Neutral Citation Number [2006] IEHC 200

THE HIGH COURT
COMMERCIAL

[2005 No. 1466P]

BETWEEN

CAMPUS AND STADIUM IRELAND DEVELOPMENT LIMITED

PLAINTIFF

AND
DUBLIN WATERWORLD LIMITED

DEFENDANT

Judgment of Mr. Justice Gilligan delivered on the 21st day of March, 2006.

1. These proceedings concern the National Aquatic Centre situate at Abbotstown in the County of Dublin. By indenture of lease made on the 30th April, 2003, between the plaintiff company of the one part and the defendant company of the other part, the plaintiff agreed to let the National Aquatic Centre (to be hereinafter referred to as 'the Centre') to the defendant for a term of 30 years subject to the annual rent thereby reserved and to the covenants on the tenant's part and conditions in the lease contained therein.

2. The plaintiff company was established by the government in January, 2000 and its shareholders are the Taoiseach as to 25%, the Minister for Arts, Sports and Tourism as to 50% and the Minister for Finance as to 25%. It was incorporated to oversee the design and construction of a sports campus at Abbotstown with the Centre being the first element of the development. The Centre is a state of the art world class venue developed at a cost of €62 million excluding VAT. It was never intended that it be subsidised on an ongoing basis as it was to be operated as a commercially viable entity. It was officially opened on the 10th March, 2003, hosting its first major event in June, 2003 when the swimming events of the Special Olympics World Summer Games were held there. It provides a unique mixture of leisure waters and high class competitive swimming facilities designed to ensure that it would be a key part of Ireland's sporting infrastructure while providing facilities for the wider community at the same time. The competitive facilities are designed to cater for international standard swimming, diving, water-polo and synchronised swimming, such that major events can be hosted there.

3. The defendant is a limited company with its registered office at Caherweesheen, Ballyard, Tralee in the County of Kerry. The company is described as having been a shelf company which was purchased and the shareholders and directors became on or about the 12th February, 2001, Mr. Moriarty, Mr. Rutledge and Mr. Bohan. The accounts for the year ending the 31st December, 2003, (being the year in which the lease was created) show it as having an authorised and paid up capital of €127. It has no fixed assets and no current assets save for a sum of €12,243 which was due to it from its 100% owned subsidiary company, Dublin Waterworld Management Ltd. Dublin Waterworld Management Limited was also a shelf company which had previously been incorporated on the 28th June, 1999. It was purchased, with the necessary share transfers and appointment of directors taking place on or about the 7th February, 2001. In March, 2003 Mr. David Nolan received instructions which he complied with to have Dublin Waterworld Management Limited become a 100% subsidiary of Dublin Waterworld Limited. Dublin Waterworld Management Limited has 100 issued shares to a total of €127 all of which shares are owned by the defendant.

4. The plaintiff in these proceedings seeks an order for possession of the Centre, damages for breach of covenant and for breach of a licence agreement dated the 14th March, 2003, and further or other relief. The defendant has filed a full defence denying the plaintiff's entitlement to the relief sought and maintains that it is in possession of the Centre as tenant to the plaintiff, which tenancy has not been determined. The defendant has also brought a counterclaim seeking damages arising out of the condition of the Centre, including fixtures, fittings, plant and equipment and it further claims that if the lease has been validly forfeited (which is not admitted) the Court should grant relief against forfeiture.

Background

5. Following the conception of the idea to construct the Centre, a bid procedure was put in place for the purposes of developing a public/private partnership arrangement. The successful bid was from The Waterworld Consortium, the principal players of which were Waterworld UK Limited (described as aquatic and leisure centre operators) and Ascon Rohcon Limited, the design and build contractor. Waterworld was described in the bid as being closely linked to one of the world's leading aquatic leisure operators and manufacturers of leisure pool attractions, Schlitterbahn. They are described as the operators for a similar new aquatic leisure centre in Southport, England, which was then currently under construction. It was indicated in their bid that they would enter an agreement directly with the plaintiff for the operation and ongoing maintenance of the Centre.

6. In the particularly detailed financial estimates of their bid, Waterworld UK Limited anticipated that in the first year the Centre would generate a net profit of IR£151,750, in the second year IR£368,000 and in the third year IR£426,000.

7. It was stated in the bid documentation that it was the intention of Waterworld UK Limited to set up a subsidiary company to run the operation in Ireland. Mr. Liam Bohan and Mr. Kieran Rutledge, who are described as "presently being two of the leading leisure managers in Ireland", would be directors of Waterworld Ireland with responsibility for the operation of the facilities at the Centre.

8. It was part of the successful bid that the anticipated capital cost including fees and statutory contributions for the construction of the Centre would be £53,005,848.83 and that a contribution in the sum of £52,505,848.83 would be required from the plaintiff. It was also part of the successful bid that there would be a contribution of IR£500,000 and VAT from the bidder and in addition there would be an annual contribution of 10% of the net annual profit achieved.

9. Subsequently on the 22nd February, 2001, heads of agreement were entered into between the plaintiff, Rohcon Limited and Waterworld UK Limited. Waterworld UK Limited was, *inter alia*, to enter into a lease which would oblige it to operate and maintain the Centre for a period of 30 years in compliance with the lease. The plaintiff was to make no payment to Waterworld UK Limited in respect of the operation and maintenance of the Centre and with the passage of time the latter would be entitled to increase the cost of subscriptions, entrance fees and concession fees but only with the prior approval of the plaintiff, unless such approval was being unreasonably withheld.

10. It was specifically provided at clause 9.5 of the heads of agreement that Waterworld UK Limited would furnish a performance bond to the plaintiff in respect of its obligations, such bond to be provided in a form similar to the form set out in appendix 4 attached to the heads of agreement or in such other form as may be approved by the plaintiff. If the provision of such a bond involved costs over and above those contemplated by the bid, the same was to be borne by the plaintiff. It was further provided at clause 10.4 of the heads of agreement that, upon the granting of the proposed lease, Waterworld UK Limited was obliged to make a payment to the plaintiff of IR£500,000 plus VAT at the appropriate rate.

11. Subsequent to the heads of agreement being signed by the parties, it became apparent that Waterworld UK Limited was not in a position to live up to its anticipated financial expectations and the reality appears to be that, with Rohcon Limited ready to commence construction of the Centre, there was in fact no operator in place. At this stage Mr. John Moriarty entered the scene and the plaintiff took legal advice as to whether or not he could step into the shoes of Waterworld UK Limited. Having received approval, he became involved by means of the defendant company, Dublin Waterworld Limited, which had as its directors and shareholders Mr. John Moriarty (60%), Mr. Kieran Rutledge (20%), Mr. Liam Bohan (15%) and finally, Mr. Roger Curry (5%), who was also a director and shareholder in Waterworld UK Limited.

12. As an inducement to procure an operator for the Centre, Rohcon Limited agreed to pay to the defendant a sum of IR£750,000 plus VAT in ease of the necessary financial commitment that would have to be made. It also agreed to make a payment to the defendant in the sum of IR£500,000 plus VAT in respect of the capital contribution to be paid to the plaintiff by Waterworld UK Limited and as referred to in clause 10.4 of the heads of agreement.

13. Extensive discussions had taken place between solicitors for the respective parties leading to the final arrangements for the signing of the project agreement and in particular a letter from the plaintiff's solicitors to the defendant's solicitors of the 2nd November, 2001, sets out the main changes that had been arrived at, including the rescheduling of the payment of IR£500,000, the amendment of the guarantee in the eighth schedule, the deletion of the operator bond and other ancillary matters.

14. It is clear from the letter of the 2nd November, 2001, that Mr. Moriarty was aware as to the fact of the deletion of the operator bond and the amendment of the guarantee.

15. The project agreement contained all the usual duties and warranties on the part of the contractor, Rohcon Limited.

16. The agreement also dealt with the operator and at clause 57 specified that:

> "upon the issue of a certificate of practical completion with respect to the works provided the operator is not otherwise in breach of any of the covenants and obligations on its part to be observed and performed in respect of the works the employer shall grant or procure the granting to the operator and the operator shall take a lease in the form set out on the sixth schedule (as may be varied if at all in accordance with the following provisions of this clause) to commence upon the issue of the certificate of practical completion provided however that the operator shall not be obliged to open the centres to the public or to the nominated bodies for a period of 14 days following the issue of the certificate of practical completion. The operator shall supply and install or procure the supply and installation of all loose equipment prior to opening the centre to the public. The operator shall pay the rent in the manner envisaged in the lease".

17. At clause 59 of the project agreement it was specified that upon the granting of the lease and thereafter throughout the term of the lease the operator was to operate and maintain the Centre in accordance with the terms of the project agreement and the lease. It was specifically agreed that the employer (i.e. the plaintiff) would make no payment to the operator in respect of the operation and maintenance of the Centre and the operator would finance the operation and maintenance of the Centre through subscriptions, entrance fees and other sources of funding, approved in advance by the employer.

18. Clause 69 of the project agreement dealt specifically with refinancing and provided as follows:

> "(a) the contractor and the operator shall be entitled to enter into any new funding arrangement or arrangements for substitute funding in relation to the works (or the Centre as the case may be) provided that it has first given the employer not less than 60 working days prior written notice of their intention to refinance and 40 working days prior written notice of the proposed terms in relation thereto. Such notice shall provide sufficient detail to allow the employer to fully understand the proposed arrangements.
>
> (b) no new funding arrangement or substitute funding shall (save with the prior consent of the employer which consent the employer may withhold at its absolute discretion) increase the liability or potential liability or make more onerous or increase the obligations of the employer under this agreement."

19. As regards any entitlement to assign the benefit of the project agreement the definition of the term "operator" refers to "Dublin Waterworld Limited, its successors and assigns".

20. Clause 15 of the project agreement deals specifically with assignment but only in respect of the contractor and the employer and the relevant clause does not limit any assignment by the operator.

21. Clause 57(e) of the project agreement, in dealing with the operation and maintenance of the Centre, states that upon the granting of the lease under clause 57(a), without prejudice to accrued rights and obligations, the obligations of the operator under the project agreement will be discharged.

22. Clause 59(a) refers to the operating and maintaining (or procuring the operation and maintenance of) of the Centre in accordance with the terms of the project agreement and the lease.

23. The project agreement, insofar as it contained guarantees, was a critical departure from the performance bond which had been agreed to in the heads of agreement. It was clear on the evidence adduced before me that Mr. Moriarty was extremely unhappy as regards the switch which was being insisted upon by the plaintiff and which had been referred to the cabinet for formal approval. On the 7th February, 2002, Mr. Moriarty was reluctant to sign the project agreement because of the nature of the guarantee the defendant was being asked to enter into, but I am satisfied on evidence that at that point in time the defendant was not tied into the process and could have walked away.

24. Prior to the signing of the project agreement, Mr. Teehan, then Executive Chairman of the plaintiff company, and Mr. Moriarty had a meeting at which Mr. Moriarty gave evidence that Mr. Teehan indicated to him that he was under extreme pressure, that the Taoiseach had been calling and wanted to know what was happening. Mr. Teehan had no precise recollection of such an event and was unable to say that it did not happen. Mr. Teehan accepted that they very much wanted to have the Centre in place for the Special Olympics and in that sense if such a situation was to be described as pressure he accepted that he was under pressure. Mr. Teehan denied that he told Mr. Moriarty that if the project agreement was not signed the whole project was going to collapse and that he would lose his job.

25. Mr. Moriarty gave evidence that on the occasion of this meeting two essential features were discussed with Mr. Teehan, the first

being that funding arrangements would have to be put in place and the ownership structure changed, both of which Mr. Moriarty alleged Mr. Teehan agreed to provided the Centre was well run and the second being that Mr. Teehan agreed that the guarantee could be re-negotiated subsequently.

26. Mr. Teehan disagrees that he ever indicated his agreement to a projected change in the ownership structure at this meeting and that if he had given such an indication he would have told Mr. Moriarty that the specifics would have to be furnished to the plaintiff and that the question of whether this would in fact be possible would then have to be determined on foot of legal advice. Mr. Teehan has no recollection of agreeing with Mr. Moriarty that the terms of the guarantee could be re-negotiated subsequently. It was also put to Mr. Teehan that there was a subsequent meeting in the Merrion Hotel in Dublin on the 22nd February, 2002, for the purpose of discussing whether the guarantee could be re-negotiated.

27. Mr. Teehan stated that the three elements necessary for the operation of the Centre were control, the ability to run the Centre and a certain financial standing. In his view the control was provided in the terms of the lease, the ability to trade would be dependent on the extent of the financial standing of the operator and the personnel to be involved were those as identified in the successful bid. The legal advice upon which Mr. Moriarty was introduced to the project was based not purely on the ownership structure *per se* but on a whole series of accompanying details and how all these different arrangements would actually operate.

28. The terms of this agreement were reduced to writing and were signed and dated on the 7th February, 2002. They provide for the sum of IR£750,000 plus VAT to be paid in 18 equal payments out of payments received by Rohcon Limited through the consortium in relation to the design and construction phase. In relation to the sum of IR£500,000 plus VAT it was agreed that this would be paid in 18 monthly equal payments incorporating both principal and VAT during the contract term and/or before practical completion into an Escrow account with Anglo Irish Bank. It was further specifically agreed that Anglo Irish Bank would pay from the Escrow account to the plaintiff the principal sum to meet the rent due under the lease (as defined in the project agreement) in the amount of IR£100,000 per year for five years commencing on the last day of the first year of the term as defined in the lease, the capital contribution of IR£500,000 having been rescheduled as a result of an agreement reached between the parties in November, 2001 to five annual payments, each in the sum of £100,000 and VAT.

29. There was a handwritten note attached to this agreement to the effect that Rohcon Limited was to provide the defendant with details of plant and equipment installed and any information the defendant might reasonably require for capital allowance calculations.

30. It is of some significance to draw a distinction between the two payments of IR£750,000 plus VAT and IR£500,000 plus VAT. Although there were no conditions attached to the payment of the former, there were conditions attached to the payment of the latter, as set out in the formal agreement made on the 7th February, 2002.

31. The terms of this agreement were more particularly reflected in a letter dated the 1st May, 2002, as forwarded by Rohcon Limited's solicitors to Anglo Irish Bank. The content of this letter was approved by the defendant's solicitors and the instructions specifically were that an account was to be opened in the joint names of the defendant and Rohcon Limited, with interest payable thereon at a rate to be agreed. This was to be the Escrow account. The bank was specifically instructed to pay to the plaintiff the rent due under the lease out of the principal sum, as defined in the project agreement, in the amount of IR£100,000 and VAT per annum for five years, commencing on the last day of the first year of the term as defined in the lease. The date of the release of the first payment was to be confirmed to the bank by either the defendant's solicitors or the defendant itself.

32. It was then incumbent on the parties to enter into a project agreement, the purpose of which was to provide for the arrangements relating to the construction of the Centre and also a lease agreement that would provide for the relationship of landlord and tenant. The lease was subsequently annexed to the project arrangement in its sixth schedule. The whole purpose of the ongoing arrangement was that there would be no requirement for a subsidy from the government and that the plaintiff in return would receive 10% of the annual net profits generated by the operation of the Centre.

33. At this point in time it is clear that on the defendant's side arrangements were being put in place for a Mr. Pat Mulcair from Limerick to become the operator of the Centre in return for the provision of venture capital. His ability to claim the capital allowances would be of immediate benefit to him and it subsequently emerged in evidence that these were capped at €34 million and were estimated to be worth in the region of approximately €2.8 million per annum on an ongoing basis. These arrangements were going to be put in place by a series of agreements, numbering five in total, which were prepared by the defendant's solicitors with the aid of professional advice from KPMG Chartered Accountants in consultation with Mr. Pat Mulcair and his legal advisors.

34. On the basis of Mr. Moriarty's own evidence, Mr. Bohan and Mr. Rutledge were the persons who had the expertise in the running of the Centre and his involvement was to raise the necessary funds. It is clear on the evidence that without Mr. Mulcair, the defendant would not have been able to maintain an involvement in the project. I am quite satisfied that one of the principal attractions from Mr. Mulcair's point of view was the annual capital allowances claim which was going to be of considerable benefit to him having regard to the confidential details that were disclosed as regards his average annual income.

35. On the 7th February, 2002, the parties entered into the project agreement wherein the plaintiff was described as the employer, Rohcon Limited as the contractor and the defendant as the operator.

36. It is of some relevance that shortly following the completion of the project agreement there was considerable disquiet expressed in the media as regards the situation that pertained to Waterworld UK Limited and the subsequent involvement of the defendant. A flavour of the type of comment that was being made can be taken from an article in the Irish Times of the 9th March, 2002, by Arthur Beesley wherein, *inter alia*, he stated:

> " … it transpired this week that the majority shareholder in the company which signed the final contract is a property developer and engineer based in Co. Kerry Mr. John Moriarty. The company which signed the heads of agreement – Waterworld UK – took only a 5.1% share in the operating firm Dublin Waterworld.
>
> Quite how Mr. Moriarty ended up with the rights to the majority benefits of the contract – and its obligations – is still unclear. This is at the heart of dissatisfaction with CSID among senior politicians and at the highest levels in the Civil Service".

37. There was also an investigation carried out under the aegis of the Attorney General and a report published but the content of that report was not introduced in evidence before me and plays no role in the decision I shall arrive at.

38. Subsequent to the project agreement having being signed, the defendant's solicitors wrote to Anglo Irish Bank Corporation by way

of a letter of the 3rd May, 2002, enclosing the letter of instruction of the 1st May, 2002, and various other documentation in connection with the setting up of an Escrow account. Over the subsequent months, the sums of €305,555, €70,639.18, €82, 419.82 and €35,278 were transferred from Rohcon Limited's current account to the defendant's account at Anglo Irish Bank bearing Account No. 1403-206782-01.

39. In fact what occurred was that an account was opened in the defendant's name bearing Account No. 1403-206782-01 with Anglo Irish Bank at 20 South Mall, Cork. I am satisfied on the evidence that this was meant to be the Escrow account but did not follow the form of the specific instructions that were conveyed to Anglo Irish Bank by the defendant's solicitors.

40. It is quite clear on the evidence that since the incorporation of the defendant company, Mr. Moriarty was in continuous communication with Mr. Pat Mulcair who was the venture capital provider for the project. By April, 2001 extensive meetings were taking place and, having regard to the evidence adduced at the hearing, it is of some significance that as early as April, 2001 Mr. Moriarty had brought up the subject of capital allowances and in a letter of the 12th April, 2001, to Una Carmody, Commercial Manager of the plaintiff company, he specifically stated that:

> "With regard to capital allowances Dublin Waterworld Limited will be allowed to claim them if they are available. We are to check with the Revenue Commissioners directly about this".

41. In a subsequent letter of the 12th April, 2001, in reply thereto Ms. Carmody replies on this topic in the following terms:

> "Your note of the meeting is entirely incorrect. The question of whether the capital allowances are claimable is being investigated by CSID Limited. I suggest that it would be appropriate for Waterworld Dublin to make its own investigations. At no time was it agreed that if capital allowances are available that Dublin Waterworld will be able to claim them. If the capital allowances are available, then CSID will take a view as to an appropriate distribution".

42. Having regard to the fact that capital allowances are a perfectly legitimate form of allowance approved by the Revenue Commissioners and would have been available to the operator of the Centre, it does appear unfortunate that if any weight was to be attached to this aspect by the plaintiff it was not clarified and brought out into the open as quite clearly it was going to be of particularly significant financial benefit to the Centre's operator.

43 Subsequently by way of letter of the 23rd October, 2002, Mr. Moriarty, writing on Dublin Waterworld notepaper, advised Mr. Sean Benton, then Chief Executive of the plaintiff company, that under clause 69 of the project agreement the operator was entitled to enter into any new funding arrangement in relation to the Centre and he wished to notify Mr. Benton in accordance with clause 69 that he was intending to enter into new funding arrangements and that he would within 20 days advise him of the proposed terms, unless the defendant decided not to enter into any new funding arrangements. During this period of time substantial sums of money were being transferred by Rohcon Limited into the defendant's account at Anglo Irish Bank in Cork.

