THE HIGH COURT

[2022] IEHC 33

[2014 No. 3292 P]

BETWEEN

ACTION ALARMS LIMITED TRADING AS ACTION SECURITY SYSTEMS

PLAINTIFF

AND

EMMET O'RAFFERTY AND TOP SECURITY LIMITED

DEFENDANTS

(NO. 2)

JUDGMENT of Humphreys J. delivered on Friday the 4th day of February, 2022

1. The plaintiff company ("Action") began business as an alarm installer but later added an alarm monitoring service. The second defendant ("Top") (who is really the only relevant defendant and thus who I will also refer to as "the defendant") is an alarm monitoring service company which worked closely with the plaintiff up to the point when the plaintiff itself diversified into monitoring.

2. The business relationship between the parties goes back to around 1986. The plaintiff encouraged customers to connect to the defendant's monitoring service, and the defendant paid the plaintiff a substantial commission from customer income. This was reflected in monthly commission statements.

3. The relationship continued without major difficulty until late 2008 or January 2009 when the plaintiff decided to set up its own monitoring service and sought to migrate customers to its own service. Most of the customers did move to the plaintiff's monitoring service, but some did not. In respect of those that remained with Top at that point, Top stopped sending commission statements, stopped paying commission on the customers introduced by Action, and according to Action, stopped responding to its communications in large measure although not completely.

4. The plaintiff now claims damages for breach of contract in respect of the non-payment of commission after January 2009.

5. The proceedings were instituted on 21st March, 2014.

6. Unfortunately the case has had a total of three separate substantive hearing dates.

7. The first hearing date was before O'Connor J. on 22nd November, 2017. After the case was opened, a dispute broke out about discovery and particulars and a possible amended defence. O'Connor J. adjourned the hearing and made an order directing the plaintiff to furnish particulars, allowed an amended defence and provided timelines for discovery.

8. In the light of a submission that the plaintiff's pleadings as to the contract were inadequate, O'Connor J. directed that the plaintiff should rectify this by additional replies to particulars (rather than by an amended statement of claim), so, in effect those replies to particulars serve a more formal purpose and now do adequately define the contractual claims, having been envisaged by O'Connor J as being in effect a refinement of what was originally pleaded. Hence while the defendant made a pleading objection at the first trial, it no longer

does so, and merely points to the lack of definition in the statement of claim prior to its clarification by replies to particulars as being evidence of what it sees as the general nebulosity of the plaintiff's claim.

9. On 14th May, 2019, the matter was set down again for trial.

10. The second hearing date was on 19th November, 2019 when trial commenced before Pilkington J. She heard the matter over seven hearing days between that date and 5th December, 2019 when judgment was reserved. Unfortunately, Pilkington J. became indisposed in mid-2021 before she had an opportunity to finalise the judgment, and in October, 2021 it was decided that the matter should be reassigned to me for a fresh hearing. In November 2021, I fixed 11th January, 2022 as the new and third hearing date.

11. In *Action Alarms v. O'Rafferty (No. 1)* [2021] IEHC 779, [2021] 12 JIC 2108 (Unreported, High Court, 21st December, 2021), I gave directions as to mode of trial and declined an adjournment request by the plaintiff.

12. The third hearing date occurred as envisaged on 11th January, 2022, and the trial then took place over four days from then until 14th January, 2022. The present judgment now deals with the substantive claim.

Plaintiff's evidence

13. The plaintiff called two witnesses, Mr Derek Mooney the founder of Action (who for simplicity I will refer to as "Mr Mooney" if used without further identification) and Mr Aaron Mooney.

Derek Mooney

14. In evidence-in-chief Mr Mooney stated that he had been in the alarm business since 1977, which included working with Chubb Alarms who had their own monitoring centre.

15. From the late 1970s there were a number of independent alarm monitoring centres. Monitoring was the only way to get Garda cover, the alternative to monitoring being external and internal bells.

16. Mr Mooney went out into business on his own and installed alarms into a monitoring centre called SCRAM (Security Control Risk and Monitoring). He had put some systems into a number of different monitoring companies to give a bit of variety.

17. He met Mr Emmet O'Rafferty of Top in 1985 and described him as "charming." Mr O'Rafferty encouraged Mr Mooney to give his business a try, and they did so, building up a good relationship. The terms were as with any monitoring service, they didn't invent the whole situation. From the very first, SCRAM had explained how it would work. The alarm company would connect into the monitoring centre which would collect the fee and split it with the alarm company, not necessarily 50:50. If the system was not connecting in, they would contact the alarm company in order to contact the customer. The signal was tested on a daily basis.

18. None of the monitoring companies were allowed to actually go into the customers premises, it was the alarm company that had the codes to the alarm panels and security systems.

The monitoring centres did not have engineers on the ground. The monitoring company would contact Action on a daily basis and they would get one of their engineers out to the customer to solve the problem.

19. As of 1985 they worked with a number of monitoring centres. The terms were the same and it generally works exactly the same way to this day. The installer would introduce the customer to Top. Top would send a contract. Action would install the alarm and check it, and Top would invoice the customer and then pay Action its proportion.

20. By 1989 he had been doing business for a number of years with Mr O'Rafferty. A letter was prepared by Mr O'Rafferty dated 28th September, 1989 referring to the possible transfer of 200 connections to Top central station. Paragraph C of that letter allowed Action to move or sell the business. However, that transfer did not happen.

21. There was a subsequent letter which was agreed of 3rd November, 1989 and new connections were introduced after that date.

22. Top was an innovative company. It encouraged installers to sell more alarms and did educational trips to New York and London.

23. A letter of 12th July, 1993 illustrated the prices for monitoring and the version produced had handwritten notes regarding alternative prices which were a result of Mr Mooney and Mr O'Rafferty discussing issues and agreeing different amounts. The prices changed every few years.

24. A commission report for November 2008 was produced. In any month they would get a report from Top for payments made in that month.

25. An invoice dated 30th November, 2014 was produced, which illustrated Top asking Action to invoice the customer. There were twelve customers for which a separate arrangement existed whereby Action invoiced for the monitoring and then Top invoiced Action for its share. There was a mechanism for reconciling this between the two accountants. This was set off and the system worked well for both sides.

26. There was one disagreement in 2006 in relation to a property in Luttrellstown where Top put in a radio communicator. Top at that stage had acquired an installer company called DeJay Royale. They were seeking to install a system in Luttrellstown. Mr Mooney was quite annoyed about this, but they got over it. He said they had a "clear the air" meeting about this and other issues and they did clear the air.

27. When the issue of transfer of customers to Action's monitoring company arose in early 2009, Jim Blake on behalf of Top wrote looking for paperwork from the customers. Action were not happy about that at the time. After the first round of letters Top basically cut them out and would not talk to them. They did not do what was agreed and refused to engage with them. Action had no option but to engage a legal firm.

28. The sense of Mr Mooney's evidence in relation to this aspect was that the paperwork issue for the transfer of customers was ultimately largely resolved, although not entirely so. He requested a contact name to ensure that the customers were processed, but never got a contact name. He said he drove up and gave in documents to the monitoring centre and that the intention was to do this on an ongoing basis, but that process came to a halt. He viewed the customers that Action introduced as being Action's customers. Action agreed with Top that Top would not make contact with their customers, but this agreement stopped and was not seen through. Action agreed to honour Top's fee if the monitoring contract was not cancelled by the renewal date. He did not believe that he breached any part of the agreement with Top.

29. The opening of his own monitoring centre was never discussed (prior to it happening). It wasn't true that he stopped providing services to the customers that remained connected to Top in March 2009. They responded to every call and never let a customer down. It was not part of the agreement that they would be given a lump sum and that was the end of it.

30. Under cross-examination he said that when they started to connect into Top's monitoring system in around 1986, he did not have a written agreement at that stage. He said that he was sure that Mr O'Rafferty knew well the way business was done in terms of monitoring centres and that it worked on the same basis as other monitoring centres. Their agreement was an oral agreement. It was put to him that at the second trial that he said that the agreement was solely based on the letter of 3rd November, 1989. He said that he was not resting his claim on anything, by which I understood him to mean that he was not himself seeking to define the claim in legal terms. They worked out an agreement after going backwards and forwards. There was no issue other than his accountant was not happy with some of the clauses, and they both agreed what they were happy with.

31. The letter of 28th September, 1989 did not form part of the agreement. However, he was clear and said he always maintained that the only letter that was relevant to the agreement was that of 3rd November, 1989. The earlier letter of 28th September, 1989 did not represent the agreement. The relevant letter was the final letter and there were negotiations leading up to that final letter. When asked whether his case was based on one letter (that of 3rd November, 1989), he agreed. When asked if the terms were not set out in that letter then they could not form part of the case, he said that was for the court to say.

32. He described the arrangement as to commission between 1986 and 1989 as a "gentlemen's agreement". Having seen and heard him give this evidence I am satisfied having regard to the totality of such evidence and the manner in which Mr Mooney used that phrase, that what he meant by that was that it was not embodied in a formal legal written contract. I certainly did not understand him to be conveying the view that the commission payments were purely voluntary on the part of Top, not something that had been commercially negotiated or not legally binding and enforceable.

