THE SUPREME COURT

Supreme Court Record No: S:LE:IE:2011:000374

McKechnie J.
Clarke J.
Dunne J.

BETWEEN

DESMOND MURTAGH CONSTRUCTION LTD (IN RECEIVERSHIP) AND PATRICK MURTAGH, SUSAN WATTERS TOGETHER WITH THE PERSONAL REPRESENTATIVES OF DESMOND MURTAGH (DECEASED)

PLAINTIFFS/RESPONDENTS

AND

BRENDAN HANNAN, OLIVER MALONE, SEÁN MCGUIGAN AND JOHN OLWILL

DEFENDANTS/APPELLANTS

Judgment of Mr. Justice William M. McKechnie, delivered the 31st day of July, 2014.

Issue:

1. In the High Court the plaintiffs obtained an order directing the defendants to specifically perform a series of contracts, in respect of 22 units being part of a residential retirement complex, known as Castlemanor Retirement Village, situated at Billis, Drumalee, Co. Cavan. The obligation in its compliance, involves the payment of €1,804,000 to the estate of Mr. Murtagh and €4,136,000 to Desmond Murtagh Construction Ltd. ("DMC" or "the company"), making in all the sum of €5,940,000, which was due under such contracts. The defendants resisted the making of such an order and grounded their appeal to this Court therefrom, on the basis that they are not bound by such agreements, because certain conditions of the planning permission by reference to which the underlying development was constructed, have not been complied with. In particular, the foul sewer specified in Condition No. 33 of the grant of planning permission, dated the 13th October, 2005 (Register Reference No. 05/162) had not been constructed at the relevant date, and therefore it is claimed, that the purported certificate of compliance, which was issued in respect of the development, is invalid. They thus argue that there has been a fundamental failure of a contractual obligation by the plaintiffs: consequently it is claimed that the High Court committed a significant error of law in not recognising their right to rescind: accordingly they seek from this Court to have that error rectified.

2. An understanding of this case requires knowledge of a number of the terms and conditions which the parties signed up to, as well as an appreciation of the relevant planning conditions. Before outlining these however, some lead-in history to the dispute is called for.

History:

3. Mr. Hannan, the first named defendant/appellant, was for a number of years the manager of the Cavan branch of ACC Bank. In 2002, he joined with the other named defendants

and together they formed a partnership known as the "Hammo Partnership", which involved itself in property speculation and development. In 2005, it purchased lands at the above location and very quickly thereafter obtained the planning permission, as mentioned, for a total outlay of €3,000,000: the breakdown showed a purchase price of €1,700,000, an unspecified payment to a Mr. Leddy, who introduced the lands, with the balance representing the cost of obtaining the said planning permission. Two years later it turned over that property for €7,000,000 having originally sought as an asking price €9,000,000. That was the beginning of the relationship between the plaintiffs/respondents and the defendants/appellants.

4. In January, 2007, a composite transaction involving the following three contracts took place:

   (i) An agreement for sale was executed whereunder Mr. Murtagh, agreed to purchase the subject lands for €7,000,000. No dispute has ever existed, in respect of this agreement.

   (ii) The second agreement, which in all respects was a building contract was also entered into, in which Desmond Murtagh Construction Ltd. ("DMC"), agreed to build, erect and construct a retirement residential complex to be known as Castlemanor Retirement Village on such lands.

   (iii) And finally, the defendants, by way of a separate agreement, agreed to buy back 48 units of this development when so constructed.

   All of these agreements, which were executed sequentially so as to give legal effect to the steps outlined, were dated the 8th January, 2007.

5. Work proceeded with accelerated haste as it had to, because of the requirement to meet deadlines so that the tax advantage envisaged by the scheme could be obtained. By the date of the events next described, the development was well under construction with the standard and quality of work carried out by Mr. Murtagh and his company, despite the time pressure, being commended by all.

6. To enhance financial return and thus profit, and following the obtaining of further tax advice, the above transaction at the behest of the defendants, was substantially recast in November, 2007. Both the building contract and the buy-back agreement were replaced by an arrangement which saw a single contract for sale and a single building contract being created for each of the residential units involved. As there were 48 such units, there was thus 48 individual contracts for sale by Mr. Murtagh to the defendants and a corresponding number of building contracts in which DMC was the contractor and the defendants were the employers. The purchase price for each unit was constant at €270,000, which when broken down showed the sum of €82,000 being allocated to each site and the sum of €188,000 to each building contract. Completion dates were of course specified. These were staggered in number and in time, with the latter extending from

December, 2007 to October, 2008. All of these steps were carried out with the agreement and consent of all parties.

7. To continue the narrative: in December, 2007, the sale back of the first 20 of the 48 units was completed: between that date and the summer of 2008, the sales of a further six units were also closed. The remaining 22 units were to be signed off, some by the end of March, 2008, some others at the end of June, 2008 with the remainder by the end of October, 2008. With both the March and June deadlines having passed, the plaintiffs had become so concerned by the apparent reluctance of the defendants to close any of these remaining units, that they served completion notices under the relevant contracts: the first of which were dated the 14th July, 2008, with a series of further such notices being served on the 4th November, 2008. As the sales were not closed, despite the service of such notices, the current proceedings then followed.

8. It might be noted that a Receiver was appointed to DMC on the 11th February, 2009 and that Mr. Murtagh died on the 5th June, 2009; hence the description of the plaintiffs in the title above given.

Relevant Documents:
The Bond/Guarantee:

9. In January, 2007, at the time of the original transaction, it was agreed by the parties that the defendants would provide a bond of €1,500,000 *in lieu* of paying any deposit under either the agreement to buy back or the building contract, and that such bond would remain in place until the sale and closure of all 48 units had taken place. In furtherance of this arrangement, a guarantee was signed on the 8th March, 2007, between National Irish Bank Ltd. ("NIB"), the lending bank of the defendants, and ACC Bank plc. ("ACC Bank"), the lending bank of the plaintiffs. This guarantee provided that in consideration of ACC Bank granting facilities to Mr. Murtagh, NIB guaranteed to pay on demand to ACC Bank the above sum, but only if Mr. Murtagh had defaulted in the credit facilities afforded to him, in that amount. The variation of the original transaction, which took place in November, 2007, was carried out on the basis that such bond would remain alive, unaltered, and in place.

10. The High Court Judge sets out at p. 6 of his judgment ([2011] IEHC 276) what occurred when on the 20th October, 2008, ACC Bank called in this guarantee. Apparently the defendants, through their solicitor's letter dated the 24th October, 2008, instructed NIB that payment was not to be made on foot of the bond, because "the amounts due and referred to in a said guarantee have already been discharged and paid to the ACC Bank plc. by Desmond Murtagh, and therefore this guarantee has been satisfied in full". Whilst nothing of significance turns on the bond/guarantee issue in these proceedings, the stance so adopted, in light of the circumstances then existing, could hardly be described as honourable.

The Planning Permission:
11. It is unfortunate but nonetheless necessary to refer to the relevant planning permission in some detail as the appellants rely on a number of conditions as part of their appeal to this

Court. In all, six permissions were granted in respect of the subject development. The first permission in point of time, as usually happens, 05/162 (or "the planning permission") is the most important one, with those which followed, providing only for modifications to this permission.

12. Planning permission 05/162 was sought and obtained by the appellants on the 13th October, 2005, after the lands had been purchased by them, but before the sale on to Mr. Murtagh. It contained 54 conditions, the following of which are the only relevant ones:

- **Condition No. 14**: this provided that the dwellings may not be occupied until the new sanitary facilities had been constructed and tested in accordance with the Council's requirements.

- **Condition No. 33**: this condition is of key important in this case and thus it is necessary to quote it in full:

  > "The proposed 150mm diameter foul sewer from Billis Cross to Drumalee Cross to be increased to 300mm diameter. The applicant shall arrange a meeting with Cavan County Council prior to commencement of the development to agree the details and construction. This section of pipeline will be taken over by Cavan County Council after installation and testing."

- **Condition No. 34**: this provided that the proposed 100mm diameter foul sewer rising main from the pumping station to Billis Cross be increased to a diameter of 150mm.

- **Condition No. 35**: this condition required written confirmation from the specialised contractor engaged, that the pumping station had been installed as *per* their specifications; save in respect of an emergency overflow tank which exception is not relevant.

13. The most critical condition for the purposes of this appeal is Condition No. 33, in respect of which it should immediately be noted, as agreed by all parties, that at the date of the High Court hearing the foul sewer therein mentioned had not been constructed. That fact in itself however may not be determinative: a consideration of the circumstances in which that has come about and the application of the relevant contractual terms to such circumstances is what will be decisive. In addition, Condition No. 14 remains significant. At one stage Conditions Nos. 34 and 35, which are directly related to Condition No. 33 were heavily in issue. This is no longer the case. No further reliance is being placed on Condition No. 34; accordingly that and the following condition can be disregarded. Finally, Condition No. 2 which required the developer to make a contribution to the planning authority, is not now in dispute, and neither is Condition No. 3, which mandated the lodgement of either a cash deposit or a bond, as security for the satisfactory completion of the infrastructure, as the required bond had been put in place many years ago.

The Sale Agreements:

14. The revised agreement reached, in respect of each residential unit, consists as I have said, of an individual contract for sale and a corresponding building agreement. Each contract for sale is based on the 2001 version of the Law Society of Ireland General Conditions of Sale ("*the General Conditions*"), which is supplemented by, but critically, which is also subject to, a number of special conditions. The relationship between both those type of conditions, is governed by Special Condition No. 2, which is quoted at para. 17 *infra*.

