Neutral Citation Number: [2008] IEHC 447

THE HIGH COURT

2007 4902 P

BETWEEN

AN CUMANN PEILE BOITHEIMEACH TEORANTA
(THE BOHEMIAN FOOTBALL CLUB LIMITED)

PLAINTIFF

AND
ALBION PROPERTIES LIMITED
ALBION ENTERPRISES LIMTIED
AND
PASCAL CONROY

DEFENDANTS

Judgment of Mr. Justice John Edwards delivered on the 7th day of November, 2008.

Introduction

1. These proceedings concern certain lands and premises in a suburb of Dublin which is known formally as Phibsborough, although this name is sometimes informally abbreviated to Phibsboro. Both names are to be found in documents that have been produced in evidence in this case, and both names are used in this judgment. They are used interchangeably and nothing turns on whether the formal or informal name is used in any particular instance.

2. The plaintiff is a company limited by guarantee. The main object of that company, as expressed in its memorandum of association, is to promote the game of association football, through a football club known as "The Bohemian Football Club" in the premises known as Dalymount Park, Phibsborough, Dublin and other premises which may be acquired for that purpose. The premises known as Dalymount Park constitutes a substantial football stadium in the heart of Dublin 7 and it is, and has for generations been, the home ground of the Bohemian Football Club. Dalymount Park is in the ownership of the plaintiff company as are certain surrounding lands.

3. Dalymount Park is adjoined along its eastern boundary by a shopping centre, owned and operated by the first named defendant, and known as the Phibsboro Shopping Centre. The second named defendant is a property development company. The third named defendant is a business man and property developer and he is, and was at all material times, the principal beneficial owner of the first and second named defendants.

4. The proceedings herein arise out of a course of dealings between the plaintiff and the defendants or some combination of them. Because of a degree of uncertainty on the part of the plaintiff concerning the exact legal person with whom it was dealing the plaintiff has, on an *ex-abundante cautela* basis, sued all three defendants herein. Nothing substantive turns on this. Although it is pleaded that the first and third named defendants are incorrectly sued the point was not pressed before me. All of the defendants have been represented by the same legal team and a unitary case has been put forward on their behalf. In the circumstances I propose to defer making any ruling on the pleading point until after I have delivered my judgment. However, for convenience I propose hereinafter to refer to the plaintiff company simply as "Bohemians" and to the defendants collectively simply as "Albion".

5. The course of dealings in question took place between 2001 and 2006 respectively and concerned the potential sale of part of Dalymount Park to Albion. Bohemians contend that the dealings between the parties never moved beyond pre-contractual negotiations and there was no concluded agreement between the parties. They contend that by October, 2006 such negotiations as existed between the parties had broken down and proceeded no further.

6. It is a matter of some significance that subsequent to this Bohemians entered into an agreement with a third party, namely Daninger Limited, for the sale of the entirety of Dalymount Park to that company for a consideration of €35 million in cash plus the provision of a new stadium (in an alternative location on the north side of Dublin), the entire package representing a total consideration in the order of €67.5 million.

7. Conversely, Albion contends that an agreement was concluded between the parties as early as February of 2003 and that a number of further agreements varying that first agreement were subsequently concluded.

8. Arising out of all of this, Albion issued High Court proceedings against Bohemians seeking specific performance of the said alleged agreements. These proceedings bore record number 2007 Number 4759P. Within days of this, Bohemians issued its own High Court proceedings against Albion, bearing record number 2007 No. 4902P (the record no. of the present proceedings), claiming a declaration that there is no concluded or enforceable contract in existence between the parties in relation to the sale of any lands of the plaintiff at or in the vicinity of Dalymount Park. Bohemians proceedings further claimed an injunction restraining Albion from asserting that they have a concluded or enforceable contract for the sale of any lands of the plaintiff at or in the vicinity of Dalymount Park, or from seeking to interfere with the plaintiff's contractual negotiations or contract with the third party. Various ancillary reliefs were also sought on both proceedings.

9. It was then sensibly decided between the parties that it was not desirable to allow both actions proceed independently. Accordingly the proceedings were de facto reconstituted on the basis that the action initiated by Albion would be pursued by way of a counterclaim to the Bohemians proceedings.

The course of dealings between the parties as established in evidence

10. The Phibsboro Shopping Centre was originally developed by Gaylon Weston when he came to Ireland in the 1960s. The initial anchor tenant was Quinnsworth. The shopping centre was managed for many, many years by Gaylon Weston's agent, Tom Murphy, through a company known as Chatham Management Limited. When Quinnsworth sold out to Tesco, the shopping centre was put up for sale and it was ultimately acquired by Albion. Thereafter Chatham Management Limited continued to run the Phibsboro Shopping Centre on behalf of Albion. Tom Murphy remained at the helm of Chatham Management Limited until about four years ago when he was tragically killed in a car crash. At some point in the latter half of the 1990s Tom Murphy suggested to Pascal Conroy that Albion should undertake a redevelopment of the Phibsboro Shopping Centre. Mr. Conroy was receptive to the idea and in furtherance of it, Albion set about the acquisition of additional land.

11. In or about 1998 (there was some inconsistent evidence as to exactly when, but nothing turns on it) Bohemians sold the east terrace of Dalymount Park, save for a strip of ground 1.8m wide nearest the pitch, to Albion. Since purchasing the east terrace Albion has not used it for any purpose and they have allowed Bohemians continue to use it on a temporary basis as a gesture of good will

towards the club. Accordingly, for some time after the sale Bohemians used it to accommodate spectators at football matches as they had in the past. However, they eventually had to stop using it for that purpose due to safety concerns arising from the structure's age and condition. Since then Bohemians have used it for the more limited purposes of accommodating advertising hoardings and providing camera positions for television and film crews. A site on the North Circular Road, referred to as the Kelly's Carpetdrome site, was also acquired by Albion. Having acquired these additional properties, Albion engaged a firm of architects, namely Project Architects, to do a feasibility study in relation to the proposed redevelopment of the shopping centre. Tesco, the current anchor tenant, was approached to ascertain its attitude. It should be pointed out that although Albion owns most of the shopping centre, Tesco actually own their own shop plus a small yard at the back. Tesco were quite co-operative and enthusiastic about the proposed redevelopment of the shopping centre. However, they made it plain that if it was to happen they would require to be provided with proper loading and unloading facilities. The existing facilities available to them for these activities were sub optimal. They wanted any redevelopment to incorporate a docking facility for articulated lorries and sufficient clear space in front of this to provide a safe turning circle for these lorries to enable them to manoeuvre safely and without creating an undue hazard to any persons, vehicles or property in the vicinity. The feasibility study indicated that Albion would need to acquire a further piece of land to accommodate Tesco's requirements. A piece of land owned by Bohemians adjacent to the Connaught Street entrance to Dalymount Park was identified as being suitable and Bohemians were approached by Tom Murphy in 2001 to see if they would agree to sell it to Albion. Bohemians responded positively to Albion's invitation to meet and the parties proceeded to enter into negotiations. Initially Albion was represented by Tom Murphy in the negotiations. For their part, Bohemians were represented by Mr. Felim O'Reilly. Mr. O'Reilly was the President of the Bohemian Football Club Limited, from in or about 1999, until February 2006. Mr. O'Reilly is also a solicitor and he is a partner in the firm of FH O'Reilly and Co., Solicitors. The firm of FH O'Reilly and Co. acts for the Bohemian Football Club Limited. Although they had only recently opened negotiations with Bohemians, Albion's representatives were impatient to lodge a planning application in respect of their proposed shopping centre redevelopment. The proposed redevelopment was to be a major project costing in the region of €200 million. From June 2001 onwards, and in advance of any agreement, Mr. O'Reilly was pressed repeatedly by Tom Murphy to provide Albion with a letter consenting to Albion including part of Bohemian's property at the Connaught Street entrance to Dalymount Park in their planning application for the redevelopment of Phibsboro Shopping Centre. However, Mr. O'Reilly resolutely resisted the pressure to do so and negotiations continued. As both sides had particular requirements with respect to the nature and extent of the parcel at issue it was decided that their respective architects would meet and liaise with a view to deciding on a parcel that would meet the requirements of both sides. Unfortunately they were unsuccessful. Accordingly, on the 18th October, 2001, Tom Murphy wrote to Felim O'Reilly in an attempt to progress matters. His letter (as with most of the inter-partes correspondence) was headed "Subject to contract/contract denied". This letter proffered a map covering part of the Phibsboro Shopping Centre and Dalymount Park with a hatched area representing the lands which Albion wished to buy. The hatched area was stated on the map to represent an area of 266.5 sq m. This map clearly indicated the general location, extent and shape of the parcel under discussion, but it was not sufficiently detailed for precise identification purposes. Nevertheless it provided the basis for further progress in the stalled negotiations and by 20th November, 2001 the parties had agreed on a monetary consideration of IR£600,000 (€761,843) in respect of the proposed sale. Now it appears that in or about this time Mr. O'Reilly had also canvassed with Mr. Conroy the possibility that by way of further consideration Albion would provide Bohemians with corporate boxes overlooking Dalymount Park within the redeveloped shopping centre building. Mr. Conroy was not prepared to commit himself on this but did agree to look into the feasibility of providing corporate boxes. Following that, there was a course of correspondence over the next five or six weeks between Tom Murphy and Felim O'Reilly focusing largely on the amount of the deposit to be paid by Albion and on what proportion of the deposit was to be non-refundable. These proved to be extremely difficult issues to negotiate and in early January 2002, the negotiations broke down. However, there was a re-engagement in mid-January 2002, and eventually an agreement was reached for the payment by Albion to Bohemians of a non-refundable deposit of IR£80,000 (€101,582). Following this agreement Albion made a payment on account of IR£50,000 (€63,486) to Bohemians in respect of the deposit by means of two cheques of IR£25,000 (€31,743). One cheque was immediately negotiable and the other was post-dated to a date approximately a month later. The parties then instructed Albion's solicitors, Messrs Hughes Murphy Walsh and Co., to draw up a contract in writing. Upon receiving these instructions Tim Ryan, solicitor, of that firm initiated a course of correspondence with John McDonald of F. H. O'Reilly & Co., Bohemians' solicitors, seeking to clarify various aspects of the transaction. The initiating letter was dated the 8th of March, 2002. It was headed "Subject to contract/contract denied" and concluded with a paragraph stating:

> "In the meantime kindly note that we have no instructions to bind our client to any contract and that no contract shall exist or be deemed to exist until contracts are executed, exchanged and a contract deposit furnished."

12. Among the various issues raised by Mr. Ryan was the need for confirmation and identification of the parcel in sale, the question of the precise nature of the interest to be granted or conveyed (i.e. a licence or a leasehold estate) and when the balance of the agreed deposit should be paid. The evidence makes it clear that on the other side John McDonald also had concerns on behalf of his clients that he felt needed to be addressed. It is important to note in this context that at this point in time Bohemians had lodged, and were awaiting a decision on, a planning application for a new North Stand at Dalymount Park. It was vital to the success of this proposal that Bohemians should be able to get a Fire Safety Certificate in respect of their new stand, and this meant that it was essential for Bohemian's to retain the Connaught Street entrance to Dalymount Park for use as an emergency exit. John McDonald was concerned on behalf of his clients to ensure that any sale of land to Albion would not prejudice Bohemian's ability to get their Fire Safety Certificate. Moreover, it remained to be clarified if Albion was agreeable in principle to providing the requested corporate boxes, and if so on what basis it would do so. Albion's Solicitors proposed that a meeting should be held, to be attended by the parties' representatives and relevant professional advisers, for the purpose of addressing these and other issues. This suggestion met with agreement and a meeting was duly convened on the 24th May, 2002. It was attended by Felim O'Reilly, Pascal Conroy, Tom Murphy, John McDonald, Solicitor, of FH O'Reilly and Co., Tim Ryan, Solicitor, of Hughes, Murphy, Walsh and Co., as well as by representatives of the parties respective Architects' firms. In his evidence before the High Court John McDonald said of this meeting that:

> "It was really to see what the parameters were. To see if we could be in a position to prepare documentation which would ultimately lead to a contract."

13. In the course of the meeting a further map labelled "corrected map" and dated 24th May, 2002, was produced. This superceded the map that had earlier been produced by Tom Murphy and the new map showed two parcels on it coloured pink and yellow respectively. After the meeting John McDonald dictated a detailed memorandum concerning what was discussed. This memorandum was produced in evidence before me and, as its accuracy was not challenged, it bears recitation:-

> "Memo
>
> To the file of Bohemians Football Club and Chatham Development
>
> Re: Minutes of meeting

Date 24th May, 2002.

In attendance were Felim O'Reilly, Tom Breen, Tom Murphy, Tim Ryan, Solicitor, Pat (Albion's Engineer), Nicola (Albion's Architects), Pascal Conroy of Albion Properties and John McDonald.

On the question of the map which was furnished it was clarified that the map furnished by Tom Murphy and hatched black did not represent the extent of the property which Albion were seeking and that the map named corrected map dated 24th May, 2002, is in fact the map showing the property which they require coloured pink and yellow at the north eastern corner ('the map'). It includes that property coloured yellow which was not on Tom Murphy's plan. They will also require the reservoir, pump house and man hole. The switch room will be relocated to Albion's land but as it exists at the moment will be moved. Albion will be responsible for obtaining the ESB's consent to the moving of the sub-station and granting the necessary rights of way.

It was agreed that heads of agreement would be drawn up at this stage and Albion stated that at minimum they would require a long lease over the property at the north eastern corner. Discussions [took place] on the basis of whether we were in a position to allow for that having regard to fire safety requirements on exiting the ground and John McDonald expressed the view that it would not be possible to give exclusive possession to Albion in respect of that particular portion. It was agreed that consent would be given to allow Albion lodge their application to include the portion that they are seeking but without prejudice to Bohemians title to the property. At the same time Bohemians would lodge an application showing a revised north stand and excluding that portion which it was proposed could be sold or licensed to Albion to ascertain whether in fact Bohemians would be in a position to obtain planning and a fire safety certificate in respect of the balance of the property on the north side. It was agreed also that Bohemians would lodge an application for a fire safety certificate at the same time as the application for planning. Both the costs of the planning permission and of the fire safety application would be subject to approval by Pascal Conroy [and] the cost of same be borne by Pascal Conroy.

He pointed out that the current application in with the planners by Bohemians for the north stand included a portion of the 'pink' property on the map.

Albion confirms that they had included in their plans a basement level under the property which extended 4m in depth and that they would require a minimum of 6m from the ground level up. It was also agreed that a time limit would be put into the heads of agreement during which planning permission must be obtained by both Bohemians and Pascal Conroy. A time of 2 years and 6 months was suggested but this has yet to be agreed.

It was agreed that Pascal's planning could be lodged as soon as the plans are agreed by Bohemians. It was agreed that Bohemians would amend their existing plans and lodge a new planning application to run concurrently with their existing application within 3 months. Pascal's plans are to incorporate replacement of one of the floodlights pylons (yet to be erected) and also provide for some form of corporate boxes for Bohemians. The plans would also be amended to ensure that Dalymount is not overlooked.

It was also pointed out that Bohemians would proceed with the construction of the lights on their property at this stage for which they have planning permission and if Albion was as successful in obtaining permission then they would have to incorporate into it an application to move one of the Bohemians lights which were on the north eastern portion of the property which they required.

It was agreed that any heads of agreement would be subject to:-

A. A grant of planning permission to Pascal Conroy's developments issuing within the time limit.

B. A grant of planning permission for Bohemians north stand development issuing within the time limit.

C. Issue of a fire safety certificate for Bohemians north stand development: issuing within the time limit.

D. The corporate box area was discussed and it was agreed that Tom Breen and Nicola meet and liaise and see if an area along the eastern boundary with Bohemians could be provided for at Albion's expense subject to Bohemians fitting same out to use as a corporate box area, either by recessing or cantilevering.

E. It was agreed that a look would be taken at "Jack's Gate" at the south eastern boundary of Dalymount where there was an exit onto the adjoining lands of what was effectively Kelly's Carpetdrome.

It was agreed that a non refundable deposit of £50,000 would paid at this stage together with a non refundable deposit of £30,000 on signing. It was also agreed that the proposed consideration would amount to £600,000.

It was further agreed that all of the outstanding items in the original contract between Albion and Bohemians would be incorporated into any subsequent agreement so as to ensure that they were attended to. End of Memo."

14. It should be pointed out that the "corrected map" was in fact a site layout map prepared by Project Architects in connection with the proposed regeneration and extension of Phibsboro Shopping Centre. This map was revised many times over subsequent months and years, but the same colour coding was used consistently throughout all revisions of it, and on related maps and elevations. Moreover, throughout all of their subsequent dealings the parties to this litigation consistently used this map or a revision of it. Accordingly, from here on in the chronology references to "the pink and yellow lands" are to be taken as referring to the lands in sale adjacent to the Connaught Street entrance to Dalymount Park. There will also be reference in due course to certain "blue lands" and these refer to lands in the ownership of Bohemians to the west of the shopping centre and at subterranean level. Further, there will be reference to certain "green lands" in the ownership of Albion where it was proposed that the aforementioned corporate boxes would be located. Finally, there will be a reference to lands in the ownership of Albion and coloured "brown", representing a proposed right of way to be granted from the North Circular Road to a gate leading into Dalymount Park known as "Jack's Gate". (Jack Charlton had been allowed exceptionally to use this gate during his time as Manager of the Republic of Ireland soccer team.)

15. Following the meeting of the 24th May, 2002 the parties' solicitors set about attempting to craft heads of agreement. At the

same time, the parties' architects began looking into the feasibility of the proposed corporate boxes. On 12th July, 2002 Mr. O'Reilly forwarded plans drawn up by Bohemian's architect, Tom Breen, to Tom Murphy so that he might in turn pass them to Albion's architects. On 16th July, 2002 Albion's solicitors forwarded draft heads of agreement to Bohemian's solicitors, the covering letter stressing that Messrs. Hughes Murphy Walsh and Company "have no instructions to bind our client to any agreement and no contract shall exist or deemed to exist until contracts are executed, exchanged and the contracts deposit furnished". This was the first of many drafts of the proposed heads of agreement. In the meantime Albion, through the agency of Tom Murphy, continued to press Bohemians for a letter of consent to planning. However, this was not immediately forthcoming. There were meetings between representatives of Bohemians and Albion at the end of August, 2002 and again in mid-September, 2002 in the hope that matters might be progressed but little progress was in fact achieved. In early October, 2002, Bohemian's architect, Tom Breen, produced a fee proposal for agreement by Pascal Conroy of Albion. This proved to be controversial and for months it represented a major sticking point in the on-going negotiations. The end of 2002 came and went but eventually in late January, 2003 agreement was reached on the question of Mr. Breen's fees. In the interim some progress had also been made on other issues. By 17th February, 2003 John McDonald was in position to produce, and forward to his opposite number Tim Ryan for his approval, a document which he described as "a final draft of the heads of agreement". As it turned out this was by no means the final draft but it was an important document in as much as it provided the template on which all subsequent revisions were based. The letter forwarding this document was headed "subject to contract/contract denied", as was the case with every revised version of it.

16. It will be of assistance if at this point I recite the template document in its entirety:-

"HEADS OF AGREEMENT

Subject to contract/contract denied.

Strictly confidential.

Bohemian Football Limited (Bohs) and Albion Enterprises Limited (Albion).

These heads of agreement are entered into on the …. day of ……. 2003.

PARTIES

1. This agreement is made between An Cumann Peile Boitheimeach Teoranta (Bohemians Football Club Limited) (hereinafter called 'Bohs') having its registered office at Dalymount Park in the City of Dublin of the one part and Albion Property Company Limited (hereinafter called 'Albion') having its registered office at 2 Herbert Street in the City of Dublin.

HEADS OF AGREEMENT

2. The purpose of this agreement is to record the principal terms and conditions under which it is proposed that a) Albion will acquire from Bohs certain property currently in the ownership of Bohs in order to construct a portion of the development envisaged by Albion on the lands adjoining Dalymount Park for the consideration agreed and b) Bohs shall acquire certain interests in land currently belonging to Albion adjoining Dalymount Park.

IDENTITY

3.1 Subject to the terms hereinafter set out Bohs shall grant to Albion a long lease over the property coloured yellow ("the yellow property") and pink ("the pink property") on the map attached hereto ("the map") to a depth of 4 metres from ground level and to a maximum height of 6 metres above ground level on the yellow property and pink property.

3.2 Bohs shall also grant to Albion a long lease over the reservoir, pump house and manhole retained by Bohs on the property adjoining Dalymount Park as identified on the map but Albion agrees to relocate a suitable reservoir, pump house, service pipes and all necessary manholes on Bohs' lands at Dalymount Park in a location to be agreed between the parties.

3.3 Albion shall relocate the switch room belonging to Bohs on to Albion's land and shall grant to Bohs a long lease of same together with all necessary rights of way and wayleaves so as to enable Bohs to have access from and to the said switch room to and from Dalymount Park and for the maintenance, repair and renewing of all conduits and wires thereto and therefrom.

