THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 157

RECORD NO. 2015/507

PEART J.
IRVINE J.
HEDIGAN J.

BETWEEN/

JOHN REYNOLDS

PLAINTIFF / RESPONDENT

- AND–

ALTOMORAVIA HOLDINGS LIMITED, THOMAS ANDERSON, COLIN DALY, MIKE ORMOND, AND IAN REDMOND

DEFENDANTS / APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 12TH DAY OF MAY 2017

1. For the trial judge to describe this as an unusual case, as he did in para. 2 of his judgment, is something of an understatement. At its heart is a perfectly straightforward agreement for lease of a well-known nightclub premises in Dublin known as 'The Pod', which was entered into on the 12th April 2012 between the present plaintiff ('Mr Reynolds') who owned the premises, and the first defendant company ('Altomoravia') which wanted to take a lease of it. The intended lease was to be supported by personal guarantees of the second to fifth defendants.

2. When Mr Reynolds had not executed the lease by the 24th April 2014, Altomoravia commenced proceedings against him for specific performance of the agreement for lease. Those proceedings eventually came on for hearing in the High Court. On the 5th March 2014, which was the second day of the hearing, the parties agreed terms of settlement which were reduced to writing and made the subject of a court order by Kelly J. (as he then was). The terms of settlement provided, *inter alia*, that Mr Reynolds would consent to an order for specific performance of the agreement for lease, and that he would by the 26th March 2014 execute a lease in terms of the draft lease already provided and agreed, that Altomoravia would pay to Mr Reynolds a sum of €185,000 due to him, and that by the 26th March 2014 Mr Reynolds would withdraw an appeal which he lodged with An Bord Pleanala in respect of a planning application made by Altomoravia to enable certain alterations to be made to the premises.

3. As a legal transaction nothing could have been more straightforward. The agreed lease had to be executed by Altomoravia and sent over to Mr Reynolds's solicitor so that Mr Reynolds could sign it by the 26th March 2014, and each guarantor had to execute his guarantee. Once that had been done one would have thought that the solicitor acting for each party would simply arrange to meet so that those documents could be handed over in exchange for a cheque for the agreed €185,000. Clearly Mr Reynolds' solicitor would also have had to hand over other necessary items such as the bank's consent and the intoxicating liquor licence attaching to the premises, but there was never any difficulty in relation to those matters. That is what ought to have happened by 26th March 2014 under the terms of settlement, or even by some agreed date in April if some slippage occurred due to the Easter holiday period. However the events that followed lend weight to the aphorism that while you may lead horses to water without any particular difficulty, it can be quite another matter to make them drink.

4. The agreed date of 26th March 2014 came and went, as did the Easter holidays, and another couple of weeks thereafter without the transaction being completed as required under the terms of settlement, and indeed the High Court order made on 5th March 2014. On the 24th April 2014 therefore a second set of High Court proceedings were commenced – only this time it was Mr Reynolds who sought an order for specific performance of the terms of settlement of the first proceedings.

5. Where each party has said during their evidence in the High Court that they were at all times ready, willing and able to complete the transaction, and blamed the other for the fact that this did not happen either by the 26th March 2014 or subsequently, one struggles to understand why it was necessary for these experienced and successful businessmen to fight each other *'fero ignique'* over some 13 days in the High Court, spawning a written judgment by Mr Justice Cregan running to some 76 pages which culminated in an award of substantial damages in favour of Mr Reynolds in lieu of specific performance, he having eventually elected to seek rescission and damages. It is against that judgment and order that the present appeal has been taken by the defendants.

6. The evidence given by both sides in the High Court revealed a number of factors which individually and cumulatively conspired to frustrate the completion of this otherwise straightforward transaction. That said, it is fair to observe that the trial judge was clearly of the view that between the 5th March 2014 and the 26th March 2014 the solicitors ought themselves to have been putting more effort into ensuring that everything was done that needed to be done by the date provided for in the High Court order.

7. While there was limited email and telephone contact between the solicitors during that period, it is the case that while on the 6th March 2014 Mr Reynolds had instructed his architect to withdraw his appeal to An Bord Pleanala as required under the terms of settlement, his architect had, due to an admitted oversight, overlooked doing so until he was reminded about it by Mr Reynolds' solicitor on the 25th March 2014. Equally, the solicitor for Altomoravia was for some reason waiting for Mr Reynolds' solicitor to send him an engrossed lease and guarantees for execution by his clients, even though in April 2012 those documents had already been provided, including in electronic/soft copy form, and therefore needed only to be slightly amended as to the date on which the lease was to commence, and be then printed off for execution by the parties. In reality there was no need for further engrossed documents to be provided by Mr Reynolds' solicitor, and better communication between the solicitors would have sorted that out very quickly. These are just a couple of simple examples of matters said to have contributed to the transaction not being completed by the 26th March 2014.

8. However, the evidence also disclosed other factors in the background on each side of more potential significance to the failure to complete matters either by the 26th March 2014, or by the time the present proceedings first came before the High Court at the end

of July 2014. It appears that even on the 30th July 2014 Kelly J. was informed that it was expected that by the end of that very day all matters would be in place to complete the transaction. But that did not happen, and by the time Altomoravia's solicitor was eventually in a position to confirm to Mr Reynolds's solicitor on the 14th August 2014 that the lease and guarantees had been executed by all necessary parties and that he was in a position to complete, Mr Reynolds had decided that enough was enough and that he would seek damages in lieu of specific performance.