33. He said that in 1989 there was a lot of activity starting within the security industry and that he knew a lot of people within the industry. There was talk about who owns contacts, what happens if someone takes your customers and that his accountant raised this issue. They were trying to look after Action's interests. Part of the value of the business was the value of recurring revenue from commissions. He was shown a sample contract between Top and a customer whose system was connected by a different alarm company (Vision Alarms). That sample contract showed that Top had the right to assign its rights under the contract. They became aware of that and that is why they insisted on the clause being put into the letter of 3rd November, 1989 about assignment. Mr Mooney asked Mr O'Rafferty to send that letter to protect Action's interest and it was his choice of wording formulated between Mr Mooney and his accountant.

34. They had three or four discussions about it. First, there was a negotiation. If he was approached by some other company, this letter allowed him to sell those customers. The letter refers to "your customers", so in it Mr O'Rafferty is acknowledging that they are Mr Mooney's customers. There was no mention of commission in the letter and no mention of circumstances where Action were to set up their own monitoring system, as that was not within their contemplation at the time. There was no mention of what would happen to commission in respect of customers if they stayed with Top. However, there was an agreement that as long as his customers were connected to Top's monitoring station the commission would continue and that had to happen because Action were the only ones who had access to the alarm system. Top did not have the engineers. It was very simple. Mr O'Rafferty did not have access to the systems, he does not have the staff or know how. He described this as "a gentlemen's agreement that runs throughout the whole industry", and again I am satisfied that Mr Mooney was using the phrase "gentlemen's agreement" not as meaning a non-legally binding agreement, but rather his own legally unlettered layman's locution as meaning an agreement that was not embodied in a formal written and witnessed legal contract.

35. Mr O'Rafferty had 100 or maybe 200 other companies that connected into him at the time. The commission was required because they had to keep the system working. When asked whether Action would still get the commission if they tried to take customers who refused to go, he said they would have obligations, who was going to repair the alarms for such customers. They had an agreement with Top.

36. It was put that the agreement does not cover a situation where he approached the customers, but that was rejected. Top wrote to all customers to stop paying Action. The agreement was that Action would write to the customers on a monthly basis three months in advance about whether the customers were going to renew with Top or with Action. They were trying to do that, but Top stopped engaging with them, and contacted the customers and offered them discounts.

37. He was questioned about certain legal matters including his understanding of the relief sought and the interplay between the defence and the replies to particulars.

38. It was put that the reason for the commission was because an installer would have to foster a continued relationship with the customer to stay with Top. He said that there were agreements in place since the 1970s and that Mr O'Rafferty does not like them moving, but the agreement is there.

39. It was put that the commission was a discretionary payment, but that was rejected. Action were there for a reason, they installed the system and connected it. If something was wrong, who fixes it? If the system is installed but does not connect on a daily basis with the monitoring centre, they get a call the next morning and they call out. Without their services the system is broken.

40. It was put that there was no obligation on the part of Top to tell the alarm company if, for example, there was a low battery. He rejected that and said there was an obligation. If there was a break in the connection, then contact could not be made from the customer to the monitoring station.

41. It was put that it is the customer's obligation to ensure that they were connected. He rejected that and asked how will the customer know if the alarm system has not automatically connected.

42. It was put that if there was a fault, the monitoring station would contact the customer. He rejected that and said that that was wrong.

43. I should note here that this very clear and explicit evidence was never directly contradicted by Mr O'Rafferty. He did make a couple of brief references to contacting the customer, but that was in the context of alarm activations in a context where they would also be calling the emergency services. He never stated unambiguously that the customer would always be contacted in the event of a fault in the daily test communication as opposed to a burglary or fire activation. Mr Mooney's evidence, which I accept, suggests that this did not routinely happen, and Mr Aaron Mooney only referred to one case where it might have happened although even that was only his interpretation of a document. The more probable scenario on the evidence is that the information about failure of the necessary communication in systems is more normally channelled to the customer through the alarm company concerned.

44. Insofar as there was a difference in the evidence, I would, having seen and heard the witnesses, accept as more likely Mr Mooney's version generally, and in particular on this point, namely that if there was a fault, the monitoring station contacted the alarm company via the activity reports rather than contacted the customer directly. That is also consistent with the practice of sending activity reports to alarm companies such as Action.

45. It was then put to Mr Mooney that it was for him to do with the activity report what he wished. He replied, let's use some common sense, why would Mr O'Rafferty provide a report and then they do as they wished.

46. It was put that the activity report was income-generating for Action, but that was rejected. Mr Mooney characterised this as Mr O'Rafferty saying that he does not care whether Action go out to the customer or not. Of course it was in Mr O'Rafferty's interest and their interest to call out, that is what they were getting paid for, "that is called customer service" (Day 1, pp. 151-152, q. 565). That was a particularly striking phrase and it makes considerable sense. It was also notable that it was only Mr Mooney that put such emphasis on the obvious point that telling the alarm company about non-communication is in the interests of customer service – this aspect wasn't adequately responded to in Mr O'Rafferty's evidence. In particular it was far from clear how the defendant's version (that sending activity reports is optional and in effect a favour to alarm companies) can be construed as putting customer service front and centre.

47. It was suggested to Mr Mooney that if there was an alert on the system that something was broken they could charge for that, but that was rejected. They had never charged any customer for what was called a self-test. On foot of an activity report regarding a burglary, they don't ring up the customer and say "we heard you had a break-in". The only way they find out about a problem is that Top tell them. All monitoring centres notify any activation overnight. That does not necessarily mean Action would ring the customer to make money out of it.

48. It was put that there was no advantage to Top in giving that information. He replied that that's what monitoring is about and that that is what they are supposed to do.

49. He said that probably nobody contemplated what was going to happen in terms of Action setting up their own monitoring centre.

50. When asked why threaten legal proceedings, he said if Top stop answering the phone, what's his next option.

51. When asked whether he raised the issue of the failure to pay commission for 2009, he said he was sure he raised it with Mr O'Rafferty.

52. When asked about the delay in raising his complaint, he said he was trying to get his new business (of the monitoring centre) off the ground.

53. In re-examination he said that the commission payment was not discretionary. He did not think there was any "legal agreement", by which I understood him to mean a formal written contract, but he said that they had agreed the commission fee. And as regards the customers where the payment was made to Action, Mr O'Rafferty invoiced Action for those customers. Action would always pay them. He said that the work they did on alarms was not part of the annual maintenance where it arose from the activity reports. He said that in the business nobody would pay for a self-test report.

54. Action continued to provide services to customers during 2009 to 2013 and occasionally Top still notified them of faults on certain customer's lines.

Aaron Mooney

55. In direct evidence Mr Mooney said that he was the son of Mr Derek Mooney. He was an accountant who joined Action in March 2012.

56. In 2016 invoices were still coming in from Top. Action were surprised because they were not getting any information from Top as to customers they were invoicing.

57. The relationship did not end in 2009 and Action continued to service the alarms and retain connectivity to the Top monitoring centre.

58. He prepared calculations of the commission as of the letter of 27th May, 2013 but got no response to that letter.

59. A letter came in from Top dated 30th January, 2014 informing Action that a customer had cancelled the monitoring service with Top and welcoming any assistance to try and convince the customer to remain with Top.

60. The letter of 27th May, 2013 referred to previous correspondence regarding outstanding commission. He said that correspondence "was the wrong word and it should have been phone calls". When engineers install alarms, they mark up what monitoring system, if any, the alarm is connected into and that information is uploaded to customer software.

61. Action sought discovery of commission reports from Top and if those had been provided they would have known how much their claim was. He remembered the frustration of discovery being agreed and not provided and of not getting cooperation.

62. The affidavit of discovery sworn on 9th April, 2015 disclosed no documents. Action then sent a schedule looking for a yes or no answer as to which customers were still being monitored by Top. They were trying to get the information and trying to make it as easy as possible to provide, but it was not provided. A further schedule was sent in 2019.

63. An activity report allows them to move earlier on issues like a low battery. As regards the suggestion that activity reports were generated for Action's benefit, he rejected that. He said that the activity reports were not revenue-generating and that everybody benefits as the customer is notified that there is an issue that they need to rectify so that Top can continue to provide a service and get paid for that service.

64. The daily check of connectivity between the alarm and the monitoring centre is automatic and is a really basic service of any monitoring centre. If there was an issue, Action would go out and repair the system. Top cannot send anyone out to repair the system because Action have the engineer codes.

65. Reference was made to a particular licenced premises that was offered a monitoring service by Action in 2011 (but didn't take that up). On 13th January, 2017 routine maintenance revealed that the phone line to the panel was cut so it was not making calls to Top, and Action fixed this.

66. In another case, a docket of 10th July, 2018 showed that a domestic customer said that Top were not getting auto test signals since April 2018 and the system was reprogrammed. Action were still providing services to make sure that the customer was connected to Top and remained connected to Top. Action decided they would keep their side of the agreement.

67. He also outlined how interest was calculated.

68. Under cross-examination he said that the first time he saw some of the invoices was in discovery and whether they were sent was a matter for Top. He did not see them in the office.

Defendant's evidence

69. The defendant's witnesses were Mr Emmet O'Rafferty and Mr Michael Lawless.

Emmet O'Rafferty

70. In direct examination, Mr O'Rafferty said he was founder and CEO of Top Security which was established in 1979. They began monitoring in 1986. Alarm companies would install alarms and seek to connect them to a monitoring centre. The alarm company has a relationship with the customer regarding installing and maintaining the system. Maintenance is governed by a maintenance agreement which generally caters for two routine visits every year and outside of that the alarm company would be contacted to call out and attend in the event of the customer having a problem.

71. He said that there was revenue from callouts in addition to the maintenance agreement. The monitoring company was concerned purely with communication to receive an alert and to advise the customer or the emergency services or both in the event of an activation. The most common type of alert was fire, personal attack or burglary.