3.4 Bohs shall grant Albion a long lease over the basement levels 1 and O on the land coloured blue ("the blue lands") on the map to a finished floor level depth of 7 metres.

3.5 Albion will grant to Bohs a long lease of the land coloured green ("the green lands") on the map above level 1 to height of x metres (this height to be agreed between the respective architects for Albion and Bohs and confirmed by the parties hereto).

3.6 Albion will grant to Bohs a right of way of the area coloured brown on the map ("the right way of way") leading from Dalymount Park at the gate known or to be known as Jack's Gate to the North Circular Road. The document creating this right of way shall contain provisions that Bohs shall provide security at Jack's gate during its use of same. This right of way shall be limited to access by the V.I.P.'s of Bohs and shall not (save in times of emergency when it may be used by the persons attending Dalymount Park) be used for general access from Dalymount Park to North Circular Road.

3.7 Albion shall grant to Bohs an irrevocable license in respect of 5 designated car parking spaces ("the car parking spaces"), the location of which shall be agreed between Albion and Bohs in level 0 of the basement of the green lands and the blue lands together with all necessary rights of ways to enable Bohs gain egress to and access from the car parking spaces.

3.8 Bohs will grant a license to Albion to enter upon the blue lands for a period of 9 months from the date of commencement of construction of the corporate box development ("the corporate box") on the green lands and blue lands. The document creating this licence shall contain all reasonable indemnities required by Bohs in respect of Dalymount Park and its use so as not to prejudice Bohs in any way whatsoever, including any breach of health and safety legislation, building control regulations, planning legislation and third party liability at Dalymount Park and so not to prejudice the use of Dalymount Park by Bohs in any way whatsoever. The document creating the licence shall also provide for access through the entrance from North Circular Road over the existing car park at the south eastern corner of Dalymount Park provided always that the said car park shall be kept clear of all material on match days and such other days as may be stipulated by Bohs from time to time. The indemnities referred to above shall extend to cover the area of the existing car park.

PLANNING

4.1 It is noted that Bohs have a current application before the Planning Authority for a new North Stand which includes a portion of the pink property and yellow property. It is agreed that Bohs shall lodge a revised application for the North Stand (without withdrawing the existing application) so as to exclude the pink property and the yellow property. The cost of this application including the cost of preparation of same and the planning fees attaching to same shall be discharged by Albion in accordance with the agreed payment schedule "the schedule" attached hereto.

4.2 Bohs shall lodge an application for a fire safety certificate in respect of the revised North Stand referred to above at the same time (or as near as shall be reasonably practicable) as the planning application. Again the cost of this application including the cost of preparation of same and the fees attaching to same shall be discharged by Albion as per the payment schedule.

4.3 Bohs shall consent, without prejudice to their title to the pink property, yellow property, and blue lands to an application for planning permission by Albion over the pink property, the yellow property and the blue lands. Albion shall within 4 months of the date hereof apply for planning permission for their proposed development ("the development") which planning application shall incorporate the following:-

(a) Permission for a basement to have a finished basement floor level of 4 metres from ground level and for a building with a maximum height of 6 metres above ground level on the pink property and yellow property subject to an agreement between the respective architects for Albion and Bohs on setting a ground level for the pink property and yellow property.

(b) The inclusion of the corporate box on the green lands and blue lands in accordance with the plans agreed between the parties annexed hereto ("the plans").

(c) An access by Bohs through the gates known or to be known as Jack's Gate for the V.I.P. guests and as an emergency exit leading to and from North Circular Road.

(d) Sufficient access by Bohs over such parts of the development as may be necessary to and from the car parking spaces.

(e) An application for a seating area and offices over the pink property in accordance with the design agreed on the plans.

(f) An application to relocate such as the flood lights at Dalymount Park as shall be necessary to facilitate the development.

4.4 Albion shall apply for the planning permission for the development (in accordance with a general design submitted to Bohs) and to incorporate the matters set out above within 4 months of the date hereof. This agreement shall be subject to final grant of planning permission being obtained in respect of the development (or such altered development as the parties may agree) within 2 years and 6 months from the date of application.

4.5 It is the intention of Bohs to relocate the existing flood lighting on Dalymount Park in accordance with planning permission obtained in respect of same. If the planning permission referred to above for which Albion shall make application is granted then it will be necessary to relocate one or more of the flood lighting pillars to be erected by Bohs and it is agreed that Albion shall relocate the said flood lighting at Albion's expense.

WORKS

5. In the event that planning permission shall be obtained for the agreed development s then Albion shall at its own expense:-

(a) Construct and complete to fitting stage only the corporate box within 15 months of the final grant of planning permission to the satisfaction of Bohs Architect. (It is agreed that Bohs will be responsible for the fit out of the said corporate box at its own cost).

(b) Relocate one or more as necessary of the new flood lights at its own expense in accordance with the planning permission to be obtained.

FINANCE

6.1 The fine in respect of the long term Lease to be granted to Albion in respect of the yellow property and pink property shall be €761,843. It is agreed that the terms of this lease shall be agreed prior to the commencement of any works.

6.2 Albion shall on the signing hereof pay to Bohs a non-refundable deposit of €101,582. It is hereby agreed and declared that if this agreement shall not proceed for any reason whatsoever the said money shall remain the sole property of Bohs and shall be deemed to be in that event a consideration for the grant by Bohs of the letter of consent to the application for planning permission by Albion.

6.3 Albion shall discharge on demand at the time and in the manner set out in the schedule the fees, costs and other outlays due to the relevant parties named therein.

6.4 Albion shall discharge upon demand the reasonable legal fees incurred by Bohs in the negotiation and preparation of this agreement and the completion thereof and the negotiation, preparation and completion of all contracts, leases, licences, wayleave agreements and other documents required, entered into, or reasonably envisaged as a result of this agreement and/or matters arising therefrom and shall indemnify Bohs against all reasonable costs incurred as a result of entry into this agreement.

GENERAL

7.1 The agreement the subject, once planning permission has been obtained, to the negotiation in good faith and the preparation and conclusion of all necessary contracts, leases, licences, wayleave agreements and other documents required or reasonably envisaged under the terms hereof.

7.2 Albion shall notify Bohs through their professional advisors of any notices served by the local authority or any requirements of the local authority in relation to the applications for planning permission envisaged by this agreement and shall comply with all reasonable requests of Bohs relating to the inspection of plans, drawings and the receipt of copies thereof including requests for copies in electronic format of such drawings and plans and any other information and any other matters reasonably required so as to enable Bohs to be fully appraised at the state and stage of the planning application.

SCHEDULE

(It is not proposed to recite this).

(The document concludes with provision for signatures and attestation)"

17. Two days later on the 19th February 2003 Felim O'Reilly wrote to Tom Murphy in the following terms:

"Dear Tom,

We ….. understand that Paschal is agreeable to release the sum of €38,095 being the balance of the non-refundable deposit.

On the assumption that the said monies are paid by Paschal forthwith, and subject to the terms of the heads of agreement, we now enclose herewith consent addressed to the Planning Authority to the application by Albion."

That letter duly enclosed a letter addressed to the Planning Department of Dublin City Council, also dated the 19th February, 2003 in the following terms:-

"Re development of Phibsboro Shopping Centre and adjoining lands at Dalymount Park.

Dear Sirs,

As solicitors for Bohemian Football Club Limited, we hereby consent to the application by Albion Enterprises Limited for redevelopment of the property at Phibsboro Shopping Centre which incorporates a small portion of the lands owned by Bohemian Football Club Limited on the plans attached hereto.

Yours faithfully."

18. In or about the 24th February, 2003, Bohemians received a cheque from Paschal Conroy in the sum of €38,000 in respect of the balance of the non-refundable deposit. Then on the 27th February, 2003, Tom Murphy forwarded maps to John McDonald for Bohemians consideration. On 26th March, 2003, John McDonald wrote back to Tom Murphy pointing out that, following a consideration of those maps, Bohemians were of the view that "the corporate box area as indicated on the map would appear to be mainly constructed on the Bohemian site. This is not what was agreed". He asked that Mr. Murphy would revert to him with corrected maps by return. Its appears that Albion's architects were not inclined to accept at first that there was an encroachment on to Bohemians lands and the argument about this dragged for some time. In the meantime, Tom Murphy came back to Felim O'Reilly indicating that, notwithstanding the letter of 19th February, 2003 written on behalf of Bohemians, one of the planners was not totally convinced "that Bohemians and Albion are good friends" and that this person "seemed to believe otherwise". Mr. Murphy requested that a stronger letter should be written to the Planning Authority. In response Felim O'Reilly wrote to the Chief Planning Officer of Dublin County Council on 6th May, 2003 in the following terms:-

"Re application for planning permission in respect of Phibsboro Town Centre, at Phibsboro Shopping Centre, Dublin 7.

Dear Sir,

We hereby confirm that Bohemians football club are fully supportive of the present application by Albion in respect of the said development. The club believed that this development would be considerably to their advantage and should any queries arise; please do not hesitate to contact the writer of this letter.

Yours sincerely."

19. Matters dragged on into the summer and autumn of 2003. In the course of pre-planning meetings Albion encountered significant difficulty in convincing the planners as to the merits of their proposals and concerning Bohemians support for what was proposed. The planners demanded major alterations to the proposed plans. On the 18th December, 2003, Tom Murphy wrote to Felim O'Reilly saying "It looks as if we are in the final stages of planning preparation and then the application will be lodged in early January". In response Felim O'Reilly wrote back on 19th December, 2003 enquiring "when do you expect we will be in a position to conclude the agreement?" Tom Murphy responded on 22nd December, 2003 with what was effectively a holding letter in which he stated that he would "answer your query as soon as I can get to Paschal". He promised to contact Mr. O'Reilly again after Christmas.

20. In reciting this chronology it is important not to leave 2003 without referring to the fact that Bohemians received a further €150,000 from Albion in that year over and above the agreed non-refundable deposit. This was paid in three tranches of €50,000. The first was by a cheque received on 04.07.2003, the second was by cheque received on 24.07.2003 and the third was received by means of two cheques, one for €40,000 received on 31.10.2003 and one for €10,000 received on 07.11.2003. The circumstances in which these were applied for and secured were probed in some detail in cross-examination of Mr. O'Reilly. It was put to Mr. O'Reilly that Bohemians was very short of money in 2003 and he agreed. It was suggested that Mr. O'Reilly had no hesitation in ringing up Mr. Conroy and asking for further payments on account over and above the agreed non-refundable deposit because Bohemians believed they had a deal with Albion, and that Mr. Conroy had no difficulty in paying the money because he also believed that Albion had a deal with Bohemians. Mr. O'Reilly disagreed with this. His evidence was that throughout 2003, he was continuously ringing up Mr. Conroy saying that nothing is happening here, no progress has been made with regard to entering into any form of legally binding agreement and that he was under considerable pressure from the club's members to bring matters to a conclusion. He claimed that he emphasized to Mr. Conroy that Bohemians officers and committee would cease to believe that "this is ever going to get anywhere unless we receive some further monies on account", and that it was in that context that Mr. Conroy paid additional monies from time to time. His contention was that it was absolutely vital for Mr. Conroy to keep Bohemians on side and that the extra monies were paid on a pragmatic basis with that objective in mind. When Mr. Conroy came to give evidence he sought to explain the circumstances in which he paid this extra €150,000. His evidence was as follows:-

> "Basically Felim and myself had become reasonably good pals. He invited – one day Tottenham Hotspur were playing in Dublin against Bohemians at the club, and he invited me along. He asked me would I like to put my two sons in as mascots. I was delighted to do that, they were delighted too. They were about seven and eight at the time. Then I was brought into the bar afterwards where we met all the players and then I was brought to dinner that night in La Stampa, where I met the directors of the club. We had become good pals. I had met him at the Galway races, I had joined him at the Galway races. So there was a good relationship there and he said to me that the club were in dire straights financially and would I give them some money. I said, well, where are we with this deal. He, well, do not worry about that, that the deal is done as far as I am concerned but we do need the money. So I gave him the money at the time and I trusted Felim, and took him as friend who would not let me down. So basically I did not have a problem paying over the monies".

21. On balance, I am inclined to prefer the evidence of Mr. Conroy on this issue. Mr. Conroy was undoubtedly well disposed towards Bohemians at this time. Moreover, Bohemians' need at this point in time was greater than Albion's need. Bohemians were very short of money. As against that, although Albion did need the continued support of Bohemians for their proposed redevelopment of the Phibsboro Shopping Centre, they were already holding a letter from Bohemians addressed to the Planning Authorities indicating that Bohemians were supporting the project. While in theory Bohemians could have withdrawn the letter they had no commercial grounds, or other good grounds, for doing so at the time.

22. Returning to the chronology, it is not clear whether Mr. Murphy did make contact with Mr. O'Reilly after Christmas as he had promised, but in any case nothing of significance happened. No further progress had been made by mid summer of 2004. In July of 2004 there is correspondence from Mr. O'Reilly to Mr. Murphy complaining about the delay, but to no avail. Seemingly, Albion had encountering numerous unforeseen difficulties with its planning application. Eventually by a letter dated the 15th of October, 2004 Albion's solicitors (now Walsh & Associates, with the same Tim Ryan, solicitor, managing the file) wrote to Bohemian's solicitors enclosing revised maps. They also enclosed a copy of an "A.I." (additional information) request that their client had received from Dublin City Council, and sought the assistance of Bohemian's solicitors in replying to aspects of this, particularly relating to Bohemian's intentions concerning the future spectator capacity of Dalymount Park and proposed means of access to it and egress from it. F.H. O'Reilly & Co replied by letter of the 6th of December, 2004 headed "Subject to Agreement to be Concluded". The letter commenced by commenting firstly on the revised maps and pointing out that they were incorrect in that they showed part of the proposed development (namely the subterranean "blue lands") extending under the existing football pitch. They requested "that you amend this proposal to exclude such development as there is no provision in our Agreement for this." The letter then went on:

> "Our planning permission was granted on a spectator capacity of 20,000. Whilst our Agreement provides for the reduction in the width of the escape route to Connaught Street it is our intention to retain this capacity and to seek a new fire safety certificate based on same. We have asked our fire engineer to prepare a strategy based on this capacity and we will let you have it in two weeks time to inform your response to the planning authorities request for further information."

23. Referring to this letter in the course of his evidence Mr. O'Reilly pointed out that at that time the actual lawful capacity of Dalymount Park was only 8,000 spectators. This was because the east stand was unusable and only part of the north stand was usable. Effectively spectators could only be accommodated on two sides of the pitch.

24. Nothing further of note happened in 2004, save for the fact that Bohemians applied to Albion for, and received on the 16th of November, 2004, a further sum of €50,000 bringing total payments over and above the agreed non-refundable deposit to €200,000 as of the end of 2004.

25. The chronology then moves into 2005. A further €50,000 was paid by Albion and received by Bohemians on or about the 5th of January, 2005. There were various unsuccessful attempts in January, February and March respectively to convening a meeting between the parties' respective principals. It appears that the blockage was largely to do with a refusal by Project Architects to accept that their maps were wrong. In the circumstances both they and Pascal Conroy were insistent that a full site survey should be carried in advance of any meeting. It appears from the evidence that a surveyor went out and conducted a site survey on the 28th of May, 2005. It was also suggested that shortly thereafter there was a meeting on site on the 1st of June, 2005 in the course of which the lands were walked. There was some controversy about this. Mr. Conroy testified that he was there, Felim O'Reilly was there, Pat O'Hara was there and Mr. Ryan was there. This was confirmed by Mr. O'Hara. Neither Mr. Conroy nor Mr. O'Hara was certain if John McDonald was there. Mr. McDonald does not appear to have been asked if he was there. It is clear from the evidence that Mr. Breen was not there. Pat O'Hara related that "On that occasion we had one of our legal meetings to deal with the transfer maps, and afterwards we then adjourned to Dalymount and physically walked the actual marked up land. I indicated the various locations of the actual survey points as completed by the surveyor." Mr. Conroy recalled seeing "stakes in the ground with a nail in the top of them". He said "we looked at the stakes in the ground and we kind of, as far as I recall, agreed that it would be up to the

architects to finalise it." Mr. O'Reilly contended he that could only vaguely recall such a meeting and he was adamant that he could not recall seeing markings on the pitch. On balance I am satisfied that this meeting did take place on the 1st of June, 2005 and, given its proximity to the 28th of May, 2005 when the survey was carried out, that there were stakes in the ground as described by Mr. Conroy, and that they were pointed out by Mr. O'Hara. Moreover, a further payment of €50,000 from Albion to Bohemians was received on the 2nd of June, 2005. This is consistent with there having been a meeting on the 1st of June. It emerged in the course of the evidence that Felim O'Reilly would frequently use the occasion of such meetings to take Mr. Conroy aside and solicit further payments on account from him in ease of Bohemian's cash flow difficulties.

26. The next thing to occur was that a meeting was convened in or about the 6th of June 2005 between the parties' solicitors at the offices of FH O'Reilly & Co in the hope of making progress on other fronts. In the course of his evidence, Mr. McDonald said:

> " …we met to discuss the outstanding legal matters that would need to be attended to once the various points were resolved in relation to mapping etc. We had a meeting and went through each of the terms of the heads of agreement at that stage."

27. Following that meeting, John McDonald of F.H. O'Reilly & Co sent an e-mail to Tim Ryan of Walsh & Associates attaching two documents labelled respectively "List of Points.doc" and "Heads of Agreement FINAL.doc". The former was based upon a handwritten attendance taken by Mr. McDonald at the meeting and it sets out issues discussed referable to paragraph numbers in the existing draft Heads of Agreement (the template document) and actions required to be taken. The latter was simply a copy of the template document re-dated "2004", presumably sent with the list of points for convenient reference purposes.

28. The document entitled List of Points.doc" is in the following terms:

> " 1. 3.1 Pink and yellow lands – identify Bohs gates.
>
> 1. 3.1 Has provision been made for office space overhead in planning?
>
> 2. 3.1 Are Bohs to retain access to offices over pink and yellow area?
>
> 3. 3.2 & 3.3 Has provision been made for relocation of reservoir, pump house, service pipes, manholes and switch room? (Switch room on Albion's lands).
>
> 4. 3.4 Agree terms of lease
>
> 5. 3.5 Agree height – agree extent of green area – see "landing" on stairwell.
>
> 6. 3.5 Agree terms of lease – service charge and insurance.
>
> 7. 3.6 Has ROW been identified?
>
> 8. 3.6 Agree terms of ROW
>
> 9. 3.7 Agree terms of licence and designation of car park spaces – service charge
>
> 10. 3.8 Envisaged date of commencement – Autumn 05?
>
> 11. 3.8 Agree terms of licence – How will plant and machinery be moved and to where?
>
> 12. 4.1 What is position re : revised application?
>
> 13. 4.2 What is position re : fire cert?
>
> 14. 4.3 & 4.4 What does planning include. Can we see maps etc. Check a) to f) inclusive of 4.3
>
> 15. 4.5 How many floodlights need to be relocated?
>
> 16. 5. a) 15 months for construction
>
> b) time limit for relocation of flood lights
>
> 17. 6.3 & 6.4 Agree relevant fees to date."

29. John McDonald laid considerable emphasis on this list in the course of his evidence as indicating that the issues still outstanding were so extensive and so complex as to negate any suggestion that the parties had a concluded agreement at that stage. It was suggested to him in cross-examination that the document was merely a "to do list" in respect of details "that would, as a matter of certainty, have been worked out" between the solicitors. He would not accept that.

30. On the 17th of June, 2005 Tim Ryan of Walsh & Associates wrote to John McDonald enclosing a letter of the 16th of June, 2005 from Albion's architects answering, or suggesting answers, to many of the queries raised in the document entitled "List of Points.doc". The letter suggested that John McDonald should liaise with Bohemians' architect, following which it was envisaged the solicitors should meet again. However, what happened next was that there was a re-engagement by the principals on both sides. On the 14th of July, 2005 a meeting was held at the offices of FH O'Reilly & Co, Solicitors, in the hope of breaking the impasse. The meeting was attended by Felim O'Reilly, Pascal Conroy, Pat O'Hara (of Project Architects), Tom Breen (Bohemians Architect), John McDonald and Tim Ryan. Unfortunately the meeting was a fraught one and it ended in a stand off. There was disagreement on a range of issues but the most serious dispute related to the proposed corporate boxes. Having committed in principle to building corporate boxes for Bohemians Mr. Conroy had discovered, upon looking into the practicalities of the proposal, that it could cost him up to €2 million to do so, and that to meet the proposed 15 months timescale suggested in the draft Heads of Agreement would be "quite difficult logistically". He outlined his concerns at the meeting and in doing so became engaged in a serious row with Bohemian's architect, Tom Breen. It is quite clear to the Court from a consideration of all of the evidence in the case that the relationship between Pascal Conroy and Tom Breen has frequently been difficult and tetchy, and that a jaundiced view which Mr. Conroy came to have of Mr.

