[2019] IEHC 829

THE HIGH COURT

[2018/5402 P.]

BETWEEN

RAY GREHAN, DANNY GREHAN AND GLENKERRIN HOMES UNLIMITED COMPANY (IN RECEIVERSHIP) MICHAEL MCATEER AND PAUL MCCANN

PLAINTIFFS

AND

MAYNOOTH BUSINESS CAMPUS OWNER'S MANAGEMENT COMPANY LIMITED BY GUARANTEE

DEFENDANT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 22nd day of November, 2019

Introduction

1. These proceedings, as they have evolved, now require the court as its primary task to rule on whether the obligation to carry out repairs to a defective surface and underground carpark in Maynooth Business Campus ("the Campus") falls on the plaintiffs as owners/developers/receivers, or the defendant management company. The Campus is a largely completed commercial business campus with light industrial units and office accommodation. While certain issues of fact fall to be determined, particularly in relation to the nature and extent of the defects in the carpark, and in relation to the context and circumstances in which an agreement between the developers and the management company was entered into, many of the salient facts are undisputed and the primary task of the court relates to construing that agreement and determining the obligations of the parties arising from that agreement and related conveyancing documentation.

The Parties

2. The first and second named plaintiffs are businessmen who have been involved in property development from 1989. They acquired the property on which the Campus was later developed, and title to the common areas are still vested in them. The first and second named plaintiffs have a track record of developing five or six large multi-use/mixed-use developments with common areas, including carparks, and the involvement in those developments of management companies. These included Glen Royal Centre in Maynooth, a mixed retail, hotel, leisure and department development, St. Wolstan's Abbey in Celbridge, and developments in Ballinteer, Dundrum, the Grange in Blackrock, St. Edmund's in Lucan, Alder Park Court in Tallaght, and Friary Gate in Naas.

3. The third named plaintiff ("Glenkerrin" or "the developer") is an unlimited company with its registered office at Unit J1 in the Campus. It is a company formed by the first and second named plaintiffs, for the purpose of developing the Campus. The first and second named plaintiffs were directors of Glenkerrin, but all three ceased to have involvement in the development of the Campus when Glenkerrin went into receivership on 3rd May, 2011.

4. The fourth and fifth named plaintiffs ("the Receivers") are insolvency practitioners in the firm of Grant Thornton. By Deed of Appointment dated 3rd May, 2011 the Receivers were appointed by the National Asset Management Agency (NAMA) as joint statutory receivers

in respect inter alia of the first second and third named plaintiffs' indebtedness owed to and securities held by Allied Irish Banks plc ("AIB"), all of which were acquired by NAMA pursuant to the NAMA Act, 2009. These securities included the lands upon which the Campus is situate, being described in Folio KE34112F, and a debenture over the undertakings of Glenkerrin.

5. The defendant (the "Management Company") is a company limited by guarantee, having its registered office at Unit F4 in the Campus. It was incorporated by the first and second named plaintiffs *inter alia* for the purposes of being the Management Company in respect of the Campus. The unit holders in the Campus are all members of the Management Company.

Background facts and relevant documentation

6. The first and second named plaintiffs acquired the Campus lands, then comprising Folio 15989F of the Register County Kildare, from one Francis Brady, on 1st September, 2000, with funds provided by AIB. The Campus lands were later registered in Folio 34112F.

7. By Deed of Mortgage also dated 1st September, 2000 the first and second named plaintiffs mortgaged the Campus lands to AIB. The Mortgage is in standard form and includes –

(1) a covenant on demand to pay to AIB all monies due (Clause 3.01).

(2) a covenant by the mortgagors to keep the property in good and substantial repair and to complete the construction of partially constructed buildings hereon to the satisfaction of AIB and to permit its servants or agents and workman to enter the property and examine its condition and make good defects, and at the cost of the mortgagors to remedy defects (Clause 7.01).

(3) a covenant "not to do or cause or permit to be done anything which might in anyway depreciate jeopardise or otherwise prejudice a value to the Bank of the security hereby created" (Clause 7.01(i)).

(4) Clause 8 conferring on AIB the statutory powers conferred on mortgagees by the Conveyancing Acts, including the power to appoint a receiver who "…shall be deemed to be the agent of the Mortgagor and the Mortgagor shall be solely responsible for the acts and defaults of such receiver and for his remuneration and the Bank shall not under any circumstances be answerable for any loss or misapplication of the rents and profits of the mortgage property or any part thereof…" (Clause 8.01(d))

(5) agreement that the mortgage is a continuing security (Clause 9.02), and "…is in addition to and not in substitution for any other remedy lien security or securities or which may hereafter be held by the Bank for the secured monies or any of them… (Clause 9.03).

8. On 6th April, 2001 the first and second named defendants contracted to sell the lands upon which the Campus was developed to Glenkerrin for IR£12m. The development of the Campus was to be undertaken by Glenkerrin, using funding obtained by the first, second and third named plaintiffs from AIB. Early in the process the defendant Management Company was incorporated. The plan was that Glenkerrin would complete the development, to include the common areas (including the carpark in question), and as each unit was completed it would be transferred by way of long lease (999 years) to the purchaser. Upon the sale of the last unit the common areas would then be transferred to the Management Company.

The Management Agreement

9. In order to effect this scheme, the Management Agreement which falls to be construed in these proceedings was entered into. This was prepared by Mr. Damien Maguire, solicitor, based on a precedent conveyancing document. He described it as "an essential component of the title as it imposed a legal obligation on the Developer that, on its completion of the development and the sale of the last unit, it would transfer the Estate Common Areas …. to the Management Company which was also a party to each purchaser's title by way of an additional document entitled a Lease of Easements" (his Witness Statement, para.3). As was accepted conveyancing practice at that time his firm acted for all three parties to the Management Agreement. His partner Ms. Elaine O'Keeffe was also involved in taking instructions at the time, and is also a witness to execution of the Agreement by Glenkerrin.

10. It is an "Agreement for Sale" made the 6th day of April, 2001 between Ray Grehan and Danny Grehan as "the Vendors", Glenkerrin Homes Limited as "the Developer", and Maynooth Business Campus Management Limited as "the Purchaser" ("the Management Agreement"). It has been variously described in these proceedings as an "agreement for transfer of the common areas", abbreviated to "ATCA", or the "Management Agreement". The latter term will be used for convenience although "agreement to transfer the common areas" may better describe its purpose.

11. It is necessary to refer to certain of the definitions, and recitals as well as the operative parts of the Management Agreement: -

> "Clause 1.1 – this defines "the estate" to include all the property comprised in Folio 34112F i.e. the Campus lands.
>
> Clause 1.3 – the "Sites" is defined to mean "the individual site sold or leased or intended to be sold or leased to any purchaser/lessee".
>
> Clause 1.4 – "The Estate Common Areas" means "the part of the Estate not included in the Leased Sites and described in the First Schedule."

It is common case that "the Estate Common Areas" includes the carpark the condition of which is in issue.

"Clause 1.5 – "Estate Service Charge" means "the aggregate costs, expenses and outgoings paid, incurred or to be paid or incurred by the Developer in discharging its obligations under the Fourth Schedule Part 1 of the Management Agreement".

This is a reference to the service charges which will fall to be discharged by the Developer under Leases of Easements to be concluded with each unit purchaser/lessee. In this regard it was common case the reference to "Management Agreement" in this and subsequent clauses is a reference to Leases of Easements, in the form of a draft prepared by Mr. Maguire/Ms. O'Keeffe prior to the execution of this agreement, and intended to be entered into by all Campus unit purchasers – although this is a subject that will be addressed in more detail in this judgment.

The Recitals and operative part then read as follows: -

"2. WHEREAS:-

2.1 The Developer has entered into an Agreement with the Vendor to purchase all of the property comprised within Folio 34112F of the Register County Kildare of which the Vendor is the registered owner.

2.2 The Developer has laid out the Estate for development as a commercial business Campus and intends to lease sites in the Estate to prospective purchasers and to enter into leases and Management Agreements similar in form to the draft Lease and Management Agreement furnished prior to the execution of this Agreement or on such other terms as may be agreed between the Developer and prospective purchasers or lessees.

2.3 The Developer will complete the development of the Estate in accordance with the plans and specifications produced to the Purchaser and shall lease all the units/sites on the estate and on the demise of the last Unit/Site,

3. IT IS HEREBY AGREED

3.1 that in consideration of the Purchaser assuming the Developer's liability under the Leases hereinafter mentioned and further in consideration of the sum of Ten Pounds (IR£10.00) the Vendor as registered owner shall transfer and the Developer as beneficial owner shall transfer and confirm unto the Purchaser ALL AND SINGULAR the freehold interest in ALL THAT AND THOSE that part of the lands comprised within Folio 34112F of the Register County Kildare more particularly described in the First Schedule hereto, subject to and with the benefits of the Leases and Management Agreements which are to be granted by the Developer and subject to the rights of the Purchaser and its members.

3.2 The transfer will be completed at the expiration of 28 days (twenty eight days) from the service of a notice requiring completion served by the Developer's Solicitor on the Purchaser provided always that the notice will be served within the Perpetuity Period. Completion will take place at the office of the Developer's Solicitor.

3.3 Pending completion the Developer shall subject to the payment to it of the estate service charge provided for in the Management Agreement, carry out all of its obligations contained in the said Management Agreement and on completion of all services charges whether in credit or in arrears shall be apportioned as between the Developer and the Management Company as of the completion date.

3.4 The Developer agrees to comply with the purchasers covenants in the Management Agreement where the Developer grants short term leases of part or parts of any of the units on the estate and as the landlord reserves a vote in the management company and a certificate of membership in the management company in the name of the Developer shall issue for the respective units.

3.5 The title of the Developer shall consist of the copy document listed in the Second Schedule hereto. The Purchaser buys with the full knowledge of the contents of the document being furnished.

3.6 Notwithstanding that the Estate is in the process of being developed as a Business par the Developer may alter the development as the Developer sees fit and there is reserved to the Developer full right and liberty to alter the Development as the Developer may think fit and reserved to the Developer full right and liberty to vary the location, layout and extent of the Estate, the sites on it, the car parking spaces and the Estate Common Areas including the exclusion of any additional lands. Accordingly, the Developer may make Lease, assignments, transfers or Assurance of any part or parts of the Estate free from any conditions or covenants contained in any Lese or Management Agreement.

3.7 The terms of the General Conditions of Sale (1995 edition) of the Law Society of Ireland shall where appropriate be deemed to be incorporated in to this Agreement.

FIRST SCHEDULE

The Estate Common Areas

The roads, paths, car parks, gardens, open spaces, water features, ponds, lakes, grass, margins, security huts and any other parts of the Estate for which no owner or lessee is directly responsible.

SECOND SCHEDULE

(The Title)

1. Folio and file plan 34112F County Kildare
2. Copy Agreement for Sale dated the 6th day of April 2001 and made between Ray Grehan and Danny Grehan and Glenkerrin Homes Limited."

12. The competing contentions and the court's decision on the true construction of the Management Agreement will appear later in this decision, but it is important to note at

this stage the defendant's claim that Clause 3.7 has the effect of incorporating into the Management Agreement the General Conditions of Sale (1995 Edition) of the Law Society including General Condition 36.

13. On a plain reading of clause 3.7 it is quite clear that General Condition 36 is incorporated into the Management Agreement, and this was accepted in the evidence given on behalf of the plaintiffs both by the independent expert conveyancer Mr. Patrick Sweetman called by the Plaintiff, and by Ms. Orla Higgins, a solicitor in Gartlan Furey being the firm instructed by the Receivers to draft Contracts and handle sales during the receivership.

General Condition 36

14. Under General Condition 36(a)(1) the vendor warrants: -

> "(ii) That all Planning Permissions and Building Bye-Law Approvals required by law for the development of, or the execution of works on or to the subject property as of the date of sale, or for any change in the use thereof at that date were obtained (save in respect of matters of trifling materiality), and that, where implemented, the conditions thereof and the conditions expressly notified with said Permissions by any Competent Authority in relation to and specifically addressed to such development or works were complied with substantially…"

15. Further under General Condition 36(c) the vendor on or prior to completion must furnish to the purchaser –

> "(i) written confirmation from the local authority of compliance with all conditions involving financial contributions or the furnishing of bonds and –
>
> (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 any such Permission of Approval (other than those referred to in the proviso aforesaid) the same relates to the subject property; that the development of the subject property has been carried out in substantial compliance therewith and that all conditions (other than financial contributions) thereof and all conditions expressly notified with said Permission by any Competent Authority and specifically directed to and materially affecting the subject property or any part of the same had been complied with substantially (and, in the event of the subject property forming part of a larger development, insofar as was reasonably possible in the context of such a development)."

16. Finally, General Condition 36(d) provides that: -

> "Unless the Special Conditions contain a stipulation to the contrary, the Vendor warrants in all cases where the provisions of the Building Control Act 1990 or of any Regulations from time to time may thereunder apply to the design or the development of the subject property or any part of the same or any activities in connection therewith, but there has been substantial compliance with the said provisions insofar as they shall have pertained to such design development or activities and the Vendor shall, on or prior to completion of

the sale, furnish to the Purchaser a Certificate or Opinion by an Architect or an Engineer (or other professionally qualified person competent so to certify or opine) confirming such substantial compliance as aforesaid."

17. Central to the defendant's defence and counterclaim is that the condition of the carpark has always been that it has structural defects such that it could not be certified by Glenkerrin as substantially complying with the Building Control Act 1990 or any regulations made thereunder by an architect or engineer, and therefore the plaintiffs could not comply with General Condition 36 and could not complete the transfer of the estate common areas in accordance with the Management Agreement. The defendant contends that as the completion of the Management Agreement is "imminent" the plaintiffs (or one or more of them) have an obligation to carry out remedial works, and for that purpose to use monies arising from the sale of the last unit, Block C and the Link Building.

The Debenture

18. Continuing chronologically, by Deed of Debenture made on 10th December, 2003 the third named plaintiff as "Developer" covenanted to repay to AIB all "principal monies" at any time due, owing or payable by the third named plaintiff to AIB, and demised to AIB property described in the First Part of the First Schedule to AIB to hold for a term of ten thousand years, and by virtue of Clause 4(e) granted a floating charge as follows: -

> "(e) Charges by way of a floating security its book debts and other debts and its undertaking and all its other property, assets and rights whatsoever and wheresoever both present and future including those for the time being charged by way of a specific charge pursuant to the foregoing paragraphs if and to the extent that such charges as aforesaid fail as specific charges but without prejudice to any of those specific charges as shall continue to be effective."

The third named plaintiff gave certain covenants in Clause 8 including –

> "(e) Not to do or cause to or permit to be done anything which may in any way depreciate jeopardise or otherwise adversely affect the value of the legally mortgaged property, equitably charged property or any of the other assets or property hereby charged;"

and –

> "(j) to use its best endeavours to ensure that no charge, easement, right or other encumbrances, save those created hereunder, shall be created over or otherwise come to effect the legally mortgaged property, the equitably charged property or any of the other property or assets hereby charged".

Clauses 11-15 conferred powers on AIB, including the power of sale – whether or not a receiver was appointed. Clause 14 provides –

"14. Neither the Bank nor any such receiver shall in any circumstance, save in the case of wilful default, either by reason of any entry by it into or by the taking by it of possession of any of the assets hereby charged to be liable to account as mortgagee in possession or on any other basis whatsoever in connection therewith for which a mortgagee in possession may be liable as such."

It is important to note that this Debenture was entered into after the Management Agreement.

The Debt

19. By Letter of Sanction dated 8th January, 2009 AIB offered various loan facilities to the first and second named plaintiff by way of ongoing funding of various developments then being carried out. The loan amounts in Euro in respect of Loan Accounts 1, 2, 4 and 5 come to approximately €40,000,000. In addition, loan accounts 3, 6 and 7 account for approximately £35,000,000 Sterling. The security required under this Letter of Sanction included the Mortgage by the first and second named plaintiffs dated 7th December, 2001 of the Campus site.

20. By Letter of Sanction dated 16th September, 2009 AIB offered loan facilities to the Glenkerrin under twenty facilities for sums in excess of €180,000,000 in total. As in the case of the Letter of Sanction of January, 2019 most of these were by way of continuation or replacement of existing loan facilities between the same parties.

21. The said Letters of Sanction, and the Terms and Conditions applicable to the facilities, were accepted by the first and second named plaintiffs and Glenkerrin respectively. It is notable that it was on foot of these facilities, and not any earlier lending, that the Receivers were ultimately appointed on 3rd May, 2011.

22. Pursuant to the NAMA Act, 2009 the said Facilities, the 2000 Mortgage and the 2003 Debenture were acquired by NALM on or about 9th July, 2010. Such acquisition was certified pursuant to s.108 of the Act of 2009 by NALM in a Certificate dated 28th January, 2019.

23. On 29th April, 2011 NALM issued a demand letter to the first and second named plaintiffs for the sum of €20,385,327.06 pursuant to the Letter of Loan Sanction dated 8th January, 2009. On the same date NALM issued a demand letter to the directors of Glenkerrin for the sum of €195,664,738.33 pursuant to the Letter of Sanction dated 16th September, 2009.

Appointment of the Receivers

24. By Deed of Appointment dated 3rd May, 2011 NALM appointed the Receivers as joint statutory Receivers over the assets charged *inter alia* by the Mortgage and Charge dated 1st September, 2000 in respect of the Campus.

25. By further Deed of Appointment dated 3rd May, 2011 NALM appointed the Receivers to be joint statutory receivers in respect of the assets comprised in and charged by inter alia the Mortgage Debenture dated 10th December, 2003 between Glenkerrin and AIB.

26. On 9th November, 2011 by order of Kelly J. (as he then was) judgment was granted in the High Court against the first named plaintiff in favour of NALM in the sum of £269,619,927.87, and against the second named plaintiff in favour of NALM in the sum of €264,869,326.07.

Unit sales by Receivers

27. When the receivership commenced the Campus was largely developed, and most of the units had been leased/purchased. Glenkerrin had also developed most of the common areas. The Receivers were effectively appointed over the following units: -

(i) Block C, an office block adjacent to the carpark, and 'the Link Building' (partially tenanted).

(ii) The undeveloped site for Blocks D and E.

(iii) Block J1 (tenanted).

(iv) Block J5 (tenanted).

(v) Block K6 (tenanted).

(vi) Block K7 (vacant).

(vii) Block K8 (vacant).

These were the units which were secured by the Receivers' agents. According to the evidence of Mr. Billy Murphy, a Director in Grant Thornton and the person in the Receivers' office most closely connected with the issues arising on the receivership, the Receivers did not take any steps in respect of the Campus Common Areas as they were under the control of the defendant at the date of appointment – although, as I find later in this judgment, this is not strictly correct in respect of the basement of the carpark, access to which was blocked off. The sale of the site for the future Blocks D and E completed in November, 2016. The marketing for the sale of Block C and the Link Building commenced in June 2017. The sale of Unit J5 completed in 2014, while K6, K7, and K8 were completed in 2018. His evidence was that the sale of Unit J1 was "due to complete shortly" (his Witness Statement para. 3). His further evidence was that at the time of appointment the Campus was under the management of the defendant which looked after upkeep and maintenance of the Common Areas, including the provision of security, and it appeared to be well maintained.

Leases of Easements

28. Prior to the receivership Campus units were sold off by Glenkerrin after they were completed. Purchasers/lessees were required to execute an Indenture headed "Lease of Easements", the form of which had been furnished prior to entry into the Management Agreement. A sample Lease of Easments dated 18th January, 2008 made between Glenkerrin as "Lessor", the defendant as "Management Company" and Sandwell Developments Ltd as "Lessee" was put in evidence. It is a lengthy document, the purpose of which was to ensure that for a term of 999 years the purchaser/lessee would

be entitled to the benefit of easements over the common areas not covered by buildings, that they would enjoy specified car parking rights – in Sandwell's case, 44 spaces - that they would become members of the Management Company and enjoy the benefit of services provided by it on the Campus, and that they would be bound to pay estate service charges levied by the Management Company.

29. It is appropriate to refer to some of the wording of the Lease of Easements, as the parties emphasise the importance of different parts, and the primary relief sought by the plaintiffs when these proceedings commenced was an order requiring the defendant to execute a Lease of Easements to facilitate the sale of Block C and the Link Building. The scheme of the Sandwell Lease of Easements is evident from some of the recitals and the main operative part: -

"3.1 The Developer has developed the Estate Common Areas for the amenity and use of the owners and occupiers of the light industrial units and offices within the Estate and to this end the Developer has procured the incorporation of the Management Company, with, *inter alia*, the object of acquiring the Estate Common Areas and assuming responsibility for the Estate Services.

3.3 The Lessor and the Management Company have by agreement dated the 6th day of April 2001 agreed to transfer all their right, title and interest in the Estate to the Management Company on the completion of the sale of the last unit in the Estate upon the terms and conditions contained in the said Agreement and subject to and with the benefit of all leases or licences created by the Lessor in respect of the Estate. Provided always that where the Lessor shall retain the freehold interest in any part or parts of the Estate, other than the Estate Common Areas, that these shall not be included in the Demise to the Management Company and in the event of the Lessor granting short term commercial leases in respect of such part or parts of the Estate that the benefit of such leases including all the rents, fines, premiums and payments thereunder shall be the sole property of the lessor and all matters in relation to the disposal of such part or parts of the Estate shall be entirely at the discretion of the Lessor provided that if the Lessor grants short term losses or retains the freehold of part of the Estate, other than the Estate Common Areas, the Lessor shall remain liable to the Management Company for the appropriate proportion of the Estate Service Charge.

3.4 The Lessor further intends that each and every person becoming the owner of a Unit on the Estate shall become a member of the Management Company other than lessees of short term leases.

3.5 The Lessee is a member of the Management Company.

3.6 By transfer of even date (hereinafter called "the Transfer") and executed immediately before the execution of these presents made between the Lessor of the first part and the Lessee of the second part, the Lessor assured the Property to the Lessee for an estate in fee simple in possession free from encumbrances.

3.7 The Lessor has agreed with the Lessee to join in these presence [sic] for the purposes of granting to the Lessee the easements rights and privileges set out in the Second Schedule herein excepting and reserving unto the Lessor the easements rights and privileges as set out in the Third Schedule herein.

3.8 The Management Company has agreed to join in these presence [sic] as the beneficial owner of the Estate Common Areas and subject to the payment by the Lessee of the Lessee's share of the Estate Service Charge as herein defined and further subject to the performance and observance by the Lessee of the obligations, covenants and conditions on the part of the Lessee more particularly set out in the Fourth Schedule hereto, to perform and observe the obligations covenants and conditions on the part of the Management Company in relation to the maintenance and upkeep of the Estate Common Areas as more particularly set out in the Fifth Schedule hereto.

NOW THIS INDENTURE WITNESSTH AS FOLLOWS:

1. For the consideration appearing in the Transfer and in consideration of the covenants on the part of the Lessee as hereinafter set out, the Vendor HEREBY DEMISES and the Management Company HEREBY DEMISES AND CONFIRMS unto the Lessee ALL THAT AND THOSE the easements, rights and privileges specified in the Second Schedule hereto EXCEPTING AND RESERVING unto the Lessor and its assigns and the Management Company the easements, rights and privileges specified in the Third Schedule hereto TO HOLD the same unto the Lessee from the 18th day of January 2008 for a term of 999 years YIELDING AND PAYING therefore yearly during the first 10 years of the said term the yearly rent of €1 and thereafter during the next 20 years of the said term the yearly rent of €1.50 and thereafter in each succeeding year of the said term the yearly rent of €2, such rent to be paid in advance on the 1st day of June in each year and the first payment thereof being a proportionate part of the said yearly rent to be paid on the execution of these presents together with the Estate Service Charge payable as set out in the Fourth Schedule, Part 1.

