

## THE HIGH COURT

RECORD NO. 2005/1335P

COSMOLINE TRADING LIMITED

PLAINTIFF

AND

D.H. BURKE & SON LIMITED  
AND DHB HOLDINGS LIMITED

DEFENDANTS

**Judgment of Finnegan P. delivered on the 8th day of February 2006.**

1. By indenture of lease made the 24th November 1997 ("the lease") the first named Defendant demised to the Plaintiff supermarket premises situate at Abbey Trinity, Tuam, Co. Galway (old A.T.) for a term of 35 years from the 24th November 1997. The lease further demised premises at nine other locations in Tuam, Athenry, Boyle, Athlone, Ballinasloe, Castlebar, Drumshambo, Ballyhaunis and Roscommon. The initial rent payable was the sum of IR£550,000 per annum and was not apportioned in the lease between the several premises and was subject to review on the 1st day of the 6th, 11th, 16th, 21st, 26th and 31st years of the term. The review provided for in the 6th year of the lease was carried out and the rent was reviewed to €800,000. The second named Defendant holds Kevin Burke's shares in the first named Defendant. However for the purposes of this action it has been agreed that no distinction is to be drawn between the Defendants.

2. The Plaintiff's case is that it entered into an agreement with the Defendants to the following effect –

(a) The Plaintiff would by the end of September 2003 vacate part of old A.T. to allow for the redevelopment and/or construction of a shopping, office and residential development to include a supermarket premises comprising 7,500 sq. ft. at the front of the premises.

(b) That the Plaintiff would move to and trade from the rear of old A.T. and that the Defendants would construct a temporary dividing wall and temporary toilet facilities and that the Plaintiff would otherwise pay its own moving costs.

(c) The Plaintiff would relocate into the new supermarket premises comprising 7,500 sq. ft. ("new A.T.") as soon as it was constructed in order to allow the Defendants to complete the second phase of the redevelopment of the old A.T. by 31st December 2004.

(d) The new supermarket premises would be located at the front of the premises as reconstructed.

(e) During the second phase of the redevelopment the Defendants would construct and provide for the Plaintiff a new store of approximately 2000 sq. ft. and approximately in the same location as the existing store forming part of the old A.T.

(f) The Defendants would provide the Plaintiff with approximately 1,000 sq. ft. of office space in one of two premises owned by the Defendants to be selected by the Defendants.

(g) The Plaintiff would have the use of the Defendants' premises known as the Bontex premises situate at Weir Road, Tuam, Co. Galway as a temporary storage facility and/or offices during the redevelopment of old A.T.

(h) The Defendants would not charge the Plaintiff any rent in respect of old A.T. or the Bontex premises from the 1st September 2003 to the 31st December 2004.

(i) The annual rent payable in respect of the new supermarket, store and offices which were to be available to the Plaintiff under the lease from the 1st January 2005 was to be as follows –

(i) €15.75 per square foot in respect of the supermarket

(ii) €12 per square foot in respect of the store

(iii) €10 per square foot in respect of the office.

3. The Plaintiff claims that the agreement is recorded in a letter dated 25th August 2003 written by the Defendants to the Plaintiff. In pursuance of the agreement the Plaintiff relocated to the rear of old A.T. and traded from there while the Defendants proceeded with the development of the remainder of the premises. The Plaintiff found trading difficult due to the development works and parking problems and in March 2004 agreed to relocate to the Bontex premises and vacated old A.T. entirely. On the 2nd November 2004 the Defendants wrote to the Plaintiff in relation to other premises and in addition dealt briefly with the Abbey Trinity premises in the following terms –

"With regard to the licence which attached to the Abbey Trinity/Chapel Lane premises, as you are aware we allowed this licence to be transferred to your premises at Circular Road, Tuam to allow demolition works to take place at Chapel Lane. This licence while in Cosmoline's name for trading purposes remains the property of D H Burke & Son Limited. As you are further aware, the intention was that this licence would revert to our new premises at Abbey Trinity when completed and would continue to form part of the property being leased by DH B to Cosmoline. As Cosmoline have decided to relocate to an alternative premises in Abbey Trinity the issues of this licence obviously has to be revisited."

4. The reference to alternative premises in Abbey Trinity is a reference to another development in the area being carried out by a different developer which I will refer to as the Tiernan development. The Plaintiff pleads that the letter constitutes a repudiation of its agreement with the Defendants. The relief sought by the Plaintiff at the hearing of the action is specific performance of the agreement pleaded.

5. The Defendants delivered a Defence and Counterclaim. The agreement is denied. In paragraph (6) of the Defence the Defendant pleads as follows –

"(6) Insofar as the Plaintiff contends for an agreement purportedly made in August 2003 (which is denied) and apparently evidenced in writing by letter from Kevin Burke dated 25 August 2003 written on behalf of both Defendants, the

Defendants contend as follows:-

- (i) The said letter sets forth the Defendants' understanding on material matters that had been agreed in principle between the parties not just in relation to the relevant premises but also other premises held under the said lease.
- (ii) The letter clearly contemplated that the Plaintiffs would clarify its position to the defendants on those matters and in particular, with reference to the premises at Abbey Trinity, whether the Plaintiff intended to surrender its interest therein.
- (iii) The Plaintiff failed to formally respond on many of the material matters set forth in the said letter but subsequently, by express agreement the parties agreed as follows:-

(a) With effect from March 2004 the Plaintiff would surrender its interest in the premises at Abbey Trinity.

(b) The Plaintiff would enjoy the use of the premises known as Bontex until the anticipated date of taking up occupation of the premises at Abbey Trinity then under development and hereinafter described as the Tiernan development without directly incurring any liability to rent in respect of that premises, the said anticipated date being January 1 2005.

(c) The Plaintiff would enjoy the benefit of the licence attaching to the premises at Abbey Trinity until such time as the said transfer of its business after which time the said licence would revert to the defendants.

(d) Insofar as the said letter dated 25 August 2003 made provision for the Plaintiff to lease some part of the new development by the Defendants of the Abbey Trinity premises, now known as Lar na Cathrach, the said agreement in principle was varied by express agreement or alternatively through operation of law by the surrender of the said lease insofar as it related to the said premises."

6. The Defence further pleads at paragraph (9) thereof in relation to the vacation by the Plaintiff of the premises at Abbey Trinity as follows:-

"(9) For the avoidance of doubt it is expressly denied that the Plaintiff vacated the said premises at Abbey Trinity on the terms contended for or that it has suffered the losses alleged or any loss as a consequence of trading from Bontex. In fact the Plaintiff vacated the said premises at Abbey Trinity because of difficulties it experienced through lack of parking facilities as a consequence of the independent act of a third party."

7. In their Counterclaim the Defendants seek a declaration that the Plaintiff has surrendered its interest in old A.T.

#### **Evidence on behalf of the Plaintiff**

8. The following persons gave evidence on behalf of the Plaintiff –

Senan McGonigle, Joseph Cummins, Jane Walsh, an engineer, Liam Hession and David O'Connor: the Plaintiff also called the Defendants' architect Brendan McGettigan.

#### **Senan McGonigle**

9. Mr. McGonigle gave evidence as follows. He is a chartered accountant and a director of the Plaintiff having become involved with the Plaintiff in early 2001. At that time the Plaintiff was going into examinership and he invested in an arrangement to enable it to be taken out of examinership. He invested the sum of £100,000. He was not involved in the day to day running of the company. In early 2002 he was involved in a meeting with other shareholders in looking at the Plaintiff's business and seeing how it could be developed. At that time there were eight outlets three of which were profitable, one marginal and four loss making. A decision was made to divest the company of the marginal and unprofitable outlets and invest in the profitable ones. The outlet at old A.T. was the most profitable of the Plaintiff's outlets accounting for almost one half of the profit generated by the Plaintiff. It was also the largest outlet in size being a supermarket the other outlets being convenience stores. With regard to the old A.T. premises it traded as "Cosmo" and the intention was to substitute a national brand name and in particular Spar. Agreement was reached with the Defendants that the Castlebar and Ballyhaunis outlets should be surrendered so that in 2002 the Plaintiff operated eight outlets. He met with Kevin Burke a director of the Defendants in early 2003 in relation to the old A.T. premises. At that time the Plaintiff was considering how those premises should operate in the future and the Defendants were anxious to redevelop the site and a number of different options were discussed. In addition a major redevelopment was taking place on a large site adjoining the old A.T. premises, the Tiernan development. Ultimately it was agreed that the Defendants would redevelop the old A.T. site and that the Plaintiff would take a 7,500 sq. ft. unit to operate in the development (new A.T.) as a convenience store as the Tiernan development would have a large supermarket as an anchor tenant in the Tiernan development. The Plaintiff had been approached by the developer of the Tiernan development to see if it would be interested in becoming the anchor tenant but it was more likely that a major chain such as Tesco or Dunnes Stores would be the anchor tenant. The Plaintiff's 7,500 sq. ft. premises could co-exist alongside a major anchor tenant. The discussions were reflected in a letter dated 25th August 2004 written by the Defendants to the Plaintiff but addressed to Joseph Cummins another director. That letter reads as follows –

"Dear Joe,

Further to recent meetings regarding the above, please note the following points on which agreement has been reached between D.H. Burke and Cosmoline:

- Cosmoline will vacate the area of the existing supermarket as marked out on site (in the main body of the existing supermarket there are fourteen bays split equally by steel columns; the area to be vacated is at the half way point) which will allow the construction of phase one of the entire development to include a new circa 7,500 sq. ft. supermarket at this level finished to a shell and core level.
- Cosmoline to vacate the required area before the end of September 2003 and is responsible for own moving costs both to temporary supermarket and back into new supermarket. D.H. B are responsible for temporary dividing wall

providing temporary toilet facilities etc.

