

THE HIGH COURT**2008 3677 P****BETWEEN****GREENBAND INVESTMENTS****PLAINTIFF****AND****MATTHEW BRUTON, DENNIS WALSH AND PATRICK HOLOHAN****DEFENDANTS****JUDGMENT of Mr. Justice Clarke delivered on the 30th January, 2009****1. Introduction**

1.1 The plaintiff ("Greenband") is an unlimited company engaged in property development. The defendants ("the Trustees") are sued in their capacity as trustees of the Irish Coursing Club ("ICC"). The ICC owns property at Davis Road in Clonmel which is immediately adjacent to (on the East side) a substantial commercial development being conducted by Greenband at a site known as the Showgrounds.

1.2 There is little doubt but that active negotiations took place between Greenband and persons claiming to represent the ICC concerning the possibility of a sale of a narrow strip of land which is situated towards the boundary between the two properties. The strip in question was owned by the ICC and was used as a roadway to access, not only the property of the ICC but also other properties.

1.3 Disputes have arisen between the parties as to whether there is an enforceable agreement for the sale of the property in question. I will turn shortly to a brief description of the progress of the proceedings to date. For reasons which will be apparent, the only issue which was ultimately tried, at this stage, was as to whether there was an enforceable agreement between the parties and, if so, whether it was appropriate to direct specific performance of that agreement. Other issues were left over, if arising in the light of the decision on that question, to a further hearing. In that context it is appropriate to turn first to the procedural history of the case.

2. Procedural History

2.1 The proceedings were commenced in the usual way and, having been admitted in to the Commercial Court, came on for hearing in early course. In the immediate run up to the trial date a number of developments occurred. Firstly, Greenband sought to amend its statement of claim by placing reliance on an alleged oral agreement rather than the written agreement which was pleaded in the original statement of claim.

2.2 Likewise it became apparent to the parties that it was unlikely that Greenband's additional claim for damages would be capable of being dealt with within the time which had been allotted for the hearing. On that basis it was agreed between the parties, and accepted by the court, that issues as to damages would be left over (in the event that they should arise) for another hearing.

2.3 At the commencement of the hearing it appeared that there were two possible bases upon which a claim for damages might arise. It is well settled that, to an extent, specific performance is a discretionary remedy and there are circumstances in which it may not be appropriate for a court to order specific performance of a contract, even though there is a valid, binding and enforceable contract in existence. One possibility was, therefore, that Greenband might establish an enforceable contract but might fail to persuade the court that it was appropriate to order specific performance. On that basis damages in lieu of specific performance would need to have been considered. Obviously for such an issue to arise it would have been necessary that Greenband satisfied the court that there was an enforceable contract, but failed to persuade the court that specific performance should be ordered.

2.4 However, by the close of the proceedings counsel on behalf of the ICC accepted that there was no legitimate basis, on the evidence that had emerged, on which he could urge on the court that it would be inappropriate to order specific performance in the event that the court were to find that there was an enforceable contract between the parties. The ICC continued, of course, to strenuously resist the contention put forward on behalf of Greenband that there was such a contract. However, it was accepted that if, contrary to that position, the court was persuaded that there was an enforceable contract in place, there was no legitimate basis for the court declining to order specific performance. The possibility of damages in lieu of specific performance is, therefore, no longer relevant.

2.5 The second basis on which damages could arise in a case such as this stems from the claim made by Greenband to the effect that it is entitled to damages even if it obtains specific performance. The basis for that claim stems from a contention that, in the light of the refusal by the ICC to complete what Greenband contends is an enforceable contract, in a timely fashion, Greenband has suffered significant loss by having to make alternative arrangements which, it is said, it was required to do in order to minimise or mitigate its potential loss arising out of what it says is the ICC's breach of contract.

2.6 In the events that have happened, therefore, the only issue which I have to decide at this stage is as to whether Greenband is entitled to a decree of specific performance. If Greenband is so entitled then it follows that it will be necessary to have a further hearing to determine whether, and if so to what extent, Greenband may also be entitled to damages arising out of the matters referred to in the preceding paragraph. It equally clearly follows that in the event that Greenband fail to obtain a decree of specific performance, same can now only be because the court was not satisfied that there was an enforceable contract and any question of damages would not, in those circumstances arise.

2.7 This judgment is directed, therefore, solely to the question of whether there is an enforceable contract between the parties, so as to entitle Greenband to a decree of specific performance. I now turn to the uncontroversial facts in the case.

3. The Uncontroversial Facts

3.1 It is perhaps appropriate to start by a brief description of a number of portions of land which are to be found off Davis Road in Clonmel. The relevant lands are situated between Davis Road and the River Suir. At the Davis Road frontage as one looks inwards onto the lands and towards the River Suir, there is towards the left the headquarters of the ICC and towards the right, the Showground premises on which Greenband is currently involved in a significant commercial retail development. Between the two is a roadway, part of which is the subject of these proceedings.

3.2 A number of other plots of land are also of some relevance to the history of events. Immediately behind the Showground premises lies Clonmel Greyhound racetrack which is, as I understand it, also owned by the ICC. Greenband had expressed an interest in acquiring those premises though nothing, in particular, turns on that fact or those premises in these proceedings. Immediately behind the premises owned by the ICC (and indeed stretching behind other premises to the left of the ICC premises which also front onto Davis Road), is a significant plot of ground known as the Galloping Field. The Galloping Field was acquired by Greenband some time ago. Access to the Galloping Field is across the roadway, part of which is the subject of the dispute in these proceedings. However, it is of some importance to note that the roadway in question runs the full length of the side of the ICC premises. Towards the rear of the ICC premises there is an entry into a premises occupied by the "Sporting Press" which is associated with the ICC. In the past the ICC sold the rear portion of the roadway in question (that is to say the portion beyond the entry into the Sporting Press premises) to the predecessor in title of Greenband to the Galloping Field. Therefore, when acquiring the Galloping Field, Greenband acquired the rear portion of the roadway in question. This much is not in dispute. Nor is it in dispute that Greenband has a right of way over the front portion of the roadway in question for the benefit of the Galloping Field as the dominant tenement.

