

**THE HIGH COURT****2008 5932 P****BETWEEN****RICHARD WINDHAM****PLAINTIFF****AND****VINCENT MAGUIRE AND LIAM MORAN****DEFENDANTS****JUDGMENT of Mr. Justice Clarke delivered on the 16th July, 2009****1. Introduction**

1.1 The plaintiff ("Mr. Windham") is the beneficiary of a trust ("the Windham Trust"). The Windham Trust owns a part of the Blackhorse House Industrial Estate. In the early part of 2007 a contract was entered into between the Windham Trust, as vendor, and the defendants ("Mr. Maguire and Mr. Moran") as purchasers for the sale by the Windham Trust of its interest in the relevant property to Mr. Maguire and to Mr. Moran. In general terms it was contemplated that a planning application would be pursued in respect of the property and, in that context, a lengthy period was allowed prior to the anticipated closing of the sale.

1.2 In circumstances which it will be necessary to explore in a lot more detail, difficulties were encountered in relation to closing the sale in the early part of 2008. It is against the background of those difficulties that these proceedings arise. The Windham Trust seeks specific performance of the contract. Mr. Maguire and Mr. Moran say that the contract has come to an end by virtue of what is said to have been the inability of the Windham Trust to deliver vacant possession in accordance with the terms of the contract in circumstances where the Windham Trust had served a completion notice, which notice was also served in accordance with the terms of the contract.

1.3 While there is a significant element of factual controversy surrounding the precise circumstances concerning the possible giving of vacant possession of the property, the general factual background to the contract is not disputed. I, therefore, turn to the uncontested facts.

**2. The Uncontested Facts**

2.1 In 2001, under advice from one of the trustees, Frank Mooney, the Windham Trust purchased units 3, 4, 5 and 6 at Blackhorse House Industrial Estate (the "Industrial Estate"). From about July, 2005 Mr. Mooney suggested that the Windham Trust should consider selling its interest in the Industrial Estate.

2.2 There was, at the time, two tenants in occupation of Units 3 to 6 of the Industrial Estate. Unit 3 of the Industrial Estate was the subject of a lease entered into on the 12th October, 2001, between the Windham Trust and a company called Fashion Blinds of Ireland Limited ("Fashion Blinds"), for the term of ten years. Units 4 to 6 of the Industrial Estate were the subject of a lease entered into on the 4th June, 1998, between the previous owners of the Industrial Estate, Red Sky Limited, and a company called Coghlan's Bakery Products (Dublin) Limited (the "Bakery").

2.3 On the 14th March, 2007, the Windham Trust on the one part and Mr. Maguire and Mr. Moran on the other part, entered into an agreement to purchase the portion of the Industrial Estate owned by the Windham Trust (the "Property"). The contracts were in the form of the Law Society General Conditions of Sale (2001 Ed). Mr. Maguire and Mr. Moran were made aware of the property through Brian Dwyer & Partners, Estate Agents. Mr. Maguire and Mr. Moran intended purchasing all the units at the Industrial Estate and did, it would appear, at around the same time, enter into contracts to purchase Units 1 and 2 of the Industrial Estate from their respective owners. Initially the property was to be purchased by a company owned by Mr. Maguire and Mr. Moran, Walsh Maguire Limited. Subsequently it was suggested that Mr. Maguire and Mr. Moran were to purchase the property "in trust". The solicitor to Mr. Maguire and Mr. Moran, Jill Crowley of O'Donnell Sweeney, wrote to the Windham Trust's solicitor, Peter Silvester of McKeever Rowan, explaining that the contract had been signed in trust in order to reserve the position of Mr. Maguire and Mr. Moran to nominate a company to take the deed at a later date if so required. The Windham Trust and its advisers were not happy with this arrangement and the contract was duly amended.

2.4 Because of that, when the contracts for sale were exchanged on the 14th March, 2007, same provided that Mr. Maguire and Mr. Moran were to purchase the properties in their own names with the purchase price being specified at €4,375,000 and with a deposit paid of €75,000. The contract provided for vacant possession in accordance with General Condition 21 of the Law Society General Conditions of Sale. The sale was due to close on the 31st January, 2008, (the "Closing Date"). It seems clear that the driving force behind the transaction on the Windham side was Mr. Mooney.

2.5 Mr. Mooney became ill in Winter 2007, after which Mr. Windham and particularly his wife took a more "pro-active" role in the transaction. Another trustee of the Settlement, Andrew McCarren, also assisted in the sale of the property at this time. Frank Mooney died on the 19th May, 2008. Maurice Healy was appointed as a new trustee to the Windham Trust on the 27th June, 2008.

2.6 The sale never completed. In that context it is necessary to turn to the contract and, in particular, the relevant facts, some of them contested, in respect of vacant possession.

**3. Vacant Possession**

3.1 As pointed out earlier the main issue arising in this case is in relation to whether or not the Windham Trust was in a

position to give vacant possession of the property, in particular in respect of Units 4 to 6, being those occupied by the Bakery. In his evidence, Mr. Liam Moran stated that vacant possession was a prerequisite to the completion of the transaction.

3.2 Under an agreement dated the 9th March, 2007, Fashion Blinds agreed to assign and surrender to the Windham Trust the lease of Unit 3 of the Industrial Estate with effect from the 31st January, 2008, for the consideration of €350,000. In evidence, William Joyce, the Principal of Fashion Blinds, confirmed that Fashion Blinds was ready and willing to complete the surrender of the lease on the 31st January, 2008, in order to deliver vacant possession of the unit to the Windham Trust. Ms. Kathryn Griffin a partner in Anderson and Gallagher Solicitors, advised Fashion Blinds in relation to this arrangement and also gave evidence to like effect.

