Neutral Citation Number: [2008] IEHC 82

**THE HIGH COURT**

**Record No: 2004 No 9627P**

**BETWEEN**

**AIRSCAPE LIMITED**

**PLAINTIFF**

**AND**

**HEASLON PROPERTIES LIMITED**

**DEFENDANT**

**Judgment of Mr Justice John Edwards delivered on the 31st day of March, 2008.**

**Introduction – the proceedings in outline.**

1. This is a breach of contract action based upon an acknowledged agreement of the 5th of March 2002 under which the plaintiff was to carry out certain building works to a premises supplied by it to the defendant. The plaintiff claims that it was an implied term of the said agreement that the defendant would not unreasonably withhold its co-operation for the carrying out of the works in question, that the defendant did not in fact co-operate with the plaintiff, and that as a result of the defendants lack of co-operation the plaintiff could not fulfil its obligations under the agreement. The plaintiff says that in the circumstances the defendant was guilty of breach of contract; that that breach was a fundamental breach; and that by virtue of the defendant's fundamental breach the plaintiff is entitled to be discharged from any further obligation pursuant to the agreement. The plaintiff claims an order directing the return of a retention sum of €317,434.52, and any interest accrued thereon, held pursuant to the agreement on joint deposit account by the parties' respective Solicitors pending completion of the works. The plaintiff further claims a declaration that it is discharged from its obligations pursuant to the said agreement. The plaintiff further, or in the alternative, claims damages for breach and/or repudiation of contract.

2. The defendant has sought to fully defend the plaintiff's claim. In substance the defence alleges unjustifiable non performance by the plaintiff, and that the plaintiff did not in fact make any or any reasonable attempts to carry out the works, nor to satisfy what the defendant characterises as its "reasonable requests concerning works of repair to the roof". The defence asserts that it is the plaintiff that is in breach of contract rather than the defendant, and the plaintiff's entitlement to relief is denied.

3. The defendant in turn counterclaims against the plaintiff for breach of contract. The defendant alleges that the agreement of the 5th of March 2002 was in fact supplemental to an earlier agreement of the 18th of July 2000. The defendant variously alleges that, on the one hand, there was a failure to carry out certain agreed works, and on the other hand, that works in fact carried out were carried out in "a grossly defective and incompetent fashion". In the circumstances the defendant claims that the plaintiff is guilty of breaches of both agreements. The defendant claims to have suffered loss, damage and expense on account of plaintiff's said alleged breaches of contract and counterclaims for damages for breach of contract and also, in the case of the agreement of the 5th of March 2002, a declaration as to the plaintiff's breach of contract..

4. In its reply and defence to the defendant's counterclaim the plaintiff, in substance, denies the alleged breaches of contract and asserts that the agreement of the 5th of March 2002 superseded the earlier agreement and that any claims that the defendant might have arising from the earlier agreement (which were not admitted) were "fully compensated …within the terms of the subsequent agreement." Further the claim of repudiatory breach by the defendant is reiterated, and there are also pleas, in the alternative, of negligence, breach of duty, breach of contract and unreasonable conduct on the part of the defendant.

**The hearing.**

5. There was a full plenary hearing in this matter. Evidence was heard over five days in the course of which both sides called and cross-examined witnesses and produced copious documentation by way of exhibits.

**Facts relevant to the liability issue as established in evidence.**

6. For many years the Semperit Tyre Company operated a substantial tyre manufacturing plant at Gallanstown, Ballyfermot, Co Dublin. Unfortunately, during the mid 1990's the Semperit factory closed with the loss of many jobs. Following the closure the factory buildings and appurtenant lands were acquired by the plaintiff, a property development company. The plan was to convert the Semperit campus, so to speak, into an industrial park comprising a number of self contained industrial units for commercial letting to businesses. The development was to be called the "Park West Industrial Estate". The plan, as conceived, involved subdividing the existing factory premises into a number of smaller units and the construction of a number of additional units on lands not previously built on. The plan further envisaged the provision of critical infrastructure within the campus such as roadways, paths, parking areas, loading bays, public lighting, signage and so forth. Planning permission was duly applied for, and successfully obtained, by the plaintiff. Works commenced in due course and by 1999 matters had progressed sufficiently to enable the plaintiff to begin letting units.

7. The lettings were conducted through two firms of Industrial Sales and Letting Agents, namely Palmer, McCormack Lambert, Smith, Hampton and DTZ Sherry Fitzgerald.

8. During 1999 DTZ Sherry Fitzgerald introduced a client to the plaintiff as a potential tenant. That client was an office furniture manufacturer, then based in Chapelizod, incorporated as Europlan Furniture Ltd and trading as Europlan Furniture. It was looking to relocate to new premises as its existing premises was too small, and in any case was unsuitable. It was decided to move the business to a 65,000 sq ft unit in the Park West Industrial Estate, being Unit S4, a unit in the now subdivided former tyre factory building.

9. Although the former tyre factory building had been physically subdivided, significant additional works required to be done to Unit S4 to render it suitable for Europlan Furniture to relocate there. Accordingly, on the 18th of July 2000 the plaintiff entered into a Contract of Sale with the defendant company (a company associated with Europlan Furniture Ltd) to sell Unit S4 to the defendant on the basis of a long lease, coupled to a Development Agreement of the same date and on foot of which the significant additional works were to be carried by the plaintiff to render Unit S4 suitable for Europlan Furniture to use as its new manufacturing centre. The total consideration payable by the defendant to the plaintiff in respect of both the Contract of Sale and the Development Agreement was IR£4,235,625 (equivalent to €5,378,134) apportioned equally between both contracts.

10. It is important at this stage to deal in a little more detail with the relationship between the defendant and Europlan Furniture Ltd. The defendant Heaslon Properties Ltd is one of four associated companies, which I shall loosely refer to as the "Europlan companies". The others are Europlan Furniture Ltd, Europlan Office Furniture Ltd, and Contract Powder Coatings Ltd. The basis of these associations is that all of these companies have common shareholders and directors. However there is no common subsidiary relationship or holding company relationship. Accordingly, they do not form a Group of companies. The defendant's managing director, Mr Frans de Ru, explained the practical reality of the relationship between the Europlan companies in the course of his testimony. He

told the Court that Europlan Furniture Ltd is the manufacturing company. Heaslon Properties Ltd owns the premises in which the business is carried on. Europlan Office Furniture Ltd holds the patents for the products manufactured by Europlan Furniture Ltd. Contract Powder Coatings Ltd carries out powder coating of components produced and used by Europlan Furniture Ltd, and also does contract work for outside companies.

11. Returning to the Development Agreement, the works to be carried out were specified in a document entitled "Outline Specification Incorporating Materials to be used in the Re-furbishment / Construction of Industrial & Warehouse Units at Unit S4 Ex Semperit Factory for Europlan Ltd" (hereinafter called "the specification document"). This specification document was prepared by the plaintiff's architects and annexed to the said Development Agreement. Although the specification document covers all of the work to be done, there are two particular aspects of that work that feature centrally in the disputes between the parties with which this Court is concerned, namely concrete flooring works and roofing works. Accordingly it is appropriate that I should recite those parts of the specification document dealing with those works. Section 3 of the specification document is entitled CONCRETE WORK. Within that section, paragraph 3.3 states:

> "Floors:
>
> New Concrete floors internally will be power floated concrete slabs, on damp proof membrane on blinded hardcore designed to Engineers requirements. Where appropriate and possible existing floors to be retained, top level taken off, and levelled with screed to accommodate required loadings, allowing for bonding to existing. All existing pits etc to be stripped out and filled with hardcore, then slab as necessary – all to structural engineer's specification and details."

Section 6 of the specification document is entitled ROOFING WORK and states at paragraph 6.1:

> "All existing roofs to be inspected to assess suitability for re-roofing, over roofing or retention.
>
> For existing roof, existing 'Trocal' or similar flat roof membrane/sheeting on insulation on metal decking on vapour check on secondary steel structure to be retained. Existing roof lights to be retained, refurbished where necessary."

12. There was another important aspect of the works to be carried out that requires to be mentioned at this stage which, while not central to the disputes that developed between the parties, nevertheless had implications for both the roofing works and the flooring works. This was the intended removal of a large steel gantry from the roof of the former tyre factory, and its supporting stanchions one of which was within the CPC area of Unit S4 encased by a blockwork wall. The gantry in question was one of a pair that had supported air conditioning plant for the tyre factory. Each gantry spanned 60 meters without touching the roof and was completely independent of the roof. When the gantry was eventually removed a special crane was required to remove it, such was its size and weight. Originally, all of the gantry legs were outside of the Semperit building. However, what is now the CPC area of Unit S4 represents an extension to the original building and this extension incorporates one leg of a gantry. It was explained in evidence by Mr Barry Kelly, Architect, that at the time of construction of this extension it would have been impossible to satisfactorily address a roof covering around the gantry leg. Accordingly, what they did was they created a well in which the leg sat, effectively an external space, by building a block wall around it. The Development Agreement called, inter alia, for removal of the gantry in question and the supporting leg or stanchion that was within the CPC area, and also demolition of the encasing block wall. This block wall partially supports the roof of the CPC area. Mr Kelly explained that the structural engineers for the project had proposed that, to allow for demolition of the wall in question, works should be carried out to the roofing steelwork to enable it to be tied back into the main structure so that the roof would be supported. This could be done either before or after the roof was resurfaced, although it would be preferable to do it before resurfacing.

