THE HIGH COURT

RECORD NO: 2004/1936P

BETWEEN:

THE COUNTY COUNCIL FOR THE COUNTY OF MEATH

PLAINTIFF

AND
IRISH SHELL LIMITED PATRICK KAVANAGH
AND
PATRICK KAVANAGH (TRIM) & SONS LIMITED

DEFENDANTS

Judgment of The Honourable Mr. Justice Vivian Lavan delivered on the 6th day of December 2006.
By reason of agreement with the first named defendant, the second and third named defendants are no longer party to the proceedings

Factual Background:
1. The first named defendant is a limited company, incorporated in the State. A site at Watergate Street, Trim, Co. Meath was owned by Shell Ireland Limited, the first named defendant, on which there was a filling station. An adjacent site was owned by Meath County Council. For some years it was used as the car park for a swimming pool. A proposal was brought before the County Council and Trim Urban Council to build new civic offices on that site. In January, 2001 prior to any work commencing, there was a major pollution incident noted in the river. It was noted to have come from a drain. What the investigations revealed at that time that the source of the leak was from Shell's site. There was fuel coming from somewhere in the site out into the street and moving down through what is called pea gravel, on which the water drain was bedded and out into the river.

2. Three months later contractors (J.J. Rhattigan) moved in onto the site to commence the work for the building of the civic offices. When they put down the board walls they immediately smelled fuel. All work stopped and an investigation was started. It was ascertained that a large area of the site, owned by the County Council, was heavily polluted with fuel. After some investigation, the first named defendant admitted that it had come from their site. Thereafter, following some considerable negotiations, the first named defendant agreed to clean up the site. Their consultants and contractors then went in on site and commenced to carry out that remediation. Shell became dissatisfied with their contractor and their consultant as they were unable to reach the target levels. In or about November, 2004, Shell asked their contractor and consultant to leave. It is contended that from November, 2004 no work was carried out by Shell on that site.

3. Prior to the events the subject of these proceedings, on 30th January, 1995, there was an incident of pollution in the River Boyne. It was investigated and found to come from the Shell site. It was found at that time that the travel of the pollution was out onto the street and down the pipe. On the 9th January, 2001, the second incident of pollution was noted. On the 4th April, 2001, the contract with the contractor to build the civic offices was agreed and signed. On the 25th April, 2001, the contamination of the site, where the civic offices were to be built, was discovered.

4. On the 3rd May, 2001, a letter from the Trim area office was written to Mr. Heffernan in Irish Shell stating as follows:

> "We are advised that the site of the new Civic Offices work is impacted by hydrocarbon contamination which appears to originate from the site of the Shell garage immediately adjacent to the site. Investigations are proceeding to determine the extent of the contamination. We hereby give you notice that we will seek to recover from you all costs (direct and consequential) which are incurred as a result of the contamination".

5. On the 28th February, 2003, the Defendant's signed an agreement for the remediation of the site. That agreement set out the standard at which the remediation was to be achieved. In August, 2003 there was a fresh invasion onto the site. At the end of 2004 the defendants' contractor and consultants, who had been carrying out the remediation, left the site. Between November, 2004 and 19th January, 2006 Shell, through their solicitors, commenced a correspondence, which attempted to renegotiate the terms of the basis on which they were to remediate the site. The Defendant invited the EPA to get involved but then failed to give them the documentation. From documentation supplied by Meath County Council the EPA found that there was no reason to lower the levels.

6. A significant body of correspondence went between the parties, as well as the contractors, prior to the commencement of these proceedings. The correspondence discussed the remediation of the site, the levels to be attained and the possible renegotiation of the target levels, the suspension of the building works, the repossession of the site from the building contractors and the construction delays. In April, 2002 the solicitors for the plaintiff sent a draft remediation agreement to the first named defendant's solicitors. In reply the solicitors for the first named defendant stated that they were reviewing this letter and the draft agreement was also forwarded on to the first named defendant. There was further correspondence between the solicitors for the first named defendant and the County Council as to whether the contract with the building contractor should or shouldn't be frustrated and what would be the best way to deal with it. It was decided that the contract should not be frustrated.

7. There is no dispute that there has been pollution on the council's site which originated from Shell's site. There is no dispute that they agreed to remediate. There is a dispute as to the level. There is also a dispute as to whether in addition to all the other costs the first named defendant should pay the consequential costs.

Admitted Facts:
8. The following facts have been admitted by the plaintiffs:

> David Keyes, (whose actions in relation to the matters the subject of the proceedings herein were at all times in respect of his role as Town Engineer for Trim UDC), was a Senior Executive Engineer with Meath County Council/Trim UDC on the 31st January, 2001, 4th March, 2001, and 23rd April, 2001.
>
> David Keyes attended a meeting of Trim UDC on the 11th April, 2000, at which Architects for the new proposed Civic Offices outlined details of the proposed development at Watergate Street.
>
> The minutes of the meeting on the 11th April, 2000, gives an accurate summary of what was said at that meeting by the architects for the proposed civic offices but this is not a verbatim record of what was said.

David Keyes, in his role as Town Engineer to facilitate the construction of a road adjacent to the proposed civic offices, was informed by letter dated 26th January, 2001, from the consulting engineers for the proposed civic offices of the key proposed levels along the road around the new offices and swimming pool building.

David Keyes was aware as of 31st January, 2001, that the ground water in the bore holes in the Garage Forecourt as tested by Euro Environmental Services was contaminated. He was also aware that there was hydrocarbon contamination in the surface water system in Watergate Street and passing through that system to the River Boyne. However, the extent of Mr. Keyes's knowledge with regard to the 'surrounds' of the garage forecourt was confined to the surface water system at Watergate Street.

The plaintiff through David Keyes sought from the second named defendants by letter dated the 31st January, 2001, proposals and a plan of action to decontaminate the second and/or third named defendant's site and its surrounds as soon as possible and not later than one week from the date of the letter. The purpose of the request was to seek proposals and a plan of action to decontaminate the site (as shown to be contaminated as a result of tests carried out by Euro Environmental on the boreholes of the garage forecourt) and its surrounds being the surface water system on Watergate Street.

David Keyes wrote to the first named defendant and second named defendant on 31st January, 2001.