3.3 These latter facts are relevant for two reasons. Firstly, it is clear that, prior to the occurrence of the events which give rise to these proceedings, the situation was that the roadway which is alleged to be the subject of the agreement to sell, was already the subject of a significant right of way in favour of Greenband in its capacity as owner of the Galloping Field. Likewise the only land which remained in the ownership of the ICC was what one might call the front portion of the roadway in question. These proceedings are, therefore, concerned solely with the front portion of that roadway.

3.4 Secondly, it is of some relevance to note that the principal of Greenband is a Mr. Paul O'Brien, who is also a practising solicitor. Mr. O'Brien gave evidence, which I accept, that he was familiar with the title of the ICC to the lands in question because he had acted for Greenband when it purchased the Galloping Field. As pointed out earlier the previous owner of the Galloping Field had acquired the rear portion of the relevant roadway from the ICC, and thus the title of the ICC to that roadway prior to such acquisition formed part of the overall title to the Galloping Field which was ultimately bought by Greenband.

3.5 Be that as it may a situation was reached in the latter months of 2007 when Greenband became interested in coming to an arrangement with the ICC concerning the ICC premises or, perhaps, parts of it. This was so for a number of reasons. Firstly, it would appear from the evidence of Mr. O'Brien that Greenband encountered some difficulties in relation to their Showground site arising out of the presence of undisclosed services facilities (such as drainage) in a location which had the potential to interfere with the construction of the development in precise conformity with the planning permission obtained. It was, therefore, in Greenband's interest to seek to relocate those services, and the roadway which is the subject of these proceedings was an obvious potential location. Likewise Greenband had entered into an agreement for a lease with Marks & Spencers (as anchor tenant for its development), which agreement provided that Marks & Spencers was to have access to the rear of the Showground site, which access could easily be facilitated by the roadway in question. For all of these reasons there was perceived to be a significant advantage to Greenband in acquiring at least some rights over the roadway in question.

3.6 In addition, however, I accept the evidence of Mr. O'Brien that Greenband also had an interest in acquiring the entire ICC site, which would have facilitated further developments to be conducted in conjunction with the major retail development being undertaken at the Showground site. It would also appear on the evidence that the ICC had at least given some consideration to the possibility of moving their headquarters from Davis Road, so that there were at least some circumstances in which the ICC might have been prepared to sell its entire premises and use the funds thereby secured for the purposes of developing a new headquarters.

3.7 Therefore, the position that had been arrived at immediately prior to the events which give rise to these proceedings, was that Greenband was interested in either acquiring the entirety of the ICC site or at a minimum certain rights over the roadway in question, with a view to giving access necessary to satisfy Greenband's obligations to Marks & Spencer and also to facilitate the relocation of the services to which I have referred.

3.8 It should finally be noted that there had been some contact between Mr. O'Brien on behalf of Greenband and the ICC in September, 2007 concerning the possibility of the acquisition by Greenband of the Greyhound Stadium.

3.9 However, the issues which give rise to these proceedings really commence with a meeting on the 22nd November, 2007, at the offices of the ICC on Davis Road, at which Mr. O'Brien and a Mr. John Costello attended on behalf of Greenband and the Chief Executive of the ICC, Mr. Jerry Desmond, attended on behalf of the ICC. A proposal to acquire the Greyhound Stadium was made at that stage, but nothing ultimately came of it.

3.10 It should also be noted that Greenband was involved, at that time, in court proceedings concerning its purchase of the Showground site. Those proceedings came on for hearing before Smyth J. on the 14th April, 2007, and the 15th and 16th May, 2007. On the 11th December, 2007, Smyth J. granted an order for specific performance of the contract whereby Greenband had agreed to acquire that property. Thereafter the purchase of the Showground site was completed by Greenband on the 24th April, 2008. A relevant leasehold interest had previously been assigned to Greenband on the 29th February, 2008. The history of these other proceedings is of some relevance in that they show that there was uncertainty as to Greenband's entitlement to the Showground premises, at least until Smyth J. had come to his decision in December of 2007, and it became clear that no appeal was being pursued in relation to that decision. It would appear that matters then moved forward with Mr. O'Brien, on behalf of Greenband, making an offer to Mr. Desmond in his capacity as Chief Executive of the ICC, to purchase the entire ICC premises for €1.5M. That offer was made in writing and was accompanied by two valuations, one from Hamilton Osborne King and the second from a local auctioneer called

Dougan Fitzgerald. Both of those firms valued the property at somewhat under €1.5m. Their valuations were sent to support the argument being put forward by Mr. O'Brien to the effect that Greenband was offering something over the market value. That written offer was made directly to Mr. Desmond in his capacity as Chief Executive of the ICC. However, it is clear that the ICC were not prepared to do business at that sum and the offer was rejected.

3.11 Before outlining what transpired thereafter it is important to mention the position of a Mr. Tom Pollard, who is also an auctioneer practicing in the Clonmel area. Mr. Pollard would appear to have had business dealings with both Mr. O'Brien and with the ICC. Indeed in the context of seeking to put together the valuations to accompany Mr. O'Brien's written offer on behalf of Greenband to purchase the entire ICC premises, Mr. O'Brien contacted Mr. Pollard with a view to asking him to provide such a valuation. However, Mr. Pollard informed Mr. O'Brien that he was already advising the ICC and that he could not, therefore, advise Greenband in the matter.

3.12 When the rejection of Greenband's offer to purchase the entire site from the ICC was communicated to Mr. O'Brien, he decided that he would attempt to negotiate the possibility of seeking to relocate the relevant services under the roadway which is now the subject of these proceedings. Having regard to what Mr. O'Brien understood to be Mr. Pollard's involvement in the matter he approached Mr. Pollard in, it would appear, the second or third week of February, 2008 with a view to seeking to negotiate such an arrangement. The relevant communications between Mr. O'Brien and Mr. Pollard took place on the phone.

3.13 It is important to note at this stage that only two witnesses were called in evidence. Mr. O'Brien on behalf of Greenband and a Mr. Brian Divilly, now President of the ICC, on behalf of the ICC. Neither side called either Mr. Pollard or Mr. Desmond (who has since retired as Chief Executive of the ICC). The only evidence tendered as to what transpired between Mr. O'Brien and Mr. Pollard is, therefore, the evidence of Mr. O'Brien which I fully accept.