13. Although both the Contract of Sale and the Development Agreement are dated the 18th of July, 2000 Europlan Furniture was allowed into occupation much earlier than that. The circumstances surrounding this were also explained in evidence by Mr de Ru. Originally Europlan Furniture had hoped that the acquisition of Unit S4 would be completed by the end of December 1999, particularly as the defendant had, in turn, had entered into an agreement to sell the Chapelizod premises to a property developer. However, for reasons that it is not necessary to go in to, it was not to be. Mr de Ru explained that in the course of pre-contractual negotiations in 1999 the defendant was particularly concerned about the concrete floors within the building, which had surface defects and differences in levels. The plaintiff agreed to install a new floor prior to Europlan Furniture entering into occupation. However, when it became apparent that the transaction could not be completed before the end of 1999 it was then further explained to the plaintiff that Europlan Furniture had acquired specialised equipment from a supplier in Holland for the powder coating section of its business. This equipment, scheduled for delivery in February 2000, would consist of an array of dipping tanks (variously containing detergent solution, a mild acid or "acid type" solution, and clean water) for cleaning metal components prior to powder coating, and a special oven for baking on the powder coating once it was applied to the cleaned metal. Europlan Furniture urged upon the plaintiff that it would make no sense to have this equipment installed in their existing Chapelizod premises, only to have to move it again a few months later when their business would be transferred to Park West.

14. In the circumstances the plaintiff agreed that Europlan Furniture could have the new equipment delivered directly to Park West and installed there in February of 2000. Moreover, the plaintiff agreed to have the new floor installed in time for the arrival of the new equipment. Without going into the reasons for it, there were delays in installing the new floor. This was to be an engineered floor in accordance with the specification document. It was originally envisaged that a new floor would be laid throughout the entire premises as a single job. As a consequence of the delays the plaintiff subsequently agreed to split the work and afford priority to the laying of a temporary new floor in the CPC area, where the new equipment would be installed, before a permanent new and engineered floor was laid throughout the unit. The temporary floor would not be an engineered floor and involved placing a temporary screed on top of the existing floor in the CPC area.

15. However, by February the temporary floor in the CPC area had still not been laid. The new equipment arrived from Holland and had to be placed in storage in another part of the premises, while the installers returned to Holland. By April the temporary floor in the CPC area was finally completed. The installers returned and the new equipment was duly installed. At the end of May or in early June somebody within the plaintiff company apparently became concerned about the insurance implications of Europlan Furniture's occupation of the CPC area of Unit S4 on a permissive basis, and the defendant was then asked to enter into a Licence Agreement. A Licence Agreement was duly entered into on the 14th of June, 2000 and the licence continued until formal possession was taken of the entire of Unit S4 pursuant to the aforementioned Contract of Sale and Development Agreement of the 18th of July, 2000.

16. The Contract of Sale provided for a closing date of six calendar weeks from the date of the contract. The concurrent and collateral Development Agreement provided for a date of practical completion of "31st October 2000 or as soon as possible thereafter". However the schedule slipped again and again, and by the end of 2001 the works covered by the Development Agreement were still not completed, and the sale was still not closed. The situation was most unsatisfactory from Europlan Furniture's

point of view. Their business was now split between the Chapelizod site and the Park West site. The main part of their manufacturing operations was still being conducted in the premises at Chapelizod, whereas the CPC part of their business was being conducted in a portion of Unit S4 at Park West. Moreover, they were being placed under enormous pressure to move out of the Chapelizod premises from the developer who had acquired it. This developer threatened to issue High Court proceedings against them; such was his frustration at the delay. Furthermore, the temporary new floor that had been laid in the CPC area in April 2000 subsequently developed cracks because the temporary screed had not fully cured before it was put to use.

17. The delays generated extensive correspondence between the parties respective solicitors, and there were innumerable meetings and so forth in an effort to move things on. A Certificate of Practical Completion was issued on the 17th of December 2001 by the plaintiff's architect, who certified that the works were practically completed on the 17th of December 2001; save for "snagging items" on a list attached thereto which still required to be attended to. This Certificate of Practical Completion was rejected by the defendant for reasons that it is not necessary to go in to.

18. Matters finally came to a head in early March of 2002 when, following a series of direct meetings between representatives of the plaintiff and defendant companies, respectively, the parties arrived at a new agreement. The status of this new agreement is disputed as between the parties. The plaintiff contends that it replaced the original Development Agreement of the 18th of July 2000. The defendant, however, contends that it was merely a supplement to, and amounted to no more than a variation of certain aspects of, the original Development Agreement. This Court will have to resolve this dispute in due course. Be that as it may, the terms of this new agreement were recorded in a letter dated the 5th of March 2002 from the plaintiff's solicitors to the defendant's solicitors. That letter records:

> "The following revised terms are agreed in full and final settlement of all outstanding issues between the parties with regard to this premises and the development agreement between the parties:-
>
> 1. Completion of the development agreement to take place this afternoon by discharge of the balance proceeds by bank draft so that your client can take possession of the premises on Wednesday. The bank draft to be couriered to us and we will send you the completed documents by return courier.
>
> 2. A retention sum of €317,434.52 (IR£250,000) will be held on joint deposit account by Partners at Law, Solicitors and Maurice J. Bannon and Co Solicitors with interest accruing to Airscape Limited. The €317,434.52 (IR£250,000) retention will be released on practical completion of the attached list of items ('the list') to be signed by Pat Power and Frans De Ru.
>
> 3. Airscape Limited will use its reasonable endeavours to practically complete the items on the list within four calendar months of the date of payment pursuant to clause one of this letter with the exception of the roof. Airscape will use it reasonable endeavours to practically complete the roof within eight weeks of the payment of the balance proceeds pursuant to clause one of this agreement. However, Airscapes endeavours to practically complete the items on the list within four calendar months is subject to the movement by the occupier of the equipment in the CPC area at its expense to permit the works to be carried out to the CPC area.
>
> 4. On practical completion of all the items on the list or of all of the items save for the works to the CPC area, your client's architect will be notified and a joint inspection of same will take place with our client's architect within three working days. Practical completion is to be agreed between our client's architect and your client's architect who will both sign a practical completion certificate to this effect. In the event of a dispute with regard to the practical completion of the items listed the matter will be referred to the decision of an independent architect who will be required to give a decision within five working days of being requested to do so. The decision of the independent architect shall be final and binding on the parties. The independent architect for the purpose of all matters in dispute will be acting as an expert and not as an arbitrator. 'Independent architect' means such independent architect as may be agreed between the parties but failing agreement between the parties within four working days, one will be appointed on the application of either party, by the President or acting President for the time being of the Royal Institute of Architects of Ireland.
>
> 5. In the event that all other items of work on the list have practically completed and certified in accordance with clause 4, save to the works to the CPC area the sum of €253,948 (IR£200,000) plus interest on this amount will be released immediately to Airscape Limited. The balance of €63,486.90 (IR£50,000) will be released, subject to the removal of the equipment and machinery on the CPC area by Heaslon, when the works to the CPC area have been practically completed and certified in accordance with clause 4.
>
> 6. A reduction of €65,000 is agreed from the balance proceeds in full and final settlement of the windows omitted from the building and the work involved in moving the equipment and machinery in the CPC area.
>
> 7. The balance proceeds therefore to be paid by bank draft by your client is the sum of €2,649,555.52 in accordance with the attached invoice of which the retention sum of €317,434.52 will be held by Partners and Law, Solicitors and Maurice Bannon on joint deposit account in accordance with these terms."

19. A schedule, representing "the list" referred to, was attached to this agreement in the following terms (reproduced with capitals and formatting preserved):

> "Euro Plan
>
> List of Items
>
> · Removal of the overhead gantry and air handling units. To include the removal of the wall in CPC and making good to the roof and wall.
>
> · Existing roof to be recovered to specification to be agreed, to include tower and 60/65 No New Sky Lights.
>
> · Credit to Europlan of €65,000 in respect of Labour to CPC area and glazing omitted to tower.
>
> · New/Remedial work to floor to CPC area to be completed between 22nd July, 02 and 29th July, 02 when platforms

are to be removed. A written undertaking will be given so that the work under the oven and tanks to take place at a later date. This does not affect the release of the €63,487 (£50,000) retention on work in the CPC area.

· Three Fire Doors to CPC area to be supplied by developer and fitted by Europlan.

· Fire alarm to be installed to CPC and P & M and completed elsewhere. Specification to be discussed/approved.

· ESB mains connection.

· Bollards to the South Elevation Pathway.

· Windows at high level to CPC area to be made good where necessary and painted.

· All Cladding and Flashing and guttering to be snagged including down pipes etc.

· Concrete splashed on claddings and doors.

· Flashing installation doors in P & M in progress.

· Doors Scratched and Damaged (To be inspected).

· Footpath and Entrance to Acute Precision.