3.3 There does not seem to be a dispute but that Fashion Blinds had vacated the property prior to the 31st January, 2008, although there now appears to be some difficulty with regard to the legal documentation required to give effect to a surrender of the lease in question as Fashion Blinds, it now appears, has been wound up prior to executing any surrender. Fashion Blinds was placed in voluntary liquidation on the 11th December, 2007, but was not ultimately wound up until 2009. Thus it would seem that Fashion Blinds had vacated the premises in good time to allow a surrender with vacant possession in the early part of 2008. The difficulty concerning winding up, to which it will be necessary to turn in due course, only arose well after these proceedings came into being.

3.4 As to the remainder of the property, on the 14th March, 2007, the Bakery agreed with the Windham Trust to surrender their lease of Units 4 to 6 of the Industrial Estate on the 31st January, 2008, for the consideration of €600,000. Vacant possession was a condition of the agreement. On agreeing to surrender the lease, the Bakery agreed to purchase and fit out a purpose built replacement premises at Unit 10B Toughers Business Park, Newbridge, Country Kildare (the "new premises").

3.5 Mr. Coghlan, the Principal of the Bakery, stated in evidence that Mr. Mooney had previously indicated that the Bakery could stay on in possession for up to six months, if required, subject to an agreed rent being paid to the new owners. Mr. Coghlan gave evidence that, on the 20th December, 2007, he contacted Robert Maguire, a son of Vincent Maguire, who, according to Mr. Coghlan, also indicated that the Bakery could stay in possession. It is not accepted that Mr. Robert Maguire told Mr. Coghlan that he could stay in occupation of Units 4 to 6 until the New Premises were completed. On the 22nd January, 2008, closing documents for the surrender of Units 4 to 6 were executed by the Bakery but copies were not furnished to the Windham Trust's solicitors until the 4th March, 2008. On the 28th January, 2008, Mr. Silvester inspected the units of the Industrial Estate owned by the Bakery. On that date the property was still being utilized for baking purposes in the ordinary way.

3.6 In a letter of the 14th February, 2008, Mr. Silvester referred to a conversation that he had by phone with Geraldine Kelly, solicitor for the Bakery. In this conversation Ms. Kelly stated that the Bakery would not be giving vacant possession, as such, but would handover the keys of the Units, and that this was acceptable to the purchasers. In a letter of the 14th February, 2008, to McKeever Rowan, Geraldine Kelly confirmed that her clients, the Bakery, were in a position to give vacant possession. Geraldine Kelly again wrote to McKeever Rowan on the 18th February, 2008, to state that her clients were in a position to give vacant possession. Mr. Silvester wrote to Ms. Crowley on 18th February, 2008 confirming that the Bakery was in a position to give vacant possession. Mr. Silvester again wrote to Ms Crowley on the 20th February, 2008, to state that the Windham Trust was in a position to close the sale. In a later letter of the 20th February, 2008, McKeever Rowan served a completion notice on Mr. Maguire and Mr. Moran ("the first completion notice").

3.7 Mr. Maguire and Mr. Moran argue that the Bakery contacted them in February, 2008 and indicated that they would not be in a position to give vacant possession of the units occupied by them for some time. Ms Crowley wrote to Mr. Silvester on the 13th February, 2008, stating that agreement had been reached between Mr. Maguire and Mr. Moran on the one part and Mr. Coghlan on the other part which allowed the Bakery to remain in occupation of Units 4-6 until its new premises were completed. Robert Maguire had emailed Ms. Crowley on the 20th December, 2007, and stated that Mr. Coghlan had requested to remain on site for 3 to 4 months after the 31st January, 2008, until the new premises had been completed. Ms. Crowley would appear to have advised Mr. Maguire not to allow the tenant to stay on in the property.

3.8 On the 25th February, 2008, Robert Maguire and Vincent Maguire attended at the Bakery. Mr. Coghlan stated in evidence that Mr. Maguire indicated at this stage that he would require full vacant possession. Mr. Maguire indicated to Ms. Crowley in a phone conversation of the 26th February, 2008, that Mr. Coghlan required payment from the agreement with the Windham Trust in order to finance completion of the new premises. Mr. Coghlan gave evidence that the Bakery eventually had to seek a bank loan in order to finance the final fit out of the new premises.

3.9 Geraldine Kelly wrote to McKeever Rowan on the 14th March, 2008, again confirming that her clients, the Bakery, were in a position to complete the matter. In a letter of the 14th March, 2008, from Mr. Silvester to Geraldine Kelly, Mr. Silvester noted that the Bakery was still using the premises at Units 4-6 of the Industrial Estate as a bakery. Ms Kelly wrote again to Mr. Silvester on the 31st March, 2008, stating that her clients were expected to fully vacate the premises by the 30th April, 2008. Ms. Kelly then confirmed by letter of the 12th May, 2008, that her clients were not in a position to give vacant possession until the 14th May, 2008.

3.10 The parties disputed the rate at which the Bakery moved or could have moved out of the Units concerned. In particular, there was a dispute over the presence of two flour silos used by the Bakery in its manufacturing process. Invoices and delivery dockets produced by Mr. Coghlan at the trial showed that the two flour silos owned by the Bakery were removed on the 15th March, 2008, in order to be painted and were refitted in the new premises on the 30th April, 2008. I accept that the silos concerned were moved from the premises on the 15th March, 2008.

3.11 It happens that the Units were vacated fully by the Bakery on the 14th May, 2008, and the premises was inspected by the Windham Trust on the 16th May, 2008. A second completion notice was served on Mr. Maguire and Mr. Moran on the 19th May, 2008, ("the second completion notice"). Mr. Coghlan gave evidence that the Bakery could have left the units on very short notice, and in direct evidence stated that the Bakery did, in fact, move out of the Units over the course of a weekend. Mr. Coghlan stated that he had made arrangements with his brother, Liam Coghlan, to use his brother's premises at Citywest Business Park, Dublin 24, to carry out the Bakery's manufacturing requirements between leaving the Units and commencing production at the new premises. Mr. Liam Coghlan corroborated this evidence. Correspondence between Sarah Windham (Mr. Windham's wife) and Mr. Silvester during February, 2008 illustrates that

Sarah Windham was uncertain as to whether or not the Bakery would be delivering vacant possession on time.

