Neutral Citation Number: [2010] IEHC 253

THE HIGH COURT

2007 5269 P

COMMERCIAL

BETWEEN

REDFERN LIMITED

PLAINTIFF

AND

LARRY O'MAHONY AND THOMAS MCFEELY

AND

BY ORDER OF THE COURT

LIAM CARROLL, TAFICA LIMITED AND AIFCA LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 29th day of June, 2010

1. The plaintiff ("Redfern") is a limited liability company registered under the laws of Jersey and, at all material times, was the sole beneficial shareholder in Alburn, a company with unlimited liability ("Alburn"). The plaintiff and Alburn were, at all material times, under the control of Noel Smyth who formerly practiced as a solicitor but who has, for some years, been carrying on business as a property developer. The first and second named defendants, collectively referred to as "the Partnership" are businessmen and developers. They have been involved in a number of joint ventures together and have also carried on their business from time to time, independently of each other. The third named defendant is a businessman and developer. The fourth named defendant, Tafica Ltd. ("Tafica") is a limited company incorporated under the laws of the State and is controlled by the third named defendant. The fifth named defendant, Aifca Ltd. ("Aifca") is a company registered under the laws of the State and, at all material times, was under the control of the first and second named defendants.

2. Mr. Noel Smyth, who controls Alburn, has been involved in the development of The Square, Tallaght, since its beginning. Companies over which he has control hold a significant portfolio of properties in The Square. Mr. Liam Carroll, the third named defendant, is a property developer. For some years, he has been involved in developments at Tallaght. In particular, he developed the buildings known as "Glashuas" and "Tallaght Cross" which compete with The Square, both for retail tenants and also for office tenants and residential purchasers.

3. These proceedings arise out of plans to redevelop the shopping centre known as "The Square" in Tallaght, County Dublin. It was proposed that the redevelopment of The Square would enlarge the footprint of the buildings on the existing site so that areas of the existing car park would be built upon. The car parks surrounding the shopping centre at The Square are subject to a number of licences, and in order to enable the redevelopment to proceed, it was necessary that the parties wishing to carry out the redevelopment would purchase these licences and/or extinguish them.

4. Redfern is the holding company of Alburn, an Irish unlimited company. In July 2003, Alburn sought to embark upon the redevelopment of The Square. The project was to proceed on the basis of a development in two phases, namely, Phase III and Phase IV, most of which was to take place on the surface car park area surrounding the existing shopping centre. This surface car parking area was approximately 18.5 acres. For that purpose, Alburn entered into negotiations with the Square Management Limited ("SML"), and in July 2003, concluded a joint venture agreement with SML ("the SML Agreement"). Under this agreement, Alburn was required to acquire a licence held by an adjoining owner in respect of the car park. The owner of the licence was Lowe Taverns (Tallaght) Limited. That company held a licence over the entire car parking area, and in order to proceed with the development of Phases III and IV, that licence had to be acquired and/or extinguished. In March 2005, the first and second named defendants, through a company which they controlled, namely, Aifca Ltd., acquired Lowe Taverns (Tallaght) Ltd. from Mr. Sean Davin for a sum of €55 million. Lowe had two assets, namely, a property known as Tuansgate (which comprised mixed commercial and residential development) at a corner of The Square development, and the licence to the car park for The Square. In order to fund this purchase, Aifca borrowed from Bank of Scotland Ireland Ltd. ("BOSI"). The loan was for a sum of up to €56 million, repayable in accordance with the terms of a facility letter of 4th March, 2005, and in any event, not later than twelve months from the date of drawdown of the funds. The sale closed in March 2005, and the loan therefore was repayable no later than one year later. In fact, the loan was not repaid on time, and in July 2006 the bank was putting pressure on the first and second named defendants to make arrangements for Aifca to repay the loan. The bank indicated to the first and second named defendants that if the monies were not paid by the end of August 2006 a receiver would be put in over the assets of Aifca. This is of significance in the context of this case, and ultimately became the reason for the involvement of the third and fourth named defendants in this dispute, as they entered into an agreement with the first and second named defendants which had the effect of clearing the BOSI debt.

5. After Aifca purchased the Lowe licence, Mr. Noel Smyth, through his company, Alburn, entered into negotiations with the first and second named defendants with a view to Alburn purchasing the Lowe licence. The negotiations led to the conclusion of an agreement dated 4th August, 2005, between Redfern Ltd. and the first and second named defendants (described in the Agreement as "the Partnership"). This agreement ("the Redfern Agreement") provided that the Partnership would dispose of the entire issued share capital in Lowe to Alburn, free from encumbrances, in exchange for Redfern issuing to the Partnership two ordinary shares and one A-ordinary share in the issued share capital of Alburn so as to ensure that 50% of the issued share capital of Alburn is owned by Redfern and 50% of the issued share capital of Alburn is owned by the Partnership in the manner provided under the Agreement. It was, in effect, a partnership arrangement for the purpose of carrying out the development of Phases III and IV of The Square through Alburn. The Agreement provided for the preparation of a detailed shareholders' agreement.

6. The completion date for the Agreement was 20th August, 2005, or such other date as might be agreed between the parties in writing. The date was extended by agreement in writing to 20th October, 2005, but no further extension was ever agreed between the parties.

7. In the summer of 2006, the first and second named defendants were coming under severe pressure from BOSI to clear the debt owed by Aifca. Noel Smyth of Alburn was aware of this and arranged an extension of the repayment date to 30th September, 2006. The Redfern Agreement provided, *inter alia*, that on completion, Lowe would have no assets or liabilities other than the Lowe licence and all benefits and rights thereunder, and a debt with Bank of Scotland for a maximum of €30 million. In fact, the debt was larger than €30 million, but it appears that the figure of €30 million came to be inserted because that was the sum attributable to the Lowe licence and the balance was allocated in respect of the Tuansgate building which was included in the sale of Lowe Taverns Ltd. to Aifca. Neither the Partnership nor Aifca were in a position to discharge the debt. Redfern agreed to procure that Alburn had, prior to or at the completion date, no assets or liabilities other than:

(a) The Square Agreement

(b) The Sandyford lands

(c) A liability of €2 million to Redfern in respect of pre-existing costs and

(d) A debt of €5 million to Irish Nationwide Building Society.

Redfern agreed to procure the assignment of an existing binding contract in respect of a site in Leopardstown known as Site A and the transfer of all lands in another site at Leopardstown known as Site B to Alburn, as well as any existing agreements in respect of the adjacent lands marked on a map attached to the Agreement.

8. With the date for repayment rapidly approaching, and as neither Noel Smyth nor his companies were able to raise the necessary finance to assist Aifca, the Partnership entered into an agreement with the third named defendant, Mr. Liam Carroll ("the Aifca Agreement"). The Agreement was made on 20th September, 2006, without the knowledge of the plaintiff, Mr. Noel Smyth, or Alburn.

9. Under the Aifca Agreement, Mr. Liam Carroll agreed either himself or though another company or entity owned or controlled by him, to refinance the borrowings of Aifca on or before 29th September, 2006, and to subscribe for shares in Aifca to the extent of 50.25% of the issued share capital of the company. Following the Aifca Agreement, the shares were allotted to Tafica, the fourth named defendant. The effect of the Aifca Agreement was that the indebtedness of Aifca to BOSI was discharged and Mr. Liam Carroll and Tafica acquired control over the Lowe licence. The plaintiff claimed that it was unaware of the Aifca Agreement until the first and second named defendants delivered their defence in these proceedings. This resulted in an application being made to join the third, fourth and fifth named defendants in the proceedings and amended pleadings were then delivered. The plaintiff commenced these proceedings for specific performance of the Redfern Agreement, together with damages and other relief. At the commencement of the hearing, counsel for the plaintiff informed the court that the plaintiff was no longer seeking specific performance, but was maintaining its claim for damages. The claim can be summarised as follows: the plaintiff claims that the first, second and fifth named defendants are in breach of the Redfern Agreement, and that the first and second named defendants are in breach of their fiduciary duties to the plaintiff. It is alleged the third and fourth named defendants procured the breach of the Redfern Agreement and entered into the Aifca Agreement in full knowledge of the Redfern Agreement. In the circumstances, the plaintiff claims damages including exemplary damages.

The issues

10. On the opening day of the hearing, counsel for the plaintiffs submitted that there were six issues for the court to decide:

(i) Was there a legally binding agreement between the plaintiff and the first and second named defendants?

(ii) Did they or did they not fail to perform it?

(iii) Did the first and second named defendants enter into a secret agreement with the third named defendant which had the effect of interfering with the performance of that contract?

(iv) Did the third, fourth or fifth named defendants procure a breach of contract?

(v) If so, should they be liable for damages?

(vi) Assess the damages.

It seems to me that the court will also have to consider whether the Redfern Agreement was subsisting at the time of the Aifca Agreement. The court will also have to decide whether the conduct of the parties and, in particular, the plaintiff and Mr. Noel Smyth, was inconsistent with the Redfern Agreement subsisting. On the issue of damages, the court will have to decide whether or not punitive or exemplary damages should be awarded.