· CPC Smurfit Junction block work damaged.

· All Raw steel work to roller shutter door runners to be painted in the house colour (Silver).

· Movement to Office Glazed North Elevation to be made good.

· Repairs to Suspended ceilings in Office area due to leaks and movement.

· All fire doors and Roller shutters to be snagged and made good in relation to mechanism/closing etc."

20. The evidence establishes that following the agreement of the 5th of March 2002, the plaintiff, through an agent Park West Construction Ltd, engaged the services of a specialist roofing contractor Gerard F May Roofing Ltd to carry out the roofing works, and supplied that firm with terms of reference based upon the specification document hereinbefore referred to. Gerard F May Roofing Ltd in turn prepared a detailed specification and a proposed programme of work and furnished that to the plaintiff. Upon receipt of Gerard F May Roofing Ltd's specification and proposed programme of work the plaintiff's Architects, Carew Kelly, forwarded these documents to the defendant on or about the 26th of April 2002, with a view to securing the defendant's agreement to what was being proposed. It is clear from the evidence that Carew Kelly did not anticipate any objection. Moreover, it is equally clear that the plaintiff didn't either, because the evidence establishes that at an early stage, before the specification and proposed programme of work was furnished to the defendant, a firm order was placed with Gerard F May Roofing Ltd by Park West Construction Ltd.

21. Having received a firm order Gerard F May Roofing Ltd in turn ordered the materials that it needed for the works from suppliers in Germany and the UK. These materials were delivered to the site on the 29th of April, 2002. They were left at ground level on that date. However, on the 7th of May, 2002 representatives of Gerard F May Roofing Ltd returned to the site, equipped with a mechanical hoist, with the intention of lifting the materials in question on to the roof and starting work. They were stopped and prevented from doing so by a representative or representatives of the defendant.

22. The evidence is somewhat conflicting in respect of the stoppage. In the course of his evidence Mr de Ru stated that the following exchange occurred:

> "I went out and said 'Listen, lads, what are you doing here?' [The reply received was] 'We are here to do the roof work' I said; 'But you can't.' [The reply to that was] 'Oh, yes, we are. e are instructed by Parkwest to carry out the work.' I said; 'Sorry, I cannot let you on the roof for a few reasons. First of all I never knew you were coming. We weren't notified. Secondly, I have not seen a health and safety statement or a risk assessment at all of the work to be carried out. Thirdly, none of your company has come to me previous to this and got a walk-through through the premises and see what equipment …..'." [the sentence was unfinished due to an interjection.]

However, notwithstanding that the court had received this testimony from Mr de Ru, Mr Seamus Kennedy, an interior architect, employed by Europlan Furniture, later testified that it was he (Mr Kennedy) who ordered the men to stop work. His evidence was "I told them; 'What are you doing here? Nothing has been agreed (sic) to the roof yet.'." Mr Kennedy further testified that he then got on to Mr Kelly's office and said "They are here and nothing has been agreed yet."

23. At any rate it is clear from the foregoing that various reasons are being advanced for the stoppage. One of the reasons for it was that, apparently, the defendant did not agree with Gerard F May's specification and proposed programme of work. That much is clear. As regards whether there really were other reasons the position is less clear. This is so notwithstanding Mr de Ru's testimony. One of the defendant's contentions is that it was concerned to see a health and safety plan, and in particular the contractor's safety statement, before it could allow the workmen on to the roof. It is true that in the course of his evidence Mr de Ru did say that he told the workmen that he had not seen a health and safety statement and a risk assessment. However, although it was put to some of the plaintiff's witnesses that the plaintiff had these concerns it was never put to the representative of Gerard F May Roofing Ltd that this was one of the reasons given to its workmen. Further, although it was put to some of the plaintiff's witnesses that the defendant also had insurance worries and required confirmation of the insurance position before it could allow the contractor on to the roof, neither Mr de Ru, nor Mr Kennedy, made any mention of insurance being a concern on the day. There is no convincing evidence that at any time either prior to, or in the immediate aftermath of the stoppage, the defendant made a request to either the plaintiff, or its contractor Gerard F May Roofing Ltd, for reassurance in respect of health and safety or insurance matters, or to see documentary evidence of the position in regard to either or both of those matters. While Mr de Ru does contend that he was not notified that the workmen were coming on that day, and the evidence does seem to bear that out, that fact alone does not dispose of the court's concerns, particularly as Mr de Ru's company had only just recently entered into an agreement whereby roofing works were to be undertaken as a matter of priority, and his company had also been sent the Gerard F May Roofing Ltd specification and proposed programme of work and, by the date of the stoppage, had not intimated having any problem or difficulty with it.

Moreover, Mr Kennedy's evidence was expressed using the conditional mood, as witnesses sometimes do, namely that "We would have been requesting for (sic) insurances and health and safety statements, all of that." (my emphasis). However when pressed subsequently to give precise details of these requests he couldn't give any. There was certainly no correspondence, nor is there a paper trail of any sort, to support these alleged requests. The plaintiff denies receiving such requests.

I am satisfied from a consideration of all of the evidence that the main reason for the stoppage was that the defendant did not agree with Gerard F May's specification and proposed programme of work, and that concerns about insurance or health and safety, if they existed at all, were peripheral.

24. In regard to the specification and proposed programme of work, there were differences between the parties both as to the materials to be used, and as to the methodology to be employed. The defendant then put forward a counter proposal involving a specification drawn up by another firm of roofing contractors, namely Moy Materials Limited. However, the plaintiff's Architects were not happy with the counter-proposal and a stand-off developed.

25. The principal difference between the parties with respect to the materials to be used was that Gerard .F. May Roofing Ltd proposed to use a Sika-Trocal type membrane whereas Moy Materials Ltd proposed using an alternative product namely Paralon. The plaintiff's architects were of the firm view that the Sika Trocal product was superior. In the course of being cross-examined by counsel for the defendant on day 2 of the trial, Mr Barry Kelly of Carew Kelly, Architects, stated that he found it "amazing" that the specification put forward by Moy Materials Ltd was being insisted upon by the defendant, as it only carried a ten year guarantee, whereas the Sika Trocal specification advocated by Gerard F May Roofing Ltd carried a fifteen year guarantee. He stated that he just could not understand the logic of it. This was not countered in evidence by the defendant's architect.

26. The principal difference between the parties with respect to methodology concerned how openings in the roof were to be covered. Mr Seamus Kennedy, an interior architect, representing the defendant, wanted these openings made good with flush coverings. The plaintiff's architect, however, felt that covering existing opes in the roof with "boxes", which allowed the formation of an upstand, with Trocal membrane dressed up around each box, represented a much better and safer detail for closing these openings. The defendant's architect disagreed, being of the view that water bunding would occur in the vicinity of the upstands. The plaintiff's architect's answer to that was that bunding was usual and to be expected with Trocal membrane, and that it was irrelevant to, and would not affect, the integrity of the watertight seal.

27. While the document trail is somewhat incomplete it appears that some correspondence was exchanged in the weeks following the 7th of May, 2002, and some meetings may also have occurred, all aimed at resolving the impasse. Ultimately this was to no avail. The solution, eventually agreed to by both parties, was that the disputes would be referred to an independent arbitrator, the late Mr David Keane, MRIAI., for his decision, which was to be binding on the parties. The referral was in October of 2002 and Mr Keane was furnished with all relevant documentation. He also visited the site and walked the roof accompanied by Mr Barry Kelly, Architect, and Mr Dermot Arthur, Head of Group Construction, representing the plaintiff, and Mr Seamus Kennedy, Interior Architect, representing the defendant. The respective proposals were apparently discussed in some detail during this walk. Mr Arthur's evidence is that Mr Seamus Kennedy specifically raised with Mr Keane his worries about water bunding around the proposed upstands if the G.F. May Roofing Ltd proposal was proceeded with. In any event Mr Keane issued his determination on the 10th of April 2003, and upheld the plaintiff's proposal. He stated, *inter alia*:

> "It seems to me, therefore, that in the circumstances the works proposed by Airscape Ltd, taking both the general tenor of the original agreements into account and also the guarantee offered by Sika Trocal, should be considered satisfactory."

28. It should also be stated, for the purpose of maintaining the chronology, that during the month of March 2003, and while the parties were still awaiting Mr Keane's determination, the gantry was removed. However, the leg in the CPC area remained in situ, the block wall encasing it remained to be demolished, and the hole in the roof above the leg-well remained to be closed over.

29. The defendant's representatives were clearly unhappy with Mr David Keane's determination. They have contended, and continue to maintain, that his determination only dealt with the materials to be used and not with the proposed methodology, particularly the use of box coverings as opposed to flush coverings for openings. The defendant sought to refer the matter back to Mr Keane but Mr Keane refused to entertain it. Having carefully considered the terms of Mr Keane's determination I am against the defendant with respect to its contention that Mr Keane's determination is to be construed narrowly and as referring only to the question of materials. Having walked the roof with representatives of both sides Mr Keane was fully aware of what was being proposed, and of the parties' respective concerns. In the paragraph that I have quoted Mr Keane clearly endorses the "works proposed by Airscape".

