintiffs conduct in this regard. The only party which stood to suffer loss from the Defendant's failure to have in place a proper bond, either restorative or performance, was the Plaintiff; unless of course it could be argued that if this problem had been resolved the other critical issues would likewise have followed suit. That submission has not been made, nor indeed could it (see also para. 44 *infra*.). In addition the offending requirements were drafted in mid-2003, at a time when the Schedule of Works was still outstanding. Therefore, on the facts of the case, no damages claim arises under this heading, either as a matter of principle or, should I be mistaken in this regard, because the Defendant has failed to adduce any substantive evidence proving that any damage caused was a result of the Plaintiffs unreasonableness.

41. Similarly, I would be disinclined to grant the damages sought in relation to the throw-away cost associated with the Bond, as claimed by the Defendant. Given that the Defendant was obliged to obtain such a Bond, there were likely to be inherent costs in so doing. Notwithstanding the finding in the main judgment that the Plaintiff was unreasonable in the conditions which he sought to impose, I do not believe that any recognisable damage came to the Defendant as a result; only frustration. I therefore would not grant the IR£7,500 recently sought by Defendant. I would note that even had I been inclined to grant these damages as a matter of principle, this head of damages was only substantially raised in recent submissions, subsequent to the delivery of the main judgment, and it is clear that this was not a point at issue in the original pleadings, or dealt with in any substantive or proper way in evidence at the hearing. I would therefore, as stated, reject this head.

42. Returning to the breach of covenant in relation to the dredge material, given the relevant findings in the main judgment and those specified herein, the question of damages for such breach arises. It has long been held that a lessee or lessor may be entitled to damages where there has been a breach of covenant. By way of example the following cases might be mentioned:

> • *Whelan v. Madigan* [1978] ILRM 136 -damages were granted for breach of covenant for quiet and peaceable enjoyment where the landlord forcibly entered premises and intimidated tenants; in fact Mr. Maddigan's conduct was such as to attract the application of aggravated damages.
>
> • *British Telecommunications plc. v. Sun Life Assurance Society plc.* [1995] 3 WLR 622 - damages were granted for breach of covenant to upkeep premises.
>
> • *Beacon Carpets Limited v. Kirby* [1984] 3 WLR 489- nominal damages (Stg£2) were granted for a breach of covenant to obtain full insurance.

43. There is thus no issue in principle with the granting of damages for a breach of covenant. It still of course remains to be shown that the breach has resulted in damage. Damages for breach of covenant are generally to be assessed in relation to the damages actually caused (*James v. Hutton* [1950] I KB 9). In that case, the Court of Appeal, although accepting that the defendant had breached his covenant to restore the shop-front to its original condition, having altered it during the course of his lease, refused to grant any damages to the plaintiff since it was clear that *"the plaintiff will not herself restore these premises and there is not the slightest likelihood of the shop-front ever being replaced. In other words, if the plaintiff obtains this sum as damages she will be enabled to put it into her pocket.* " In those circumstances, the plaintiff was only entitled to nominal damages for the breach of covenant, since it was clear she had in fact suffered no loss, and had in reality gained, from the breach, in that the replacement shop window actually enhanced the demised premises (see also *Beacon Carpets Limited v. Kirby* [1984] 3 WLR 489).

44. There are thus two questions which arise: firstly, whether the Defendant has incurred any loss as a result of refusal to permit the removal of dredge material; secondly, even if the some loss has arisen to what extent was it a result of the Defendant's conduct, noting that the Court has found, *inter alia*, that it was in breach of covenant with regards to the Schedule of Works and noting also the suggestion that it should have proceeded without consent or else moved for court relief in that regard? (but see para. 53 *infra*.) Further, the Plaintiff is clear in his submissions that, in his opinion, no evidence sufficient to establish loss was before the court which would allow it to conclude, as a matter of probabilities, that any actual loss has been suffered as a result of the his actions.

45. As to loss arising from the refusal to permit the removal of dredge material, the Defendant claims that it is entitled to both general and special damages. It claims that general damages should be awarded for:

> i) damage to its commercial reputation; and,
>
> ii) frustration, inconvenience and stress caused to the company's principal, Mr. John McDaid, and its general manager, Ms. Nancy Doherty.

In support of its contention, the Defendant points to the general course of its dealing with the Plaintiff, and in particular notes that the Plaintiff continued, into the hearing with allegations of bad faith, exaggeration, a lack of candour and breach of planning laws; such allegations were totally without foundation and were wholly unsubstantiated by evidence; in fact these were not ultimately even put to the Defendant's witnesses at the hearing. With regards to special damages, the Defendant claims that it is entitled to the loss of the value of the dredged sand which it would have sold, but for the actions of the Plaintiff and secondly that it is entitled to loss of earnings, as evidenced by the testimony of Mr. Daragh Duffy and the report of McCambridge Duffy dated the 15th May 2009, in which a sum of €2,876,065.00 is claimed.

46. In reply the Plaintiff contends that the Defendant has failed to satisfy the Court that it has suffered any loss of commercial reputation arising from its actions. In this regard I would agree with the submission that on the evidence presented to the Court this conclusion could not be borne out. As noted by the Defendant's witness, Mr. Daragh Duffy:

"[T]here is [sic.] currently 168 berths that are full and the development that has been done by the company in the interim ... [I}t 's completely full. "

47. The present case, in this context, may be distinguished from *Emerald Meats Ltd v. Minister for Agriculture* [2007] IEHC 331, where Feeney J. noted, in assessing damages to be awarded, that it was clear that there had been serious damage to the reputation of the plaintiff, particularly with regards to "*honouring its commitments*", which the defendant had undermined: "*[s]uch reputation is an essential part of the capacity to do business in the meat trade.* " This is clearly not the case here; the Defendant was effectively constructing the marina itself. There could not be said to have been any loss of reputation such as to damage the Defendant's business. No particular example or instance of reputational loss has been identified, either with regard to the marina project or to any other business which the Defendant is involved in or associated with. Vague and generalised allegations, without some evidential base will not suffice. I would therefore not award general damages for loss of reputation to the Defendant, not as a matter of principle, but on the evidence actually presented.