11. In order to resolve the issues it is necessary to consider, in some detail, not only the Redfern Agreement and the Aifca Agreement, but also a number of other relevant documents including, but not limited to, the following:

(a) A side letter connected to the Redfern Agreement and dated 27th July, 2005, and two other letters dated 3rd August, 2005, and 4th August, 2005, respectively, which purport to amend the terms of the Agreement.

(b) The joint venture agreement between The Square Management Ltd., Alburn Ltd. and Alburn Investments Ltd., dated 31st July, 2003, ("the SML Agreement").

(c) A manager's order made under s. 183 of the Local Government Act 2001 and dated 3rd February, 2006, and

(d) A subscription agreement between Tafica Ltd., Aifca Ltd. and Liam Carroll dated 1st February, 2007, ("the Tafica Agreement").

(e) Agreement dated 3rd August, 2006, between Thomas McFeely, Larry O'Mahony and Noel Smyth (Alburn) ("the Phil Flynn Agreement").

There are other documents which will be referred to in the course of this judgment where they are relevant to the issues to be decided.

The Redfern Agreement

12. The first recital in the Redfern Agreement states:

> *"The partnership are the sole beneficial and legal owners of the entire issued share capital of Lowe, free from encumbrances."*

This was, in fact, incorrect. The first and second named defendants did not own the share capital. It was owned by Aifca Ltd., a company controlled by the Partnership. The completion date of the Agreement was 20th August, 2005 *". . . or such other date as is agreed between the parties in writing"*. That date was extended to 20th October, 2005, by virtue of a letter from Alburn of 4th August, 2005, which responded, *inter alia*, to a request from the solicitors of the Partnership on 3rd August, 2005.

13. Clause 1 of the Agreement provides that Redfern and the Partnership shall be equal 50% shareholders in Alburn with equal Board representation, and the parties to the Agreement were to procure the relevant share transfer and issues on completion, so that Alburn is owned equally by the Partnership and Redfern and Alburn would own all the shares in Lowe. A project management fee of 15% of the construction costs was to be solely for the benefit of Redfern (clause 5).

14. Clause 11 of the Agreement stated that Alburn intended, as soon as possible after completion, to make an offer to the existing shareholders of The Square Management Ltd. ("SML") to acquire each of such shareholders' interests in the units of The Square Town Centre, Tallaght, at a yield 4% following the proposed rent review in October 2005. Alburn also agreed, in clause 12, to take a lease of approximately 20,000 sq. ft. of the property at Tuansgate at an open market rent under a four year and nine month lease.

15. Clause 13 provided that the parties would incorporate the terms into a final shareholders' agreement which would be prepared and submitted to the parties. If there was any disagreement between them as to what the Agreement should contain, there was provision for referring the dispute to a Senior Counsel from a list of names set out in the Fourth Schedule. Clause 20 of the Agreement provided that the parties would cooperate with each other and exchange all necessary information, and clause 23 contained provisions relating to good faith, including a provision that neither party shall be entitled to assign or transfer the benefit of the Agreement or any shareholding or interest held by them in Alburn or Lowe.

16. The side letter of 27th July, 2005, refers, *inter alia*, to the BOSI debt of €30 million, notwithstanding the fact that the debt was greater than that figure. As I have already indicated, this was because €30 million of the loan was attributed to the licence and the balance to the purchase of the Tuansgate building. It also refers to clause 3.2.1 of the SML Agreement which requires the developer to procure the agreement of Lowe Taverns to the extinguishment of their interest in the licensed area on terms approved by SML and records the agreement of the parties that Redfern will make an application to The Square for its approval of the Agreement as complying with the pre-condition.

17. On 3rd August, 2005, Messrs. Ivor Fitzpatrick, the solicitors for the Partnership, wrote to Mr. Noel Smyth of Alburn, referring to the "Draft Heads of Terms" furnished by Redfern, and they set out their comments on required amendments to the draft document. The first matter they pointed out was that the completion day of 20th August, 2005, would be extremely difficult to achieve and they suggested a later date to be agreed between the parties. The solicitors to the Partnership also requested that recital F in the Redfern Agreement should reflect the fact that Alburn owed approximately €5.7 million to Irish Nationwide Building Society. They asked that clause 11 relating to the proposed purchase of the units of The Square at a yield of 4% should be amended to a yield of 3.9%. Clause 12, relating to the lease of 20,000 sq. ft. of office space at Tuansgate, was to be amended to a 25-year lease. There were some other amendments sought which it is not necessary to refer to here and also certain documents were requested.

18. By reply dated 4th August, 2005, Alburn agreed to a new completion date of 20th October, 2005, *"or such earlier date as may be agreed between the parties".* On the issue of the project management fees, Alburn said that as it was now to be owned on a 50-50 basis with the Partnership, *". . . then the project management must remain and the benefit of the fees payable must remain for the benefit of Redfern."* Alburn agreed to clause 11 being amended to show a yield of 3.9%. They also agreed to the lease referred to in clause 12 being for a period of 25 years. There were other matters referred to in the letter which, again, it is not necessary to refer to here.

19. In order for the development to proceed, a number of matters had to be put in place. Under the SML Agreement, the Lowe licence had to be bought out or extinguished. There had to be a valid planning permission in place and an order had to be made under s. 183 of the Local Government Act 2001, permitting the Council to dispose of lands at The Square. A Manager's Order to this effect was made on 3rd February, 2006.

20. After the signing of the Redfern Agreement, a number of problems emerged. These included the requirement to extinguish a licence held in connection with the UCI cinema complex, and a claim by Dunnes Stores Ltd. that they held a licence. The extinguishment of these licences was referred to at clause 3.1.5 of the SML Agreement, made in 2003, between SML, Alburn Ltd. and Alburn Investments Limited. But on day 14 of the hearing, Mr. Noel Smyth stated:

> *"So, at the time when we entered into the Agreement with the parties in the partnership in 2005, the UCI licence was never part of anyone's consideration."* (Page 45, A. 66)

It also became clear that the planning permission which had been granted in October 2000 was not financially viable for the parties to the Agreement, and would, in any event, expire on 21st February, 2006. A new planning permission was obtained in February 2007 and Noel Smyth gave evidence that it was not commercially viable either.

UCI Licence

21. In the course of his evidence, Mr. Noel Smyth said that the sale of the UCI interest arose in June 2006. (T. 14, p. 44). The plaintiff discovered late in the day about the UCI licence and Mr. Smyth said that he or his companies were offered the cinemas and a

lease which gave them the right to a licence. He went to SML and asked if they were interested in purchasing the licence and the cinemas and they told him they were not. He then says that he spoke to the first and second named defendants and sought counsel's opinion. Redfern finally purchased the interests of the UCI cinema for €52 million (T. 5, pp. 96 and 97). When asked if he got the consent of the Partnership to acquire the UCI interest, Mr. Smyth replied, *"consent mightn't be the correct word".* (T. 17, p. 83). He said he met with the second named defendant and explained to him the problem that had arisen with the UCI licence and that it was going to cost €52 million. The first and second named defendants, for their part, gave evidence that Mr. Smyth went on a "*solo-run*" on this issue and that they did not agree to the sum being spent on the licence. They felt it was a ridiculous figure. The second named defendant said that the Partnership was not asked at any stage about the purchase of the licence before Noel Smyth made an offer of €55 million for it. The first named defendant said that after Noel Smyth bought the licence on behalf of Redfern, he looked for a contribution and he thought the price was outrageous. Mr. O'Mahony said that Mr. Smyth did not keep the first and second named defendants informed when buying the UCI licence, and that it was not part of the Redfern Agreement.

22. I am satisfied, on the balance of probabilities, that Noel Smyth negotiated the purchase of the UCI cinema and licence independently of the Partnership and the fifth named defendant, that he made the offer of €52 million without consulting them or, at the very least, getting their consent to the payment of that sum. Redfern/Alburn put in a bid and the third named defendant also did so. I am satisfied that Noel Smyth only went to them looking for contribution after he had concluded the deal. I accept the evidence of Mr. Philip Flynn who was also of the view that Mr. Noel Smyth concluded a deal on the UCI cinema and licence and subsequently went to the Partnership looking for a contribution towards that portion of the purchase price that he allocated to the licence. He said that the Partnership was not happy about that at all and did not accept it.

23. The purchase of the UCI cinema and licence was a significant matter. The licence had to be acquired in order for the redevelopment of the Tallaght Town Centre to take place and it involved the expenditure of a considerable sum of money. In its closing submissions, the plaintiff stated "*. . . its acquisition by Redfern was a necessary element in the project*" (para. 443). It was never provided for in the Redfern Agreement and there was no agreement between the plaintiff or Mr. Smyth, on the one hand, and the Partnership and Aifca, on the other hand, concerning the purchase of the cinema and licence and the expenditure of the sum of money involved.