30. Following Mr Keane's determination the plaintiff set about making fresh arrangements to carry out the required roofing works. Mr Pat Power, on behalf of the plaintiffs stated in evidence that they assumed that that was the end of the disputes and that it was just a case of getting on and doing the work. Gerard F May Roofing Ltd was contacted and asked to proceed with the works. They were prepared to do so but only subject to an additional "restocking charge" of €5, 328.89 which the plaintiff agreed to pay.

31. On the 25th of April 2003 Mr Barry Kelly, on behalf of the plaintiff, wrote to Mr Frans de Ru, on behalf of the defendant, in the following terms:

> "Re: Roofing works to Europlan at Unit S4, Park West.
>
> Dear Frans,
>
> Following on from David Keane's decision in respect of the proposed works to the roof, we are currently in the process of organising the contractor to commence the works. In order to co-ordinate with yourselves and to ensure the works can be carried out with as little disruption as possible to yourselves, can you indicate what timeframe suits you best – we would intend to start within the next couple of months, to ensure good weather.
>
> I would be grateful if you could revert to me in connection with the above, and we will set the process going.
>
> Yours etc."

32. There does not appear to have been any response to this letter. According to Mr. Kelly this was just one of a number of attempts on his part to get agreement from the defendant as to when the works could start but the defendant did not reply to any of his communications. Matters dragged on for some weeks and eventually, the plaintiff instructed its solicitors to write to the defendant's solicitors about the matter. By letter of 28th May, 2003 from Partners at Law, solicitors for the plaintiff, addressed to Maurice J.

Bannon & Company, solicitors for the defendant, the plaintiff's solicitors wrote in the following terms:-

> "Re: Premises Unit S4, Park West Industrial Estate
>
> Dear Sirs,
>
> We refer to the above and to previous correspondence. We are instructed by our client that they have endeavoured on numerous occasions to contact your client with a view to agreeing a date and time for access to be granted to the roof contractor to carry out the works, without success.
>
> In the circumstances, if your client does not propose allowing access to the roof contractor to carry out the works, please confirm by return that the retention can be released. We await hearing from you.
>
> Yours etc."

That letter was apparently despatched by fax.

33. Maurice J. Bannon & Company, Solicitors, in turn replied by fax on the same date in the following terms:-

> "Re: Premises Unit S4, Park West Industrial Estate.
>
> Dear Sir,
>
> We refer to the abovementioned matter and thank you for your fax on the 28th May, 2003. We are awaiting clarification from David Keane in relation to the following:
>
> 1. Ponding of water to rear of tower area.
> 2. Upstands/boxing on roof.
> 3. Closing/removal, open area to gantry legs.
>
> We will contact you in the near future.
>
> Yours etc."

34. As previously alluded to, notwithstanding this attempt by the defendant to refer certain matters back to Mr. Keane, Mr. Keane declined to revisit the matter. The correspondence indicates that the attempt to refer matters back to Mr. Keane was by means of a letter from Maurice J. Bannon & Company, Solicitors dated 27th May, 2003. Mr. Keane's letter declining to revisit matters is dated the 9th June, 2003.

35. On the 17th June, 2003 the plaintiff's solicitors wrote again to the defendant's solicitors pointing out that as Mr. Keane had made his decision he was functus officio and that there was no basis for the defendant seeking to re-open the matter. The letter went on to state the position of Mr. Barry Kelly, of Carew Kelly, Architects, with respect to the three items mentioned in the defendant's solicitors fax of 28th May, 2003 and then, in conclusion, stated:-

> "We would suggest, at this stage, that your client's attention be focused on a schedule for executing the roof and any further works required.
>
> Our client is anxious to have all matters resolved and awaits your cooperation in this regard. Our client proposes to have the work carried out in July and you might please let us have proposed dates in this regard. We look forward to hearing from you.
>
> Yours etc."

36. Neither the plaintiff's solicitors nor the plaintiff itself received an immediate response to that letter. Accordingly, on the 26th June, 2003 Mr. Barry Kelly wrote again to Mr. Frans de Ru. He stated:-

> "Re: Roofing works to Europlan at Unit S4, Park West.
>
> Dear Frans,
>
> Further to my letters of 25/04/03 and the 20/05/03 in connection with the carrying out of works to the roof at Europlan (Unit S4) we would request that you would reply in writing within seven days, if we receive no reply, Airscape Ltd, will be forced to initiate the appropriate legal proceedings.
>
> Yours etc."

37. It seems that this letter did elicit some form of response. Apparently a fax was sent by Mr. Seamus Kennedy, Interior Architects, to Mr. Barry Kelly. Unfortunately that fax has not been exhibited before me. However, it is referred to in a subsequent letter from Mr. Barry Kelly addressed to Mr. Seamus Kennedy and dated the 30th June, 2003 which is in the following terms:-

> "Re: Roofing Works to Euro Plan at Unit S4, Park West.
>
> Dear Seamus,
>
> Further to your fax of 27/6/03 in connection with the roofing works to Unit S4, we would note that we will be carrying out the works in accordance with the specification and scope of works submitted to the arbitrator, and approved by him. We will not be removing or treating the upstands other than as part of the recovery works. It is intended to close over the

roof at the gantry support location and treat the area behind the tower, but the removal of the wall at the CPC side of the factory did not form part of the arbitration, and is not relevant to the issue of roofing works.

We would note that our letter of the 26/06/03 states that written agreement must be received within seven days and we would reiterate that this remains the position particularly as the arbitrator has given his clear decision.

Yours sincerely."

38. The next thing that occurred was by letter of 2nd July, 2003 the defendant's solicitors wrote to the plaintiff's solicitors seeking the plaintiff's consent to a supplemental referral of the three issues mentioned in their fax of 28th May, 2003 to Mr. David Keane. There was some delay on the plaintiff's side in replying to this. The plaintiff appears to have changed solicitors around this time. At any rate the plaintiff's new solicitors (Sheehy Donnelly, Solicitors) eventually replied to the defendant's solicitors said letter by a letter of the 28th October, 2003 in the following terms:-

"Dear Sirs,

We refer to previous correspondence in this matter and in particular your letter of the 2nd July, 2003.

1. Our client's architect has advised that the issue of the ponding of the water has been addressed in Gerard F. Mays revised proposal, it will be dealt with as part of the recovering of the roof.

2. The issue of the upstands does not relate directly to the referral to Mr. Keane. As our client's architect has noted on previous occasions, he regards the covering of the existing opes in the roof with 'boxes' which allows the formation of an upstand, as a much better and safer detail for closing these openings. Our client does not propose to change them, which our client is advised by its architect will allow for the possibility of leaks and will be more dangerous as weak points (which flush coverings of openings would be) will not be obvious on the roof. Our client's architect is of the opinion that the detail provided is best practice and that he would not be prepared to stand over the flush finishing of opes, as it is not a good detail.

We trust that this deals with the issues raised. In these circumstances can you please confirm your client's permission to our client to commence work on the roof?

Yours etc.

39. A reminder was sent by the plaintiff's solicitors on the 10th of November, 2003 as no response had been received by that stage. The end of the year came and went and there was still no response. Accordingly, on the 5th of February 2004 the plaintiff's solicitors wrote in comprehensive terms to the defendant's solicitors placing the defendant on notice that a continued failure to nominate a commencement date for the roofing works would result in proceedings being commenced by the plaintiff against the defendant on the basis that the defendant had repudiated the agreement. The plaintiff's solicitors went on to call upon the defendant, within 7 days of the date of that letter, to nominate a date for the commencement of the roofing works, failing which High Court proceedings would issue.

40. The 13th of February 2004, being seven clear days after the letter of the 5th of February 2004 came and went without the defendant nominating a commencement date.

41. The Plenary Summons herein issued on the 3rd of June 2004.

42. In the course of the evidence before me it was put to the plaintiff's witnesses by counsel for the defendant, and the defendant's own witnesses, particularly Mr de Ru and Mr Kennedy, expressed the view on behalf of the defendant, that notwithstanding the existence of an on-going dispute between the parties concerning the proposed roofing works, there was no reason why the plaintiff could not have carried out the remainder of the works that required to be done under the agreement of the 5th of March 2002. To adopt a phrase used by Mr Gilhooley S.C., it was strenuously urged that "there was no critical path".

43. The plaintiff's witnesses, particularly Mr Power and Mr Kelly, rejected the suggestion that there was no critical path. On the contrary they maintained that it was central to the agreement between the parties that the roof was to be done first. This was why the agreement of the 5th of March 2002 provided for the shorter time period of eight weeks for the carrying out of the roofing works, so says the plaintiff. In particular Mr Kelly, in the course of his evidence in chief, and in response to a question as to what was the anticipated sequence of works, described the roofing works as "the key element". He went on to describe proffering the Gerard F May Roofing Ltd specification to Europlan and being unable to obtain agreement on it. He then stated:

"In the meantime we wished to proceed with the other works which involved the repairing of the floor in the CPC area, the removal of the wall in that particular area and various other minor works within that area primarily. Unfortunately, we were never able to gain access because the equipment in that CPC area was required to be removed. We did understand and, I believe there was an agreement, that it would be moved at the end of July 2002 in order that we would get in and do the work in a safe manner."