72. As regards self-testing, he said that in the early 1990s there was a charge for sending a signal on a regular basis to the control centre to ensure that the system was working. Over time that became an integral part of the system and competitors did not charge for it, so in recent times they did not charge for it either.

73. The commission structure was in the business before he got involved in it. Monitoring centres would incentivise alarm companies to put their systems in to the monitoring centre concerned. That was to pay to put the system in, and secondly for the relationship to be supported. The rationale was first the introduction of the customer and over time the customer became more familiar with Top, but the alarm company also had a relationship. If the alarm company was supportive of the relationship with the customer, that helped Top to retain the customer and, therefore, commission was paid.

74. He started the relationship with Action shortly after they started business in 1986. There was no written agreement and he does not remember the exact conversation about terms. They would obviously have agreed that Action would put the systems in and Top would pay them commission.

75. Trips to New York were to incentivise the alarm companies in terms of meeting numbers. Trips were always to a seminar or trade show and over the years they went all around the world. At one point they ran a two-and-a-half-day seminar involving two Harvard professors running five case studies.

76. Any changes to the commission paid arose out of conversations. There was a negotiation on the amount of commission per customer.

77. The letter of 28th September, 1989 was a typical approach. Action had a bloc of customers, so Top was saying we would do the following to incentivise you. The transfer did not in fact happen. However, in the event of selling Action Alarms, the letter would have allowed a transfer to a new company. The rationale was that if Action sold their business to a monitoring centre the monitoring centre would not be happy to do business if the connections remained with Top so Top would not stand in the way. They had suggested a one-off fee although they were not specific about that. He was shown a standard contract which he said was an old contract but contained standard terms. Clause 12 allowed the company to assign its rights and obligations. That was a standard clause in any of the contracts.

78. As regards the letter of 3rd November, 1989, the context was referring to assignment in terms of a sale. Action had asked for certain things to be defined more specifically to protect them in the event of selling their business. As regards whether this was part of a series of discussions based on the advice of Action's accountant, he recalled that he was dealing with an accountant who had been involved in the transfer of Allied Alarms business, so Mr Mooney wanted the wording in the letter of 3rd November, 1989 as opposed to the wording in the previous letter.

79. When asked what did no penalty mean, he said they were not going to penalise Action for cutting short the contract or for administering the change in the system from one alarm monitor to another.

80. Action negotiated a better commission rate for themselves. Top did not pay commission to all installers. They have approved and unapproved installers. The unapproved ones are those not doing sufficient business with Top or who have a predominant relationship with another monitoring centre.

81. The customer activity report is done first thing in the morning based on the previous 24 hours. Any system serviced by the alarm company is included in the report if they have activations. That is what he called a value added service they provide. If there is a burglary alarm activation, they ring the premises. The activity report allows Action to contact the customer and in servicing a customer they can generate income. He disagreed that the service was of benefit to Top. Their contract was to react to an activation into the monitoring centre from their premises. They have no responsibility in respect of the health of the system or the health of the communication between the system and the control centre.

82. The following reply is particularly notable as a straight disagreement with the notion that Action's receipt of the activity report (and its action thereon) was of benefit to Top (Day 2, pp. 153-154, qq. 584-585):

> Q. Just in relation to another point that Mr Mooney said, he said that the customer activity report showed in some way that Action Alarms were providing service which was of benefit to you?
>
> A. Yes.
>
> Q. Well, what do you say about that?
>
> A. Well, again, I mean, I would disagree with that. It is our contract, and we have a contract here, it's very clear, our contract with the customer is purely to react to an activation that comes into our monitoring centre from their premises and to inform them and the relevant emergency services accordingly.
>
> We have no responsibility in respect of the health of the system or the health of the communication between the system and the control centre. We have no responsibility in that area and.... [answer trails off here].

83. At this juncture I should say that insofar as Mr O'Rafferty attempted to advance the position, which as we shall see he later resiled from in cross-examination, that the service provided on foot of the active report was not for the benefit of Top, I would reject that evidence having seen and heard him and Mr Mooney. While it seems to be clear that Top security does not have a *contractual* responsibility for the maintenance of the connection between the alarm company and the monitoring centre, and while there was no evidence that the Private Security Authority imposes any *regulatory requirement* on monitoring companies to furnish such activity reports, nonetheless, it is self-evidently in the interest of the customer first and foremost that the connection is maintained. Therefore, it is in the interests of the alarm company and the monitoring company even if one wants to call that an indirect interest. If there is no active link between the alarm and the monitoring centre then Top would be charging for a service that was not in fact being provided. In the event of an incident, that would come to light which clearly would not be to the benefit of either the alarm company or Top independently of the question of legal responsibility.

84. Mr O'Rafferty went on to say that Top did not have any access to the alarm system. It was not their responsibility and they did not install it.

85. A letter from Jim Blake to Paul Daly was written in the context of Action's attempt to migrate what they called their customers to their monitoring centre. He does not remember when Top discovered this, but suggested around December 2008 to January 2009. Obviously they were not happy to be losing all those customers, but having said that they dealt with several hundred alarm companies. They had an agreement with Action and would not stand in their way so they took the position that they would honour that and not try to obstruct the process in any way.

86. The following exchange took place on Day 2, pp. 158-159, qq. 604-607, in response to his own counsel:

> Q. And the customers who have always been invoiced directly from our customers in terms of monitoring relationship, and that has been the case for years, as you are aware. So the customers that have been so you are saying that they are "our" customers?
>
> A. Well, they are our customers, yeah.
>
> Q. And that there is a huge debate between yourself, and Mr Mooney I think passionately believes that the customers are his customers.
>
> A. I know.
>
> Q. And you stated that they are your customers. I mean, is there ...(interjection)
>
> A. Well, to be fair, they are both our customers because they have a contract with the customer to maintain the system, having installed it. We have a contract to monitor it. So they are both our customers. Now having said that, they are both our customers but neither of us own the customer.
>
> Q. I see. I see.
>
> A. You know, the customer has rights in this as well.

87. In fairness that is a reasonable answer - unfortunately not one that he seems to have given by way of instructions prior to that point because he was questioned by his own side on the basis that there was a "huge debate" as to whether the customers were customers of Action, a position which also seems to have featured in cross-examination of Mr Mooney. Not much perhaps turns on that alone but it is perhaps an example of the slightly shifting ground overall on which Mr O'Rafferty's evidence stood.

88. When Mr O'Rafferty received legal correspondence from Action he thought that they had jumped the gun. Top were not trying to obstruct the transfer. He wrote directly in reply himself. He did not feel the need for legal advice because he thought Action had misunderstood matters.

89. Following that, it looked like Action would do as Top had suggested and that the transfer of customers would be ongoing. He said that the procedures were followed to his knowledge and that the vast majority of customers transferred over. He stopped the commission reports because the basis for doing business had ended. Action were not supporting Top and were competing with Top. There was no sense in commission and no value. There was no mention in correspondence of commission for people who did not transfer. Mr Mooney never contacted him to complain about this. He said that he answered his phone calls and that if someone rings him and left a message, he rang them back and said he did not get any message.

90. In relation to this aspect of the evidence, I am afraid that I also prefer the evidence of Mr Mooney having heard and seen both witnesses. It is very clear that Top did bring the shutters down in many respects as of January, 2009. Commission reports stopped instantly, and information dried up. Even when trying to settle the 2008 liabilities, the correspondence is largely one-way. Letters of demand went unanswered. Subsequent correspondence which sought to obtain disclosure for the purposes of the proceedings was also not responded to. So it seems in the context of a fairly strong pattern of non-communication by Top as and from January, 2009, including the ultimate step, later stated by Mr O'Rafferty that he was no longer currently providing the activity reports to Action (to which we will return), that Mr Mooney's evidence that the shutters came down and phone calls were not answered is more consistent with other objective facts and is more likely to be true. Having seen and heard both witness I accept that Mr Mooney is correct that his attempts to contact Mr O'Rafferty were not being entertained and calls were not being returned. I reject Mr O'Rafferty's evidence under this heading and in particular his protestations that he always returned messages.

91. As regards the letter of 27th May, 2013 asking for commission, Mr O'Rafferty thought that that was a try-on. The relationship had finished and he found the request extraordinary. There were no previous communications or correspondence that he was aware of. He did not think he responded to that letter, but then he said that he chose not to respond to it because he felt it was a try-on. The letter of 27th January, 2014 states that there was no response to the 2013 letter. He did not understand the rationale for the letter. He said that Action never requested commission reports and the reason they stopped was because the arrangement came to an end.

92. Under cross-examination, he said that he agreed that part of the agreement was in writing. The rest was oral and that it evolved over the years. That is fairly obvious but again significantly undermines the instructions that underlay the cross-examination of Mr Mooney which sought to pin him down to the entire contract being in the letter of 3rd November, 1989.