9. At the hearing before Mr Justice Cregan in the High Court each side alleged factors on the other side which caused the transaction not to be completed by the 26th March 2014 first of all, or by the end of April, or thereafter up to the 14th August 2014. Each side strenuously rejected those allegations, and blamed the other. The following is a brief summary of these allegations which emerged during the trial:

- As already mentioned, Altomoravia's solicitor maintained that after the settlement on 5th March 2014 he was expecting Mr Reynolds' solicitor to send him a hard copy engrossed lease for execution by his clients, with the guarantees attached for execution by the guarantors. He did not however write seeking these. He had simply assumed that they would be furnished. Mr Reynolds' solicitor on the other hand had expected that these documents which he had already previously provided in 2012 would simply be printed off by his opposite number with appropriate amendments as to the date of commencement. It had not occurred to him that he would have to provide further engrossed documents for execution before the 26th March 2014 in circumstances where they had already been provided. Better communication between the solicitors would certainly have prevented that misunderstanding.

- Altomoravia's solicitor discovered on the 25th March 2014 that Mr Reynolds had not yet withdrawn his appeal to An Bord Pleanala. He contacted Mr Reynolds' solicitor about this on that date. It was immediately brought to the architect's attention, and was attended to immediately, resulting in the withdrawal of the appeal being noted by An Bord Pleanala as being withdrawn as of the 26th March 2014. Altomoravia's solicitor said in evidence that even if everything else had been in order by the 26th March 2014 he would not have completed the transaction without written confirmation from An Bord Pleanala that the appeal had been withdrawn. That written confirmation was available within a few days of the 26th March 2014. Again, better communication between the parties after the 5th March 2014 would have ensured that this appeal was withdrawn in good time prior to the 26th March 2014 thereby avoiding any last minute hitch in this regard.

- Altomoravia's solicitor did not confirm that he was actually in funds to close by the 26th March or even during April 2014. In fact it has turned out that he was not in funds. Even by the time he was put in funds by Mr Anderson in the rather circuitous manner described by the trial judge, it appears that he was under instruction from Mr Ormond (Mr Anderson's man in Dublin who carried out Mr Anderson's instructions) not to part with the funds until the question of certain damage to the premises which had occurred to the premises since April 2012 was dealt with. The question of such damage being rectified by Mr Reynolds was a new condition and not part of the terms of settlement despite the fact that it had been an issue in the first proceedings. Altomoravia's solicitor's evidence was that by the 30th July 2014 this conditionality had been removed on the instructions of Mr Ormond, so that he was free to release the funds if a closing had taken place. However, Mr Ormond in his evidence had denied that he ever instructed his solicitor that he could release these funds. That evidence was given before Altomoravia's solicitor gave his evidence that the conditionality was removed by Mr Ormond. He stated that he believed that Mr Ormond was simply wrong in this regard, though he had to accept that he had no memo or note of the telephone call from Mr Ormond in which the conditionality was removed, or any written instruction in that regard. Mr Anderson's evidence was that at all times he had the money, and it was only a matter of being told by Mr Ormond that the money was required on a particular day, and that he would have transferred it. On the other hand Mr Reynolds did not believe that Mr Anderson could come up with the funds required to complete at all.

- Altomoravia was of the view that it was Mr Reynolds who did not want to go through with the lease because all along he had what came to be referred to as a "Plan B" which essentially involved the development of the Pod site as a hotel complex, and that he was therefore intent on ensuring that the lease did not take place, even though his Bank was putting him under pressure to enter into the lease with Altomoravia. They referred to his failure to withdraw the appeal to An Bord Pleanala as required by the 26th March 2014 and the failure of his solicitor to furnish an engrossment of the lease for execution by Altomoravia, and the guarantees, as indicating his desire to ensure that the implementation of the settlement was frustrated. They referred back also to the fact that Mr Reynolds had failed to sign the intended lease in April 2012 which had led to Altomoravia's proceedings for specific performance of the agreement for lease.

- What has turned out to be the most significant factor of all in the failure to complete the transaction by the 26th March 2014, and certainly after the 14th May 2014 involves the third defendant Mr Dolan who was one of the intended guarantors of Altomoravia's obligations under the intended lease. Mr Dolan's interactions with his co-defendants shortly after the 5th March 2014, and his contacts with Mr Reynolds on and after the 14th May 2014 are at the heart of this appeal.

10. Altomoravia is convinced that it was in fact Mr Reynolds who after the 14th May 2014 was trying to ensure that Mr Dolan did not sign the guarantee which he was required to sign before this transaction could be completed, and that he did so deliberately to ensure that the premises did not become subject to a 20 year lease to Altomoravia, so that he could, instead, develop the site under so-called Plan B. In this regard, Altomoravia places heavy reliance upon certain text messages which passed between Mr Reynolds and Mr Dolan after 14th May 2014, as well as a certain indemnity provided by Reynolds to Mr Dolan at the end of July 2014. Further, in so far as Mr Reynolds stated in his evidence that he was at all times very anxious to complete this transaction because he was under great pressure from his bank to have the matter completed, Altomoravia contends that this alleged pressure by AIB was not borne out by the evidence of Mr Cranston of AIB whom they called as a witness. The appellants submit that the trial judge failed to give any proper consideration and weight to these matters when concluding that it was Altomoravia, and not Mr Reynolds, who was responsible for the failure of this transaction to complete, and that Mr Reynolds was entitled to rescission and damages in lieu of specific performance in all the circumstances.