15. General Condition No. 36 is the most important condition of the General Conditions for the purposes of this appeal. That condition, under the heading of "Development", provided as follows:

> "(a) Unless the Special Conditions contain a stipulation to the contrary, the Vendor warrants:
>
> (i) that there has been no Development of the Subject Property since the 1st day of October, 1964, for which Planning Permission or Building Bye-Law Approval was required by law
>
> or
>
> (ii) that all Planning Permissions and Building Bye-Law Approvals required by Law for the Development of the Subject Property as at the Date of Sale were obtained (save in respect of matters of trifling materiality), and that, where implemented, the conditions thereof in relation to and specifically addressed to such Development were complied with substantially
>
> PROVIDED HOWEVER that …
>
> (b) …
>
> (c) …
>
> (d) The Vendor shall prior to the Date of Sale make available to the Purchaser for inspection or furnish to the Purchaser copies of:–
>
> (i) all such Permissions and Approvals as are referred to in Condition 36(a) other than in the Proviso
> (ii) all Fire Safety Certificates and (if available) Commencement Notices issued under Regulations made pursuant to the Building Control Act, 1990, and referable to the Subject Property (such Permissions, Approvals and Certificates specified in this Condition 36(d) being hereinafter in Condition 36 referred to as the 'Consents') and
> (iii) (save where Development is intended to be carried out between the Date of Sale and the date upon which the Sale shall be completed) the documents referred to in Condition 36(e).
>
> (e) the Vendor shall, on or prior to completion of the Sale, furnish to the Purchaser

(i) …

(ii) a Certificate or Opinion by an Architect or an Engineer (or other professionally qualified person competent so to certify or opine) confirming that, in relation to such Consents (save those referred to in the *Proviso*)

- the same relate to the Subject Property
- (where applicable) the design of the buildings on the Subject Property is in substantial compliance with the Building Control Act, 1990 and the Regulations made thereunder
- the Development of the Subject Property has been carried out in substantial compliance with such Consents
- all conditions (other than financial conditions) of such Consents have been complied with substantially

and

- in the event of the Subject Property forming part of a larger development, all conditions (other than financial conditions) of such Consents which relate to the overall development have been complied with substantially so far as was reasonably possible in the context of such development as at the date of such Certificate or Opinion

(f)

(i) Where the Vendor has furnished Certificates or Opinions pursuant to Condition 36(e), the Vendor shall have *no liability* on foot of the warranties expressed in Condition 36(a) or 36(b) or either of them in respect of any matter with regard to which such Certificate or Opinion is erroneous or inaccurate, unless the Vendor was aware at the Date of Sale that the same contained any material error or inaccuracy

(ii) if, subsequent to the Date of Sale and prior to the completion thereof, it is established that any such Certificate or Opinion is erroneous or inaccurate, then, if the Vendor fails to show

that before the Date of Sale the Purchaser was aware of the error or inaccuracy

or

that same is no longer relevant or material

or

that same does not prejudicially affect the value of the Subject Property

the Purchaser may by notice given to the Vendor rescind the Sale." (Emphasis added)

16. The parts of this Condition, which are not reproduced are irrelevant and do not inform, in the context of this case, those parts which are.

17. The General Conditions, as in every contract, are to be read and applied in conjunction with the Special Conditions: S.C. No. 2 governs this relationship; it reads as follows:

> "The said General Conditions shall:
>
> (a) apply to the sale insofar as the same are not altered or varied, and these special conditions shall prevail in case of any conflict between them and the general condition.
> (b) be read and construed without regard to any amendment therein, unless such amendment shall be referred to specifically in these special conditions".

18. The other Special Conditions which are relevant are those numbered 10 and 22 (a). The former is particularly so because of its impact on General Condition no. 36, which it says, by express wording "… is hereby varied accordingly" (emphasis added). It reads as follows:

> "On Completion the Vendor shall furnish the Purchaser with an Engineers Certificate of Compliance with Planning Permission and Building Regulations together with a Structural Defects Indemnity from the Contractor in the Building Agreement for a period of six years for major Defects and no objection, query or requisition raised regarding same shall be admitted and General Condition 36 is hereby varied accordingly."

19. A central issue on this appeal is how and to what extent Special Condition No. 10, as applied in accordance with the provisions of Special Condition No. 2, circumscribes the purchaser's otherwise entitlement to rely upon General Condition No. 36, regarding planning warranties and documentary evidence in respect thereof.

20. The appellants for their part say that Special Condition No. 10 has minimal effect on General Condition No. 36: its consequences being purely timing in nature as to when evidence of planning compliance must be produced: whereas the respondents say it supplants General Condition No. 36 in its entirety. That as I have said is a key issue in the case.

The Requisitions on Title and the Replies Thereto:

21. Pursuant to Special Condition 22(a) the purchasers are obliged to accept the replies to objections and requisitions on title, as contained in the Booklet of Title, and further are restricted to a period of 14 days within which to raise any requisitions or rejoinders in respect thereof. These imposed requirements are stated to be "… subject always to the performance of the vendor of its obligations as per the replies thereunder". The only requisition on title and reply which is relevant in this context is that as specified at No. 27, which deals with planning. At 27(2)(e), the requisition, reads: "… please furnish now [where applicable] Certificate/Opinion from an Architect/Engineer that the Permission/Approval relates to the property and that the development has been carried out in conformity with the Permission/Approval (if applicable) and that all conditions other

than financial conditions have been complied with": the reply is as follows: "(e) Agreed per draft contained in the Booklet of Title".

The Certificate of Compliance regarding Planning Permission, Register Reference No. 05/162:

22. The Certificate of Compliance in its draft and tendered form, with respect to the development, is contained in the Booklet of Title. Taking Unit No. 4 as an example, Mr McCormack, the architect, after an inspection on the 9th November 2007, at what he described, as the "Practical Completion Stage" of the development, signed and issued two documents, the first of which was headed "Certificate of Practical Completion". The phrase "Practical Completion" is defined in that document as meaning that:

> "the work has been completed to such a stage that it can be taken over and used for its intended purpose, and that any items of work or supply then outstanding or any defects then patent are of a trivial nature only, and such that their completion or rectification does not interfere with, or interrupt such use."

23. The second and accompanying Certificate related to planning compliance: It:

(i) states that Mr. McCormack was the architect retained by the construction company to design the development and secondly was instructed to periodically inspect the works during the course of construction, which he says he did so at various intervals;

(ii) provides, by reference to what the planning permission authorised, a description of the works involved, namely:

> detached two storey 70 bed nursing home, terraced blocks of single storey two bed retirement homes – total No. of units 38. Three no. hardstanding play areas with 2.5m high p.v.c. coated security fencing with service entrance gates. A detached single storey building to contain toilets, changing rooms, boiler house and store. Construct 32 no. single storey 2 bed retirement homes in 8 terraced blocks of 4 units each. Connect all services to existing Council mains water and sewerage together with all associated site works at Billis Td, Cavan in the County of Cavan, such building or works being hereinafter referred to as 'the Relevant Works'. (Clause 3)

(iii) identifies planning permission 05/162 as being the only permission pertinent to the development and states that the same had been inspected by him.

(iv) confirms that the development as constructed "complies substantially" with planning permission 05/162 (Clause 8).

(v) confirms that "the conditions of [planning permission 05/162] relating to the Estate of which the relevant Works form part have been substantially complied with insofar as it is reasonably possible at this stage of the development of such Estate But…" (Clause 10). And finally,

(vi) states that the certificate "is issued solely with a view to providing evidence for title purposes of the compliance of the Relevant Works with the requirements of planning legislation …" and

> "does not warrant, represent or take into account any of the following matters:
>
> (a) …
> (b) Matters in respect of private rights and obligations
> (c) …
> (d) Development of the relevant works which may occur after the date of issue of this certificate" (Clause 13).

24. It should be noted that the sales of the first 26 units were closed following the issue by the architect of individual certificates in this exact format, and that no issue was raised as to the accuracy, completeness or validity of such certificates, nor at a more general level was any question raised as to overall planning compliance at the time.

The Building Agreements:

25. Each building agreement is governed by the General Conditions of the Law Society of Ireland's Building Agreement (2001 edn.) as modified by a number of Special Conditions agreed between the parties. In the covenant to build, the company has agreed for the contract price to build and completely finish in a good, substantial and workman-like manner, and deliver to the defendants, the specified works in accordance with the relevant plans: this was subject to a number of Conditions annexed to the Agreement, which are not presently material.

26. "The Works" in question were defined at Recital (vi) as meaning "… the dwelling house and premises specified in the Plans together with such necessary ancillary works and services as may be necessary to render the dwelling house and premises reasonably habitable when completed and comply with health service executives' specifications." In fact it should be noted that by the end of November, 2007, the works as so described had been substantially completed in respect of every unit the subject of these proceedings.

27. The only Condition of the General Conditions which is relevant, is No. 3 which reads "The contractor (the company) shall at his own expense conform to the provisions of any statute, by-law or regulation applicable for the time being and effecting the Works and the Site and shall give all necessary notices to and obtain all necessary sanctions of the local planning or any other authority in respect of the Works and shall keep the Employer indemnified against all fines, penalties, expenses and loss incurred by reason of any breach of any statute, by-law or regulation or the failure to give any such notice or the failure to obtain any such sanction."

28. The above quoted conditions, obligations and definitions have also been taken from the documents referable to Site No. 4, but, save for completion dates, these are otherwise in identical form in respect of all Units in sale.