Euro Environmental Services informed the plaintiff on the 30th January, 2001, of the extensive petrol and diesel range hydrocarbon contamination of water samples taken from the ground water at the second and/or third named defendants' garage forecourt. Test results indicated high levels of contamination in the bore hole samples taken at the garage site.

Meath County Council were aware through David Keyes on the 4th March, 2001, that the groundwater boreholes tested by the Euro Environmental in the second and/or third named defendants garage site were extensively contaminated with hydrocarbons and also that there was hydrocarbons contamination in the surface water system in Watergate Street and passing through that system to the River Boyne.

The letter dated 4th March, 2001, from David Keyes to the second named defendant and copied to the first named defendant is an accurate and/or substantially accurate record that the plaintiff was aware as at the 4th March, 2001, that there was hydrocarbon contamination in the groundwater in the boreholes tested by Euro Environmental on the garage site and that the surface water system at Watergate Street Trim was contaminated. However, the extent of the plaintiff's knowledge related only to the bore holes and the surface water system.

The plaintiff was informed by Irish Shell Trust Limited by fax on the 12th March, 2001, of works that were proposed to be carried out arising from the ground water monitoring at Watergate Street Trim. The fax referred to works found to be necessary following recent ground water monitoring at the above site and did not specifically refer to contamination.

There were internal communications between Greg Duggan and David Keyes both Employees of the plaintiff on the 12th March, 2001, in respect of the contamination of the second and/or third named defendants' garage site.

The plaintiff through David Keyes sought the following from the first named defendant by letter dated the 13th March, 2001:

> (i) The report by the first named defendants environmental consultants of the contamination at the second and/or third named defendants site and its environs.
>
> (ii) Details of the programme of works to be carried out by the first named defendant for the purpose of rehabilitating the affected area.
>
> (iii) Details of the timescale for the implementation of these rehabilitation works.

This request was issued in response to a fax from the first named defendant on 12th March, 2001, on the advice of the plaintiff's environmental department and on the basis of David Keyes' awareness that the ground water in the bore holes in the garage forecourt as tested by Euro Environmental Services was contaminated and that there was hydrocarbon contamination in the surface water system in Watergate Street and passing through that system to the River Boyne. A response was received from Irish Shell to this letter on the 3rd May, 2001.

The plaintiff through the consulting engineers hired for the construction of the new civic offices at Watergate Street did commission a site investigation of the lands for the proposed new civic offices between the 3rd February, 2000, and 24th March, 2000, by Site Investigations Limited.

The plaintiff entered into a contract for the construction of its new civic offices at Watergate Street, Trim with J.J. Rhattigan & Co. Limited on or about the 23rd April, 2001.

The plaintiff was aware of the contamination of the groundwater in the boreholes in the garage site on the second and/or third named defendants' site and the presence of hydrocarbon contamination in the surface water system in Watergate Street on the 23rd April, 2001.

David Keyes did by letter dated the 6th June, 2000, from the consulting engineers to the proposed Civic Office receive a copy of the Site Investigation Report prepared by Site Investigations Limited.

David Keyes, Senior Executive Engineer to Meath County Council, Trim UDC., was not a member of the project team from within the plaintiffs engaged in the development of the new proposed civic offices adjoining the property of the second and/or third named defendant. David Keyes' actions in relation to the matters, the subject of these proceedings, were at all times in respect of his role as town engineer and he had no responsibility for or role in providing the proposed new civic offices.

David Keyes is a qualified civil engineer.

David Keyes was Town Engineer for Trim UDC., for the relevant period namely the year 2001.

The plaintiff commissioned a report, in respect of archaeology at Watergate Street at the site of the proposed civic office, from Margaret Gowan & Company Limited.

Margaret Gowan & Co. Ltd did carry out an archaeological assessment for the plaintiff which assessment included the excavation of the test trenches throughout the site on the 14th September, 2000.

Margaret Gowan & Co. Ltd did inform the plaintiff's architects on the 20th September, 2000, of the location of the Test Trench no. 2 where archaeological deposits were revealed.

There were internal communications between David Keyes and Gregory Duggan both Employees of the plaintiff on the 30th January, 2001, in respect of the contamination of the second and/or third named defendants' garage site as recorded in the handwritten notes of David Keyes.

The notes of the conversation between Gregory Duggan and David Keyes, both employees of the plaintiff, on the 30th January, 2001, is a true or a substantially true record of what was said between Mr. Duggan and Mr. Keyes.

The plaintiff on the 24th January, 2001, did issue a dangerous substance licence to the third named defendant to permit the third named defendant to store petroleum class 1 for a period of 3 years from 24th January, 2001.

9. The following facts have been admitted by the first named defendant:

The hydrocarbon contamination of the civic office site at Watergate Street, Trim, Co. Meath originated from the adjoining site to the plaintiff's site which included a Shell petrol station.

Irish Shell Limited accepts responsibility for the contamination and remediation of the civic office site.

Irish Shell Limited accepts responsibility for the direct costs of the remediation required by reason of the contamination of the civic office site. Without prejudice to the foregoing Irish Shell Limited does not accept responsibility for any consequential losses including but not limited to any alleged losses arising from the plaintiff's decision to enter into the contract for the construction of the civic offices or any alleged losses arising from the decision to proceed to develop the civic offices on the site by entering into the contract for the construction of the civic offices.

Irish Shell Limited entered into an agreement with White Young Green on 28th February, 2003, by which Irish Shell Limited employed White Young Green to remediate the civic office site.

Following discussions between Irish Shell Limited, Meath County Council and White Young Green Ireland Limited, Irish Shell Limited agreed the remediation levels as set out in the agreement with White Young Green dated 28th February, 2003. The remediation levels were those agreed by White Young Green Ireland Limited, then acting as consultants to Meath County Council. Meath County Council received a collateral agreement directly from White Young Green Ireland Limited warranting, *inter alia*, that White Young Green Ireland Limited would carry out all duties and responsibilities which may be required to secure the timely and satisfactory completion of the remediation under the agreement dated 28th February, 2003. Irish Shell Limited (under the agreement) were to receive a certificate from White Young Green Ireland Limited when the remediation was completed in accordance with the agreement dated 28th February, 2003. No certificate was issued.

Irish Shell Limited engaged the services of White Young Green to carry out remediation of the civic offices site pursuant to the agreement for remediation services dated 28th February, 2003.