3.14 It should also be noted that Mr. Divilly was not, at the relevant time, the President of the ICC having only achieved that office later in 2008. He was present at some of the internal meetings of the ICC which formed part of the backdrop to the issues between the parties, and on which I will touch later. However, it is clear that Mr. Divilly took no part in any contact between the ICC and Greenband.

3.15 As what was going on behind the scenes in the ICC during this period is the matter of a little controversy between the parties, I will leave over until later in the course of this judgment a discussion of those issues. However, it would appear that what transpired between Mr. O'Brien and Mr. Pollard was that Mr. O'Brien requested that the ICC would give various rights over the portion of the roadway in question to Greenband. That request was conveyed on the phone to Mr. Pollard. Mr. Pollard came back indicating that the ICC would only be prepared to consider giving rights in the event that it was paid. Mr. O'Brien countered by suggesting that if he had to pay money he would want to buy the roadway. Mr. Pollard accepted that this would be possible in principle and negotiations as to price proceeded. An initial offer from Mr. O'Brien on behalf of Greenband of €50,000 was rejected, as was an increased offer of the order of €70,000 to €80,000. However, a final figure of €100,000 was agreed between Mr. Pollard and Mr. O'Brien. Mr. O'Brien and Mr. Pollard also discussed and agreed a traffic arrangement designed to minimise any disruption to the ICC during any works.

3.16 There is one disputed question of fact which arises as to the precise nature of the arrangements entered into between Mr. Pollard and Mr. O'Brien at this stage. This is an issue to which I will have to turn in due course. However, it is Greenband's case that a concluded agreement was entered into between Mr. O'Brien on behalf of Greenband, and Mr. Pollard on behalf of ICC at this stage. It is principally that agreement which Greenband now says should be the subject of a decree of specific performance.

3.17 The next matter that occurred was that Mr. Pollard wrote a letter to Mr. Nicholas Shee of John Shee & Company, Solicitors dated the 10th March, 2008. John Shee & Company had been solicitors to the ICC for a significant number of years prior to the events with which I am concerned. The letter from Mr. Pollard was also copied to Mr. O'Brien and to Mr. Desmond. It thus represents, on its face, confirmation of an agreement for what is described as compensation in the amount of €100,000 "for inconvenience and the Freehold of the road". The letter also refers to the traffic question mentioned at para 3.15 above.

3.18 As it is contended on behalf of Greenband that the document in question represents a sufficient note or memorandum to satisfy the Statute of Frauds, I should set out its text in full. The text is as follows:-

"Dear Sirs,

Re: ICC to Paul O'Brien and John Costello

In the past ICC sold an area adjoining their property to Dan Casey, owner of "The Galloping Fields" to facilitate a roadway and access to those lands. ICC own the roadway in as far as their entrance gate to the Sporting Press Printing Works with Dan Casey have a Right of Way over the said road. Paul O'Brien and John Costello now wish to construct a main sewage pipe underneath this roadway. They wish to purchase the Freehold of that portion of the road and when all developments are complete arrange to have this roadway taken in charge by the Local Authority. In the meantime ICC will hold their Right of Way over the same roadway. They also intend to widen the access on to the Davis Road which will improve visibility.

The purchasers also own the Showgrounds on which they have Planning Permission for Retail Development which they propose to construct and start immediately. A traffic plan has been provided to the ICC for access during the works which will take about 2 weeks.

Compensation in the amount of €100,000 has been agreed for the inconvenience and the Freehold of the road.

You might please arrange for the necessary agreements to be sent to Mr. Paul O'Brien at McMahon O'Brien Downes, Solicitors, Mount Kennett House, Henry Street, Limerick.

Yours faithfully,

Tomas Pollard

3.19 Matters proceeded at a pace thereafter. So far as the conveyancing end of things is concerned, Mr. O'Brien followed up on Mr. Pollard's letter of the 10th by writing to Mr. Shee on the 12th March enclosing an appropriate map and a draft deed. Mr. O'Brien requested the return of the draft deed in an approved form and also a copy of the ICC's title. It will be recalled that Mr. O'Brien was, in fact, familiar with the ICC's title by reason of his involvement in the acquisition of the rear portion of the roadway in conjunction with the Galloping Field. A reminder was sent on the 25th March, and on the 1st April, Mr. Shee replied to Mr. O'Brien's firm enclosing contracts for sale and title documents. The letter noted that it was expected that a duly signed contract would be returned together with a deposit cheque within fourteen days.

3.20 The letter contained the following paragraph:-

"In the meantime, please note that we have no authority, either expressed or implied, to bind our client to any Contract and no Contract shall exist until Contracts have been signed by both parties, exchanged and a deposit paid."

Mr. O'Brien's firm promptly replied on the 2nd April enclosing the relevant matters and raising a few minor points concerning title. A deposit cheque in the sum of €10,000 was also included, as were requisitions. On the 4th April, Mr. Shee replied, noting that while the contracts in duplicate were signed, same were not witnessed and asking for that matter to be remedied. The letter of the 4th April included a similar, but not identical, addendum to that of the 1st April which read in the following terms:-

"In the meantime, please note that we have no authority to bind our client to any Contract or Agreement in this matter and there shall be no Contract or Agreement binding on our client unless and until same has been signed by our client, if at all."

The signed and witnessed contracts were returned by Mr. O'Brien's firm on the 7th April, 2008. Nothing further progressed between the parties until a reminder of the 24th April, when Mr. O'Brien's firm asked when he might expect to receive "confirmed contracts".

3.21 The first sign of any difficulty, as and between the parties, emerges with a letter of the 28th April from Mr. Shee to Mr. O'Brien's firm in which Mr. Shee invites Mr. O'Brien to note that his "clients have decided not to proceed with the sale of their property at Davis Road to your clients". The deposit is returned, and there is also mention of the fact that Greenband had already commenced work on the property which is coupled with the request that such works cease immediately. Thereafter, on the 30th April, a letter was written to Mr. Shee contesting the ICC's entitlement to withdraw from the sale. In particular, it is asserted that, on foot of the agreement made, as evidenced by Mr. Pollard's letter of the 10th March, Greenband had commenced a programme of works which had, by that time (the end of April) been completed. Thereafter, these proceedings issued.

