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THE HIGH COURT

2009 1834 S

BETWEEN

FINBAR MURPHY, ENDA MURPHY, STEPHEN MURPHY,

RONAN MURPHY, CHRIS GIBLIN AND PATRICK DOYLE

APPLICANTS

AND

GOWAN DISTRIBUTORS LIMITED

RESPONDENT

AND

THE HIGH COURT

2009 4983 S

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FINBAR MURPHY, ENDA MURPHY, STEPHEN MURPHY,

RONAN MURPHY, CHRIS GIBLIN AND PATRICK DOYLE

RESPONDENTS

JUDGMENT of Mr. Justice McMahon delivered on the 5th day of April, 2011

Introduction

1. Seán Murphy ran a garage repair business in Dublin in the 1970s and 1980s. He also dealt in used cars. Finbar Murphy and his three brothers grew up in the business with their father and finally took over from their father when he became ill in 1989.

2. Mr. Murphy's family garage was also a recognised service dealer for Peugeot cars at that time. Mr. Murphy and his sons in that capacity had a good relationship with Gowan Distributors Limited (hereafter "Gowan") which was the importer and distributor of Peugeot cars in Ireland.

3. In the early 1990s, it was intimated to Finbar Murphy by Gowan that unless the business took "a new route" it would probably lose the service business for Peugeot cars. Finbar Murphy said that he and his brothers came under pressure to develop the family business into a full-blown Peugeot dealership covering not only the servicing side of the business but also the sale of new cars. It was realised, however, that to graduate to this higher level of business, new and better quality premises would be required. Finbar Murphy was on the lookout for suitable premises for approximately six or seven years until finally, Unit 4 Liffey Valley Shopping Centre was suggested to him, probably by Mr. Frank Scanlon, Marketing and Development Manager for Gowan. The Murphy brothers then decided to run with the plan of the new dealership with Peugeot. In April, 2000 they, together with two outside investors, Chris Giblin and Patrick Doyle (hereafter "the outside investors"), incorporated Westland Company Limited (hereafter "Westland") as the new business vehicle to take the dealership. The premises at Liffey Valley Shopping Centre, however, were owned at that time by Glencullen Retail Limited (hereafter "Glencullen") which was not prepared to deal directly with Westland, a new company with no track record, and which insisted that, if the property was to be let it would only be let in the first instance to Gowan, which could then sublet it to Westland if it wished. This then was the arrangement: Glencullen would lease the showroom and premises to Gowan and Gowan in turn would appoint Westland as a Peugeot dealer and would then sublet the premises to Westland. The sublease was signed on 18th April, 2001. The first dealership agreement (signed 2001) was in the standard form which carried all the provisions mandated by E.U. regulations. The sublease mirrored the head lease as might be expected and, in addition, the four Murphy brothers, who were directors of Westland, provided certain personal guarantees in respect of Westland's obligations to Gowan for the rent (schedule 5 of the sublease). The terms of this agreement are a very significant part of Gowan's case and they will have to be revisited in detail later in this judgment. In addition, before Gowan sublet the premises it spent in excess of €750,000 in an extensive fit-out of the premises. A further agreement was entered into between Gowan and Westland wherein Westland agreed to repay part of the cost of the fit-out over an extended period of years.

4. Westland moved into the premises at the beginning of 2001 and, after a couple of good years trading, it became apparent that the

premises were not sufficient for both the sales and servicing aspects of the expanding business. A particular problem arose because of the limited parking space on the site, and Westland decided that new premises would be purchased and that the after sales services and parts department of the Westland business would be relocated to give more comfort to the sales part of the operation. This happened in 2005.

5. When business was good and Westland was making profits, the Murphy brothers together with the outside investors availed of the opportunity to purchase Glencullen's interest in the Unit 4 premises at Liffey Valley Shopping Centre, as tenants in common of one sixth equal shares. This was done on 26th June, 2003. Gowan was unaware of the transfer until the deal was completed. It was informed, however, by Finbar Murphy and Ms. Butler (an accountant acting for Mr. Doyle) shortly after the deal was concluded. The unusual position that then prevailed was that after that date the Murphy brothers together with the outside investors were the owners/landlord of the Unit 4 property leased to Gowan, while Gowan, in turn, remained the lessor of the sublease to Westland, in which the Murphy brothers and the outside investors were the shareholders and directors. Moreover, the Murphy brothers had given personal guarantees to Gowan in respect of the rent payable by Westland under the sublease.

6. In 2005 Westland's business began to decline and despite best efforts to save it, the company's credit line with G.E. Woodchester was cut in January, 2009 and Westland went into liquidation on 13th February, 2009. Westland has paid no rent to Gowan since then and the Unit 4 premises have remained unoccupied from that time.

7. There are two sets of proceedings now before the Court. First, the Murphy brothers and the two outside investors have commenced proceedings against Gowan for rent due to them under the head lease. Gowan in these proceedings has filed a full defence. Second, Gowan is suing the Murphy brothers on the personal guarantees in respect of rent due by Westland on the premises at Unit 4 and calling on them to execute a new lease as they had undertaken to do in the event that Westland went into liquidation. A full defence has been entered by the Murphy brothers. It will be recalled that the applicants in the first set of proceedings include both the Murphy brothers and the two outside investors, who have not guaranteed the payment of Westland's rent to Gowan. To avoid confusion, I will refer hereafter to the applicants in the first set of proceedings as "the Murphy brothers and the outside investors"; and the respondents in the second set of proceedings as "the Murphy guarantors".

8. The cases are interlocked and the parties agreed that the best way of proceeding at the hearing was for counsel for Gowan to open its case first and then for the Murphy guarantors to give their evidence in their defence/counterclaim of this, which would also be their evidence in the action in which they, together with the outside investors, are the applicants in the proceedings against Gowan.

9. To establish the rights and obligations of the parties *inter se*, the Court is obliged to engage in the first instance with the relevant documents. In particular, the Court must consider the head lease between Glencullen and Gowan signed on 6th October, 2000; the sublease between Gowan and Westland (of which the Murphy brothers were guarantors) executed on 18th April, 2001; the dealership agreement between Gowan and Westland dated 25th September, 2003 (which replaced an earlier agreement of 2001); and two letters dated 23rd March, 2001, sent by Gowan personnel to the Murphy guarantors and to Westland respectively.

10. I set out hereunder the relevant provisions of these documents.

The Head Lease
11. The head lease between Glencullen and Gowan was signed on 6th October, 2000, and is a standard form document and requires little elaboration. The initial rent was €110,000 for the first year, €115,000 for the second year and €120,000 for the following three years and was subject to review thereafter. The premises, described as high quality car showrooms, were to be used exclusively for the retail sale of new Peugeot motor vehicles and ancillary purposes only. Both landlord and tenant gave the usual covenants.