44. Subsequently on the 13th November, 2002, Mr. Moriarty wrote further to Mr. Benton advising him that the defendant intended to enter into a funding arrangement for which consent was not required. Mr. Moriarty further advised Mr. Benton that, while the terms of the project agreement did not prohibit the operator entering into funding arrangements nor indeed did it prohibit the operator from assigning the said agreement or holding it in trust, he nevertheless wished to keep the plaintiff informed in order to comply with his notification obligations under clause 69. He outlined the terms of the arrangements which would include the following:

> 1. The holding in trust by the defendant of the lease for the venture capital provider.
>
> 2. The management of the pool by the defendant.
>
> 3. Termination of the arrangement referred to in points 1 and 2 at any time by the defendant so that the beneficial ownership of the lease would revert to it.

45. Mr. Moriarty further advised that the arrangement would not in any way prejudice the management or commerciality of the Centre or the rent payable to the landlord. Mr. Moriarty then indicated that he could not furnish any further information as he was bound to confidentiality.

46. It is against the now known background that the content of the letter from the defendant of the 13th November, 2002, to Sean Benton takes on a reasonably clear meaning. However, without a knowledge of the actual background details, the content of the letter sets out, in my view, a clear indication that the project agreement and lease were to be held in trust for a venture capital provider who would provide the relevant funds, that the defendant would continue to operate the Centre and that there would be no change in its day to day operation or the personnel involved. It was indicated in the letter that the proposed arrangement would not prejudice the Centre's management or commerciality or the rent payable to the landlord.

47. Having regard to clause 69 of the project agreement, Mr. Sean Benton replied to Mr. Moriarty's letter of the 13th November, 2002, by way of letter of the 15th November, 2002, where, *inter alia*, he specifically asked that details of the terms of the new funding arrangement be provided so that the plaintiff could understand what agreement was being proposed between the venture capital provider and the defendant.

48. There was no reply to this letter by the defendant.

49. Subsequently, Ms. Laura Magahy, Project Director for the plaintiff company, wrote to Mr. Moriarty by way of letter dated the 26th November, 2002, taking issue with the content of Mr. Moriarty's previous letter and seeking detailed information.

50. Acting on behalf of the defendant, Mr. Moriarty replied to this letter on the 27th November, 2002, but no where therein did he set out the relevant information in relation to Mr. Mulcair, the venture capital provider, becoming the Centre's operator.

51. There was then a subsequent meeting and a further letter of the 3rd December, 2002, with some details of what was proposed and then a further letter of the 9th December, 2002, from Ms. Della O'Donoghue, acting on behalf of the plaintiff, wherein she specifically asked Mr. Moriarty to make available the terms of the arrangements so that the plaintiff could understand what was being proposed.

52. There is then further correspondence from Mr. Moriarty, who appears to have not replied directly to the letter from Ms. O'Donoghue, indicating that the defendant was anxious to enter its proposed funding arrangement and seeking to know if the plaintiff

had any further comments on the proposal.

53. By way of letter of the 10th December, 2002, Ms. Magahy replied to Mr. Moriarty seeking, pursuant to clause 69(a) of the project agreement, the sufficient detail required to be given by the defendant to allow the plaintiff to fully understand any proposed revised funding arrangements. This letter also stated the opinion that the information as provided to date was not adequate and that satisfaction of the notice requirements set out under clause 69(a) required the giving of sufficient details to allow the plaintiff to fully understand the proposed funding arrangements.

54. Ms. Magahy also referred to clause 4.22 of the lease which prohibits the holding on trust of the lease for another without the prior written consent of the landlord. She further stated that the information which had been requested would be required if the plaintiff was to make a decision on foot of an application for such consent.

55. Mr. Moriarty replied to Ms. O'Donoghue by way of letter of the 10th December, 2002, wherein he stated that the terms of clause 69 of the project agreement had been satisfied and he sought to be advised by the plaintiff as to the specific items that they did not understand.

56. In the background to this correspondence, the site works were progressing and in early January, 2003 it was anticipated that the completion date of the 24th January, 2003, would be met. This, in effect, brought about a situation whereby once the certificate of practical completion was issued the defendant would be obliged to enter into the lease as agreed and set out in an appendix to the project agreement.

57. On the 3rd February, 2003, Rohcon Limited transferred the further sum of €70,541.04 into the defendant's account, being Anglo Irish Bank Account No. 1403-206782-01.

58. The building works progressed but the date for practical completion had been pushed back to the 17th February, 2003.

59. It is clear on the evidence that at this point in time substantial work was being carried out in relation to the proposed funding arrangement with Mr. Mulcair and advices were being received from KPMG Chartered Accountants and in particular from Ms. Olivia Lynch. As of the 14th February, 2003, she was advising that a cover letter should be prepared to accompany the various agreements and that a letter should be forwarded to the plaintiff explaining Pat Mulcair's introduction into the arrangement and that the plaintiff's consent should be obtained.

60. By the 11th February, 2003, Mr. Donagh Morgan was the Chief Executive of the plaintiff company and Mr. Moriarty wrote to him indicating, *inter alia*, that the VAT issue which had recently come to light had precipitated a need on the part of the defendant to conclude its funding transaction prior to the granting of the lease of the facility and in this context, Mr. Moriarty wrote seeking the plaintiff's consent to the holding of the lease on trust for the funding provider and for the transfer by the funding provider of its beneficial interest in the lease back to the defendant upon termination of the funding transaction.

61. Mr. Morgan replied to this letter on the 14th February, 2003, with a clear shift of emphasis and indicated that consent could not be applied for or given prior to the lease being granted and indeed in no circumstances could consent actually be given until the lease was granted. Nevertheless, in order to facilitate the defendant's funding arrangements he indicated that the plaintiff was prepared to consider the defendant's proposal in advance of the lease being granted but he reiterated the point that the plaintiff required adequate information to enable it to properly consider the request for consent.

62. On the 20th February, 2003, Mr. Moriarty wrote to Mr. Morgan and specifically accepted that until the lease existed no consent could be given under it. This letter also indicated that the intended funding provider would be absolutely entitled to the full beneficial interest under the lease. The defendant would be his bare nominee and the intended funding provider would also take on full responsibility for the performance of all of the obligations on the tenant's part under the lease. In the same letter, Mr. Moriarty also provided considerable information as regards the venture capital provider, Mr. Mulcair, and stated that he looked forward to hearing from Mr. Morgan in relation to the consent sought in the letter of the 11th February, 2003.

63. Ms. O'Donoghue of the plaintiff company replied to Mr. Moriarty's letter seeking further information and in particular indicated that the plaintiff would need to be satisfied that the proposed arrangement would allow the Centre to continue to be operated and maintained by the defendant in accordance with the provisions of the project agreement and the lease. She asked for sight of the funding agreement so as to give approval.

64. On the 24th February, 2003, there was an indication that the Centre was practically completed, the effect of which was that the defendant would have to enter into the lease.

65. Mr. Moriarty replied to the letter from Ms. O'Donoghue on the 25th February, 2003, wherein he stated:

> "As to your requirement for satisfaction that the facility would be managed in accordance with the project agreement and the lease the position is as follows; the project agreement and the lease are the fundamental agreements relating to the centre. As party to those agreements we have no alternative but to manage the centre in accordance with their terms. We cannot change this position by entering into an agreement with the third party. Nor can a third party have any effect on this position without your consent. Accordingly the documentation regarding our financing transaction is not of relevance to the manner in which the facility will be managed. The project agreement and the lease set out the rules in this regard."

66. On the 25th February, 2003, the defendant's solicitors wrote to Mr. Moriarty advising that the proposed transaction would involve the defendant holding the lease of the facility on trust for a specified individual and that upon termination of the transaction the beneficial interest in the lease would be transferred back to the defendant. As a matter of contract, the letter indicates that the defendant would at all times remain the tenant under the lease and would continue to be bound by each of its continuing obligations under the project agreement. Further the plaintiff's legal rights as landlord under the lease would not be affected.

67. Further correspondence ensued wherein the plaintiff's solicitors sought copies of the documents concerning the funding arrangements while the defendant's solicitors strongly indicated that these documents were sensitive and confidential between the parties and thus could not be disclosed. This was met with the reply from the plaintiff's solicitors that there would be no difficulty in editing out commercially sensitive funding information but reiterating that it was impossible for the plaintiff to make a decision on the matter and for it to assess the merits of the application without having some understanding of precisely what it was being asked to consent to.

68. This course of communication culminated in a letter of the 12th March, 2003, from Mr. Morgan to Mr. Moriarty seeking sight of the proposed funding agreement with a view to approving the proposed funding arrangements. The letter indicated that, if it was thought appropriate, the relevant sums of money involved in the agreement could be blanked out.

69. It is then apparent that the defendant decided that the proposed draft declaration of trust agreement and the proposed draft management agreement to be entered into between it and Mr. Mulcair should be forwarded to the plaintiff. It is of significance that Mr. Moriarty received advice from Mr. Caulfield (acting on behalf of Mr. Mulcair) as to the content of a letter that should be forwarded to Mr. Morgan but this letter was heavily edited by Mr. Moriarty, the draft letter as prepared by Mr. Caulfield reading as follows:

> "Dear Donagh,
>
> I refer to previous correspondence and our meeting of the 3rd instant. I wish to confirm that is out intention to proceed with our funding arrangements as follows:
>
> (1) DWW Management Ltd (a subsidiary of DWW) will manage the facility on behalf of Patrick Mulcair.
>
> (2)(i) Patrick Mulcair will take the lease from CSID under Clause 57 of the Project Agreement (as DWW's assignee).
>
> (ii) DWW will hold the lease as nominee for Patrick Mulcair.
>
> (3) DWW Management Ltd (a subsidiary of DWW) will manage the facility on behalf of Patrick Mulcair.
>
> (4) As part of the funding arrangement Patrick Mulcair will exit the scene after approximately 10 years by assigning the lease to DWW and DWW will continue as tenant.
>
> This funding arrangement falls within Section 69 of the Project Agreement and we attach copy of the draft Management Agreement and the Declaration of Trust. The benefit to DWW is that Patrick Mulcair will provide working capital to the project over the first 5 years (the high risk years) of the project. This will assist DWW in defraying the initial set up costs and will ensure the viability of the project for all concerned.
>
> Once the VAT issue has been resolved and practical completion achieved, we propose to proceed as above.
>
> Yours sincerely,
>
> John Moriarty
>
> DWW."

70. Mr. Moriarty's actual letter of the 15th April, 2003, read as follows:

> "*Re: The National Aquatic Centre*
>
> Dear Donagh,
>
> I write further to our meeting of 3rd April last. We will be proceeding with our funding arrangement. We will assign our right under the Project Agreement to take the lease and, in consequences, the lease will be held by us as nominee for Mr Patrick Mulcair, during the term of the funding arrangement.
>
> I will provide you with a copy of the Declaration of Trust, which provides for this nominee arrangement, together with a copy of the Management Agreement under which our team will manage the centre.
>
> Yours faithfully
>
> John Moriarty."

71. Mr. Morgan, in a letter of the 23rd April, 2003, advised Mr. Moriarty that the project agreement made no reference to the defendant having a right to make such an assignment without the plaintiff's consent so any purported assignment would be ineffective. He reiterated that, as previously stated, once the lease had been granted to the defendant the plaintiff would look at any request to assign or hold the lease in trust on its merits and that an essential requirement of such a request would be that any such holding in trust or assignment would not prejudice the bank guarantee or Rohcon Limited's obligations under the project agreement or the defendant's obligations under the lease.

72. Mr. Moriarty replied by way of letter of the 25th April, 2003, noting that the project agreement was for the benefit of the defendant, its successors and assigns, that there was no prohibition of the operator's assignment rights and that the funding arrangements would not prejudice the obligations of Rohcon Limited, the bank guarantee or the ongoing management and operation of the Centre. It is of significance in my view that Mr. Moriarty did not state in this letter that regardless of the absence of consent it was proposed to proceed ahead with the arrangements that were now in place between the defendant and Mr. Patrick Mulcair.

73. Mr. Donagh Morgan replied by way of letter on the 30th April, 2003, which was faxed to Mr. Moriarty and set out that each party had opposing interpretations of the project agreement and little was to be served by repeating the arguments. The plaintiff reserved its position as in any event it understood that the defendant would execute the lease and then any request under the lease could be dealt with formally.

74. The certificate of practical completion of the Centre's works was furnished on the 30th April, 2003, with the exception of work to the tube conveyer. It is apparent on the evidence that it was hoped that the Centre would have been completed and open for business in December, 2002 but due to delay it was not opened until the 10th March, 2003. At that point there was then a dispute

between the parties as to whether or not there was a threat to lock out the defendant but this matter was resolved by a licence being entered into between them on the 14th March, 2003.

75. The lease, as entered into on the 30th April, 2003, refers in clauses 3.1 and 4.2 to the rent as being IR£100,000 per annum for the first 5 years of the term plus 10% of the net profit payable in the manner described and subject to the provisions of schedule 2 of the lease and 10% of the net profit thereafter.

76. The sinking fund account is described as the bank account or some other form of prudent investment set up pursuant to clause 4.62 and approved of from time to time with the landlord, such approval not to be withheld or delayed unreasonably.

77. Pursuant to clauses 3.1 and 4.2 of the lease, the tenant was obliged to pay insurance rent calculated in accordance with the provisions of the lease within 14 days of demand by the landlord.

78. Pursuant to clause 4.62, the tenant was obliged to contribute in the first year of the term of the lease a sum of €126,974.00 in respect of the sinking fund to be set up by the tenant to provide for the costs and expenses of any replacement or renewal of any part or parts of the premises.

79. Pursuant to clause 4.30, the tenant was obliged to pay to the landlord all value added tax payable on the grant of the lease.

80. Pursuant in clause 4.34 the tenant was obliged to operate the premises.

81. Pursuant to clause 4.22 the tenant was prohibited from assigning, sharing or parting with possession of the premises or any part thereof without the prior consent of the landlord.

82. Clause 4.22 states as follows:

> "not to assign, under let or part with possession
>
> > a) Not to assign transfer under let charge mortgage (save to a reputable financial institution and in compliance with sub clause (b) below) encumber hold on trust for another share or (subject to sub clause (c) below), part with the possession or occupation of the demised premises or any part thereof or suffer any person to occupy the demised premises or any part thereof as a licensee or as concessionaire without the prior written consent of the landlord (which consent may not to the extent required by the CSID legislation be unreasonably withheld or delayed)."

83. Clause 4.34 deals with the operation of the Centre and states as follows:

> "legislation and standards for an aquatic and leisure centre; to operate the demised premises in accordance with the terms of the bid submitted on behalf of Rohcon Limited and Waterworld U.K. Limited on the 15th December, 2000, and all subsequent amendments and additions thereto a copy of which is attached in schedule 3 hereto, and to comply with that bid (as amended and supplemented) the terms of the project agreement and the terms of this lease. In particular the tenant shall operate the demised premises to the highest international standards in accordance with the permitted use relevant to an aquatic and leisure centre of its size and nature."

84. Pursuant to clause 4.55, the tenant was obliged to manage the premises in a good and efficient manner and to procure the landlord's approval in advance to the appointment of the manager of the competition pool and manager of the leisure waters.

85. The plaintiff and the defendant executed the lease in the late afternoon of the 30th April, 2003. At that point in time, unknown to the plaintiff, the defendant, Dublin Waterworld Management Limited and Mr. Mulcair had only hours previously entered into five agreements. These were (1) a declaration of trust in relation to the leasehold interest in the pool at Abbotstown between the defendant and Mr. Mulcair, (2) an agreement relating to certain transactions relating to the pool at Abbotstown between the defendant and Mr. Mulcair, (3) a management agreement between Mr. Mulcair and Dublin Waterworld Management Limited, (4) a put and call option relating to the pool at Abbotstown between the defendant and Mr. Mulcair and (5) an agreement providing for an asset replacement reserve fund in respect of the pool at Abbotstown between the defendant and Mr. Mulcair.

86. The declaration of trust between the defendant and Mr. Mulcair and the management agreement between Mr. Mulcair and Dublin Waterworld Management Limited were the only two of these five documents that were furnished in draft form to the plaintiff prior to the signing of the lease.

87. The declaration of trust agreement provided that pursuant to an oral assignment made prior to the execution of the deed, the defendant had assigned to Mr. Mulcair its right to take a lease of the Centre. Further, in fulfilment of the assignment, Mr. Mulcair was to hold the leasehold interest in the Centre on trust for the defendant. He also agreed to assume the burden of the leasehold interest and, in particular, to assume the obligation to keep and maintain the whole of the pool in good and substantial repair and condition and to repair, replace, reinstate, rebuild and review the whole of the pool so as to put it into that condition.

88. The trust is described in the deed as Mr. Mulcair holding the leasehold interest as the nominee and bare trustee of and on behalf of and in trust for Dublin Waterworld Limited.

89. The second agreement relating to certain transactions concerning the pool at Abbotstown, which was not handed over prior to the signing of the lease, referred to Mr. Mulcair as the 'owner' and the defendant as 'manager'. It stated that Mr. Mulcair intended to carry on the business of the swimming pool and leisure centre and that, having regard to the defendant's requisite skill and expertise in the management, promotion and marketing of swimming pools and leisure centres, he had appointed the manager as managing agent of the pool in accordance with the management agreement. It is in this agreement that the question of capital allowance arises and is defined as meaning the wear and tear allowance providing relief from taxation under Part IX of the Taxes Consolidation Act, 1997. The pool capital allowance is defined as meaning a capital allowance available to the person carrying on the trade for the purpose of which pool expenditure has been incurred, provided that if the pool capital allowances exceed €34 million then, for the purposes of the agreement, they shall be deemed to be €34 million, except to the extent that the owner actually uses such allowances in excess of €34 million to reduce or eliminate any liability to tax.

90. There was also provision in this agreement for termination events which provided that the transactions may be terminated, *inter alia*, by either party in the event that during the ownership period (the owner having complied with his obligations under clause 5) it is definitively determined on or before the expiry date that none of the pool capital allowances are available to the owner or where it is

determined by a court of competent jurisdiction that the landlord has validly terminated or is entitled validly to terminate the lease by reason of a breach of clause 4.22 of the lease. Thus, in essence, the agreement allowed either party to terminate "the funding arrangements" in the event that none of the pool capital allowances were available to Mr. Mulcair, or in the event that a court of competent jurisdiction came to the conclusion that the plaintiff had validly terminated or was entitled to validly terminate the lease, by reason of a breach of clause of 4.22.

91. The third agreement entered into between Mr. Mulcair and Dublin Waterworld Management Limited prior to the signing of the lease was a management agreement which described Mr. Mulcair as the owner, being the beneficial owner of a leasehold interest in the swimming pool incorporating the Centre and its associated leisure centre and facilities. It also stated that Mr. Mulcair intended to carry on the business at the Centre and appoint Dublin Waterworld Management Limited as managing agent of the pool on the terms as set out in the agreement.

92. At clause 4.2 of this agreement it is stated that Dublin Waterworld Management Limited will receive the pool receipts as undisclosed agent for Mr. Mulcair and pay the pool receipts into the pool bank account which was to be in the sole name of Mr. Mulcair.

93. At clause 5.1, Mr. Mulcair agreed to pay Dublin Waterworld Management Limited a management fee calculated in accordance with the agreement, the basis of which was set out at clause 5.2.

94. Clause 6 sets out the owner's obligations which included, *inter alia*, a provision at clause 6.1.4 (b) that Mr. Mulcair would from time to time promptly pay and discharge out of the pool bank account the rent, insurance rent and public area service charge (each as defined in the lease).

99. The fourth agreement, which was not handed over to the plaintiff prior to the signing of the lease, was the put and call option agreement between Mr. Patrick Mulcair who was described therein as the beneficial owner of the leasehold interest in the swimming pool and leisure facility known as the pool at Abbotstown, Co. Dublin arising under a lease granted by Campus and Stadium Ireland Development Limited on or about the date of the agreement and operates or is to operate the business at that premises and the optionee who is described as Dublin Waterworld Limited. This put and call option agreement provided, *inter alia*, that in consideration of the granting by the owner of the call option the optionee grants to the owner the right exercisable in accordance with clause 2.2 of the agreement to require the optionee to acquire from the owner the assets, subject to the burdens, upon the terms and subject to the conditions of this agreement and that the put option may be exercised only during option season and by irrevocable notice in writing from the owner to the optionee and further in consideration of the granting by the optionee of the put option the owner grants to the optionee the right exercisable in accordance with clause 3.2 of the agreement to require the owner to sell to the optionee the assets, subject to the burdens, upon the terms and subject to the conditions of the agreement.

