

THE HIGH COURT

COMMERCIAL

[2021] IEHC 811

[2018 No. 5619 P.]

[2018 No. 172 COM.]

BETWEEN

CLARION QUAY MANAGEMENT COMPANY LIMITED BY GUARANTEE

PLAINTIFF

AND

DUBLIN CITY COUNCIL, PIERCE CONTRACTING UNLIMITED COMPANY,

JOHN McCORMACK, BRIAN McCORMACK, NIALL McCORMACK, ALAN

McCORMACK AND PATRICK KELLY

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 21st day of December,

2021

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A. Introduction

1. This is my judgment on a number of issues which were directed to be tried pursuant to O. 25, r. 1 RSC by order of the High Court (Quinn J.) made on 4th July, 2019 in these proceedings. The proceedings were commenced by the plaintiff, Clarion Quay Management Company Limited by Guarantee (referred to in this judgment as “Clarion” or the plaintiff), against Dublin City Council (“DCC”) in June, 2018. The remaining defendants, the second to seventh defendants who are sued as members of a partnership called the “Campshire Partnership” (referred to as “Campshire”) were joined as defendants on the application of the plaintiff on 12th October, 2018. Clarion is the owners’ management company in respect of a mixed-use development (apartments and retail) called Clarion Quay which is located north of the River Liffey in Dublin 1. DCC is sued as the statutory successor in title of the Dublin Docklands Development Authority (“DDDA”) and is the registered owner of the lands on which the Clarion Quay development has been constructed. DDDA entered into a joint venture agreement dated 21st March, 2000 (the “JVA”) with Campshire for the development of Clarion Quay. Clarion and DDDA (and another entity to which reference will be made later) entered into a Management Company Agreement dated 13th July, 2001 (the “MCA”) in respect of Clarion Quay. DCC has succeeded to the rights and obligations of the DDDA under that agreement. Clarion Quay was constructed under the JVA. In the proceedings, Clarion contends that there are multiple defects in Clarion Quay for which it contends that DCC and Campshire are liable.

B. Issues Directed to be Tried

2. On the consent of the parties, the High Court (Quinn J.) made an order on 4th July, 2019 (the “Order”) directing the following issues to be tried in advance of the trial of the action:-

- (1) Whether DCC (and its predecessor) is bound by the provisions of general condition 36(d) of the Law Society General Conditions of Sale (1995 ed.);
- (2) Whether the terms pleaded at para. 20 of the statement of claim are implied terms of the MCA;
- (3) Whether the plaintiff is entitled to rely on the Multi-Unit Developments Act, 2011 (the “MUDs Act”) in these proceedings; and
- (4) If so, whether the defendants, as developers within the meaning of the MUDs Act, are obliged to complete the development of the common areas of Clarion Quay in accordance with, (*inter alia*), the Building Regulations, and to indemnify the plaintiff in respect of all claims made against the plaintiff of whatever nature or kind in respect of acts or omissions by the defendants in the course of works connected with the Clarion Quay development.

3. The Order further provided that those issues were to be determined on the pleadings already delivered, including the documents appended to the plaintiff’s replies to particulars dated 15th January, 2019 (which were listed in schedule 1 to the Order) and on the basis of the facts pleaded in the statement of claim which was delivered on 17th October, 2018. The Order further noted that the defendants were fully reserving their position as to the facts alleged in the statement of claim and that those alleged facts were being accepted only for the purposes of the trial of the preliminary issues.

4. The parties exchanged detailed and helpful written submissions in advance of the hearing of these issues. However, I found it difficult to follow precisely what facts were

being accepted by the defendants for the purposes of the trial of these preliminary issues. Consequently, I directed that the parties agree a statement of facts. The parties did agree a statement of facts which was provided to me following the conclusion of the hearing on the issues directed to be tried. I set out below the facts set out in that statement. However, the facts set out in that statement are not the only relevant facts for the purposes of the trial of these issues. It was apparent to me that there are other relevant facts which must be taken either to have been agreed by the parties for the purposes of the trial of the preliminary issues or, alternatively, which could not be disputed, such as the existence of other relevant proceedings. I will refer to those other facts after I set out the facts expressly agreed by the parties in the statement of agreed facts.

C. Facts Agreed by the Parties for the Purposes of the Trial of the Preliminary Issues Only

5. The following facts were agreed by the parties for the purposes of the trial of the preliminary issues the subject of this judgment.
6. The plaintiff, Clarion, is the owners management company (“OMC”) with respect to the Clarion Quay development in Dublin 1 (the “development”). The development is a mixed-use development comprising 184 apartments and twelve retail units spread over twelve blocks together with car parking. It is located between Mayor Street Lower, Alderman Way and Excise Walk, in Dublin 1.
7. The first defendant, DCC, succeeded to the rights and obligations of DDDA as of 1st March, 2016 pursuant to the Dublin Docklands Development Authority (Dissolution) Act, 2015.
8. The second to seventh defendants are partners in a partnership known as the “Campshire Partnership”. At all material times, DCC (after 1st March, 2016), or its predecessor, DDDA, (prior to 1st March, 2016), is or was the registered owner of the lands

upon which the Clarion Quay development has been constructed. Legal title to the reversionary interests, the common areas and any of the unlet areas is currently vested in DCC.

9. Of the twelve blocks comprising Clarion Quay, there are retail units on the ground floor of blocks 1 to 6 and 9 to 11. Campshire claims beneficial ownership over units 1A, 1B, 2, 3A, 3B, 4A and 6 and 37 car parking spaces.¹ North Wall Quay Partnership (in respect of the membership of which there is an overlap with the membership of Campshire) is the legal owner of unit 5A under a 200 year lease dated March, 2001. The remaining retail units are owned by unconnected parties.

10. The first two preliminary questions raised for the court's determination relate to the interpretation of the MCA entered into between Clarion, DDDA and North Wall Quay/Mayor Street Management Company on 13th July, 2001. The MCA was executed by the parties as a deed under seal. The signatories to the MCA on behalf of Clarion were members of Campshire. In the MCA, DDDA is described as the grantor, Clarion is described as the grantee and North Wall Quay/Mayor Street Management Company Ltd is described as the "management company".

11. Scheduled to the MCA are:-

- (a) a draft form of fee farm grant to be made between the parties to the MCA; and
- (b) in the fifth and sixth schedules, an example of an apartment lease and a retail unit lease in respect of the relevant apartments and retail units in the Clarion Quay development.

12. For the purposes of these proceedings, the parties agreed that the court may have regard to the following leases as sample apartment and retail unit leases:-

¹ Notwithstanding the agreed statement of facts, I note that, at para. 8 of its defence and counterclaim, Campshire pleads that it is the holder of the beneficial interest in 49 (and not 37) car parking spaces and certain storage facilities and also in apartment 14.

- (a) Lease of apartment 6, block 3, Clarion Quay dated 26th October, 2001 between DDDA, Campshire, North Wall Quay/Mayor Street Management Ltd, Clarion and the named lessee; and
- (b) Lease of unit 4B, Excise Walk, Clarion Quay dated 16th January, 2003 between DDDA, North Wall Quay/Mayor Street Management Company Ltd, Clarion and John Walsh and Tadgh Campion t/a C&W Partners.

13. Clause 10 of the MCA provides:-

“Save insofar as same are inconsistent herewith that the Law Society General Conditions of Sale (1995 edition) shall apply to this sale. In the event of any inconsistency between presents and the said General Conditions these presents shall prevail.”

14. The Law Society General Conditions of Sale (1995 ed.) were included in a book of core documents provided to the court.

15. As at 13th July, 2001, being the date of execution of the MCA, the Clarion Quay development had commenced but was not completed. The exact state of construction or progress will be a matter for evidence in any future trial but certificates for practical completion of the various blocks issued from August, 2002 onwards.

16. The residential units were sold on various dates between 2001 and June, 2006. One retail unit was sold in January, 2003. It appears from the facts agreed (and referred to at para. 9 above) that most, if not all, of the retail units have been sold.

17. For the purposes of the trial of the preliminary issues the subject of this judgment, the parties agreed that the court may accept the existence of the alleged defects pleaded in para. 23 of the statement of claim (as further set out in the plaintiff’s replies to particulars).

18. The relationship between DDDA and Campshire is governed by an agreement entitled *“Joint Venture Agreement – Residential and Retail Development”* dated 21st March, 2000

(i.e. the JVA). In the JVA, DDDA is described as the “*Authority*” and Campshire is described as the “*Developer*”. The parties agreed that the court should note in that regard that reference is made in the JVA to the “*Estate Management Company*” and to the “*Management Company*” and that these are, respectively, Clarion and North Wall Quay/Mayor Street Management Company Ltd.

19. Clarion was incorporated by Campshire pursuant to its obligations under the JVA. The original subscribers to the memorandum of association of Clarion were nominees of Campshire. The subscriber members stepped down from the board of Clarion in 2011.

20. In addition to these facts which were set out in the statement of agreed facts, there are also other relevant facts which are either agreed between the parties or which cannot be disputed. The first of those is that, in addition to commencing these proceedings in the High Court, Clarion also commenced proceedings in the Circuit Court on 1st May, 2018 (the “Circuit Court proceedings”) seeking orders pursuant to s. 24 of the MUDs Act against a number of respondents who were, or who claimed to be, “*subscriber members*” of Clarion and who had purported to submit a proxy, *qua* subscriber member, for the purposes of Clarion’s Annual General Meeting in 2018. DCC is not a party to the Circuit Court proceedings. There is an overlap between some of the respondents to those proceedings and four of the partners of Campshire named as defendants in these proceedings. Clarion seeks various remedial orders in the Circuit Court proceedings pursuant to s.24 of the MUDs Act.

21. There are also two other sets of related proceedings pending in the High Court. The first are proceedings brought by Campshire against Clarion seeking injunctive relief and damages in respect of the alleged trespass by Clarion on certain of the retail units, car parking spaces, storage areas and one of the apartments in Clarion Quay (High Court Record No. 2018/5344P). There is a further set of proceedings brought by another partnership, the North Wall Quay Partnership, against Clarion seeking injunctive relief and damages in respect of

alleged trespass by Clarion on another property, unit 5A, Excise Walk (High Court Record No. 2018/5343 P.).

D. Agreed Contractual Documents

22. The material which the parties agreed the court could consider in determining the preliminary issues directed to be tried included the various agreements listed in schedule 1 to the Order. Those agreements included the JVA, the MCA and a draft fee farm grant attached to the MCA and the standard form retail unit and apartment lease agreements. It is appropriate now to describe those agreements and to identify some of their relevant terms.

(1) The JVA

23. The first agreement in time is the JVA. The JVA was made between DDDA and Campshire on 21st March, 2000. As noted earlier, DCC is the statutory successor in title to DDDA and, for convenience, I will refer throughout this judgment to DCC as the relevant party to the JVA. The JVA described DCC as the “*Authority*” and Campshire as the “*Developer*”.

24. Recital A stated that Campshire submitted a tender dated 12th November, 1999 to DCC for the purpose of participating in the development of certain lands of Mayor Street, Dublin 1. Recital B then stated:-

“The Authority and the Developer have agreed to enter into these presents for the purpose of participating in the said development.”

25. Under clause 2 of the JVA, Campshire was to be given possession of the building site (as defined) and was required to commence, proceed with and complete the building works in accordance with an agreed schedule (the last completion date was to be 31st December, 2001).

26. Under clause 3.2.1, Campshire agreed to take the building site in its present condition and DCC did not warrant that any of the existing facilities on or off the building site were fit

for the purpose for which Campshire intended using them or for any particular purpose.

Clause 4 provided for the establishment of a development committee, one function of which was to oversee the granting of the leases in respect of the retail units and the apartments and the incorporation of the “*Estate Management Company*” which was to manage and maintain the completed common areas of the estate. It was agreed that as part of the management scheme for the common areas each lessee of a residential lease should be a member of that management company (clause 4.1(x) of the JVA). Clarion was incorporated as the “*Estate Management Company*” in accordance with that provision.

27. Clause 5 of the JVA set out the “*Developer’s Duties*”. It should be stressed that the JVA was between DCC and Campshire. Clarion was not a party to that agreement. The duties on Campshire under the JVA were owed to DCC as the other party to the agreement and not to anyone else. Under clause 5.1, it was agreed that Campshire, as the defined “*Developer*” under the agreement:-

“... shall, in accordance with and subject to the terms of this Agreement, design, execute and complete or procure the design, execution and completion of the Building Element:

- (i) with proper skill and care;*
- (ii) in a good and workmanlike manner in accordance with good building and engineering practice and all relevant building codes;*
- (iii) utilising good quality materials and equipment;*
- (iv) ...*
- (v) In compliance with the Building Control Regulations 1991, the Building Regulations 1991 and the Building Control Act 1990, where relevant;*

...”

28. Under clause 5.2, Campshire was required in carrying out its obligations under the JVA to “*substantially comply with the Statutory Requirements*”. The “*Statutory Requirements*” were defined in clause 1.1 as meaning:-

“all provisions relevant to the compliance by the Developer with its duties, either express or implied by this Agreement, under every Act of the Oireachtas and/or every Regulation or Directive of the European Community and/or every statutory instrument, and regulation made thereunder relevant to the Works or the Building Element.”

Campshire was also required under clause 5.2 to use reasonable endeavours to procure that others would substantially comply with those statutory requirements.

29. Provision was made in the JVA for the disposal of the residential and retail parts of the development by way of leases to be granted by DCC as lessor or landlord (clause 25). Clause 25(f) provided that Campshire was required to procure that the “*Estate Management Company*”, i.e. Clarion, would execute the retail and residential leases and certain other leases at the request of DCC. With respect to title, clause 37.3 provided that Campshire was to procure that the “*Estate Management Company*” would within fourteen days after the grant of the last of the retail and residential leases (and the leases in respect of certain other specified areas) accept delivery of a fee farm grant from DCC, subject to and with the benefit of those leases.

(2) *The MCA*

30. The MCA is a crucially important document for the purposes of the issues to be determined. The MCA was made on 13th July, 2001. The parties to the MCA were DDDA (now DCC and, again, I will refer to the relevant party throughout this judgment as DCC), Clarion (which by that stage had been incorporated as the relevant OMC) and North Wall Quay/Mayor Street Management Company Ltd (the “North Wall Quay Management

Company”), which was described in the MCA as the “*Management Company*” but whose role was never fully described or explained to the court. I have assumed that the North Wall Quay Management Company is not relevant to any of the issues which I have to decide in this judgment. DCC is referred to as the “*Grantor*” under the MCA and Clarion as the “*Grantee*”. Although Campshire is referred to in the MCA, it is not a party to the MCA.

31. Clause 1 of the MCA stated:-

“The Grantor and the Campshire Partnership... are in the course of developing certain property situate at Clarion Quay, Excise Walk, International Financial Services Centre, North Wall Quay, Dublin 1 (hereinafter called ‘the Estate’) and to (sic) erecting thereon apartments, retail units and carparking spaces (‘the Lettable Areas’) and intend to dispose of the Lettable Areas by way of leases for a term of 200 or 250 years from the 1st day of January 2000.”

32. Clause 2 stated:-

*“For reasons of good estate management, the Grantor hereby agrees to sell and the Grantee hereby agrees to purchase for the sum of £10.00 (ten pounds) **ALL THAT AND THOSE** the Estate and all appurtenances thereto subject to the Leases of the Lettable Areas hereafter to be granted by the Grantor to the purchasers of the Lettable Areas in the Estate.”*

33. Clause 3 stated:-

“The Grantee agrees that the Grantor shall be at liberty to dispose of the Lettable Areas in the manner specified in clause 1 hereof or otherwise as the grantor may see fit.”

34. Clause 4 is a very important term in the MCA for present purposes and was heavily relied upon by DCC and Campshire in resisting the case made by Clarion on the first two issues directed to be tried. Clause 4 stated:-

*“Notwithstanding the intention of the Grantor and the Campshire Partnership specified in clause 1 hereof to carry out the development of the Estate in the manner specified at clause 1 hereof or otherwise, the Grantor shall not be under any obligation to complete or cause to be completed such development and may alter such development as it may wish and the Grantee hereby agrees and confirms that it has not been induced to enter into this Agreement by reason of the fact that any plan has thereon the present intended development of the Estate or any part thereof or by any representation by any person acting or purporting to act on behalf of the Grantor that the Estate shall conform in all respects with any plan. There is reserved unto the Grantor full right and liberty to alter such development or to discontinue developing the Estate and to exclude such works and erections thereon or any part thereof as the Grantor may think fit and notwithstanding anything contained in this Agreement or in any of the leases of the Lettable Areas there is reserved to the Grantor full right and liberty to vary the location, layout and extent of the Estate and to record the inclusion of additional lands thereto including the right to exclude any part or parts therefrom (in which case the reference here to the Estate shall be modified accordingly) **PROVIDED HOWEVER** that the Grantor shall have obtained any necessary planning permission for any such alteration (including alteration by way of discontinuance of the development or variation).”*

35. Under clause 6 of the MCA, completion was to take place *“28 days after the completion of the sale of the last of the Lettable Areas or within 21 years from the date hereof (whichever is the earlier)”*.

36. Clause 7 provided that the assurance by DCC, as grantor, to Clarion, as grantee, was to be by way of deed of fee farm grant in the form set out and attached in the schedule to the MCA with any necessary modifications to take account of any variations in the estate. Clause

7 further provided that the fee farm grant was to except and preserve to DCC and to the North Wall Quay Management Company certain easements, rights and privileges which were set out in the third schedule to the draft fee farm grant.

37. Clause 9 of the MCA provided for an indemnity for DCC by Clarion once the estate was assured to Clarion under the fee farm grant in respect of *“all liability on foot of the covenants and conditions in the leases of the Lettable Areas”*.

38. Another very important term of the MCA was clause 10. It stated:-

“Save insofar as same are inconsistent herewith that the Law Society General Conditions of Sale (1995 edition) shall apply to this sale. In the event of any inconsistency between presents and the said General Conditions these presents shall prevail.”

The Law Society General Conditions of Sale (1995 edition) (the “general conditions”) were also listed as an agreed document in schedule 1 to the Order. One of the issues which I have to determine (Issue (1)) is whether DCC is bound by the provisions of general condition 36(d) of the general conditions. It will be necessary to consider certain of the general conditions in more detail later.

(3) *The Draft Fee Farm Grant*

39. As I have indicated, the MCA attached a draft deed of fee farm grant which (subject to any required modifications) was agreed to be the form in which the estate would be assured by DCC to Clarion. It is appropriate to draw attention to certain of the provisions of the draft deed of fee farm grant.

40. Recital 1 provided that DCC and Clarion agreed that a contract of tenancy and the relationship of landlord and tenant should be created between them in respect of the lands in question. In the operative part of the draft deed DCC agreed to grant a demise to Clarion the premises described in the first schedule together with the rights, reasons and privileges set out

in the second schedule but accepting and reserving from the grant and demise to DCC and to the North Wall Quay Management Company certain rights, easements and privileges which were set out in the third schedule, subject to and with the benefit of the retail and residential leases. The premises were described in very broad and extensive terms in the first schedule and included all of the lands and buildings comprised in the Clarion Quay Development, “*all halls, staircases, landings, lifts and other parts of the buildings forming part of the Estate which are used in common by the owners or occupiers of any two or more of the apartments or the retail units (and car parks) forming part of the estate*”, “*the main structural parts of the buildings forming part of the estate including the rooftop patios, foundations, basements and external walls*” (but not the glass in the windows or the internal faces of the external walls) and all pipes and drains etc. not used solely for the purpose of one apartment or retail unit, and the car parks (excluding car park spaces demised under the residential and retail leases).

41. The draft deed provided that Clarion would covenant to observe and perform certain obligations set out in the fourth schedule. Those covenants included covenants to pay the reserved rent (if demanded), to keep the premises in a good state of repair, decoration and condition throughout and so on. Paragraph 5 of the fourth schedule stated:-

“(Save where the obligations rests (sic) with the Management Company²) the Grantee shall from time to time and at all times during the said grant well and sufficiently repair and keep in repair and first class decorative condition the premises and all buildings for the time being thereon.” (emphasis added)

Clarion repeatedly stressed the obligation imposed upon it under this covenant to repair and keep in repair and “*first class decorative condition*” the premises and buildings, in its submissions to the court in respect of the issues directed to be tried.

² ie. The North Wall Quay Management Company and not Clarion.

42. Paragraph 9 of the fourth schedule provided that Clarion was required to do “*all such works as under any act of the Oireachtas or rule of law are directed or necessary to be done on or in respect of the premises (whether by landlord, tenant or occupier) and shall keep the Grantor [i.e. DCC] indemnified against all claims, demands and liabilities in respect thereof*”.

43. Paragraph 13 of the fourth schedule provided that Clarion was required to perform and observe certain covenants on the part of DCC with the owners of the apartments under the residential leases, insofar as those covenants were intended to bind the premises or Clarion and indemnify DCC in respect of actions or claims arising from the breach of those covenants.

44. The draft fee farm grant made provision for DCC to re-enter the premises and determine the grant in the case of a breach by Clarion of any of the covenants imposed upon it under the grant. Clarion pointed to the existence of the re-entry clause in the context of its covenant to repair the premises and keep them in repair and “*first class decorative condition*” in support of its case in respect of each of the issues to be tried.

(4) The Leases

(a) *The retail lease*

45. The parties agreed to put before the court as a sample retail lease, the lease in respect of retail unit 4B in block 6. The retail lease is dated 16th January, 2003. The parties are DDDA (now DCC and, as with the other documents, I will refer in this judgment to the lessor as DCC) as lessor/landlord, the North Wall Management Company (described in the retail lease as the “*Management Company*”), Clarion (described in the retail lease as the “*Estate Company*”) and the tenant. Clause 1.4 of the lease described the scheme of disposal and management in respect of the estate. The North Wall Quay Management Company was incorporated with the object of managing the public areas on behalf of the landlord, the tenant

and the occupants of the relevant area and Clarion (clause 1.4(a)). Clarion was incorporated with the object of acquiring the estate, subject to and with the benefit of the retail and residential leases of the “*Lettable Areas*” (defined in clause 1.1 as meaning “*the Apartments and the Retail Units and any other parts of the Estate leased or intended to be leased to investors or the occupational tenants*”) and assumed the responsibility for the future management of the estate (clause 1.4(b)). Clause 1.4(c) then stated:-

“As part of the scheme for the disposal and future management of the Estate, the Landlord has entered into the Management Agreement with the Management Company and the Estate Company wherein, inter alia, the Landlord has agreed to convey all of its estate right title and interest in the Estate to the Estate Company as soon as leases for a period of not less than 200 years of all of the Lettable Areas have been granted.”

The reference to the “*Management Agreement*” in clause 1.4(c) is a reference to the MCA.

46. Section 2.0 contains the provisions governing the demise, the premium, the rent and the covenants provided for under the retail lease. Those covenants include covenants by Clarion and The North Wall Quay Management Company which are contained in the fourth schedule. Relevant for present purposes is a covenant contained in para. 6 of part two of the fourth schedule. Under that paragraph, Clarion agreed to “*keep the Retained Parts and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair, decoration and condition including the renewal and replacement of all worn or damaged parts...*”. The term “*Retained Parts*” was defined in clause 1.1 of the retail lease to mean all parts of the estate which do not comprise the lettable areas (i.e. the apartments and retail units) including but not limited to the common areas, the main structure of the buildings including the roof, foundations and external walls and so on. The covenant in para. 6 was subject to the proviso that it was without prejudice to Clarion’s right to recover from the

tenant or any other person in respect of a loss or damage caused to Clarion or to those parts of the property by the negligence or the wrongful act or default of the tenant or such of a person. Finally, in respect of the retail lease, clause 2.2. contained a provision in very similar terms to clause 4 of the MCA concerning the right of DCC, as landlord, to alter the development (other than the demised unit itself).

(b) *The residential lease*

47. The parties agreed that the lease in respect of apartment 6 in block 3 of Clarion Quay was to be treated as the sample residential lease. That lease was dated 26th October, 2001. The parties were DDDA (now DCC and will, as before, be referred to in this judgment as such), Campshire (referred to in the lease as the “*Developer*”), The North Wall Quay Management Company, Clarion and the lessee. The term of the lease was 250 years from 1st January, 2001.

48. At para. 6 of clause 1.2 of the residential lease, reference was made to the MCA and the fact that DCC had agreed under the MCA to transfer to Clarion the estate by way of fee farm grant as of the completion date provided in that agreement, but otherwise subject to and with the benefit of the leases of the lettable areas and other encumbrances affecting the estate.

49. Clause I provided for the demise by DCC and for the demise and confirmation by Clarion to the lessee of the relevant apartment together with the various other rights set out in the fourth schedule, with respect to the retained parts of the estate including the common areas, for the term of 250 years. DCC and Clarion granted the lessee an exclusive licence to use the balcony in respect of the premises. Clarion further granted and confirmed to the lessee the easements, rights and privileges set out in the fourth schedule.

50. In clause IV, Campshire covenanted with the lessee that, until completion of the MCA, Campshire would observe and perform the covenants contained in the seventh schedule provided that on completion of the MCA, the liability of Campshire under that

clause would “*absolutely cease*”. Under clause V, Clarion covenanted with the lessee that, as and from completion of the MCA, Clarion would perform and observe the covenants contained in the seventh schedule and that references in the seventh schedule to the “*Developer*” (i.e. Campshire) would, as and from completion of the MCA, be deemed to be references to Clarion. Among the relevant covenants set out in the seventh schedule was that contained in para. 4 which stated:-

*“The Developer shall keep the Retained Parts and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair, decoration and condition including the renewal and replacement of all worn or damaged parts **PROVIDED** that nothing herein contained shall prejudice the Developer’s right to recover from the lessee or any other person the amount or value of any loss or damage suffered by or caused to the Developer for the Retained Parts by the negligence or other wrongful act or default of the Lessee or such other person.”* (emphasis added)

51. In its submissions on the four issues to be tried, Clarion stressed the fact that on completion of the MCA, it would be obliged to perform the covenant contained in para. 4 of the seventh schedule to keep the retained parts (which includes the common areas and the main structure of the buildings) in a “*good and tenantable state of repair, decoration and condition*”.

52. Clause IX of the residential lease contains a similar provision to that contained in the retail lease and in clause 4 of the MCA entitling Campshire, as the developer, to alter the development (other than the apartment the subject of the lease).

53. It might be helpful to recap and summarise here the parties to the relevant agreements. The parties to the JVA are DCC and Campshire. Clarion is not a party to the JVA. The parties to the MCA are DCC, Clarion and The North Wall Quay Management Company. Campshire, although referred to in the MCA, is not a party to the MCA. The parties to the fee farm grant

under which the estate will be transferred to Clarion will be DCC, Clarion and The North Wall Management Company. Campshire will not be a party to the fee farm grant. The parties to the retail leases are DCC, The North Wall Management Company, Clarion and the tenants. Campshire is not a party to the retail leases. Finally, the parties to the residential leases are DCC, Campshire, The North Wall Quay Management Company, Clarion and the lessees.

E. The Pleadings Case

54. In order better to understand the issues which arise for determination on foot of the Order, it is necessary to consider how the case has been pleaded by the parties.

55. Having initially issued proceedings against DCC only, Clarion applied to join Campshire to the proceedings and it was joined by order made on 12th October, 2018.

(1) Clarion's Statement of Claim

56. In the statement of claim, having described the parties, Clarion referred to the JVA and pleaded that DCC and Campshire were the “*developers*” of Clarion Quay within the meaning of the MUDs Act. Clarion then referred to the MCA and to the draft fee farm grant attached to it and to certain of the express terms of the MCA and the fee farm grant, including some of the terms to which I have referred earlier.

57. Having referred to clause 10 of the MCA and to its application of the general conditions to the sale the subject of the MCA, save to the extent that they were inconsistent with the MCA, Clarion then pleaded (at paras. 18 and 19) that DCC is and will, at the time of completion under the MCA, be obliged to comply with the provisions of general condition 36(d) which provides for a warranty on the part of a vendor to the effect that there has been substantial compliance with the provisions of the Building Control Act, 1990 or of any Regulations made thereunder to the extent that they applied to the design or development of

the relevant property and imposes an obligation on the vendor on or prior to completion to furnish to the purchaser a certificate or opinion confirming such substantial compliance.

58. Having pleaded that general condition 36(d) applied to the MCA, Clarion then pleaded (at para. 20) that the MCA contained certain implied terms. Those implied terms were as follows:-

- (1) That DCC would ensure completion of the Clarion Quay development;
- (2) That as regards the work that had already been done at the date of the MCA, the quality of the work and materials were such that the Clarion Quay development, when completed, would be reasonably fit for immediate occupation;
- (3) That as regards works that remained to be done at the date of the MCA, the quality would be such that the Clarion Quay development, when completed, would be reasonably fit for immediate occupation;
- (4) That as regards what then remained to be done at the date of the MCA, the work would be carried out in a good and workmanlike manner with sound and suitable materials; and
- (5) That the Clarion Quay development would be constructed in a *“first class state of decorative repair and condition”*.