11. All these matters were the subject of thrust and counter-thrust during the evidence given by the respective parties and their witnesses in the High Court. There was little that was uncontroversial, and it fell to the trial judge to decide as a matter of probability where the fault lay for the failure to have completed this transaction either by the 26th March 2014 as agreed in the terms of settlement dated 5th March 2014, or by the 30th July 2914 which seems to be the latest agreed date by which it might have been completed so as to avoid the continuation of the present proceedings.

The judgment of Mr Justice Cregan

12. In the course of a lengthy and detailed judgment, Mr Justice Cregan outlined certain of the events which transpired between the

5th March 2014 and the commencement of the present proceedings on the 24th April 2014, and thereafter. Some of these events have already been referred to above.

13. He accepted the evidence given that in accordance with common and accepted conveyancing practice it was for the defendants to execute the lease and guarantees and to furnish same together with the sum of €185,000 to the plaintiff's solicitor before Mr Reynolds executed same, and to do so in time before the 26th March 2014 so that Mr Reynolds could then execute the lease prior to that agreed date, even though that detail was not included in the terms of settlement. In my view he was entitled to accept that evidence.

14. He also accepted the plaintiff's evidence that as a matter of fact Mr Reynolds' objection lodged with An Bord Pleanala had been withdrawn as of the 26th March 2014, even though the defendants had been given wrong information in that regard when they inquired about the matter with An Bord Pleanala, and therefore drew a wrong conclusion in that regard. Again, the trial judge was entitled to accept that evidence, and to conclude that the appeal was withdrawn by the specified date, even though very close to the deadline for doing so.

15. As I have already stated, the trial judge considered that the respective solicitors ought to have been in better communication between the 5th March 2014 and the 26th March 2914 in order to make sure that everything was in order in good time to ensure completion by the 26th March 2014. But he accepted Mr Reynolds' solicitor's evidence that having already provided the engrossed lease and guarantees in April 2012, it was reasonable for him to have expected that those would be used for the purposes of the completion now required by the 26th March 2014 without any need for him to provide a further engrossment. Again, I consider that he was correct to so conclude.

16. He noted also that on the 26th March 2014 the defendant's solicitor had contacted the plaintiff's solicitor and had requested a meeting on the following Monday the 31st March 2014 "to discuss a closing agenda", as Mr Anderson, the principal guarantor, was out of the country. Noting that if Mr Anderson was going to be out of the country he ought to have made arrangements to sign the lease before he left, the trial judge stated that the responsibility for the failure to close the transaction on the 26th March 2014 was that of the defendants and not of Mr Reynolds. It also appears that by that date the defendants' solicitor had not been provided with the necessary funds to close the transaction. Again, this was evidence that the trial judge was entitled to accept in order to so conclude.

17. On the 4th April 2014, the plaintiff's solicitor sent an email to inquire if the matter could be closed on the 9th April 2014, stating also that he was under pressure from both the plaintiff and the bank to complete the matter. The trial judge noted that the 9th April 2014 was significant since the defendants' solicitor was due to go on holidays on the 12th April 2014. No such confirmation was received, and on the 8th April 2014 a further letter was sent referring to the continued failure to complete in accordance with the terms of the court order, and stating that if the documents were not signed that week and the funds paid over, the plaintiff would regard the defendants' failure in that regard as being a breach of the court order, and reserved his position in that regard.

18. There was some controversy about the reality of the plaintiff's position as reflected in that letter. It was suggested by the defendants that the plaintiff was only going through the motions, as it were, of applying this pressure in order to keep his bank happy that he was trying hard to get the matter completed, whereas, as contended for by the defendants, the plaintiff was at all times intent upon pursing his Plan B to which I have referred, and was not therefore serious about the threat of taking steps to address the breach of the court order. Mr Ormond had stated in evidence that before sending this letter Mr Reynolds' solicitor had phoned the defendants' solicitor to tell them that he was under instructions from the bank to send such a letter. However, the trial judge was satisfied that Mr Reynolds was anxious to complete the transaction at this date, and that he was under pressure from his bank to do so. As I have already mentioned, the defendants contest this finding on the basis of Mr Cranston's evidence to which, they say, the trial judge did not give sufficient consideration and weight.

19. With regard to the question of bank pressure on Mr Reynolds, Mr Cranston stated in his evidence that he did not think he had met Mr Reynolds more than once between the 5th March 2014 and the 26th March 2014 but would have spoken to him on the phone during that period. When asked if he might have telephoned him every day for an update, he stated that he may have rung him "a couple of days in a row" but not every day, but that this may have been because he had failed to get through to him on the first occasion. He had been made aware after Easter that the transaction had not closed, and he understood that the reason for this was that certain documents had not been signed. He was asked if the bank was putting pressure on Mr Reynolds to which he responded that he was not "putting enormous pressure on Mr Reynolds" but "would have been asking him for updates in relation to what was going on … and that would be it". In relation to the period between March and July 2014 he felt that there would have been three to four meetings, and apart from these meetings any contact would have been by telephone. He was aware that further proceedings had been issued by Mr Reynolds, and stated that the bank's approach was "very much a hands off approach" pending the conclusion of those proceedings. There was also evidence that on the 25th July 2014 when the matter was for mention in the Commercial Court, Mr Cranston had decided to come down to court to see for himself what was happening, and that he left the court satisfied that there would be progress towards completion of the transaction by the same afternoon – in other words that whatever documents remained to be signed would be signed later that day. It appears that quite apart from any direct contact between Mr Reynolds and the bank to keep them updated on what was happening, there was contact between Mr Cranston and the bank's own solicitors, and between Mr Reynolds' solicitor and the bank's solicitor in relation to the matter.