The Sublease
12. Gowan leased the property to Westland on 18th April, 2001. By and large the sublease mirrors the head lease in its ordinary terms, with the same rent as in the head lease so that as far as Gowan was concerned it was a cash neutral transaction. Gowan was making no profit on the sublease. There was, however, a guarantee given by the Murphy brothers (but not by the outside investors), the terms of which are important for these proceedings, and for that reason the relevant provisions are reproduced hereunder:-

> **"THE FIFTH SCHEDULE**
>
> **(Form of Guarantee Covenant)**
>
> Any covenant from a Guarantor given under this Lease will be in the form set out below mutatis mutandis, and the Guarantor named in the Particulars hereby covenants as set out below:
>
> The Guarantor covenants with the Landlord, as a primary obligation, as follows:-
>
> 1. The Tenant will pay the rents payable under this Lease on the dates on which rent is due and payable and will comply with all the obligations and conditions contained in this Lease relating to any other matter.
>
> 2. In case of default or delay on the part of the Tenant in such performance the Guarantor will by way of primary obligation and not merely as a guarantor or as collateral to the Tenant's obligation to do so, pay to the Landlord any sum which ought to be paid and make good any breaches of the Tenant's obligations hereunder including all losses, damages, costs and expenses arising or incurred by the Landlord.
>
> 3. The Guarantor further covenants with the Landlord that if a liquidator examiner or trustee in bankruptcy surrenders or disclaims the Lease or if the Lease becomes forfeited then the Guarantor shall upon being required so to do by the Landlord by written notice given at any time take up a new lease of the Premises and deliver a duly executed counterpart to the Landlord upon the same terms as the Lease save that:-
>
> (A) such lease will be subject to and with the benefit of the Lease (or any right which the Tenant shall have to the grant of the same) if and so far as it is subsisting;
>
> (B) the term will be for the residue of the Term which would have remained had there been no surrender disclaimer or forfeiture but commencing on the date of such surrender disclaimer or forfeiture;…"

13. The reason Gowan insisted on this guarantee was that it wanted to have some additional security if Westland failed to pay the rent or went into liquidation. The evidence was that it also asked the two outside investors to sign the guarantee, but they were not willing to do so. In those circumstances, it was content to accept the personal guarantees of the Murphy brothers.

14. Clause 5.13(C) of the sublease is an important clause and is quoted here:-

> "In the event of the termination of the Peugeot Dealer Agreement entered into between the Landlord and the Tenant mentioned at clause 5.14(B) for whatever reason either the Tenant or the Landlord will be entitled at any time thereafter to terminate this Lease on giving one month's notice in writing to the other party of such termination expiring on any day."

The Dealership Agreement

15. In his affidavit sworn on 18th November, 2009, in the first set of proceedings, that is, *Finbar Murphy et al v. Gowan Distributors Limited*, Mr. Anthony Maher, a director of Gowan, set out the background to the dealership agreement entered into between Gowan and Westland, at para. 4:-

> "The Defendant is the importer into Ireland of new Peugeot motor vehicles, spare parts and accessories. The retail sale of the vehicles is channelled through a network of independent dealers who are contractually appointed pursuant to a standard form dealer contract. All manufacturers of motor vehicles including Peugeot impose standards which must be met in order to qualify for appointment as a dealer, commonly known as selection criteria. Amongst the most important of the selection criteria is the premises from which the dealership operates which must be up to a minimum standard. This involves a significant investment on the part of the dealer."

16. These standard agreements contain many provisions which are necessary because of E.U. competition rules. Such dealership arrangements are contrary to E.U. law on the face of it, but are exempted by the European Commission if certain conditions are fulfilled. The original dealership agreement was signed in 2001, but because of a new block exemption issued by the European Commission in 2002, a new standard dealership agreement was adopted thereafter. Accordingly, the original dealership agreement of 2001 was replaced in 2003 by a new agreement. This, according to witnesses from Gowan, entirely replaced the earlier agreement.

17. Under the new dealership agreement, the dealer (Westland) has a non-exclusive right to sell new Peugeot vehicles, spare parts, *etc.* subject to terms and conditions and also on condition that the right is exercised from approved premises. If the dealer wishes to market vehicles other than Peugeot brands, it undertakes to give the grantor (Gowan) at least three months notice thereof by registered letter and to provide it with all relevant information to enable it to ensure that the selection criteria and conditions by which the dealer was selected are respected. There are various terms relating to sale targets, general conditions of sale, resales to non-network retailers, sales to intermediaries, facilities and organisation for sales, after sales service, taking back and sale of used vehicles, *etc.* The grantor may terminate the contract if the directors of the dealer no longer meet the selection criteria or the financial selection criteria set out in annex one of the agreement.

18. Article XVII stipulates the term of the contract and Article XVIII provides for early termination. Since these two articles are relied on heavily by the Murphy guarantors in the second set of proceedings, *Gowan v. Finbar Murphy et al*, it is necessary to reproduce their substantive provisions:-

> **"Article XVII – TERM**
>
> This contract shall enter into force on 1st October 2003, except for the provisions of Article IX-2 where is it which shall enter into force on 1st October 2005, and shall end, except in the even (*sic*) of extraordinary termination, on 31st May 2010. On this date, a new contract shall be concluded, unless one of the two parties has notified the other, by recommended letter with acknowledgement of receipt, of its decision not to enter into a new contract at least twelve (12) months before the expiry of the contract, *i.e.*, by 31st May 2009.
>
> In the event that, despite their intention to conclude a new contract, the parties fail to reach agreement on the clauses and conditions before 31st May 2010, their commercial relationship shall automatically end on 31st May 2010.
>
> **Article XVIII – TERMINATION**
>
> Without prejudice to any provisions in this Contract allowing early termination, either of the parties may legally terminate this Contract with immediate effect and without prior notice, in the event that the other fails to comply with any one of its essential obligations, subject to all other rights and actions.
>
> It is expressly agreed that such shall be the case particularly:
>
> ? in the event that the Dealer acts in such a way as to cause material or moral prejudice to the Grantor, Manufacturer or its brands,
>
> ? …
>
> ? in the event of non-compliance with the Grantor's selection criteria, norms and standards,
>
> ? in the event that the Dealer's ability to conduct business is withdrawn, modified or reduced, even if this situation was in existence before the signature of this Contract, unless it was communicated in writing to the Grantor before the signing of this Contract,
>
> ? …
>
> ? in the event that, for whatever reason, the Dealer can no longer ensure the proper performance of this contract."

Two Letters of 23rd March, 2001
19. Reference must also be made to the two letters sent by Gowan to the Murphy brothers and to Westland respectively on 23rd March, 2001.