3.22 As indicated earlier it will be necessary in due course to address what was going on behind the scenes in the ICC at this time.

3.23 In addition it is appropriate to recall that Mr. O'Brien gave evidence that part of the arrangement which he had agreed with Mr. Pollard was that Greenband would comply with a traffic management plan (which was documented and available at the relevant time), in the course of carrying out any works at the roadway, so as to avoid any inconvenience to the ICC (or indeed the Sporting Press) relating to access to the site. Thus, it is said on behalf of Greenband, that part of the relevant agreement was that the works would be carried out in a particular way and in conformity with the plan. Furthermore, it is clear that all of the relevant works were carried out commencing in March, and being completed by the end of April. Those works were carried out in the clear view of the ICC premises. Mr. O'Brien and Greenband assert that it would have been obvious to any members or officials of the ICC attending at the ICC premises that the relevant works were being carried out during that period and that, prior to the letter written by Messrs. Shee & Company on the 28th April (which, it would appear, was received on the 29th), no complaint about the carrying out of those works was made to Greenband. No evidence was tendered on behalf of the ICC to contest those contentions. In so far as it may be relevant to the issues which I have to decide, it is clear that the works in question were carried out as a result of an agreement between Mr. O'Brien and Mr. Pollard (as part of the overall arrangement), and that the works in question would have been obvious to any member or official of the ICC.

3.24 Against the background of that factual history it is appropriate to turn now to the specific issues which arise between the parties.

4. The Issues

4.1 The principal contention put forward on behalf of Greenband is that there was an oral agreement entered into by Mr. O'Brien on behalf of Greenband, with Mr. Pollard on behalf of the ICC, which is evidenced by Mr. Pollard's letter of the 10th March, 2008.

4.2 As a secondary, or fall back, position Greenband argues that a contract in writing was entered into as a result of the exchange of correspondence and documentation to which I have earlier referred, coupled with the fact, which emerged in the course of an earlier stage of the proceedings and was confirmed in discovery, that the duplicate contracts returned by Mr. O'Brien to Mr. Shee on the 7th April, 2008, were in fact signed by the trustees in their capacity as trustees of the ICC, even though those copies, now signed by both sides, were not returned to Mr. O'Brien.

4.3 The position taken by the ICC is, understandably, somewhat different in respect of the two alleged contracts.

4.4 So far as the alleged oral contract is concerned a number of issues are raised:-

A. Firstly, it is said that there was, in fact, no concluded agreement between Mr. O'Brien and Mr. Pollard, but only a so called "agreement to agree".

B. Secondly, it is said that, even if there was a concluded agreement between Mr. Pollard and Mr. O'Brien, Mr. Pollard did not have authority to enter into such an agreement on behalf of the ICC.

4.5 In reply Greenband asserts that, at a minimum, even if Mr. Pollard did not have actual authority, he had ostensible authority. In particular, Greenband say that Mr. Pollard was clearly acting with the authority of Mr. Desmond, the Chief Executive of the ICC and was thus empowered to enter into the contract concerned.

4.6 Furthermore, Greenband argue that having regard to the events that followed, including the carrying out, to the knowledge of the ICC, of the works to which I have referred, the ICC is now estopped from denying the authority of Mr. Pollard to enter into the agreement in question.

4.7 So far as the alleged written agreement is concerned the ICC argues that the correspondence from Mr. Shee makes it clear that he had no authority to bind the ICC. Therefore, it is said, that correspondence cannot form the basis of a contractual arrangement between the parties. Furthermore, it is said that even though the contemplated written agreements were signed by the trustees on behalf of the ICC, no concluded agreement in writing can thereby be established for, it is argued, the proper characterisation of Mr. Shee's correspondence is as an invitation to treat which, if so, would result in the characterisation of the return of the contracts executed on behalf of Greenband as amounting to an offer. On that basis it is argued that until there is a communication of the acceptance of that offer to the offeror there can be no binding contract. Thus, it is said, the failure to return the documents (even though signed) gives rise to a situation where there was no communicated acceptance of the offer and thus, no contract in writing.

4.8 It seems to me to be convenient to commence with a consideration of the issues which arise in relation to the primary claim put forward on behalf of Greenband, that is to say the claim that there is an oral contract evidenced in writing and/or partly performed. As a key initial question under that heading concerns whether there was, in fact, an oral agreement I propose to deal with that factual question first.

5. Was there an Oral Agreement?

5.1 There are a range of ways in which parties who contemplate entering into binding contractual arrangements for the sale of an interest in land may choose to put in place such a binding contract.

5.2 At one end of the spectrum it may be clear from the statements or actions of those involved that any discussions which parties may have concerning the terms on which they might be prepared to enter into contractual arrangements are not, themselves, intended to create a contract. Parties may enter into discussions for the purposes of identifying the terms on which they might be prepared to contract but may expressly, or by implication, do so on the basis that no contractual relations will be entered into until such time as formal written contracts have been executed by all of the parties. In such circumstances no oral agreement can be said to come into existence which amounts to a binding contract, for the parties do not have in their contemplation that their oral discussions will lead to contractual relations.

5.3 In those circumstances it is only if the process leading to the finalisation of a written agreement reaches the stage where it can be said that that written agreement amounts to binding contractual arrangements between the parties, that there can be said to be any contract in existence. It will be necessary to return to this question in the context of dealing with the issues which have arisen between the parties arising out of the fallback position adopted by Greenband to the effect that there is a written contract in this case.

5.4 However, parties may also enter into oral discussions which can not be properly characterised as involving either an express or an implied intention that the discussions concerned should not, if successful, to give rise to a contract between the parties. In such circumstances, provided all of the relevant prerequisites for a binding contract are in place, then there is no reason why a court should not conclude that there is an oral agreement between the parties which amounts to a contract. It will, of course, be the case that any such oral agreement will not be enforceable unless and until there comes into existence a note or memorandum sufficient to satisfy the Statute of Frauds or a sufficient act of part performance to render it inequitable to allow a party resisting enforcement of the contract to rely on the absence of such a note or memorandum. However, these latter issues are, of course, only concerned with the enforceability of the contract rather than whether there is a contract in the first place.