48. In relation to the alleged inconvenience caused to Mr. John McDaid and Ms. Nancy Doherty it is not clear that any loss has been occasioned by this situation. Damages for breach of covenant are not designed to compensate for mere inconvenience alone, or for annoyance, vexation or disappointment (*Wylie "Landlord & Tenant (2nd Ed*)" para. 15.20). In addition, I am not satisfied that the circumstances in this case would fall under any of the general exceptions to this rule, namely where:

i) Pain, suffering or loss of amenities result from the breach;

ii) The object of the agreement was enjoyment; or,

iii) Physical inconvenience and discomfort, and mental suffering directly related thereto, was caused by the breach, and such effects were reasonably foreseeable.

(*Watts v. Marrow* [1991] 1 WLR 1421; see also *Johnson v. Long/eat Properties (Dublin) Ltd* [1976-1977] ILRM 93; *Foley v. Skinner* [2001] 3 WLR 899; *Jiminez v. Morrisey* [2006] IEHC 18). Therefore, neither a legal nor evidential basis has been established to grant damages for the inconvenience alleged in this case; nor has any authority been cited supporting such damages. Similar observations apply to the disparaging allegation made but not pursued by the Plaintiff. I would thus find that the Defendant cannot recover any general damages under this heading.

49. The Defendant also claims that it has suffered the financial loss in value of the dredged material as well as loss of earnings as a result of the breach of covenant in this respect. When assessing damages in this context the question to ask is: what are the consequences, for the purposes of *restitutio in integrum*, of the failure of the Plaintiff to permit the removal of the sand? The Defendant, in answer, points to the fact that it has lost the value of the sand as well as loss of profits as per the McCambridge Duffy report of the 15th May 2009.

50. It seems to me that it is not immediately obvious, or necessarily consequential, that the Plaintiff's refusal to permit the removal of sand, as considered at that time, would result in the Defendant being unable to sell the sand at all. In the meantime the world, and indeed Ireland, has undergone one of the worst financial crises in almost a century, or at least certainly within most peoples' living memory. Such circumstances and events, must necessarily go towards the reasonable foreseeability or reasonable contemplation by the parties of the damage claimed in this regard. Although with hindsight some might argue that it was foreseeable that the bubble might burst, I do not think that any reasonable person, at the time that consent was withheld, could have foreseen the events that ultimately transpired; indeed from the parties' point of view these events were virtually *vis major*.

51. Irrespective of this however, I would note that scant evidence has been lead as to the value of the sand *simpliciter*, or as to loss of value which allegedly has been occasioned. In this regard one could not consider the note of a meeting held on the 5th September 2001 as offering such evidence. I would also agree with the Plaintiff that the transcript references relied upon by the Defendant in its submissions cannot be viewed in isolation. The evidence so contained was tendered in the context of delay and to show that the material was not waste. I am reinforced in this view by the fact that up until its recent submissions no reference was explicitly made to the loss of value of the sand. Nor was such claim contained in its pleadings, the original submissions, or in any of the numerous oral submissions made by Counsel. In my opinion, when the evidence referred to was tendered at trial this was not a matter in issue; had it been so I suspect far greater scrutiny would have been given to the figures now quoted and which are, as rightly pointed out, at least hearsay, and indeed maybe "double hearsay", as the Plaintiff puts it. In the circumstances I could not permit the Defendant to adduce a further claim for damages following the delivery of my original decision. On this ground too I would refuse to grant damages under this head.

52. Even should I have been minded to grant damages under this head, I would nonetheless have had to take into account the actions of the Defendant, and the reality of the situation in circumstances where the Defendant itself was also in breach of covenant, by failing to provide a proper Schedule of Works, including where appropriate, supporting drawings. The provision of these documents would, it seems to me, have been essential for the lawful continuation of works on the site, notwithstanding the reasonableness or otherwise of the Plaintiff's position with regards to the location of removal for the sand. I would therefore be inclined to find that even had permission been granted for the removal of the sand, the Defendant would still have been unable to continue with works on site without the Schedule of Works and technical drawings being agreed. Whilst the Defendant may justly complain about the tardiness of the Plaintiff in his response to the Schedule of Works submitted in October 2003, nonetheless, as found in the main judgment, overall responsibility for submitting acceptable drawings must rest with the Defendant. Had this covenant been properly complied with, the Defendant might legitimately have complained that it could not continue works without this permission, however in reality even had it been forthcoming the works could not have proceeded due to the Defendant's conduct. I would therefore, on this ground as well, have found that it cannot be shown that the actions of the Plaintiff in this regard, in actuality, occasioned any loss or damage to the Defendant. I therefore would grant no damages under this heading.

53. Nonetheless I would note, albeit *obiter*, that I reject the Plaintiffs submissions that the Defendant's failure to proceed, notwithstanding the absence of consent, or to obtain court relief is a form of contributory negligence or a failure to mitigate; nor do I accept that, had the Defendant disclosed the existence of the licence of Brickkiln Haulage Limited, the issue of the removal of dredge spoil would have been at an end.