Planning Permission

24. Tallaght is the nominated County Town of South County Dublin. The Square Shopping Centre in Tallaght was completed in or about 1991. Many shopping centres at that time were owned by a single entity. But at The Square, long leasehold interests in individual units were made available for sale to investors. All the investors were shareholders in SML. The Square was the first major town centre development in Dublin and commenced trading in 1991. At that time, it had 141 retail units and there were three anchor tenants. By 2006, The Square had been operating for fifteen years and had become somewhat jaded in terms of its appearance and facilities. In the meantime, other major shopping centres had developed, such as Dundrum and Liffey Valley, and access to competing shopping centres had become easier with the development of the M50 around the City of Dublin. It was generally accepted that The Square was in need of redevelopment as its market share was declining and it was losing competitiveness. When redevelopment was being considered, SML, through "*the Phase III Ltd. Partnership*" sought and obtained planning permission for what became known as the Phase III development. This planning permission was obtained in October 2000 and had a reference S00A/0553. It lapsed in February 2006. SML was pivotal in any arrangements for the future development of The Square. It held the licence to the entire car parking area and it managed the existing shopping centre. Therefore, whoever would redevelop The Square had to involve SML. A year after the planning permission for Phase III had been granted, the local authority, South Dublin County Council ("SDCC") called back the site that the Tuansgate building was built on and they sold it to Lowe Taverns Tallaght Limited. On 25th October, 2001, they granted Lowe Taverns a licence to park cars in the car park. When SML sought to proceed with the Phase III development, they came into conflict with Lowe Taverns, which had a right to park cars anywhere in the car park of The Square. Litigation ensued and a High Court decision delivered on 14th November, 2002, determined that the Lowe licence applied to the whole of the car parking area. SML tried to resolve this obstacle but was unable to do so. Noel Smyth and his company, Alburn, then became involved. The Partnership, through Aifca, purchased the Lowe licence in March 2005.

25. Under the Redfern Agreement of 4th August, 2005, Redfern and the Partnership were to carry out Phase III and Phase IV of the development of The Square. In order to this, they would have to act on the planning permission granted in respect of Phase III and apply for permission in respect of Phase IV. Following the Redfern Agreement, Alburn entered into discussions with SDCC and on 3rd February, 2006, an order was made under s. 183 of the Local Government Act 2001, transferring approximately eleven acres of land at Tallaght from the County Council to Alburn. The disposal was by way of a building licence. The Phase III development was to be based on the scheme for which planning permission was granted, ref. S00A/0553, save as amended by subsequent planning applications prior to the commencement of the development and/or by the parties and/or by agreement between the parties. When Alburn investigated the existing Phase III planning permission, it discovered some defects concerning the boundary of the development. Planning permission was also due to expire in February 2006. It was decided to submit a new planning permission which was submitted to SDCC on 31st July, 2006.

26. The original planning permission granted in 2000 was for a development of 386 apartments, a 43-bedroom hotel, a 47-bedroom aparthotel and 14,144 sq. m. gross of retail and 1,321 sq. m. gross convenience retail, 2,387 sq. m. gross for restaurant and bars, 6,171 sq. m. gross for offices and services and a 1,529 space multi-storey car park.

27. A decision on the new application issued on 22nd September, 2006. The permission was for a development consisting of the following uses: 384 apartments and associated private open space; a 27-bedroom hotel; 23,232 sq. m. of retail floor space; 3,690 sq. m. of restaurants/bars; 4,108 sq. m. of office space and 1,720 sq. m. of leisure space. A 6,117 space multi-storey car park was also to be provided. The permission was granted on the basis that it accorded with the policies and objectives of SDCC as set out in the Local Development Plan. There were forty-eight conditions attached. Two appeals were lodged against the decision. One was by a nearby resident, Mr. Darren Ireland, and the other was by Alburn itself, who objected to some of the conditions. Both appeals were subsequently withdrawn. The date of Final Grant of permission was 22nd February, 2007.

28. The second planning decision was substantially based on the earlier permission for Phase III. There were some design amendments and there was a requirement for more dual-aspect apartments. Mr. Noel Smyth gave evidence that the permission was not, in fact, viable, and that Alburn would have to submit further applications and have the terms altered. Before the first permission expired, Alburn had written to the Deputy County Manager on 10th October, 2005, stating, *inter alia*:

> *". . . we have considerable difficulty with the terms advised by the Chief Valuer for Phase III. The high capital value, which is linked to a specific planning approval, and the overall burden on the land due to the 'Lowe' factor, has resulted in an unviable project."*

The letter went on to say that Alburn would not be proceeding on the basis of those terms. But the terms of the second permission were not very dissimilar and also involved a substantial amount of residential development. Although Mr. Smyth sought to persuade the court that it was likely that Alburn would be able to get more favourable conditions by way of amendment to the planning permission, this was disputed by other witnesses. He also anticipated that the development could commence on the site in January 2008, and would have been completed by July 2010.

29. In order for the project to be viable from the plaintiff's point of view, they would have to have obtained a higher retail element. Mr. Tom Walsh of Muir & Associates, who were project managers employed by Alburn, agreed that there was no planning permission between February 2006 and February 2007, and that the development could not be started without planning permission. It was accepted by Mr. Smyth that Alburn could not ignore the residential requirements entirely. What it was seeking was contrary to the Local Area Plan which was designed to ensure that The Square developed into a town centre with mixed residential retail, office and hotel and leisure facilities.

30. Mr. Fergal McCabe, a town planner, was of the view that it was not unusual for a developer to go in on site without all the conditions being complied with. But he was quite clear in his evidence that he would not advise a developer to start work without any conditions precedent being met. He expected Alburn could commence Phase III of the development by the end of 2007, and then seek changes. But Alburn could not have built out the development because they had not got the Lowe licence. Ms. Anne Mulcrone, a planning consultant, expressed the view that Alburn was never in a position, during the course of the lifetime of the planning permission, reference S00A/0553, to commence development on the site. Moving on to the next planning permission, reference SD06A/0654, she dealt at some length with the planning report and appraisal signed off by Mr. Daragh Larkin, the senior executive planner with SDCC, which established that there was a significant number of issues which had to be sorted out before the development could commence. She referred to correspondence between Mr. Noel Smyth and Mr. Tom Walsh of Muir & Associates, and in particular, a letter of 3rd March, 2008. In that letter, Mr. Noel Smyth stated, *". . . what we cannot do is that we cannot emasculate ourselves because of the planners concerns and that our ultimate position must be that if we have to go back to the Manager and to the local representatives to amend the LAP in order to preserve and hold Tallaght in its place, then so be it. That is the position we would take, but for the most part, we will try and work with them."* This was a reference to the conflict between what Alburn wanted to do and needed to do and what the Local Area Plan allowed them to do. This had been alluded to in an email of 3rd March, 2008, from Muir & Associates which was copied to Noel Smyth and others and which stated, *inter alia*, *"**Thirdly,** we had our standard Alburn meeting on Friday last, **and it was agreed** that the most urgent task now facing us is to establish **the extent of substantive conflict between what Alburn want and need to do and what the LAP allows us to do"*. In the discovery made by Muir & Associates, notes of a meeting in SDCC offices on 15th February, 2008, were produced. In the course of that meeting, Mr. Paul Hogan, a senior planner for the Tallaght Town Centre, stated, *"in the overall, what has been presented runs totally counter to the LAP aspirations. I understand why you are proposing this Scheme, but we would recommend refusal on the grounds of conflict with LAP".* Mr. Tom Walsh of Muir & Associates was in attendance at that meeting.

31. Ms. Mulcrone said that Alburn had presented its plans and strategy and SDCC had responded clearly, indicating that they would refuse permission on the basis sought. She said the range of issues in conflict was considerable and covered urban design, parking strategy, social mix, entertainment use and the land mix use. Alburn did not focus on the grant of permission, but rather, was proposing to pressurise the manager and local authority to grant something that they had already outlined was not in accordance with proper planning and sustainable development. This would involve a change to the Local Area Plan. The submission made by Lafferty Design and Development to the County Council related mainly to the commercial viability of the scheme and did not advance alternative planning scenarios. What Alburn was trying to do was in conflict with the Local Area Plan.

32. I accept the evidence of Ms. Mulcrone that there was a significant number of problems to be overcome by Alburn before it could commence the development.

33. A considerable amount of debate took place between a number of witnesses on the issue of what Fire Certificates were required to cover the proposed building work. Mr. Tom Walsh of Muir & Associates arranged for a Fire Certificate to be obtained that would be sufficient to allow the development to proceed. The application was made by Michael Slattery & Associates and Lafferty Design & Development had inputs into that application. The certificate issued on 2nd August, 2006, and in the view of Mr. Walsh, would have been sufficient to enable a commencement notice to be served. Mr. Patrick Lafferty, who is a principal of Lafferty Design Group Ltd., architects, were engaged by Alburn in connection with the redevelopment of The Square. He was involved in obtaining the Fire Certificate and met with the fire authority in the company of Michael Slattery Associates, who were the lead consultants involved in obtaining the certificate. Mr. Maurice Johnson was the main person in Michael Slattery Associates dealing with the matter. He was of the view that the Fire Certificate would have enabled them to commence development. Although it would have only applied to some of the development, it would take four to six months for a full Fire Certificate for the entire building to be obtained. He would not have recommended starting work on areas not covered by a Fire Certificate without one being in place. Mr. Lafferty agreed that Mr. Maurice Johnson was an expert in this area, but said he had thirty-nine years experience himself. Mr. Maurice Johnson said that the Fire Certificate related to the first planning permission which lapsed in February 2006. In his view, it was not a basis for commencing that portion of the development to which it related because there were substantial differences between the fire safety certificate design and the subsequent planning application. He disagreed with the view expressed by Mr. Lafferty that moving a water main and hydrants in the course of preliminary works would not pose a problem under the existing Fire Safety Certificate. He said that such works would be a material alteration which would be affected by building regulations and would require a separate Fire Safety Certificate prior to its commencement. Mr. Johnson's position was somewhat compromised because he did not inform the court, until pressed in cross-examination, that he commenced working for Mr. Liam Carroll, the third named defendant, in April 2008. It seems to me that, having regard to all of the evidence on this issue, the commencement of the development could have taken place on the basis of the existing Fire Safety Certificate, although works would have had to be limited to those areas covered by the Fire Safety Certificate. Further, discussions would have been required with the local authority in order to obtain the relevant Fire Safety Certificates to progress the work and I am satisfied that this would have taken something in the order of one year. That would have had implications for the commencement date of much of the project.