- Cosmoline to vacate old bakery area (back stores) before the end of September 2003.
- When the new circa 7,500 supermarket is constructed Cosmoline will immediately relocate into the same to allow phase 2 of the development to be completed by 31 December 2004.
- Cosmoline to confirm the length of lease that will be required in the new D.H. B supermarket by return (are Cosmoline eventually moving to Tiernan development?).
- During phase 2 a new circa 2000 sq. ft. store will be constructed to be leased by Cosmoline and located approx. where existing store is with an access corridor of circa 1.8 m. to new supermarket.
- Cosmoline office accommodation of circa 1,000 sq. ft. to be provided by D.H. B at either new Barrack Street development or new Shop Street development.
- Cosmoline to forward layout plan of new supermarket asap to allow correct loadings on floor for meat counters etc.
- Bontex building at Weir Road available as temporary storage facility/offices for Cosmoline during construction (available immediately if required). No rent will be charged for this facility, Cosmoline will be responsible for any other costs incurred (ESB, oil etc.). D.H.B may also require a small area of this building for storage purposes while Cosmoline are in occupation.
- D.H. B will allow Cosmoline to vacate Boyle and Drumshambo branches from 1 September 2003.
- The rent on the new Abbey Trinity Branch will be broken down as follows –
  - Supermarket €15.75 per sq. ft.
  - Store €12 per sq. ft.
  - Office €10 per sq. ft. (Barrack Street/Shop Street).
  - D.H.B will not charge Cosmoline any rent on Abbey Trinity branch from 1 September 2003 to 31 December 2004.
  - The rent on Dublin Road branch will increase by 20% of current level from 1 April 2004. This revised rent amounts includes the additional "hairstresser unit" adjacent to the supermarket which Cosmoline have been in possession of for some months.
  - The rent on Ballinasloe branch will increase by 15% of current level from 1 April 2004.
  - No rent will be charged on Roscommon branch for 6 months from 1 September 2003. From 1 March 2004 rent will revert to the current level and remain at this level until next review.
  - Athlone branch rent remain at current level until next review.

We would appreciate if you would review the above and confirm your agreement with same by return.

Feel free to contact the undersigned if you have any queries.

Yours sincerely,"

10. The benefit to the Plaintiff of this agreement was that the Plaintiff would have a new town centre store in Tuam with the ability to achieve the same sales in a 7,500 sq. ft. unit as it had in its 14,000 sq. ft. but with lower rent and overheads. For the Defendants the agreement would allow them to go ahead with their proposed development. The Plaintiff was able to surrender the stores at Boyle and Drumshambo.

11. Pursuant to the agreement the Plaintiff vacated the front part of its premises in September 2003 and moved to the rear portion of old A.T. and traded from there. The Defendants did not start work on the development until February 2004. While the development was being carried out it was very difficult for the Plaintiff to trade due to disruption caused by development works. In addition the Tiernan development and other adjoining developments created parking problems. As a result it was agreed with Kevin Burke on behalf of the Defendants that the Plaintiff would vacate the old A.T. premises entirely to facilitate the Defendants' development and move to the Bontex premises until the Defendants new A.T. development should be complete. It was anticipated that this move would save some ten weeks on the completion date and as compensation for moving the Defendants' builder paid the Plaintiff €60,000 (sic). The move took place in March 2004 and resulted in an increase in business initially.

12. When he received the letter of 11th August 2004 it suggested to him that the Defendants' understanding was that the Plaintiff had decided not to relocate into new A.T. He was surprised by this. He checked the Plaintiff's files with a co-director Joseph Cummins to see how that view could have been formed. He could find no basis for the same. The Plaintiff had discussions with the developer of the Tiernan development and was interested in becoming the anchor tenant there. If successful the Plaintiff would have operated in both premises. The possibility of the Plaintiff locating entirely to the Tiernan development was discussed by him with Mr. Burke but no agreement was reached and at his meetings with Mr. Burke he kept him advised as to the discussions in relation to the Tiernan development. These discussions however were in the context of general discussions concerning the Athlone and Roscommon outlets which the Plaintiff wished to surrender. The supermarket in the Tiernan development was in fact taken by New West Investments Limited a company formed by the witness, Luke Mooney and Mike Murphy and it trades as Euro Spar. The witness and Luke Mooney are also investors in the Plaintiff. He did confirm to Mr. Burke that the Plaintiff would not be returning to a 14,000 sq. ft. supermarket in new A.T. He later confirmed that the Plaintiff would be taking 7,500 sq. ft. in new A.T.

13. In an Affidavit filed on behalf of the Defendant it was deposed that the witness had said to Mr. Burke: "The deal is done with

Tieman so we will be going across the road and will not be back to you". In relation to this, while he did not doubt Mr. Burke's bona fides, the witness said that he did not make that statement and accordingly it must be an interpretation which Mr. Burke placed on something that he said perhaps that the Plaintiff would not be returning to the 14,000 sq. ft.

14. A reply to the letter of 11th August 2004 was sent on the 28th October 2004 in the following terms –

"Dear Kevin,

I refer to your letter of the 11th August 2004.

I confirm that Athlone and Roscommon are fully secured and that the rent will continue to be paid until Cosmoline has an opportunity to consider what we are going to do with these premises.

In regard to Abbey Trinity we are currently trading in Bontex while awaiting completion of your new Abbey Trinity development. On completion the licence will transfer to Abbey Trinity.

As you state you agreed, to abate the rent under the lease of Abbey Trinity until the end of 2004. This was based on the projected completion of Abbey Trinity by the end of 2004 and our occupation of the Bontex unit until then. Clearly this is not now going to happen until some time in the Spring of 2005 and accordingly rent must continue to be in abeyance until Abbey Trinity is ready.

At that time we will re-occupy the agreed new space in Abbey Trinity at the rent outlined in your earlier correspondence.

You might give me an update on the projected completion date and when you expect we will be able to move in.

Sincerely yours"

15. The Defendant responded to that letter on the 2nd November 2004 in the following terms –

"You appear to intimate that your company now wishes to effect a lease over portion of the D.H. Burke Abbey Trinity development when completed – is this correct? You might please clarify since you advised this firm on a number of occasions, on behalf of your company, that your company wished to effect an early surrender of the lease insofar as it related to the Abbey Trinity property and vacate the said premises in order to avail of an opportunity to become the anchor tenant of the adjacent Tieman development, now under construction. Indeed, your planned relocation was the subject of an article in "The Tuam Herald" as far back as April 2004, in which your fellow director Joe Cummins also confirmed the above. In a spirit of good will on the part of this firm, we agreed to your proposal without imposing a fine for early surrender and we further facilitated the temporary use by Cosmoline of this firm's licence until end December 2004 pending you resolving your licensing situation in the new Tieman development or otherwise.

The abatement of the rent was agreed up to the 31st December 2004. Cosmoline decided in March 2004 to vacate in full and surrender our Abbey Trinity premises earlier than planned, rather than trading from the business premises during the course of our own development. This firm in a further good will gesture did not prevent you temporarily relocating your trading operations to an alternative location owned by D.H. Burke being our Bontex premises, pending a relocation to the Tieman development in December 2004, in order to provide continuity for your customers rather than you losing trade. Furthermore despite the fact that only part of the Bontex building was to be used solely for storage and office purposes during the agreed abatement of rent, we continued to allow the abatement run until your relocation to the Tieman development which you confirmed would be in December.

Should Cosmoline now wish to lease part of our development in Abbey Trinity, as appears to be your proposal, you might please forward details of the area you now have an interest in leasing. It can then be established if we are in a position to facilitate you and whether appropriate terms and conditions, including rent, can be agreed. On the basis of your vacating and surrendering the Abbey Trinity property we have altered the internal layout of our development at considerable expense and we have also in principle agreed terms with tenants on a number of units."

16. The Plaintiff ceased trading in the Bontex premises in February 2005. There were planning problems. The Euro Spar premises were due to open and staff from the Bontex premises were to move there: this was done on foot of advertisements for vacancies in Euro Spar for which fifteen of the twenty staff in the Bontex premises applied.