Breen most likely had its genesis in the protracted wrangling which had occurred over the previously mentioned controversial fee proposal of October 2002. At any rate, Tim Ryan, solicitor's, minute of the meeting of the 14th of July, 2005 vividly records what happened at that meeting:

> "A major row then broke out at the meeting in relation to clause 5 between Pascal Conroy and Tom Breen. Pascal indicated that there was no way that he could construct and complete the fitting out stage of the corporate boxes within 15 months of the final grant of permission. He pointed out that it will take between four and six months to get a Fire Certificate and then there will be demolition and piling works before the construction could even commence. He further indicated that he may have a problem with getting tenants to vacate. He even suggested that if the economic climate was not appropriate at the time of the Grant of Planning Permission....then he might not want to proceed for a couple of years.
>
> Solicitors for Bohemians were not happy with this state of affairs. Tom Breen suggested that the whole thing could be easily done within 15 months and indeed that the corporate boxes could be constructed within twenty six weeks. With this, Pascal Conroy told Mr. Breen that he hadn't a clue what he was talking about and he stormed out of the meeting. The parties continued with the meeting and it was suggested that Pat O'Hara will revert to Pascal Conroy and come back to us. It was suggested that the meeting would be reconvened for the next Thursday.
>
> In the meantime I spoke with Pascal by telephone in the afternoon and he indicated that he is not prepared any dateline (sic) into this Agreement in relation to the construction of corporate boxes and that Bohemians could take it or leave it."

31. The minutes of a meeting of the Directors of Bohemians Football Club held four days later on the 18th of July 2005 were produced in evidence and are instructive as to the attitude of Bohemians at this time. The relevant minute states:

> "FOR [Felim O'Reilly] updated the board re Pascal Conroy situation as this impacts almost every other financial area. Following meeting FOR attended with Pascal last week it appears that the corporate boxes will not commence until 12 months after planning permission granted. Issue of Fire Certificate main part of this delay. They hope to have planning permission in September. Further meeting with P.C. to be held on Wednesday 20th July. FOR to try to meet with him alone and to pursue some more funds on grounds of initial contract broken."

32. It is important to contextualise this document by saying that the evidence establishes that at this time Bohemians was continuing to experience serious cash flow difficulties, and that the club remained desperately in need of money. Clearly, Mr. O'Reilly did not regard the row as representing a serious set-back. Rather he saw in it the opportunity to secure the payment of further monies on account from Albion. The defendants point to this minute as being evidence of a confidence on Mr. O'Reilly's part that Bohemians and Albion had concluded a firm agreement, and they say that this confidence was reflected by his use of the word "contract". Under cross –examination about this minute Mr. O'Reilly denied that the minute was accurate saying "I wouldn't have used the word 'contract'". Moreover, he was emphatic in asserting in that he did not regard Bohemians as having a firm deal with Albion. Notwithstanding Mr. O'Reilly's testimony, I regard the defendants interpretation as being a reasonable one, and I am satisfied that it is correct. Confident that Bohemians and Albion had an existing deal, Mr. O'Reilly's attitude was that if Albion wanted a variation to what they had agreed then they could have it, but only at a price, namely, by having to pay more money up front.

33. Continuing with the chronology, a further attendance of Tim Ryan, solicitor, was produced. This details separate conversations he had with Pascal Conroy and Felim O'Reilly, respectively, on the 20th of July, 2005 (two days after the Bohemians board meeting). It states:

> "I spoke with Pascal Conroy today, 20th July in relation to Bohemian Football Club.
>
> 1. He insists that he will not change his mind on his objection to a 15 month deadline being put in the completion of the boxes.
>
> 2. He wants to see the papers where he agreed a fee of £50,000 with Tom Breen for his architectural fees (Felim O'Reilly says that he met Tom Breen directly and this was agreed and that in fact there is partial payment and acknowledgement thereof)
>
> 3. There is a gate which Bohemians Club opened (or widened) between Kelly's Car Park and Bohemians Football Club for the purposes of building the south stand. He wants this re-instated.
>
> I spoke to Felim O'Reilly after that and he insisted that he is going to leave Pascal 'sit on it'. He is not going to allow Bohemians Football Club to be bullied or pushed into anything and that he may advise Bohemians Football Club to pursue a different deal with the Mater Hospital in relation to parking as the Mater Hospital has approached the club. This will involve Bohemian Football Club giving the turning space to the Mater rather than to Pascal Conroy for the purpose of the Tesco lorries.
>
> This was pointed out to Pascal whereupon Pascal also indicated that he was thinking of demolishing the East Stand and doing a deal with the Mater Hospital in relation to parking on that area and Kelly's yard for a couple of years until the development of Phibsboro Shopping Centre is complete."

34. It is quite clear from all of this that both sides were engaging in brinksmanship, and indeed a certain amount of posturing, at this point in time. However, I am satisfied that neither side was seriously contemplating walking away from the transaction. Not surprisingly, and after a short cooling off period, the putative stand-off was ultimately resolved in the following circumstances. Mr. O'Reilly telephoned Mr. Conroy and invited him to lunch, suggesting that if the principals could meet and talk without their professional advisors, it might be possible for them to resolve their difficulties. Mr. Conroy was agreeable and so on Monday the 22nd of July, 2005 he joined Mr. O'Reilly, who was accompanied by the then Secretary of Bohemians F.C., Mr. Gerry Cuffe, for lunch at "Peploes" restaurant on St Stephen's Green in Dublin city centre. Over a long afternoon the business in hand (namely the dispute over the corporate boxes) was discussed, a way forward was found, lunch was had, and a good deal of alcohol was consumed. The way forward involved an agreement that Albion would buy out the obligation to build corporate boxes for Bohemians. Both Mr. O'Reilly and Mr. Cuffe left Peploes believing that they had also agreed with Mr. Conroy that a consideration of €750,000 should be paid by Albion to Bohemians in respect of the buy out. However, while Mr. Conroy acknowledges that "they were looking for €750,000" he denies that he agreed to this. He said that he told Mr. O'Reilly and Mr. Cuffe that he would ask his quantity surveyor "to cost out the job for me and then we would negotiate a figure that was acceptable to both parties". In emphasising his position he said:

> "Well, let me put it this way: There was a lot of drink consumed that day, I would not have agreed to any deal like that until I was conclusively sure of what the costs were to me. Now, it is possible that it could have been done for 250,000, I don't know. But I wasn't going to take any chances, I wanted to know the exact figures and then I would take, I would negotiate with them."

35. There was some conflict in the testimonies of the respective participants as how exactly the afternoon proceeded. Mr. O'Reilly's belief was that they talked business immediately, successfully finding a way forward within about an hour or so, and then in celebration of having broken the log jam had a lengthy and convivial lunch during which a good deal of alcohol was consumed. Mr. Cuffe gave testimony along similar lines, adding however that the meeting was fraught in the extreme at the outset and that no alcohol was consumed while discussions were ongoing. Mr. Conroy's recollection was somewhat different. He said the meeting commenced in a rather frosty atmosphere. He went on:

> "…we chatted about different things. I personally felt it was best, that if we start into a meeting again about previous stuff, well, this is going to go nowhere, we won't even get through our lunch because there will be another blow up. So I felt the best thing to do - and this is my recollection, this is what I recall - is that we all sat down, we had a few glasses of wine, we chit-chatted about everything and about nothing basically, about how Bohs were going, things like that, how I was going. Then the meeting softened and mellowed and we got almost back on to a level of where we originally had been. It was then that we started chatting."

36. He added:

> "Maybe towards the end of the main course we started chatting about -- I can't specifically recall what point in time that we started chatting about the corporate boxes, but I can certainly assure you that we did not start the minute we arrived into the room. Because that was a recipe for disaster."

37. Counsel for the plaintiff spent some time highlighting these differences in recollections. While they are seemingly trivial at first sight, and might on one view of it be explained away on the basis that a large amount of alcohol was undoubtedly consumed, the plaintiffs strongly repudiate Mr. Conroy's account of the sequence of events and insist that their recollection of the events of that afternoon is clear. They were adamant that there had been no misunderstanding, that when the parties met it was straight down to business before pleasure, that Mr. Conroy agreed a consideration with them and then in due course sought to renege upon that agreement. While I am not sure that very much ultimately turns on it, I prefer the evidence of Mr. Conroy, to that of Mr. O'Reilly and Mr. Cuffe, as representing in my view a more inherently likely scenario.

38. As I have indicated Mr. O'Reilly left the luncheon in Peploes Restaurant believing that he had a commitment from Mr. Conroy that Albion would buy out its obligation to construct the corporate boxes for Bohemians at a consideration of €750,000. Mr. O'Reilly then went off to the Galway Races and while there, happened to bump into Mr. Conroy. They had a brief conversation and each of them expressed relief to the other that the problem relating to the corporate boxes had been solved. There was no mention of any problem whatsoever. At some point between the 22nd July, 2005 and the 2nd September, 2005, Mr. O'Reilly informed the committee of Bohemians Club that Albion were going to buy out the obligation for €750,000 and he similarly informed John McDonald. On the 2nd September, 2005 John McDonald wrote to his opposite number Tim Ryan in the following terms:-

> "Subject to agreement/agreement denied re Bohemian Football Club – Development at Phibsboro shopping Centre.
>
> Dear Tim,
>
> I trust you have a pleasant holiday and refer to our recent telephone conversation. As indicated my understanding is that Albion have agreed to pay to Bohemians on the signing of an agreement an additional sum of €750,000 compensation in lieu of having to construct the corporate boxes. Albion however, will continue to apply for planning permission for the corporate boxes and will leave Albion's finished construction of the car park basement areas ready for the construction by Bohemians of the corporate boxes and stands and roofs on top thereof.
>
> In all other respects I believe the points agreed in negotiations to date will continue. Bohemians accordingly will continue to grant to Albion a lease of the area coloured blue below ground and Albion will continue to grant Bohs a lease of the area coloured green above level 1 of the car park to the height arranged.
>
> Because the car park "roof" and the buildings of Albion which will abut the green area are to be left in such a manner both structurally and practically to allow Bohemians to construct their corporate boxes thereon and tie in where necessary to the structure to be built by Albion abutting the green area, there will be an engineering input into the plans to be prepared and you might let us have a draft condition in consultation with your client's engineers in relation to a proposal as to how same may be dealt with in practice.
>
> Provision will also need to be made in relation to the roof stand which will need to be supported by your client's structure and indeed the lease to be granted to our client of the "green area" will need to incorporate various easements of support and shelter etc. I will be obliged if you would take your client's instructions as soon as possible and revert to me.
>
> Yours sincerely."

39. Mr. McDonald was asked in the course of his evidence why it was that he was focussing on the issues of structure and support. He replied:

> "Well there was always going to be an issue where we either retained land above land being granted to Albion, or Albion retained land above or below land which had been granted to us. But because in this particular area what was being left was a space, if you like, we wouldn't be getting a lease of a completed building. We would need any lease to be granted by Albion to us to incorporate various rights to either tie into their building if that was necessary and again it would -- I mentioned in the letter we would need an engineering input to enable me draft the type of conditions that we would need and the easements which we would need to retain or include in any lease."

40. This elicited a response from Mr. Ryan dated the 29th of September, 2005 in the following terms:-

> "Re: Bohemian Football Club/Re development of Phibsboro Shopping Centre, Our client Pascal Conroy/Albion Properties Limited subject to agreement/agreement denied.

Dear Sirs,

We refer to the above matter and to your letter dated 2nd September, 2005, a copy of which we have passed to our client.

We also refer to several telephone conversations we have had in relation to this matter since the date of your said letter.

Our client instructs that he has no recollection that any agreement was made in relation to a definite figure to be paid. Our client does agree that the topic of compensation in lieu of building corporate boxes was brought up for discussion between the parties but that no figure was agreed. Our client accepts that there appears to a misunderstanding in relation to a final figure to be agreed. Our client does not rule out a future agreement for a cash payment as compensation for not constructing a corporate box for Bohemians and in the event that there was to be an agreement in relation to such compensation this matter could be expedited quickly.

Our client further instructs that if there is failure to reach an agreement in relation to a compensation sum for not constructing corporate boxes for Bohemians then our client is prepared to adhere to the agreement which has been negotiated over a long period of time and almost complete. You will recall that this is where Albion will continue grant to Bohemians a lease of the area coloured green above level of the one car park to an agreed height. Bohemians will grant to Albion a lease of the area coloured blue below ground, Albion will continue to apply for planning permission for the corporate boxes and will construct the corporate boxes as part of the redevelopment of the Phibsboro Shopping Centre.

Yours faithfully."

41. There was then a further letter by way of rejoinder (again entitled subject to agreement/agreement denied) from John McDonald to Tim Ryan dated 12th October, 2005. This was in terms:-

"Dear Sirs,

We refer to your letter of 29th inst. We have taken instructions from our clients and both the President and the Honorary Secretary of our clients are in no doubt whatsoever that a figure was discussed and agreed and to suggest that there might be a "misunderstanding" in relation to a final figure is wholly disingenuous to say the least. You will be aware that this is not the first time that our clients have sat down with your clients, negotiated points in relation to the proposed Heads of Agreement and agreed same only for your clients to subsequently deny that the point was agreed.

We have now passed the fourth anniversary of the commencement of negotiations in relation to Heads of Agreement – something which would normally take less than a month. If the Heads of Agreement itself cannot be agreed within four years then our client has no confidence that a full contract which is capable of binding both parties can be agreed and accordingly sees no basis for the continuation of any further negotiations.

Indeed both the President and the Honorary Secretary of our clients have been subjected to no little vilification at the hands of the members as a result of this saga and would have no appetite to enter any further negotiations even if they were so authorised.

Please note that it is our client's intention to notify the Planning Department that our clients can no longer support your client's proposals having regard to the breakdown in relations between our clients.

Yours faithfully."

42. In the course of his evidence Mr. McDonald explained what he was alluding to in the first paragraph as follows:

"Well there had been various discussions which took place where at different stages throughout the course of negotiations Mr. Conroy denied that an agreement had been reached. For instance on the issue of architectural fees, my Lord. It was agreed that Mr. Breen's fees would be paid by Albion and at one particular meeting where Mr. Breen produced a letter confirming his fees, his schedule of fees, Mr. Conroy denied that he had ever agreed and the meeting became a little bit tetchy until the letter was actually produced. Another situation [related to] the corporate box area where [a] dispute arose when we got [a] map, in that the green area was wholly located on Bohemian's land. Mr. Conroy …..denied that he had ever agreed that the corporate boxes area would be built on Albion's land and again we had to go back to the prior draft Heads of Agreement to show that that was in fact the case."

43. It seems that there was then a subsequent telephone conversation between Felim O'Reilly and Tim Ryan in which the new impasse was discussed, following which Mr. O'Reilly wrote to Mr. Ryan on the 24th October, 2005 stating:

"I refer to our telephone conversation and I confirm that I have now received instructions to forward the letter as discussed to Bord An Pleanála."

44. Mr. Ryan replied quickly on the next day, the 25th October, 2005, in the following terms:-

"Subject to agreement/agreement denied

Dear Sirs,

We refer to the above matter and to your letter of 24th October, last.

We have since taken instructions from our clients in relation to same. We refer in particular to your reference to a letter to be furnished to An Bord Pleanála on behalf of your client. You will recall that we discussed this said letter by telephone conversation.

Our client firmly instructs that in the event of you sending such letter, our client will immediately demand the return of the approximately €400,000 as furnished to your client by way of part performance in relation to the post transaction being discussed over the past number of years.

In the event that your client does forward such letter to An Bord Pleanála, our client will be demanding the immediate return of such monies and he has pointed out that in the event of any delay in relation to the return of any such monies, he should use all and every legal means to compel your client to furnish such monies to him in their entirety."

45. On the 8th November, 2005 Mr. O'Reilly wrote to Walsh Associates in the following terms:-

"Subject to Agreement/Agreement denied

Re: Bohemians Football Club – re-development of Phibsboro Shopping Centre

Your client: Paschal Conroy/Albion Properties Limited

Dear Sirs,

We hereby confirm that in relation to the corporate box issue that arose our clients have agreed with yours the following arrangement:

(1) That a sum of €650,000 be paid in compensation for the building of the corporate box and that this will be deemed as follows:

(i) A sum of €100,000 to be paid on tomorrow's date the 9th November, 2005.

(ii) A further sum of €200,000 to be paid on 30th day of November, 2005. In relation to (i) and (ii) the said cheques will be delivered to this office tomorrow.

(iii) Further cheques in the sum of €100,000 be paid on the 1st of each successive month to discharge the total liability to Bohemians which is the said sum of €650,000 together with the balance due in relation to the original figure agreed for the area to be leased at Connaught Street corner after allowing for the monies already paid.

It is also agreed that your clients will lay foundations and structure for the building of the corporate boxes overhead.

It is also agreed that the entire agreement will not be subject to any planning permissions.

In the circumstances we look forward to hearing from you immediately so that the full formal agreement may be concluded so that all matters may be clarified and finalised between the parties.

Yours faithfully."

46. Mr. O'Reilly was, to quote him, "a little hazy" as to how that letter came to be written. He thought that the letter may have been written as a result of a phone call from Mr. Ryan. He said he did not have any conversation with Pascal Conroy. Mr. Conroy's evidence as to how it came about was fairly cryptic. He did, however, say this much:

"…there was a threat here to pull down the whole deck of cards. So I was concerned. So I readily went ahead and did a deal with them."

47. The evidence establishes that on the 30th of November, 2005 Bohemians duly received a further €300,000 from Albion by means of two cheques, one for €100,000 and the other for €200,000.

48. On 20th December, 2005 the Bohemians Architect, Michael Breen wrote to Felim O'Reilly stating "I have raised the matter of the lands to be transferred in the heads of agreement with Pat O'Hara in Project Architects. They are to revise their scaled drawings to include information, including digital co-ordinates and dimensions; sufficient to allow the lands to be found and identified when the site is been cleared and all existing landmarks are gone. I will be back in touch as soon as the drawings are to hand."

49. There then followed a meeting at the offices of F.H. O'Reilly and Company, Solicitors, on 13th December. Subsequent to that meeting Mr. Ryan wrote to F.H. O'Reilly and Company on the 11th of January, 2006 stating:-

"Subject to agreement/agreement denied.

Dear Sirs,

We refer to the above matter and to the meeting which occurred on 13th December last at your offices in the presence of Paschal Conroy, Pat O'Hara and Robert Walsh, solicitor for our side.

We also refer to our telephone conversation of today's date with your Felim O'Reilly solicitor.

The main issue outstanding appears to be the agreement of final maps between our respective client's architects. We are informed by Pat O'Hara, Architect that he has furnished hard copy maps and some other necessary date to Tom Breen just before Christmas and he is waiting for Tom Breen to revert to him to say that all is in order.

Furthermore we note from the attendance filed by Robert Walsh that Bohemians account[ant]s are to agree and confirm what is being [sic] paid by our clients to date.

We shall contact our client today in relation to the outstanding figure of €100,000 to be paid by the 1st January.

As agreed we shall try and proceed to bring this matter to a conclusion this month. Thank you for your co-operation.

In the meantime kindly note that we have no instructions to bind our client to any agreement and no contract shall exist or begin to exist until contracts are executed, exchanged and deposit furnished.

Yours faithfully."

50. It seems that the cheque promised for the 1st January, 2006 did not arrive by that date. On the 17th January, 2006 Felim O'Reilly wrote to Walsh and Associates complaining that he had still not received a cheque and also enclosing an email from Tom Breen, Architect, in which he had stated that he was due to receive a survey from project architects but had not yet received it. On the 26th of January 2006 Bohemians received the outstanding €100,000. In the first week of February 2006 Mr. O'Reilly stood down as President of the Bohemian Football Club and was replaced by Mr. Cuffe. Bohemians received a further €100,000 on the 9th of February, 2006. Then on 26th February, 2006, Mr. O'Reilly wrote again to Walsh and Associates saying that he had heard from Tom Breen to say that he had requested and was awaiting from Albion an ordnance survey map and full planning applications documents together with any further maps and documentation submitted or lodged in the course of the application. He asked if they would confirm that these matters were being attended to.

51. The evidence establishes that in or about the same time, circa February 2006, Bohemians entered into negotiations with a third party, a building conglomerate called "Andorrey", for the sale to that entity of the remainder of Dalymount Park. In March and April of 2006 Bohemians received two more payments of €100,000 respectively from Albion. In early May rumours concerning the ongoing third party discussions were published in the print media and Mr. Conroy, on reading them, became alarmed. Arising out of this, Mr. Ryan of Walsh and Associates wrote to F.H. O'Reilly and Company, solicitors, on the 9th of May, 2006. This was an open letter in the following terms:

"Re Bohemian Football Club/Re development of Phibsboro Shopping Centre.

Our client: Paschal Conroy/Albion Properties Limited".