59. With respect to the implied term at (5) above, Campshire sought particulars as to the source of the alleged implied term. In replies to particulars, Clarion pleaded that that implied term arose from the covenants contained in the fourth schedule to the draft fee farm grant attached to the MCA and was also *“reflected in”* the obligations of Campshire under the JVA. It was further stated that the reference to *“first class state”* was to a *“state of repair and condition for a high specification development free from defects such as persist in the*

Clarion Quay development” (para. 7d of Clarion’s replies to particulars dated 15th January, 2019).

60. At para. 21 of the statement of claim, Clarion pleaded that DCC and Campshire, as “*developers*” within the meaning of that term in the MUDs Act, were obliged (a) to complete the development of the common areas in accordance with, *inter alia*, the Building Regulations and (b) to indemnify Clarion in respect of all claims made against it of whatever nature or kind in respect of acts or omissions by the “*developer*” in the course of the works connected with the development. In replies to particulars sought by Campshire, Clarion stated that it was relying on ss. 1, 2, 7, 9, 13 and 31 of, and schedule 3 to, the MUDs Act in support of this plea (para. 8b of Clarion’s replies to particulars of 15th January, 2019).

61. Clarion pleaded (at para. 22 of the statement of claim) that in breach of DCC’s contractual obligations, in breach of DCC and Campshire’s obligations as developers and in breach of their duty of care to Clarion, DCC and Campshire failed to ensure that the development was carried out, completed and constructed in a manner consistent with the five implied terms of the MCA pleaded at para. 20. In replies to particulars, Clarion confirmed that the claim in contract in this paragraph of the statement of claim was against DCC only, with the other claims (including those made in reliance on the MUDs Act) being made against DCC and Campshire.

62. Clarion pleaded in the statement of claim (paras. 33 onwards) that, notwithstanding the alleged breaches by and failures on the part of DCC and Campshire, they wrongfully contended that Clarion was obliged to join in further leases with Campshire on the sale of further units in the development. Clarion pleaded that in circumstances where DCC and Campshire had not complied with their obligations under the MCA, under the MUDs Act or in accordance with their respective duties of care to Clarion, neither was entitled to rely on the MCA, the MUDs Act or otherwise to require Clarion to join in or to be a party to leases

on the sale of properties at the Clarion Quay development, including the retail and apartment units that remained unsold (para. 24). Clarion then pleaded that if units were sold, DCC would not be in a position to call on Clarion to complete the MCA and DCC would be required to provide certificates pursuant to general condition 36(d) on completion of the relevant sale (para. 25).

63. Clarion contended that it was entitled to an order of specific performance of the MCA and, in particular, an order directing DCC to ensure completion of the development in a good and workmanlike manner in accordance with the applicable statutory provisions and regulations (including the Building Control Act, 1990 and the Regulations made under it) (para. 26).

64. Clarion sought several forms of declaratory relief against DCC including a declaration that DCC was and is obliged to ensure that the development is constructed and completed in accordance with the implied terms pleaded at para. 20, a declaration that Clarion would not be obliged to complete the MCA until DCC had complied with those alleged obligations, a declaration that on completion of the MCA, DCC would be obliged to comply with general condition 36(d) and with the warranty provided for thereunder and that DCC would be required on completion of the sale under the MCA to provide a certificate or opinion of compliance with respect to substantial compliance with the Building Control Act, 1990 and the Building Regulations. Specific performance or, in the alternative, damages for breach of the MCA was sought by Clarion against DCC. Those reliefs were all sought against DCC only.

65. With respect to the relief sought against both DCC and Campshire, various declarations were sought as well as damages. Clarion sought a declaration that it was not obliged to join in any lease or sublease to be granted by DCC and Campshire on the sale of any further units in the development having regard to their failure to comply with obligations

under the MCA or with their duty of care to Clarion. A declaration was also sought that DCC and Campshire were obliged to indemnify Clarion in respect of all claims and costs as however arising from defects in the design, construction and certification of the development. Damages were sought against DCC and Campshire for breach of contract, negligence and breach of duty and on various other grounds.

(2) DCC's Defence and Counterclaim

66. In its defence and counterclaim, DCC pleaded that Clarion's claim was statute barred. That is not one of the issues which I have to decide pursuant to the order. I mention the most relevant pleas in DCC's defence and counterclaim to the issues which I have to decide.

67. DCC denied that general condition 36(d) applies to the MCA for various reasons. First, it pleaded that by reason of clause 10 of the MCA, general condition 36(d) could not apply if its provisions were inconsistent with the terms of the MCA. It contended that general condition 36(d) is inconsistent with clause 4 of the MCA (which I have quoted earlier). It also contended that that general condition is inconsistent with a number of other general conditions, namely, general conditions 16, 43 and 44. DCC pleaded that there is no express or implied term in the MCA or in the draft fee farm grant that the quality of work done and the material used would be such that on completion of the MCA the property (which would include the retained areas and the common areas) would be reasonably fit for human habitation or that the work would be done in a good and workmanlike manner, with sound or suitable materials or that the buildings would be in a good state of repair or in a "*first class state of decoration*" (para. 9).

68. DCC denied that the implied terms pleaded at para. 20 of the statement of claim form part of the MCA. DCC also denied that it was subject to obligations under the MUDs Act which it said could not operate retrospectively to amend or alter DCC's obligations under the MCA (which was executed in 2001). DCC further denied that it was obliged to complete the

development of the common areas of the development or to indemnify Clarion in respect of any claims made against Clarion in respect of acts or omissions of the developer in the course of carrying out the works, particularly with respect to such acts or omissions carried out prior to the MUDs Act coming into force in April, 2011.

69. While denying the alleged defects in the development (the fact of such defects are admitted solely for the purposes of the issues which I have to determine), DCC pleaded that Clarion is, nevertheless, required under the MCA to join in further leases with Campshire on the sale of further units in the development (paras. 13 and 14).

70. DCC denied that it has been in breach of any of its obligations under the MCA or under the MUDs Act or in breach of any other duties of care to Clarion or that as a result of any of these, DCC is precluded from relying on the MCA or the MUDs Act to require Clarion to join in further leases in respect of the sale of properties in the development (para. 15).

DCC pleaded that it was entitled to call on Clarion to complete the MCA without having to provide certificates of compliance under general condition 36(d) on completion. DCC then referred to the alleged failure by Clarion to keep the property under its control in proper repair and alleged breaches of covenant by Clarion in respect of its contractual obligations under the MCA and, in particular, under certain of the covenants contained in the fourth schedule to the fee farm grant.

71. In its counterclaim, DCC sought to rely on express or implied terms in the MCA to the effect that Clarion would cooperate in the disposal of the lettable areas; that Clarion would execute leases of the lettable areas to the nominees of DCC and Campshire; and that Clarion would join in leases for the lettable areas in order to ensure the efficient operation of the development, the common areas and the required services for the development (para. 32). DCC also sought to rely on s. 6 of the MUDs Act as imposing a requirement on Clarion to

join in the residential leases and pleaded that Clarion has failed to accept the conveyance to it of the common areas or to join in the final leases.

(3) Clarion's Reply and Defence to DCC's Defence and Counterclaim

72. In its reply and defence to DCC's defence, Clarion disputed the contention that general condition 36(d) did not apply and that the general conditions relied on by DCC were inconsistent with it. It disputed the application of those other general conditions. Clarion further pleaded that its reliance on general condition 36(d) was not inconsistent with clause 4 of the MCA. Clarion continued to rely on the implied terms pleaded at para. 20 of the statement of claim.

73. With respect to the MUDs Act, Clarion pleaded that that Act does have retrospective effect, and can both alter the contractual arrangements agreed between those involved in a development to which the MUDs Act applies and can operate so as retrospectively to impose obligations on (*inter alia*) DCC (para. 6). Clarion disputed DCC's contention that it was obliged to join in further leases or to complete the MCA without certificates under general condition 36(d). It further pleaded that DCC was obliged to furnish certificates confirming completion of the development in accordance with all relevant planning permissions and in accordance with the Building Control Acts under schedule 3 to the MUDs Act. In its defence and counterclaim, Clarion disputed the entitlement of DCC to rely on s. 6 of the MUDs Act without complying with the obligations on developers contained in that Act (paras. 14 and 16).

(4) Campshire's Defence and Counterclaim

74. In its defence and counterclaim, Campshire also pleaded that Clarion's claim is statute barred. With respect to the MUDs Act, Campshire raised a number of preliminary objections. First, it pleaded that, insofar as reliefs are sought by reference to the provisions of the MUDs Act, the Circuit Court has exclusive jurisdiction in respect of such claims. Second, it pleaded

that as the property the subject of the proceedings was completed in or about 2002, the MUDs Act does not have retrospective effect so as to apply to the claims made by Clarion in reliance upon it (preliminary objections IV and V). Campshire reiterated the plea that the Circuit Court has exclusive jurisdiction in respect of Clarion's claims under the Act (para. 5) in its substantive defence.

75. At para. 8 of its defence and counterclaim, Campshire pleaded that it continues to hold the beneficial interest in an apartment, a number of retail units and car park spaces and storage facilities. Campshire pleaded a trust of a right of action in respect of the MCA (notwithstanding that it is not a party to the MCA). This was explained by Campshire's counsel at the end of the hearing to be an assertion of a *Vandepitte* trust (the name coming from the decision of the Privy Council in *Vandepitte v. Preferred Accident Insurance Corporation of New York* [1933] AC 70 ("*Vandepitte*"). Counsel explained that, at the time of the delivery of its defence and counterclaim, Campshire was unaware as to what DCC's position would be with respect to the enforcement of the MCA. Once it became clear that DCC intended to rely on and enforce the provisions of the MCA against Clarion, it was no longer necessary for Campshire to seek to rely on such a trust. It was confirmed, therefore, that, in light of the position adopted by DCC in its defence, Campshire was no longer relying on an alleged trust of a right of action in respect of the MCA.

76. Campshire disputed the application of general condition 36(d). It further denied the existence of any of the implied terms of the MCA pleaded at para. 20 of the statement of claim. It denied that the plaintiffs were entitled to rely on the MUDs Act or that the alleged obligations relied on by Clarion are justiciable before the High Court or that the MUDs Act has retrospective application in the manner sought by Clarion. Campshire pleaded that Clarion is obliged to join in further leases of lettable areas and, in particular, those in respect

of an apartment, a retail unit, a number of carpark spaces and the storage area as a matter of contractual and statutory obligation.

77. In its counterclaim, Campshire sought expressly to rely on certain express or implied terms of the MCA with respect to the completion of the MCA and joining in the execution of leases (para. 5). Campshire pleaded that in the event that Clarion established that the provisions of the MUDs Act are justiciable by the High Court, it was reserving the right to refer to obligations on OMC under the MUDs Act to take a transfer of the common areas of a multi-unit development and, where requested by a developer, to join in assurances of units in such a development (para. 6). Campshire also pleaded the existence of a collateral agreement to the MCA between Clarion and Campshire (para. 7). It sought various reliefs in the counterclaim seeking to compel Clarion to join in leases of the remaining lettable areas and to comply with its obligations under the MCA to joining such leases and to take an assurance of the estate.

78. The court was not provided with any reply by Clarion to Campshire's defence and counterclaim. However, I have assumed that it has or would join issue with the matters pleaded just as it has done in the case of the defence and counterclaim delivered by DCC.

F. Trial of Preliminary Issues

79. It can be seen from this description of the matters pleaded between the parties that there are a large number of matters in dispute between them. Following the delivery of these pleadings, various motions were brought by DCC and Campshire seeking a trial of certain preliminary issues and/or a modular trial, as well as security for costs. Ultimately, agreement was reached between the parties as to the issues which they wished to have tried in advance of the other issues in the case. They are the four issues set out in the Order which I have referred to earlier. In summary, those issues are:-

- (1) whether DCC/its predecessor is bound by general condition 36(d);

- (2) whether the terms pleaded at para. 20 of the statement of claim are implied terms of the MCA;
- (3) whether Clarion is entitled to rely on the MUDs Act in the proceedings; and
- (4) if so, whether DCC and Campshire as “*developers*” within the meaning of the MUDs Act are obliged (a) to complete the development of the common areas in accordance with (*inter alia*) the Building Regulations and (b) to indemnify Clarion in respect of all claims made against it of whatever nature or kind in respect of acts or omissions by DCC and Campshire in the course works connected with the Clarion Quay development.

80. With respect to issue (4), the parties were agreed that I do not have to determine whether DCC and Campshire or either of them is or are “*developers*” within the meaning of that term in the MUDs Act and that that issue is not encompassed by issue (4).

81. While I have some reservations as to the appropriateness of selecting these four issues from the range of issues in dispute between the parties evident from a review of the pleadings, as it is highly doubtful that a selection of these issues will ultimately lead to a significant shortening of the case, and while it has been necessary to attempt to determine these issues, not on the basis of witness statements with witnesses giving evidence and being cross-examined, but on the basis of certain agreed facts (and other facts which cannot be disputed), nonetheless I am satisfied that I can determine the four issues set out in the Order. I have had the benefit of helpful written and oral submissions which have greatly assisted my task.

G. Structure for Determination of the Issues

82. I will deal in turn with each of the issues to be determined. The first two issues concern the proper interpretation of the MCA and whether or not general condition 36(d)

forms part of that contract (issue (1)) and whether or not certain terms are implied into the contract (issue (2)). Since both those contractual issues require the court to interpret the MCA, it is appropriate before turning to a detailed consideration of the issues themselves that I identify and briefly discuss the relevant legal principles applicable to the construction or interpretation of contracts. Having done so, I will then address the first two issues. As part of my consideration of those issues, it will be necessary for me to consider some further legal principles applicable to the implication of terms in a contract.

83. Having addressed those two contractual issues, I will then turn to consider the next two issues (issues (3) and (4)), both of which concern the MUDs Act and whether Clarion can rely on that Act in support of its claims in the proceedings and, if so, whether the MUDs Act imposes obligations on DCC and Campshire (a) to complete the development of the common areas of the development in accordance with (*inter alia*) the Building Regulations and (b) to indemnify Clarion in respect of certain claims arising from the works connected with the development. Those issues in turn will require the court to consider various sub-issues such as the jurisdiction of the High Court to consider the claims made by Clarion in the proceedings based on the MUDs Act and, if so, whether that Act is intended to be applied retrospectively so as to confer an entitlement to Clarion to any of the reliefs sought in the proceedings in respect of the development, the construction of which was completed, and many units in which were sold, many years prior to the MUDs Act coming into force.

H. Issues (1) and (2): The Contractual Issues

(1) Relevant Legal Principles Governing Construction of Contracts

84. Before considering the two contractual issues and whether certain terms form part of, or should be implied in, the MCA (issues (1) and (2)), it is necessary first to identify the relevant principles governing the construction or interpretation of contracts.

85. The starting point in terms of the task of the court in construing or interpreting a contract is the following statement of Keane J. in the Supreme Court in *Kramer v. Arnold* [1997] 3 IR 43, where he said:

“In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances.” (per Keane J. at p. 55)

86. Those observations echo what had previously been said by Griffin J. in the Supreme Court (in the context of the interpretation of an insurance policy) in *Rohan Construction Ltd v. Insurance Corporation of Ireland Plc* [1988] 373, where he stated:-

“It is well settled that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The Court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at, and not merely a particular clause.” (per Griffin J. at p. 377)
(emphasis added)

87. The general principles applicable to the construction or interpretation of contracts under Irish law are well settled and have been the subject of several significant recent decisions of the Supreme Court. The relevant principles were set out by Lord Hoffman in his seminal judgment in *Investor Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 (at p. 912) and were expressly approved and applied in this jurisdiction by the Supreme Court in several cases, including *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 274, *ICDL v. European Driving Licence Foundation* [2012] 2 IR 327,

Law Society of Ireland v. Motor Insurers Bureau of Ireland [2017] IESC 31 (“*MIBI*”). The five principles set out by Lord Hoffman are so well known that it is unnecessary to set them out again here.

88. In very brief summary and without attempting comprehensively to summarise the principles set out in those cases, the following can be stated. The interpretation of a written contract is an entirely objective process. The court must interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties when the contract was made. The court looks not only at the words used in the contract but also considers the relevant legal and factual context at the time the contract was made. Context is given a wide meaning and includes any objective background facts or provisions of law which would affect the way the words used in the contract would have been understood by a reasonable person. The contract must be considered as a whole and not by reference to the individual words used.

89. The Supreme Court extensively considered and discussed the applicable legal principles on the construction of contracts in *MIBI*. Although the court was split on the outcome of the case, several members of the court adopted what has been described as the “*text in context*” approach to interpretation. Although he was in the minority on the outcome of the case, Clarke J. referred to this as being the “*modern approach*” to the construction of contracts (at para. 10.4). His observations on the “*text in context*” approach to interpretation did not differ substantially from those made by other members of the court, including O’Donnell J. who delivered the lead judgment. Clarke J. described the approach in this passage:-

“...It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard

to the context or circumstances in which the document in question came into existence. On the other hand it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, a contract, the rules of an organisation, a patent or, indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights and obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence.”

(para. 10.4)

90. At para. 10.5, Clarke J. observed that the “*main underlying principle*” is that such a document should be interpreted by the court:-

“in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context.”

91. Clarke C.J. (as he had by that stage become) repeated those observations in his judgment in *Jackie Greene Construction Ltd v. Irish bank Resolution Corporation (In Special Liquidation)* [2019] IESC 2.

92. In his leading judgment for the majority in *MIBI*, O'Donnell J. made a number of important observations on the proper approach to interpretation of contracts. At para. 6 of his judgment, O'Donnell J. stated that the meaning of the relevant provision of an agreement as *"to be determined from a consideration of the Agreement as a whole"* and *"not an interpretation in which some aspects win out over others"*. He stated:-

"Rather it is a case of providing an interpretation of the Agreement as a whole, which not only relies on those features supportive of the interpretation, but also most plausibly interprets the entire Agreement and in particular those provisions which appear to point to a contrary conclusion. Even if the majority of factors appeared to tend broadly to one side of the argument, that interpretation cannot be accepted if it is wholly and fundamentally irreconcilable with some essential features... It is important therefore to test any interpretation of a clause against the understanding of the agreement to be gleaned from what is said, and sometimes not said, elsewhere in the agreement."

93. At para. 8, O'Donnell J. referred to the *"importance of approaching the Agreement in a holistic way rather than having immediate resort to case law"*.

94. At para. 12, O'Donnell J. referred to the complexity of language and of the business of communication which might throw up issues which are not anticipated or precisely considered when the relevant agreement was made. He continued:-

"It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard, the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted

at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement. All of these are features which point towards the interpretation of the agreement, and in complex cases, a court must consider all of the factors, and the weight to be attributed to each. The reasonable person who is the guide to the interpretation of the agreement is expected not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate...”

95. Later, at para. 14, O’Donnell J. observed:-

“It is necessary to understand the entirety of an agreement and then to consider what that means for the specific issue now raised. It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later.”

96. Finally, at para. 30, O’Donnell J. expressed the view that the majority in the Court of Appeal had elevated the *“ordinary meaning of the words to a position which is not perhaps entirely merited”*, although he did agree that *“since in any agreement words are used to convey meanings and to express agreement, very considerable weight must be given to them...”*

97. The importance of context can also be seen in the observations of Fennelly J. in the Supreme Court in *ICDL* where he stated:-

“Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words used should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words.” (per Fennelly J. at para. 70, p. 352)

98. The significance of context can also be seen in some of the leading English cases. Reference was made to some of these cases in the submissions of DCC and Campshire. In *Arnold v. Britton* [2015] AC 1619 (“*Arnold*”), Lord Neuberger stated that the meaning of the relevant words in the contract at issue (in that case certain leases) had to be considered in their “*documentary, factual and commercial context*”. He continued:-

“That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions...”

(per Lord Neuberger at para. 15, pp. 1627-1628)

99. One of the matters to be considered, according to Lord Neuberger, is “*commercial common sense*”. He stressed, however, that this is not to be invoked retrospectively and observed that:-

“The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.” (per Lord Neuberger at para. 19, p. 1628)

100. Lord Clarke had mentioned, in *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 (“*Rainy Sky*”), in the context of his description of the unitary process of construction, that:-

“If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”

(per Lord Clarke at para. 21)

101. That remains the position in English law following *Arnold*: (see: *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24, per Lord Hodge at paras. 8-15).

102. In certain circumstances, recourse can be had to business or commercial common sense in the interpretation of an agreement. In *BNY Trust Co (Ireland) Ltd v. Treasury Holdings* [2007] IEHC 271 (“*BNY*”), Clarke J. (while a judge of the High Court) cited with approval the passage from the judgment of Lord Diplock in *Antaios Compania Naviera SA v. Salen Rederierna A.B.* [1985] AC 191 (at p. 201) where he said that:-

“...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense.” (approved by Clarke J. in *BNY* at para. 4.4)

103. It should, however, be noted that, in *Marlan Homes Ltd v. Walsh* [2012] IESC 23 (“*Marlan Homes*”), McKechnie J. in his judgment for the Supreme Court stated:-

“It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned.”

(per McKechnie J. at para. 51)

104. McKechnie J. approved the statement of Lord Mustill in *Charter Reinsurance v. Fagan* [1997] AC 313 that:-

“...to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court...”

(per Lord Mustill at p. 388 and approved by McKechnie J. at para. 52 of *Marlan Homes*)

105. Another word of caution with regard to the use of commercial common sense in construing a contract was expressed by MacMenamin J. in his judgment (in the minority) in *MIBI*. He expressed concern that:-

“...the application of ‘business commonsense’ can, in certain circumstances be difficult to distinguish from subsequent rectification of a contract. At what point does business commonsense end and rectification begin, albeit with the benefit of hindsight? Part of the attraction of a ‘contextual approach’ is that it can obviate injustice. But it can also create contractual uncertainty, or it can lead to an interpretation with the wisdom of hindsight.” (per MacMenamin J. at para. 16)

106. MacMenamin J. approved of the limitations to the court’s reliance on commercial or business common sense discussed by Lord Neuberger in *Arnold* and agreed that it should not *“undermine the importance of the language and wording of the provision to be construed”* (per MacMenamin J. at para. 18).

107. These are the principles which I propose to apply in interpreting the terms of the MCA and the other relevant agreements which may require to be construed in determining the first two issues directed to be tried. It should be said that there was no great dispute or debate between the parties as to the application of these principles. All parties were agreed that the court should approach the interpretation of the MCA and the other relevant documents in an objective manner and that the context in which that agreement was made should also be considered. Where the parties differed was on what that objective interpretation was and how the context informed the respective interpretations advanced by Clarion, on the one hand, and of DCC and Campshire, on the other.

108. Bearing those principles in mind, I now turn to the first of the issues.

(2) *Issue (1): Does general condition 36(d) form part of the MCA?*

(a) *Introduction to issue (1)*

109. I have explained earlier how this issue arises. Briefly summarised, DCC and Clarion (as well as The North Wall Quay Management Company) are parties to the MCA. Campshire is not. Under the MCA, DCC agreed to sell to Clarion and Clarion agreed to purchase from DCC for the sum of £10 the “*Estate*” (comprising the property being developed at Clarion Quay) and all appurtenances thereto subject to the retail and residential leases to be granted by DCC to purchasers. It was agreed that the “*Estate*” would be conveyed or assured to Clarion by means of a deed of fee farm grant (in the form set out in the schedule) with any necessary modifications and that such completion would take place 28 days after the completion of the sale of the last of the apartments and retail units or within 21 years from the date of the MCA (whichever was the earlier). The 21 years will expire in July, 2022. I have referred earlier to the relevant terms of the draft deed of fee farm grant attached to the MCA. That deed makes clear what will actually be conveyed to Clarion on completion. It will include the reversionary interest in the leases, the common areas including halls, staircases, landings and lifts, the main structural parts of the buildings forming part of the estate including the roofs, rooftop patios, foundations, basements and external walls and the car parks (excluding carpark spaces demised to lessees of the apartments and retail units).

110. Clause 10 of the MCA states that:-

“Save insofar as same are inconsistent herewith that the Law Society General Conditions of Sale (1995 Edition) shall apply to this sale. In the event of any inconsistency between presents and the said general conditions these presents shall prevail.”

111. The general conditions include general condition 36(d). It states:-

“(d) Unless the Special Conditions contain a stipulation to the contrary, the Vendor warrants in all cases where the provisions of the Building Control Act, 1990 or of any Regulations from time to time made thereunder apply to the

design or development of the subject property or any part of the same or any activities in connection therewith, that there has been substantial compliance with the said provisions insofar as they shall have pertained to such design development or activities and the Vendor shall, on or prior to completion of the sale, furnish to the Purchaser a certificate or opinion by an architect or an engineer (or other professionally qualified person competent so to certify or opine) confirming such substantial compliance as aforesaid.”

(b) *Clarion’s case on issue (1): Summary*

112. Clarion’s case on this issue is simple and straightforward. It contends that clause 10 of the MCA is equivalent to a special condition of the contract for sale between DCC and Clarion. The provisions of general condition 36(d) apply “*unless the special conditions contain a stipulation to the contrary*”. Clarion maintains that there is no “*stipulation to the contrary*” in the MCA or elsewhere. Therefore, there is nothing in general condition 36(d) which would disapply its application to the MCA. Nor, Clarion says, is there anything in the MCA which precludes its application or disapplies its provisions. Clarion contends that general condition 36(d) is not “*inconsistent*” with the MCA or with any of its provisions and that there is, therefore, no inconsistency between the MCA and general condition 36(d) which would disapply general condition 36(d). Insofar as DCC and Campshire contend that general condition 36(d) is inconsistent with clause 4 of the MCA, Clarion disagrees. Clarion maintains that clause 4 is a standard estate variation clause which is intended to allow a developer to extend, reduce or otherwise change the layout or extent of a development and that that description of the clause is supported by clause 7 of the MCA. It states that without such a clause, which it notes is replicated in the residential leases (and also in the retail leases), there would be an obligation on the developer to build a scheme as initially sold to the early purchasers even if the developer could not complete the scheme or if it wished to

extend it. Clarion contends that clause 4 does not permit, and was not intended to permit, the developer to build a defective development and cannot permit the developer to avoid its obligations to build properly. It contends that clause 4 was intended to give, and did give, flexibility to DCC and Campshire to mould the development actually constructed to commercial exigencies and ensure that there was no enforceable right on the part of Clarion or on the part of the owners of the apartments and the retail units to require DCC to adhere strictly to the original plan. It contends that clause 4 does not afford an opportunity to the developer to build other than in accordance with the Building Regulations or to construct common areas in a defective manner.

113. Insofar as DCC appeared also to be relying on an alleged inconsistency between general condition 36(d) and a number of other general conditions, namely, general conditions 16(a), 43 and 44, Clarion disagreed. Its position is that there is, and can be, no inconsistency between general condition 36(d) and other general conditions contained in the same document.

(c) DCC's and Campshire's case on issue (1): Summary

114. DCC and Campshire are aligned in the position they take on this issue. They stress that the MCA is not a building contract and that there is no building element in it. Both rely on clause 4 of the MCA. They contend that general condition 36(d) is wholly inconsistent with clause 4 of the MCA. They stress that under clause 4, DCC is, and was, under no obligation to complete the development, may alter the development, may discontinue the development, may exclude certain works from the development, may vary the location, layout and extent of the development and may include additional lands or exclude any parts from the development. They submit that it is clear from clause 4 of the MCA that DCC has no obligation to complete the development and has no obligation in relation to quality of the finish of the development.

115. DCC maintains that, objectively ascertained, the intention of the parties to the MCA was that DCC would not be under any obligation to complete the development and could alter the development as it wished. It contends that clause 4, properly construed, makes clear that general condition 36(d) could not apply to the MCA and that DCC is not subject to the obligations contained in that general condition.

116. Both DCC and Campshire stress that the purpose of the sale to Clarion agreed under the MCA is for the purposes of good estate management (clause 2), that the MCA is not a construction contract and that, as a consequence, general condition 36(d) could have no application. The position adopted by DCC and Campshire on this issue was succinctly put by DCC's counsel at the hearing as being that general condition 36(d) "*clearly can't be squared*" with clause 4 of the MCA and that it is, therefore, inconsistent with and does not form part of the MCA. DCC has a subsidiary argument that general condition 16(a), which DCC submits is not inconsistent with the MCA, would preclude the application of general condition 36(d). DCC relies on general condition 16(a) in a slightly different way in response to Clarion's case that the MCA contains certain implied terms (i.e. issue (2)).

(d) Decision on issue (1)

117. In determining this issue, I must first attempt to construe the relevant provisions of the MCA and the documents incorporated by reference in it. In doing so, I apply the legal principles summarised earlier. I must approach the process of construction in an objective manner. I must do so by reference to the meaning which the relevant terms would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties when they entered into the MCA. I must look at the words used not in isolation, but in the context of the MCA as a whole and by reference to the relevant factual and legal context at the time the parties entered into the MCA. I must also have cautious regard to business or commercial common sense but must be careful not to force a meaning

on the words used by the parties which they cannot fairly bear, thereby rewriting the contract made by the parties. I have no difficulty in construing the MCA in accordance with these principles.