White Young Green have failed to achieve the remediation levels as agreed in the agreement for remediation services dated 28th February, 2003, in respect of the said civic office site.

The Evidence

10. Having regard to the foregoing I accept the evidence of all of the witnesses called on behalf of the plaintiff.

11. I do not accept the evidence called on behalf of the defendants. In particular I am satisfied that the opinion expressed by Mr. Beckett, as expert, is one based on hindsight on the instructions of the defendants.

Plaintiff's Statement of claim

12. The plaintiff claims that the keeping of the hydrocarbon products, which are dangerous substances, constitutes an unnatural user of their land. The plaintiff, further, claims that the defendants failed to keep the product from their land, they failed to protect it and they failed to keep it within their bounds and that the defendants are liable for their escape onto the plaintiff's lands. Further, it is claimed that, in the alternative, the escape of the said hydrocarbon products and the resulting contamination of the plaintiff's lands were caused by the negligence, breach of duty or breach of statutory duty of the defendants or any of them, or their respective servants or agents in and about the management, care, control, upkeep and supervision of the said lands and of the tanks, including underground tanks, pipes and pumps thereon. The plaintiff claims, in the alternative, that it was a nuisance created or maintained by the defendants as a consequence whereof the plaintiff suffered loss, damage and expense. By reason of contamination there was an obligation to cease the work on the civic offices in order to allow remediation works to be carried out and therefore the plaintiff has incurred additional and on-going costs to the contractor as well as administration costs and legal costs. As a result of the first named defendant failing to abate the nuisance, the plaintiff has suffered additional loss, damage and expense.

13. The following particulars are set out by the plaintiffs:

The defendants…

(a) failed to take the necessary or appropriate steps to prevent hydrocarbon products escaping from the defendants' premises onto the plaintiff's lands;

(b) caused, allowed or permitted hydrocarbon products to escape from the defendants' premises onto the plaintiff's lands;

(c) caused, allowed or permitted tanks, including underground tanks, pipes and pumps to be and/or to become and/or to remain in a state of disrepair;

(d) failed to properly service or otherwise maintain the aforementioned tanks, pipes and pumps;

(e) failed to replace damaged tanks, pipes or pumps;

(f) failed to warn the plaintiff of the escape of hydrocarbon products from the defendants' premises;

(g) failed to take the necessary of appropriate steps to prevent continuing escape and contamination when they knew or ought to have know that hydrocarbon products were escaping from the defendants' lands on the plaintiff's lands;

(h) delayed in carrying out and/or commencing remediation works;

(i) failed to comply with the statutory obligations in the operation of a filling station;

(j) The plaintiff will further rely upon the doctrine of *Res Ipsa Loquitur* in support of the claim.

14. The plaintiff claims that the first named defendant agreed to compensate the plaintiff in respect of all losses, including consequential losses, and in particular but not confined to the losses arising from the disruption of the building works on the said site. The plaintiff claims in breach of this agreement that the first named defendant has failed to complete remediation of the said site within the timescale agreed and has refused to compensate the plaintiff in respect of the losses set out above. The plaintiff states that the first named defendant is estopped from denying the existence of the agreement to compensate the plaintiff for any losses, in particular but not limited to the losses arising from the disruption of the building works on the said site. There is a further claim from the plaintiff that by reason of the failure on the part of the first named defendant to comply with the terms of the said agreement and/or comply with its obligations pursuant to the said representations the plaintiff has suffered and continues to suffer loss, damage and expense.

Defence

15. In the outset the first named defendant denies that the plaintiff is entitled to the relief claimed. The first named defendant denies that the plaintiff has suffered loss, damage and expense, either as alleged or at all. Further, or in the alternative, the first named defendant denies that the plaintiff suffered any loss, damage and expense as a result of the alleged contamination of its lands with hydrocarbon products which had allegedly escaped from the first named defendant's adjoining premises, either as alleged or at all. The first named defendant denies that the keeping of hydrocarbon products by the first named defendant on its lands constituted a non-natural user of the lands, either as alleged or at all. Further, or in the alternative, the first named defendant denies that it is liable for the alleged escape of any hydrocarbon products onto the plaintiff's lands either as alleged or at all.

16. The first named defendant pleads that the plaintiff is estopped from taking issue with the keeping of hydrocarbon products by the first named defendant, its servants or agents, on the said lands or with any alleged unnatural user of the lands by reason of the fact that the plaintiff licensed the second and/or third named defendant to keep hydrocarbon products on the said lands. The first named defendant denies that the alleged escape of the said hydrocarbon products and the alleged resulting contamination of the plaintiff's lands were caused by the negligence, breach of statutory duty of the first named defendant, its servants or agents. There is a further denial that the alleged contamination of the plaintiff's lands arose as a result of a nuisance created or maintained by the first named defendant, its servants or agents. Further, or in the alternative, the first named defendant denies that the plaintiff suffered loss, damage and expense as a result of any nuisance created or maintained by the first named defendant. The first named defendant denies that by reason of the alleged contamination of the plaintiff's lands, the plaintiff was obliged to cease the construction works on its civic offices in order to allow remediation works to be carried out, either as alleged or at all. Further, or in the alternative, the first named defendant denies that the plaintiff has incurred and continues to incur additional costs and legal costs as a consequence of the cessation of the construction works in order to allow remediation works to be carried out.

17. The first named defendant denies that it undertook to the plaintiff to abate the nuisance to an agreed standard and in accordance with the agreed timescale. The first named defendant denies that the plaintiff has suffered loss by the nuisance not being abated. Further, or in the alternative, if the first named defendant did agree to abate the said nuisance, the first named defendant denied that it failed to do so as a consequence whereof the plaintiff has suffered and continues to suffer additional loss, damage and expense. Further, or in the alternative, if there was an agreement to remediate the said site, the said agreement was entered into by the first named defendant with consultants then acting for the plaintiff, White Young Greene Ireland Limited ('the consultants'), on 28th February, 2003, for the purpose of the remediation by the consultants of the site to standards and in a timeframe that the consultants believed were achievable. The said remediation agreement was entered into by the first named defendant with the consultants on foot of representation made by the consultants to both the first named defendant and the plaintiff. Further, the defendant procured a collateral agreement from those consultants in favour of the plaintiff. The first named defendant denies that it agreed that the civic offices could be remediated to the standards by the consultants. On foot of the aforesaid remediation agreement, the plaintiff acquired the civic office site back.