5.5 It should be noted that the fact that the parties may contemplate the possibility (or indeed the likelihood) that their oral agreement may come to be formalised in a written contract does not, of itself, necessarily give rise to an inference that the parties did not intend their oral agreement to be a contract. There is nothing, in principle, wrong with parties entering into an oral contract but contemplating that the terms which they have agreed will be incorporated into a more elaborate document. Whether this can be said to have occurred on the facts of any individual case depends, of course, on the evidence. Amongst the factors that may well be relevant is the question of whether it might be reasonable for the parties to assume that further significant discussions or negotiations would be required to finalise the terms of any written agreement.

5.6 It is against that background that the issue as to whether there was a concluded oral agreement on the facts of this case arises. In the course of cross examination, Mr. O'Brien confirmed that he had entered into an agreement with Mr. Pollard, the essential terms for which are as set out in the letter of the 10th March, 2008. However, a number of points are made about that letter in the context of the agreement said to have been entered into. Firstly, the letter refers to the freehold of the road. On Mr. O'Brien's evidence what he in fact agreed was that Greenband would acquire either a freehold or long leasehold interest. That is an issue to which I will return in due course.

5.7 Secondly, attention is drawn to the fact that Mr. Pollard invited Mr. Shee to arrange "for the necessary agreements to be sent" to Mr. O'Brien. On that basis it was suggested that the arrangements between Mr. O'Brien and Mr. Pollard could not have amounted to a concluded agreement, but rather contemplated that the formal agreement would be entered into through the auspices of the respective solicitors.

5.8 I do not agree that that is an appropriate characterisation of Mr. O'Brien's evidence. In my view the totality of Mr. O'Brien's evidence was clear and was to the effect that he had entered into a concluded agreement with Mr. Pollard. The ICC did not choose to call Mr. Pollard to contradict that position. I have no reason to doubt Mr. O'Brien's account. I, therefore, find as a fact that Mr. O'Brien did enter into a contract with Mr. Pollard which involved the payment of €100,000 by Greenband for a freehold or long leasehold interest in the relevant portion of the roadway, and which also

involved an agreement on the part of Greenband that it would comply with the traffic plan referred to in the second paragraph of the letter of the 10th March while it was engaged in the works referred to in the first paragraph of that letter.

5.9 I am satisfied that the proper characterisation of the reference in the final paragraph of that letter to agreements to be sent to Mr. O'Brien by Mr. Shee, is a reference to the contemplation which both parties (that is to say both Mr. O'Brien and Mr. Pollard) had, that the agreement which they had reached would be put into written form and, in so doing, would be produced in a more formalised way. I am strengthened in that view by the fact that Mr. O'Brien was, to the obvious knowledge of Mr. Pollard, a solicitor. Mr. Pollard would also have been aware, from previous dealings, that Mr. O'Brien would have had some knowledge of the title of the ICC to the property. This was not a case where it would have been likely that either Mr. O'Brien or Mr. Pollard would have expected that there would have been anything unusual that would need to be included in such a formal written contract, and which would not already be well known to the parties.

5.10 It is also worthy of some note that Mr. Pollard does not include in his letter to Mr. Shee any language, such as that frequently utilised by auctioneers, to imply that there is no contract in being. Phrases such as subject to contract/contract denied are frequently used by auctioneers when communicating even to a solicitor acting for the same party, for the purposes of ensuring that any documents produced by such auctioneer cannot be used to justify a finding that there was a contract, or that such document might represent a note or memorandum of any such contract. I do not believe that the proper characterisation of the final paragraph of the letter is to suggest that it amounts to the same thing as a denial of contract (as was asserted on behalf of the ICC). On that basis it does not seem to me that *Mulhall v. Haran* [1981] I.R. 364 or *Tiverton Ltd v. Wearwell Ltd* [1975] Ch 146 are relevant. Rather, for the reasons which I have sought to analyse, I am satisfied that the relevant paragraph amounts to an acknowledgement that it was in the contemplation of the parties that the verbal agreement already entered into would be translated into a formal written agreement which, it seems clear, could have been anticipated to have been done without any great difficulty or material further negotiation.

5.11 It seems to me that if the ICC wished to put any other characterisation on the agreement between Mr. O'Brien and Mr. Pollard, such as would contradict Mr. O'Brien's contention that he entered into a concluded verbal agreement with Mr. Pollard, then it was incumbent on the ICC to call Mr. Pollard to give evidence to that effect. That not having been done, I am satisfied that there was a concluded oral agreement between Mr. O'Brien on behalf of Greenband and Mr. Pollard entered into in the days immediately prior to the 10th March, 2008.

5.12 The next question which logically arises is as to whether Mr. Pollard had authority to enter into that contract, whether actual or ostensible, or if he did not whether the ICC are now estopped from denying that authority by reason of subsequent events.

5.13 The issues which arise in relation to authority stem partly from the constitutional structure of the ICC, and partly from the facts which involve a consideration of the internal affairs of the ICC at the relevant time. I turn firstly to the structure of the ICC.

6. The Structure of the ICC

6.1 The position of the ICC is somewhat unusual. It would appear to have existed for a very considerable period of time and carried out its functions in respect of the greyhound industry as a private organisation. However, the ICC was given a certain recognition by Statute under the provisions of the Greyhound Industry Act 1958 ("the 1958 Act"), in which it is recognised, in s. 26(2), as being, subject to the provisions of that Act, and of the constitution of the club and subject to the general control and direction of Bord na gCon, to be the controlling authority for the breeding and coursing of greyhounds.

6.2 The same section also places some control over the constitution of the club which is, as of the date of the Act, required to be in the form set out in the schedule to that Act. In addition, changes to its constitution can only occur, by reason of s. 26(1), with the prior written consent of Bord na gCon.