20. There are two references to bank pressure on Mr Reynolds in the judgment of the trial judge. In para. 27 he states "it is clear that Mr Reynolds was most anxious to complete the transaction at this time; it is also clear that AIB was putting Mr Reynolds under pressure to complete the transaction …". In para. 132 he stated that not only was Mr Reynolds ready willing and able to execute the lease by the 26th March 2014, but "was most anxious to do so as he was under immense pressure from his bank, AIB, to execute the lease" so that rental income would start to flow in order to reduce his indebtedness to the bank.

21. The defendants submit that the trial judge has erred in concluding that Mr Reynolds was under pressure or immense pressure to complete, and that he has completely overlooked and failed to refer to the evidence given by Mr Cranston. They submit that his evidence does not support the conclusion that pressure was being applied to Mr Reynolds by the bank, as Mr Reynolds stated in his evidence, and as his solicitor had stated in correspondence and in his dealings with the defendants' solicitor. The defendants contend that the trial judge fell into error in this regard, and that in so far as the finding of such pressure by the bank on Mr Reynolds assisted the trial judge in concluding that Mr Reynolds was at all times ready willing and able to complete, that finding also should be set aside.

22. In my view, however, whether the bank did or did not put pressure on Mr Reynolds at various times is not particularly important. The trial judge referred to this pressure in the context of Mr Reynolds being anxious to complete the transaction. Firstly, there was other evidence which the trial judge was entitled to accept that pointed to Mr Reynolds being ready willing and able to complete by the 26th March 2014 and on later dates. The finding of pressure from the bank was not crucial to such a conclusion. But in any

event, it is clear that somebody in Mr Reynolds' position would, as he himself stated, feel under pressure from his bank to complete this transaction, whether or not the bank was in fact from its perspective putting him under pressure or "immense pressure", given:-

> (a) that a receiver had been appointed by AIB over the company he had used to operate the nightclub business at The Pod premises,
>
> (b) he owed the bank a great deal of money which the bank was naturally keen to recover,
>
> (c) there was a risk that further enforcement by the bank would have a knock-on effect on his other business interests,
>
> (d) the matter was dragging on since 2012,
>
> and
>
> (e) he was required to keep the bank updated as to how the transaction was proceedings through such meetings as took place and through telephone contact.

23. The bank was certainly keenly interested in what was happening with this transaction and the court proceedings, as is evidenced by the fact that on one occasion at the end of July 2014 Mr Cranston even saw fit to attend the Commercial Court to see for himself what was happening. After all it was owed a great deal of money and was anxious to see a substantial income stream coming into the bank by way of rental income. I have no doubt that some customers of the bank may have been placed under far greater pressure than was Mr Reynolds, and that Mr Cranston might well consider that given the degrees of pressure possible, that applied to Mr Reynolds was not at the high end of that spectrum of possible pressure. But it was certainly open to the trial judge to consider that Mr Reynolds was under pressure from the bank to complete the transaction, even if his use of the word "immense" was not an adjective used by Mr Cranston. Whether he was or was not under pressure, or immense pressure, does not determine anything of relevance as far as this appeal is concerned. In that regard, what is important is whether or not the trial judge was entitled to conclude that it was defendants who were responsible for the failure to complete this transaction, rather than any action by Mr Reynolds, particularly by reference to his dealings with Mr Dolan on and after the 14th May 2014, and his alleged desire to scupper the whole transaction so that he could pursue his Plan B. These are the real issues for determination, and not whether or not there was immense bank pressure put upon Mr Reynolds by the bank. I shall come to these other issues in due course, and in particular the significance of the text messages already referred to, and the indemnity given by Mr Reynolds to Mr Dolan on the 30th July 2014, and the question whether any failure by the trial judge to refer to these matters in any detail, and/or whether he overlooked or ignored them, means that this Court should overturn his findings of fact in this regard.

24. Having digressed in order to address the question of bank pressure, I should resume the narrative of events from the 9th April 2014 to which the trial judge referred in his judgment in order to put into context the defendants' contention that it was Mr Reynolds who contrived deliberately to frustrate the completion of this transaction for his own purposes.

25. On the 9th April 2014, three days prior to his going on vacation for two weeks, the defendants' solicitor, on the instructions of Mr Ormond, wrote to the plaintiff's solicitor raising a number of matters. He said that he was awaiting an engrossment of the lease, in addition to confirmation in relation to the provision of the skywalk and as to the ownership of the rear stairway, as well as a draft consent from both the bank and the receiver. He sought also confirmation that the intoxicating liquor licence was still in place and a copy of same, and an undertaking that it would be transferred to Altomoravia upon completion. These matters with the exception of the skywalk and the rear stairway, as the trial judge noted, were matters which could and should have been raised prior to the 26th March 2014, but were in any event normal conveyancing matters. However, the letter also concluded with the following paragraph:

> *"You should be aware that there is a leak on the ground floor which has become worse due to your client's failure to complete this lease over the last two years as this is a full FRI lease, and in such circumstances we will be calling on your client immediately upon completion to repair this leak. You might confirm the position by return."*

26. In relation to that paragraph the trial judge noted that Mr Reynolds's view was that it was raising new conditions which were not part of the terms of settlement. He noted Mr Ormond's view also that these matters were simply what were referred to as "information matters" and not intended to be additional conditions to be fulfilled prior to completion. However the trial judge rejected Mr Ormond's evidence in this regard, stating that it was difficult to accept it because the letter of the 9th April 2014 did not indicate that it was simply seeking information in relation to the matters, and that it would not hold up completion. In fact the trial judge went on to state that quite the opposite was the case. In that regard he referred to a later letter dated 2nd July 2014 in which the defendants' solicitor referred to the issues raised in this letter of the 9th April stating *"which we would imagine are essential to the completion of the transaction",* and went on to state *"subject to the above … we confirm that we are ready willing and able to complete this transaction and close this agreement"* [emphasis added].