118. The question posed in issue (1) is whether DCC is bound by the provisions of general condition 36(d). The only way in which DCC could be bound is if general condition 36(d) formed part of the relevant contract. The relevant contract is the MCA between DCC and Clarion (to which The North Wall Quay Management Company is also a party). Clause 10 of the MCA expressly refers to the general conditions. It provides that they apply to “*this sale*”, i.e. the sale of the estate and appurtenances subject to the leases, agreed between the parties to the MCA, “*save insofar as same [i.e. the general conditions] are inconsistent herewith*”. There is no dispute between the parties that this means that the general conditions apply to the sale the subject of the MCA unless they are inconsistent with the MCA. If there is any “*inconsistency*” between the terms of the MCA and the general conditions, the terms of the MCA “*shall prevail*”.

119. The starting point, therefore, is to see whether the general conditions are and, in particular, whether general condition 36(d) is, “*inconsistent*” with the terms of the MCA. In order to determine that question, it is necessary to consider the terms of general condition 36(d). I have reproduced the terms of that general condition already. It contains a warranty on the part of the “*vendor*”. Again, there was no real dispute between the parties that DDDA and its successor DCC, as the grantor under the MCA, is and should be treated as the “*vendor*”. However, before considering the substance of the warranty in general condition 36(d), it is necessary to consider the opening words. According to those words, the warranty applies “*unless the special conditions contain a stipulation to the contrary, ...*”. There were no “*special conditions*” so called agreed between the parties. However, Clarion argued, and DCC appeared to accept, that the terms of the MCA could be treated as the equivalent to

“*special conditions*” for the purposes of general condition 36(d). I agree that, for present purposes, the terms of the MCA are the equivalent of “*special conditions*” and may be treated as such for the purposes of general condition 36(d). Therefore, not only is the court required to consider whether general condition 36(d) is “*inconsistent*” with the terms of the MCA (in accordance with clause 10 of the MCA), it is also necessary to consider whether the MCA contains a “*stipulation to the contrary*”, in other words, a stipulation that general condition 36(d) does not apply to the sale the subject of the MCA.

120. It seems to me that, properly understood, in order for the exclusionary words in general condition 36(d) to apply, the “*special conditions*” and, in this case, the terms of the MCA must contain a “*stipulation*” that general condition 36(d) does not apply to the sale. In my view, that would require an express provision in the MCA stipulating or stating that the particular general condition does not apply to the sale. The MCA does not contain such an express provision. Therefore, there is no “*stipulation to the contrary*” in the MCA.

121. However, the analysis does not, of course, end there. It must next be considered whether, in accordance with clause 10 of the MCA, general condition 36(d) is “*inconsistent*” with any of the terms of the MCA. If it is, then the relevant terms of the MCA will prevail under clause 10. In considering that question, it is necessary to go back to general condition 36(d). It contains a warranty by the vendor “*in all cases where the provisions of the Building Control Act, 1990 or of any Regulations from time to time made thereunder apply to the design or development of the subject property or any part of the same or any activities in connection therewith*” that there has been “*substantial compliance*” with those provisions, insofar as they relate to such design, development or activities. General condition 36(d) also requires the vendor, in circumstances where the condition applies, to furnish to the purchaser, on or prior to completion of the sale, a certificate or opinion of an architect or an engineer (or similar professional) “*confirming such substantial compliance as aforesaid*”. If general

condition 36(d) applies to the sale the subject of the MCA, DCC will be bound by and subject to the warranty contained in the first part of general condition 36(d) and will be required to provide the certificate or opinion of substantial compliance with the Building Control Act, 1990 and the Regulations made thereunder on, or prior to, completion of the sale, which is required to take place in accordance with the provisions of clause 6 of the MCA.

122. The next step in the analysis, therefore, is to consider whether general condition 36(d) is “*inconsistent*” with any of the terms of the MCA. DCC and Campshire point to clause 4 and contend that the general condition is clearly inconsistent with clause 4 and that it “*can’t be squared*” with that clause. Before turning to consider clause 4, I must address the point forcefully made by DCC and Campshire that the MCA is not a building agreement and does not involve any building element in it in the sense of DCC building or causing to be built any part of the development for Clarion. I have set out earlier the various different contracts between the parties. The building agreement in terms of the overall development is contained in the JVA between DCC and Campshire. The MCA provides for the conveyance or assurance of the reversionary interest in the retail units and apartments sold by way of long lease to retail and residential purchasers as well as the common areas and other areas referred to in the first schedule to the fee farm grant attached to the MCA. The purpose of the sale the subject of the MCA is, as stated in clause 2, “*for reasons of good estate management*”. There is nothing unusual about this type of scheme: see, for example, *Re Heidelberg Company Ltd* [2007] 4 IR 175 (per Laffoy J. at paras. 2 to 4, p. 177). DCC and Campshire are quite correct in their contention that the MCA itself does not involve any building element in the sense of DCC building out the development for Clarion. However, it must nonetheless be seen in the context of the overall scheme comprising the JVA, the MCA (and deed of fee farm grant attached) and the individual retail and residential leases.

123. I now turn to consider the terms of clause 4 of the MCA in order to determine whether general condition 36(d) is “*inconsistent*” with that clause. I have set out the terms of clause 4 in full earlier. The essential elements of the clause are that:-

- (a) DCC is not obliged to complete or cause the Clarion Quay development to be completed;
- (b) DCC may alter the development as it wishes;
- (c) Clarion agrees and confirms that it has not been induced to enter into the MCA on foot of any plan which shows the present intended development of the estate or any part of it or by any representation by any person acting on behalf of DCC that the estate will conform in all respects with any such plan;
- (d) DCC has the full right and liberty to alter the development of the estate;
- (e) DCC has the full right and liberty to discontinue developing the estate;
- (f) DCC has the full right and liberty to exclude any part of the works or buildings as it wishes;
- (g) notwithstanding anything contained in the MCA or in any of the retail or residential leases, DCC has the full right and liberty to vary the location, layout and extent of the estate;
- (h) similarly, DCC has the right to include additional lands and the right to exclude any lands from the development; and
- (i) in order to exercise any of these rights or liberties, DCC must have obtained the necessary planning permission.

124. Clause 4 must be read with clause 7 which provides that the assurance to Clarion is to take place by way of deed of fee farm grant in the form set out in the schedule to the MCA “*with any necessary modifications to take account of any variations in the estate...*”. The

deed can, therefore, be modified in order to take account of any “*variations in the estate*” made by DCC in accordance with clause 4.

125. Those, it seems to me, are the essential elements of clause 4. Clarion maintains that there is nothing in general condition 36(d) which is inconsistent with clause 4. DCC and Campshire, on the other hand, contend that the two provisions are mutually exclusive and that general condition 36(d) is completely inconsistent with and cannot stand with clause 4. They say that the fact that DCC is under no obligation to complete the development, may alter the development, may vary the location, layout and extent of the development and may discontinue the development is fundamentally inconsistent with any obligation on DCC with respect to the quality of the works in the development or the compliance or substantial compliance of the development with the Building Control Act or the building regulations.

126. In my view, Clarion’s position is to be preferred on this issue. I do not accept the obligations imposed on DCC under general condition 36(d) are inconsistent with the extensive rights which DCC has with respect to the completion of the development under clause 4 of the MCA. I agree with Clarion that clause 4 is a relatively standard type of estate variation clause which allows the developer to alter the layout or extent of the development. It goes further than that, however, in that it also clearly allows DCC to discontinue developing the estate altogether. Similar terms are contained in clause 2.2 of the retail lease and in clause IX of the residential lease. Having considered the essential elements of clause 4 and the obligation on DCC under general condition 36(d), I do not see the fundamental inconsistency which DCC and Campshire put forward.

127. While DCC has the very extensive rights under clause 4 not to complete the development or to alter the development and so on, the obligations under general condition 36(d) would arise in circumstances where, notwithstanding its wide powers under clause 4 not to complete the development, it does proceed to complete the development and then seeks

to complete the sale the subject of the MCA. I do not see an inconsistency between the two provisions in circumstances where DCC completes the development and then seeks to complete the sale to Clarion under the MCA. Where it does complete the development (whether varied or otherwise from the plans initially produced and it appears that there were variations), there is nothing inconsistent with the wide powers in clause 4 for DCC to be subject to general condition 36(d)(which its predecessor, DDDA agreed in Clause 10 of the MCA should apply to the sale). If DDDA did not wish to be subject to the particular obligations under general condition 36(d), it could have insisted on an express term in the MCA excluding the application of general condition 36(d). The fact is there is no express exclusion in the MCA and, therefore, no "*stipulation to the contrary*" for the purpose of general condition 36(d). Nor, in my view, having regard to the natural and ordinary meaning of the words used in clause 4 and in general condition 36(d), is there any inconsistency between those two provisions. They can be readily reconciled, in my view. A conclusion to the contrary would run counter to the natural and ordinary meaning of the words used in the two provisions. Had it been the intention of the parties to the MCA to exclude the provisions of general condition 36(d), an express provision to that effect could have been included in the MCA but was not.

128. A consideration of the factual and legal context confirms the view which I have expressed based on the natural and ordinary meaning of the words used. The most significant context is the structure and content of the various agreements between the relevant parties setting up the scheme. I have referred in some detail to these agreements earlier. First, Campshire is subject to extensive duties to DCC with respect to the construction of the development, including the obligation to carry out the development in compliance with the Building Control Acts and the Building Regulations, under clause 5.1 of the JVA. Clarion will be subject to extensive obligations to DCC with respect to the condition of the premises

and buildings from the date of completion under the fourth schedule to the deed of fee farm grant and, in particular, under paras. 5 and 9. It will be recalled that under para. 5, Clarion will be required to “*repair and keep in repair and first class decorative condition the premises and all buildings...*” from the time of completion. It rightly draws attention in this context to the re-entry and forfeiture provisions contained in p. 4 of the deed of fee farm grant. Clarion is also subject to extensive repairing obligations to purchasers of the retail leases with effect from the date of those leases under clause 2.1(d) and para. 6 of part 2 of the fourth schedule to those leases and to the purchasers under the residential leases under clause V and para. 4 of the seventh schedule to the residential lease, with effect from the date of completion of the MCA (although I note that it appears to be accepted that Clarion has, in fact, been performing such obligations under the residential leases prior to completion of the MCA).

129. All of this leads me to conclude that the context, if anything, strengthens my conclusion that on the proper construction of the MCA and general condition 36(d), that general condition does form part of the MCA. The context demonstrates the extensive obligations with regard to the development work owed by Campshire to DCC under the JVA and the extensive obligations which Clarion will owe to DCC under the fee farm grant, which it owes to the purchasers of the retail leases and which it will owe to the purchasers of the residential leases on completion of the MCA.

130. I have also considered as part of the relevant context what O’Donnell J. referred to in *MIBI* as the “*logic, commercial or otherwise*” (at para. 12) and have taken account of the fact that the reasonable person who acts as the guide to the interpretation of the agreement at issue must, in addition to having “*linguistic skills*”, also have a “*sympathetic understanding of the commercial or practical context in which the agreement was meant to operate*” (again, per O’Donnell J. at para. 12 of his judgment in *MIBI*). I am, of course, conscious of the need for

caution in considering business or commercial common sense in order to ensure that the court does not end up rewriting the parties' agreement so as to fit with commercial common sense or at least the court's view of what that might be. The court should endeavour to give a common sense construction to the relevant agreement but should be slow to reject the natural and ordinary meaning of a term.

131. In the present case, DCC and Campshire have urged the court to find that general condition 36(d) does not apply to the MCA stressing the absence of any building element in that agreement and the tiny amount of the consideration payable by Clarion under it. They, in effect, argue that it would be contrary to commercial common sense to interpret the MCA so as to include general condition 36(d). However, I do not believe that they are correct. I have already outlined what I believe to be the natural meaning of the relevant provisions of the MCA and, in particular, clauses 4 and 10 and of general condition 36(d) itself. I have also outlined the relevant context including the obligations on Campshire under the JVA and on Clarion under the fee farm grant and under the retail and residential leases. I do not accept that it is contrary to common sense to interpret the relevant provisions of the MCA including clauses 4 and 10 in such a way that general condition 36(d) forms part of the agreement. In my view, it is an express term of the MCA and forms part of the bargain made between Clarion and DCC's predecessor, DDDA, and, therefore, binds DCC.

132. I should now briefly address the argument made by DCC that general condition 36(d) cannot apply on the basis that it is inconsistent with general condition 16(a) and general conditions 43 and 44. In my view, this point does not assist DCC. General condition 16(a) states:-

“Subject to Condition 15, the Purchaser shall be deemed to buy: (a) with full notice of the actual state and condition of the subject property...”

General condition 15 imposes an obligation on the vendor to disclose easements, rights and liabilities known to the vendor to effect or likely to affect the relevant property. Apart from the obvious point that both general condition 16(a) and general condition 36(d) both form part of the general conditions and it is difficult in principle to see how one could be inconsistent with the other, there is in fact, in my view, no inconsistency between the two general conditions. They are dealing with completely different issues. General condition 36(d) contains the warranty and obligation on the part of the vendor to provide the certificate or opinion of substantial compliance with the Building Control Acts and the Building Regulations. General condition 16(a) addresses something completely different, namely, the fact that the purchaser is deemed to buy with full notice of the actual state and condition of the property. I do not see an inconsistency between those two provisions. As noted earlier, DCC makes a different point in reliance on general condition 16(a) with reference to the implied term issue (issue (2)). However, that point is not relevant here.

133. While DCC raised an inconsistency between general conditions 43 and 44 and general condition 36(d) in its defence, it did not develop or press the point in its written or oral submissions. The same conceptual difficulty applies in trying to understand how general conditions 43 and 44 could be inconsistent with general condition 36(d) when they all form part of the general conditions. Aside from that, it does not seem to me that there is any inconsistency or contradiction between general condition 43 and general condition 36(d). General condition 43 reverses the position at common law that the purchaser could take the gain but bear the risk of any loss or damage to the property between the date of the contract for sale and the completion: see Wylie “Conveyancing Law” (3rd Ed.), paras. 12.36-12.37. There does not seem to me to be anything inconsistent between that general condition and general condition 36(d). Nor does general condition 44 appear to me to have any relevance to that issue. It simply provides for circumstances in which the vendor will not be liable under

general condition 43 in respect of loss or damage to the property between the date of sale and the date of completion in certain circumstances. Again, that deals with something completely different to general condition 36(d). I do not accept, therefore, that there is anything in those other general conditions which precludes the application of general condition 36(d) to the MCA or which disturbs my conclusion that general condition 36(d) is an express term of the MCA and imposes obligations on DCC.

134. I should finally note, with respect to the first issue, that after judgment was reserved, the parties initially drew to my attention the judgment of Haughton J. in the High Court in *Grehan & ors v. Maynooth Business Campus Owners' Management Company Limited by Guarantee* [2019] IEHC 829 (“*Grehan*”) and the subsequent judgment of Costello J. for the Court of Appeal on the appeal in that case [2020] IECA 213. The court heard further oral submissions from the parties following the judgment of the High Court in *Grehan*. The Court of Appeal judgment was subsequently furnished to the court, but the parties did not request a further hearing following that judgment. The Court of Appeal judgment in *Grehan* is relevant to a number of the issues which I have to determine. With respect to this first issue, it is relevant in the sense that both the High Court and the Court of Appeal proceeded on the basis that there was no issue or problem with general condition 36 forming part of a management agreement in respect of the development of a business campus which contained a clause which was similar to clause 4 of the MCA in this case (and which allowed the developer to alter or vary the location, layout and extent of the development albeit that it did not go so far as expressly permitting the developer to discontinue the development as in the case of clause 4 of the MCA).

135. The general conditions (including general condition 36) were incorporated into the management agreement at issue in *Grehan* by slightly different words in the management agreement to those used in the MCA. Clause 3.7 of the management agreement in *Grehan*

provided that the general conditions “*shall where appropriate be deemed to be incorporated in to this Agreement*”. Insofar as I can ascertain, there was no dispute or issue in that case that general condition 36(d) was incorporated into the management agreement by those words. Nor was it argued that general condition 36(d) should not or could not apply to the management agreement by reason of the existence of the estate variation clause in the agreement (clause 3.6). Neither the High Court nor the Court of Appeal, therefore, had to consider the question which I have had to decide in determining this first issue. It is, however, of interest (albeit certainly not determinative of the issue which I have had to decide, as it was not an issue in *Grehan*), that the parties in *Grehan* and the High Court and Court of Appeal proceeded on the basis that general condition 36 (including para (d)) did apply to the management agreement at issue in the case. That was significant as, at para. 137 of her judgment for the Court of Appeal, Costello J. concluded that because of the significant defects in the car park (which was part of the common areas to be transferred to the defendant management company), the plaintiffs could not comply with the management agreement and transfer to the defendant the common areas, and the reversions, in compliance with general condition 36 until the works necessary to remedy the defects were carried out.

136. Since the incorporation of general condition 36 into the management agreement was not in dispute in that case, the court’s conclusion in that regard is interesting but not determinative of the first issue which I have had to decide. I will return to the judgment of the Court of Appeal in *Grehan* when considering the second issue which I have determine, namely, whether certain terms were implied into the MCA. It is to that issue that I now turn.

(3) *Issue (2): Are the terms pleaded at paragraph 20 of the statement of claim implied terms of the MCA?*

(a) *Introduction to issue (2)*

137. I have referred earlier to the terms which Clarion has pleaded at para. 20 of the statement of claim are implied terms of the MCA. In summary, those alleged implied terms are as follows:-

- (1) That DCC would ensure completion of the development;
- (2) That as regards work already done at the date of the MCA, the quality of the work and the materials were such that, when completed, the development would be reasonably fit for immediate occupation;
- (3) That as regards work that remained to be done at the date of the MCA, the quality of that work will be such that, when completed, the development would be reasonably fit for immediate occupation;
- (4) That as regards work that remained to be done at the date of the MCA, the work will be carried out in a good and workmanlike manner with sound and suitable material; and
- (5) That the development will be constructed in a *“first class state of decorative repair and condition”*.

138. It must be recalled that, insofar as Clarion is relying on these alleged implied terms in the MCA and alleging that DCC is in breach of those terms by reason of the alleged defects in the works, Clarion is at all times referring to works done and alleged defects in the works to the common areas and the main structures of the buildings, including the roofs and external walls and so on and not to the retail units or apartments themselves.

139. Clarion contends that these terms are implied in the MCA on two bases. First, it contends that they are implied as a matter of law by reason of the nature and type of contract encompassed by the MCA. Second, Clarion contends that, in any event, the terms are to be implied as a matter of fact on the basis of the presumed intention of the parties having regard to the relevant factual matrix, including the MCA itself and the other legal documents

underlying or referred to in the MCA. DCC and Campshire deny that any of these terms are implied terms of the MCA on either of the bases relied upon by Clarion.

(b) *Clarion's case on issue (2): Summary*

(i) Terms implied by law

140. In support of its contention that these terms are to be implied by law in the MCA, Clarion relies on a series of Irish and other cases in which certain terms are implied into a contract for the sale of a dwelling house which is to be constructed or is in the course of construction. It relies, in particular, on the judgment of Davitt P. in *Brown v. Norton* [1954] IR 35 (“*Brown*”) (and on the earlier English decision referred to in *Brown* and, in particular, *Lawrence v. Cassell* [1930] 2 KB 83 (“*Lawrence*”) and *Miller v. Cannon Hill Estates Ltd* [1931] 2 KB 113 (“*Miller*”)), the decision of the Court of Appeal of England & Wales in *Hancock & ors v. BW Brazier (Anerley) Ltd* (“*Hancock*”) and that of Lowry L.C.J. in the High Court of Northern Ireland in *McGeary v. Campbell* [1975] NI 7 (“*McGeary*”).

141. Clarion contends that *Brown* and the other cases referred to are authority for the proposition that an agreement to purchase a dwelling house in the course of construction, where it is clearly understood that the purchaser is intending to live in the house as soon as it is completed by the vendor, in the absence of negating circumstances, contains the following implied terms that (a) the vendor will complete the building of the house; (b) that as regards work already done at the date of the agreement, as regards what remains to be done, the quality of the work and the materials are and will be such that, when completed, the house will be reasonably fit for immediate occupation as a residence; and (c) that as regards the work which remains to be done, such work will be carried out in a good and workmanlike manner and with sound and suitable materials.

142. While Clarion accepts that both *Brown* and *Hancock* (and the other cases on which it relies) involved the sale of a dwelling house in the course of construction, it contends that the

same principles apply to the MCA which provides for the sale of the common areas of a mixed use multi-unit development with 184 residential apartments, as the common areas of the residential part of the development are intended for human occupation and use, are ancillary to the residential units themselves and include parts of the apartments such as the balconies. Although Clarion concedes that the court might come to a different view in the case of a purely commercial development, it contends that the principles set out in *Brown* do apply to the common areas referable to the residential parts of the Clarion Quay development in the absence of any negating circumstances and that there are no such negating circumstances. On the contrary, it contends that the factual matrix clearly supports an obligation on DCC, as the successor to DDDA, to build out the development in a good and substantial manner and, in accordance with the Building Regulations, having regard to the obligation on Clarion to keep the whole of the development in “*first class decorative repair and condition*” after completion of the MCA.

143. Clarion accepts that there is no direct authority on the point but argues that its case for the implication of these terms in the MCA in the case of Clarion Quay does not really amount to an extension of the principles in *Brown*. It further argues that it would be unreal if the terms referred to in *Brown* were to be implied in the contracts for the sale of the apartments themselves but not to the sale of the common areas around them and the reversions.

144. Insofar as DCC and Campshire have contended that there are several negating circumstances, including clause 4 of the MCA and certain of the general conditions, such as general conditions 16(a), 43 and 44, Clarion submits that those provisions are not negating circumstances at all. With respect to clause 4 of the MCA, Clarion maintains that there is nothing in clause 4 of the MCA which is inconsistent with any of the implied terms. It further asserts that the express inclusion of general condition 36(d) of the general conditions supports the implication of these additional terms. Clarion submits that clause 4 of the MCA is a

standard estate variation clause and does not mean that the developer can choose to carry out the development in a defective manner or in a manner which does not comply with the Building Control Act or with the Building Regulations.

(ii) Terms implied on the facts

145. The second basis on which Clarion seeks to imply these terms in the MCA, is that they should be implied as a matter of fact. It relies on the principles discussed in McDermott “Contract Law” (2nd Ed.) (paras. 8.49-8.96), on the judgment of McCarthy J. in *Tradax (Ireland) Ltd v. Irish Grain Board* [1984] IR 1 (“*Tradax*”), the decision of the Privy Council in *BP Refinery (Western Port) PTY Ltd v. Shire of Hastings* (1977) 180 CLR 266 (“*BP Refinery*”) and the decision of the Court of Appeal in *Flynn v. Breccia* [2017] IECA 74 (“*Flynn*”). It contends that the disputed implied terms satisfy the five-point test for the implication of terms set out by Lord Simon in *BP Refinery* and that the terms are (a) reasonable and equitable; (b) necessary to give business efficacy to the contract; (c) so obvious that it goes without saying; (d) capable of clear expression; and (e) do not contradict any express term of the contract.

146. In support of its case that these terms are implied in the MCA. Clarion asks the court to have regard to:-

- (a) the express obligation in the JVA that Campshire would build in a good and substantial manner and in accordance with the building regulations (clause 5.1 of the JVA);
- (b) the intention to sell the apartments in the development as residences;
- (c) the obligation on Clarion in the retail leases to keep the retained parts in a “good and tenantable state of repair, decoration and condition” (para. 6 of part 2 of the fourth schedule to the retail lease);

- (d) the equivalent obligation on Clarion and Campshire in the residential leases (clause V and para. 4 of the seventh schedule to the residential lease);
- (e) the intention to convey the common areas to Clarion after the sale of the apartments and retail units upon which an immediate obligation would fall on Clarion to “*well and sufficiently repair and keep in repair and first class decorative condition*” the “*premises and all buildings for the time being thereon*” (para. 5 of the fourth schedule to the deed of fee farm grant);
- (f) the right of DCC to enforce the obligation at ((e) above) and even to forfeit the fee farm grant in the event of its breach (p. 4 of the deed of fee farm grant);
and
- (g) the obligations under Irish law to comply with the Building Regulations.

147. Clarion contends that if these terms were not implied in the MCA, DCC and its predecessor DDDA would be entitled to build the development in a defective manner, to convey to Clarion the common areas and other areas to be assured under the MCA and then immediately require Clarion to remedy the defects, failing which proceedings could be issued against Clarion or the right to determine the fee farm grant could be exercised in accordance with its terms. On that basis, Clarion submits that the implication of these terms is “*so obvious that it goes without saying*” and that the “*officious bystander*”, or the reasonable person in the position of the parties at the time, would clearly have said that the common areas and other areas to be assured under the MCA had to be built properly.

148. It submits that having regard to the obligations on Clarion under the deed of fee farm grant to keep the common areas and other parts of the development to be assured under the MCA in repair and in “*first class decorative condition*”, it would make no sense for Clarion to accept that obligation if it were not taking the areas to be transferred in that state in the first place.

149. While DCC and Campshire rely on the judgment of Kenny J. in *Whelan v. Madigan* [1978] ILRM 136 (“*Whelan*”) as authority for the proposition that Clarion’s obligations would not extend to defects caused by a structural defect which was present at the time of the completion of the MCA, Clarion relies on the dicta of Black J. in the Supreme Court in *Groome v. The Fodhla Printing Company Ltd* [1943] IR 380 (“*Groome*”) and the discussion of those cases in Wylie “*Landlord and Tenant Law*” (3rd Ed.) (at paras. 15.26-15.30) to the effect that the covenant to repair to which Clarion is subject could well involve an obligation on Clarion to put the premises into repair by remedying defects, even where the defects exist at the time of the completion of the MCA. Clarion argues that *Whelan* can be distinguished by reference to its unusual and rather particular facts. On that basis, Clarion submits that there is a real risk that DCC could seek to enforce the covenant under the deed of fee farm grant against Clarion and seek to determine the grant for breach of covenant.

(c) *DCC’s and Campshire’s case on issue (2): Summary*

(i) Terms implied by law

150. In response to Clarion’s case that these terms should be implied as a matter of law by reason of the nature of the MCA, DCC contends that the terms of the MCA are clear and unambiguous and that there is no necessity to imply the disputed terms in the MCA. It asks the court to have regard to the nominal level of consideration provided for in the MCA (£10) which it says is inconsistent with the obligation on DCC to build at all, let alone to be subject to the obligations and terms of the quality of workmanship and materials or fitness for habitation of the property.

151. DCC submits that Clarion’s reliance on *Brown, Hancock* and *McGeary* is misplaced. The common features of those cases, it submits, is that the properties under construction which were the subject of the contracts at issue in those cases were being purchased by a person who intended to purchase a dwelling house which he or she intended to occupy as

such and, in those circumstances, the court was prepared to imply terms as to the quality of the building work and materials and so on. DCC stressed that the agreements in those cases all involved a building element in which a building to be used as a dwelling house was to be constructed. That is not so, it submits, in the case of the MCA.

152. DCC contends that in order for implied terms to arise on foot of the *Brown* line of authority, certain conditions must be satisfied:-

- (a) the contract in question must be for the construction and acquisition of a dwelling house;
- (b) the purchaser under the contract must be intending to live in the dwelling house himself or herself; and
- (c) the terms sought to be implied must not have been negated by other circumstances or by an express term of the contract.

It submits that those conditions are not satisfied in the present case. The MCA does not have a construction element to it. Clarion was not agreeing to purchase a dwelling house with the intention of living in it. Also, DCC submits that there are negating circumstances, including clause 4 of the MCA.

153. Therefore, DCC sought to distinguish *Brown*, *Hancock* and *McGeary* (and the other English cases referred to in those cases) and relied on the decision of the Court of Appeal of England & Wales in *Lynch v. Thorne* [1956] 1 WLR 303 (“*Lynch*”) to demonstrate that the existence of an express term in the agreement can exclude the operation of an implied term of the type sought to be implied here. In that regard, DCC places great reliance on the provisions of clause 4 of the MCA as negating the implication of any of these terms.

154. DCC also relies on the judgment of Kenny J. in *Whelan* in response to Clarion’s case that its repairing covenant in the fee farm grant could impose an obligation on it to repair structural defects which exist at the time of the completion of the MCA. On that basis, DCC

maintains (as does Campshire) that Clarion will not be obliged to put the property in a better position than it was at the time of completion.