18. The first named defendant denies that any of the alleged loss, damage and expense sustained by the plaintiff has been caused and/or contributed to by any acts of negligence, breach of duty, breach of statutory duty or creation or maintenance of nuisance on the part of the first named defendant. The defendant states that if the plaintiff sustained any loss, damage and/or expense then same was caused wholly or was contributed to by acts of negligence and/or breach of duty on the part of the plaintiff.

19. The following details are claimed by the first named in relation to the particulars of negligence, contributory negligence and breach of duty on the part of the plaintiff:

1. The plaintiff, its servants or agents, knew or ought to have known prior to the commencement of the works on the said lands on 24th April, 2001, of the alleged contaminated nature of the plaintiff's lands;

2. The plaintiff knew or ought to have know prior to 24th April, 2001 of the alleged contaminated nature of the plaintiff's site yet entered into a contract with the construction company;

3. The plaintiff engaged the construction company at a time when it knew or ought to have known of the alleged contamination of the plaintiff's site;

4. The plaintiff failed to advise and/or warn the construction company that the lands upon which the civic offices were to

be built were allegedly contaminated;

5. The plaintiff exposed itself to financial loss, via claims from construction company, by entering into the contract in the above circumstances;

6. The plaintiff failed to have any or any adequate regard for its own financial interest.

20. The first named defendant claims that if the plaintiff has suffered the alleged loss, damage and expense (which is denied) it has failed to mitigate its loss. The first named defendant denies that it entered into an agreement with the plaintiff, evidenced by correspondence passing between their respective servants or agents, pursuant to which the first named defendant admitted responsibility for the contamination on the civic office site, agreed to remediate the said site to an agreed standard (and in accordance with an agreed timescale), and further agreed to compensate the plaintiff in respect of all losses, including consequential losses, and in particular, but not confined to, the losses arising from the disruption of the building works on the said site. Such negotiations and correspondence as took place and passed between the parties were conducted on a 'without prejudice' basis which never ripened into an agreement between the parties. The first named defendant objects to the purported reliance by the plaintiff upon the said 'without prejudice' negotiations and correspondence. Further, or in the alternative, if the first named defendant entered into an agreement with the plaintiff pursuant to which the first named defendant admitted responsibility for the contamination of the civic office site, it is denied that the first named defendant agreed to compensate the plaintiff in respect of all losses, including consequential losses, either as alleged or at all.

21. The first named defendant denies that it or its servants or agents represented to the plaintiff, its servants or agents, that it had accepted responsibility for the contamination of the civic office site and that it would remediate the said site to an agreed standard and that it would compensate the plaintiff in respect of all losses, including consequential losses, and in particular but not limited to the losses arising from the disruption of the building works on the said site. The first named defendant denies that the plaintiff, acting on the faith of the alleged agreement and representations, entered into an agreement on 14 October, 2002, with J.J. Rhattigan & Company Limited. Further, the first named defendant denies that it was agreed that it would take over the defence of any dispute arising and indemnify the plaintiff in full in respect of any claim by J.J. Rhattigan and Co. Limited. The first named defendant denies that the plaintiff, acting on faith of the alleged agreement and representations, allowed the first named defendant into occupation and possession of the said civic office site for the purpose of carrying out the said remediation works. The first named defendant admits that it entered into an agreement with the consultants to remediate the said site and in order to effect the terms of that agreement it was necessary to secure the site from the second and third named defendant and J.J. Rhattigan & Co. Limited. The first named defendant denies that the first named defendant is estopped from denying the existence of any of the aforesaid alleged agreements and/or making of the aforesaid representations. The first named defendant denies that it is consequently bound by the aforesaid alleged agreement and/or alleged representations. The first named defendant denies that as a result of its alleged failure to comply with the terms of the alleged agreement and/or to comply with its alleged obligations pursuant to the alleged representations, the plaintiff has suffered and continues to suffer loss, damage and expense. The first named defendant denies that the plaintiff is entitled to recover any damages in respect of consequential losses allegedly sustained by the plaintiff as a result of claims made by J.J. Rhattigan & Co. limited or howsoever arising. Further, the first named defendant pleads that the aforesaid losses are not recoverable in law because they are too remote. If the plaintiff suffered losses (which is denied) then same are limited to the amount of IR£3,000 per month or part thereof, being the amount of liquated and ascertained damages agreed under the building contract that the plaintiff entered into with J.J. Rhattigan & Co. Limited.

Without Prejudice correspondence

22. An issue arose as to whether 'without prejudice correspondence' should be admitted at the hearing. The issue that the Court has been asked to determine is whether or not a letter dated the 12th October, 2001, from the solicitors for the first named defendant to solicitors for the plaintiff, headed 'Without Prejudice' and as part of a chain of 'Without Prejudice' correspondence, should be admitted on the grounds that it is evidence of a concluded compromise agreement between the parties. The plaintiff contends that it should be admitted and seeks to isolate one particular sentence within that letter for the purpose of allegedly evidencing to the Court that the first named defendant had, in fact, admitted liability for all consequential losses arising from the building contract. The first named defendant submitted that it should not and gave the following reasons:

1. As a mater of policy, matters raised in 'without prejudice' correspondence are not admissible in subsequent proceedings.

2. Neither the letter nor any portion of the letter of the 12th October, 2001, constitutes an 'offer' as contended for by the plaintiff.

3. The letter is not an agreement and any admission that may be contained therein is not to be construed or analysed as if it were a contractual document.

4. No single phrase can be isolated in the letter. It must be viewed as a whole both as to the particular context of the paragraph and the other paragraphs of the letter.

5. An admission of liability for loss and damage in tort as a matter of law would not include damage for economic loss much less alleged consequential/economic loss.

6. If the letter construed as a whole is unclear as to whether consequential loss is covered (which we submit it is not), parole evidence is admissible to clarify the alleged admission.

7. Although subsequent correspondence or conduct is not in general admissible to construe a document, here it is clear that the parties regarded themselves as still operating under the cloak of without prejudice correspondence and there was nothing done by the plaintiff relative to the consequential loss claim to alter irreparably its position.

8. The failure of the plaintiff to advert to the alleged 'admission' at any time in the proceedings up and until the original opening of same in February, 2006 reinforces the view that the plaintiff had no belief or understanding that the proceedings had been compromised by an admission of liability for all loss and damage.