6.3 However, it does not seem to me that those provisions change the essential legal character of the ICC. It remains a members club. It is true to say that, in the ordinary way, as was argued by counsel for Greenband, a members club is governed by its rules which amount to a contract between the members which contract can, in turn, be altered in whatever way the rules provide. That common feature of a typical members club is not, in one sense, to be found in the case of the ICC where the arrangements between the members are specified in a schedule to an Act of the Oireachtas and can only be altered by the agreement of a statutory body in the shape of Bord na gCon. However, it does not seem to me to be appropriate to characterise the ICC as a "creature of statute". It is not set up by the 1958 Act. It is not continued in existence by that Act. Rather the 1958 Act confers powers on the ICC and regulates the terms of its constitution and amendments of that constitution. The 1958 Act does not, in my view, alter the fundamental fact that the ICC has no corporate existence conferred on it, and thus can only exist as a members club albeit a unusual one whose constitution is determined and regulated by statute. It follows that the property of the club is owned by its members. See *Feeney and Shannon v. McManus* [1937] I.R. 23.

6.4 On that basis the ICC argues, placing reliance on a decision of the Court of Session in *Murray & Ors v. Johnson* R 981, that the property of a members club can only be alienated by an agreement of all of the members of the club in question, in the absence of a specific power in the constitution of the club concerned, empowering some person or body within the club to exercise that power. That case involved an attempted sale by a majority of the members of a sporting club of a Silver Cup presented to the Curling Clubs of Dumfriesshire. A minority successfully opposed the sale of the cup in question on the basis that the proper legal characterisation of the ownership of property of a members club was that each member had a share in the property and that, therefore, a majority had not a natural right to sell the minority's share. The Court of Session agreed.

6.5 It is, however, interesting to note that *Murray v. Johnson* involved not real property but a simple (if emotionally important) cup. To the extent that the proposition in that case is correct then it would follow that no property of a club, whether valuable land or invaluable goods, could be sold without the agreement of each and every member. Even if such a position represents the theoretical position in this jurisdiction, it seems to me that a court, in interpreting the rules of a club, should not lightly conclude that the members intended that literally no property of the club could ever be sold without a decision unanimously made by all of the members. In so saying I am not suggesting that there is any particular

rule of law to that effect. Rather that that possible difficulty would form part of the factual matrix by reference to which the arrangements between the members, as set out in the constitution of the club concerned, needs to be interpreted.

6.6 The constitution of the ICC provides for an executive committee which is, in the words of clause 4(i) "to administer the business and affairs of the club". It seems to me that this clause is more than sufficient to confer on the executive committee the power to sell any property of the club. If that clause were not to be interpreted in that way, then the club could never sell any asset no matter how humble. Such a situation would make the carrying out of the functions of the club wholly unworkable. Such a construction on the rules is one which should only be taken if the wording makes it absolutely clear that that is what is intended. On the contrary, the wording of clause 4(i) refers to all the business and affairs of the club which, in my view, clearly encompasses an entitlement to sell the property of the club.

6.7 I am, therefore, satisfied that the executive committee of the ICC has authority to sell any property of the ICC without requiring the agreement of each member of the club. On that basis it is necessary to turn next to what actually happened within the ICC at the relevant time.

6.8 Before doing so I should briefly touch on an issue which arose at the hearing which concerned the power of the trustees to sell. Reference was made to a court order of the Circuit Court of the 12th October, 1989, appointing new trustees of the ICC which expressly gave those trustees the powers under the Trustees Act 1893. However, I agree with the submission of counsel for the ICC that the 1893 Act does not, of itself, confer a power of sale. Rather it empowers a trustee to sell where there already is a trust for sale or power of sale in the trust documents and further sets out the manner in which such sale can be effected. Insofar as the trustees hold property on trust for the ICC such property is held to be dealt with in accordance with the constitution of the ICC which does not purport to confer a power of sale on the trustees. While any conveyancing documents would require to be executed by the trustees, I am not satisfied that the trustees had any power of sale as such and their actions and motives in signing the written agreement for sale are not, therefore, in my view relevant.

7. Internal Affairs of the ICC

7.1 As pointed out earlier only two witnesses were called and only one of them, Mr. Divilly, had any involvement in the internal affairs of the ICC. However, as a result of an arrangement between the parties, it was accepted that the minutes of the various bodies within the ICC (including handwritten drafts or contemporaneous notes) were to be admitted in evidence as *prima facie* proof of their contracts. From that source and from the evidence of Mr. Divilly a picture of what occurred within the ICC becomes relatively clear, even though there are some matters of controversy which it will be necessary to resolve.

7.2 On the basis of that evidence I am satisfied as a fact that all of the negotiations that were conducted with Mr. O'Brien were carried out with the authority of Mr. Desmond in his capacity as the Chief Executive of the ICC. There is, however, no evidence that the question of a sale of the portion of the roadway in question came to the attention of the executive committee prior to the conclusion of the arrangements between Mr. Pollard and Mr. O'Brien in the early part of March, 2008. I must, therefore, conclude that Mr. Pollard did not have the actual authority of the ICC through its executive committee at the time when he entered into the contract. I accept the submission of counsel for the ICC that an auctioneer, as such, does not have implied authority to enter into a binding sale. *Law & Anor v. Robert Roberts & Co.* [1964] I.R. 292. Mr. Pollard did not, therefore, have implied authority. It must be said, in fairness to him, that he was acting on the instructions of the Chief Executive and may well, therefore, have been reasonable in his assumption that he had any necessary authority. It should also be noted that the Chief Executive had been delegated to convey the refusal of the ICC of the offer to buy its premises and to convey the preparedness of the ICC to "sell" rights over the roadway. The Chief Executive, and through him Mr. Pollard, had, I am satisfied, authority to negotiate such a sale of rights. It is only the full sale of the roadway that was not authorised.

7.3 However, I am also satisfied as a fact that Mr. Desmond brought to the attention, initially of the finance sub committee of the executive committee, and subsequently to the executive committee itself, at separate meetings of both of those bodies which took place on the 21st April, 2008, the fact of the sale of the roadway. I have come to that view on the evidence notwithstanding the fact that the minutes of the finance committee are somewhat ambiguous on the matter. It is clear that the finance committee had previously contemplated, (when rejecting the offer on behalf of Greenband to buy the entire ICC premises) that rights in relation to the roadway might be given to Greenband provided there was a payment. The minutes of the finance committee meeting of the 21st April, 2008 are ambiguous as to whether what Mr. Desmond reported to the meeting amounted to a sale of the roadway or simply an agreement to confer rights over the roadway at a price. However, while Mr. Divilly gave evidence that he understood it to be the latter, the fact is that a majority of the people present at the finance committee meeting concerned are recorded in later minutes as indicating their understanding of having been told at that meeting of the 21st April, 2008, that the roadway itself had in fact been sold.

