THE HIGH COURT

[2015 No. 5676 P]

BETWEEN

FASTWELL LIMITED

PLAINTIFF

AND

OCL CAPITAL PLC

DEFENDANT

JUDGMENT (No. 2 in these proceedings) of Mr. Justice Tony O'Connor delivered on the 2nd day of February, 2018

Introduction

1. This judgment, which is quite fact specific, leads to a determination about whether the plaintiff can rely on an agreement for lease dated 14th April, 2014, for two kiosks at Grand Canal Harbour, Dublin ("**AFL**"). This Court has delivered pre-trial rulings and a judgment [2017] IEHC 144 following the application to amend the statement of claim which caused the trial to be adjourned in July 2016. The trial ultimately resumed in December 2017 following necessary case management.

2. The principal areas of dispute as to fact concerned:

(i) the extent of the demise covered by the lease mentioned in the AFL;

(ii) the effect of the failure to obtain planning permission limited to and covering the entirety of the development within the demise on the provision for terminating the AFL; and

(iii) the consequences of subsequent support for the development of the demised premises relating to the landlord's purported termination of the AFL.

3. The evidence in controversy concerned the history of dealings between the parties from the date of a letter dated 16th January, 2014, setting out an offer from the principal behind the plaintiff to lease, to the date of the AFL in April 2014 and then from a letter dated the 10th June, 2015, requesting a schedule of the works from solicitors for the defendant landlord, to 6th July, 2015, when the defendant itself served notice terminating the AFL.

4. The prayer in the final amended statement of claim delivered in 2017 ("**ASC**") was confined to:-

(i) a declaration that the AFL is valid and effective and has not been terminated;

(ii) an order compelling the defendant to withdraw its notice of termination dated 6th July, 2015, ("**NOT**") in respect of the AFL and to facilitate the completion by the plaintiff of the two kiosks;

(iii) "*if necessary an order rectifying the AFL to provide that planning permission for the purposes of clause 11, includes permission for a development in accordance with the Plans*" [this is related to the plaintiff's claim that the demise extended to a part of the basement which is the subject of a planning permission]; and

(iv) damages for breach of contract.

5. The defence to the substantive elements in the ASC as narrowed in the final days of trial in December 2017, focused on:-

(i) the alleged entitlement of either party under clause 11 of the AFL to terminate due to the absence of a notification of grant of planning permission ("**NGP**") by 14th October, 2014, ("**the long stop date**") for kiosk 1 to be used "as *a refreshment and Drinks kiosk including wine*" and kiosk 2 to be used "*for the sale of flowers, gifts and other confectionaries";*

(ii) the alleged waiver by the defendant in a letter dated 10th June, 2015, and subsequent discussions of its entitlement to terminate; and

(iii) the submission for the plaintiff that there was a continuing common intention that the plaintiff was to get an unused part of the basement beneath the ground level kiosks incorporated into the area to be demised.

Background to AFL

6. Mr. Ray Peers (managing director at Q-Park Ireland which had a short-term lease to operate the car park in the basement of Grand Canal Dock) acknowledged that he was neither an agent nor an authorised official for either of the parties to negotiate or conclude an agreement for the kiosks which are above the car park. He outlined for the Court the benefits of engaging with Harry Crosbie ("*HC*"), the principal behind the plaintiff as the latter had worked on creating the Grand Canal Harbour development.

7. Following the introduction of Mr. Peers to Mr. Michael Maye, an investor whose company managed assets for the defendant, the defendant acquired the car park as the investment manager for a qualified investment fund ("**QIF**"). A copy of the transfer from the Dublin Docklands Development Authority ("**DDDA**") to Michael Maye Limited dated 13th January, 2014, was furnished to this Court. There was no debate at trial about the status of the defendant to grant the lease provided for by the AFL even though the defendant had transferred its interests in the car park to a third party by December 2017.

The dispute concerning the basement

8. The evidence of Mr. Peers, Mr. Maye and Mr. Paul Pugh (who worked with Mr. Maye and who explained that he attended Court on foot of a subpoena) did not diverge. The Court appreciates that these three gentlemen were positive and worked towards an agreement with HC. However, they were not authorised to agree the detail about the use of the basement as contended by HC. They

did not purport to have agreed the details which HC, without notice to the plaintiff's own legal team, gave evidence about on Thursday, 30th June, 2016. This surprise delayed the conclusion of the trial of these proceedings so that the plaintiff could add in a claim for rectification of the area to be demised in order to incorporate an area of the basement mentioned by HC in cross-examination.