2. The Lessor and Management Company hereby covenant and undertake with the Lessee to complete the Assurance pursuant to the Agreement for Sale of the Common Areas as soon as practicable after the sale of the last Unit and in the event of the Lessor being desirous of retaining any of the Units, the Lessor shall take an assurance of same as soon as practicable after completion of the sale of the remainder of the units and in any event within 60 days of same.

3. Notwithstanding that the Estate is in the process of being developed as a commercial business campus and in the manner hereinbefore recited the Lessor shall not be under any obligation to complete or cause to be completed such development or may alter such development (other than the Premises) as the Lessor may wish…provided however that the Lessor shall have obtained any

necessary Planning Permission for any such alteration (including alteration by way of discontinuance of the development) or variation."

30. The operative parts at clauses 6 and 7 then delineate the obligations of Glenkerrin during the period of the development of the Campus, and the transfer of obligations to the defendant as the Management Company on completion of the sale of the estate common areas to it: -

> "6. The Lessor hereby covenants with the Lessee that subject to the Lessee and all persons deriving title under him as the owner for the time being of the Premises complying with the covenants, obligations, agreements, stipulations and restrictions set forth in the Fourth Schedule hereto, that the Lessor until the completion of the sale of the Estate Common Areas to the Management Company will perform and observe the covenants, obligations and agreements set out in the Fifth Schedule hereto provided that on the completion of the sale of the Estate Common Areas to the Management Company, the liability of the Lessor under this covenant shall absolutely cease.
>
> 7. The Management Company hereby covenants with the Lessee that subject to the Lessee and all persons deriving title under him as the owner for the time being of the Premises complying with the covenants, obligations, agreements, stipulations and restrictions set forth in the Fourth Schedule hereto, the Management Company on and from the completion of the sale of the Estate Common areas to the Management Company will perform and observe the covenants, obligations and agreements set out in the Fifth Schedule hereto and references therein to the lessor shall as and from the completion of the sale of the Estate Common areas to the Management Company be deemed to be references to the Management Company."

31. The Second Schedule then sets out the "Easements, Rights and Privileges granted to the Lessee for the benefit of the premises" and lists the Passage of Services for the lessee, Support for the Premises, the use of the Estate Common Areas, Rights of Way and, the most relevant to the present case, Car Parking Spaces, which in the Sandwell Lease of Easements specified: -

> "The exclusive use of 44 car parking spaces, as shown coloured in yellow on Plan No. 3 next year to, for the sole purpose of use as car parking spaces only and for no other purpose for the term of this Lease."

32. The Third Schedule set out the Easements, Rights and Privileges accepted and reserved to the lessor and the Management Company, and of note is that in respect of Car Parking Spaces they reserve: -

> "The full right and liberty for the Lessor/Management Company at any time on giving written notice to the Lessee to alter or vary the location of the car parking spaces allocated to the Lessee in the visitor's car parking areas as marked on the

map and next to some part of the Estate Common Areas designated by the Lessor/Management Company for car parking."

33. The Fourth Schedule sets out the lessee's covenants including a covenant to pay the Estate Service Charge, calculated in accordance with Seventh Schedule Part One "to the lessor or after the transfer of the common areas to the Management Company".

34. The Fifth Schedule sets out the covenants of "the lessor and after the transfer of the estate common areas the Management Company". These include covenant 2.1.3 "to effect and maintain public liability insurance and employer's liability insurance in respect of the estate."

Covenant 6 headed "Provision of Services" then provides: -

"6. "PROVISION OF SERVICES

Subject to reimbursement by the Lessee of the Estate Service Charge and the performance and observance of the covenants contained in this Lease, the Lessor covenants with the Lessee that it will use its best endeavours in accordance with the principles of good estate management to observe and perform the obligations set out in Part II of the Seventh Schedule hereto until such time as the freehold reversion in respect of the Estate Common Areas is transferred to the Management Company.

The Management Company covenants with the Lessee that subject to the payment by the Lessee of its share of the Estate Service Charge and the performance and observance by the Lessee of the covenants and obligations contained in this lease that it will on the completion of the transfer of the Estate Common Areas pursuant to the agreement for Sale dated 6th April 2001 and made between the Vendor of the First Part, the Lessor of the Second Part and the Management Company of the third part that it will at all times thereafter use its best endeavours in accordance with the principles of good estate management observe and perform the obligations set out in Part II of the Seventh Schedule herein."

35. The Seventh Schedule, Part 2 is headed "Estate Services", and sets out the covenants of the Lessor and the Management Company to provide certain services, and the opening part is particularly relevant: -

"The lessor and after the transfer of the Estate Common Areas to the Management Company, then the management Company covenant with the Lessee: -

1. The Services.
Subject to reimbursement by the Lessee of the Lessee's Share of the Estate Service Charge to use all reasonable endeavours to provide the following services in accordance with the principles of good estate management:

1.1 As often as may be required to maintain, *repair, cleanse and renew* the Estate Common Areas and all Buildings, erections and fixtures on the Estate Common Areas (if any) including the roads, paths, car parking areas, pipes, drains, water course, sewers, cabling, wires, and other conduits for the passage of water, soil, gas, electricity, telephone, radio and television transmission, heating fuels and other services in under or passing through the Estate Common Areas.

1.2 To maintain all plants and decorative features within the Estate Common Areas including the maintenance and landscaping of appropriate areas to be determined by the lessor or Management Company subject to the proviso that the Lessee will pay the relevant proportion of the costs of doing so as part of the Estate Service Charge." [Emphasis added]

36. The plaintiffs argued that insofar as the carpark in question required repair or renewal, this covenant and the words highlighted placed the obligation on the Management Company. The plaintiffs also relied on the covenant at para. 1.19 of the Seventh Schedule in support of their argument that the Management Company had an obligation to execute the Lease of Easements in respect of Block C: -

"1.19 To take reasonable steps to enforce the observance and performance by the owners of other parts of the Estate/Demised Units of their obligations arising under their assurances and management deeds and to impose financial penalties on the owner/Purchases of the premises in particular in relation to the clamping/removal of authorised and unauthorised vehicles parked in unauthorised areas of the estate and the removal of waste/rubbish from the Estate Common Areas."

The plaintiffs also relied on covenant 1.21 in support of the contention that the obligation to repair/renew the carpark rests with the defendant. The salient part of this reads: -

"1.21 Provision of such sinking or reserve funds as the Lessor/Management Company may reasonably deem fit for the replacement or renewal of the Estate Common Areas or any part of them or for the renewal, replacement or purchase of other capital items, machinery or equipment in the Estate Common Areas…"

37. In addition to being required to execute a Lease of Easements, purchasers were also required to execute a "Deed of Covenant" with the defendant as "the Management Company" and "Glenkerrin" as "the developer". In the case of Sandwell this was also executed by it on 18th January, 2008. It recites that Glenkerrin is the beneficial owner of the property in Folio 34112F which it has laid out as a commercial business park, and that it has developed the Estate Common Areas and: -

"It is intended that the freehold interest in the Estate Common Areas will be transferred to the Management Company on completion of the sale of the last unit or office premises subject to and with the benefit of any commercial leases entered into by the Developer in respect of those units or office premises on the Estate, but

otherwise free from encumbrances, provided always that the benefit of any short term commercial leases on any units or office premises retained by the Developer and any rents payable thereunder shall vest solely the Developer as the case may be".

38. It further recites that Sandwell is entitled to be registered as a full owner of the unit that it is acquiring, and that it "will become a member of the Management Company, and that as such it has agreed to 'enter into this Deed of Covenant'". The operative part consists of a covenant by Sandwell to bind it and its successors in title to a series of covenants which are largely reflective of the covenants provided in the Fourth Schedule in the Lease of Easements.

39. The first and second named plaintiffs were directors of Sandwell Limited. That company also went into receivership, and was sold on by the Receivers on 9th December, 2013.

40. Subsequent to 3rd May, 2011 the Receivers utilised similar, but not identical, Leases of Easements and Deeds of Covenant when disposing of Campus Units. The first of these put in evidence by Ms. Orla Higgins, solicitor in the firm of Gartlan Furey acting for the Receivers. It was in fact prepared by A&L Goodbody Solicitors in a parallel receivership concerning the assets of Mr. Ray Grehan, and related to Block B, but it became the template for further Leases of Easements prepared by Ms. Higgins and utilised by the Receivers in the disposal of Block C and the other blocks/units listed earlier in this judgment. The post-2011 Lease of Easements is substantially in the same form as those utilised by Glenkerrin prior to 2011 but certain differences should be noted. Thus in respect of the Lease of Easements in respect of Block B, the parties are firstly the first and second named plaintiffs as "Registered Owners", secondly "Glenkerrin Homes (in receivership)" as "lessor", thirdly the Receivers as "Joint Statutory Receivers", fourthly the defendant, and fifthly the purchaser TMT Digital Centre Limited as "lessee". The recitals record that: -

"3.1 The Registered Owners are the registered owners of all the estate comprised within Folio 34112F of the Register County Kildare"

and then sets out similar recitals to those set out in the earlier Leases of Easements, including recital 3.4 as follows: -

"3.4 The Lessor agreed pursuant to the Management Agreement agreed to transfer all its right, title and interest in the Estate to the Management Company on the completion of the sale of the last Unit in the Estate upon the terms and conditions contained in the Management Agreement and SUBJECT TO and with the benefit of all leases or licenses created by the Lessor in respect of the Estate PROVIDED ALWAYS that where the Lessor shall retain the freehold interest in any part or parts of the Estate, other than the Estate Common Areas, these shall not be included in the transfer to the Management Company and FURTHER PROVIDED THAT in the event of the Lessor granting short term commercial leases in respect of any part of the Estate, the benefit of such leases including all the rents, fines, premiums and

payments thereunder shall be the sole property of the Lessor and all matters in relation to the disposal of such part or parts of the Estate shall be entirely at the discretion of the Lessor. In the event the Lessor grants short term leases or retains the freehold of part of the Estate, other than the Estate Common Areas, the Lessor shall remain liable to the Management Company for an appropriate proportion of the Estate Service Charge."

Recitals 3.8 and 3.9 then provide: -

"3.8 The Registered Owners acting by the Joint Statutory Receivers have agreed to join in these presents as the registered owner of the Estate and for the purpose of confirming the within demise.

3.9 The Management Company has agreed to join in these presents as Management Company under the Management Agreement and subject to the payment by the Lessee of the Lessee's share of the Estate Service Charge as herein defined and further subject to the performance and observance by the Lessee of the obligations, covenants and conditions on the part of the Lessee more particularly set out in the Fourth Schedule hereto, to perform and observe the obligations covenants and conditions on the part of the Management Company in relation to the maintenance and upkeep of the Estate Common Areas as more particularly set out in the Fifth Schedule hereto."

41. The operative part then opens: -

"NOW THIS INDENTURE WITNESSETH AS FOLLOWS:

4. For the consideration appearing in the Transfer and in consideration of the covenants on the part of the Lessee as hereinafter set out, the lessor acting by the Joint Statutory Receivers HEREBY DEMISES and the Registered Owners acting by the Joint Statutory Receivers HEREBY DEMISES AND CONFIRMS and the Management Company HEREBY DEMISES AND CONFIRMS unto the Lessee ALL THAT AND THOSE the easements, rights and privileges specified in the Second Schedule hereto EXCEPTING AND RESERVING unto the Registered Owners, the Lessor and the Management Company (as appropriate), and their respective undertenant, servants, licensees, agents and invitees to easements, rights and privileges specified in the Third Schedule hereto TO HOLD the same unto the Lessee from for a term of 999 years YIELDING AND PAYING therefore yearly during the first 10 years of the said term the yearly rent of €1 and thereafter during the next 20 years of the said term the yearly rent of €1.50 and thereafter in each succeeding year of the said term the yearly rent of €2, such rent to be paid in advance on the 1st day of June in each year and the first payment thereof being a proportionate part of the said yearly rent to be paid on the execution of these presents together with the Estate Service Charge payable as set out in the Fourth Schedule, Part 1.

There is also a further section in the operative part headed "Joint Statutory Receivers", Clause 15 of which reads: -

> "It is hereby expressly agreed and declared that nothing in this Lease will prejudice or affect the estate, person or properties of the Joint Statutory Receivers who join in this Lease solely in their capacity as Joint Statutory Receiver aforesaid and not otherwise."

In the Second Schedule under the heading "Car parking Spaces" the lessee was granted "the exclusive use of 212 car parking spaces, as shown delineated in purple and red on the Plan annexed hereto (the Car Spaces) for identification purposes only, for the sole purpose of use as car parking spaces only and for no other purpose for the term of the Lease."

In the Third Schedule, which sets out the easements rights and privileges accepted and reserved to the registered owners, the lessor and the management company, Clause 10 in relation to "car parking spaces", provides: -

"10.1 The full right and liberty for the Lessor/Management Company at any time on giving written notice to the Lessee to alter or vary the location of the car parking spaces allocated to the Lessee to some part of the Estate Common Areas designated by the Lessor/Management Company for car parking."

42. A Lease of Easements in substantially the same form was prepared by Ms. Higgins in respect of the disposal of Block C and the Link Building. It is clear therefore, and I so find, that the Receivers recognised and adopted the Management Agreement, and enjoyed the benefit of it in carrying out sales, and in providing a good and marketable title to unit purchasers. In theory the Receivers could have sold a unit without the benefit of car parking spaces. It is notable that the plaintiffs' own conveyancing expert Mr. Sweetman was of the view that Clause 3.6 of the Management Agreement entitled the developer (and hence the Receivers) "to sell units outside of the management scheme" (Transcript Day 3 pg. 78 line 17-20, and lines 25-pg. 78 line 2). However the Receivers chose not to go down that route and elected to rely on the Management Agreement.

43. With regard to Block B and the Link Building, this was originally the subject of a Lease of Easements dated 2nd May, 2001 made between Glenkerrin, the Defendant and Ray Grehan, and gave him exclusive use of 212 car parking spaces. Before the completion of the sale of Block B and the Link Building to TMT (pursuant to Contract of Sale dated 23rd December, 2014 made between TMT Digital Centre Limited and Martin Ferris as Receiver over certain assets of Raymond Grehan), the Lease of Easements originally entered into by Ray Graham and dated 2nd May, 2001 was surrendered and the new Lease of Easements – being that referred to above – was provided by the Receivers in favour of TMT.

44. It appears that in pre-contract inquiries on behalf of TMT, Mr. Ferris's Solicitors A&L Goodbody confirmed that all 212 spaces were located at surface level, as distinct from

basement level, in the car park at issue in these proceedings. The position of the car parking spaces has become contentious, and the subject of correspondence between TMT's solicitors Mullany Walsh Maxwells, and Gartlan Furey acting on behalf of the Receivers. In her witness statement Ms. Higgins states: -

> "8. …It appears from the documents reviewed by me that it was at all times intended that a number of the car spaces to Block B were to be located in the basement car park. An allocation of surface spaces was included in the Lease of Easements but same were at all times intended to be allocated on a temporary basis pending completion/commissioning of the basement carpark. A significant number of spaces currently allocated to Block B are located on the upper deck of the basement carpark and I am advised that the same are being utilised by the occupiers of Block B."

45. Ms. Higgins presented plans indicating that Block B is currently allocated 118 spaces on the surface carpark and 94 in the basement. Ms. Higgins was recalled (on Day 3) to give evidence in relation to correspondence that demonstrates an ongoing dispute as to the allocation of the carparking, and indeed a threat of litigation. This relates to the disposal by the Receivers of Blocks D & E to Jomaijo Trading Limited, and that company's Lease of Easements dated 29th September, 2016 which includes the right to car parking spaces shaded on a map attached, which clearly replicate or overlap with some of the car parking spaces already granted to TMT pursuant to its deed dated 17th February, 2015, and in particular car parking spaces no.'s 1-94. In the correspondence produced by Ms. Higgins TMT's solicitors Mullany Walsh Maxwells state, on 14th January, 2014: -

> "It is very clear to us that you have gravely misled Jomaijo, which company now believes that our Client [TMT – purchasers of Block C] is trespassing on its car parking spaces when, in fact, due to nothing other than your negligence and carelessness, the opposite is true.
>
> Further to Jomaijo's claim of trespass against our Client, it has threatened legal proceedings as well as practical measures such as clamping and removal of vehicles."

Gartlan Furey in their reply on 25th January, 2019 rely on the power to vary the parking spaces from time to time, and state: -

> "It is clearly evident that when your client acquired the property, the intended allocated spaces for your client in the basement were unavailable. Attached is the car parking plan which includes spaces at both surface and basement level for Block B. Our client is completing commissioning works for the basement car park and written notice will be served upon you when the basement spaces are opened and available for use. We expect the commissioning works to be finalised in the next couple of weeks."

In response on 6th February, 2019 Mullany Walsh Maxwells Solicitors indicated that their client would reserve its rights pending the completion of commissioning works for the basement car park. The last letter produced dated 20th February, 2019 from Mullany Walsh Maxwells to Gartlan Furey shows the dispute to be ongoing, with litigation still a possibility.

46. The Contracts for Sale of the sites upon which Blocks D and E were to be constructed were entered into by the Receivers on 19th April, 2016 with Jomaijo Trading Limited, and a Lease of Easements substantially similar adopted in respect of Block C was entered into at closing in 2016. The Second Schedule grants to Jomaijo "the exclusive use of 200 car parking spaces, as shown coloured in green on Plan no. 2 annexed hereto for identification purposes only, for the sole purpose of use as car parking spaces only and for no other purpose for the term of this Lease." Plan no. 2 identifies 200 car parking spaces on the surface car park.

47. Also put in evidence was a Deed of Covenant executed by Jomaijo Trading Limited in respect of the site in purchase upon which Units D and E were to be constructed, and the same parties, including the Receivers, joined in this deed. It is in similar terms to the Deeds of Covenant which purchasers were required to execute on the acquisition of units prior to 3rd May, 2011. It is worth noting that that the first and second named plaintiffs, and the Receivers, joined in this and the other Deeds of Covenant executed with purchasers since 3rd May, 2011.

48. I find from the foregoing evidence that because the basement car parking has not been usable the Receivers/their solicitors in undertaking sales of units have deliberately allocated more surface parking spaces than originally planned for particular units, notwithstanding that some of these space have previously been allocated to other purchasers. I infer from this that there has, at least in the minds of the Receivers and their advisors, been an imperative or urgent need to commission the basement car parking so that more permanent allocations could be made that are not overlapping, in order to avoid litigation. This is reinforced by consideration of the contract for the sale of Block C/the Link Building.

Block C/ the Link Building and the Carpark

49. The evidence of Ms. Higgins was that in or around May, 2017 Gartlan Furey were instructed to prepare documents for the sale of Block C (which includes "the Link Building"). On 20th November, 2017 Gartlan Furey issued the Contract for Sale to Mason Hayes and Curran Solicitors, acting on behalf of the purchaser, Fine Grain Property (Ireland) Limited. Subsequently, before the contract was entered into, a draft Lease of Easements was provided to the defendant on 20th December, 2017 in anticipation of facilitating the sale of the property. By email dated 2nd February, 2018 Mason Hayes and Curran emailed Gartlan Furey advising that "Our clients have instructed their technical team to commence their review of the car park and roof repairs and we expect to progress to contract exchange once those works are signed off".

50. On 15th February, 2018 P. & G. Stack Solicitors acting for the defendant wrote to Gartlan Furey claiming that there were a number of works which were required to be completed to the Estate Common Areas, and the Receivers' confirmation was sought that they would undertake and attend to all works to the common areas.

51. A Contract for Sale of Block C was entered into with the purchaser on 23rd March, 2018 for €5,210,000, with payment of a deposit of €521,000. In Special Condition 6.2 the purchaser acknowledged that the Receivers were executing the contract in their capacity as Receivers "only for the sole purpose of facilitating the acquisition of the Subject Property to the Purchaser" and acknowledging that neither of the Receivers "nor their estate shall have any personally liability whatsoever…".

52. Special Conditions 12 and 13 provided: -

"12. Remedial Works

The Vendor agrees to undertake the following works as soon as possible:

(a) install signage as per the indicative drawings and maps attached at Appendix 1;
(b) undertake drainage works as per the spec set out in the estimate from Gene Clancy attached at Appendix 2; and
(c) repair the light fitting at the centre stairwell of the basement car park.

The parties hereby agree that the Vendor's solicitors shall retain the sum of €50,000 from the purchase monies which said retention sum can be released to the Vendor upon email confirmation from WK Nowlan confirming that the works set out above are completed.

12.2 Purchaser Works

The Vendor hereby permits and agrees to grant to the Purchaser a licence for works when and if requested by the Purchaser, in the form of Licence for Works at Appendix 4 hereto, in relation to certain works in the basement car park to include the installation of fire doors and hoses wheels. The Purchaser agrees upon completion of these works to furnish evidence of certification to the Vendor.

13. Car Park Allocation

The Vendor agrees that the car parking spaces as per the plans attached hereto at Appendix 3 and coloured green shall be included in the Lease of Easements to the Purchaser."

53. The documentation appended to the Contract for Sale included an estimate from a builder a Mr. Gene Clancy for carrying out specified works primarily to the "ACO-channels" in the carpark. On the underground section the breaking out and disposing of the existing 100 linear metres of 100 graded ACO-channel and its replacement with pre-fabricated ACO-channel was estimated to cost €12,380 plus VAT at 13.5%. On the underground section

similar works to 40 linear metres of damaged 300 mm deep by 350 mm wide floor carpark ACO–channel was costed at €11,800 plus VAT at 13.5%. The impression given is that these are relatively minor works designed to improve the drainage.

54. The sale included 290 car parking spaces, and these were to be allocated as to 172 in the basement carpark and 118 on the surface level.

55. On 28th March, 2018 a further draft Lease of Easements in respect of Block C was provided to the defendant.

56. The first written indication from the defendants that there was something more serious wrong with the carpark came on 10th April, 2018 when Ms. Gemma Stack of P&G Stack Solicitors for the defendant sent an email to Ms. Higgins in Gartlan Furey in the following terms: -

> "Dear Orla
>
> I am attaching an estimate of the costs in order to finish the common area. I am advised that the underground carpark for Block C is not fit for purpose. The car spaces for E & D are currently being used, but clearly this cannot continue when these blocks are developed.
>
> The Management Company requests that the receiver discharge the costs for completing the development and I await hearing from you in this regard when you have taking your clients instructions.
>
> Regards."

57. The accompanying documentation is from Mr. Seamus Nolan, Chartered Engineer and Director of NRB Consultant Engineers Limited and consists of a page of "Non Exhaustive Schedule of Information Requested", setting out 21 items, and a one-page letter of estimates signed by Mr. Nowlan. The Schedule commences with the words – "The following documentation to accompany a written request for taking in charge in order to determine if services are completed to standard:", and item 2 reads: -

> "2. As–constructed drawings (Paper Copy & AutoCAD) for the completed semi-basement and deck carpark structure include full structural, servicing, drainage, lighting, water proofing details etc along with any previous investigations and reports prepared on the constructed structure, issues identified, remediation measures identified and costs established for same."

58. In the accompanying letter Mr. Nowlan states that "as requested, to date we have undertaken a visual inspection of the common areas to undertake a preliminary review of works which require completion" and he states that the Schedule of "Information Required" is prepared to include "all – constructed records, health and safety fire certifications. We would expect this information to be available for any project of this nature."

59. He goes on to state the following, of relevance to the carpark:

> "In the absence of this information at this stage, based on our experience, we have prepared the budget estimate below to provide an order of magnitude of the costs expected to complete the common areas. This assumes that the deck carpark requires remediation work only i.e. that there is no underlying structure failure issues which is yet to be confirmed. Based on consultations, visual inspections, reasonably best estimates and our previous experience we give the following preliminary budget advice:
>
> - The completion of the underground carpark to the rear of Block A, B & C would cost in the region of €1m to €2m depending on results of further detailed investigations and assuming that there are no major structural issues discovered."