20. The context of these letters is important. When Gowan was negotiating the terms of the lease with the Murphy brothers on behalf of Westland, it sought personal guarantees from all the shareholders. The outside investors were unwilling to give such security, however, and refused to sign any such guarantees. Furthermore, the Murphy brothers sought some concessions and assurances before signing the guarantees. Their concern was with the potential length of the guarantees, which were to be co-extensive with the sublease, and second that there was no ceiling on the amount of the guarantees. The first letter was sent by Mr. Tony Maher, Financial Director for Gowan to the Murphy brothers and sought to give some comfort to the potential guarantors on these issues. Since it is brief, the relevant paragraph can be reproduced in full:-

> "In consideration of you entering into personal Guarantees in respect of this Lease, we as Landlord hereby agree with you as follows:-
>
> > 1. Your maximum joint and several liability as Guarantors of the Tenant's obligation under the Lease, shall not exceed a maximum sum equivalent to three years arrears of rent and service charge payments under the Lease.
> >
> > 2. In the event that the company falls into serious arrears of rent and service charge payments under the Lease being not less than one year arrears of rent and service charges, we will be prepared to discuss the acceptance of a surrender of the Lease with the company, if so requested, but without any legal obligation to do so."

21. It can be seen that the letter, addressed to the four potential guarantors (the Murphy brothers), in my view, purported to set a legal limit on their possible liability under schedule 5 of the sublease. The liability was not in any circumstances to exceed three years arrears of rent and charges. Additionally, if Westland fell into more than one year's arrears, Gowan was prepared to discuss the surrender of the lease without any legal obligation to do so. The extent of the guarantees, however, were disputed and I will refer to this later in this judgment.

22. The second letter, also written on the same date, was addressed to Westland and was signed by Mr. Frank Scanlon, Marketing Development Manager for Gowan. It confirmed the appointment of Westland as a Main Peugeot Dealer, subject to signing the dealership agreement and executing the lease and guarantee, *etc.*, "and upon the following conditions". It then went on to deal with various matters such as premises development, volume rebates, corporate identity, service and parts equipment and G-Net Communications (internet). The final matter dealt with, and which is of significance since the Murphy guarantors rely on it in their defence, is then addressed under the heading 'Peugeot Stocking Plan':-

> "You are aware of the workings of the new unit-stocking scheme that uses an agreed credit-limit with GE Capital Woodchester and this credit line is subject to the usual credit checks. An initial credit line of £400,000 has been agreed for Westland and securing and maintaining this credit line is an essential part of your appointment as an authorised Peugeot Dealer. Obviously the continuance of this Credit Line throughout the terms of the Dealer Agreement, (or an extension thereof) is *a condition of the franchise*."[Emphasis added].

23. In short, the Murphy guarantors argue that when the credit line was closed by G.E. Woodchester in January, 2009 this clause terminated the dealership agreement which in turn meant that they were no longer bound by the sublease or the guarantee contained in schedule 5 of the sublease.

24. Having considered the matter carefully and in spite of some indicators to the contrary already identified, I have come to the conclusion that the letter from Mr. Frank Scanlon written on 23rd March, 2001, was of no legal significance and gave no legal rights to the Murphy guarantors for the following reasons. First, the letter was headed "Subject to Contract – Contract Denied". The existing jurisprudence on the meaning of this clause is strong and it normally protects the letter carrying such a heading from a conclusion that it contains legally binding commitments. This view is reinforced since another letter written to the Murphy brothers on the same day was sent by Mr. Tony Maher without such a heading and which, because of this omission, must be construed as giving a legally binding representation. Second, it is specifically confirmed in the body of the letter that the appointment of Westland as a Main Peugeot Dealer was "subject to signing the dealer agreement (as per attached draft) executing the Lease and Guarantees…" The letter in question was written on 23rd March, 2001, but was subsequently followed by the first formal dealership agreement more than six months later, that is in October 2001. It is reasonable to assume in these circumstances that the later document replaced the earlier document and that the more formal document takes precedence over the informal document. The final version of the dealership agreement signed in October, 2001 was not before the Court, but a six month delay weakens the suggestion that the letter continued to have relevance by the time the dealership agreement was finally signed, especially since the word "draft" was used to describe the agreement in the letter. Third, insofar as the letter of 23rd March, 2001, referred to "Peugeot stocking plan" and to the "credit line", no such reference appears in the later more formal dealership agreement signed in 2003, which replaced the 2001 version of the agreement, and which regulated the relationship between the parties until Westland went into liquidation in 2009. Finally, a reasonable interpretation of the relevant paragraph in the letter of 23rd March, 2001, would suggest that the reference to the maintenance of the credit line was for the benefit of Gowan and was such that the failure to maintain it did not automatically terminate the dealership agreement but, at most, might be invoked by Gowan if it wished to do so. In any event, it would appear that a reasonable construction of the paragraph does not permit the Murphy guarantors to invoke the clause in their favour, especially when the termination of the credit line was largely due to the dealer's own fault and failings, as will become clear from my analysis later in this judgment.

25. My conclusion, therefore, on the significance of Mr. Scanlon's letter of 23rd March, 2001, on this issue, is that for reasons advanced by Gowan it does not override the later formal dealership agreement signed in October, 2001 or the later version of the dealership agreement signed in 2003. Even if I accepted that the letter did legally make the continued existence of the credit line a condition of the contract, I am of the opinion that it could not be invoked by the Murphy guarantors in the circumstances of the case where the termination of the credit line was due to Westland's own fault and failings.

The Issues for Determination
26. The two sets of proceedings contain claims by the landlord for rents due: in the first case, by the Murphy brothers and the outside investors (the new owners of the head lease) against Gowan under the head lease; and in the second case, by Gowan against the Murphy guarantors for rents owed by Westland (now in liquidation) under the sublease.

27. Whether these rents are properly due should in the first instance be determined by the terms of the respective leases, but because of the defences advanced, in particular by the Murphy guarantors in the second case, it is necessary to consider also the

dealership agreement and the side letters dated 23rd March, 2001.

A. Clause 5.13(C) of the Sublease.
28. In the second set of proceedings, *Gowan v. Finbar Murphy et al*, the Murphy brothers are being sued as guarantors for Westland under the sublease. The guarantee is contained in schedule 5 of the sublease. The Murphy guarantors in resisting the claim rely particularly on clause 5.13(C) of the sublease which as already noted reads:-

> "In the event of the termination of the Peugeot Dealer Agreement entered into between the Landlord and the Tenant mentioned at clause 5.14(B) for whatever reason either the Tenant or the Landlord will be entitled at any time thereafter to terminate this Lease on giving one month's notice in writing to the other party of such termination expiring on any day."