7.4 Likewise I have come to the conclusion that the executive committee were told of the sale notwithstanding the absence of any mention of that fact in the minutes of the meeting of that committee on the 21st April, 2008, because Mr. Divilly gave evidence that it was in fact mentioned and that it was its mentioning at that meeting that led him to begin to have concerns.

7.5 The function of the finance committee under the constitution of the ICC is to advise the executive committee on financial matters, and to make reports and recommendations thereon to the executive committee. It is clear on the evidence that the finance committee were appraised of the sale and raised no objection to it. The executive committee meeting was later on the same day and I am, as I have pointed out, satisfied that the Chief Executive reported the sale to the executive committee and no opposition occurred at that meeting either.

7.6 It is, of course, important to note that the practical commercial difference between the sale of rights to place services under the roadway and the sale of the roadway itself, were not at all as great, on the facts of this case, as might be the position in other circumstances. The roadway in question already had significant rights of way over it in favour of Greenband in its capacity as the owner of the Galloping Field. It could never, therefore, in practice, be used by the ICC for any purpose other than a roadway. There is also evidence that it was contemplated at the relevant time that there was a realistic possibility that the roadway might, in due course, be taken over the local authority. The ownership of the roadway, therefore, conferred very little commercial benefit on the ICC which could not use it for any purpose other than a roadway to facilitate those properties which had a right of way over the roadway. In those circumstances its only value was as to the extent that money might be extracted from any other parties (such as Greenband in its

capacity as owner of the Showground premises) as might wish to acquire rights over it. That being the only commercial value of the roadway there was not, in my view, any significant practical commercial difference (although there was obviously a significant legal difference) between a sale of rights and a sale of the roadway itself. The difference, in commercial terms, therefore, between what was authorised and what was negotiated was not very significant.

7.7 In any event I am satisfied that the actions of the committees of the ICC, and in particular the executive committee, in not objecting when the Chief Executive informed those committees that the roadway had in fact been sold, as opposed to rights over it being sold, amounted to a retrospective approval by those bodies of the sale that had been entered into by Mr. Pollard in March. Such approval in perhaps an informal way is not surprising given the marginal commercial difference between what had been negotiated and what had already been authorised.

7.8 It should also be noted that in the week immediately after the 21st April, it would appear that Mr. Divilly and persons associated with him began to mount a campaign against the sale of the roadway. Ultimately a meeting was held on the 28th April which gave rise to the instructions contained in Mr. Shee's letter indicating that the ICC was not willing to go ahead. However, I am satisfied that there was, in fact, an approbation of the contract before that and that there was, at least from that time, a binding contract in being between the ICC and Greenband.

7.9 However, lest I be wrong in that conclusion, I should also deal with the contention made on behalf of Greenband that the ICC is now estopped from denying the existence of a contract. I turn to that issue.

8. Estoppel

8.1 I have already noted that the works to be carried out on the roadway, and the manner of the carrying out of those works in accordance with the Traffic Management Plan, were part of the arrangements entered into between Mr. O'Brien and Mr. Pollard. Those works were carried out to the clear knowledge of the ICC. The position is, therefore, that Mr. O'Brien had entered into arrangements with the ICC in the sense that he had entered into arrangements with an auctioneer who had been appointed by the Chief Executive of the ICC and, whose negotiations were carried out with the approval of that Chief Executive. Greenband then proceeded to comply with part of its side of the bargain by means of carrying out the works concerned in accordance with the Traffic Management Plan. It was clearly doing so in the full sight and with the full knowledge of any member of the ICC or any of its constituent committees who attended the premises concerned during the relevant period. In my view in those circumstances, and having permitted those facts to occur without demur, the ICC is now estopped from denying the existence of any contract.

8.2 Therefore, even if I am wrong in the conclusions which I have reached concerning approbation, I would hold that the ICC is estopped by conduct from denying the existence of the contract at this stage. The ICC allowed its Chief Executive to negotiate a deal (albeit one of a slightly different type though commercially similar) and allowed Greenband (to its knowledge) to expend significant funds complying with part of its obligations under the deal.

9. Conclusions on Oral Contract

9.1 I am, therefore, satisfied that there is a binding contract between the ICC and Greenband for the sale of the portion of the roadway concerned in the sum of €100,000 which contract contained a term that the works to be carried out by Greenband to the roadway were to be in conformity with the Traffic Management Plan, to which I have referred.

9.2 The next question is as to whether there is any doubt about the enforceability of such contract. In that context it is appropriate to turn to both the letter of the 10th March as a note of memorandum and the alleged acts of part performance.

10. Note or Memorandum and Part Performance

10.1 It seems to me that the letter of the 10th March does contain all the essential terms of the contract. It makes reference to the roadway, the price, the traffic management issue and obviously the parties. I have already dealt with the proper characterisation of the final paragraph and it is not necessary to deal with it again here. It does not seem to me to preclude the letter from representing a proper note or memorandum for the purposes of the Statute of Frauds. On that basis it does not seem to me that *Boyle v. Lee* [1992] I.I.R. 555 is relevant. Also the absence of a reference to a deposit is not sufficiently material to render the note or memorandum inadequate. *Higgins v. Argent Developments Ltd* (Unreported, Supreme Court, Keane C.J. 13th May, 2003).

10.2 The only remaining issue as to the adequacy of the note or memorandum is the question of the use of the term "Freehold" in the letter, whereas the oral agreement, as I have indicated, was for freehold or long leasehold. While again potentially a legally important question in the context of the form of assurance that would need to be put in place to transfer the relevant interest from the ICC to Greenband, it does not seem to me that, in the context of the issues between the parties, the distinction is of any significant materiality.