155. Campshire adopts a similar position to DCC in response to Clarion’s case that these terms should be implied as a matter of law by reason of the nature of the MCA. It also seeks to distinguish *Brown* and *Hancock* from the present case on the basis that the MCA is not a contract for the construction of a residential house. Clarion is not a residential purchaser but, rather, a company incorporated by Campshire specifically to assume the role of the management company in respect of the development. Effectively, Campshire submits, the plaintiff seeks, by making its case for the implication of these terms on this basis, to convert or elevate the MCA (which is essentially the transfer of the common areas and other areas referred to in the fee farm grant) into a new building contract. In response to Clarion’s case that the common areas are themselves intended for human occupation or are ancillary to the occupation of the apartments, Campshire queries where the line can be drawn since those areas include the roads and car parks in the development. Campshire maintains that this supports the position of the defendants that the circumstances in which the *Brown*-type terms can be implied in a contract are limited to the type of situation at issue in *Brown* and *Hancock*. On that basis, both DCC and Campshire contend that there is no basis for implying these terms as a matter of law by reason of the nature of the MCA.

(ii) Terms implied on the facts

156. In response to the second basis on which Clarion says that these terms should be implied, namely, as a matter of fact, DCC and Campshire maintain that the conditions for the implication of terms as a matter of fact are not satisfied in this case.

157. DCC relies on cases such as *The Moorcock* (1889) 14 P.D. 64, *Carna Foods Ltd v. Eagle Star Insurance Company (Ireland)* [1997] 2 IR 193 (“*Carna*”), *Sweeney v. Duggan* [1997] 2 IR 531 (“*Sweeney*”), *Meridian Communications Ltd v. Eircell Ltd* [2002] IR 17

(“*Meridian*”), *O’Donnell v. Ryan* [2017] IEHC 607 (“*O’Donnell*”) and *Flynn*. It submits that the five-point test of Lord Simon in *BP Refinery*, which was endorsed by the Court of Appeal in *Flynn*, is not satisfied, and that the disputed implied terms would be in conflict with express provisions of the MCA and, in particular, with clause 4 and with a number of the general conditions incorporated in the MCA, in particular, general conditions 16(a), 43 and 44.

158. It submits that, by reference to the five-point test in *BP Refinery*, as adopted by the Court of Appeal in *Flynn*, the disputed implied terms (a) are not reasonable; (b) are not necessary to give business efficacy to the transfer the subject of the MCA, the principal object of which is to transfer the common areas to Clarion (and it is, therefore, unnecessary to import terms as to the quality of the building works to be carried out); (c) are not so obvious that it goes without saying that the parties intended to agree them; (d) are not capable of clear expression, in that there is no clear identification of the building works intended to be subject to the disputed implied terms; and (e) contradict express terms in the MCA and, in particular, clause 4.

159. Campshire takes a similar position to DCC but makes the additional point that the disputed implied terms breach the rule of privity of contract in that one of the sources for the terms which Clarion claims are implied in the MCA is the JVA between DCC and Campshire to which Clarion is not a party. It submits that the express incorporation of certain terms in the JVA demonstrates the knowledge and awareness of DCC (or, rather, its predecessor DDDA) and Campshire of those terms and, yet, nonetheless DCC/DDDA did not include them in the MCA. It further submits that individual tenants were in a position to incorporate a clause as to the quality of the works into their respective leases or building agreements, as the case may be, and that a number of the units sold prior to or during construction involved building contracts with stipulated terms as to construction standards (para. 3.24 of

Campshire's written submissions, although I note that there was no evidence before me and no agreed facts to support that submission).

160. Campshire also maintains that the five-point *BP Refinery* test is not satisfied in the case of the disputed implied terms pointing to the lack of clarity of those terms and querying the standard with which it is suggested the works were supposed to comply. It contends that the uncertainty in the terms means that it could not be so obvious that those terms would have been agreed had they been adverted to by the parties when agreeing the terms of the MCA. Campshire makes the additional point that certain of the apartments would have been bought off the plans and some during or after construction and points to the difficulty of implying those terms bearing in mind those different situations.

161. As noted earlier, both DCC and Campshire rely on *Whelan* in response to the concern expressed by Clarion that, if the disputed terms are not found to be implied in the MCA, it would be at risk of being in breach of its covenant to repair under the deed of fee farm grant and at risk of the grant being determined by DCC. Both DCC and Campshire, in their written submissions, and Campshire in its oral submissions to the court, disputed the existence of the risk relied on by Clarion and maintained that it would not be obliged to put the property into a better position, or to maintain the property to a better condition, than it was when demised or assured to it.

162. They submit, therefore, that the conditions for the implication of terms as a matter of fact has not been satisfied here and, therefore, the terms pleaded at para. 20 of the statement of claim are not implied terms of the MCA.

(d) *Decision on issue (2)*

163. The parties are agreed that terms can be implied into agreements in a variety of different ways. Leaving aside the implication of terms by statute or by custom or usage (neither of which is relevant in this case), terms may be implied (i) as a matter of law arising

from the nature of the agreement at issue and (ii) as a matter of fact based on the presumed intention of the parties on the facts.

164. In *Sweeney*, Murphy J. stated:-

“There are at least two situations where the Courts will, independently of statutory requirement, imply a term which has not been expressly agreed by the parties to a contract. The first of these situations was identified in the well-known Moorcock case (1889 14 P.D. 64) where a term not expressly agreed upon by the parties was inferred on the basis of the presumed intention of the parties...

In addition there are a variety of cases in which a contractual term has been implied on the basis, not of the intention of the parties to the contract but deriving from the nature of the contract itself...” (per Murphy J. at p. 538)

165. In *Society of Lloyd’s v. Clementson* [1995] C.L.C. 117, Steyn L.J. in the Court of Appeal of England & Wales described the distinction between terms implied as a matter of law and those implied in fact as follows:-

“Terms implied in fact are individualised gap-fillers, depending on the terms and circumstances of a particular contract. Terms implied by law are in reality incidents attached to standardised contractual relationships, or, perhaps more illuminatingly, such terms can in modern US legal terminology be described as standardised default rules.”

166. Clarion contends that the five terms pleaded at para. 20 of the statement of claim are implied (i) as a matter of law and, also or, alternatively, (ii) as a matter of fact. As I explain below, I do not accept that those terms are implied in the MCA on either of those two bases.

(i) Terms implied by law

167. The starting point when considering whether the terms are implied by law by virtue of the nature of the agreement comprised in the MCA is the decision of Davitt P. in *Brown*, which in turn relied on two earlier English cases, *Lawrence* and *Miller*. In order to understand the principle identified and applied by Davitt P. in *Brown*, it is necessary briefly to mention the facts of the case. There were three plaintiffs. Two of the plaintiffs (Mr. Brown and Mr. Burgess) entered into contracts with the defendants for the purchase of two dwelling houses which were then in the course of construction. The third plaintiff (Mr. O'Connor) entered into a contract with the defendants for the purchase of another house at a time when construction of the house had been completed. The sale in each case was effected by way of sublease. Each of the plaintiffs alleged that there were defects in the houses which they claimed were in breach of certain implied terms of their agreements with the defendants.

168. Davitt P. held that there were defects in all three houses. He then turned to consider whether terms should be implied into the agreements. Having considered the English decisions of *Lawrence* and *Miller* and various other cases, Davitt P. summarised the legal position as follows:-

"I think that the law which I have to apply in these cases may be stated thus: where there is an agreement to purchase a house in the course of erection, and it is clearly understood by the parties that what the purchaser is contracting to buy and the vendor is contracting to sell is a dwelling-house in which the purchaser can live as soon as it is completed by the vendor, the Court may hold, in the absence of any circumstances negating such an implication, that the vendor impliedly agrees (1) that he will complete the building of the house; (2) that as regards what has already been done at the date of the agreement the quality of the work and materials is such, and as regards what then remains to be done the quality will be such, that the house when completed will be reasonably fit for immediate occupation as a residence; and

(3) that as regards what then remains to be done the work will be carried out in a good and work-manlike manner and with sound and suitable materials.”

(per Davitt P. at p. 56)

169. These are more or less the terms which Clarion says should be implied in the MCA (with an additional term not mentioned in *Brown* but, according to Clarion, to be implied on the basis of the specific obligation on Clarion under the deed of fee farm grant to keep the premises in a “*first class state of decorative repair and condition*”).

170. Davitt P. went on to state that:-

“The expressions, ‘completed house’ and ‘house in course of erection,’ so frequently used in cases of this kind are not, of course, to be treated as if they were expressions used in an enactment of the Legislature. In no case has it been sought to define them nor would it be advisable to make an attempt at definition.”

(per Davitt P. at p. 56)

Clarion relies on this passage in an attempt to persuade the court that the implied terms referred to in *Brown* can also arise in the case of a development such as Clarion Quay.

171. Having identified the relevant principles, Davitt P. went on to apply them to the facts of each of three plaintiffs. In the case of Mr. Brown, he held that the terms were implied in his contract with the defendants and that a number of them were breached. In the case of Mr. Burgess, again he found that the terms were implied in his agreement with the defendants and that a number were breached. However, in his case, some walls were already built at the time of the agreement. Unlike the other plaintiffs, his agreement contained a clause stating that he had inspected the building as it stood and would be taken to be “*satisfied*” with it. The court held that, as regards walls which were already built at the time of the agreement, that clause negated the implication of any warranty in respect of them. With respect to Mr. O’Connor, the court held that on the evidence the house the subject of his agreement was not in the

course of erection at the time of the agreement and that it was, at that stage, almost complete. His agreement was, therefore, a contract for the sale of a completed house and did not, therefore, include the implied terms applicable to the other agreements.

172. What can be seen from the summary of the applicable legal principles outlined by Davitt P. in *Brown* and by his exclusion of the implied terms with respect to the walls in Mr. Burgess' case, that the terms will not be implied where there are circumstances which negative their implication. While DCC and Campshire primarily contend that the implied terms set out in *Brown* do not apply at all in this case as the MCA is not the type of agreement in which those implied terms can arise, they also rely on the existence of negating circumstances, principally the existence of clause 4 in the MCA, and, in that context, they rely on the decision of the Court of Appeal of England & Wales in *Lynch*. In that case, the court held that there were express terms in the relevant contract as to the way in which the house was to be built and the builder had precisely and exactly complied with its obligations under the contract. The court held on that basis that there could be no implied term in the contract for sale that the dwelling house, when completed, should be reasonably fit for human habitation. Therefore, the implied terms were negated by the express terms of the contract with which the builder had complied.

173. A somewhat similar argument was rejected by the court in *Hancock*. The Court of Appeal held that the terms to be implied on the basis of *Lawrence* and *Miller* were not excluded by a clause in the relevant agreements which provided that the builders would build and complete the houses at issue "*in proper and workmanlike manner*" and in accordance with a particular plan and specification, which required a specified size of hardcore on the basis that that clause only dealt with workmanship and not with materials. The court held that the quality of the materials was left to be implied and the necessary implication was that they should be good and suitable for the work. Therefore, the clause relied on by the builders did

not negative the implied terms. Another relevant point in that case is that the defendant sought to rely on a provision in the UK National Conditions of Sale (condition 12(3)) which was similar to general condition 16(a) of the general conditions. The court held that that condition applied merely to the contract for conveyance and not to the contract to erect the building and did not, therefore, apply to the building work or derogate from the implied term “*that the builder would do his work well and with proper materials and be fit for human habitation*” (per Lord Denning MR at p. 1333). Clarion relies on *Hancock* to defeat the case made by DCC and Campshire that the express terms of the MCA (and, in particular, clause 4) and general condition 16(a) negated the implication of the implied terms for which Clarion contends.

174. Clarion also relies on the judgment of Lowry L.C.J. in the Northern Ireland case of *McGeary*, where the court held that the implied term in a contract for the purchase of a house which is to be erected or is in the course of erection that the house be well built and fit for human habitation arose where, at the time the agreement was made, any work remained to be done and applied to the house in every respect (including the work already done at the time of the agreement).

175. In *O'Donnell*, Baker J. in the High Court held that the implied terms referred to in *Brown* had no application in the case of the contract at issue in that case between a partnership which owned land and a development company which carried out an apartment development on the partnership's lands under a licence with the partnership, under which the partnership agreed to execute an assurance of the finished apartments to purchasers nominated by the developer and, following the sale of the last unit, to assure the common areas and the reversion in the leases to a management company. The court held that the contract between the partnership and the developer did not contain any of the indicia of a building contract and, therefore, the implied terms referred to in *Brown* did not arise.

176. Having carefully considered the parties' submissions and the authorities on which they rely, I have come to the conclusion that the terms pleaded at para. 20 of the statement of claim should not be implied in the MCA as a matter of law by reason of the nature of the MCA. It is clear from *Brown* and from the other authorities relied on by Clarion that terms of that type will only be implied in very limited circumstances, i.e. where there is an agreement to purchase a house which is in the course of being built and where it is clearly agreed and understood by the parties that what the purchaser is agreeing to buy and what the vendor is agreeing to sell is a dwelling house in which the purchaser can live as soon as the house is completed by the vendor. Davitt P. in *Brown* made clear that those are the particular circumstances in which the three implied terms which he identified (which broadly correspond with three of the implied terms pleaded by Clarion at para. 20 of the statement of claim) may arise, in the absence of negating circumstances.

177. Self-evidently, the MCA is not an agreement between a purchaser and a vendor to sell a house in the course of construction. Clarion, which was incorporated by Campshire pursuant to its obligations under the JVA, was entering into the MCA for the purpose of acquiring the common areas and other areas set out in the first schedule to the deed of fee farm grant and the reversionary interest in the retail and residential leases to carry out its obligations as the estate management company for the development. In no sense could it be said that under the MCA Clarion and DCC were agreeing that Clarion was purchasing a dwelling house or houses in which it could live when completed. To apply the principle in *Brown* (and in the other cases in which similar implied terms were held to exist) would be stretching the principle well beyond breaking point. I agree with DCC and Campshire that the circumstances in which implied terms of the kind relied on by Clarion can arise as a matter of law are limited to the type of situation considered in *Brown* (and in all of the other cases relied on by Clarion such as *Lawrence, Miller, Hancock* and *McGeary*).

178. In order for terms to be implied on the basis of *Brown* and the other cases, the contract in question must be for the construction and acquisition of a dwelling house which is in the course of construction and it must be clearly agreed and understood between the parties that the purchaser can live in the dwelling house when it is completed. The MCA is clearly not such a contract. It does not have a construction element to it. It is not a contract for the acquisition of a dwelling house in the course of construction and, quite obviously, it is not a contract under which the parties agree that Clarion can reside in the development when completed. It is the estate management company. The common areas and other areas to be transferred to Clarion under the MCA and pursuant to the deed of fee farm grant can not be equated to a dwelling house in the course of construction. As I have indicated, they include driveways, paths and forecourts and car parks. The development includes retail units and Clarion can point to no authority which establishes that such implied terms can be implied in agreements for the construction of retail units, still less in agreements for the transfer of the common areas relevant to those units.

179. I mentioned earlier the judgment of Baker J. in the High Court in *O'Donnell*. While that case involved a different factual scenario to that at issue here and the issue there was not whether the *Brown* implied terms could be implied in the management agreement in that case, but rather in an agreement between the purchasers of units in the development and the partnership which owned the lands, Baker J. held that that agreement did not contain any of the indicia of a building contract and, therefore, the *Brown* terms could not be implied. Nor, in my view, does the MCA.

180. In my view, Clarion's case that the terms pleaded at para. 20 of the statement of claim should be implied in the MCA as a matter of law in reliance on *Brown* and the other cases referred to does not even get off the ground as the MCA is not a contract to which that case law applies for the reasons I have mentioned. That is certainly the case in respect of the

second, third and fourth implied terms pleaded at para. 20 of the statement of claim The first alleged implied term pleaded, namely, that DCC would ensure completion of the Clarion Quay development does not arise from *Brown* or the other cases relied on under this heading. It is also inconsistent with clause 4 of the MCA. Clause 4 expressly provides that DCC is not under any obligation to complete or cause the development to be completed and that DCC has the entitlement to discontinue developing the estate. Even if this implied term could be said to derive from *Brown* (and I don't believe that it does), Clause 4 would, in any event, be, having to effect a negating circumstance described by Davitt P. in *Brown* and it would have a similar effect in law to the clause at issue in *Lynch*.

181. The final implied term relied on by Clarion (and referred to at para. 20(vii) of the statement of claim), that the development would be constructed in "*first class state of decorative repair and condition*", similarly does not arise from *Brown* or the other cases relied on by Clarion. Clarion made clear in replies to particulars that that implied term is said to arise from the use of that phrase in para. 5 of the fourth schedule to the draft deed of fee farm grant attached to the MCA. It does not, therefore, arise from *Brown*. If it is to be implied, it can only be on the basis that such implication arises on the facts based on the presumed intention of the parties and not as a matter of law. I will consider it, therefore, in that context. Suffice to say at this point that the term is not to implied in the MCA as a matter of law.

182. For these reasons, I am satisfied that the terms pleaded at para. 20 of the statement of claim are not to be implied in the MCA as a matter of law based on *Brown* and the other cases relied on by Clarion.

(ii) Terms implied on the facts

183. The test for determining whether a term should be implied into a contract as a matter of fact based on the presumed intention of the parties and the legal principles relevant to that

test are well established and are not significantly in dispute between the parties. The principles can be traced back to cases such as *The Moorcock, Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 K.B. 206 (“*Shirlaw*”), *Trollope & Colls Ltd v. Northwest Metropolitan Regional Hospital Board* [1973] 1 WLR 601 (“*Trollope*”) and *BP Refinery in England* and have been applied by the Irish courts in the leading cases such as *Sweeney, Carna* and *Meridian* and, most recently, by the Court of Appeal in *Flynn*.

184. In *BP Refinery*, Lord Simon (speaking for the majority in the Privy Council) said that:-

“... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that “it goes without saying”; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.” (per Lord Simon at p. 283)

185. This summary was approved by Finlay Geoghegan J. in her lead judgment for the Court of Appeal in *Flynn*, although she noted that the parties in that case were in agreement that the possibility that conditions (2) and (3) might be alternatives, and not necessarily cumulative, was consistent with the law in this jurisdiction as set out in *Sweeney* (para. 77). Finlay Geoghegan J. accepted the submission of the appellant in that case that

“...obviousness requires the Court to be satisfied that, firstly, reasonable people in the position of the parties would all have agreed to make provision for the contingency in question, and second, that they would ‘without doubt’, or with something approaching certainty, have accepted the term proposed by the officious bystander” (per Finlay

Geoghegan J. at p. 86). She found support for that submission in the judgment of Lord Neuberger in the UK Supreme Court in *Marks & Spencer plc v. BNP Paribas Securities*

Services [2016] AC 742 (“*Marks & Spencer*”). She noted that Lord Neuberger summarised and, in part, quoted from the judgment of Sir Thomas Bingham MR in *Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd.* [1995] EMLR 472, 481 (“*Philips*”) where he, Lord Neuberger stated at para. 19:-

“...Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which ‘distil[led] the essence of much learning on implied terms’ but whose ‘simplicity could be almost misleading’. Sir Thomas then explained that it was ‘difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue’, because ‘it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision’, or indeed the parties might suspect that ‘they are unlikely to agree on what is to happen in a certain ... eventuality’ and ‘may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur’. Sir Thomas went on to say this at p 482:

‘The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in Reigate³, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can

³ *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592

also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ...”

(quoted by Finlay Geoghegan J. in *Flynn* at para. 88)

186. These observations by Sir Thomas Bingham MR in *Philips*, which were approved by Lord Neuberger in *Marks & Spencer* and by Finlay Geoghegan J. in *Flynn*, are helpful in identifying what Finlay Geoghegan J. described as the “*difficult task facing the court when asked to imply a term in relation to a matter for which no provision has been made in the contract*” (also at para. 88).

187. It is also, I think, helpful to refer to some additional comments made by Lord Neuberger in *Marks & Spencer* to supplement Lord Simon’s summary in *BP Refinery* as extended by Bingham MR in *Philips*. He made the following six supplementary or additional comments:-

“First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was ‘not critically dependent on proof of an actual intention of the parties’ when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon’s first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I

think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, at para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where one only of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care', to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is... that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

(per Lord Neuberger at para. 21)

188. I accept that those additional comments of Lord Neuberger are of assistance and also reflect the law in this jurisdiction. The first of those additional comments was expressly quoted with approval by Finlay Geoghegan J. in *Flynn* (at para. 87).

189. Those are the principles, therefore, which I will apply in determining whether the terms pleaded at para 20 of the statement of claim should be implied as a matter of fact. Before setting out my conclusions on the submissions advanced by the parties on this issue, I should refer to how the principles were applied in two of the cases to which my attention was drawn by the parties. In *O'Donnell*, a claim was made that certain obligations were to be implied into the long lease by which the apartments in the development were sold. The partnership which owned the lands was the lessor under the lease and its role was expressly to

act and to be engaged at the request of the developer and to hold the legal title pending the sale of the last unit until the reversion in the leases and the title to the common areas would be assured to the management company, which is what happened. It was argued that certain obligations were to be implied in the lease concerning the quality of the construction of the apartments and their compliance with the Building Regulations. Baker J. rejected that argument and held that no such term could be implied on the ground that the entire substance and form of the sale, when objectively ascertained, was inconsistent with the implication of such terms. The court, therefore, struck out the claim against the first defendant (representing the partnership), which was based on the claimed implied terms of good workmanship and structural soundness, on the basis that it was bound to fail.

190. In *Grehan*, the Court of Appeal reversed the finding of the High Court that there was an implied term in the management agreement that the receivers had to serve a 28-day completion notice as soon as was practicable after the sale of the last unit in the estate on the basis that the parties had agreed an express term governing the completion of the transfer of the lands to the management company. On the basis, the court concluded that the principles derived from *The Moorcock* did not dictate that the express term dealing with that issue and agreed between the parties should be supplemented by such an implied term (para. 103). The court disagreed with the trial judge's emphasis upon business efficacy as a basis for implying the term in question and noted that, since all of the parties to the relevant management agreement were connected and working together in relation to the development of the business campus, it was not an arm's length sale to a third party. The court concluded that the implied term relied on did not satisfy the legal test (referring to *Meridian*), in that it was not necessary to imply the term in the agreement and the term was not necessary to give business efficacy to it. Nor was it a term which could be presumed to reflect the common intention of the parties. The application of such a term would have involved the court in rewriting the

agreement actually entered into between the parties. The court did, however, uphold the trial judge's conclusion that a different term should be implied elsewhere in the management agreement concerning the obligation on the defendant to execute a lease of easements with the developer and with each purchaser of the unit. The court agreed with the trial judge's conclusion that such a term was to be implied, having regard to the terms of the management agreement itself and its interconnection with other documents (such as the draft lease of easements) and that it was necessary to give business efficacy to the agreement (para. 114). The court concluded that the implication of such a term did come within the principles in *The Moorcock* and reflected the intention of the parties at the time of the agreement.

191. I have carefully considered the agreed facts, the agreed documents, the submissions of the parties (which I have attempted to summarise earlier) and the principles which I have just set out and, having done so, I am not persuaded that the terms pleaded at para. 20 of the statement of claim should be implied as a matter of fact in the MCA on the basis of the test summarised by Lord Simon in *BP Refinery* and approved of and applied by the Court of Appeal in *Flynn*, taking account of the additional comments and observations of Lord Neuberger in *Marks & Spencer*.

192. Starting with the first condition referred to by Lord Simon in *BP Refinery*, I take the point made by Lord Neuberger in *Marks & Spencer* (at para. 21) that it is questionable whether the requirement that the term be "*reasonable and equitable*" will usually, if ever, add anything to the other conditions or elements of the test as, if the term does satisfy those other conditions or elements, it is difficult to see how it would not also be reasonable and equitable. I would prefer, therefore, to consider those other conditions or elements first. I turn then to the second condition, namely, that the term or terms in question must be "*necessary to give business efficacy to the contract*" such that "*no term will be implied if the contract is effective without it*". I am not satisfied that the terms pleaded at para. 20 of the statement of

claim are necessary to give business efficacy to the MCA. The MCA can work or, to use the term used in the condition, can be “*effective*” without any of the disputed implied terms.

While it may be the case, as Lord Neuberger said in *Marks & Spencer*, that it is not necessary to establish the “*absolute necessity*” of the term in order to demonstrate that it should be implied to give business efficacy to the contract, I do not accept that Clarion has demonstrated that if the disputed terms were not implied in the MCA, the MCA would lack “*commercial or practical coherence*” (being the alternative formulation suggested by Lord Neuberger). Without the disputed implied terms, the MCA will do what it was intended to do and will not be ineffective without them. The common areas and other areas to be conveyed to Clarion, together with the reversionary interests in the retail and residential leases, can be conveyed without the implied terms. On its proper interpretation, the MCA will do what, on its face, it was intended to do without the implied terms and will not lack “*commercial or practical coherence*” without them.

193. I accept, as did Finlay Geoghegan J. in *Flynn* and Lord Neuberger in *Marks and Spencer*, that the second and third conditions, namely, the necessity to give business efficacy to the contract and the obviousness of the term may be alternatives. However, I do not accept that Clarion has established that either of the alternative conditions has been satisfied here. With respect to the third contention, I am not persuaded that the disputed implied terms are so obvious that “*it goes without saying*” that they ought to be implied in the MCA. I bear in mind the observations of Sir Thomas Bingham MR in *Philips*, quoted by Lord Neuberger in *Marks & Spencer* and by Finlay Geoghegan J. in *Flynn*, that while it might be tempting to fashion a term which might be said to reflect the merits of the situation when a dispute or crisis has arisen, it would be wrong to do so. I also bear in mind, and agree with, the point made by Sir Thomas Bingham MR made the point that it is not enough to show that had the parties foreseen the eventuality which in fact occurred, they would have wished to make

provision for that eventuality, unless it could also be shown that there was “*only one contractual solution or that one of several possible solutions would without doubt have been preferred...*”. I find it very difficult on the agreed facts and on the basis of the agreed documents to conclude that, had the parties to the MCA foreseen the eventuality which has occurred here (being the defects which are admitted for the purposes of the determination of these issues) that it is clear that the only contractual solution is that the disputed implied terms formed part of the MCA. In considering this issue, I must bear in mind that as was said by Lord Neuberger in *Marks & Spencer* and by Finlay Geoghegan J. in *Flynn* that the question has to be approached by reference to “*notional reasonable people in the position of the parties at the time at which they were contracting*” and not by reference to the “*hypothetical answer of the actual parties*”.

194. It must be recalled that the JVA was agreed by the parties (DCC and Campshire) in March, 2000. The JVA imposed significant obligations on Campshire, including those set out in clause 5.1 concerning the quality of the works and materials and compliance with the Building Control Acts and the Building Regulations, on which Clarion places great weight in support of its case that the disputed terms should be implied in the MCA. The MCA was entered into by the parties (DCC and Clarion, as well as The North Wall Quay Management Company) in July, 2001, well over a year after the JVA. At the time the MCA was agreed (and the agreed facts do not mention the fact or extent of the negotiations which may have taken place between the parties to the MCA before agreeing to its terms), DCC and Clarion (which was incorporated by Campshire in accordance with its obligations under the JVA) would have been well aware of the terms of the JVA which imposed those obligations on Campshire. They agreed the terms of the MCA, including the terms imposing obligations on Clarion in the draft deed of fee farm grant and providing for the application of the general conditions (including general condition 36(d)). The parties were presumably also aware of

the terms of the retail and residential leases at that stage since they are referred to throughout the MCA. While it is not expressly agreed in the agreed facts that draft leases were available at the time the MCA was agreed, it would be surprising if they were not given the references to the leases in the MCA (such as in clause 1). I also note from the agreed facts that residential units were sold between 2001 and June, 2006. Those sales would have been effected by the residential leases. While it is not critical to my conclusion on this issue, which stands without this assumption, I believe that it is reasonable to assume that the terms of the leases, both retail and residential, were available when the MCA was agreed between DCC and Clarion (as well as The North Wall Quay Management Company) in July, 2001.

195. The parties could have, but plainly did not, expressly agree the terms now said by Clarion to be implied terms in the MCA, if they had intended them to apply. Because of the timing of the entering into of the JVA and the MCA, the fact that Clarion was incorporated by Campshire in accordance with its obligations under the JVA and the fact that those who signed the MCA on behalf of Clarion were members of Campshire, I must conclude that those entering into the MCA were aware of the JVA and must also have been aware of the terms of the draft fee farm grant which imposes obligations on Clarion (including the covenant in para. 5 of the fourth schedule which refers to the obligation to repair and keep in repair and "*first class decorative condition*" the premises and the buildings).

196. It is much more likely, therefore, not that the parties omitted the terms now sought to be implied in the MCA due to an oversight or omission but rather that the parties did not regard it as necessary or appropriate to include those terms in the MCA, having regard to the nature of that agreement. The purpose of the agreement was to convey the common areas and other areas to Clarion as a management company as well as the reversionary interests in the retail and residential leases. I find it impossible to see, in the circumstances, how the

condition requiring the relevant term or terms to be “*so obvious that ‘it goes without saying’*” can be satisfied on these facts.