High Court Proceedings

29. In the High Court, the plaintiffs, having referred, in respect of the remaining 22 units to the existence of the aforesaid contracts in their essential terms, and also having referred to the completion notices served in respect thereof, sought as a remedy, for what they claimed to be material breaches thereof, an order for specific performance of each such contract. The defendants, in both their defence and counterclaim, asserted a right to rescind the subject contracts because Condition No. 33 of the planning permission had not been complied with. Condition No. 33, to recall, related to the construction of the 300mm foul sewer from Billis Cross to Drumalee Cross (para. 12 *supra*). It was also claimed that non-compliance further existed with regards to Conditions Nos. 14, 34 and 35 of the permission. As noted, Condition No. 34 related to increasing the width of a proposed foul sewer rising main from the pumping station to Billis Cross with Condition No. 35 requiring written confirmation that the pumping station had been constructed correctly and in accordance with certain standards. These have now fallen out of the case. Finally, Condition No. 14 specified that the dwellings should not be occupied until the new sanitary facilities were constructed

30. As a result of those allegations, it was suggested that the plaintiffs were not in a position to provide an appropriate and valid certificate of planning compliance, with the actual document signed by the architect being both inaccurate and erroneous. In such circumstances the contracts cannot be enforced and therefore the defendants are entitled to rescind. It was further argued in specific terms that the failure to comply with the terms and conditions of the planning permission, in the manner above described, precluded the dwellings from being used as residential units, because they were not habitable, which in itself was contrary to the Building Agreements. By virtue of these combined circumstances the defendants argue that it would be inequitable to compel completion, as to do so would result in forcing upon them an unlawful development, having regard to the provisions of s. 150 of the Planning and Development Act 2000. By reason of and based upon these submissions, the defendants contended that they were entitled to a declaration on their counterclaim, that the notices as served by them rescinding the contracts of the remaining 22 units were valid.

Judgment of the High Court:

31. The learned High Court Judge found in favour of the plaintiffs and stated that Special Condition No. 10 of the Contract for Sale, meant what it said. He concluded that the parties had contracted for the form of certificate which was supplied and that even if such certificate proved to be incorrect, any remedy would be against the certifier rather than the plaintiffs. Even though of the view that such a conclusion would be sufficient to dispose of the case, he went on to consider the other issues as raised.

32. In short he went on to discuss the respective submissions, addressed to all points and issues, commencing with what was stated at paras. 5.008 and 5.011 of *Emmett & Farrand on Title* (Sweet & Maxwell, 2010). The first passage is relied upon by the defendants to suggest that Special Condition No. 10 is misleading and as a result can be disregarded. Therefore General Condition No. 36 applies in its entirety. The second

extract condemns any Condition which obliges a purchaser to assume a state of facts which the vendor knows to be untrue. In certifying substantive compliance, when the vendors knew that the foul sewer was not installed, is captured by the rule. Therefore the certificate could not be binding.

33. The learned judge then considered the plaintiffs' response by firstly quoting from Farrell's *Irish Law of Specific Performance* (Tottel Publishing, 1994) which offered a view, highly supportive of the primacy of contractual freedom even where conditions involved significant constraint. In essence the argument was that if a purchaser is unwise enough he can debar himself from making any inquiry as to title and yet have specific performance enforced against him.

34. The second response was that even if what *Emmett and Farrand* stated, commended itself to the Court, such related only to matters of title, and not to matters of planning which were in issue in that case. The judgment of Keane J. in *Doolan v. Murray* (Unreported, High Court, Keane J, 21st December, 1993) was cited to support this proposition. As Special Condition No. 10 dealt exclusively with planning issues, it should be construed normally and enforced in the manner suggested.

35. The third aspect of the plaintiffs' argument on these issues was to submit that in any event the certificate was in fact both correct and accurate. The plaintiffs therefore never asked the defendants to assume any state of facts which they knew to be untrue: on the contrary the architect's certificate had been made available in good faith and was appropriately qualified by the phrase "insofar as is reasonably possible at this stage of the development of the Estate …". (para. 23(v) above)

36. The learned trial judge agreed with the plaintiffs' submissions on all of these issues. With regard to the sewer he was perfectly satisfied on the evidence that at all stages the respondents were anxious to install the sewer but had to defer to the wishes of Cavan County Council, which in the circumstances was a reasonable course of action for them to adopt. Therefore the Certificate was a fair representation of the situation pertaining at the relevant time.

37. Although setting out in fairly full detail what the arguments were, which it should be said were substantially greater than the abbreviated version given above, the learned judge did not consider it necessary to further discuss or analyse to any great depth, the reasoning which lead to his conclusions. The reason for this approach followed from his decision that the case should also be decided upon its merits: hence in addition to determining that the Certificate was correct he also considered, as a matter of some significance whether the defendants knew at the relevant time that the sewer had not been built. On the basis of the evidence presented, the judge found as a fact that the defendants had been aware of the position regarding Condition No. 33 of the planning permission, at all relevant times, and expressly rejected their individual and collective evidence that it was early 2009 before they became aware of the facts. On this additional basis he held that no reliance could be based on the absence of the sewer, whatever representation the respondents may have given in that regard.

38. Regarding Condition No. 14 of the planning permission, which related to the dwelling units remaining unoccupied until the new sanitary facilities were constructed and tested in accordance with the Council's requirements, the learned High Court judge held that Mr McCormack's certificate was not in any way inconsistent with the terms of such Condition. He accepted that the requirement related to such facilities as were internal to the site and that once connected to the public sewer, it had been duly complied with.

39. It is fair to say that in an overall way the learned High Court Judge was quite unimpressed with what he described as the defendant's "stratagem to try and avoid contractual obligations", starting in mid-2008 and continuing on other occasions thereafter, noting that it was only after being unsuccessful with such efforts, that they sought to raise and rely on planning issues.

40. Finally it was accepted by the plaintiffs in the High Court that they still had undertakings to fulfil in respect of the development such as compliance with Condition No. 33 of the planning permission. In addition to the bond being still in force, the receiver was in funds to discharge any shortfall in respect of these obligations and was willing to do so. Despite the Council's continuing difficulty regarding the provision of finance for the water main (paras. 107-115 i*nfra*), nonetheless the learned judge found that the plaintiffs were still entitled to orders for specific performance in respect of the disputed contracts. *Spry on Equitable Remedies* (8th ed.; 2010 at p. 111) was cited in support of such orders: this relief however should be subject to the Receiver's undertaking, to be recited in the order, that when called upon by Cavan County Council to do so, he will ensure that sufficient funds be made available so that Condition No. 33 can be complied with, at that stage.

Notice of Appeal:

41. The appellants have filed an extensive notice of appeal setting out seventeen grounds upon which they say the trial judge erred. Each of these have been spoken to by written submissions filed by both sides. In the discussion which follows the issues between the parties will become clear and therefore it is not necessary to separately detail the content of either the notice or the submissions at this point.

The Decision:

42. In this section of the judgment I therefore propose to consider, the following issues: (i) firstly the relationship between the General Conditions and the Special Conditions and in particular how the former are affected by the latter; and secondly the nature of the obligation imposed on the vendors regarding evidence of planning compliance ("The First Issue"); (ii) thirdly whether, even if Special Condition No. 10 has the meaning argued for by the respondents, they are nevertheless precluded from relying upon it, by virtue of certain principles of law which the appellants say deny it, any validity ("The Second Issue"); (iii) whether the architect's Certificate is correct in accordance with its terms ("The Third Issue"); (iv) the position regarding planning Condition No. 14 ("The Fourth Issue") and (v) the appropriate remedy ("The Fifth Issue"). This sequence largely follows that adopted by the learned High Court judge in his judgment.

The Context:

43. At the outset however, it is worth noting in a little more detail the context giving rise to this dispute. Having acquired the subject land and having obtained the relevant planning permission upon which the development was subsequently based, the appellants sold on the land with the benefit of such permission, making a profit within two years of well over 100% of their original outlay. No doubt on the back of costly legal, accounting, financial and tax advice, the composite transaction entered into in January, 2007 was at that time then considered, as the optimum vehicle by which all possible gain could be extracted from this venture. On foot of such an arrangement, the respondents were up against very definite deadlines, the first ending in March, 2007 and the second in December, 2007, by which dates, specified works had to be completed or in place, as otherwise the tax advantage envisaged would not, or at least would not to the same extent, materialise. Whatever else may be in dispute in this case, what is not is the fact that Mr. Murtagh and his company delivered on this timeline, and constructed the development to a very high and admirable standard of construction.

44. At a point in time when the vast majority of the residential units were well advanced in construction terms, and again no doubt to reflect expert advice, which obviously in the intervening period had changed, the single structure arrangement was replaced by an individual transaction for each unit, resulting, as above stated, in 48 contracts for sale being executed with a corresponding number of Building Agreements. (para. 6 above). This re-adjustment for tax purposes was undoubtedly driven by the appellants but obviously was also agreed to by the respondents.

45. The purpose of these observations is not to offer criticism as to how parties set up or organise their dealings: it is their business and they are entitled to so do in their preferred manner, provided the same is lawful, as it is in this case. Rather, the intention is to highlight the obvious, which is that this transaction was purely commercial in nature with the appellants being well informed, well advised and experienced individuals, in property development and speculation, and in matters of planning and the planning process, with at least one member of the partnership being a builder all his life. Evidently at the highest level, legal and taxation advice was brought in: in fact, from the evidence given in the High Court, it is certainly the case that the project and the manner of its legal structure was heavily influenced by tax considerations.

46. The contractual obligations of the parties, as outlined in the contract documents, cannot be divorced from this background: rather, they must be informed by it and interpreted, accordingly (paras. 61 to 62). The first issue therefore will be to ascertain what the relevant provisions mean, in terms of rights and obligations of each party. This will inevitably involve a consideration of the relationship between the General Conditions and the Special Conditions, particularly so arising out of the Contracts for Sale, and also, but albeit to a lesser extent, arising out of the Building Agreements.