17. The witness saw no difficulty in the 7,500 sq. ft. unit being created in the Defendants' development. There was space for the storage area and access to it along a corridor. There would be no difficulty in the Defendant providing the agreed office accommodation.

18. The witness was cross examined. The delay in replying to the letter of 11th August 2004 was due to him checking the Plaintiff's papers and also checking with his co-director Mr. Cummins. He met with Mr. Burke on the 6th September 2004 at 2.30 p.m. At that date the Athlone and Roscommon premises had closed. There was a proposal that a surrender of the lease insofar as it related to these premises would be accepted by the Defendant but that €20,000 per annum rent would be added to the rent payable in respect of the Dublin Road and Athlone premises. The significance of this discussion, it seems to me, is that it took place in the interval between the Defendants' letter of the 11th August 2004 and the Plaintiff's reply of the 28th October 2004. At the meeting licences were also discussed as the witness was anxious to obtain two licences one for the Longford premises and one for the new premises in the Tieman development. However it was not his intention that the licence attached to the Plaintiff's premises at Circular Road, Tuam being that formerly attached to old A.T. should be moved to the Tieman development but rather that some other licence available from other premises demised by the lease should be obtained and in particular from the Athlone or Roscommon premises should those premises be surrendered. The letter of 11th August 2004 was not discussed at the meeting.

19. The letter of 23rd August 2003 asked whether the Plaintiff were moving to the Tieman development in the longer term: it was never the intention of the Plaintiff to vacate the Defendants' premises if successful in becoming the anchor tenant in the Tieman development. The Plaintiff never responded to the request in that letter for layout plans for its premises in new A.T. the reason for this being that it was awaiting finalisation of its plans as to whether it would take 7,500 sq. ft. or a larger area. Layout plans were never prepared.

20. At the time the Bontex premises were vacated the Plaintiff had accumulated losses of over €2m. However as no rent was being paid in respect of the old A.T. premises or the Bontex premises these were not imposing a burden on the Plaintiff. The witness agreed that he met with Mr. Burke on a number of occasions – 23rd January 2004, 1st April 2004 and 28th April 2004 at which he kept him informed of the progress of negotiations in relation to the Tiernan development. However he did not recall an article in the Tuam Herald which stated that Cosmo would not be returning to Abbey Trinity being discussed at the meeting of 28th April 2004. He was aware of the article and spoke to Mr. Cummins to whom the statement was attributed. Mr. Cummins told him that he was misreported.

21. The witness's understanding of the letter of the 25th August 2003 was that the Plaintiff would return to the new A.T. premises on the terms of the existing lease but with the premises to be occupied reduced to 7,500 sq. ft. or such other area as might be agreed and with rent calculated in accordance with that letter. The rent would be subject to the review terms of the lease. The witness said that one of the reasons for delay in replying to the letter of 11th August 2004 was that the Plaintiff was awaiting the outcome of discussions in relation to the Tiernan development as, if unsuccessful, the Plaintiff might take a larger area than the 7,500 sq. ft. In any event it was never the Plaintiff's intention to surrender its lease of old A.T. as it was the key profit contributor to the Plaintiff. The fact that the rent payable in respect of the 7,500 sq. ft. would be €153,000 per annum was not a problem. The witness did not discuss with Mr. Burke when the new A.T. premises would be available having regard to delays that had taken place because this was being dealt with by his co-director Mr. Cummins: he believed that he may have had some general discussion with Mr. Burke about this but it was principally dealt with by Mr. Cummins. The witness believed that the rent proposed in respect of the Defendants' development was some 50% of the market rent. If the premises in the Tiernan development did not become available there was an opportunity for the Plaintiff to take a space in excess of the 7,500 sq. ft. Agreement in respect of the Tiernan development was reached in October 2004: however the franchise in respect of the trading name and funds were in place from March 2004. Once it was clear that the Tiernan development was being availed of it was clear that 7,500 sq. ft. was all that was required in new A.T.

22. In re-examination the witness said that it became clear in the course of negotiations in respect of the Tiernan development that a stronger brand than Cosmoline was required by the developer: the Plaintiff could not get an appropriate franchise and that is why the lease in the Tiernan development was taken by New West Investments Limited. The witness could not say if the Defendants were aware that the entity involved in the Tiernan development was not the Plaintiff. The Plaintiff remained committed to taking 7,500 sq. ft. in Abbey Trinity and had the finance available to do that. At the meeting of the 28th April 2004 it was clarified to Mr. Burke that only 7,500 sq. ft. would be required. The monies received from the Defendants' builder for vacating the entire of the premises was largely consumed in fitting out the Bontex premises but the Plaintiff were reimbursed by an allowance against rent.

23. In answer to questions from me the witness said that at an early stage there had been discussions with Mr. Burke Snr. about a cash payment for a surrender of the lease in old A.T. and the Plaintiff had put a value of €2m. on the same. Mr. Burke Snr. was not interested in making any cash payment and a variety of non cash arrangements were discussed. In August 2003 an application for planning permission by the Defendants for the development of new A.T. was pending. The surrender of other premises the subject matter of the lease was effected informally or by forfeiture.

#### **Joseph Cummins**

24. Mr. Cummins said that in 1997 the Defendants operated a chain of supermarkets and when these became available he and a number of colleagues acquired the same under the lease. Payment of €1m. for goodwill was made although this is not reflected in the lease. The Plaintiff was formed for that purpose. The Castlebar premises were surrendered shortly after the lease was granted. The Plaintiff went into examinership in 2000 and in February 2001 the Plaintiff acquired a new structure the shareholders being the witness, Senan McGonigle, John Lavery, Ken Rolands, Mike Murphy and Luke Mooney. Mr. David O'Connor was the Managing Director and the witness was responsible for the day to day operation. He met Mr. Burke Snr., regularly and had discussions with him about proposals to develop old A.T. He was aware of proposals to develop an adjoining site, the Tiernan development, which would involve the loss of two large surface car parks. In addition to paying €1m. on acquisition of the lease the Plaintiff had invested almost €1m in refurbishing old A.T. The Plaintiff was approached by a representative of the Tiernan development in relation to becoming the anchor tenant in that development. The old A.T. premises were not entirely suitable as a supermarket being a modified furniture shop. The Plaintiff's intention was that if successful in obtaining the tenancy in the Tiernan development the Plaintiff would continue to operate in new A.T. as a convenience store. After the death of Mr. Burke Snr., the witness had discussions with Kevin Burke. The Plaintiff engaged a property consultant who together with Senan McGonigle handled the discussions with Kevin Burke. The proposal developed that the Plaintiff should have a smaller unit in the new A.T. and that the remainder of those premises would be surrendered. Drumshambo and Ballyhaunis were surrendered in 2001 and as of Spring 2003 the Plaintiff was still trading from eight locations. In November 2003 there were discussions concerning a rent review which would increase the rent payable under the lease to some €800,000 per annum. By August 2003 planning permission had been obtained by the Defendant. In the discussions it was to be open to the Plaintiff to take either a large or small unit. The rent review was agreed a single rent being agreed in respect of all the premises then held under the lease the amount of rent being €800,000. The agreement reached in relation to old A.T. was beneficial to the Plaintiff in that they were permitted to surrender a number of leases and would have a new premises in new A.T. in a developing retail area. If successful in acquiring premises in the Tiernan development the Plaintiff would operate a Cosmo store in the Tiernan development and have a Costcutter store in the 7,500 sq. ft., at new A.T. Whether the Plaintiff required 7,500 sq. ft. only or a larger area depended upon whether or not it succeeded in relation to the Tiernan development. The smaller area was ideal for a convenience store. The witness's understanding from the letter of 11th August 2004 was that the Defendant wished to create a new lease whereas it was the witness's understanding that they would occupy the new premises on the terms of the lease. Cosmoline Trading Limited is a legal entity: Cosmo is a supermarket concept or brand operated by Cosmoline Trading Limited. It was the intention that the Plaintiff should operate from the Tiernan development as a supermarket. It would also operate the Costcutter franchise from the new A.T. In relation to the request in the letter of 25th August 2004 for details of layout the witness and David O'Connor met Kevin Burke in relation to this and explained that this was unnecessary. At the meeting they explained that heavy plant would be accommodated in the basement car park and he believed that agreement had been reached on this. There was no necessity for reinforcement to accommodate plant or equipment. The rent proposed by the Defendant for the 7,500 sq. ft., equated with the rent being paid for the entire of the premises demised by the lease at old A.T. While there was no response from the Plaintiff to the letter of 25th August 2003 the witness had several conversations with Mr. Burke and he is satisfied that the letter represented the agreement arrived at. The Plaintiff acted on foot of the agreement in moving firstly to the rear of the premises at old A.T. and then to the Bontex premises. It was difficult to trade from the rear of old A.T. because of building work and parking difficulties created by other developments in the area and the loss of two surface car parks. In the course of discussions Mr. Burke agreed that the Plaintiff could move to the Bontex premises to trade as a supermarket. This would achieve savings of time in the development of new A.T. and as a result €55,000 was paid by the builder to the Plaintiff as consideration for the move to the Bontex premises. Approximately €50,000 was spent in preparing the Bontex premises for trading. It was never the intention to surrender old A.T. It was anticipated that on returning to the 7,500 sq. ft., in new A.T. the Plaintiff would generate there profits of €300,000 to €350,000 per annum.