54. Moving to the Defendant's claim for loss of earnings, from the facts as found it is clear that works could not have proceeded, in any event, until August 2005 at the earliest; when an acceptable Schedule of Works was finally provided. The report of McDuffy Cambridge dated the 15th May 2009 seeks damages from 2002 to 2011. Given the way in which it calculated loss of earnings it would not be possible to merely take the figures from 2005 onwards. However, although I am satisfied that the Plaintiffs action might have given rise to some loss of earnings *post*-2005, I feel that any such loss is more properly attributable to the inability of the Defendant

to access funds under the Interreg IIIA Scheme, rather than directly due to the Plaintiffs refusal to allow the removal of dredge material. Notwithstanding what was said by Mr. McDaid, I am not satisfied, as a matter of likelihood, that the Defendant would have progressed the marina, to completion stage, prior to the outcome of the Interreg application being known; in fact it may have sought to rely on such funding, at least in the first instance, before carrying out any further works. Therefore, any loss of earnings would not arise from the breach of covenant or unreasonable withholding of consent by the Plaintiff, but from the lack of funds, which it had hoped and expected, it would receive from the grant. Had the grant not been in issue, it is uncertain what course the further construction of the marina would have taken. In any event, I feel it is likely that the Defendant would have postponed any further works at least until the grant was obtained.

55. In this regard I would also note that the damages sought *post*-2005 under the McCambridge Duffy report of the 8th May 2009 only considered the Plaintiffs frustration of the Interreg application, and took no account of the Plaintiffs unreasonable withholding of consent in relation to the dredge material in its calculation of loss of earnings; it is therefore difficult to find a basis for loss of earnings in this context independent of the Interreg grant. Any damages for loss of earnings will therefore be dealt with under the Interreg Scheme heading only.

56. I would finally note that the Plaintiff is not claiming any damages in relation to breach of covenant. Even should such have been claimed, as indicated above, it is clear that no damage resulted to the Plaintiff from the Defendant's failure to provide a Schedule of Works or properly detailed technical drawings; I would therefore have refused to grant such damages for this reason.

Rent and Interest:
57. The Plaintiff claims that it is entitled to further rents due and owing, as well as interest on the rents which are due to date. On foot of my findings in the judgment of the 3rd September 2010, it is clear that the Defendant is liable for rent since 1999; this amounts in total to €251,408.14. The Defendant had made payments to the Plaintiff, since May 2006, of €136,080.00. As the Reddendum part of the lease provides for payment in advance, further rent fell due on 1st January 2010 and 2011, neither of which were accounted for in the September 2010 judgment. I have no issue in finding that the defendant is liable for all outstanding rent since 1999, including that required for 2010 and 2011.

58. The Plaintiff has provided a table in relation to outstanding rent, which he also uses for the application of interest. For the sake of clarity I reproduce a portion of this table here:

Year/Rent Due Date	**Annual Rent Due per High Court Judgment (€)**	**Apportionment of Rent Paid to Date (€)**	**Cumulative Rent Outstanding (€)**	**Simple Interest at 8%**
01/01/1999	22,855.29	22,855.29		
01/01/2000	22,855.29	22,855.29		
01/01/2001	22,855.29	22,855.29		
01/01/2002	22,855.29	22,855.29		
01/01/2003	22,855.29	22,855.29		
01/01/2004	22,855.29	21.803.57	1,051.72	84.14
01/01/2005	22,855.29	-	23,907.00	1,912.56
01/01/2006	22,855.29	-	46,762.29	3,740.98
01/01/2007	22,855.29	-	69,617.57	5,569.41
01/01/2008	22,855.29	-	92,472.86	7,397.83
01/01/2009	22,855.29	-	115,328.14	9,226.25
01/01/2010	22,855.29	-	138,183.43	11,054.67
01/01/2011	22,855.29	-	161,038.71	12,883.10

The total rent outstanding is therefore €161,038.71, upon which interest of €51,870.94 is claimed, a total of €212,909.65.

59. The only remaining issue relating to this is whether the Plaintiff is entitled to interest on outstanding rent. The basis upon which it seeks such interest is unclear and somewhat confusing. Firstly, in its submissions of 2nd February 2011, it claims that the Court has inherent jurisdiction to grant interest, but fails to cite any authority in this regard. Without such authority, I would not be prepared to proceed on this basis. Secondly, in its submissions of 22nd March 2011, it seems to rely on *Crofter Properties Ltd v. Genport Ltd*. [2002] 4 I.R. 73, as being the basis for seeking 8% *per annum* as the interest rate. This case, either on a relief against forfeiture basis or otherwise, is not an authority for such proposition. The requirement on *Genport Ltd*. to pay interest at 8% per annum was a term of a stay, granted many years earlier, on the entry and execution of a judgment, decreed against the company, at that time. This clearly does not apply in the instant situation. Therefore, as far as I can see, if the Plaintiff has any basis, unrelated to the forfeiture, for claiming interest, it must be found in the statutory provision next mentioned.

60. Section 22 of the Courts Act 1981 provides that:

> " (1) Where in any proceedings a court orders the payment by any person of a sum of money (which expression includes in this section damages), the judge concerned may, if he thinks fit, also order the payment by the person of interest at the rate per annum standing specified for the time being in section
>
> 26 of the Debtors (Ireland) Act, 1840, on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgment.
>
> (2) Nothing in subsection (1) of this section-
>
> (a) shall authorise the giving of interest on interest, or
>
> (b)
>
> (3) In this section ... "proceedings" includes proceedings to which the State or a State authority (within the meaning of the Act of 1961) is a party."

61. It is accepted that interest in these circumstances is set at 8% *per annum*. The question of whether or not to grant interest on a sum of money pursuant to s. 22 of the Courts Act 1981 is ultimately a matter of court discretion. In deciding whether to grant such interest, all of the surrounding circumstances must be considered, as must be the justice in granting or not so granting, as the case may be. In the present situation I would take account of the following, some of which lean in favour of granting interest whilst others do not:-

> (i) the terms of the contractual relationship between the parties, noting, in particular, that the lease does not make any provision for the payment of interest on outstanding rent;
>
> (ii) the fact that the Plaintiff, who issued a Civil Bill on 12th September 1994, seeking arrears of rent, did not pursue those proceedings to finality, either by way of compromise or court order;
>
> (iii) the genuine belief held by the Defendant, although not legally supportable, that some level of forgiveness would be granted by the Plaintiff in respect of arrears of rent;
>
> (iv) the Defendant did not pay any rent, at all, for many years, during which it was seeking to have this rent waived or remitted; by mid May/June 2003, however, it was clear that the Plaintiff was unwilling to do so;
>
> (v) the Plaintiff would have been entitled to a significantly larger sum for back rent, but for the operation of the statutory time limit; and,
>
> (vi) the findings of fault by the Court in relation to both the Plaintiff and the Defendant.