The First Issue: The relationship between the General and Special Conditions and the obligations of the respondents in regard to planning compliance:

47. In the discussion which follows, I will continue working off the papers relating to a single unit, which randomly happens to be Unit No. 4 and consequently, unless otherwise

indicated, I will discuss the issues *via* that medium; as already pointed out however, each agreement, both on the land and building side, is dated the 30th November, 2007 and save for completion dates are otherwise in identical form. In addition, I will abbreviate General Condition(s) and Special Condition(s) to "G.C." and "S.C." respectively, inserting then the appropriate number of the Condition intended. Furthermore reference to such Conditions relate to the Contract for Sale and not the Building Agreement, unless so stated.

48. The Memorandum of Agreement between the parties, being part of the Contract for Sale described the subject property, or as it was termed, "the property in sale", as being the lands and hereditaments known or to be known, by reference to the Unit number given to each residential house then under construction on the estate.

49. The Building Agreement defined "The Site", as being the plot of land known as Site No. 4. "The Works" in that agreement were described as "the dwelling house and premises specified in the plans, together with such ancillary works and services as may be necessary to render the dwelling house", when completed, "reasonably habitable" and compliant with Health Service Executive specifications. The "Covenant to Build", obliged the contractor to construct "The Works".

50. They are therefore contractual definitions/descriptions of the plot of ground in sale, the site to be built upon, the works required to be constructed, with this obligation being underpinned by a covenant to that effect and to that end. In short, a site was being sold upon which a house was to be built and finished, so that when handed over it was reasonably habitable for its intended use and purpose. This is what the vendor/builder was obliged to do and what the purchaser was acquiring and entitled to expect. It is the closing of such agreements, with these essential terms, that the High Court has directed the appellants to perform.

51. By virtue of its express provisions, where the general conditions are altered or varied, the special provisions in case of conflict prevail (S.C. No. 2, para. 17 *supra*). If it became an issue, it is again clear by express provision that "altered or varied", includes "inconsistent with" (S.C. No. 8). Those provisions and the consequences of the interplay between Special Conditions and General Conditions are entirely standard and quite unexceptional. Given the issues at hand it becomes necessary to mention again three Special Conditions, all of which are significant, but evidently the most important of which is S. C. No. 10.

52. The title to the "property in sale", is set out in the "Document Schedule" of the Special Conditions, which includes a bundle of documents combined to form the "Booklet of Title". These set out details, not only how and in what way, but also the precise manner in which, evidence of planning compliance is to be dealt with; it is by furnishing, not the draft architect's certificate included in the Booklet, but a certificate in that form duly signed by the architect as representing his certification of planning compliance. This Certificate is also the subject matter of a Requisition on Title, and reply, which the purchaser is obliged to accept and in respect of which he is required to raise any requisition/rejoinder within two weeks from the date of receipt. Nothing of significance

arose from this entitlement of the purchaser. This obligation, which is imposed by S.C. No. 22(a) is subject to the *proviso* that the same is "… subject always to the performance of the vendor of his obligations *as per the replies thereunder*" (emphasis added).

53. In their submissions (Section C – para. 3), the appellants have omitted that part of the *proviso* which is i*talicised* and have relied upon the incomplete version to support a suggested generalised obligation on the vendors, regarding planning, which evidently, in light of the *proviso* as a whole, cannot stand.

54. In any event, as above stated (para. 21), Requisition No. 27, which deals with planning, reflects, in its requesting terms, a general or expansive approach, by seeking an Architect's (or Engineer's) certificate confirming that the relevant permission relates to the subject-property, that the development thereof has been carried out in conformity with such permission and that all conditions (excepting financial conditions) have been complied with. The reply however was definitive and strictly qualified: it merely but strikingly said "[A]greed *per* draft contained in the booklet of title". As this was the contractual provision agreed upon regarding the matters covered by the Requisition, there was a joinder between the parties on this issue, the effect of which was that relative to what was sought to be certified, the purchaser was being obliged to accept the terms of the draft, as contained in the Booklet of Title.

55. As pointed out, the "Reply", obligation, imposed directly by S.C. 22(a), was subject to the *proviso* mentioned at para. 52 above: this *proviso* as properly understood gives rise to no difficulty. The certificate as specified, although not tendered because of the appellants' refusal to close, is on offer and at the trial, Mr. McCormack, the nominated architect, gave evidence, which the trial judge accepted, that he was prepared to certify in accordance with the draft. Hence on each closing, the vendors will procure and make available a duly executed and signed certificate in the appropriate format.

56. Special Condition No. 10 (para. 18 *supra*) reflects a provision which the parties were satisfied to be contractually bound by, whatever the scope of the dispute regarding its application may be. Its subject-matter was undoubtedly planning, by reference to 05/162 and in particular how compliance with that permission should be verified; evidently in the context of the phased nature of the development as envisaged by all.

57. Some aspects of S.C. No. 10 are expressed in rather unambiguous language: firstly the timing of the vendors' obligation is "On Completion". As this event is date specific and thus known for each contract for sale, and likewise for each corresponding building agreement, this requirement is pretty definite. Secondly, the vendors must furnish, on such occasion, an "engineer's" certificate of compliance with planning: although Mr. McCormack is an architect, nothing turns on the question of qualification. Thirdly, this certificate in its pre-agreed format, cannot be questioned: no objection, query or requisition can either be made or raised in respect of it. And finally, in the manner and within the scope of how this Condition varies, alters, or is inconsistent with G.C. No. 36, the latter provision is disapplied (S.C. No. 2).

58. It is worth noting that the entire documentation upon which all contractual obligations were based, was in the possession of each party prior to the date of their execution and accordingly they must therefore be taken to have had express knowledge of their content as and from that time.

59. The appellants boldly mount a frontal assault on Special Condition No. 10: it means very little, if anything, in its denial of G.C. No. 36. At most it affects the question of timing, which I will explain more fully in a moment. If this is correct, they say that, in the absence of the foul sewer having been installed, and to a lesser extent because of their view on planning condition No. 14, the architect's certificate simply cannot be offered, or imposed upon them, as to do so, would in effect be stating that the foul sewer is in, when obviously it is not. Therefore, no court should foist an unauthorised development on a purchaser and thus, to rescind, is their right.

60. A diametrically opposed view is postulated by the respondents. They say that S.C. No. 10 is self-enclosing and stands alone as the agreed provision dealing with planning. It supersedes G.C. No. 36 which can in its entirety, be disregarded when discussing the vendors' obligations under the agreements. Once they are in a position to provide on closing a signed certificate by the architect to replicate the draft, their contractual obligations regarding all aspects of planning have been satisfied. As at all relevant times, they were and remain in that position, they have complied with their commitments under the contract, and are therefore entitled to specific performance. They fully stand over the decision of the learned trial judge.

61. This issue, which is one of interpretation, falls to be decided by reference to the appropriate principles which in my view were set out concisely by Keane J. in *Kramer v. Arnold* [1997] 3 I.R. 43 at pg. 55 where the learned judge 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."

The approach therefore is to have regard to the nature of the document in question and to consider the words used, by reference to the context in which they are stated.

62. In *Marlan Homes Ltd. v. Walsh & Wedick* [2012] IESC 23 (Unreported, Supreme Court, 20th March, 2012), I said the following, in a context somewhat reminiscent of that presenting in this case:

> "50. The type of document has a clear relevance [not only] in a specific sense but also in a general sense for, as has been pointed out in many judgments, courts will not 'easily accept that parties have made linguistic mistakes, particularly in formal documents.' This was stated by Geoghegan J. in *Analog Devices B.V. & ors. v. Zurich Insurance Company & ors.* [2005] I.R. 274, where [he] adopted the five principles set out by Lord Hoffman in *Investors' Compensation Scheme v. West*

Bromwich Building Society [1998] 1 W.L.R. 896. One may obviously add that documents prepared with the benefit of professional assistance, including, but not limited to legal advice, increases [the formality of the language]. The words in question must be given their ordinary and natural meaning, in a sense as would be understood by a reasonable person having an interest in or knowledge of the material circumstances.

51. It is important however to note that where the parties have committed their responsibilities to written form, in a particular manner, it must be assumed that they have intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law. Accordingly it is important that, when faced with a construction issue, a court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions. 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.

52. The boundary between what is permissible and not in this context is captured by the following quotation from *Charter Reinsurance v. Fagan* [1997] A.C. 313 where at p. 388 Lord Mustill stated:-

> "There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and 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. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms."

I would respectfully agree with this passage."

I therefore propose to apply these provisions to this the first issue for consideration.

63. In order to assess what aspects of G.C. No. 36 are varied, altered or are inconsistent with S.C. No. 10, it will be a helpful exercise to firstly consider the provisions of the former and its scope.

64. Condition, No. 36 (para 15 *supra*) broadly speaking, has three distinct but linked aspects to it. Para. 36(a) contains, what can be described as two general warranties regarding planning permission and by-law, with (a)(ii) being the only relevant one to this case. Sub-para. (b) has a similar obligation regarding building control, with sub-para. (c), disapplying both (a) and (b) when, as of the date of sale, the breach is no-longer continuing. Sub-paras. (b) and (c) are not relevant.

65. The second part of the condition is governed by sub-para. (d) and (e), both of which deal with the furnishing of documents by the vendor. Again broadly speaking, (d), is largely relevant to completed units as in such circumstances a vendor should be in a position to furnish, before sale, the necessary planning permission, fire safety certificates, and those documents specified at sub-clause (e). Sub-para. (d)(iii) supports this view as the requirement to furnish the documents at (e) does not apply where post-date of sale, on-going works are intended so that the development will only be finalised by completion date.