3.12 There is also an issue as to whether Robert Maguire indicated to the Bakery that they could remain in occupation of Units 4 – 6 of the Industrial Estate. On the 20th December, 2007, Robert Maguire sent an email to Jill Crowley in which he relayed to her that Mr. Coghlan had requested to remain on site for three to four months after the closing date as the building to which the Bakery was due to move into was a number of months behind completion. Robert Maguire did not give evidence in this matter. Ms. Crowley gave evidence that she advised the Maguires not to enter into such an agreement with the Bakery.

3.13 Against those rather complicated, and at times contested, facts it is next necessary to turn to the relevant provisions of the contract.

#### **4. The Contract**

4.1 In relation to the wording of the contract for sale, O'Donnell Sweeny sent a letter to McKeever Rowan, on the 2nd February, 2007, requesting the deletion of a proposed Special Condition 11 from the contract of sale. The proposed Special Condition 11 had stated as follows:-

"The property in sale is currently subject to the leases referred to in the Particulars and Tenure of this contract. The Vendors have made arrangements with the tenants of Units 3, 4, 5 and 6 for their leases to be surrendered prior to 31st January, 2008. In the event that either of the tenants holding the units under the leases fails to surrender its lease and to vacate this property by the 31st January, 2008, the Purchaser shall be entitled to rescind this contract by giving the vendors 14 days notice in writing in which event its contract deposit will be refunded in full without any deduction but without any entitlement to interest, costs or compensation."

4.2 With Special Condition 11 deleted, the only condition in the Contract for Sale relating to vacant possession is General Condition 21, on which Mr. Maguire and Mr. Moran rely and which states as follows:-

"Subject to any provision to the contrary in the Particulars or in the Conditions or implied by the nature of the transaction, the Purchaser shall be entitled to vacant possession of the Subject Property on completion of the Sale."

It is clear, therefore, that the contract as and between the Windham Trust on the one hand and Mr. Maguire and Mr. Moran on the other hand, is not in any way conditional on the Windham Trust being able to obtain vacant possession from both Fashion Blinds and the Bakery. In substance the Windham Trust accepted that it would have to take its chances on being able to procure vacant possession from its tenants in accordance with the respective contracts which it had entered into with those tenants. Indeed it would appear on the evidence that Mr. Silvester, as the Windham Trust's solicitor, was not entirely happy with that situation and, indeed, advised the Windham Trust of the risk inherent in contracting to sell to Mr. Maguire and Mr. Moran with vacant possession on foot of an unconditional contract in circumstances where the Windham Trust would have to rely on its tenants complying, in a timely fashion, with their own contractual obligations to the Windham Trust, in order that that vacant possession become available. It certainly seems as if this is one of those cases where commercial judgment (in the shape of Mr. Mooney) seems to have triumphed over a prudent legal judgment (in the shape of Mr. Silvester).

4.3 However, in the context of being in a position to close on service of a completion notice it is also necessary to have regard to the General Condition 40(g) which provides:-

"the Vendor shall not be deemed to be other than able, ready and willing to complete for the purpose of this Condition:-

(i) ...

or

(ii) by reason of being unable, not ready or unwilling at the date of service of such notice to deliver vacant possession of the Subject Property provided that (where it is a term of the Sale that vacant possession thereof be given) the Vendor is, upon being given reasonable advice of the other party's intention to close the Sale on a date within the said period of twenty eight days or any extension thereof pursuant to Condition 40(f), able, ready and willing to deliver vacant possession of the Subject Property on that date."

4.4 It is important to note that, because of the provisions of General Condition 40, a party serving a completion notice in the context of a contract to which the relevant Law Society General Conditions applies, is obliged to be "then" (that is to say at the time of the service of the notice), able, ready and willing to complete. There is a legal dispute, at the level of principle, between the parties to these proceedings as to the consequences of it turning out to be the case that the party serving such a notice was not, at the relevant time, able, ready and willing to complete. I will set out that dispute in more detail in due course.

4.5 However, it is clear that General Condition 40(g) is intended to alter the general rule so far as issues concerning the availability of vacant possession are concerned. There is, as it happens, a similar relaxation in respect of charges over the property. It is clear, therefore, that, in general terms, a party who serves a completion notice ought, as of the time of the service of the completion notice, to be in a position to give good title subject to a number of matters including the fact that there is a relaxation of that provision so far as vacant possession is concerned.

4.6 It seems to me that the wording of General Condition 40(g)(ii) is clear. A party serving a completion notice is not obliged to be in a position to give vacant possession on the date of the service of the notice concerned. Rather, that party is required to be able, ready and willing to deliver vacant possession "upon being given reasonable advice of the other party's intention to close the Sale on a date within the said period of twenty eight days...". There is also a mention of an extension to the twenty eight day period which is not material to this case.

4.7 Under this heading three questions seem to me to arise. Firstly, does the relevant clause operate at all in

circumstances where the purchaser concerned does not "give reasonable advice" of his "intention to close the sale". The Windham Trust argues that a proper construction of the Condition concerned is that it can only operate against a vendor where the purchaser gives reasonable advice as to a closing date and thus, places an onus on the vendor to deliver vacant possession as of that date. Mr. Maguire and Mr. Morgan argue that the giving of such advice is not a necessary pre-requisite to the operation of the Condition concerned particularly where, as is argued to be the case on the facts of these proceedings, there would, it is said, have been no point in fixing such a date for the there was no realistic possibility of vacant possession being given.