100. The final agreement, which was not handed over to the plaintiff prior to the signing of the lease provided for an asset replacement reserve fund in respect of the pool at Abbotstown and was entered into by Mr. Patrick Mulcair as owner and Dublin Waterworld Limited and provided, *inter alia*, as is prudent that payments are to be made to the asset replacement reserve to ensure that sufficient funds are available to finance the upkeep and reinstatement of the pool arising under the lease.

101. Mr. Moriarty had indicated variously that it was proposed to proceed ahead with the funding arrangements and had forwarded documents pertaining to two out of the five agreements to Mr. Morgan. Alternatively, he had accepted that he required consent to an assignment of the lease and had sought that consent while the plaintiff had fairly consistently maintained that an assignment was not possible under the project agreement and that, pursuant to the lease, an assignment of the lease or the lease being held in trust required the plaintiff's prior written consent. As events transpired, Mr. Moriarty proceeded with his funding arrangement with Mr. Mulcair, resulting in an oral equitable assignment of the lease that was to be entered into by the defendant with the plaintiff prior to the lease being signed and, the lease then being signed by the defendant, to be held in trust for Mr. Mulcair, who is then to be described as the owner of the Centre, and he in turn retained the services of Dublin Waterworld Management Limited to manage, promote and market the Centre.

102. Subsequent to the defendant taking the lease, it failed to advise the plaintiff as to the factual background situation that existed and in my view no satisfactory explanation has been offered to this Court as to why the application for consent was not proceeded with or why the plaintiff was not advised as to what had actually occurred. The reality of the situation appears to be that once the lease had been entered into the issue of consent was not proceeded with against the background where the lease specifically provided for the lease being held in trust for another subject to the prior written consent of the landlord which consent was not to be unreasonably withheld or delayed.

103. Subsequently, on the 15th May, 2003, the plaintiff sent an invoice to the defendant in respect of the licence fee and VAT to a total of €1,494.88 and no reply was received.

104. The issue of VAT on the lease was also the subject matter of an invoice of the 15th May, 2003, in the sum of €10,254,600. No reply was received to this invoice.

105. There then followed a series of invoices for ongoing charges including, *inter alia*, insurance and by the 17th June, 2003, there were outstanding invoices in the sum of €10,360,472.24, with no adequate response.

106. Mr. Moriarty was actively involved in the ongoing arrangements at the Centre and also in respect of matters arising out of the five agreements that had been entered into prior to the lease being signed.

107. On the 6th June, 2003, the defendant's solicitors wrote to the plaintiff's solicitors advising that a management company entitled Dublin Waterworld Management Limited had been incorporated for the purposes of managing the Centre and that in these circumstances the solicitors felt that a waiver of subrogation rights should also be obtained against this company and asking that same be obtained. This letter stands in isolation to any other correspondence, does not appear to have been followed up, was not brought to the attention of Mr. Morgan, Chief Executive of the plaintiff company, and in my view could not possibly be taken to have put the plaintiff on notice of the *de facto* situation that was pertaining behind the lease agreement.

108. Subsequently, Mr. Moriarty wrote to Mr. Morgan on the 3rd July, 2003, disputing that VAT arose at all on the lease and this letter was copied to Mr. Tom Caulfield, Mr. Mulcair's accountant, as was a further letter of the 1st August, 2003, wherein Mr. Moriarty again informed Mr. Morgan that, while the defendant was happy to pay any VAT that was properly chargeable on the creation of the lease, a dispute had arisen as to this issue and he asked whether the matter could be referred to arbitration. This letter also nominated 3 potential arbitrators. The plaintiff would not agree to this course of action. It is in the view of this Court very

unfortunate that the plaintiff did not agree to the matter being referred to arbitration as provided for in the lease as this aspect of matters could then have been clarified at a much earlier stage. I am satisfied that this issue was *bona fide* and was resolved by arbitration on the 1st July, 2005, in the plaintiff's favour, the application to set aside the award of the arbitrator being dismissed by order of this Court (Gilligan J.) on the 26th September, 2005, and further judgment being entered in the plaintiff's favour as against the defendant in the amount of the arbitrator's award, being €10,254,600 together with costs to be taxed in default of agreement and the application for a stay on the said judgment being refused.

109. Throughout the course of the hearing of this action and its concluding submissions there was no indication from the defendant's legal advisors that the order of the Court as made on the 26th September, 2005, was going to be appealed to the Supreme Court and thus at the conclusion of the case the *de facto* situation that pertained was that there was no appeal from the order relating to the arbitrator's award and no stay on the judgment in the plaintiffs favour. This Court first became aware that the order of the 26th September, 2005, had been appealed to the Supreme Court by virtue of internal Courts Service correspondence from the Registrar of the Supreme Court dated the 21st December, 2005. It was then deemed necessary to advise both parties as to the fact that it had been brought to the attention of this Court that an appeal had been lodged from the order of the 26th September, 2005, pursuant to an order of the Supreme Court as dated the 16th December, 2005, the hearing of this matter having concluded on the 4th November, 2005.

110. On the 7th February, 2006, counsel for the parties advised this Court that not only had an appeal been lodged from the orders of this Court in relation to the application to set aside the arbitration award and the judgment as given against the defendant in the sum of €10,360,472.24 and costs, but that by agreement of the parties subject to security for costs a stay was agreed pending appeal on the enforcement of the monetary award in respect of the amount of VAT payable on the lease.

111. By September, 2003, the defendant was making allegations regarding defects, outstanding works and general snags surrounding the Centre premises. It also suggested that the retention monies be used to cover the cost of remedying some of the alleged defects but this was declined by the plaintiff. On the19th September, 2003, Mr. Kieran Rutledge, Managing Director of the defendant company, wrote to the plaintiff seeking an update on performance and voicing a number of complaints, in particular, that the Special Olympic Games which had been held in June, 2003 were a disaster for the Centre in economic terms. He also estimated that income was down for a variety of reasons and again sought the use of the retention monies to cover certain alleged outstanding defects. It is of interest to note at this stage that the defendant's customer research showed that the vast majority of customers were happy with their experience at the Centre. The research showed that 95.4% of persons attending would visit again, 78.7% said cleanliness of the facilities was good or very good, 84.8% said customer care was good or very good, 90.3% said safety was good or very good and 82% said that the Centre offered good or very good value for money, the favourite attraction on site being the "Master Blaster".

112. As of October, 2003, there was extensive correspondence regarding alleged outstanding and defective work between Mr. David Warden, General Manager of the defendant company, Rohcon Limited and the construction consultants David Langdon PKS.

113. In a letter of the 4th November, 2003, Mr. Jack O'Brien, the plaintiff company's secretary, wrote to the defendant seeking audited accounts for the Centre up to the end of September, 2003 with detailed analysis for each line item.

114. On the 1st December, 2003, Mr. Rutledge, on behalf of the defendant company, replied to Mr. O'Brien, enclosing accounts and balance sheets for the requested period and also a list of creditors. An invoice dated the 18th November, 2003, was raised by the defendant for loss of income at the Centre during the period of the Special Olympic Games in the amount of €140,000.00. The accounts provided to the plaintiff were accounts for Dublin Waterworld Management Limited dated the 1st December, 2003. These accounts show income for the period ending the 9th December, 2003, of €3,763,523.33, purchases of €126,378.03 and overheads of €4,065,061.53, thus producing a net loss for the period of €427,916.23.

115. In the background, meetings were continuing to take place between the defendant, Rohcon Limited and the relevant professional experts as regards the updating of the ongoing snagging list.

116. Subsequently, on the 10th February, 2004, Mr. Morgan followed up the issue of the accounts with Mr. Rutledge, seeking further information but not picking up the fact that the accounts which he had been shown were those of Dublin Waterworld Management Limited. As against that, all correspondence from Mr. Morgan is addressed to the defendant and it continues to use the same headed notepaper which it had used prior to entering into the lease.

117. Mr. Rutledge replied by way of letter of the 16th March, 2004, declining to provide further information and indicating that in accordance with the lease the defendant would provide all the information that was required under the lease at the appropriate time.

118. Further invoices issued from the plaintiff in April, 2004 and these were followed up throughout 2004 with no or no adequate response.

119. On the 27th July, 2004, Ms. O'Donoghue, acting on behalf of the plaintiff, wrote to Mr. Moriarty putting him on notice that the first set of audited accounts were due pursuant to the terms of the lease and should have been furnished on the 30th March, 2004.

120. Mr. Rutledge replied to this letter on the 3rd August, 2004, by indicating that the accounts had not yet been completed, that the accountant was on holidays and that he would apply further pressure to have the accounts submitted as soon as the accountant returned. In September, 2004 documentation was circulated on the plaintiff's behalf in relation to a community access programme. The first paragraph of this document referred to Dublin Waterworld Management Limited as the operators of the Centre and this gave rise to a letter of the 1st October, 1994, from Ms. O'Donoghue seeking clarification as to what role, if any, Dublin Waterworld Management Limited had in relation to the Centre. In particular, she sought clarification of the basis upon which Dublin Waterworld Management Limited had been given a role in the light of the defendant's obligations under the lease to operate the Centre, in particular having regard to clauses 4.22 and 4.34 and the prohibition against sharing with third parties.

121. No response was received to this letter.

122. Mr. Morgan wrote to Mr. Moriarty in October, 2004 bringing to his attention the failure to furnish the audited accounts, the failure to establish the sinking fund account and the failure to discharge the insurance rent. Mr. Morgan specifically separated these matters from the calculation of the VAT payable on the lease and put the defendant on notice that unless it complied with its obligations in relation to these matters within 28 days from the date of the letter it was the plaintiff's intention to take the further necessary action to secure compliance.

123. It is clear that the defendant's accounts were approved by its Board and signed on the 22nd October, 2004, in respect of the

financial year ending the 31st December, 2003. These accounts show that the defendant did not trade in 2003. This fact is confirmed in the defendant's pay and file corporation tax return for 2003, wherein it is specifically recorded that no transactions occurred during the year.

124. In September, October and November, 2004 there was extensive communication between Mr. David Langdon, on behalf of PKS the construction consultants, the defendant and the plaintiff. It is clear that the defendant was concerned as regards a number of matters which it felt were not receiving attention. The roof of the Centre was blown off in a storm on the night of the 31st December, 2004/1st January, 2005, and this resulted in closure of the premises until May, 2005.

125. It was against this background that the plaintiff served a forfeiture notice on the defendant on the 18th March, 2005, the notice referring to the indenture of lease and the various clauses which the plaintiff company indicated that the defendants were in breach of. The notice read as follows:

> *"FORFEITURE NOTICE*
>
> *SECTION 14 OF THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881*
>
> (served on behalf of Campus and Stadium Ireland Development Limited, herein the "*Landlord*")
>
> To: Dublin Waterworld Limited
>
> c/o Kieran Ruttledge, Caherweesheen, Ballyard, Tralee, Co. Kerry
>
> and
>
> The National Aquatic Centre, Abbotstown, Co. Dublin
>
> (the "Tenant")
>
> *AND ALL PERSONS CONCERNED*
>
> *WHEREAS:-*
>
> 1. By indenture of Lease (the "Lease") dated 30 April 2003 made between Campus and Stadium Ireland Development Limited (the "Landlord") of one part and Dublin Waterworld Limited (the "Tenant") of the second part the Landlord demised unto the Tenant all that the premises known as the National Aquatic Centre, Abbotstown in the County of Dublin (the "premises") for a term of 30 years from 30 April 2003 subject to the annual rent thereby reserved and to the covenants on the Tenant's part and conditions in the Lease contained.
>
> 2. Under Clauses 3.1, 4.2 and Schedule Two of the Lease you are obliged during the first five years of the term to pay by way of rent the sum of €126,974 per annum plus 10% of the net profit of the Tenant payable in the manner described and subject to the provisions of Schedule Two of the Lease.
>
> In breach of the aforesaid obligation, since the date of commencement of the Lease you have failed to pay such rent, despite demand and have furthermore, in breach of Clause 3 of Schedule Two of the Lease, failed refused or neglected to deliver all audited accounts to the Landlord within 90 days of the accounting period termination date, namely the 31 December 2003 and the 31 December 2004.
>
> By reason of the aforesaid failure to deliver accounts, the Landlord has not been in a position to accurately assess that portion of the rent due which represents 10% of the Tenant's profit for the said years and no such sum has been paid by the Tenant.
>
> Accordingly, pursuant to the terms of Schedule Two, without prejudice to the Landlord's rights to seek such further sums as are due in respect of that portion of the rent based on the Tenant's profit, the sum of €634,869 has become due and owing by you, the Tenant which said sum has not been discharged.
>
> 3. Furthermore under the said clauses 3.1 and 4.2 of the Lease you are obliged to pay insurance rent calculated in accordance with the provisions of the Lease within 14 days of demand by the Landlord.
>
> In breach of the aforesaid obligations you have failed refused or neglected to pay the insurance rent due in respect of the period 30 April 2003 to 4 March 2004 in the amount of €88,108.72.
>
> 4. Under Clause 4.62 of the Lease you are obliged, inter alia, to contribute in the first year of the term a sum of €126,974 in respect of the sinking fund to be set up by the Tenant to provide for the costs and expenses of any replacement or renewal of any part or parts of the Premises.
>
> In breach of the aforesaid obligations you have failed to pay the said sum and you have furthermore, in breach of the said clause failed to take any steps to agree with the Landlord the terms of a Capital Maintenance Programme or to set up the said sinking fund, thereby rendering the accurate calculation of the Tenant's contribution unascertained and accordingly, under clause 9 of Schedule Ten of the Lease, a further sum remains due and owing in respect of the year ending 29 April 2005 in the amount of €126,974.
>
> 5. Under Clause 4.30 of the Lease, you are obliged to pay to the Landlord all Value Added Tax payable on the grant of the Lease.
>
> In circumstances where you failed refused or neglected to take all necessary steps to obtain an exemption under Section 4A of the VAT Act, 1972 and where the Revenue Commissioners have assessed the Value Added Tax due in respect of the Lease in the amount of €10,254,600, you are due in continuing breach of the aforesaid obligation in

refusing to discharge the said sum due.

6. Under Clause 4.34 you are obliged to operate the Premises and under Clause 4.22 of the Lease you are prohibited from assigning sharing or parting with possession of the Premises or any part thereof without the prior written consent of the Landlord.

In breach of the aforesaid obligation, the Landlord understands that the Premises may have been operated by Dublin Waterworld Limited and/or you may have assigned your interest in the Premises to that company and you have failed to respond to correspondence in that regard.

7. Under Caluse 4.55 of the Lease you are obliged to manage the Premises in a good and efficient manner and to procure that the manager of the Competition Pool and manager of the leisure waters shall be approved by the Landlord in advance.

In breach of the aforesaid obligation, the Landlord understands that the approved manager is no longer in the employ of the Tenant and the Tenant has failed to respond to the Landlord's correspondence in relation to this matter.

8. Under Clause 6(k) of the Lease you are obliged to seek the Landlord's consent for any increase in ticket prices above the Consumer Price Index.

In breach of the aforesaid obligation, the Landlord became aware, by way of your newsletter dated 6 December 2004, that the Tenant had announced price increases from January 2005 without the prior consent of the Landlord.

TAKE NOTICE that unless you remedy the said breaches within a period of 28 days of today's date, including but not limited to the payment of all the sums due, and make compensation to the satisfaction of our clients within the same period, your Lease of the said premises will be forfeit and at an end proceedings will be instituted without further Notice to recover possession should you fail to deliver up peaceable possession thereof.

AND FURTHER TAKE NOTICE that acceptance by the Landlord of part only of the arrears or rent or any part thereof due will not constitute a waiver of the notice.

Dated 18 March 2005 …"

126. In response to the service of the forfeiture notice, the defendant wrote to the plaintiff on the 14th April, 2005, arguing that there were a number of reasons why the rent and insurance had not been paid, including the substantial losses which arose out of the Special Olympic Games, the problems with the condition of the premises (the repair of which had forced the defendant to expend considerable sums of money) and the closure of the premises due to the roof being blown off. In relation to the sinking fund, the defendant maintained that although it had been set up the funds had been expended in carrying out repairs. As regards VAT on the lease the defendant indicated that it had received advice that VAT was not payable.

127. In relation to the involvement of Dublin Waterworld Management Limited, the defendant indicated that it was carrying out a management function which did not prejudice the plaintiff's position in any way. Furthermore, the defendant argued that the plaintiff had always been aware of the role played by Dublin Waterworld Management Limited, even prior to the grant of the lease. It was further argued that the original bid never referred to separate managers in respect of the competition pool and leisure waters and only referred to a general manager and that consent had been obtained in respect of its general manager, albeit retrospectively.

128. It was also contested that any price increases had been above the consumer price index. Finally, it was indicated that any step to forfeit the lease would result in the defendant immediately issuing a claim for relief against forfeiture and it was suggested that the way forward was to arrange a meeting between the respective parties to resolve the various outstanding issues.

129. Pursuant to the plaintiff's calculations, as of the 25th May, 2005, the defendant owed the sum of €11,316,507.27 and this figure did not include 10% of the net profits for the Centre for 2003 and 2004 (presumably on the basis that there was a net profit for each of the years), insurance rent as due from January, 2005 and the sinking fund from January, 2005.

130. There was no meeting of minds in relation to the various outstanding issues between the parties and the plaintiff instituted proceedings in this Court by way of plenary summons on the 26th April, 2005. It subsequently proceeded to draw down the amount of the guarantee in place with Anglo Irish Bank pursuant to the terms of the lease and on the 31st May, 2005, the sum of €761,842.00 was paid by Anglo Irish Bank to the plaintiff, at the same time confirmation being given that the bank guarantee as provided by Anglo Irish Bank was no longer in place.

131. The plaintiff's proceedings sought an order for possession of the Centre and a statement of claim was delivered on the 29th April, 2005, setting out in detail the background to the claim and the reliefs as sought. At paragraph 20 of the statement of claim, it was pleaded that the defendant's interest in the lease was forfeit on or about the 15th April, 2005.

132. The proceedings were entered in the commercial list and came before Kelly J. who, on the 3rd June, 2005, ordered that so much of the plaintiff's claim as related to the question of VAT on the lease be stayed and referred to arbitration and Mr. Dermot O'Brien was nominated arbitrator by agreement of the parties. Kelly J. also ordered that so much of the plaintiff's claim as related to clause 4.5 of the lease (relating to maintenance of the premises and of the equipment) was to be referred to expert determination and Mr. David Keane was agreed between the parties and appointed in that regard. The Court also made orders in respect of the delivery by the defendant of a defence and counterclaim.

133. These were delivered on the 15th June, 2005, the defence raising a number of issues, including, *inter alia*, the fact that the defendant had admitted it had not delivered the audited accounts in accordance with the terms of the lease but asserting that at no stage had the plaintiff been unable to assess the portion of the rent payable under the lease, which represented 10% of the tenants' net profit.

134. Furthermore, the defendant pointed out that it had not during any of the years in question made any net profit and that, in light of this fact, the clause in the lease which requires IR£500,000 to become immediately due and payable in the event of the defendant's failure to pay the rent amounted to a penalty and was not therefore enforceable. The defendant also denied that it had

not paid the relevant insurance contributions, averred that it had set up a sinking fund and had lodged thereto an amount €254,000, denied that it had permitted Dublin Waterworld Management Limited to operate the premises or that it had assigned or otherwise parted with possession of the demised premises without the plaintiff's consent. Further, and in the alternative, the defendant maintains that the plaintiff has at all times been aware of the fact that the premises were being operated by Dublin Waterworld Management Limited and had in fact acquiesced and consented thereto. The defendant also takes issue with the forfeiture notice on the basis that it is invalid because:

> 1. It fails to identify with sufficient particularity the breaches complained of.
>
> 2. It fails to identify with sufficient particularity the steps required to be taken by the defendant to remedy the alleged breaches.
>
> 3. It fails to identify the compensation required to be paid to the plaintiff.
>
> 4. It fails to allow a reasonable time within which to remedy the alleged breaches and furthermore, the defendant denies that it has any liability for value added tax, denies that its interest in the lease was forfeit on or by the 15th April, 2005, as alleged or at all.