Michael Neary Solicitor
9. Although HC testified that the AFL and draft lease exchanged between the solicitors for the parties ought to have included some part of the basement, there is no mention of the basement in the AFL or lease which was returned by the plaintiff's own solicitor. Mr. Michael Neary, then a senior associate solicitor in the firm acting for the defendant, noted in his evidence on 14th December, 2017, that the cover page of the draft lease for the AFL had been marked by the plaintiff's solicitor to delete the words "[*basement car park*]" prior to the execution of the AFL by Mr. Pugh as instructed by Mr. Panos Nikopolitidis of the defendant.

10. Mr. Neary was clear and fair in his understanding of HC's position. While Mr. Pugh was unsure about whether a map was attached to the documents which he signed for the defendant, the evidence of Mr. Neary satisfied the Court that the ground floor plan with the triangular areas for the two kiosks incorporating stairwells marked Map 1B was the plan identified in Part 2 ("**the demised premises**") in the AFL. The execution of the AFL was somewhat rushed at the prompting of HC for commercial and planning reasons. That, however, did not deflect Mr. Neary from fulfilling his duty to the defendant, which was his client. He was requested by HC to visit the area for the two kiosks so that he could finalise the AFL and draft sublease. He walked around with HC for about twenty minutes when HC pointed out where a toilet and kitchen would be situated in the kiosk stairwell.

11. Mr. Neary was pressed in cross-examination about a letter from HC to Mr. Maye dated 16th January, 2014, and its consistency with HC's belief that everyone was agreed that the AFL incorporated some basement area. Mr. Neary explained that his instructions and understanding related to the cages for the kiosk and not to the basement.

12. The suggestion on behalf of the plaintiff that the defendant was bound by Mr. Neary's purported knowledge of the plans for the basement by reason of a short cover email dated 30th April, 2014, from Ms. Nikki O'Donnell, an architect engaged for the plaintiff, to Mr. Neary was unwarranted. The plaintiff, in relying on this email, conveniently ignored that the email post-dated the AFL and sought to cast a burden on a solicitor for the other side which had no basis. The email had a large file attachment with plans which had been submitted to the DDDA. I find it extraordinary in the circumstances that the plaintiff's team expected Mr. Neary to interpret that email as amending his instructions about the extent of the demise. The email did not ask Mr. Neary to note anything in particular and Ms. O'Donnell in her evidence did not state or infer that Mr. Neary failed in his duty in any respect.

Attention to detail of HC
13. On the 30th June, 2016, HC answered a question during cross-examination along the lines that it was Mr. Maye who called to his door and told him that he (Mr. Maye) was representing "*a large English capital fund*" in seeking to purchase the car park. That account differed slightly with that given by Mr. Maye and Mr. Peers which is not particularly significant. However, in addressing me on the 14th December, 2017, HC took the opportunity in answering a question from Counsel for the defendant, to mention that the root cause for the confusion leading to this litigation arose from his lack of knowledge that "*there was a British Vulture Fund*" behind Mr. Maye. This Court formed the impression that HC has and gave a global picture rather than being attentive to pertinent details. Therefore, where there is a dispute between accounts of witnesses, I rely on such an impression along with my wider perception of the witnesses and their evidence.

14. In addition, the Plaintiff's witnesses were unable to clarify satisfactorily why Q-Park had been identified as the owner of the car park enclosures for the DDDA when lodging the Section 25 application for permission to develop the kiosks. Further, the curious copying of the alleged execution page of the lease to the DDDA did not instil confidence that the full unvarnished account of that which had transpired was given at trial.

15. Having said that, I do not find as put to HC by Counsel for the defendant on instructions during the final cross-examination in December 2017, that the plaintiff has been "*squarely dishonest*" which HC strenuously denied. The defendant in making such an allegation in this type of case bears an onus of proving same on the balance of probabilities which the defendant has not discharged. Moreover, dishonesty was not pleaded and HC's umbrage on the part of the plaintiff to that question had some justification and particularly when it had not been alleged in such specific terms during the trial in 2016.