93. Contrast Mr O'Rafferty's following answer (Day 2, pp. 173-174, q. 680):

> Q. Okay. The third question was whether the agreement was in writing, okay? The answer to that was:
>
> "The agreement was in writing and reflected the private security interest norms and standards and had been agreed orally by Mr Emmet O'Rafferty, the Plaintiff's agent in the early 1980s, whereby commissions had been paid and it is evidenced by the letter of 3rd November 1989, as disclosed in the book of pleadings."
>
> Would you agree with that, that it is partly in writing, as in part of it is evidenced in writing but the rest of it was oral between you an[d] Mr Mooney and had evolved over the years, and I think that is exactly what you said?
>
> A. Yeah, yeah, I would agree with that, yeah.

with the lengthy cross-examination of Mr Mooney to the opposite effect (Day 1, pp. 101-103, qq. 299-308:

Q. Well, you have, you certainly were, because the impression that I got and in fact okay, maybe we can move onto this. So can I just shortcut all this then. So just in terms of what your case is, the agreement you are relying upon, and you said this on the last occasion, that you are resting your case solely on the letter of 3rd November 1989 as containing the full parameters of the agreement that you are asking the Court to enforce here. Your case is based on one letter. Isn't that correct?

A. My case is based on one letter, yes.

Q. The 3rd November 1989?

A. Yes.

Q. Isn't that correct?

A. Yes.

Q. If the terms are not set out in that letter then it can't form part of the case. Isn't that correct?

A. That's for, I presume, the Court to decide.

Q. Yes

A. Not for me to decide.

Q. I am asking you? I am asking you?

A. No, I understood that to be the agreement.

Q. Okay. So we then in order to find when we're searching for the agreement, when we are searching for the agreement we can ignore all letters apart from the letter of 3rd November 1989. Isn't that correct?

A. You'd have to ask a Judge or ask the Court.

Q. No, I'm asking you.

A. I can't say that they can

Q. Mr Mooney, this is your case. This is your company's case.

A. Yes.

Q. It has taken a long time to get an answer from the Plaintiff as to what they base their agreement on. I just want to make sure before we proceed any further with the

cross examination just to confirm that we are only looking at one letter which sets out the terms of your agreement and you're confirming that; isn't that correct?

A. I agree with that, yes.

94. That extract will have to stand as representative because there was much more cross-examination dedicated to the proposition that the letter of 3rd November, 1989 represented the full agreement, and since it didn't mention commission, then commission can't have been part of the agreement. Mr O'Rafferty's *volte face* on those instructions, accepting that the agreement was part oral and part written, illustrates a degree of mutation that was a recurrent feature of his evidence.

95. Mr Mooney described Mr O'Rafferty as "a very charming man" (Day 1, p. 50, q. 13), and having seen Mr O'Rafferty give evidence I do understand why Mr Mooney might say that. Mr O'Rafferty's avuncularity was quite palpable and it is no surprise that he has been very successful in business and no doubt will continue to be so. In forensic terms this translated into a lot of quick and confident answers, but some of those rather pat answers didn't withstand a great deal of probing. There are numerous examples of this on key points, and I have endeavoured to identify the more notable instances in this judgment.

96. It was put to Mr O'Rafferty that maintenance of the customer as referred to in para. 5 of the defence meant maintenance of the alarm system and that when activity reports were sent to Action they tested the system and replaced batteries and that amounted to support. He said that Top have a remote operation and that they only interact when the customer signs up as an activation or pays the bill, whereas the alarm company does go onto the premises. The alarm company encourage the customer to come to Top and thereafter Top looked to the alarm company to be supportive of the relationship and that it was not anything to do with maintenance.

97. When asked how the alarm company was to be supportive, he again repeated that it was first to introduce business and see if the customer is happy to stay with Top. Sometimes people don't understand the service and the alarm company was in a position to explain that.

98. Insofar as Mr O'Rafferty's evidence as to his interpretation of "support" laid repetitive emphasis on the original introduction when asked about ongoing support, this was irrelevant. Insofar as it laid emphasis on explaining to and encouraging the customer, this was highly nebulous. It was very hard to see on that evidence anything tremendously tangible that would justify the payment by Top of about 45% of its customer income to Action. And it also leaves one with the question as to how Top would meaningfully monitor such nebulous encouragement, and whether something so ephemeral and practically unmeasurable would justify payment out of nearly half of the customer fee. Again in this regard I prefer the evidence on behalf of the plaintiff, which makes considerably more sense in that it links the commission payment to the actual physical maintenance of the system, particularly in response to the activation reports. That service is something tangible, practical and something that imposes a cost on the alarm company which could reasonably

explain the very substantial percentage of customer income that is provided by way of a commission. It provides a clear benefit to both Action and Top in keeping the customer connected to the system.

99. Mr O'Rafferty was particularly emphatic about there being no contractual obligation on Top to maintain the system. When asked whether making sure the customer was happy by responding to an activity report was for the benefit of Top and fostering the relationship, he denied that and said it was making sure the system works. He claimed that Action, by calling out, were first and foremost helping themselves.

100. However he specifically said as follows on Day 2, pp. 186-187, qq. 702-704:

> Q. Mr O'Rafferty what I am putting to you is that is of benefit to you because you look good because Action call out the next day and fix that sensor?
>
> A. It is not of direct benefit to us, it is of indirect benefit because the customer is happy.
>
> Q. So it is maintaining the customer relationship with you?
>
> A. If I can just finish.
>
> Q. Please do.
>
> A. There is an indirect benefit to us, and I couldn't dispute. We have no responsibility. The best way I can explain it is it, if we didn't send an activation report to the alarm company and the alarm company found out that there was an activation through the [name of customer] that would be a matter totally separate from us. We don't have any responsibility to do that, we chose to do it to give an added value service to the alarm companies or to some alarm companies, it is not something that we are obliged to do contractually, it is not something that we have a responsibility to do and it is not something that we are paid for.

101. He later said on Day 3, p. 26, q. 94:

> Q. Is of assistance to you because it makes you look good. You said it's an indirect benefit to you, not a direct benefit you said indirect benefit, right?
>
> A. No, the calling out to the alarm company is nothing to do with us. That's absolutely nothing to do with us. The only thing we pay them for is to support us in the relationship. In other words like if a customer is thinking of cancelling his monitoring or a customer might want to move to another central station because he was offered something, the alarm company is in a position to help us keep that customer from a relationship point of view. That's the only reason. There is no other reason.

102. Having regard to the totality of the evidence I think the statement that Mr O'Rafferty "couldn't dispute" the indirect benefit to Top created by Action taking steps on foot of activity reports to keep customers connected makes much more sense than what seem to

be his attempts to dispute this, on which the cross-examination of Mr Mooney was predicated.

103. Mr O'Rafferty regarded the callouts in response to activity reports as totally separate from Top, they choose to provide activity reports as an added value service to the alarm company. They were not obliged to do it contractually. He said it was never envisaged that Action would set up their monitoring centre and that, therefore, all bets would be off. He saw the letter of 3rd November, 1989 as more in the event that it would apply if they sold their business.

104. When asked if that meant that the customers could be procured for anybody else other than the plaintiff itself that would be acceptable, he seemed to agree with that.

105. When asked if he could point to anywhere where this was raised he did not seem to provide a direct answer to that and seemed relatively confused about para. 5 of the defence.

106. He never used the word "repudiation" of the contract, but he did believe that the plaintiff's actions were a breach of contract entitling Top to treat the contract as at an end.

107. It was put to him that it was contradictory to say that the contract had been repudiated at the start of 2009 when in his letter of 3rd March, 2009 he said he fully intended to honour the commitments of the letter of 3rd November, 1989. He said that that was part of terminating the agreement. He claimed that he had honoured the agreement and that Action terminated it. Their actions were a breach of contract and that gave rise to a right to stop paying commission. In his mind the contract was at an end. The breach was not setting up a monitoring station, but no longer supporting customers to be connected to Top. They told Top that they would be taking all the customers away. As soon as they stopped supporting Top the agreement is at an end.

108. When it was put to him that in November, 1989, he said that he would assign the customers without penalty, he said there was no commercial reason to pay people that do not support you. He agreed that that was an arrangement and an understanding, but whether that was a contract was bound up with legalese. He agreed that the letter of 3rd November, 1989 became part of the arrangement. Penalty was to do with an administrative charge. It was not to do with stopping payment of commission. He did not regard themselves as having penalised Action by stopping payment. Action were paid by customers for maintenance.

109. The letter of 28th September, 1989 was effectively a first draft and the ultimate draft referred to matters differently. He accepted that the reference to sale in the earlier letter of 28th September, 1989 was not included in the letter of 3rd November, 1989 and nor was the reference to a commitment from Action in terms of future business.

110. It was put that the plain meaning of Action asking for an assignment to themselves envisaged them having a monitoring centre. He rejected that and said it could be assignment for the purposes of onward sale. He agreed that the agreement between the parties was in accordance with industry norms, but said they made certain exceptions for

Action in the letter of 3rd November, 1989. The only written part of the agreement was the letter, but there was also agreement to pay commission. He did not deny the agreement about commission. Again it is notable that one only has to compare that to the instructions that underlay cross-examination of Mr Mooney.

111. An analysis of connections in the context of the New York trip promotion between October 2001 to July 2002 showed that they gave 45% of customer income to Action and also flew Action personnel to New York. He would not dispute Aaron Mooney's analysis of the customers that as of January, 2009 there were 804 customers introduced by Action and that ultimately 703 customers migrated to Action's monitoring centre or terminated their contracts with Top, leaving 101 customers with Top. They did not specifically say to Action that if you take away some customers they will stop paying commission on the ones that remain, but the reason they have companies they pay commission to and ones they don't is for that reason. If the alarm company is only putting customers into Top if the customer wants that, then the alarm company is doing nothing for Top. The fact that Action did not take all customers was not because they were supporting Top.