66. Sub-para. (e) also deals with the furnishing of documents but unlike (d), the timing obligation on the vendor is "On or Prior to completion". This is explained by the fact that unlike sub-para. (d) it makes provision not only for a situation where the property in sale constitutes the full extent of the development, but also where it is but part of a larger estate. Concentrating on (e)(ii), a vendor, within the time period mentioned, must furnish an architect's/engineer's certificate to the effect, that the identified planning permission relates to the subject property, that in its development there has been substantial compliance with such permission and that, excepting financial provisions, the conditions attaching thereto have likewise been substantially complied with. In addition, where the unit in sale is but part of an overall development, the certificate must state that all conditions, save financial, which relate to the overall development "… *have been complied with substantially so far as was reasonably possible in the context of such development as of the date of such certificate or opinion"* (emphasis added).

67. The third part of this G.C. No. 36 deals with aspects of the vendor's liability and with a purchaser's right in certain circumstances to rescind the contract: ((f)(i) and (f)(ii)). Where a vendor has furnished a certificate under sub-clause (e), he shall have no liability on the basis of the general warranties, above mentioned, even for any inaccuracy or error in such certificate, unless at the date of sale he knew that such contained that material error or inaccuracy. Where between the date of sale and the closing date, an error or inaccuracy of the type mentioned has been discovered, then the purchaser will be entitled to rescind unless the vendor can establish, that before the date of sale, he, the purchaser, knew of such error or inaccuracy, or that the same is no-longer relevant or material, or that the value of the subject property has not been prejudicially affected thereby.

68. As can therefore be seen, there is a general warranty regarding planning, there is a requirement to satisfy that warranty and the way to do so, is by furnishing on or between specified dates, certain documents including a certificate of compliance, which also covers, a situation, if such be the case, where the subject property is part of an overall development; further, where such a certificate has been tendered, be it one with or without errors or inaccuracies, the vendor's potential liability on foot of the warranty and the purchaser's conditional right to rescind, are also dealt with.

69. It seems to me that all three parts of the condition, as viewed in the above way, are interlinked one with each other, in particular the provisions of the general warranty and the manner in which the vendor can discharge his compliance obligations, therewith.

However certain features of the Condition, highly relevant to this case must be noted: these include the fact that sub-para. (e)(ii) is in many respects couched in general terms, such as, the qualification of the certifier, who in fact that person might be in any given transaction, and the precise wording of any such certificate. Moreover and of considerable significance is the absence of any restriction on what queries, objections or investigations a purchaser might make in respect thereof.

70. As can be seen from para. 23 above, the architect's certificate, as provided for in the contract, refers to the relevant planning permission, relates that to the development, and confirms at clause 8 that the development substantially complies with such permission, and at clause 10 that the conditions thereof likewise have been substantially complied with. It is however subject to the qualification that such compliance is "… insofar as it is reasonably possible at this stage of the development of such Estate …". Moreover it confirms that the certificate does not, *inter alia*, take into account any development of the relevant works which may occur after the date of its issue.

71. As can be seen, the certificate covers each essential matter which sub-paras. (a) and (e) of G.C. No. 36 are designed to deal with. It does so of course in a specific way, which is a distinctive feature of Special Conditions, and which by their nature will most probably have been carefully scrutinised by the parties in a manner in which perhaps General Conditions have not been: as such they are deserving of that recognition.

72. The question then is what meaning should be given to S.C. No. 10 , and the documents to which it applies, in particular what effect does it have on G.C. No. 36? What did the parties intend by the language which they have used to reflect their position on planning? What, by reference to the ordinary meaning of the words, did the vendors understand their obligations to be? Likewise, what did the purchasers expect to receive? This at a time when the single structure transaction was being replaced with individual contracts for each unit. Disregarding any question of the appellant's knowledge *vis-á-vis* the foul sewer, but otherwise being mindful of the overall context as it existed at the end of November, 2007, it is in my view an inescapable conclusion that the appellants agreed to have displaced the open contractual approach to matters of planning now espoused by them, and in these key areas, to have substituted therefor, the architect's certificate as agreed. This in my opinion follows from the combined effect of S.C. No. 10, as applied by its own express wording, in conjunction with S.C. No. 2, and having regard to S.C. No. 22(a), which outlined the pre-agreed position regarding Requisition No. 27(2)(e); all of which gave rise to the contractually agreed architect's certificate, to be provided by Mr. McCormack. Once the same could be procured in the format as agreed, the vendors' commitment regarding planning was satisfied: if such a process should give rise to any risk, the parties agreed to its allocation in the manner stated: thereafter it became a matter between the purchasers and the certifier. Consequently in respect of the matters governed by such Special Conditions I am satisfied that the appellants cannot rely on G.C. No. 36 and that their submission on the relationship between that Condition and the Special Conditions, is misguided in law.

73. This view can be tested by a closer look at the only concession which the appellants were prepared to make in relation to S.C. No. 10. What is said is that the documentary requirement of (e)(ii) continues to apply, but that the architect's certificate does not have to be provided any earlier than at closing. This is not in fact a concession at all, and therefore could not explain why the parties had gone to the trouble of inserting S.C. No. 10 in the first place. The reason why I say this is that sub-para. (d)(iii) pushes back from the date of sale to the date of closing the documentary obligation referred to at (e)(ii), where on-going works are envisaged, as is the instant case. In fact, the opening words of sub-para. (e) give the timeline for compliance as "[o]n or prior to completion of the sale". Thus, this line of reasoning, advanced to support the appellant's contention, cannot be accepted.

74. In conclusion the appellants are bound to accept the architect's certificate, the procuring of which will be a sufficient discharge by the respondents of their obligations in this regard.

The Second Issue: Reliance on and Enforceability of Special Condition No.10

75. Anticipating this possibility, the purchasers then argue that based on what *Emmet & Farrand on Title* (Sweet & Maxwell 2010), state at paras. 5.008 and 5.011 of the text, the restrictions imposed on the investigation of title which result from the above interpretation of the relevant conditions, cannot be enforced. If they are correct in this submission they would of course have a right to investigate title, free from such constraints.

76. The first proposition of law referred to, reads as follows (para. 5.008):

> "Conditions of Sale -
>
> In the light of the above complexities, a vendor may wish to insert a Condition in the contract dealing with any defect in his title, designed to "safeguard himself against any undue trouble to which he might be put by inquiries about facts which took place some time ago …".

The text continues:

> "If so the rule is that the Condition must not mislead the purchaser in any way (*Re Bannister* [1879] 12 Ch. D. 131). The vendor will only be able to rely on the Condition if he has made a sufficiently full disclosure to enable the purchaser to consider and determine whether it is worth his while to accept a particular defective title by entering into the contract (*Re Haedicke v. Lipski Contract* [1901] 2 Ch. 666)."

In support of what is stated the authors cite a number of cases including: *In Re Holmes* [1944] Ch. 53, at p. 57 (Simonds J.); and *Becker v. Partridge* [1966] 2 Q.B. 157, at p. 171 to 172 ("*Becker*").

77. The principle being advanced in this passage is that such a Condition cannot mislead and accordingly adequate disclosure must be made, so that a purchaser can decide whether or not to commit himself to the transaction. A concrete example of which this principle finds expression, is to be found in the circumstances of the *Becker* case, where the vendor did not know of the covenant breaches of the underlease in sale, which because of their nature could give rise to the possibility of forfeiture. He should however have known and would have, but for his failure to inspect the superior underlease, which he had a right to do. When these matters were discovered, the vendor tried to rely on a condition of sale to the effect that the purchaser had accepted the vendor's title and had agreed not to raise any requisition or objection thereon. In refusing to enforce this condition the Court of Appeal at p. 171 of the report said:

> "… there is no doubt but that a clearly drawn Special Condition put in the contract by a vendor who acts in good faith, and disclosing a possible defect in title, the purchaser may be compelled to accept the title offered by the vendor. But the vendor must have disclosed the defects of which he knew … or ought to have known …".

As the vendor had not done so the purchaser was entitled to rescind.

78. Although the Court did say that 'a full and fair representation' must be made, it did not elaborate on the scope or extent of that requirement and neither did it review cases, where although the purchaser was held bound by the Contract, the Court nonetheless refused specific performance, because of the defects in title, leaving the vendor to common law remedies only.

79. The *rationale* behind the rule is that, a would-be purchaser is entitled to be informed of such facts as are or ought to be known by the vendor, as this will enable him to decide whether to enter into the contract with knowledge of the existing defect, which the Special Condition is designed to protect, or otherwise to decline to so do. Any condition which misleads, necessarily deprives him of this assessment opportunity. The condition should be drafted with care and avoid ambiguity. What will constitute disclosure or non-disclosure, as the case may be, is fact and circumstance specific, and need not detain us at this point. As so stated this is a rule or principle with which I agree.

80. The second statement of law relied upon, appears at para. 5.011 of the same text and reads:

> "Purchaser to Assume that a State of Facts Exists –
>
> A condition requiring a purchaser to assume that what the vendor knows is not true, can be disregarded on the ground that it is misleading and the vendor cannot enforce specific performance …. This is also so if the vendor knows only what has to be assumed may not be true … but the Condition will not be considered misleading if the vendor believed it to be true what he asked the purchaser to assume, although his belief was untrue and unsupported by the

> evidence … the utmost that can be asked of a purchaser is that he shall assume something of which the vendor knows nothing. It follows that if the vendor knows, or from the state of his title ought to know, that what he asked the purchaser to assume is not correct, the Condition will be misleading".

The proposition is said to derive from and be supported by, amongst others, the cases of *Re Sandbach and Edmondson's Contract* [1891] 1 Ch. 99 ("*Sandbach*"); *Wilson v. Thomas* [1958] 1 W.L.R. 422, and *In re Banister* [1879] 12 Ch. D. 131 ("*Banister*").