197. I am concerned with what notional reasonable people in the position of the parties at the time they were agreeing the MCA would have said and not what one side might argue best reflects the merits of the situation as it now appears. I am, of course, not permitted to rewrite the contract that the parties made by implying these disputed implied terms. If I were to find that these terms were implied in the MCA, I believe that I would be doing just that. I am not in a position to say that if the notional “*officious bystander*” or nosey parker standing beside the parties when they were agreeing terms of the MCA had said “*surely, you all intend to include these implied terms*”, the parties would have testily responded with a common “*oh, of course!*” (as MacKinnon L.J. observed in *Shirlaw*). I am not persuaded that they would have said that, bearing in mind what they agreed in the MCA. Clause 4 of the MCA is certainly inconsistent with the first of the disputed implied terms, namely, that DCC would ensure completion of the development in circumstances where the clause made clear that DCC was not under any obligation to complete the development as I have already mentioned.

198. It also seems to me that the other implied terms are not consistent with the type of contract which the parties were agreeing by means of the MCA, particularly where Campshire had incorporated Clarion to be the management company and had nominated the original subscribers who remained in their positions until 2011. Nor could the last of the disputed implied terms satisfy the test of obviousness, in circumstances where considerable reliance is placed by Clarion on the covenant contained in para. 5 of the fourth schedule to the draft deed of fee farm grant to which I have referred. The parties must have been aware of what was expressly contained in that paragraph which would impose obligations on Clarion and yet they did not include any of the disputed implied terms in the MCA. They did,

however, include reference to the general conditions, including general condition 36(d) with which DCC will have to comply at the relevant time.

199. That leads me to the next condition in Lord Simon's list. The disputed implied terms must be "*capable of clear expression*". While three of those implied terms are taken from *Brown* and while, having regard to the restricted scope of application of *Brown* (as I have concluded earlier), those terms may not have been regarded as unclear or uncertain in that particular context, it seems to me that the position is somewhat different when one considers the potential scope of application of the terms if Clarion is correct in its case that they should be implied in the MCA. It is sought to imply those terms to cover all of the common areas and other areas which are to be conveyed to Clarion under the MCA by means of the deed of fee farm grant attached to the agreement. The areas covered are set out in the first schedule to the draft deed and it is unnecessary to list them again, suffice to say that they include things like the driveways, paths and forecourts, staircases, landings and lifts, roofs, rooftop patios, foundations and basements and car parks. It is difficult to reconcile some of the disputed implied terms with the object and scope of application of the terms. Two of them (the second and third terms) expressly refer to fitness for "*immediate occupation*". I agree with the submission made by Campshire that it is difficult to envisage how those terms could apply to the common areas and other areas which I have just mentioned with which the proceedings are concerned. I accept that in respect of those two implied terms, it is difficult to envisage their application to the areas with which we are concerned and to the defects which are admitted in respect of those areas for the purposes of the determination of these issues.

200. The final condition in Lord Simon's list is that the terms sought to be implied in the agreement must not contradict any express terms of the contract. I have already indicated that, in my view, the first of the implied terms contradicts clause 4 of the MCA which makes clear that DCC did not have an obligation to complete the development. In light of my

conclusions in respect of the other conditions in Lord Simon's list, it is perhaps unnecessary to consider this condition further. However, in case I am wrong in my earlier conclusions that the implied terms are not necessary to give business efficacy to the contract and do not satisfy the test of obviousness, I should say that I agree with Clarion that, with the exception of the first implied term relied on, the other implied terms do not necessarily contradict and are not necessarily inconsistent with clause 4 of the MCA which, as I have concluded earlier in respect of issue (1), is a relatively standard type of estate variation clause. It would not, in my view, be inconsistent with clause 4 for those implied terms (with the exception of the first such term) to be implied in the MCA, if it were otherwise appropriate for the terms to be implied (and I do not believe that it is appropriate for them to be implied, for the reasons I have just explained). The entitlement to vary the location, layout and extent of the development, to include additional lands or even to discontinue developing the estate or to exclude certain works from it is not inconsistent with terms with respect to the quality of the work and with the materials used. That having been said, however, I am not satisfied that these terms can be implied at all as I am not persuaded that Clarion has satisfied the conditions with respect to business efficacy and obviousness.

201. I do not think that it is necessary for me to address the argument made, particularly by DCC, in reliance on clause 16(a) of the general conditions. DCC sought to distinguish between the physical property itself and an interest in the property and argued that general condition 16(a) provided that Clarion was deemed to buy "*with full notice of the actual state and condition*" of the physical property itself and that this was inconsistent with implied terms as to quality of work and workmanship. I have to confess that I found it somewhat difficult to follow DCC's argument on this issue and I do not think that it is necessary for me to reach a conclusion on the point as I have decided for other reasons that the terms should not be implied in the MCA.

202. Nor is it necessary for me to express a conclusion on Clarion's reliance on *Hancock* and the distinction drawn in that case by Lord Denning MR between the contract for the conveyance and the contract for the erection of the building to defeat the case made by the builder against the implication of the disputed implied terms in reliance on condition 12(3) of the National Conditions of Sale. It is unnecessary because I am satisfied that the disputed terms cannot be implied on either of the two bases put forward by Clarion. They do not arise as a matter of law by virtue of the nature and type of agreement provided for in the MCA and they do not arise as a matter of fact, as the conditions for their implication are not satisfied.

203. Finally, in respect of this issue, I must address the point made by Clarion that, if the terms are not implied in the MCA, and if the common areas and other areas referred to in the MCA and the fee farm grant are conveyed to Clarion with the defects as are alleged to exist, Clarion could well be under an obligation to remedy the defects by reason of the covenants contained in the fourth schedule to the deed of fee farm grant (and, in particular, the covenant in para. 5) and the failure to do so could leave Clarion open to proceedings by DCC and the potential for the grant to be determined by DCC for breach of covenant by Clarion.

204. In answer to that point, DCC and Campshire both rely on the decision of Kenny J. in *Whelan*. DCC maintains that Clarion is not bound to maintain a better property than the one demised or assured. Campshire contends that Clarion is mistaken in claiming that it will be obliged to put the property in a better condition than it was when it contracted to take it (under the MCA). Both rely on the statement by Kenny J. in *Whelan* where, having referred to a number of cases, including what Kenny J. referred to as the "*elaborate judgment*" of Black J. (in the Supreme Court) in *Groome*, Kenny J. stated that those cases "*establish that a covenant by the tenant to repair does not extend to defects caused by a structural defect which was present in the premises when they were let to the tenant*" (at 145). In response, Clarion relies on the discussion of *Groome* in Wylie "Landlord and Tenant Law" (3rd Ed.)

(paras. 15.26-15.30). In commenting on the terms of an agreed covenant to repair, Wylie noted:-

“...there is a clear difference between repairs, which are designed to cure defects in the existing demised premises, and improvements, which add to what were previously the demised premises.” (para. 15.30) (footnoted references omitted)

205. However, the author noted that that is often a difficult distinction to draw in practice.

He referred to what Black J. stated in *Groome* where he said:-

“It has often been said that the covenanting lessee is not bound to give back a better house than the one demised to him. I regard this as one of those treacherous generalisations that are true in one sense and not in another. It is true in the sense that the lessee cannot be made do improvements in the guise of repairs. But if genuine repair involves, as it often does, inevitable improvement, that does not enable the covenantor to say he will not do the repair. He is often obliged in this way to give back a better house than the one he got.” (per Black J. at pp. 414-415)

206. Wylie also noted (at para. 15.30) that it is often stated that a tenant subject to a repairing covenant is not responsible for repairs to the “*structure*” of the premises, Black J. was “*equally cautious of this proposition*” in *Groome* noting that “[*a defect in structure seems to me a relative term*” (at p. 415). The author then referred to *Whelan* and to the extract from Kenny J.’s judgment which I have just quoted and on which both DCC and Campshire rely. He noted, however, that in that case the repairing covenant imposed an obligation on the particular tenant in respect of the interior only of the flat and that Kenny J.’s remarks should be read in that context. Wylie continued:-

“The position remains, however, one of construction of the agreement and tenants should understand that many repairing covenants may involve them in major expenditure on the demised premises. The Groome case involved major work like

taking down and rebuilding half of a wall and just over half of the roof of a building and the Supreme Court held that this came within the repairing covenant. Over the years the courts have recognised that major parts of buildings will wear out or come to the end of their natural life and that replacing these parts with modern parts, using the latest building techniques, will necessarily bring about an ‘improvement’; nevertheless such work is likely to be regarded as coming within a full repairing covenant. Indeed, such ‘improvement’ will often be inevitable if compliance with current building regulations is to be met.” (para. 15.30 (footnotes excluded))

207. While the covenants in the fourth schedule to the fee farm grant on which Clarion relies in support of its case that the disputed terms should be implied in the MCA are broad and extensive in their scope, that is particularly so in the case of para. 5 which refers to the covenant by Clarion *“from time to time and at all times during the said grant [to] well and sufficiently repair and keep in repair and first class decorative condition the premises and all buildings for the time being thereon”*. If the common areas and other areas to be conveyed to Clarion under the MCA contain the defects set out in the statement of claim which are set out in the reports of Michael Slattery & Associates and Aecom Ireland Ltd, which are referred to in the statement of claim, it is difficult to see how the covenants (including that contained at para. 5) would be interpreted as imposing an obligation on Clarion, post the assurance of the relevant areas to it under the MCA, to remedy and repair the defects. To that extent, it seems to me more likely that a court would apply the *dictum* of Kenny J. in *Whelan* as covering the defects referred to. However, I do not need to reach a decision on this point and do not need to reconcile *Whelan* with *Groome* as both DCC and Campshire have expressly confirmed in their written submissions (and Campshire in its oral submissions to the court) that Clarion would not be obliged to repair defects caused by structural issues, which exist at the time of the assurance to Clarion, or obliged to put the property in a better position than it was in

when it was demised or assured to Clarion (para. 4.2 of DCC's submissions and para. 3.23 of Campshire's submissions). Those submissions were made in response to the point made by Clarion that it would be subject to onerous duties under the covenant if the disputed terms were not implied in the MCA and that DCC could take action to enforce the covenant and potentially to determine the grant.

208. In light of the submissions made by DCC and Campshire in response, it is very difficult to see how DCC could make the case that the covenant to repair extends to the defects complained of and that the grant could be determined by reason of a failure by Clarion to repair or remedy the defects which exist at the time of the assurance to Clarion. It is also significant that, as I have concluded in respect of issue (1), general condition 36(d) applies and Clarion has the benefit of the warranty from DCC contained in that general condition concerning substantial compliance with the Building Control Acts and the Building Regulations and an entitlement to a certificate or opinion certifying such substantial compliance. For these reasons, therefore, I do not accept that Clarion's concerns that it would be subject to onerous repairing covenants under the grant which might compel it to remedy the existing alleged defects and leave open the possibility that DCC could determine the grant if Clarion failed to do so, provide any support for the implication of the disputed terms.

209. In conclusion, therefore, I do not accept that the terms pleaded at para. 20 of the statement of claim are implied terms of the MCA on either of the grounds advanced by Clarion. Accordingly, I must answer the question posed in issue (2) in the negative.

I. Issues (3) and (4): Issues concerning the MUDs Act

(1) Introduction

210. Two of the issues directed to be tried (issues (3) and (4)) concern the MUDs Act. The first of those issues (issue (3)) asks whether Clarion is entitled to rely on the MUDs Act in the proceedings. The second (issue (4)) is predicated on a positive answer to the question raised

in issue (3). Issue (4) is, on the basis that Clarion is entitled to rely on the MUDs Act in the proceedings, whether DCC and Campshire, as “*developers*” within the meaning of that term in the MUDs Act, are obliged (a) to complete the development of the common areas in accordance with (*inter alia*) the Building Regulations and (b) to indemnify Clarion in respect of all claims made against Clarion of whatever nature or kind in respect of acts or omissions by DCC and Campshire in the course of works connected with the Clarion Quay development.

211. While issue (4) appears to be predicated on an assumption that DCC and Clarion are both “*developers*” within the meaning of that term in the MUDs Act, that issue is in dispute between the parties. Neither DCC nor Campshire accepts that it is a “*developer*” within the meaning of that term in the MUDs Act. It was expressly agreed between the parties during the course of the hearing of the trial of these issues that the court is not required to decide the issue as to whether DCC and Campshire, or either of them, are “*developers*” for the purposes of the MUDs Act as that was not one of the issues which the parties agreed, or the court ordered, should be tried at this stage in the proceedings (Transcript Day 2 pp. 87-88). It appears, therefore, that depending on the outcome of the trial of the two issues concerning the MUDs Act which the parties did agree should be tried at this stage, it may be necessary at some later stage for a court to decide whether DCC and Campshire or either of them are “*developers*” for the purposes of the MUDs Act.

212. Earlier in this judgment, I reviewed Clarion’s pleaded case and the defences and counterclaims pleaded by DCC and Campshire. It is evident from Clarion’s pleaded case and from its written and oral submissions that Clarion is making a case against DCC and Campshire under the MUDs Act. While Clarion and DCC are parties to the MCA and DCC and Campshire are parties to the JVA, Clarion is not a party to any contract with Campshire (apart from the contracts comprised in the residential leases). Therefore, in order to maintain

a number of its claims against Campshire, Clarion relies on the provisions of the MUDs Act which it contends allows Clarion to pursue Campshire in circumstances where it would not otherwise have had privity of contract to do so prior to the enactment of the MUDs Act (Clarion's counsel, transcript, Day 1, p. 13 and 134; Day 2 pp. 83-85).

213. As noted earlier in my review of the pleadings, Clarion includes a number of pleas relevant to the MUDs Act in its statement of claim. At para. 13, it is pleaded that DCC and Campshire are "*developers*" within the meaning of the MUDs Act. At para. 21, it pleads that DCC and Campshire, as "*developers*" within the meaning of the MUDs Act, were and are obliged (a) to complete the development of the common areas in accordance with (*inter alia*) the Building Regulations and (b) to indemnify Clarion in respect of all claims made against it of whatever nature or kind in respect of acts or omissions by the "*developer*" in the course of works connected with the Clarion Quay development. Particulars were sought by Campshire arising from that plea and, in response, Clarion referred to a number of sections of the MUDs Act to support the plea, including ss. 7, 9, 31(2) and Schedule 3 (see paras. 8b and 11a of Clarion's replies to particulars of 15th January, 2019).

214. As we shall see, the wording contained in para. 21 of the statement of claim, which is replicated in the wording of issue (4), appears to be an attempt by Clarion to pray in aid the provisions of s. 7 of the MUDs Act, in the case of the pleaded obligation on DCC and Campshire to complete the development of the common areas in accordance with (*inter alia*) the Building Regulations and s. 9 of the MUDs Act, in the case of the pleaded case that DCC and Campshire are obliged to indemnify Clarion in respect of the claims referred to.

However, in the prayer for relief, although there is a claim for a declaration that DCC and Campshire are obliged to indemnify Clarion in respect of such claims (relief 10), there is no claim for a declaration that DCC and Campshire are obliged to complete the development in accordance with (*inter alia*) the Building Regulations. Despite that, the parties agreed, and

the Order provides, that those issues be tried at this stage as issue (4). Nor, should I say, is there any relief directed to the matters dealt with in s31(2) and Schedule 3, although those provisions are relied on in support of the pleas made at paras. 21 and 24 of the statement of claim (see again paras. 8b and 11a of Clarion's replies to particulars of 15th January 2019).

215. Also relevant to Clarion's case under the MUDs Act is para. 24 of the statement of claim. In that paragraph, Clarion pleads that DCC and Campshire have not complied with their obligations under the MCA (although Campshire is not a party to that agreement), the MUDs Act and their alleged duties of care to Clarion and that, as a consequence, neither DCC nor Campshire is entitled to rely on the MCA, the MUDs Act or otherwise to require Clarion to join in or to be parties to leases on the sale of units in the development, including the unsold apartments and retail units. The issue pleaded at para. 24 of the statement of claim is, however, not one of the issues directed by the Order to be tried at this stage.

216. None of the reliefs sought in the statement of claim expressly refer to the MUDs Act. However, as I have already mentioned, relief 10 is clearly an attempt by Clarion to rely on the provisions of s. 9(2). Relief 9, which appears to be connected with the plea contained at para. 24 of the statement of claim, is also an attempt to rely on the MUDs Act, as well as on other sources for the alleged right of Clarion not to be joined in the leases on the sale of units, such as the MCA. Relief 11 seeks damages against DCC and Campshire for (*inter alia*) breach of statutory duty. Clarion maintains that it is entitled to seek damages for breach of statutory duty, including for breach by DCC and Campshire of alleged obligations under the MUDs Act. It was clarified on behalf of Clarion at the hearing that Clarion is asserting an entitlement to maintain an action for a declaration with respect to its rights arising by virtue of the MUDs Act as against DCC and Campshire (even though the MUDs Act is not mentioned in the prayer for relief) and its entitlement to seek damages for breach of statutory

duty, including a breach of the provision of the MUDs Act, notwithstanding the provisions of ss. 24 and 26 of that Act (Clarion's counsel, transcript, Day 3, pp. 75-79).

217. In my review of the defences and counterclaims delivered by DCC and Campshire, I referred to their responses to the claims pleaded by Clarion based on the MUDs Act. It is sufficient at this point briefly to recap on what they said. Campshire raised a preliminary objection that, insofar as Clarion seeks reliefs by reference to the provisions of the MUDs Act, the Circuit Court has exclusive jurisdiction in respect of such claims. While DCC did not include an express plea to that effect, it has joined with and supported the case made to that effect by Campshire. Both claim that that part of Clarion's case based on the MUDs Act must be brought in the Circuit Court, having regard to the provisions of ss. 24 and 26 of that Act. Clarion does not agree and claims an entitlement to seek reliefs by way of declaration and damages in reliance on the MUDs Act in the High Court. That dispute is the subject of issue (3).

218. Both DCC and Campshire deny that they have obligations to Clarion under the MUDs Act. They both make the point that the MUDs Act does not have retrospective effect and that by relying on it in the proceedings, in circumstances where it is said by the defendants that the development was completed in or about 2002, or, at any event, years before the MUDs Act came into force in 2011, Clarion is impermissibly seeking to give the legislation retrospective effect. In response, Clarion maintains that the MUDs Act is intended to have retrospective effect and to change pre-existing contracts. The issue between the parties concerning the alleged retrospective effect of the MUDs Act forms part of issue (4), which asks whether DCC and Campshire are subject to certain obligations which, as I have noted, clearly have their source in the MUDs Act (ss. 7 and 9(2)). Before turning to consider the first of the two issues referable to the MUDs Act, it is necessary to refer to a number of

provisions of the legislation in order better to understand the arguments made by the parties on those two issues.

(2) *Relevant Provisions of MUDs Act*

219. The MUDs Act was enacted in part to give effect to recommendations made by the Law Reform Commission in a report which it published in 2008 entitled “*Report on Multi-Unit Developments*” (LRC90-2008). Apart from ss. 14 and 32, the MUDs Act was commenced with effect from 1st April, 2011 pursuant to the Multi-Unit Developments Act, 2011 (Commencement) Order, 2011 (SI No. 95 of 2011). Sections 14 and 32 came into effect in January, 2011. The commencement date is relevant in light of the agreed fact that the residential units in the Clarion Quay development were sold on various dates between 2001 and June, 2006 (and a retail unit was sold in January, 2003). It is not an agreed fact between the parties that work on the development has been completed (aside from the carrying out of such repairs or other works as are necessary to remedy the defects alleged by Clarion in the proceedings). The parties have agreed that the exact date of construction or progress will be a matter for evidence in any future trial but that “*certificates of practical completion for the various blocks issued from August, 2002 onwards*” (agreed fact 10).

220. Section 1 is the interpretation section and contains various relevant definitions. The term “*common areas*” is defined, but it is unnecessary to reproduce here the terms of that definition. The term “*developer*” is defined as meaning “*the person who carries out or arranges for the development or construction of a multi-unit development*”. The term “*development stage*” is defined as meaning “*the period which begins when the first unit to be made available for sale is so made available and ends after all construction works and ancillary works (including works on the common areas), for the multi-unit development have been completed in accordance with...*” (*inter alia*) all relevant planning permissions and the requirements under the Building Control Acts, 1990 and 2007. The term “*multi-unit*

development” is defined and it is not disputed that, if the MUDs Act does apply, Clarion Quay would constitute a “*multi-unit development*”. The term “*owners’ management company*” (or OMC) is defined. Again, there is no dispute that, if the MUDs Act applies, Clarion satisfies the definition of a “*owners’ management company*”. It is clear from s. 2 that a mixed-use development can include commercial units as well as residential units.

221. Section 3 applies to the transfer of interests in a residential unit in a multi-unit development after the coming into operation of the section in April 2011. The section applies in the case of a multi-unit development in which a residential unit has not previously been sold and to a person, other than the relevant OMC, who is the owner of relevant parts of the common areas of such a development. The term “*relevant parts*” is defined in s. 1 as meaning “*in relation to a unit, those parts of the common areas of a multi-unit development necessary for the enjoyment of quiet and peaceful occupation of such unit*”. One of the requirements in the case of the transfer of an interest in a residential unit after the coming into operation of s. 3 is that ownership of the relevant parts of the common areas of the development and of any reversion in the residential unit to be transferred must have been validly transferred to the OMC relating to that unit (ss. 3(1)(b) and (7)). Section 3 does not apply on the facts of this case as, even assuming that the MUDs Act does apply, residential units in the development were sold prior to the coming into operation of the section.

222. Sections 4 and 5 provide for the transfer of common areas in cases where s. 3 does not apply. Section 4 applies where less than 80% of the residential units in a development were sold prior to 1st April, 2011. Section 5 applies where 80% or more units were sold prior to that date. Under ss. 4 and 5, developers of developments existing as of 1st April, 2011, where residential units had been sold, were required to transfer the relevant parts of the common areas of the development concerned together with the reversion in the units within six months of the coming into operation of s.4 on 1st April, 2011. Therefore, those transfers had to take

place by 1st October, 2011. Both ss. 4 and 5 expressly provide that the transfer obligations contained in those sections apply where residential units have been transferred “*before the coming into operation*” of s. 4 (ss. 4(1) and 5(1)).

223. Section 6 imposes an obligation on OMCs, where requested by the developer, to join in a deed of conveyance or transfer relating to a residential unit in the development and to take other steps as may reasonably be requested of it to enable good marketable title in the residential unit to vest in the purchaser from the developer.

224. Section 7 is important for present purposes and provides as follows:-

“The transfer of the ownership of an interest in the relevant parts of the common areas of a multi-unit development shall not relieve the person who would otherwise have been responsible from the duty, obligation or responsibility to ensure completion of the development, including—

- (a) compliance with the requirements or conditions of a planning permission under the Planning and Development Acts 2000 to 2009 which relates to the development concerned, and*
- (b) compliance with the Building Control Acts 1990 and 2007.”*

As I have noted earlier, Clarion does seek to rely on s. 7 as against both DCC and Campshire (para. 21 of the statement of claim and issue (4)).

225. Section 9 is also important. It addresses the respective rights and responsibilities of developers, unit owners and OMCs where a transfer of the ownership of the relevant parts of the common areas of the development is made and where works still have to be carried out to complete the development. Under s. 9(1), in such a situation, the developer retains the right to pass and repass and to have access to such parts of the common areas as is “*reasonably necessary to enable the multi-unit development to be completed*”. Section 9(2) states:-

“(2) The developer shall indemnify the owners’ management company in respect of all claims made against the company of whatever nature or kind in respect of acts or omissions by the developer in the course of works connected with the completion of the multi-unit development.”

As noted above, Clarion relies on s. 9(2) to seek an indemnity from DCC and Campshire (para. 21 of the statement of claim, relief 10 of the prayer for relief and issue (4)).

226. The remaining subsections of s. 9 impose an obligation on the developer to have a policy of insurance to cover risks in respect of the developer’s use or occupation of the development, an obligation on the developer to take reasonable steps to minimise inconvenience to unit holders when exercising rights or in discharging obligations in relation to the development and to ensure that access to the transferred common areas by unit holders is maintained. Certain obligations are also imposed by s. 9 on unit holders and on OMCs also, including that they do not obstruct the developer in exercising any rights or in discharging any obligations under s. 7 (concerning the completion of the development).

227. The next relevant section for present purposes is s. 24. Section 24(1) provides:-

“A person specified in section 25 may make, in respect of a multi-unit development, an application to the court—

(a) for an order under this section to enforce any rights conferred, or obligation imposed, by this Act or any rule of law, or

(b) for an order relating to any matter to which reference to making an application under this section is made in this Act.”

228. Section 24(3) provides:-

“In a case to which subsection (1)(a) applies, where the court is satisfied that a right has been infringed or an obligation has not been discharged, it shall make such remedial order as it deems appropriate in the circumstances with a view to ensuring

the effective enforcement of a right or the effective discharge of an obligation relating to the multi-unit development.”

229. Section 24(5) contains a list of remedial orders which may be made under s. 24(3).

The list is non-exhaustive and is expressly stated to be “*notwithstanding the generality of*” s. 24(3). The list of orders in s. 24(5) is extensive and covers a wide range of issues. Among the orders that can be made is an order that legal documentation relating to the OMC be amended. That is the provision relied on by Clarion in the Circuit Court proceedings in seeking to have Clarion’s articles of association amended. Most relevant for present purposes is the order listed at s. 24(5)(1). Under that provision, an order can be made:-

“directing the developer of a multi-unit development to complete the multi-unit development in accordance with—

- (i) the terms of any contract,*
- (ii) the conditions of a relevant planning permission under the Planning and Development Acts 2000 to 2009, or*
- (iii) the Building Control Acts 1990 and 2007;”*

This is clearly a very far-reaching order and featured prominently in the debate between the parties as to whether the claims made by Clarion in reliance on, or by reference to, the MUDs Act could be, and are required to be, brought in the Circuit Court. It is notable that there is no limit to the monetary value of the cost of the works which may be necessary to be done by a developer in order to comply with an order made under s. 24(5)(1).

230. The persons who are entitled to apply for, or to appear and be heard at, an application for an order under s. 24 include the OMC, any member of the OMC and the developer (s. 25(1)).

231. Section 26 is the section providing for the exclusive jurisdiction of the Circuit Court and for the relevant Circuit Court to exercise that jurisdiction. Section 26 provides:-

“(1) *The Circuit Court shall have exclusive jurisdiction to hear and determine applications under section 24 and such applications shall not be made to the High Court.*

(2) *The jurisdiction conferred on the Circuit Court by this Act may be exercised by the judge of the circuit in which the relevant multi-unit development or any part thereof is situated.”*

232. Sections 24 and 26 are highly relevant to issue (3) which raises the question as to whether Clarion is entitled to rely on the MUDs Act in these proceedings in the High Court or whether such claims must be brought in the Circuit Court. Section 29 is also relevant to that issue. The marginal note for s. 29 states that it is a “*Saver for existing jurisdictions*”. However, the section is, in fact, much wider than that. It provides:-

“Nothing in this Act shall be taken to derogate from any right or power which may, whether before or after the passing of this Act, be vested in any person or court, by statute or otherwise, and the powers conferred by this Act shall be in addition to, and not in substitution for, such other rights or powers.”

Clarion seeks to rely on s. 29 as entitling it to advance the claims it makes in these proceedings in reliance upon or by reference to the MUDs Act. DCC and Campshire disagree with that and contend that nothing in s. 29 can confer on Clarion the entitlement to advance such claims which, they contend, must be brought in the Circuit Court which has exclusive jurisdiction in relation to them.

233. The next relevant provision is s. 31(2). It states:-

“(2) *Where the development stage of a multi-unit development has ended, a developer shall furnish to each owners’ management company concerned the*

documentation specified in Schedule 3 relating to the development concerned.”

234. Schedule 3 contains a list of documentation to be handed over pursuant to s. 31(2). That list includes confirmation that the development has been completed in accordance with all relevant planning permissions and in accordance with the Building Control Acts (para. 1 of Schedule 3). In replies to particulars, Clarion included s. 31(2) and Schedule 3 among the sections on which it was relying in support of the case pleaded by it at para. 21 of the statement of claim (being the obligation to complete in accordance with the Building Regulations and the indemnity claimed). In its written submissions, it included s. 31(2) and Schedule 3 as part of the statutory framework on which it was relying to establish a statutory obligation on DCC and Campshire to ensure that the common areas comply with the Building Control Acts/the Building Regulations, to provide certificates that that is so and to indemnify Clarion in respect of any failure to do so. However, as I have observed earlier, it does not appear that any relief is sought in the prayer for relief as against either DCC or Campshire in reliance on s. 31(2) and Schedule 3 in terms of the provision of confirmation of completion of the development in accordance with the Building Control Acts. Clarion does seek to compel DCC to comply with the provisions of general condition 36(d), with the warranties contained in that general condition and with the obligations in terms of providing the certificate or opinion of substantial compliance. Nonetheless, Clarion has sought to rely on those provisions in support of its pleaded case in reliance on the MUDs Act. Clarion maintains that s. 31(2) and Schedule 3 apply to all multi-unit developments (including those commenced and even completed prior to the MUDs Act coming into force).

235. Having set out what appear to me to be the relevant provisions, I will now turn to consider issue (3) which raises a fundamental question as to the entitlement of Clarion to rely on the MUDs Act in the proceedings.

(3) Issue (3) is Clarion Entitled to Rely on the MUDs Act in These Proceedings?