Dear Sirs,

We refer to the above matter. We are aware from various reports in the media that your client has sold the Bohemian Football Club site to a consortium of developers. You are aware that your client has a binding agreement with our client to sell to our clients the lands, the subject matter of the agreed heads of agreement to our client for the amounts of money as stated therein.

In addition you will be further aware that our client has already paid to your client approximately €1.6 m in part performance of the agreement.

Please confirm by immediate return that your clients intends to honour its agreement with our client and that it is prepared execute the heads of agreement in the very near future.

Mr. Conroy instructs that he is extremely anxious to have the heads of agreement executed and pay over any outstanding sums owed to your client under the agreement (if any) to bring this matter to a conclusion. Our client further instructs that in the event that your client fails to confirm the binding agreement between our respective clients within seven days from the date hereof, he will be compelled to use all necessary measures available to him to ensure that the agreement is honoured.

Yours faithfully."

52. It should be pointed out that the figure of €1.6 million mentioned in that letter was in fact incorrect. The total amount paid in excess of the non-refundable deposit was in fact €1,050,000. In any event Mr. McDonald replied to this letter by his letter of the 11th May, 2006. Again this was an open letter and it was in terms:-

Dear Sirs,

We refer to your letter of 9th May and are much surprised at the contents thereof. There is no binding agreement in place between our clients in this matter and whilst we acknowledge that negotiations have continued for five years with a view to reaching such a conclusion, nevertheless such conclusion has not been reached.

We refer you to your letter of the 8th March, 2002 addressed to Felim O'Reilly of this office which was the first letter written by your firm and to the final paragraph thereof which states:-

> "In the meantime kindly note that we have no instructions to bind our client and that no contract shall exist or to be deemed to exist until contracts are executed by both parties, exchanged and a contract deposit furnished."

Whilst our client acknowledges that it has been in receipt of monies from your client the facts of the matter are that no agreement has yet been concluded, no agreed contracts have been prepared and nor have any documents which either singly or in conjunction with others could be deemed to constitute a contract or a memorandum sufficient to satisfy the Statute of Frauds been signed or indeed exchanged. In all of the correspondence to date, including your last letter to this office on 16th January last, same are all marked "agreement denied".

We do not understand therefore how your client is claiming that there is a binding agreement in existence.

Strictly without prejudice to the fact that there is no such binding agreement, our client is prepared to meet with your client on a without prejudice basis to discuss matters and in this respect would suggest that you contact the writer with a suitable date to meet in our offices. We look forward to hearing from you.

Yours faithfully."

53. A meeting did take place arising out of this letter on the 17th of May, 2006 at the offices of F.H. O'Reilly & Co. John McDonald described to the court what happened at this meeting:

"….there was some media coverage of the proposed sale to Andorrey, which I think probably frightened Pascal Conroy into the belief that we had gone behind his back and dealt with Andorrey in respect of all of the property, and it was that that prompted the letter from Walsh and Associates to ourselves.

When we met at the meeting I confirmed at that stage that the lands which we were negotiating with Albion were excluded from the discussions with Andorrey and we were still prepared to trade with Albion in that respect.

Q. How did that affect the mood of the meeting?

A. I think the mood was significantly better after I explained that.

Q. So what was discussed then at that meeting?

A. We mainly discussed that if we were going to go forward there would be other changes required, because if we concluded a deal with Andorrey we wouldn't be requiring various aspects. In other words, we would get rid of the pitch itself so we wouldn't be requiring various aspects relating to the monies that were -- sorry, the items that were set out in part of the Heads of Agreement, and we listed them down: The executive offices for instance; the corporate boxes in the green area, they wouldn't be required; the cost of construction to the foundation level of the executive boxes; the cost of the relocation of the switch room, the well, reservoir and pump house; the value of the right of way to Jack's gate; the value of the car spaces in the basement; and the cost of the application for planning permission in respect of the offices, the cost which wouldn't be incurred then as set out in the schedule, and these are the schedules to the draft Heads of Agreement; and the cost of relocation and reconstruction of the flood lights.

Q. Do I understand this correctly? The Andorrey deal was the other part of the jigsaw, the vast bulk of Bohemian's land was now being sold?

A. There were discussions in relation to the sale of it.

Q. So if that deal went ahead, Bohemians would have moved from there to another ...(INTERJECTION)

A. To another pitch.

Q. And that had a knock-on effect as to what you might or might not need in any deal.

A. In any deal we concluded.

Q. And these are a list of items that would now come out of the Heads of Agreement, but for which at the meeting you were suggesting had a value to you or to Bohemians; is that right?

A. That is correct. And that was acknowledged at the meeting and Pascal Conroy agreed that he would put a value on those and come back to us."

54. On 17th August, 2006, John McDonald wrote to Walsh and Associates in the following terms:

"Subject to contract/contract denied:-

Re Our Clients Bohemian Football Club, Your Client Albion Properties Limited

Dear Sirs,

We refer to the above and to the meeting held on 17th May, at our offices. At that meeting it was agreed that the matters listed would be valued by your client. We confirm that the items listed were as follows:-

(1) The area of land which was going to be leased on a long term lease to Bohs for the executive boxes and that part of the roof of the stand over the executive boxes.

(2) The cost of construction to foundation level of the executive boxes.

(3) The costs of relocation and reconstruction of the well reservoir and the pump house.

(4) The value of the right of way to Jack's Gate.

(5) The value of the car spaces in the basement (eight in all).

(6) The cost of the application for planning permission in respect of the offices.

(7) Costs which will now not be incurred as set out in the schedule.

(8) The costs of relocation and reconstruction of the flood lights.

We understand that several meetings have taken place between Mr. Cuffe of our client and Pascal Conroy of your client and it has been agreed that these matters will be removed from the draft heads of agreement proposed to date provided the sum of €600,000 together with an overdue sum of €280,000 out of the original price are each paid on or before the 30th September, 2006. Please let us hear from you by return with your client's confirmation of the above agreement and we will arrange to redraft the heads of agreement. We look forward to hearing from you.

Yours faithfully."

55. Mr. Ryan replied by an open letter dated 8th September, 2006. That was in the following terms:-

"Dear Sirs,

We refer to the above matter and to your letter of 17th August, last. You may be aware that Mr. Cuffe of your clients and Paschal Conroy of our clients met recently in relation to the matter set out in your said letter of 17th August last. Arising out of the said recent meeting, our client confirms that the items listed (1) to (8) inclusive in your said letter may be removed from the drafts heads of agreement proposed to date. Our client is prepared to pay the sum of €600,000 together with the sum of €280,000 in relation to an earlier overdue sum. He instructs that his financial controller will confirm the said overdue sum of €280,000 with reference to his records but our client confirms that he is prepared to pay any overdue sum relating to the original price. We should point out however that your client's said representative agreed with Mr.Conroy that our client will be entitled to develop or construct in the area coloured yellow and pink on the maps previously utilised to any height above ground or depth below ground as it requires. You might confirm this latter matter with your client. In view of the fact that there now appears to be an agreement between our respective clients, we would be obliged if you would redraft the heads of agreement and furnish such redraft at your earliest convenience. We thank you for your co-operation.

Yours faithfully."

56. It seems that John McDonald was unable to take immediate instructions from Mr. Cuffe as Mr. Cuffe was away. However he eventually spoke with him and, according to Mr. McDonald, "he became highly incensed" … "and he told me there was no such discussion, not alone agreement in relation to it." Mr. Cuffe confirms this. On the instructions of Mr. Cuffe John McDonald wrote to Walsh and Associates by a letter dated 9th October, 2006 and headed "Subject to contract/contract denied" stating:

" …..Mr. Cuffe denies that any discussion took place in relation to the right to develop and construct in the areas coloured yellow and pink to any height or depth above or below ground beyond what was originally discussed. We will revert to you as soon as we have met with Mr. Cuffe.

Yours faithfully."

57. Nothing further happened for many months. The transaction remained stalled and there was a total impasse. There were, however, significant developments on the third party front. As Mr. Cuffe explained in his evidence, part of the consideration for the proposed sale to Andorrey of the majority of Dalymount Park involved the provision to Bohemians by Andorrey of an alternative stadium on a site in Castleknock adjacent to the M50. However, it had by this time become obvious to both Bohemians and Andorrey that to get planning permission for a football stadium there would be difficult and, at best, a protracted process. In the meantime Daninger Ltd had come to the table and were offering a better deal to Bohemians. According to Mr. Cuffe:

"[On the night of a club EGM]….we received an offer from Daninger of €55 million cash. No stadium, no strings attached. 'You give us the keys to Dalymount, we will give you the 55 million'. It was never going to work for us, because we are a football club at the end of the day. We are not an investment company. We wanted a football pitch that we could make our home and move forward. So, we rejected that and we put it to the members on the night of the meeting just as a 'by the way, today we received this', and we got a clear direction from the meeting that that was never going to work for Bohemian Football Club. Some time elapsed, maybe 6, maybe 8 weeks, …and we had a further approach …. that Daninger were looking to talk to us again."

"…we explained to Daninger what we would require, i.e. a stadium in a site within the boundaries that I have previously mentioned, and Daninger had identified the site, and at a point in time there was a little bit of horse trading over the financial package to go along with it, but it was substantially in excess of where Andorrey were at with regard to finances."

"….ultimately the overall value of the package, if it was to take five years to deliver the stadium for us, came in at circa €67.5 million."

58. So Bohemians broke off negotiations with Andorrey in favour of negotiations with Daninger. It should be noted, and it may be of some significance in terms of what happened next, that the Daninger offer was for the whole of Dalymount Park including the parcels the subject matter of Bohemian's protracted dealings with Albion. Then on 20th April, 2007 John McDonald received a telephone call from Tim Ryan. The subject matter of that telephone call is recorded in an attendance note dictated subsequently by John McDonald on 23rd April, 2007. That attendance note states:-

"I got a telephone call from Tim Ryan on 20th inst. who asked me what the position was in relation to the property. He indicated that the last thing he remembered was that Albion had stated that they would be entitled to build as high as they wanted on the pink and yellow portions and we had reverted confirming that was not the case and had never been the case. He confirmed that he had recently spoken with Paschal Conroy and Paschal Conroy was prepared to go back to the original position if we were prepared to deal with him on that basis and I said that we were in the course of taking instructions and that I should have definitive instructions within the next few days and I would write to him on the matter. I indicated that I would telephone him once I had any instructions as a matter of courtesy to just to let him know what our clients were going to do."

59. It appears that subsequent to this telephone conversation Mr. Ryan sent a fax to F.H. O'Reilly and Company, Solicitors, marked for the attention of John McDonald. This fax was an open letter and it was in the terms:-

"Dear Sirs,

We refer to the above and to our recent telephone conversation with your Mr. John McDonald. We are writing this letter on the strict instructions of our client. We refer to our letter to you of 8th September last, together with your letter of 19th October, last. Your said letter clearly states that our client will not be allowed to build to any heights or depth in the areas shaded yellow and pink beyond what is set out in the heads of agreement. Our client accepts this. We now call upon you to confirm that your client is prepared to execute the heads of agreement which terms are clearly now agreed. Our client has given us the strictest instructions to us to inform you that in the event of your client failing to execute the agreed heads of agreement and be bound by them, our client will take all necessary measures to compel your client to do so and if necessary our client will issue High Court proceedings against your client. We wish to point out that our client has made significant part performance of this contract to date. Our client hopes not to have to take any steps to compel your client to execute the agreement, but in the event the same is not executed and furnished to us in the very near future, then our client will have to take such measures. We await hearing from you by immediate return.

Yours faithfully."

60. By letter of the 22nd May, 2007 headed "Subject to contract/contract denied" John McDonald then wrote to Mr. Ryan of Walsh and Associates as follows:-

"Dear Sirs,

We refer to your Mr. Ryan's telephone conversation with the writer on the 20th ult and your subsequent letter of 20th ult received on 23rd ult. Our client has indicated that it is not prepared any longer to continue with negotiations with your client.

Our client acknowledges however that certain monies were paid by your client in good faith in anticipation of reaching an agreement with our client which sums our client confirms amount to €1,050,000. As a result of our clients ceasing all negotiations in this matter we accordingly return herewith said monies received.

Kindly acknowledge safe receipt and oblige.

In the meantime please note that we have no authority to bind our client and we are under strict instructions that we are not acting as agents for our clients. Accordingly neither this letter nor any further correspondence from this firm shall be deemed to constitute an offer or an acceptance of an offer on the part of our client.

Our client, however, also denies the existence of a concluded agreement intended to represent a memorandum within the meaning of The Statute of Frauds (Ireland) Act, 1695. We would further ask you to note that our client is not to be considered bound until formal contracts have been signed by all parties and a full deposit paid.

Yours faithfully."

61. As intimated in the letter it was accompanied by a cheque (drawn on the client account of F.H. O'Reilly & Co and payable to Walsh & Associates) in the sum of €1,050,000.

62. The final letter in the course of correspondence under review, and the end of the material chronology, is a letter from Walsh and Associates to John McDonald of F.H. O'Reilly and Company dated the 23rd May, 2007. Once again this is an open letter and it is the following terms:-

"Dear Sirs,

We refer to your letter of 22nd May last and we have taken instructions from our client in relation to same. Mr. Conroy utterly rejects the content of your said letter and to this end we return your cheque in the sum of €1,050,000. We refer to our letter to you of the 20th April last. We repeat that our client has an agreement with yours in relation to the purchase of certain parts of Dalymount Park. Furthermore our client has paid considerable monies to your client over a number of years as part performance of this agreement. In fact the monies paid by our client represent the vast majority of the agreed purchase price which said monies were accepted and utilised by your client on the basis that there is a binding agreement between our respective clients. Mr. Conroy is most disappointed at this attempt by your client to reject this agreement and will take every step to ensure that your client honours the said agreement in full. We now call upon you to furnish us with the engrossed heads of agreement in duplicate for immediate execution by our client as already called for in ours of 20th April last. If these are not furnished within seven days from the date hereof, our client will immediately institute High Court proceedings in order to compel your client to complete the agreement and we shall use this letter to fix your client with the costs of any such application that will have to made to the High Court in this matter. In the mean while your client is to immediately reinstate the wall on our clients' property, knocked by your client and cease using both the east terrace and passageway known as Jack's Gate. We await hearing from you with engrossed agreements by return of post.

Yours faithfully."

63. This letter was not replied to and shortly thereafter the parties issued their respective proceedings.

Other evidence in the case

64. There was other evidence in the case which it is not necessary to review in as much detail as heretofore. The reason for this is that it consists of evidence which, although relevant, is quoted and referred to extensively in the submissions of the parties which I will be reviewing later, alternatively it is evidence that is no longer relevant in the light of the decisions that I have come to on the various issues that I have had to consider.

65. A great deal of time was spent by Counsel for the defendants in cross-examining both Mr. O'Reilly and Mr. Cuffe concerning the financial circumstances of Bohemians Football Club Ltd, and concerning statements contained in the annual accounts for the years ended 30th November, 2004, 30th November, 2005 and 30th November 2006 respectively. It was clearly established in evidence that Bohemians was in grave financial difficulties throughout this time, and was only able to keep going at all because it received a total €1,151,486 from Albion between January 2002 and the end of August 2006. Moreover, things were mostly getting worse not better as time went on. It had a steeply climbing debt graph.

66. Much was made in cross-examination (reiterated in detail in the defendants' submissions) of the following statements which appeared in the 2004 accounts and the 2005 accounts respectively. In the plaintiffs' accounts to the year ended 30th November, 2004, signed by Mr. O'Reilly as President and Mr. Cuffe as Secretary, the Directors Report refers, *inter alia*, to "Future Developments". Under that heading it states:

"The company has incurred significant cash flow deficiencies in the year under review. The trading losses at balance sheet date stand at approximately €1.5 million. The company has undertaken a number of plans to utilise the companies resources and generate income. These plans include:

- sale of small part of land to Albion Enterprises Limited for €750,000. The company has already received a deposit in the sum of €200,000, with a further €300,000 receivable immediately upon planning permission being granted to Albion Enterprises Limited. Planning permission is expected to issue shortly."

67. In the same Directors' Report, under the heading "Sale of Part of Land" it is stated:

> "The Company have agreed to sell a small part of its land at the shopping centre end of the ground to Albion Enterprises Limited. The sale is dependant on Albion Enterprises Limited receiving planning permission for development at said location. The proceeds of sale would yield the company €750,000, in addition to the provision of Corporate Boxes for the company at no cost. The value of the ground will not be reduced as a result of this sale. On receipt of planning permission the full €750,000 becomes receivable. The company have [sic] already received a deposit of €200,000 from Albion Enterprises Limited towards this sale, of which €100,000 is refundable. The €100,000 will become refundable if the planning permission is refused to Albion Enterprises Limited and this sum has been provided for in creditors as a refundable deposit."

68. In the plaintiffs' accounts to the year ended 30th November, 2005, signed by Mr. O'Reilly as President and Mr. Cuffe as Secretary, the Directors Report again refers, inter alia, to "Future Developments". Under that heading it states:

> "The losses of the company currently stand at approximately €0.72 million. The company has undertaken a number of plans to utilise the companies resources and generate income. These plans include:
>
> - the sale of a small part of land to Albion Enterprises Limited has been agreed at €720,000, in addition to the provision of corporate boxes at no cost. Of this amount, the company has already received funds in the sum of €600,000, with a further €120,000 receivable immediately. The company is to receive a further €650,000 from Albion Enterprises Limited in compensation for the delay in the provision of the corporate boxes. The total monies receivable are to be paid to the company by way of monthly instalments of €100,000, beginning January 2006 until the balance is settled in full."

69. In the same Directors' Report, under the heading "Sale of Part of Land" it is stated:

> "The Company has sold a small part of its land at the shopping centre end of the ground to Albion Enterprises Limited. The sale price has been agreed at €720,000, in addition to the provision of Corporate Boxes for the company at no cost. The value of the ground will not be reduced as a result of this sale. The company has already received funds in the sum of €600,000, from Albion Enterprises Limited at the balance sheet date. The company, as stated earlier in the director's report, is due to receive a further €650,000 from Albion Enterprises Limited in compensation for the delay in the provision of the corporate boxes."

70. The Court also heard evidence that Bohemians was under severe pressure from the Revenue in late 2005. There was evidence concerning a letter written by Mr. O'Reilly on behalf of Bohemians to a revenue official on the 17th of November, 2005. That letter stated *inter alia* that:

> "I would like to basically summarise the position regarding Bohemian Football Club and Pascal Conroy, Albion Properties Limited, relating to the redevelopment of Phibsboro Shopping Centre. In this regard we enclose herewith a copy of the initial Heads of Agreement which dealt with all issues including the payment of €650,000 on the full granting of planning permission and the other issue set out in the agreement. All issues in the agreement are not in dispute, save in respect of the building of corporate boxes for the club on an area of land already owned by Albion Properties limited".
>
> ….
>
> "The original agreement, as you will see, provided the corporate boxes would be built within a period of 15 months, the final grant of planning permission. It is in relation to this provision only that dispute has arisen. You will see from correspondence that all the other issues including payment of the balance of monies at Paragraph 6.1 are not in dispute".
>
> "Albion now inform us that the building of the corporate boxes could be as long as five years down the road rather than the 15 month period that was specified. They are entitled to argue that if they are delayed in carrying out this work that they cannot be forced to do it under the time provision in the contract..."
>
> "obviously we have raised the issue that if there is such delay in building the corporate boxes that they should pay us compensation and with this we could then build the corporate boxes ourselves."
>
> "We clearly could not agree to observe the existing Heads of Agreement and wait for approximately five years when building the corporate boxes. This would not be in the best interest of the club."

71. Mr. O'Reilly was cross examined extensively about this letter by Counsel for the defendants.

72. There was also evidence concerning the terms of the Memorandum and Articles of association of the plaintiff company. Article 58(15) of the Articles of Association empowers the directors (the committee) to dispose or part dispose of any of the club's assets without the sanction of a General Meeting up to a value of IR£500,000 (or nowadays its euro equivalent €635,000). There was also evidence of a temporary amendment to Article 58 suspending the limit specified there in sub-article 15 for a period twelve months from the 5th of May, 2006.