Events following the Redfern Agreement

34. Having entered into the Redfern Agreement, neither Messrs. O'Mahony and McFeely nor Aifca were in a position to repay the monies borrowed from BOSI in order to fund the purchase of the Lowe licence. It is clear that Noel Smyth was aware of this because he negotiated an extension of time from the bank to the end of September 2006, at a time when the bank was threatening to call in a receiver over Aifca's assets. Mr. Noel Smyth gave evidence that he was determined that this would not happen, as it would jeopardise the project. But in the course of cross-examination, he conceded that he wished to have a pre-emptive right to acquire the loan in the event of non-performance by Aifca by 31st August, 2006, which was the deadline at that time. (T. 16, A. 91). If he took over the loan, no receiver would be put in.

35. On 25th September, Mr. Duffy asked Mr. Smyth if he would take over the loan, but there was an issue in relation to €10 million of the loan. It seems that it would have been Redfern or Alburn who would have taken over the loan, but the bank wanted Mr. Smyth to guarantee the debt personally. Mr. Smyth agreed in cross-examination that in a conversation with Mr. Duffy on 25th September, 2006, he agreed to guarantee the debt personally to allow that loan transfer over to Alburn. (T. 16, A. 261). Although he admitted that this was a very critical matter, it did not appear in his witness statement, nor did he have an attendance of the conversation with Mr. Duffy. No guarantee was completed or furnished to Mr. Smyth. With the time limit about to expire at the end of September 2006, Mr. O'Mahony made contact with Liam Carroll who obtained funding from Irish Nationwide Building Society and entered into the Aifca Agreement, to which I will refer in greater detail later. It was the Aifca Agreement which would signal the final breakdown in the relationship between the plaintiff and Mr. Noel Smyth, on the one hand, and the Partnership on the other hand. But between the signing of the Redfern Agreement and that point, a number of other developments had taken place which are relevant.

36. The Redfern Agreement provided for a completion date of 20th August, 2005, which was extended in writing by mutual agreement between the parties to 20th October, 2005. Subsequent to the completion date, the parties continued to negotiate. On 4th November, 2005, draft Heads of Agreement were furnished by Ivor Fitzpatrick & Company, solicitors for the Partnership, to Noel Smyth & Partners in which it was proposed that the partners would buy out Alburn's interest. In March 2006, Mr. Noel Smyth proposed splitting the redevelopment of The Square, with the Partnership taking over Phase III and Alburn taking over Phase IV.

37. On 4th May, 2006, a draft Share Purchase Agreement was furnished by Noel Smyth & Partners to Ivor Fitzpatrick & Company whereby the partners were to purchase the entire issued share capital of Alburn.

38. On 29th May, 2006, a revised proposal was put by Mr. Noel Smyth to Mr. Phil Flynn (acting on behalf of the Partnership). This proposal envisaged the joint venture along the lines of the Redfern Agreement, but with an option for the Partnership to buy out the plaintiff's interest in Alburn, failing which, Redfern would have an option to purchase the partners' interest.

39. On 29th June, 2006, a draft shareholders' agreement was furnished by Noel Smyth & Partners to Ivor Fitzpatrick & Company on foot of the proposals of 29th May, 2006.

40. On 3rd August, 2006, an agreement (which became known as the "Phil Flynn Agreement") was signed by Noel Smyth and John McKenna, as directors of Alburn, and Phil Flynn on behalf of Thomas McFeely and Larry O'Mahony. The Agreement stated as follows:-

> *"At a meeting held today (3rd August), facilitated by the undersigned, Thomas McFeely, on behalf of Larry O'Mahony and himself, agreed to sell their interest in Tallaght Square to Noel Smyth (Alburn) on the terms set out below:*
>
> *Existing Bank Loan and Share Option*
>
> *Noel Smyth (Alburn) to take over the existing bank loan with Bank of Scotland in the sum of €30m and to honour their entitlement to a 15% interest in the option previously granted to them.*
>
> *Glasnevin/Terenure/Murphystown Sites*
>
> *The above sites to be transferred to McFeely/O'Mahony on payment to Noel Smyth of €5.5m. In addition, a charge of €5m to be held against one of the above sites until planning permission is granted on Phase III (current application).*
>
> *Timeframe*
>
> *Contracts to be agreed by 31st August and closure by 30th September."*

Noel Smyth accepted that this was a binding agreement. This Agreement was a radical departure from the Redfern Agreement. It was never completed.

41. On 1st February, 2007, the subscription agreement between Tafica Ltd., Aifca Ltd. and Liam Carroll ("Tafica Agreement") was entered into between the parties.

42. Even after the Aifca Agreement was signed on 19th September, 2006, the Partnership continued to correspond with Noel Smyth through their solicitors without disclosing the existence of that Agreement and they attended meetings from time to time with Noel Smyth. At a meeting in April 2007, Noel Smyth brought up the question of the Redfern Agreement and was told by Larry O'Mahony that it was no longer in existence and Noel Smyth became very angry and upset.

Conduct of the Parties to the Redfern Agreement

43. It seems to me that in resolving the issues in dispute, the conduct of the parties to the Redfern Agreement is of some relevance.

Noel Smyth

44. On 4th August, 2005, Noel Smyth informed SDCC that Alburn had taken over Lowe Taverns on terms acceptable to all concerned. This was before the Redfern Agreement was performed. The evidence establishes that, in the summer of 2006, Noel Smyth agreed to purchase the UCI cinema licence independently of the first and second named defendants. It was only after he had concluded the Agreement that he sought a contribution from the first and second named defendants who thought that the amount spent on the licence was ridiculous.

45. On 10th October, 2005, Mr. Derek Brady, on behalf of Alburn, wrote to Mr. Tom Doherty, the Deputy County Manager of SDCC, informing him that Alburn would not be proceeding with Phase III on the basis of the terms advised by the chief valuer. This was written without consultation with the first and second named defendants. In the same letter, Mr. Brady invited SDCC to consider the option of becoming a full development partner in the project. Again, this was done without reference to the first and second named defendants.

46. On 9th March, 2006, Mr. Noel Smyth wrote to the first and second named defendants, suggesting, *inter alia*, that they would take over Phase III of the development and that Alburn would develop Phase IV. Noel Smyth wrote to the chairman of SML on 18th March, 2006, informing him of this arrangement.

47. On 27th March, 2006, SML's solicitors wrote to Noel Smyth & Partners informing them that this proposal was "*. . . wholly unacceptable to SML*".

48. Clause 11 of the Redfern Agreement provided that Alburn intended, as soon as possible after completion, to make an offer to the existing shareholders of The Square to acquire each of such shareholder's interest in the units of The Square at a yield of 4%, following the proposed rent review in October 2005 (this was later amended by agreement to 3.9%). At the end of 2005 and beginning of 2006, Alburn entered into negotiation to buy out these interests independently of the first and second named defendants. In fact, the first and second named defendants put in a competing bid for the Quinlan units, and in the course of the evidence it was suggested that Noel Smyth phoned the third named defendant to join him in a bid. He purchased the Quinlan units at a yield less than 3.9% which involved additional cost and liability for Alburn over and above what had been agreed under the Redfern Agreement.

49. On 3rd August, 2006, the "Phil Flynn Agreement" was signed. The parties were stated to be "Noel Smyth (Alburn) and Thomas McFeely/Larry O'Mahony". Under this Agreement, the first and second named defendants agreed to sell their interest in The Square to Noel Smyth (Alburn) on terms set out in the Agreement.

50. After the s. 183 manager's order had been signed, Mr. Eoghan Clear, the solicitor to SDCC, insisted on full compliance with the order. Mr. Noel Smyth was of the view that Mr. Eoghan Clear was interpreting the s. 183 order in too strict a fashion and he sought to sideline Mr. Clear by making unwarranted claims to SDCC that Mr. Clear had a conflict of interest.