44. An issue arose in the course of Mr de Ru's evidence on day 4 of the trial as to the extent to which it was in fact necessary to move equipment out of the CPC area for the purpose of doing works other than the roofing works. Mr de Ru suggested that to remove all of the equipment from the CPC area in one go would involve a shut down of CPC operations for 7 to 8 weeks. He was fully aware of this, having discussed the matter with the Dutch equipment installers, at the time of negotiating the agreement of the 5th of March 2002, and it was not something that he was prepared to contemplate at that time. Accordingly, he says that he agreed with Mr Power on behalf of the plaintiff, that part only of the equipment would be removed from the CPC area at the end of July 2002, and that the tanks and the oven would specifically not be moved at that time. He stated that these items of equipment were coming to the end of their working life and were going to have to be replaced "within a space of six to eight months" anyway. That being so, the plan was to lay a new floor around, but not under, the tanks and oven in July 2002 and then when the tanks and oven were being replaced at a later date the plaintiff's workmen would come and do the portion of floor on which the tanks and oven had been standing. Mr de Ru pointed out that the following paragraph from "the list" annexed to the agreement of the 5th of March 2002, reflects this:

> "New/Remedial work to floor to CPC area to be completed between 22nd July, 02 and 29th July, 02 when platforms are to be removed. A written undertaking will be given so that the work under the oven and tanks to take place at a later date. This does not affect the release of the €63,487 (£50,000) retention on work in the CPC area."

45. Mr de Ru went on to state that at this stage the new equipment has in fact been installed. However, neither the flooring work nor demolition of the gantry leg-well has taken place. His evidence as to exactly what has been done then became rather confused. He initially stated that the "new equipment" was installed about a year previously (c. January 2007, as the witness was giving his evidence in January 2008). He also gave the impression that both tanks and oven had been replaced. He later seemed to suggest that only the oven was in fact replaced, that it had been replaced "a year later" (ie a year after the agreement of 5th March 2002) and that "now" (ie at the time of the case) "we are in the process of taking the tanks out because we are not using them anymore". When asked by the Court if Mr Power was notified "that the old equipment has now gone out of the premises and if you want to carry out the [outstanding] works now is your opportunity", Mr de Ru stated:

> "Well at that stage when that was all done there was a big dispute going on and they refused to do any work in our premises, regarding the floor, the gantry wall and the roof. They just point blank refused to come and talk to us or do any work for us at all."

46. The evidence before me suggests that up to late May 2002 both sides were in the course of preparations for works to be carried out during the proposed shutdown of operations, scheduled to occur from 22nd of July 2002 to the 29th of July 2002. (This week had been chosen deliberately and specified in the agreement of the 5th of March because it was immediately prior to a week of annual holidays during which the factory would be closed in any event. Accordingly the actual window available for the carrying out of the necessary works was two weeks.) The defendant retained the services of the Dutch equipment installers to move the spray equipment and so forth to facilitate the works, and there is evidence of a payment to them of IR£15, 227 (being 33,500 Dutch Guilders) in that regard. The evidence is not satisfactory as to whether it was the defendant itself or another of the Europlan companies that actually issued this cheque, or as to how it was accounted for, but I am, on balance, satisfied that the Dutch equipment installers were paid such a sum. On the plaintiff's side its personnel were engaged in discussions with Seamus Kennedy concerning the logistics of carrying out the proposed works to the gantry leg well and this is reflected in an exchange of correspondence between the plaintiff's project manager, a Mr Peter Howcroft, and Mr Seamus Kennedy. On the 28th of May 2002 Mr Kennedy stated in a letter to Mr Howcroft:

> "I spoke to Barry Kelly and Dermot Arthur last week and they are due to come back with a proposal for removal of the wall and roofing of the former gantry area. It is now vital that this is agreed so that works can go as planned."

Mr Howcroft replied by letter of 30th May 2002 enclosing the requested proposal (i.e. a technical drawing) and stating:

> "This proposal has been discussed in detail between our structural engineers D.B.F.L. and our steelwork contractor (Paddy Wallis) and in both their opinions it is the safest most practical solution to the works.
>
> We await your comments"

47. There is no evidence that Mr Howcroft's letter of 30th May 2002 was responded to. Indeed Mr Seamus Kennedy did not recall receiving it but I am completely satisfied that he did receive it. The context, of course, is that this correspondence was exchanged just three weeks after the refusal to allow G.F. May Roofing Ltd's workmen access to the roof, and during a period of deteriorating relations between plaintiff and defendant.

48. In the course of his evidence on day 4 of the trial Mr de Ru sought to suggest that a major variation to the timeframe provided for under the agreement of the 5th of March 2002 was discussed as between himself and Mr Peter Howcroft in a meeting held on or about the 11th of July 2002. He stated that Mr Howcroft came to him and stated that the intended works involving the gantry leg well was "a bigger job than they anticipated" and that it couldn't be done in the time available. His evidence was that Mr Howcroft asked:

> "…would I be agreeable to not to carry out the work, get an engineer to come out after the summer holidays and investigate exactly what work had to be done on the repair job on the gantry wall and could they then come out another time, preferably the Christmas holidays to carry out all that work."

Mr de Ru's response, according to his testimony, was as follows:

> "I said; 'listen, what I will do is, if you come and do all that work I will close down that part of the factory for an extra week so we have three weeks to do all the work; the gantry leg, the wall and the floor. We do it in a three week period. I have one condition, I have paid the people in Holland already 15,000. If you are prepared to pay them the same amount again for them to come over to do that work, I will close down the factory for a week for you to carry out all the work.' He said; 'I have to go back to my superior and discuss it all. In the meantime an engineer from DBFL will come over after the summer holidays to do a further investigation and we will report back to you.' Which somebody did come out and met me on site and went through the whole lot. He went off and he said; 'You will be hearing from us.' And to date I have heard nothing."

49. The plaintiff strenuously denies that the alleged variation was agreed, and it is suggested that if Mr de Ru did have discussions with Mr Howcroft about the logistics and timeframe for the carrying out of the gantry leg well works, those discussions occurred much earlier. The Court has some difficulty in resolving this issue because Mr Howcroft was not called by the plaintiff. Apparently he no longer works for the plaintiff and was not available to be called as a witness. That having been said, I regard the evidence of Mr de Ru on this issue as somewhat unsatisfactory and I have significant doubts about the reliability of his testimony. His contention is not corroborated or supported by any documentation. Given the background to the matter, and in particular (i) the supposed exasperation of the defendant with a string of persistent delays on the part of the plaintiff; (ii) the existence of an agreement concluded as recently as the 5th of March of that same year after lengthy negotiations, and containing a specific timeframe for the carrying out of outstanding works; and (iii) the development of a new dispute about the specification for roof works which was now causing further delays, it seems highly improbable that such a discussion could have taken place in July of 2002 as suggested by Mr de Ru. If, indeed, it did take place, one would have expected to see follow up correspondence, or some paper record of it, given the extent of the proposed departure from what had been agreed in March. In particular, one would have expected strong written complaints from the defendant's side at the failure of the plaintiff company to revert after the proposed DBFL inspection, as had been allegedly promised by Mr Howcroft. There were none. Indeed, it was put to Mr de Ru by Mr McDowell S.C., representing the plaintiff company that the plaintiff's proposed engineering solution, approved by DBFL, Consulting Engineers, was sent to the defendant on the 30th of May 2002

(in which case Mr de Ru was wrong about the July date), and it was put that the failure to revert was in fact the defendant's. Mr de Ru's response was to disavow any knowledge of the letter of the 30th of May 2002 and to claim that he had never seen it before. The plaintiff's position, unlike that of the defendant, is supported by documentation. On balance I am satisfied that I must resolve this conflict in favour of the plaintiff.

50. Furthermore, a close scrutiny both of witness testimony at the trial, and of the documents put before the Court, concerning events subsequent to the 30th of May 2002 reveals no evidence, apart from Mr de Ru's say so, of a complete refusal on the part of the plaintiff to do any work for the defendant, or of a point blank refusal to talk to the defendant. On the contrary there is a complete absence of the sort of supporting documentation that one would expect to see were that really the case. There is not a single document to suggest that the plaintiff was requested to get on with the outstanding works apart from the roofing works. For example, there is not a single letter, fax, e-mail or telephone attendance to suggest that the defendant confirmed to the plaintiff that, notwithstanding the dispute about the roofing works, the premises would still be made available during the two week closure originally envisaged (i.e., the agreed factory shut down period from 22nd of July 2002 to the 29th of July 2002, and the subsequent week, being the first week of August, during which the factory would be closed for holidays in any event), and that the plaintiff was expected to proceed with those works during that period. There is no correspondence complaining that they didn't turn up, or offering alternative dates or anything of that sort. Moreover, in the aftermath of Mr Keane's award it is quite clear that it was the plaintiff that was pressurising the defendant for confirmation as to when its roofing contractor could get back to work with a view to the plaintiff fulfilling its contract. There is not one single letter, fax or e-mail from the defendant to the plaintiff suggesting that, notwithstanding the ongoing dispute about the roof, there was no reason why the plaintiff could not get on with the flooring works and demolition of the gantry leg-well. Moreover, it is clear from Mr de Ru's evidence that the plaintiff was not informed when new equipment was being installed and offered an opportunity to do the works at that time.