81. In *Sandbach* the Conditions of Sale, relating to a number of properties, stated that the title was to commence with "… an Indenture of Settlement dated the 10th day of June, 1848 and made between John Bouchier of the one part, Frederick Calvert and Michael P. Calvert of the second part, Robert Broome of the third part and Mary Whittaker of the fourth part", and went on to provide, by Condition No. 4, that the purchaser was required to assume "that the said John Bouchier died intestate and without an heir before the year 1870". The reason for this condition was that the title of the vendor depended upon the death of the said Mr. Bouchier intestate and without heirs before the death of Robert Broome, party of the third part, who in fact died on the 4th November, 1870. The legal reasons why the title was so dependant are not relevant, but fully support such a proposition.

82. The purchaser, in requisition, argued that the condition did not sufficiently disclose the importance of the fact required to be assumed and was therefore not binding upon him. Freed therefrom he then sought proof of what he was being required to assume. By way of requisition reply and in an affidavit sworn in the subsequent action, the vendor averred that in his belief, Mr. Bouchier had in fact died, intestate and without an heir before 1870: but that he could not support this belief by evidence. Lord Halsbury L.C., having referred to this evidence, which in his view disavowed any suggestion that the vendor knew, what he required the purchaser to assume to be untrue, or indeed that the underlying events themselves were not true, said the following, when giving the judgment of the Court at p. 103 of the report:

> "I should quite agree that if there was an actual misstatement or such an imperfect statement of the facts as in the result makes what is stated untrue, the Condition would be so tainted by falsehood that it could not be insisted upon as against the purchaser misled by such taint of falsehood. But now that the facts are all known the Condition appears to have been aptly and properly framed to prevent the purchaser insisting on proof of what was then and is now believed to be the fact, but which the vendor is not in a position to be established by legal proof."

83. The Lord Chancellor then touched upon the scope of what disclosure would be required so as to support the validity of such condition; he said:

> "It seems to me that although the exact defect in the proof of the title is not specifically pointed out, it required very little foresight to conjecture that the

death of John Bouchier intestate and without an heir was really material by reason of some such objection as that which is now in question.

It seems to me that an opposite view would establish the principle, that apart from an intentional misleading, and apart from any knowledge by the vendor that the facts required to be assumed were not true, a Condition requiring assumptions as to title could only be supported where the specific objection to the title was pointed out. For that proposition I can find no authority …".

84. As can be seen *Sandbach* as such, did not involve any requirement to assume a state of affairs which the vendor knew to be untrue: the contrary in fact was the position with the real difficulty being the absence of proof. Quite a different situation presented in *Banister* which is a first class example of the type of condition which the above passage is intended to capture. In that case the purchaser was firstly required to assume that a certain named individual, one Ester Banister, was seized of and entitled to the property in fee simple in possession, free from encumbrances, as of 1835, and that her possession continued in that manner until her death in 1860; and secondly, to accept that it was not accurately known and could not be satisfactorily explained how the said Ester Banister, acquired the property in the first place. Both of these Conditions were underpinned by a restriction which prohibited the purchaser from making any inquiry as to any other title.

85. The purchaser subsequently discovered that the said Ester Banister was in possession of the property as a mortgagee since 1844 only and that she had no title against the mortgagor except by adverse possession under the Statute of Limitations: and furthermore that her Executor in 1861 had paid legacy duty on the mortgage debt, and not succession duty on the estate. In such circumstances the purchaser argued that he should not be bound by those Conditions.

86. On the factual side it was held that the vendor knew or ought to have known that in 1835 the said Ester Banister was not entitled to the entire property with the estate or interest which the conditions ascribed to her. In fact the true position was, as asserted by the purchaser, and was so known to the vendor. Jessell M.R. in holding that the purchaser's rejection of the conditions was well-founded said:

> "I do not think a vendor is entitled to say that a purchaser shall assume that which the vendor knows not to be true. The utmost that can be asked of the purchaser is that he shall assume something of which the vendor knows nothing, but this Condition does appear to me inferentially to represent to the purchaser that at all events so far as the vendor knew, Ester Banister was seized or entitled which was not a true statement".

He continued:

> "That being so, it appears to me that the vendor knew, firstly that in 1835 Ester Banister was not seized in fee: and secondly knew quite accurately how she had obtained possession."

Given that position the Court held that the Conditions did not reflect a fair representation of the true state of the title and thus would not hold the purchaser to such Conditions.

87. Much the same broad principles have been accepted as applying in this jurisdiction. Subject to any statutory imposition, the parties are free to negotiate and agree conditions of sale, including those which are restrictive of a purchaser's common law right to investigate title. There are similar requirements on a vendor when drafting such conditions as those mentioned above: he must for example intimate fairly the difficulty which the special condition is addressing, and do so in a manner which permits the purchaser to ascertain the essence of the defect. Like Lord Halsbury in *Sandbach*, it would be an excessive burden on the vendor and perhaps even render the property unsaleable, if the obligation to inform necessitated the giving of specific and minute details of such defect: rather in my view it will be sufficient if a purchaser, aided by enquiry expected of him together with the knowledge which he has or ought to have, can ascertain what the problem is. See *In re Turpin & Ahern's Contract* [1905] 1 I.R. 85. A little more recently, Kingsmill Moore J., in *Re Flynn and Newman's Contract* [1948] I.R. 104 repeated the substance of the obligation in much the same way as I have stated it to be, saying at p. 112 of the report:

> "The vendor may, of course, limit his obligation to show good title by suitable Special Conditions, but, if he does so, he must fairly indicate what is the defect in his title to which the purchaser must submit and must take care that he is not guilty of misrepresentation."

88. A good example of how this rule works in practice is provided for in *Clements v. Conroy* [1911] 1 K.B. 500. In that case, the advertisement offering for sale a public house described it as in the occupation of a tenant at a yearly rent, but did not specify the tenure by which the tenant held. Subsequently the purchaser sought to be excused from the contract on the basis that the tenant held under a lease which had ten years to run, claiming in the process that she had been misled by the advertisement, but stopping short of making any allegation of fraud. It was held by the Court that whilst the advertisement did not disclose the nature and extent of the tenancy, it did not on the other hand either, suggest that vacant possession could be obtained by the service of a notice to quit or otherwise. Having signed the Conditions of Sale, which were not in any way misleading, and by which the purchaser was on express notice of the lease, she was bound by such conditions and could not be excused from her contractual obligations.

89. I am therefore satisfied that what is stated in *Emmet and Farrand* and outlined above are correct statements of the law and have been so accepted as such in this jurisdiction (see also 9.36 of Wiley in *Irish Conveyancing Law*).

90. This conclusion is not I think in any way disturbed by what is said in *Farrell on the Irish Law of Specific Performance* (Tottel Publishing, 1995) which is relied upon by the respondents as asserting the complete and unqualified primacy of contractual freedom. The first such passage reads "In a vendor's action for specific performance it is a good defence to show that he has no title unless the purchaser has unwisely agreed to a very

restrictive Special Condition" (para. 9.74). In particular the second part of this extract is stressed.

91. Having so stated, the reader is then referred to footnote no. 646 wherein it is said "[o]n such Conditions generally see paras. 9.78 post. O'Connor M.R. has said in *In re White and Hague's Contract* [1921] 1 I.R. 138 at p. 144 that:

> "a purchaser may preclude himself by agreement for making any enquiry as to title". However, it is not clear how far an intended vendor can go towards excluding investigation of title altogether: see discussion of this by Wiley, *Irish Conveyancing Law* (1978) at paras. 10.040 – 14.04".

Whilst it is undoubtedly true that O'Connor M.R. did indeed say what is attributed to him in this footnote, it would be entirely incorrect to treat this as either a standalone observation or a complete statement of the law. In fact, it is highly qualified by the remainder of his judgment and is properly contextualised when that is fully considered. That this is so, is put beyond doubt by the conclusion which the learned judge reached in that case.

92. The facts were: the vendor acquired the land in sale, under the Land Purchase Acts and was registered as the fee simple owner in the appropriate folio subject to the "rights/equities" (if any) arising from the interest thus acquired being deemed to be a graft on her previous interest. The purchaser required an abstract of title showing that the land would not be subject to any equities which could affect his interest after purchase. The response of the vendor was to rely on a condition of sale which precluded the making of any inquiry as to equities, or indeed as to the vendor's title prior to first registration. If the condition should be upheld and the investigation of title precluded, it was possible for a variety of reasons that the purchaser might end up with no beneficial interest, to any degree, in the property. The question therefore which the Court had to consider was:

> "… whether it is permissible, and if so, in what circumstances, to bind the purchaser of land to pay his purchase money without getting any evidence of title or only such a shred of evidence as may be absolutely unreliable" (p. 143).

93. Having given examples of circumstances in which it would be quite reasonable, by condition, to restrict a purchaser to such title only as the vendor had ,and to enforce that, by condition, the Master of the Rolls' quite definitely did not think that the case before him was a further example of what he had in mind: he described it as one:

> "… which suggests no reason for not disclosing the vendor's title, except an effort to foist upon a purchaser a worthless title, or mere perversity on the part of the vendor. I entertain the gravest doubt that the contract would be enforced."

At the conclusion of his analysis, which did not in any way suggest that which can be inferred from a literal consideration of what para. 9.74 recites, he was satisfied that the vendor could not rely on those Conditions and thus had not shown good title.