62. Having set out the above and having considered the suitability of applying s. 22 to the facts of this case, it seems to me that the question of interest may more appropriately be dealt with in the context of the forfeiture issue. For the reasons later mentioned, the court undoubtedly has jurisdiction, in this regard, to make such an award, if it thinks fit to do so.

Terms and Conditions of Relief Against Forfeiture:
63. In the main judgment, I have held:

> (i) that the Forfeiture Notice dated 12th June 1998, could not be relied upon, for the reasons stated, including the agreement reached on 19th May 2000, therefore, the lease remains "active", a description specifically used by the Plaintiff in the exchange of correspondence giving rise to that agreement;
>
> (ii) that if however, such conclusion be incorrect, the court would grant relief against forfeiture under s. 14(2) of the Conveyancing Act 1881; and,
>
> (iii) that the Plaintiff was entitled to rely upon the provisions of s. 52 of Deasy's Act, but in the presenting circumstances, relief against forfeiture in that regard, would also be granted.

What is at issue, thus, are the terms which should be imposed on the grant of such relief.

64. There is no doubt that where relief against forfeiture is granted, the Court may impose conditions. This is clear from the generalised wording of s. 14(2) of the 1881 Act. In addition there are numerous authorities on the court's power in this regard, including the judgment of Earl Loreburn L.C., in *Hayman and Another v. Rose* [1912] A.C. 623, where, in a passage which appears at p. 630 of the report, the judge states, in decisive language, that in considering what conditions may be imposed, by virtue of this statutory provision, the court has a free discretion which should not be fettered by limitations, other than those mandated by the circumstances of each case. Whilst I note the views expressed by Murphy J., in *Cue Club Ltd. and Others v. Nevaro Ltd.* (Unreported, Supreme Court, 23rd October 1996), that the nature of this discretion may not be as fulsome where the subject matter is a commercial transaction between parties of equal terms, I do not read such comments as intending to reflect on the generalisation of the discretion, but rather, as identifying the particularity of the subject lease and the status of the parties to it; factors which are always relevant to the exercise, but not the scope, of such discretion. Finally I do not believe that *Sweeney Ltd. v. Powerscourt Shopping Centre Ltd.* [1984] IR 501 says otherwise.

65. Section 52 of Deasy's Act offers no guidance as to the type of terms which may be imposed or the court's power in that regard, when denying to a lessor the prima facie right to re-enter for breach of the provisions of that section. Case law undoubtedly establishes that terms such as payment of the outstanding rent, interest on arrears, if appropriate, and costs, are conditions typically found as having been imposed when relief has been given against non-payment of rent; this in circumstances where forfeiture has been sought, both under the section and also pursuant to a re-entry clause, contained in a lease (see *Whipp v. Mackey* [1927] I.R. 372, *Blake v Hogan* (1933) ILTR 237 and *Ennis v. Rafferty* [1938] 72 ILRN 56.

66. The terms last mentioned are individual examples, appropriate to the type of covenant relieved against, of a much wider jurisdiction vested in the court. It seems clear from authority that relief against forfeiture, whether involving a statutory provision or otherwise, is grounded upon general equitable principles, the application of which will be case specific. There are no fixed rules for the exercise of this discretion, and at a level of principle it may well be that a court's approach will be much the same irrespective of the type of covenant involved. This is not however in any way intended to neutralise the importance of such covenant, as the breach of some may be much more difficult to remedy than others. For example, the non-payment of rent, without further damage, may be easily and justly remedied, whereas a breach of a complex covenant with on going consequences, may not be so. In essence the general position is relatively straight forward; it is the individual case which created the difficulty.

67. This view of the law is, I believe, in accordance with the following passage from Wylie, "*Landlord and Tenant Law* (*2nd Ed*.)" where the author, at para. 24.21, states:

> *"... but it seems clear from the wording of the sub-section [s. 14(2) of the 1881 Act} that the jurisdiction is discretionary and is to be exercised largely on the same principles as the general equitable jurisdiction to afford relief which must be invoked in cases of non-payment of rent. "*

I would therefore adopt that as a correct statement of the law in this regard.

68. To the above, however I would add this *caveat*; no debate has taken place on what the outer limits of the court's power in this regard might be. Whilst the parties have engaged, in a factual sense, in discussing what conditions might be appropriate, they have

not done so in a legal sense. Questions, such as, for example, how related to, rationally connected with, and how proportionate to the breach ought, the imposed conditions be, have not been explored. Must such conditions not only remedy the breach(es) giving rise to the forfeiture, or can they also regulate a wider relationship between the parties? These matters, in certain cases, could possibly create a difficulty, but for reasons later explained, they do not, in the instant case, quite have such impact as events have turned out. Therefore it is unnecessary to further explore this issue. Accordingly, I proceed as above indicated.

69. Furthermore, as I do not believe that any of the breaches which may have occurred in this case can be said to have been "wilfully committed", as that term is understood, it is not necessary to consider the case law in this area. Consequently I am therefore satisfied to proceed on the basis of the court having a wide discretion in its authority to impose conditions and in that regard should take into account all relevant circumstances, including the nature of the lease provisions and the conduct of the parties.