51. It also requires to be noted in this review of the evidence relevant to liability that on day 2 of the trial Mr Barry Kelly gave evidence, which was not challenged, that a great many of the items of work specified in the schedule accompanying the agreement of the 5th of March 2002 have in fact been completed by the plaintiff. The only works that remain to be done are those relating to the gantry leg well, the floor in the C.P.C. area and the roof. While the defendant's witness Mr Blaise Alexander, inspected the premises in August 2004 for the purpose of identifying defects in the building and cross referencing/comparing them to the works listed in aforementioned schedule, the major items identified by him as needing to be attended to are those relating to the gantry leg well, the floor in the C.P.C area and the roof. As it is common case that these works have not yet been done, and that at this stage they urgently require to be done, his evidence is not of major assistance to me, at least in terms of deciding on liability. Moreover his inspection post-dated the 13th February, 2004, the date upon which the plaintiff claims the contract terminated due the defendant's breach.

52. Finally I should say that Mr Alexander's evidence is of some significance in the context of the counterclaim in as much as he does not significantly criticise those works that have been performed since the 5th of March 2002. While he had some minor criticisms with respect to vegetation in gutters, loose flashing and so forth he was understood by the Court as accepting in cross examination that these problems could have arisen after the fact in which case they would be maintenance issues for the occupier. All in all his evidence does not satisfy me that such works as have been carried out by the plaintiff were carried out negligently or in a substandard fashion. I regard it as of some significance that there are no complaints in the inter partes correspondence about the quality of the plaintiff's work in the period from the 5th of March 2002 to the 13th of February 2004.

**The plaintiff's legal submissions with respect to liability**

53. There are essentially two legal strands to the plaintiff's case on liability.

> (a) That there was an implied term in the agreement of the 5th March, 2002 that the defendant would not unreasonably delay the carrying out of the agreed works and/or unreasonably withhold its co-operation for the carrying out of the works;
>
> (b) That in refusing to allow the plaintiff to carry out the agreed works, the defendant was guilty of repudiatory breach, in which circumstances the plaintiff is entitled to be discharged from any further obligation pursuant to the agreement;

**The implied term**

54. The Court was referred to para. 7.45 *et seq* of Contract Law by Paul Anthony McDermott (2001:Lexis Nexis Butterworths) wherein the author explains both the business efficacy test and the officious bystander tests respectively.

55. McDermott states that the leading statement of the business efficacy test is to be found in *The Moorcock* [1889] 14 PD64 wherein it was stated:

> "the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to affect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties".

As McDermott points out, the test as formulated in *The Moorcock* has been cited with approval by the Irish Supreme Court in *Tradax (Ireland) Ltd. v. Irish Grain Board* [1984] I.R. 1.

56. The officious bystander test was formulated in *Shirlaw v. Southern Foundries Ltd*. [1939] 2 K.B. 206 where MacKinnon J. stated:

> "*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a comment of 'oh, of course!'".

McDermott points out that this test has been cited with approval in a number of Irish cases including *Carna Foods Ltd. v. Eagle Star Insurance* [1997] 2 I.L.R.M. 499; *Sullivan v. Southern Health Board* [1997] 3 I.R. 123 and *Sweeney v. Duggan* [1997] 2 I.L.R.M. 211.

57. The plaintiff submits that it was at all times essential for the performance of the contract that the defendant would agree to reasonable specifications for work to be done; would indicate such agreement within a reasonable time and would co-operate with the execution of the works following such agreement. The plaintiff further submits that if such terms were not implied in the contract, it would make a nonsense of the timeframes stipulated by the defendant in the letter of the 5th March, 2002, and, further, would mean

that the defendant would be in a position to reject every offer made by the plaintiff of specifications for and/or the execution of work, and would enjoy an open-ended right to sue the plaintiff for breach in the event of the works not being done.

58. The plaintiff further submits that a contract which allowed the defendant assume such a position would be fundamentally improvident and on such basis the obligation to act reasonably must be imposed on the defendant by implying such a term into the contract.

**Repudiatory breach**
59. The plaintiff contends that the evidence before the Court establishes that the plaintiff was ready, willing and able to perform the works as agreed on the 5th March, 2002. The plaintiff points out that it engaged contractors who presented themselves on site, only to be turned away by the defendant. The plaintiff had submitted specifications and expert reports for the works to the roof but the defendant refused even to debate their merits. The plaintiff co-operated with the reference to the independent architect, Mr Keane, and, having been fully vindicated by Mr Keane's decision, again offered to undertake the work. Notwithstanding this, the defendant failed to co-operate with, and facilitate the plaintiff, in having the works carried out. The plaintiff contends that the defendant, by effectively preventing the plaintiff from performing its duties under the contract, was in breach of contract.

60. The plaintiff further contends that the defendant's particular breach is a properly to be characterised as a repudiatory breach because it was the defendant who refused to co-operate with the performance of the contract, despite the fact that it may appear to all the world that the failure was on the part of the plaintiff to carry out the works. In that regard the Court was referred to Chitty on Contracts, 27th Edition, para. 24-027 at p.11168 where it is stated:

> "It has been noted that the Court will readily imply a term that each will co-operate with the other to secure performance of the contract and that neither party will, by his own act or default, prevent performance of the contract. If one party is in breach of his duty to co-operate, so the performance of the contract cannot be affected, the other party will be entitled to treat himself as discharged".

61. The plaintiff further contents that it is clear from the evidence of the plaintiff's witnesses that the plaintiff repeatedly tendered to perform his contractual obligations. The plaintiff submits that the rule that a tender performance is equivalent to performance is particularly applicable in this case. In support of this rule, the Court has been referred to the case of *Start-up v. McDonald* [1843] 6 Man & G.593.

62. The plaintiff further contends that although the plaintiff was frustrated by the defendant's conduct, it was so only in the literal sense. The plaintiff submits that the legal doctrine of frustration has no application in this case.

**The Defence filed**
63. With respect to the defence filed by the defendant, the plaintiff says that no cause of action or grounds of defence can lie based upon any alleged delay or defect of workmanship prior to the 5th March, 2002. The plaintiff contends that the defendant did not adduce credible evidence of "reasonable requests concerning works of repair to the roof" as alleged in the defence. Instead, the defendant furnished the Court with extensive lists of outstanding works which pre-date the 5th March, 2002 and with letters which outline dissatisfaction post-dating the 13th February, 2004, the date upon which the plaintiff claims the contract terminated due the defendant's breach.

64. The plaintiff further submits that the defendant is estopped from relying on any alleged breach of contract on the part of the plaintiff prior to the 5th March, 2002. The plaintiff acknowledges that it has not carried out the final works agreed in March 2002 but contends that this is solely because of the defendant's refusal to co-operate. The plaintiff acknowledges that the evidence of Mr Frans De Ru for the defendant asserted that he had discussed the works to the roof, the floor, to the CPC, the removal of the gantry leg and wall and the high level decoration with representatives of the plaintiff, named as Mr Pat Doherty and Mr Peter Howcroft. The plaintiff submits that Mr de Ru may be mistaken regarding the timing of such discussions and/or the persons named and that he is incorrect in his assertion.

65. The plaintiff further submits that the defendant did not raise reasonable issues regarding the specification for the works to the roof and the plaintiff further submits that even if the defendant had such issues, its signal failure to communicate same to the plaintiff is a matter for which the defendant should bear total responsibility.

**The Counterclaim**
66. The plaintiff further seeks to address the counterclaim put forward by the defendant. The defendant asserts that the plaintiff failed to carry out the works in the agreed list appended to the letter of the 5th March, 2002 in the time specified in a proper and workmanlike fashion. The defendant further claims that the plaintiff carried out works pursuant to the development agreement in a grossly defective and incompetent fashion. The defendant alleges that as a consequence of these matters it suffered loss, damage and expense. In so far as legal submissions are concerned the plaintiff relies upon its assertion that the agreement of the 5th of March 2002 was "in full and final settlement of all outstanding issues between the parties" with regard to the premises and the development agreement, and says that in the circumstances so much of the defendant's counterclaim as relates to pre 5th March 2002 issues is misconceived and is not justiciable by this Court.

67. Further, with respect to that aspect of the defendant's counterclaim relating to works to be performed under the agreement of the 5th of March 2002, the plaintiff reiterates its defence and says that it was unable to carry out the required works in the time specified due to the defendant's non co-operation and repudiatory breach. The plaintiff rejects the defendant's allegation that such works as were performed were not performed in a proper and workmanlike fashion, and contends that this is not supported by the evidence.

**The Defendants' Legal Submissions with respect to Liability**
68. The defendant contends that the agreement of the 5th March, 2002, did not put an end to the development agreement. The defendants' position is that this agreement was merely supplemental to the development agreement and had the effect of varying aspects of it. The defendant points in particular to Clause 29 of the Development Agreement which is in terms that it:-

> "… will continue in full force and affect after the date of Practical Completion in so far as anything remains outstanding on the part of any of the parties to it and the Covenants and Conditions contained therein shall not in any way be extinguished or affected by the Practical Completion of the Development".