112. When it was put that what Action did in January 2009 changed Top's cut (on its analysis) from 55% to 100%, he replied that that was not written down, but neither was the 45% cut. However, the price list was then put to him and he had to agree that the 45% cut *was* written down in the letter of 17th August, 1992. This was another example where Mr O'Rafferty gave a confident answer which he then had to modify or abandon when contrary information was put to him. None of these examples enhanced the overall reliability and weight of his evidence where that differed from the evidence given on behalf of the plaintiff.

113. When it was put that after January 2009 Action continued to call out to the customers, he said he did not deny that. The following exchange took place on Day 3, p. 89, qq. 430-431:

> Q. You still send activity reports?
>
> A. Currently? No.
>
> Q. I think we have them for 2017 and 2018.
>
> A. To be honest with you, do we send them today? I don't know. But what I would say about sending activity reports is this; that if activity reports went out after the event it would have been because we were [...] we're not going compromise anybody in terms of their security because we're having a dispute with Action Alarms. So, if activity reports went out after 2009, that would have been the context. Like we weren't looking to, we certainly weren't looking to have a row with anybody, we certainly weren't looking to compromise a client because people's security is too sensitive. So if reports went out, I can't say for fact myself what reports went out or didn't go out.

114. Two things were notable about this exchange. First the positive, confident statement – a flat denial of currently sending activity reports. Then when this is challenged – a reversal of engines – "To be honest with you ... I don't know ... I can't say for fact myself".

115. The second striking thing is the emphasis (that only emerged when challenged) on not compromising customer security. The implied logic is that it supports customer security to continue to send out activity reports – and this seems to me to be entirely obvious. Any connection problems are much more likely to be resolved if the alarm company is notified about them. But that being the case, and impliedly admitted to be the case, then why the initial firm statement that activity reports were not being sent to Action? The apparent implication in the particular context of that evidence is that Mr Mooney was something of a *persona non grata*, and was not particularly to be communicated with, and that customer security didn't really come into it. This evidence overall seems somewhat contradictory, or at the very least to raise far more unanswered questions than the evidence on behalf of the plaintiff.

116. Mr O'Rafferty went on to say that activity reports were not a commitment. Top did furnish such reports to certain service providers if they looked for it. He did not deny that activity reports were received by Action after January 2009.

117. When it was put that Action did not stop doing what they were doing just because they were not being paid by Top he said it was not Top's place to stop them. He agreed that, without information from Top, Action would not know if somebody paid their bill to Top, although they would know if the customer was monitored by Top.

118. When asked why Top had agreed to make discovery in a consent order on 12th January, 2015 but then did not produce any commission reports, he said this was because such reports did not exist. He denied that this was done in a contrived manner to mislead anybody, but could not remember the circumstances.

119. It was put that he had instructed his lawyers to agree to discover commission reports when he knew there weren't any. He said he did not remember doing it in that fashion, although he accepted that that is what the documents say.

120. It was put to him that he did not reply to schedules in 2015, or to a reminder in 2018, or to a further schedule in May 2019. He said that the parties were already in dispute at that stage.

121. That's as may be but overall it seemed to me that there was inadequate explanation from Mr O'Rafferty as to his non-cooperation in providing information for the purposes of the litigation.

122. He accepted that there were invoices from 2016 to 2017 from Top to Action Alarms.

123. When asked about a document relating to commission for November 2008, he said that the system produces it. He denied that withholding the commission amounted to penalisation.

124. In re-examination he said that he never discussed commission in the context of the letter of 3rd November, 1989.

Mr Michael Lawless

125. In direct evidence Mr Lawless said he was the financial controller of Top from November 2006 until recently. He was in charge of a team of five people and Mr Daly was his counterpart in Action.

126. On 25th September, 2009, Mr Daly emailed him saying that €6,491 was owed to Top Security for the customers directly invoiced by Action, whereas Top owed Action €16,728.85 for November and December 2008. They had a number of phone calls discussing netting of amounts and collection of cheques and how to treat transactions.

127. There was a second email from Mr Daly to Mr Lawless as to whether he wanted to swap cheques or pay the difference and on 1st December, 2009 there was a third email from Mr Daly to him saying that he had collected the cheque earlier.

128. There was a sales statement for November 2008 to January 2009 dated 16th September, 2009 which Mr Lawless said was not available to him when he was discussing the amounts with Mr Daly. He thought the letter of 27th May, 2013 was unusual because it did not relate to any specific invoices or statements.

129. As regards the reference in the letter of 27th January, 2014 to many phone calls, he and Mr Daly had three phone calls. He found the letter unusual. The amount referred to did not relate to any statements or invoices and the idea of €10,000 being a part payment was not what he spoke to Mr Daly about. He said up to 2013 there was no request by Mr Daly for payment or statements.

130. In cross-examination it was put that what happened in September 2009 was that he settled the 2008 liabilities to which he replied that they settled what Mr Daly had on his books at that time. When it was suggested that this was incorrect and that they did not settle monies for January 2009, he said that Mr Daly did not request that. He said they settled what Mr Daly was looking for.

131. In re-examination he denied that Mr Daly ever asked for commission from 2009 to 2012. He said that this request was not made.

Matters not in dispute

132. Helpfully the parties prepared written statements of matters that are not in dispute. I can endeavour to combine those statements as follows, leaving out any matters that were objected to by either side:

    (i). Action is an alarm installation and maintenance company. In 2009, an associated company Action Alarm Control 24 Ltd., set up an alarm monitoring station.

    (ii). Mr O'Rafferty is the founder and principal director of the Top. Top set up an alarm monitoring station in or around 1986, and the Top group purchased a number of

alarm installation companies in the early 2000s (including DeJay Royale, Best Alarms, Whelan Alarms and Napier Alarms).

(iii). In the mid-1980s Mr Derek Mooney of Action and Mr O'Rafferty formed a business relationship, whereby Action would solicit customers for whom it installed and/ or maintained alarms to become users of Top's monitoring centre.

(iv). Between circa 1986 and 2009 Action and Top had a commercial relationship whereby Action introduced alarm monitoring customers to Top.

(v). During this period Top paid Action what the parties termed commission, calculated as a percentage of the annual fee received by it from the introduced monitoring customers, to secure the introduction of the customer and procuring the maintenance of the customer's relationship with Top.

(vi). In 1989, Action was anxious to have its position as introducer of customers to Top protected by limiting Top's ability to assign Top's interest in the monitoring contracts it had with those customers (clause 12 of the sample contract provided).

(vii). A draft letter offering to limit Top's ability to rely on clause 12 of the monitoring contract it had with each of those customers relating to the assignment of its monitoring contracts was furnished by Top on 25th October, 1989, and agreed, signed by Mr O'Rafferty on behalf of Top and accepted by Action on 3rd November 1989. The crucial term was stated thus:

> "I therefore agree that Top Communications will, at your request, assign all or any of its rights under the agreement it has with your customers to you or your nominees without penalty to the subscriber or Action Alarms Ltd. There will be no penalty for allowing this transfer however, any annual renewals which have become due at that stage would be due for the full 12 month period and still remain owing if outstanding at that date. The three year contract in terms of these customers would in this instance be waived."

(viii). The letter of 3rd November 1989 was sought by Action's Mr Mooney, with the benefit of his accountant's advices, in order to have a right to assign customers agreed in a formal written manner.

(ix). The letters of 28th September 1989 and 19th October 1989 did not form part of any binding agreement between the parties.

(x). The annual monitoring fee was revised on occasion, and the split due to Action from the annual monitoring fees was adjusted.

(xi). Top ran regular marketing drives, which comprised encouraging alarm installers/ maintainers to introduce new customers to Top for each of which new customer the alarm installer/ maintainer would receive a split of the monitoring fee.

(xii). In 1992, Top ran a promotion which after 9 months had seen Action introduce 97 connections with an annual monitoring contract value of IR£10,050 to Top, of which Action would be entitled to IR£4,500 and Top IR£5,550.

(xiii). A small number of customers wished to receive one invoice for security services, and for those customers Action raised invoices to the customer for Top's monitoring, and Top would seek that its split of the annual monitoring fee would be paid to it by invoicing Action.

(xiv). For 20 years from 1989 to 2008, Top provided Action with a monthly "Commission Report" based upon which Action would provide an invoice to Top for the amount owed to Action from annual monitoring fees collected in that month by Top. Such Commission Report was readily capable of being printed by Top from the computer system which it operated until January 2015 when a new computer system was installed.

(xv). Commission payments were made *via* a process of commission reports being generated monthly by Top and invoices raised by Action on foot of those reports.

(xvi). Action requested and were given daily overnight customer alarm fault reports from Top's system up until January 2009; It was not alleged that there was an enforceable agreement that these reports be provided. [I note here that I don't imply from this agreed wording that the activity reports stopped in January, 2009 – the evidence was that they didn't, but the only agreement between the parties as to the facts was in respect of the period up to then].

(xvii). Checking the connection to the monitoring station was one of Action's obligations pursuant to the maintenance contract Action had with the majority of its customers.

(xviii). Action was entitled to charge customers for servicing their system *inter alia* to ensure it was connected to Top's monitoring service.

(xix). In 2008, 804 customers had been introduced by Action to Top and Action was entitled to part of the annual monitoring fee for each of them.

(xx). In 2008, Action informed Top that it intended opening its own monitoring station (through its associated company) and that Action intended to rely on the letter of 3rd November, 1989, and seek that Top assign its interest in the monitoring contracts with such of the 804 customers introduced to Top by Action as agreed to transfer their monitoring contract to Action.