60. On 16th April, 2018 Gartlan Furey responded saying that "Our client is reviewing your correspondence" but requesting immediate return of the Lease of Easements duly executed and stating "your client's failure to comply with this request could jeopardise the transaction and will result in our client having no alternative but to consider its rights and entitlements including, but not limited to, legal action against the management company …".

61. On 24th April, 2018 Ms. Higgins emailed to Ms. Stack advising that their client had

> "Completed all necessary commissioning works for the basement carpark as were required. Drainage is not critical to the user of the basement carpark but is being addressed by the Receiver.
>
> The purchaser of Block C is undertaking its own comprehensive due diligence and is satisfied to proceed to complete the purchase and permits its tenants and occupiers of
>
> Block C to use the carpark.
>
> Given that the commissioning works had been completed, signed off and the property
>
> acceptable to a purchaser can you please confirm that executed Lease of Easements
>
> will be returned to us without any delay."

The more costly and serious remediation work identified by Mr. Nowlan was not addressed.

62. It is apparent from the accompanying documentation that the "commissioning works" referred to by Ms. Higgins and which were said to have been completed were those identified in Mr. Clancy's estimate attached to the contract of sale i.e. in relation to ACO-

channel replacement, and the installation of appropriate signage and lighting. A scoping of these works had been prepared by WK Nowlan for the Receivers on 20th December, 2017 and appears to have been the basis for the works actually carried out by 24th April, 2018. Correspondence between Ms. Higgins and Mason Hayes and Curran for the purchaser confirmed this to be case. In a letter of 14th March, 2018 Mason Hayes and Curran also referred to carpark allocation, stating: -

> "My client understands that the basement carpark is not yet open. Therefore, the 43 temporary surface spaces provided to LINK [another unit holder] have not yet been relocated to the basement.

My client requires that prior to completion the basement carpark is opened and operational and that LINK is notified of same. Please confirm this can be done.

I attach surface and basement carpark allocation map prepared by my client with the total number of spaces allocated to Block C comprising 290. Please confirm these maps represented the agreed allocation of spaces in Block C and that this figure of 290 will be noted in the Lease of Easements and to be granted on completion."

63. It is clear that following receipt of Mr. Nowlan's estimate in April 2018 the defendant had serious concerns about the carpark. As a result J.J. Campbell and Associates Limited, Consulting Civil and Structural Engineers, was engaged to undertake a fuller examination and provide a structural report. These concerns were communicated by Ms. Stack to Ms. Higgins by email of 1st May, 2018, and she advised that "we expect to have the structural report this week …". On 3rd May, 2018 Ms. Stack again wrote to Gartlan Furey emphasising that in no way did the Management Company wish to interfere with or restrict the entitlement of Receivers in relation to the Campus and the sale of units, but pointing out that the Management Company was obliged to comply with its obligations to other users. The letter continues: -

> "To this end, in order to fully advise our clients, can you please, as a matter of urgency, confirm and identify that your clients will comply with its and their obligations under agreement for sale of the 6th April, 2001, clause 2.3, namely to complete the development of the estate in accordance with the plans and specifications then produced. This requires completion of Block C to include the carpark.
>
> In addition, your clients in the representative capacities of the Developer are obliged to deal with the common areas and complete the works in accordance with previously provided schedules.
>
> Whilst of course it is recognised that this takes time, and there are requirements in relation to the completion of the sale and carpark spaces, it would appear that what is proposed is a completely different proposition, with no confirmation as whether or not there will be any completion of the underground carpark. Please refer to the health and safety concerns in relation to the underground carpark highlighted by

Seamus Nowlan, Engineer which were furnished to you by email on 1st May, 2018. As you know we are awaiting a structural Engineer's Report from John Campbell Director of JJ Campbell Associates who is a structural engineering expert. We expect to be in receipt of same very shortly and will furnish a copy to you.

Please confirm whether your clients intend to comply with their obligations in relation to the balance of the works to be carried out in the common areas or what proposals, if any, your clients have in this regard. We have sought this information for considerable period of time and find it unfortunate that deadlines are now being imposed with threats of litigation against your clients against the backdrop of the complete and absolute failure to reply".

64. On 10th May, 2018 Ms. Stack forwarded to Gartlan Furey a copy of the Preliminary Structural Report of JJ Campbell Associates which they had received that day and which is dated 3rd May, 2018. At section 2.0 Mr. Campbell describes the structure of the "carpark suspended deck" as follows:

> "The carpark consists of deep hollow core units, probably 400 deep with a structural concrete screed supported on precast concrete beams and precast concrete columns. The concrete columns have corbels, we expect that steel dowels incorporated into the corbels are inset and grouted into the precast beams during erection of the carpark.
>
> No original structural drawings were available at the time of preparing this report."

65. He further describes at section 2.1 the "lower carpark slab upgrade" as having "cracking in various sections were ground water seepages is evident … and they do not appear to be regular controlled joints in the slab".

66. In section 3.0 Mr. Campbell recommends that detailed structural investigation be carried out to the carpark and "this may involve opening up works". The next sentence reads –

> "We expect that the carpark precast concrete deck structure (see Photo No. 2) with thesurrounding walls is too large to have no thermal expansion joints. The large thermal forces induced are relieved by the precast units pulling and spalling concrete of the precast beams (see Photos No. 06, No. 07, and No. 8).
>
> These thermal forces have also pulled down the dowel connections between the beam and column's corbels, causing cracking in same (see Photos No. 09 and No. 10).Expansion joins are required in both directions in the precast concrete carpark.
>
> The condition of the ends of the precast hollow-core units and cracked corbels shall require further scrutiny involving a small opening up."

67. In section 4 Mr. Campbell recommended further investigation works, but based on this visual inspection he was of the view that the spalled concrete needed repairing, and that the cracking in the column's corbels needed to be investigated further but at a minimum

needed to be “epoxy injected”. He then states – “putting a cost on the above at this stage is difficult but in order to give the Client a quantum for budgeting purposes, structural repairs shall be in the region of €1.5m.”

68. In his Executive Summary he states the following:

“1.1 At the time of preparing this report original structural drawings were not available to us.

1.2 The pen carpark precast concrete deck is of a considerable size without expansion joints. The deck is also locked into peripheral concrete walls which further restricts expansion and contraction thermal movements (See Photo No. 02).

1.3 Cracking is evident in the column corbels supporting the precast concrete beams (See Photos No. 09 & No. 10).

1.4 Precast hollow core units on the end bays are pulling concrete off the support beams due to the inbuilt thermal forces being applied in the concrete deck (See Photos No. 06, No. 07, & No. 08).

1.5 The ongoing spalling concrete shall present an ongoing health and safety risk to the public should they use the lower floor of the carpark.

1.6 Remedial works are required to relieve these thermal concrete forces. The remedial works involves introducing expansion joints in the carpark suspended deck together with injection works to the cracks in the corbels. The spalled concrete area requires repairs. The details of this are complex and require a number of considerations.

1.7 We must emphasise that the above is based on a walk around inspection of the deck, without a very detailed inspection and without opening up-works – which may present further problems.”

69. Gartlan Furey next wrote on 22nd May, 2018, but did not address Mr. Campbell’s report at all. Instead they indicated that they were instructing Counsel to prepare proceedings, and allowed a further period of seven days for the execution of Lease of Easements by the Management Company. In a letter of 23rd May, 2018 Gartlan Furey referred not to Mr. Campbell’s report but to P. & G. Stack’s letter of 3rd May “in which you mentioned that your client’s engineer has safety concerns relating to the underground car park”. Gartlan Furey then state: -

> “Please be advised that our client recently commissioned its own survey of the carpark which confirmed that the structure is stable and that it accords with Grade 1 basement in accordance with BS8102. Any observations as to compliance that were raised in this survey, have either been attended to, or are in the process of being attended to.”

Gartlan Furey did not furnish a copy of the survey obtained for the Receivers, and no engineer was called on behalf of the plaintiffs to give evidence in this case. The assertion that the Receivers had an engineering report on stability of the structure was contradicted by the first witness called by the plaintiffs, Ms. Maura O'Sullivan, the "Team Leader" in NAMA having "oversight" in respect of this receivership from April 2017, and manager of one Deidre Barry, who did not give evidence but was the NAMA person dealing mostly with the Receivers/Grant Thornton. I found Mr. O'Sullivan to be defensive, lacking in recall, and evasive. Her evidence was that from NAMA's perspective there was no structural issue with the car park, Mr. Campbell's evidence was "speculative" without further investigation, she had never "personally" seen the structural survey referred to in Gartlan Furey's letter, and NAMA had never commissioned a structural survey. Under cross examination she was referred to a report of Kavanagh Burke Consulting Engineers prepared for the Receivers in March 2017 'Outline Scope of Works for Finishing Works to Existing Lower Level Car Park', which she said was not brought to her attention when she took over as Team Leader a month later. This is not a structural report as such, and certainly could not be said to have "confirmed that the structure is stable". On the contrary it bullet point lists problem areas including –

- Repair existing concrete beams.
- Repair existing concrete walls.
- Seal leaks in existing lower car park level.
- Repair existing construction joint in existing lower car park RC slab

These references could be interpreted as referable to structural issue, and along with visual inspection should have alerted the Receivers to the possibility, at least, that there was a serious structural issue. Ms. O'Sullivan later recalled that W.K. Nowlan were asked to comment on Mr. Campbell's reports, but added "Sorry, I don't know whether that was in writing or verbalised but I do recall there being some discussion with the Receiver after he had sought advices on that". Counsel for the plaintiffs then intervened to say that this was in the context of the proceedings and "privileged engagements between the solicitors and relevant clients and experts."

70. P. & G. Stack responded, in the court's view quite reasonably, on 31st May, 2018 asking Gartlan Furey to address the engineering concerns rather than threatening litigation.

To this Gartlan Furey responded on 7th June, 2018 stating: -

> "Our client's position is that your client has no entitlement to impede the sale of the property at Block C and Link Building…in circumstances where the common areas have not been transferred to your client. Further, our client is of the view that it is under no obligation to address the issues raised by you and they certainly do not form any basis upon which your client can seek to refuse to execute the Lease of Easements. It is evident that your client is unlawfully taking advantage of the Joint

Receivers' requirement to secure a Lease of Easements and leveraging it against what your client alleges are remedial works required to the common areas. This is a clear tactical ploy by the management company, is contrary to the management agreement and will not be tolerated."

71. The letter went on to state that, without prejudice, the Receivers did not accept that there were health and safety issues associated with the carpark, and they then went on to deal with points made in the email from Seamus Nolan of NRB Consulting Engineers Limited of 30th April, 2018. The first, third and eleventh points are relevant: -

"1. Enclosed is the Architects Opinion on Compliance dated 3 October, 2010 which contains Engineers Certificate. The car park was completed by the developers of the business campus in/around 2001, several years prior to the non-consensual appointment of the Joint Receivers. Given the circumstances, and as your client will be well aware, it is to be expected that the Joint Receivers will have little access to historical documentation relating to the car park."

"3. The car park was designed as a Grade 1 basement car park in accordance with BS 8102. In effect, this means that the car park is not expected to be watertight. Rather, water seepage and damp areas are considered tolerable given its intended use and do not present a safety issue."

"11. In terms of the structure, as mentioned in previous correspondence, our clients have confirmation from their engineer that the car park structure is stable. As also mentioned in point (3) above, due to the design of the car park, water seepage is to be expected. As water ingress results in the spalling of concrete cover, it requires ongoing repair with suitable compounds. There is evidence that such repairs have been carried out on many occasions during the life of the structure so far. Similar future repairs will no doubt be required as part of the ongoing maintenance programme for all of the common areas of the estate."

Points 4-10 addressed less costly aspects such as the repair of the drainage channel, the completion of road markings, the completion of stair case and balustrades on the half landings, warning signage and road markings in respect of the basement ramps, and lighting. The letter gave the management company until close of business on Friday 8th June, 2018 to execute the Lease of Easements.

Once again engineer's report/opinion relied on by Gartlan Furey was not furnished. It is however apparent from these exchanges that while Mr. Campbell was attributing the spalling of concrete on beams and corbels to lack of expansion joints – arguably a structural defect - the Receivers/their engineer were attributing the spalling to permissible or acceptable ingress of water.

72. Before and after the interlocutory injunction settlement P & G Stack continued to press for joint engineering inspection and further investigative works. They furnished the Travelers Insurance report of 3rd August, 2019. By letter dated 24th September, 2018 they pressed

Gartlan Furey for their engineer's report, and for joint inspection to narrow the issues and scope the work required to the car park. On 4th October, 2019 they furnished the additional report of Mr. Campbell dated 3rd October, 2018 concerning remediation works. On 22nd October, 2018, shortly before the injunction application was due to proceed, they responded to an Affidavit of Mr. McCann sworn on 19th October 2019, which appeared to express willingness for a joint inspection by the parties' engineers, and they suggested such a meeting to discuss the defects and scope of remedial work but this was not taken up. On 16th January, 2019 P & G Stack wrote indicating their instructions were for the investigative works to proceed, they sought permitted access for this purpose, and that the Receivers pay half the cost. Gartlan Furey did respond on 24th January, 2019 refusing an "invasive inspection" and adverting to "significant additional costs" and the need "to retain experts to be present to supervise and report upon such an inspection".

Under cross examination Ms. O'Sullivan gradually recalled discussions on whether NAMA would agree to engineering investigative work, and recalled relying on the Receivers' recommendation that they should not agree to this. On further probing she recalled this to be the advice of Mr. Billy Murphy rather than either of the Receivers. This led NAMA/the Receivers to refuse to permit further investigative works."

73. P. & G. Stack responded on 11th of June stating that the deadline of 8th June was unrealistic and that they anticipated reverting by the 15th of June. They requested Gartlan Furey to furnish a copy of their engineer's report, given that Mr. Campbell's Preliminary Structural Report had been furnished to Gartlan Furey on 10th May. Gartlan Furey responded on 11th June stating that they had "answered all of the queries raised by you and addressed/responded to the issues identified by your client's engineer" and they gave until 2pm on 12th of June to execute the Lease of Easements in default of which proceedings will be issued. Their engineer's report was not furnished; moreover, at no stage did the plaintiffs agree to the further investigative works advised by Mr. Campbell. Proceedings were then commenced.

The Proceedings

74. The Plenary Summons was issued on 13th June, 2018, and the Statement of Claim is dated 15th June, 2018. An application to admit the proceedings to the Commercial List was made on Monday 18th of June. Particulars were raised and responded to promptly, and Amended Defence and Counterclaim were delivered on 31st October, 2018. Particulars were raised and replied to and an Amended Reply to Defence and Counterclaim was delivered on 8th November, 2018, and a reply to Defence to Counterclaim was delivered on 10th December, 2018. Interrogatories were raised by both parties on 3rd December, 2018 and duly replied to and discovery was made by the plaintiffs in January, 2019.

75. By Notice of Motion issued on 5th September, 2018, which came on for hearing before Barniville J. on 23rd October, 2018, the plaintiffs sought an interlocutory order requiring the defendant to execute the Lease of Easements and to take all necessary steps to facilitate the sale of Block C and the Link Building, and further an interlocutory order prohibiting the defendant from interfering or otherwise obstructing the sale of the

property to a third party. The Motion was compromised and struck out on consent on terms ruled before Barniville J. on 24th October, 2018 on the following terms: -

"Without prejudice to the legal position of any party to the proceedings, in exchange for the execution by the Defendant of the Lease of Easements exhibited at PMC8 to the Affidavit of Paul McCann of fifth named plaintiff September, 2018, and the Deed of Covenant and Management Company Members Certificate, the Fourth and Fifth Plaintiffs, on behalf of all Plaintiffs, will:

1. The Defendant is at liberty to deliver an Amended Defence and Counterclaim within 7 days of the date hereof.

2. The Plaintiffs will not bring an application for security for costs arising on the Counterclaim.

3. The Fourth and Fifth Plaintiffs will continue as Receivers over the Property pending delivery of judgment by the High Court in these proceedings provided the hearing of the action takes place in or before March, 2019.

4. The Plaintiffs will refrain from serving the 28-day notice referred to in paragraph 3.2 of the Management Agreement of 6th April, 2001 pending delivery of the judgment by the High Court in these proceedings.

5. The Plaintiffs agree to take responsibility for the underground carpark until the trial of the action."

The notice referred to at para.3.2 is the Completion Notice that may be served by Glenkerrin's solicitors on the defendant requiring completion of the Transfer of the Common Areas within 28 days.

76. Pursuant to the resolution of the interlocutory application the defendant did execute the Lease of Easements in respect of Block C and the Link Building. That ultimately enabled the Receivers to close the sale (although it had not actually closed at the date of trial).

77. During the trial Counsel for the plaintiffs attempted to use the fact of such execution to argue that it was no longer open to the defendant to assert that it was not obliged in law to execute the Lease of Easements, or to assert that the obligation to carry out further remedial work to the carpark rests with the plaintiffs. This was, rightly in my view, not pursued in closing submissions. I am quite satisfied that the settlement of the interlocutory application was expressly without prejudice to the legal position of the defendant, and that the act of execution of the Lease of Easements by the defendant cannot be taken out of context or in isolation. The defendant is therefore entitled to assert and argue the legal position with regard to the carpark as if it had not executed the lease of Easements in respect of Block C and the Link Building.

78. The Statement of Claim recites the history of the borrowing and security, and having referred to the Management Agreement in para. 10 the plaintiffs plead: -

"10. The Developer, Glenkerrin developed the Estate Common Areas for the amenity and use of the owners and occupiers of the Units within the Estate and procured the incorporation of a Management Company with "inter alia" the object of acquiring the Estate Common Areas and assuming responsibility for the Estate Services pursuant to the terms of the Management Agreement."

The Statement of Claim recites the most relevant terms of the Management Agreement, and then refers to Clause 3.6, (which allows the Developer to vary the location layout and extent of the estate and the car parking spaces) and pleads:

"15. Clause 3.6 made it clear that the Developer was entitled to alter or change any part of the development but in particular the Common Areas as it saw fit and to lease sites to individual purchasers while the development was still in the process of being developed. In particular, the Developer was not required to complete any aspect of the works to the Common Areas by any particular date let alone complete those works to any stipulated standard or locate any aspect of the facilities at any particular location. In particular, the Management Agreement does not impose on the Developer any obligation to complete the Common Areas prior to entering a lease with any purchaser. Further, Clause 2.3 was expressly conditioned by the rights of the Developer in Clause 3.6."

79. The Statement of Claim then pleads the sale by the receivers of Block C, and the refusal by the defendant to execute the draft Lease of Easements. In para. 19 the plaintiffs plead: -

"19. The defendant is obliged to execute the Lease of Easements but has unlawfully refused to execute the draft Lease of Easements despite request. Its conduct in that regard appears motivated by its desire to force the Plaintiffs to carry out works in the Common Areas and/or complete the Common Areas in circumstances where the Defendant has no right to so require. It is refusing to execute the Lease of Easements in order to exercise commercial leverage on the Plaintiffs in circumstances where it appears not to be a mark for the losses which the Plaintiffs are exposed to."

Particulars were raised. In the Replies to Particulars furnished on behalf of the plaintiffs in response to query 13 requesting disclosure as required by O. 20, r. 12 of the RSC of expert evidence the following response appears: -

"13. The plaintiffs propose to offer the expert evidence of

(i) an expert in conveyancing to the effect that the defendant is not entitled to refuse to execute the Lease of Easements and/or reserve rights over the car park and

(ii) an engineer and/or surveyor as to the adequacy of the carpark condition and structure."

As previously mentioned, at hearing the plaintiffs did not call any engineering or surveying expert evidence as to the adequacy of the carpark condition or structure.

Amended defence and counterclaim

80. The gravamen of the defendant's case is set out in para.s 7.1-7.6: -

> "7.1 The Defendant is neither required nor obligated to acquire the Estate Common Areas until such time as Glenkerrin Homes has completed the development of the Estate as a business park and the Estate Common Areas therein, in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health and/or safety risk to occupiers in the Estate or members of the public.
>
> 7.2 The Defendant is neither required nor obligated to assume responsibility for the Estate Services (an undefined term and in respect of which no admission is made as to the meaning thereof) until such time as Glenkerrin Homes has completed the development of the Estate as a business park and the Estate Common Areas therein, in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health and/or safety risk to occupiers in the Estate or members of the public.
>
> 7.3 The Defendant is neither required nor obligated to assume responsibility for the Estate Services (an undefined term and in respect of which no admission is made as to the meaning thereof) until such time as Glenkerrin Homes can transfer to the Defendant the Estate Common Areas free from any express, implied or contingent liability attaching thereto whether manifest or latent at the time of transfer, and/or otherwise to indemnify the Defendant in respect of any such express, implied or contingent liability attaching to the Estate Common Areas whether manifest or latent at the time of transfer.
>
> 7.4 Properly construed the effect of the Management Agreement is such that Glenkerrin Homes is under an obligation to develop and complete the Estate, including Estate Common Areas, in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulars and standards, and such that the Estate Common Areas do not pose a health and/or safety risk to occupiers in the Estate or members of the public. To date Glenkerrin Homes has failed, refused or neglected to discharge its obligations in this regard properly, or at all.
>
> 7.5 Properly construed the effect of the Management Agreement is such that Glenkerrin Homes remains liable for any defects or liabilities arising, howsoever, described,

pertaining to the Estate Common Areas that were manifest or latent prior to the transfer of the Estate Common Areas to the Defendant.

7.6 To date, and notwithstanding requests made by or on behalf of the Defendant, the Plaintiffs, and in particular Glenkerrin Homes, have failed, neglected or refused to construct and/or repair and/or maintain the Estate Common Areas, specifically the carpark, in accordance with their obligations. In particular, the carpark is not properly constructed and/or in need of repair and/or maintenance for the following reasons."

The Defence at 7.6.1 – 7.6.14 then sets out the alleged defects with the carpark, which list *inter alia* spalling of beams/corbels, cracking of corbel columns, exposure of steel "re-bar" and "tendons", cracking and water ingress. Included are the following -

"7.6.11 Owing to the current state of carpark the corrosion and cracking is continuing and ongoing and likely to further deteriorate. Further, as a result of the foregoing the risk of local collapse in both the upper and lower car decks shall be a concern in the next ten years.

7.6.12 In addition, the carpark is presently uninsured, the plaintiffs having failed, refused or neglected to obtain insurance cover in respect of same, and therefore it is not suitable for use or occupation. Further, absent to the completion and/or repair of the carpark in a proper manner it is unlikely that insurance cover will be obtained at a reasonable or viable premium, or at all.

7.6.13 Pending the carrying out of investigative works, the estimated cost of remediating the plaintiffs' default in this regard is €2,258,000, (ex. VAT)."

81. At para. 8.6 the plaintiffs plead:

"8.6 The Plaintiffs, without lawful authority, now seek to compel the Defendant to execute the Impugned Lease of Easements the effect of which is such that it will render the Defendant, on acquiring legal title to the Estate Common Areas (which is anticipated to be imminent), liable for the failure on the part of the Plaintiffs to construct and/or repair and/or maintain the car park in accordance with their obligations. In that regard the Plaintiffs seem to impose on the Defendant positive covenants concerning the maintenance and repair of the carpark in respect of which the Plaintiffs know the Defendant cannot comply with. Properly construed, the Management Agreement does not require the Defendant to acquire the Estate Common Areas or assume responsibility for Estate Services (an undefined term and in respect of which no admission is made as to the meaning thereof) until such time as Glenkerrin Homes has completed the development of the Estate as a business park and the Estate Common Areas therein, in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health

and/or safety risk to occupiers in the Estate or members of the public. In seeking to compel the Defendant to execute the Impugned Lease of Easements the Plaintiffs, and in particular Glenkerrin Homes, are wrongly, and without lawful authority, seeking to impose on the Defendant a binding liability to third parties to which it is under no contractual obligation to discharge per the Management Agreement. In particular, the Plaintiffs wrongly, and without lawful authority, seek to impose on the Defendant a liability created by the Plaintiffs in respect of which pending investigative works, it is estimated will cost approximately between €2,258,000 (ex VAT) to discharge."