27. It must be remembered that by the time that letter was written on the 2nd July 2014 the second plenary proceedings commenced by the plaintiff on the 24th April 2014 were well under way, and in fact, as noted by the trial judge, the defendants' defence and counterclaim specifically pleaded that the issues of the skywalk and the rear stairs were essential to the completion of the transaction.

28. The trial judge concluded that he was satisfied from the evidence of Mr Ormond that these issues were deliberately raised by Mr Ormond for the purpose of negotiating further concessions from the plaintiff in relation to the significant costs associated with the leak complained of, and damage caused to the premises. He stated that *"it is clear from the Mr Ormond's evidence that he directed Mr Carty (defendants' solicitor) to write this letter and insert the condition about the cost of repairs because he wanted Mr Reynolds to take on the liability for the repairs or because he wanted Mr Reynolds to be equally liable for the cost of repairs."* These were undoubtedly matters which the defendants were well aware of by the 5th March 2014 when the first proceedings were compromised, and yet were not referred to as part of that settlement. The trial judge was in my view entitled on the evidence which he heard to come to this conclusion, despite the view expressed by Mr Anderson in his evidence that what the defendants were seeking was simply common sense and normal – namely that when the lease actually commenced they should get the premises in the same condition they were in when the agreement for lease was first signed back in 2012, and accordingly that Mr Reynolds should be responsible for any damage to the premises caused by the leak in the intervening two years. It seems obvious that if the defendants felt this way, they ought to have included that as a condition of the terms of settlement that were agreed on the 5th March 2014. There may well have been less than optimal communication between Mr Ormond and Mr Anderson around the 5th March 2014. Mr Anderson was in the United Kingdom, and Mr Ormond was dealing here with the first proceedings and the settlement of them. Perhaps if Mr Anderson had had a more hands-on approach to the case, and was more directly involved in the settlement negotiations on the 5th March 2014, rather than relying on Mr Ormond as his 'man on the ground', the parties might have made reference to the condition

of the premises and the repairs thereof, and reached some agreement in relation thereto. But the settlement is silent on these matters, and stands to be enforced on the basis of its express terms.

29. By letter dated 11th April 2014 the plaintiff's solicitor replied to the letter of the 9th April 2014. He dealt with a number of matters including that he was enclosing fresh engrossed documents for execution, even though he noted that these were already provided in 2012. He refuted the suggestion that he had agreed a postponement of the closing to the 25th April 2014 (after the defendants' solicitor would have returned from vacation). The trial judge made a finding of fact that there had been no such agreement – again, in my view, a finding of fact which he was entitled to make on the evidence which he heard.

30. Another matter dealt with in the reply dated 11th April 2014 was a request by the defendants' solicitor, which had been made on the 2nd April 2014, that perhaps Mr Dolan could be released as a guarantor of the intended lease. It appears that the reason for that request was that Mr Dolan was for his own reasons in the process of extricating himself from his previous close business relationship with the Altomoravia parties. He no longer wanted to be part of Altomoravia's plans for The Pod or its other activities. It presumably seemed logical therefore that he should not be required to be a guarantor of the lease going forward, even though in April 2012 he had been willing to do so. In his own evidence, however, Mr Dolan stated that in fact if he had been asked to sign the guarantee at any time up to the 14th May 2014 he would have done so. As he understood the guarantee, he would have only a limited exposure in the event that Altomoravia defaulted on its rent obligations. I will return to that question when dealing with the text messages issue. At any rate, having received the request on the 2nd April 2014 that Mr Dolan be released, Mr Reynolds's solicitor stated in this letter that his client's instructions were that the lease had to proceed on the basis of the terms of settlement, meaning that Mr Dolan had to sign as one of the guarantors. When giving evidence, Mr Cranston of AIB stated that he had not been requested by Mr Reynolds to agree to Mr Dolan's release, but that if he had been he would have had to pass the request up the line for a decision. The defendants seek to rely on that evidence as further support for their contention that Mr Reynolds deliberately obstructed the completion of this transaction by, inter alia, not even asking AIB if they would be agreeable to removing the need for a guarantee from Mr Dolan. However, as of April 2014 certainly and also up to 14th May 2014, Mr Dolan, according to his own evidence, was still willing to act as one of the guarantors.

31. The reply of the 11th April 2014 also stated that the skywalk and rear stairs were extraneous matters unrelated to completion, and confirmed also that the licence was in place and would be transferred on completion.

32. By the 12th April 2014 the defendants' solicitor was on holidays until the 24th April 2014. However he managed nonetheless to send a holding reply on the 16th April 2014 stating simply that he would take his clients' instructions.