9. Properly construed the letter of the 12th October, 2001, is merely an acknowledgement that the first named defendant was accepting responsibility for the remediation and clean up of the site and the loss and damage thereby occasioned.

23. The evidence of the plaintiff is that the letter of 12th October, 2001, constituted a proposal from the first named defendant's

solicitor. The plaintiff submits, however, that the letter also constituted an agreement on the part of the first named defendant to pay for all losses, including consequential losses, derived from the building contract. The first named defendant submits that the letter clearly was concerned with the issue of remediation, and that issues pertaining to the building contract were not then under discussion. The first named defendant submits that the letter of 12th October, 2001, needs to be read, firstly, in its totality, and, secondly, in the context of the correspondence then existing and which followed.

It is submitted on behalf of the first named defendant that the letter of 12th October, 2001, cannot be regarded as an admission of liability in respect of the building contract. The first named defendant states that the letter when read as a whole clearly separates the issues of remediation from a building contract claim.

Admitting Without Prejudice Correspondence

24. The issue for the Court to determine is whether or not the "Without Prejudice" letter of 12th October, 2001, should be admitted in evidence. The issue of admitting "Without Prejudice" documentation was considered in *Greencore v John Murphy* [1995] 3 I.R. 520 where the plaintiffs in that case argued that certain documents exhibited in an Affidavit were "Without Prejudice". Keane J. stated at page 525:

> "A number of authorities were cited in the course of argument which make it clear that offers made in the course of negotiations for settlement are not normally admissible in evidence and that this is usually ensured by marking the relevant correspondence or documents "Without Prejudice". (It should, of course, be borne in mind that the application of the rule is not necessarily dependent on the use of the words "Without Prejudice"). It is also clear that the rule is founded on public policy, the Court taking the view that parties should be encouraged as far as possible to settle their disputes without recourse to litigation and should not be discouraged by the knowledge that anything that is said in the course of negotiations may be used in the course of proceedings. The relevant law is clearly and comprehensively stated in the speech of Lord Griffiths in *Rush and Tomkins Limited v Greater London Council* [1989] AC 1280. This last mentioned decision also makes it clear that such correspondence is also inadmissible in any subsequent litigation connected with the subject matter, whether between the same or different parties."

25. The issue was also considered by Barron J in *Quinlivan v Tuohy and Curtin* [Unreported, High Court, 29th July, 1992], where he distinguished the legal professional privilege attaching to medical reports from that attaching to "Without Prejudice" communications. He stated:

> "The privilege attaching to offers of compromise without prejudice arises under a different heading of public policy, which seeks to allow offers of compromise to be made without such offers having to be disclosed. Once the offer is accepted, the reason for non-disclosure ceases and the fact of the compromise is admissible in evidence."

26. The issue for the Court to determine in this application is whether or not the letter of 12th October, 2001, constitutes an offer by the first named defendant to be responsible for consequential losses derived from the building contract. It is submitted, based on the content of the letter, the chain of correspondence and the evidence of the first named defendant's solicitor, that the letter of 12th October, 2001, did not constitute an offer by the first named defendant to the plaintiff to be responsible for all consequential losses derived from the building contract. It simply concerned the remediation process that was then being dealt with.

27. The first named defendant submitted that there are recognised circumstances in which the rule protecting "Without Prejudice" correspondence can be departed from. In *Unilever Plc v Proctor and Gamble Company* [2000] 1 W.L.R. 2436 Walker L.J. noted the following well established exceptions to the rule:

> "1. [W]hen the issue is whether "Without Prejudice" communications have resulted in concluded compromise agreement, those communications are admissible;
>
> 2. Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence;
>
> 3. Even if there was no concluded compromise, a clear statement which is made by one party to negotiations on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel;
>
> 4. Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act a cloak for perjury, blackmail or other "unambiguous impropriety"…"

28. In *Muller & Muller v Linsley & Mortimer* [1996] P.N.L.R. 74 Hoffman L.J. dealt with the circumstances in which "Without Prejudice" correspondence may be admitted. He stated that the public policy rationale only protected admissions:

> "Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute."

29. The first named defendant submits that it cannot be contended that the letter of 12th October, 2001, and any subsequent reply from the plaintiff constitutes an "offer and acceptance forming a contract." It is submitted that the plaintiff did not believe this to be the case, particularly since the proceedings that it originally initiated did not contain any claim seeking specific performance of such an agreement. Rather, such relief was only sought during the course of the opening of this hearing before the President of the High Court in February, 2006.

30. In *Admiral Management Services Limited v Para-Protect Europe Limited* [2002] E.W.H.C. 233 (CH), Stanley Burton J. emphasised that where agreement was alleged to have been reached, 'Without Prejudice' communications were not admissible in order to evidence an admission made by a party in "Without Prejudice" communications, but in order to ascertain whether an agreement or what agreement has been made between them. He stated:

> "when it is alleged that a settlement has been concluded as a result of without prejudice communications, those communications are admissible as to the issue whether a settlement has in fact been concluded….Similarly, in the case of

> a settlement made in without prejudice correspondence, the correspondence, although privileged when sent and received, is admissible in the event of a dispute as to the terms and the meaning of the settlement, on the same basis that any correspondence in which a contract is made is admissible. In such cases, the correspondence is not adduced in order to evidence an admission made by a party in a without prejudice communication, but in order to ascertain whether an agreement or what agreement has been made between them. However, when an agreement has been reduced to a formal document, antecedent correspondence is in general only admissible if it is sought to rectify the agreement or if it is expressly or impliedly referred to in the agreement. A difference between an antecedent proposal and the final agreement may be due to a mutual failure to set out in the agreement the terms agreed between the parties, in which case rectification may be available."

31. The first named defendant submits that the handwritten notes forming the skeleton basis of a draft agreement prepared by the first named defendant's solicitor on 26 February, 2002, are evidence that no formal agreement existed as of that stage. The first named defendant also contends that the plaintiff's solicitor also accepted that this did not constitute a formal agreement.