4.8 Secondly, depending on the outcome of that legal debate, there is the hotly contested factual question as to whether the Windham Trust could, on reasonable notice having been given, have delivered vacant possession. A subsidiary question as to what would, in all the circumstances, be reasonable notice also arises.

4.9 The third issue stems from the fact that it is common case that formal surrender documentation in respect of neither of the two tenants concerned had been executed and delivered during the currency of the period specified in the completion notice. In particular, it is certainly true to say that as of the date of the service of the first completion notice, the relevant tenancies still subsisted. On that basis it is argued that the Windham Trust was not in a position to make title (as opposed to giving possession) by virtue of the existence of those tenancies as of the date of service of the completion notice concerned. In those circumstances it is said that the Windham Trust was not "ready, willing and able" to complete as required by the contract.

4.10 It seems to me that this latter point can be dealt with fairly shortly. It would seem to me to make a nonsense of General Condition 40(g)(ii) if, notwithstanding the fact that a party was able to give vacant possession on being given reasonable notice within the twenty eight day period of a completion date, such party would nonetheless not be in a position to enforce the contract concerned because, at the date of the service of the relevant notice, a tenancy, or other similar interest, which was all that stood in the way of the vendor being able to give vacant possession, still subsisted.

4.11 It seems to me that the clear intent of General Condition 40(g) is that a party does not need to be in a position to give vacant possession when serving a completion notice. It seems to me to necessarily follow that any tenancy or lease (or indeed licence) which would preclude such a vendor from being in a position to give vacant possession, is also governed by General Condition 40(g). Therefore, it seems to me that a completion notice is, *prima facie*, valid notwithstanding the fact that there may, as of the date of service of it, have been in place a lease, licence or tenancy which would effect the ability of the vendor to give vacant possession, provided that the vendor is nonetheless able to procure, on reasonable notice within the twenty eight day period, the termination of any such lease, tenancy or licence such that the vendor is able to deliver vacant possession unencumbered by the former interests of the lessee, tenant or licensee concerned. To attempt to separate the inextricably linked issues of possession on foot of a tenancy or other similar interest and the tenancy or similar contract itself, so as to allow possession on foot of the tenancy to be governed by General Condition 40(g), but the tenancy itself not be covered by it, would, in my view, create a nonsense.

4.12 However, the two other issues seem to me to be matters that do need to be more fully addressed. I will shortly, therefore, turn to the question of the proper construction of General Condition 40(g) itself.

4.13 Before doing so I should also note that there is a connected issue which arises from a dispute between the parties as to how, in practice, the contract in this case could have closed. That dispute stems from the fact that, at least in general terms, the Windham Trust contemplated that the funds necessary to close its surrender contracts with its two tenants would have come from the monies available to it on the closure of the sale of the property to Mr. Maguire and Mr. Moran. Further issues, therefore, arise as to whether the Windham Trust would, in practice, and even with vacant possession being available, have been in a position to close the sale. As what was contemplated as the means of closing by Mr. Sylvester, as solicitor for the Windham Trust, was a so called four way closing (or a variation on such a practice) I will deal with this issue in more detail under the heading of "Four Way Closing" at s. 7 below.

## **5. The Construction of General Condition 40(g)**

5.1 It seems to me that the wording of General Condition 40(g)(ii) is clear. The operative part of Condition 40(g) coupled with the first clause of subclause (ii) makes clear that, *prima facie*, a vendor is not to be taken to be other than able, ready and willing to complete simply because he is not in position to deliver vacant possession on the date of service of a completion notice. It will be recalled that, in general terms, it is the date of service of the completion notice that is the relevant date for the purposes of determining the readiness, ability and willingness of the party serving that notice to be in a position to complete. The part of General Condition 40(g) to which I have referred has the effect, therefore, of negating that general proposition in a case where vacant possession is concerned. The fact that the vendor is not, at the date of service of the completion notice concerned, able to give vacant possession does not make that vendor unable, unready or unwilling to complete.

5.2 However, the part of the clause to which I have referred is then subject to a proviso. It seems to me that it is clear, therefore, that the question of whether a vendor is able, ready and willing to complete for the purposes of a contract governed by the relevant Law Society Standard Conditions insofar as vacant possession is concerned, is wholly governed by whether it can be said that the vendor is in a position to meet the proviso. The proviso requires, as I have pointed out, that the vendor is "upon being given reasonable advice of the other party's intention to close the Sale on a date within the said period of twenty eight days...able, ready and willing to deliver vacant possession of the subject property on that date". If the vendor is not given the opportunity of establishing that he is in a position to give vacant possession on such a date (because the purchaser does not give "reasonable advice" of the purchaser's "intention to close" then how can it be said that the vendor has failed to meet the proviso. It would make a nonsense of the clause if a purchaser, by the simple device of not fixing a closing date on reasonable notice, were able to avoid the operation of the clause at all. But, in any event, it does not seem to me that a proper construction of the clause leads to such an interpretation in any event. The proviso requires that the vendor be ready, able and willing to give vacant possession on a date which is fixed by reference to the purchaser giving reasonable advice of intention to close. The proviso does not speak of a vendor who would have been in a position to deliver vacant possession, had he been given notice. Rather the proviso speaks of a vendor who "is" in such a position. If the purchaser does not give such reasonable advice of intention to close, then there is no date by reference to which the vendor has to demonstrate an ability to give vacant possession. The proviso can not, in those circumstances, in my view operate against a vendor who is not given the opportunity to deliver vacant possession on reasonable advice being given.

5.3 The only other question of interpretation which arises is as to whether it can be said that a purchaser must nonetheless give reasonable advice of intention to close, even where it is clear that the vendor would not be in a position to give vacant possession on the giving of such reasonable advice. It seems to me that there are reasons deriving from both the wording of the Condition itself and from the likely practical operation of such a clause which demonstrate that, even in those circumstances, a purchaser should give advice of intention to close. Firstly, it seems to me that such advice is required by the contract. If the only matter standing between the parties and a proper closure is the question of vacant possession, then it seems to me that the terms of the contract, which I have sought to analyse, require the purchaser to give reasonable advice of intention to close and, as it were, to put it up to the vendor to be in a position to deliver vacant possession on that date.