82. At para. 11.4 the defendants' plead: -

> "The Management Agreement, and in particular Clause 3.6 thereof, properly construed and/or an applied term thereof, is subject to the applicable grant of planning permission in respect of the Estate and any part thereof, the operable building regulations and standards, health and safety requirements, good practice and proper estate management."

83. At para. 11.5 the defendants go on to plead an implied term requiring the developer to construct the Estate Common Areas "in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the estate common areas do not pose a health and/or safety risk or to occupiers in the Estate or members of the public."

84. In the Counterclaim the defendants plead Clause 2.3 of the Management Agreement which is asserted as placing an obligation on the plaintiffs to complete the development of the estate in accordance with plans and specifications, and at para. 31 it is pleaded: -

> "31. It is an express and/or implied term of the Management Agreement that:
>
> 31.1 Glenkerrin Homes complete the development of the Estate (as defined in the Management Agreement) as a business park and the Estate Common Areas therein, in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health and/or safety risk to occupiers in the Estate or members of the public.
>
> 31.2 The Defendant is neither required nor obligated to acquire the Estate Common Areas until such time as Glenkerrin Homes has completed the development of the Estate as a business park and the Estate Common Areas therein, in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health and/or safety risk to occupiers in the Estate or members of the public.

32. Insofar as the aforementioned terms of the Management Agreement constitute implied terms, such implied terms were agreed between the parties to the Management Agreement, and/or represent the presumed common intention of the parties to the Management Agreement, and/or are necessary in order to give business efficacy to the Management Agreement given the nature of the contract."

At para. 35 it is pleaded that Glenkerrin has failed to date to construct, repair or maintain the estate common areas and in particular the carpark in accordance with its obligations under the Management Agreement and identical particulars to those set out in para.7 of the Defence are repeated. Then there is a plea in the alternative for rectification of the Management Agreement:

"36. Further and/or in the alternative, and without prejudice to the foregoing, if the defendant is incorrect in its construction of the Management Agreement, which is denied the defendant seeks rectification of the Management Agreement as pleaded herein after."

At paragraph 36.1 it is pleaded that the parties executed the Management Agreement under a "mutual mistake of fact and that the Management Agreement embodied the complete terms of the agreement reached between them". Paragraph 36.2 pleads: -

"36.2 Further and/or in the alternative and without prejudice to the foregoing, the Management Agreement was executed by the parties thereto under the Defendant's unilateral mistake of fact that the Management Agreement reflected the agreement of the parties requiring, prior to the acquisition of the Estate Common Areas by the Defendant, Glenkerrin Homes to complete the development of the Estate as a business park and the Estate Common Areas therein, in accordance with the plans and specifications thereof, to a good and workmanlike standard free from defects and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health and/or safety risk to occupiers in the Estate or members of the public. The Defendant laboured under this unilateral mistake of fact in circumstances where the Plaintiffs knew, or ought to have known, of the said mistake by the Defendant."

85. In their amended Reply to Defence and Defence to Counterclaim at para. 2 the plaintiffs do not admit failure to –

"completely and/or properly develop and construct the estate common areas, specifically in the underground carpark and the defendant is put upon strict proof of: -

(i) The alleged obligation to so complete as alleged, and
(ii) The alleged failure to develop and construct."

The defects particularised by the defendant in para. 7 and repeated in para.35 are specifically "not admitted and the Defendant is put on proof of each and every plea and particular set out therein" and the repair estimate is denied and said to be "wholly speculative". Para.7(d) pleads:

"d. Strictly without prejudice to the generality of the foregoing, it is not admitted that the Plaintiffs have failed, refused or neglected to develop and complete the Estate, include Estate Common Areas, in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health/and or safety risk to occupiers in the Estate or member of the public."

The construction of the Management Agreement contended for by the defendant is denied; so also the implied terms contended for by the defendant are denied, as is the case pleaded for rectification, and it is pleaded that the defendant "has assumed responsibility for the Estate Common Areas (including the obligation to repair and/or upkeep)" (para. 17). In other respects, the plaintiffs essentially join issue with the defendant on its defence and counterclaim.

86. The defendant raised some eighty-four Interrogatories for the examination of the plaintiffs, to which sworn answers were given by Mr. McCann. These relate largely to the condition of the underground carpark at different times. A number of the responses are noteworthy. No. 46 asked "on 23rd March, 2018 was the underground carpark fit for occupancy?" To which the response was –

> "On the information available to the Receivers on 23rd March, 2018 the underground carpark was fit for occupancy."

At no. 47 the response was given that it was "fit for occupancy" at the time of commencement of the proceedings. No. 48 asked – "Is the underground carpark presently fit for occupancy?" To which the response was "it is so alleged that the carpark is presently not fit for occupancy but the Receivers cannot answer this interrogatory until investigative works are performed." Notwithstanding this reply at trial the plaintiffs stood over all the pleas in their Reply and Defence to Counterclaim related to the condition of the car park.

Interrogatory no. 76 asked –

> "On what dates did the plaintiffs, or any of them, cause a survey to be conducted of the underground carpark?"

The sworn response was: -

"76 For the purposes of the matters at issue in these proceedings, a survey was conducted in May, 2018. Previously, in April 2017 and October, 2017 the site was examined by contractors primarily for the purposes of preparing tenders for works

focussing on the condition of the existing firearm and electrical system installed in the carpark."

No. 78 asked –

"Had the plaintiffs, or any of them, caused a survey of the underground carpark to be conducted since the commencement of these proceedings?"

- to which the answer was "yes", and, at answer 79, that this survey was done in August, 2018.

Notwithstanding that such surveys were carried out, the plaintiffs did not put such surveys to Mr. Campbell in cross-examination or seek to stand over them at trial.

The Carpark, its condition and the evidence of Mr. Campbell

87. Counsel for the plaintiffs did suggest that the court was required to construe the Management Agreement and, in combination with that, the Leases of Easements, and was not required to make any findings or determinations with regard to the state or condition of the car park.

88. I cannot agree with the last part of that submission. Central to the defendant's case is that the condition of the car park is such that if the plaintiffs were now required to transfer the Estate Common Areas to the Management Company they would be unable to comply with their obligations under the Management Agreement. This is specifically denied by the plaintiffs, and in the pleadings all alleged defects are denied and the defendant is 'put on proof', and this is therefore an issue in the case. Moreover, given that it is beyond dispute that the Management Agreement incorporates Condition 36 of the Law Society General Conditions of Sale (1995 Edition), as previously recited, and that this would (at the very least) impose obligations of certification in respect of Planning Permission compliance and Building Bye-Law Approval and substantial compliance with Building Regulations, it is essential that the court address the evidence of Mr. Campbell, and I propose to do so.

89. It is first necessary to make findings as to when the carpark was constructed. Planning Permission for the Campus was granted on 6th December, 2000. Kildare County Council issued a Commencement Notice under the Building Control Regulations, 1997 on 23rd February, 2001 in respect of "erection of Blocks A,+ B, + C, + D, + E and car parking…". Mr. John Brady, a Director of the defendants since 2012, gave evidence. He became the owner of Unit 6 in the Campus in 2003, and became registered as owner on 11th November, 2003. His evidence was that the carpark was for much of the time hidden from his view by hoarding, but that it "existed in 2004". An Ordnance Survey aerial photograph of the Campus taken on 8th September, 2004 shows some parts of the Campus constructed, other parts under construction, and quite clearly shows that the Carpark had been constructed, and cars can be seen parked on it at upper deck level, alongside newly constructed Blocks A and B. The second named plaintiff Mr. Danny

Grehan was called by the defendant to give evidence. He said the carpark was constructed in "probably 2003" and he went on to state: -

> "completed, probably, I would say, maybe, 2004 and only the upper deck would have ever been in use".

I regard this as the best available evidence of when it was constructed and completed.

90. I find that construction of the carpark probably took place in 2003/2004, and was probably complete (in the sense that the structure was in place) in 2004, and was certainly complete to the point where the upper deck could be used at some point prior to 8th September, 2004.

91. Mr. John Campbell engineer gave evidence on Day 3 on behalf of the defendant. There was some challenge under cross-examination as to whether his experience was such as to enable him to give expert opinion evidence in relation to carpark structures. As he states in his Witness Statement he is "an engineer of JJ Campbell & Associates Limited. I have 40 years' experience and my qualifications are: BE, P. Eng. – Canada, C.E. Eng. MIEI, ACEI, Registered Engineer." In his oral evidence he said he had designed "twenty or so" multiple storey or two deck carparks, and that he had "remediated a number of carparks in my lifetime". He confirmed on re-examination that he had worked on twenty or thirty multi-storey carparks.

92. Mr. Campbell's primary evidence in relation to the carpark was that it was not constructed with any expansion joints, and under re-examination he was asked whether he had ever seen other carparks of a similar size without an expansion joint, to which he responded –

> "A. I've remediated one 35 years ago in British Columbia without the appropriate expansion joint and exactly the same thing… similar… a spalling of the concrete was occurring. The actual pre-stressed units were pulling away from the beam. It's the same symptoms." (Transcript Day 3, pg. 159).

93. I was satisfied at hearing and remain satisfied that Mr. Campbell had appropriate qualifications and experience to tender expert evidence as to the nature and condition, including structural, of the carpark and the nature of any remediation works that might be required. I also found Mr. Campbell to be a good witness and in all material respects I accept his evidence and opinions as correct.

94. Furthermore, the plaintiffs did not call any engineer or other expert to contest any of Mr. Campbell's evidence, nor did they produce any engineering report that would call into question any of his core evidence or opinions. This casts in a very poor light the correspondence sent on behalf of the Receivers pre-trial, and prior to the issue of proceedings, making assertions as to the safety of the carpark based on their own engineering advice, and the belief of NAMA as expressed by Ms. O'Sullivan in her evidence characterising Mr. Campbell's evidence as "speculative."

95. Mr. Campbell attended at the carpark on 24th April, 2018 with Mr. Seamus Nolan, whose report of 30th April, 2018 has been referred to earlier. Mr. Campbell then prepared his "Preliminary Structural Report on Maynooth carpark" dated May, 2018. Mr. Campbell stood over the contents of that report, and these contents have been detailed earlier in this judgment. I accept as correct Mr. Campbell's findings in that Preliminary Report, and in particular as set out in the extracts and the executive Summary quoted earlier. It will be recalled that he found that there were no expansion joints in the pre-cast concrete deck, that there was cracking in the column corbels supporting the pre-cast concrete beams, that the pre-cast hollow core units on the end base were pulling off concrete off the support beams due to the inbuilt thermal forces being applied in the concrete deck, that there was a spalling of concrete which presented an ongoing health and safety risk to users of the lower floor, and that –

"1.6 Remedial works are required to relieve these thermal concrete forces. The remedial works involve introducing expansion joints in the carpark suspended deck together with injection works to the cracks and the corbels. The spalled concrete area also requires repair. The details of this are complex and require a number of considerations."

96. Mr. Campbell's evidence then relied on his second report dated 21st June, 2018, prepared following a visual structural inspection of the carpark without any opening up. In s.1.0 he describes the carpark as consisting "of a suspended upper deck over a lower deck which is 1.5m below surrounding ground level. This lower deck has a slab on grade and is currently closed to the public." He indicates that he limited his structural overview to the suspended upper deck measuring –

"18m x 93m on plan" and consisting of "16m long 400mm deep pre-cast pre-stressed hollow–core units with a concrete structured screed supported on corbeled pre-cast concrete beams supported off corbeled pre-cast columns. An asphalt water-proof barrier is present on top of the deck.

The suspended deck is supported by concrete walls on all four sides, these walls incorporate ventilation openings and ramp openings."

Mr. Campbell reported that he was unfamiliar with the foundation type, and that the "structure is circa 10 years old", although as matters transpire I find that it is probably 15 years old at this stage. His core evidence is set out in s.2.0 where he comments on the existing structure, and at s.3.0 where he gives his opinion: -

"2.0 Comment on existing structure:

2.1 Thermal forces in the car park structure are causing spalling of the concrete corbels to a number of beams and cracking in a number of column corbels. Water ingress at these locations has initiated corrosion of the exposed re-bar at the spalled locations. In addition the exposed pre-stressed steel tendon at the ends of the precast hollow-core units are susceptible to corrosion.

2.1 [sic]Ongoing spalling of concrete at beam corbels renders the car park unfit for occupancy at basement level. The spalled concrete pieces are sharp in profile and create a risk to the public. It is of note that where the spalled areas have been repaired, the repair itself has since partly spalled and fallen off. Water ingress is also occurring down through the spalled beams suggesting that horizontal separation is occurring in the precast deck over.

2.2 The corbels integral with the columns are showing signs of vertical cracking.

2.3 The 80-metre x 93-metre precast concrete car deck – open to the elements, is of a considerable size without expansion joints. The deck is also locked into peripheral concrete walls which further restricts thermal expansion and contraction creating additional localised cracking in the deck.

2.4 The Institute of Structural Engineers – Design Recommendations for Multi Storey and Underground Car Parks (3rd Edition) – Recommend expansion joints at a maximum of 60 metre centres as opposed to the 80 metre x 93 metre deck.

3.0 Opinion: We are of the opinion that:

3.1 The ongoing random spalling of sharp angular pieces of concrete from support beams over makes the lower car park level a severe health & safety risk, due to the significant potential to be struck & injured by large chunks of falling concrete.

3.2 If the existing structural arrangement continues, the cyclic thermal forces shall further deteriorate the suspended structure leading to more severe ongoing corrosion caused by water ingress, possible cracking to ends of hollow-core units and enlargement to cracking in column corbels.

3.3. The ongoing cyclic forces, the deterioration in the beam corbels caused by cracking and spalling together with enlargement of cracking of the column corbels shall present a further health and safety risk to any public user in both the upper and lower car decks as local collapse shall be a concern in the next 10 years.

3.4 We are of the opinion that new expansion joints should be incorporated into the structure including a combination of sliding joints and additional rows of columns at the new expansion joints.

We must emphasise that the above is based on a visual inspection and we recommend that opening up works are carried out to establish conditions of

ends of precast hollow-core units and condition of structural screed where water ingress has occurred. The impact of new expansion joints on potentially propped cantilever walls shall require further investigation."

97. On this evidence alone I find: -

(1) That the structure of the carpark as designed and constructed is significantly defective in that it fails to incorporate expansion joints such as are recommended/required for a concrete decking as large as 80m x 93m.

(2) That thermal forces caused by the absence of expansion joints has led to spalling of concrete corbels and a number of beams, and cracking of a number of column corbels.

(3) That the thermal forces are such that where spalled areas have been repaired, the repair itself has since partly spalled and fallen off, and clearly such repairs are not an adequate answer to the problem of expansion.

(4) That the cyclic thermal forces will cause further deterioration to the suspended structure, leading to more severe corrosion caused by water ingress, and possible cracking of the ends of the hollow-core units, and enlargement of cracking in column corbels.

(5) That there is an existing health and safety risk from random spalling.

(6) That further deterioration will lead to further health and safety risk to the public, including a risk of "local collapse in the next 10 years".

(7) That to remedy the defects new expansion joints should be incorporated into the structure which include a combination of sliding joints and additional rows of columns at new expansion joints as outlined by Mr. Campbell.

(8) That opening up works are required to establish the condition of the ends of the pre-cast hollow-core units and condition of structural screed where water ingress has occurred, and depending on what is found *further* remedial works may be required i.e. the incorporation of new expansion joints may not be the only remedial work required.

[Emphasis added]

98. Photo no. 8 accompanying Mr. Campbell's report, an enlarged coloured copy of which was produced in evidence, is a "view of 'repaired' concrete column, concrete spalling off beam & crack at beam crack – column junction" and graphically demonstrates the features of cracking and spalling and failure of repairs referred to in Mr. Campbell's reports and in his evidence. One of these cracks, described on the photograph as "expansion cracking in concrete beam/column joint" is present in a beam immediately over one of the corbels. Mr. Campbell characterised this as "alarming", and even a layperson viewing this would have to agree. Mr. Campbell's photographs nos. 4 & 5 show views of asphalt cracking on

the deck surface, and his opinion was that this cracking was likely to be over a horizontal concrete support beam. His photographs nos. 9 and 10 showed cracks in column corbels

99. It was suggested to Mr. Campbell in cross-examination that the spalling and cracking damage could have been caused by water ingress rather than thermal movement, given that there was ingress of water from the upper deck. Mr. Campbell's opinion was that the spalling happened first because the structural screed surface "would have been intact before the spalling occurred and…there would have been no cracks within that structural screed before the spalling occurred." He also relied on the fact that a particular problem with drains on the upper deck concerned Eco drains which he stated were "downstream" of the locations where the spalling of the structural beams was observed. On re-examination he confirmed his opinion that the cause of the spalling was: -

> "The thermal movements. And what's happening there is its where the hollow-core unit is burying [sic] locally on the actual beam and then it's being pulled by the thermal movements, and that's what creates a spalling of the concrete. And that will continue to happen because we have seen the last time it was all repaired and the repair was ripped off again." (Transcript Day 3, pg. 157).

100. Mr. Campbell also relied on parts of BS 8110-2 of 1985 "Structural use of concrete – part 2: Code of Practice for special circumstances". I am satisfied from his evidence that this is a document relied on by engineers as setting a standard in the field, and as identifying the need for expansion joints to cope with thermal expansion in circumstances such as prevail in this car park. Section 8 is headed "Movement Joints", and explains the properties of concrete, and why movement joints may be needed. Section 8.1 notes "the tendency for concrete to crack and the limitation of such cracking is also influenced by many factors…However, there are cases where the most appropriate or only control measure is a movement joint." Section 8.2 is headed "Need for Movement Joints" and explains: -

> "8.2 In common with all other structural materials, concrete expands when heated and contracts when cooled; it also expands when wetted and shrinks when dried. It also undergoes other strains due to the hydration of the cement and other properties of the material itself and of its constituent parts. If these expansions and contractions are restrained stresses will occur which can be of sufficient magnitude to cause immediate cracking of the concrete or cause cracking to occur later owing to fatigue failure due to long term repetition of the stresses. Creep of the concrete over a long period and in some cases reduce stresses due to restraint, but generally this should not be relied upon. Differential settlements of foundations due, for example, to mining subsidence should also be taken into consideration. As these factors may cause unsightly cracking, damage to finishes and even structural failure, the possibilities and effects of such cracking should be properly investigated in relation to the design, reinforcement and form of the member or structure concerned and in the light of published information, and if then found necessary to

present or limit the effects of such potential cracking, movement joints should be provided at predetermined locations.

Some indication of the possible magnitude of the movements to be dealt with in a concrete structure may be gained from the following examples-

(but see also section 7).

(a) The average coefficient of thermal expansion of normal-weight concrete is of the order of 10 x 10 -6/◦C and 8 x 10-6/◦C for lightweight aggregate concrete (see Table 7.3); thus the difference in length of a concrete member 30m long due to 33◦C change in temperature could be approximately 10mm.

8.4 Provision of Joints.

The risk of cracking due to thermal movement and shrinkage may be minimized by limiting the changes in temperature and moisture content to which the concrete of the structure is subjected. The extent to which this can be done in the completed structure will depend very largely on its type and environment, ranging from the underground basement which is in conditions of relatively constant temperature and humidity, to the uninsulated elevated structure which might follow closely the atmospheric temperature and humidity. Furthermore, in buildings the effects of central heating on both the temperature and moisture content of the structure, combined with the relatively low thermal storage capacity of buildings clad with lightweight curtain walls, may give rise to more onerous thermal and humidity conditions than in the older, heavier, relatively unheated buildings. Thus, the investigation of the necessity to provide movement joints is becoming more important.

Cracking can be minimized by reducing the restraints on the free movement of the structure, and the control of cracking normally requires the subdivision of the structure into suitable lengths separated by the appropriate movement joints."

101. Mr. Campbell's conclusion at s.2.4 refers to a document produced by the Institute of Structural Engineers headed "Design Recommendations for Multi-Storey and Underground Carparks (Third Edition)", which appears to be the June 2002 edition. Mr. Campbell described this as the "Bible" for engineers when designing or constructing carparks, and again I am satisfied from his evidence that this is a document relied on by engineers as setting the standard in the construction of the concrete carparks. I am satisfied it was published before the carpark was constructed. He referred to one extract: -

"Table 8.1 shows that a typical design temperature range (taken from BS5400) for a carpark top deck in the UK can be 45◦C. On this basis, for a 60m-long structural frame, the movement joint may have to deal with thermal movements of the order of 30mm. The movement joint must be able to accommodate this movement in addition to shrinkage and creep."

102. This extract is reflective of the detail from s.8.2(a) of BS8110-2 quoted above. I accept Mr. Campbell's evidence that these documents represent the standards that should have been adopted in the design and construction of a large carpark in order for it to be structurally sound, and to remain so over its expected lifespan, which Mr. Campbell said should be in the range 60-100 years. I am therefore quite satisfied that the failure to incorporate movement joints into such a large expanse of concrete carpark constitutes a structural defect. Nor is it necessary for further investigations to be undertaken in order to confirm this finding. Mr. Campbell was "very confident about why the carpark is behaving the way it is" i.e. spalling and cracks due to thermal expansion due to the absence of movement joints. The reason he recommended further investigations was to ascertain whether "there are more structural defects than what's already been identified" (see Transcript Day 3 pp. 133-134).

Mr. Campbell's evidence, which I accept, is that "if you put in the expansion joints in the right place and if you engineer it properly with the proper reinforcement, you won't have a crack…if the concrete is properly engineering, it will not crack" (Transcript Day 3 p. 148).

103. Mr. Campbell also gave as his evidence that the works most recently carried out at the behest of the Receivers, and for the purpose of "commissioning" the basement car park and enabling the sale of Block C to be completed, "do not address the structural defects" which he identified. I accept this evidence as correct.

104. There was one other report put in evidence that refers to the condition of the carpark. This is a report from Travelers Insurance Co. Ltd dated 3rd August, 2018, addressed to Ms. Rose Anne Grehan, and obtained by her in her capacity as manager employed by the defendant. Although she was involved with the Campus from 2006, she did not see the basement car park until about 2011 as it was blocked off, and the defendant did not visit or inspect it until 2016. Her evidence was that in March/April 2016 the Receivers were planning works on the car park to make it fully operable, and she became aware that Declan Keane Consulting Engineers, had been engaged by the Receivers for that purpose, and that contractors were carrying out works. In June 2018, following the reports from Mr.Nolan and Mr. Campbell to the effect that the car park was not fit for purpose, and concerns of the defendant as to the insurance position in the event that it was obliged to take over the car park, Ms. Grehan briefed Travelers Insurance and requested their report. Their Report of 3rd August, 2018 is signed by Mr. Ray McKenna and opens –

> "Following on from our risk management surveyors on-site meeting of the 2nd August 2018 this letter related to our opinion as to the property and public liability insurers on the issues noted in the lower ground level car parking structure to Blocks A,B and C of the Maynooth Business Campus.".

On p.2 Mr. McKenna refers to Mr. Campbell's report of 3rd May, 2019 on the pre-cast concrete structures and states: -

> "I would be in agreement with his opinion on the issues noted. Specifically that these issues were likely caused by inappropriate, ineffective or missing

expansion/movement joints to the large area of concrete deck that forms the car park above."

After referring to some of his own photographs of the spalling and defects he states, on p.4: -

"As the insurer of both the property and liability associated with these premises we would be concerned that this issue will continue to develop and as such

1. In the short term this issue results in an increased risk to those who would use the area being injured or their cars being damaged by falling pieces of concrete
2. In the longer term it will likely result in the weakening of the structure itself to the point it becomes unusable both above and below."