70. The question therefore arises upon what terms relief against forfeiture should be granted? The answer to this has been helpfully facilitated by the parties, in that a number of outstanding issues can be resolved by way of agreement or at least, on the basis of the Defendant having no objection to the Plaintiff's proposals in this regard. In the first instance, the Plaintiff seeks to have inserted a new clause in the lease, which, when adjusted slightly, reads as follows:

"It is agreed that the lessee shall construct breakwaters and marina facilities:

> (i) in accordance with the Arup drawing C66411 0/01 of 251h May, 2000 (Revision Cl) titled 'Details for Completion of Marina, Embankment and Basin';
>
> (ii) in accordance with additional drawings and specifications detailing the other marina facilities specified in the lease but not shown in the said drawing; and,
>
> (iii) in accordance with a Schedule of Works to be prepared by the lessee and to be agreed by the lessor prior to the commencement of this lease."

The reference last mentioned, to the commencement " ... of this lease", is to reflect how the parties propose to incorporate, not only this clause but also the further demise of the "encroached area", into the existing lease. In essence, both will operate as a graft upon such lease which, in reality, will result in the creation of a new composite lease between them. Therefore, what is intended is that the requirements contained in this new clause must be implemented prior to the commencement of such lease.

71. Arising out of this clause, the insertion to which the defendant has no objection, it is evident that additional drawings and specifications as well as an updated Schedule of Works must be prepared. In addition, the Plaintiff requires the Defendant to engage and/or retain consulting engineers of suitable speciality and experience, at whose direction and under whose supervision all further works necessary to complete the marina in accordance with the terms of the lease will be carried out. Arup, who have been retained previously, have been suggested and would seem the obvious choice, but others of like speciality and skill could also fill the required role. The Defendant has no objection to these requirements and further has no objection to such being imposed as part of the forfeiture conditions.

72. With regard to the Interreg money, the Plaintiff seeks an order from this Court that the same should be impressed, effectively with similar conditions as would have applied, if obtained under the Interreg Scheme. It is said that the monies should be paid into court, that under court supervision, some process of certification should be put in place and that drawdown be permitted only against such process. The Defendant is dissatisfied with such a proposal, pointing out the expenditure committed on the project to date, and its personal commitment to fully develop and complete the marina. It would, however, agree that such monies could be subject to the condition that, "*the Defendant devotes the sum so awarded to the development of the marina at Fahan as specified in the updated Schedule of Works*".

73. It is clear from the Lease that the Defendant covenanted to build a marina at the relevant site and thereafter to operate it; it can logically be surmised that such a marina should be a complete one. The marina, it is accepted, as presently constructed is not fully completed. Whilst, as noted, this was not done for a variety of reasons, with fault on both sides, it cannot be denied but that the Defendant is in ongoing breach of covenant as such; although, of course, no loss to the Plaintiff arises therefrom and therefore no damages would be granted in respect thereof.

74. As noted in the main judgment, the relationship between the parties arises from the Lease. The damages awarded for breach of statutory duty were premised upon the assumption that the Defendant would have fully constructed the marina, had the monies been made available under that scheme. The construction of the marina was inextricably linked to the landlord and tenant relationship between them. The monies that would have been granted under the Interreg Scheme, would have had to be expended on the project and could never have been granted without the existence of the lease.

75. In light of these facts, it could be strongly argued that a sum equivalent to the award damages for breach of statutory duty, should be expended upon the construction of the marina. These monies would only have been granted were the Defendant to construct the marina; the damages should therefore only be usable by reference to such construction. This can only take place if the Lease is subsisting, and the Lease will not so continue if the Defendant remains in breach of covenant by failing to construct the marina. It would therefore follow that it should be a condition of relief against forfeiture that the Defendant apply such monies, as if the Interreg application had been successful, to the construction of the marina.

76. Despite the logic of this line of argument, the fact remains that the award sum in this case was for damages for breach of statutory duty; it is therefore unclear as to whether the Court would have jurisdiction to impose such conditions on such an award in this suggested way. No authority for or against such a proposition has been advanced by either party. In particular the court's relieving power in forfeiture has not been explored in this regard.

77. This legal difficulty, however, does not have to be resolved because, in any event, it would be quite impossible to devise and operate the type of verification regime suggested by the Plaintiff. The Court has no mechanism to administer the award sum as would have existed if granted under the scheme. Therefore, subject to some minor adjustment, I am satisfied to accept the Defendant's position on this issue, which thus by its agreement, allows me to impose a term in this regard. Therefore, in this way there will be impressed upon the award sum a condition forming part of relief against forfeiture. Finally in this context, it should be noted that the Defendant has already expended considerable sums on the marina and I have no reason to doubt its declared *bona fides* to finish the project

78. At para. 62 of this judgment I decided to deal with the question of interest, on the outstanding rent, as part of the Forfeiture

issue. Of all the factors relevant to this matter, the most applicable and pertinent must surely be the defendant's failure to pay any rent between 1993 and 2006, noting in particular that the marina has been operational since 2002, albeit if only partially. Whatever expectation it may have had with regard to the historical rent being remitted, it could never have hoped to avoid liability for the most substantial part of the reserved rent. Therefore it seems to me that payment of interest, on the outstanding rent is just and necessary. As only one rate has been suggested, interest will run at 8% *per annum*. Finally, the Defendant cannot have any objection as to how payments made on account, have presently been allocated to the arrears of rent by the Plaintiff.