5.4 Secondly, as a matter of practicality, and as the facts of this case amply demonstrate, there is always a real risk of a significant debate as to whether, and within what timescale, a party who is not immediately able to deliver vacant possession could or would have been able so to do. The best way to test, in real terms, any such ability is by giving advice of intention to close. A vendor either will, or will not, be able to then deliver vacant possession. Provided the notice is reasonable (and it can not, by virtue of the terms of General Condition 40(g) itself, extend beyond the twenty eight day period specified in the relevant completion notice) then the vendor will be put to the test as to whether he is able to deliver vacant possession. If he fails then he will not have met the proviso and will not escape the consequences of being unable, unready or unwilling to complete. Likewise, if he can deliver vacant possession then there will be no valid basis for the purchaser not closing on the specified date.

5.5 For those reasons I am satisfied that, on a proper construction of General Condition 40(g), a vendor can not be said to have been unable, unready or unwilling to close as result of having been unable to provide vacant possession, unless the purchaser has first given reasonable advice of intention to close. On the facts of this case, it is clear that no such reasonable (or any) advice was given. For those reasons, it does not seem to me that it is open to Mr. Maguire and Mr. Moran to argue that the Windham Trust failed to provide vacant possession in accordance with the terms of the contract. Rather, the proper characterisation of what occurred was that Mr. Maguire and Mr. Moran failed to crystallise the date by reference to which the Windham Trust had to provide vacant possession. If Mr. Moran and Mr. Maguire had crystallised that date (within the period of the twenty eight notice specified in the first completion notice), then the Windham Trust either would or would not have managed to deliver vacant possession by that date. However, that duty did not arise by virtue of the failure to give reasonable advice of intention to close.

5.6 In my view that fact alone is sufficient to dispose of the argument put forward on behalf of Mr. Maguire and Mr. Moran to the effect that the contract came to an end by virtue of what was said to have been a failure on the part of the Windham Trust to be able, ready, willing, as a result of the absence of vacant possession, to close. Subject, therefore, to the question, to which I have averted, as to whether the contract could, in practice, have closed by a four way closing or other similar practice and to the complexity that has arisen by virtue of the fact that Fashion Blinds has now been wound up, it would seem to me that it follows that the Windham Trust would be entitled to the order for specific performance sought. However, lest I be wrong in the conclusion which I have reached as to the proper construction on Clause 40(g), it is necessary to address the contested question of the timeframe within which it would have been possible for the Bakery to vacate the premises so as to allow for a surrender of its lease to the Windham Trust with vacant possession, which in turn would have permitted the Windham Trust to close with vacant possession in favour of Mr. Maguire and Mr. Moran. I now turn to that question.

## **6. How Quickly could the Bakery have Vacated?**

6.1 As indicated earlier in the course of this judgment, Mr. Coghlan, on behalf of the Bakery, gave various estimates of how long it would have taken to actually deliver vacant possession. However, Mr. Maguire and Mr. Moran sought to question the credibility of Mr. Coghlan's evidence. It is true to say that it became clear in the course of Mr. Coghlan's evidence that some of the instructions which he gave, at a critical period in the course of dealing between the various parties, to his solicitor, were, to put it at its mildest, exaggerated. At a time when, even on the high watermark of his argument, Mr. Coghlan had had nothing more than discussions with one or both of the Maguires, from which he might have taken some comfort, Mr. Coghlan instructed his solicitor to write a letter which wrongly indicated that an agreement had been reached to the effect that the Bakery could remain in possession for some months to facilitate the contemplated move to the new premises. Likewise, a subsequent solicitor's letter, again written on Mr. Coghlan's instructions, asserted that there was an agreed arrangement whereby a notional form of handing up possession would occur, but that possession would be given back to the Bakery for a period to allow it to finish off its new premises. It became clear that those instructions were also incorrect. The arrangement referred to in the correspondence in question was a suggestion on Mr. Coghlan's part rather than an arrangement that had been agreed with the Maguires. It is, therefore, clear that Mr. Coghlan gave materially incorrect instructions to his solicitors, and that letters written by those solicitors on his incorrect instructions undoubtedly significantly complicated matters as and between the Windham Trust and Mr. Maguire and Mr. Moran. That Mr. Coghlan is open to very significant criticism for having given such incorrect instructions to his solicitor can hardly be doubted.

6.2 However, it does not follow that there is any basis for doubting Mr. Coghlan's sworn evidence in court. Mr. Coghlan did, it needs to be emphasised, concede that the instructions which he gave to his solicitor had been incorrect. It did not seem to me that there was any real basis established for the suggestion that I should not treat Mr. Coghlan's sworn evidence (as opposed to matters which had been included, on his instructions, in correspondence between his solicitors and others) as anything other than truthful. In that context it is also important to note that the only witnesses who gave evidence on behalf of Mr. Maguire and Mr. Moran were Mr. Moran and one of the solicitors who dealt with most of the relevant correspondence between the parties at the relevant time. Neither Mr. Maguire Senior nor Junior was called to give evidence. It is clear that most of the direct conversations between the Maguire/Moran side and Mr. Coghlan, took place through one or other of the Maguires.

6.3 I did not, therefore, have the opportunity to observe either Mr. Maguire Senior or Mr. Maguire Junior giving evidence. I did have that opportunity in respect of Mr. Coghlan. I found Mr. Coghlan to be a truthful witness. Indeed, when he was challenged as to his evidence in respect of certain matters it seemed to me that, in the main, when the issues put to him were capable of independent verification, such verification was frequently forthcoming. Therefore, I see no reasons to reject the evidence of Mr. Coghlan.