(xxi). In late 2008 Action advised Top that it was setting up its own monitoring station in competition with Top and that it wished to have the Action introduced monitoring customers transferred to its monitoring station. While in 1989 it had not been envisaged that Action would establish a monitoring business, Top largely complied with the 3rd November 1989 letter as regards allowing Action-introduced customers to transfer to Action's monitoring service, subsequent to Action addressing Top

"reasonable" request to procure the Customer's written consent and RC1C form to facilitate the transfers of the customers;

(xxii). In the undated letter to Paul Daly of Action from Jim Blake of Top, it was stated that for monitoring customers to be transferred from Top to Action, a signed letter of consent from the customer was required, along with a form RC1C for Top's records and for forwarding to An Garda Siochána. It was also asserted on behalf of Top that:

> "The customers who we have always invoiced directly are our customers in terms of the monitoring relationship and that has been the case for many years as you are aware. Until such time as those customers request a transfer to your central station we do not intend to alter the way we deal with them. We will continue to operate under our current terms and will facilitate all requests by those customers in a timeous fashion".

(xxiii). By letter of 25th February, 2009, Dillon Solicitors on behalf of Action asserted that the requirement for a letter of consent and a form RC1C from each transferring customer was inconsistent with the agreement in the letter of 3rd November 1989 and threatened to seek an injunction compelling Top to comply with the terms of that letter.

(xxiv). By reply to Dillons Solicitors from Top of 3rd March 2009, it was stated that:

> "We fully intend to honour those commitments made to your client in our letter dated [3/11/89]. This requires us to transfer the customers without penalty to a central station of Action Alarm's choosing, in this case their own."

The letter went on to state in its penultimate paragraph that

> "Your clients are getting what they want, there is just a process to be gone through. It seems to me that they are making it unnecessarily difficult for the sake of a few short months at the end of which they will be in full control and can get on with their business".

(xxv). In reply to that letter from Top, Action wrote on 10th March 2009, confirming it was glad that Top agreed to honour the agreement of 3rd November 1989 and that Action would comply with its commitment to allow Top to collect the full year monitoring fee if the contract was renewed before transfer.

(xxvi). Top stopped sending Commission Reports after the report for January 2009.

(xxvii). Top did not pay Action its part of the split fee of any monitoring contract after December 2008.

(xxviii). In December 2009, Top paid Action €10,000 in settlement of the amount owed by Top for November and December 2008 net of the amount owed by Action to Top at the end of 2008.

(xxix). In December 2019, without an admission of liability, Top offered an analysis of Action's claim for the split fees from monitoring contracts for customers who did not transfer from Top between 2009 and 2019. Action identified that out of 804 customers at December 2008, 703 had transferred to Action, and 101 either remained with Top or had cancelled their monitoring contracts with Top. Top applied its standard fee split to Action's calculation (which reduced the claim) and inserted an amount by way of set-off of €4,830 being Top's entitlement to €69 per annum for 10 years from 7 customers who were invoiced by Action for monitoring by Top.

(xxx). The last commission report generated was in January 2009 and no written request was made for commission reports until after these proceedings were issued.

(xxxi). No written demand was made for unpaid commissions for the period January 2009 until a written demand was made on the 27th May 2013.

Overall evaluation of witnesses

133. In broad summary having seen and heard all of the witnesses give their evidence, I prefer the evidence of the plaintiff's witnesses where they differ from Mr O'Rafferty. Generally, their evidence was more internally consistent and more consistent with objective facts and left fewer unanswered questions or inconsistencies than the evidence of Mr O'Rafferty. I have endeavoured to deal with specific examples of this elsewhere in the judgment. Insofar as Mr Lawless is concerned, his position was that all Mr Daly was trying to do at the time of their discussions in 2009 was deal with particular months in 2008. Even assuming that to be the case, one can't infer from that that the plaintiff was abandoning any claims about commission from 2009 onwards. Given all the circumstances and the difficulties around communications that were referred to in evidence, it isn't hugely surprising that Mr Daly might have focused only on the period that wasn't particularly contentious for the purposes of the balancing exercise he engaged in.

134. All that said, I need to make clear that I don't think that anybody was intentionally trying to give incorrect evidence. But Mr O'Rafferty's evidence, interpretations and positions were generally less convincing or persuasive than those of the plaintiff, where they differed, for the reasons that I have sought to identify. I now turn to the specific issues that arise for decision.

Whether there was a contract

135. In commercial arrangements, it is to be presumed that the parties intend to create legally binding contracts: see *per* Fennelly J. *in McCabe Builders (Dublin) Limited v. Sagamu Developments Limited* [2009] IESC 31, [2011] 3 I.R. 480 at 492. He made reference to the decision of the House of Lords in *Hillas & Co. Ltd. v. Arcos Ltd*. [1932] UKHL 2, (1932) 147 LT 503 (HL). In that case Lord Wright said as follows: "Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita*

sunt intelligenda ut res magis valeat quam pereat ["words are to be so understood that the subject-matter may be preserved rather than destroyed", Sir Francis Bacon, *Collection of Some Principal Rules and Maxims of the Common Law* (1630) (London, J. More, 1636), *regula* 3]. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law".

136. This has a certain resonance here. The only part of the agreement that was specifically drawn up in a contractual-type letter was that of 3rd November, 1989 which didn't refer to commission (Lord Wright's "crude and summary"-type instrument), but the clear and obvious background against which that was agreed was the payment of commission. Both the element of transfer in the letter of 3rd November, 1989 and the payment of commission itself are integral to the commercial relationship between the parties. Thus, to use the phrase of Lord Clarke in *RTS Flexible Systems Limited v. Molkerei Alois Müller Gmbh & Co. KG* [2010] UKSC 14, [2010] 3 All ER 1 (at para. 45) "a consideration of what was communicated between them by words or conduct … leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."

137. When Mr Mooney referred in evidence to a "gentlemen's agreement" and also said "I didn't think there was any legal agreement", it is clear to me having seen and heard his evidence and having regard to the totality of that evidence, that in using this sort of terminology he was doing so amateurishly and was not thinking of Murdoch and Hunt's *Dictionary of Irish Law*, or any other legal dictionary. What he meant was that there was not a formal signed legal instrument. He did not mean that he did not see the arrangement with Top as being an agreed and negotiated commercial arrangement that was binding and enforceable in the event of a breach.

138. The arrangement between Action and Top could not have been anything other than a contract. The law on the lack of legal status of a "gentlemen's agreement" has no relevance whatsoever here, and doesn't acquire such relevance merely because of Mr Mooney's legally uninformed and maladroit use of that phrase.

139. The clear evidence was that alarm companies had some bargaining power given that monitoring companies were dependent on alarm installers for the introduction of business. The idea that alarm installers would provide such introductions and maintain the connections in return for just a "discretionary" payment (which was what was put in cross-examination to Mr Mooney but never actually positively backed up in Mr O'Rafferty's evidence) is utterly fanciful. Clearly the payment was very significant, about 45% of customer income on the evidence. It makes no sense not to view this as a contractual arrangement, albeit one that was not reduced to writing in a detailed written document.

Whether the contract was limited to the letter of 3rd November, 1989

140. It is also obvious that the letter of 3rd November, 1989 is not the totality of the contract, merely one term of it. That was Mr Mooney's evidence which I accept and it was also expressly accepted by Mr O'Rafferty, as we have seen above. The payment of commission

was the agreed background against which the specific term about assignment of customers made sense. Insofar as the defendant seeks to make much of the lack of reference to commission in the letter of 3rd November, 1989, that point is based on the false premise that the letter was the entire agreement. While the defendant sought to commit Mr Mooney in cross-examination to the position that the letter was the entire agreement, and while his unfamiliarity with legal matters was such that at certain (though manifestly not all) points he might have seemed to have been induced to agree with that, it must be remembered that the witness box is not an oral examination in a litigant's understanding of the legal nuances of their case. The parameters of a case are to be determined by legal advisers within their instructions. And instructions generally are an envelope rather than a straitjacket. So concessions or apparent concessions on legal matters, legal implications or nuances, or issues about the scope of one's case, made by a litigant in the witness box, don't normally carry much weight, and generally just prove that the witness doesn't understand law very much. While evidence on *factual* matters that undermines one's own case can be held against one, a litigant is not to be debarred from advancing a *legal* issue merely because she amateurishly misunderstands the point in the witness box or even says expressly that she is not relying on it. To hold a witness to such a "concession" would be to immensely privilege litigants with legal literacy over their less learned counterparts. It would make equality before the law into a delusion, a mockery and a snare. The ultimate call on one's legal points, within instructions, is for one's lawyers. And maybe this works both ways – after all Mr O'Rafferty agreed in cross-examination that the letter wasn't the entire agreement. That being so it raises the question of why give instructions to cross-examine Mr Mooney on a contradictory basis. In any event, from Mr Mooney's evidence overall it was clear that he was stating that there was an agreement to pay commission as well as regarding the matters set out in the letter of 3rd November, 1989. That is a fairly obvious conclusion from the circumstances anyway.

Whether the payment of commission was a contractual term

141. It is also obvious that payment of commission was a core part of the contract between the parties. While not an agreement reduced to writing, it is certainly evidenced in writing and evidenced by the conduct of the parties and in particular the payment of commission for the best part of two decades. This is not a case of needing to imply any terms into the contract by reference to the custom in a particular trade, which would normally need to be proved by expert evidence. The conduct and correspondence and actions as between the parties themselves clearly illustrate the terms of the contract between them, one of which was the payment of commission in respect of customers introduced to Top by Action.