69. The defendant strongly contends that its refusal to allow the plaintiff's contractors access to the premises to carry out roofing works was not unreasonable. The defendant says that the plaintiff has sought to categorise this refusal as a type of objection to the

position of the late Mr. David Keane in the arbitration process and relies upon this refusal as repudiating the agreement of the 5th March, 2002. The defendant submits that the evidence clearly discloses that the defendant accepted the decision of the late Mr. Keane insofar as decision was confined to the choice of material to be used to cover the roof.

70. The defendant further submits that, while the defendant was disappointed with Mr. Keane's decision, it sought clarification as regards the particular methodology for the execution of the roof works, from both Mr. Keane initially, and thereafter, from the plaintiff. The defendant submits that to characterise the invocation of a contractual right to arbitration, on foot of the original agreement, as being in some way unreasonable is manifestly absurd. The defendant submits that the issues relied upon by the defendant relating to the time scale, methodology and ancillary matters, regarding the execution of the outstanding works were never satisfactorily answered by the plaintiff, and thus the plaintiff cannot claim that full or even partial responsibility for the failure to complete works lies with the defendant.

71. The defendant admits and accepts that the court will, where necessary, imply a term into a contract that each party will co-operate with the other to secure a performance of the contract and that neither party will, by his own act of default, prevent performance of the contract. The defendant has referred the court to the decision in *Mackay v. Dick*, [1881] 6 App. Cas. 251. The defendant contends that if the plaintiff is seeking to contend that the implied term as to co-operation was a condition precedent it is then for the court to determine what was the standard of endeavour which the plaintiff itself must have satisfied before it may attempt to rely upon a breach of condition precedent. The defendant also refers to Contract Law by McDermott, wherein the author states at para. 19.64 thereof:-

> "[w]here the contract has not expressly stated the particular standard of endeavour, the courts will imply a term requiring reasonable efforts to be made".

72. The defendant submits that if the plaintiff is to rely on the failure of the defendant to allow the workers on site as a breach of a condition precedent to the contract it must also establish that it made reasonable efforts to agree the roofing specification or other preliminary requirements, to ensure its subcontractors were permitted access to the work side. If that had been done, the plaintiff would be in a position to claim unreasonableness, since it would have duly performed all of the duties required of it prior to commencing work. However, the defendant submits that, as only one attempt was made to access the premises, and as the plaintiff failed to attempt to address the concerns of the defendant as raised subsequent to the refusal of entry to the premises, the plaintiff failed to satisfy this burden. The court is further referred to the decisions in *Rooney v. Byrne* [1933] I.R. 609 and *Conor v. Pukerau Store Ltd* [1981] 1 NZLR 384 in support of this submission.

73. The defendant further alleges that the plaintiff, in failing to agree a specification for the roof and in failing to consult adequately with the defendant, and in failing to address outstanding health, safety and insurance issues, was itself in breach of contract. The defendant's position is that while this was a breach of contract it was not one which could properly be classified as repudiatory but it did entitle the defendant to turn the plaintiff's contractors away from the site pending some attempt from the plaintiff to demonstrate that it was in compliance with its obligations. The defendant contends that no serious attempt was made by the plaintiff to return to the site to complete the work to the roof, at any stage up to the issue of proceedings.

74. The defendant further contends that if the court should find that the actions of the defendant in refusing the plaintiff's contractors entry to the premises amounted to a breach of an implied term of the contract, such a breach was not in fact a repudiatory breach. The court has been referred to the statement in *Ross Smyth and Company Limited v. Bailey Son and Co*, [1940] 3 All ER 60 at 71 to the effect that whether or not a particular breach amounts to a repudiation is "a serious matter not to be likely found or inferred".

75. The defendant submits that what falls for the determination of the court in this respect is whether the plaintiff has established that the refusal of the defendant to allow access to the plaintiff's contractors, on the single occasion on which they attempted to gain entry to the premises, amounted to a breach of a term of the contract that goes to its route. The defendant's submits that the case law suggests that in arriving at the decision on this the court is obliged to consider all the facts of the case. The court was referred to case of *Decro-Wall International v. Practitioners in Marketing*, [1971] 2 All E.R. 216 wherein the English Court of Appeal held that a number of delays in making payment pursuant to a contract did not constitute a fundamental breach of its terms giving rise to an entitlement to rescind, as the contract did not make time of essence in respect of payment, and the plaintiffs did not give notice that if late payment continued the contract would be terminated. The defendant submits that, likewise, the defendant's refusal of entry to the plaintiff's contractors did not constitute a repudiation of the contract in the particular circumstances of this case.

76. As to what are the circumstances of the case, the defendant firstly points to the fact that no notice was given to the defendant of the date on which the work was to be commenced. Secondly, it says that its refusal to allow the roofing contractor access was not an act done with the intention of preventing the contract from being performed. Thirdly, while the turning away of the plaintiff's contractors may indeed have delayed the performance by the plaintiff of its contractual obligations, and may have entitled the plaintiff to damages in respect of that delay, the circumstances of the case reveal that it would be impossible for the plaintiff to now claim that time was of the essence in the contract, given its delay in the performance of its obligations under the agreements of the 18th July, 2000, and the 5th March, 2002. Fourthly, the evidence does not establish that the defendant did not intend to be bound by the contract. On the contrary, the defendants refusal to the allow the plaintiff's contractors on the premises was an act done in good faith and was founded upon genuine concerns as to compliance on the part of the plaintiff with various contractual obligations and statutory obligations. Fifthly, it is important not to view the incident in which the contractors were turned away from the premises in isolation. The court is referred again to Contract Law by McDermott, at para. 21.112, wherein the author states:

> "conduct which, a first sight, may seem repudiatory may be held not to be so when the court examines the history of dealings between the parties".

Sixthly, it is a relevant matter to be considered by the court, in determining whether a breach amounted to repudiation of the contract, as to whether or not notice was given by the party seeking to establish the repudiation, that it viewed the breach as giving rise to its entitlement to terminate the contract. The Decro-Wall International case previously referred to was also cited in support of this proposition.

77. The defendant further submits that even if it was guilty of a repudiatory breach of contract the plaintiff did not accept the defendant's repudiation. The defendant refers to *Heyman v. Darwins Limited*, [1942] A.C. 356 at 361 as authority for the proposition that in order for a party to rescind the contract, not only must there be a repudiatory breach, but the party seeking to rely on that breach must accept the repudiation. The court was further referred to the following passage from *Chitty on Contracts*, (27th Ed.) wherein it is stated at para. 24-011, p.1158:

"This usually done by communicating the decision to terminate to the party in default, although it may be sufficient to lead evidence of an 'unequivocal overt act which is inconsistent with the subsistence of the contract'…without any concurrent manifestation of intent directed to the other party'. Unless and until the repudiation is accepted the contract continues in existence for 'an unaccepted repudiation is a thing write in water'. Acceptance of a repudiation must clear and unequivocal and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose".

**Decision on Liability**

78. I am satisfied on the evidence that has been adduced before me that up until the 5th of March 2002 the plaintiff was in significant default in the performance of its obligations under the Development Agreement of the 18th of July 2000, and that the defendant had multiple legitimate grievances arising out of that default. Counsel for the plaintiff very fairly acknowledged this in opening the case before me, and at no time since then has the plaintiff attempted to resile from that acknowledgement.

79. However, I am also satisfied that by the agreement of the 5th of March 2002 the defendant settled with the plaintiff in respect of all and any claims that it had, or may potentially have had, against the plaintiff as of that date in respect of non-performance by the plaintiff of its contractual obligations under the development agreement and grievances on the part of the defendant arising therefrom. I regard the agreement of the 5th of March 2002 as being clear and unequivocal in terms of its objectives and intended effect. It expressly states that it is "*in full and final settlement of all outstanding issues with regard to this premises and the development agreement between the parties*." I further consider that the new obligations assumed by the plaintiff under the agreement of the 5th of March 2002 were intended to provide the defendant with satisfaction and accord in respect of those claims or potential claims.

80. I do not consider that the agreement of the 5th of March 2002 put a complete end to the development agreement. It did not do so because the development agreement of the 18th of July 2000, in addition to providing for the carrying out of works, also covered matters such as the developer's insurance obligations, site security, advertising, site safety and so on. The agreement of the 5th of March 2002 does not address such issues and it is to be inferred that it was never the intention of the parties that they should be released from their respective obligations in respect of issues of that variety. The correct interpretation is therefore that the development agreement continued to subsist after the 5th of March 2002 but that it was supplemented, and very significantly varied, by the new agreement. In essence in so far as any works scheduled to be performed under the development agreement of the 18th of July 2000 remained to be done, the plaintiff was relieved of its obligation in that regard, and instead assumed a replacement obligation to perform such works as were specified in the agreement of the 5th of March 2002 according to the timetable provided for in the new agreement.