On p.5 he concludes:

"Overall Opinion

Specifically with regard to this lower ground level car parking area it is our opinion that the issues highlighted above currently make the area unacceptable for use as a car park. Indeed it should remain closed to all but those who have to access it for the purposes of addressing the issues raised. It is further suggested that due to the risk of falling concrete, noted above, hard hats should be worn by anyone visiting the area.

Again given the above issues we are continuing with our decision not to extend the public liability cover provided by your policy to this area.

Should you wish further clarification or should any remedial works be scheduled please contact me directly."

Ms. Grehan confirmed that it has not been possible to include the basement car park in the defendant's insurance cover since the inception of cover with Traveler's in 2011.

105. A copy of the Traveler's report was furnished by the defendant's solicitors P & G Stack to the plaintiff's solicitors Gartlan Furey with a letter dated 4th September, 2018. This followed numerous requests by P & G Stack in earlier correspondence for a copy of the plaintiffs' engineer's report that prompted Gartlan Furey to assert in their letter of 23rd May, 2018 that "our client recently commissioned its own survey of the car park which confirmed that the structure is stable and that it accords with a grade 1 basement in accordance with BS8102", to repeat such assertions in their letter of 7th June, 2018 and state "our clients have confirmation from their engineer that the car park structure is stable", and to assert in their letter of 13 July 2018 that "we have independent confirmation that the car park is fit for purpose". Despite these assertions no engineering report backing them up was disclosed, and no such evidence was adduced at hearing,

even though Ms. Higgins admitted in her evidence that a survey report was obtained by the Receivers in May 2018, and that a positive decision was taken not to furnish it.

106. The reason offered for not furnishing that report was that it was not reasonable to produce it at a point in time when litigation was being threatened. It is difficult to accept this explanation. Although it is tempting to draw another inference, suffice it to say that if it is correct it is quite extraordinary that the Receivers should decide not to furnish an expert survey that backed up their position at a critical stage in the engagement between the parties/their solicitors. I also find it probable, from Ms. Higgins' evidence under cross examination, that the Receivers, with the knowledge and approval of NAMA, took the decision to issue proceedings to compel the defendant to execute the Lease of Easements in May 2018 and were not prepared to countenance what would be occasioned by further investigation of the condition of the car park, and were not prepared to face what it might disclose, and were insistent on deadlines that were unreasonable given the ongoing investigations by the defendant's experts of which they must have been aware.

107. The Receivers must have been aware that there was a structural issue, if not from their WK Nowlan's report in 2017, or from their own survey, at least from receipt by their solicitors of Mr. Campbell's first report, yet they chose to push through a sale of Block C with works that would allow the basement to be used as a carpark in the short-term. Regrettably I find, whether it was on foot of advice or otherwise, that they deliberately and irresponsibly closed off their minds to the core structural problem and the future risk to safety, including the risk of collapse in years to come.

108. The extent and cost of remedial work was also put in dispute. In their letter of 13 July 2018 Gartlan Furey disclaimed all liability for the works, and contested the extent of the works required, but on a without prejudice basis expressed willingness to place in an escrow account €196,230 as the "sum estimated by WK Nowlan in respect of the scope of works required to address the matter raised by" Mr. Nolan in his report of 30 April, 2018. However WK Nowlan's estimate makes no provision for the installation of expansion joints or the possibility that on full investigation further significant remedial work might be required. Insofar as it allows €75,000 for repair of spalling I am satisfied that it contemplates only cosmetic repair work ("surfaces to be sanded down and replastered/sealed") and does not cover the cost of any structural work.

109. Mr. Campbell's third report dated 3rd October, 2018 was also put in evidence and does deal with the scope of structural repair and estimated cost. It is entitled "expected structural remedial works…and quantum of costs of works". It emphasises the risk that the further investigation recommended may "uncover other structural problems", but it anticipates that the main structural work "is the installation of two expansion joints in the carpark deck and slip joints at spalled beams at each end".

110. This work involves "synchronised jacking of the hollow-core slabs and beams and installing special Teflon/Neoprene slip pads as an engineered sliding joint. A special Radflex expansion joint system together with a Conidec epoxy repair and new asphalt are

to be installed. Ends of concrete beams are to have exiting dowels released at expansion joints".

111. Other cost items then are referenced – investigation works including opening up, repair of column corbels, load testing, repair of spalled corbels, walls and foundations to be saw cut at new expansion joints, general repair of the asphalt surface. Section 5 deals with quantum: -

> "5.1 Preliminary Cost of Structural Repair: At this stage we are of the opinion that the Works shall exceed €1.5m due to their specialist nature. As is evident from the Drawings attached, showing the specialist works involved – it is only after tender that a definite repair cost can be established.
>
> We shall not give an itemised breakdown of costs, however there are approx. 200m of expansion joints/slip joints. This complex works to the carpark, involves synchronised specialised propping/jacking and specialised installation of the Radflex joint system. The contractor is likely to engage specialist companies from the UK such as for the synchronised jacking. The cost of specialist works is difficult to establish at this stage and the €1.5m is our best preliminary estimate."

Section 5.2 indicates that replacement of the asphalt on the deck may be required, with a new epoxy bonded membrane and this would be an additional cost. Section 5.3 indicates the need for supervision via a structural engineer, at a cost around 10% of construction.

112. A further "preliminary works estimate for structural remediation to Maynooth Carpark" dated 8th October, 2018 prepared by Mr. Campbell and exhibited by him in an affidavit sworn for the interlocutory hearing consists of two pages listing all the items, including contingency of €200,000 and giving a costing of €1.99m, which with VAT at 13.5% comes to €2.258m, and such a figure excludes "non-structural repair works", "design team fee 10% cost of works", and "cost of impact on operation of carpark".

113. It is evident from this material that the cost of remedial works cannot at this stage be ascertained with any accuracy, but looking at the figures presented I am of the view that overall it has the potential to exceed €3 million. No other solution or remedial works, and no other costings were suggested in any evidence called by or on behalf of the plaintiffs.

The likely cost of the work is itself further evidence of the significance of the structural defect.

Building Regulations

114. Mr. Campbell's evidence also addressed the question of whether the structural defect in the car park is such that it was built in breach of Building Regulations, and hence the question whether, as it stands, it could be certified as compliant for the purposes of satisfying General Condition 36. From his evidence and this court's scrutiny of the relevant primary and secondary legislation, and applicable standards, I find as follows: -

(a) The applicable overarching legislation is the Building Control Act, 1990. Section 1 defines "building" such that it "includes part of a building and any class or classes of structure which are prescribed by the Minister to be buildings for the purposes of this Act." Accordingly the starting point is that *any* structure or building is included, and this includes a car park. "Works" is also defined; it "includes any act or operation in connection with the construction, extension, alteration, renewal or repair of a building". Section 2 applies the Act to "buildings" and "works".

(b) Section 3(1) of the 1990 Act empowers the Minister to make regulations inter alia in relation to the "(a) the design and construction of buildings", and "(d) buildings as regards which any material change takes place in the purposes for which the buildings are used." By virtue of s.3(3) "…there shall be deemed to be a material change in the purposes for which a building is used if, on or after the operative day

(a) ….
(b) ….
(c) where building regulations contain special provisions in relation to buildings used for a particular purpose, a building to which the regulations apply and which was not being used for that purpose, becomes so used."

(c) Under s.3(2) the purpose for which regulations may be made includes -

"(a) making provision for the securing the health, safety and welfare of –

(i) persons in or about buildings, and
(ii) persons who may be affected by buildings or by matters connected with buildings" and

"(e) making provision for the encouragement of good building practice".

(d) The Building Regulations, 1991 promulgated by the Minister under the 1990 Act, apply to "buildings" and "works" other than those exempted in regulation 6, which does not exempt car parks. Reg.5 provides –

"(1) The Minister may publish, or arrange to have published on his behalf, documents to be known as "technical guidance documents" for the purpose of providing guidance with respect to compliance with the requirements of any of the provisions of the First Schedule."

Reg.8 provides:

"(1) All works to which these Regulations apply shall be carried out –

(a) in accordance with the appropriate requirements as set out in the First Schedule; and
(b) in such a manner as to avoid the breaching of any other requirement of that Schedule."

Reg. 9 provides:

"Subject to articles 6 and 7, these Regulations shall apply to all works in connection with the design and construction of every new building."

Nothing in article 6 or 7 is directly relevant.

Part A of the First Schedule is headed "Structures" and under the sub-heading "Loading." section A1 reads:

"A1. (1) A building shall be so designed and constructed that the combined dead, imposed and wind loads are sustained and transmitted to the ground –

(a) safely, and
(b) without causing such deflection or deformation of any part of the building, or such movement of the ground, as will impair the stability of any part of another building."

(e) If it is assumed that the 1991 Building Regulations applied to the design and construction of the car park, I find that the there was breach of A1 in Part A of the First Schedule in that the absence of expansion joints means that the design and construction of the car park is such that the combined dead load is not "sustained and transmitted to the ground…safely" given the probability that the entire structure will (unless remedied) become unsafe in 10 years or so.

(f) In particular I find that the engineering standard set out in BS8110, published in 1985, was not followed. Although not a standard prescribed by the 1990 Act or the 1991 Regulations the failure to follow its logic and guidance on movement joints has resulted in a breach of regulation insofar as the car park as constructed to date is not designed or constructed to safely sustain its load for its expected lifespan.

(g) Further, the Minister published a technical guidance document ("TDA") I.S. 326 of 1995 for 'Structural work of reinforced pre-stressed or plain concrete'. Although out of print and not available – since it was replaced by another I.S.326 effective from 16 July 2004 – I am satisfied from the evidence of Mr. Campbell that the 1995 TDA was substantially the same as the 2004 TDA, and that both are "no different to" and "almost a duplicate of BS8110 (1985)". Indeed I.S. 326 of 2004 in the Foreword expressly "consists of the text of BS8110: Parts 1,2, and 3 'Structural Use of Concrete' as amended herein", and is revised to avoid conflict with a new Irish Standard I.S.EN:2002, which covers the methods for specifying and producing concrete as a construction material up to the point of delivery – and is therefore not relevant to the issue of movement joints.

(h) In my view this entitles the court to view the substance of Part 2 of the BS8110, including Section 8 on Movement Joints, as setting out the standard that should have been applied by virtue of I.S.326 of 1995. The design and construction of the car park did not follow the advice set out in BS8110, and hence was not compliant with I.S.326 of 1995, and hence breached Regs. 8 and 9 of the Building

Regulations, 1991 in that the building as constructed to date is not designed or constructed to safely sustain the load for its expected lifespan.

(i) The Building Regulations 1997 were promulgated under the 1990 Act to replace the 1991 Regulations but may not have replaced them in respect of the car park in the following circumstances. Although Reg.2 provides that the 1997 Regulations came into operation on 1st July, 1998, under Reg.3(2) they were disapplied to "works, or a building as regards which a material change of use takes place, where –

(a) ….
(b) the works commence or the material change of use takes place between the date referred to in article 2 [1st July 1998] and the 31st day of December, 2002."

The Commencement Notice for the Blocks A-E and the car parking was dated 23 February, 2001. I have found, based on the evidence of Mr. Danny Grehan, that actual construction work probably commenced in 2003 and probably ended in 2004. Reg.4(2) of 1997 provides for the continued application of the 1991 Regulations where the "works or building fall within article 3(2)" i.e. where work commenced before December 2002.

If the works had "commenced" prior to 2002 by virtue of the Commencement Notice, or if they had in fact actually commenced prior to December, 2002, then Reg.3(2) would see to disapply the 1997 Regulations. I prefer to the view that use of the work "commence" in Reg.3(2) as referring to actual commencement of work because there is no further wording in the regulation that ties it in to the issue of a Commencement Notice.

(h) There is however no need to resolve the conundrum as to whether the 1991 Regulations or 1997 Regulations apply, because the relevant provisions of the latter regulations are substantially the same, and if anything are more tightly drawn and hence more onerous for builders/developers. The Third Schedule lists classes of buildings that are exempt; car parks are not mentioned. Reg.7 empowers the Minister to publish "technical guidance documents" compliance with which leads to *prima facie* compliance with Building Regulations; Reg.9(1) mandates compliance in design and construction of works/buildings with the requirements of the Second Schedule, and Reg.10 extends this to "every new building". I am satisfied that these regulations therefore apply to the design and construction of an underground/overground two story car park such as that at issue. Slightly different wording in Part A of the Second Schedule under "Structure" and "Loading" now reads:

"A1 (1) A building shall be designed and constructed *with due regard to the theory and practice of structural engineering, so as to ensure* that the combined dead, imposed and wind loads are sustained and transmitted to the ground –

(a) safely, and

(b) without causing such deflection or deformation of any part of the building, or such movement of the ground, as will impair the stability of any part of another building."

[Emphasis added to the new wording].

(h) In addition under the Building Regulation 1997 the Minister published "Technical Guidance Document A" which gives guidance in relation to Part A of the Second Schedule. Sub-section 2 on "Design and Construction of all Building Types – Codes, Standards and References" lists the codes and standards appropriate for design and construction of "all buildings" and structures, and includes "Structural work of reinforced, prestressed or plain concrete – I.S. 326: 1995". This was "Standard Specification (Concrete. Part 1: Code of practice for the structural use of concrete) Declaration 1995", referred to earlier, which was revoked by I.S.326:2004 but which was, I am satisfied, current when the car park was under construction.

(i) I am satisfied that, as with the 1991 Regulations, the failure to incorporate expansion joints constituted a breach of A1(1) in the 1997 Regulations, and that that omission was a failure to have due or any regard to the theory and practice of structural engineering as advised in BS8110 and I.S.326 of 1995, and the Institute of Structural Engineers document of June 2002 (the 3rd Edition) in regard to specific advice on the need for movement joints in concrete frames exceeding 60 metres.

Certification

115. I turn now to the question of certification following the construction of the carpark. This is of some significance because Gartlan Furey in their letter of 7 June, 2018 on behalf of the Receivers suggested to P& G Stack solicitors for the defendant that there was certification for the car park, and they purported to enclose "Architects Opinion on Compliance dated 3 October 2010 which contains Engineers Certificate." The letter enclosed various Certificates, which were put in evidence by Ms. Higgins, and which were put to Mr. Campbell. These appear to have been obtained in 2010 in order to support the Receivers title and facilitate sales.

116. I have been unable to locate any certificate dated 3 October, 2010, but this seems to be because that date was given in error, and the author intended to refer to the main Architect's Opinions from Horan Associates which both appear to be dated 3rd November, 2010 and one of which contains in Schedule A. a list of other "Confirmations" or certificates. The confirmations or certificates of any possible relevance are:

(a) The certificate from Edward Horan of Horan Associates Architects, dated 3rd November, 2010 giving an "opinion on the Compliance of Block C (Shell & Core building only)" with planning permission. I find that this certificate does not relate to the carpark.

(b) The certificate from Edward Horan of Horan Associates Architects, dated 3rd November, 2010 giving an "Opinion on the Compliance of Block C (Shell & Core

building only)" with Building Regulations. I find that this certificate also does not relate to the carpark, contrary to the assertion of Gartlan Furey in their letter of 7 June, 2018.

This document, in Schedule A, lists various other "Confirmations" to some of which I now refer.

(c) A certificate dated 5th November, 2010 from Glenkerrin Homes as "Contractor". This covers "all works at Block C including such parts of the common areas supporting, serving or leading to the 2nd Floor situate at Maynooth Business Campus, Maynooth, Co. Kildare". It reads: -

"We Glenkerrin Homes certify that the construction of General Building works in relation to the above premises:

(1) In substantial compliance with the Building Control Act 1990, the Building Control Regulations, 1997 – 2004 and to the Building Regulations 1997 – 2004; and
(2) In substantial compliance with the Design Documents, prepared by the Design Team and Specialist Sub-Contractors/Consultants for the above premises."

This certificate adopts the definitions used in the Building Control Act 1990. Two things are notable. Firstly, the developer appears to be assuming responsibility for completion in accordance with the Building Regulations, including Regulations up to and including 2004. Secondly, this certificate, although it refers to certain "common areas supporting, serving or leading to the 2nd Floor", it does not appear to relate to the carpark as such.

(d) A certificate dated 27th October, 2010 from David Jenkins of Burke Jenkins Consulting Engineers; this again relates to Block C, and construction works which commenced "Feb 2007". The description of the project covered by the certificate states "this is a three storey office block, reference Block C. The project included the structure which is pre-cast concrete frame and floors with part steeled roof and masonry walls on strip and path foundation. This project was developed to shell stage only."

There is no reference to the carpark, which had been constructed prior to that stage, and I find that this certificate does not relate to the carpark.

(e) A certificate dated 2nd November, 2010 from Concast Building Limited, which relates to "Block C" and states –

"I confirm that the Pre-Cast Concrete elements designed, manufactured and installed at the above by Concast Building Limited comply with the requirements of the current Irish Building Regulations and with British

Standards BS8110 with regard to structure and/or in accordance with approved Concast Drawings." [Emphasis added]

Nothing suggests that this certificate covers the carpark. If it does, it only covers the *elements* manufactured and supplied by Concast – it does not extend to design or overall method of construction of the entire car park. It is however notable that Concast seek to comply with BS8110 in the design manufacture and installation of concrete product.

(f) Next is a "roof warranty registration form WRD 991" from Multi-Roofing Systems Limited, based on a completion/inspection date of July 2008. It relates to the concrete deck structure in Block C – there is no reference to the carpark and it appears to relate to the roof of Block C.

There are other certificates included with Ms. Higgins' witness statement, but none of them are material to the carpark.

117. It follows that the plaintiffs have not presented any certificate of compliance with planning permission or Building Regulations in relation to the *carpark* or its construction. Even if the Glenkerrin certificate could be generously construed as covering the car park, I find that in light of Mr. Campbell's evidence it is now worthless as certification, as the car park was not in fact compliant with Building Regulations as constructed, or at the date of certification in 2010, and the car park is not compliant as matters stand today, whether you take the 1991 Regulations or the 1997 Regulations as applicable. On all these dates it suffered from the same structural defect, albeit that there may have been no manifestation of consequential stress or spalling when construction was first completed.

Substantial compliance

118. The only witness who addressed what would be required to constitute "substantial compliance" under General Condition 36 was defendant's independent expert Ms. Suzanne Bainton, who distinguished it from a requirement to complete "free from all defects". Her evidence (D4 Transcript p. 163/164) was as follows:

"A. Substantial compliance, in my view means substantial compliance with the requirements of the planning permission or with the requirements of the Building Regulations and in the Standard RIAI Certificates of Compliance and its meaning, and I am certainly not quoting, that along the lines that any non-compliance does not warrant enforcement action by the local authority. So that would be my understanding of what substantial compliance means. Free from defect has a different meaning.

Q. It does?

A. In my view, yes.

Q. Yes. So we are in agreement about that, that you can have a building that is substantially compliant in accordance with the definitions used in the certificate,

that albeit has some defects but they don't affect their ability to say it is in substantial compliance?

A. Yes, if the defect was normal it could be in substantial compliance, yes".

119. I accept this evidence as correct. Insofar as the carpark as constructed was structurally defective in not having any expansion joint in the concrete slab, this could never be described as a minor defect, and it constitutes such non-compliance with the Building Control Act/Regulations that it could not be certified as "substantially compliant".

120. Accordingly I find that the Glenkerrin certificates/opinions presented would not satisfy General Condition 36 in the Management Agreement. No other potentially applicable certificate has been put in evidence. Even if other certificates existed they could not satisfy General Condition 36 in light of Mr. Campbell's evidence.

121. Before leaving this subject, it is also worth noting that in the Special Conditions relating to the sale of Block C and link building, the Receivers expressly excluded any warranty as to compliance with planning permission, bye-law approval, Building Control Act and building regulations, and General Condition 36 was "hereby deleted and shall not apply to this sale" (Sp.C. 11.1), and by Sp.C. 11.3 limited the documentation/certificates to be furnished to documents listed – and in the case of building certificates to the two Horan Opinions of 3 November, 2010. The significance of this is that any contractual or other claim that the purchaser might otherwise have had against the Receivers/vendor in respect of the condition of the car park is contractually excluded.

Construing the Management – Principles of Construction

122. There was little if any dispute between the parties as to the principles that the court should apply. These have been recently restated by the Supreme Court in *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31, where the Supreme Court affirmed the continued application of the five rules of contractual construction set out by Lord Hoffman in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 All E.R. 98, which are: -

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract;

(2) The background was famously referred to by Lord Wilberforce as the '*matrix of fact'*, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an

action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…

(5) The '*rule'* that words should be given their '*natural and ordinary meaning'* reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude form the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said…

> '…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'"

123. Commenting on these principles O'Donnell J. in *Law Society v. MIBI* stated:

"8. These principles represent a significant staging point in the development of what might be described as a modern approach to the interpretation of contracts, a development which, as the principles recognise, has not necessarily reached its terminus. The common law is treated as a coherent and consistent body of law developing incrementally by subtle changes, and only on occasion by sharp and dramatic turns. It is sometimes only after a period of time that the significance of a development is understood and it becomes apparent that the direction of the law has altered considerably. The modern approach to the interpretation of contracts is one which would probably be unrecognisable to, and might be regarded as heresy, by the Victorian judges who expounded so confidently on commercial matters. In my view, it is important to understand the full import of the changes wrought by the approach set out in *Investors Compensation Scheme Ltd. V. West Bromwich Building Society.* It is also necessary to be aware of the significance of this development for the overall approach to the interpretation of agreements, and not to simply mix and match authorities drawn from different eras and contexts, as if they were a body of coherent rules produced by a single author. For example, the "rule" that where a recital and an operative part of a deed conflict that the operative provision must prevail, is like the "rule" referred to by Lord Hoffman that

words should be given their "natural and ordinary meaning", no more than an expression of common sense about the manner in which we communicate. It is not an iron rule, particularly if it may not have been present to the mind of the parties when making their agreement. To take a homely example, if in agreement it is recited that a landowner wishes to have ragworts removed from a specified field, and the operative provisions says in general language that he will pay a certain amount per 100 ragworts delivered on a given day, no one would suggest that this entitles the other party to produce an unlimited number of ragworts from any other location and demand payment. In that case of course it might be said that there is no true conflict, but rather that the recital can be read harmoniously with the operative provision as indicating the scope of the agreement. But this itself illustrates the importance of approaching the Agreement in a holistic way rather than having immediate resort to case law.

9. A contract is a form of communication intended to convey the meaning agreed upon by the parties. Words are the vehicle through which that meaning is conveyed but the earning of a document is much more than the meaning of the word. It is what the parties would reasonably have been understood to mean from a consideration of all the available guides to the meaning of the agreement. Words are an important and very often the only necessary guide to discerning the meaning, but they are only a guide, and as recognised by Lord Hoffman, they can be ambiguous, and sometimes even, as happens in real life, it may be apparent the parties have for whatever reason used the wrong words or syntax. In those circumstances, the words must give way."

In that case the Law Society argued that no reliance should be placed upon the preamble to the MIBI Agreement, on the basis that where recitals are at variance with the operative part the latter must be treated as "officious". O'Donnell J. stated: -

"34. I cannot accept this argument. I rather question whether this Victorian certainty is applicable here at least to exclude the question in *limine*. The judgment cited expresses the common sense view that the parties will pay particular attention to the operative provisions of a contract, which are likely to be more specific than any generalisation in the preamble or recitals. Where there is a clear conflict between such general descriptive provisions and specific operative provisions, then effect will normally be given to the operative provisions applying that presumption. But the question here is whether there is such an inconsistency or rather whether the two can be read consistently which is what one would normally expect. Put more simply still, the question for the Court is perhaps why would the parties describe this Agreement in inadequate and misleadingly narrow terms, if indeed the agreement has the broad and generous sweep for which the Law Society contends? To my mind, it is an inadequate answer to this question to merely cite Victorian authority."