25. The Plaintiff was anxious to be released from the premises at Athlone and Roscommon but no agreement was reached. The lease insofar as it related to these premises was forfeited for non payment of rent towards the end of 2004. Contrary to what was stated in the letter of 11th August 2004 the Plaintiff had never decided to relocate to the Tiernan Development. The witness spoke to Mr.

Burke in June 2004 at the District Court in Tuam in relation to an application to transfer a licence to premises at Circular Road, Tuam. Mr. Burke asked him, as he had previously on a number of occasions, had a deal been done in relation to the Tiernan development and the witness told him that he was not directly involved but that no deal had been done. Following receipt of the letter of 11th August 2004 he discussed the same with Mr. McGonigle and Mr. O'Connor as there had been no decision to relocate. He also sent the letter to the Plaintiff's solicitors on the day he received it. By May 2004 the Plaintiff was aware that New West Investments Limited, a company in which Mr. McGonigle had an interest, would be taking the supermarket in the Tiernan development: the witness has no interest in New West Investments Limited.

26. The premises at Circular Road, Tuam were owned by the witness and David O'Connor who leased it to the Plaintiff. The premises had the use of the licence formerly attached to the old A.T. The witness spoke to the Tuam Herald and that resulted in the article in which he is quoted as follows –

"Joe Cummins had also stated they expect to be in a position to open their new supermarket at Abbey Trinity in November. Cosmo Supermarkets are the anchor tenants with the new shopping mall being developed as the retail section of the multi storey car park opposite the Garda Station."

27. This was a PR statement primarily. It was important that the Plaintiff's customers should know they still existed. It was also his intention that the supermarket in the Tiernan development would trade as Cosmo, a brand developed by the Plaintiff. As the developer of the Tiernan development required a major brand name it was not possible for the Plaintiff to trade there and the supermarket in that development was then operated by New West Investments Limited trading as a Euro Spar franchise. The reference accordingly in the article was to Cosmo supermarket and not to the Plaintiff. The witness did not meet with Mr. Burke formally after August 2004.

28. The Defendants' development at new A.T. has only been completed for some five to six weeks.

29. The witness identified a map which showed the area to be occupied by the Plaintiff at the rear of old A.T. while development was being carried out on the remainder of old A.T. and also the area which the Plaintiff would occupy in the new A.T.

30. Difficulties arose in relation to the Bontex premises in that the Defendants demanded possession of the same on the 31st December 2004. The Plaintiff did not vacate as it considered its occupation of these premises to be part and parcel of the entire arrangement and that it should continue until the development at new A.T. was ready for occupation. However for its own reasons the Plaintiff discontinued trading at the Bontex premises after February 2005 – the premises at the Tiernan development were about to open and many staff were leaving to go there. In addition there was pressure from the Defendants and planning problems. However there was no transfer of staff: many of the staff left employment with the Plaintiff and took up new employment with New West Investments Limited. The staff who did not go to the Tiernan development were made redundant. The Defendant had the finance to take up the 7,500 sq. ft. in new A.T. and indeed a larger area if that was required. If a larger area was required the witness believed that the Plaintiff would have to pay the market rent for the same. The decision not to take any additional space beyond 7,500 sq. ft., was made in the Summer of 2004 when it became clear that the Plaintiff would not be getting the anchor tenancy in the Tiernan development. In relation to the forfeiture of the premises in Roscommon and Athlone the Plaintiff handed back the keys to the Defendants' offices and subsequently paid the rent up to the date of vacation.

31. The witness was cross examined. He accepted that there were difficulties and delays in the Plaintiff paying rent during 2003 and 2004. Part of the scheme proposed in the examinership was that the Plaintiff would be supplied by BWG who control the Spar and Euro Spar franchises. The arrangement with them broke down in August/September 2003 over a number of issues but including an issue relating to the Plaintiff's compliance with credit terms. With regard to the letter of 25th August 2003 the witness agreed that the Plaintiff did not respond to the request to confirm the length of the lease which the Plaintiff required. The reason for this was that his understanding was that the term was to be that of the lease of 24th November 1997. In relation to the query in that letter as to whether the Plaintiff would eventually be moving to the Tiernan development in the longer term the Plaintiff's position was that it would operate both in the Tiernan development and at the new A.T. It was put to the witness that in his discussions with Mr. Burke the context was that if the Plaintiff moved to the Tiernan development it would vacate old A.T.: the witness responded that he could not understand how Mr. Burke could come to this understanding.

32. Part of the reason for delay in replying to the letter from the Defendant dated 11th August 2004 was that the witness had gone on holiday the following weekend for two weeks. Insofar as that letter stated that the Plaintiff had decided to relocate it ought to have been dealt with by Mr. McGonigle in his meeting with Mr. Burke on the 6th September. He did ask Mr. McGonigle what did Mr. Burke say at that meeting about new A.T. and was told that no proposals had been made. However at this time the Plaintiff was dealing with its solicitors who replied to the letter on the 28th October 2004.

33. The witness met Mr. Burke on the 5th February 2004 and discussed trading difficulties from the rear portion of old A.T. He asked if the Defendants could provide alternative parking and a possible move to the Bontex premises was discussed and Mr. Burke agreed to discuss compensation for the Plaintiff so moving with his builder. He denied that he then raised the question of the Plaintiff permanently vacating the old A.T. premises and remaining in the Bontex premises until the Plaintiff could move to the Tiernan development: he stated that the Plaintiff had no connection with the Tiernan development as of the date of the meeting.

34. With regard to the article in the Tuam Herald the reference to Cosmo Supermarket not returning to new A.T. was not a reference to the Plaintiff but to the Cosmo brand: his wish at that time being that the Cosmo franchise should operate from the Tiernan development while the new A.T. premises should operate under a different franchise.

35. The witness was then asked about the meeting with Mr. Burke following the District Court application in Tuam on the 18th June 2004. It was put to him that he told Mr. Burke that he was hoping to commence the fit out of the premises in the Tiernan development in September: he could not have said this as there was no agreement in relation to the Tiernan development at that time.

36. In June 2004 the Plaintiff was breaking even on its trading notwithstanding that the Roscommon and Athlone premises had closed and rent on the same was still payable. The surrender of those premises and an increased rent being paid on other premises to compensate was being discussed the increase being €20,000 per annum in respect of each. The witness was prepared to purchase a licence on the open market for the Circular Road premises should that be necessary and the Plaintiff was in a position to finance that purchase. Vacating old A.T. and relocating was not part of the various discussions which took place between the Plaintiff and the Defendants in September 2004. The witness denied that the intention of moving back into the new A.T. expressed in the Plaintiff's letter of 28th October was inconsistent with the discussions between the parties up to that date.

37. The witness was never involved in the day to day running of the Plaintiff's business. In the period July to September 2004 the Plaintiff took no steps towards occupation of the new A.T. premises as construction of the same was behind schedule: after receipt of the letter of 25th August 2004 there was no point in taking steps as the parties were in dispute.

#### **David O'Connor**

38. The witness is a Chartered Accountant. He is also an investor in and Director of the Plaintiff. His role for the Plaintiff was to attend to finance on a day to day basis. He described the old A.T. outlet as the jewel in the crown of the Plaintiff's business.

39. Prior to 2002 the Defendants had hoped to develop the adjoining site which was in fact developed as the Tiernan development but they were unsuccessful in this. Accordingly in 2002 discussions centred on redevelopment of the old A.T. site. Discussions at that time were always on the basis that the Plaintiff would return to the new A.T. premises when developed and eventually on the basis that the site would be cut in half and that the Plaintiff would occupy the front half. It was important for the Plaintiff that the arrangement outlined in the letter of 25th August 2003 be completed in time for the Christmas trade in 2004 and also that it should be completed prior to the opening of the Tiernan development. The proposed size of the Plaintiff's take and the rent were acceptable and the proposal made good commercial sense. His understanding was that the proposed rent was about one half of the commercial rent. The move to the Bontex site was because of difficulties experienced in trading alongside the building works but also to expedite the completion of the development. Other developments in the vicinity were causing difficulties with traffic and parking. The move would also enable the Plaintiff to maintain its customer base until it returned to new A.T. The Plaintiff bore the costs of the move to the Bontex premises but was reimbursed for these costs by a reduction in rent subsequently. The development of new A.T. was delayed by water table problems on the site. He learnt of the letter of the 11th August 2004 in a telephone conversation with Joseph Cummins. The witness's involvement with negotiations in relation to the Tiernan development was peripheral and principally involved conversations with Mr. Cummins and Mr. McGonigle. By mid August 2004 it was clear that the Plaintiff would not be successful in obtaining a lease in the Tiernan development. The Plaintiff's attitude up to that time was that if a large supermarket say 16,000 to 20,000 sq. ft., went into the Tiernan development there would not be room for another large supermarket to be operated by the Plaintiff but that there would be room for a convenience store. Again if successful in obtaining a lease in the Tiernan development the Plaintiff would operate a convenience store at new A.T. The Plaintiff never abandoned its intention to return to the new A.T.