Separate claim
16. In assessing the overall situation, I have had little regard to the storage area in the basement which was the "*Disputed Area*" in proceedings commenced on the 9th September, 2015, by the defendant against the plaintiff claiming alleged trespass. That disputed area was not described and the Court was informed that that particular row had been compromised in December 2017 or around that time. This indicated that there was some separate arrangement about that area in the basement.

Conclusion on the evidence
17. I prefer the evidence of Mr. Neary to that given by HC where it differed. Mr. Neary was consistent and thorough while HC tended to show a lack of attention to detail along with being an inconsistent historian about some facts. I listened to the evidence carefully and have had the benefit of transcripts for all the days of hearings. In those circumstances, I conclude that the basement was not agreed to be part of the demised premises in the AFL which is consistent with the written terms. The plaintiff and HC may have had designs for the basement as can be inferred from the application to Dublin City Council ("**DCC**") which is discussed later.

18. It is unfortunate that HC and the plaintiff persisted in the claim that the AFL included an agreement relating to the basement, not least because the trial of these proceedings could have been concluded in the days allotted by this Court for the trial at the end of June and beginning of July 2016.

Principles on interpretation of contract
19. The relevant principles on the interpretation of a contract were, as submitted by Counsel, those described by Fennelly J. in *ICDL v European Computer Driving Licence Foundation Ltd* [2012] 3 I.R. 327 at paras. [65] - [75]. I specifically have regard to the statement that there must be precise observance of any conditions or procedures governing termination of the agreement.

Law Relating to Rectification
20. The submissions on the law relating to the claim for rectification have become redundant and the Court merely identifies that the law relating to unilateral mistake was recently summarised by Ryan P. in *Slattery v. Friends First* [2015] 3 I.R. 292 at paras. [34] – [39]. In the context of this claim I quote from para. [37] in particular:-

> "*The first principle is that it is difficult for a party to a written contract to escape the effects of its provisions by reason*

of mistake. When he has had the benefit of legal advice and versions of the deed have gone back and forth in the course of drafting, the undertaking is even more onerous for a party seeking to establish entitlement to rectification. There is, however, an equitable jurisdiction in exceptional cases for a court to order that the written formal document be rectified by removing, inserting or altering the provisions so as to reflect what the parties truly intended, understood and agreed."

21. The defendant did not agree a plan or map referring to the basement in the context of the AFL. In *Slattery*, there had been sharp practice by the non-mistaken party. The plaintiff in the present case does not allege sharp practice but alleges a common continuing intention which was not reflected in the AFL. The plaintiff has not established such a common intention at the time of the AFL. At its height, HC for the plaintiff may have alluded to the basement when speaking with advisers but there was not a continuing common intention on the part of the defendant at the time of executing the AFL that it would lease part of the basement to the plaintiff for developing the two kiosks.

22. I am satisfied that the defendant did not agree to include any part of the basement in the AFL. Moreover, the plaintiff did not produce any plan or map which was available at the time of the AFL and was agreed to identify the basement area to be demised.

Interpretation issue
23. A further issue posed for the Court ("**the interpretation issue**") was whether the certificate dated 23rd September, 2014, ("**the first certificate**") from the DDDA granting permission for a change of use for one of the kiosks is a valid permission within the meaning of clause 11 of the AFL so as to trigger the entitlement of the plaintiff to a grant of the lease.

24. The plaintiff's approach to the interpretation of clause 11 was to proceed on the basis that the AFL is ambiguous so as to give rise to the need to have regard to external matters and construe the relevant terms in some way other than would arise from their plain meaning. It was submitted that the question of what constitutes a valid planning permission for the purposes of the AFL can only be determined by an interpretation of the AFL against its "*background matrix of facts*" known or which ought to have been known to both parties.

25. It was contended on behalf of the defendant that the terms of the relevant provisions precluded or did not require a consideration of the background matrix. The following particular clauses were highlighted:-

(a) Clause 1.1 under the heading "*definitions and interpretation*" for the AFL had:-

> "***Planning Permission**" is defined as "a notification of grant of planning permission for a change of use in respect of the **Premises** for the **Permitted Use**."*
>
> "***Premises**" is defined as meaning "…the **Demised Premises** as defined in the lease."*
>
> "***Permitted Use**" is defined as meaning "the permitted use as defined in the lease".*

(b) Clause 1.1 of the draft lease to which the AFL referred ("**the lease**") provided the following definitions:-