33. On the same date, the plaintiff's solicitor wrote again complaining that the agreed closing date had passed, and that no executed lease or funds had been received, and stating further that unless confirmation was received by close of business on the following day the case would be re-entered before the court. The defendants' solicitor was also asked if he had authority to accept service of proceedings. A reply dated 17th April 2014 (Holy Thursday) stated that he had no such authority, and raised again the issue of the leak, and whether the plaintiff would agree to rectify it. Thereafter the Easter break intervened, and nothing further occurred before the return of the defendants' solicitor from vacation on the 24th April 2014.

34. On the 24th April 2014, having received no substantive response to his letter dated 16th April 2014 the plaintiff's solicitor issued the present proceedings. These were served on Altomoravia by post that same day, and a courtesy copy was sent with a covering letter to the defendants' solicitor. No response was received. Some difficulties were encountered in effecting personal service of these proceedings on the remaining personal defendants which necessitated an application to the High Court for an order for substituted service upon the solicitors acting for the defendants in the transaction. That order was granted on the 12th May 2014, and service was effected on these solicitors that same date.

35. The trial judge concluded, and correctly so in my view, that the plaintiff's action in issuing these new proceedings and seeking an order for substituted service as soon as that proved necessary indicates that he was ready, willing and able to conclude this transaction in accordance with the terms of the previous settlement, and that by contrast it was the defendants who were dragging their feet and making no real effort to abide by the court order and complete the transaction.

36. On the 14th May 2014 the plaintiff issued and served a motion to have the proceedings admitted to the Commercial Court pursuant to O. 63A RSC. That order was granted on the 26th May 2014. The trial judge concluded that it was extraordinary that the defendants, who were professing that they were at all times ready, willing and able to complete, did not simply do so even by this time by simply executing and returning the lease and guarantees, and paying over the sum of €185,000 being the agreed sum due for rent. He noted also Mr Reynolds' evidence that if that had happened he would himself have immediately executed the lease.

37. I pause this narrative briefly to draw attention to the fact that on the 14th May 2014 Mr Reynolds happened to meet Mr Dolan on the street, and a discussion ensued as to the terms of the guarantee that, *inter alios*, Mr Dolan was required to sign. The defendants relied heavily in the High Court upon certain text messages and other events following that meeting between the two men for their contention that at all times, while giving the appearance of being ready, willing and able to complete, Mr Reynolds, in reality, had no wish to complete this transaction following the settlement on the 5th March 2014, and pursued a contrary agenda, so that he could implement his Plan B, of trying to frustrate the completion of this lease by putting into the mind of Mr Dolan an interpretation of the guarantee which was wrong, and which also was contrary to what Mr Dolan had up to the 14th May 2014 believed it to mean. As I have said already, the defendants contend that the trial judge virtually ignored the existence and significance of these text messages and the interactions between Mr Reynolds and Mr Dolan between the 14th May 2014 and the end of July 2014, and that this Court should overturn his findings of fact in relation to complete the transaction.

38. The trial judge noted that following the entry of this case into the Commercial List the defendants had failed to enter an appearance in a timely fashion despite undertaking to do so, and had failed also to deliver a defence as directed, necessitating a motion for judgment in default of defence. That motion issued on the 24th June 2014, and a defence was delivered on the 27th June 2014.

39. On the 27th June 2014 the plaintiff's solicitor wrote noting that a defence was received and went on to request confirmation:

(a) that the lease had been sealed by Altomoravia,

(b) that the guarantees had been executed by all guarantors and were available to be handed over,

and

(c) that the defendants' solicitor was in funds to complete.

This letter evoked a response by letter dated 30th June 2014 stating:

(a) that the lease had been sealed by the company,

(b) that "the guarantees are physically attached to the lease but are executed and are available",

and

(c) that the solicitors were in funds to the required amount *"to be handed over to your office on completion"*.

The trial judge stated that what was surprising about this letter was what it did not say, namely that it did not send over the lease or the funds and make a demand that the plaintiff execute the lease, and in addition that it did not mention any of the other issues that had been raised in previous correspondence. The plaintiff's solicitor responded that same day by asking that the lease and guarantees as executed be furnished immediately. A reminder letter was sent on the following day, the 1st July 2014, and on that date also the plaintiff's solicitor delivered a reply and defence to counterclaim in the proceedings.

40. On the 2nd July 2014 the defendants' solicitor wrote quite a lengthy letter. But before I set it forth verbatim as the trial judge did in his judgment because of what he called its significance, I want to note, as the evidence in the High Court revealed, that the reference made by the defendants in their letter dated 30th June 2014 to the lease being sealed and to the guarantees being executed and available refers to the execution of the documents back in 2012, and not to the execution of the freshly engrossed lease containing the new commencement date of the lease, and the new guarantees which the defendants' solicitors had required to be furnished to them in April 2014. This is a very significant fact in my view, especially when one realises that according to the uncontroverted evidence of Mr Dolan's own solicitor, from whom he had sought his own advice as to the interpretation of the guarantee after the chance meeting with Mr Reynolds on the 14th May 2014, he had specifically and clearly told the defendants' solicitor that he was not authorised to hand over the earlier guarantee that Mr Dolan had executed back in 2012. In other words, the statement in the letter dated 30th June 2014 that the guarantees were executed "and available" was not correct.

41. The letter dated 2nd July 2014 was in the following terms:

"Dear Sirs,

Further to yours of 30th ult. and 1st inst., we enclose herewith as requested lease and guarantee in duplicate executed by our clients.