40. In cross examination the witness agreed that there was no mention in the letter of 25th August 2003 of the possibility of the Plaintiff taking a larger unit in new A.T. The witness had no formal dealings with Mr. Burke during 2004 but had "bumped" into him on occasion. He left it to Mr. Cummins to deal with the letter of 11th August 2004. At that time the witness was involved in other projects of his own and was spending less and less time in Tuam attending there on an irregular basis only. The witness was asked as to the arrangements which were being made for the purpose of moving back to new A.T. in terms of finance and fit-out: the witness replied that a large amount of equipment from the former premises in old A.T. were in storage, there was new shelving which had been purchased in relation to the Bontex premises and a large element of the capital spend was ready. Refrigeration would be obtained from a local supplier who would prepare architects' plans as to layout and the nominated shop fitter would install the same: a plan could be ready within a day or so. He did not agree that the company was in financial crisis throughout 2004. The witness agreed that on the 26 month figures produced by Mr. Hession the company was trading at a loss.

41. The witness was recalled on day seven of the hearing to deal with the evidence given by Mr. Murray. The old A.T. outlet was the Plaintiff's best outlet and sold a significantly higher proportion of products with high mark-up than the other outlets resulting in a significant variation between gross margin there and in the other stores. For this reason Mr. Murray's averaging process is not valid. There were better salary and wage percentages for the old A.T. outlet also. He disagreed with Mr. Murray attributing head office costs to the old A.T. outlet. In cross examination the witness said that separate accounts were kept in respect of each outlet and this facilitated the figures produced by Mr. Hession in respect of old A.T. Head office costs were not apportioned between the stores but were treated as a separate item and applied to determine the overall performance of the Plaintiff.

#### **Jane Walsh**

42. Ms Walsh is an Engineer and she gave evidence describing the Defendants' development of new A.T. The present position is that there is a large retail unit in the area where it was intended that the Plaintiff should occupy. The unit is 7,115 sq. ft., in area. There is a non load bearing wall dividing this unit from the remainder of the development. To the rear of this wall there is an opening to a balcony at first floor level. If the wall is demolished and moved to the next logical position beneath a steel beam this would create an area of 7,721 sq. ft. However this would entail filling in a portion of the opening to the first floor and modification of the balcony.

#### **Brendan McGettigan**

43. The witness was the Defendant's Architect in connection with the application for planning permission for the development of new A.T. He was called by the Plaintiff. The planning application which was made on the 2nd November 2002 described the ground floor as being retail and was open plan the intention being that sub divisions would be made when tenants were obtained. The plans made provision for a coffee shop at the western end of the development. Planning permission was granted on the 16th June 2003. Condition 12 of the planning permission required a separate application for permission if a supermarket or chain store should be proposed for any of the retail units. Submission was made to the planning authority in relation to this condition and a letter of comfort was received to the effect that this condition would only operate if the area was to be used in conjunction with another large supermarket in the area. After the Plaintiff vacated the old A.T. premises a corridor was built to the rear of the individual shop units the intention being that individual shops could open out into the same and gain access to storage areas. His instructions were to provide a corridor for access to the storage area for all units. The storage area shown on the plans was intended for all units and was not intended to be exclusively for the supermarket. The development was delayed due to ground water difficulties. Work commenced in early 2004 completion was approximately one year behind the schedule date.

#### **Brendan Hession**

44. The witness is a Chartered Accountant with the Plaintiff's auditors and has been involved with the Plaintiff as auditor since 1998. The old A.T. was by far the largest contributor to the Plaintiff. In 2002 it made a contribution of €314,000 profit. The Plaintiff had two other profitable outlets Ballinasloe and Dublin Road, Tuam and its other outlets were loss making. In 2003 old A.T. contributed €195,000 to the Plaintiff's profits. The Plaintiff moved to the rear of old A.T. in 2003 and this affected profitability and turnover. Again there was a drop in turnover in 2004 from €4.7m. to €2.57m. He was unable to calculate the contribution to the Plaintiff's profits while trading was from the Bontex premises but he believes that that outlet would have broken even as it was not paying rent. However in March 2004 the weekly turnover had dropped to €40,000 per week.

45. The witness was cross examined. The most recent audit of the Plaintiff was in November 2005. As of August 2005 no accounts had been filed in respect of the years 2003/2004 as the company decided to extend its accounting period and no audit was sought. The accounts to 2005 had been prepared some weeks prior to the hearing and covered a period of 26 months. Up to December 2003 separate accounts were kept for each branch but no separate accounts were kept in 2004 and for that reason there was no breakdown in the audited accounts. From January 2003 onwards the Plaintiff's trading position had continued to worsen. He was not

in a position to offer an opinion as to how a supermarket trading in the Tiernan development would affect the Plaintiff trading in new A.T. The accounts had been prepared upon the basis that the company was a going concern and would have the support of its shareholders, bankers and creditors. The accounts for the period ended 28th February 2005 show the company as having no employees but this is an error: the witness did not know how many employees there were.

#### **Evidence on behalf of the Defendants**

46. Two witnesses gave evidence on behalf of the Defendants Mr. Declan Murray and Mr. Kevin Burke.

##### **Declan Murray**

47. The witness is a Chartered Accountant. He gave evidence as to the profitability of the Plaintiff's old A.T. outlet. He had examined the Plaintiff's audited accounts and profit and loss information. He abstracted the gross profit margin and the overhead expenditure for all the Plaintiff's outlets. He would expect the gross margin to be the same in all the Plaintiff's outlets plus or minus 1%. The witness disagreed with the calculation of the profit of the old A.T. outlet as calculated by Mr. Hession for 2002 at €314,000. The difference between them arises because some items of cost of sales are not included. The figure for wages and salaries incurred at old A.T. is inconsistent in proportion to the turnover of the old A.T. outlet. His approach was to take the proportion of turnover attributable to each outlet and apply a similar proportion of costs of sales to that unit and this gives a completely different result. Thus in 2002 the old A.T. outlet would have incurred a loss of €60,000 rather than a profit of €314,000 as calculated by Mr. Hession. For 2003 the respective figures are €242,000 profit before relocation and a loss of €305,000. In 2004 the old A.T. outlet would have made a small profit in the region of €20,000.

48. The witness attended a meeting in March 2003 at which Mr. Burke, Mr. McGonigle and a gentleman named Kieran attended. One of the matters discussed at the meeting was compensation to be paid to the Plaintiff should the Plaintiff determine to move to the Tiernan development and vacate old A.T. The Plaintiff calculated the amount which it would require in relation to eight headings and arrived at the figure they would require. Mr. Burke indicated that it would not be worth his while to obtain vacant possession at that price. There was some discussion as to the date at which possession would be given up. The Defendant would wish for possession in October 2003 and the Plaintiff wished to avail of the Christmas trade for Christmas 2003. Mr. Burke then indicated that he would require possession by the 7th January 2004 at the latest. There was no discussion on the possibility of the Plaintiff trading from both new A.T. and the Tiernan development: the discussion was on the basis that the Plaintiff would either move or not move.

49. In cross examination the witness agreed that he could not dispute Mr. Hession's evidence that in 2003 the old A.T. outlet had a turnover of €100,000 per week, that when trading was restricted to the rear of the original premises this dropped to €80,000 a week and dropped further to €50,000 per week on the move to the Bontex premises.

##### **Kevin Burke**

50. Mr. Burke, a Director of the Defendants, gave evidence as follows. The first Defendant was incorporated in 1977 and the second Defendant in 2001. Prior to 1997 the business of the first Defendant was to carry on a grocery business established in 1893. The business developed during the 1970s and 1980s to operating a chain of ten supermarkets but also held a property portfolio. The second Defendant held the witness's shares in the first Defendant the remaining shares being held by the witness's mother. In 1997 the ten supermarket premises were leased to the Plaintiff. The old A.T. premises were formerly Tuam Furniture Stores and it was basically a type of hay shed or industrial building. There was an extension to the front of some 1,500 sq. ft., over two storeys. There were some outhouses to the rear. The original rent under the lease was IR£550,000 per annum. The Plaintiff was frequently in arrears with rent during 1998 and even more so in 1999 when the Plaintiff began to pay rent quarterly and at one stage monthly. When the Plaintiff went into examinership there were rent arrears of approximately IR£110,000. In the examinership 10p in the IR£ was paid. By the time of the examinership the Plaintiff was trading from eight premises only. The Plaintiff had an option under the lease to surrender Castlebar and it did so. There was no formal surrender and simply the keys were handed back. There were no solicitors involved. In 1999 the Plaintiff asked if they could surrender the Ballyhaunis premises. Again this was done by handing back the keys and no solicitors were involved. After the examinership problems with prompt payment of rent continued.