51. It was at all times clear to Mr. Smyth that Anglo Irish Bank was not prepared to fund the redevelopment of The Square so long as the first and second named defendants were involved. Mr. Smyth produced to SDCC correspondence from Anglo Irish Bank Corporation Ltd. which purported to show that there was loan approval, when, in fact, there was a side letter making it clear that the loan would not be forthcoming if the first and second named defendants were involved in the project. Noel Smyth failed to pass on this information to SDCC or to its solicitor. Mr. Clear gave evidence that he would have expected it to be brought to his attention, and Mr. Derek Brady, the Chief Development Officer of Alburn, and a former County Manager of Dun Laoghaire Rathdown County Council, stated in evidence that he would have expected that information to be made known.

52. I am satisfied that the information was deliberately suppressed by Mr. Noel Smyth and that he misled SDCC as to the position concerning available finance for the project. Mr. Clear gave evidence that, from the point of view of SDCC, funding was crucial, and I accept that this was so. The letter of 8th August, 2006, from Anglo Irish Bank was a letter of comfort but could not be relied on, in view of the side letter.

53. In July 2006, Mr. Noel Smyth/Alburn was trying to buy out the BOSI loan to the first and second named defendants without them knowing it.

54. The defendants argue that the matters referred to above are relevant in determining whether or not the Redfern Agreement continued in existence or had terminated. I will deal with the legal principles involved in applying this evidence to the enforceability of the Redfern Agreement later in the judgment.

Larry O'Mahony and Thomas McFeely

55. The first and second named defendants borrowed monies from BOSI for the purpose of purchasing the Lowe licence. They were never in a position to repay that money within the period laid down by the bank. As early as April 2005 (before the Redfern Agreement), they were discussing a joint venture with the third named defendant.

56. On 13th April, 2005, Mr. Garret O'Reilly (solicitor for the third named defendant) wrote to Ivor Fitzpatrick & Co. (solicitors for the first and second named defendants), suggesting that the third named defendant might acquire a 50% interest in Lowe Taverns (Tallaght) Ltd., in a deal which was similar to the Aifca deal concluded in August 2006. In that letter, he passed on correspondence from Mr. Noel Smyth.

57. The first and second named defendants appear to have purchased the Lowe licence in order to turn it over at a profit or to get involved in the redevelopment of The Square. When BOSI called in the debt, it was their responsibility, and not that of Mr. Noel Smyth, to organise the repayment of the loan. Having signed the Redfern Agreement, it became clear that they were unable to repay the bank and then they entered into the "Phil Flynn Agreement" in August 2006. The first named defendant admitted in evidence that the ink was hardly dry on the Phil Flynn Agreement when he commenced talking to the third named defendant and Irish Nationwide Building Society with a view to paying off the loan. There are numerous diary entries for the third named defendant in August 2006, referring to the first and second named defendants which support the plaintiff's contention that there was ongoing contact between these parties. When they met the third named defendant on 8th August, 2006, and 10th August, 2006, they did not tell him that, as recently as 3rd August, 2006, they had done a deal with Mr. Noel Smyth, namely, the Phil Flynn Agreement. At the same time, they were entering into discussions with the third named defendant which were wholly incompatible with the Redfern Agreement. When they signed the Aifca Agreement, it provided, *inter alia*, that each of the shareholders shall terminate or procure the termination of any third party negotiations currently taking place. They were binding themselves to terminate all those negotiations from 20th September, 2006, onwards, even though, under the Phil Flynn Agreement, Mr. Noel Smyth had until 30th September, 2006 to try and persuade BOSI or some other bank to provide finance to the tune of €30 million.

58. Both the first and second named defendant insisted that the Redfern Agreement had a completion date of 20th August, 2005, which was extended, by agreement in writing, to 20th October, 2005, and then lapsed - not having been extended further - in accordance with the terms of the Agreement. Yet it is quite clear that they allowed their solicitors to convey the impression that they were bound by the Redfern Agreement after that date. For example, on 7th July, 2006, their solicitors wrote to Noel Smyth & Partners informing them that their clients were aware of their obligations under the Redfern Agreement.

59. In correspondence leading up to the Aifca Agreement, the solicitors for the first and second named defendants informed the third named defendant's solicitor that he was purchasing in full knowledge of the Redfern Agreement and they sought an indemnity in respect of any claims that might arise, pursuant to that Agreement.

60. At the same time, they were writing to the solicitors for Alburn, looking for the shareholders agreement under the Redfern Agreement. The Redfern Agreement provided, *inter alia*, that neither party was entitled to transfer the benefit of the Agreement or any shareholding or interest held by them in Alburn or Lowe. Yet, the first and second named defendants transferred 50.1% of Aifca (the owner of the Lowe licence) to the third named defendant in September 2006, and took elaborate steps to ensure that neither

Mr. Noel Smyth nor Alburn nor Redfern were aware of these discussions. Furthermore, they arranged for correspondence and other documents to be passed on to the third named defendant's solicitors for consideration before deciding on the manner of reply to Noel Smyth & Partners concerning implementation of the Redfern Agreement.

61. In short, the first and second named defendants were trying to have it every way. They were negotiating with both Noel Smyth and Liam Carroll up until June or July 2006. In August, 2006, the Phil Flynn Agreement was signed, and around the same time, they reopened negotiations with Mr. Liam Carroll which culminated in the Aifca Agreement.

62. Around the time that Mr. Noel Smyth put in a bid for the Quinlan units at The Square, the first and second named defendants put in a competing bid of €307 million. Mr. McFeely admitted in evidence that he was not sure where he and Mr. O'Mahony were going to get this money. It is hard to credit that Messrs. O'Mahony and McFeely would offer €307 million for the units and not know where the money was coming from but that, apparently, was the position. The first named defendant believes he told Mr. Noel Smyth about this. Mr. Smyth claimed to have bought the Quinlan units under the Redfern Agreement and the court will have to assess whether this could have been so, having regard to the fact that separate bids were made by Mr. Smyth/Alburn, on the one hand, and the first and second named defendants, on the other hand.

63. The first named defendant agreed that by June 2007 he and the second named defendant had agreed to repudiate the Redfern Agreement and look for an indemnity from the third named defendant.

Liam Carroll

64. Liam Carroll was at pains to ensure that his negotiations with the first and second named defendants were concealed from the plaintiff, Mr. Noel Smyth, and Alburn. He had tried to purchase the UCI cinema licence but was unsuccessful. He knew that when he bailed out the first and second named defendants by paying off the loan due to BOSI through the Aifca Agreement, that he could effectively block the redevelopment of The Square by the plaintiff.

65. On 22nd September, 2006, Mr. John Pope, on behalf of the third named defendant, sent an email to Mr. John Maxwell of AIB in which he stated, "*this will provide us with a licence over the development rights of the entire car park in The Square and will prevent anyone else developing The Square without us*". Although the Aifca Agreement stated that it was subject to the Redfern Agreement, this was a fiction, because the two Agreements were wholly incompatible. The Redfern Agreement could not have been completed under the Aifca Agreement.

66. Mr. Liam Carroll did not give evidence. Medical evidence was produced to me which satisfied me that he was not fit to attend court or give evidence, either on commission or otherwise. It is quite clear from the evidence which was given to the court that in various respects, which have been outlined above, Mr. Noel Smyth, on the one hand, and Messrs. Larry O'Mahony and Thomas McFeely, on the other, failed to act in good faith towards each other in certain material respects. I am also satisfied that while the Aifca Agreement referred to the fact that it was subject to the Redfern Agreement, this was a charade as the two Agreements were incompatible. The evidence clearly establishes that the third named defendant knew, when he was rescuing the first and second named defendants from their obligations to BOSI, that he (or a company controlled by him) would either supplant Redfern/Alburn or frustrate the attempt of Mr. Noel Smyth to redevelop The Square through those companies or by himself. As between the plaintiff, on the one hand, and the first and second named defendants, on the other, they had duties of good faith towards each other under the Redfern Agreement (if it was a binding agreement) and they were in each in breach of that duty. It is necessary, therefore, to see whether the Redfern Agreement was binding or enforceable and, if so, to determine the effect of those breaches of duty of good faith on each side. The allegations against the third named defendant fall to be considered if the Redfern Agreement was binding at the time the Aifca Agreement was signed.

The law

67. It seems to me that the first legal issue to be decided is whether or not the Redfern Agreement was a legally binding agreement or merely Heads of Agreement. The Agreement was entered into between Redfern and the Partnership for the purpose of facilitating the development by them, through a company called Alburn, of the 18.5 acre car park area surrounding The Square Shopping Centre in Tallaght. The development would also have involved integrating the existing Centre with the newly developed area. The Agreement envisaged the development taking place through an equally owned joint venture company, namely, Alburn, in which the shareholders would be Redfern, on the one hand, and the Partnership, on the other. The Agreement provided for the disposal by the Partnership of their interests in the entire issued share capital of Lowe Taverns (Tallaght) Ltd. ("Lowe") to Alburn, a subsidiary of Redfern, in exchange for Redfern issuing shares in Alburn to the Partnership. The Agreement further provided for the regulation of the affairs of Alburn and the regulation of relations between Redfern and the Partnership as shareholders in Alburn.