Non Recoverability in Tort of Economic Loss

32. The first named defendant claims that even if the Court were to accept that the letter of 12th October, 2001, constituted an admission of liability in respect of the building contract, the Court could then not take the extra step of determining that, as a consequence, the first named defendant is liable for the plaintiff's consequential or economic loss. The first named defendant submits that many decisions of the Irish and English Courts have recognised that economic loss is generally not recoverable in tort. The leading Irish case on this matter is *Glencar v Mayo County Council* [2002] 1 I.R. 84 in which Keane C.J. at page 142 explained the reason why economic loss was generally not recoverable in actions in tort:

"There remains the question of economic loss. The reason why damages for such loss - as distinct from compensation for injury to persons or damage to property - are normally not recoverable in tort is best illustrated by an example. If A sells B an article which turns out to be defective, B can normally sue A for damages for breach of contract. However, if the article comes into the possession of C, with whom A has no contract, C cannot in general sue A for the defects in the chattel, unless he has suffered personal injury or damage to property within the *Donoghue v. Stevenson* [1932] A.C. 562 principle. That would be so even where the defect was latent and did not come to light until the article came into C's possession. To hold otherwise would be to expose the original seller to actions from an infinite range of persons with whom he never had any relationship in contract or its equivalent."

33. In conclusion, the first named defendant submits that the letter of 12th October, 2001, should not be admitted since it does not constitute an agreement as advanced by the plaintiff. Nowhere is there an offer and acceptance evidencing an agreement that the first named defendant shall be liable for the consequential losses arising from the building contract. At best, the first named defendant contends, the letter constitutes an agreement in respect of remediation and the first named defendant being liable for the cost of same.

34. The plaintiff claims that there are at least two exceptions to the principle that 'without prejudice correspondence' is inadmissible. The first is that where the exchanges between the parties have led to an agreement then the Court is, firstly, entitled to look at the correspondence to see if such an agreement has been arrived at, and secondly, if such an agreement has been arrived at that the without prejudice privilege no longer applies. In *Tomlin .v. Standard Telephone and Cables Limited* [1969] 3 All E.R 201, at page 203 of the judgment, Danckwarts L.J. quoted from the case of *Walker .v Wilsher* [1889] 23 Q.B.D.335.

> "What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one"

35. The plaintiff submits that *Tomlin .v. Standard Telephones* also is authority for the proposition that the Court is entitled to look at the letters to establish whether the correspondence disclosed a binding agreement.

36. The plaintiff claims that the second exception to the inadmissibility of 'without prejudice' correspondence arises where a clear statement is made in a letter and that statement is accepted and acted on by the other party. Authority for same is set out in *Hodgkinson and Corby Limited .v. Wards Mobility Services Ltd* [1997] F. S. R.178 where at head note 3 of the report it states as follows:

> "Where a clear and unambiguous statement has been made by one party in "without prejudice" correspondence, and that statement was reasonably acted on by the other party, an objection by the first party to the correspondence being put into evidence by the second party in order to justify the step taken by the second party would be plainly unconscionable and would not be upheld by the Court. The Court could look at the correspondence to see if the negotiations resulted in a settlement and equally it could look at it to see whether it had given rise to an estoppel"

37. The plaintiff claims that having received the letter of the 12th of October, 2001, it was accepted as a settlement of the proceedings. Three matters were addressed:

> 1. an acceptance of liability,
>
> 2. an acceptance to pay the costs incurred.
>
> 3. an acceptance to clean up the unfortunate event

38. As a result of the above the plaintiff claims it accepted the above admissions and took the following steps;

> (a) Agreed not to frustrate the contract at the urging of the first named Defendant.
>
> (b) Agreed with the contractor Rhattigan, to obtain repossession of the site for the purposes of remediating the site to the levels agreed.
>
> (c) Gave comfort to the first named Defendant in respect of the section 12 notice that the levels as agreed between the parties, if achieved would constitute compliance with the section 12 notice.
>
> (d) Granted a licence to the first named Defendant to go on the property for the purposes of carrying out the remediation

agreement.

39. It is further submitted by the plaintiff that each of the above steps as taken by the plaintiff in furtherance of the acceptance of the letter from the first named defendant is documented in the correspondence and the notes of and minutes of the meetings held between the respective parties. The plaintiff claims that the statement of acceptance in the letter of the 12th October, 2001, is clear and unambiguous. The plaintiffs state that it acted on foot of same and it would be unconscionable for the first named defendant to now seek to resile from the bargain by hiding behind the privilege of without prejudice, and they are estopped from doing so.

Ruling on 'Without Prejudice' Correspondence:
40. Following submissions of the parties and the consideration of same the Court on Friday the 30th June, 2006, ruled that on foot of correspondence passing between the parties in October, 2001 comprising a letter of the 12th October, 2001, from the first named defendant to the plaintiff and the reply of the plaintiff dated the 9th November, 2001, that an agreement between the parties existed to the effect that the first named defendant;

a) Admitted they had caused the contamination/pollution of the plaintiff's site, known as the Civil Office site in Trim.

b) Agreed they would remediate the said site to a standard agreed between the parties

c) Agreed they would pay the plaintiff all costs arising out of the damage caused including the extra building costs to be paid to the plaintiff's contractor (J. J. Rhattigan & Company)

41. The Court also ruled that as the claim was grounded in contract, and the plaintiff was seeking specific performance of the agreement which the Court has found to exist, contributory negligence does not arise. The plaintiff now seeks an Order of Specific Performance of the agreement and a Mandatory Injunction requiring the first named defendant to take immediate steps to remediate the site in accordance with the levels agreed between the parties.

42. In response to an application made by counsel for the plaintiff for an Order of *Mandamus* directing the first named defendant to remediate the site to the agreed remediation levels it was submitted on behalf of the first named defendant that the remediation target levels set in respect of the Civic Office Site ('the Levels') were impossible to achieve. The issue to be determined by the Court is whether on the balance of probabilities the levels as agreed to by the parties are in fact achievable in respect of the Civic Office Site in Trim.

Closing Submissions

Closing Submission of the Plaintiff
43. It is submitted by the plaintiff that having agreed to the levels and having entered an agreement of the 28th February, 2003, to remediate the Civic Office Site to those levels, the onus of proof is placed upon the first named defendant to establish that the achievement of the agreed levels is impossible.

The Levels:
44. It is accepted by the parties that the remediation target levels having been agreed between Meath County Council and Irish Shell were set out in a document entitled 'Agreement for Remediation Services' made between Irish Shell Limited and White Young Green (Ireland) Limited and dated the 28th February 2003.