124. O'Donnell J. went on to emphasise the importance of the context in which a contract is concluded, stating, at paragraph 13 of his judgment: -

> "…It is important to remind ourselves, that the process is not the deconstruction of a text, but rather the interpretation of an agreement. Parties undoubtedly seek clarity of language, but they do not do so as an end in itself. The focus of the parties is an agreement, normally commercial, which they consider is to their benefit that is the context in which the words are used, and in which they must be interpreted."

125. Even more recently in *Jackie Greene Construction Limited v. IBRC in Special Liquidation* [2019] IESC 2 Clarke C.J. emphasised the importance of construing words in context -

> "5.2 The more recent authorities in this area suggest that the detailed rules for the proper approach to the construction of contractual documents all derive in substance from the approach which can be encapsulated in the phrase 'text in context."

He continued, in para. 5.4

> "5.4 As is clear from those authorities, it is important to give due recognition both to the text of any document creating legal rights and obligations and to the context in which the words used in the measure concerned were chosen. To fail to give adequate weight to the words is to ignore, or downplay, the fact that those were the words that were chosen to define the relevant legal arrangement. To fail to give adequate weight to context is to ignore the fact that all language is inevitably interpreted by reasonable persons in the light of the context in which that language is used."

126. In support of their contention that Recital 2.3 imposes on the Developer a legal obligation to complete the development of the estate the defendant also relied on Lewison in *The Interpretation of Contracts* (6th Ed., 2017) where the following principle is stated at s.10.15: -

> "In an appropriate case the court may interpret a recital as carrying with it an obligation to carry into effect that which is recited."

And the further statement from the authors that: -

> "Any words in a contract which show an agreement to do a thing amount to an obligation. No special language is necessary."

One authority relied upon for these statements is *Aspidin v. Austin* [1844] 1 Q.B. 671, where Lord Denman stated: -

> "Where words of recital or reference manifested a clear intention that the parties should do certain acts, the courts have on these inferred a covenant to do such acts

and sustained actions of covenant or no-performance, as if the instruments had contained express covenants to perform them."

The defendants also cite in support of these propositions *Samson v. Easterby* [1830] 9 B.& C. 505, and a more modern expression of the approach found in the judgment of *Flaux J.* in *Mr. HTV Limited (formerly known as Can Associates TV Limited v. ITV2 Limited* [2015] EWHC 2840, (Comm), where he stated:

"38. In any event, it seems to me that the point about commitment being "pre-operative" is a non-point on analysis. As Mr. Nambisan submitted, it is well established that, where the wording of a recital manifests a clear intention that the parties should do certain acts, the Court may infer from that wording a covenant to do such acts as if the instrument had contained an express agreement to that effect, citing Chitty on Contracts 31st Ed. [13-025]. Furthermore, where there is ambiguity within the operative parts of a contract and a recital is clear, the recital will govern the construction of the contract: see per Lord Eshmer MR in Rey Moon [1886] 17 QBD 275."

127. It seems to me that the approach taken by the Supreme Court evident from *Law Society v. MIBI*, and in *Jackie Greene Construction Limited v. IBRC* establishes general principles which reflect the succinct statements in Lewison, and the position taken in the UK case law just mentioned, and I propose to apply these principles.

Construing the Management Agreement

128. The context in which the Management Agreement was entered into was the prior purchase by the first and second named plaintiffs of the land in Maynooth on which they planned to develop a business park. For this purpose they borrowed and provided various securities including entering into the Deed of Mortgage with AIB dated 1st September, 2000. It should be noted that the Debenture entered into by the Developer Glenkerrin on 10th September, 2003 post-dated the Management Agreement and was not therefore part of the "context" for the earlier agreement. A further part of the context was the incorporation of the defendant for the purpose of being the management company in respect of the proposed Campus.

129. Evidence was given by Mr. Damien Maguire solicitor, whose office prepared the Management Agreement, and Elaine O'Keeffe a solicitor in the same firm also involved in the preparation of the Management Agreement, and evidence was also given by the second named plaintiff who was called on behalf of the defendants, and part of whose evidence related to the making of the Management Agreement. Although these witnesses were asked to remember matters occurring 18 years ago for the most part I believe their recall was good, and I accept their evidence as truthful (save where I expressly indicate doubt). The evidence of these witnesses as to background and "context" is taken into account, but I am careful to exclude from my consideration evidence given by any of these witnesses as to the negotiations or declarations of subjective intent leading to the execution of the Management Agreement, which can have no bearing on the true construction of that agreement.

130. The firm of Damien Maguire & Company Solicitors acted for all three parties i.e. the first and second named plaintiffs as owners/vendors, Glenkerrin Homes Limited as "Developer" and the defendant as the "Purchaser" when the Management Agreement was prepared and executed. I am satisfied that this was accepted conveyancing practice at the time. The defendant was incorporated specifically for the purpose of becoming Management Company in respect of the estate common areas of the business campus. The Management Agreement was prepared by Mr. Maguire based on precedent conveyancing documentation, and most importantly it formed part of a suite of title documents some of which were to be executed at or prior to closing on the sale or lease of units in the campus.

131. It is clear that the primary objective of the Management Agreement was to ensure the smooth transfer of the estate common areas to the management company at the completion of the development, thus ensuring that once the development was complete each unit holder enjoyed the benefit of easements granted to them, and the burden of service charges imposed on them, and would continue to enjoy those rights and have those obligations under the Leases of Easements and as members of the management company. Thus, and entirely logically, within the suite of documents is the Lease of Easements that it was intended would be entered into between the Developer of the first part, the defendant Management Company of the second part and the purchaser of the third part, granting various easements including parking rights to the unit purchaser, requiring the lessee/unit purchaser to become a member of the Management Company, ensuring that the Management Company would have obligations to maintain the common areas once transferred to it by the Developer, and including provisions relating to maintenance and renewal of the common areas and the levying of service charges on unit purchasers both prior to and subsequent to the completion of the transfer of the common areas to the Management Company.

132. Also part of the suite of documents was a Deed of Covenant intended to be entered into by each unit purchaser with the Management Company and the Developer, containing covenants on the part of the unit purchaser binding it to comply with various restrictive and negative covenants (such as to pay rates and taxes and the estate service charge, and to keep their unit lands in good repair), and covenants on the part of the Developer, and after the transfer of the estate common areas, the Management Company, in accordance with the Third Schedule dealing with the levying of estate service charges, and the provision of services such as repair maintenance and renewal of estate common areas.

133. As Mr. Maguire states, in para. 3 of his Witness Statement: -

> "The Management Company was set up by the Developer and Agreement for Sale dated 6 April 2001 (the Management Agreement) was based on a precedent conveyancing document and it was prepared by me and signed by all parties at an early stage of the development of the Maynooth Business Campus. The Management Agreement formed part of the title documents presented to

prospective purchasers' solicitors – it was an essential component of the title as it imposed a legal obligation on the Developer that, on its completion of the development and the sale of the last unit, it would transfer the Estate Common Areas (as herein defined) to the Management Company which is also a party to each purchaser's title by way of an additional document entitled a Lease of Easement. This is to ensure that all owners in the Business Campus were bound by similar covenants and conditions. Without a functioning Management Company, the purchasers would not have good marketable title to their property and it would not be possible to sell any of the units in the Business Campus."

Similar evidence was given by Ms. O'Keeffe, who indicated that both she and Mr. Maguire took instructions for the Management Agreement, and both were very much involved with the clients. Her evidence was that she was very involved in the preparation of the Lease of Easements.

134. In his evidence Mr. Danny Grehan confirmed that the reference in Recital 2.1 of the Management Agreement to the property comprised within Folio 34112F of the Register of County Kildare is a reference to the land upon which it was intended that the Campus would be developed. He referred to Recital 2.3 which states: -

"2.3 The Developer will complete the development of the Estate in accordance with the plans and specifications produced to the Purchaser and shall lease all the units/sites on the Estate and on the demise of the last unit/site, - …"

135. Mr. Grehan confirmed that the plans and specifications were in existence at the time the Management Agreement was entered into, and that these were those in respect of Planning Permission had been granted for the development. A copy of this was handed in and shows that planning permission was granted by Kildare County Council on 6th December, 2000, and Condition 1 stipulates –

"1. The development shall be carried out in accordance with the documentation and drawings submitted to the Planning Authority on 26/11/99 and where superseded by details submitted on 19/05/00, except where altered or amended by conditions in this permission."

136. Mr. Grehan was asked about Clause 3.6 of the Management Agreement which provides: -

"3.6 Notwithstanding that the Estate is in the process of being developed as a Business Park the Developer may alter the development as the Developer sees fit and there is reserve to the Developer full right and liberty to alter the Development as a Developer may think fit and to reserve to the Developer full right and liberty to vary the location, layout and extent of the Estate, the sites on it, the car parking spaces and the Estate Common Areas including the exclusion of any additional lands. Accordingly, the Developer may make Lease Assignments, Transfers or Assurance of any part or parts of the Estate free form [sic] any conditions or covenants contained in any Lease or Management Agreement."

He was asked what this clause meant to him in his capacity as a Developer and he answered:-

> "From the, I suppose, commercial approach to a development like a business campus or any other major development, if market forces change reasons or sizes of buildings I mean you have to…maybe you have a client that wants a 60,000 square foot building and you have two 40,000 square foot buildings. You may seek planning permission to accommodate them in one building and be reserved the right to do so…you would need, you would need planning consent to alter a building in any regard and if a building was started well anything that is started is presumed to be done as per specs…modifications would be something that would come into it if you had a situation whereby somebody was modifying a building rather than making it bigger, but you would need planning permission to change any footprints." (Day 4 pp. 5-16).

137. Under cross examination Mr. Grehan agreed that there were no negotiations as such between the first and second named plaintiffs and the Developer or Management Company prior to the Management Agreement being entered into, but he said the Management Agreement would have been discussed with their solicitors. He agreed that he was a Director of Glenkerrin and a Director of the defendant. His brother Mr. Ray Grehan was also a Director of both companies. He also agreed that over time approximately fifty leases of easements had been entered into by unit purchasers and were registered in the Folio, and he agreed that the terms of each of these were substantially the same. While Mr. Grehan gave much more evidence in relation to the Management Agreement and Lease of Easements this largely reflected his subjective views as to the meaning of these documents and did not relate to the "matrix effects" or context in which the Management Agreement was entered into.

138. Mention should be made of expert conveyancing evidence called by both parties in which points were made and opinions expressed as to the correct construction of the Management Agreement. The plaintiffs called Mr. Patrick Sweetman, a consultant in Matheson Solicitors, with extensive commercial and conveyancing experience over a wide range of property transactions. The defendants called Ms. Suzanne Bainton, a partner in Liston & Company Solicitors with whom she has practiced since 1998. Both of these individuals are members of the Conveyancing Committee of the Law Society – Mr. Sweetman is currently in the Chair and Ms. Bainton is a former Chairperson.

139. While I accept that both these witnesses have the requisite experience and expertise, and would have been familiar with conveyancing practice in 2001, for a number of reasons I find their evidence on this aspect to be of little assistance. The main reason for this is that it is the court that must construe the Management Agreement, and should do so by reference to the actual words used and the context in which the Agreement was made. This is not a case of expert determination, and the opinions of experts, wise though they may be, cannot substitute for the court's objective decision.

140. Further, conveyancing practice at the time – on which subject the experts in fact differed – has little or no relevance to the proper construction of this particular document. This is not a case where the court is asked to construe 'words of art', with an accepted special meaning to conveyancers at that time.

141. Thirdly, while both experts gave evidence in relation to whether Recital 2.3 could constitute a covenant by the Grehans/Glenkerrin to complete the development, neither expert was aware of the recent decision in *Law Society v. MIBI*, and in particular neither had considered the judgment of O'Donnell J. where he deals with the possible status and import of a recital when considered in context with the operative parts.

142. There is a further reason for attaching little weight to Mr. Sweetman's evidence on the issue of construction of the Management Agreement. This is because the plaintiff's instructing solicitors asked him to address a number of specific questions, which he dealt with, but none of these caused him to address Clause 3.7. In response to the court he stated "I didn't at the time put any particular significance on the incorporation of the general conditions of sale" (Day 3, p. 39), and he agreed that it didn't feature in his Witness Statement, and that he only looked at it after he read Ms. Bainton's witness statement. Accordingly, from the outset Mr. Sweetman did not consider the Management Agreement as a whole. Interestingly when cross-examined in relation to Clause 3.7 Mr. Sweetman, described it as a "planning warranty" and stated that "It is not something that a Developer would ever do intentionally…it would be unusual for a Developer to give a planning warranty to a Management Company. It has been done here because they haven't excluded it." (Day 3, transcript pp. 42-43). Later in his evidence he confirmed that his reference to incorporation of the "planning warranty" included the Building Regulations – and that he used the term "as a catch-all to mean planning and building control". (Day 3, transcript p. 49). He further agreed that on the Transfer pursuant to the Management Agreement the transferors would have to "produce evidence of compliance", and that "the Management Company would be entitled to insist on them". (Day 3, transcript p. 51).

Discussion

143. The first thing to observe is that the wording of the Management Agreement of 6th April, 2001 points to the interaction between Management Agreement and the Lease of Easements, the form of which Mr. Maguire and Ms. O'Keeffe confirmed had been drafted in advance of 6th April, 2001. Although the Management Agreement does not specifically refer to "lease of easements", the definition of "Estate Service Charge" in Clause 1.5 refers to –

> "the aggregate costs, expenses and outgoings paid, or incurred to be paid or incurred by the Developer in discharging its obligations under the Fourth Schedule, Part 1 of the Management Agreement."

There is no Fourth Schedule in the document, which only has two short schedules, descriptive of the Estate Common Areas and the Title, and not in any way related to 'obligations'. However, the Fourth Schedule, Part 1 in the Sandwell Lease of Easements

(to take as an example) sets out the covenants by Sandwell Developments Limited in relation to the payment of rent, rates and taxes etc., including, at Clause 1.9, Estate Service Charges payable to the "lessor or after the transfer of the Common Areas to the Management Company."

There is a further reference in Recital 2.2 in the Management Agreement that confirms the interaction, or future interaction between the Management Agreement and prospective purchasers or lessees of units within the business campus. It reads: -

> "2.2 The Developer has laid out the estate for development as a commercial business campus and intends to lease sites in the Estate to prospective purchasers and to enter into leases and Management Agreements similar in form to the draft Lease and Management Agreement furnished as part of the execution of this Agreement or on such other terms as may be agreed between the Developer and prospective purchasers or lessees."

144. While this judgment adopts the term "Management Agreement" to refer to the agreement dated 6th April, 2001, in Recital 2.2 this term appears to be a further reference (as in the definition Clause 1.5), to Leases of Easements intended to be entered into by purchasers or lessees of units. Also while Recital 2.2 appears to contemplate such purchasers entering into leases, it goes on to contemplate that they may be "purchasers or lessees". Similar terminology is adopted in Clause 3.1, which is the operative provision placing the primary obligation on the Grehans and Glenkerrin to transfer the freehold interest in Folio 34112F, County Kildare to the defendant "subject to and with the benefit of the Leases and Management Agreements which are to be granted by the Developer and subject to the rights of the Purchaser and its members."

145. There are further references to "Management Agreement" in operative Clauses 3.3, 3.4 and 3.6 which can only be meaningfully read as references to the Leases of Easements intended to be entered into by purchasers or lessees of sites or units within the business campus.

146. I am satisfied therefore that the references to "Management Agreement" in clauses 1.5, 2.2, 3.1 3.3 and 3.4 must, in order to render these clauses and the entire agreement dated 6th April 2001meaningful, be read as referring to the Lease of Easements that had been drafted and furnished prior to execution. This was not a matter of controversy between the parties.

147. The defendant relied on Recital 2.3, in combination with the obligation on completion to comply with Clause 3.7 and provide appropriate certificates under General Condition 36 of the Law Society General Conditions of Sale (1995) Edition, to assert that the Developer is obliged to *complete* the carpark, which it is accepted forms part of the "estate" to be laid out and developed as a business campus, and which definition includes "estate common areas" which include the carpark. In opposing this construction, the plaintiffs relied principally on Clause 3.6 of the Management Agreement, which it was said conditions the effect of Recital 2.3.

148. Operative Clause 3.6 is quoted above. It clearly does entitle a Developer to alter the development of the Estate "as the Developer sees fit", and the Developer reserves to itself the right to "vary the location, layout and extent of the Estate, the sites on it, the car parking spaces and the Estate Common Areas including the exclusion of any additional lands". The second sentence "accordingly" empowers the Developer to make leases or assurances of part of the Estate "free form [*sic*] any conditions or covenants contained in any Lease or Management Agreement."

149. This is a significant empowerment that was clearly intended by the parties to give flexibility to the Developer to alter the planned Campus in the course of its development. As pointed out by Mr. Grehan in evidence this may prove commercially useful if the demand on the market place for a particular type of unit or development changed from that for which planning permission was originally obtained. Any such change in development would of course require new planning approval. This all makes commercial sense.

150. There was in fact no evidence that the Developer availed of the power in Clause 3.6, or that there was any variation in the planning permission and particularly that part of the permissions that pertained to the carpark which was developed and probably completed in 2003. While undoubtedly Clause 3.6 is an important power reserved to the Developer, it does not conflict with the obligation, asserted by the defendant, on the Developer to complete the development in accordance with plans and specifications produced. In my view that should be construed as the overriding obligation whether the development of the estate is (as happened) carried out in accordance with the original planning permission plans and specifications, or whether it is carried out with alterations, whether in the development, location, layout or extent of the estate, as contemplated by Clause 3.6.

151. In either case the commitment to complete in Recital 2.3 can be construed harmoniously with Clause 3.7 in the operative part, in placing on the Developer the overriding obligation to complete the development of the estate in accordance with planning permission and building regulation/bye-law approval such that at the time of the transfer the Developer is in a position to furnish appropriate certificates in relation to Planning and Building Control Act/Regulations compliance.

152. I agree with the defendant's submission at para. 11 of their Closing Submissions that –

> "...This construction permits for a coherent and consistent construction of Clause 2.3 and 3.6 of the Management Agreement such that the Developer has an entitlement to vary the development of the campus (Clause 3.6), but that which it does build it must complete (Clause 2.3)."

To put it another way, it would not be consistent with the Developer's commitment to completion if it was entitled to rely on Clause 3.6 as a justification for failing to complete, or failing to complete properly and in accordance with planning and building control requirements, estate common areas including a carpark where there has been no

alteration of the development and no planning permission has been sought for such alteration.

153. In fact even Mr. Sweetman's evidence did not support the plaintiff's reliance on Clause 3.6, when he stated (Day 4, p. 15) –

> "A. The Developer has a right to vary but he can't do so in ignoring the rights to third parties that he has already granted, and as the carpark has been licensed out to various unit owners, it can't, having integrated it as part of the estate then use that clause to extract it again. The provisions of that clause say that where it is decided not to develop part of the estate that it can be excluded from it, rather than to say some part that had been part of the common areas I am now taking away, because maybe the management company couldn't complain in the circumstances, but every unit owner who had relied on and taken lease of easements on the basis of the common areas, would object."

Of course *ex post facto* evidence is not an aid to construction of the Management Agreement, but this illustrates the confines of Clause 3.6.

The standard to which the Management Agreement requires the Estate Common Areas to be completed

154. The second issue is the standard to which the Developer must complete the development of the estate, including the carpark and Estate Common Areas. Having regard to the evidence and admissions made in the course of the hearing it is no surprise that in the plaintiff's Closing Submission the following concession is made: -

> "8. It is important to note that there is no contest that the Developer has an obligation to complete the development in accordance with planning specifications, building regulations and bye-laws at the time of the development, which includes health and safety regulations because of the incorporation of the General Conditions. Therefore, the Counterclaim Terms cannot be required for that purpose."

155. What the plaintiffs continued to resist were the defendant's claims pleaded in the amended defence and counterclaim at paras. 7.2 – 7.4, and 31.1 and 31.2, which may be restated as follows: -

> "A. Prior to the acquisition of the Estate Common Areas by the Defendant, Glenkerrin Homes is required to complete the development of the Estate as a business park and the Estate Common Areas therein, in accordance with the plans and specifications thereof, *to a good and workmanlike standard free from defects* and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate Common Areas do not pose a health and/or safety risk to the occupiers of the Estate or members of the public.
>
> B. The defendant is neither required or obligated to require the Estate Common Areas until such time as Glenkerrin Homes has completed the development of the Estate as a business park and the Estate Common Areas therein in accordance with the

plans and specifications thereof *to a good and workmanlike standard free from defects* and in accordance with the applicable grant of planning permission, building regulations and standards, and such that the Estate common Areas do not pose a health and/or safety risk to occupiers in the Estate or members of the public." [Emphasis added].

156. In light of the concession just referred to it is the words in italics to which continued objection was taken. It was argued on the plaintiff's behalf that reading in the words "to a good and workmanlike standard free from defects" goes far beyond what is required by the incorporation of General Condition 36.

157. I agree with the submission that the standard defined by the words "to a good and workmanlike standard free from defects" cannot be read into the Management Agreement by virtue of incorporation of General Condition 36. The key wording in that General Condition has been referred to earlier in this judgment, and nowhere does it make reference to such a standard. In summary it is: -

(1) A warranty by the vendor that the development is compliant with planning permission and building bye-law approval;

(2) an agreement by the vendor to furnish copies of all Fire Safety Certificates and Commencement Notices under the Building Control Act 1990;

(3) an agreement that the vendor will on completion furnish confirmation of compliance with all financial contribution or bonds conditions of any permission or approval;

(4) an agreement by the vendor on completion to furnish the certificate or opinion of an architect or engineer that the development has been "carried out in substantial compliance" with permissions and approvals; and

(5) a warranty by the vendor that "there has been substantial compliance" with the provisions of the Building Control Act, 1990 or any regulations from time to time made thereunder, supported by the certificate or opinion of an architect or an engineer.

158. This is the express extent of the Developer's obligations under the Management Agreement, and it is implicit from the incorporation of this provision that upon completion of the Transfer the Developer will have completed the development in accordance with the standards required in all relevant planning permissions and approvals and all relevant parts of the Building Control Act 1990 and any regulations made thereunder to the standard required for certification. Insofar as that Act or those regulations sets standards as at the date of construction, it is these standards that the Developer must comply with, and in respect of which confirmation certificate, opinions or Fire Safety Certificates must be furnished prior to completion, and not any other or higher standard. The defendant's argument in relation to an express term, or a term "to a good and workmanlike standard

free from defects" that must be "read in" based on the Management Agreement wording and General Condition 36 must therefore fail.

159. The defendant argues in the alternative that the standard "*to a good and workmanlike standard free from defects"* should be implied. This argument does not stand up to scrutiny. In *Sweeney v. Duggan* [1997] 2 IR 531, the Supreme Court set out the test for the implication of terms and the principles were set out by Murphy J. at p. 538: -

> "There are at least two situations where the courts will, independently of statutory requirement, imply a term which has not been expressly agreed by the parties to a contract. The first of these situations was identified in the well-known case *The Moorcock (1889)* 14 P.D. 64, where a term not expressly agreed upon by the parties was inferred on the basis of the presumed intention of the parties. The basis for such a presumption was explained by MacKinnon L.J. in *Shirlaw v. Southern Foundries (1926) Limited* [1939] 2 K.B. 206, at p. 227 in an expression, equally memorable, in the following terms: -
>
> > "*Prima Facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would intensely suppress him with a common 'oh of course'"

160. Further in *Meridian Communications v. Eircell Limited* [2002] 1 IR 17, O'Higgins C.J. also summarised the principles that govern the identification of an implied term in an agreement as follows, at p. 40: -

"- before a term will be applied in a contract it must be necessary to do so, and not merely reasonable;

- the term must be necessary to give business efficacy to the agreement;

- it must be a term that both parties intended, that is, a term based on the presumed common intention of the parties;

- the court will approach the implication of terms into an agreement with caution;

- there is a presumption against importing terms into a contract in writing and the more detailed the terms in agreed in writing the stronger is the presumption against the implication of terms;

- if the terms sought to be implied cannot be stated with reasonable precision, it will not be implied."