68. The Agreement was signed, sealed and delivered by the parties on or about 4th August, 2005, and was supplemented by a side letter of 25th July, 2005, and by letters of 3rd August, 2005, from Ivor Fitpatrick & Co., solicitors on behalf of the Partnership, to Noel Smyth on behalf of Redfern, and 4th August, 2005, from Noel Smyth on behalf of Redfern to Ivor Fitzpatrick & Co., solicitors to the Partnership. The Agreement provided for certain steps to be taken in the future. For example, clause 11 (as amended) provided that Alburn intended, as soon as possible after completion, and with the support of their bankers, to make an offer to existing shareholders of The Square to acquire each of such shareholder's interest in the units of The Square at a yield of 3.9% following the proposed rent review in October 2005. By clause 13, the parties agreed to incorporate the terms into a final shareholders' agreement which would be prepared and submitted to the parties and provided a mechanism for the resolution of any dispute that might arise as to what that agreement should contain. There were some ambiguities in the text of the agreement. For example, clauses 16 and 26 were somewhat contradictory. Clause 16 states:

> *"Each of the parties hereto hereby confirms that they have each had independent legal and professional advice prior to entering into the terms hereof and that same is legally binding on the parties."*

Clause 26 states:

> *"**Proper Law**: save to the extent that may be otherwise agreed in writing, the transaction (including these Heads of Agreement to the extent that they are legally binding) will be subject to Irish law. The Irish courts are to have exclusive jurisdiction to settle any disputes that may arise out of or relate to these Heads of Agreement or any relationship created thereby."*

69. Clause 8 of the Agreement provides that Redfern is appointed by the parties to be project manager of both the Sandyford Project and The Square Project. Redfern are to charge open market rates for its services or, where a rate is agreed, an agreed rate. On the other hand, clause 5 provides that the project management fee was 15% of the construction costs to be paid to Redfern.

70. Mr. Tim Scanlon, a solicitor and partner in Matheson Ormsby Prentice, was called to give evidence on the nature of this Agreement. Counsel for the plaintiff objected to his evidence being given and I overruled that objection. In the circumstances, the witness confirmed his statement and was not cross-examined. His view was that the Redfern Agreement had many of the characteristics one would expect of a typical Heads of Agreement. While such evidence might be a useful guide to the court as to how it should approach the issue, the court has to decide, by the exercise of its own judgment, what is the legal status of the Redfern Agreement, having regard to the surrounding facts. There was broad agreement between the parties as to the way in which the court should approach this task. The test is an objective one. In the case of *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274, the Supreme Court adopted the following statement of principles relating to contractual interpretation as set out in the speech of Lord Hoffman in the House of Lords' decision in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 W.L.R. 896 at pages 912-913:

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous, but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax; see Mannai Ltd. v. Eagle Star Ass. Co. Ltd. [1997] A.C. 749.*
>
> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania S.A. v. Salen A.B. [1985] A.C. 191, 201:*
>
> > *'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."*

71. The principles enunciated by Lord Hoffman have been applied recently by the Supreme Court in *Emo Oil Ltd. v. Sun Alliance and London Insurance plc*. [2009] IESC 2, which noted, with approval, the views expressed by Laffoy J. in *UPM Kymmene Corporation v. BWG Ltd*. (Unreported, 11th June, 1999), when she stated:

> *". . . The basic rules of construction which the court must apply in interpreting the documents which contain the parties' agreements are not in dispute. The court's task is to ascertain the intention of the parties, and the intention must be ascertained from the language they have used, considered in light of the surrounding circumstances and the object of the contract. Moreover, in attempting to ascertain the presumed intention of the parties the court should adopt an objective, rather than subjective approach and should consider what would have been the intention of reasonable persons in the position of the parties."*

72. Applying these principles to the Redfern Agreement and the relevant side letters, it seems to me that while there are some ambiguities and inconsistencies contained in the Agreement, it was intended to create legal relations. While there were further matters to be put in place, for example, the shareholders' agreement and the purchase by Alburn of the interests in existing shareholders in units at The Square at a yield of 3.9%, the Agreement was clear that these were matters that were required to be done as obligations under the Agreement. The Agreement was complete to the extent that it set out, albeit in broad terms, what had to be done and what the parties agreed would be done. In an exchange of correspondence on 3rd and 4th August, 2005, between Ivor Fitzpatrick & Co., solicitors, and Alburn, the authors (including Mr. Noel Smyth of Alburn) referred to the Agreement as "*Heads of Terms*". While this is so, and while clause 26 refers to "*. . . these Heads of Agreement to the extent that they are legally binding*", the document, when considered in its entirety, and in the light of surrounding circumstances, seems to me to be more than Heads of Agreement. The fact that clause 26 uses the words "*. . . to the extent that they are legally binding*" does not mean that the Agreement is not legally binding. It may raise an issue as to the status of the Agreement. But this issue seems to be resolved by clause 16 which states that "*each of the parties . . . . confirmed that they have had independent legal and professional advice prior to entering into the terms hereof and that the same is legally binding on the parties".* Using the objective test, and considering the context in which the parties entered into the Agreement, I hold that it was their intention to enter into a legally binding relationship in the Redfern Agreement, notwithstanding some inconsistencies to which I have already referred. Whether the Agreement is enforceable or whether its performance has been frustrated or whether it has been repudiated by the conduct of the parties, is a separate issue and I will now go on to consider these matters.

73. The first and second named defendants claim that the Redfern Agreement ceased to remain enforceable for a number of reasons which are also advanced by the third and fourth named defendants. The third and fourth named defendants say that by the time the Aifca Agreement was concluded, the Redfern Agreement had ceased. The following are the arguments advanced by the defendants on this issue:-

(i) The Redfern Agreement was not completed by the extended completion date, namely, 20th October, 2005, and it thereby lapsed. Alternatively, there was a failure to complete it within a reasonable time thereafter, rendering the Agreement unenforceable.

(ii) The Redfern Agreement was terminated unilaterally by the plaintiff on or about 10th October, 2005, when Mr. Derek Brady wrote to the Deputy County Manager of SDCC informing him that Alburn would not be proceeding with Phase III of the development.

(iii) The Agreement was rescinded when replaced by another binding arrangement between the parties, namely, the Phil Flynn Agreement in August 2006.

(iv) It was frustrated by a number of subsequent events including (a) the emergence of the UCI cinema licence as a necessary obstacle to be overcome; (b) the acquisition of Carstan Ltd., the owner of the UCI licence at a cost of €52 million by Alburn, thereby making the performance of the parties' respective obligations under the Redfern Agreement commercially impossible; (c) the strict provisions of the s. 183 order issued by SDCC preventing the performance of the Redfern Agreement insofar as it related to the involvement of the first and second named defendants; and (d) funding being provided to Alburn on the basis that the first and second named defendants would not be shareholders in Alburn, which was a breach of the terms of the Redfern Agreement.

(v) There are other issues raised by the defendants. For example, it is alleged that the transfer of shares in Lowe Taverns Tallaght Ltd. under the Redfern Agreement amounted to an unlawful distribution and that the Agreement was unenforceable because it breached prior subsisting legal obligations as the shares in Lowe Taverns had been charged in favour of BOSI in March 2005, so that the transfer of those shares without the consent of BOSI was not permissible. Finally, it is alleged that Redfern was not at the date of the Agreement ready, willing and able to complete the Agreement as it did not have the finance to do so.

74. I will now look at some of the legal issues that apply.

Completion date

75. Mr. Noel Smyth, on behalf of Alburn and Redfern, adopted his witness statement. In that statement, at paragraph 53, he stated:

> *"It was always the clear understanding that time was critical in order to ensure that we could get on site, open negotiations in a fuller sense with SDCC to acquire the Freehold, pursue the activity of getting on site without delay and ensuring that the Planning Permission that had been secured some years previously was acted on immediately and that Capital Allowances were not lost."*

In his evidence, however, Mr. Smyth sought to resile from that position and stated that 20th October, 2005, became a "*rolling date*". This was disputed by the defendants. It is quite clear from the evidence that apart from the one extension in writing of the completion date to 20th October, 2005, it was never extended in writing beyond that or by agreement between the parties. The contract is clear in its terms as to the closing date and the method whereby it could be extended. Under the "*Parol Evidence Rule*", oral testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms on which the parties have deliberately agreed to record any part of their contract. In *Analog Devices B.V.. v. Zurich Insurance Co*. [2002] 1 I.R. 272, Fennelly J., giving the judgment of the Supreme Court, stated at p. 294:

> *"Insofar as Irish law is concerned, a contract is to be interpreted objectively in accordance with the meaning of the words the parties have used. The corollary is that parol evidence is not admissible so as to add to or vary that meaning."*

Common law adopts a strict approach in relation to times specified in a contract; time is always of the essence of the contract. But a different set of rules evolved in Equity, where time was not of the essence of the contract, except in certain cases. In *Hynes Ltd. v. Independent Newspapers Ltd*. [1980] I.R. 204, Kenny J., for the majority in the Supreme Court, stated at p. 219:

> *"When is time of the essence of the contract? There have been such a number of cases (both Irish and English) on this matter that I do not intend to review them because the law is, I believe, correctly stated in a text-book of high authority in a passage which has been judicially approved on a number of occasions. The passage appears at p. 502 of the 6th edition of Fry on Specific Performance:*
>
> > *'Time is originally of the essence of the contract, in the view of a Court of Equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. As this intention may either be separately expressed, or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to any one or more of its terms, either by virtue of an express condition in the contract itself making it so, or by reason of its being implied'."*

Contracts for the sale of shares are a contract in which time is generally considered of the essence because shares vary in price from day to day. In *Hare v. Nicoll* [1966] 2 Q.B. 130, the Court of Appeal considered whether or not time was of the essence in a contract which provided an option for the purchase of shares. The Court of Appeal held that time was of the essence due to the commercial nature of the contract. Winn L.J. stated at p. 147:-

> *"In my judgment, where there is a provision for the purchase of shares upon payment by a stated date, it is to be presumed, in the absence of any contrary indication that the parties to such a contract have impliedly stipulated and mutually intend that the time of payment shall be of the essence of the contract."*

76. The Redfern Agreement is not a contract for the sale of shares, but it is a contract which required, *inter alia*, a share transfer agreement to be executed. I have already indicated what Mr. Noel Smyth said in his witness statement about time being "*critical*". When the Agreement was signed, the parties knew that the planning permission for the redevelopment of The Square, which had been obtained in February 2001, was due to expire in February 2006. This, of itself, would suggest that time was of importance to the parties.