29. This, as can be seen, provides that the tenant (Westland) can terminate the sublease by giving one month's notice if the dealership agreement has terminated. The Murphy guarantors argue that the dealership agreement has terminated for the following reasons:

> i. there has been "extraordinary termination" under Article XVII of the dealership agreement;
>
> ii. Article XVIII provides that one party can terminate if the other party fails to comply with one of the essential obligations of the dealership agreement. The Murphy guarantors invoke this even though it is the failure of Westland that is at issue;
>
> iii. Article XVII is also relevant as it provides that the dealership agreement shall end on 31st May, 2010. A new contract shall be concluded on that day, unless one party has given 12 months notice (*i.e.* by 31st May, 2009) that it does not intend to renew the dealership.

30. It is obvious that this argument collapses if the Court finds that the dealership agreement has not been terminated in the manner suggested by the Murphy guarantors as, in that case, an essential element of the their argument cannot be sustained.

B. Gowan's "Bad Faith" and "Misrepresentations"
31. The Murphy guarantors next argue that Gowan acted in "bad faith" and made "misrepresentations" which would make it unjust for the Court to enforce the guarantees in these circumstances. To assess this argument, the Court must examine the evidence to see whether the claims of "bad faith" and "misrepresentation" are established before determining, in the event that such allegations are upheld, what effect such a finding would have on the guarantees.

C. Maximum Liability of Guarantors.
32. If the Court does not hold with the Murphy guarantors in A or B, it must determine the maximum period for which they should be liable. The Murphy guarantors argue that their maximum liability is for twelve months plus one month's notice. This will be determined by interpreting Article XVII of the dealership agreement and clause 5.13(C) of the sublease. It will also be necessary for the Court to consider Mr. Tony Maher's letter of 23rd March, 2001, which purports to put a three year ceiling on the guarantor's liability. Gowan argues that there was no limit placed on the tenant's liability, that is, the liability of Westland.

D. Rights of the Outside Investors
33. The rights of the outside investors, Chris Giblin and Patrick Doyle, will have to be evaluated separately since (a) they are one sixth owners in common of the head lease; and (b) they are not guarantors under the sublease.

34. I now propose to deal with each of these arguments in turn.

A. The dealership is terminated within the meaning of clause 5.13(C) of the sublease
35. (i) Counsel for the Murphy guarantors, Mr. J. Brennan B.L., relies on Article XVII, the relevant sentence of which reads as follows:-

> "This contract shall enter into force on 1st October 2003… and shall end, except in the even (*sic*) of *extraordinary termination*, on 31st May 2010." [Emphasis added]

36. The article clearly sets out that the contract was for a fixed term and that a new contract was to be concluded on 31st May, 2010, unless one of the parties gave notice of its intention to discontinue by 31st May, 2009. There is provision, however, that the contract will not run the full term "in the event of extraordinary termination". In particular, the Murphy guarantors rely on the following events which they argue amount to "extraordinary termination" in the present circumstances:

> i. the general collapse of new motor car sales in the economy, especially since 2008;
>
> ii. the termination of Westland's credit line with G.E. Woodchester in January, 2009;
>
> iii. the history and the evolution of the relationship between Gowan and the Murphy brothers;
>
> iv. the disparity between the business acumen of the parties where the Murphy brothers were mere motor mechanics to begin with, with limited business experience;
>
> v. the state of the art showrooms sourced by Gowan and fitted out by it prior to their occupation by Westland;
>
> vi. the unusual position that prevailed when the shareholders in Westland purchased the head lease, which resulted in Gowan being the tenant under the head lease, while at the same time continuing as the landlord in the sublease;
>
> vii. the fact that the Murphy brothers were guarantors under the sublease.

37. In the opinion of counsel for the Murphy guarantors, these events were sufficiently extraordinary to trigger the termination of the dealership agreement under Article XVII.

38. Mr. G. McCarthy S.C., on behalf of Gowan, claimed that this wide approach to the interpretation of Article XVII was not what was pleaded or argued by counsel for the Murphy guarantors in the course of the trial. These arguments did not appear in the written

submissions made on behalf of the Murphy guarantors and were not in the counterclaim, but were advanced for the first time in oral submissions at the end of the trial. I will postpone engaging with this objection until I examine the merits of the new arguments in the first instance. It is only if I accept Mr. Brennan's argument that I need to consider the objection.

39. What then does the phrase "except in the event of extraordinary termination" mean? I am satisfied that it does not mean termination for any of the events catered for in the "No Assignment" clause or for breach of the selection criteria insisted upon by Gowan. These matters are expressly dealt with in Article XV of the dealership agreement. Neither, in my view, does it extend to the right of the innocent party to terminate where there is a failure by the other party to comply with any of the essential obligations in the contract. This, as we have seen, is catered for in Article XVIII. Where the dealer suffers financial difficulties, cash flow problems or where a liquidator is appointed, *etc.*, Article XVI provides that the grantor (Gowan) can also legally terminate the contract, but there is no similar provision protecting the dealer (Westland) in such circumstances. It is also clear that Article XVI of itself does not terminate the agreement in such circumstances: it must be invoked.

40. I cannot accept the arguments advanced on behalf of the Murphy guarantors that the circumstances and background against which the contract was signed cast any light on the meaning of the term "extraordinary termination". Even if the factual matrix and the unusual circumstances listed by counsel for the Murphy guarantors (some of which are objected to by counsel for Gowan as being made too late in the proceedings) are "extraordinary", this does not cast any light on the meaning of the phrase "extraordinary termination", as used in Article XVII. The epithet "extraordinary" in Article XVII applies to the termination and not to the formation of the contract. It is to be contrasted with "ordinary termination", which in my view principally refers to those circumstances where, under ordinary contractual principles, a party may lawfully terminate the contract, and two instances of which are explicitly referred to at Articles XV and XVIII of the dealership agreement.

41. It is my conclusion that the exception mentioned in Article XVII refers to a termination which is brought about, not by an act of a party, but by some supervening act which would in contract law be recognised as frustrating the contract (see Clark *Contract Law in Ireland* (4th Ed.), (Dublin, 1998), p. 439 *et seq*). The wording of the exception clause itself – "except in *the event* of extraordinary termination" (emphasis added) – would to some extent also suggest that what is at issue is some external event over which the parties have no control.

42. I am not prepared to hold in this case that the termination by G.E. Woodchester of Westland's credit line, in the circumstances in which it occurred, amounted to "extraordinary termination", as the term is used in Article XVII of the dealership agreement. Even if it were, I am not satisfied that the Murphy guarantors have shown to the satisfaction of the Court that it was not self-induced in any event. (See Clark 4th Ed., pp. 448 to 449).

43. (ii). The second argument relied on by the Murphy guarantors that the dealership agreement is terminated is based on Article XVIII which specifically provides for termination in certain circumstances. The main provision is contained in the first sentence which I set out here:-

> "Without prejudice to any provisions in this Contract allowing early termination, either of the parties may legally terminate this Contract with immediate effect and without prior notice, in the event that the other fails to comply with any one of its essential obligations, subject to all other rights and actions."