Whether any agreement requiring payment of commission is no longer binding

142. It is clear from the evidence of the contract between the parties envisaged the payment of commission by Top to Action on the following basis:

    (i). That Action introduced the customer to Top. That is not written down, but is evidenced by the conduct of the parties and the general commercial environment that an alarm company has influence over which monitoring company to introduce the customer to.

(ii). That the customer remains with Top. Again that is not written down, but is evidenced by the conduct of the parties in that commission statements only refer to current customers and because the commission is only paid from monies actually received, so that if the service ceases Top would cease to pay the fee.

(iii). That the customer pays the fee to Top from time to time which is then split with Action as it is paid, in a negotiated proportion. Again that is not written down as a contractual term, but is evidenced by the conduct of the parties, the commission reports, the records of prices, and handwritten notes of negotiations between Top and Action on the split of fees.

(iv). That Action continues to procure the maintenance of the customer as a customer of Top. There was much debate about how this concept of supporting or maintaining the relationship should be defined, but it is clear to me that the most appropriate understanding of Action's implied agreement to support the relationship with Top is in the sense of maintaining the physical connection with Top by servicing the alarm system so that the necessary connection is maintained. This is in the context of the entire monitoring service depending on their being a connection between the alarm company and the monitoring centre. Again that is not written down as a contractual term, but is evidenced by the conduct of the parties, the supply of activity reports and the call out visits by Action's engineers where connection issues arose above and beyond the regular scheduled maintenance checks on an annual or six-monthly basis. By contrast there is virtually nothing to support some alternative interpretation whereby Action were supposed to have agreed to jolly along the customer, to see if they were happy with Top, answer their questions about Top and so on. All that seems to me totally ephemeral, speculative and after-the-event. One searches in vain for actual evidence that this was ever agreed as a term of the arrangement, or that it was ever in fact done. Where are the records of Top trying to identify whether Action were answering customers' questions, encouraging them and so forth? There was no evidence that this ever happened or was ever inquired about by Top. What *did* happen was a servicing of the physical connection, and that, it seems to me, can only be what the arrangement and agreement to maintain and support the customer's connection was about.

143. It is true that an alarm company such as Action maintains alarms whether they are monitored or not, and charges for doing so, but obviously there is additional work for a monitored alarm. That additional work is reflected in the activity reports generated by the monitoring centre where the signal failed to communicate from time to time, for example, or where some other fault is detected. A graphic example was provided in respect of licenced premises in Dublin city where the phone cable had been cut (presumably accidentally during some other works – although for whatever reason there was no real exploration in evidence as to when exactly this happened, how long the customer was left without service, who knew about the lack of service during that period and how did they know). In the absence of Action having rectified that, there would be no communication between the Alarm and the monitoring company, hence meaning that no actual monitoring

service would be provided by Top, even though it would continue to be charged for even if the problem is not rectified. The lack of connection presumably would come to light in the event of an incident, to nobody's satisfaction. Obviously such problems could arise at any time, not just on the date of annual or biannual maintenance.

144. On the basis of the totality of the evidence and having seen and heard the witnesses I reject the suggestion from the defendant that Action actually charged separately for call-out in response to failure in the daily self-test connection, at least as a general or routine practice, even assuming *arguendo* that they had a right to do so under their contract with their customers. I accept the evidence of Mr Mooney in this regard. Thus I reject the argument that Action were the primary beneficiaries of the activity reports. Providing a continued connection with Top obviously provided a benefit to Top which Mr O'Rafferty strangely denied but ultimately acknowledged. He predominantly characterised the activity reports as conferring a benefit on Action which I consider to be a mischaracterisation. They were clearly primarily of benefit to the customer, but secondarily of mutual benefit to both Action and Top who had a shared interest in seeing that the system worked properly.

145. The evidence was that the plaintiff continued to provide the same service to the disputed customers after early 2009 as it had provided before. It seems to me that under those circumstances, the plaintiff continued to support the relationship between the customer and Top by maintaining the physical connection and therefore satisfied the conditions for payment of commission even after January 2009. Thus it was entitled to such commission under the contract.

146. The defendant argued that the plaintiff's action in seeking to transfer customers to its own monitoring centre gave rise to legal consequences to the contrary. Those consequences were advanced on a number of alternative bases either as breach of the agreement *simpliciter*, a repudiatory breach, or a change of circumstances that terminated the agreement.

147. Mr O'Rafferty's evidence was that the commission was conditional on Action encouraging the customer to remain with Top. However, the court should be slow to infer terms into an agreement: see *Sweeney v. Duggan* [1997] 2 I.R. 531*, Meridian Communications Limited v. Eircell* [2001] IEHC 195, [2002] 1 I.R. 17, *The Law Society of Ireland v. The Motor Insurers' Bureau of Ireland* [2017] IESC 31, [2017] 5 JIC 2501 (Unreported, Supreme Court, O'Donnell J. (Denham C.J., McKechnie, Charleton and O'Malley JJ. concurring), 25th May, 2017), *Tradax Ireland Limited v. Irish Grain Board Limited* [1984] I.R. 1.

148. In the latter case, O'Higgins C.J. referred to the power to imply terms into the contract and said that "[t]his power must, however, be exercised with care. The Courts have no role in acting as contract makers, or as counsellors, to advise or direct what agreement ought to have been made by two people, whether businessmen or not, who choose to enter into contractual relations with each other".

149. Finlay Geoghegan J. in *Irish Bank Resolution Corporation Limited v. Morrissey* [2013] IEHC 208 (Unreported, High Court, 14th May, 2013), at para. 112, said that "[i]t is well

established that the courts must be extremely cautious about implying terms into a commercial agreement", and Fennelly J. in *Dakota Packaging Ltd. v. AHP Manufacturing BV T/A Wyeth Medica Ireland* [2004] IESC 102, [2005] 2 I.R. 54, at 106, said that "courts will not lightly infer terms."

150. The defendant seems to think that it is up to the plaintiff to show that a term can be inferred to the effect that Action was permitted to seek to have customers avail of its own service and to continue obtaining commission for the customers that don't transfer. That is a complete misunderstanding and a reversal of the legal position. Given that it is clear that the agreement was to that Top would pay commission, it is up to Top to demonstrate an implied term allowing it to terminate such payments. This Top has failed to do.

151. The default position in general is that if something is not specifically envisaged by an agreement and then happens, the agreement normally continues undisturbed. The defendant's written submissions refer to the speech of Lord Hoffman in *Attorney General of Belize v. Belize Telecom Ltd*. [2009] UKPC 10, [2009] All ER 1127, [2009] 1 WLR 1988 at para. 17. However, the defendant only quotes a fragment of that paragraph. The full paragraph is particularly instructive and I consider it a valuable encapsulation of the law across these islands:

> "The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls."

152. Applying that approach here, it is up to the defendant to show that a term can be inferred that the plaintiff was prohibited from asking customers to avail of its own monitoring centre such that it would lose the right to commission even if they failed or refused to do so. No such term has been demonstrated. Top's route to proposing such a term is *via* an expansive interpretation of the duty to "support" or "maintain" the relationship with Top as meaning not the obvious and tangible maintenance of the physical connection but some sort of ephemeral loyalty test, bordering on a non-competition clause. First of all, there was no satisfactory evidence whatsoever that this was a term. Secondly, there was no evidence of any specific instances of steps by the plaintiff that the defendant regarded as required by an alleged clause requiring the plaintiff to support the relationship with Top Security as noted above. Mr O'Rafferty spoke vaguely about customers sometimes having questions but no specific instance of that ever happening were identified. Thirdly, there was no evidence of how the defendant would monitor the alleged encouragement of the relationship or how that would really arise in practice. Most fundamentally of all, given that the commission was such a large percentage of customer income, 45% approximately for an indefinite period going forward, it is implausible that such large sums would be paid for such a nebulous alleged obligation.

153. What is much more plausible is that the sense in which the plaintiff was required to maintain the relationship with Top was not in the sense of not asking the customer to move service, but in physical and engineering terms, that is, to maintain the physical connection between the customer's alarm and Top through ongoing maintenance of the system for so long as the customer was monitored by Top.

154. More centrally, this proposed term is fundamentally contradictory of Action's agreed right to assign the monitoring contracts of customers to itself, which implies a right to ask those customers if they want to be assigned. The "no-attempted-poaching" clause proposed by the defendant is inconsistent with the express agreement as reflected in the letter of 3rd November, 1989 which explicitly allows Top's interest to be assigned to Action itself or its nominees without penalty. Thus, it cannot be a breach of contract for Action to ask a customer whether the customer wishes to be assigned to Action's own monitoring service. Therefore the plea in para. 5 of the amended defence that commission was in consideration for not procuring or seeking to procure the customers of Top for itself cannot be accepted. Reinforcing this is the fact that there is no satisfactory evidence that such a term was agreed and no evidence that this issue was even raised with Action. Finally, and for what it's worth, such a proposed clause does not make sense in terms of what is fair and reasonable, given that the commission is on a customer-by-customer basis premised on who renews, who is retained, who does not cancel and who actually pays. Of course, the fact that something is reasonable does not mean that it was contractually agreed, but the fact that Top's proposed contractual term does not appear to be self-evidently reasonable does not automatically assist in the argument that it should be inferred. For all of these reasons, where Action transferred some customers to itself, it has not been demonstrated that it would lose the right to commission in respect of other customers who remain with Top despite being asked whether they wish to transfer.