73. The Court further heard the evidence of both architects, namely Mr. Breen on behalf of the plaintiffs, and Mr. O'Hara on behalf of the defendants. It should be noted that Mr. Breen practises in two firms, namely Michael T Breen, Architects, and Gardiner Architects. Both firms have acted for the plaintiff at different times relevant to these proceedings and nothing turns on that. The common denominator in each instance was Mr. Breen. The main point arising from the architectural evidence was that Mr. Breen was not happy and would not approve the maps sent to him by Mr. O'Hara, being of the view that that the Project Architect maps did not show a gap of 6m between the boundary wall of Dalymount Park and the north boundary of the pink and yellow lands, and indeed show a gap of 5.3m, a difference of some 70cm. It will be recalled that a 6m gap was critical in terms of satisfying the Fire Officer in respect of the Connaught Street entrance. However, it emerged in cross examination that Mr. Breen never conveyed his concerns to Mr. O'Hara. Moreover, it was common case that both principals knew that a 6m gap was required, and accepted that that had to be. There was no dispute about on this. It was a non issue. Further, Mr. Breen was also of the view that the maps should have been developed to refer positions to fixed features that would not be obliterated in the course of the intended developments. For this reason he asked Mr. O'Hara for digital co-ordinates. He did not receive them, but then the evidence establishes that he did not explain to Mr. O'Hara why he wanted them and what his concerns were. Mr. O'Hara didn't provide them because he was sure that he had provided sufficient information already for what he believed were Mr. Breen's purposes. He said that if Mr. Breen had made his specific concerns known to him he could, and would, have supplied him with the digital co-ordinates.

The Issues For The Court
74. It seems to the Court that the following issues may, on the pleadings, arise for decision:

- Was there a concluded agreement or agreements?

- If there was a concluded agreement or agreements -

  - what was the effect of the endorsements "Subject to Contract / Contract Denied"?

  - was there a sufficient note or memorandum for the purposes of the Statute of Frauds (Ireland)1695?

  - If there was not a sufficient note or memorandum were there sufficient acts of part performance?

  - If there was an otherwise enforceable agreement or agreements, was that transaction or those transactions ultra vires the powers of the company? Further, if so, is any difficulty for the defendants arising from that to be avoided on account of section (8) of the Companies Act, 1963 or the European Communities (Companies) Regulations, 1973 or otherwise?

  - If there was an otherwise enforceable agreement or agreements, was that transaction or those transactions in breach of the internal rules of the plaintiff company. Further, if so, is any difficulty for the defendants arising from that to be avoided by the rule in *Royal British Bank Ltd –v. Turquand* [1856] 6 E & B 327?

- If there was no concluded agreement at all, do the circumstances of the case nonetheless give rise to a proprietary estoppel in favour of the defendants?

Was there a concluded contract?

The plaintiff's submissions
75. The first issue that the Court is required to consider is whether there was a concluded contract or contract. In this regard the plaintiff submits that while the parties treated in relation to a piece of land at Dalymount over a number of years, there was no concluded agreement at all (whether oral or evidenced in writing). It further submits that the Court could not, on the evidence before it, conclude that in some way the bones of a deal were in place and that the parties were bound together in such a way that they were forced to continue negotiation until a final written document incorporating all of the terms that either party would want came about. The plaintiff points to key elements that it says were never agreed:

> (i) While it was agreed that Mr. O'Hara representing the defendants' architects should produce a map for approval and agreement by Mr. Breen, the plaintiff's architect, Mr. Breen never approved and agreed any map. In addition to the general complaint that there was no agreed map, the plaintiff's witnesses made much in the course of the evidence of two reasons as to why it was not possible for Mr. Breen to agree the maps tendered to him . The first was the fact that the plaintiff required a minimum gap of 6m between the boundary wall of Dalymount Park and the north boundary of the pink and yellow lands. The plaintiff says that the Project Architects' maps tendered to Mr. Breen did not show the required gap of 6m. Rather, they show a gap of 5.3m, a difference of some 70cm. Secondly, they say the maps should have been developed to refer to fixed features that would not be obliterated in the course of intended developments.
>
> (ii) The negotiation of the "leases, licences, wayleave agreements and other documents to be drafted and completed" had not even started.
>
> (iii) Clause 7.1 of the Heads of Agreement refers to the agreement being subject …. "to the negotiation in good faith" …. of all necessary contracts, leases, licences, wayleave agreements and other documents required or reasonably envisaged. The plaintiff says an agreement to negotiate has no legal content.

76. In his submissions to the Court, Counsel for the plaintiff referred specifically to the following points in the evidence as supporting the plaintiff's contention that there was no concluded agreement.

77. The first contract contended for by the defendants in their pleadings is that of February 2003. Heads of Agreement were forwarded on 17th February, 2003 in a letter marked "Subject to Contract" and indicating that they were subject to approval and required the necessary maps to be attached. Included in that proposal was the construction of corporate boxes. Yet there was evidence is that Mr. Conroy "stormed out" of a meeting over Mr. Breen's requirement that if a deal were to go ahead the Corporate boxes would have to be built within the specified time limit. Mr. Conroy's behaviour was not consistent with there being a concluded agreement, so says the plaintiff.

78. On 19th December, 2003 Mr. O'Reilly wrote to Mr. Murphy asking him "When do you expect we will be in a position to conclude the Agreement?" On 9th July, 2004 he wrote indicating that "It is most urgent that this matter must be concluded". The plaintiff suggests that none of this correspondence would be consistent with there being a concluded agreement yet it is met with the assertion that there was in fact a contract of February 2003.

79. In mid 2005, John McDonald prepared a memo concerning the issues that were still outstanding. This was forwarded on 10th June, 2005 yet the defendants variously give June or July 2005 as a date when it is contended there was a contract.

80. In late 2005 there was a sequence following the meeting at Peploes. This commences with a letter from John McDonald of FH O'Reilly to Tim Ryan dated 2nd September, 2005. This states, "my understanding is that Albion have agreed to pay to Bohemian on the signing of an agreement as additional sum of €750,000". The letter goes on to indicate that a base is to be left to facilitate later building of corporate boxes and looks for a "draft condition" and that the lease would need to "incorporate various easements of support and shelter". Mr. Ryan on 29th September, 2005 in a letter marked "Subject to agreement / agreement denied" goes on deny that any agreement was made in relation to a definite figure to be paid". On 12th October Bohemians reply, again on a "Subject to contract basis" that this was not the first time that Bohemians believed Mr. Conroy had gone back on oral commitments made. They refer to the "breakdown in relations between our clients". On 24th October Mr. O'Reilly indicates that he will forward a letter

withdrawing consent to An Bord Pleanála. On 25th October, 2005 Mr. Ryan indicates that if such a letter is sent his client "will immediately demand the return of the approximately €400,000 as furnished to your client". While he goes on to mention part performance, it is noteworthy that nowhere does he suggest that there was (a) a contract (either of February 2003 or June/July 2005), or (b) that his client has a right to specific performance. The plaintiff submits that this sequence of correspondence runs absolutely contrary to any notion that these are parties who were in agreement on all "essential terms". Accordingly, the plaintiff says, there is no evidence to establish a concluded agreement.

81. On 11th January, 2006, Mr. Ryan wrote to F.H. O'Reilly and stated "The main issue outstanding appears to be the agreement of final maps between our respective clients' architects". That letter is headed "Subject to agreement / agreement denied" and concludes with the words "no contract shall exist or be deemed to exist until all contracts are executed, exchanged and deposit furnished". It is clearly accepted that as at 11th January, 2006 there was no agreement of a final map between the architects. The plaintiff suggests that this in itself accepts that agreement by the plaintiff's architect was a core requirement, and this never happened.

82. In mid 2006 the Andorrey negotiations came into the picture. On 9th May, 2006, Mr. Ryan wrote to F.H. O'Reilly and for the first time asserts that there is a binding agreement with Bohemians. The Court is asked to note in passing that even the Defendant does not assert that there had been some agreement between the letter of 11th January and that of 9th May. Mr. McDonald replied on 11 May pointing out that all the negotiations had been conducted on the basis set out in the last paragraph of the letter of 8th March 2002 from Hughes Murphy Walsh & Co to FH O'Reilly & Co. He goes on to say "no agreement has yet been concluded, no agreed contracts have been prepared..." and notes that all of the correspondence was marked "Agreement denied". However he indicates that "strictly without prejudice to the fact that there is no such binding agreement" and on "a without prejudice basis" his client (the plaintiff) was prepared to meet Mr. Ryan's clients (the defendants). The plaintiff submits that the negotiations in mid to late 2006 were

> (i) conducted on a without prejudice basis.
>
> (ii) conducted on a subject to contract basis (cf. F.H. O'Reilly & Co.'s letter of 17 Aug 2006).
>
> (iii) clearly conditional on the Andorrey deal going ahead. Insofar as there was discussion about the value of the items not necessary if Bohemians were leaving Dalymount (as set out in the letter of 17th August) this would only have been the case if the Andorrey deal was proceeding. However, there was absolutely no guarantee that Bohemians would in fact be leaving Dalymount. As it happened the Andorrey deal did not proceed, and insofar as the plaintiff subsequently entered a contract with Daninger Ltd that was not in the parties minds as of August 2006.

83. The plaintiff says that the evidence discloses further uncertainty at this time on account of an assertion by Mr. Conroy, through his solicitor, on 8th September, 2006 that he, "will be entitled to develop and construct in the areas coloured yellow and pink on the maps previously utilised to any height above ground or depth below ground that it requires." On 19th October, 2006 Mr. McDonald replied to the effect that "Mr. Cuffe denies that any discussion took place in relation to the right to develop and construct in the areas coloured yellow and pink to any height above ground or depth below ground". No reply to that was received and in fact there is then a gap of six months until 20th April, 2007. Mr. McDonald's file memo of 23rd April, 2007 states that "[Mr. Ryan] confirmed that he had *recently* spoken with Pascal Conroy and Pascal Conroy was prepared to go back to the original position" (the plaintiff's emphasis). A letter was written on the same day. Mr. Ryan was asked about this in the following passage from the transcript of day 12 of the trial:

> "Q `(Mr. Mohan S.C.) – And you tell John McDonald that, you said to him that Pascal is prepared to go back to the original position if Bohs were prepared to deal with him on that basis.
>
> A (Mr. Ryan) – Correct".

84. The plaintiff suggests that that evidence is not consistent with there being a concluded agreement at that point.

85. The plaintiff further submits that on the letter of 8th September, 2007 alone, the counterclaim should fail. It is suggested that this should be viewed as Mr. Conroy seeking to negotiate yet again a further advantage to himself in the context of the parties dealings. This takes place just one month after the last of the alleged dates of contract (viz, August 2006) Counsel for the plaintiff speculated that perhaps Mr. Conroy felt that if Bohemians were leaving Dalymount the height/depth issue was no longer important to them but, whatever his reasons, it is suggested that he made a clear counter offer which was rejected by the letter of 19th October, 2006.

> "…before one comes to the question of a note or memorandum it is necessary to see if an entire contract was concluded on Sunday the 24th October, for it is only in that event that the statutory note or memorandum would be required. If the negotiations between the parties had not ripened into the fullness of an entire contract the plaintiff's claim for specific performance would fail...."
>
> "The formation of a contract, in my view, involves more than a serial accumulation of separate and discrete agreed clause. Consensus on several particular terms of an overall agreement normally will not give rise to a contract until all essential terms have been formulated and agreed upon. A contract is more than the sum of its parts considered separately, just as a melody is different from the individual notes....."

86. The Court was also referred to *Dore v. Stephenson*, (Unreported, High Court, Kenny J., 24th April 1980). In that case the parties had discussions about the sale and purchase of a cafe on the first floor of premises on the High Street in Kilkenny without making any provision as to the rights of either party with regard to access to the premises or ownership of the foyer through which the same were entered. Kenny J. held that:

> "The nature of the property and particularly the mutual rights in the foyer made it essential that the parties should agree on whether the plaintiff was to remain the owner of the foyer with the defendant having a right for himself and the customers of the Country Shop and the occupants of the flat to pass through the foyer to go up the stairs or whether the defendant was to remain the owner of the foyer and the plaintiff and his customers would have a right to pass through it. Until agreement was reached on this point, there was in my opinion, no consensus between the parties."

87. The Court was also referred to the statement of Geoghegan J. in the Supreme Court in *Supermacs Ireland v. Katesan (Naas) Ltd.* [2000] 4 I.R. 273 (an application to dismiss) indicating that the correct test as to whether there is a concluded agreement is whether

"everything intended to be covered by the agreement has been either expressly or impliedly agreed".

88. The plaintiff lays great emphasis on the statement in the letter of the 8th of March, 2002 that "no contract shall exist or be deemed to exist until contracts are executed by both parties, exchanged and a contract deposit furnished". It says that the defendants have put forward no evidence as to when this basis of negotiation was changed. Moreover, they say that this understanding is reflected in clause 7.1 of the Heads of Agreement which, it will be recalled states:

> "The agreement is subject, once planning permission has been obtained, to the negotiation in good faith and the preparation and conclusion of all necessary contracts, leases, licences, wayleave agreements and other documents required or reasonably envisaged under the terms hereof."

89. The plaintiff has referred the court to a recent examination of the law in relation to negotiation in good faith by Laffoy J. in *Triatic Limited v. Cork County Council* [2007] 3 I.R. 57, at 78 seq.. In that case the Laffoy J. considered the House of Lord decision in *Walford v. Miles* [1992] 2 A.C. 128. In that case Lord Ackner distinguished between an agreement to negotiate in "good faith" as against an agreement to use "best endeavours". He stated:

> "The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. The uncertainty is demonstrated in the instant case by the provisions which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether subjectively a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith". However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering improved terms.....a duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. Thus there is no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content."

90. Laffoy J. indicated that she found the reasoning of Lord Ackner persuasive.

91. The plaintiff submits that the absence of agreement in relation to the "leases, licences, wayleave agreements and other documents to be drafted and completed" is important and is not some sort of mere trifle, that would have been worked out.

92. The plaintiff invites the Court to conclude that, having regard to the complexity of the transaction, the parties never intended to contract until a final written document was in front of them. It says that in a complicated transaction of this type all of the detail has to be put down on paper. It further says that with two experienced conveyancing solicitors involved they would undoubtedly have insisted that all of the details should be worked out, and that these would be embodied in a contract document built around the standard Incorporated Law Society of Ireland conveyancing contract, adopting in so far as possible the normal General Conditions of that contract and with further Special Conditions appropriate to the particular transaction. Counsel for the plaintiffs contended that the plaintiff would never have agreed on an open contract which would have left it wholly unprotected, and asserted a belief that neither would the other side.

93. The court was further referred to the following statement of Parker J. in *Van Hatzfeldt Widenberg v. Alexander* [1912] 1 Ch. 284 which, the plaintiff says, encapsulates the law on this issue and, properly applied, supports its position:

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

94. The plaintiff's position, in summary, is that although the parties treated over a long period, their dealings never moved beyond a series of offers and counter offers. In short, there was never a concluded agreement.

The Defendants' Submissions

95. In reply to the plaintiff the defendants say the following. They say there were successive contracts with variations. They say there is nothing complicated about the idea of successive contracts, each one a variation on the one before it, with each contract remaining in place unless and until replaced by a variation. Moreover, they say there are three points in time at which the existence of a concluded contract can be identified with certainty on the evidence.

- July 2005, just prior to the introduction of the variation arising from the corporate boxes. (The defendants' pleadings refer to June 2005 rather July 2005 but the Court is of the view that nothing turns on it.)
- November 2005, when agreement was reached on removing the corporate boxes and paying compensation instead.
- August 2006, when agreement was reached on removing further elements of the original deal and paying additional compensation for that.

(Though it was contended in the pleadings, and at one point during the trial, that there was a concluded agreement as early as February of 2003, this was not pressed in submissions and the Court understands the defendants to be confining their claims at this stage to the three dates mentioned above.)

96. It is necessary to deal with each in turn.

July 2005

97. The defendants point to the following evidence as demonstrating that there was a concluded contract at this stage:-

(a) The payments from February 2003 to June 2005. Excluding the non-returnable deposit of over €100,000, these amounted to €300,000.

(b) The alleged representations made by Felim O'Reilly to Paschal Conroy on the occasion of these payments. Mr. Conroy gave the following account:-

> "I said, well, where are we with this deal. He said, well, do not worry about that, that deal is done as far as I am concerned but we do need the money. So I divvied up the money at the time and I trusted Felim, and I took him as a friend who would not let me down." (Day 10, page 100)

There are statements to similar effect on day 10, page 108 and day 11, page 113 of the transcript. He later stated at day 11, page 115:

> "No, sorry, I was paying the money because I had a deal with Bohemians. I was assured by Felim O'Reilly that I had a deal with them. He told me, we need the money. I said, fine, because we have a deal here, I don't really have a problem with giving you the money up front."

(c) The statements in the directors' reports and the accounts of the plaintiff company to December 2004, which were signed off in January 2005.

(d) The defendants say that statements themselves are utterly unequivocal. Moreover, they say that while it is tentatively suggested by Bohemians that one would not want to understand these to mean what they say, because they were prepared by the auditors and merely signed by the directors, that was not the process. They point out that the plaintiff company's auditor Mr. Whelan described the process in the course of his evidence. He said he went to the directors, spoke to them about the affairs of the company, went away, prepared accounts and reports based on what he had been told, sent drafts back to the directors, came and spoke to them, made alterations based on these discussions, and then finally sent the drafts. Mr. Whelan made it clear that the statement in the directors' report to the effect that Bohemians had agreed to sell land to Albion was precisely what the auditors were told by the directors. Mr. Whelan also said that if he had been told that this money might or might not come in and was dependent on something other than planning permission, he would possibly have taken the view that Bohemians was not viable as a going concern.

November 2005

98. The defendants point to the following evidence as demonstrating that there was a concluded contract at this stage:-

(a) All of the evidence relating to the July 2005 period.

(b) The agreement of November 2005, which was recorded in the letter of the 8th November 2005 but was reached prior to that. The defendants say that the position is completely changed from the position that applied prior to this. There is now an acknowledged liability on the part of Albion to pay, irrespective of planning permission, or of the existence of heads of agreement.

The letter means on its face that Albion had agreed to pay €1.4 million only on the basis that it was getting land in exchange. Any other explanation of what occurred is simply absurd. The case made by Bohemians amounts to saying that Albion was committed to paying €1.4 million, but that it was getting nothing in return. On the contrary, Bohemians could hand the money back at any time that it wanted. They point out that, indeed, Mr. McDonnell's view was that Bohemians did not even have to hand the money back, but rather was entitled to keep it, and that Albion was in any event entitled to nothing in return. They suggest that if the question is asked the other way around, the reality becomes clear: could it really have been the case that Albion was entitled at any stage simply to say that it wanted the money back, and that Bohemians would have had to repay it?

(c) The money actually paid under the November 2005 agreement. €750,000 was paid between November 2005 and August 2006.

(d) The accounts to December 2005. Again, they say these are utterly unequivocal. The accounts state:-

> "The company has sold a small part of its land at the shopping centre end of the ground to Albion Enterprises Limited. The sale price has been agreed at €720,000, in addition to the provision of Corporate Boxes for the company at no cost. The value of the ground will not be reduced as a result of this sale. The company has already received €600,000 from Albion Enterprises at the balance sheet date. The company, as stated earlier in the directors report, is due a further €650,000 from Albion Enterprises in compensation for the delay in the provision of the corporate boxes."

The defendants say that the evidence establishes that in 2005 the auditors followed the same process of obtaining information from the directors and checking it carefully with them, as they had done in 2004. They suggest that it is not simply the statements in the directors' reports and accounts that are significant. The accounting treatment of the payments from Albion depends entirely on whether it was payable as of right by Bohemians or not. It was only when he was told that it was payable as of right that Mr. Whelan could include it in income. If he had been told it was repayable, he would have had to show it as a liability. Mr. Whelan asked specifically whether the money due to Bohemians was coming in. He got a letter back from Mr. O'Reilly dated the 13th January 2006 saying that the entire was due. Mr. Whelan then spoke to Mr. O'Reilly. His view following that conversation was that the money was Bohemians to keep, and that it was entitled to get the further payments. If he had been told that the state of affairs was such that Bohemians might have to repay it, it would not have been possible to draw the accounts on a going concern basis. He continued (transcript, day 8):-

> " 212. Q. So through whatever Mr. O'Reilly said to you, he clearly conveyed the impression to you that this was

their money to which they were entitled?

A. That is correct…….

220. Q. And none of that was done?

A. None of that was done. Basically, we were not told that this money was going to be repaid. Under no circumstances were we told that.

Q. Or even repayable?

A. No, we were not.

Q. Under any circumstances?

A. We were not told that."

The defendants submit that it is hard to imagine anything more definite. The directors at the time were clearly of the view that the land had been sold. The defendants say they were of that view because they were right.

(e) The alleged representations of Mr. McDonald made at the meeting of the 17th May, 2006, supported tacitly by Mr. Conway and Mr. Cuffe.

In the course of his testimony Mr. Conroy described these events:-

"Yeah. At this point I would have said to them, look, guys, we have a deal here, you know, I don't want any messing with this deal. I said, you know, it could possibly end up in the High Court if it ever got messy. John McDonald assured me that no, definitely not, that the deal was mine."

The defendants point to the fact that Mr. Ryan gave similar evidence on day 12 of the trial. Moreover Mr. O'Hara testified on day 10 of the trial that Mr. Cuffe gave similar assurances that the deal was going ahead at a meeting held in the autumn of 2006.