6.4 On that basis I am satisfied as a fact that it would have been physically possible for the Bakery to fully vacate the premises in no more than fourteen days and, in all probability, had it been absolutely essential to do so in a somewhat shorter timeframe (perhaps of the order of ten days), then same could also have been achieved. While it is true to say

that, even after the Bakery had moved its operations to its new premises, a reasonably significant amount of items were left around the premises, I am not satisfied that there would have been any difficulty, if under time pressure, in all of those items being moved in one or two days. The fact that it might, in fact, have taken longer when the Bakery was not under any specific time pressure does not, in those circumstances, seem to me to be decisive.

6.5 I have no doubt but that Mr. Coghlan and the Bakery wished to remain in possession until their new premises was ready. I have no doubt but that they communicated that fact to Mr. Maguire. However, that is not really the point. The point is as to what would have happened had Mr. Moran and Mr. Maguire given reasonable advice of intention to complete.

6.6 In that context, and having regard to the fact that Mr. Coghlan was, at least at some stages, given some comfort about the fact that Mr. Moran and Mr. Maguire might give consideration to allowing him an additional period of occupation, it seems to me that a minimum of fourteen days advice of intention to complete would have been required in order that that advice would properly be described as "reasonable". I am satisfied, on the facts, that had fourteen days advice of intention to complete been given to the Windham Trust, and had the Windham Trust immediately informed the Bakery of the need to close the surrender contract in relation to the Bakery's lease, then it would have been physically possible for the Bakery to have delivered up vacant possession in that timescale.

6.7 I am also satisfied that, while Mr. Coghlan and the Bakery would have preferred to remain in possession, they would, had there been an immediate and proximate closing date fixed, have closed within that timeframe. In that context I accept the evidence given by Mr. Coghlan to the effect that he would have closed had he been given a closing date. It needs to be recalled that Mr. Coghlan was under some financial pressure himself to meet the cost of fitting out his new bakery. While a temporary move to his brother's premises would not, from an operational point of view, have been ideal, it also needs to be taken into account that an immediate closing of his surrender contract with the Windham Trust would have provided the necessary funding to allow him to complete the fit out of his new bakery without recourse to bank borrowings and without any risk that, should anything get in the way of a closure of the surrender contract, he might be left with those borrowings. Mr. Coghlan's evidence was that, in those circumstances, he would have closed. I accept that evidence.

6.8 It follows that I am satisfied, as a fact, that had fourteen days advice of intention to complete been given by Mr. Maguire and Mr. Moran to the Windham Trust, it would have followed that the Windham Trust would have fixed the same date for the closing of its surrender contract with the Bakery. It also follows from what I have already found as a fact that it would have been possible, by that date, for the Bakery to deliver vacant possession to the Windham Trust so that the Windham Trust could, in turn, have delivered vacant possession to Mr. Maguire and Mr. Moran. It also follows, from what I have already found, that the Bakery would, in fact, have been willing to close its surrender contract within such timeframe and would have done so.

6.9 That leads to the issues which arise out of the so called "four way closing" to which I have briefly referred and to which I now turn.

## **7. The Four Way Closing**

7.1 As noted briefly earlier in the course of this judgment, the question which arises under this heading stems from the fact that the Windham Trust contemplated using the monies which it was to receive from Mr. Maguire and Mr. Moran for the purposes of paying the agreed price to both Fashion Blinds and the Bakery so as to secure a surrender of the respective leases held by those parties. The issue is as to whether the Windham Trust was, in reality, able to close in those circumstances. In that regard a starting point has to be a consideration of the judgment of McCarthy J., in *Jackson & Anor v. Stokes* (Unreported, High Court, McCarthy J., 25th July, 2008) on which Mr. Maguire and Mr. Moran relied. The issue in that case centred around the fact that the property in question in those proceedings was subject to a number of charges and mortgages which obviously were required to be cleared in order to give clear title to the purchaser concerned. The vendor had proposed that the sale should close on the basis of appropriate undertakings being given in respect of those encumbrances by the vendor's solicitor. In that context McCarthy J., noted the following, at p. 7:-

"The purchasers contend that whatever may be conveyancing practice in terms of the acceptance of undertakings pertaining to encumbrances they have a free standing right to a perfected title and are not to be placed in a position of having to accept undertakings which do not, of themselves, give them title, merely the assurance that they will obtain title in the future or one which they must take steps themselves to achieve. This bald, freestanding position is unexceptional and unassailable whatever grace might be extended by purchasers to vendors."

7.2 At page 12 of his judgment McCarthy J. went on to hold as follows:-

"There is no suggestion in this however, or in any other authority opened to me, that there is an obligation to accept undertakings in substitution for ones strict rights, desirable through this in many circumstances and in the present case might be.

...

I do not think there could, by the way, be any question of legitimate expectation that an undertaking would be accepted or, even if it be normal conveyancing practice, one could assume that undertakings would be accepted and to purport to complete or offer to complete on the basis of them. In this case...the purchasers made their position abundantly clear as to their requirements, requirements which were never disputed and which, I have held, in any event, were perfectly proper.

...

The vendor seems at all times, and ultimately at closing to have been unwilling to close on the basis required by law, even if he was able or ready because he possessed the capacity to perfect the title but did not and of course he must not only be able and ready but also willing."

7.3 There is no doubt, therefore, that the obligations of parties in respect of the closing of a sale is to meet the parties' contractual obligations strictly. The fact that in some or even most cases parties may not insist on their full contractual entitlement, and that there may be general practice to accept something less than delivery of full contractual entitlement, does not mean that a party is not entitled to insist on its rights.

7.4 Under this heading it is, therefore, necessary to ascertain what the legal entitlement of Mr. Maguire and Mr. Moran was and to assess whether the Windham Trust would have been in a position to deliver that legal entitlement.