135. The defendant counterclaims for damages on the basis that the plaintiff has failed to maintain adequate insurance in respect of the demised premises. It argues that damage has been caused to the premises as a result of subsidence, leaking water tanks, pipes and apparatus and further although not included in the counterclaim that damage has also been caused by the roof being blown off by high winds. The defendant asserts that the plaintiff should have made claims in respect of all of these damages as all of the dangers which caused them constituted insured risks. The plaintiff's failure to reinstate the demised premises has meant the defendant has suffered significant loss and damage. All of these developments have deprived the defendant of monies which would otherwise be available to it to meet its financial and other obligations under the lease. As a result, the defendant asserts that if the lease has been validly forfeited, which is not admitted, this Court should grant relief against such forfeiture.

136. The plaintiff's solicitors raised a notice for particulars as dated the 21st June, 2005, and further on the 22nd June, 2005, sought discovery of certain documentation. In a reply dated the 24th June, 2005, the defendant indicated that a sinking fund had been set up in the week ending the 17th June, 2005, with funds provided by Mr. Moriarty and enclosed was a draft capital maintenance programme dated June, 2005.

137. Of particular significance in the replies to particulars of the 24th June, 2005, is the reply contained within paragraph 2(a) relating to the position of Dublin Waterworld Management Limited. It states:

> "Dublin Waterworld Limited operates and manages the premises but avails of the services of Dublin Waterworld Management Limited in relation to certain management and supervisory functions at the premises. Dublin Waterworld Management Limited is a group company and a wholly owned subsidiary of Dublin Waterworld Limited."

138. At paragraph 2(b) it is stated:

> "Dublin Waterworld Management Limited has been carrying out certain management and supervisory functions at the premises on behalf of Dublin Waterworld Limited since prior to the date of the granting of the lease (with the agreement of the former chairman of CSID)."

139. Paragraph 2(c) states:

> "The defendant does not accept that the lease requires Dublin Waterworld Limited to obtain the consent of the plaintiff to engage the services of Dublin Waterworld Management Limited in relation to certain management functions at the centre. It is a common practice in the industry for certain management functions to be carried out by group companies other than the tenant."

140. Paragraph 2(d) goes on to state:

> "The premises are not being operated by Dublin Waterworld Management Limited. As part of the operating the premises (sic) the defendant avails of the services of Dublin Waterworld Management Limited to carry out certain management and supervisory functions including the hiring of staff and the payment of overheads. It was agreed by the Chief Executive Officer of the plaintiff prior to the signing of the contracts in February 2002 that in exchange for the defendant accepting new clauses which were being asserted into the contract the plaintiff would allow Dublin Waterworld Limited to employ any structures necessary so long as the centre was operating successfully. John Moriarty told Paddy Teehan that the defendant would be employing the services of another entity to assist in the management and supervision of the centre. Paddy Teehan stated to John Moriarty that he had no difficulty with this so long as the centre was well run."

141. Paragraph 2(i) states:

> "The services provided by Dublin Waterworld Management Limited to the defendant include functions such as hiring of staff, paying of overheads, providing advisory services to the defendant."

142. Subsequently, on the 30th June, 2005, the defendant's solicitors furnished additional particulars in relation to the defendant's counterclaim. On the 11th July, 2005, the plaintiff's solicitors delivered a reply and defence to the defendant's defence and counterclaim.

143. On the 11th July, 2005, this Court (Kelly J.) made an order that the plaintiff's claim for possession against the defendant be listed for hearing on the 26th July, 2005, and that the defendant must comply with the order of discovery before its counterclaim was listed for trial, save for the claim for relief against forfeiture, same to be heard on the 26th July, 2005. The plaintiff's claim came on for hearing before this Court on the 26th July, 2005, together with the defendant's claim for relief against forfeiture. The defendant's counterclaim being be held over pending compliance with an order for discovery and was to be dealt with at a later date.

144. It became apparent on the opening of the case that there was a controversy regarding the date of forfeiture relied on in the statement of claim, being the 15th April, 2005, as such was in fact the date of the expiry of the 28 day period. It was accepted that this date was technically incorrect and the plaintiff sought an amendment of the statement of claim to coincide with the date of the

institution of these proceedings, being the 26th April, 2005. Following legal argument on the fourth day of the hearing, being the 29th July, 2005, this Court acceded to the plaintiff's request to amend the statement of claim so that the relevant date now reads the 26th April, 2005, in paragraph 20 thereof. It should be noted however that in making that ruling the Court did reserve its decision in respect of the costs implications until the final determination of these proceedings.

145. A considerable body of evidence was heard in this matter from Mr. Donagh Morgan, Mr. Paddy Teehan, Ms. Una Carmody and Mr. David Motherway on the plaintiff's behalf and from Mr. Liam Bohan, Mr. David Nolan, Mr. Terry O'Neill and Mr. John Moriarty on the defendant's behalf. I shall refer to such of the evidence as I consider relevant to the issues to be determined during the course of this judgment.

146. Mr. O'Neill raises a number of issues on the defendant's behalf.

147. In the first instance it is contended that the provisions of clause 2 of the second schedule of the lease constitute a penalty. The term sets out that the rent for the first five years of the term shall be payable in the first instance as to IR£100,000 payable on the last day of the first year of the term together with 10% of the net profit calculated and payable at the time and in the manner as set out in the lease and payable in the same terms for the following 4 years. If the tenant fails to pay to the landlord the amount described in clause 2 then, without prejudice to the landlord's rights and remedies under the lease and for the avoidance of doubt, the total of all the instalments of IR£100,000 as described in clause 2 shall become immediately due and payable, giving due credit for such elements of those instalments of IR£100,000 as shall at the date of default have been paid to the landlord. The defendant submits that the proviso must be looked at against a background where not only does that acceleration take place but there are also provisions in the lease providing for the payment of interest on late payments at clause 3.1 and also in the schedule there is a provision for the payment of interest on the profit rent at clause 3.2 to the second schedule. It is submitted that the Court would normally approach this situation as regards a default in payment of rent on the basis that the landlord would be entitled to the payment of rent together with a payment of interest. However, in the particular circumstances of this situation not only is interest payable but the payment of the sum of IR£500,000 is accelerated and also very significantly all other remedies such as forfeiture of the lease are kept open. It is submitted that the situation that arises is to compare using a sledge hammer to deal with a situation which is normally dealt with by the payment of interest.

148. In the present case the defendant submits that it is clear that the requirement that the balance of the sum of IR£500,000 must be paid is a penalty because:

> 1. The sum is payable over and above the rent and interest thereon.
>
> 2. The payment purports to be due under the terms of the lease even in circumstances where due to non payment the landlord forfeits the lease.
>
> 3. The requirement to pay the sum of IR£500,000 is a liability to pay in default of payment of an ascertained figure. The sum of IR£100,000 payable per annum is ascertained and the net rent in the context of paragraph 2 to schedule 2 is also ascertained.

149. The defendant submits that the plaintiff is seeking to go behind the very clear wording of the lease and to suggest that at one stage the arrangement envisaged under the heads of agreement to which the defendant was not a party provided for a contribution of IR£500,000 from Waterworld U.K. Limited together with VAT on the grant of the lease. In Mr. O'Neill's submission this apparently refers back to the contribution in the final bid being described as a contribution from the bidder of IR£500,000. Mr. O'Neill submits that in fact this sum is already taken into account with the reduction in the contract sum from £48.9 million to £48.4 million in respect of the construction process of the Centre.

150. It is submitted on the defendant's behalf that it was under no contractual obligation prior to the signing of the project agreement. It is further submitted that negotiations leading up to a contract are not admissible in interpreting a contract and it is quite clear that the final agreement recorded in the project agreement and draft lease relating to the rent was negotiated on a give and take basis. Mr. O'Neill refers to the fact that Ms. Carmody, in her evidence on behalf of the plaintiff, acknowledged that the rent was "pushed out" over a 5 year period in return for Mr. Moriarty entering into a bank guarantee.

151. Mr. O'Neill further submits that had the parties to the project agreement intended that the sum of IR£500,000 was payable in any circumstances, the documentation could and should have said so and the lease could have provided that such a sum was payable. Instead, it was agreed to accept payment on a deferred basis. This issue was dealt with by the Court of Appeal in *Intermediate Ltd v. Smith* (Unreported, Court of Appeal, 22nd March, 1991) in which Staughton, L.J. (with whom the other members of the Court agreed) stated:

> "The effect of that doctrine [the doctrine in relation to penalties], as it seems to me, is that a skilled draughtsman can avoid the law relating to penalties in a great many cases by framing his contract as providing the defendant with the option either to pay the proper amount on time, or some other amount later. Possibly it is better done by providing that there shall be a discount for payment on time. This is not an area where one looks at substance rather than form. It is to be contrasted with the doctrine enunciated by Lord Dunedin in the case of *Dunlop Pneumatic Tyre Co. v. Newgrange Motor Co.* [1915] AC 79, where he expressly said that it was not conclusive that something is called a penalty if it was in fact a genuine pre-estimate of damages, or vice versa.
>
> In this area which I am now dealing with, form is important so I look to the terms of the contract to see whether the one and a half per cent was to be payable on an event which was not a breach of contract, or whether it was an optional method of performance".

153. In the present case and Mr. O'Neill submits that the plaintiff seems to be asserting that one does not look at form. The defendant's initial objection to the line of evidence adduced by Ms. Carmody and Mr. Motherway is that the evidence is not admissible. In *Igote v. Badsey* [2001] 4 I.R. 511, Murphy, J., delivering the judgment of the Supreme Court, accepted that in certain circumstances one can look at the "factual matrix". However, he also sounded a word of caution in stating:

> "The dangers involved in exploring the background or surrounding circumstances to a document under construction and the limitations which must be placed upon the factual matrix were referred to in *Plumb Brothers v. Dolmac (Agriculture) Ltd.* (1984) 271 E.G. 373 by May L.J. where he said at page 374:
>
> 'There has grown up a tendency to speak about construing documents in or against what is described as the

> "factual matrix" in which the contract or documents first saw the light of day. In truth that is only, I think, a modern way of saying what has always been a rule for a long time that, in construing a document, one must look at all of the circumstances surrounding the making of the contract at the time it was made. There is a danger, if one stresses reference to the "factual matrix" that one may be influenced by what is in truth a finding of the subjective intention of the parties at the relevant time, instead of carrying out what I understand to be the correct exercise, namely, determining objectively the intent of the parties from the words of the documents themselves in the light of the circumstances surrounding the transaction. It is not permissible, I think, to take into account the finding of fact about what the parties intended the document to achieve when one is faced with the problem some five, ten or many years later of construing it. In deciding what the document did in fact achieve, all that one can look at are the general circumstances surrounding the making of the document and in which it was made, and deduce the intentions of the parties from the actual words of the documents itself. The contract between the parties is what they said in the relevant document. It is not for this or any court to make a contract for the parties different from the words that the documents actually use merely because it may be that the parties intended something different.' "

154. Murphy J. continued:

> "At the end of the day the rule as to construction and the context in which it is to be achieved is most succinctly expressed in the judgment of Keane J. (as he then was) in *Kramer v. Arnold* [1997] 3 I.R. 43 at p. 55 when he said:
>
> > 'In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances.' "

155. It is urged on the defendant's behalf that the fact that the defendant and Rohcon Limited came to some arrangement in relation to the payment of the sum of IR£500,000 cannot affect the interpretation or consequences of any agreement between the plaintiff and the defendant.

156. Further, the defendant refers to the fact that the plaintiff asserts that because the defendant has accepted, through Mr. Moriarty's affidavit, that the rent is due, it is now somehow precluded from asserting that the requirement to pay the sum of IR£500,000 constitutes a penalty. However, if such an acknowledgment could have that effect a party could never allege that a provision in a contract constituted a penalty. The whole basis of the doctrine in relation to penalties is that the parties have acknowledged and agreed that the sum of money is payable, as of course the defendant has by signing the lease. However, the law on grounds of public policy refuses to uphold such agreements. Consequently, the mere fact that the defendant may have acknowledged that under the terms of the lease the sums of money are payable does not bar it from asserting that the payment is a penalty any more than its initial agreement to pay the sum (in the lease itself) could amount to such a bar.

157. On the plaintiff's behalf, Mr. McDonald contends that the monies comprised in the accelerated payment pursuant to the terms in the lease were never paid by the defendant but were the monies of Rohcon Limited which were paid over by them to the defendant. He submits that this was always the situation and that as early as 2001 when Mr. Moriarty was speaking to Rohcon Limited about getting involved in the project it was clear in their projections that the sum of IR£500,000 would eventually be paid to the plaintiff. Furthermore, in the course of his evidence Mr. Moriarty accepted that the sum of IR£500,000 was always a feature because it was a figure that was contained in the bid.

158. In these circumstances Mr. McDonald submits that it is not understood how it can be argued that the accelerated provision for payment is a penalty and that, in any event, Mr. Moriarty's affidavit of the 19th May, 2005, expressly concedes that all of the monies to be paid by Anglo Irish Bank under the guarantee were due under the lease and, having regard to that averment, the defendant is now estopped from seeking to contend otherwise. Mr. McDonald argues that this affidavit was sworn for the express purpose of persuading the Court (Kelly J.) that the issues raised in these proceedings should be referred to arbitration under s. 5 of the Arbitration Act, 1980 on the basis that the only matters in dispute between the parties fell within the ambit of clause 10 of the lease which contains an arbitration clause. In order to succeed in that argument the defendant had to persuade the Court that there was no dispute between the parties in relation to "the rent" because any question which arises in relation to schedule 2 of the lease dealing with rent was excluded from the ambit of clause 10. Having expressly sworn that there was no dispute in relation to "the rent", it is argued that the defendant cannot now raise an argument which is inconsistent with this oath and to allow it to do so would amount to an abuse of court process.

159. The central thrust of Mr. McDonald's argument is that the sum of IR£500,000 is the same sum as carried through from the initial bid and that the Court should look at all the surrounding circumstances for the "matrix of fact", as it is referred to. The plaintiff relies on the judgment of Keane J. (as he then was) in *Kramer v. Arnold* [1997] 3 I.R. 43 at p. 55 as already quoted.

160. Further, the plaintiff relies on the Court of Appeal decision in *Dunlop Pneumatic Tyre Company v. New Garage and Motor Company Limited* [1915] A.C. 79, at p. 86, wherein Dunedin LJ. stated:

> "The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not at the time of the breach."

161. In reaching my conclusion on this aspect of the case it is clear that there is a considerable difference of emphasis between the parties in relation to the payment of the sum of IR£500,000 and VAT. The plaintiff contends that at all times this particular sum represented a capital contribution from the bidder, which had its inception in the successful consortium's bid through the heads of agreement, the project agreement and the lease and that the payment was never as such a rent. The defendant on the other hand maintains that it was not a party to the actual bid or the heads of agreement and that when it came on board the project, albeit in the place of Waterworld U.K. Limited, the payment was described as rent payable over a period of 5 years and subject to the provisions contained in the lease. In order to resolve this issue, I take the view that I am entitled, in the particular circumstances, to review the factual matrix that led to the adoption of the particular form of wording in the project agreement and lease.

162. The appropriate starting point in my view is an understanding as to what constitutes a penalty and in this regard, the relevant principles are set out by Dunedin L.J. in *Dunlop Pneumatic Tyre Company v. New Garage and Motor Company Limited* [1915] A.C. 79, at p. 86, wherein he stated:

> "1. Though the parties to a contract who used the words 'penalty' or 'liquidated damages' may prima facie be supposed to

mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Caitaneda*).

3. The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as of at the time of the making of the contract, not at the time of the breach….."

163. Barron J., with whom the other members of the Supreme Court agreed, approved these principles in his judgment in *Pat O'Donnell and Co. v. Truck and Machinery Sales* [1998] 4 I.R. 191. In dealing with the circumstances in which an agreed sum might be held to be a penalty, he referred to Dunedin L.J.'s statement in *Pneumatic Tyre Company* at p. 87 and stated that;

"(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank* case).

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid."

164. As to the second situation, Barron J. quoted the following passage from the judgment of Parmoor L.J. at p. 101:

"The second instance in which the Courts have sanctioned interference is in the case of a covenant for a fixed sum, or a sum definitely ascertainable, and where a larger sum is inserted by arrangement between the parties, payable as liquidated damages in default of payment. Since the damage for the breach of covenant is in such cases by English law capable of exact definition, the substitution of a larger sum as liquidated damages is regarded, not as a pre-estimate of damages, but as a penalty in the nature of a penal payment."

165. Barron J. then stated at p. 215:

"These two instances are quite different. In the first case, the damages would be uncertain and there may genuinely be a difficulty in a pre-estimate of the damage which would occur in the event of breach. A latitude is allowed, but even then the sum agreed must not be extravagant or unconscionable in relation to any possible amount of damages that could have been within the contemplation of the parties at the time when the contract was made. If it is, it is regarded as a penalty, and the plaintiff is left to prove the actual damage.

In the second case, no question of a pre-estimate of loss arises because the amount of the damages is treated as being certain. As will be seen from the cases to which I shall refer the damages are regarded as certain because the only sum allowed over and above the actual fixed sum is interest. This is allowed at the then subsisting commercial rate. Accordingly if the agreed rate is in excess of that it will be treated as a penalty because any interest over the commercial rate will in effect provide for the payment of larger sum in place of a smaller one."

166. In the circumstances that arise in this instance I propose to follow the reasoning of Keane J. (as he then was) in *Kramer v. Arnold* [1997] 3 I.R. 43 at p. 55 to the effect that the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances.

167. I fully accept that the wording in the lease refers to rent but clearly the surrounding circumstances have to be considered so as to decide the intention of the parties.

168. As Wilberforce LJ. stated in *Reardon Smith Line Limited v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, at p. 995-997:

"… In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating…what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were."

169. I also rely on the views of Upjohn L.J. in *Lombank Limited v. Excell* [1964] 1 Q.B. 415, wherein he stated at p. 425-426:

"Mr. Terrell, for the plaintiffs, argues that in every case the question is purely one of construction, and that evidence of the surrounding circumstances, such as the subject of the hire-purchase, is not admissible. We are quite unable to accept this argument. It is directly contrary to what Lord Dunedin said, where he recognised that the circumstances of each case must be highly relevant. Furthermore, it is plainly contrary to the observation of Lord Radcliffe in *Bridge's* case, where he said this:

> 'The court's jurisdiction to relieve against penalties depends on "a question not of words or of forms of speech but of substance and of things" (see Lord Davey in the *Clydebank Engineering* Case). It cannot really depend on a point of construction though it is often spoken of as so depending.'

In many cases, the question of construction will be of great importance, and *Bridge's* case is a very good example of this. There, the depreciation clause was so expressed as to make nonsense, for, as Lord Radcliffe pointed out, though the scale for depreciation was a sliding scale, it slid the wrong way: that is to say, the estimated amount of depreciation became progressively less the longer the vehicle was used under the hire. That, amongst other circumstances, was a strong indication that there was no genuine pre-estimate of the depreciation."

170. In my view, the original bid, and the heads of agreement, constitute part of a factual matrix which constituted the basis upon which the project agreement and subsequently the lease came to be negotiated and agreed.

171. It is clear from a consideration of the genesis of the transaction that the requirement to pay IR£500,000 was by way of a contribution towards the cost of the construction of the Centre. In the heads of agreement this sum became payable by Waterworld

U.K. Limited and when the defendant stepped into the latter's shoes they were clearly on notice that this was a payment which had to be made. On the defendant's behalf, Mr. O'Neill argues that, having regard to the project agreement, it is clear that the contract sum of IR£48.4 million already takes into account the deduction of IR£500,000.

172. I do not accept Mr. O'Neill's submission in this regard because quite clearly in the project agreement Waterworld U.K. Limited specifically accepted at clause 10.4 that upon granting the lease it would be obliged to make a payment to the plaintiff in the sum of IR£500,000 together with VAT at the appropriate rate and it appears to follow from the evidence adduced before me that if that sum had been taken into account then quite clearly there was no need for Rohcon Limited, through Mr. Motherway, to have given any consideration to paying the defendant what I am satisfied is that same amount, i.e. IR£500,000 together with VAT. In any event this very sum was advanced to the defendant for the very purpose of being placed in an Escrow account enabling the defendant to pay the amount of IR£100,000 and VAT per year for five years commencing on the last day of the first year of the term of the lease.