(f) The fact that in the negotiations with third parties, at all stages up to November 2006, the lands in sale to Albion were excluded from those on offer. The defendants suggest that was only when it became clear after November 2006 that Bohemians may have mistakenly sold these lands to Daninger that a suggestion was made that they had not been sold to Albion.

August 2006

99. The defendants point to the following evidence as demonstrating that there was a concluded contract at this stage:-

(a) All of the evidence relating to the November 2005 period

(b) The exchange of correspondence from the 17th August, 2006 to the 20th April, 2007. They say that the first letter in that sequence reflected an agreement reached directly between the parties, to the effect that certain obligations would not have to be fulfilled by Albion and that an additional consideration of €600,000 would be paid.

(c) The fact that, in the negotiations after August 2006, the lands in sale to Albion were not offered to third parties.

100. In reply to the plaintiff's suggestion that there could be no agreement until "contracts are executed by both parties, exchanged and a contract deposit furnished" the defendants say that this is wrong as a matter of principle. While acknowledging that the quotation cited by the plaintiff from the judgment of Parker J. in In *Van Hatzfeldt Widenberg v. Alexander* correctly encapsulates the law, the defendants say it is a question of interpretation as to whether this falls into one category or the other. The defendants submit that the reality is that in this case, the relevant clause (i.e. clause 7.1) of the Heads of Agreement is no more than a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. They suggest that any other view is inconsistent with the course of dealing between the parties, in particular the payment of monies, the representations made, and the contents of the accounts and directors' reports. Further, they say that the proposition can have no relevance to contracts reached directly between the parties. In the specific case of the November 2005 agreement contended for this agreement was reached directly between the parties. The defendants submission is that in these circumstances the contents of subsequent letters and draft heads of agreement cannot alter the simple fact that an agreement was reached.

101. With reference to the mapping issues they say that the absence of an agreed map is irrelevant. They accept that no map was finally agreed but say that there was no doubt as to what was in sale. They say that the lands to be transferred to the defendants are and always were what the parties long ago started to call "the pink and yellow lands" and "the blue lands" as repeatedly shown on the maps submitted in evidence. They say that in truth, the pink and yellow lands have never moved or changed while the blue subterranean lands were always intended to stop short of the plaintiff's playing surface and were fixed in that and all other respects after the survey and subsequent walking of the lands in late May and early June, 2005.

102. Dealing in more detail with the identification issues the defendants say the following:

Re: The Pink and Yellow lands

103. The defendants acknowledge that the Project Architect maps do not show a gap of 6m between the boundary wall of Dalymount Park and the north boundary of the pink and yellow lands, and indeed show a gap of 5.3m, a difference of some 70cm. However, they contend that this is an irrelevant issue. They say it is simply a mapping error, caused in turn by a mapping error as to the true position of the boundary wall of Dalymount Park. The important point is that it is common case that, at all times, both parties intended the north boundary of the pink lands to be 6 metres south of the plaintiff's north boundary.

104. They say there is no mistake as to what was in sale. The mapping error, such as it is, can be readily corrected. In fact, that has been done, and by Mr. Breen. They point out a map prepared by Mr. Breen in June, 2006 in the course of negotiations with Andorrey, shows the pink and yellow lands set back correctly (i.e. 6 metres) from the correct boundary, as it was always intended to be. Furthermore, that this was what was intended is perfectly clear not only from Mr. Breen's mapping, but from the fact that, as much stressed in evidence, he never even raised the point when he discovered the alleged mapping error mentioned above. He simply took the pink and yellow lands to run only to six metres from the boundary of the plaintiff's land.

105. The defendants say that had the parties persisted with the Project Architects' map and attached it to a documentary contract, and if it had ultimately transpired that there was a mapping error, the Court would readily have rectified the document in relation to the 6 metres on the common evidence that a 6 metre gap had been what was intended. They seek to emphasise that what was agreed is not in issue. Moreover, had the mapping error spotted by Mr. Breen been pointed out to Mr. O'Hara (or anyone) the maps would have been corrected. And there is, in fact, an undeniably correct map, prepared by the very person who had to approve it for the plaintiffs, namely Mr. Breen's map referred to above.

Re: The Blue Lands

106. The defendants submit that these lands are also identified beyond any doubt on a set of five maps submitted by Project Architects on the 5th July, 2007. Critically, they are also clearly shown, in identical terms, on a map prepared by Gardiner Architects (representing the plaintiff) in June, 2006, at the time and for the purpose of the (ultimately abortive) negotiations for the sale of Dalymount Park to Andorrey. This is Gardiner Architects drawing number GAL05-107-001 which was produced in evidence and discussed by Mr. Breen in response to questioning from Mr. McCullough S.C in relation to the proposed sale to Andorrey and then to Daninger. It is a hand-numbered "1" in a bound and indexed set of maps produced in court. Drawing number "2" in the same book is even clearer, says the defendant. This drawing, taken from the December, 2005 version of the Project Architects set, has manuscript notes on it penned by Mr. Breen and dated the end of March, 2006. In those notes he clearly indicates that the key dimensions of the blue lands are correct. The defendants submit that, putting the two drawings together, Mr. Breen's own and his notes on the Project Architects' drawing, it is beyond doubt that both parties knew very well both the position and the dimensions of the blue lands and that Mr. Breen's understanding of the blue lands corresponded with that of Mr. O'Hara (from July, '05 onwards) as shown on the maps cited above.

107. The defendants also sought to deal in the course of their submissions with the complaints made by the plaintiff concerning the method of mapping. They acknowledge that numerous references were made during the evidence of Mr. O'Hara and Mr. Breen, to Mr. Breen's view that the maps should have been developed to refer positions to fixed features that would not be obliterated in the course of the intended developments. They do not disagree that this could have occurred. However, they point out that Mr. Breen accepted in the course of cross-examination by Mr. McCullough S.C. that the lands could be identified by reference to any such fixed feature. That being so, they make two points. First, there are numerous fixed points outside the plaintiff's lands on most of the drawings. Connaught St., North Circular Road and Phibsborough Road appear on most of them and houses and buildings on all three. Secondly, dimensions are given on many of the drawings to fixed points which, at the dates of those drawings, were not intended to be obliterated, and this was emphasised in evidence. They point to the fact that examples were specifically put to Mr. Breen in cross-examination and Mr. Breen accepted that these were dimensions to given features of the football ground.

108. In summary the defendants position on this issue is this: while there may have been, especially in relation to the final deal of August, 2006, when the football ground itself was to be obliterated, considerable practical merit in the proposal to establish references that would survive, the failure to do so did not indicate that the lands in sale were not known. While they might usefully have been mapped in a way that would make it easier to mark them in the future, the failure to do so does not go to the identification of the lands in sale.

109. Turning then to the plaintiff's submission that there could be no concluded agreement in the absence of agreement on the "leases, licences, wayleave agreements and other documents to be drafted and completed", the defendants contend that the issue here is whether these were minor matters left to be agreed later by lawyers, or were they fundamental matters on which agreement was never reached.

110. They cite *Black v. Kavanagh* (1973) 108 I.L.T.R. 91. (However, I am not sure that that case is in point. While Gannon J. did refer to circumstances where the authority of solicitors to negotiate and conclude a contract on behalf of their clients may be implied from the circumstances, the facts of that case were very different to those of the present case.) Perhaps, more pertinently, they also refer to *Chitty on Contracts* (28th edition, Volume 1) wherein it is stated at paragraph 2-104-

> "On the other hand, an agreement may be complete although it is not worked out in meticulous detail. Thus, an agreement for the sale of goods may be complete as soon as the parties have agreed to buy and sell, where the remaining details can be determined by the standards of reasonableness or by law."

The authors then go on at paragraph 2-105 to say:-

> "Even an agreement for the sale of land dealing only with the barest essentials may be regarded as complete if that was the clear intention of the parties. Thus in *Perry v. Suffields Ltd* [1916] 2 Ch. 187 an offer to sell a public house with vacant possession for £7,000 was accepted without qualification. It was held that there was a binding contract even though many important points e.g. the date for completion and question of paying a deposit, were left open."

111. Further, the defendants rely on the New Zealand case of *Electricity Corporation of New Zealand v. Fletcher* [2001] NZCA 289. (This case was also referred to in oral argument by counsel for the plaintiff.) The New Zealand Court of Appeal said in that case:-

> "A helpful analysis of various possible situations is given by Lloyd L.J. in *Pagnan S.p.A. v. Feed Products Ltd* (1987) 2 Lloyd's Rep 601, 619. After pointing out that the parties may intend to be bound forthwith even though there are further terms still to be agreed, his Lordship said that, if they then failed to reach agreement on the further terms, the existing contract is not invalidated unless the failure to reach agreement renders the contract as a whole "unworkable" or void for uncertainty. By "unworkable" we take him to mean that the transaction is lacking in business efficacy. Lloyd L.J. continued:
>
> > 'It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by "essential" one means only a term

> which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, "the masters of their contractual fate". Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

112. Albion submits that in this case, that was precisely the intention of the parties. Agreement had been reached. The terms of the wayleaves, leases etc were (and still are) minor details to be filled in later, according to the standards of reasonableness. The most significant consideration is that the terms of the wayleaves, leases etc were never mentioned once in correspondence. Both parties were happy in November 2005 that Albion could safely commit to paying over large amounts of money without these details being in place. They submit that the most significant issues are in the draft heads of agreement anyway. Further, in relation to the proposed leases they cite *Yaxley v. Gotts* [2000] Ch 162, an equitable estoppel case, as an example of a case in which the court was prepared to order a defendant to grant the plaintiff a 99 year lease, although the terms of any such lease had neither been negotiated nor agreed.

113. The defendants contend that in this case, that was precisely the intention of the parties. Agreement had been reached. The terms of the wayleaves, leases etc. were (and still are) minor details to be filled in later, according to the standards of reasonableness. The most significant consideration is that the terms of the wayleaves, leases etc were never mentioned once in correspondence. Both parties were happy in November 2005 that Albion could safely commit to paying over large amounts of money without these details being in place. They submit that the most significant issues are in the draft heads of agreement anyway. Further, in relation to the proposed leases they cite Yaxley v. Gotts [2000] Ch 162, an equitable estoppel case, as an example of a case in which the court was prepared to order a defendant to grant the plaintiff a 99 year lease, although the terms of any such lease had neither been negotiated nor agreed.

114. Turning to the question of the requirement of "negotiation in good faith" …. of all necessary contracts, leases, licences, wayleave agreements and other documents required or reasonably envisaged," the defendants maintain that the decision in *Triatic v. Cork Co. Council* favours them. They say that *Triatic* is a case in which it was sought to create a contract out of an obligation to negotiate in good faith. However, in this case, there is already a contract in existence, and the question is whether details can be filled in by negotiations conducted in good faith. They say Triatic supports the proposition that this is permissible.

115. The defendants' submissions deal at some length with the evidence that they claim supports their contention that the parties were committed to each other from an early stage. They say that the evidence is overwhelming in this regard. They claim that the payments made represent compelling evidence that the parties were fully committed. They further submit that, as the trial has developed, the position of the plaintiff's officers on the question of whether there was a deal has become quite bizarre, not only in relation to the payments they sought, but much more tellingly because it was so clearly recorded, in relation to the documents they themselves generated or transmitted. They say the plaintiff's officers, for the purposes of this case, ask the Court to find that they themselves consistently misrepresented the position to their own members, to their creditors and to the Revenue and that they misled Andorrey (against their own interest) and (also against their own interest) Mr. Black (the solicitor originally acting for Daninger).

116. The defendants submit that the relationship of the payments to the transaction is clear and that the only credible explanation is that of Mr. Conroy; that they were made on promises that the deal (in place at each date) would be completed.

Date	Payee	Amount
17/1/02	F.H. O'Reilly & Co	€31,743.45
15/2/02	F.H. O'Reilly & Co	€31,743.45

117. These first two payments were payments in consideration of negotiation. It is acknowledged that they did not reflect a committed deal. However, that had been specifically agreed.

20/2/03	F.H. O'Reilly & Co	€38,000.00

118. This was the last payment of the agreed non-refundable deposit of IR£80,000, and it was paid just after the first heads of agreement were prepared.

04/07/03	Bohemian F.C.	€50,000.00
24/07/03	F.H. O'Reilly & Co	€50,000.00

119. The above payments are accidentally listed as income in the 2003 accounts, which treatment was corrected in the 2004 accounts on the basis that they would be refundable if (but only if) planning permission were ultimately refused.

1/11/03	F.H. O'Reilly & Co	€50,000.00

120. This payment, with the previous two, completes the €150,000 recorded in the plaintiff's accounts for the year ended 30th November, 2003 as income but as giving rise to a contingent liability. €50,000 is reclassified in the 2004 accounts.

12/11/04	F.H. O'Reilly & Co	€50,000.00
04/01/05	F.H. O'Reilly & Co.	€50,000.00
02/06/05	F.H. O'Reilly & Co.	€50,000.00
09/11/05	F.H. O'Reilly & Co.,	€100,000.00

121. This last is the first payment on foot of the agreement of November, 2005 for increased payments in lieu of having to build the corporate boxes, which were to be made in instalments. This is also the point at which the agreement ceased to be contingent on planning permission, a point that clearly demonstrates the defendants' commitment to the purchase.

4/12/05	F.H. O'Reilly & Co.,	€200,000.00
23/1/06	F.H. O'Reilly & Co.,	€100,000.00
06/02/06	F.H. O'Reilly & Co.,	€100,000.00
09/03/06	F.H. O'Reilly & Co.,	€100,000.00

06/04/06	F.H. O'Reilly & Co.,	€100,000.00

122. All of the above are instalments paid pursuant to the November, 2005 agreement.

24/8/06	Bohemian F.C.	€50,000.00
Total	€1,151,486.90	

123. The defendants contend that the Court has heard no credible explanation of these payments other than that they were made in reliance on assurances that the relevant deal was in place. (The Court would comment that that assertion is correct, but, of itself, it is not dispositive of the matter). The plaintiff's officers accept that they sought these payments but, even though they amount to most of what was payable for the lands and clearly relate from November 2005 onwards to the specific agreement of that date, they deny that the payments were made in reliance on completed deals. The amount of the payments is obviously very significant in the context of the parties' dealings, whatever their nature.

124. The defendants ask the Court to consider what is the alternative explanation offered by the plaintiff? They submit that it is only this: that Mr. Conroy paid these sums to keep the plaintiff on side, specifically to keep the plaintiff's support in relation to its planning permission and not on the basis that the plaintiff was committing to the sale. They suggest there is a complete absurdity at the heart of that explanation: the land may have been of little use to the defendants without a planning permission but *any* planning permission incorporating the lands was worse than useless to the defendants without those lands (the defendants' emphasis). The defendants contend that the proposition that Mr. Conroy was paying the price he might have had to pay in the future for the privilege of getting a planning permission that would bind his €200 million investment to a piece of land he might never get is bizarre. Furthermore, they say, this was necessarily obvious to every person aware, even in general terms, of the defendants' overall plan and the significance of the lands in sale to that plan. The plaintiff's officers admit they were aware in this regard.

125. The defendants submit that it just is not credible that the plaintiff's officers thought there was no commitment between them when they sought and obtained these payments from the defendants.

126. They suggest that the proposition put forward on behalf of the plaintiffs is particularly absurd in relation to the payments made from the 9th November, 2005 onwards. They say that in respect of these payments, there is no need to rely on any assurances given on behalf of the plaintiff, because the basis upon which they are paid is specifically set out in writing. They were made on foot of the deal recorded in the letter from the plaintiff's solicitors of the 8th November, 2005. That letter specifically records the fact that the parties "have agreed the following *arrangement*". The arrangement set out in the letter commits the defendant to paying a further sum of €650,000 "*in compensation* for the building of the corporate boxes". It need hardly be said that one can only be compensated for a right that one has given up, which in this case can mean only the contractual entitlement to have the defendant build the corporate boxes. The letter further states that this amount together "with the balance due in relation to *the original figure agreed for the area to be leased at Connaught Street…*" would be paid according to an agreed schedule. The entitlement of the plaintiff to these payments was not made subject to execution of the heads of agreement, to planning, or (still less) to any further agreement on the terms of leases. And indeed the defendant began to pay the amounts due under this arrangement without waiting for anything else to occur. The defendants submit that it simply makes no sense to say that the parties entered into a deal whereby the plaintiff would be entitled to these large payments, and the defendant would be entitled to nothing.

127. They further assert that, in fact, the plaintiffs told various unconnected parties that they had a deal. In the plaintiff's accounts for the year to the 30th November, 2004, which the Court heard was sent to every member, not only is the deal with the defendants described, but the description and accounts show, they suggest, an acute awareness of two very relevant points; the matters on which the deal was contingent and the consequential obligations in accounting for monies received from the defendants. The Directors' report, signed by Mr. O'Reilly as President and Mr. Cuffe as Secretary, refers to "Future Developments" including plans for the sale in issue in these proceedings. They say that Mr. O'Reilly, attempting to explain this away, suggested that this was only a description of plans (in the sense of "possibilities"), but, even at that point, the report goes on to be very clear. It says:

> "- sale of small part of land to Albion Enterprises Limited for €750,000. The company has already received a deposit in the sum of €200,000, with a further €300,000 receivable immediately upon planning permission being granted to Albion Enterprises Limited. Planning permission is expected to issue shortly."

128. Thus a contingency is identified, but only one – that of whether the defendants would obtain planning permission. The defendants say that use of the word "receivable" clearly showed an intention that once such permission was obtained, the plaintiff would receive the additional money.

129. Moreover, they suggest that, in any event, the position is put even more explicitly further down on the same page:

> "Sale of Part of Land"
>
> The Company *have agreed* [sic] to sell a small part of its land at the shopping centre end of the ground to Albion Enterprises Limited. The sale is dependant on Albion Enterprises Limited receiving planning permission for development at said location. The proceeds of sale would yield the company €750,000, in addition to the provision of Corporate Boxes for the company at no cost. The value of the ground will not be reduced as a result of this sale. On receipt of planning permission the full €750,000 becomes receivable. The company have [sic] already received a deposit of €200,000 from Albion Enterprises Limited towards this sale, of which €100,000 is refundable. *The €100,000 will become refundable if the planning permission is refused to Albion Enterprises Limited* and this sum has been provided for in creditors as a refundable deposit." (defendants' emphasis in italics)

130. So it is contended that the auditors, instructed by the officers of the club, and fully aware of the need to distinguish monies which might have to be returned from those which might not, drafted for the Directors, and the directors signed and sent out to the members, a plain statement that there was an agreement for sale that was contingent only on planning permission, as was in fact the case at that time, and accounting for the financial position on that basis. And this was in the context of fundamental uncertainty about the club / company to continue as a going concern.

131. In the accounts themselves, at page 7, point 1.5, the auditors made specific reference to their preparation on the basis of a going concern, referred to the deal with the defendants (again in terms that leave no doubt other than the contingency as to planning) and confirmed, on that basis, that the directors considered it appropriate to treat with the company as a going concern. Finally, and still with that set of accounts, the auditors emphasised their appreciation of contingency by making special provision for monies that had been treated as income the previous year but which might have to be repaid if planning were refused.

132. Those accounts show that they were signed for the board by Mr. O'Reilly and Mr. Cuffe on the 2nd February, 2005. This, of course, was before the survey of late May, 2005, the walking of the lands, the revised deal of June, 2005 and the maps of July. But in November, 2005, the deal having been revised, Mr. O'Reilly wrote to Mr. Joe Connolly of the Revenue Commissioners. His letter discusses the deal in detail, including the planning issue and the row that had then erupted as to whether the defendants would build the corporate boxes within 15 months of planning. The letter is couched entirely in terms that there has been a deal in place for some time. Indeed, it discusses the enforceability of one aspect of the deal then in place, using the term contract to describe it. It includes the following sentence:

> "They [the Defendants] are entitled to argue that if they are delayed in carrying out this work that they cannot be forced to do it under the time provision in the Contract."

133. Thus, the defendants contend, it is quite clear, notwithstanding that a row was ongoing, that Mr. O'Reilly saw that issue partly in terms of whether the terms of the deal could be enforced. In that regard he was concerned not as to whether there was a deal but as to whether delay might have excused performance within the time specified.

134. There is, of course, some disagreement as to whether the row about the time-frame for building the corporate boxes was resolved at the Peploe's lunch, but there is no doubt that it was subsequently resolved and that this produced the agreement of November, 2005. Mr. O'Reilly's letter of the 8th November 2005, as set out above, clearly records the fact that "our clients have agreed with yours the following arrangement". It goes on to record that a sum of €650,000 was to be paid "in compensation for the building of the corporate boxes" and that this sum "together with the balance due in relation to the original figure agreed for the area to be leased at Connaught Street" would be paid according to an agreed schedule. By letter of the 13th December, 2005 to Mr. Breen, Mr. O'Reilly confirmed that "as I informed you there is a new arrangement whereby Albion will build the foundations for the corporate boxes and will pay off instead a compensation figure of €650,000." The defendants contend that not only do these letters acknowledge that an agreement has been reached, but the use of the phrases "new arrangement" and "compensation" clearly show that Mr. O'Reilly saw this as replacing a previous commitment. Otherwise, for what was the plaintiff to be compensated?