> "***Permitted Use**" as meaning "the use of the Demised Premises as …*
> *(i) to the area marked red for use as a refreshment and drinks kiosk including wine; and*
>
> *(ii) as to the area coloured green for the use as a kiosk for the sale of flowers, gifts and other confectionaries".*
>
> "**Demised Premises**" was defined as meaning the land and premises described in Part 2 of Schedule 1 to the lease, which schedule referred to "*…the hereditaments and premises known as the kiosks at Grand Canal car park being all of the property outlined in red and green on the plans annexed."*

(c) Clause 11 of the AFL provided as followed:-

> *"In the event that a Planning Permission has not issued by the Long Stop Date, then either the Landlord or the Tenant may terminate this Agreement by service of five (5) Business Days with notice to this effect on the other whereupon this Agreement shall become null and void and cease to be binding on the parties hereto but without liability on the part of the Landlord to the Tenant or the Tenant to the Landlord respectively."*

(d) For completeness, the "*Long Stop Date*" was defined at clause 1.1 of the AFL as meaning "*six months from the date of this Agreement*".

26. The first certificate did not grant the plaintiff permission for the change of use required for kiosk 1. The written submissions for the plaintiff recited that:-

> *"Insofar as the first planning permission granted permission for the change of use of one of these kiosks to the use permitted for it under the Lease without permitting the change of use of the other kiosk to any use not permitted under the Lease, it was a planning permission for the Permitted Use within the meaning of this term and it is used in clause 11 of the Lease."*

27. The defendant in reply contended that the plaintiff could not sever the use of one kiosk from the other and that the plaintiff did not notify the defendant of the grant of the certificate in the first place.

28. Given the evidence of HC and others relating to the viability of the project to use the kiosks, it was readily apparent that the plaintiff had no interest in triggering the obligation of the defendant to grant a lease if only one of the kiosks could be operated. This fact is corroborated by the failure of the plaintiff to notify the defendant about the first certificate when it issued. Ms. O'Donnell confirmed that there was an estimated cost of €750,000 for recladding the two units. It was said that it did not make sense to develop the two units if only one was to function.

NGP from DCC

29. Ultimately, DCC decided by order dated 27th April, 2015, (a date after the Long Stop Date) to grant permission to change the two metal structures which accommodated pedestrian access to the basement car park to two kiosks in the form of metal mesh panels with glazing panels. The NGP referred to a 77sq m coffee/refreshment kiosk with a new sales hatch and a second unit of 67sq m to accommodate a flower shop with a new entrance. The conditions provided that it was not to be construed as approving any development which was not part of the plans published for the purposes of obtaining the planning permission from DCC. The covering letter with the application had included reference to storage accommodation in the basement for both kiosks.

Discovery of NGP and support in June 2015
30. Mr. John Pryor was a senior project manager in a firm which provided property advisory services to the defendant in 2015. After he learnt that the plaintiff wanted to start work by dismantling the cages at the location for the new kiosks in June 2015, he contacted Mr. John Lupton of the defendant who confirmed that the website of DCC had details of the NGP. In short, this prompted a letter from the defendant's solicitor to the plaintiff's solicitor dated 10th June, 2015, which attached a copy of the notification of final decision dated the 5th May, 2015. This letter, which did not reserve the right to terminate or insert an alternative to clause 11 as a condition of continuing with the proposal in respect of the kiosks, went on to state:-

> *"Our client now wishes to grant the lease but before doing so requires the information set out in the schedule annexed to be delivered within the next 10 days."*

31. There was a flurry of activity on the part of HC, Ms. O'Donnell, Mr. Pryor and others to progress the development which had the support of the defendant as noted by Mr. Neary in his email to the plaintiff's solicitor of 18th June, 2015 at 23.41. Mr. Pryor struck me as independent or colloquially having "*no skin in the game*". He was clear that the AFL did not include the basement and that he, as an adviser to the defendant, had not received sufficient information to advise that the plans now relied upon by HC should be put into effect. Despite a rigorous cross-examination, Mr. Pryor maintained his position that HC, if allowed to proceed according to the latter's request, would have disrupted the basement which was not in the interest of the defendant. More significantly, he was concerned that the proposal to work on both kiosks at the same time would deny or hinder pedestrian access to the car park.

32. Mr. Matthew Gill is a chartered civil engineer who worked with Tobin Consulting Engineers in 2015 when it advised the defendant on the kiosk project. He explained to the Court that the existing car parking arrangement in the basement would have had to be reconfigured without necessarily reducing the number of spaces to facilitate the plaintiff's then plan to complete the development of the kiosks.