173. I am satisfied that nowhere in the original documentation was there any reference to the necessity for a rent to be paid for the first five years other than a profit rent of 10% of the annual net profit nor was any evidence adduced before me that there was any discussion prior to the signing of the heads of agreement as regards the payment of such a rent of IR£100,000 per annum.

174. I am satisfied on the evidence that there is no real dispute as to the purpose of this sum of IR£500,000. Ms. Carmody in her evidence specifically refers to it as the capital contribution, as does Mr. Motherway who, when specifically asked where this figure came from with regard to the agreement that was entered into on the 7th February, 2002, indicated that it was part of the bid on the first day and was a contribution made by Rohcon Limited to satisfy the financial part of the bid.

175. I take the view on the evidence adduced that the original capital contribution payment of IR£500,000 was rescheduled and I am fortified in this view having regard to the content of the e-mail of the 2nd November, 2001, from the plaintiff's solicitors to the defendant's solicitors. The main changes to the revised project agreement were set out in that email and included, inter alia, the rescheduling of the payment of IR£500,000, the amendment of the guarantee in the eighth schedule and the deletion of the operator bond.

176. Mr. Moriarty was at all times aware and accepted that the IR£500,000 figure was always a feature because it was a figure that was contained in the bid and it is clear from the evidence adduced that he negotiated on the defendant's behalf not only a payment of IR£750,000 from Mr. Motherway, but also this very sum of IR£500,000.

177. In these circumstances I come to the conclusion that the provision in relation to the accelerated payment in the lease does not relate to an accelerated payment of rent in the sense of that term but factually relates to the original capital contribution of IR£500,000 and VAT which was always going to have to be paid whether it was paid by way of a lump sum or by way of five annual payments. In effect, at the end of the day in drawing down this sum from the Anglo Irish Escrow bank account, the plaintiff was getting no more than had been provided for in the successful bid and the heads of agreement. The defendant was given the opportunity to pay the sum of IR£500,000 over a five year period but failed to avail of this facility. The actual rent was that as provided for in each year of the 30 year term of the lease being 10% of the annual net profit.

178. Before I leave this aspect of the case it is appropriate that I state for the sake of completeness that, had I been minded to come to a conclusion that the reference in the project agreement and the lease to the payment of IR£500,000 was a reference to rent and not the original capital contribution, I would not have been disposed to entertain an argument on the defendant's behalf that the terms of the lease in relation to such a payment of rent constituted a penalty and accordingly were in dispute between the parties. This is due to the fact that when this matter was previously before the Court (Kelly J.) the defendant, through Mr. Moriarty, deposed on oath in an affidavit sworn on the 19th May, 2005, that €634,896 was due in respect of rent to the plaintiff and further, that the sum of €88,108.72 was due in respect of insurance rent for the period of the 30th April, 2003, to the 4th March, 2004. The defendant did dispute that the sum of €67,191.33 was due in respect of insurance rent from the 4th March, 2004, to the 3rd March, 2005, on the basis that that sum had been paid to the plaintiff. It was accepted that the sum of €17,763.22 was due by way of the licence fee and Mr. Moriarty specifically acknowledged under oath that a total of approximately €740,760.94 was due and owing by the defendant to the plaintiff in respect of rent, insurance rent and licence fees. It would, in my view, be an abuse of process to allow the defendant to now contend that this sum is not due and owing to the plaintiff by reason of the fact that the relevant terms in the lease in relation to the accelerated payment of such a sum constitutes a penalty.

179. Mr. O'Neill also argues that the forfeiture notice is defective because where compensation is sought the amount of that compensation should be identified. Further, it is alleged that no reasonable time was allowed by the twenty eight day limit to remedy all the alleged breaches of the lease and further, the date of forfeiture cannot as a matter of law have been the 15th April, 2005, as originally claimed.

180. The defendant maintains that if in a forfeiture notice the payment of compensation is claimed then that compensation must be specified and against this background it is clear that the compensation does not have regard to remedying the breaches alleged. Mr. O'Neill refers to s. 14(1) of the Conveyance Act, 1881, which provides as follows:

> "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

181. The defendant contends that the rationale and purpose behind this provision was identified by Andrews L.J. in *Walsh v. Wightman* [1927] N.I. 1 as follows at p. 9:

> "I approach the consideration of the question from the standpoint that the policy of the law in modern times has been against the enforcement of forfeitures when the breach relied upon can be remedied, pecuniary compensation awarded, and adequate undertaking given to prevent a recurrence of the breach. Obviously the lessee may be deprived of this right to relief if he receives no notice specifying the breach relied upon; for without such notice he may reasonably assume that is the lessor's intention to waive the breach, and may refrain from proceeding to effect a remedy."

182. It is contended on the defendant's behalf that the subsection requires the breaches relied upon to be specified and to be remedied (where capable of remedy) and to require the lessee to make compensation in money for the breach. The failure to seek compensation is not fatal but where, as in the present case, compensation is sought the nature and amount of that compensation

should be identified.

183. The defendant contends that a reasonable time has to be allowed to remedy the alleged breaches and further, in assessing what a reasonable time is regard must be had to all the alleged breaches and the existence of a requirement to pay compensation. Reliance is placed on the decision of McCracken J. in *Crofter Properties v. Genport* (Unreported, High Court, 6th December, 1995) wherein he stated at page 5 of his judgment:

> "Whether the time allowed was or was not reasonable is a question of fact, to be determined objectively on the evidence before the Court. It is of course, for the plaintiff to prove as a matter of fact that a reasonable time is allowed and in that regard I would refer to the comments of Mr. Justice Gavin Duffy, in The Minister for Local Government & Public Health v. Kenny, 1975, where he said at p. 29 'the forfeiture of a substantial property demised for a term of 99 years is no trivial matter and as the idea of forfeiture is abhorrent, the law always requires a plaintiff in forfeiture to prove his case strictly."

184. McCracken J. further at page 6 of the judgment states:

> "There is no doubt that there is clear authority that the covenants themselves specified in a forfeiture notice may be severable. For example, if there is a notice specifying three covenants and alleging a breach of each of them and it subsequently transpires that one of them was not breached and if the breaches were not remedied within a reasonable time, forfeiture may take place. See for example *Pannell v. City of London Brewery Co.* [1900] 1 Ch. 496.
>
> However, cases such as this relate to the validity of the notice and I have come to the view that the determination of the question of reasonable time does not affect the validity of the notice as time does not have to be mentioned in the notice at all. Rather, the determination of the question of reasonable time relates to the validity of the forfeiture. The forfeiture notice is certainly valid in itself even though it may contain allegations of matters which are shown not to constitute a breach of covenant. However, I can find no authority that says that such matters should be disregarded for the purposes of assessing whether a reasonable time has been allowed. Common sense seems to me to dictate that such cannot be the case. It would be quite wrong that a lessor could serve a forfeiture notice and then issue proceedings requiring a large number of items to be rectified when some of those complaints could not be rectified. It would also be wrong to allow a lessor to specifically claim in those proceedings that the matters complained of were breaches of covenant and then to allow him to argue the case that the court need not have regard to the time necessary to remedy the alleged breach even though he has failed to prove that the item is a breach of covenant.
>
> I am supported in my view by several authorities. As is stated in Woodfall's book, *Landlord and Tenant*, 36th ed., (Sweet and Maxwell Ltd., 1994) at para. 17.1.35:
>
> > "What will constitute a reasonable time will vary in each case. The reasonable time must be sufficient for remedying all the breaches specified in the notice, and no action for forfeiture lies on any of the breaches until the reasonable time for remedying them all has expired."

185. The defendant maintains that the period of 28 days was not a reasonable time within which to comply with all the alleged breaches as identified in the forfeiture notice. In support of this argument it emphasises in particular the non payment of the VAT upon the taking of the lease. The lease provides for arbitration in respect of matters in dispute and, in circumstances where the plaintiff previously had refused the defendant's request to submit the dispute to arbitration, the period of 28 days as specified in the forfeiture notice is clearly inadequate.

186. As regards the actual date of forfeiture, the defendant contends as a matter of law that the actual re-entry must be either by way of a physical re-entry or service of legal proceedings seeking possession.

187. The defendants contends that the pleadings and the correspondence treat the lease as having been determined on the 15th April, 2005, and that following that date the plaintiff regarded the lease as having been forfeited and was not prepared to treat with the defendant. Particular reference is made to the evidence of Mr. Morgan wherein the defendant contends that he stated that he was not going to deal with the issue of the approval of Ms. Boyer as Manager of the competition pool as the lease had been forfeited.

188. The defendant contends that the significance of forfeiture on a particular date is that the landlord having treated the lease as forfeited cannot subsequently seek to change the date.

189. Mr. O'Neill refers to the classic statement of Parke B. in *Jones v. Carter* [1846] 15 M. & W. 718, at para. 726:

> "…the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once and for all….for after such an act, by which the lesser treat the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind and hold the tenant responsible for the breach of duty, after that time".

190. The plaintiff argues that there is nothing in s. 14(1) of the Act of 1881 which requires the claiming of a specific sum in respect of compensation. Reference is made to the cases of *Silvester v. Ostrowska* [1959] 3 All E.R. 642, *McIlvenny v. McGeever* [1931] N.I. 161 and *Crofter v. Genport* (Unreported, High Court, 6th December, 1995), where similar forfeiture notices to that which was served by the plaintiff on the defendant were all held to have been valid.

191. It is contended on behalf of the plaintiff that it is for the tenant to offer an amount of compensation if general compensation is sought rather than the reimbursement of an ascertained sum.

192. Mr. McDonald argues on the plaintiff's behalf that there is no authority to support the defendant's proposition that the forfeiture notice should set out in monetary terms the compensation actually being claimed. In this regard, he relies on the interpretation adopted in *Silvester v. Ostrowska* of the UK equivalent of s. 14(1) of the Act of 1881 and that is of assistance to the Court.

193. The plaintiff relies on the decision in *McIlvenny v. McGeever* [1931] N.I. 61 and refers to the fact that in that particular case the notice of forfeiture required the remedy of the breaches of covenant complained of and the payment of reasonable compensation to the plaintiff within 3 weeks of service. Mr. McDonald further refers to the case of *Pannell v. City of London Brewery Co.* [1900] 1 Ch.

496, while accepting that the specific point as raised by Mr O'Neill was not dealt with. He refers to the statement of Brown J. in *McIlhenny*, at p. 188, that he had no hesitation in following the decision reached in *Pannell* and further, that he was satisfied that the notice before him was a good notice within the section. Mr. McDonald relies on these judgments on the basis that they suggest very strongly that a claim for compensation in general terms was not something which was out of the ordinary nor was it contrary to the provisions of s. 14 of the Act of 1881. His primary submission is that s. 14(1) does not support the construction advanced by the defendant.

194. Mr. McDonald also argues that the courts have previously accepted the validity of a forfeiture notice even in circumstances where the monetary compensation claimed therein was not properly claimable as compensation. In this regard, he relies on the judgment of Escher LJ. in *Lock v. Pearce* [1893] 2 Ch. 271, wherein at pp. 275-276 he stated:

> "….there is another point relied on by the lessees which we must consider. They say that if the Court could inquire whether there was properly a forfeiture – that is, whether the judgment in the county court action was a right one – they can show that the judgment was wrong, because the notice mentioned in sect. 14, sub-sect. 1, was not given: in other words, that the notice which was given was not a valid one. Now in this notice the lessor did complain of a breach of the covenant to repair, which is capable of a remedy. Where there is a breach which is capable of a remedy, this section requires that the lessor should in the notice require the lessee to remedy that breach; and he cannot, if it is a breach which can be remedied, pass that by, and not give notice that he requires it to be remedied. When asking for compensation in money for a breach which can be remedied, he is bound in the notice to require the lessee to remedy the breach. In the present case the lessor did require the lessee to remedy the breach, which was a breach capable of being remedied. Then there comes the question whether in any case he is to require the lessee to make compensation in money for the breach. If he is bound, where the breach is capable of being remedied by the lessee, to require him to remedy the breach, it is impossible to suppose, or to hold, that he must ask for compensation in money as well as for the breach to be remedied. It is not compensation for the expenses of doing the repairs; it must be for something more than that. This is shown by the rest of the section: for if 'the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach,' the forfeiture will be enforceable. It has been strongly argued that 'and' in this sentence ought to be read 'or'. I see no ground upon which the Court can properly read 'and' here as 'or'; although, of course, if there is a breach, the lessor is entitled to compensation in money instead of allowing the lessee to remedy the breach. Therefore it seems to me that the meaning of the section is that the breach must be remedied if it can be, and there must be compensation besides that, if there is anything for which to compensate."

195. In *Lock v. Pearce* the notice of forfeiture actually required payment of a specific sum of money in compensation in respect of expenses which were due to a solicitor and an auctioneer. In that case the Court came to the conclusion that, notwithstanding the fact that the basis for the claim in compensation had been held to be invalid, the notice of forfeiture itself was held to be valid.

196. Mr. McDonald relies on the content of the letter of the 14th April, 2005, as forwarded by the defendant's solicitors in answer to the forfeiture notice wherein they raised no point as regards a claim for compensation nor did they suggest any uncertainty on their client's behalf arising from the wording of the notice of forfeiture.

197. As regards the issue of time for compliance with the forfeiture notice, Mr. McDonald submits that the appropriate time is that period from the date of the service of the notice to the date of commencement of the proceedings. In the present case that period was 39 days and it is submitted that this time is manifestly sufficient to remedy the breaches identified in the forfeiture notice. It is also argued that a number of breaches could have been easily remedied within the prescribed period including the non payment of rent, the failure to deliver accounts, the setting up of a sinking fund, the approval of a manager and the matter relating to the increase of ticket prices.

198. As regards the alleged breaches of clauses 4.34 and 4.22, these breaches were identified in terms which were unknown to the plaintiff at the time of service of the forfeiture notice, primarily due to the involvement of Dublin Waterworld Management Limited in the operation of the Centre. Mr. McDonald refers to the correspondence in October, 2004 wherein the defendant was asked to explain the role of Dublin Waterworld Management Limited and no response was received. He also relies on the fact that an arrangement had been put in place whereby the assets and liabilities of Dublin Waterworld Management Limited were to be transferred over to the defendant. Indeed, it appears that this arrangement was arrived at within the course of a few days and was not something that took these two parties any particular length of time.

199. In relation to the time element of this case, the defendant emphasised the non payment of the VAT. The plaintiff relies on the fact that the covenant in the lease is a covenant to pay the VAT and, while the arbitration procedure may have been available as an alternative to court procedures, where a dispute exists between the parties the covenant itself is to pay the VAT. On behalf of the plaintiff, Mr. McDonald accepts that when a tenant is served with a forfeiture notice he can go to court and defend the case and is not obliged to concede the breach but the time taken to resolve any dispute either in court proceedings or in an arbitration is of absolutely no relevance to the time given.

200. Mr. McDonald emphasises that the covenant in respect of VAT is performable on the day that the VAT became due under the lease and to suggest that one should have taken into account the length of time it would take to arbitrate any dispute that might arise in relation to that payment or subsequent proceedings is, in his view, wholly fallacious. In any event, Mr. McDonald argues that when the matter was referred by this Court (Kelly J.) to arbitration the matter was dealt with within a period of 28 days.

201. He further argues that, notwithstanding that the plaintiff may not have agreed to the matter being referred to arbitration in 2005, nevertheless there was nothing to prevent the defendant itself from taking the appropriate procedural steps to have the matter referred to arbitration. He asserts that if the defendant believed that they had a very good case to go to arbitration they could have invoked that procedure long before the forfeiture notice was ever served instead of taking no action which was what in fact occurred. On this aspect, Mr. McDonald contends that this Court should not take into account the period of time it takes to resolve the dispute which might arise between the parties as to whether or not there is a liability under the lease, as to do so would simply make it impossible ever to seek possession pursuant to a forfeiture notice.

202. In relation to the further issue of the date originally pleaded as the date of forfeiture, said being the 15th April, 2005, Mr. McDonald accepts and concedes that this date was wrong. He accepts that as a matter of law there are only two methods of affecting forfeiture, those being either peaceable re-entry or the institution of forfeiture proceedings. He relies on the judgment of O'Hanlon J. in *Bank of Ireland v. Lady Lisa* [1992] 1 I.R. 404, wherein at p. 409. He stated:

> "I conclude that the notice served on the lessee in the present case was not an effective exercise of the power of re-

entry for non-payment of rent referred to in the lease.

This need not be fatal to the plaintiff's case if the procedure followed thereafter was effective of itself to forfeit the lease and set in motion a valid claim for an order of possession."

203. In the present case Mr. McDonald urges upon the Court that the correct procedure was followed whereby proceedings were instituted for forfeiture and this was without question the act of forfeiture and the one relied upon in the proceedings notwithstanding that the original incorrect date was opted for in the pleadings. He does not consider that there is anything in the authorities which supports the proposition that by pleading the wrong date originally in the proceedings the landlord would be stuck with that date and cannot rely upon the fact that the proceedings themselves are valid in order to affect forfeiture. Mr. McDonald contends that in this particular instance an error was made in the statement of claim and in later proceedings where the wrong date was relied upon. Mr. McDonald urges that what happened in this case is very similar to the error that was made in the *Lady Lisa* case, an error which O'Hanlon J. described as "not being fatal if the right procedure was used thereafter" and the right procedure was used thereafter in this case because the proceedings for forfeiture were commenced by plenary summons.

204. Mr. McDonald further relies on the fact that the defendant has not been able to identify any circumstances which caused a difficulty as a consequence of the manner in which the case was pleaded and that, in any event, with the benefit of Mr. O'Neill's advice the defendant would have been aware that the lease could not be forfeited save by peaceable re-entry or by the institution of proceedings.

205. I take the view that it is not necessary to set out in monetary terms the actual amount of the compensation being claimed and that a landlord may claim compensation in general terms and leave it to the tenant to ascertain the precise amount as the tenant is the only party with all the relevant knowledge as to what should be done about the alleged breaches and the only party with the relevant knowledge as to how much it may cost to remedy such breaches since he occupies the premises.

206. I take the view that s. 14(1) of the Conveyance Act, 1881 effectively requires the tenant to remedy the breaches and to make reasonable compensation in money to the satisfaction of the lessor within a reasonable period of time following service of the forfeiture notice.

207. Mr. O'Neill, on the defendant's behalf, is not in a position to point to any authority for the proposition that compensation has to be claimed in actual defined monetary terms.

208. I am further satisfied that no complaint was ever made by the defendant that it was under a misapprehension about the terms of the notice or that it was unclear what was required of it.

209. In my view the manner in which compensation was claimed in the forfeiture notice is in compliance with s. 14(1) of the Conveyance and Law of Property Act, 1881 and I reject the defendant's submissions in this regard.

210. The second aspect is the question of the period of time that was allowed to the tenant to comply with the notice of forfeiture and remedy the alleged breaches. Whether the time period was 28 days or 39 days, and taking into account all the circumstances of this case and bearing in mind that at all times since the commencement of dealings between the parties the defendant had the benefit of legal advisors, I do not believe that there was any real difficulty in the defendant, as tenant, complying with the requirements made of it in the notice of forfeiture. The defendant has placed considerable emphasis on the position pertaining to VAT but in this regard I come to the conclusion that it is not appropriate to take into account the period of time it may take to resolve any dispute as regards whether VAT is payable or not or as to whether or not there is a liability under the lease. In the particular circumstances of this case the defendant is perfectly entitled to argue that VAT is not payable but in my view the time given to resolve that dispute is not something which has to be taken into account in confusing reasonable time from the date of service of the forfeiture notice.

211. The third issue regards the date of the 15th April, 2005, as originally pleaded. The plaintiff argues that this date was incorrect and as a matter of law it follows that the date cannot have been correct. I do not accept that the mere pleading of the incorrect date is in any way fatal to the proceedings herein. The procedure which was followed after the 15th April, 2005, by way of the institution of forfeiture proceedings is, as a matter of law, the act of forfeiture. It has to be borne in mind that in any event the defendant does not accept the effect of the notice of forfeiture and has contested same throughout these proceedings.