135. Mr. O'Reilly writes to the company auditors on the 13th January, 2006 again in terms which clearly describe an agreement and, again, in place of "the Agreement referred to earlier for the sale and interest in relation to the Connaught Street side."

136. This leads to the directors' report and accounts for the year ended 30th November, 2005, signed by Mr. O'Reilly and Mr. Cuffe as Directors and on behalf of the Board of the plaintiff, on the 19th January, 2006. Again, these accounts are prepared in circumstances where there is doubt about whether they can be presented on a going concern basis and that doubt is explicitly resolved by reliance on the monies received and to be received from the defendants. Here again, the sale to the defendants is recorded both as a future plan and, more explicitly, on the basis that "The company has sold a small part of its land…" The contingency in relation to planning is gone. There is now no contingency at all. No part of the monies paid is recorded as potentially repayable and the monies to be received are clearly stated to be receivable in specific instalments.

137. The defendants ask what then, is the explanation offered to the Court by the plaintiff company's officers for years of representations that, they now say, were not true?

138. The defendants remind the Court that the evidence in that regard was to the effect that they almost had a deal, they believed they would get a deal and so they treated with the situation as if they had a deal. They say their auditors went along with that; the same auditors that were so careful in the accounts for 2004 to correct the mistaken treatment of refundable monies as income. They say they always told the members at general meetings that the deal was only potential and that the reason the minutes do not reveal this is that they were prepared hurriedly and are incomplete. They don't explain why, if they needed to explain this to the members, they did not simply instruct their auditors to reflect the position correctly in the accounts. They don't say that they took any steps to correct the mistaken impression they were giving to members who were not in attendance at meetings or creditors or revenue officials or companies office officials. Finally, they imply that this mis-accounting was deliberate but well-intentioned, to allow the company and thus the club to continue to operate. (The Court would observe that this appears to be a fair commentary on the relevant evidence.)

139. The defendants submit that the reason there are no serious explanations for the fact that all these statements were untrue is that they were not untrue. They were perfectly true. A senior solicitor, a careful auditor and a banker carefully told their members, their creditors, the revenue, each other and ultimately third parties who wanted to buy their lands what they, in fact, understood to be the case; that they had agreed the sale of these parts of their lands to the defendants. They suggest that it was only when one of those third parties, Daninger, refused to proceed with a deal worth perhaps €67 million unless these lands were included, that the plaintiff decided it hadn't really had a deal with the defendants because the documentation had never been concluded. The defendants suggest that documentation was not essential in their minds until they needed to escape the deal they had so extensively reported.

140. The defendants rightly point out that the evidence establishes that the plaintiff told Andorrey it could not sell the subject lands to it and mapped the exclusion. But, it is contended, the Court also has evidence from which it can only infer that it said the same to a Mr. Black, who, for a time, represented Daninger. This is because, following discussions with Mr. Cuffe, at the end of 2006, Mr. Black provided a draft letter for F.H. O'Reilly to send to him stating, *inter alia*, that "while [the Plaintiffs] have entered into a Verbal Agreement or Arrangement with their Adjoining Owner no contract or written agreement of any kind has been signed or exchanged by our client with the Adjoining Owner…." Following this, the draft does go on to say that, although money has been received for the lands "no contract is in place…" and the Club is "prepared to abandon the proposed arrangement…" It is contended that there can be no doubt from what has gone before, there can be no doubt that Mr. Black, in drafting the letter, relied upon the absence of writing to say that there was no contract and to describe the arrangement as proposed. The defendants consider that he believed that there was, in fact, an agreement. Of course, the draft was corrected and the letter in that form was never sent. But Mr. Black was dealing for Daninger, not for Andorrey (which had the same understanding) or for the defendants. The defendants suggest that his understanding can only have come from his discussions with Mr. Cuffe.

141. The defendants say that this draft letter and what it reveals about the state of mind of the plaintiff's officers as late as December, 2006, is like the background radiation of this dispute. It discloses the thinking of the plaintiff's officers, as given to a third party, just after the big bang, when they knew they had a problem. They speculate that it may even have been from Mr. Black that they got the idea of working from the denial of anything in writing to the denial of any contract at all. But, the defendants say, whether the plaintiff's officers suggested it to him or he suggested it to them, there is no doubt that the letter shifts, over two paragraphs, from "our clients have entered into a verbal agreement" to "no Contract or Written Agreement of any nature has been signed" to "no contract is in place." This is at or close to the origin of the present dispute. This is why, they suggest, even in giving evidence, Mr. O'Reilly keeps saying, "no", "no deal", "no concluded deal", even when faced with stark statements of his own that

there was a deal. The defendants say the root of the plaintiff's denials in the face of their own accounts and correspondence is seen, for example, in Mr. O'Reilly's evidence on day 4. Pressed with the conflict between his directors' report and his statement that it would have been ludicrous to say there was a deal, he answers (at Q494);

> "I have not said – what I have said is that I could not say that a *concluded deal had come into effect.*" (italics added).

142. At Q.499 to 501, faced with the fact that he is denying the plain meaning of what he has said, Mr. O'Reilly says –

> "perhaps these are words – these are words used by an auditor, and I would perhaps as a lawyer, even take issue with whether – I would take issue that they actually mean that a sale has been made."

143. Leaving aside the fact that no such qualifying words as Mr. O'Reilly inserts (Q. 494) actually appear in the directors' reports (and also the fact that the auditors had no difficulty elsewhere noting payments that were contingent – a point made by the Court two pages later), the defendants say that these answers reveal the thinking, of the plaintiff's officers.

144. They suggest that the plaintiff's officers feel entitled to deny an agreement because they feel, or have been advised, that they can challenge its effectiveness in law. This, they suggest, is how the plaintiff has ended up denying what it told everyone for years was the case. But the existence of an agreement is quite different from its enforceability and the right to question its enforceability does not justify denying that it was made.

Decision

145. The court is extremely grateful to the parties for their comprehensive and very helpful submissions. Although unimpressed with some of the plaintiff's arguments, particularly those relating to mapping and mapping issues, and the requirement of "negotiation in good faith" …. of all necessary contracts, leases, licences, wayleave agreements and other documents required or reasonably envisaged", I do think there may be substance in the point that the negotiation of the "leases, licences, wayleave agreements and other documents to be drafted and completed" had not even started. Applying the test enunciated by Geoghegan J. in *Supermacs Ireland v. Katesan (Naas) Ltd.* [2000] 4 I.R. 273 I have to consider whether "everything intended to be covered by the agreement has been either expressly or impliedly agreed". The number and complexity of the outstanding matters leads me to seriously doubt that they would all necessarily have been agreed with ease *ex post facto*. Moreover, there was no specific mechanism in place for their agreement, or for something like arbitration in default of agreement.

146. In the *Supermacs* case the term at issue, and said by the defendant not to have been agreed, was the amount of a deposit. However the principles discussed therein have much wider application. In that case Geoghegan J, in the course of reviewing the authorities, and in particular having subjected the judgments in *Boyle v. Lee* [1992] 1 I.R. 555 to very detailed analysis, accepted that in some cases leaving over of the question of a deposit until the drawing of a formal contract document would not necessarily mean that there was not a concluded agreement. Referring to a passage from the judgment of O'Flaherty J. in *Boyle v. Lee* he stated:

> "It is clear from this passage that the evidence in the case must have been that Mr. McManus as agent for the vendor had expressly declined to take a deposit on the basis that the deposit question was to be left to be put into the formal contract. There might be situations where that would not necessarily mean that there was not a concluded agreement as, for instance, where each side simply trusted the other to submit to reasonable arrangements which the solicitors might include in the contract relating to deposit and other matters etc. But it is obvious that on the transcript of evidence in *Boyle v. Lee* [1992] 1 I.R. 555, both Finlay C.J. and O'Flaherty J. accepted that the question of the deposit was still to be negotiated and that it was intended to be a term of the agreement. In my view Finlay C.J.'s reference to the importance of a deposit in such a transaction was simply a comment on credibility. He was taking the view that once the deposit was still to be negotiated that meant there was an actual term of the contract still to be negotiated and therefore there was no concluded contract. The views of O'Flaherty J., although expressed differently, are not dissimilar."

147. Continuing with his review of the authorities Geoghegan J. said:

> "In *Barrett v. Costello* (Unreported, High Court, Kenny J., 13th July, 1973), (noted in (1973) 107 I.L.T.R. 239) the plaintiff told his agent that he was prepared to pay £40,000 and auctioneer's fees in relation to a particular property but had stipulated that there was a deposit of 10%. The agent spoke to the vendor and told him of the offer but omitted to mention the stipulation about the deposit of 10%. The defendant approved the sale and although it had not been mentioned to him he would have agreed to the 10% deposit had it been mentioned. On the particular facts of the case and the evidence as to how the negotiations ran Kenny J. held that there was an oral concluded agreement without any express term relating to the deposit. But he went on to observe as follows:-
>
> > "In former times a deposit of 25% was usual but the evidence satisfies me that a deposit of 10% has become a common practice in property sales in Dublin. I do not accept the submission of the defendant's counsel that there was never a concluded contract between the parties."
>
> While it is not entirely clear, I think that Kenny J. was effectively holding that there was an implied term as to a deposit of 10% rather than that there was no agreement of any kind relating to deposit. But it does not much matter because if Kenny J. was holding that there was neither an express nor an implied term as to the deposit then effectively he was holding that there was a concluded agreement with both parties ignoring the question of a deposit and leaving it as something to be dealt with ultimately when the formal contracts were drawn up. In such a situation however if for some reason or other the solicitors drawing up the contract were unable to agree on a deposit, the original oral agreement would remain binding and there would be no contractual deposit. The underlying legal principle was referred to by Lavery J. in his dissenting judgment in *Godley v. Power* (1961) 95 I.L.T.R. 135 at p. 147 where he quotes with approval what he described as "the oft quoted and oft approved" passage from the judgment of Parker J. in *Van Hatzfeldt Wildenberg v. Alexander* [1912] 1 Ch. 284 at p. 288. The passage reads as follows:-
>
> > "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Applying the above principles as enunciated in the case law to this particular case, it would seem that if this action goes to trial there may be a number of alternative arguments relating to the question of the deposit. I would list these as follows:-

(1) That it was always intended that the parties would be contractually bound by a particular deposit yet to be negotiated.

(2) That having regard to the nature of the transaction in this case and in particular the fact that there was a franchisor - franchisee relationship between the parties, it was not intended that there be a deposit.

(3) That in all the circumstances of the case there would have been an implied term that a reasonable deposit would be paid.

(4) That in all the circumstances there was an implied term that the standard deposit normally payable in transactions of this kind would be paid.

(5) That it would never have occurred to any of the parties that there would be a problem about the deposit and that a concluded agreement was reached ignoring it with the assumption that the solicitors when drawing up formal contracts would agree a deposit.

If the trial judge held in favour of the first of those arguments the action would undoubtedly have to be dismissed because there would then have been no concluded agreement. But the action would not have to be dismissed if any of the remaining four arguments held good."

148. It is clear from the decision in Supermacs, and the earlier authorities reviewed by Geoghegan J, that the critical question for this court is whether the intended execution of the wayleaves, leases, licences and so forth contemplated by the parties were conditions of the bargain or whether the references to them are merely an expression of the desire of the parties as to the manner in which the bargain is to be effected. By what means is the Court to make this assessment? I am provided with considerable assistance in that regard by the following somewhat lengthy passage from the judgment of Blanchard J. in the New Zealand Court of Appeal in case of *Electricity Corporation of New Zealand v. Fletcher* [2001] NZCA 289 which was cited by the plaintiff and the defendant. Before quoting from the judgment I should state that the case concerned whether Heads of Agreement executed by the Electricity Corporation of New Zealand and a company called Fletcher Challenge Energy Ltd reflected a concluded agreement. Among the issues the Court had to consider was whether, having regard to the fact that the Heads of Agreement provided for the parties "to use all reasonable endeavours" in reaching certain further agreements, there could be a concluded agreement. In the course of his judgment Blanchard J. said:

"[57] It is …. very important, in considering the intention of the parties to be bound, to bear in mind the dynamics of the negotiation process and the internal inter-relationship of the terms of a commercial bargain. Tamberlin J. of the Federal Court of Australia made the following valuable observation in *Seven Cable Television Pty Ltd v. Telstra Corporation Ltd* (2000) 171 ALR 89, 114 (para [97]):

'When parties are negotiating in order to arrive at a contract to govern their legal relations the process is often complex, especially in cases of detailed and wide ranging agreements intended to endure over many years. In the course of negotiations there will generally be a constant and ongoing process of adjustment and readjustment of the positions adopted by the parties on particular clauses. This process sometimes involves a series of mutual "trade-offs" whereby a concession is made by one party in respect of one provision in exchange for the giving of a concession by the other party in respect of a different provision. It will also involve compromise and adjustment so that it is often difficult to determine whether at any particular point of time prior to execution of a final agreement the parties have entered into contractual relations. Before a final contract is made it is also difficult to detach any particular provision from its context and say that a final agreement has been reached on that particular clause as a discrete agreement.'

[58] The Court has an entirely neutral approach when determining whether the parties intended to enter into a contract. Having decided that they had that intention, however, the Court's attitude will change. It will then do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities (*Hillas & Co Ltd v. Arcos Ltd* (1932) 147 LT 503; [1932] All ER Rep 494; R & J. *Dempster Ltd v. Motherwell Bridge and Engineering Co Ltd* [1964] SC 308 and *Attorney-General v. Barker Bros Ltd* [1976] 2 NZLR 495). We agree with the way in which Anderson J. expressed the position in *Anaconda Nickel Ltd v. Tarmoola Australia Pty Ltd* (2000) 22 WAR 101, 132-3:

'I think it is fair to say, speaking very generally, that where the parties intended to make a final and binding contract the approach of the courts to questions of uncertainty and incompleteness is rather different from the approach that is taken when the uncertainty or incompleteness goes to contractual intention. Where the parties intended to make an immediately binding agreement, and believe they have done so, the courts will strive to uphold it despite the omission of terms or lack of clarity: see *Trustees Executors & Agency Co Ltd v. Peters* (1960) 102 CLR 537; *Upper Hunter County District Council v. Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429; *Meehan v. Jones* (1982) 149 CLR 571. However, the principle that courts should be the upholders and not the destroyers of bargains, which is the principle that underlies this approach, is not applicable where the issue to be decided is whether the parties intended to form a concluded bargain. In determining that issue, the court is not being asked to enforce a contract, but to decide whether or not the parties intended to make one. That inquiry need not be approached with any predisposition in favour of upholding anything. The question is whether there is anything to uphold.'

[59] In the *Australian Broadcasting* case (at 548), Gleeson CJ. commented on the need to examine together both contractual intent and adequacy of agreed terms:

'It is to be noted that the question in a case such as the present is expressed in terms of the intention of the parties to make a concluded bargain: see, e.g. *Masters v. Cameron* [(1954) 91 CLR 353, 360]. That is not the same

as, although in a given case it may be closely related to, the question whether the parties have reached agreement upon such terms as are, in the circumstances, legally necessary to constitute a contract. To say that parties to negotiations have agreed upon sufficient matters to produce the consequence that, perhaps by reference to implied terms or by resort to considerations of reasonableness, a court will treat their consensus as sufficiently comprehensive to be legally binding, is not the same thing as to say that a court will decide that they intended to make a concluded bargain. Nevertheless, in the ordinary case, as a matter of fact and commonsense, other things being equal, the more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower a court will be to conclude that they had the requisite contractual intention.'

[60] Something should be said about the place that the controversial decision of the House of Lords in *May and Butcher Ltd v. The King* [1934] 2 K.B. 17n has in the modern law of contract. We take the view that this case is no longer to be regarded as authority for any wider proposition than that an "agreement" which omits an essential term (or, as Lord Buckmaster called it, "a critical part"), or a means of determining such a term, does not amount to a contract. No longer should it be said, on the basis of that case, that *prima facie*, if something essential is left to be agreed upon by the parties at a later time, there is no binding agreement. The intention of the parties, as discerned by the Court, to be bound or not to be bound should be paramount. If the Court is satisfied that the parties intended to be bound, it will strive to find a means of giving effect to that intention by filling the gap. On the other hand, if the Court takes the view that the parties did not intend to be bound unless they themselves filled the gap (that they were not content to leave that task to the Court or a third party), then the agreement will not be binding.

[61] On its own facts we respectfully doubt that *May and Butcher* would be decided by their Lordships in the same way today. We are now perhaps more accustomed to resort to arbitration in order to settle even matters of considerable importance to the contracting parties. We find curious the notion that, in a commercial contract where price is left to be agreed, a reasonable price cannot be fixed and that, even where there is an arbitration clause, that clause cannot be used to determine the price because "unless the price has been fixed, the agreement is not there". (p20)

[62] We agree with Professor McLauchlan (*Rethinking Agreements to Agree* (1998) 18 NZULR 77, 85) that "an agreement to agree will not be held void for uncertainty if the parties have provided a workable formula or objective standard or a machinery (such as arbitration) for determining the matter which has been left open". We also agree with him that the court can step in and apply the formula or standard if the parties fail to agree or can substitute other machinery if the designated machinery breaks down. This is generally the approach taken by this Court in *Attorney-General v. Barker Bros Ltd*.

[63] However, if essential matters (i.e. legally essential or regarded as essential by the parties) have not been agreed upon and are not determinable by recourse to a mechanism or to a formula or agreed standard, it may be beyond the ability of the Court to fill the gap in the express terms, even with the assistance of expert evidence. In *Coal Cliff Collieries Pty Ltd v. Sijehama Pty Ltd* (1991) 24 NSWLR 1, 20, Kirby P remarked:

'Courts are not well equipped, drawing on their own experience, to fill out the detail of such contracts where the parties leave gaps in their own agreement. The fact that this may result in wasted time and money is a risk which parties to negotiation must always weigh up. Courts cannot enforce such agreements because they are incapable of judging where the negotiation on particular points would have taken the parties, acting bona fide but legitimately in their own interests.

It will be a matter of fact and degree in each case whether the gap left by the parties is simply too wide to be filled. The Court can supplement, enlarge or clarify the express terms but it cannot properly engage in an exercise of effectively making the contract for the parties by imposing terms which they have not themselves agreed to and for which there are no reliable objective criteria.'

[64] Where the intention to contract is found to have existed, the Court may supply an omission by implying a term. It is true that the Privy Council remarked in *Aotearoa International Ltd v. Scancarriers A/S* [1985] 1 NZLR 513, 555 that, in order to determine whether there is a legally binding bargain, it is impermissible to add to the express terms further implied terms upon which the parties have not expressly agreed, and then, by adding the express terms and the implied terms together, thereby to create "what would not otherwise be a legally binding bargain". But this observation was made on the particular facts of that case, where there does not appear to have been a mutual intention to contract. Mustill L.J., having referred to it in *Malcolm v. Chancellor, Masters and Scholars of the University of Oxford* [1994] EMLR 17, said that there could not be found in this passage the route to a decision on whether there is a contract or not "since it requires the court to assess the contractual efficacy of express terms which the court knows, *ex hypothesi*, could be bulked out by implied terms" (at p. 35). It provided, he said, a valuable reminder of the risks involved in the exercise of taking potential implied terms one group at a time, implying them, moving on to another group, implying those, and so on until a contract is built up out of implied terms from no express bargain at all. Mustill L.J. thought it was necessary instead to "consider whether there was a sufficient skeleton of express terms to be fleshed out by implication". We respectfully agree. Gaps can be filled by implication, but only if there is such a skeleton of express terms combined with an intention to contract.

[65] A helpful analysis of various possible situations is given by Lloyd L.J. in *Pagnan S.p.A. v. Feed Products Ltd* (1987) 2 Lloyd's Rep 601, 619. After pointing out that the parties may intend to be bound forthwith even though there are further terms still to be agreed, his Lordship said that, if they then failed to reach agreement on the further terms, the existing contract is not invalidated unless the failure to reach agreement renders the contract as a whole "unworkable" or void for uncertainty. By "unworkable" we take him to mean that the transaction is lacking in business efficacy. Lloyd L.J. continued:

'It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by "essential" one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge,

"the masters of their contractual fate". Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called "heads of agreement".'

[66] It follows that merely because an important term is deferred to be settled on a future occasion, that does not mean that there is no intention to be bound. In such circumstances, provided the Court is satisfied that the parties did intend to enter immediately into a contractual relationship, it will do its best to find a means of giving effect to that intention by determining, if possible, the outstanding matter."