These principles were applied by the Court of Appeal in *Flynn v. Breccia* [2017] IECA 74.

161. I have already decided that the Management Agreement properly construed included an obligation on the Developer to complete the development in accordance with plans and

specifications, and in accordance with the warranties and other commitments set out in General Condition 36. The Management Agreement therefore expressly included terms related to what was to be developed/constructed and the standard to which these works were to be undertaken. Where this is covered by an express term it is very difficult to see how the court could imply a term that is more onerous. How could it be said that such an implied term was "necessary" where the contract already addressed works specification, permissions and standards? Mr. Grehan in his evidence suggested that he and the first named plaintiff would always have sought to develop common areas to a high standard, and with good workmanship, because their good reputation as builders depended on finishing developments properly and to a high standard, and he considered this to be a commercial necessity. However, that is a subjective intention, and even if it was the actual intention of the parties to the Management Agreement in 2001, it is not necessarily the view that would be taken by "an officious bystander" viewing the agreement as a whole.

162. In any event I am of the view that the distinction between the standard conceded by the plaintiffs as being part of the agreement, and the higher standard contended for by the defendants, ultimately has no relevance to the present case having regard to the findings that I have already made - to the effect that the carpark as constructed was structurally defective, and in breach of the Building Regulations 1991 or Building Regulations 1997, the technical guidance document I.S. 326 of 1995 and, in effect, BS 8110 (1995), and my finding that the condition of the carpark was always and remains such that the plaintiffs cannot currently comply with General Condition 36.

Obligation to transfer under the Management Agreement

163. As has been seen Recital 2.3 stipulates that the Developer will complete the development "…and shall lease all of the units/sites on the Estate and on the demise of the last Unit/Site; – 3. IT IS HEREBY AGREED". This indicates an intention that what follows in the operative part is to occur after the last unit has been developed.

164. The operative part then provides: -

> "3. IT IS HEREBY AGREED
>
> 3.1 that in consideration of the Purchaser assuming the Developer's liability under the Leases hereinafter mentioned and further in consideration of the sum of Ten Pounds (IR £10.00) the Vendor as registered owner shall transfer and the Developer as beneficial owner shall transfer and confirm onto the purchaser ALL AND SINGULAR the freehold interest in ALL THAT AND THOSE that part of the lands comprised within Folio 34112F of the Register County Kildare more particularly described in the First Schedule hereto, subject to and with the benefit of the Leases and Management Agreements which are to be granted by the Developer and subject to the rights of the Purchaser and its members.
>
> 3.2 The transfer will be completed at the expiration of 28 days (twenty-eight days) from the service of a notice requiring completion served by the Developer's Solicitor

on the Purchaser provided always that the notice will be served within the Perpetuity Period. Completion will take place at the office of the Developer's Solicitor."

3.3 Pending completion the Developer shall subject to the payment to it of the estate service charge provided for in the Management Agreement, carry out all of its obligations contained in the said Management Agreement and on completion all service charges whether or in credit or in arrears shall be apportioned as between the Developer and the Management Company as of the completion date."

In the Definition section at Clause 1.2 "the Perpetuity Period" is defined to mean "the period during the lives of the issue now living of His Britannic Majesty George V and for 21 years after the death of the survivor of such issue".

165. The ordinary meaning of these words is that the lease or demise of the last unit triggers the obligation on the first and second named plaintiffs as "vendors" to transfer the Estate Common Areas to the Management Company, but the obligation to actually complete is not triggered until the 28-day notice required by Clause 3.2 is served by the Developer's Solicitor.

166. At the date of hearing sales were agreed in respect of the last two units, including Block C and the Link Building, but no 28-day notice had been served. It was therefore the plaintiff's contention that the vendor's obligation to complete the transfer had not yet arisen.

167. The defendants however placed reliance on a clause in the Lease of Easements. The form of the Lease of Easements was one of the suite of documents prepared at the same time as the Management Agreement, and, taking the Sandwell Lease of Easements as an example, the Management Agreement is recited at Clause 3.3, and Operative Clause 2 provides: -

"The Lessor and the Management Company hereby covenant and undertake with the Lessee to complete the Assurance pursuant to the Agreement for Sale of the Common Areas *as soon as practicable after the sale of the last Unit* and in the event of the Lessor being desirous of retaining any of the Units, the Lessor shall take an Assurance of same as soon as practicable after completion of the sale of the remainder of the Units and in any event within 60 days of same." [Emphasis added]

In the slightly different Leases of Easements utilised by the Receivers in respect of unit sales after their appointment in 2011 there is a similar clause – Clause 5 in the operative part - which provides: -

"5. The Lessor and the Management Company each hereby covenant and undertake with the Lessee to complete the assurance pursuant to the Management Agreement *as soon as practicable after the sale* of the last Unit and in the event of the Lessor

being desirous of retaining any of the Units, the Lessor shall take an Assurance of same *as soon as practicable after completion of the sale of the remainder of the units and in any event within 60 days* of same. The Registered Owners covenant to join in the aforesaid Assurance if required." [Emphasis added]

It is only the earlier of these two documents that can be relied upon, on the assumption that it follows the form of Lease of Easement that was furnished prior to execution of the Management Agreement. As such its wording represents part of the 'matrix of fact' that aids construction of the Management Agreement.

168. That being said the form of the Lease of Easement, although part of the suite of documents prepared at the time of the Management Agreement and therefore part of the context in which the Management Agreement was concluded, is not to be read as part of the Management Agreement. There is no express provision, such as a term incorporating the form of Lease of Easments, that would permit such a construction. Accordingly, if Clause 3.2 is construed on its own its wording means that the defendant has no entitlement to insist on service of a notice to compel completion of the transfer of the common areas, and the timing of such transfer is within the control of the Developer who can serve the notice at any time up to expiry of the Perpetuity Period.

169. However this raises the question whether such a narrowly based interpretation conflicts with the intention of the parties which emerges from a reading of the Management Agreement as a whole, and in particular Recital 2.3 which contemplates the transfer of the common areas agreed in Clause 3.1 happening "on the demise of the last Unit/Site". There is an obvious tension between a strict construction of Clause 3.2 on its own without reference to Recital 2.3, which envisages the assurance happening "on the demise of the last unit" and not being deferred, potentially indefinitely, at the whim of the developer, if a 28 day completion notice mentioned in clause 3.2 is not served.

170. Viewed another way, the narrow interpretation yields a result that is so commercially lacking in common sense that it can only be regarded as absurd, and not one that any commercially minded developer and management company would agree. If there was no obligation on the developer to serve a 28-day notice within a reasonable time of the demise of the last unit it would be open to Glenkerrin to decline or refuse to serve such a notice for many years or decades, with the prospect that in the meantime Glenkerrin might go into liquidation or be struck off for failing to file returns. Indeed this very suggestion - that the developer was entitled to delay serving a notice indefinitely leaving, in the court's words, "the common areas forever more in the ownership of the developers…" (Transcript Day 1, p.154) - was made by counsel for the plaintiffs in the course of dialogue with the court. It might also enable the developer to side step the obligation to complete the estate common areas in accordance with its contractual obligations. Such a possibility would fly in the face of good estate management and business efficacy, and cannot have been within the contemplation or intent of the parties.

171. In my view this entitles the court to consider the wider suite of contemporaneous documents – including the form of Lease of Easements that is referenced in clauses 1.5, 2.2, 3.1, 3.3, 3.4 and 3.6 - to ascertain the true intention of the parties.

172. When regard is had to the draft Lease of Easements, the parties' real intentions become clear: the covenant by Glenkerrin in Clause 2 of the form of the Lease of Easements "to complete the Assurance… *as soon as practicable after the sale of the last Unit*" shows that as soon as the last unit had been sold, the parties intended, and Glenkerrin covenanted and undertook, to take the steps necessary on its part to complete the Transfer of the Common Estate Areas "as soon as is practicable".

173. Alternatively, if it were necessary to do so I would imply as a term of the Management Agreement that "the Developer covenants and undertakes to serve such a notice (requiring completion within 28 days) as soon as practicable after the sale or lease of the last unit".

Such an implied term passes the test set out in *Sweeney v. Duggan* by Murphy J.

If, while the parties were making the Management Agreement, an officious bystander were to have suggested that the notice was to be served and the assurance to be executed "as soon as practicable after the sale of the last unit" the parties would have said "oh, of course", and would surely have referred to the provisions of the draft Lease of Easements.

Accordingly in the alternative I would find that the implication of such a term is necessary in order to give business efficacy to the Agreement, and that it is a term that the parties intended or maybe presumed to have intended, based on the content of Clause 2 of the draft Lease of Easements.

Alternative reasoning

174. Even if such a term were not to be implied, independently of the Management Agreement Glenkerrin has in fact, in all of the Leases of Easements (there are some 55 units in all, 3 of which are combined in one ownership), expressly covenanted and undertaken with each of the lessees or unit purchasers to complete the assurance pursuant to the Management Agreement "as soon as practicable after the sale of the last Unit". While strictly speaking this is a covenant and undertaking between Glenkerrin and the defendant on the one part, and each lessee on the other part, its importance cannot be overstated. It means that each and every unit lessee or owner would be entitled, after the sale of the last unit, to take proceedings for breach of covenant against Glenkerrin and seek appropriate mandatory relief if, after the passage of a reasonable period of time to allow for the "practicalities" to be addressed, no clause 3.2 completion notice was served. It should also be noted that in the Leases of Easements executed after the appointment of the Receivers in 2011, all of them were entered into by, *inter alia,* Glenkerrin as "lessor", and by the Receivers as "joint statutory receivers", and in the operative part the demise was made by "the lessor or acting by the joint statutory receivers" and "the Registered Owners acting by the joint of statutory receivers"

175. In pointing this out I am mindful of clauses 15 and 16 which provide: -

> "15. It is hereby expressly agreed and declared that nothing in this Lease will prejudice or affect the estate, person or properties of the Joint Statutory Receivers who join in this Lease solely in their capacity as Joint Statutory Receiver aforesaid and not otherwise.
>
> 16. The Lessee hereby acknowledges and accepts that the [*sic*] each of the Joint Statutory Receivers is executing this Lease in their capacity as Joint Statutory Receiver only. For the avoidance of doubt, the Lessee hereby acknowledges and agrees that the Joint Statutory Receivers shall not have any personal liability under or in connection with this Lease or under any document executed pursuant to this Lease in any respect."

176. The purpose and effect of these clauses is to protect the Receivers and their property and estates from any personal liability. It does not necessarily follow that a Lessee would not have an entitlement to join them in an action to compel performance of the Management Agreement, or to obtain orders against them for the purposes of ensuring implementation of any order that might be made against the developer.

177. I am satisfied therefore that Glenkerrin is bound to take all necessary steps to complete the Assurance pursuant to the Management Agreement "as soon as practicable after the sale of the last Unit". This means that the 28-day notice referred to in Clause 3.2 must be served by the developer "as soon as practicable after the sale of the last unit".

178. In that the sale of the last unit has taken place the time for service of such a notice can be described as "imminent". However insofar as Glenkerrin/the Receivers have the obligation to complete the common areas by remedying the structural defect in the carpark first, the time for service is postponed until such remedial work is carried out, whereupon the service of such a notice is rendered "practicable" because certification can be provided on closing.

Had the defendant a duty to execute the Lease of Easements in respect of Block C/The Link Building

179. The Management Agreement does not in terms mandate that the defendant enter into Leases of Easements. However, Recital 2.2 refers to the Developer's intention to develop the estate as a commercial business campus and to lease sites to prospective purchasers "and to enter into leases and Management Agreements similar in form to the draft lease and Management Agreement furnished part of the execution of this Agreement or in such other terms which may be agreed between the Developer and prospective purchasers or lessees." Further, the operative Clause 3.1 stipulates that Ray and Danny Grehan as registered owners are to transfer the Estate Common Areas "subject to and with the benefit of the Leases and Management Agreements". The Management Agreement referred to is the draft form of Lease of Easements, and this form of Indenture includes as parties Glenkerrin, the defendant as "the Management Company" and the unit purchaser.

180. It is therefore apparent that it was intended by the parties to the Management Agreement that the defendant would be a party to and would execute all Leases of Easements in the form "furnished prior to the execution of this Agreement". Although not a relevant consideration in the construing of the Management Agreement, the defendant did in fact execute Leases of Easements in respect of all sales prior to 2011, and following the appointment of the Receivers the defendant continued to execute similar Leases of Easements up to the point that it declined to execute the Lease of Easements in respect of the sale of Block C/The Link Building.

181. But was the defendant legally obliged to execute that Lease of Easements? Mr. Sweetman's opinion was that "good estate management would require that the management company to join in each Deed of Lease of Easments" (Witness Statement para.5.2.2) and that this would be "generally accepted conveyancing practice" (para. 5.2.3). At hearing he indicated that sales of units were dependant on the Management Company entering into Leases of Easements, and he stated (Day 3, pp. 23-24): -

> "A. …it is critical in the context of the management structure, to my mind that the Management Company executes the Lease of Easements. It is critical, not so much from the point of view of the Developer in this specific instance curiously, but in the context of the overall integrity of the Management Scheme, and the reason for that is that the Management Company wants to be able to have a direct privity in relationship with each unit owner, and that is more specifically important in the context of collection of service charges, because if there is one unit owner who is enjoying the benefit of the estate common facilities, but is not paying their service charge contribution, is then liable, I should say to pay their service charge contribution, that undermines the integrity of the entire scheme…"

And at p. 25 of the transcript he stated: -

> "…to answer their specific question it is my view, that for the integrity of the management structure it is absolutely essential that the Management Company join in each of the Lease of Easements and has privity with each of the unit owners."

Mr. Sweetman also accepted under cross-examination that the Receivers wouldn't have achieved a proper price for the sale of Block C unless they could provide a Lease of Easements that would provide access to the common areas and use of the carpark, although again this is not relevant to the construction issue.

For these reasons Mr. Sweetman gave as his opinion that the defendant was obliged to execute a Lease of Easements by virtue of the Management Agreement.

182. Ms. Higgins, the plaintiff's conveyancing solicitor, did not entirely agree. Under cross-examination she accepted that "there is no specific obligation, there is no express obligation" in the Management Agreement (Day 2, p. 69). However, Ms. Higgins stated "but she had every reason to expect that [the Management Company] would sign [the Leases of Easements] in a similar way as they had done so."

183. In closing submissions counsel for the plaintiff argued that it is inconsistent for the defendants to assert a term or implied term that the assurance of the estate common areas under the Management Agreement must be completed "as soon as is practicable" after the demise of the last unit, based on clauses in the form of Lease of Easements, and at the same time to deny an obligation to execute a Lease of Easements simply because there is no express term in the Management Agreement in posing such an obligation.

184. There is force to Counsel's argument. In my view the references in the Management Agreement of 6th April, 2001 to "Management Agreement", which I take to be references to the form of draft Lease of Easements furnished prior to execution, taken in conjunction with the suite of documents and in particular the draft form of Lease of Easements, disclose the clear common intention of the parties that the Management Company would execute a Lease of Easements in that form at the time each sale or demise of a unit in the business campus was completed. Such common intention was clearly grounded in the need to provide overall integrity to the management scheme, centred on the Management Company in which each unit holder was to be a member, and which company had to be in a position to carry out its functions including the levying and collection of state service charges from all members.

185. I have come to the conclusion therefore that were it necessary for the court to determine this issue, I would decide that it was an implied term of the Management Agreement that the defendant would enter into Leases of Easements with purchasers of units being called upon so to do, in the form of the Lease of Easement furnished prior to execution of the Management Agreement "or in such other terms as may be agreed between the Developer and prospective purchasers or lessees". This is strongly implied by the wording in the Management Agreement and its interconnection with the draft Leases of Easements, and is necessary to give business efficacy to the Management Agreement.

186. However, it is doubtful whether the court needs to make such a determination for a number of reasons. Firstly, as a result of the without prejudice settlement entered into in respect of the interlocutory injunction application, the defendant in fact executed the Lease of Easements in respect of Block C/The Link Building (the execution of such an agreement with the purchaser of unit J1 was never raised as an issue). To that extent the issue is moot.

187. Secondly, in the face of the refusal of the Receivers to address the structural defects in the carpark, and given the fact that the proceeds of sale of Block C/the Link Building represented the only fund from which the developer/the Receivers could ever fund remedial work, in my judgment the defendant was entitled in all the circumstances to decline to execute the Lease of Easements unless and until the plaintiffs provided satisfactory undertakings to remedy the structural defects in the carpark, or at least, if the sale proceeded, to hold the proceeds in escrow pending resolution of any dispute as to responsibility to carry out and fund those works – which is precisely what the defendant's solicitors sought in correspondence prior to the institution of the proceedings.

Who has the obligation to remedy the structural defect in the carpark?

188. Two arguments were made on behalf of the plaintiffs to suggest that this obligation did not fall on the Receivers. The first was that the repair/renewal and capital costs are captured by the estate service charges arising under the Lease of Easements, and are therefore the responsibility of the defendant rather than the Developer. The second is that the Receiver has no liability as it has not adopted the liabilities of the developer under the Management Agreement. These are now addressed in turn.

(1) Leases of Easements argument

189. It was submitted that the structure of the Lease of Easements is such that repairs of structural defects are covered by the Estate Service Charge, and that it is "manifest from the Lease of Easements that the party that collects the Service Charges and takes the benefit of them is the party that carries out the Services under the Lease of Easements". (Para. 52 of Closing Submission). In support of this the plaintiff relied upon the uncontroverted fact that the defendant is the entity that is collecting the Estate Service Charges.

190. The argument relied on principally on words highlighted below from the Seventh Schedule of the Lease of Easements Part 2 of which provides: -

> "The Lessor and after the transfer of the Estate Common Areas to the Management Company then the Management Company covenant with the Lessee: -
>
> (1) The Services subject to reimbursement by the Lessee of the Lessee's share of the Estate Service Charge to use all reasonable endeavours to provide the following services in accordance with the principles of good estate management.
>
> 1. As often as may be required to *maintain, repair, cleanse and renew* the Estate Common Areas in all buildings, erections and fixtures on the Estate Common Areas, if any, including the roads, paths, car parking area, pipes, drains, water courses, sewers, cabling wires and other conduits for passage of water, gas, electricity, telephone radio and television transmissions, heating fuels and other services in, under or passing through the Estate Common Areas."

191. In addition reliance was placed on Clause 1.21 in Part 2 which provides: -

> "Provision of such sinking fund or other reserve as the Lessor/Management Company may reasonably deem fit for *the replacement or renewal of the Estate Common Areas* or any part of them for the renewal, replacement or purchase of other capital items, machinery or equipment in the Estate Common Areas…"

The argument made was that the highlighted parts of this provision clearly contemplated Glenkerrin, or the defendant post-Transfer, charging unit holders in such a way as to create a sinking/reserve fund for the purposes which would include repair, renewal or replacement of the car park.

192. The plaintiffs also relied on the words highlighted below in Clause 1.22 in Part 2 which lists as one of the "Estate Services" in the Seventh Schedule: -

> "The provision of such other Services *including capital items* as the Lessor or the Management Company shall consider more properly and reasonably to be provided for the benefit of the Estate and for the proper maintenance and servicing of the Estate."

193. The above quotations are from the Sandwell Lease of Easements but similar provisions appear in Part II of the 7th Schedule in the TMT Digital Centre Limited Lease of Easements, being a sample Lease of Easements entered into by the parties, including the Receivers post-2011, at Clauses 1.1, 1.28, and 1.30.

194. The plaintiffs also relied upon the opinion of Mr. Sweetman, expressed on Day 3, pp. 85-86 where the following exchange took place with the court: -

> "Mr. Sweetman: I see that the service charges are drafted wide enough to capture all works that may need to be done once development has been built, if you like. In other words, while a service charge provisions deal with capital expenditure, I think in any fair interpretation that must mean future capital expenditure, but other than the initial provision of the development. The service charges are drafted wide enough to capture and needs to be drafted wide enough to capture any issue that may arise subsequently.
>
> Mr. Justice Haughton: So all 47 unit holders will have to contribute if there is a significant structural expenditure required in the car park. They will all have to contribute, there will be no question of it falling just on the shoulders of Blocks A, B, C, D, or whatever, or even fewer than that?
>
> A. Yes, that is correct, Judge, and that would have been the case whether or not the company had gone into receivership and would have been, in my view, funded through the service charge regardless."

195. I reject these arguments for a number of reasons. What is at issue in the present case is a capital item, but it is not maintenance, repair or renewal of the car park as that might be commonly understood. Rather it is a matter of completing the car park to a satisfactory standard, as envisaged by the need to provide certificates of compliance in accordance with General Condition 36 at the time of transfer of the Estate Common Areas. The car park must be satisfactorily completed by the developer *before* the obligation of maintenance repair or renewal falls on the shoulders of the unit holders/the defendant as management company. Fundamentally the obligation to "repair, maintain and renew" does not encompass the *original* capital expenditure required to complete the development. This is clear from a reading of the Lease of Easements as a whole, including the power to establish "sinking" funds for future capital expenditure on renewal or replacement.

196. Secondly, the legal obligation to collect service charges, including charges required for repair or renewal or create a sinking/reserve fund for replacement, rests with the developer until the common estate areas have been transferred. As that transfer has yet to occur the legal obligation remains with Glenkerrin.

197. The fact that *de facto* the defendant has taken responsibility for repair and maintenance, and collects the service charges, does not alter this. Firstly, there was no evidence to suggest that the defendant had in fact taken on responsibility for any capital project, still less one concerned with making good structural defects in developed Estate Common Areas. Secondly Ms. Rose Anne Grehan, who was an accountant and employee of the defendant from 2005 to 2012 and has since then been the defendant's operations manager, and who I found to be a good and reliable witness, gave evidence that the entry/exit to the basement of the car park was blocked off by Glenkerrin and this remained the position until it was opened up by the Receivers' agents in 2016. The defendant did not have access until then, and since then the basement has remained under the control of the Receivers/their agents, and their contractors who have undertaken works which they consider sufficient to "commission" the basement for use as a carpark. Thus it cannot be said that the defendant has taken over *de facto* control or possession of or responsibility for the basement carpark. It has not even been possible for the defendant to extend its public liability insurance to the basement, due to Travelers' concerns over structural deficiency and safety – and it seems that the only insurance put in place was organised by the Receivers. It is of note that Ms. Grehan requested sight of this insurance in the context of the Receivers' contractors entering and carrying out works. Thus the Receivers remained in control of the car park, and in particular the basement. The lack of merit in this argument is further pointed up by the fact that the Receivers were billed by the defendant for service charges for Block C (ground floor) and Unit J1, but these were outstanding at the time of the hearing.

198. There is a further reason why this argument is misconceived. Clause 1.31 in Part 2 of the TMT Lease of Easements provides: -

> "The provision of other Services including capital items as the Lessor or the Management Company shall consider ought properly and reasonably to be provided for the benefit of the Estate and for the proper maintenance and servicing of the Estate. All costs and fees in relation to the above services must be reasonable and competitive BUT PROVIDED ALWAYS notwithstanding any provision to the contrary contained in this Lease they shall be excluded from the Lessee's Service Charge liability: -
>
> > 1.31.1 The cost of any works to the extent that money has been or is recovered from third parties in respect hereof;
> >
> > 1.31.2 Al*l costs occasioned as part of the initial construction of the Estate or the completion of any incomplete structural elements thereof;*

1.31.3 The enforcement of the provisions of any other lease of the Estate or any other part of the Estate which are not for the benefit of other tenants or occupiers of parts of the Estate;

1.31.4 *Any costs and expenses associated with the making good of any historic environmental contamination or structural deficiencies to any part of the Estate*." [Emphasis added]

199. Accordingly, and given that this is a sample of the Leases of Easements entered into by purchasers of units since 2011, there is an express provision, signed up to by all of the plaintiffs including the Receivers, to the effect that the Estate Services covenants by the Lessor, and after transfer of the Estate Common Areas by the Management Company, do not cover costs occasioned on "the completion of any incomplete structural elements" (1.31.2) or costs or expenses associated with "making good…structural deficiencies to any part of the Estate" (1.31.4)."