51. The Defendants first considered developing old A.T. in 1999. Two adjoining car parks came up for public tender and the area was designated as an urban renewal site. The Defendants tendered for the same but were unsuccessful. In December 1999 there was a meeting between the witness, Mr. Cummins, Mr. O'Connor and Paul Murrins. The meeting concerned delayed payment of rent. It was suggested at the meeting by the witness that if the Defendants were successful in their tender the Plaintiff should move to the new development and the Defendants would redevelop old A.T. The costs incurred by the Plaintiff in upgrading old A.T. were discussed. However as the tender was unsuccessful these discussions came to nothing. The Defendants then looked at the possibility of developing old A.T. A planning application was submitted and was successful. At this time he had several informal conversations with Mr. Cummins when he met him in Tuam.

52. The first discussions concerning the Plaintiff moving out of old A.T. took place on the 24th March 2003 at a meeting between the witness, Declan Murray the Plaintiff's Accountant, Mr. O'Connor, Mr. McGonigle and "Kieran" whose surname the witness did not know. At that time to develop relief any development would have to be completed by the end of 2004. The witness was told that the Plaintiff was in discussions with the developer of the Tiernan development. He was told that if the Defendants were not going to develop old A.T. the Plaintiff would upgrade the premises and continue there. The Plaintiff put forward the costs it would incur should it move to the Tiernan development and asked what was it worth to the Defendants if they should move. The witness did not then or ever agree to make any money payment but indicated a willingness to accept surrenders of other outlets the subject matter of the lease. There were a number of similar discussions before the letter of the 25th August 2003 issued the last meeting being one or two weeks prior to the letter when the witness met Mr. Cummins. Mr. McGonigle came to that meeting late. The witness was accompanied by "Kieran". Mr. O'Connor was in the vicinity but was not at the meeting but was present afterwards when they all walked the old A.T. premises.

53. The witness then dealt with the bullet points in the letter of 25th August 2003. The first bullet point was agreed. The second bullet point was necessary if the benefit of the urban renewal designation was to be obtained: the area for the temporary supermarket was agreed. The fourth bullet point was agreed. The fifth bullet point arose because the Plaintiff was still in negotiation in relation to the Tiernan development and if they were successful the witness's understanding was that the Plaintiff would move to that development: if they were unsuccessful they would remain on and the length of the lease would need to be agreed. No reply was received to the query as to whether the Plaintiff would eventually move to the Tiernan development in the longer term. As to bullet point eight the witness never received a layout plan. Bullet point nine dealt with the availability of the Bontex building as a temporary storage facility/offices: it was not the intention that it should be used as a supermarket. The Bontex premises are five minutes away from old A.T. Bullet point ten, the surrender of the premises at Boyle and Drumshambo, was a concession by the Defendants to the Plaintiff in relation to the transaction as a whole and was included as an alternative to making a money payment to the Plaintiff. There was no formal deed of surrender and the keys were simply handed back. Bullet point eleven proposed the rent for the redeveloped new A.T. and represented the market rent at the time: the rent payable by Euro Spar in the Tiernan development is €15



per sq. ft. Bullet point twelve – not to charge rent on old A.T. from 1 September 2003 to 31 December 2004 - was again consideration moving to the Plaintiff. Bullet point thirteen was again consideration moving to the Plaintiff in that the review date in the lease was November 2002.

54. The witness was not concerned at receiving no reply to the letter of 25th August 2003 as he was aware that the Plaintiff was still in discussion in relation to the Tiernan development.

55. Work commenced on the development of new A.T. in October/November 2003 and by February the front part of old A.T. was fully demolished and construction proper had commenced. Difficulties were experienced with the water table. There were difficulties for the Plaintiff in that with other developments in the area there was no car parking available. In March 2004 the Plaintiff vacated old A.T. This followed a meeting between the witness and Mr. Cummins over a cup of coffee. The witness agreed that the Plaintiff could move to Bontex. This move made sense as Mr. McGonigle had earlier confirmed that the Plaintiff had now done a deal in relation to the Tiernan Development. Mr. Cummins said that the Plaintiff would move to the Bontex premises and instead of moving back into the front of new A.T. when constructed would move from Bontex to the Tiernan development. Mr. McGonigle had told the witness on the 23rd January 2004 that the Plaintiff was nearly there in relation to the Tiernan development and that the deal should be done and dusted over the next couple of weeks. It was in that context that Mr. Cummins said that the Plaintiff would move into Bontex and go straight from there to the Tiernan development as both the Tiernan development and new A.T. would be ready at about the same time.

56. On the 12th June 2004 the witness met with Mr. McGonigle. There had still been no reply to the letter of 25th August 2003. At that time Mr. McGonigle was Managing Director of the Plaintiff. Up to that time the witness's main point of contact was Mr. Cummins. Mr. McGonigle asked if the Defendants would have any objection if a number of the Plaintiff's remaining stores were assigned to different investors who wished to go in different directions and do different things. Mr. Cummins and Mr. O'Connor wished to acquire the Ballinasloe outlet. A Mr. Paul Fitzpatrick was interested in taking over the Dublin Road outlet. The witness informed him that he would look at any proposal. In relation to the Tiernan development Mr. McGonigle said that a deal in respect of the same would be done and dusted over the following couple of weeks and that he would come back to the witness in relation to the same. Some two weeks later the witness agreed to the assignment of the Ballinasloe outlet and signed a consent to same.

57. The next meeting in point of time was the February meeting with which the witness had already dealt in evidence. At that meeting Mr. Cummins asked what would it be worth if the Plaintiff were to move to the Bontex premises and the witness replied that it was worth nothing to him as he had a fixed price contract with the builder. However the witness agreed to talk to the builder and ask what it was worth to him and he did that and as a result an agreement was made that the Plaintiff would receive €55,000 from the builder to move to the Bontex premises. At the meeting Mr. Cummins informed the witness that the Plaintiff would move directly from the Bontex premises to the Tiernan development. It was clear to the witness that the Plaintiff would not be returning to new A.T. There was no discussion of compensation to the Plaintiff for so moving.

58. There were a number of contacts with Mr. McGonigle after the February meeting. At that time the Defendants had a licence available and they made that available to the Plaintiff in respect of its Circular Road premises until such time as it was required to be returned to new A.T. There was no agreement in writing in relation to the Bontex premises. The witness saw the article in the Tuam Herald of 14th April 2004 and understood from the same that the Plaintiff would not be returning to new A.T. and this was in accord with the factual position as he understood it. The witness met with Mr. McGonigle on the 1st April 2004. Mr. McGonigle told him that the Plaintiff had bought premises at Circular Road, Tuam. Mr. McGonigle also raised the question of being released from the premises in Athlone and Roscommon and the witness asked for proposals.

59. The next meeting took place after the article appeared in the Tuam Herald on the 28th April 2004. So far as the witness was concerned there was no difference between Cosmo and the Plaintiff Cosmo being the Plaintiff's trading name. The article confirmed in his mind what had been said to him by Mr. Cummins as to the Plaintiff's intentions and also what Mr. McGonigle had said to him in relation to the Tiernan development that the deal was nearly done and would be done and dusted over the following few weeks. He also received a phone call from Mr. Cummins in relation to water ingress in the Dublin Road premises in which Mr. Cummins told him that the deal in relation to the Tiernan development had been done and that the Plaintiff would not be returning to the new A.T. The witness was aware that changes were under discussion whereby different investors in the Plaintiff would take control of different premises: this was not a matter of concern to him so long as rent continued to be paid. In the course of various discussions when Mr. McGonigle would speak of Cosmo doing this or that he was aware that different companies would be set up to do different things.

60. The witness met with Mr. Cummins on the 18th June 2004 at the District Court in Tuam on the occasion of a licence transfer application. Over coffee they discussed the Tiernan development. Mr. McGonigle hoped that it would be possible to obtain a Euro Spar franchise in respect of the same and hoped that fitting out would be done in October. Mr. McGonigle asked about interest being received by the Defendants for space in Abbey Trinity. The witness told him that the response was good and that there was interest from a Subway in the front of the premises and interest from a number of boutiques. At that time the entire premises were advertised as available for letting both in the local paper and on a large sign to the front of the building. All the advertisements referred to 25,000 sq. ft., retail to let – the entire premises – and also to offices and luxury apartments and underground parking. A little later there was a large banner sign again referring to 25,000 sq. ft. The smaller signs were placed in April 2004 and the banner in July 2004.

61. After the Defendants letter of the 11th August 2004 and before a reply was received to the same he met with Mr. McGonigle on the 6th September 2004. That meeting was again concerned with the Athlone and Roscommon premises but also licences. There was no reference to the letter of 11th August 2004 during the meeting.