149. I agree wholeheartedly with Blanchard J. that the more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower a court should be to conclude that they had the requisite contractual intention. Despite what the defendants say I feel I must accept the evidence of Mr. McDonald, an experienced conveyancer, that the complexity of the outstanding issues was such that he could have no confidence that they would be resolved straightforwardly or with ease. He explained carefully and cogently what his concerns were and the court will not lightly gainsay them. A good example of Mr. McDonald's conscientiousness, and of the care that he takes in his work, is to be seen in his explanation for the issues raised by him in his letter of the 2nd September, 2005 to his opposite number Tim Ryan concerning the need for an engineering input to the plans for the car park, and for a draft condition "in consultation with your client's engineers in relation to a proposal as to how same may be dealt with in practice". He explained: "We would need any lease to be granted by Albion to us to incorporate various rights to either tie into their building if that was necessary and ….we would need an engineering input to enable me draft the type of conditions that we would need and the easements which we would need to retain or include in any lease." The Court would not agree that matters of this sort are standard or routine or minor. There is no mechanism in the supposed agreements whereby a failure to agree on important issues of this sort can be resolved. These are not matters determinable by recourse to a mechanism or to a formula or agreed standard. As pointed out by Blanchard J. it is a matter of fact and degree in each case whether the gap left by the parties is simply too wide to be filled. The Court can supplement, enlarge or clarify the express terms but it cannot properly engage in an exercise of effectively making the contract for the parties by imposing terms which they have not themselves agreed to and for which there are no reliable objective criteria. I therefore consider that in all the circumstances of this case there was no concluded agreement between the parties.

Proprietary Estoppel

150. As the defendants are counterclaimants for relief on the grounds of proprietary estoppel, and as the plaintiff is defendant to that counterclaim and seeks to resist it, it is appropriate to consider the defendants submissions first and then the plaintiff's submissions in reply.

The Defendants' Submissions

The defendants submit that even if the Court does not find a finalised contract or, doing so, finds no memorandum or part performance, the plaintiff is estopped from denying the commitment made, the detriment to the defendants arising therefrom, or that, having sought and accepted the payments concerned, it knew of the reliance being placed on its commitment to sell to the Defendant. On these grounds, they submit, the case presents a classic example of circumstances to which proprietary estoppel is applicable.

In *Haughan v. Rutledge* [1988] 1 I.R. 295 Blayney J. summarised the requirements for this form of estoppel (at p. 300) as follows (quoting the terms of the rules from Snell's Equity):

"1. Detriment.

'There is no doubt that for proprietary estoppel to arise the person claiming must have incurred expenditure or otherwise have prejudiced himself or acted to his detriment.'

2. Expectation or Belief.

' "A" must have acted in the belief either that he already owned a sufficient interest in the property to justify the expenditure or that he would obtain such an interest.'

3. Encouragement.

'"A" must have been encouraged by "O" or his agent or predecessor in title.'

4. No bar to the equity.

'No equity will arise if to enforce the right claimed would contravene some statute, or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty.'"

(emphasis added).

151. The defendants submit that this is a particularly clear case for the application of these principles since, even if certain details were not concluded, the dealings and expectations of both parties on the fundamental elements of the sale sought to be enforced are quite clear and the detriment incurred in reliance thereon was not only observed but initiated by the plaintiff. They also refer to the acknowledged leading authority on estoppel; that of *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129. Although the classic statement from the judgment of Cranworth L.C. in that case deals with a true owner standing idly by while witnessing mistaken acts of ownership by another (a situation more analogous to adverse possession) even in 1866 it was clear that the principles were applicable to the enforcement of incomplete transactions. So Lord Kingsdown is quoted by Blayney J. in *Haughan v. Rutledge* as follows:

"If a man, under a verbal agreement with a landlord for a certain interest in land, or *what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest*, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation." (emphasis added)

152. The defendants further submit that an even broader application of the doctrine of estoppel is applicable to the attempt of the plaintiff to rely, in the face of the assurances of commitment given at the dates of payment, on the Statute of Frauds (Ireland), 1695

or on an alleged agreement that no contract would exist pending the execution of formal documentation. In *Doran v. Thompson Ltd* (1978) and in *Ryan v. Connolly* [2001] 1 I.R. 627, the Supreme Court indicated that estoppel could be applied very broadly to, for example, prevent reliance on the statute of limitations by a party who had indicated that it would not do so.

153. Returning to the specific case of proprietary estoppel, in *Owens v. Duggan* (Unreported, High Court, Hardiman J., 2nd April, 2004) Hardiman J., sitting as a judge of the High Court on appeal from the Eastern Circuit, specifically relied on a wide formulation of the doctrine of estoppel and on the passage from the judgment of Lord Kingsdown in *Ramsden v. Dyson* quoted above, to uphold an award of specific performance, specifically noting that the trend of the authorities is not to require exact compliance with a formulaic statement of proprietary estoppel but to look, in the words of Robert Walker J. in *Gillet v. Holt* [2001] Ch. 211 to "whether repudiation of an assurance is or is not unconscionable in all the circumstances." In this regard, Hardiman J. expressly relied, also, on the broad statement of similar principles given by Murphy J. in *McCarron v. McCarron* (Unreported, Supreme Court, 13th February, 1997).

154. The defendants say this application of estoppel to contractual cases is well established. The principle is applicable to assurances given in the course of sales of land which otherwise would be in writing and which, for lack of writing, are unenforceable as contracts by reason, for example, of the Statute of Frauds. It is also applicable notwithstanding a degree of uncertainty or incompleteness in the agreement of parties that would prevent a finding of a concluded oral contract.

155. In *Yaxley v. Gotts* [2000] Ch. 162 proprietary estoppel was the basis for an order (upheld in the Court of Appeal) requiring the Defendant to make a grant of a lease for 99 years in the face of the Defendant's argument that the agreement was unenforceable by virtue of the modern English replacement for s. 2 of the Act of 1695, namely Section 2 of the Law of Property (Miscellaneous Provisions) Act, 1989 (England). Furthermore, the Court of Appeal was willing to apply the principles of proprietary estoppel even though the English section contains a specific saver for constructive trusts and in the face of an argument that their application to cases such as this ran in the face of the intention of the primary provisions of the Act (for sales of land to be in writing only) and even though the acts of detriment could not have been treated as part performance because that concept had been abolished in England, by the same section. The Court took this view because the application of proprietary estoppel in this scenario did not undermine or offend, but actually supported the underlying policy of the Act; the avoidance of fraudulent assertions or fraudulent denials of contracts. Robert-Walker L.J., citing a number of recent authorities, stated (at p. 174 F) that he had;

> "…no hesitation in agreeing with Peter Gibson L.J., Neill L.J. and Morritt L.J. that the doctrine of estoppel may operate to modify (and sometimes perhaps even counteract) the effect of section 2 of the Act of 1989. The circumstances in which section 2 has to be complied with are so various and the scope of the doctrine of estoppel is so flexible, that any general assertion of section 2 as a 'no-go area' for estoppel would be unsustainable."

156. The other judges agreed. Beldam L.J. specifically draws a moral or policy-based analogy between the application of the doctrine of constructive trust to family situations and its application to persons, such as the claimant in *Yaxley*, acting at arms length and led to expect an interest during discussions of a sale:

> "There are circumstances in which it is not possible to infer any agreement, arrangement or understanding that the property is to be shared beneficially but in which nevertheless equity has been prepared to hold that the conduct of an owner in allowing a claimant to expend money or act otherwise to his detriment will be precluded from denying that the claimant has a proprietary interest in the property. In such a case it could not be said that to give effect to a proprietary estoppel was contrary to the policy of s. 2(1) of the 1989 Act. Yet it would be a strange policy which denied similar relief to a claimant who had acted on a clear promise or representation that he should have an interest in the property."

157. *Yaxley* is followed on this point in *Kinane v. Mackie-Conteh* [2005] EWCA Civ. 45. There the Court of Appeal upheld and enforced assurances for the grant of a charge on the basis that the promise to grant the charge created an estoppel (and a constructive trust to that extent) over the land intended to be charged. The application of estoppel to what would otherwise have been a contractual sale of land is again illustrated in *Cobbe v. Yeoman's Row Management Ltd* [2006] 1 WLR 2964 where the Court of Appeal explicitly recognised that the "case [was] set very close to contract territory" having arisen "in the context of pre-contractual negotiations for the sale, purchase and development of a block of flats." *Cobbe* is discussed further below.

158. The assurance or conduct leading to the expectation to be enforced need not itself be as certain as contractual terms might need to be. The above quotation from the judgment of Beldam L.J. adopts the same phraseology in its opening words as used by Lord Bridge in *Lloyds Bank plc v. Rosset* [1990] 1 All E.R. 1111 at 1118. What is required is an "agreement, arrangement or understanding". Similar points are made by Murphy J. in *McCarron* and by Mummery L.J. *in Cobbe v. Yeoman's Row Management Ltd* (2006). In the latter case Mummery L.J., again adopting Lord Bridge's wide wording, put the matter as follows (at p. 50):

> "It was accepted by Mr. Cobbe that the second agreement was not a legally binding and enforceable agreement, lacking the certainty and not containing all the necessary terms. The judge held that this was not fatal to the proprietary estoppel claim. I agree."

159. Dyson L.J. and Sir Martin Nourse also agreed. Mummery L.J. went on (at p. 51):

> "As a general proposition, the assurance, arrangement or understanding relied on to found an estoppel need not be sufficiently certain to be an enforceable contractual obligation. The crucial element is that the defendant has created or encouraged the belief on the part of the claimant that the defendant will not withdraw from the assurance, arrangement or understanding."

160. This same view, though not explicitly restated and applied to a very different circumstance, underlies the following memorable passage from the judgment of Murphy J. in *McCarron*. After referring to cultural differences so profound as to have made it difficult to record the evidence at the trial, he says:

> "It is these difficulties that remind one that in Ireland accent and style of speech may vary substantially from place to place. What is noticeable from the transcript and in particular the evidence of the plaintiff was that natural courtesy (which John Millington Synge associated with the west of Ireland) which often results in an unwillingness to pursue discussion to a logical and perhaps harshly expressed commercial conclusion….I would merely conclude that in some, particularly rural areas, a meeting of minds can be achieved without as detailed discussion as might be necessary elsewhere."

161. It is not suggested that similar habits of speech or culture precluded formal or final expressions of agreement in this case. But here too there were prolonged dealings and an understanding emerged. The plaintiff not only encouraged it but took advantages from

it. The Defendant not only relied on it but made very substantial payments pursuant to it. The key point is that such an understanding, being relied upon and being known to be relied upon, is sufficient sometimes to give rise to *a contract*, as it did in *McCarron*, and must, a *fortiori*, certainly be sufficient to give rise to an enforceable estoppel, where less precise terms are required.

162. This flexibility is not excluded by the use of terms such as "subject to contract". Indeed, in *Cobbe*, a comparable, though different, phase had been used. While accepting that "subject to contract" (in England) had a well understood meaning (which is not necessarily clear here), reserving the rights of the parties to walk away, Mummery L.J. makes the following point:

> "Even the use of the expression "subject to contract" would not, however, necessarily preclude proprietary estoppel if the claimant established that the defendant had subsequently made a representation and had encouraged on the part of the claimant a belief or expectation that he would not withdraw from the "subject to contract" agreement or rely on the "subject to contract" qualification."

163. The defendants submit that this is precisely what has happened here.

The Plaintiff's Submissions
164. The plaintiff refers to the defendants' assertion that, "Even if the Court does not find a finalised contract or, doing so, finds no memorandum or part performance, it is submitted that the plaintiff is estopped from *denying the commitment made...*" (the plaintiff's emphasis). The plaintiff submits that it is not clear what the commitment is, and this is too vague to be capable of specific performance.

165. The plaintiff suggests that the Court should examine the authorities in this regard. *Haughan v. Rutledge* [1988] 1 I.R. 295 is cited as an example of a case where, although Blayney J. summarised the requirements for proprietary estoppel, he found that although the plaintiffs (representing a harness racing club) had actually constructed a track on the lands, it could not be said that they did so in the belief that they owned, or in the expectation that they would own, a sufficient interest in the lands to justify such action, which belief was encouraged by the owner of the property.

166. The plaintiff also urges the Court to consider the decision of Laffoy J. in *Triatic Limited v. Cork County Council* [2007] 3 I.R. 57 again in this context. There the Court held that an agreement to negotiate was unenforceable. It was submitted therefore that the law on equitable estoppel does not and cannot lead to a view that simply because the parties negotiated over a long period of time, that this in itself entitles the Defendant to say that he was given an expectation or belief that he had or would obtain an interest in the land and that this was encouraged by the plaintiff or its authorised agents.

167. Furthermore in relation to estoppel itself, the plaintiff invites the Court to have particular regard to the recent Supreme Court decision of *CF v. JDF* [2005] 4 I.R. 154. There the Supreme Court held that in order to establish the existence of a beneficial interest on the basis of promissory or proprietary estoppels, there must be some clear evidence of an actual promise – "in order to establish such an estoppel there must be a promise, or at least a reasonably clear direct representation or inducement of some kind. It is not sufficient to say that this or that was permitted to happen or that third parties looking at the situation thought that a particular outcome was likely."

168. The plaintiff submits that these two authorities tie up logically. If in fact there was no concluded contract then the fact that the plaintiff continued to negotiate over a long period and the fact that the parties hoped a contract would come about cannot amount to the necessary "promise" or "reasonably clear inducement." To hold otherwise would be to say that in almost any case where there were protracted negotiations where one side (or even both sides) believed there would be an eventual contract, that this limb of the test for proprietary estoppel was satisfied.

169. Furthermore in relation to the detriment it is not entirely clear from the defendants' submissions what alleged detriment the defendants rely on. It is clear that it must be "something substantial" (cf. Robert Walker J. in *Gillet v. Holt* [2001] Ch. 211, at 232). The plaintiffs cite various examples as to what has been held to be sufficient detriment.

170. The case of *Smyth v. Halpin* [1997] 2 I.L.R.M. 38 concerned the building of an extension to a family home. The plaintiff's father had suggested that the plaintiff should build an extension on to the family home. An extension was designed by an architect on the assumption that the entire house would eventually belong to the plaintiff. The site on which the extension was built was transferred to the plaintiff so that he could use it as security to borrow the money required to build the extension. The plaintiff built the extension. In a will dated 25 June, 1991, the plaintiff's father left his land to his wife for life, then to the plaintiff absolutely, and left the house to his wife for life, then to the second named defendant (one of the plaintiff's sisters) absolutely. Geoghegan J. ordered the fee simple to be transferred to the plaintiff.

171. In *Cullen v. Cullen* [1962] I.R. 268 the mother gave the son a portable home. He intended to erect it on his own lands. The parents moved to lands at Adamstown in Dublin. The mother sought permission from the father to have the son erect the portable home on the family lands. The father said that as he was making the land over to her, she could erect the house where she liked. As a result the son erected the portable home on the family lands and not his own lands. He spent £200 at least (presumably a considerable sum almost 50 years ago).

172. In *McMahon v. County Council of Kerry* [1981] I.L.R.M. 419 the plaintiffs were prevented on "principles of equity" from recovering possession of land because the Council had in fact built two houses on the land and these were in the occupation of needy persons. It was that it would be unconscionable and unjust for the plaintiffs to be allowed to recover possession of the lands.

173. In *McCarron v. McCarron* (Unreported, Supreme Court, 13th February, 1997) the case was ultimately decided on the basis of there being a contract, but the Court also indicated that if proprietary estoppel was established it "would permit the plaintiff to claim in equity an estate in the lands of the deceased". As regards detriment Murphy J. stated: "The facts, of which the plaintiff in particular gave evidence, established that the plaintiff worked on the farms of the deceased over a period of sixteen years - and that for long hours - without reward".

174. The plaintiff submits that if one compares the evidence in the present case to the examples cited above it is clear that there is insufficient detriment to enable the Court to conclude that the first limb as suggested by Blayney J. is satisfied. All of the examples cited involved family or *quasi* family situations where the promissee made what might be described as lifetime decisions, such as the building of an extension, the erection of the portable home, or performing 16 years of unpaid work. In all of these cases the Court, quite correctly, decided that this was a substantial detriment.

175. In the present case the defendant pleads detriment in paragraphs 22 (b) – (f) of the Defence and Counterclaim. [Paragraph

22(b) refers to continuing to allow the plaintiff to use the route along the brown lands to "Jack's Gate. Paragraph 22(c) refers to permitting increased used of the lands coloured brown to include access and egress of camera crews. Paragraph 22(d) refers to "substantial investment" in preparing plans for the development of the lands the subject matter of the parties negotiations. Paragraph 22(e) refers to payments to the plaintiff's architect. Paragraph 22(f) refers to permitting advertising hoardings to be placed upon, and filming from, the East Stand.] The plaintiff says it is a matter for the Court to assess the evidence in relation to these pleas. However the plaintiff would contend that the defendant suffered no "substantial detriment".

176. They comment that in relation to items (b), (c) and (f) the permissions provided, or forbearances suffered, were based upon no more than good neighbourliness and not on foot of a sufficient promise/representation. They continued from the start of the negotiations. It was submitted that no evidence was given of any other usage that the defendant had enjoyed, but which he yielded in reliance on a promise from the plaintiff.

177. In relation to (d) they submit that it was clear from the very first approach from Chatham Ltd to Felim O'Reilly that the defendant was committed to a planning application with all of the plans etc. that this would involve regardless of whether a contract came about. The letter of 13th June, 2001 states:

> "....the project team will all continue with their work and it is proposed to make a planning application in the very near future. I am enclosing a draft letter of consent, which I shall be grateful if you would put to your own letterhead and return to me in order to allow our clients to submit their planning application. This letter of consent does not bind you in any way to our client but merely demonstrates to the Planning Authority that you are aware of and agreeable to our client making his planning application."

178. In the plaintiff's submission it is clear that insofar as the defendants say they advanced plans for their development, they were committed to expenditure on those plans almost two years prior to February 2003 which is the first date when the defendant ever contended there was an agreement.

179. In relation to (e) the plaintiff says the only payment made to Mr. Breen was a 20% fee on 15th December, 2004. This sum was not attributable to any specific work but as per the Heads of Agreement was to be paid simply on the "signing hereof". It is clear that this was the fee for Mr. Breen's work in advising on the negotiations and was not therefore paid in reliance on a contract/representation that the lands were sold. Furthermore, the plaintiff says that such payment cannot in the context of the figures that were cited in relation to the value of the development constitute a "substantial" detriment.

180. Finally, it is contended that as the defendant relies on proprietary estoppel it is important to draw attention to one aspect of the Supreme Court decision in *McCarron v. McCarron.* That case was determined on the basis of there being a contract. However, the Court went on to indicate that if it were decided on proprietary estoppel it would not necessarily follow that the plaintiff would obtain title to the lands. Murphy J. indicated that:

> "In practice, however, it might be difficult to determine the extent of the estate or interest in land for which a plaintiff might qualify as a result of his personal efforts. Perhaps a claim of that nature would be adequately compensated by a charge or lien on the lands for a sum equivalent to reasonable remuneration for the services rendered."

181. In other words the court could value the equity rather than give the promissee the land.

Decision

182. Having carefully considered all of the evidence in the case I have come to the view that the defendants are entitled to an equitable interest in the pink and yellow lands, and in the blue lands on the grounds of proprietary estoppel. There was clear evidence of repeated promises, representations and inducements held out to Mr. Conroy by Mr. O'Reilly that if Bohemians were paid money on account Albion would get the land. I find as a fact that Mr. Conroy was assured repeatedly that he had "a deal". Moreover, I also find as a fact that Mr. Conroy did alter their position substantially to their detriment. Mr. Conroy, representing Albion, devoted much time, attended many meetings and devoted significant resources in terms of the employment of professional assistance, in attempting to accommodate the specific ongoing needs or wishes of Bohemians, particularly by accommodating within Albion's plans Bohemian's need to ensure that the Fire Officer would be satisfied with respect to the Connaught Street entrance to Dalymount Park, and their desire to have corporate boxes. While it is true to say that the scale of the effort and expenditure on these items was relatively small compared to the overall investment, both in effort and financial terms, of the defendants' redevelopment project that is beside the point. The effort and expenditure concerned was by no means insignificant in terms of the transaction in contemplation between the parties. Moreover, it cannot be overlooked that the defendants paid over in excess of a million euro in advance of any contractual obligation to do so in response to specific requests for money from the plaintiff. While the plaintiff may now be in a position to repay this money if required to do so, the defendants paid over the bulk of it during a period when the plaintiff's ability to repay, if called upon to do so, was seriously in doubt. In my view it would be unconscionable in all the circumstances of the case for the plaintiff not to transfer an appropriate estate in the lands in question, namely the pink and yellow lands, and the blue lands, to whichever of the defendants shall nominated to receive the appropriate transfer. I therefore deem the plaintiff to hold the lands in question upon a constructive trust for the benefit of the defendants. I will receive further submissions concerning the appropriate nature of the estate to be transferred in respect of each parcel respectively, the appropriate nominee to receive the transfers, and any other matter or matters arising from my decision.