44. The article then goes on to specify specific examples where the right to termination may be availed of. Included in this list are: where the grantor's selection criteria, norms and standards are not complied with; where the dealer's ability to conduct business is withdrawn, modified or reduced; or, where, for whatever reason, the dealer can no longer ensure the proper performance of this contract.

45. An ordinary reading of this article would clearly suggest that the right to early termination is given to one party where the other party fails to comply with one of the essential obligations of the contract. I interpret the article as only enabling one party to lawfully terminate the contract if the other party is in default. It does not suggest in my view that the party in default can invoke this article in its own favour to terminate the contract and relieve itself of other contractual obligations. This interpretation follows from the language used in the first sentence of the article. The second paragraph sets out examples, non-exhaustive in my opinion, where the grantor (Gowan) would clearly have this right because of the failings/shortcomings of the other party *i.e.* the dealer (Westland). Even if the dealer "can no longer ensure the proper performance of this contract", as specified in the last example, this event would only seem to give the grantor the option to terminate. The article does not automatically terminate the dealership agreement in this event and it certainly does not give the dealer the entitlement to end the contract where it is itself at fault. In the present circumstances, it is my opinion that the dealership agreement collapsed because of the inability of the management team at Westland to run the business properly, a fact which was known to them for many years prior to the liquidation. I have come to this conclusion from an examination of the evidence, something I will elaborate on below in greater detail. It is not surprising in the circumstances, given the history of the matter, that its credit line was eventually cut-off by G.E. Woodchester. The credit line was not cut-off solely because of the unforeseen action of a third party.

46. In my view, there is no evidence that Gowan influenced G.E. Woodchester in coming to this decision. Accordingly, I am not satisfied that the Murphy guarantors can rely on the provisions of Article XVIII to support their case.

47. (iii). Having determined this, I must now examine the other circumstances in Article XVII which permit or allow the dealership agreement to be terminated. The relevant provision of the article provides:-

> "…On this date [*i.e.* 31st May, 2010], a new contract shall be concluded, unless one of the two parties has notified the other, by recommended letter with acknowledgement of receipt, of its decision not to enter into a new contract at least twelve (12) months before the expiry of the contract, *i.e.*, by 31st May 2009.
>
> In the event that, despite their intention to conclude a new contract, the parties fail to reach agreement on the clauses and conditions before 31st May 2010, their commercial relationship shall automatically end on 31st May 2010."

48. The ordinary meaning of the first sentence of the part of Article XVII just quoted is that, although the existing contract is for a fixed term ending on 31st May, 2010, the dealer (Westland) can, if it wishes not to renew the agreement, give twelve months notice to the grantor (Gowan) that it will not be entering a new contract after the expiry date. It would seem to me that Westland has complied with this notice (see *infra*) and accordingly, the dealership agreement came to an end on 31st May, 2010. In any event, as the parties had not agreed the "clauses and conditions" before the 31st May, 2010, the commercial relationship between them is automatically ended as of that date.

49. The first sentence of Article XVII above quoted strictly speaking does not set out to deal with the situation where one party wishes to terminate the existing contract, but rather deals with the situation where one party does not wish to renew the contract between the parties. It provides that a new contract shall be concluded unless one party indicates in a timely fashion that it does not intend to sign a new contract at the end of the term of the dealership agreement. Such notification must be made more than twelve months before the end of the contract *i.e.* before 31st May, 2009. Notice was given by letter on 20th February, 2009, which to my mind complies with the article. Further, although the liquidator had been appointed on 13th February, 2009, he subsequently confirmed by letter dated 9th March, 2009, that the dealership agreement was not being renewed. I do not think that this analysis is weakened by the fact (if this is so) that the letter was not a "recommended letter" (the phrase used in the article), whatever that phrase means (no evidence was given on its meaning to the Court).

50. My conclusion, therefore, is that the 2003 dealership agreement ran for its full term, that is until 31st May, 2010, and was not terminated by Westland or by "extraordinary termination" prior to that date. Westland, however, gave notice in a timely manner that there was to be no new dealership contract after that date.

51. What then is the effect of this on the sublease and in particular on schedule 5 thereof?

52. I set out hereunder the relevant provisions of schedule 5:-

"The Guarantor covenants with the Landlord, as a primary obligation, as follows:-

> 1. The Tenant will pay the rents payable under the Lease …and will comply with all the obligations and conditions contained in this Lease relating to any other matter.
>
> 2. In the case of default or delay on the part of the Tenant in such performance the Guarantor will pay by way of primary obligation and not merely as a guarantor or as collateral to the Tenant's obligation to do so, pay to the Landlord any sum which ought to be paid and make good any breaches of the Tenant's obligations hereunder including losses, damages, costs and expenses arising or incurred by the Landlord.
>
> 3. The Guarantor further covenants with the Landlord that if a liquidator, examiner or trustee in bankruptcy surrenders or disclaims the Lease or if the Lease becomes forfeited then the Guarantor shall upon being required so to do by the Landlord … take up a new lease of the Premises … upon the same terms as the Lease…"

53. It is clear from reading para.1 of the schedule that the guarantor (the Murphy brothers) covenants, as a primary obligation, that the tenant (Westland) "will pay the rent under the Lease". It is important to appreciate, however, that the guarantor's obligation in this respect, even though a primary obligation, only arises when the tenant does not pay the rent "*under the Lease*". When the lease is lawfully terminated, the tenant has no obligation to pay any rent, and accordingly no primary obligation falls on the guarantor after that date. There is no obligation on the guarantor to pay the rent in all circumstances; the obligation only arises where the tenant is in default or delay *under the lease*. No liability, primary or otherwise, can arise under paras. 1 or 2, other than for rents *etc.*, which had arisen during the life of the lease. After the lease has been properly terminated or is no longer in existence, there can be no liability under these paragraphs. This conclusion is mandated, in spite of the primary nature of the obligation, by the wording of the covenant itself.

54. To follow the argument the Murphy guarantors' advance, it is now necessary to recall again that clause 5.13(C) of the sublease provides that "*in the event of the termination* of the Peugeot Dealer Agreement entered into between the Landlord and the Tenant mentioned at clause 5.14(B) for whatever reason either the Tenant or the Landlord will at any time be entitled thereafter to terminate this Lease on giving one month's notice…" [Emphasis added].

55. I have already found that the dealership agreement was not terminated under the "extraordinary termination" provision in Article XVIII of the agreement or under the provisions of Article XVII, but continued in existence until it expired on 31st May, 2010. For these reasons, clause 5.13(C) of the sublease, in my view, only comes to the aid of the Murphy guarantors from that date. I hold in these circumstances that the one month's notice given by Westland in February, 2009 and confirmed by the liquidator in March, 2009 only takes effect from 30th May, 2010. As of that date, the sublease terminated and the Murphy guarantors' obligations under paras. 1 and 2 of schedule 5 fell with it.