Rescission
77. In *Chitty on Contracts*, 29th ed. Para. 22-028, the author states:

> *"A rescission of the contract will also be implied where the parties have effected such an alteration of its terms as to substitute a new contract in its place. The question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form. The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances. Rescission will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it."*

An oral agreement is sufficient to effect its discharge. In *Morris v. Baron & Co*. [1918] A.C. 1, the House of Lords held that a subsequent oral agreement was sufficient to discharge an original agreement, even where the subsequent oral agreement was itself unenforceable for want of writing. In *British & Benningtons Ltd. v. Northwestern Cachar* [1923] A.C. 48, the House of Lords adopted the decision in *Morris v. Baron & Company*. Lord Atkinson, in his speech, said at p. 62:

> *"A written contact may be rescinded by parol either expressly or by the parties entering into a parol contract entirely inconsistent with the written one, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it."*

This issue was considered by Budd J. in *Marchioness of Headfort v. Ronald Arthur Nall Baron Brocket* [1966] I.R. 227. He held that a new agreement impliedly rescinded the original agreement contained in Heads of Settlement as being inconsistent with it. If consideration was needed to support the implied agreement to rescind, it was to be found in the mutual implied promises to rescind.

78. Mr. Noel Smyth conceded in evidence that the Phil Flynn Agreement signed by the parties in August 2006 was a legally binding agreement. The first and second named defendants gave the same evidence. It was an entirely different contract to the Redfern Agreement. It is clear, however, that that contract was not performed but that does not appear to be relevant on the authorities which have been opened to me. Evidence was also given of other agreements subsequent to the Redfern Agreement which were of similar effect to the Phil Flynn Agreement. One of these was referred to in an email of 30th January, 2006, from Mr. Derek Brady to Mr. Coleman Birmingham of Noel Smyth & Partners after a meeting between Mr. Noel Smyth and the second named defendant where he stated, *inter alia*:

> *"They shook hands on that basis. Deal done. Close Tuesday next."*

Repudiation by conduct/breach of contract
79. In paragraphs 44-66 of this judgment, I have referred to the conduct of various parties after the signing of the Redfern Agreement which might have a bearing on the outcome of this case. The defendants contend that the conduct of Mr. Noel Smyth and other agents of Redfern or Alburn amounted to a breach of the Redfern Agreement and a repudiation of it. Mr. Noel Smyth, on the one hand, and the first and second named defendants, on the other hand, made separate bids for the *"Quinlan units"* in The Square and it is contended by the defendants that this amounted to a repudiation of the Agreement. Furthermore, Mr. Noel Smyth purchased the Quinlan units at a yield which was less than 3.9%, as specified in the Redfern Agreement, and involved additional cost to Alburn over and above what had been agreed. The defendants entered into the Aifca Agreement and the Tafica Agreement which is a breach of the Redfern Agreement if it subsisted at the time. Both Mr. Noel Smyth, on behalf of Alburn/Redfern, on the one hand, and the first and second named defendants, on the other hand, failed to comply with their good faith obligations under the Redfern Agreement.

80. Where there is repudiation by breach of contract, the innocent party must elect to treat the contract as continuing or at an end. It is clear from the evidence that the first and second named defendants were of the view that they were discharged from the contract and they appear to have based this opinion largely on the fact that the completion date had expired and there had been other negotiations such as the Phil Flynn Agreement. But the first and second named defendants allowed their solicitors to write to the solicitors for the plaintiff, making it clear that they were aware of their obligations under the Redfern Agreement. Indeed, they sought an indemnity from the third named defendant in respect of any breach of the Redfern Agreement arising out of the Aifca Agreement. Some of the actions alleged to constitute repudiation were known to the other parties and some were not. For example, the first and second named defendants were not aware that Mr. Noel Smyth was negotiating with BOSI to buy out their interest. Nor were they aware that Mr. Derek Brady had been writing to SDCC to inform them that Alburn would not be proceeding with Phase III of the development. Neither Mr. Noel Smyth nor the plaintiff were aware that the first and second named defendants were negotiating with Liam Carroll. I will deal, in my conclusions, with the question of whether these actions brought the Redfern Agreement to an end.

Frustration
81. *"A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract."*

See *Chitty on Contracts*, 29th ed., para. 23-001.

82. In *National Carriers Ltd. v. Panalpina (Northern) Ltd*. [1981] A.C. 675, Lord Simon, in the House of Lords decision, stated at p. 700 of his speech:

> *"Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."*

83. In *J. Lauritzen A.S. v. Wijsmuller B.V. (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, Bingam L.J. set out five propositions

which describe the essence of the doctrine. These propositions are summarised at para. 23.007 of *Chitty on Contract*, 29th edition, as follows:

> (i) The doctrine of frustration has evolved "to mitigate the rigour of the common law's insistence on literal performance of absolute promises" and that its object was "to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances".
>
> (ii) Frustration operates to "kill the contract and discharge the parties from further liability under it" and therefore it cannot be "lightly invoked" but must be kept within "very narrow limits and ought not to be extended".
>
> (iii) Frustration brings the contract to an end "forthwith, without more and automatically".
>
> (iv) "The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it" and it must be some "outside event or extraneous change of situation".
>
> (v) A frustrating event must take place "without blame or fault on the side of the party seeking to rely on it".

84. The defendants contend that the following matters had the effect of frustrating the Redfern Agreement:

> (a) The necessity to purchase the UCI cinema licence in order to proceed with the redevelopment of The Square, pursuant to the Redfern Agreement, in circumstances where the first and second named defendants did not know about this at the time they entered into the Agreement. The Redfern Agreement was drafted by Noel Smyth & Partners and it was suggested, in the course of the evidence, that Mr. Noel Smyth knew or ought to have known about the UCI licence because it was referred to in the SML Agreement of 31st July, 2003. Alburn was a party to that Agreement in which SML, in consideration of a non-refundable payment of €1 million, agreed, at the request of the developer and subject to the terms of the Agreement, to extinguish its licence in the licensed area. Clause 3.1.5 provided, *inter alia*, that the extinguishment would be subject to the right or entitlement (if any) of a number of named parties, including UCI Cinemas. But for whatever reason, it was not adverted to by Mr. Smyth or the solicitors acting on behalf of Alburn/Redfern, and the first and second named defendants knew nothing about it. The fact that €52 million was paid for the cinemas and the licence clearly establishes that this was a very significant burden to be assumed.
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> (b) Alburn acquired Carstan Ltd., the owner of the UCI licence, without the consent of the first or second named defendants.
>
> (c) The s. 183 resolution passed by the members of SDCC, in February 2006, contained a clause (clause 34) prohibiting the first and second named defendants becoming directors of Alburn which they claim made the Redfern Agreement incapable of implementation. Clause 34 reads as follows:-
>
> > *"That for the avoidance of doubt, this transaction shall take place between South Dublin County Council, on the one hand, and Alburn on the other hand i.e. the present directors of Alburn as at 3rd February, 2006. Alburn shall take the Agreement for Lease and perform on the financial and other terms of the agreement until such time as the agreement is terminated."*

At that time, SDCC was unaware of the Redfern Agreement. It first received it on the cover of a letter of 30th May, 2006. Mr. Eoghan Clear said that SDCC was concerned about the involvement of the first and second named defendants in Alburn and I accept his evidence.

> (d) The Anglo Irish Bank facilities of 7th February, 2007, (together with the side letter) were provided to Alburn strictly on the basis that the first and second named defendants were not participating in the development. Mr. Eoghan Clear, solicitor for SDCC, said that a fully binding, unconditional and irrevocable commitment letter from a financial institution was a condition precedent to the completion of the s. 183 agreement. I accept this evidence. In my conclusions to follow I will consider the implications of these matters.