79. I would therefore Impose the following conditions upon the relief against forfeiture:

> i) The Defendant will pay all rent due and owing to the Plaintiff, together with interest, in the total sum of €212,909.65; with such liability being subject to set-off;
>
> ii) The Defendant will provide an updated Schedule of Works and detailed drawings, plans and technical specifications with regard to the breakwaters and the marina facilities, all by reference, inter alia, to the inserted lease clause;
>
> iii) The Defendant will retain Consulting Engineers of suitable speciality and skill, such as Arup Consulting Engineers, at whose direction and under whose supervision the remaining works necessary to fully complete the marina will be carried out; and,
>
> iv) The Defendant will apply and lay out the sum of€1,545,000 awarded on the Interreg issue, or its equivalent, solely and exclusively in satisfactorily completing the marina in accordance with the parties' contractual relationship with each other.

Damages for Trespass:

80. Where a trespass is ongoing the party subject to such trespass will generally be entitled to damages. The Defendant contends that in this case the trespass is at best *de minimis* and therefore the Plaintiff is entitled to either no damages or at most nominal damages. Whilst I accept that the trespass in this case is somewhat unusual, the trespassed area being underwater, I cannot agree that it is either *de minimis*, the Defendant has trespassed over and beyond the original area demised in the Lease by approximately 0.484 hectares, or that the Plaintiff should not receive damages for it, the land upon which the Defendant is trespassing is public land, and as such it should have to pay for its use.

81. The Plaintiff has suggested a number of ways in which the resulting damages are to be assessed:

> i) by reference to an increase in rent of €928.78 *per annum* (which would equate, by my calculation, to an increased areas of 0.43 hectares);
>
> ii) by reference to the final revised rent payable, which he says would be €23,957.28 (which would equate with an increase in area of 0.482 hectares), and
>
> iii) on the basis of a *pro-rata* calculation of effectively €22,855.30 per ten hectares *per annum*, being the rent due for the lease area (a figure of €29,750 per ten hectares *per annum* was quoted by Counsel, on behalf of the Plaintiff in his opening in the main action, although later admitted to be a miscalculation, it was included in the main judgment as the Plaintiffs original position, and then reproduced, albeit with the incorrect unit of acres instead of hectares, in the Plaintiff's submissions for this judgment nothing in any event turns on this).

In addition to the monetary calculations, the same uncertainty applies to the measured area of the encroachment. As previously noted, it appears from the primary evidence of Mr.O'Sulllivan, given at trial, that the area in question is 4840 m2 or 0.484 hectares (see the transcript of the 251h March 2009, p. 12). I proceed as such.

82. The measure of damages for ongoing trespass was considered in the Court of Appeal in *Jaggard v. Sawyer* [1995] 1 WLR 280, albeit in the context of considering damages in lieu of injunctive relief. The Court, reviewing the case law in this area, noted the conclusion of the Court in *Bracewell v. Appleby* [1975] Ch. 408:

> *"In that case ... the plaintiffs voiced their objection before building work began, but did not issue proceedings until after. Application was made for an interlocutory irljunction, but not until after the new house had been finished, and then it was refused. At trial the plaintiff sought an injunction which Graham J was unwilling to grant. He acknowledged that an irljunction would not require the new house to be pulled down, but it would make it uninhabitable. Instead, he awarded damages in lieu, holding (in accordance with the approach of Brightman J in Wrotham Park [[1974]1 WLR 798}) that the defendant should be liable to pay an amount of damages which in so far as it could be estimated would be equivalent to a fair or proper price payable for the acquisition of the right of way in question: see [1975} CH 408, 419D."* (emphasis added)

I would respectfully adopt the underlined approach in determining the amount of damages which the Defendant is liable to pay for the trespass in question.

83. Applying this principle to the case at hand, given the relationship between the parties, which is in the nature of a landlord and tenant relationship, and the nature of the demesne covered by the Lease, namely an area below the high-water mark, which will ordinarily be granted under a Foreshore Lease (as indeed was the case here), I accept that the proper method of payment for the acquisition of this area would be by reference to rent. I would agree with the Plaintiff that such compensation should be both calculated and payable at the same rate as presently provided in the Lease, on a *pro-rata* basis. This is what I believe the Defendant would have had to pay, had the area now in question been part of the original subject of the Lease.

84. The trespass commenced in or around 2003. I would therefore hold that the defendant's obligations will commence from that date. The amount of *mesne rates* to be paid for the encroachment is based on the passing rent, which equates to €2,285.53 per hectare *per annum*. The Defendant has encroached upon approximately 0.484 hectares, which equates to approximately €1,106.20 *per annum*. Calculating this as being ongoing since 1st January 2003, I would therefore find that the Defendant must pay an additional €9,955.80 as *mesne rent*, in relation to the trespassed area. This covers the period up to the 31st December 2011.

85. The Plaintiff also seeks interest on such sum. Given my previous finding in relation to interest on the rent owed (see para. 78 *supra*.) I would have no hesitation in also imposing 8% *per annum* interest on this amount; such interest amounts to €3,982.32. The

total amount payable for the trespass to date is therefore €13,938.12.

86. The plaintiff agrees that the affected area should be demised to the Defendant, on the same terms and conditions as the original lease; subject of course, to increased rent again calculated *pro rata* on the existing rent. The new composite rent should therefore be €23,961.49. Subject to conveyancing advice, there should be attached to the lease a map delineating the entire demise.

Further Damages for Breach of Statutory Duty:
87. The Defendant has claimed, on foot of the McCambridge Duffy report of the 8th May 2009, that it has suffered loss of earnings as a consequence of the Plaintiffs breach of statutory duty, relating to the Interreg Grant, of€1,558,221.00. It now falls to the Court to consider whether the Defendant is entitled to such damages in addition to the special damages already granted by the Court.

88. As to the claim for special damages I must firstly note the extreme reservation which the witness, Mr. Kieran Wallace, Accountant, voiced in relation to the McCambridge Duffy reports. In particular he placed much emphasis on his "*three main conclusions*", which were:

> i) there was insufficient material provided, to properly allow him to credibly review or critique the work done by McCambridge Duffy, who apparently relied upon representations from the directors of the Defendant, for most of the information used by them;
>
> ii) from what was available, the information m the reports appeared unreliable; and,
>
> iii) from independent or public information available about the Defendant, it was clear that certain issues in the report were unreliable and the loss of earnings calculations appeared extremely exaggerated.