81. I hold that even though the agreement of the 5th of March 2002 did not put a complete end to the development agreement of the 18th of July 2000, the variations effected by the new agreement were so far reaching as to render the plaintiff correct in its assertion that no cause of action or grounds of defence can lie based upon alleged delay, or defective workmanship, in respect of works carried out, or to be carried out, under the original development agreement..

82. In addition the plaintiff is correct in saying that the defendant is estopped from complaining about any issue relating to the premises or the development agreement, that pre-dates the 5th of March 2002.

83. It is common case that the Court will, where necessary, imply a term into a contract that each party will co-operate with the other to secure a performance of the contract and that neither party will, by his own act or default, prevent performance of the contract. I consider that the implication of such terms is indeed necessary in the circumstances of this case. However, the plaintiff suggests that the Court should go further and, applying the business efficacy test and/or the officious bystander test, imply terms requiring the defendant (i) to agree to reasonable specifications for work to be done; (ii) to indicate such agreement within a reasonable time and (iii) to co-operate with the execution of the works following such agreement. I think that it is not necessary to go that far. The implication of a general term requiring that the parties should co-operate with each other to secure a performance of the contract is sufficient. I am further satisfied that this implied term is fundamental to the contract and that compliance with it constitutes a condition precedent. Whether or not a particular party has truly co-operated is a question of fact to be decided upon the evidence. A single transient instance of non co-operation would not, I think, be sufficient to be deemed a breach of the implied term. Conversely, a persistent single episode, or multiple or successive instances of non-co-operation might indeed be sufficient to be deemed a breach of the implied term.

84. The plaintiff in this case contends that there has been a lack of co-operation on the part of the defendant, on multiple fronts, dating from in or about the 7th of May 2002 when the roofing contractor's workmen were denied access to the roof. The plaintiff says that there has been a breach of the implied term, and moreover that this constituted a fundamental breach entitling the plaintiff to treat the contract as having been discharged.

85. I am satisfied that the defendant was entitled to be consulted with respect to the roofing specification and that its agreement to any proposed specification was required before any works could be carried out. The plaintiff, perhaps unintentionally and out of an excess of zeal, did act in a somewhat cavalier manner towards the defendant in placing a firm order for roofing works with Gerard F May Roofing Ltd before securing the defendant's agreement. Accordingly I find that the defendant was within its rights in calling a halt to roofing works pending agreement being reached on specification. There was not a failure to co-operate at this stage. Moreover, the defendant cannot be criticised for insisting upon an arbitration when, after some period of engagement between the parties concerning the roofing specification, it proved impossible to get agreement on specification.

86. However, what has concerned me throughout this case is the obstructive attitude of the defendant that seems to have developed within weeks of the work stoppage. I am satisfied that the evidence establishes that from the beginning of June 2002 there was a complete unwillingness on the part of the defendant to co-operate with the plaintiff, or indeed to engage meaningfully with the plaintiff, to facilitate the carrying out of the other major works, apart from the roofing works, that required to be performed, or indeed with respect to any issue. While the agreement envisaged that ideally the roofing works should be carried out first, the evidence establishes that it would have been perfectly possible, had co-operation been forthcoming from the defendant, to carry out the flooring and gantry leg well works in advance of the roofing works in circumstances where the roofing works were being unavoidably held up on account of a referral to arbitration. Ironically it was Counsel for the defendant who contended that there was no critical path. In fact there was a critical path, but it could be deviated from providing that the defendant was willing to facilitate deviation. What was required was that the defendant should shut down the CPC area and move some of the equipment out for a limited period so as to provide the plaintiff with unimpeded access to enable the necessary non roofing works to be carried out. The agreement of the 5th of March 2002 envisaged that this would be done towards the end of July of that year. The significant point is that this deadline was missed through the defendant's default and there is no evidence of any attempt by the defendant to discuss with the plaintiff (who was, I am satisfied on the evidence before me, anxious to get on with the job) as to an alternative date when the

works might be conveniently done. It was for the defendant to take the initiative and make the premises available to the plaintiff. The plaintiff could do nothing unless the defendant moved out temporarily. The defendant was in control of the premises but failed to facilitate, co-operate or engage with the plaintiff in that regard. There were other occasions subsequent to July 2002 when the premises could conveniently have been made available, such as when the new equipment was being installed, but the plaintiff was never notified concerning, or requested to avail of, the opportunity. In all the circumstances I am satisfied therefore that from the beginning of June 2002 onwards there was a lack of co-operation by the defendant and that it has persisted, and indeed it has broadened (particularly in the aftermath of David Keanes's ruling), to such an extent as to constitute a breach of the implied term requiring co-operation.

87. I accept in principle the defendant's submission that it is for this Court to determine the standard of endeavour which the plaintiff must have satisfied before it can rely upon a breach of condition precedent, as constituting a fundamental breach of contract. I am satisfied that the preponderance of evidence supports numerous attempts by the plaintiff to engage with the defendant in a meaningful way in an effort to progress matters, only to be ignored or rebuffed by the defendant. I am satisfied that these efforts constituted a sufficient endeavour by the plaintiff to allow it to rely upon breach of condition precedent.

88. I am satisfied from the inter partes correspondence, and in particular the letter of the 5th of February, 2004, that it was made abundantly plain to the defendant that the plaintiff, in specifying an ultimate deadline of seven clear days from the date of that letter, viz the 13th February 2004, was effectively making time of the essence of the contract, and that a failure on the defendant's part to respond within that time with a firm proposal as to when the works might be permitted to commence would result in the plaintiff treating the contract as having been discharged.

89. I find both as a matter of fact and of law that the defendant has been guilty of a fundamental breach of contract, and that the plaintiff must succeed in its action. Accordingly, the plaintiff is entitled to a declaration that it is discharged from any further obligation under the contract.

90. The plaintiff is also entitled to the return of monies held by way of retention and I will deal further with this under a separate heading below. The plaintiff is also entitled to recoup by way of special damages the restocking charge in the sum of €5,238.89 paid to Gerard F May Roofing Ltd.

91. I am further satisfied that the defendant's counterclaim must be dismissed. In so far as it purports to relate to events pre- 5th of March 2002 it is misconceived. In so far as works subsequent to the 5th of March 2002 are concerned I find no evidence of negligence, breach of duty or breach of contract on the part of the plaintiff. While the roof is continuing to leak, and damage has been caused by water ingress, this has not been due to any breach of the agreement of the 5th of March 2002 by the plaintiff. It is the view of this Court that, since the date of Mr Keane's award, total responsibility for the fact that the roofing works provided for in the agreement of the 5th of March 2002 have yet to be carried out, rests with defendant.

**The monies retained**

92. The Plaintiff has submitted that if the defendant is due anything further from the plaintiff that it can only amount to the monetary value of the works not performed by the plaintiff at the cost of such works to the plaintiff at the time when it was reasonable for such works to be carried out.

93. The plaintiff asserts that in the agreement of the 5th of March, 2002 it was expressly agreed between the parties that a sum of IR£250,000 (€317,434.52) would be retained on joint deposit pending completion of the agreed outstanding works. Despite some exchange of correspondence prior to the agreement offering valuations for various items of work, there was no attempt in the letter of the 5th March, 2002 to ascribe any particular value to the works or any component part or parts thereof. Although there is acknowledgement that IR£200,000 could be released when all works were complete, save those to the CPC area, it was essentially a sum held in terrorem over the plaintiff as an additional incentive for the plaintiff to carry out the agreed works. It was not an agreed retention based on any valuation. The plaintiff submits that if the plaintiff is not required to carry out all the works on the list due to repudiatory breach and breach of an implied term to co-operate, then it may be argued that the plaintiff would be unjustly enriched were the entire of the retention to be released to the plaintiff. The plaintiff's position is that it seeks no unjust enrichment and is desirous only to secure such sum from the retention as is just. The plaintiff contends that as it was ready, willing and able to proceed in April 2003 with the agreed works which at that time remained undone, it is that date upon which the plaintiff values such works and submits such value should be released to the defendant pending further adjustment by this honourable Court, if appropriate. The plaintiff submits that such date is important not only because the value has increased by 17% according to the plaintiff's quantity surveyor since that date, but also because, crucially, in April 2003, the plaintiff had significant ongoing construction activities at Park West, which meant that labour, plant and other costs would have been very much reduced. The plaintiff submits that any later date for valuation of the works will unreasonably penalise the plaintiff for not carrying out the work when it wished to, and at the same time unjustly reward the defendant for persistently failing and refusing to co-operate with the execution of the works.

94. I consider that the plaintiff's position is commendable and reasonable. At the end of December 2007 the balance of funds in the joint deposit account was €328,829.03 inclusive of interest. In the circumstances, and in accordance with evidence that I have received, I direct the repayment to the plaintiff of the sum of €194,716.30 and the repayment to the defendant of the sum of €134,112.73. The plaintiff is also entitled to a decree in the sum of €5,238.89 in respect of damages for breach of contract.

**Costs**

95. In the absence of exceptional circumstances, costs must follow the event on both claim and counterclaim respectively. Accordingly, the plaintiff is entitled to its costs on both claim and counterclaim, respectively, to include any and all reserved costs. I further direct that the costs on both claim and counterclaim respectively are to be taxed in default of agreement.