45. Evidence Submitted by the Plaintiff to the Court in support of the Contention that the levels are achievable:

1. WYG (previously K.T. Cullen) generated soil and groundwater clean up levels in respect of the Civic Office Site using the RBCA Environmental Risk Assessment Model – an EPA approved model - as confirmed by Mr. Graham Webb, Consulting Engineer (employed by URS Ireland Limited and engaged by Irish Shell).

2. URS Ireland Limited a company offering environmental consultancy services across Ireland and their principal engineer, Mr. Graham Webb, an engineer with 16 years experience in environmental engineering in both Ireland and the UK who had designed soil and groundwater remedial programmes involving in situ and ex-situ bioremediation, in their report of August 2001 (page 3) confirm that:-

'URS accept that the clean up levels are achievable and will adopt the levels generated by K.T. Cullen'.

The report prepared by URS is unqualified in this regard and contains no suggestion that the levels are impossible, unachievable or will take years rather than months to achieve.

3. Mr. Philip Smart, Associate Director responsible for hydro-geology in Faber Maunsell Limited, who was commissioned by Meath County Council to provide an independent review of the ground and groundwater conditions in the area of and surrounding the site of the Civic Offices at Trim, gave evidence to the Court that in his opinion there was no reason why the remainder of the site could not be remediated to the agreed levels. He further suggested that the remediation could be carried out and completed within a period of 9 to 18 months and if the remediation had continued throughout 2004 and 2005 the Civic Office Site would have been remediated or be very close to remediation by this time.

4. Most of the Civic Office Site has already (since December, 2003) been remediated to levels consistent with the remediation criteria and in the remediated areas the petrol range hydro-carbon concentration is in fact lower than the remediation criteria. By way of illustration Mr. Smart confirmed that some of the Bore Holes originally providing measurements of the concentrations of petroleum range hydrocarbons at very elevated concentrations subsequently demonstrated concentrations at below detection level.

5. In a letter of the 19th January, 2006, to Meath County Council, the EPA confirmed that having been asked to consider and advise in relation to the agreed remediation targets it came to the following conclusion:-

'Having reviewed the reports in relation to both sites and following our discussions at the meeting here in December the Agency is of the view that there is no apparent reason to depart from the remediation targets set out in the

Agreement for Remediation Services document dated 28th February 2003 and agreed by the relevant parties'.

In arriving at its decision in this regard, the EPA had the benefit of considering all of the reports in the possession of Meath County Council relating to the Civic Office Site and had the opportunity of reconsidering the remediation target levels in circumstances where remediation works had already been carried out and still arrived at the conclusion that there were no 'apparent reasons to depart from the remediation targets set'.

In this regard, the EPA acted in the appropriate manner as described by Mr. Doak, (formerly of the EPA and now a Director of the Consultancy Firm RPS Group engaged by Irish Shell) who confirmed that the EPA when licensing sites do not set the target values before consultants go on site but rather 'during the process'.

46. In conclusion the plaintiff submits that the evidence before the Court is that Mr. Smart, an independent experienced hydro-geology expert, was satisfied that the levels agreed are achievable and achievable within a period of 9 to 18 months if a proper remediation process is put into place on the Civic Office Site. The plaintiff submits that the view expressed by the EPA is that there is no apparent reason why the levels originally agreed should be reduced and it is submitted by the plaintiff that Irish Shell have presented no reasonable objective evidence for the Court to disregard the opinion of the EPA in this regard. The plaintiffs also claim that it is also highly significant that while Irish Shell have suggested that the agreed target levels are unachievable none of their experts have suggested precisely what Benzene, Mineral Oil and PRO levels are appropriate in respect of the soil and groundwater on the Civic Office site or what time period would be required before such levels could be achieved.

Closing Submissions of the First Named Defendant:
47. The plaintiff seeks a Mandatory Order from the Court requiring the first named defendant to forthwith carry out remediation works to the Civic Office site at Trim in the County of Meath to specific levels within an unspecified time and that the first named defendant provide a certification of compliance with having achieved the said levels.

48. The defendant submits that such an Order should not be contemplated by this Honourable Court for many reasons including:

1. Damages are not only an adequate remedy but the only appropriate remedy.

2. The Order sought is not self executing and the making of the Order would require the Court to constantly supervise the execution of its own Order.

3. The plaintiff has the resources to carry out the remediation work itself and can recover the cost of remediation from the first named defendant.

4. The Order sought is an Order for the first named defendant to specifically perform a contract for personal services.

5. The Order sought is not and cannot be framed with any specificity as to time and method to be employed and is therefore vague and uncertain.

6. The Evidence adduced established that the levels sought cannot be achieved within a reasonable time or at all.

7. The Order sought is an Order on foot of the agreement which the Court has held was concluded on 12th October, 2001. This agreement was however negated by the subsequent agreement of February, 2002 whereby the first named defendant agreed to procure the carrying out of the remediation works by the Plaintiffs consultant White Young Green.

The Agreement:
49. The first named defendant states that as of 12 October, 2001, levels had been agreed between the plaintiff and defendants' respective experts but no agreement had been reached as to who would carry it out or what method would be employed to do so. The first named defendant states that it is important to emphasise, however, that this agreement changed in February, 2002. As was stated by the defendants' solicitor in his evidence, the technical advisors to both the plaintiff and defendant had agreed remediation levels up to the early part of October, 2001. Subsequently, however, the defendants' consultants, URS, having engaged in further exploration, determined that the levels that were being sought to be achieved were not achievable through their process. It was in that context that the discussion took place at the meeting on 4th February, 2002 – namely that there were two competing remediation strategies in play and two competing levels by which the remediation was to be achieved. It was at the meeting of 4th February, 2002, that the plaintiff's technical advisors, White Young Green, stated that they could achieve the levels which URS had indicated could not be achieved. In order to accommodate this development, it was subsequently agreed at meetings of 14th and 20th February, 2002, that the defendants would enter into a separate agreement to procure White Young Green to seek to achieve the levels which URS had indicated could not be achieved.

50. It was against this background that the agreement between the defendant and White Young Green subsequently was entered into on 28th February, 2003. White Young Green failed to achieve these levels either within the time agreed or an extended time. This failure on the part of White Young Green is the subject of separate proceedings.