200. The cost of remedying the structural deficiency in the car park comes fairly and squarely within the provisions of Clause 1.31.1 and Clause 1.31.4, and therefore the other covenants, in particular the primary covenant in relation to repair and renewal in Clause 1.1, simply cannot apply to purchasers of units since 2011. Further it would be invidious if the court were to accede to the plaintiffs' argument to the extent only that purchasers of units prior to the appointment of the Receivers would through their service charges have a legal obligation to discharge the cost of remedying the structural deficiencies in the car park. By executing Leases of Easements since 2011 with Clause 1.31.1 the Receivers and other parties were accepting, at least by implication, that unit holders and service charges are not liable for the cost of remedying incomplete or deficient structural elements in the Estate Common Areas, which are of course part of the Estate as defined in the Lease of Easements. In my view the inclusion of this express provision estops the plaintiff from pursuing any contrary argument.

(2) Can the Receivers disclaim the liabilities of the developer?

201. A second argument relied on by the plaintiffs was that, because the Management Agreement, and any obligation assumed thereunder by the Developer in respect of common areas including the carpark, predated the appointment of the Receivers, the Receivers could disclaim the contract. In written Closing Submissions at para. 68 Counsel relied on Forde, Kennedy and Simms, "*the Law of Company Insolvency*" (Third Edition), at para. 5.30

"5-30 Unlike the situation in liquidations, there is no statutory mechanism whereby a receiver can disclaim or repudiate onerous contracts. By "onerous" here is meant obligations which would cost the company more to perform than the amount of damages it would have to pay for breach of the contract. However, because these contracts do not bind a receiver, he can simply prevent the company from performing its obligations and thereby, in effect, disclaim the contract. When the company does not fulfil its obligations, the other party has a right of action against it for damages. But that claim ranks after the debenture, so that generally the

receiver is not concerned with the claim. In sum, therefore, unless the company stands to make a profit from the contract, the receiver will not cause it to perform its side of the bargain. For instance, in *Macleod v. Alexander Sutherland Ltd*, the company sold land and undertook in the contract to perform specified building and construction work on it. That work was never carried out, and the company was placed in receivership. It was held that the company, through the receiver, could not be compelled to perform that work. The court's reasoning was that,

> '[s]ince *ex hypothesi* the responsibility for whatever is done [under] the contract must in fact be done by the receiver, it [is] out of the question to pronounce a decree ostensibly against the company, which would in effect result in the receiver either incurring personal liability or in his bearing the responsibility for contempt of court.'"

202. Counsel also relied on the following passage from Lightman & Moss on "*the Law of Administrators and Receivers of Companies"* (6th Edition), at para. 10-019: -

> "If and when a receiver decides that the company shall repudiate the contract, the other party is left with his remedy in damages against the company and a claim as an unsecured creditor and has no claim against the receiver or his appointer, notwithstanding the receiver's interim adoption of the contracts in the course of managing the company's business. This does not offend against basic conceptions of justice and fairness. The liability has been undertaken by the company at the inception of the contract and the benefit accrues to the company even when the receiver is in office. The other contracting party (like other creditors) must look to the company for payment. During the receivership the other contracting party is in no way inhibited from exercising his contractual rights and remedies."

203. It was therefore argued that the Receivers were not party to the Management Agreement and that they had not assumed any liability under it. Counsel argued that this was reflected in Special Condition 6.2 of the Contract for Sale of Block C/the Link Building, under which the purchaser acknowledged that the Receivers were executing the contract in their capacity as Receivers, and that they would not have any personal liability- a special condition that reflects the position as set out in Clauses 15 & 16 of the Leases of Easements executed by the Receivers quoted earlier in this judgment.

204. The significance of this submission, if it is correct, became very clear from the evidence given by Mr. Billy Murphy, a director in Grant Thornton designated by the Receivers to address any matters arising from the receivership, and the person "most closely connected with the issues arising in the receivership" (para. 1 of his Witness Statement). His evidence under cross-examination (Transcript Day 2 pp. 186-196) was that the Receivers did not see themselves as "stepping into the shoes of the Developer", and that their task was to realise the assets for the charge holder. He stated that "in three weeks' time we will be finished the works programme which will address the issues that currently prohibit [the carpark basement] from use and we have a purchaser who is willing to accept that and willing to close on those grounds. He agreed that the purchaser of Block

C/Link Building was paying consideration on the basis of the provision of 172 car spaces. He agreed that this money would all be taken by the charge holder (NAMA). He was asked (p. 188) in effect whether the sale proceeds would be used to discharge the receivership "if he knew you were not able to transfer over the common areas" because of structural issues with the basement carpark. He agreed that this was what would happen "if it was a position that we weren't able to transfer without incurring further costs…we are selling a unit, we are realising assets which is only going to cover a fraction of the debt here." He was asked (p. 187) what would happen if the Receivers could not provide an opinion or certificate of compliance with planning or building regulations, and hence could not comply with the Management Agreement obligations in relation to transfer of the common areas, to which he answered "I presume we agree to discharge", which he agreed meant that the money which the Developer was receiving would all be taken by the charge holder. He agreed that this would be the position if the Receivers weren't able to transfer without incurring further costs (p.188). He later agreed that if the monies were paid over to NAMA, the Receiver's recommendation to NAMA would be that the cost of remedial works would have to be paid by existing unit holders through the levying of service charges (p.190).

205. Added to this is the evidence of Ms. O'Sullivan of NAMA, who under cross examination was asked about what would happen to the money obtained from the sale of Block C and the Link Building, and whether there would be any transfer of the common areas (Transcript Day 1, commencing p.143):

> "319.Q.……once you have gotten the money from the sale of C, you will then direct Mr. McCann or the recommendation will be to transfer over the common areas and walk away?
>
> A. Well, as required under the documentation to initiate the process of transfer of the common areas.
>
> 320 Q. Yes?
>
> A. And should issues arise then, the Receiver will have to come to NAMA.
>
> 321 Q. Yes. But are you saying NAMA will refund the Receiver if it suddenly transpires that there is an issue in relation to certifying either a compliance with planning or compliance with the then applicable Building Regulations. Will NAMA fund the works if it has to be done?
>
> A. Where it's demonstrated that it's a liability of the Receiver.
>
> 322 Q. Will NAMA fund it or not?
>
> A. Only if it's a liability of the Receiver."

On re-examination (Transcript p.154) Ms. O'Sullivan was asked if the transfer of the common areas involved certification that could "incur a liability of one million or 1.5

million or two million would that be something that would influence NAMA's decision?" to which she answered "It could do yes".

In the exchange with the court immediately following this, mentioned earlier in this judgment, I suggested that this "leaves the common areas forevermore in the ownership of whom, the developers or…" to which Mr. Howard responded "Actually that is exactly what happens, Judge…".

This evidence reinforces my view that, absent court intervention, there is a likelihood that the NAMA will decide that the cost of remedial work is too great, and that, on the Receivers recommendation it will be paid over to NAMA without certification or completed transfer, leaving the unit holders to through their service charges to pay for the remediation of structural defects arising from the developers default because the Receivers may have no personal liability.

206. The court was informed that pending delivery of this judgment the proceeds of sale of Block C/the Link Building will be held by the Receivers/their solicitors. I am satisfied that, absent that undertaking or any further court intervention, and absent any further agreement between the parties, the Receivers were/are likely to pay over to NAMA the net balance of the purchase monies in part discharge of the Receivership, and that that payment would be made in the belief, and in the reliance on advice received, that they have no legal obligation to remedy the structural defects in the carpark, and in reliance on contractual clauses in the contract of sale and Leases of Easements which provide that they have no personal liability.

207. While it is the case that the Management Agreement predates the appointment of the Receivers, and predates the debenture pursuant to which they were appointed, the argument that the Receivers have no liability – or at least they have no liability so long as they hold or are entitled to receive the proceeds of sale of property invested in the Developer, does not stand up to scrutiny.

208. The limitations on a Receiver's power to disclaim a contract are evident from the immediately preceding passage in "the Law of Company and Solvency" 3rd Edition where the authors state: -

> "5-29 A Receiver will not be permitted to enforce a contract concluded with the company if, at the same time, he is not prepared to cause the company to honour its side of the bargain. He cannot obtain the benefit of the contract which simultaneously denying the other party any rights which it may have under it. For instance, if the company agreed to buy land, but the conveyance has not yet been executed, the Receiver will not be allowed to claim specific performance or damages for breach of the contract unless he causes the company to tender the outstanding price."

209. The issue is therefore whether the Receivers have adopted the Management Agreement, and accordingly, are liable to perform it.

210. As stated earlier I am satisfied that the Receivers have adopted and benefitted from the Management Agreement, and cannot now disclaim obligations of Glenkerrin arising under the Management Agreement. The Management Agreement is extensively referenced in the Statement of Claim. It is also of significance that the 2003 Debenture was executed post the Management Agreement, and accordingly the security thereby obtained is subject to the performance of the Management Agreement. I accept the defence submission that in order to maximise the value of such security it was necessary to build, and complete the Campus, including the Estate Common Areas. Since their appointment in 2011, the Receivers have sought to sell the remaining units, and in every case in so doing have relied upon the common areas, including the carpark, both at surface level and at basement level, and the Management Agreement as a document of title. It is clear that in selling these secured assets the Receivers are doing so on the promise of use of the common areas including the carpark and thereby achieving and benefitting from a higher sale price. Mr. Murphy accepted in his evidence that the sale price obtained in respect of Block C/the Link Building was greater than it would have been had the building been sold without the right to any car parking spaces, and that the inclusion of car parking spaces was required in order to maximise the price obtained. Mr. Sweetman in his evidence gave similar recognition to the necessity for the Receivers to sell with the benefit of car parking spaces. Mr. Sweetman also acknowledged that Clause 3.6 of the Management Agreement would have permitted the Receivers to carve out the carpark from the sale of Block C (see Transcript Day 3 pp. 24, 78 & 79). The Receivers therefore elected to sell with the use of the carpark and received a greater benefit by so doing.

211. It is also of some significance that the Receivers are named as parties to the Leases of Easements executed from July 2011 onwards. Strictly speaking this may not have been necessary. Further the Receivers sold Block C/the Link Building with full knowledge that there were issues with the condition of the carpark. I am satisfied that this knowledge extended back to 2017 when the Receivers tendered for works to be carried out with a value between €1m and €1.25m. I do not accept that the Receivers only became aware of structural issues in May 2018, on receipt of Mr. Campbell's report, although that report certainly raised such issues unequivocally. The Receivers in fact carried out works in the carpark between 2016 and 2019, and these were ongoing at the time of hearing, and according to Mr. Murphy were due to be completed in about three weeks' time. In any event these interventions in themselves indicate acceptance on the part of the receivers of some responsibility for the condition of the carpark. Mr. Murphy agreed that in 2016 they engaged John Hoare to go to tender and to provide a scope of works "to be able to commission the carpark for use as part of our requirement" (Transcript Day 2, p. 180). In response to the court Mr. Murphy accepted that the work done on commissioning the carpark was being done with a view to selling it so that the carpark could be used immediately by the purchaser and would be fit for purpose and "to provide car spaces for the three blocks" (Day 2 p.185). He accepted that the Receivers were "spending money, spending a couple of hundred thousand in getting the carpark up to speed" (Day 2, p. 190).

212. Mr. Murphy went on to agree with the court that in order for the carpark to be fit for purpose it must be capable of being insured. He accepted that when the defendant was unable to obtain insurance from Travelers, the Receivers obtained public liability cover – although in email queries to him from the purchaser of Block C he singularly failed to answer the query whether the defendant's/Mr.Campell's reports had been disclosed to the Receivers' insurers (if they were not, the Receivers' insurers might well be entitled to repudiate for material non-disclosure). Indeed, and as I have found, the Management Company did not have the use or control of the basement carpark after the appointment of the Receivers, and that access remained blocked off until in or about 2016 when the Receivers entered it, obtained reports, and commenced and carried out works with a view to commissioning it for use.

213. I also agree with the submission on behalf of the defendant that the Receivers are statutory receivers, appointed by NAMA, and as such under s.148 of the National Assets Management Agency Act 2019 they enjoy the powers, rights and obligations that a receiver has under the Companies Acts "and the powers, rights and obligations specified in Schedule 1". In Schedule 1 statutory receivers are empowered, under item 20 "to enter into, abandon, perform, repudiate, rescind, vary or cancel any contracts as he or she thinks fit."

214. It would therefore have been open to the Receivers to cancel the Management Agreement. The fact that they choose not to do so does indicate that they did not regard it as burdensome, but rather as an agreement from which they could benefit.

215. I am therefore satisfied that, while the Receivers have no personal liability, the Receivership has adopted and benefitted from the Management Agreement and cannot now seek to disclaim or repudiate Glenkerrin's legal obligations under the Management Agreement. It follows that the Receivers should not be permitted to pay over to NAMA the net proceeds of sale received by the Receivers as agents for Glenkerrin in the sale of Block C/The Link Building when they are the only resource available, or that will ever be available, to Glenkerrin/the Receivers to complete the development in accordance with planning permission and building regulations and their legal obligations.

Undermining the 2000 Mortgage

216. Another argument pursued on behalf of the plaintiffs was that the construction of the Management Agreement contended for by the defendant, and accepted by the court, would somehow undermine NAMA's security over the Campus. This argument carries no force when one considers the history of the security.

217. The property held by the first and second named defendants on which the Campus was subsequently developed was the subject matter of the 2000 Mortgage dated 1st September, 2000 made between the Grehans and AIB. However, on 6th April, 2001 the first and second named defendants contracted to sell the lands upon which the Campus was developed to Glenkerrin for IR£12m. Whilst the folio remained in the name of the first and second named plaintiffs, they hold a bare legal interest in the Maynooth Business Campus, having contracted to sell those lands to Glenkerrin.

218. The Management Agreement was entered into on 6th April, 2001. Thereafter, on 10th December, 2003 AIB entered into the Debenture.

219. The real and substantial security under which NAMA and the Receivers are operating is therefore the 2003 Debenture, rather than the 2000 Mortgage, although it is the case that the Receivers were appointed under both instruments. All that remains secured by the 2000 Mortgage is the bare legal interest in the lands.

220. Glenkerrin developed the Maynooth Business Campus and added value "*for Glenkerrin as Developer*". The requirement that Glenkerrin complete the development, and do so to the standard contemplated by the Management Agreement, including the common areas, had the effect of enhancing the value of the Glenkerrin interest. It cannot be said that the true construction of the Management Agreement found by this court could in any way have undermined the bare legal interest retained by NAMA, and certainly no evidence was adduced to support such a contention.

Rectification – the standard to which the development was to be completed

221. The defendant in its counterclaim makes an alternative claim for rectification, based on a mutual mistake of a fact, or alternatively unilateral mistake on the part of the defendant that Management Agreement embodied the complete terms of the agreement between the parties.

222. The onus is on the defendant to prove such a claim on the balance of probability. The leading authority on mutual mistake is *Irish Life Insurance Company Limited v. the Dublin Lands Securities* [1989] I.R. 253 where Griffin J. observed, at p.260: -

> "As a general rule, the courts only rectify an agreement in writing where there has been mutual mistake - i.e. where it fails to record the intention of both parties. Although that was the original conception of reformation of an instrument by rectification, nowadays a party who has entered into a written agreement by mistake will also be entitled to rectification if he establishes by convincing evidence that the other party, with knowledge of such intention and mistake, nevertheless concluded the agreement."

223. Griffin J. then referred, at p.263, to the judgment of Kenny J. in *Lucey v. Laurel Construction Co. Ltd*. (Unreported, High Court, 18th December, 1970) and cited and adopted the essential principles clarified by Russell L.J. in the leading English authority of *Joscelyne v. Nissen* [1970] 2 Q.B. 86, as summarised by Lord Lowry L.C.J. in *Rooney and McParland Ltd. v. Carlin* [1981] N.I. 138 at p. 146:—

> "(1) There must be a concluded agreement antecedent to the instrument which is sought to be rectified; but
>
> (2) The antecedent agreement need not be binding in law (for example, it need not be under seal if made by a public authority or in writing and signed by the party if relating to a sale of land) nor need it be in writing: such incidents merely help to discharge the heavy burden of proof; and

(3) A complete antecedent concluded contract is not required, so long as there was prior accord on a term of a proposed agreement, outwardly expressed and communicated between the parties, as in *Joscelyne v. Nissen."*

224. Applying these principles, for there to be mutual mistake there must have been prior agreement in terms different from those recorded in Management Agreement. A peculiarity of such claim in the present case is that all three parties i.e. the Grehans, Glenkerrin and the defendant, had a common purpose and were represented by the same firm of solicitors. Mr. Danny Grehan's evidence was that he "understood" that the Management Agreement meant that the Business Park would be completed to a good and workmanlike as standard. It went no further than an 'understanding' which does not amount to an agreement. There is no evidence from him, or either of the two solicitors concerned, Mr. Damian McGrane and Ms. Elaine O'Keeffe, of any prior common agreement on such wording.

225. With regard to the claim based on a unilateral mistake, in *Slattery v. Friends First Life Assurance Company Limited* [2015] 3 I.R. 292 the Court of Appeal held that a party seeking to achieve ratification of a contract had to establish that it had executed the contract under a mistake; that the other party to the contractor's agent was aware of that mistake; and that there was an element of sharp practice on the conduct of that other party or his agent, or that the circumstances where such that it would be unconscionable for a court to enforce the terms of a contract as executed. The Court of Appeal held:

"37. The first principle is that it is difficult for a party to a written contract to escape the effects of its provisions by reason of mistake. When he has had the benefit of legal advice and versions of the Deed have gone back and forth in the course of drafting, the undertaking is even more onerous for a party seeking to establish entitlement to rectification. There is, however, an equitable jurisdiction in exceptional cases for a Court to order that the written formal document be rectified by removing, inserting or altering the provisions so as to reflect what the parties truly intended, understood and agreed."

226. I am not satisfied that the evidence adduced on behalf of the defendant indicates any mistake in the Management Agreement insofar as it addresses the standard to which the estate common areas were to be completed and finished, let alone that this is an exceptional case that would justify equitable intervention. Mr. Grehan's own evidence indicated that the developer would not be required to complete entirely "free from defects", and that some defects would be acceptable provided there was substantial compliance with planning requirements and the Building Control Act/regulations made thereunder. There was also no evidence from Mr. Maguire or Ms. O'Keeffe to suggest that they were aware of any "mistake" that would justify rectification. Moreover, the Grehans, Glenkerrin and the defendant, i.e all the parties to the Management agreement, had the benefit of legal advice, and it was not, in 2001, a requirement and that parties to such an agreement receive independent legal advice. In this respect also there is no evidential basis, let alone convincing evidence, to justify the claim to rectification.

Conclusions

(1) The Management Agreement is to be construed as imposing a legal obligation on Glenkerrin to complete the Campus including the carpark to a standard such that it can be certified in accordance with General Condition 36 of the Law Society General Conditions of Sale (1995 Edition).

(2) This is not a standard "of good workmanship free from defects", but it does require completion in "substantial compliance" with planning permission, plans and specifications, the Building Control Act, 1990, and Building Regulations made thereunder.

(3) This legal obligation is also owed by the Receivers who have since their appointment adopted and benefitted from the Management Agreement in successive sales of Campus units and are now estopped or otherwise not entitled to disclaim or repudiate the Management Agreement.

(4) The concrete surface of the carpark (over basement level) was constructed without any thermal expansion joints rendering it structurally defective having regard to its size. As a result concrete spalling, cracks in support columns, beams and corbels and other defects have emerged which have rendered the basement carpark unfit for use, and the underlying structural defect will lead to deterioration and collapse of the carpark over time, with local collapse possible in 10 years. While "commissioning works" have been carried out by the Receivers these do not address the structural defect.

(5) The structural defects are such that the Campus common areas are not "complete" and certification in accordance with General Condition 36 cannot be provided until remedial works, including probably replacement of the asphalt deck, to the car park are carried out. Such Certification as was put in evidence does not cover the car park structure, and even if it did would be worthless in light of Mr. Campbell's evidence. An intrusive structural investigation needs to be carried out before the full extent of the remedial works required can be ascertained. Glenkerrin and the Receivers have the legal obligation to carry out these works.

(6) It is an implied term of the Management Agreement that Glenkerrin/the Receivers must serve the 28 day completion notice referred to at clause 3.2 "as soon as is practicable" after the sale of the last unit. Although the last unit has been sold it is not "practicable" for Glenkerrin/the Receivers to serve such a notice while they are not in a position to furnish certification in accordance with General Condition 36. The date for service must therefore be postponed until the remedial works to the car park are carried out and certified.

(7) Were it were necessary to so determine the issue (which I do not believe it is for reasons given earlier), I would determine that it is an implied term of the Management Agreement that the Management Company is required to execute a Lease of Easements with the developer and each unit purchaser in the form furnished prior to execution of the Management Agreement. Notwithstanding this the defendant, in the particular circumstances of this case, was entitled to decline to execute the Lease of Easements in

the sale of Block C and the Link Building unless the Receivers gave appropriate undertakings to remediate the structural defects in the car park and/or agreed to place the proceeds of sale in escrow pending determination of the dispute as to where the legal obligation to carry out those works rested.

(8) Having regard to the manner in which the Receivers have sought to avoid/dispute their legal obligations both prior to and since the institution of these proceeding, the process of establishing what remedial works are required, and the carrying out of those works must be transparent. To achieve this the defendant must be afforded the opportunity to have its own engineering or other experts informed, by being present at inspections, opening up, and at critical stages of the work, and by being briefed with all relevant scoping and remedial work specifications/plans or other relevant documents, and by being given the opportunity to express views on what is proposed, and on the works as carried out. Similarly the defendant either directly or through it agents should be kept informed and copied in a timely fashion with all relevant documentation. On their part the defendant and its agents must at all time bear in mind that Glenkerrin/the Receivers obligation is to achieve "substantial compliance", and not perfection.

(9) The cost has been estimated at €2.26 million to which are to be added consequential repair works plus 10% for professional fees. The full cost cannot be ascertained with any accuracy until the further investigation is carried out and costings obtained, but on the basis of Mr. Campbell's estimates in my view it has the potential to exceed €3 million.

(10) The sale of the last unit – Block C and the Link Building – has yielded in excess of €5 million, which is held in escrow for the Receivers pending the outcome of these proceedings. As Glenkerrin has no funds to carry out these works, and as the Receivers are contractually protected from any personal liability, the remedial works must be funded from these proceeds of sale.

(11) I would expect the Receivers, following consideration of this judgment, to undertake to utilise the funds so held to fully and properly investigate and scope the remedial works required to the car park, and to carry them out as soon as is practicable in accordance with their legal obligations and to the standard required to provide certification in accordance with General Condition 36, and to do so with the transparency that I have indicated is necessary, and then to serve the notice required by clause 3.2 of the Management Agreement, and finally to complete the Transfer of the estate common areas.

(12) In the absence of appropriate undertakings I will make declarations and orders in line with the findings and conclusions in this judgment, including orders having mandatory effect under the "further and/or other relief" sought in the Amended Defence and Counterclaim. Pending a short adjournment for the parties to consider this judgment I require the Receivers' assurance that the proceeds of sale will continue to be held in escrow.