We would ask you to note that the attached are forwarded to you on a strictly without prejudice basis to the current proceedings in this matter and our clients' rights to recover damages from your client for the damage caused to the premises known as The Pod, Harcourt Street, Dublin 2 due to water ingress arising as a result of inter alia your client's negligence, disregard, breach of duty, breach of statutory duty relating to the protection of the premises. Further, for the record, we note that we have not received clarification to the issues raised in our letter of 9th April last which we would imagine are essential to the completion of this transaction:

(1) confirmation regarding the consent given by your client for the provision of the skywalk on the building.

(2) confirmation of the ownership of the rear stairways.

(3) consent from the mortgagee in this matter.

(4) consent from the receiver in this matter.

(5) confirmation regarding the liquor licence attached to the premises namely that same is in order and remains in place.

Subject to the above and the attached we confirm as per our pleadings, we are ready willing and able to complete this transaction and close this agreement.

We await hearing from you,

Yours faithfully"

42. This letter evoked an immediate response on the 3rd July 2014. Before setting out the terms of that letter, one must recall that the defendants had raised the issue of water damage to the premises since April 2012 and the skywalk in previous correspondence, and those matters were not referred to in the most recent letter dated 2nd July 2014. Understandably, the plaintiff's solicitor wanted clarification that those issues were no longer alive. The letter dated 3rd July 2014 stated as follows:

"Dear Sirs,

Please confirm the following by return:

(1) That in accordance with the terms of the agreement for lease with guarantee and of the lease itself, your clients will take the premises as is.

(2) That your clients accept that our client has no liability whatsoever to your clients in respect of any alleged damage, which is denied, which is said to have been caused by ingress of water. In this regard we draw your attention to clause 8 of the agreement for lease with guarantee, and the terms of the lease itself.

(3) We have reviewed the lease as executed by your clients and furnished to this office, and note that the

commencement date of the term of the said lease is 20th September 2012. Kindly confirm therefore that your client will commence the payment of the rent reserved under the lease immediately upon execution thereof by our client.

(4) It has come to our client's attention from a third party that there may be a miss apprehension on your client's part as to the correct interpretation of the guarantee provided by the guarantors at the fifth schedule of the lease. For the avoidance of any doubt the liabilities of the guarantors, or each of them, shall not exceed the sum of €260,000 in each and every year of any default on the part of the tenant or a sum which equates to 50% of the annual rent in each and every year of any default on the part of the tenant which gives rise to a liability under the guarantee, whichever is the greater. Accordingly, the guarantors are potentially liable to pay a sum equivalent to up to half the rent reserved under the lease in each and every year of the 20 year term created thereby.

Please confirm by return that you accept the position as set out above.

Yours faithfully. "

43. This letter was responded to by letter dated 4th July 2014 from the defendants' solicitor. In addition to taking issue with what the plaintiff's solicitor had stated as to the meaning of the guarantee, the letter dated 4th of July 2014 stated:

"(1) Our client had not been afforded any opportunity to inspect these premises prior to the order of the High Court on 5th March 2014. Your client refused to complete this transaction for a period of 18 months and during that time allowed severe damage to be caused to the premises which will necessitate huge expense for our client in rectifying same.

(2) When the agreement for lease was entered into over two years ago our client was then happy with the state of the premises. However since that time your client has allowed the premises to fall into disrepair and in particular has allowed the premises to suffer water damage which to date your client has not remedied. The agreement for lease in this matter does not relieve your client of his obligation to protect the premises for the benefit of our client pending our client taking up lawful occupation of the premises. In short, the completion does not deprive our client reserving their position via any action they may take against your client for the damage caused to the premises."

44. In relation to this reply, the trial judge stated at para. 68 of his judgment:

"It is clear from this letter, that the plaintiff's request in his letter of 3rd of July 2014 that the defendants would take the premises "as is" had not been accepted by the defendants, and instead they are complaining not only of the damage to the premises but also that they had not been afforded any opportunity to inspect these premises prior to the order of the High Court on 5th March 2014. Given that the defendants had obtained an expert's report on the state of the premises dated August 2013 and which was exhibited as a witness statement for the first set of proceedings it is difficult to understand this statement. Thus again the defendants were making an issue of the state of the premises almost 4 months after the court order and agreement of 5th March 2014."

45. The plaintiff's solicitor wrote again on the 6th July 2014 stating *inter alia*:

"… it is quite clear both at the date of the hearing and now that your clients continue not to be ready, willing and able to close and furthermore seeking to negotiate new terms by way of amending the liability of the guarantors under the guarantee and by introducing other matters in relation to the premises itself.

Again, we have taken our client's instructions and the state of the premises was known to your client at the date of the hearing on the High Court in March 2014 when the parties settled the proceedings on foot of your client's oral evidence under oath that your clients were ready, willing and able to close the transaction.

It is now not open to your clients to introduce new elements that could have been addressed during the negotiations that lead to the terms of settlement of 5th March 2014 that were entirely foreseeable and mount your clients and while the premises remained unoccupied for approximately 2 years.

Your clients chose not to seek to introduce terms in the settlement at that time in circumstances where at all times your client's would take the premises 'as is'.

It would appear therefore that your clients are now seeking to introduce further pre-conditions before closing to which they are not entitled.

Further, as previously advised to you, confirmation of consent in relation to the provision of the skywalk and the ownership of the rear stairways cannot now be imposed as pre-conditions before the closing by your clients.

…… .

The attempt to introduce further pre-conditions as another attempt on the part of your clients to renege on the terms of settlement and earlier agreement.