62. Next to occur was that the witness received the letter dated 28th October 2004 which came as a surprise to the witness. He then dealt with his solicitors and got advice as to a reply which he sent on the 2nd November 2004 which set out the witness's view of the situation. His belief was that the move from old A.T. to the Bontex premises was to facilitate a move to the Tiernan development and not a return to new A.T. The Plaintiff's view now was that the move was to facilitate the development of Abbey Trinity to which they would return when the development was completed but this was not what the witness had agreed.

63. With regard to the new A.T. premises it was always the witness's understanding that there would be a new lease of the unit which it was proposed the Plaintiff should take the terms of which would have to be agreed. While correspondence passed between solicitors during 2005 the Defendants were prepared to negotiate a new lease with the Plaintiff.

64. The witness was cross examined. It was put to the witness that the Plaintiff's old A.T. outlet was the most profitable of the Plaintiff's shops and contributed substantial profits to the company: the witness replied that he did not believe that any of the Plaintiff's outlets made profits. The witness accepted that the development of new A.T. could not go ahead without the Plaintiff's co-operation. The arrangement reached was that contained in the letter of 25th August 2003. The arrangement was for 7,500 sq. ft.,

together with storage and offices but a larger area could have been negotiated but never was. The witness did not consider the lease which the Plaintiff was now claiming a valuable or saleable asset: there was some 75,000 sq. ft., of retail space available within the area and he could see no reason why someone should pay for this particular lease when they could lease adjoining premises at no premium. The rent payable so far as he was concerned was market rent. While a smaller unit might achieve €20 per sq. ft., for a unit of this size the rent proposed was the market rent. The auctioneer in charge of letting new A.T. was quoting €30 per sq. ft., but that would relate to a smaller unit and he did not think that it would be achieved. As to the discussions which preceded the letter of 25th August 2003 the witness had written on a map 7,000 but the agreement was for 7,500 sq. ft. That map is not available to the Court. The original map showed a coffee shop at the front and the Plaintiff's take was to be to the rear of that. The artist's impression prepared in September 2003 shows a shop sign with the words "Co...": the witness's understanding that this was intended to refer to coffee shop and not to Cosmoline. So far as the witness is concerned there was never any discussion nor intention that the Plaintiff should have the coffee shop area which was in the curved area to the front. On the map that was produced by the Plaintiff's engineer an area of 7,500 sq. ft. to the front is shown but this includes the coffee shop. He did not agree with the Plaintiff's assertion that it was to get 7,500 sq. ft. from the very front of the building as there was always to be a coffee shop to the front of its take. There is a stairs in the curved section and the Defendant's intention was that the coffee shop should be on the ground and first floors. On walking the premises with Mr. Cummins he had marked out the area proposed for the Plaintiff with spray paint. Further it was always the case that the Plaintiff would move to the Tiernan development or continue to trade from new A.T. but never that the Plaintiff would trade from both. He did not think that it would make sense to trade from both. This was his belief even if the new A.T. unit operated as a convenience store. The Defendants had advertised an area for a convenience store in their development but this was at the other end and a smaller unit than that envisaged by the Plaintiff: it was closer to the town centre. The witness was aware from January 2004 that the unit in the Tiernan development would not be taken by the Plaintiff but by an associated company. There would be some of the investors in the Plaintiff involved but never other investors from outside. He had heard the name New West Investments Limited in the course of discussions with Mr. McGonigle. In January 2004 he first heard about Laiter an associate company of the Plaintiff which was to take over the Longford outlet and also who was involved in the same. He did not attach importance to the different company names but rather to the investors in the Plaintiff who were the same group of persons. He learned in court that Mr. Cummins had no interest in the unit in the Tiernan development. The witness's understanding at the moment is that the unit in the Tiernan Development was not making money and believed that if two units were operating neither would make money. It is his belief that the Plaintiff shared this view and that was why it moved to the Bontex premises. The witness agreed that the terms of the existing lease permitted sub-letting with consent of the lessor. He did not believe that sub-letting was an option for the Plaintiff as it was his intention that the first review under any new lease would be two years after commencement and that would be a review to market rent. The extension of time of the urban renewal relief for the area was announced in the Budget on 3rd December 2004 but there was an expectation in advance of that that this would occur. The delay in completing the development was some eleven months but the ground floor was ready for fit out in July 2005. The witness had informed Mr. McGonigle of the likely delay but this did not concern Mr. McGonigle as the deal with the Tiernan development was almost done and dusted. So far as the witness was concerned the delay was irrelevant to the Plaintiff as it was not its intention to return to the new A.T.

65. The witness was then taken through correspondence and circumstances surrounding the surrender and/or forfeiture of other premises the subject matter of the lease. I do not consider his answers on these matters as relevant to the issues I have to decide.

66. The witness was asked about his conversation with Mr. Cummins on the 5th February 2004. Mr. Cummins was coming out of Café Connect when they met and that was when Mr. Cummins asked him what was it worth to the Defendants if the Plaintiff did not return to new A.T. There was a further conversation along the same lines that evening at the Dublin Road premises.

67. The witness was asked about his discussions with Mr. Cummins in relation to the move from old A.T. to the Bontex premises. He agreed that he told Mr. Cummins that if this occurred it would advance the completion date by six to eight weeks. He did not say this in the context that the Plaintiff would be able to move into the new A.T. that much earlier but rather in the context of there being a saving to the builder who had a fixed price contract. At that time he was aware that the Plaintiff would not be returning to new A.T. As the Plaintiff would not be returning to new A.T. it was irrelevant to it whether or not the redevelopment was completed for Christmas 2004.

68. The circumstances in which the letter of the 11th August 2004 was written were as follows: the witness's mother was shopping in the Bontex premises and one of the staff told her that they would not be moving to the Tiernan development until after Christmas. When the witness learned this he wished to revisit the question of the licence from old A.T. and the occupation of the Bontex premises. There were other parties interested in the Bontex premises.

### **Observations on the Evidence**

69. The transactions with which I am concerned were conducted between men of business and entirely without the assistance of legal advice. It was never suggested to any witness that his evidence was not a complete and honest recollection of the events which occurred and I am satisfied that each witness gave his evidence truthfully. If anything is to be learnt from these proceedings it is the folly of embarking on major commercial transactions without the benefit of legal advice and without having the transaction embodied in a formal document duly executed. I am satisfied that the misunderstandings which were disclosed in the course of evidence and which led to these proceedings arose out of the misconception by each party of the intentions of the other. Such misconception was inevitable having regard to the manner in which discussions took place between the parties. While the directing mind of the Defendants, Mr. Kevin Burke, was involved throughout he discussed the matter at different times with investors and directors of the Plaintiff. The discussions took place at a time when the Plaintiff's affairs were being re-organised with a view to different outlets being operated by separate companies with different combinations of the directors and investors of the Plaintiff and with the involvement of outside investors: Mr. Burke's discussions were with individuals with differing views of their own commercial future involving not just the Plaintiff but other companies. The confusion was further compounded by the existence of the Plaintiff Cosmoline Trading Limited the lessee of Abbey Trinity and the entity involved in discussions with the Defendant and a brand name Cosmo under which the Plaintiff or any combination of the directors and investors in the Plaintiff and outsiders could trade. Again confusion was caused in that the original intention of the Plaintiff was that it should trade from the Tiernan Development if it could become the anchor tenant there: the Plaintiff was unsuccessful in this and the anchor tenant is now New West Investments Limited a company in which some directors and investors in the Plaintiff are involved.

### **The Issues**

70. The Statute of Frauds has not been pleaded by either party. In these circumstances my task is to examine the evidence and determine the following two questions –

1. Is there an agreement for the lease by the Defendants to the Plaintiff of premises in new A.T. in substitution for the demise thereof by the lease of 24th November 1997.
2. If not did the Plaintiff surrender to the Defendant its interest in old A.T. pursuant to the lease dated 24th November

**Is there an Agreement for the lease by the Defendants to the Plaintiff of premises in new A.T. in substitution for the demise thereof by the Lease of 24th November 1997**

71. The Courts will grant specific performance of an agreement for lease: *Irish Shell & BP Ltd v Costello* (1981) ILRM 66 at 70. It is well settled that to create an enforceable contract for the grant of a lease the following matters must be agreed –

- (i) The parties: *Silverwraith Ltd v Siucire Eireann* Cpt High Court 8 June 1989 Unreported.
- (ii) The premises: *Law v Murphy* High Court 12 April 1978 Unreported.
- (iii) The term: *Crane v Naughten* 1912 2 I.R. 318.
- (iv) The commencement date: *O'Flaherty v Arvan Properties Ltd* Supreme Court 21 July 1977 Unreported.
- (v) The rent: *Shannon v Bradstreet* (1803) 1 Schoales & Le Froy 52

72. Depending on the circumstances of the particular case there may be other material terms. Thus where there is an existing tenancy or a tenancy has been terminated by notice to quit and the parties agree on an increase in rent the effective date of the increase is a material term: *Ormond v Anderson* (1813) 2 Ball & Beatty 363. The nature of the premises to be demised may give rise to other material terms. In *Dore v Stephenson* High Court 24 April 1980 Kenny J. said that it is particularly necessary that there should be agreement about any exceptional features when the purchaser is buying part of a building and the vendor is retaining the remainder of it. In the present case as it was the intention that there should be a lease of portion of a multi storey building I would expect provision to be made for mutual covenants for support and protection: these however may be implied where a lease is silent. Again in the case of a multi occupancy building involving retail, office and residential portions one would expect to find a management structure and indeed provision for a service charge.