94. The second reference to *Farrell* relates to para. 9.78 and reads:

> "Formal contracts usually contain some restrictions on the right of the purchaser to investigate title. It is obvious that under an 'open' contract the purchaser is entitled to a full investigation of title and no less obvious that a right to a full investigation may be cut down by conditions of sale. It has been said that 'a purchaser may preclude himself by agreement from making any inquiry as to title and specific performance may be enforced against him. …'".
>
> This passage does not in any way add to the extract previously quoted as in support of what is stated, the only authority cited is the same decision of O'Connor M.R. in *In re White and Hague's Contract* [1921] 1 I.R. 138. That being so the suggestion that conditions of this type can be inserted without restraint is not supported by the referenced text in Farrell. In fact the author was doing so more than outlining what the case law established – even if perhaps on reflection that could have been made a little clearer. In particular, I am satisfied that he was not in any way attempting to restate the position. This becomes abundantly evident when reference is made to para. 9.79 of the same text, where succinctly but thoroughly, the position of restrictive conditions in Contracts for Sale is dealt with, citing in the process some of the authorities discussed herein. Therefore it seems to me that when correctly read and properly interpreted there is nothing in Farrell which is in any way inconsistent with the conclusions above reached.

Planning: A Matter of Title or User:

95. There is no doubt but that the principles above outlined have been established, developed and refined in the context of property disputes, when title is the issue, irrespective of the particular form the action at law may have taken. The relevant extracts from *Emmet and Farrand* are contained in Chapter 5 under the heading "Deduction and Investigation of Title". Similarly with Wylie, who deals with the issues as involving contractual provisions relating to land sale. There is neither subject matter or case law, at least to my knowledge, in which such principles have either been considered much less applied, in areas divorced from property law. There is no real dispute between the parties that this is so: how then one must ask are these principles relevant to this case? This question gives rise to a sharp conflict of position: quite simply the appellants say that matters of planning are now matters of title, and should be so regarded, whatever the historical position may have been. Not so say the respondents. Such matters have never been and should not be so considered. In my view their submission in this regard is correct.

96. Land, by which I mean property in a realty sense, is a physical immovable object: it has existed for time immemorial: man's ownership of land has likewise so existed.

97. Such ownership, as developed and recognised under the common law, was not directly that of land itself, but rather of a person's "estate or interest" in land. Accordingly, there was interposed, between the subject matter and the owner, this theory of estates or interests; by which the quality or degree of one's ownership and the terms thereof, could

be determined. These concepts remain very much part of the common law today. Thus when one refers to a person's title to land, one is referring, in legal terms, to the estate or interest which that person has in the land in question.

98. An 'estate or interest', terms which I use in a broad and general sense, can range from what in common parlance may be called full ownership on the one hand to that which reflects the lowest recognisable legal interest on the other. The former, to lawyers, would be expressed as a person having the fee simple interest in absolute possession, and free from all encumbrances, whereas an example of the latter might be an occupation enjoyed by "sufferance" or "at will". In between, one will find a great variety of 'estates and interests', at different levels of the title chain, such as fee farm grants, fee tails, life estates, leases for life, leaseholds, tenancies of definite and periodic duration, easements, and a whole host of other incorporeal hereditaments, to name but some. Any number of people can hold different estates in the same property at the same time either in possession or in remainder: they can do so either individually or in conjunction with each other. Where a system of statutory registration is involved, which in some form has existed since 1865 (The Record of Title (Ireland) Act), there is recognised as regards freehold land, absolute, qualified and possessory title, with an additional class – good leasehold title – also applying to leasehold property: in addition there is a variety of subsidiary interests, all reflecting a gradation of entitlement to the property. What each one has in common is that it confers some entitlement(s), to use a neutral expression, on the beneficiary in question, the scope and utility of which will of course depend on the nature of the particular interest and the subject matter of that interest (now governed by and subject to the provisions of Part Two of the Land and Conveyancing Law Reform Act 2009).

99. In a great number of cases, an estate or interest in property has inherent in or intrinsic to it, certain defined and ascertainable characteristics of ownership. These may be expressed as rights, duties or powers and may be exercised by those who possess them, in protection of their estate or interest against the world at large. Some obvious attributes which come to mind include, the right to occupation, possession and use, with the attendant right to deny entry to or expel the unwelcome: the *inter vivos* right of disposition, in and by the diverse means available: the right to establish a succession line on death, marriage or other event; and the right to utilise such interest as security. These are some of the more general rights but evidently there are exceptions to all of these examples.

100. The 'investigation of title' has a related but separate context: its exercise is in searching for proof and verification, at an evidential level, that the seller can establish ownership of the estate or interest in sale, in such a manner as will satisfy conveyancing law and practice, so that the purchaser can acquire what he has contracted for. To that end the root of title, the devolution of that title, the General and Special Conditions of sale, together with the requisitions in title and replies thereto, are all means of achieving a mutually acceptable transfer of the interest in question. Once complete the purchaser

obviously should enjoy the same incidence of ownership attaching to the estate, as the vendor previously did.

101. Planning however is an entirely different type of species. It is a method, statutorily based, founded on and derived from a broad range of policy considerations, reflecting both public and private interests, which are designed to regulate an orderly society, including the environment and the existence of structures and use of land, etc, though its provisions by no means are confined to realty. Every aspect of the process is highly controlled, and as influenced by case law, implemented thus. Once obtained, a grant of permission must generally be activated within a particular time; with its overall lifespan for that purpose, subject to extension, being finite. It attaches to the land as distinct from conferring a personal interest on the grantee, unless otherwise stated (s. 39(1) of the Planning and Development Act 2000). It does not by itself authorise the carrying out of any works, development or use of land (s. 34 (13) of the 2000 Act): a grant is simply confirmation that what it covers is authorised under the planning code and if carried out in accordance with the specified conditions, will be duly planning compliant. Other licences, permits or authorisations may be necessary, by way of statutory or regulatory requirement. Quite evidently it neither creates nor conveys any legal or equitable estate or interest in the subject land: that remains entirely a matter governed by land and conveyancing law. A permission is not capable of being disposed of or inherited. It cannot be offered as security in its own right. It cannot be enjoyed in the same manner as property and otherwise does not possess any of the attributes above mentioned. It is therefore at the level of principle a wholly distinct and different species from land or from title to land.

102. The only authority which the Court has been referred to which touches on this point is the case of *Doolan v. Murray* (Unreported, High Court, 21st December, 1993), where Keane J., as he then was, stated the following:

> "The objection, moreover taken by the plaintiff at this stage to the replies, all relate to alleged non-disclosure of planning matters. Although requisitions in relation to such matters are raised today as a matter of course, they are not in the strict sense requisitions on title and, even if the plaintiff's contention that they were inadequate in the present case was well-founded, and she had been in a position to rely on them at the appropriate time, that is before the sale was completed, it is unlikely that their allegedly inadequate nature would have afforded her any grounds for rescinding the contract". (para.109)

I respectfully agree that this is a statement of what the true position is, in the context of planning considerations which arise, in the disposal of land.

103. I am therefore quite satisfied on the above analysis that matters of planning cannot, as such, be classified as matters of title, and accordingly for that reason the principles of law espoused by the appellants in this regard, have no application to this issue.

104. No doubt the issue of planning is of considerable importance and quite obviously has incrementally increased in such importance over the years. However, in principle it is no

different from other regulatory regimes which may impact on how property is used, such as licensing, health and safety, food and hygiene, etc.. None of these, even where the property in sale is affected by their provisions, at least in the absence of very special circumstances, can be classified as matters of title. Quite evidently these can be of the greatest of importance to the parties in any given situation and thus, like planning, are specifically covered in the standard conditions of contract issue by the Law Society, which of course the parties are free to supplement by agreed Special Conditions if need be. However such standardised procedure does not in any way change their essential character: in reality and in law these are matters of contract and are perfectly capable of being adequately dealt with in that way. Accordingly in my view the above rules or principles of law, regarding conditions of sale or assumptions imposed upon purchasers, are not relevant to planning matters.

105. This view is also supported by the following statement in *Emmet and Farrand* at para. 4.025:

> "User of Property: …
>
> > 'if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purposes for which he wants to use them, whether that fitness depends on the state of their structure or the state of the law or any other relevant circumstances.'
>
> (per Devlin J. in *Edler v. Auerbach* [1950] 1 K.B. 359, at p. 374). This statement of the law enjoys the express approval of the Court of Appeal (*Hill v. Harris* [1965] 2 QB 601, concerning a head lease covenant) …".

106. In conclusion therefore on this, the second issue (para. 42 above), the appellants' response to the Special Conditions having the effect as previously stated, cannot be upheld.

The Third Issue: The Accuracy of the Certificate:

107. The second way in which the respondents answer the appellants' submission regarding what *Emmet and Farrand* say, is to assert the accuracy of the written certification: it therefore becomes necessary to consider whether in its actual terms, the certificate can be classified as being substantially correct?

108. In this regard the learned High Court judge made a number of key findings of fact which cannot be disturbed on appeal. Firstly, he found that Mr. Murtagh was at all times not only willing to install the sewer, but was most anxious to so do and in fact was putting the Council under continuous pressure to permit this to occur. Secondly, the only reason why it had not been installed either earlier than or even by the date of trial, was because of a clear and definite preference by

Cavan County Council that a trunk water main, which it intended to lay along the same stretch of road, would be installed concurrently with the construction of the sewer.

109. For many years the Council had this project in mind and had been in long standing discussions with the Department of Environment seeking the necessary funding. Certainly by 2007, Council officials were satisfied that such finance was "imminent", and thus, had a definite view that both schemes, which involved extensive infrastructural works, should be executed at the same time. This made perfect sense and the intended co-ordination was in the public interest as otherwise the inevitable major disruption to traffic, over a lengthy period, would have to be experienced on more than one occasion. Consistent with this position, the Council willingly agreed to permit the subject development in October, 2007 to connect into the existing public services adjacent to the site, insisting at all times however that the foul sewer would still have to be installed at the appropriate time. Unfortunately, by trial date such funding had not materialised, a cause of great frustration to the local authority. It was however hoped and anticipated, at that time, with some added justification it should be said, that it would be provided within a short period thereafter.