56. To avoid the implications of this interpretation of clause 5.13(C), Gowan argues that "termination" in this context means "being brought to an end" (actively), rather than ending due to the expiry of time. I cannot agree with this interpretation. The alternative, that the guarantor's obligations continue even when the dealership agreement is not renewed, would be so onerous that it would need to be explicitly stated before the Court should reach that conclusion. A close reading of schedule 5 does not lead to such a conclusion and if there is an ambiguity in the clause, it should, on the basis of *contra preferentum*, be interpreted against the landlord (Gowan).

57. It follows from this that the Murphy guarantors, by way of primary obligations under paragraphs 1 and 2 of schedule 5, must pay the landlord (Gowan) all arrears of rent and service charges due up to 30th June, 2010, but not after that date. Since this does not exceed the purported ceiling of three years imposed by the letter to the Murphy brothers of 23rd March, 2001, I need not consider the terms of this correspondence further. The question then remains as to what obligations fall on the Murphy guarantors by virtue of para. 3 of schedule 5 of the sublease.

58. It seems to me that the covenant given by the Murphy guarantors does not automatically end when the sublease falls, as is argued on their behalf. Although the guarantee is contained in schedule 5 of the sublease, it is phrased and worded in a way that, in my opinion, creates an agreement in respect of taking up a new lease if required to do so, that was intended to exist even if the sublease fell. From reading para. 3 (*supra*), it is clear that it stipulates an obligation undertaken by the Murphy guarantors to take up a new lease in the circumstances now before the Court. It is clear that the liquidator has surrendered or disclaimed the lease by letter dated 24th March, 2009, and by returning the keys to Mr. Maher around that time. The landlord (Gowan) served the requisite written notices and schedule 5 provides that the new lease is to be on the same terms as the old lease, with certain savings which need not concern the Court. The term of such a new lease, however, is set out in para. 3(B): it is only for the residue of the term of the original sublease. From my analysis, already given, when called upon by the landlord, by letter dated 1st May, 2009, to execute a new lease under para. 3, the guarantor's obligation could only be for the unexpired term of the lease, *i.e.* until the 31st May, 2010.

B. Bad Faith and Misrepresentation

59. The argument that the guarantees should be set aside because Gowan was guilty of "bad faith" and/or misrepresentation must now be examined. Before doing so, however, I must first examine the evidence on which the allegations are based. The narrative that

follows is based largely on the evidence of Mr. Finbar Murphy, who it must be said impressed as a truthful witness, and from the affidavits sworn in the proceedings. In the main Mr. Murphy's evidence on these issues was not disputed by witnesses called by Gowan.

60. In the first years of trading, between 2002 and 2004, new car sales by Westland were exceptionally good. Accordingly, when the opportunity to purchase the head lease arose, in June, 2003, Finbar Murphy said in evidence that it was decided to purchase it as "a pension" for the directors. It seemed a good idea when property prices were rising in a booming economy. The purchase, however, came as a surprise to Gowan when it eventually learned of it and it caused some friction between Westland (and Finbar Murphy) and Gowan at the time. The argument advanced on behalf of Gowan, that it changed the nature of the relationship between the parties, cannot be sustained as Gowan signed a new version of the dealership agreement in September of the same year.

61. The evidence is that even though sales of new cars continued to be strong up to 2006, Westland had other business problems during the early years of the decade. Gowan, which was in regular contact with Westland, pointed this out to Finbar Murphy and identified an adviser, Mr. Millstead of Health Check, who was an expert in the motor business. In his report (August, 2004), Mr. Millstead identified in particular an over reliance on new car sales, too many used cars in stock and a failure to take on successfully the Kerridge I.T. system which was being introduced by many of the Peugeot dealers in Ireland. Finbar Murphy said that he addressed some of the issues that were raised at the time, but it did not seem to turn the company's fortunes around.

62. It became clear in 2005/2006 that business was not improving and by 2007, there was also a further sharp falloff in new car sales. To compound matters further Westland purchased additional premises at Cherry Orchard in August, 2005 for €1.6m plus V.A.T. This was financed by a commercial loan from A.I.B. The purchase of the Cherry Orchard premises was necessitated by congestion on the principal site at Liffey Valley Shopping Centre, and followed a decision by Finbar Murphy that the problem might be mitigated somewhat if the after sales services and parts departments were moved to another location. The increased overheads and the failure of the after sales department to pick up, however, continued to cause problems for Westland.

63. At this stage, Mr. Murphy came to the conclusion that the only way the difficulties of the company, acute by then, would be solved was if Westland took on a second brand. He made contact with Mazda in 2006. Gowan was not enthusiastic, but since the main dealership agreement was amended in 2003, it was not entitled to prevent Westland taking on an extra brand if it wished to do so. Gowan sought to persuade Westland that this was not the way to go and that taking on a new additional brand did not necessarily mean that Westland would return to profit. It also said that if Westland was going to take on the Mazda brand, Gowan would look for a substantial contribution in respect of its fit-out costs initially incurred on the main premises. It is significant to note that Finbar Murphy in his evidence to the Court said that Gowan did not directly refuse Westland permission to take on the second brand, but put up practical barriers that made it difficult for Westland to do so. (In the pleadings, Finbar Murphy alleged that there was "a refusal" by Gowan). In an effort to convince Westland not to take on a second brand, Gowan did two further things at this point: it made available additional advance rebates to Westland in the amount of €200,000 over a two year period; and it offered the services of Mr. Hayes, from its marketing sales department, to review Westland's business in an effort to identify the problems and, hopefully, to recommend a solution to its financial difficulties. The rebate offer from Gowan, however, was on condition that Westland remained an exclusive Peugeot dealer. Westland accepted this offer and signed a letter to this effect. Over the period 2007/2008, Mr. Hayes met with Westland staff on several occasions and addressed the main areas in the after sales area, in particular where improvement in work practices and record keeping were recommended. In spite of Mr. Hayes' assistance, however, Westland did not seem willing or able to implement the required changes.

64. The hope for the Mazda dealership eventually came to nothing when Mazda refused to appoint Westland as its dealer. Sometime later, in 2008, Westland also made a pitch for a Honda dealership. This time it did not approach Honda directly, but asked Mr. Tony Maher of Gowan to contact Honda directly on its behalf. Mr. Maher did so and indicated in evidence that he was told he would have a reply within two weeks. Time was of the essence of course at this stage as Westland by then was losing about €20,000 per week. In spite of further calls from Mr. Maher to the Honda contact, the final refusal did not come for another nine weeks, by which time Westland was no longer in a position to trade. Its credit line with G.E. Woodchester was cut at the end of January, 2009 and a liquidator was appointed shortly thereafter in February, 2009.