212. The actual forfeiture in this case arises because of the very service of the proceedings and there was no attempt to re-enter the premises physically.

213. The plaintiff has always maintained that forfeiture has taken place and has not attempted in anyway to resile from that contention so that, in effect, the plaintiff herein is not at all in the same position nor can the situation that pertains in this matter be compared with the situation which arose in *G&S Fashions v. B&Q* [1995] 1 W.L.R. 1088 and I do not accept that the plaintiff in these proceedings is seeking to do exactly that which Lightman J. in the G&S Fashions case indicated could not be done.

214. I do not accept that there is any substance to the case made out on the defendant's behalf in this regard.

The alleged breaches of covenants

215. The principal covenant which it is alleged has been breached is referred to in clause 6 of the forfeiture notice of the 18th March, 2005, in the following terms:

> "Under clause 4.34 you are obliged to operate the premises and under clause 4.22 of the lease you are prohibited from assigning sharing or parting with possession of the premises or any part thereof without the prior written consent of the landlord. In breach of the aforesaid obligations the landlord understands that the premises may have been operated by Dublin Waterworld Management Limited and/or you may have assigned your interests in the premises to that company and you have failed to respond to correspondence in that regard."

216. The defendant submits that what occurred was in fact a funding arrangement involving Mr. Mulcair in respect of which consent was not required. Furthermore, the defendant submits that even if consent was required the plaintiff's failure to give such consent was both unreasonable and delayed and as a result the defendant was entitled to proceed as it did.

217. In making this argument the defendant asserts that there was no clause in the project agreement which prohibited the right of the operator to assign its interest thereunder. The defendant argues that certain aspects of the wording of the agreement support

the contention that it was free to so assign its interest. Examples of such terminology were set out including the meaning given to the term operator (i.e. "Dublin Waterworld Limited, its successors and assigns"), the specific clause prohibiting the contractor and the employer from assigning its interest under the project agreement but not the operator, the reference at clause 59(a) of the project agreement to "Dublin Waterworld Limited, its successors and assigns" operating and maintaining or procuring the operation and maintenance of the Centre in accordance with the terms of the agreement in the lease and finally, a reference in clause 57(e) referring to the fact that upon the granting of the lease under clause 57(a), without prejudice to accrued rights and obligations, the obligations of the operator under the project agreement would be discharged. The defendant submits in these circumstances that it was entitled to assign or otherwise dispose of its interest under the project agreement and consequently, under the lease during the currency of the project agreement.

218. In relation to the funding arrangement, as referred to at clause 69(a) of the project agreement, the defendant contends that no consent was necessary and that such a situation only arose if any new funding arrangement would increase the liability or potential liability or make more onerous or increase the obligations of the plaintiff under the agreement. In any event, the defendant contends that, even in the absence of a specific provision in the lease, the lease was nevertheless subject to the relevant terms set out in s. 66 of the Landlord and Tenant (Amendment) Act, 1980 which protect a tenant's right to assign. The defendant asserts that the consequence of this provision is that the lessor cannot prohibit the assignment of the lease absolutely. Any term purporting to do so must be read as subject to the requirement that the assignment shall not take place without the landlord's consent, that this consent shall not be unreasonably withheld and that the landlord may, as part of the consent, require payment of a reasonable sum in respect of legal or other expenses incurred by him in connection with the licence or consent.

219. The defendant criticises the plaintiff's attitude by reason of the fact that initially it indicated as of the 26th November, 2002, that the defendant should seek the plaintiff's formal consent to hold the lease in trust for the venture capital provider and that subsequently, when details were finally provided, the plaintiff's attitude changed, as it indicated that when the lease was actually granted to the defendant the plaintiff would look at any request to assign or hold in trust on its merits and that Mr. Morgan, in the course of his evidence, acknowledged that an inconsistent approach existed.

220. The defendant advances the case that once Mr. Morgan received the draft agreements, the plaintiff had all it required for consideration by the board and Mr. Morgan's objection appeared to be that a formal request for consent was required.

221. The defendant contends that the provision in the management agreement (as furnished to Mr. Morgan) which provides for the payment of the income from the Centre into the accounts controlled by Mr. Mulcair does not place the plaintiff at any disadvantage as the plaintiff never had, nor was it ever intended to have, any claim to any part of the proceeds and that such an arrangement does not affect the plaintiff's entitlement to 10% of the net profit.

222. The defendant contends that the existence of Mr. Mulcair as a financial backer to the project was in the interest of both parties.

223. It is further contended that the plaintiff was fully put on notice of what was taking place prior to the lease being signed and in this regard, the following factual matters are relied on:

(i) The plaintiff was given details of the arrangements (draft Declaration of Trust and Management Agreement) on approximately the 15th April, 2003;

(ii) The plaintiff was told that the arrangements had to be put in place prior to the grant of the lease (letters dated the 27th November, 2002, and the 11th February, 2003);

(iii) The plaintiff was told in very clear terms in a letter of the 15th April, 2003, that the arrangement was going ahead;

(iv) Mr. Morgan met Mr. Mulcair's accountant, Mr. Tom Caulfield, on the 3rd April, 2003;

(v) Mr. Caulfield attended the signing of the lease on the 30th April, 2003, where he introduced himself as being the representative of the funder and actually witnessed the execution of the lease by the defendant;

(vi) Two weeks after the lease was signed, correspondence passed between the defendant and the plaintiff in relation to liability for VAT, all of which was copied to Tom Caulfield, as clearly appears from the letters themselves (see letters from defendant to the plaintiff dated the 15th May, 2003, undated letter sent at the start of July, 2003, letter dated the 1st August, 2003, and letter dated the 29th September, 2003);

(vii) In a letter dated the 6th June, 2003, the plaintiff's solicitors were informed that Dublin Waterworld Management Limited was managing the Centre;

(viii) Dave Warden (Manager of the competition pool, leisure waters and other elements of the demised premises) wrote on behalf of Dublin Waterworld Management Limited to PKS/Rohcon Limited on the 3rd and 11th October, 2003. This correspondence (in which the name Dublin Waterworld Management Limited clearly appears) was copied to the plaintiff;

(ix) Management Accounts were furnished to the plaintiff on the 1st December, 2003, clearly identifying Dublin Waterworld Management Limited as the operator of the Centre;

(x) In September, 2004 the Community Access Programme prepared by Dublin Waterworld Management Limited specifically referred to Dublin Waterworld Management Limited as operator of the Centre.

224. The defendant contends that it is extraordinary that Mr. Morgan could depose in two affidavits that the defendant had never asked for consent to the operation of the Centre by any other party and that the first time the plaintiff learned of Dublin Waterworld Management Limited was in October, 2004.

225. The defendant contends that the plaintiff has not been prejudiced by the involvement of Dublin Waterworld Management Limited in any respect.

226. In summary on this issue the defendant submits that:

(i) The plaintiff accepted the need and desirability for a funder/backer to the defendant;

(ii) The project agreement allowed the provision of such a funder;

(iii) The project agreement permitted assignment of the defendant's rights;

(iv) The defendant informed the plaintiff of the name of the funder and details of the funding arrangement (apart from the financial details between the funder and the defendant which the plaintiff did not require – see letter of the 12th March, 2003, from the plaintiff to the defendant);

(v) The plaintiff's objection was that no "formal application" for consent was made despite the fact that an application for consent was in fact made (see letter dated the 11th February, 2003, and letters of the 20th and 26th February, 2003);

(vi) Late in the day and by way of cross examination of Mr. Moriarty, counsel for the plaintiff suggested that the existence of the capital allowances was a material issue. This was not supported by the evidence of any of the plaintiff's witnesses.

227. It is asserted that the plaintiff's consent to the funding arrangement as detailed was not required. In the alternative, that if such consent was required, and in particular if consent to holding the lease in trust for Mr. Mulcair was required, it is clear from the evidence that the plaintiff could have had no reasonable basis for withholding such consent. It must be borne in mind that where a landlord unreasonably withholds consent the tenant is entitled to proceed without it – see Woodfall, *Landlord & Tenant*, 36th ed., (Sweet and Maxwell, 1994) at para. 11.128, where it is stated that, "[t]he effect of a contravention of [a contractual] proviso by an unreasonable refusal of consent is to release the tenant, in respect of that transaction for which consent has been refused, from his obligation to obtain consent."

228. The defendant is in the process of "reversing" the involvement of Dublin Waterworld Management Limited so that hereinafter the Centre will be operated by the defendant alone. The requirement of a trust in favour of Mr. Mulcair is tax driven and is of no disadvantage to the plaintiff. The plaintiff, despite the existence of the trust, is still in a position to enforce the covenants against the defendant and in that regard the plaintiff's position is strengthened in knowing that behind the defendant is an investor of substantial means.

229. It is contended on the plaintiff's behalf that the involvement of Dublin Waterworld Management Limited first came to its attention at the end of September, 2004 arising from the proposals for a community access programme to the Centre in which it was described as operating the Centre. The plaintiff accepts that a number of documents may have been furnished to it which refer to Dublin Waterworld Management Limited but the plaintiff relies on Mr. Morgan's evidence that these documents did not alert the plaintiff to the fact that Dublin Waterworld Management Limited was involved in any way in the running of the Centre. The plaintiff submits that the defendant presented a factual ongoing position of it being the sole entity operating and controlling the Centre. The plaintiff relies on the fact that it was only in a letter from the defendant's solicitors dated the 22nd July, 2005, that the five agreements which had been entered into on the afternoon of the 30th April, 2003, were brought to its attention. Furthermore, these documents were only signed one hour before the date of the execution of the lease and the plaintiff maintains that these five documents disclose for the first time the nature and extent of the true role played by Dublin Waterworld Management Limited. The plaintiff asserts that they establish that Mr. Mulcair was in fact the operator of the Centre and that Dublin Waterworld Management Limited was acting as his agent and that contrary to the provisions of clause 4.22 of the lease the defendant was holding its interest in the lease on trust for Mr. Mulcair and that it had parted with possession of the Centre to Mr. Mulcair. The plaintiff contends that this was the first time it had learned of the true situation and that the defendant had gone ahead with the proposal which had been mooted prior to the execution of the lease.

230. The plaintiff takes the view that the defendant's case in this regard can be broken down into three separate aspects:

(a) The defendant did not require the plaintiff's consent to enter into these transactions which it has described as "funding arrangements". This argument appears to proceed on the basis that it was entitled to assign its interest under the project agreement of the 7th February, 2002, and that in any event under clause 69 of the project agreement it was entitled to enter into "funding arrangements" without the plaintiff's consent;

(b) The defendant appears to make the case that the plaintiff knew at all times that these funding arrangements were going to be entered into;

(c) The defendant seeks to suggest that in some way the plaintiff had, through Mr. Teehan, represented that it would have no difficulty with such arrangements.

231. The plaintiff narrows down its submissions in respect of the project agreement by stating that if the Court is prepared to accept that there was an assignment of the project agreement prior to the lease and even if the Court is prepared to accept that an assignment of the project agreement could take place without the consent of the other parties to that agreement, that the assignment would nevertheless be of no avail to the defendant in the present circumstances because the defendant was the party which executed the lease and under the lease there were two very clear covenants by which the defendant as tenant covenanted to operate the Centre and, inter alia, not to hold the Centre on trust for any other person or share it with any other person or part with possession or occupation.

232. As regards the question of the funding arrangement pursuant to the project agreement, the plaintiff argues that the agreement must be seen in the light of clauses 59 and 64 which set out the nature of the defendant's financial obligations. Clause 59(a) specifically requires it to finance the operation and maintenance of the Centre through subscriptions, entrance fees and other sources of funding approved in advance by the plaintiff, save where such funds were provided by a reputable financial institution. In any event, the plaintiff submits that the funding arrangement or arrangements as referred to in the project agreement were a long way removed from the type of arrangement which was actually put in place on the 30th April, 2003, which required an assignment of the entire beneficial interest under the declaration of trust to Mr. Mulcair, the giving up of possession and operation of the Centre to Mr. Mulcair and the provisions in relation to the put and call option. The plaintiff further submits that in the particular circumstances there was no compliance with the condition of clause 69(a) of the project agreement because two of the agreements, namely the declaration of trust and the management agreement, were provided in draft form to the plaintiff prior to the 30th April, 2003, and yet Mr. Moriarty accepted in evidence that all five of the documents were comprised in what he described as "the funding arrangements".

233. The plaintiff contends that having regard to the changing nature of the correspondence which passed between the parties there can be no substance to the defendant's suggestion that the plaintiff had notice that the transactions were proceeding.

234. Insofar as the defendant relies on alleged representations by Mr. Teehan, the plaintiff submits that there is no reliable evidence to suggest that such alleged representations were in fact ever made. However, it further submits that even if the Court was prepared to accept that such representations were made they were far too uncertain in their terms to be enforceable.

235. In coming to a conclusion on this matter, it is apparent that the project agreement as entered into does not contain any prohibition on the defendant assigning its interest. However, in this instance there was not as such an assignment of the project agreement and the lease but rather an oral assignment of the right to take the lease of the Centre and in the course of his evidence Mr. Moriarty accepted that what was being assigned was "the right to take the lease of the pool". The relevant documents in this regard were effected at around 4.00 pm on the afternoon of the 30th April, 2003, with Mr. Moriarty, Mr. Bohan and Mr. Caulfield being present. Mr. Moriarty was not aware of any other terms of the assignment nor was he aware of the consideration for the assignment yet in the circumstances that arose it was the defendant who entered into the lease as tenant and on the very signing of the lease took on the burden of clause 4.22 which prevented it from holding the lease on trust for another. It also took on the burden of clause 4.34 to operate the demised premises to the highest international standards in accordance with the permitted use relevant to an aquatic and leisure centre of its size and nature. Having entered into the lease the defendant effectively abandoned, of its own volition, any further role it may have had in the operation of the Centre and this is demonstrated by the fact that in 2003, and indeed since that time, it has effectively ceased to trade.

236. The defendant raises the defence that it was entitled to enter into any new funding arrangement but in my view on an interpretation of clause 69 of the project agreement it was clear that it could only do so where it gave the plaintiff the prescribed notice and provided sufficient detail to allow it to fully understand the proposed arrangements. In my view clause 69(v) is a separate condition indicating that no new funding arrangement is to increase the liability or potential liability or make more onerous or increase the obligations of the employer under the agreement save with the prior consent of the employer.

237. Insofar as the plaintiff raises the argument of clause 59 of the project agreement, I take the view that this particular section is not to be read in conjunction with clause 69 as it relates to a point in time following the granting of the lease and to a time when the Centre shall be operational.

238. Insofar as the defendant relies on the events which took place as constituting a new funding arrangement which did not require the plaintiff's consent, I am satisfied on the evidence that the defendant was free to enter into a new funding arrangement provided it gave the requisite notice required under clause 69(a) of the project agreement and provided it gave sufficient detail to allow the plaintiff to fully understand the proposed arrangements. In my view it did not provide sufficient detail as, in spite of the fact that Mr. Moriarty furnished the draft declaration of trust and management agreement to Mr. Morgan, he did not forward the draft agreement regarding certain transactions relating to the pool at Abbotstown nor did he forward the agreement providing for an asset replacement reserve fund or the put and call agreement.

239. Had all five finalised agreements been forwarded then the plaintiff would have been aware as to what was being proposed and that in particular Mr. Mulcair, being the beneficial owner of the leasehold interest in the swimming pool and leisure facility known as the pool at Abbotstown, intended to carry on the business of operating and admitting users to the pool/leisure centre. It would also have been made aware of the fact that capital allowances were to play a significant role in the agreement concerning the Centre. The inclusion of owner capital allowances in the agreement would mean a pool capital allowance available to the owner and it was to be assumed conclusively for the purposes of the agreement that during the ownership period all pool capital allowances were to be available to the owner and that if these allowances exceeded €34 million then capital allowances were to be deemed to be €34 million and further, and in my view crucially, the transactions could be terminated by either party in the event that none of the pool capital allowances were available to the owner or alternatively, inter alia, by either party in the event that it was determined by a court of competent jurisdiction that the landlord had validly terminated or was entitled validly to terminate the lease by reason of a breach of clause 4.22 of the lease. Accordingly, the reality of the situation was that Mr. Mulcair was to be entitled to avail of substantial capital allowances but if for any reason they were not available to him the transaction could be terminated and further, if a court of competent jurisdiction took the view that there was a breach of clause 4.22, and in my view this could only relate to the particular factual circumstances of the lease being held in trust, either party could terminate.

240. The defendant makes out the case that the plaintiff and Mr. Morgan in particular were at all times aware as to what the position was and were so made aware following the signing of the lease on the 30th April, 2003. Interwoven into this argument is the defendant's claim that in any event it asked for consent to the lease being held in trust for the venture capital provider and that the plaintiff unreasonably withheld its consent and that in such circumstances the defendant was entitled accordingly to proceed.

241. I do not accept on the evidence that the plaintiff was given sufficient detail by the defendant so as to be in a position of having an informed view as to the arrangements which the defendant was proposing prior to the signing of the lease. There was considerable confusion regarding any application for consent for the lease to be held in trust for the venture capital provider and at one time Mr. Moriarty was agreeing that consent was necessary and at other times was strongly of the view that consent was not necessary and that the defendant would proceed ahead in any event. However crucially, in my view, the situation crystallised in February, 2003 when Mr. Morgan was clearly indicating that consent could not be applied for or given prior to the lease being granted and indeed in no circumstances could consent actually be given until the lease was granted. Mr. Moriarty was being advised by his accountants KPMG on the 13th February, 2003, to get consent from the plaintiff by forwarding a letter explaining Mr. Mulcair's introduction into the arrangement and on the 20th February, 2003, Mr. Moriarty wrote to Mr. Morgan accepting that until the lease existed no consent could be given under it.

242. There may well have been a shift in emphasis by the plaintiff but in my view, as of the 23rd April, 2003, Mr. Morgan was making it quite clear that when the lease had been granted to the defendant the plaintiff would look at any request to assign or hold it in trust on its merits.

243. On the 25th April, 2003, Mr. Moriarty replied by way of letter indicating that the funding arrangement would not prejudice the obligations of Rohcon Limited, the bank guarantee or the ongoing management and operation of the Centre and Mr. Morgan, by letter of the 30th April, 2003, confirms the plaintiff's position that when the defendant had executed the lease the request under it for consent could be dealt with formally. Subsequently on that day the lease was executed but the request was not followed up on nor, importantly in my view, as they should have done, did either Mr. Moriarty or Mr. Mulcair or anyone on their behalf notify Mr. Morgan or any other person on behalf of the plaintiff that in fact the five agreements as referred to had all been entered into shortly prior to the defendant signing the lease. In my view on the evidence no satisfactory explanation has been offered in this regard as to why the plaintiff was not so advised.

244. I do accept that in an unsatisfactory manner the relevant consent was being sought but in my view, against a background where inadequate and unclear information was being made available, Mr. Morgan acted reasonably and relatively consistently in

indicating that the consent could be dealt with formally on its merits once the lease had been entered into by the defendant. In view of the particular circumstances there is in my view no question of consent having been unreasonably withheld.

245. I have a difficulty in comprehending why the defendant did not proceed with the application for consent, as provided for in the lease especially as this issue had been opened to some extent to the plaintiff and the defendant was being told that the matter could be dealt with on its merits once the lease had been executed. Counsel for the plaintiff urges that the reason why the defendant was not prepared to reveal the five agreements was that they would have immediately put the plaintiff on notice that one of the primary motivations for the transaction was to procure for Mr. Mulcair a reduction in his income tax through the use of the capital allowances that would have been available to him as operator.

246. I accept this proposition but I also bear in mind more particularly that if the arrangement that was arrived at and as set out in the five agreements failed to produce for Mr. Mulcair the benefit of the relevant capital allowances he was then in a position to terminate the transaction. Clearly if he was to do so then the defendant, having entered into the lease for the Centre, would have found itself without a venture capital provider for its operation. In any event, for whatever reason, the application for consent was never proceeded with nor was the issue ever raised on the defendant's behalf with the plaintiff prior to the service of the notice of forfeiture.