His criticisms included severe scepticism of the filed accounts upon which the reports were based, which he said did not "*portray in any way a true and fair view of what the financial position of the company is.* " He also criticised the projections for increases in costs, as well as the potential profit.

89. Having considered the report of McCambridge Duffy report of the 8th May 2009 (and indeed also that of the 151h May 2009), in relation to the alleged loss of earnings, I am prepared to accept some of the criticisms which Mr. Wallace has directed at this report. In particular, I feel that there is significant doubt in relation to the presumptions upon which the report is based and consequently I feel it is likely that the projected loss of earnings is overstated. I would therefore not be prepared to grant special damages for loss of earnings in the amount claimed under the report.

90. Nonetheless, it is clear that where the Plaintiff has been found to have committed a statutory breach of duty, which this Court has already granted special damages for, and in circumstances where an acceptable Schedule of Works was provided in August 2005, I feel that I must grant some damages for loss of earnings, notwithstanding my reservations about the McCambridge Duffy report.

91. In *Emerald Meats Ltd. v. Minister for Agriculture* [1997] I IR 1, the Supreme Court noted that where special damages have been granted it will usually follow that general damages for tortious conduct should also be granted. When considering such general damages the court must assess the extent and nature of the loss suffered as a result of the impugned party's conduct. In that case the Supreme Court had overturned the High Court decision on damages because, although awarding special damages for the Department's breach, the court had refused to grant any general damages. The Supreme Court reversed this decision and referred it back to the High Court for assessment (the assessment of damages judgment is reported at [2007] IEHC 331).

92. In assessing the appropriate damages in that case, it might be noted that the court took the view that there had been loss arising to the plaintiff from damage to reputation; this is not at issue here. However in relation to alleged loss of earnings in that case the court, whilst noting that the plaintiffs methods of calculation for measuring its loss, were "*inappropriate and unjustified*", nonetheless held that this did "*not result in the court forming the view that the plaintiff did not suffer real loss and damage.* " Although the question of damages was to be approached with such certainty and particularity as is reasonable in the circumstances (*Ratcliffe v. Evans* [1892] 2 QB 524), the principle of *restitutio in integrum* still applies, notwithstanding evidential difficulties. In this regard, I note the statement of O'Flaherty J. in *Callinan and Deane v. VHf (*Unreported, Supreme Court, O'Flaherty J., 28th July, 1994), referred to in *Emerald Meats Ltd v. Minister for Agriculture* [2007] IEHC 331, where he stated:

> *"A party who suffers damage is required to be put in the same position as he would be if he did not suffer the damage: restitutio in integrum. It is obviously not the case that the Plaintiffs are in the same position as if the wrong had not been done to them; therefore, they must be entitled to damages. The fact that the actual figure to which they maybe entitled may not have been presented to the satisfaction of the judge does not mean that the Plaintiffs should not get any damages at all under this heading. "*

O'Flaherty J. continued, at page 9 of the judgment, quoting from McGregor on Damages (151h Ed.), in particular para. 344 thereof, where it was stated:

> *"[W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J put it in Chaplin v. Hicks [1911] 2 KB 786, the leading case in the issue of certainty:*
>
> > *'The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages. '*
>
> *Indeed if absolute certainty were required as to the precise amount of loss that the Plaintiff had suffered, no damages would be recovered at all in the great number of cases."*

In that case it was unquestionable that the plaintiff had suffered serious problems as a result of the defendant's wrongful acts and the award of special damages alone did not put the plaintiff back in the position it would have been, but for the wrongful actions of the Department.

93. In the present case, it is quite clear that the McCambridge Duffy report does not represent a satisfactory basis for calculating the loss of earnings as made. Nonetheless, as noted in *Callinan* and in *Emerald Meats*, the fact that a party has not sufficiently proved the actual quantum of damage caused should not deny it compensation where it is clear that the wrongful party's actions have actually occasioned loss. The measure of that loss must be such that it will place the relevant party back in the position it would

have been, but for the tortious conduct; *restitutio in integrum*. Since a breach grounding damages has been found by this Court and since I am satisfied that loss has been occasioned as a result, which loss has not been compensated for adequately by the award previously made, I should not refuse relief merely because of the Defendant's inappropriate and unsatisfactory way of calculating such loss.

94. The question therefore arises on what basis should such general damages be based? Ultimately it must be noted that any calculation for loss of earnings at this stage, would be subject to innumerable imponderables, upon which no particular evidence, actuarial or otherwise, has been presented, for example: with regards to the effect of the aforementioned recession; the occupancy of other marinas at the present time etc. The Court will therefore proceed on the basis that whilst based in some part rationally on the claim for loss of earnings put forth by the Defendant, the actual figure to be granted for further damages under this heading is a general sum granted for compensation.

95. Having regard, therefore, to the loss of earnings claim by the Defendant, such loss of earnings arose by virtue of the Defendant being unable to increase the number of berths available at the marina from 164 to 396. The Defendant has claimed that in addition to the construction of the additional berths it would been able to increase its prices for berthing due to the construction of further onshore facilities and by virtue of the marina being in a completed, rather than partially completed, state. It should of course also be noted that the Defendant has claimed that even once funds are forthcoming it will take them an additional 18 months to complete the construction of the marina. I would accept as accurate, given both the Defendants general representations, as well as the note of the Plaintiff, albeit in regard to alleged loss of reputation, that the marina has consistently remained in or around full capacity. I would also accept that since this would appear to be the only marina in the Northwest there would seem to be significant demand; which can be taken as meaning that should the additional berths be constructed, the Defendant would be able to make addition money therefrom at near full occupation. Nonetheless, there is a significant difference between 164 berths and 396. Whilst I am sure full occupancy could be maintained at the lower level, I cannot be so sure that it will do so at the higher one; especially in light of the current economic climate. In this regard I will therefore presume, for the purposes of a rough calculation on damages, that occupancy of the marina once completed, will average 90%; a relatively generous presumption.