7.5 So far as a clean title is concerned, it is clear that the legal entitlement of Mr. Maguire and Mr. Moran was, on closing, to have delivered over to them executed surrenders of the relevant leases. Without such appropriate surrenders Mr. Maguire and Mr. Moran would not, of course, have obtained clear title. There is no doubt but that the judgment of McCarthy J. in *Jackson* is clear authority for the proposition that Mr. Maguire and Mr. Moran could not have been obliged to accept any undertakings from Mr. Silvester, as the Windham Trust's solicitor, in respect of such surrenders. Mr. Maguire and Mr. Moran would have been entitled to insist on having an actual executed surrender handed over. Against that background it is necessary to consider the evidence as to what could have been done by the Windham Trust in order to deliver such documentation.

7.6 The situation in respect of Fashion Blinds is entirely straightforward. The solicitor who acted on behalf of Fashion Blinds in respect of the surrender contract gave evidence that she would have been more than happy to hand over, on behalf of her client, an executed surrender by that client in return for an undertaking on the part of Mr. Silvester, on behalf of the Windham Trust, to pay over to her the contract price. It follows that there would have been no difficulty in full compliance with the contractual obligations of the Windham Trust to Mr. Maguire and Mr. Moran, so far as the Fashion Blinds lease is concerned.

7.7 So far as the Bakery is concerned, evidence was given by Mrs. Windham to the effect that she would, if necessary, have sought bridging finance to enable the Windham Trust to put up the necessary funds to close the surrender contract with the Bakery. The way in which such finance would need to have been provided also needs to be analysed. There are a number of ways in which any necessary arrangements could have been put in place. However, all that was required was that, immediately prior to the finalisation of the closing as and between the Windham Trust on the one hand and Mr. Maguire and Mr. Moran on the other hand, the Windham Trust should have in its possession, and be free to handover, a surrender of the Bakery's lease. Whether described as a three (or in theory a four way closing if the solicitor for Fashion Blinds was actually present, rather than accepting undertakings) or whether described as two or more separate transactions taking place sequentially in the same premises on the same occasion, it seems to me that all that the Windham Trust would need to have procured was a draft in the appropriate sum necessary to close with the Bakery which draft could have been obtained, for example, on foot of an undertaking by Mr. Silvester not to release the draft concerned to the Bakery until he was on the point of closing the sale with Mr. Maguire and Mr. Moran. In those circumstances all Mr. Silvester would have to do is satisfy himself that everything was in order for the closure of the sale with Mr. Maguire and Mr. Moran (and that the solicitors acting for Mr. Maguire and Mr. Moran were happy that this was so). On being so satisfied, Mr. Silvester could then have finalised his arrangement with the solicitor acting on behalf of the Bakery and released, in conformity with the contemplated arrangement with the bank concerned, the relevant draft so as to complete the sale with the Bakery. He would then have the executed surrender document available for finalising the closing with Mr. Maguire and Mr. Moran. There are, of course, other variations on that method which could have been adopted. Given the very large sum of money indeed which the Windham Trust was going to obtain from the sale, it seems to me inconceivable that the Windham Trust's bankers would not have facilitated the Windham Trust in some method such as that which I have set out above. The bank would, in those circumstances, be at little or no risk. The Windham Trust was, in any event, a good mark.

7.8 I am satisfied, therefore, as a fact, that the Windham Trust would have been able to devise an appropriate method whereby it would have been in a position to comply with its contractual obligation to satisfy Mr. Maguire and Mr. Moran, on closing, that the leases had been surrendered. It would not have been necessary for the Windham Trust to seek to persuade Mr. Maguire and Mr. Moran to accept solicitor's undertakings which fell short of their contractual entitlements.

7.9 I am not, therefore, satisfied that the fact that the Windham Trust was hoping to fund its obligations under the surrender contracts to the respective lessees from the sale monies to be obtained from Mr. Maguire and Mr. Moran would have placed any practical barrier in the way of the Windham Trust complying with its contractual obligations on closing to Mr. Maguire and Mr. Moran.

7.10 When coupled with the findings which I have already made to the effect that:-

A. Mr. Maguire and Mr. Moran failed to crystallise the date on which actual vacant possession had to be made available to them by virtue of having failed to give reasonable advice of intention to close; and

B. Vacant possession could have been provided had such reasonable advice of intention to close been given,

it follows that I am satisfied that the Windham Trust was able, ready and willing to close the sale in dispute in these proceedings within the terms of the contract.

7.11 It will be necessary to turn shortly to the complication which I have already identified which stems from the fact that Fashion Blinds has now been wound up. However, before so doing I should touch on a number of other issues which arose in the course of the hearing but which it is not, by virtue of the findings which I have already made, necessary for me to decide.

## **8. Some other Issues**

8.1 There was a significant debate between the parties as to the proper view that should be taken of the legal consequences of the service of a completion notice where it transpires that the party serving the notice concerned is not able, ready and willing to complete. Counsel for the Windham Trust argued that a proper construction of the relevant General Condition (General Condition 40) is simply to the effect that any such notice is "not effective" given the use of that term in the text of Condition 40 itself. On that basis it is argued that the only consequence of the service of such a notice is that the completion notice is not effective to make time of the essence. If that be correct it would, of course,

follow that the service of a completion notice by a party who was not able, ready and willing to complete would not entitle the other party to rescission, but rather would simply leave the contract subsisting with time not being of the essence. Wiley and Woods, on *Irish Conveyancing Law* suggest the alternative (and perhaps more traditionally accepted) view that the service by a party of a completion notice when that party is not able, ready and willing to complete, entitles the receiving party to rescind when the notice expires.

8.2 Precisely because of the importance of resolving the competing arguments under this heading, it seemed to me that it would be inappropriate to express any view on the issue concerned in a case where, for the reasons I have already outlined, the resolution of that question would not be material.