85. The shares in Lowe Taverns Tallaght Ltd. were charged in favour of BOSI when Aifca Ltd. borrowed the money to purchase Lowe Taverns Tallaght Limited. This meant that until the loan was paid off, Aifca could not transfer the shares to Alburn and it could not thereby acquire the licence under the Redfern Agreement. The Agreement provided for the first and second named defendants to dispose of the entire issued share capital in Lowe to Alburn, free of encumbrances. In fact, the first and second named defendants did not own the share capital in Lowe, and while it might be argued that they could procure that Aifca would dispose of the entire issued share capital in Lowe to Alburn, free of encumbrances, this could only have been done if the debt to BOSI was discharged and the bank's consent to the transfer was obtained.

86. In order to decide this case, I do not have to decide whether or not the transfer of shares from Aifca to Alburn amounted to an unlawful distribution. I believe I can reach my conclusions on the central issues that arise in this case on the basis of the facts set out above. On the question of damages, the plaintiff claims general damages for breach of contract and also punitive and/or exemplary damages. These issues become relevant if the plaintiff succeeds in establishing breach of contract against the first, second and fifth named defendants, and the procurement of a breach of contract by the third and fourth named defendants.

Conclusions

87. I am satisfied that in entering into the Redfern Agreement the parties intended to enter into legal relations. The Agreement, as executed, contains some fundamental errors of fact and omits to deal with certain issues that were necessary to carry it into effect. I refer to the recital to the effect that "*the Partnership are the sole beneficial and legal owners of the entire issued share capital of Lowe, free from encumbrances*". This is incorrect. The share capital was owned by Aifca Ltd., a limited liability company, with a separate legal identity from the Partnership. The Agreement was drafted by Noel Smyth & Partners on behalf of the plaintiff and it seems to me that they must bear the consequences of this fundamental error. The legal consequences of incorporating a limited liability company are that the company assumes a separate legal identity as distinct from its owners. This is not a fiction. The rule in *Salomon v. Salomon & Co*. [1897] A.C. 22 is still the law in this jurisdiction. The Company and its shareholders are separate legal entities. (See *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519).

In *Fyffes plc .v DCC plc*. [2009] 4 I.R. 417 Laffoy J. at p. 488 quoted with approval the following passage from the third edition of Keane, *Company Law*, at para. 11.64:

> *"In certain cases, where no actual misuse of the privilege of incorporation is involved, the courts may nonetheless infer the existence of an agency or trust if to do otherwise would lead to injustice or facilitate the avoidance of a tax liability".*

The plaintiff could make an arguable case that the court could infer the existence of an agency or trust in this case so as to impose on the first and second named defendants ("the Partnership") a duty to procure that Aifca Ltd. transfers the shares to Alburn. But even if that were so, it seems to me that there are other problems of a fundamental nature affecting the enforceability of the contract. I am satisfied that the conduct of the parties after the execution of the Redfern Agreement, and in particular, the fact that the parties executed what they considered to be a legally binding agreement in August 2006, namely, the Phil Flynn Agreement, had the effect of rescinding the Redfern Agreement, notwithstanding the contents of correspondence from the solicitors for the first and second named defendants, thereafter, suggesting that they were aware of their obligations under the Redfern Agreement.

88. I hold that in setting a completion date and the manner whereby it could be extended, and having regard to the surrounding circumstances, the parties made time of the essence. The Agreement was made in the context of clear understanding that time was critical in order to ensure that the redevelopment of The Square could commence as soon as possible and that negotiations could proceed with SDCC to acquire the freehold. The parties were aware that the original planning permission was about to expire and that they would have to get on site quickly in order not to lose capital allowances. The parties complied with the terms of the contract by extending the completion date in writing, on one occasion, up to 20th October, 2005, but did not do so thereafter. In my view, that rendered the Agreement unenforceable as it had lapsed. On 10th October, 2005, Mr. Derek Brady wrote to the Deputy County Manager of SDCC informing him that Alburn would not be proceeding with Phase III of the development which indicated a desire to unilaterally terminate the Redfern Agreement, and was contrary to the provisions of the Agreement because it was done without consultation with the first or second named defendants.

89. I hold that the attempt by Mr. Noel Smyth/Alburn to buy out the BOSI loan to the first and second named defendants in July 2006, without them knowing it, was in breach of the Redfern Agreement and a repudiation of it. Similarly, the separate bids by Mr. Noel Smyth or one of his companies, on the one hand, and the first and second named defendants, on the other hand, to buy out the other units in The Square known as the "*Quinlan units*", separately, amounted to a repudiation of the Agreement. Furthermore, the purchase of the units by Mr. Noel Smyth at a yield which was less than 3.9% as specified in the Redfern Agreement amounted to a breach.

90. I hold that the conduct of the first and second named defendants in negotiating with the third named defendant, without the knowledge of the plaintiff or Mr. Noel Smyth or Alburn, was in breach of the good faith provisions of the Redfern Agreement. At the time when they transferred 50.1% of Aifca (the owners of the Lowe licence) to the third named defendant in September 2006, the Redfern Agreement was already repudiated and had been rescinded by the Phil Flynn Agreement. But I am satisfied they were negotiating with both Noel Smyth and Liam Carroll up until June or July 2006, when the Phil Flynn Agreement was signed, and that shortly thereafter, they reopened negotiations with Mr. Carroll which culminated in the Aifca Agreement. By that time, there had been conduct on the part of the first and second named defendants, on the one hand, and Mr. Noel Smyth on behalf of Alburn/Redfern, on the other hand, which could only be described as a breach of the good faith obligations on their respective parts under the Agreement. By then, the Redfern Agreement was "*. . . more honoured in the breach than the observance",* and in August 2006, the signing of the Phil Flynn Agreement had the effect of rescinding the Redfern Agreement. It is my view that none of the parties to this action emerges with much credit for the manner in which they conducted their business dealings with each other.

91. A number of matters took place after the contract which had the effect of frustrating it. I do not include in this list the inability of the first and second named defendants and/or Aifca to procure the release of the shares in Lowe Taverns Tallaght Ltd. to Alburn on account of their inability to repay the BOSI loan. This cannot amount to frustration because it does not arise without the default of the first and second named defendants. But I hold that there were a number of matters that do give rise to frustration of the Redfern Agreement and they are as follows:-

> (i) The necessity to purchase the UCI Cinema licence was not adverted to in the Agreement by either party, and yet the purchase of that licence was necessary to give effect to the Agreement. It also involved the expenditure of a considerable sum of money which would have imposed a significant burden on the parties to the Agreement. This meets the criterion of a supervening event without the default of either party and for which the contract made no sufficient provision and which significantly changed the nature of the contractual rights and obligations of the parties which could reasonably have been contemplated at the time of the execution of the Agreement. I hold, therefore, that the Redfern Agreement was frustrated by the necessity to purchase the UCI licence. Furthermore, the acquisition of Carston Ltd., the owner of the licence, by Alburn, without the consent of the first and second named defendants, was, in itself, a breach of the good faith provisions of the Redfern Agreement.
>
> (ii) Clause 34 of the s. 183 resolution passed by the members of SDCC contained a clause prohibiting the first and second named defendants from becoming directors of Alburn which made the Redfern Agreement incapable of implementation.
>
> (iii) The provision of finance for the project was of critical importance to SDCC and the evidence established that the facilities of 7th February, 2007, offered by Anglo Irish Bank Corporation to Alburn, were provided strictly on the basis that the first and second named defendants would not be participating in the development. This meant that the Redfern Agreement could not have proceeded unless finance was organised elsewhere. There was no evidence of such other finance. Indeed, I was not impressed by the wilful concealment, on the part of Mr. Noel Smyth, of the conditions attached by Anglo to the provision of such funds, when he was corresponding with SDCC and its legal advisor, Mr. Clear.

92. For the reasons I have outlined above, I am satisfied that the Redfern Agreement is unenforceable.

93. So far as the third and fourth named defendants are concerned, I hold that the initial approach made to the third named defendant for assistance in bailing out the first and second named defendants in respect of their obligations to BOSI came from the first named defendant, Mr. Larry O'Mahony. I am also satisfied that the third named defendant was a willing participant in the proposal to obtain alternative finance to discharge the BOSI debt because he knew that he could use the Aifca Agreement as a vehicle to supplant Mr. Noel Smyth or his companies in the redevelopment of The Square or, alternatively, he could thereby frustrate the plans of Mr. Smyth or his companies to carry out the redevelopment. His motives in becoming involved were self-serving and the elaborate steps which he took to ensure that his involvement was kept secret from Mr. Noel Smyth lends credence to this. Having said that, he can only be liable if, at the time he became involved, the Redfern Agreement was still subsisting. I am satisfied that, at the time the Aifca Agreement was concluded on 19th September, 2006, the Redfern Agreement was no longer subsisting, notwithstanding the

correspondence which had passed between the solicitors for the first and second named defendants and the plaintiff/Alburn/Mr. Noel Smyth or their legal advisors, and notwithstanding the indemnity sought by the first and second named defendants from the third named defendant.

94. The plaintiff has failed to establish a breach of contract or the procurement of a breach of contract. In the circumstances, I do not need to consider the issue of damages.

96. I dismiss the action.