33. In summary, HC had a vision for the kiosks and knew the area well. He treated the area where the kiosks were to be situated and its surrounds as an area which he should be allowed to develop as long as he, rather than the defendant and its advisers, decided that it did not affect the defendant. The Court noted HC's apparent frustration and his allegation of "*racist remarks*" towards him made at a meeting on the 29th June, 2015, which were denied and not supported by other evidence. In fact, the plaintiff through HC took a subjugating type position while the defendant did not have any authorised person in Dublin to make decisions to implement HC's vision for the kiosks and the area below the kiosks in the period from 10th June, 2015, until 6th July, 2015.

"NOT" and these proceedings
34. On the 6th July, 2015, the defendant, as opposed to its solicitors, wrote in the following terms to the plaintiff in relation to the AFL as follows:-

> *"Planning permission was not obtained within the six month period referred to in clause 11 of the Agreement. Please accept this letter as notice terminating the Agreement in accordance with clause 11. The Agreement shall terminate on 13th July, 2015, being five Business Days from the date hereof."*

35. Solicitors for the plaintiff by letter dated 8th July, 2015, wrote to Mr. Neary:-

> *"Your client in serving the said Notice has acted in bad faith and we note such behaviour to be vexatious and unacceptable. […] We might also add that, even if permitted on the face of Clause 11, the many representations of intention to proceed, made by your client following the expiry of the six month period, on which our client has extensively and detrimentally relied, would have been such as to estop it from repudiating under this clause. The fact of the planning permission having issued however, makes your client's actions unlawful irrespective of any such estoppel."*

36. Solicitors for the defendant replied to deny the bad faith allegation and to assert that the NOT was valid and would not be withdrawn. In a later letter dated the 14th July, 2015, it was denied that the right to terminate had been waived and these proceedings were issued on that day also.

37. Following applications and exchanges the defendant undertook, pending the determination of these proceedings, not to develop the kiosks.

Superseding agreement?
38. The intricate arguments for both sides on the interpretation issue ranging from the meaning of definitions in the AFL and accompanying lease to the effects of silence on the part of the plaintiff about what was happening and the literal interpretation of the AFL were in this Court's view superseded by the willingness of the defendant and its advisers to accommodate the required works for the kiosks in June 2015. The fact that neither of the parties took issue with the authority of advisers to bind the parties until the hiatus caused by the NOT on 6th July, 2015, informs the Court that the parties had a degree of understanding amounting to an agreement based on the AFL with the draft lease which had been agreed by the solicitors for both parties. In short, positions had changed and there was a consensus that the developments of the kiosks should proceed. The NOT on 6th July, 2015, ignored what had transpired since the discovery by the defendant in June 2015 of DCC's grant of permission.

39. The kiosk developments meant a lot to the plaintiff and HC while they were just an enhancing feature for the defendant's interest in the car park at Grand Canal Square. The Court was informed when this matter resumed in December 2017, that the defendant had recently transferred its interest in the car park to a third party.

40. Neither side to this litigation did themselves favours by their conduct or lack of attention to detail in relation to the operation of the AFL as time elapsed and particularly after 10th June, 2015. The Court is satisfied particularly that the plaintiff should have worked on satisfying the requirements set out in the letter of the 10th June, 2015, without insisting on enlarging the demise to the basement. The term "*hedging bets*" might describe the approach taken on behalf of the plaintiff. Assuming that an adviser or a solicitor for your landlord or supplier will divine your vision or reasons for "*hedging bets*" in a commercial transaction has no legal basis. HC and his family members who were directors of the plaintiff are familiar with significant property developments and the roles and duties of

advisers and solicitors acting on the other side to commercial agreements.

41. I have already determined what Mr. Neary, then solicitor for the defendant, understood to be the situation and what was intended to be the subject of the demise to the plaintiff. It is quite remarkable that on the last day of oral submissions at the trial of these proceedings, Counsel for the plaintiff informed the Court, in answer to the Court's question, that the plaintiff had no idea until Mr. Pryor and Mr. Neary had given evidence on 13th and 14th December, 2017, that the defendant conceded that the demise included the stairwell immediately beneath the surface area for kiosk 1. This tends to show a significant lack of engagement since July 2015 to iron out and fulfil the requirements of the defendant's engineers and the plan of action agreed as mentioned in the email from the plaintiff's solicitor dated 29th June, 2015. A breakdown of trust between the defendant and HC acting for the plaintiff had occurred.