155. Overall again, the law as explained in *Attorney General of Belize* applies here. There was no explicit agreement as to what would happen if the plaintiff tried to move some of the customers to its own service. The general presumption is that nothing would happen and that the agreement would continue, and I think that general presumption applies here. Top certainly have not demonstrated an agreement that the pre-existing contractual arrangement would come to an end on asking any customers to move or in any of the other circumstances here.

156. As regards the argument about repudiation, that requires first of all establishing a breach of the contract, which in turn involves identifying a term of the contract which the relevant party's actions are inconsistent with. It seems to me that the defendant has failed to establish the existence of a term which the plaintiff breached. As noted above, the *Attorney General of Belize* approach applies here. The steps by Action in asking customers to transfer do not disturb the existing contract. Obviously commission no longer arises for the customers that *did* transfer, but the commission continues to be payable in respect of the customers who didn't transfer and who stayed with Top.

157. Insofar as it is argued that there was no consideration by Action for payments by customers made after January 2009, that is clearly not so. Consideration had already been provided in the form of the original introduction for which there would be ongoing payment, together with ongoing maintenance and service of the link between the customer and the monitoring centre in physical and engineering terms. There is no evidence whatsoever that the plaintiff failed in its maintenance duties and indeed its positive evidence was that it continued to carry on such duties. I do not accept that the parties treated the contract as at an end in 2009, and the exchanges between Mr Daly and Mr Lawless are best understood, in the light of the overall evidence, as a squaring-off of the liabilities as of 2008 only.

158. Cases relied on by the defendant regarding the termination of commission for agents are totally irrelevant because this is a very different situation, namely, commission in respect of a client that had been introduced by the plaintiff.

159. It is true that there was something of a delay in the first written demand for the unpaid commission, but Mr Mooney attributed some of this to his preoccupation with setting up the new business of the monitoring centre and I would broadly accept that explanation. In any event, whatever one might think of the delay in instituting the claim, it is not such as to outweigh the conclusion that the plaintiff has a legitimate complaint.

Whether the agreement regarding non-penalisation precludes Top from withholding the commission.

160. If I am wrong in relation to the foregoing, I am satisfied that the specific agreement as to non-penalisation of Action in the event of customer transfer as set out in the letter of 3rd November, 1989 precludes Top from withholding commission that would otherwise be payable. To do so amounts to penalising top for seeking to activate a right specifically granted to it by the agreement reflected in the 3rd November, 1989 letter

161. The net effect of having withheld the commission was to increase the portion of customer income taken by Top from 55% to 100%. That results in Top profiting from Action availing of the agreement that it was entitled to seek to assign its customers. It seems to me by withholding the commission in the case of customers that did not transfer, Top is in substance and reality penalising Action for having sought the transfer.

162. I reject Mr O'Rafferty's narrow interpretation of the meaning of "penalisation" (insofar as he could be said to have given it any definite meaning), and I reject the idea that either these parties as of 1989 or a hypothetical reasonable person interpreting the letter in 1989 would have applied such a narrow interpretation.

The plaintiff's alternative equitable claim

163. Given that the plaintiff's primary claim in contract succeeds, I do not need to address the alternative equitable claim.

Whether Courts Act 1981 interest is appropriate

164. Interest under s. 22 of the Courts Act 1981 is to an extent discretionary. In *Reaney v. Interlink Ireland Ltd*. [2016] IECA 238, [2016] 7 JIC 2904 (Unreported, Court of Appeal,

29th July, 2016), Finlay Geoghegan J. (Hogan and Mahon JJ. concurring) said (at para. 22) as follows:

> "There are a number of decisions which refer to the discretionary nature of the jurisdiction. Once the court orders the payment by any person of a sum of money (including damages) the judge concerned, "may, if he thinks fit", also order the payment by the person of interest "on the whole or on the part of the sum in respect of the whole or any part of the period between when the cause of action accrued and the date of the judgment"."

165. In *First Active Plc v. Cunningham* [2018] IESC 11, [2018] 2 I.R. 300, McKechnie J. considered the question of interest under the Courts Act, 1981. McKechnie J. said as follows:

"The following factors may be relevant to the exercise of the court's discretion, either in the granting of interest *per se* or in respect of the period for which interest may be appropriate:

- The nature of the case
- The reasons why the debt was not discharged at an earlier date
- The conduct of each party to the litigation
- The reason for the passage of time or delay in the processing of the litigation
- The absence of any contractual clause dealing with interest in circumstances where its existence might be expected
- The desire to achieve full restoration, but no more, for the judgment creditor
- The avoidance of penalising the judgment debtor."

166. It seems to me on considering these factors that the Courts Act 1981 interest is particularly appropriate here. Insofar as passage of time or delay in the processing of the litigation is concerned it should be noted that s. 22(1) of the 1981 Act allows the court to award interest going back to "the date when the cause of action accrued". If the plaintiff had applied for interest from the date of accrual of the cause of action here I would not have considered that to be particularly appropriate in the absence of a written demand. However, the plaintiff's written schedule of calculations makes clear that the claim is only made dating from the actual initiation of the proceedings.

167. While some of the delay in the processing of the litigation was outside the control of the parties as such, insofar as delay is attributable to them, I think it is primarily down to the defendant. This is because the defendant failed to reply to a number of requests for information, and failed to really engage with the detail of how many customers from Action were still on Top's books until a very late stage.

168. I also have regard to the fact that what happened here was in effect the unilateral ceasing by Top of pre-existing contractual arrangements, most importantly the payment of commission, but also the provision of commission reports and information, and a broad shutting off of the stop-cock of communications.

169. In all the circumstances and having regard to the overall criterion of just compensation for the successful party, as put by McKechnie J. in *First Active Plc v. Cunningham*, the appropriate order is to allow the plaintiff's claim in respect of interest under the 1981 Act for the period going back to the institution of the proceedings. It seems to me that where there is a clear contractual arrangement to pay commission, this is closer to the case of the defendant refusing to pay the contract price rather than the alternative scenario of a genuine dispute with some merit on each side to which O'Donnell J. referred in *Reaney v. Interlink Ireland Ltd*. [2018] IESC 13, [2018] 2 JIC 2703 (Unreported, Supreme Court, O'Donnell J. (Clarke C.J., McKechnie, MacMenamin and Dunne JJ. concurring), 27th February, 2018) at para. 17. In coming to that conclusion I have had regard to all of the relevant matters referred to in this judgment, which I don't need to rehearse again here.

170. It is also relevant that Top's failure to properly engage with the detail of the customers' contracts led to a significant prolongation of the second hearing and the need to adduce and explore evidence in detail about the schedule of customers. Overall it seems to me there is an ample case for Courts Act 1981 interest here.

Order

171. Before concluding I might return to the more general issue of the need for continuous communication between a monitoring company and the company that installed any given alarm as to the status of the physical connection of the alarm, even if the commercial relationship between those two entities has otherwise faltered. Continued mutual communications on the live status of the physical connection is clearly in the interests of customer security. The defendant's position, which wasn't contradicted by the evidence, is that there is no contractual or regulatory obligation on it to inform an alarm company of any defect in the communication with the monitoring station. I will accept that for present purposes, but it does give rise to concerns. I would firstly encourage Top and indeed any monitoring company to send out activity reports in near real time to all alarm companies whose alarms are affected, even if they don't have a positive working relationship with any of those companies. Failure to do so could mean that the system might not be corrected in a timely manner, that security would be compromised, and indeed that monitoring was being charged for without the service being provided. In a situation where the signal doesn't communicate, one can't rely on the customer to take the initiative, even if they are told about the problem (which may or may not happen in any given case). Secondly, as noted, there was no evidence that automatic notification of faults to the relevant alarm company was an obligation imposed on monitoring companies by the Private Security Authority, but if not I would respectfully suggest that the Authority might consider whether this duty should be imposed, and perhaps I might even be allowed to suggest that the parties might draw the Authority's attention to this aspect of the judgment. In doing so however I make clear that I don't in any way suggest that Top were not complying with

existing regulatory duties – the case raises a general issue as to what the scope of those duties should be.

172. Turning then to the order, for the reasons set out, there will be judgment as against the second defendant in the amount of €148,324.89 made up as follows:

(i). damages for breach of contract of €95,528;

(ii). VAT at 23% in the amount of €21,971.44; and

(iii). Courts Act 1981 interest of €30,825.45.

173. As regards costs, I will direct that the plaintiff should furnish written submissions within seven days, that the defendant should furnish replying written submissions within seven further days and that the matter will be listed remotely on Monday 21st February, 2022, at 9.30 am for mention. The submissions should deal with the following issues:

(i). the costs of the first hearing date in 2017;

(ii). the costs of the second hearing in 2019;

(iii). the costs of the third hearing in 2022;

(iv). insofar as the issue arises, whether the costs of the second and/or third hearings should be dealt with on the basis of refresher fees or on the basis of additional brief and instruction fees in the particular circumstances that arose here;

(v). the question of reserved costs;

(vi). the costs of making discovery;

(vii). the costs of written submissions (and the number of such submissions across the three hearing dates);

(viii). what order if any is appropriate as regards the first defendant, and the precise extent to which any costs were incurred on his behalf above and beyond those incurred on behalf of the second defendant;

(ix). the form of the order that would accommodate the event of the State agreeing to the request that has been made to it to pay a contribution by reason of the unusual circumstances that arose necessitating a further hearing; and

(x). any other relevant headings in relation to costs not covered by the above points.