73. Bearing the foregoing in mind I propose looking at the letter of the 23rd August 2003 and which the Plaintiff relies upon as embodying an agreement. Bullet point five in the same requires the Plaintiff to confirm the length of lease that will be required in the new development and also enquires as to whether the Plaintiff will be moving to the Tiernan development in the longer term. This was never replied to formally. However the letter of the 28th October 2004 in reply to the Defendants' letter of the 11th August 2004 implies an understanding on the part of the Plaintiff, which understanding was given in evidence by the Plaintiff's witnesses, that the existing lease should continue the only alterations being

- (a) in respect of the premises to be comprised in the same and
- (b) the rent to be payable under the same.

74. However Mr. Burke on behalf of the Defendants was adamant in his evidence that his understanding at the time he wrote the letter of the 23rd August 2003 was that there would be a new lease with a rent review after two years. I am satisfied that the witnesses on both sides are honest in their evidence and in these circumstances the parties were not ad idem as to the terms of the lease under which new A.T. would be occupied. Neither were the parties ad idem as to the commencement date (although I would be ready to infer that this was to be the date upon which the premises were available for occupation: *Silverwraith Ltd v Siucire Eireann* above). Similarly having regard to bullet point five there was no agreement as to the term of years. Again on the evidence I am not satisfied that there was agreement as to the premises. Mr. Kevin Burke in his evidence was adamant that while there was a reference throughout to the front of the new A.T. it was always the intention that there should be a coffee shop to the front. He is borne out in this in that there is within the area claimed by the Plaintiff stairs leading to the first floor area which on Mr. Burke's evidence would also form part of the coffee shop. The Defendants' architects' evidence was that the plans prepared by him provided for a coffee shop. I would have no difficulty with the letter of the 25th August 2003 referring to "circa 7,500 sq. ft.," if it was clear in evidence where the area would begin and end: Ms Walsh in a sketch prepared to illustrate the area claimed by the Plaintiff included in the same the coffee shop and the stairs leading to the same but also a corridor leading to the store as provided for at bullet point six. The Plaintiff's witnesses in evidence were equally as adamant as Mr. Burke that the coffee store area to which he referred was to be included in the demise to the Plaintiff. Again I am satisfied that each of the witnesses are honest in their evidence and again this satisfies me that the parties were not ad idem. Further the location of the storage area to be provided was not specified. Indeed it seems to me that the Plaintiff considered the premises to be demised to be still in negotiation in that it considered that it would be appropriate to place its refrigeration equipment in the basement car park rather than within the retail or storage areas there having been otherwise no mention of any rights in the underground car park. In a multi storey multi occupier building ownership of the horizontal boundaries are a matter of some importance and on the evidence these were never discussed or agreed. Neither were rights of support and shelter although these in many cases can be implied. Again in a multi storey multi occupancy building a management structure would normally be required in order to deal with the maintenance, upkeep and repair of the building as a whole and common areas (of which there would not appear to be any in the present case). The fact that none of these matters were discussed or raised at any time suggests strongly to me that the letter of the 25th August 2003 was a general proposal which had not firmed up into an agreement. I fully accept that the Defendants acted upon the same to their detriment and that they also received benefits under the same particularly in relation to the surrenders of the Boyle and Drumshambo premises from the 1st September 2003 which surrenders were effected, in relation to the increase in rent on the Dublin Road premises mentioned at bullet point thirteen and the Ballinasloe premises mentioned at bullet point fourteen and the rent concessions at bullet points fifteen and sixteen.

75. In order to obtain specific performance a party must first of all establish a contract and without this there can be no specific performance. In this case I am satisfied that there were negotiations but that the same never resulted in an entire and completed contract. Where there is no contract part performance does not arise and if in reliance on an incomplete contract a party performs some or more of the matters on which agreement has indeed been reached that will not cause the negotiations which were otherwise incomplete to mature into a completed contract. Where as here there was no consensus on material and essential terms there cannot be a contract. See *Dore v Stephenson* above.

76. Having regard to the foregoing I am satisfied that there was no concluded agreement in that material terms were not agreed and in the instances which I have mentioned the parties were not ad idem. I accept that each of the parties may well have been under the misapprehension that they had an agreement but this is immaterial. In these circumstances the Plaintiff fails in this aspect of its claim.

**If not did the Plaintiff surrender to the Defendant its interest in old A.T. pursuant to the Lease dated 24th November 1997**

77. In its Counterclaim the Defendants seek a declaration that the Plaintiff surrendered its interest in the old A.T. premises demised by the lease.

78. Deasy's Act section 7 provides –

"The estate or interest of any tenant under any lease or other contract of tenancy shall not be surrendered otherwise than by deed executed, or note in writing signed by the tenant or his agent thereto lawfully authorised in writing, or by act and operation of law.

79. It is not alleged that the Plaintiff executed a deed or signed a note in writing. It therefore remains only to ascertain if there was a surrender by act and operation of law. In *Lynch v Lynch* (1843) 6 IR.L.R 131 Brady C.B. said –

"A surrender by act and operation of law I think may properly be stated to be a surrender effected by the construction put by the courts on the acts of the parties, in order to give to those acts the effect substantially intended by them; and when the courts see that the acts of the parties cannot have any operation, except by holding that a surrender has taken place, they hold it to have taken place accordingly."

80. An example of surrender by act and operation of law is what transpired in relation to several other premises comprised in the lease – the vacation of the premises and the handing over of keys. Again should the tenant abandon the premises and the landlord resume possession this also constitutes such a surrender. I am satisfied in construing the acts of the parties here that insofar as the Plaintiff removed from the entire of its take under the lease to the rear of the premises and later removed from the rear of the premises to the Bontex premises there was no intention by it to surrender its lease. In each of these cases the Defendants did not at the time understand that it was the Plaintiff's intention to surrender its lease.

81. After the Plaintiff vacated the Bontex premises there were a number of circumstances which I believe induced the Defendants to believe that it was the Plaintiff's intention to surrender its lease. Mr. Kevin Burke's state of mind must have been influenced to some extent by the circumstance that by then eight of the premises originally demised by the lease had been surrendered or the lease insofar as it related to the same forfeited. Again at an early stage of discussions the Plaintiff had suggested that it would consider a cash offer to vacate the premises and indeed this suggestion was repeated again at a later stage: however the Defendants were never prepared to make a payment to obtain vacant possession. He was also aware that negotiations had taken place whereby the Plaintiff would become the anchor tenant in the Tiernan development. He believed it to be commercially impractical for the Plaintiff to trade from both new A.T. and the Tiernan development. While he was aware at a later stage that New West Investments Limited would become the anchor tenant in the Tiernan development in his mind this was simply another manifestation of the Plaintiff and an instrument of the investors in the Plaintiff. Against this state of mind it is perfectly understandable that he misconstrued Mr. Cummins comments as quoted in the newspaper that "Cosmo" would not be returning to new A.T. and other statements made to him directly by Mr. Cummins who had no connection with New West Investments Limited. Again he had regular conversations with Mr. McGonigle about progress of negotiations for the Plaintiff to take the anchor tenancy in the Tiernan development but did not understand and indeed it was not made clear to him by Mr. McGonigle that an entity different to the Plaintiff was involved. I am satisfied on the evidence that there was never an intention on the part of the Plaintiff to forego its interest in the old A.T. save and except upon an agreement being concluded containing the terms set out in the letter of 25th August 2003 when those terms should be incorporated into a completed agreement. In these circumstances there was no surrender by act and operation of law.

82. The unfortunate consequence of the foregoing it seems to me is that the Plaintiff retains an interest in that part of the new A.T. which was comprised in the lease – a portion of the ground floor and a portion of the upper floors corresponding to the volume of space occupied under the lease. While it has not been argued before me it seems to me unlikely that the Court would seek to unravel the situation by restoring the Plaintiff to its original take: the Court would however be entitled to award compensation, the equivalent in equity of damages at common law. In assessing compensation the Court would have regard to the value of the Plaintiff's interest in old A.T. and the benefits received by the Plaintiff in terms of forgiveness of rent, delay or modification of rent increases on other premises, the use of the Bontex premises, the use of the licence formerly attached to the old A.T. and the value to be ascribed to the surrender of leases. These last comments I make with a view to directing the parties' minds to the resolution of their difficulties and are purely obiter.