65. It is in these circumstances that Finbar Murphy alleges in the pleadings that its credit line with G.E. Woodchester was terminated, which in turn led to the collapse of Westland's business in 2009. Against this background, I must now examine Westland's claim that its financial difficulties were caused:

> (i) by Gowan's "refusal" (later modified in evidence to Gowan's "hindrance") in relation to securing the second brand for Westland; and
>
> (ii) by misrepresentations made by Gowan to Westland of such a nature that the Court should not be willing to enforce the personal guarantees furnished by the Murphy brothers.

"Refusal"

66. As already noted, Finbar Murphy resiled from stating in evidence that Gowan explicitly refused permission for the second brand in spite of using this word in the pleadings. The "hindrances" it now alleges in evidence do not, in my opinion, amount to a refusal, as suggested. Gowan was entitled to seek some kind of clawback for its fit-out if a dealer from another brand was to come onto the premises. This was a proper matter for commercial negotiation. In pointing out that a second brand was not possibly the solution to Westland's problem, Gowan was merely discussing the wisdom of Westland's decision in the difficult circumstances that confronted it. Moreover, in voluntarily offering advance rebates in the amount of €200,000 to Westland, it is clear that Gowan was supporting Westland in its difficulties. This support was evidenced also by the assistance it offered and gave in sending Mr. Hayes into Westland (at no cost to Westland) to identify the business problems so that the real difficulties could be addressed in an effort to turn the business around. It must be noted also that it was not in Gowan's interest that Westland should go into liquidation and in attempting to keep Westland afloat there may have been an element of self-interest involved on the part of Gowan. In these circumstances, I am not prepared to find that Gowan refused Westland permission to take on a second brand.

Misrepresentation

67. The misrepresentation that the Murphy guarantors rely on here are those put forward by Mr. Mark O'Connell of Gowan, in particular in 2006, when the Mazda issue was in play and when Mr. O'Connell is alleged to have said that new models being brought in by Peugeot in the following years would result in an increase in the sales of new Peugeot cars for Westland. This, of course, we know, was not what happened, unfortunately for Westland. But at its height these assurances cannot have been "misrepresentations of fact", which is what is required by the law if they are to be relied on by an injured party who alleges reliance and damage in such

cases. At most, what Mr. Mark O'Connell in particular said was that Gowan's "expectations" and "hopes" were that the introduction of new models by Peugeot would result in big increases in sales. There was nothing inevitable in the forecast and in any event it was not a statement of fact. At its height it was the expression of an expectation as to the future.

68. I find, therefore, that there was no refusal by Gowan, such as is alleged by Mr. Murphy, and that such hindrances as were identified did not amount to a refusal which should have a bearing on my decision. Further, I do not find that there was any misrepresentation which would suggest that the Court should ignore the guarantees. There were no other credible instances or allegations that in my view support an allegation of bad faith.

69. Moreover, this line of argument is advanced on the assumption that the nature of the relationship established in schedule 5 of the sublease was a true guarantee in law. We have seen, however, that the Murphy guarantors are sued here on a covenant of *primary liability* and are not sued because Westland failed initially to meet its obligations. In truth, they are not sued under a guarantee in the true sense of the word and the law relating to guarantees does not apply to their case.

70. In any event, I am not convinced, even if there was a refusal and a misrepresentation in the sense advanced by Mr. Murphy, that such refusal and misrepresentation was connected with the collapse of Westland's business to any significant extent. The true situation in relation to the demise of Westland was as follows.

71. The expert evidence given in court is that the profits in the motor dealership business are to be found under five headings, that is, profits from:

(i) new car sales;

(ii) used car sales;

(iii) commission on finance from financial companies;

(iv) after sales servicing and repairs; and

(v) sale of parts.

72. It is clear that from the beginning of 2003 onwards, Westland had serious difficulties with its after sales department and with its used car business. These weaknesses were identified earlier on, but were never successfully addressed. They continued to infect the company for many years. In addition, the increase in overheads, due to the purchase of the head lease and the Cherry Orchard property, stretched the capacity of Westland and burdened it with debt that dragged it down when the bad times came. As far back as August, 2004 Westland was in possession of the report of Mr. Millstead of Health Check. As already noted this report identified the problems and weaknesses in Westland's business. It focussed in particular on the failure by Westland to embrace the Kerridge I.T. system.

73. This last item in the report related to the software in use by Westland. Mr. Millstead was highly critical of this area of Westland's business. He indicated that if Westland was to expect a reasonable financial return, it would have to be able to provide financial information on a monthly basis. In his report he said:-

> *"The easiest way of doing so is using your DMS. The duplication of work is costing you money. If you do not want to use Kerridge then you should sell off your current system and invest in another (Kerridge REV 8, Microsoft, Avonbrook, Kalamazoo are worth considering).*
>
> *If you as a management team are not into this then I suggest that in the longer term (less than five years) you will lose your franchise and that you should run the business with the sale clearly in mind.*
>
> *This may sound like very blunt advice but is in my mind the best advice that I can give you if you fail to embrace computers and DMS systems. I do not see the business as a viable long term proposition without addressing the general IT and DMS issues as a matter of urgency."*

74. It is clear from this that as far back as August, 2004 Westland had serious problems on this front. The evidence was that this was never addressed. Mr. Millstead proved to be acutely prophetic in that regard.

75. The problems in Westland continued and in 2006 Gowan suggested that Mr. Mark Hayes from its marketing sales department would visit and observe Westland's systems and administration, focussing on the service department in particular. He again emphasised the weaknesses in the service department and the failure to embrace the Kerridge I.T. system. Finbar Murphy accepted in evidence that the service department was a weak area in the organisation at that time.

76. By October/November, 2006 Finbar Murphy came to the view that the only thing that would save Westland was a second franchise from Mazda. The evidence recited above on this, however, does not, in my view, suggest bad faith on the part of Gowan. Furthermore, when Westland agreed to accept the advanced rebates in 2007, it made a business decision that it would remain an exclusive Peugeot dealer at that time.