8.3 There was also a question at the hearing before me concerning the second completion notice. Given the findings which I have made concerning the first completion notice, no question concerning the second completion notice, therefore, arises. The question of the validity of the second completion notice would only have arisen in the event that counsel for the Windham Trust was correct in his assertion as to the proper view to be taken in relation to the consequences of a party serving a completion notice not being able, ready and willing to complete, and it transpiring that I was not satisfied that the Windham Trust was able, ready and willing to complete at the time of the serving of the first completion notice. It is, therefore, equally unnecessary to deal with any issues concerning the second completion notice.

8.4 A further issue was canvassed at the hearing concerning the conduct of the parties (and in particular Mr. Maguire and Mr. Moran) after the expiry of the first completion notice. On the case made at the hearing before me on behalf of Mr. Maguire and Mr. Moran, those parties were entitled to rescind the contract at any time after the expiry of the first completion notice. There is no doubt but that Mr. Maguire and Mr. Moran did not purport to rescind the contract for a very significant number of months thereafter. Correspondence was not replied to. It is true that a meeting took place with Mr. McCarren, whom, it will be recalled, was a trustee of the Windham Trust, during which certain discussion took place. All in all it is difficult to avoid the conclusion that Mr. Maguire and Mr. Moran wanted to have their cake and eat it. They wished to retain some prospect of acquiring the property (perhaps at a reduced price), but equally wished to retain the possibility of being able to extract themselves from any contractual relations. They avoided nailing their colours to the rescission mast for a very considerable period of time. Against that background it did not seem to me that the tentative suggestion made in the course of documents filed prior to the commencement of the proceedings to the effect that the Windham Trust might have lost an entitlement to enforce the contract by a delay in issuing proceedings could have any merit. However, given that I am satisfied, for the reasons which I have sought to analyse, that Mr. Maguire and Mr. Moran never acquired a right to rescind the contract, it is unnecessary to decide whether their action (or, in the main, inaction) over the significant period of time from the expiry of the first completion notice until the commencement of these proceedings, might have debarred them from a belated exercise of any entitlement to rescind which they might have had.

8.5 Having set out those issues for the purposes of recording that they arose at the hearing but setting out the reasons why I considered it unnecessary to deal with them, it is now necessary to turn to the problem created by the winding up of Fashion Blinds.

## **9. The Winding up of Fashion Blinds**

9.1 There is no doubt but that as of the time of the hearing before me (and so far as I am aware as of the time of delivering judgment) the Windham Trust can no longer comply with its obligation under the contract by virtue of the final winding up of Fashion Blinds. In those circumstances, the lease in favour of Fashion Blinds has become vested in the State. Fashion Blinds does not exist and cannot execute any necessary documents to provide for a surrender. Through no fault of its own the Windham Trust is no longer in a position to make title.

9.2 In passing I should note that, immediately before the final day's hearing of these proceedings (which occurred after a short break necessitated for logistical reasons), an application was made to me to reinstate Fashion Blinds. However, for reasons that it is unnecessary to go into in the course of this judgment, I was not satisfied that the application concerned was properly constituted and did not allow it. It may well, in practice, be the case that no difficulty would be encountered in such an application in the future should one be made in a properly constituted way. Be that as it may the position appears, as of today, to be that Fashion Blinds does not exist and could not, therefore, deliver a surrender of its lease to the Windham Trust.

9.3 I am, therefore, faced with the situation where, at present, the Windham Trust is not in a position to make title. However, that fact must be viewed against the backdrop of the findings which I have already made which were to the effect that the Windham Trust was able, ready and willing to complete as of the time of the expiry of the first completion notice. It is also clear that the Windham Trust would have been able to complete as of the time of the commencement of these proceedings and, indeed, for much of the life of the proceedings for the final winding up of Fashion Blinds only occurred some short number of weeks prior to the hearing before me commencing.

9.4 Against that backdrop I have to consider what the appropriate order to make should be. I have, somewhat regrettably, come to the view that I cannot, in those circumstances, give a decree of specific performance. If I were to make such a decree it would amount to a legally binding direction to both parties to immediately complete the sale. There is no guarantee that this could be done. I would, therefore, be running the risk that I would be making a court order, at the request of the Windham Trust, in circumstances where there was real risk that the Windham Trust would not itself be able to comply with its side of the obligations required by that order. That is not a course of action which, in my view, a court should contemplate.

9.5 However, it would, in my view, be manifestly inequitable if Mr. Maguire and Mr. Moran were to be able to escape from their obligations by reason of their own default. On the basis of the findings which I have made, Mr. Maguire and Mr. Moran should have completed this sale over a year ago. They certainly should have completed the sale when these proceedings were issued. It is only because of the failure of Mr. Maguire and Mr. Moran to complete the sale at either of those times that the difficulty with which I am now concerned has arisen. Mr. Maguire and Mr. Moran should not be entitled to benefit by their own default. In those circumstances, it seems to me that the most appropriate order to make is to direct that the Windham Trust should be entitled to damages in lieu of specific performance, and I propose to direct that the amount of the damages to which the Windham Trust should be entitled be assessed by a judge sitting alone. I will direct that the Windham Trust should serve points of claim in respect of the quantum of those damages within four weeks from today's date. I will put the proceedings in for mention on the first Tuesday of next term for the purposes of reviewing the readiness of the assessment to go to hearing. It seems likely that the principal evidence which will need to



be tendered by both sides will be expert valuation evidence. The parties should attempt to agree a timeframe within which such expert evidence (and indeed any other evidence that might be required) can be exchanged.

#### **10. Conclusion**

10.1 It follows, therefore, that the only order which I should make at this stage is to direct that the Windham Trust is entitled to recover damages in lieu of specific performance as against Mr. Maguire and Mr. Moran, such damages to be assessed by a judge sitting alone. I will also make the procedural directions which I have already indicated.