(a) *Introduction to issue (3)*

236. This issue has been treated by the parties as one of justiciability, but the issue is really focused on whether Clarion is entitled to maintain a claim in these proceedings in the High Court in reliance upon, or by reference to, the MUDs Act in light of the provisions of ss. 24, 25, 26 and 29 of that Act. There is no question but that the issues are justiciable. The question is by what court must or should they be considered.

(b) *Clarion's case on issue (3): Summary*

237. Clarion maintains an entitlement to assert its claims in reliance on or by reference to the MUDs Act in the High Court. It says that s. 26(1) is narrowly framed and confers exclusive jurisdiction on the Circuit Court only in respect of applications under s. 24. It has not brought any application under s. 24 and, therefore, it maintains that the Circuit Court does not have exclusive jurisdiction in relation to any of the claims made by it in the proceedings. Clarion contends that it is entitled to seek declaratory relief in the High Court with respect to rights and obligations under the MUDs Act and as to how that Act has affected existing agreements. It says that the High Court has jurisdiction to grant declaratory relief as to the meaning and effect of the relevant provisions of the MUDs Act, even where a statutory scheme provides for exclusive jurisdiction in respect of applications under that scheme (as here). Clarion also asserts that it has an entitlement to seek damages for breach of statutory duty, including breach of alleged duties under the MUDs Act, in these proceedings and that neither its claim for declaratory relief nor its claim for damages is caught by the provisions of s. 26(1). Clarion makes the point that the vast majority of the issues raised in the pleadings concern the proper construction of the MCA as a matter of contract and that no orders are sought under the MUDs Act. It argues that it could not seek damages for breach of statutory duty in the Circuit Court as its claim greatly exceeds the jurisdictional limit of that court of

€75,000. It also points to what it terms the “*obvious efficiencies*” of litigating all matters between the parties in the same set of proceedings rather than having to litigate some of those issues in the Circuit Court and others in these proceedings in the High Court, although it does acknowledge that the issue is one of jurisdiction rather than discretion.

238. Clarion relies on the decision of the Supreme Court in *Tormey v. Ireland* [1985] IR 289 (“*Tormey*”). While accepting that the Supreme Court in that case held that Article 34.3.1 of the Constitution, which refers to the High Court being invested with “*full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal*”, must be read in light of other provisions of the Constitution, including Article 34.3.4 and that while, in appropriate cases, the Oireachtas may legislate to confer exclusive jurisdiction on courts of local and limited jurisdiction, Clarion submits that any provision which purports to do so should be strictly construed.

239. Clarion also relies on a number of cases which considered the extent to which the High Court continues to have jurisdiction in certain landlord and tenant matters under the Landlord and Tenant (Amendment) Act, 1980 (the “1980 Act”) and in ground rents applications under the Landlord and Tenant (Ground Rents) Acts, 1967-1978 (as amended) (the “Ground Rents Acts”). In particular, it relies on the judgment of the Supreme Court in *Kenny Homes & Co Ltd v. Leonard* (Unreported, Supreme Court, 18th June, 1998) (“*Kenny Homes*”) (which concerned an application for an injunction against a person alleged to be a trespasser who was claiming to be entitled to a new tenancy under the 1980 Act) and of the High Court in *Smiths (Harcourt Street) Ltd v. Hardwicke Ltd* (Unreported, High Court, 30th July, 1971 (O’Keeffe P.) (“*Smiths*”) (in which the court had to consider whether it had jurisdiction to hear and determine an application to interpret the rights of parties arising under an award of the County Registrar under the Ground Rents legislation). In his reply, Clarion’s counsel sought to distinguish one of the cases relied on by DCC and Campshire, *Doherty v.*

South Dublin County Council (No. 2) [2007] 2 IR 696 (“*Doherty*”) and argued that the principle in that case had no application to this case as the MUDs Act did not create any entirely new norms but, rather, a statutory means of enforcing existing contractual rights (including to the extent of permitting Clarion to maintain a claim against Campshire against which it did not have a pre-existing contractual right).

240. Clarion’s counsel also addressed in his reply the provisions of s. 29 of the MUDs Act. He argued that, properly interpreted, that provision does allow Clarion to include pleas and seek declarations with respect to rights and obligations under the MUDs Act, including declarations as to how existing contracts are affected or altered by the Act, as well as allowing damages for breach of statutory duty which entitlement is not excluded by ss. 24 and 26 and is preserved by s. 29.

241. For these reasons, Clarion contends that it is entitled to maintain all of the claims pleaded in the statement of claim and that it is not, and should not be, necessary for it to maintain separate parallel proceedings in the Circuit Court dealing just with its claims relying on or referring to the MUDs Act.

(c) DCC’s and Campshire’s case on issue (3): Summary

242. DCC contends that Clarion is not entitled to rely on the provisions of the MUDs Act in these proceedings having regard to s. 26 which provides for exclusive jurisdiction in respect of applications under s. 24. It contends that s. 24 encompasses all potential issues of dispute arising between parties involved in a multi-unit development and in respect of obligations and duties arising under the MUDs Act. DCC maintains that it is not appropriate for Clarion to seek declarations or damages for breach of statutory duty in respect of matters that could be the subject of an application under s. 24.

243. DCC contrasts the wording of s. 26 of the MUDs Act with the wording of s. 3(1) of the 1980 Act which makes clear, for the purposes of that Act, that the relevant court is the

Circuit Court. Section 26 of the MUDs Act, on the other hand, is much more explicit in stating that the Circuit Court has “*exclusive jurisdiction*” in respect of applications under s. 24 and that such applications “*shall not be made to the High Court*”. That was one of the grounds on which DCC sought to distinguish the decision of the Supreme Court in *Kenny Homes*. The other two grounds on which it sought to distinguish *Kenny Homes* were that (a) the Supreme Court (and the High Court) in that case concluded that the relevant premises were not held under a lease or other contract of tenancy and that the premises were not, therefore, a tenement and so the provisions of the 1980 Act did not apply and (b) that the court was dealing with a claim for equitable relief which, DCC submitted, was separate from the claim for a new tenancy which had been made by the defendant in the Circuit Court. DCC also sought to distinguish *Smiths* on the basis of the difference in the wording used in the relevant sections of the 1967 Act at issue in that case which simply referred to the fact that there was a right of appeal to the Circuit Court from the award or decision of the arbitrator compared to the more explicit terms of s. 26 of the MUDs Act.

244. DCC maintains that where legislation creates new obligations and duties and provides for a mechanism for their enforcement, there is a strong presumption against a continued parallel jurisdiction for their enforcement alongside the procedure provided for under the statute. It referred in that regard to the provisions of s. 160 of the Planning and Development Act, 2000 (as amended) and also to s. 21 of the Building Control Act, 1990 (which provides that a person is not entitled to bring civil proceedings under that Act “*by reason only of the contravention of any provision*” of the Act or of any regulation made under it). Enforcement of the Building Control Acts, is carried out by a building control authority by issuing proceedings in the District Court on foot of a statutory enforcement notice or by a separate statutory procedure in the High Court under s. 12. DCC also relies on the decision of the Supreme Court in *Tormey* and on the judgment of Charleton J. in the High Court in *Doherty*.

245. It maintains that the combined effect of ss. 24 and 26 of the MUDs Act is to confine disputes with respect to the matters covered by s. 24, which it maintains is so wide as to capture every possible dispute which could be brought before the courts in relation to a dispute involving a multi-unit development, to the jurisdiction of the Circuit Court. DCC argues that s. 29, properly interpreted, does not give Clarion the entitlement to maintain a claim for declarations or damages for breach of statutory duty in respect of matters encompassed by s. 24.

246. Campshire also relies on the combined effect of ss. 24 and 26 and stresses the very broad terms of s. 24(3) and the type of remedial orders that can be made by the court under that section, noting that there is no monetary limit to the jurisdiction which may be exercised by the Circuit Court under s. 24. It contends that s. 24 is concerned with all alleged infringements of rights and breaches of obligations under the MUDs Act and that it goes even further than that, in that s. 24(1)(a) refers not only to an order being made to enforce rights conferred or obligations imposed by the MUDs Act but also those conferred or imposed under “*any rule of law*”. It relies on this to emphasise the very broad nature of the Circuit Court’s jurisdiction under s. 24. With respect to Clarion’s contention that its damages claim very significantly exceeds the jurisdiction of the Circuit Court and that it could not, therefore, be heard by that court, Campshire disagrees and maintains that a monetary claim for breach of the provisions of the MUDs Act, which may be the subject of orders under s. 24, is equivalent to a claim for compensation for disturbance under the 1980 Act (in respect of which there is no limit to the amount which can be awarded by the Circuit Court) and relies in that regard on passages from the judgment of Baker J. in the High Court in *In Re Lance Investments Ltd (In Liquidation) and Lee Towers Management Company Ltd v. Lance Investments Ltd (In Liquidation)* [2018] IEHC 444 (“*Lance Investments/Lee Towers*”) and to the description given by Baker J. to the form of relief under the MUDs Act as a “*form of*

statutory injunction” and a “*statutory form of specific performance*” (at para. 72 of her judgment).

247. In response to Clarion’s reliance on *Tormey*, Campshire also relies on that case as well as on *R v. R* [1984] IR 296 (in which Gannon J. held that it was competent for the High Court to decline to entertain applications for orders which could be obtained in other courts or to remit to those other courts for hearing applications brought in the High Court which are within the jurisdiction of those other courts). It contends that as new rights were created in respect of multi-unit developments and a new dispute resolution procedure introduced by the MUDs Act, it was open to the Oireachtas to provide that such disputes be determined in accordance with that procedure.

248. Campshire also relies on a series of cases demonstrating the principle that there is a strong presumption where a statute creates an obligation and provides for its enforcement that it is not possible for those obligations to be enforced in a different way, including *Doherty* and the earlier judgment of Murphy J. in *Deighan v. Hearne* [1986] IR 603 (“*Deighan*”). Campshire submits that the MUDs Act does create new rights and liabilities in respect of multi-unit developments and confers new statutory rights and remedies to enforce those rights and liabilities. The remedies provided for under the MUDs Act are extremely broad and do not ordinarily require to be supplemented by the court’s residual equitable jurisdiction. It relies on the express terms of s. 26 and contends that it cannot have been the intention of the Oireachtas that a party could circumvent the exclusive jurisdiction conferred on the Circuit Court under s. 26, merely by adding a claim for declaratory relief. It contends that the MUDs Act is a clear instance where the statutory remedy contained in the Act is intended to be exclusive in all but “*exceptional circumstances*” (in the words used by Murphy J. in *Deighan* at 615). It too distinguished the wording of s. 26 from the wording used in the 1980 Act and

in the Ground Rents Acts designating the relevant court in respect of the areas covered by those statutes as the Circuit Court.

(d) *Decision on issue (3)*

249. The determination of this issue turns on the interpretation and application principally of the provisions of ss. 24 and 26 and also of s. 29 of the MUDs Act to the claims pleaded by Clarion in the statement of claim. It also requires consideration to be given to the cases concerning Article 34 of the Constitution and the full original jurisdiction conferred on the High Court by Article 34.3.1 and to those cases which have considered how that jurisdiction is affected by statutory provisions which create new rights and obligations and statutory procedures for the protection and enforcement of those rights and obligations and for the resolution of disputes in relation to them.

250. The starting point is s. 26(1). It is very clear and explicit in its terms. Not only does it state that the Circuit Court is to have “*exclusive jurisdiction to hear and determine applications under s. 24*”, it also states that “*such applications shall not be made to the High Court*”. The clarity and explicit nature of the terms of s. 26 can be contrasted with the provisions of the 1980 Act and of the Ground Rents Acts to which reference was made by the parties in their submissions. Section 3 of the 1980 Act defines the “*court*” as the Circuit Court. Section 8 then provides for the particular Circuit of the Circuit Court in which the jurisdiction conferred by that Act on the Circuit Court must be exercised. Those are two of the provisions which were at issue in *Kenny Homes* to which I will turn shortly. Similarly, the combined effect of ss. 2 and 22 of the 1967 Act is that an appeal lies to the “*court*” (which is defined in s. 2 as the Circuit Court) against an award, order or other decision of a County Registrar in a ground rents arbitration under that Act. Those were among the sections at issue in *Smiths* which I will also return to shortly. Those provisions are quite different to s. 26 of the MUDs Act and do not contain the type of mandatory language used s. 26.

251. Clarion maintains that s. 26 does not apply because it has not made any application under s. 24 of the MUDs Act. While it is true that Clarion has not made an application under s. 24 in these proceedings (it has done so in the Circuit Court proceedings), I do not accept that that is determinative of the issue. A person entitled to make an application under s. 24 could hardly avoid the exclusive jurisdiction of the Circuit Court mandated under s. 26 by the simple device of making a claim in High Court proceedings, by framing that claim as a claim for a declaration as to the effects of the MUDs Act on the relations between parties or as to the rights and obligations of parties under the MUDs Act or as a claim for damages for breach of statutory duty. Such a course of action would fly in the teeth of what the Oireachtas intended when enacting s. 26. I do not accept, therefore, that the fact that Clarion has framed its claims under the MUDs Act as claims for declarations and damages for breach of statutory duty (not even referring in the prayer for reliefs to the MUDs Act) and not expressly as an application under s. 24 can be an answer to the question raised in issue (3). I do not believe that it is open to a claimant to avoid the exclusive jurisdiction of the Circuit Court by framing its claims in that way.

252. The scope of s. 24 of the MUDs Act is extremely wide and extensive. Although s. 24(1) provides that a person specified in s. 25 “*may make, in respect of a multi-unit development, an application to the court...*” for one of the orders referred to in paras. (a) and (b), when such a person does intend making such an application, it must, having regard to the terms of s. 26, be made to the Circuit Court. We are concerned here with the type of order referred to in para. (a) of s. 24(1), namely, “*an order under this section to enforce any rights conferred, or obligations imposed, by this Act or any rule of law,...*”. It is not entirely clear what the term “*any rule of law*” is intended to mean in this context but it certainly shows the breadth of the matters intended to be covered by s. 24.

253. The breadth of the section is also clear from the terms of s. 24(3) which provides that, in a case to which s. 24(1)(a) applies, where the court is satisfied that a right has been infringed or an obligation has not been discharged “*it shall make such remedial order as it deems appropriate in the circumstances with a view to ensuring the effective enforcement of a right or the effective discharge of an obligation relating to the multi-unit development*”. The reference to a “*right*” and an “*obligation*” is clearly intended to be a reference back to rights conferred or obligations imposed by the MUDs Act as referred to in s. 24(1)(a). Where it is satisfied that such a right has been infringed or such an obligation has not been complied with, the court is required to make a remedial order and the purpose of such an order is to ensure the “*effective enforcement*” of the right or the “*effective discharge*” of the obligation relating to the multi-unit development. This demonstrates the breadth of the section in terms of the type of order which can be made by the court, namely, the Circuit Court under s. 24.

254. Section 24(5) sets out a list of non-exhaustive orders. The list is clearly non-exhaustive as s. 24(5) makes clear that the list is “*notwithstanding the generality of subs. (3)*” and states that the orders which can be made under s. 24(3) “*may include*” one of the orders then set out in paras. (a) to (m). Other orders can, therefore, be made under s. 24(3) to achieve the purpose set out in that subsection apart from those listed in s.24(5).

Demonstrating further the breadth of the orders that can be made as between parties concerned in a multi-unit development, the orders listed cover a multitude of matters and are themselves very extensive in their scope in s. 24(5). For example, para. (a) refers to an order that legal documentation relating to the OMC be amended. Paragraph (g) refers to an order amending covenants contained in an agreement (including a lease) between the developer, the OMC and unit owners. Most relevant for present purposes is the type of order referred to in para. (l), namely, an order directing the developer to complete the multi-unit development in

accordance with (i) the terms of any contract, (ii) the conditions of a relevant planning permission and (iii) the Building Control Acts.

255. While the orders listed in s. 24(5) do not expressly include an order directing the payment of monetary sums, s. 24(3) is undoubtedly broad enough in its terms to encompass an order directing the payment of a monetary sum if the court is of the view that that is necessary to ensure the effective enforcement of a right or the effective discharge of an obligation relating to the multi-unit development. In my view, therefore, if the Circuit Court felt that if an order under s. 24(5)(1) directing the developer to complete the development in accordance with the terms of a contract or the conditions of a planning permission of the Building Control Acts could not, for whatever reason, be complied with, the terms of s. 24(3) are wide enough to allow the court to make an order directing the developer to pay a sum of money (as damages) to achieve the same objective, namely, the completion of the multi-unit development in accordance with the matters specified in s. 24(5)(1), such as to ensure compliance with the terms of a contract or with the Building Control Acts. Baker J. so concluded at para. 88(2) of her judgment in *Lance Investments/Lee Towers* and I completely agree with her. It is also the case that there is no jurisdictional monetary limit in s. 24. Therefore, just as the Circuit Court has unlimited jurisdiction in measuring compensation under the 1980 Act for improvements and for disturbance and is not limited to the monetary jurisdiction of €75,000 that might otherwise be applicable in the Circuit Court, the Circuit Court's jurisdiction to direct the payment of monetary sums under s. 24 is similarly not so limited.

256. In *Lance Investments/Lee Towers*, Baker J. in the High Court considered the provisions of s. 24 and the nature and scope of the remedial orders which the Circuit Court is entitled to make under that section. In that case, the OMC brought proceedings in the Circuit Court for various orders under s. 24, including mandatory orders directing the developers to

complete the development in accordance with a development agreement and to comply with planning obligations and obligations under the Building Control Acts. The Circuit Court made those orders which required works to be carried out to the common areas of an apartment complex. The Circuit Court also granted a *Mareva*-type injunction. At the time the orders were made, the developer companies were in liquidation and the liquidator did not defend the proceedings. However, the liquidator applied for directions to the High Court and appealed the *Mareva*-type injunction granted by the Circuit Court. Among the issues considered by Baker J. in dealing with the directions application and the appeal to the High Court were the alleged retrospective application of some of the provisions of the MUDs Act, the type of remedial orders which can be granted by the Circuit Court under s. 24 and the priority given in respect of such orders in circumstances where the developers against which they are made are companies in liquidation. I will consider other aspects of Baker J.'s judgment when addressing Clarion's case that the relevant provisions of the MUDs Act on which it relies do have retrospective effect. At this stage, however, I draw attention to those parts of Baker J.'s judgment which concern the nature and extent of remedial orders which may be made under s. 24(3) of the MUDs Act.

257. At para. 66 of her judgment, Baker J. described the circumstances in which remedial orders, including "*a mandatory form of order for the carrying out of works*", may be made and noted that it was that section which was invoked by the OMC in the case. At para. 67, Baker J. stated that the provisions of s. 24 "*permit the making of an order of a mandatory nature, and not one that sounds in damages only*". At para. 72, Baker J. described a remedial order under s. 24 as being "*a form of statutory injunction*" and "*a statutory form of specific performance*" (in a passage quoted with approval by Costello J. in the Court of Appeal in *Grehan*). At para. 87, Baker J. stated that the "*form of statutory injunction*" created by s. 24 "*may or may not enlarge the current common law powers or the powers of the courts of*

chancery". However, one of the conclusions she reached on the issues before her, was that the obligation to complete a development in accordance with the relevant planning permission and with the Building Regulations, is enforceable as a matter of statute by virtue of s. 24 of the MUDs Act but that "*like any action in specific performance it may be one which is enforceable only as a claim in damages*" (para. 88(2)). She concluded that remedial orders do not displace the statutory scheme of priorities set out in the Companies Act, 2014.

258. I would observe that nowhere was it suggested by Baker J. when considering the nature and extent of the remedial orders which can be made by the Circuit Court under s. 24, that there was any monetary jurisdictional limit to the cost of the works which may be ordered to be undertaken on foot of orders made under that section.

259. I turn now to consider Clarion's reliance on Article 34.3.1 of the Constitution in support of its contention that the provisions of s. 26 and the conferral of exclusive jurisdiction on the Circuit Court by that section should be narrowly construed. In my view, the claimant's reliance on cases such as *Tormey* and on the landlord and tenant and ground rents cases such as *Kenny Homes* and *Smiths* is misplaced.

260. The Supreme Court made clear in *Tormey* that Article 34.3.1 must not be read literally but had to be read in the context of the Constitution as a whole and that its various provisions had to be looked at, not in isolation but as "*interlocking parts of the general constitutional scheme*" (per Henchy J. at p. 296). The Court held that Article 34.3.1, "*properly construed*", meant that all justiciable matters and questions are within the original jurisdiction of the High Court "*in one form or another*". While the Oireachtas could, under Article 34.3.4, confer exclusive jurisdiction in respect to certain matters of questions on the District Court or on the Circuit Court, that did not mean that those matters and questions were outside the original jurisdiction of the High Court. The combined effect of Articles 34.3.1 and 34.3.4 was that, while the District Court or the Circuit Court could be given exclusive jurisdiction to hear and

determine a particular matter or question, the full original jurisdiction of the High Court could be invoked “*so as to ensure that justice will be done in that matter or question*” (per Henchy J. at p. 296). Where exclusive jurisdiction has been conferred a statute on the District Court or the Circuit Court, the High Court “*will not hear and determine the matter or question, but its full jurisdiction is there to be invoked – in proceedings such as habeas corpus, certiorari, prohibition, mandamus, quo warranto, injunction or a declaratory action – so as to ensure that the hearing and determination will be in accordance with law*” (per Henchy J. at pp. 296-297). The High Court, therefore, retains supervisory jurisdiction by way of judicial review in respect of matters in which the District Court or Circuit Court is given exclusive jurisdiction by statute.

261. I do not accept that *Tormey* means that legislative provisions which confer exclusive jurisdiction on the Circuit Court must necessarily be strictly construed (since the High Court will retain its original supervisory jurisdiction, as outlined by Henchy J.), although, if I am wrong about that, a strict construction of s. 26 would have to take account of the clear and explicit terms of the section and of the undoubted intention of the Oireachtas as expressed in ss. 24(3) and (5) that a wide range of disputes between parties involved in multi-unit developments must be dealt with in the Circuit Court and not in the High Court.

262. Nor do I believe that cases such as *Kenny Homes* and *Smiths* are of much assistance to Clarion as they can be readily distinguished. In *Kenny Homes*, the plaintiff originally sought an interlocutory injunction restraining the defendants from trespassing on a petrol filling station in circumstances where the defendants were making an application to the Circuit Court for a new tenancy. The High Court (Costello J.) held that, notwithstanding s. 3 of the 1980 Act which provided that the court for the purposes of that Act was the Circuit Court, having regard to the “*particular urgency*” in the case, the High Court should not decline jurisdiction to grant the injunction sought. He held that the Circuit Court had exclusive

jurisdiction under the 1980 Act to hear and determine the defendants' claims for a new tenancy, that the proceedings before the High Court were for injunctive relief based on a claim that the defendants were trespassers and that the 1980 Act did not deprive the court of jurisdiction to hear and determine the injunction application. He further held that ordinarily where a right to a new tenancy under the 1980 Act was contested on the grounds that a tenancy did not exist or that the premises were not a "*tenement*", those issues should be determined in the Circuit Court and the High Court should stay the proceedings in which they were raised. However, because of the "*particular urgency*" in the case, he held that the High Court should not decline jurisdiction. Further, he held that should the court decide that there was a tenancy or that the premises constituted a "*tenement*" within the meaning of the 1980 Act, then s. 28 of that Act applied and the defendants would be entitled to retain possession pending the determination in the Circuit Court of the application for a new tenancy. The urgency arose from the fact that there was no policy of insurance in place for the premises and also that the plaintiffs stood to lose possible incentives in the event that development did not take place within a particular time period. In the absence of that urgency, it appears that the High Court would have adopted the normal course, namely, to stay the proceedings in the High Court to allow the defendants' application for a new tenancy to be dealt with by the Circuit Court. Costello J. proceeded to conduct a full hearing of the case and decided that the relevant agreement did not create a tenancy and that the premises were not a "*tenement*". In those circumstances, he concluded that the defendants had no right to a new tenancy under the 1980 Act and had no right to remain in possession pending the determination of their application to the Circuit Court.

263. The Supreme Court upheld the decision of Costello J. With respect to the contention that the High Court had no jurisdiction to deal with the matter because of the pending application under the 1980 Act in the Circuit Court, the Supreme Court agreed with Costello

J. In giving judgment for the Supreme Court, Lynch J. expressly stated that in reading that decision he had regard to Article 34.3.1 of the Constitution and the decisions of the former Supreme Court in *Walpoles (Ireland) Ltd v. Dixon* (1935) 69 ILTR 232 (“*Walpoles*“) and the decisions of the High Court in *R v. R* [1984] IR 696 and *O’R v. O’R* [1985] IR 367.

264. In *Walpoles* the High Court (O’Byrne J.) granted an order for possession of premises in favour of the landlord, notwithstanding that the tenant had made an application to the Circuit Court for a new tenancy under the Landlord and Tenant Act, 1931. The tenant sought an adjournment of the proceedings in the High Court pending the determination of that application in the Circuit Court. O’Byrne J. stated that he would have granted the adjournment if he had thought there was any substantial ground on which a tenant’s application for the new tenancy might be granted. However, on the facts, he held that such an application could not possibly succeed as the premises were not a “*tenement*” for the purposes of the 1931 Act. The Supreme Court affirmed his decision. The approach was not dissimilar to that taken by Costello J. and by the Supreme Court in *Kenny Homes*.

265. In *R v. R*, one of the other cases referred to by Lynch J. in *Kenny Homes*, Gannon J. had to consider whether the High Court continued to have jurisdiction in respect of certain family law applications following the enactment of the Court’s Act, 1981, which conferred jurisdiction in respect of those applications on the Circuit Court and on the District Court and removed any reference to the High Court. Although he held that it was not open to the Oireachtas by reason of Article 34.3.1 validly to create “*a new juridical jurisdiction and withhold it from the High Court; nor can it reduce, restrict or terminate any jurisdiction of the High Court*”, a conclusion which is not consistent with the views subsequently taken by the Supreme Court in *Tormey*, nonetheless he held that it was competent for the High Court to decline to entertain applications for orders which could be obtained in other courts and to remit such applications to those courts.

266. In *O’R v. O’R*, Murphy J. had to consider a practice direction issued in the High Court following the decision in *R v. R* which required evidence to be submitted to the High Court as to whether it was appropriate for the relevant application to be heard by the High Court or whether it should be remitted to the Circuit Court or the District Court. Murphy J. held that the 1981 Act indicated a clear intention on the part of the Oireachtas that the relevant application should be made in the first instance to the Circuit Court or the District Court. He held that the appropriate course to adopt was to decline to exercise jurisdiction to determine the issues in the case and to leave the parties to pursue their remedies in the courts on which the Oireachtas had expressly conferred jurisdiction. Murphy J. had no hesitation in holding that the court should give effect “*to the intention of the Oireachtas as expressed in legislation validly and constitutionally enacted*” (per Murphy J. at p. 372). He stated:-

“It seems to me that the only circumstances in which the court would be justified in departing from the procedure envisaged by the legislature would be where the High Court was satisfied that in the circumstances of a particular case there was a serious danger that justice would not be done if that court decided to exercise the jurisdiction vested in it by the Constitution in relation to that particular case.” (per Murphy J. at p. 373)

267. Although the decision of Murphy J. in *O’R* predated the decision of the Supreme Court in *Tormey*, the approach taken by Murphy J. is consistent with the position subsequently stated by the Supreme Court in *Tormey*. I mention *R v. R* and *O’R v. O’R* as they were referred to by Lynch J. in *Kenny Homes* on which Clarion relies. However, they do not appear to me to be of any assistance to Clarion in its attempt to persuade the court that Article 34.2.1 of the Constitution provides a basis for the court narrowly to construe the provisions of s. 26 of the MUDs Act so as to avoid the exclusive jurisdiction of the Circuit Court in respect of those parts of its claim which rely on the MUDs Act. On the contrary,

they are unhelpful to Clarion. Nor, in my view, does the judgment of O’Keeffe P. in *Smiths* assist Clarion. I have referred earlier to the significant differences between the terms of the relevant sections in the 1967 Act and the clear terms of s. 26 of the MUDs Act. I regard those differences and the differences between the relevant sections in the 1980 Act and s. 26 of the MUDs Act as being particularly significant.

268. Although there are several more recent cases which discuss the approach taken by the Supreme Court in *Kenny Homes*, including *Crofter Properties Ltd v. Genport Ltd* [2007] IEHC 80, *Esso Ireland Ltd v. Nine One Retail Ltd* [2013] IEHC 514, *Cuprum Properties Ltd v. Murray* [2017] IEHC 699 and *Castletown Foundation Ltd v. Magan* [2018] IEHC 653, they were not referred to by the parties and it is unnecessary to consider them having regard to the clear differences between the statutory provisions in the 1980 Act and s. 26 of the MUDs Act.