Resurrection of right to terminate

42. As for the refrain on behalf of the defendant that the NGP from DCC was issued after the Long Stop Date and that it related to the basement as well as the kiosks and stairwells, it is a fact that until the NOT on the 6th July, 2015, the defendant had led the plaintiff to believe that it did not intend to terminate the AFL using those points. The grant of permission did not stipulate that the work in the basement had to be done in order for the kiosks to be completed. Rather, the plan submitted to DCC referred to work in the basement. This is somewhat analogous to a permission for three houses. The purchaser of one house which is built has a valid permission for that house even if the third house has not been built by the developer unless the planning authority makes it a condition that all houses should be finished before sales or occupation occur. Although there were suggestions that the basement may be required to reroute drainage and redesigned ventilation (mechanical and engineering features), neither Ms. O'Donnell nor any other witness with professional experience stated that the project involving the kiosks and stairwell without the basement will contravene the NGP.

43. It was submitted on behalf of the defendant that "*it is clear that there is explicit conditionality placed on the invitation to proceed*" in the letter of 10th June, 2015, and that those conditions were never met. Further, it was contended that the email from the plaintiff's solicitor dated 29th June, 2015, referred to a plan of action which had been agreed with "*our client's design team regarding the preparation of a pack so the below request* [the list of outstanding items from Mr. Neary in his email earlier that day] *may have been superseded by events*".

44. There was indeed a requirement for the plaintiff with its professional advisers to carry out an action plan in respect of which they had the obligation to propose for the approval of the defendant and its advisers within the footprint of the demise. The remedy for the defendant where the plaintiff fails in or rejects that obligation may be termination of the revised agreement based on the AFL with reasonable notice. The Court did not hear submissions in that regard but it is a fact that the defendant chose to resurrect the right to terminate which it had never exercised or communicated its intention to reserve when supporting the plaintiff to carry out the kiosk project after 10th June, 2015. The plaintiff acted on the unqualified support given, albeit in a manner which stretched the limits of the demise without the legal right to do so. The NOT did not mention the real reason for the defendant to terminate. The true cause was the breakdown of trust between HC and the defendant. The Court recognizes the dilemma which faced the defendant but in line with the statement by Fennelly J. in *ICDL v European Computer Driving Licence Foundation Ltd* [2012] 3 I.R. 327 at para. [75], "*precise observance of any conditions or procedures governing termination*" is required. It may be open for the defendant to give notice of termination for failure to comply with the plan of action mentioned by the plaintiff's solicitor in his email of the 29th June, 2015, at 15:15 which followed his attendance at "*the design team meeting*" that morning and the subsequent relevant exchanges. The defendant's solicitor did not give evidence. While the Court is loath to invite another spat, I am not in a position to determine this final issue about notice without hearing the parties further.

45. A cost benefit analysis of the stances taken by each of the parties may reveal a significant disproportion between the ultimate costs of development and the cost of this litigation. I say this based on the estimates of costs which were submitted for the application seeking security for costs.

Reliefs

46. In those circumstances the Court proposes after hearing Counsel further to make orders which relate to the reliefs set out in the prayer to the ASC delivered on the 7th March, 2017, along the following lines:-

> (i) A declaration that the agreement between the parties which incorporates the terms of the AFL save for clause 11 thereof, has not been terminated;
>
> (ii) An order which will enable the plaintiff to commence work within and by such time (for which I will hear submissions from Counsel) on the kiosks and stairwell in compliance with the permission granted by DCC for the work on the kiosk and stairwell only;
>
> (iii) An order dismissing the plaintiff's claim for rectification.
>
> (iv) An order dismissing the claim for damages for breach of contract.

47. The claim for damages was not actively pursued and evaporated due to the absence of substantive evidence that the plaintiff itself has a liability or entitlement to sums which were mentioned at the trial in 2016. In addition, the plaintiff failed to mitigate any loss which it could have advanced. Lest there be any doubt, the Court was not satisfied that the plaintiff suffered loss or damage due to the purported NOT.

Post-delivery of judgement note: Counsel for the parties will address the Court on the outstanding issues including the terms of the final order of the Court arising from this judgement on the 2nd March 2018.