The Evidence of the Experts for the First Named Defendant in relation to Remediation Levels
51. Mr. Gerry Beckett gave evidence in relation to the remediation levels. He has extensive experience and expertise in technical hydro geological matters pertaining to the management of chemicals released to the subsurface, particularly petroleum products in fractured limestone bedrock. His evidence was that he was involved in hundreds of clean up designs for petroleum from filling stations to large refineries. Mr. Beckett's evidence was that it was "highly improbable" that the site could be remediated to the White Young Green levels in 9-18 months. In fact, he believed that "we are talking decades" for those levels to be achieved.

52. Mr. Graham Webb also gave evidence on behalf of the defendant. He was also of the opinion that it would take "tens of years" in order for the White Young Green levels to be achieved. He did not believe that there was any possibility that the site could be remediated within a 15-18 month period to the White Young Green levels.

The Proposal of White Young Green to Remediate
53. The clean-up levels proposed by White Young Green in 2001 were developed using a numerical risk assessment model, and were based on the conservative assumption that groundwater immediately adjacent to the Civic Offices site was required to meet drinking water standards for petroleum hydrocarbons. It is submitted by the first named defendant that the requirement to meet drinking

water standards is not appropriate nor required to protect the health of the current users of the site, the construction workers involved in the construction of the Civic Offices, the future occupants or users of the Civic Offices and the users of any adjacent lands.

54. This was supported by the evidence of Mr. Smart who agreed that the land was not useless, and that one could safely build on this site at levels way above the White Young Green levels. The first named defendant further submits that all that is required is that the level of contamination does not expose the people working in the civic offices to any danger. In this regard, it is submitted by the defendant, that it is significant that all experts agreed that one can build on the site on the basis of URS March, 2006 proposal offered to the plaintiff by the defendant but rejected by the plaintiff. Mr Smart confirmed that there is no requirement for the levels, from a safety point of view, to be at anything like that sought after White Young Green levels; that the risk assessment in 2006 showed the levels as satisfactory; and that you could tolerate levels hundreds if not thousands higher and never in a million years would there be a health risk.

55. The first named defendant's March, 2006 proposal was to remediate the site to clean-up levels that are also risk-based. The key difference between the White Young Green approach and the first named defendant's proposal is the requirement for potable water. The first named defendant submits that this proposal is considered the appropriate solution since it is in keeping with the Irish EPA's and the European Environment Agency's (EEA) philosophy of risk-based land management, would be far less disruptive to the local community, and would facilitate the development of the Civic Offices site within 6 – 9 months from agreement to this proposal.

56. The defendant claim that what has become apparent as a result of the various attempts by White Young Green to effect the remediation is that the levels which White Young Green said could be achieved cannot be achieved. White Young Green were contracted to carry out remediation over a specific period of time, six months, with a set number of treatments, the contract was then extended for a further nine months and additional treatments. The number of treatments was increased to seek to achieve the sought after levels, all without success. The first named defendant terminated the agreement with White Young Green in September/October 2004. Thereafter, the first named defendant sought an agreement from the plaintiff to remediate the site to the levels proposed by URS. This, however, was declined by the plaintiff who insisted upon the attainment of the White Young Green levels which, it is submitted, cannot be achieved. The first named defendant submits that there is no reason to believe that these levels can now be achieved when this previously was not attainable.

57. The most recent proposal in respect of this issue was outlined by solicitors for the defendant in a letter to the plaintiff's Solicitors on 8th March, 2006, which set out, as submitted by the first named defendant, a clear and logical solution to a remediation process that effectively cannot be achieved to the levels outlined by White Young Green. The plaintiff has asserted that these levels are not acceptable. The defendants submit that the levels proposed in this letter sets out what is best practice at present and is more than adequate for the purpose of re-mediating the said site and recommencing the building of the Civic Offices within the shortest time and consistent with the obligation to mitigate their damages.

58. It is submitted by the first named defendant that no court should make an order for specific performance of a contract for personal services and certainly should not contemplate an order which would require the first named defendant to engage White Young Green with whom they are in litigation over the very issue of failure to remediate to the required levels. The first named defendant submits that it is a clear rule of equity that the Court will not make a decree to compel a party to do that which he cannot. The first named defendant relies on the dicta of *Brewster L.C. in Sheppard v Murphy* [1868] I.R. 2 E.Q. 544 where he stated:

> "A Court of Equity cannot compel him to do that which is impossible".

59. This point was re-emphasised by Murphy J. in *Neville & Sons Ltd v Guardian Builders Ltd* [1990] I.L.R.M. 601 where he stated that:

> "If a contract is discharged by impossibility then clearly no court could compel its performance".

60. In the proceedings herein, it is submitted by the first named defendant that the remediation sought by the Plaintiff cannot be achieved. The first named defendants have sought to procure the levels proposed without success. It believes these levels are impossible to achieve. The first named defendant states that should this Court direct that remediation to the standard sought by the Plaintiff be permitted, the first named defendant states that it would mean that the first named defendant would be placed in the impossible position of having to procure an unspecified third party to carry out the remediation within an unspecified period of time. In effect, the first named defendant claims that such an Order of the Court would be in vain and since equity will not act in vain it is submitted that no such Order should be made.

61. The first named defendant submits that the order is in effect a mandatory injunction, in circumstances where the impossibility of the action proposed means the balance of convenience should lie with an award of damages and the plaintiff having responsibility for remediation works where there is dispute over what is achievable. The plaintiff requires the remediation and says that it is achievable. The plaintiff, as submitted by the first named defendant, is therefore free to contract an agency to undertake the work and damages are an adequate remedy. In conclusion the first named defendant submits that for the several reasons cited above no mandatory order for specific performance should be made in this case and the plaintiff should be left to its remedy in damages.

62. I am satisfied on the balance of probabilities that the defendants have not made out their case, that remediation are not achievable. Having regard to the foregoing, I am satisfied on the balance of probabilities that the plaintiff at all material times co-operated fully and relied upon the defendants' advice and expertise.

63. Secondly, the remediation agreement was entered into by the defendant after diligent negotiations between them and the plaintiff.

64. In all of the circumstances I am satisfied that I should accept the plaintiff's claim herein. In the result I will direct specific performance of the remediation agreement dated 28th February, 2003 together with a mandatory injunction requiring the first named defendants to take immediate steps to remediate the site in accordance with the levels agreed between the parties.