10.3 Greenband, through Mr. O'Brien, was already aware of the title. There is little commercial difference between a freehold title and a long leasehold title unless the leasehold contains onerous clauses. No assertion is made that any such clauses arose in this case. Given Mr. O'Brien's knowledge of the title and the absence, to his knowledge, of anything in the long lease concerned which would cause any trouble, it seems to me that the difference, on the facts of this case, between freehold and long leasehold is, in truth, immaterial. In any event it is correct, as was argued by counsel for Greenband, to say that it would be open to Greenband to accept a lesser title than that contracted for which it is, of course, happy to do, as evidenced by the fact that the conveyancing documents exchanged between Mr. O'Brien's firm and Mr. Shee concentrated on the correct leasehold title. I am, therefore, satisfied that the letter represents a proper note or memorandum to satisfy the Statute of Frauds.

11. Part Performance

11.1 Independently I am also of the view that the ICC, by permitting Greenband to go onto its lands and carry out significant works on them without in any way indicating that Greenband was not authorised to carry out those works, has permitted Greenband to partly perform the contract in a manner which would make it unconscionable for the ICC to rely on any absence of a note or memorandum to satisfy the Statute of Frauds. I, of course, agree with the submission of counsel for the ICC who argued, correctly, that an act of part performance cannot create a contract where there was no contract in the first place. Part performance is relevant only to questions of the necessary note or memorandum to satisfy the Statute of Frauds.

11.2 I am, however, satisfied that even if I am wrong in my determination that the letter of the 10th March amounted to

a sufficient note or memorandum to satisfy the Statute of Frauds, then there were sufficient acts of part performance to render the absence of such note or memorandum immaterial. It is, of course, the case that my finding to the effect that there was a sufficient note or memorandum to satisfy the Statute of Frauds and/or that there was a sufficient act of part performance are only relevant in the event that my decision to the effect that there was a binding contract in the first place is correct.

11.3 However, it is clear from the findings which I have set out that I am satisfied that there was such a contract and that it is enforceable by virtue of the presence of an adequate note or memorandum and/or acts of part performance. It follows that Greenband are entitled to a degree of specific performance of that contract. However, I should also deal with the fall back case made on behalf of Greenband which seeks to rely on the events that transpired concerning the production of the written agreements, as constituting a separate case for the existence of a binding and enforceable contract. I therefore turn to that issue.

12. The Written Documents

12.1 In this context, counsel for the ICC places reliance on *Embourg Limited and Another v. Tyler Group Limited* [1996] 3 I.R. 480. In that case the oral arrangements between the parties were clearly, on the evidence, not such as gave rise to an oral agreement between the parties. Rather the opposite was agreed and the facts suggest a case in that category which I identified earlier in this judgment, where the parties only contemplate that there would be binding relations between them when a written agreement has been completed.

12.2 The only issue in *Embourg* was, therefore, as to whether the exchange of written documentation between the parties could give rise to a binding contract. The difficulty which arose was, however, not dissimilar to that which has arisen in this case. The documents were signed by the purchaser and returned to the vendor. The vendor signed them in turn but gave them to his solicitor to keep in escrow on condition that they were not to be released to the purchaser without further authority. That further authority was not forthcoming. The purchaser sought to rely on the fact that there had come into existence a document signed by both parties as evidence of a written contract.

12.3 The matter was dealt with by Costello P. in this Court and by a Supreme Court in which the judgment of the court was delivered by Blayney J. It is clear from the judgment of the Supreme Court that the plaintiff lost for two reasons. One of those reasons is of particular relevance to the issue with which I am now concerned. Blayney J. agreed with the submissions of counsel for the vendor, to the effect that the proper characterisation of a letter emanating from a vendors solicitor, with an accompanying draft contract, which contains a clause denying the solicitor's authority to bind, is that those actions amount to an invitation to treat rather than an offer. The logic behind this is, in my view indisputable. An offer is capable of acceptance. A document which expressly indicates that the person submitting it has no authority to bind cannot therefore be an offer.

12.4 On that basis the Supreme Court went on to hold that the proper characterisation of the return of the draft contracts duly signed by the purchaser was an offer by the purchaser to buy the lands in question. On that basis the Supreme Court further agreed with the submission of counsel for the vendor that no concluded contract could be reached until an acceptance of that offer was communicated to the purchaser for there can only be a concluded contract when there is both offer, acceptance and a communication of that acceptance to the offeror. On that basis the Supreme Court held that there had been no communication of the acceptance of the offer to the purchaser because the signed contracts had never been returned nor had there been any other form of communication of the acceptance of an offer.

12.5 It seems to me that virtually identical facts have occurred in this case. The signed contracts were never returned to Greenband. Nor was there any other communication to Greenband of the fact that there had been an acceptance of what is properly characterised as its written offer to purchase the property by the returning of the draft contract signed on behalf of Greenband. I am not, therefore, satisfied that the exchange of letters and documentation in this case could, independently of the oral contract to which I have already referred, give rise to contractual relations between the parties.

12.6 If, therefore, I had not been satisfied that there was an enforceable oral agreement between the parties, that exchange of documentation would not, in my view, have altered the position so as to create a binding written contract.

13. Conclusion

13.1 It is clear, therefore, that the contract which Greenband is entitled to enforce is the original oral contract whose terms have already been set out in the course of this judgment. I propose, therefore, to grant a decree of specific performance to Greenband of that contract.

13.2 It also follows that Greenband are entitled to seek to pursue their claim for damages arising out of the failure of the ICC to complete that contract in a timely fashion. Nothing which I have said in this judgment should be taken as implying any view as to whether and if so to what extent, such a claim is properly maintainable. All those issues remain for further debate. However, it is clear that the claim which, on the pleadings, Greenband seeks to make, is a very substantial one, running into a significant number of millions of pounds. Furthermore, Greenband is, on the evidence, in the middle of a significant commercial development in what are difficult economic times. In those circumstances it seems to me that it is of the utmost importance that a trial as to the issue of damages be conducted in as early course as is consistent with ensuring a fair opportunity to all sides to make their case.

13.3 I propose hearing counsel as to the directions which should be put in place to ensure that such a trial can take place in early course.