247. I am satisfied that on the balance of probabilities there was pressure on the plaintiff on the 7th February, 2002, to finalise the project agreement with the defendant and to get it signed. I am also satisfied on the balance of probabilities that the plaintiff by that time had come to the conclusion that the performance bond as originally provided for was a non-runner as it was going to be very costly to purchase and the plaintiff had to pay for it. It was realised that a guarantee from the operator was needed in place of the performance bond.

248. As regards the meeting on the 7th February, 2002, between Mr. Moriarty and Mr. Teehan, then Chief Executive of the plaintiff, there are two central and important allegations made by Mr. Moriarty. The first is that he advised Mr. Teehan that he was going to put in place a funding arrangement and bring about a change in the ownership structure and that Mr. Teehan indicated his acceptance to such a course of action provided the Centre was well run. The second allegation relates to the defendant entering into a guarantee in substitution for the performance bond and Mr. Moriarty alleges that Mr. Teehan advised him that he needed a fudge and that the guarantee to be signed on the 7th February, 2002, could be re-negotiated at a later stage.

249. I come to the conclusion on the basis of the evidence adduced before me that on the balance of probabilities Mr. Moriarty did advise Mr. Teehan that the defendant would employ the services of another entity to assist in the management and supervision of the Centre and furthermore, did so in general terms without going into the actual specifics of exactly what was proposed. I am satisfied on the evidence that if Mr. Moriarty had indicated to Mr. Teehan on the 7th February, 2002, that there was going to be an actual change in the ownership structure, Mr. Teehan would have taken legal advice and would then have come to a judgment. I have regard to Mr. Teehan's evidence to the effect that if the person that was to be put in was not to have been Mr. Moriarty but instead Mr. Mulchair it could well have been the situation that the plaintiff would have given its consent but as he says in his own words he "was never placed in that situation or given the opportunity to take legal advice and come to a decision". In any event a whole series of accompanying details would also have to have been considered. Accordingly, in respect of this aspect of the meeting I am satisfied that Mr. Moriarty went no further than to indicate that the defendant would be employing the services of another entity to assist in the management and supervision of the Centre and that in all probability Mr. Teehan indicated that such a course of action would be acceptable provided the Centre was well run.

250. I am reinforced in reaching this conclusion by the fact that in the subsequent correspondence between the parties there is no reference to the alleged fact of Mr. Teehan having given consent on the 7th February, 2002, to a proposed change in the ownership structure.

251. As regards the second aspect of this meeting relating to the switch from the performance bond to a guarantee in the sum of IR£500,000, I do not accept Mr. Moriarty's evidence that Mr. Teehan indicated that he wanted a fudge in respect of the proposed guarantee and that it could be re-negotiated at a later stage. It is in my view quite clear that the nature and extent of the guarantee had been discussed at cabinet level by the government and was an essential condition to be agreed upon if the defendant was to stay involved. It is also important to note that Mr. Moriarty had the benefit of his own legal advisor prior to signing off on the project agreement.

252. I am fortified by the view I have adopted as to what occurred at the meeting in February and the subsequent meeting in the Merrion Hotel by the fact that Mr. Moriarty, when seeking the release of the guarantee as signed, did not raise in correspondence the very fact that, as alleged by him, Mr. Teehan agreed that the guarantee could be re-negotiated and in effect was only a fudge for the purpose of the signing of the project agreement.

253. I am satisfied that what actually occurred in the particular circumstances on the 30th April, 2003, is that the defendant orally assigned its right to take the lease of the Centre to Mr. Mulcair. However, instead of Mr. Mulcair then taking the lease, an elaborate set of agreements were put together to protect his position with regard to his claim for capital allowances. The defendant entered the lease with the plaintiff on the 30th April, 2003, relying solely on the benefit of the five agreements in trust for Mr. Mulcair, knowing that they did so without the plaintiff's consent and with no intention of seeking that consent, in the knowledge that Mr. Mulcair was protected by reason of the fact that either party could terminate the arrangements if a court of competent jurisdiction held against the defendant under clause 4.22 of the lease and if the capital allowances that were going to be claimed by Mr. Mulcair were not available to him. It is quite clear from the content of the five agreements and in the light of events that subsequently unfolded that on the signing of the lease the defendant would play no further role in the operation of the Centre, that Mr. Mulcair would become its operator and would retain Dublin Waterworld Management Limited as managing agent of the pool subject to various terms and conditions.

254. In my view these facts have brought about a situation whereby the defendant is in breach of clause 4.22(a) of the lease in that it is holding the lease in trust for Mr. Mulcair without the plaintiff's prior written consent and further, is in breach of clause 4.34 of the lease in that the defendant as tenant is not operating the demised premises.

255. In signing the lease, the defendant became liable to pay any Value Added Tax payable on the grant of the lease.

256. The issue as to the non payment of VAT has been viewed by me as set out in this judgment as being a bona fide dispute on the defendant's behalf and I have clearly indicated that in my view the defendant had an arguable case but not one that was ultimately successful. In my view, as also previously referred to herein, the issue as regards the non payment of VAT on the lease should have been referred to arbitration following the defendant's request in this regard as made on the 1st August, 2003, and which would have

resulted in this aspect of matters being determined at a much earlier stage and both parties would clearly have known where they stood on the issue. It is clear that the defendant does not propose to pay any VAT lawfully due on the lease unless it is recoverable from the Revenue Commissioners.

257. By agreement on Friday, the 24th February, 2006, further submissions were made by counsel for both parties in relation to the VAT issue and a further relevant event which has occurred subsequent to the conclusion of the evidence and the reserving of my judgment herein which I shall deal with hereunder.

258. In respect of the VAT issue Mr. McDonald for the plaintiffs has indicated to the Court that a stay is now in place with regard to an appeal to the Supreme Court in respect of the order declining to set aside the arbitrator's award and the judgment as entered in the plaintiff's favor against the defendant in respect of the amount of VAT and costs. The stay is agreed between the parties, although no order of the Supreme Court has been made. Mr. McDonald outlines that his client has a concern that the fact of an intention to appeal was not brought to the notice of this Court, either pending the hearing or the submissions that were advanced on the defendant's behalf, against a background where on the evidence presented to the Supreme Court the defendant had formed an intention to appeal while the actual hearing was taking place.

259. Mr. McDonald submits on the plaintiff's behalf, notwithstanding the appeal and the stay, that the Court should not treat the VAT issue as a "no go area" insofar as this judgment is concerned. It is submitted that there is in place a valid and binding award of an arbitrator which is binding on the parties unless and until it has been set aside. Mr. McDonald relies on s. 27 of the Arbitration Act, 1954 as amended.

260. Mr. McDonald relies on a passage from the current issue of *Russell on Arbitration*, para. 6.190, which deals with the English equivalent section to s. 27 of the Act of 1954 in s. 58(1) of the Arbitration Act, 1996 and which states:

> "Under section 58(1) of the Arbitration Act 1996 an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them, unless otherwise agreed in writing by the parties. This means that, as between the parties to the reference and persons claiming through or under them, the award is conclusive as to the issues with which it deals, unless and until there is a successful challenge or appeal against the award".

261. Mr. McDonald submits that the only effect of the stay as agreed between the parties is the plaintiff's ability to execute on foot of the judgment which has been given in the matter as against the defendant. The award itself is still final and conclusive and binding on the parties unless and until it is set aside.

262. Mr. McDonald argues that this Court should approach the VAT issue on the basis that it is payable following upon the arbitrator's award and this award has not been set aside and if subsequently there was to be an appeal to the Supreme Court there could be a stay on execution pending the appeal and in that way all of the issues would have been dealt with in this Court and everybody's position would be perfectly protected pending the outcome of any appeal to the Supreme Court.

263. Mr. O'Neill on the defendant's behalf submits that the provisions of s. 27 of the Arbitration Act, 1954, as amended, presuppose that there is in place a valid award, whereas in this case as a result of the appeal it is open to the Supreme Court to set aside the award. It is submitted that if the plaintiff cannot establish that there was a breach in relation to the non payment of VAT it cannot rely upon such an event. Mr. O'Neill submits that if this Court was to come to the conclusion that the lease was validly forfeited, how then can account be taken of the potential liability to VAT in circumstances where it has not been established that there is actually a liability for that VAT.

264. I take the view that s. 27 of the Arbitration Act, 1954, as amended, is to be interpreted as referring to a final award which shall be final and binding on the parties and the persons claiming under them respectively. I appreciate that the award of the arbitrator in this instance has not been set aside but the issue as to whether or not it may be set aside on appeal to the Supreme Court is still pending and in this regard a stay on the relevant judgments has been agreed between the parties as regards the enforceability of the judgments pending the determination of the appeal.

265. I take the view in doing justice to both parties that, on the basis that I am not in a position to predict the outcome as regards the appeal to the Supreme Court on the issue of VAT on the lease, that this issue should form no part of my further consideration in this matter.

266. The further submissions heard before me on Friday, the 24th February, 2006, by agreement of the parties relates to the fact that it has been brought to the attention of this Court that the defendant's counter claim in these proceedings has been withdrawn on terms which do not involve a payment of any damages by the plaintiff to the defendant. For the avoidance of any doubt, it was acknowledged by both parties that the damage to the roof of the Centre was not the subject matter of the counterclaim. Both parties accept that this is an objective fact of which this Court should be made aware of and I shall return to this aspect later in the judgment.

267. As of the date of the service of the notice of forfeiture and the date of the institution of these proceedings the defendant was in breach of clauses 3.1 and 4.2 of schedule 2 of the lease in that it failed to pay any of the five prescribed sums of €126,974 per annum. It is also in breach of clause 3 of schedule 2 of the lease in that it failed or neglected to deliver up to the plaintiff audited accounts within 90 days of the accounting period termination dates namely the 31st December, 2003, and the 31st December, 2004. The defendant also breached clauses 3.1 and 4.2 of the lease in that it failed to pay insurance rent calculated in accordance with the provisions of the lease within 14 days of demand by the plaintiff. It further breached clause 4.62 of the lease in failing to contribute in the first year of the term a sum of €126,974 in respect of the sinking fund to be set up by the tenant to provide for the costs and expenses of any replacement or renewal of any part or parts of the premises and in failing to take any step to agree with the plaintiff the terms of a capital maintenance programme. Furthermore, I am of the view that the defendant is in breach of clause 4.55 of the lease in that it failed to have the landlord approve in advance the appointment of the manager "of the competition pool and manager of the leisure waters and other elements of the demised premises" who took over following Mr. David Warden's resignation.

268. In these circumstances I am satisfied to come to the conclusion that by the institution of these proceedings on the 26th April, 2005, the lease relating to the Centre of the 30th April, 2003, was lawfully forfeited.

269. It is in these circumstances that the defendant is desirous of remaining on in the Centre as tenant and seeks relief against forfeiture.

270. Wylie, *Irish Land Law*, 3rd ed. (Butterworths Ltd., 1997) at p. 950 provides a brief summary of the law in relation to relief against forfeiture in the following terms:

> "[A]nd the court has a general discretion to grant whatever relief it thinks fit in the light of the parties' conduct and all the other circumstances of the case. There are no fixed rules for the exercise of this discretion which is administered by the courts on general equitable principles".

271. It is clear in my view from a perusal of the various authorities which have been opened to me on this aspect that the courts in general strive not to place rules or restrictions on the exercise of judicial discretion in relation to relief against forfeiture.

272. Earl Loreburn LC in his judgment in *Hyman and Another v. Rose* [1912] A.C. 623 made the following statement at p. 630:

> "My Lords, the question in this case is upon what terms, if at all, relief should be given against forfeiture for breaches of covenant in a lease of Adelphi Chapel, under s. 14, sub-s.2, of the Conveyancing Act, 1881. When that is decided the decision will have to be applied to the orders made by the Court of Appeal and by the several judges and Masters before whom this intricate piece of litigation has been discussed at different stages. I desire in the first instance to point that the discretion given by the section is very wide. The Court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to some one else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand."

273. There has been reference in a number of authorities to the wilfulness of a breach. For example, Wilberforce LJ. in his judgment in *Shiloh Spinners Ltd. v. Harding* [1973] 1 All E.R. 90, at p. 103, states as follows:

> "Failures to observe the covenants having occurred, it would be right to consider whether the assignor should be allowed to exercise his legal rights if the essentials of the bargain could be secured and if it was fair and just to prevent him from doing so. It would be necessary, as stated above, to consider the conduct of the assignee, the nature and gravity of the breach, and its relation to the value of the property which might be forfeited. Established and in my opinion sound principle requires that wilful breaches should not, or at least should only in exceptional cases, be relieved against, if only for the reason that the assignor should not be compelled to remain in a relation of neighbourhood with a person in deliberate breach of his obligations".

274. The aspect of a wilful breach was raised again in the case *of Southern Depot Company Ltd. v. British Railways Board* [1990] 2 E.G.L.R. 39 wherein Morritt J. stated at pp. 43-44:

> "There can be no doubt that the wilfulness of the breach is a relevant consideration in that the court should not in exercising its discretion encourage a belief that parties to a lease can ignore their obligations and buy their way out of any consequential forfeiture. But to impose a requirement that relief under section 146(2) [of the Law of Property Act, 1925] should only be granted in an exceptional case seems to me to be seeking to lay down a rule for the exercise of the court's discretion which the decision of the House of Lords in *Hyman v. Rose* [1912] A.C. 623 said should not be done. Certainly Lord Wilberforce in *Shiloh Spinners v. Harding* [1973] AC 691, [1973] All ER 90 did not purport to do so in cases under the statute.
>
> Accordingly, in my judgment, although I should give considerable weight to the fact that two out of the three breaches were wilful, I am not required to find an exceptional case before granting relief from forfeiture".

275. I also have regard to the view expressed obiter by Murphy J. in *Cue Club Limited and Others v. Navaro Limited* (Unreported, Supreme Court, 23rd October, 1996) wherein he stated:

> "The nature of the discretion exercised by the Courts of Equity in granting relief against forfeiture is hardly applicable or applicable to the same extent, at any rate where the Court is dealing with substantial commercial transactions in which the lessor and lessee are on equal terms".

276. I take the overall view that in order to exercise my discretion fairly, I must take into account the conduct of the parties, the wilfulness of any breach by the tenant, the general circumstances particular to the issue, the nature of the commercial transaction the subject matter of the lease, whether the essentials of the bargain can be secured, the value of the property, the extent of equality between the parties, the future prospects for their relationship, the fact that even in cases of wilful breaches it is not necessary to find an exceptional case before granting relief against forfeiture and then apply general equitable principles in reaching a conclusion.

277. In the circumstances, in coming to a conclusion as to the appropriate exercise of my discretion I propose to give consideration to each alleged breach of covenant committed by the defendant.

Failure to obtain plaintiff's approval to managerial appointment

278. The first such breach is that of failing to obtain in advance the landlord's approval to the appointment of the competition pool manager and manager of the leisure waters. This is allegedly in breach of clause 4.55 of the lease.

279. In this regard, the defendant has indicated to the Court that formal approval will be sought for the appointment of the present manager Ms. Celine Bowyer and if for any reason she proves to be unacceptable to the plaintiff an alternative manager will be selected and approval will be sought in turn for that purpose. However, the defendant maintains that the plaintiff has not suffered any loss as a result of a failure to have sought approval for the appointment of the person fulfilling the managerial function as evidenced by the fact that the Centre has been well run. I do not conclude on the evidence adduced before me that there is, as

such, any significant opposition from the plaintiff to the appointment of Ms. Bowyer and it is not disputed that the Centre has been well run, although it should be noted that such an issue was not debated before the Court. It is clear from clause 4.55 of the lease that the manager of the leisure waters and other elements of the demised premises was, in each case, to be approved by the landlord in advance. The previous manager had been so approved and it was accordingly incumbent on the defendant to secure the approval of Mr. David Warden's successor in advance of her appointment. It is of some significance in my view that this was a singularly simple obligation which was not complied with, especially when one considers that the plaintiff had previously been asked to approve David Warden as General Manager of the Centre on the 10th March, 2003.

280. It does appear that the plaintiff was actually made aware on or about the 18th December, 2003, that Mr. Warden was leaving his post as General Manager and that subsequently Ms. Bowyer was appointed as General Manager and remained in that position.

281. I do not regard the failure to seek the plaintiff's approval in advance of Ms. Bowyer's appointment as being in any way a serious breach of covenant, particularly against the background where it was common knowledge that Ms. Bowyer was the General Manager and no evidence was adduced before me to the effect that the plaintiff ever took issue with the de facto situation that pertained. In any event the defendant is now prepared to seek the relevant consent in accordance with the terms of the lease.

Failure to meet financial obligations

(i) Insurance Rent
282. As regards the defendant's failure to pay the insurance rent calculated within 14 days of demand by the landlord in accordance with clauses 3.1 and 4.2 of the lease, the current situation is that the entire of the contribution due in the sum of €155,300.00 have now been paid.

(ii) Sinking Fund and Capital Maintenance Programme
283. The sinking fund provided for by clause 6.2 of the lease was put in place by the defendant on the 17th June, 2005, when it paid into an account with Allied Irish Bank, Tralee, Co. Kerry the sum of €253,948, and accordingly is now fully funded to date. However, I take the view that the definition of "sinking fund account" in the lease is clear in necessitating the defendant to have obtained from the plaintiff approval for the particular setting up of the sinking fund account with the relevant Bank. Within the lease that term is stated to be "a bank account or some other form of prudent investment set up pursuant to clause 4.62 and approved of from time to time by the landlord such approval not to be withheld or delayed unreasonably". Mr. Moriarty in evidence has confirmed that he will agree to transfer the sinking fund account to another bank account to be approved by the plaintiff if required to do so.

284. By way of letter of the 24th June, 2005, the defendant's solicitors forwarded to the plaintiff's solicitors a draft proposed capital maintenance programme for the plaintiff's consideration in accordance with clause 4.62(a) of the lease. This document was forwarded in circumstances where the defendant was indicating that the creation of a comprehensive capital maintenance programme was currently impossible given the defective nature of many items of plant in the Centre. Further, the defendants complained that the capital maintenance programme had been compromised by the plaintiff and the main contractor's refusal to complete items on the snag list and defect list and there was also a complaint that the defendant had been excluded from meetings relating to the snag list and defects to be addressed.

285. I will be dealing with the defendant's complaints as regards the alleged defective nature of the Centre hereunder. The plaintiff has not to date taken up any discussion with the defendant in respect to the draft proposed capital maintenance programme.

(iii) Payment of Rent pursuant to clauses 3.1, 4.2 and schedule 2 of the lease
286. The current situation is that the rent which I have previously held in this judgment to be the capital contribution of IR£500,000 and VAT has now been discharged in total by virtue of the draw down by the plaintiff of the guarantee with Anglo Irish Bank. On the 31st May, 2005, the sum of €761,842 was transferred by Anglo Irish Bank to the plaintiff's account. The draw down of the guarantee has resulted in the entire of the capital contribution being paid but there is no longer any guarantee in place, although Mr. Moriarty on behalf of the defendant has indicated that it would be prepared to put in place a further guarantee with Anglo Irish Bank or some other financial institution in the sum of €450,000 in accordance with the terms and conditions of the previous guarantee.

287. As a matter of commercial reality I take the view that the capital contribution, as divided into five annual payments equivalent to IR£100,000, clearly should have been paid by the defendant who had been provided with the sum of IR£500,000 by Rohcon Limited and who had specifically agreed that this sum was to be paid over by five annual payments of £100,000 drawn down from the Escrow account at Anglo Irish Bank. The defendant did not comply with the agreed arrangements and ensure that the Escrow account was opened in both its name and that of Rohcon Limited. The money having been provided by Rohcon Limited to the defendant was at all times available to them and pursuant to the letter of instruction of the 1st May, 2002, had the agreed procedure and instructions been complied with no difficulty would have arisen in this regard. On the defendant's behalf, Mr. Moriarty made the case in evidence that the money in the Escrow account was in some way trapped. In my view there is no substance to this allegation as it is quite clear that the prescribed Escrow account was never initially set up as directed, that the Rohcon monies, both with regard to the payment in the sum of £750,000 and the separate payment of the capital contribution of £500,000, were spread between at least two accounts and that from the time of the opening of the accounts there was extensive dealing in the monies. Mr. Moriarty accepted in evidence that the defendant received several demands for payment of the sums of IR£100,000 as they fell due and no response was made.