77. The final throw of the dice was made by Westland in 2008 when Finbar Murphy asked Mr. Tony Maher of Gowan to place a call with Honda Importers requesting, on behalf of Westland, that Honda appoint Westland as a Honda dealer. Neither Mr. Maher nor Gowan had any direct legal relationship with Honda, but there appears to have been an overlapping of directors which facilitated contact. Mr. Maher was initially told that Honda would make a decision within a couple of weeks. This information was relayed to Finbar Murphy. Mr. Murphy himself made no direct contact with Honda. The couple of weeks, however, drifted and eventually Honda's refusal was given some eleven weeks after the initial contact. Mr. Murphy complained that during this period, it continued to lose approximately €20,000 a week which could have been avoided had an earlier decision been made. Tony Maher from Gowan, however, was merely an intermediary in this action and he gave unchallenged evidence of making the initial call and a further call to Honda in an effort to expedite the decision. Mr. Maher, however, was not the decision maker in this and he could not determine Honda's position at the end of the day. There was no evidence that Mr. Maher did anything positive to thwart the Honda dealership and, in these circumstances, I am not prepared to say that Gowan, through Mr. Maher, did anything wrong. In particular, there is no evidence of bad faith on Mr. Mather or Gowan's part.

The Credit Line with G.E. Woodchester

78. Neither can I find that Gowan influenced G.E. Woodchester in its decision to end its credit line to Westland. There is no doubt that it was essential for Westland to have a strong credit line to facilitate its ability to purchase the cars and to provide it with liquidity until the cars were disposed of. While Gowan had a general relationship with G.E. Woodchester in respect of all its dealers, the legal obligation in respect of the provision and borrowing of money was a bilateral one between G.E. Woodchester and Westland. There had been a disagreement between G.E. Woodchester and Westland in December. 2007 when Westland apparently sold fourteen hybrid cars and did not repay G.E. Woodchester as it should have done immediately. Eventually, this dispute was resolved and Finbar Murphy arranged a stage pay-off of these monies. Nevertheless, G.E. Woodchester was upset. When it was put to Mr. Murphy that this contributed to G.E. Woodchester's eventual decision to pull the credit line that was essential to the stocking plan, Mr. Murphy responded by saying "I imagine it did not help".

79. When G.E. Woodchester eventually terminated the credit line in January, 2009 it was justified in so doing, because at that time Westland was losing €20,000 *per* week and it had failed to secure either the Mazda or the Honda franchise.

80. Finbar Murphy alleges that Gowan, had it wished to, could have intervened to prevent termination of the credit line. In the circumstances, I see no legal obligation on Gowan to intervene any further than it did at that time. It is clear from the evidence that there were many reasons why Westland failed in its business before the credit line was terminated. The inherent defects in the business have been referred to earlier and I need not repeat them. From the evidence, it is clear that G.E. Woodchester had many valid reasons for terminating the credit line at that time. There was no evidence that Gowan did anything to encourage G.E. Woodchester to pull the credit, and the most that Finbar Murphy alleges is that it failed to intervene on Westland's behalf. The evidence, however, is that Gowan had acted to support the efforts of Westland to stay alive and indeed it was in its interest to do so.

81. In summary, to suggest that the failure to secure the second brand was the cause of Westland's demise is over simplistic. No evidence of what might have happened had it secured the Mazda or Honda dealerships was before the Court. In these circumstances, it is no more than speculation or conjecture. In any event, as I have already determined, there was no evidence that Gowan refused or indeed effectively obstructed Westland in securing the second brand. The financial difficulties of Westland were well documented and it is clear that, although the problems were identified at an early stage, they were never effectively addressed. In my view, Gowan was supportive of Westland during its difficulties and showed no bad faith in its dealings with Westland prior to its ceasing to trade in 2009. Finally, there was no evidence of misrepresentation of fact by any of Gowan's employees that could be relied on in law by the Murphy guarantors to avoid their commitments and obligations under the guarantee.

C. Extent of Guarantors' Liability

82. The third issue for determination by the Court relates to the alleged cap or limit of three years on the liability of the Murphy brothers "as guarantors of the tenant's obligation under the lease", which they say was conceded to them by Mr. Maher in his letter dated 23rd March, 2001. The relevant paragraph of that letter reads as follows:-

> "In consideration of you entering into personal Guarantees in respect of this Lease, we as Landlord hereby agree with you as follows:-
>
> > (1) Your maximum joint and several liability as Guarantors of the Tenant's obligation under the Lease, shall not exceed a maximum sum equivalent to three years arrears of rent and service charge payments under the Lease..."

83. Gowan argues that this limit only applies to the guarantors' liability for the tenant's obligations under the lease, and that it does not place any limit on the guarantors' personal liability under schedule 5 of the sublease. Needless to say, the Murphy guarantors reject this interpretation claiming that it also limits their liability.

84. Since it is common case, however, that the claim by Gowan for arrears of rent in *Gowan v. Finbar Murphy et al* is for less than three years rent, it does not fall to the Court to interpret this clause and I refrain from doing so for this reason.

85. The full extent of the Murphy guarantors' liability is fully set out hereafter.

D. The Rights of Chris Giblin and Patrick Doyle

86. The outside investors, Mr. Giblin and Mr. Doyle, are not parties to the second set of proceedings, *Gowan v. Finbar Murphy et al* (sued as guarantors), not being guarantors themselves, and are unaffected by any orders made in that case. In the first set of proceedings, *Finbar Murphy, Enda Murphy, Stephen Murphy, Ronan Murphy, Chris Giblin and Patrick Doyle v. Gowan*, Mr. Giblin and Mr. Doyle are one sixth owners as tenants in common of the head lease, and accordingly they are each entitled to one sixth of the rent and services owed by Gowan as of the date of the judgment. No question of set-off can arise against them.

Conclusions and Orders

87. My conclusions in relation to the liability of the Murphy brothers (the guarantors in the sublease) in *Gowan v. Finbar Murphy et al*, is that the they are liable to pay the rents and services due under the sublease by Westland until the lease ended on the 30th May, 2010, and an additional sum in respect of the additional month's notice required under clause 5.13(C) of the sublease. I so order.

88. With regard to the guarantor's obligation to take up a new lease under para. 3 of schedule 5 of the dealership agreement, that obligation would only have extended until 31st May, 2010, or 30th June, 2010, at the latest. Because, however, I have found that the Murphy brothers, as guarantors, are obliged to pay the arrears of rent for the same period now, as already noted, and as that date has long since passed, it would be futile to order specific performance in that regard now.

89. The claim by the Murphy brothers and the outside investors against Gowan in the first set of proceedings is a straightforward claim by the landlord for rents and services due. This claim is not complicated by the existence of any guarantees and is not affected by the dealership agreement. The statement of claim is calculated up to 3rd July, 2010, for rent and up to 30th June, 2010, for services, and the total claim for arrears of rent and services, therefore, is €381,086. The Murphy brothers also claims arrears of rent and services up to the date of the judgment which is today's date. I am satisfied to make an order for all arrears of rent and services (to be quantified by the parties) under the terms of the head lease up until today's date, since the head lease continues to bind the parties.

90. Gowan can have no set-off against Mr. Giblin or Mr. Doyle in these proceedings. Gowan, however, is entitled to set-off the amount that the Murphy brothers owe as guarantors to Gowan against the amount it owes them for rents and services under the head lease.