269. The judgment of Murphy J. in *Deighan* is also relevant to the interpretation and scope of the application of s. 26 of the MUDs Act and to Clarion’s claim that it should be narrowly construed and should not preclude it from seeking declarations or damages in the High Court in reliance upon, or by reference to, provisions of the MUDs Act. In that case, one of the arguments raised by the plaintiff was that he had a constitutional right to have his liability to tax determined by the High Court in the event of a dispute. The argument was rejected by Murphy J. by reference to the decision of Gannon J. in *R v. R* and his own decision in *O’R v. O’R*. In rejecting the argument, Murphy J. stated:-

“While those cases clearly accept, as the Constitution very clearly provides, that the High Court is invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, that the Court has an inherent jurisdiction to decline to entertain certain issues where legislation has provided other suitable and appropriate machinery to resolve them. It seems to me, therefore, whilst

accepting that the High Court does indeed possess the jurisdiction to determine in the event of controversy the liability of a citizen to tax that this is not a jurisdiction which the Courts would exercise save in the most exceptional circumstances as long as legislation provided a constitutional procedure competently staffed and efficiently operated to carry out that unpopular but very necessary task.”

(per Murphy J. at pp. 614-615)

270. It seems to me that those observations in *Deighan* are entirely consistent with the approach taken in the earlier cases just discussed, including *Tormey* and *O’R v. O’R*. It provides further support for the position advanced by DCC and Campshire that the court should give effect to s. 26 of the MUDs Act in respect of those parts of the case made by Clarion in the High Court in reliance on or by reference to the MUDs Act.

271. So too does the other case on which reliance is placed by DCC and Campshire, namely, the judgment of Charleton J. in the High Court in *Doherty*. In that case, the applicants claimed that rights available to them under the Equal Status Acts, 2000 to 2004 could be pleaded and determined in judicial review proceedings in the High Court. Charleton J. disagreed. He applied the principles set out and the analysis contained in the judgment of Henchy J. in *Tormey* and that of Murphy J. in *Deighan* (see pp. 705-706). Charleton J. held that it was not open to the applicants to make a case under the Equal Status Acts in the judicial review proceedings. He held that those Acts created an entirely new legal norm and provided for a new mechanism for enforcement and for the disposal of controversies connected with those norms through a tribunal set up under the legislation. He held that the legislation did not create norms which were justiciable outside of the framework established under it. The reasoning of Charleton J. can be seen in the following passage from his judgment:-

“Many of the rights and obligations created by modern statute were never justiciable until they were created by the passage of legislation. Some legislation consolidates existing rights in a code form while others interfered with the general freedom of contract by establishing, for instance, that particular terms of contracts in particular circumstances may be unfair. These Acts tag onto the existing law, by way of amendment or tidying up, and divert the law in a particular direction. Such legislation contemplates that the courts are to be used for the settling of controversies. Where, however, an Act creates an entirely new legal norm and provides for a new mechanism for enforcement under its provisions, its purpose is not to oust to the jurisdiction of the High Court but, instead, to establish new means for the disposal of controversies connected with those legal norms. In such an instance, administrative norms, and not judicial ones are set: the means of disposal is also administrative and not within the judicial sphere unless it is invoked under the legislative scheme. In the case of the Planning Acts, in employment rights matters and, I would hold, under the Equal Status Acts, – , these new legal norms and a new means of disposal through tribunal are created. This expressly bypasses the courts in dealing with these matters. The High Court retains its supervisory jurisdiction to ensure that hearings take place within jurisdiction, operate under constitutional standards of fairness and enjoy outcomes that do not fly in the face of fundamental reason and common sense. In some instances, the High Court has declined jurisdiction on the basis that a forum established by law, over which it exercises supervisory jurisdiction, as above, is a more appropriate forum.”

(per Charleton J. at p. 706)

272. I agree with Clarion that the decision in *Doherty*, and the reasoning set out in the above extract from the judgment of Charleton J. in that case, is not directly relevant to, or on

all fours with, the issue of jurisdiction which I have to decide here. The court in *Doherty* was dealing with legislation which created new administrative and not judicial norms and provided for an administrative procedure for their enforcement, bypassing the courts, albeit that the High Court retained its supervisory jurisdiction. While s. 24 of the MUDs Act does create some entirely new rights and imposes some entirely new obligations, such as in the range of remedial orders that can be made under s. 24(3), including those listed by way of examples in s. 24(5), the MUDs Act does not go so far as to create entirely new legal norms with new mechanisms for enforcement outside the court system as in the case of the Equal Status Acts which was the case in *Doherty*. Nonetheless, it is clear that s. 24 does confer on the Circuit Court the power to make very wide-ranging orders, many of which would not have been open to that court or to any other court, including the High Court prior to the MUDs Act coming into force. Such orders include orders amending legal documentation and amending covenants. It may well have been open to the Circuit Court or, indeed, to the High Court to make some of the orders referred to prior to the coming into force of the MUDs Act, such as an order directing completion of a development in accordance with the terms of a contract, where the orders were sought by a party to the contract. However, if Clarion is correct in the case which it seeks to make in reliance on or by reference to the provisions of the MUDs Act (and I express no view at this stage on whether it is), the legislation will have very radical effects and will have conferred rights on Clarion which it certainly did not have prior to its enactment. I refer particularly in this context to the acknowledgement by Clarion that it can only maintain certain of its claims against Campshire because of the provisions of the MUDs Act. In other words, Clarion accepts that, for reasons of privity of contract, it would not have been entitled to seek to compel Campshire to complete the development in compliance with the Building Control Acts and the Building Regulations were it not for the MUDs Act. Clarion places direct reliance, therefore, on the MUDs Act in order to confer

upon it a right to pursue Campshire for relief which it accepts it would not otherwise have been entitled to pursue were it not for the enactment of the MUDs Act.

273. Clarion sought to portray this change as merely a procedural change conferring on Clarion a right of action against Campshire which it would not otherwise have had due to the absence of privity of contract between Clarion and Campshire. However, I do not agree that the change for which Clarion contends is a mere procedural change. In my view, it goes much further than that. Clarion seeks to rely on the MUDs Act to confer a substantive cause of action and an entitlement to relief on it as against Campshire which it would not otherwise have had on its case, were it not for the enactment of the Act. Whether the Act does or does not have that affect, if it did it would not be a mere procedural change but would be a significant substantive change to the rights and obligation of the parties. It is a change which Clarion contends has occurred as a result of the enactment of the MUDs Act.

Notwithstanding that, Clarion maintains that it is entitled to frame its claim as a claim for a declaration or for damages and to bring it in the High Court. I cannot agree. Having regard to the significant change to the preexisting position which Clarion contends arises by virtue of the enactment of the MUDs Act, I do not accept that Clarion is entitled to rely on that significant change but nonetheless avoid the strictures and conditions under which a claim must be made under the Act by framing its claim as one for a declaration or damages. I am satisfied that, insofar as Clarion wishes to make a claim by reference to or in reliance upon the MUDs Act, whether as against Campshire or as against DCC, that claim is one which falls within the exclusive jurisdiction of the Circuit Court under s. 26 of the MUDs Act.

274. The clear intention of the Oireachtas in enacting the MUDs Act and in conferring the very wide powers on the Circuit Court to grant remedial orders under s. 24 is that such matters will be dealt with in the Circuit Court. It was entirely open to the Oireachtas to legislate on that basis in light of cases such as *Tormey* and *Deighan*. It has done so in clear

and explicit terms in s. 26. Even in the absence of such clear and explicit terms, cases such as *Kenny Homes* demonstrate that the High Court should be reluctant to deal with a matter for which the Circuit Court is the designated court unless there is a particular urgency or unless it is clear that the relevant application could not succeed in the Circuit Court. Notwithstanding the provisions of s. 26 conferring exclusive jurisdiction on the Circuit Court, the High Court retains its full original jurisdiction by way of judicial review.

275. The final issue to consider in the context of issue (3) is whether s. 29 of the MUDs Act affects the position or assists Clarion in its claimed entitlement to seek reliefs in the High Court in reliance upon, or by reference to, provisions of the MUDs Act. I do not believe that it does. I have set out earlier the terms of s. 29. While the marginal note states that it provides for a “*Saver for existing jurisdictions*”, it appears to be intended to do more than that. There are a number of different component parts in s. 29. Broken down into those component parts, it provides that nothing in the MUDs Act “*shall be taken to derogate from*” (a) any right or power which may (b) be vested in (i) any person or (ii) court (c) whether (i) before or (ii) after the passing of the MUDs Act (d) by statute “*or otherwise*” and (e) the “*powers conferred*” by the MUDs Act “*shall be in addition to, and not in substitution for, such other rights or powers*”.

276. This is a difficult section to construe, and it is unnecessary for the purpose of resolving issue (3) to consider all of the possible circumstances and situations to which s. 29 could apply. It seems to me that it is at least intended to cover the following situations. First, where one of the parties to a contract made before the MUDs Act came into force, relating to a development which would come within the definition of a “*multi-unit development*” under the MUDs Act wishes to enforce the terms of that contract against the other, Section 29 makes clear that in such a case the party can rely on the contract and seek to enforce its provisions in addition to and not in substitution for any rights or powers under the MUDs

Act. Second, since s. 29 refers to rights or powers which may also arise “*after the passing of*” the MUDs Act, where the parties enter into a contract relating to a development which constitutes a “*multi-unit development*” under the Act, again, the parties can seek to enforce the provisions of such a contract in addition to seeking remedies under the MUDs Act. Third, parties involved in a development which satisfies the definition of a “*multi-unit development*” under the MUDs Act may have rights or be subject to obligations under a statutory provision which predates the coming into force of the MUDs Act. Section 29 would entitle the parties to rely on those statutory provisions (whether by seeking declarations or damages or other forms of relief) in addition to seeking to enforce rights or obligations under the MUDs Act. Fourth, a statute passed after the coming into force of the MUDs Act could also confer rights and impose obligations on parties involved in a “*multi-unit development*”. Again, it would be open to those parties to rely on those statutory provisions enacted after the MUDs Act has come into force in addition to relying on the provisions of the MUDs Act. I acknowledge that in that fourth situation it might have been unnecessary to make express provision for the parties to seek to rely on such subsequently enacted statutory provisions, but it may have been deemed appropriate to confirm the position by referring to rights or powers vested in a person or court after the passing of the MUDs Act. It seems to me that these are the type of circumstances in which s. 29 makes clear that parties can rely on other rights, whether conferred by contract or by statute, in addition to relying on the provisions of the MUDs Act.

277. Section 29 expressly refers to rights or powers being vested in a “*court*”. It may be intended, therefore, to confirm that, insofar as persons bring proceedings to enforce rights or obligations or seek to exercise powers conferred by a contract made or a statute passed before or after the MUDs Act came into force, the court can continue to deal with those proceedings notwithstanding anything in the MUDs Act. I acknowledge that s. 29 may well be intended to

cover a range of other situations or circumstances not envisaged by the examples I have given.

278. With respect to Clarion's claim against DCC, insofar as its claim is based on a contract (the MCA) made before the MUDs Act came into force, s. 29 makes clear that Clarion is entitled to maintain proceedings to enforce the contract and is not precluded from doing so by reason of anything in the MUDs Act. Clarion is, therefore, clearly entitled to maintain its claim under the MCA against DCC in these High Court proceedings. Similarly, insofar as Clarion seeks to rely on a breach of some other statutory provision apart from the provisions of the MUDs Act, it is entitled to bring such claim in the High Court proceedings. It is not clear, however, from the pleadings or from the submissions made by Clarion that it does in fact seek to assert a cause of action by reason of the alleged breach by DCC of some other statutory provision, apart from those contained in the MUDs Act. There was some debate in the submissions as to whether it was open to Clarion to maintain an action for damages against DCC and Campshire for the alleged breach of the Building Control Acts or the Building Regulations. It is unnecessary for me to express a conclusion or even a view as to whether such an action can be maintained, having regard to the provisions of s. 21 of the Building Control Act 1990 (as amended) but it does not appear to me from a review of the pleadings that Clarion is actually making a claim for damages for breach of the provisions of that Act. If it is, then it is not precluded by s. 29 from doing so. The Order does not include as one of the issues which I must determine, any issue as to the entitlement of Clarion to rely on alleged breaches of the Building Control Acts or the Building Regulations in a claim for damages in breach of statutory duties.

279. The effect of section 29 of the MUDs Act is that it is open to Clarion to maintain its claim in contract and, to the extent that it seeks to do so, to maintain a claim for damages for breach of other statutory provisions apart from the MUDs Act in these High Court

proceedings. However, it does not mean that Clarion can bring a case in reliance on, or by reference to, the MUDs Act in the High Court. Insofar as Clarion seeks to rely on the MUDs Act in respect of a claim against DCC it must make that case in the Circuit Court which, by virtue of s. 26, has exclusive jurisdiction. As I have already concluded, it is not open to Clarion to frame such a case by reference to a claim for a declaration as to the effects of the MUDs Act on the relevant contracts or as a claim for damages for breach of statutory duty. In my view, the Oireachtas clearly intended such claims to be brought in the Circuit Court.

280. With respect to Clarion's claims against Campshire, I do not believe that s. 29 assists Clarion at all. Unlike DCC, Clarion does not have a contract with Campshire which predated or postdated the coming into force of the MUDs Act (apart from the fact that both are parties to the agreements constituting the residential leases which does not seem relevant to this issue). Clarion is not a party to the JVA. Insofar as Clarion may be maintaining a claim for damages for breach of statutory duty in respect of some other statutory provision (and my comments with respect to its claim against DCC apply equally here), Clarion may be entitled to maintain such a claim in the High Court (and the observations I made about its potential entitlement to rely on the Building Control Acts also apply equally here). However, it is not entitled to maintain any part of its case against Campshire which relies on the MUDs Act in the High Court proceedings. For the same reasons as apply to its case against DCC, insofar as Clarion wishes to rely on the MUDs Act to support its claim against Campshire, it must make that case in the Circuit Court and not in the High Court.

281. Section 29 is, therefore, of no assistance to Clarion in its assertion to be entitled to make claims in reliance on, or by reference to, the MUDs Act against DCC and Campshire in the High Court. It must do so in the Circuit Court. Insofar as it seeks to maintain claims in contract or for breach of statutory duty in respect of statutory provisions other than the MUDs

Act, it is open to Clarion to maintain such claims in the High Court, subject to the observations I have made about the Building Control Acts and the Building Regulations.

282. I am satisfied, therefore, that the answer to issue (3) is that Clarion is not entitled to rely on the MUDs Act in these proceedings.

(4) Issue (4): If so, whether defendants, as developers under MUDs Act are obliged (a) to complete development of common areas in accordance with building regulations and (b) to indemnify Clarion in respect of certain claims

(a) *Introduction to issue (4)*

283. In light of my conclusion on issue (3) that Clarion is not entitled to rely on the MUDs Act in these proceedings and my finding that Circuit Court has exclusive jurisdiction in respect of those parts of its claim are as made in reliance on, or by reference to, the MUDs Act, it might be said that it is unnecessary for me to determine issue (4). Issue (4) is predicated on a positive response to issue (3) and a finding that Clarion is entitled to rely on the MUDs Act in these proceedings. I have, therefore, considered whether I should refrain from dealing with issue (4) on the basis that, in light of my conclusions on issue (3), the Circuit Court has exclusive jurisdiction in relation to Clarion's MUDs Act claims. However, I have decided that as it is possible that my decision in relation to issue (3) could be the subject of an appeal, and that the Court of Appeal and/or Supreme Court could take a different view on that issue, in those circumstances, it is appropriate that I determine issue (4). In the event that there is no appeal from my finding on issue (3) or if any such appeal is unsuccessful, then it will be a matter for the Circuit Court to decide the two substantive issues referred to in issue (4) and it should be free, in those circumstances, to form its own view on those issues and should not in any way be constrained by the decision I have reached and the views I have expressed on those issues. If, however, it is found by an appellate court that I have incorrectly decided issue (3) and if, as a consequence, Clarion is entitled to rely on the MUDs Act in

these proceedings, then my decision in relation to issue (4) should stand (unless, of course, it too is successfully appealed).

284. In respect of issue (4), Clarion asks the court to conclude that DCC and Campshire as “*developers*” within the meaning of that term in the MUDs Act are obliged (a) to complete the development of the common areas in accordance with (*inter alia*) the Building Regulations and (b) to indemnify Clarion in respect of all claims made against it “*of whatever nature or kind in respect of acts or omissions*” by DCC and Campshire “*in the course of works connected with the Clarion Quay development*”.

285. The principal provisions of the MUDs Act on which Clarion seeks to rely in support of its contention that the court should decide sub-issues (a) and (b) of issue (4) in its favour are ss. 7, 9(2), 31(2) and schedule 3. As I have noted earlier in this judgment, Clarion relies on ss. 7 and 31(2) and schedule 3 in respect of the case it makes on sub-issue (a) and on s. 9(2) for the case it makes in respect of sub-issue (b).

286. A threshold issue does arise in respect of the issues raised in issue (4) and that is whether the provisions of the MUDs Act relied upon by Clarion can have retrospective effect and apply to the Clarion Quay development in which the relevant contracts (such as the MCA and the JVA) were entered into around ten years before the MUDs Act came into force, and where the apartments in the development were sold between 2001 and June, 2006, at least five years before that date as were at least some of the retail units. Clarion contends that the provisions of the MUDs Act on which it relies do apply in respect of those contracts and in respect of the Clarion Quay development in general. DCC and Campshire dispute this and, while accepting that some of the provisions of the Act may have retrospective effect, they contend none of the provisions on which Clarion relies has such effect.

287. It is necessary, therefore, first of all to consider the threshold question of the alleged retrospective effect of the relevant provisions. Depending on my conclusions on that issue, it

may well then be necessary to consider how the court should resolve the two sub-issues under issue (4).

288. Before considering the question of retrospectivity, I should stress again here that, although issue (4) appears to be predicated on an acceptance by the parties that DCC and Campshire are “*developers*” within the meaning of that term in the MUDs Act, that is an issue in dispute between the parties and it was agreed at the hearing that it is not one of the issues which I have to decide on foot of the Order. My conclusions on the issues raised in issue (4) may, therefore, be subject to a court subsequently deciding that DCC and Campshire, or one or both of them, are “*developers*” within the meaning of the MUDs Act.

(b) *Retrospective effect of MUDs Act provisions*

(i) Clarion’s case on retrospectivity: Summary

289. Clarion contends that, on its face, the MUDs Act and, in particular, the provisions on which it relies are clearly intended to have retrospective effect and that many of its provisions distinguish in their terms between developments at various different stages of development. In support of its contention that the provisions relied upon have retrospective effect, Clarion relies on several provisions of the MUDs Act including ss. 4 and 5, as well as the sections on which it directly relies in support of the two matters raised in issue (4). It also places much reliance on the judgment of Baker J. in the High Court in *Lance Investments/Lee Towers*. In its written and oral submissions, Clarion referred to a number of passages from that judgment. Clarion contends that ss. 4 and 5 of the MUDs Act clearly have retrospective effect and change pre existing contracts by accelerating obligations on a developer to transfer common areas to OMCs. It also urges the court to confirm that the sections on which it principally relies, ss. 7, 9(2) and 31(2) and schedule 3, similarly have retrospective effect. It stresses a number of themes underlying the MUDs Act, including the requirement to ensure

that the common areas are built in accordance with planning laws and with the Building Control Acts and the Building Regulations.

290. Clarion relies on the discussion in *Lance Investments/Lee Towers* on the first issue which had to be determined in that case, namely, whether the MUDs Act had retrospective effect and, if so, whether it could operate to impose an obligation on a liquidator to ensure completion of a development partially completed by the developer companies prior to the liquidation. That discussion is to be found in paras. 39 to 53 of the judgment of Baker J. in that case. In its written and oral submissions, Clarion also drew attention to the decision of the Supreme Court in *Minister for Social Community and Family Affairs v. Scanlon* [2001] 1 IR 64 (“*Scanlon*”) and, in particular, to the judgment of Fennelly J. in that case where he referred to the two essential elements of the rule or presumption against the retrospective operation of legislation affecting vested rights. The two elements referred to were, first, that the rule or presumption is “*designed to guard against injustice, in the sense that new burdens should not be unfairly imposed in respect of past actions*” and, second, that the rule is one of construction and not of law and can be displaced by clear words in a statute (see, per Fennelly J., at p. 88). Clarion submits that its reliance on the provisions of the MUDs Act relevant to issue (4) does not fall foul of either of these two elements of the rule.

291. First, it contends that the obligations in ss. 7, 9(2) and 31(2) and schedule 3 are not new burdens being imposed on DCC and Campshire, since Campshire owes obligations in similar terms to DCC under the JVA and DCC owes similar obligations to Clarion under the MCA (containing general condition 36(d) and the implied terms for which Clarion contends). On that basis, Clarion submits that it has rights, and DCC and Campshire have obligations, under these provisions of the MUDs Act, which it contends confirm pre-existing obligations on those parties. Therefore, Clarion contends that it is not seeking to impose new burdens on DCC and Campshire in respect of past actions. Second, it notes that the rule or presumption

against retrospective operation of legislation can be displaced by clear words in the statute. It submits that it is clear from the terms and objectives that the MUDs Act is intended to apply to contracts already in force and developments already completed by 2011 and relies (*inter alia*) on paras. 49 to 51 of the judgment of Baker J. in *Lance Investments/Lee Towers*. Clarion relies on various other passages from Baker J.’s judgment in that case in support of its contention that reliance on these provisions of the MUDs Act is not precluded by the presumption of retrospectivity and that it would not be unfair on DCC and Campshire by reason of their pre-existing contractual obligations and obligations under the Building Control Acts and the Building Regulations.

(ii) DCC and Campshire’s case on retrospectivity: Summary

292. Both DCC and Campshire contend that, without prejudice to their case that neither is a “*developer*” for the purposes of the MUDs Act, the imposition of duties and obligations on them under ss. 7, 9(2), 31(2) and schedule 3 would infringe the principle against the unfair retrospective effect of those provisions. They too rely on Baker J.’s judgment in *Lance Investments/Lee Towers* and on cases such as *Hamilton v. Hamilton* [1982] IR 466 (“*Hamilton*”) and *Scanlon*. Campshire also relies on the decision of the Supreme Court in *Dublin City Council v. Fennell* [2005] 1 IR 604 (“*Fennell*”).

293. In its submissions, DCC sought to distinguish between the provisions of ss. 4, 5 and 6 of the MUDs Act and the provisions on which Clarion seeks to rely. DCC accepts that, on their terms, those sections can have retrospective effect in terms of the obligation on a developer to transfer the common areas and the reversions relating to the residential units within six months of the Act coming into operation in the case of multi-unit developments in which sales of residential units closed before the coming into operation of s. 4. DCC maintains that such retrospective effect arises by virtue of the express terms of those statutory provisions and submits that by expressly confining the retrospective effect to issues of title,

there can be no presumed retrospective effect in respect of the quality of works done or materials used in the construction of the units or in the common areas.

294. Both DCC and Campshire contend that s. 7 on its terms does not have retrospective effect in that it is expressly predicated upon the person transferring ownership of an interest in the relevant parts of the common areas being “*otherwise... responsible*” to ensure completion of the development in compliance with planning requirements and with the Building Control Acts. They submit that s. 7 does not create any new obligation on its own and rely in that regard on what Baker J. stated at para. 62 of her judgment in *Lance Investments/Lee Towers*.

295. With respect to s. 9(2) and the indemnity claimed by Clarion against both defendants, Campshire asserts that s. 9 is concerned with situations where the transfer of the common areas takes place prior to the completion of the development and that s. 9(2) provides for an indemnity for the OMC with respect to the works necessary to complete the development. DCC contends that s. 9 (and the other sections on which Clarion relies) cannot alter pre-existing contractual rights and obligations under the MCA (and under the JVA) and cannot rewrite the terms of those contracts but merely provides a means by which existing obligations can be enforced more effectively in the Circuit Court.

296. With respect to s. 31(2) and schedule 3, both DCC and Campshire submit that those provisions cannot retrospectively impose an obligation on either party to complete the development of the common areas in accordance with the Building Regulations. Campshire contends that the obligations in s. 31(2) and schedule 3 are prospective obligations, save insofar as they relate to the transfer of such documents as may exist as a matter of title. It maintains that, as Clarion had no rights against Campshire immediately prior to the commencement of the MUDs Act in April, 2011, the provisions of the Act relied on by Clarion should not be construed as adversely affecting Campshire’s property rights as they

existed at that point. Campshire contends that the provisions relied on do not retrospectively give rise to statutory rights where no preexisting contractual rights existed.

297. Both DCC and Campshire rely on the important distinction drawn by Baker J. in *Lance Investments/Lee Towers* between the two types of orders at issue in that case, namely, (a) the order made by the Circuit Court to complete the conveyancing and (b) the remedial orders made by the Circuit Court under s. 24. While Baker J. held that the MUDs Act had retrospective effect to some extent in relation to the former order as it created a statutory means of enforcing existing obligations and rights, it did not have retrospective effect in relation to the remedial orders made. They urge the court to recognise and apply the distinction drawn by Baker J. between the two types of orders at issue in that case.

298. In summary, therefore, both DCC and Campshire acknowledge that the MUDs Act does, in part, have retrospective effect and could operate retrospectively to affect existing contracts with respect to the transfer of the common areas (under ss. 4 and 5) but not otherwise and certainly not in respect of the provisions relied upon by Clarion which are relevant to issue (4).

(iii) Decision in relation to retrospectivity

299. The legal principles to be applied in determining whether the provisions of the MUDs Act on which Clarion relies in respect of issue (4) can, or ought to, be interpreted and applied retrospectively are well established. They were as set out and applied by Baker J. in the High Court in *Lance Investments/Lee Towers* which is the most relevant judgment for the purpose of this issue. As Baker J. observed, the leading cases are *Hamilton* and *Scanlon* (see paras. 42 to 45 of the judgment).

300. O'Higgins C.J. stated in *Hamilton*, that many statutes are enacted to deal with events which are over and which, therefore, necessarily have retrospective effect. Other statutes having such effect include those dealing with the practice and procedure of the courts and

apply to causes of action arising before the statute comes into operation. However, O’Higgins C.J. noted that “*such statutes do not and are not intended to impair or affect vested rights...*” (at p. 473). He continued:-

“For the purpose of stating what I mean by retrospectivity in a statute, I adopt a definition taken from Craies on Statute Law (7th ed., p. 387) which is, I am satisfied, based on sound authority. It is to the effect that a statute is to be deemed to be retrospective in effect when it ‘takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past’.” (at pp. 473-474)

301. O’Higgins C.J. observed that since retrospective legislation necessarily affects vested rights it has always been regarded as being *prima facie* unjust. While noting that it was open to the Oireachtas to legislate retrospectively and prospectively, there is “*a rule of construction which leans against such retrospectivity and which, according to Maxwell, is based upon the presumption ‘that the legislature does not intend what is unjust’ — see Maxwell on The Interpretation of Statutes (12th ed., p. 215)*”. O’Higgins C.J. approved the following passage from the judgment of Wright J. in *Athlumney’s Case* [1898] 2 QB 547:-

“Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”

(at pp. 551-552, quoted by O’Higgins C.J. at p. 475)

302. The issue in *Hamilton* was whether the Family Home Protection Act, 1976 (the “1976 Act”) had the effect of defeating an action for specific performance of a contract which had

been entered into before the Act came into force. In his judgment, O’Higgins C.J. held that apart from the constitutional dimension arising from the defendant’s property rights, even on the basis of the common law principles set out in the quotations just referred to, he:-

“...would be bound to assume that the legislature did not intend to affect contracts and transactions already entered into but, on the contrary, intended only to affect such contracts and transactions as were entered into after the Act of 1976 came into operation. I would continue so to view it unless or until something in its provisions compelled me to take a contrary view.” (per O’Higgins C.J. at pp. 476-477)

303. He found nothing in the 1976 Act which displaced the presumption of prospectivity. However, as the authors of *Kelly: The Irish Constitution* (5th Ed.) note (at para. 4.2.121), O’Higgins C.J. added that if the 1976 Act had purported to have retrospective operation, it would, to that extent, necessarily have unfairly prejudiced the plaintiff’s property rights. The authors further note that Henchy J. took a different approach in relation to the balancing of the plaintiff’s property rights as against the Oireachtas’ obligation to legislate to protect the family under Article 41 of the Constitution. However, that difference in approach is not relevant for present purposes. Henchy J. did, however, state that the 1976 Act was silent as to its effect on pre-existing agreements to sell. He stated that, if the Oireachtas had intended the 1976 Act retrospectively to affect rights created by such agreements, *“one would expect the enacted words to state that effect clearly and unambiguously”* (at p. 485). As they did not, it was necessary to consider whether *“an inference to that effect follows necessarily from the statutory provisions”* (also at p. 485).