110. Those findings by the trial judge were firmly rooted in the uncontradicted evidence of the architect, of the consulting engineer retained for the project and more significantly, of the relevant Council personnel, who included the area engineer and his colleagues in Sanitary Services. Exchanges between the learned trial judge and a number of those witnesses, which appear at pp. 40 to 41 and 44 to 45 of his judgment, confirm this situation. His conclusion, that no blame or fault could be attached to the respondents regarding the foul sewer situation, was wholly justified. Against this background, the accuracy of the certificate must now be considered.

111. Condition No. 33 of the planning permission required the respondents, before the commencement of the development, to agree details with the Council regarding the construction of the sewer. On several occasions such meetings were held with on-going discussions taking place throughout 2007. From their perspective, the respondents were anxious to get agreement so that the sewer could be installed, whilst at the same time, having an understanding of the Council's predicament regarding the trunk water main. As matters transpired, the Council for the above reasons, repeatedly deferred furnishing its consent for such works. This meant that the sewer could not be installed until either the Council altered its position or received the necessary funding for the water main. I discount, as entirely unrealistic, the suggestion that the respondents should have instituted High Court proceedings against the Council in this regard. In these circumstances the respondents therefore did everything they could, to advance the situation.

112. Their position might be entirely different had the respondents declined, refused or delayed in carrying out the intended works or if they had withdrawn from the site or otherwise ceased operations. None of these possibilities occurred. At all times, up to and including the date of trial, they were committed to installing the sewer in accordance with Condition No. 33. It is in these acknowledged circumstances that the architect's certificate must be judged.

113. Before outlining my views on this point I should say that, I am quite satisfied that the reliance which the appellants place on the description of, "The Relevant Works", as contained in the certificate, is incorrect. In clause 3, the architect sets out the works, authorised by the permission, in their entirety, and refers to them as "The Relevant Works". That phrase is repeated elsewhere in the Certificate. It is therefore said by the appellants, that by reason of such description, the certification could only be made by reference to the entire development, including the nursing home, all residential units and of course the foul sewer. As it was not, substantial compliance could not be asserted. In my view this is not correct and when the description of the authorised works is properly considered, the phrase as used, namely "The Relevant Works", has no legal significance.

114. The reasons are that the relevant works, for each contract are those described in that contract, the provisions of which are above outlined: in the case of any doubt those provisions must prevail. Secondly such works were evidently part of the larger estate comprised in the overall development, which the parties clearly intended to be phrased in nature, and thirdly the submission fails to have regard to clause 10 of the Certificate, which is the key part of the certification.

115. The provisions of para. 10 have been quoted on a number of occasions previously (para. 23 *supra*). The critical phrase, which qualifies the confirmation is that the planning conditions have been substantially complied with "… insofar as it is reasonably possible at this stage of the development of such Estate is ...". The facts and in particular the findings made by the learned high Court judge fully support the conclusion, that had the sales been closed pursuant to the Completion Notices served in 2008, such a representation would have been accurate. It was not possible for the reasons stated to have the foul sewer installed by that date: but there remained every commitment to so do. The development therefore had yet to be completed at that date. Given the state at which such development had reached, at that point, there was nothing misleading, inaccurate or incomplete in the representation contained in para. 10. I am therefore satisfied that such a certificate was accurate.

The Fourth Issue: Planning Condition No. 14:

116. The submission made by the appellants on Condition No. 14 must be rejected. That Condition it will be recalled reads "[t]he dwellings may not be occupied until the new sanitary facilities had been constructed and tested in accordance with the Council's requirements". In accordance with well-established principles, a condition in a planning permission must be given its ordinary meaning, as would be understood by reasonable members of the public and by developers and their agents, and not simply by lawyers, unless when the documentation read as a whole, mandates a contrary meaning (*In Re XJS Investments Ltd.* [1986] I.R. 750 at p. 756).

117. The argument advanced by the appellants is that the only interpretation available is one which prevents any unit being occupied until the entire works, building, services and otherwise, authorised by the permission are completely finished. Given the phased nature of the development, which all parties were aware of from the outset, it seems to me that this is a highly unlikely meaning of the condition. Mr. McCormack's evidence was sharp

and focused to the point, namely that the phrase "the new sanitary facilities" referred to in the condition, was referable to the internal facilities of each individual unit and did not extend to those outside of the site. Having obtained the necessary permission in October, 2007 those facilities were thereafter connected to the public sewer adjacent to the site. In that way, as each unit was finished, connected and tested by the Council as they were, this condition in my view was satisfied.

118. Whilst not in any way decisive, it is perfectly clear from the evidence, as so found by the High Court, that the relevant Council officials were likewise of this view, as they never considered the existence of any difficulty with this condition. Therefore, in my opinion the facilities, which are in situ are in satisfactory compliance with this Condition.

Question of the Appellants' Knowledge Regarding the Sewer:

119. The learned High Court judge made a specific finding, that at all relevant times the appellants knew what the true position was, regarding the installation of the foul sewer and therefore were fully aware that Condition No. 33 of the planning permission had not, at such times, been complied with. The reasoning why he so concluded appears at pp. 50 to 55 of his judgment. In the process he expressly rejected the evidence given individually by each of the appellants, and refused to accept that they became aware of the true position only in early 2009. With these findings, he considered that as a matter of law, even if an express representation had been given by the vendors to the purchasers in respect of the sewer, the purchasers were not entitled to rely upon it as they knew the true position at all stages. In this regard, he adopted as a correct statement of the law that which is stated at para. 5.009 of *Emmet and Farrand*.

120. For my part I do not find it necessary to expressly deal with this issue. Based on the conclusions previously reached in this judgment, I am satisfied to proceed and consider the final question for decision which is whether the ultimate order as made by the trial judge was in the circumstances an appropriate one.

The Fifth Issue: The Appropriate Order in the Circumstances:

121. The order which the respondents obtained from the trial judge was one directing the appellants to perform their contractual obligations, and close the purchase of the remaining 22 units. Such an order is of course an equitable remedy and therefore is discretionary in nature. Its granting however is governed by certain well-settled principles, one of which is that it will normally issue as a contractual remedy in property transactions, unless there is established a reason(s) which would make it inequitable to do so.

122. The background circumstances giving rise to the legal relationship between the parties in this case, both initially and in their revised terms, have been fully set out in both the judgment of the High Court and in this judgment, thus making their repetition once again quite unnecessary. It is important however to note that if any one party to the transaction could be said to have held a stronger or superior position, it was the appellants. The commitments thus undertaken by them were undoubtedly fairly entered into with full knowledge of their legal consequences. One such commitment quite evidently, was to

close the purchase of the remaining units: this they have refused to do at a loss of almost €6 million to the respondents. Therefore unless they can point to some reason or establish some ground making it unjust to do so, it is difficult to see how the order made by the High Court should be dispelled.

123. That Court, and on appeal this Court, has found that the respondents are not in breach of any obligation to the appellants: there remains however, or at least did so at the date of trial, which is the relevant date, the fulfilment of Condition of No. 33 of the planning permission. At all times, the respondents were ready and willing to install the foul sewer: that remains the position and is now underpinned by a guarantee that sufficient funds will be available once the County Council calls upon them to install it. When those construction works have been completed, then the outstanding obligation under the planning permission will have been fully complied with.

124. It is important to note that in the intervening period the appellants have not in any way been restricted in their use or enjoyment of the units in question. The temporary connection, which satisfied all of the sanitary requirements, will remain in place until the foul sewer is *in situ*. There has never been any suggestion that the planning authority is dissatisfied with the state of planning compliance: on the contrary the evidence is quite the reverse. Thus the risk of any public enforcement is non-existent. In addition, this is not a case of forcing a purchaser to accept a development which is unauthorised: this is not the current planning status of that development. It is fully authorised but subject to the completion of the outstanding obligation which remains, as acknowledged by all parties.

125. Given this situation it appears to me that there exists a significant justification which heavily favour the making of the order. This was evidently also the view of the trial judge who found authority to support such an order in *Spry on Equitable Remedies* (8th edition, 2010), at p. 111. In the following passage the author deals with the partial enforcement of contracts: he says:

> "Specific performance is not ordered against the defendant if by reason of the non-specific enforceability of an obligation of the plaintiff the order would operate unjustly. However a number of different positions arise. In the first place, the plaintiff may overcome the material objection by performing the obligation in question before the time of the making of the order of the court, or the defendant may in some circumstances be sufficiently protected by a conditional order or by a special term inserted in the order. Secondly, on the proper construction of the contract, obligations of the defendant may be independent of the performance of the relevant non-specifically enforceable term, and if so specific performance of those obligations may be obtained, provided that special considerations such as hardship do not render this course unjust. So the non-specifically enforceable term may be an inessential term rather than an essential term, that is to say, the intention of the parties may be such that the obligation of the defendant to

perform the remainder of the agreement is not conditional or dependent on the absence of a breach of the term in question."

I respectfully agree with this statement of the law, which is supported by older English case law, such as *Dyster v. Randall & Sons* [1926] Ch 932, in which it was held that the term breached by the plaintiff in an agreement for the selling of and building upon plots of land, namely a failure by him to submit the building plans to the vendor's architect before he commenced building, was of too trivial a nature so as to disentitle him from his sought order of specific performance. The evidence showed that the plans themselves were unexceptional and that no objections could reasonably have been raised by the architect thus there was no sense in which he had breached an essential term of the agreement (see also *Wilkinson v. Clements* (1872) L.R. 8 Ch 96).

126. In conclusion therefore I am perfectly satisfied that the trial judge was correct and amply justified in law in making the order which he did.

127. For the above reasons, I would dismiss this appeal.