96. In considering the actual quanturn of the damages I will use the company's filed accounts referred to in the McCambridge Duffy report of the 81h May 2009, notwithstanding Mr. Wallace's reservations in this regard. From this it can be seen that the revenue of the Defendant in 2005/2006 was €193,026. This figure remained relatively constant for the period 2005 to 2009, with a maximum of €213,645 in 2007/2008. As noted it can be taken that the additional berths would take, at a minimum, 18 months to complete; a figure which I feel may be somewhat conservative. I am therefore satisfied that given the disruption likely to be caused by such construction and the potential for overrun that the Defendant would not have begun to see any significant increase in earnings from the increased berths until 2007 at the earliest. However, given that the Defendant has yet to construct the marina, and has claimed it will take him 18 months following his receipt of damages and all proper permissions from the Plaintiff, it is arguable any loss of earnings claim should extent to at least 18 months beyond this judgment. Indeed it might be noted that the McCambridge Duffy report, which was created in early 2009, projected forward to 2011 taking into account monies which it anticipated the Defendant would receive from the action herein. I would therefore propose to adopt the same approach.

97. On a simple calculation of earnings based proportionately to the number of berths, and taking an approximate average of €200,000 for revenue based on 164 berths, the revenue which it might be expected to receive from 396 berths would be approximately €480,000. However, as stated, I am not satisfied that I 00% occupancy is realistic; I therefore reduce this amount by 10% to €432,000. There would of course also be an increase in the associated costs of running the enlarged facility, which the report indicated would be in the region of €73,000. I believe that this may be somewhat conservative; especially given that by the reports own admission a full-time employee will cost at a minimum €20,000 *per annum* in wages. I would therefore apply a rate of €100,000 *per annum* for the increased costs associated with the enlarged marina. For the period of 2007 to 2013, being the period until the marina will actually be constructed, the loss in revenue will be approximately €232,000 *per annum* minus the increase in associated costs of €100,000 *per annum*; a total loss of earnings of €132,000 *per annum*. For the full period indicated this would therefore amount to a total of €924,000 in loss of earnings. As noted, this figure is only a general measure of damages, and does not purport to be an accurate calculation, taking into account the many variables and imponderables. Nonetheless, the Court is satisfied that damage has occurred to the Defendant, and it is therefore appropriate to grant some damages under this head. The Court therefore adopts the figure of €924,000 as a guideline of the general damages for breach of statutory duty.

98. Continuing with the calculation, however, as with the special damages granted in the main judgment, these damages must also be reduced by 50% since they are awarded in relation to a loss of chance. As noted in *Malett v. McMonagle* [1970] AC 166 at 176:

> *"[I]n assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards. "*

(See also *Allied Maples v. Simmons & Simmons* [1995] 4 All ER 907; *North Sea Energy Holdings MV v. Petroleum Authority of Thailand* [1998] EWCA Civ 1953; and paras. 190-193 of the main judgment).

99. To proceed specifically on the above bases, given the imponderables mentioned, might well have the potential to do injustice to the Defendant, Given the absence of detail, I would not be confident to rely solely on this approach. Justice is more capable of being done by approaching it at a more general level.

100. I would therefore grant general damages for the Plaintiff's breach of statutory duty, in relation to the Interreg Grant, in the amount of €500,000, in addition to the amount already granted in the main judgment; meaning total damages on the Interreg issue of €2,045,000.00. This figure is the final compensation due to the Defendant from the Plaintiff herein, and encompasses all claims herein.

Conclusion:
101. In light of the above findings, I would therefore make the following Orders:

> 1) Judgment against the defendant in the sum of(i) €212,909.65, representing arrears of rent and interest thereon, up to and including the 31st December 2011, and (ii), the sum of €13,938.12, representing compensation for trespass.
>
> 2) An Order directing the Plaintiff to procure a further demise of the trespass area, measuring 0.484 hectares or thereabouts, in favour of the Defendant for the residue of the term granted by, and on the same terms and conditions, including rent, as *pro rata* applied as contained in the lease.

3) An Order that subject to the following terms and conditions the lease is valid and subsisting:-

i) The Defendant will pay all rent due and owing to the Plaintiff, together with interest, in the total sum of €212,909.65, with such liability being subject to para. 129 of the main judgment, dealing with set-off;

ii) The Defendant will provide an updated Schedule of Works and detailed drawings, plans and technical specifications with regard to the breakwaters and the marina facilities, all by reference, *inter alia*, to the inserted lease clause;

iii) The Defendant will retain Consulting Engineers of suitable speciality and skill, such as Arup Consulting Engineers, at whose direction and under whose supervision the remaining works necessary to fully complete the marina will be carried out; and,

iv) The Defendant will apply and lay out the sum of €1,545,000 awarded on the Interreg issue, or its equivalent, solely and exclusively in satisfactorily completing the marina in accordance with the parties' contractual relationship with each other.

4) An Order directing the Defendant to procure a Bond in favour of the Plaintiff, in accordance with the agreement of the 191h May 2000, in the sum of €317,434.52, of suitable duration and which covers all works set out in the Schedule of Works to be agreed, the general terms of which are to reflect existing commercial construction norms.

5) Judgment against the plaintiff in the sum of €2,054,000 representing damages for breach of statutory duty, with that part thereof being, €1,545,000, being impressed with the condition mentioned at para. (3)(iv), above.

6) An Order for set-off with regard to the respective damages award.

7) Liberty to apply.