288. I am satisfied in the circumstances that Mr. Moriarty on the defendant's behalf took a conscious decision not to make the initial payment of IR£100,000 and VAT, as due on the 30th April, 2004, and I am satisfied that this money was available for the purpose for which it had been paid over by Rohcon Limited. My determination in this regard is fortified by the extensive correspondence between the parties and inquiries that were being made by the plaintiff of the defendant in relation to outstanding financial obligations which were going unanswered.

289. An initial explanation was offered by Mr. Moriarty that payments were not being made because of losses as sustained by the defendant arising from the holding of the Special Olympics but this aspect is now no longer being pursued. Having regard to the fact that the Special Olympics only endured over a period of approximately 10 days, I can readily understand why the defendant is no longer pursuing this line of defence.

290. Mr. Moriarty in a general way also raised a defence to the non-payment of rent and of a failure to honour the relevant financial obligations in the lease on the delay in the opening of the Centre, the alleged defects and the poor quality of the building, plant and machinery that was handed over. He argues that they have necessitated excessive expense which has resulted in the defendant suffering loss and damage.

291. It is correct that there was a delay of approximately three months in the opening of the Centre but if such a delay did cause the defendant any significant loss or damage it is surprising that such a claim was not raised by the defendant's solicitors in their response to the service of the forfeiture notice on the 14th April, 2005. Furthermore, this issue was not raised in any of the various affidavits sworn by Mr. Moriarty nor was it raised in the pleadings, particulars or replies to particulars. The first time the matter appears to have come to light in any meaningful way was during the course of the evidence adduced before this Court.

292. I am satisfied from the evidence of Mr. David Nolan, accountant to the defendant and Dublin Waterworld Management Limited, that it was only in March, 2003 that the instruction was given that Dublin Waterworld Management Limited was to become a 100% subsidiary of the defendant and it was between the 5th and 12th March, 2003, that Dublin Waterworld Management Limited was empowered with a new object to carry on the business of managing and operating sports and leisure facilities in all its branches and to supply or procure the supply of others.

293. The reality of the situation appears to have been that not only were the five agreements not in place prior to the 30th April, 2003, but neither was Dublin Waterworld Management Limited in a position to assume its role under the proposed agreement in relation to the management of the Centre. In the circumstances I conclude that Mr. Moriarty is not entitled to rely on any delay that there was in the actual opening of the Centre as a tenable excuse for the defendant's failure to meet its various financial obligations pursuant to the lease and in particular the five payments of IR£100,000 each.

294. In relation to Mr. Moriarty's argument that the condition of the building plant and machinery contributed to the defendant's failure to meet its financial obligations, this is an issue which was the subject matter of the defendant's counter claim which is now withdrawn. At this point in time it is not possible to come to any conclusion as regards the allegation of defects but if there are defects the defendant may well be entitled to compensation by way of damages from Rohcon Limited, as it has the benefit of collateral guarantees from the latter under the project agreement. Mr. Moriarty has indicated to the Court that the defendant has taken legal advice as regards pursuing a claim for damages against Rohcon Limited. In this regard the defendant has the benefit of the expert determination of Mr. David Keane, Arbitrator, Architect and Building Dispute Consultant, who was appointed by this Court (Kelly J.) on the 20th June, 2005. Following an inspection, he concluded that any failure in the overall operation and maintenance of the mechanical and electrical appliances was not of itself of such a level to justify a decision that the tenant had not complied with its obligations under the lease. As the defendant was not in a position to proceed with its counter claim, this Court (Kelly J.) directed on the 11th July, 2005, that these proceedings in relation to the claim for possession of the Centre be determined and that the defendant's counter claim be proceeded with when ready for hearing.

295. In these circumstances the defendant's position as a matter of law has always been protected in that if it has a genuine claim for damages by reason of defective buildings, plant or equipment it is entitled to the appropriate compensation for any loss and damage suffered.

296. In these circumstances, I find no justifiable cause for the defendant to decline to meet its financial obligations pursuant to the terms and covenants as set out in the lease. Further, I take the view that the defendant and Mr. Moriarty took a conscious decision not to meet these financial obligations, save in respect of one insurance payment, and that accordingly the decision not to honour the financial obligations as imposed in the lease was wilful. I take into account however that the financial obligations (apart from the VAT issue which is ongoing) under the lease have now been regulated and complied with save for the payment of some interest that may be due arising on the late payment of the sums that were overdue.

Audited accounts

297. The audited accounts were of crucial importance to the plaintiff as each year they were entitled to 10% of the defendant's annual net profit arising from its operation of the Centre. The accounting period termination date was defined in the lease as the 31st December of each year and the defendant was obliged, in accordance with the terms of the lease, to deliver to the plaintiff a copy of its audited accounts. The defendant also covenanted with the landlord that the said audited accounts would state accurately all financial matters and information referred to in the relevant schedule attached to the lease.

298. The defendant accordingly was obliged to deliver up its audited accounts within 90 days of the 31st December, 2003, and likewise following the 31st December in each succeeding year. The defendant failed to deliver the relevant accounts and it is clear that if the accounts had been delivered they would have shown that in fact during 2003 the defendant had not traded, had no income, no expenditure, no activity of any type and that in fact the defendant could not have been operating the Centre.

299. As an explanation for this failure to deliver accounts, Mr. Moriarty argues that he was waiting for the accounts of Dublin Waterworld Management Limited to be completed. However, by coincidence Mr. Morgan wrote to Mr. Moriarty on the 22nd October, 2004, putting him on notice that the board of the plaintiff company was most concerned that the defendant had failed to comply with its obligations to furnish audited accounts for the accounting period ending the 31st December, 2003, in accordance with clause 2 of the second schedule to the lease. It was further pointed out to Mr. Moriarty that in the absence of those accounts the portion of the rent to be assessed by reference to the defendant's net profits could not be calculated and an appropriate rent invoice could not be issued. In fact the 22nd October, 2004, was the very day when Mr. Kieran Rutledge in his capacity as a director, and Mr. Moriarty, signed off the defendant's accounts, which would have demonstrated the non-trading position of the company and that its only asset was retained profit brought forward in the sum of €12,116.00. In any event, Mr. Moriarty declined to reply to the letter of the 22nd October, 2004. Mr. Moriarty was aware at all times that the defendant had never traded. This is reflected in the defendant's form C2T Tax Return to the Revenue Commissioners for 2003, which indicated that there had been "no transactions during the year".

300. When eventually the accounts of Dublin Waterworld Management Limited were made available it became apparent that there was also a formula relating to the calculation of a management fee to be paid to Dublin Waterworld Management Limited. Mr. Nolan, auditor of the accounts, explained the management fee in the following terms:

> "There is a formula in the management agreement which takes the running costs and multiples them by a figure of 102.5 % and basically there is a simple formula for working it out. Then there is a further agreement whereby the owner will pay 10% of the losses as there was in this case and that is further included in the figure in order to determine the management fee."

301. Mr. Nolan stated that after each financial year the tax advisers to Dublin Waterworld Management Limited got together with Mr. Mulcair's tax accountants and hammered out the management fee. Once they had agreed the fee the accounts were then finalised.

302. On further questioning Mr. Nolan had to concede that in relation to these discussions the fact of the owner paying 10% of the losses was reflected by a gentleman's agreement.

303. When Mr. Nolan was asked directly if reliance could be placed on the management agreement to explain how the management fee is to be calculated, he accepted that reliance could not be so placed. Furthermore, with respect to the gentleman's agreement regarding the payment of 10% of the losses, he stated in evidence that this was a parol agreement and not one that was reflected anywhere in the books or records. It then appears from Mr. Nolan's evidence that there is a further commercial agreement in place which clearly he did not know much about.

304. Mr. Nolan further accepted that whatever was agreed between the various parties would affect the turnover and income figure which Dublin Waterworld Management Limited was entitled to receive.

305. It is clear in the circumstances that there were arrangements in place in the background between Mr. Mulcair and Dublin Waterworld Management Limited, which affected the accounts to which the plaintiff was not privy. The relevant audited accounts have now been furnished in respect of the trading of the Centre and these accounts make it clear that no profit rent is payable in respect of the relevant two years trading. Through Mr. Moriarty, the defendant has undertaken that in the event of relief against forfeiture being granted full access to its books and records will be given to the plaintiff and insofar as is relevant the books and records of Dublin Waterworld Management Limited for the purpose of enabling the plaintiff to satisfy itself as regards the defendant's liability if any for the 10% profit rent.

306. The reality of the situation in my view is that Mr. Moriarty was attempting to protect the true background situation which prevailed and there is no justifiable cause for the defendant having declined to furnish the audited accounts in accordance with the terms of the lease as entered into. I take the view that the defendant took a conscious decision not to furnish the audited accounts and in my view the decision not to do so in accordance with the terms of the lease was wilful.

Breach of clauses 4.22 and 4.34 of the lease

307. The defendant knew at all times that it could not hold the lease on trust for Mr. Mulcair without the plaintiff's prior written consent (provided such consent was not unreasonably withheld) and furthermore, that it was obliged to operate the demised premises. A situation was arrived at whereby Mr. Moriarty was on the one hand applying for consent and on the other advising Mr. Morgan that he was proceeding ahead. In the final outcome, with the five agreements in place, he proceeded ahead without advising Mr. Morgan as to what was occurring, thereby leaving the plaintiff in a situation whereby it had no reason to believe anything other than that the defendant was entering into the lease and would abide by the covenants and conditions that were therein set out. In the aftermath of having signed the lease it was clearly incumbent on the defendant to seek the plaintiff's consent to the arrangement that had been put in place as it was only entitled to hold the lease in trust for another provided it obtained such consent. No satisfactory explanation is offered to this Court as to why consent was not sought after the lease had been entered into.

308. I do bear in mind that the plaintiff was given certain details of the proposed arrangement by reason of the forwarding of the draft declaration of trust and the management agreement on or about the 15th April, 2003. Mr. Morgan accepts that he read these documents and referred them to his solicitors for advice, that the plaintiff was told that the arrangements had to be put in place prior to the grant of the lease and that it was told by way of letter of the 15th April, 2003, that the arrangement was going ahead. Mr. Morgan accepts that he met with Mr. Mulcair's accountant, Mr. Tom Caulfield, in early April, 2003, that Mr. Caulfield attended the signing of the lease as representative of the funder and actually witnessed the execution of the lease by the defendant. Mr. Morgan also accepts that subsequently correspondence passed which was copied to Mr. Caulfield, that in a letter of the 6th June, 2003, the plaintiff's solicitors were informed that Dublin Waterworld Management Limited was managing the Centre, that further correspondence passed between Dublin Waterworld Management Limited and the builders and their advisors in October, 2003 (which correspondence bore the name Dublin Waterworld Management Limited and was copied to the plaintiff), that management accounts were furnished to the plaintiff on the 1st December, 2003, which identified Dublin Waterworld Management Limited as the operator of the Centre and that in September, 2004 the Community Access Programme prepared by Dublin Waterworld Management Limited specifically referred to it as operator of the Centre. I equally have to bear in mind that Mr. Morgan has given evidence, which I accept, that these incidents referring to Dublin Waterworld Management Limited did not put him on notice of what had actually occurred on the day of the signing of the lease and what was, from the defendant's perspective, the *de facto* position that pertained following the signing of the lease.

309. I am satisfied that the documentation that has been referred to and the facts relied on by the defendant in this regard could not amount to any form of a reasoned indication to Mr. Morgan or the plaintiff that the defendant, notwithstanding that it had signed the lease, had ceased to trade and that the Centre was now being operated by Mr. Mulcair with the benefit of the agreements that were in place with Dublin Waterworld Management Limited. The defendant in ease of its position maintains that the plaintiff had no objection in principle to the involvement of a venture capital provider and was aware of the financial strength of Mr. Mulcair and I accept that the reality of the situation is that the plaintiff was on notice that Mr. Moriarty, not having been part of the original successful consortium, needed a venture capital provider to maintain his position. It may well have been that the plaintiff would not have had any basis in law to have withheld its consent to the lease being held in trust for Mr. Mulcair but that situation has now changed because Mr. Mulcair effectively took on the terms, conditions and covenants as set out in the lease of the 30th April, 2003. In my view, he is effectively in the same position as the defendant as regards each breach of covenant.

310. The case has been made out that Dublin Waterworld Management Limited will cease to have any function in relation to the Centre but I would not be impressed with the steps that so far have been taken in this regard. Furthermore, it has to be borne in mind that Mr. Mulcair and Dublin Waterworld Management Limited have been operating a very substantial business at the Centre without making a profit, that Dublin Waterworld Management Limited have significant creditors and that the defendant has not traded. The reality of the situation is that even if all the assets and liabilities of Dublin Waterworld Management Limited were transferred to the defendant and such a transaction could take place within the law, the lease would still be held by the defendant in trust for Mr. Mulcair.

311. I regard as particularly significant the fact that the defendant was at all times aware from the forfeiture notice that the plaintiff believed that the Centre was being operated by Dublin Waterworld Management Limited and/or that the plaintiff had assigned the premises to that company, when in fact it knew that it was Mr. Mulcair who was the owner/operator, with the defendant simply holding the lease in trust for him. In the replies to particulars dated the 24th June, 2005, it is specifically maintained that the defendant operates and manages the premises but avails of the services of Dublin Waterworld Management Limited in relation to certain management and supervisory functions at the premises. Further, it is stated that Dublin Waterworld Management Limited has been carrying out certain management and supervisory functions at the premises on behalf of the defendant since prior to the date of the granting of the lease. In my view this was simply not so. The defendant had ceased to trade and held the lease in trust for Mr. Mulcair and Dublin Waterworld Management Limited did not provide any services for or on behalf of the defendant. There is no reference in the replies to particulars or in the defence and counterclaim to the existence of Mr. Mulcair. Further, it was not until the 22nd July, 2005, that the five signed agreements were made known and provided to the plaintiff herein. I take the view that the conduct of the defendant in this regard was wilful and in breach of the terms of the lease.

Conclusion
312. My overall conclusion is that the defendant company, and in particular its directors, failed to comprehend that in entering the lease, serious legal obligations to the plaintiff of the most basic nature were being undertaken.

313. The defendant's failure to adhere to the covenants, as outlined and contained in the lease stem from a serious commercial transaction and Mr. Moriarty, on behalf of the defendant, was clearly on notice from the very publicity which he introduced in evidence that there were considerable misgivings and public disquiet as regards the defendant's involvement in the Centre. So that there is no misunderstanding, I state that such misgivings and disquiet play no part in the decision which I arrive at but should have put Mr. Moriarty, his fellow directors and Mr. Mulcair on notice that they should have at least honoured the basic obligations undertaken in a lease which related to premises built with taxpayers monies and which cost a sum in excess of €60 million. Clearly the defendant was taking a commercial lease of a very valuable property in return for the payment of a capital contribution of IR£500,000.00 together with VAT, and an annual rent of 10% of the net annual profits generated from the running of the Centre and subject to the terms of the lease.

314. I take the view that the defendant wilfully declined to honour its obligations pursuant to the lease of the 30th April, 2003, wherein it knew it would be taking the lease in trust for Mr. Mulcair and that he would be the operator of the Centre, knew it was not going to trade, declined to meet its various financial obligations save the payment of one insurance premium, declined to pay the capital contribution broken down into five annual payments of £100,000 each, declined to provide audited accounts on time declined to set up the sinking fund and declined to enter into discussions for the purpose of agreeing a capital maintenance programme.

315. I have given careful consideration to the defendant's counterclaim for relief against forfeiture which would result in my declining to grant an order for possession against the defendant on terms as outlined. I am conscious of the enormity of a decision to decline relief against forfeiture and to grant an order for possession and the undoubted serious financial consequences that will follow the loss by the defendant and associated persons of the lease of the Centre.

316. In my view the evidence in this case establishes a clear case of wilful breaches of more than one covenant of a serious nature in a substantial commercial transaction where the parties were on equal terms and each had the benefit of legal, financial and other material advice. It appears to me improbable that the essentials of the bargain as set out in the lease can be maintained between the parties, particularly having regard to the fact that the defendant is only interested in remaining involved in the Centre provided the lease is held in trust for Mr. Mulcair. This view is further supported by the nature of the method of accounting in place pursuant to the various agreements as entered into by the defendant with Mr. Mulcair and Dublin Waterworld Management Limited.

317. I have particular regard to the evidence of Mr. Morgan which I accept to the effect that trust has broken down between the plaintiff and the defendant because of the events that have occurred. While his personal view may carry little weight it would in my view be a reasonable attitude to be adopted by any landlord faced with a similar set of circumstances as pertain in this case. I accept and concur with his view that the arrangements that were put in place were done so behind the plaintiff's back and do not represent what the plaintiff signed up to in the lease. In my view the position is well described in the evidence as given to the Court in Mr. Morgan's own words on the 25th October, 2005.

> "This is not the arrangement that was put to CSID. This is not the proposal that was signed off by the government before the lease was entered into. So I think in view of what has emerged, and it only really starts to emerge in July of this year when we received the various agreements between Mr. Mulcair and Mr. Moriarty the day before these court proceedings took place we began to discover what had taken place. I would suggest to your honour that we still don't fully understand the arrangements that are in place."

318. I further note and accept as being reasonable Mr. Morgan's view that none of the explanations as offered by Mr. Moriarty give him any comfort if this Court was to grant relief against forfeiture that the plaintiff would not be back before the Court in the future with the same problems.

319. Having regard to the findings which I have arrived at, I come to the conclusion that it should not be incumbent on the plaintiffs, even at the defendant's expense, to retain chartered accountants of its choice to carry out a full audit of the defendant's method of accounting to date, particularly having regard to the evidence pertaining to the various agreements as given by Mr. David Nolan. It is clear that the defendant is only willing to stay with the project if the lease is held in trust for Mr. Mulcair and accordingly remains in breach of covenant. It is further clear that the defendant is not and will not under the defendant's own existing arrangements be the operator of the centre thereby remaining in breach of covenant. Furthermore the venture capital provider, Mr. Mulcair, can terminate the agreement of the 30th April, 2003, with the defendant in the event that it is determined that none of the pool capital allowances are available to the owner and if it is determined by a court of competent jurisdiction that the landlord has validly terminated or is entitled validly to terminate the lease by reason of a breach of Clause 4.22 thereof.

320. The financial requirements under the lease may have been regularised to date but the general background circumstances regarding the totality of the financial aspects of the lease, leaving aside the issue of VAT on the lease, does not augur well for the future.

321. Mr. O'Neill on the defendant's behalf has urged that a reason for granting relief against forfeiture is the future well being of the Centre, the staff employed there and the fact that the Centre is a public facility widely enjoyed by members of the community provided at tax payer's expense. Mr. Morgan has indicated to the Court that there are contingency plans in place in the event that an order for possession is granted by this Court. Clearly it is difficult to predict the future outcome for the Centre in the event that an order for possession is granted but I am satisfied on the basis of Mr. Morgan's evidence that this is an aspect that has been considered by the plaintiff and in the circumstances I reject the defendant's contention in this regard.

322. In my view, having regard to the wilful breaches of covenant, and the general circumstances of the situation that has arisen between the plaintiff and the defendant, the plaintiff ought not to be forced to remain in "a relation of neighbourhood" with the defendant.

323. Accordingly I decline to grant the defendant's relief against forfeiture and I accede to the plaintiff's request for an order for possession for all that and those the premises known as the National Aquatic Centre at Abbottstown in the County of Dublin, more particularly described on the map as annexed to the plenary summons and thereon edged in red.

324. Nothing in this judgment is intended to or to be taken as reflecting any view as regards the defendant's counterclaim, notwithstanding that it has now been withdrawn on terms agreed, or the defendant's indicated possible proceedings against Rohcon Limited.

325. In furtherance of the Centre the operator has incurred expenditure in installing plant and equipment and while this may have been done pursuant to obligations as set out in the lease of the 30th April, 2003, it does not appear to me to be just or equitable that following upon the handing over of possession, the plaintiff should reap the benefit of such expenditure. The defendant is to be free to remove any items of plant and equipment as purchased and installed in the Centre by or on its behalf or alternatively should be fairly reimbursed for the investment in any such items as opposed to those matters which were the subject matter of the defendant's counter claim against the plaintiff and those matters of which may be the subject matter of a possible claim against Rohcon Limited. I will hear the submissions of counsel in this regard.