304. In his judgment for the Supreme Court in *Scanlon*, having referred to and approved the statements set out in the quotations from the judgments of O’Higgins C.J. and Henchy J. in *Hamilton*, Fennelly J. noted, with respect to the rule or presumption against the retrospective operation of a statute, as follows:-

“The two essential elements of the rule, as it emerges from these, passages are: Firstly, it is designed to guard against injustice, in the sense that new burdens should not be unfairly imposed in respect of past actions; secondly, the rule is one of construction, not of law. It amounts to a presumption against retrospective effect which may be displaced by the clear words of the statute.” (per Fennelly J. at p. 88)

305. In *Lance Investments/Lee Towers*, Baker J. referred to and applied the principles set out by O’Higgins C.J. in *Hamilton* and the *dicta* of Fennelly J. in *Scanlon* (which I have just quoted). She observed that the Supreme Court made clear that the presumption against retrospective effect was not absolute and could be displaced by clear words in the statute (and also, according to Henchy J. in *Hamilton*, by necessary inference). She also noted that Fennelly J. had identified one element of the rule or principle against retrospective operation of a statute as being that *“a new burden should not be unfairly imposed in respect of past actions”* (paras. 43 and 45 of the judgment in *Lance Investments/Lee Towers*).

306. Before considering in greater detail what was at issue in *Lance Investments/Lee Towers* and how the court in that case resolved the retrospectivity issue, I should refer to two other judgments of the Supreme Court which address the issue of retrospectivity. The first is *Fennell* (on which Campshire relies). In his judgment for the Supreme Court in that case, Kearns J. quoted with approval from the passage from *Craies on Statute Law* (7th Ed.) (at p. 387), which was approved by O’Higgins C.J. in *Hamilton* and also the following statement of principle in *Maxwell on The Interpretation of Statutes* (12th Ed.) (at pp. 215-216) as follows:-

“It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.”

(quoted by Kearns J. at pp. 620-621 and at p. 630)

Kearns J. also referred to the “*well-established presumptions that statutes do not operate retrospectively unless a contrary intention appears*” (at p. 629).

307. The second and more recent judgment of the Supreme Court is *Sweetman v. Shell E&P Ireland Ltd* [2016] 1 IR 742 (“*Sweetman*”). In that case, the Supreme Court had to consider whether the costs provisions in the Environment (Miscellaneous Provisions) Act, 2011 had retrospective effect so as to apply to the applicant’s application in the High Court (which was made in March, 2005 and determined in March, 2006) and/or to the appeal to the Supreme Court (which was brought by the applicant in April, 2006 and was determined in February, 2016). The Supreme Court held that the relevant sections as to costs in the 2011 Act did not apply retrospectively. In summarising the rationale and effect of the presumption against retrospectivity, Charleton J., speaking for the Supreme Court, stated:-

“...it is clear that the presumption in interpreting legislation is that, unless there are clear words affecting existing rights, then the provisions of an enactment apply prospectively; that is from the time of enactment and not retroactively. It seems that there are two principles that guide this position. Firstly, there is certainty of law. Where a citizen adopts a particular position, whether it be as to the sale of goods or the formation of a contract or the obtaining of the necessary permission for the building of an extension to a family home, he or she will ascertain the law as it stands on that day and will be expected to obey that law. If today a person does not need planning permission to repair the roof on a family home and repairs the roof, a law passed the next day should not upset the certainty of compliance by imposing civil consequences or criminal penalties.” (per Charleton J. at pp. 753-754)

308. Charleton J. cited with approval the various *dicta* of O’Higgins C.J. and Henchy J. in *Hamilton* (quoted above). He found that when the substantive law, as opposed to procedural law, is changed during the currency of litigation, “*the entitlements of the parties must be*

determined according to the law when the case was commenced” unless the legislation shows a “*clear intention to the contrary*” (p. 755). He distinguished between substantive and procedural changes. Procedural changes, such as alterations to forms of procedure or the admission of evidence, do not involve vested rights and the presumption against retrospective operation does not apply to such provisions. However, he held that substantive rules as to costs were in the nature of vested rights and were not merely procedural. Therefore, there would need to have been clear words in the statute to make the provisions in relation to costs retrospective. There were no such clear words.

309. *Sweetman* is relevant to the extent that Clarion seeks to make the case that the provisions of the MUDs Act relevant to issue (4) merely effect procedural changes and not substantive changes, notwithstanding that the effect of the provisions relied on, Clarion contends, is to enable it to maintain a direct claim in respect of the matters referred to in issue (4) against Campshire in circumstances where, for privity of contract reasons, it could not do so prior to the coming into force of the MUDs Act. As I observed earlier, in my view, that claimed effect (if correct) could not be described as merely procedural, but is in the nature of a substantive change in that the effect (if correct) would be to impose on Campshire obligations owed to Clarion in respect of the matters referred to in issue (4) in circumstances where Campshire was not subject to those obligations owed to Clarion prior to the coming into operation of the MUDs Act.

310. An example of the application of the principle just outlined in a somewhat similar situation is *Lance Investments/Lee Towers*. I have already briefly touched on the factual background to that judgment and have referred to Baker J.’s analysis of the types of remedial orders which can be made by the Circuit Court under s. 24 of the MUDs Act. One of the issues considered in the judgment was whether the MUDs Act had retrospective effect. It will be recalled that two types of orders had been sought against the developer companies (which

were, by that stage, in liquidation) in the Circuit Court. (a) orders directing the companies to transfer to the OMC the common areas and reversions in the leases in the relevant part of the development (the “conveyancing order”) and (b) an order directing the companies to complete the development in accordance with a development agreement made in 2001, ten years prior to the coming into force of the MUDs Act, and directing the companies to comply with their obligations under the planning laws and under the Building Control Acts (the “remedial orders”). The Circuit Court made those orders and subsequently granted a *Mareva*-type injunction against the liquidator of the developer companies. The liquidator appealed the *Mareva* injunction and also separately applied for directions to the High Court. The first issue which Baker J. had to consider in the High Court was whether the MUDs Act had retrospective effect and, if so, whether it operated to impose an obligation on a liquidator to ensure completion of a development which had been partially completed by the developer companies prior to their liquidation. Other issues considered were whether the obligations on the companies to complete the development under the MUDs Act were specifically enforceable or whether they sounded only in damages and whether the mandatory orders granted by the Circuit Court operated to displace the statutory scheme of priority of payments set out in s. 621 of the Companies Act, 2014. To that extent, the factual background and the issues in the case are not the same as those which arise in this case. However, the judgment is very relevant to the retrospectivity issue and it is that part of the judgment on which I propose to concentrate here.

311. In *Lance Investments/Lee Towers* the OMC argued that the MUDs Act did permit the enforcement of obligations which were in being at the date of its enactment since a prospective interpretation would mean that only developments commenced after 2011 would be captured by the legislation. Having quoted with approval the *dicta* of O’Higgins C.J. in *Hamilton* and of Fennelly J. in *Scanlon*, Baker J. found that it was not necessary to engage in

a detailed analysis of the question of retrospective effect as the question which arose in the case was a more narrow one, namely, whether the case being made by the OMC might impair or otherwise alter existing rights of other creditors of the companies in liquidation. She held that there was nothing in the MUDs Act which expressly displaced the existing statutory scheme of distribution in a winding up and that the principle against an unfair retrospective effect appeared to offer some support for the proposition for which the liquidator contended, namely, that the MUDs Act was not retrospective in that sense (para. 46).

312. Baker J. proceeded to consider the two different type of orders made by the Circuit Court, namely, the conveyancing order and remedial orders. She held that a different approach was warranted in respect of each of those two types of order (para. 47). She considered the retrospective effect of the Act, insofar as the conveyancing order was concerned, at paras. 48 to 53 of her judgment.

313. With respect to the conveyancing order, namely, that the companies should complete the management company agreement and effect an assurance of the common areas and reversions, *“the question of retrospectivity is not wholly engaged as the MUD Act did no more than create a statutory means of enforcing the pre-existing obligations and rights created by the Management Company Agreement and under which, as a matter of contract, the owner was obliged in due course to effect the necessary assurances”* (para. 48). Baker J. was, therefore, making clear that what was at issue with respect to the conveyancing order was the enforcement of *“pre-existing obligations and rights”* created under the relevant management company agreement under which the relevant party was, as a matter of contract, under an obligation, in due course, to effect the necessary assurances. As regards the enforcement of that obligation, Baker J. referred (at para. 49) to the statutory mechanism by which an order for the completion of the conveyancing could be made in the Circuit Court. Baker J. accepted that the MUDs Act was:-

“...capable in its import of altering the contractual obligations contained in a management company agreement in that, in certain cases, it can accelerate the obligation to transfer which in most management company agreements is contractually mandated only when the last unit in a development is sold.” (para. 49)

314. The entitlement of the Circuit Court to make the conveyancing order was not in dispute and the liquidator was not challenging the conveyancing order. Baker J. held that the obligation to transfer the common areas and the reversions, which was specifically enforceable as a matter of law, was an obligation attaching to the title of the developer companies in the relevant lands (para. 50). She further held that such an order was capable of being made by the Circuit Court against the companies under the MUDs Act even if the last unit was not sold and that the MUDs Act had *“to that extent, a ‘retrospective effect’ in regard to this class of order”* (para. 51).

315. That conclusion is consistent with the acceptance by both DCC and Campshire that ss. 4 and 5 are capable of having retrospective effect by accelerating an obligation to transfer the common areas and the reversions to the OMC in advance of the point in time provided for in the pre-existing management company agreement. The retrospective nature of those provisions is expressly stated in ss. 4(1) and 5(1), both of which refer to the transfer obligation provided for in the sections as arising where relevant sales have taken place *“before the coming into operation”* of s. 4. To that extent, therefore, those provisions of the MUDs Act are stated to have and do have retrospective effect. However, they are not the provisions on which Clarion relies in respect of the issues arising under issue (4). Baker J.’s consideration of the second type of order made by the Circuit Court in *Lance Investments/Lee Towers* is of particular assistance in respect of the possible retrospective effect of the statutory provisions relied upon by Clarion in respect of those issues.

316. Baker J. noted that the analysis which applied to the statutory provisions referable to the conveyancing order was not “*readily applicable*” to the obligations imposed on the companies by the remedial orders made by the Circuit Court, which required the expenditure of monies on refurbishment and repair works and the reimbursement of monies already expended by the OMC (para. 54). The OMC had argued that those orders and the provisions of the MUDs Act on which they were based had to be complied with prior to the distribution of the assets of the companies by the liquidator and that the OMC’s rights under the MUDs Act and under the remedial orders made by the Circuit Court displaced the statutory scheme of distribution in the winding up of the companies. Baker J. rejected that argument. She reviewed some of the provisions of the MUDs Act relevant to that question, including ss. 7 and 9.

317. Baker J. stated that the effect of s. 7 was that obligations to ensure completion of the development continued to subsist, notwithstanding the transfer of ownership of the common areas and reversions (para. 61). She stated:-

“The section [i.e. s. 7], in its plain language, suggests that a transfer of the common areas and reversions does not relieve a person from any existing obligations, but does not create new obligations.” (para. 62) (emphasis added)

I agree with Baker J. that s. 7 does not create any new obligations. Nor, it seems to me, can it have the effect of altering an existing obligation owed by one party (party A) to another (party B) by providing that party A now also owes that obligation to a third party (party C). If it were to have that effect, it would be creating a new obligation in the sense that party A would now owe the obligation not just to party B but also to party C. That would, in my view, be a new obligation and s. 7 does not create new obligations.

318. Baker J. then referred to s. 9 of the MUDs Act by which, she stated, “*certain easements and rights are preserved insofar as they are reasonably necessary to enable the*

multi-unit development to be completed by the developer even after the transfer has been completed” (para. 63). This is in fact a reference to s. 9(1) only. She did not need to refer to the other subsections of s. 9, including s. 9(2). She did note, however, that s. 9 suggested “*that the transfer may be made, and indeed is often directed to be made, before the works are finished*”. This gives a good clue to the matters addressed under s. 9 and its various subsections. As I briefly explain later, I agree with Campshire that s. 9 (and its various subsections) is intended to cover the position where a transfer of the common areas takes place prior to the completion of the development where further works are required and that rather than providing for a freestanding independent indemnity, s. 9(2) provides an indemnity to the OMC in respect of claims arising from the outstanding works necessary to complete the development. That construction of s. 9(2) is consistent with the other subsections in s. 9, including the requirement for the developer to have insurance in place (s. 9(3)), and to take steps to minimise and convenience to the unit holders (s. 9(4)). In any event, as I conclude below, s. 9(2) is prospective and not retrospective in its operation.

319. In considering the potential retrospective effect of the remedial orders made by the Circuit Court in that case under s. 4, Baker J. accepted that *prima facie*, at least, the companies did have an obligation to complete the works to the common areas in accordance with the development agreement and that the application to, and the remedial orders made by, the Circuit Court were “*for the purposes of enforcing pre-existing rights*” (para. 68). Those pre-existing rights arose under the development agreement. That conclusion is consistent with the relevant provisions of the MUDs Act referable to the remedial orders not being retrospective in effect (as Baker J. ultimately concluded). She rejected the contention that remedial orders made under s. 24 had a preferential status or displaced the statutory scheme of distributions in the winding up of insolvent companies. Baker J. ultimately concluded that the provisions under which the remedial orders were made by the Circuit Court in that case

and the remedial orders themselves did not have retrospective effect. The court stated (at para. 87) as follows:-

“Finally, the MUD Act creates a machinery by which certain existing laws may be enforced. Section 24 creates a form of statutory injunction which may or may not enlarge the current common law powers or the powers of the courts of chancery, but an argument that an order under the MUD Act could give a form of a preferential treatment in respect of those obligations, or permit the enforcement of the existing rights of an owners’ management company of a wholly different nature than that which existed before the coming into operation of the MUD Act would offend the principle against retrospectivity.” (para. 87) (emphasis added)

320. In my view, this conclusion is critical to an assessment of the potential retrospective effects of the statutory provisions on which Clarion relies in respect of the issues the subject of issue (4). Consistent with the conclusions of Baker J. set out in para. 87, if the interpretation of the sections relied upon by Clarion would permit the OMC to enforce rights “*of a wholly different nature*” to those that existed prior to the coming into force of the MUDs Act, that would offend the principle against retrospectivity. If the relevant provisions were to have the effect of conferring rights on an OMC or imposing obligations on a developer “*of a wholly different nature*” to those which existed prior to the MUDs Act coming into force, such would have to be expressly provided in the Act or arise by necessary inference. That was not the case in relation to the provisions under consideration in *Lance Investments/Lee Towers*. Nor is it the case in respect of the statutory provisions on which Clarion relies here.

321. The conclusions expressed by Baker J. at para. 88 of her judgment are relevant. With respect to the first question she had to decide, Baker J. stated:-

“(1) the MUD Act has retrospective effect to some extent, in that it creates a statutory means of enforcing existing obligations and rights. It does not of itself impose an obligation on the liquidator to take positive steps to carry out works of construction and development;” (para. 88(1))

322. The second conclusion she expressed (at para. 88(2)) is relevant to the nature of the remedial orders which the Circuit Court can grant under s. 24 of the MUDs Act and is notable for her conclusion that, like any action for specific performance, an order made by the Circuit Court under s. 24 compelling a developer to complete a development in accordance with its planning permission and under the Building Regulations may be one which is enforceable only as a claim in damages.

323. Finally, the court concluded that the mandatory orders granted by the Circuit Court (i.e. the remedial orders) did not displace the statutory scheme of priority under the Companies Act.

324. Having considered the principles applicable to the retrospective effect of statutory provisions and having considered the comprehensive judgment of Baker J. in *Lance Investments/Lee Towers*, it seems to me that the position in relation to the potential retrospective effect of the statutory provisions on which Clarion relies in respect of the issues in issue (4), namely, ss. 7, 9(2) and 31(2) and schedule 3 is reasonably clear.

325. For the purposes of these conclusions, I am proceeding on the assumption (which is, of course, disputed) that DCC and Campshire are “*developers*” within the meaning of that term in the MUDs Act. At the time the MUDs Act came into force in April, 2011, Clarion and DCC had rights and owed obligations to each other under the MCA (including, as I have already concluded, rights and obligations arising under general condition 36(d)). DCC may also have had other non-contractual or statutory obligations to Clarion. As of that date also, DCC and Campshire had rights and owed obligations to each other under the provisions of

the JVA. They may also have been subject to pre-existing non-contractual or statutory obligations *inter se*. On the coming into force of the MUDs Act, Campshire did not owe contractual duties and obligations to Clarion (other than those arising under the residential leases which do not appear to be relevant for present purposes). The effect of the MUDs Act for which Clarion contends with respect to Campshire is radical. It maintains that, while prior to the coming into the force of the MUDs Act, it could not enforce contractual obligations which Campshire owed to DCC under the JVA as no privity of contract existed between them but that after that date and because of the provisions of the MUDs Act, it can enforce those obligations.

326. I do not agree. In the first place, as I have stated already, I do not accept that such a radical change could be described as a mere procedural change. It is a substantive change as, if Clarion were correct, the effect would be that it can now exercise contractual rights and enforce contractual obligations against Campshire which it could not have done prior to the MUDs Act. That is not a mere procedural change but a significant and substantive change to the pre-existing contractual rights and obligations.

327. Second, since the presumption against retrospective application of legislation is just that, a presumption, and not a rule of law, it could, subject to potential constitutional obstacles on the grounds of interference with property rights, have that effect provided such was expressly stated or arose by necessary inference. However, none of the sections of the MUDs Act on which Clarion relies in respect of the issues raised in issue (4) expressly states that it is to have retrospective effect. That is in contrast to ss. 4 and 5, which, as already noted, do make clear that, the type of conveyancing order which was at issue in *Lance Investments/Lee Towers* can have retrospective effect and can accelerate obligations to transfer the common areas and the reversions to the OMC arising under pre-existing

agreements. Nor, in my view, can it be said that such retrospective effects must arise by necessary inference. There is no basis for concluding otherwise.

328. Third, it is clear from Baker J.'s judgment in *Lance Investments/Lee Towers* that the types of orders which the Circuit Court can make under s. 24 with respect to the completion of a development are those which enable the enforcement of pre-existing rights (see para. 68 of her judgment).

329. Fourth, Baker J. made clear that s. 7 provides that the transfer of the common areas and reversions to the OMC does not relieve persons from any existing obligations they may have but does not create any new obligations. That applies equally to DCC and Campshire. Neither can be subjected to new obligations by virtue of s. 7.

330. Fifth, it is again clear from Baker J.'s judgment that the MUDs Act, and orders made under s. 24, do not confer on an OMC a right or impose an obligation on any other person, "*of a wholly different nature*" to that which existed prior to the coming into force of the Act. Any other approach would offend against the principle against retrospectivity (para. 87). While Clarion and DCC have rights and obligations *inter se* under the MCA and DCC and Campshire have rights and obligations *inter se* under the JVA, to permit Clarion to exercise rights or to impose obligations under the JVA, which Campshire may owe to DCC, would, in my view, offend against that principle also. It would be imposing an obligation of a "*wholly different nature*" on Campshire to that which existed prior to the MUDs Act coming into force.

331. Sixth, insofar as Clarion seeks to rely on ss. 7, 9(2) and 31(2) against DCC and Campshire, those provisions go significantly further than the obligations owed by DCC to Clarion under the MCA and the obligations owed by Campshire to DCC under the JVA. That is particularly so in the case of s. 9(2) which Clarion relies on to give it an entitlement to an indemnity from DCC and Campshire in respect of claims made against Clarion of whatever

nature in respect of acts or omissions of DCC and Campshire in the course of works connected with the development. Apart from the fact, as I conclude in the next section, I do not believe that s. 9(2) is a freestanding indemnity and must be seen in its context, an indemnity of that type goes beyond any of the contractual obligations on DCC and the MCA and on Campshire in the JVA, to which my attention was drawn by the parties.

332. With respect to s. 31(2) and schedule 3, there is nothing on the face of those provisions which indicate that they are intended to have retrospective as opposed to prospective effect. Indeed, as I point out in the next section, s. 31(2) and schedule 3 only arise where the “*development stage of a multi-unit development has ended*”. Under s. 1(1), the “*development stage*” ends “*after all construction works and ancillary works (including works on the common areas)*” have been completed in accordance with all relevant planning permissions and the requirements of the Building Control Acts. On Clarion’s case, the development stage has not ended, as it contends that the relevant works have not been completed in accordance with the requirements under the Building Control Acts. Apart from that, insofar as Clarion contends that s. 31(2) and schedule 3 impose obligations to provide certain confirmations and documentation, such obligations would appear to go further than is required of DCC under the MCA and on Campshire under the JVA. The reliance by Clarion on those provisions would, therefore, amount to the attempted imposition of obligations of a “*wholly different nature*” than existed prior to the coming into operation of the MUDs Act and would, on the approach adopted by Baker J. in *Lance Investments/Lee Towers* (at para. 87), with which I completely agree, offend the principle against retrospectivity. Strictly speaking, however, as I have previously noted, Clarion does not seek any relief to give effect to s. 31(2) and schedule 3 in the statement of claim and it is not expressly raised in issue (4) (although it was relied on by Clarion in its written and oral submissions).

333. In my view, for all of these reasons, I agree with DCC and Campshire, and disagree with Clarion, that the provisions on which Clarion relies in respect of the issues arising under issue (4), namely, ss. 7, 9(2), 31(2) and schedule 3 do not have retrospective effect and do not have the effect for which Clarion contends.

(c) *Remaining issues relevant to issue 4*

334. In light of the conclusions reached and the views expressed in the preceding section of this judgment, I can deal briefly with the remaining issues which arise for determination under issue (4). Most of those issues have been addressed in my decision on the retrospectivity issue. However, in case I am wrong in the conclusions I have expressed on the issue of retrospectivity, I should briefly set out why I believe that Clarion's reliance on ss. 7, 9(2) and 31(2) and schedule 3 is misplaced.

335. With respect to the first issue arising under issue (4), namely, the alleged obligation on the defendants to complete the development of the common areas in accordance with the Building Control Acts/Building Regulations, I should first make the point that although Clarion makes a plea to this effect in para. 21 of the statement of claim, it does not in fact seek any relief in the prayer for relief that DCC and Campshire are obliged to complete the development in accordance with those statutory provisions by reason of the MUDs Act (unlike the position in relation to s. 9(2) where such relief is sought in the prayer for relief – relief 10). Nevertheless, as it is one of the issues directed to be tried in the Order, I will address it here.

336. In support of its claim, Clarion relies on s. 7. However, as is clear from paras. 61 and 62 of Baker J.'s judgment in *Lance Investments/Lee Towers*, that section does not create any new obligations but merely provides that a person who transfers ownership of an interest in the common areas of a multi-unit development is not thereby relieved of an obligation which the person would otherwise have had to ensure completion of the development in compliance

with planning requirements and with the Building Control Acts. The section does not create any new obligations. The contractual obligations owed by DCC to Clarion are those contained in the MCA, including (on the basis of my conclusion on issue (1)) the obligations arising by virtue of the incorporation of general condition 36(d). The contractual obligations owed by Campshire to DCC are those contained in the JVA, including those set out in clause 5. DCC and Campshire may also be subject to statutory duties and obligations under the Building Control Acts/Building Regulations. However, while the entitlement of Clarion to rely on those statutory provisions in these proceedings was challenged by DCC and Campshire in submissions, it is not one of the issues which was directed to be tried by the Order. I do not exclude the possibility that Clarion can rely on alleged breaches of the Building Control Acts and the Building Regulations as part of its claim in these proceedings for damages for breach of statutory duty, although such a claim has not been pleaded in any detail in the statement of claim or in the replies to particulars delivered to date by Clarion. I am making no decision one way or the other on that question as it is not one of the issues I am required to decide on foot of the Order.

337. Insofar as Clarion relies on s. 9(2) in respect of the second issue arising in issue (4), namely, the alleged obligation on DCC and Campshire to indemnify Clarion in respect of all claims made against it arising from acts or omissions of the defendants in the course of works connected with the development, it seems to me that such reliance is also misplaced. As I indicated earlier, I agree with Campshire that s. 9 and its various subsections, including s. 9(2), is intended to apply to situations where the transfer of the common areas of a multi-unit development has occurred but where further works are necessary to enable the development to be completed. Under s. 9(1), in such situations the developer retains the right to pass and repass and to have access to such parts of the common areas as is reasonably necessary to enable the developer to complete the development. Section 9(3) provides for the developer to

have a policy of insurance providing for adequate insurance in respect of risks arising from the developer's use or occupation of the development. The developer's use and occupation of the development would arise where it is carrying out works to complete the development. While s. 9(4), which imposes an obligation on the developer to take all reasonable steps necessary to minimise inconvenience to the unit holders arises where the developer is exercising rights or discharging obligations in relation to the development (including those arising under the MUDs Act "*or otherwise*"), has a potentially wider and more extensive application than just where the developer is completing the necessary works, I do not think that that must necessarily lead to a broader or more extensive construction of s. 9(2) and the indemnity provided for in that subsection which, I believe, must be read in its proper context. Section 9(5) provides that the developer must ensure that access to common areas which have been transferred is maintained for unit holders. That obligation on the developer arises where the developer has transferred the relevant parts of the common areas but must still have access to those areas to carry out works to complete the development. The developer must ensure that unit owners and their agents etc. continue to have access to those areas. That would also seem to be the context of s. 9(6) which requires the OMC and unit holders not to obstruct the developer in exercising any rights or in discharging any obligations under s. 7.

338. While it is not absolutely clear, on balance it seems to me that, having regard to its context, s. 9(2) and the indemnity provided in that section is intended to cover a situation where a claim is made against the OMC in respect of alleged acts or omissions by the developer while it is carrying out works to complete the development in the circumstances envisaged in s. 9(1). While that seems to me to be the most likely interpretation of the section, I acknowledge that it is not entirely clear cut. In any event, it is not, I believe, absolutely necessary conclusively to decide that question as, for reasons set out in the previous section of this judgment, I do not believe that s. 9(2) can be operated retrospectively

so as to effect pre-existing contractual rights and obligations arising under the various agreements between the parties and to impose new obligations or obligations of a “*wholly different nature*” to those that existed before the MUDs Act came into force. That would be the effect of a decision that Clarion is entitled to rely on s. 9(2) for the indemnity which it claims from DCC and Campshire which is sought in relief 10 of the prayer for relief and reflected in the second of the issues under issue (4).

339. I have already indicated my views in relation to the remaining provisions of the MUDs Act on which Clarion has relied, namely, s. 31(2) and schedule 3. I have concluded that provisions cannot be applied retrospectively for reasons set out earlier. I have also expressed the view that the obligation contained in those provisions does not, in any event, arise until the “*development stage*” has ended and, on Clarion’s case, that point has not yet been reached. Apart from that, the obligation on the developer under s. 31(2) is to provide, at the relevant point in time, the documentation specified in schedule 3, including confirmation that the development has been completed in accordance with the relevant planning permissions and in accordance with the Building Control Acts. I agree with Campshire that these provisions are directed to the handing over of title related documents on the completion of the development and do not impose a duty on the developer to carry out substantive works in order to produce the relevant confirmations or, indeed, any of the other types of documents listed in schedule 3. The list of documents in schedule 3, in my view, supports the conclusion that what s. 31(2) and schedule 3 are dealing with is the furnishing of documents once the development has completed, rather than imposing any substantive obligation on the developer to carry out works in order to generate the confirmations or the other documents referred to in the schedule.

J. Conclusions

340. In conclusion, for the reasons set out in detail in this judgment, I have determined the issues directed to be tried in the order of the High Court (Quinn J.) of 4th July, 2019 as follows:-

- (1) Issue (1): DCC is bound by the provisions of general condition 36(d) of the Law Society General Conditions of Sale (1995 ed);
- (2) Issue (2): The terms at para. 20 of the statement of claim are not implied terms of the Management Company Agreement;
- (3) Issue (3): The plaintiff is not entitled to rely on the Multi-Unit Developments Act, 2011 in these proceedings as the Circuit Court has exclusive jurisdiction under s. 26 of that Act in respect of those parts of the plaintiff's case which rely on or refer to that Act. The plaintiff is not precluded from maintaining other causes of action, not based on the MUDs Act, in these proceedings or in the Circuit Court, in the circumstances discussed in the section of this judgment which considers issue (3) (section I); and
- (4) Issue (4): Although not strictly speaking arising because of my conclusions on issue (3), I have nonetheless determined this issue (for reasons explained in para. 283) I have concluded that the provisions of the Multi-Unit Developments Act, 2011 on which the plaintiff relies in respect of the issues referred to in issue (4) do not have retrospective effect. Further, insofar as the plaintiff seeks to rely on those provisions of the Act, and in the event that the defendants are "*developers*" within the meaning of the Act (an issue I have not been directed to decide), the defendants are not obliged, pursuant to those provisions of the Act, (a) to complete the development of the common areas in accordance with, (*inter alia*), the Building Regulations and (b) to indemnify

the plaintiff in respect of all claims made against it of whatever nature or kind in respect of acts or omissions by the defendants in the course of works connected with the Clarion Quay development. However, that conclusion is expressed solely by reference to the plaintiff's case that the defendants are subject to those obligations under the MUDs Act and not otherwise.

341. This judgment is being delivered electronically. To afford the parties an opportunity of considering the judgment, I will list the matter for mention at 10.00am on 13th January, 2022 and will, on that date, give any further directions as may be necessary in order to make final orders, including orders as to costs.