Accordingly, on the grounds that it is quite clear that your clients are not willing to complete the transaction, in all of the above circumstances, the current proceedings will now proceed and our client will continue to seek damages on foot of same.

Yours faithfully."

46. The trial judge stated in his judgment that the plaintiff's solicitor, was right to respond in these terms and that the letter was "clearly an attempt by them to introduce new conditions to the court order and the settlement". The trial judge went on to refer to further correspondence between the parties' solicitors and in particular a letter dated 25th of July 2014 from the defendant's solicitors stating that subject to the execution of the agreement in writing the following payments would be made by the defendants forthwith, namely:

(1) the sum of €180,000 representing the deposit,

(2) payment of €130,000 for rent repayments,

and

(3) €5000 for stamp duty.

The letter also requested that the plaintiff's solicitor should make contact to confirm an appointment to complete the transaction. The trial judge referred also to a letter from the plaintiff's solicitors dated 30th July 2014 which requested the defendant's solicitor to revert by return to confirm that his office was in funds in order to close the transaction, and that his clients were in a position to close the transactions that day. The trial judge noted that evidence was given during the hearing that this letter was written in order to see whether the defendant's would in fact be in a position to close the transaction on that date. The letter was clearly sent by fax because it was responded to on the same date, 30th July 2014, as follows:

"Dear Sirs,

Further to your letter of even date we confirm that we are awaiting signatures on the documentation necessary to complete this transaction. As soon as the documentation is signed we will forward it to you for completion. Funds are in place to close this transaction and will be given to you on completion.

Yours faithfully."

47. Although this letter was sent by fax to the plaintiff's solicitors, which apparently was not seen by the plaintiff's solicitors until they saw it at the trial of this action before Mr Justice Cregan. However, as he stated in his judgment, "nothing substantive turns on this". It was certainly clear that the defendants were still not in a position to complete the transaction that day. I should perhaps mention also that the proceedings were listed for mention before the Commercial Court on the 30th July 2014 having been adjourned from the 25th July 2014 on the basis that it was anticipated that by the 30th July the necessary documents would have been signed to enable the transaction to be completed. On the 30th July 2014 the Court was informed by the defendants' counsel that Mr Dolan had still not executed his guarantee.

48. It is unsurprising in my view that, as the trial judge stated, the plaintiff decided at this stage that "enough was enough" and that his solicitors wrote to the defendant's solicitors on 31st July 2014 as follows:

"Dear Sirs,

We refer to previous correspondence in relation to the above matter and our recent attendances before the Commercial Court. We refer specifically to the representations to the court made by your counsel to the effect that the lease, guarantee and settlement agreement were not signed by all the defendants.

Given your clients' related admission yesterday they are not in a position to comply with the terms of the court order of 5th March last, we wish to advise that we are instructed that our client will not now seek specific performance of the agreement referred to above, but rather will seek damages in lieu.

Furthermore, in an attempt to minimise his losses our client now proposes to deal with other interested parties in relation to the said property, and the purpose of this letter is to formally put your clients on notice of this fact."

49. It is clear that it was the absence of Mr Dolan's guarantee that was causing the problem. While he had signed a guarantee back in April 2012, his own solicitor had made it clear to the defendants' solicitor, as already referred to, that that particular guarantee could not be handed over. It was also stated by Mr Dolan in his evidence in the High Court that in fact he had been advised by his own solicitor that he should not sign any fresh guarantee since he was not going to have any involvement in the Pod enterprise and no control over what happened. Mr Dolan was not prepared to sign the guarantee unless he was given an indemnity by the other guarantors.

50. I have referred to the fact that Mr Dolan was from 14th May 2014 unclear as to the precise meaning of the guarantee and his potential liability thereunder, and had sought his own legal advice in relation to it. I have referred to the fact that by April 2014 Mr Dolan was anxious to disentangle himself from his previous business relationship with the other defendants but was nevertheless by that date at least, albeit perhaps based on a misunderstanding of its potential liability under the proposed guarantee, still willing to execute the guarantee. Thereafter, however, and as noted by the trial judge at para. 80 of his judgment, Mr Dolan was unwilling to sign the guarantee unless he received an indemnity in respect of any liability he might have under that guarantee from all of the other guarantors. As the trial judge noted, such an indemnity was not given to him by his co-guarantors until the 4th or 5th of August 2014. Again, as noted by the trial judge, the plaintiff would not have been aware of this. Having received that indemnity from his co-guarantors Mr Dolan signed the guarantee in the knowledge that he was protected from any exposure thereunder, but the plaintiff's solicitor was not made aware that the defendants were in a position to complete the transaction until the defendants' solicitor wrote to that effect on the 14th August 2014 when the documentation was furnished duly executed by all necessary parties, but extraordinarily in my view the necessary funds were still not enclosed. However, the plaintiff's solicitor replied on 15th August 2014 stating that his client's position remained as set out in the letter dated 31st of July 2014 already referred to, and he returned the documentation which had been closed.

51. I will return to the contention by the defendants that it was a deliberate ploy by the plaintiff to sow the seeds of doubt in the mind of Mr Dolan as to the meaning of the guarantee and the potential extent of Mr Dolan's liability under it, in order to ensure that he would not sign the guarantee, and thus deliberately frustrate the completion of the transaction by the defendants, all with a view to being able himself to pursue the alternative Plan B for the premises which would otherwise be subject to the 20 year lease in favour of Altomoravia.

52. Before returning to that question, and the series of text messages upon which the defendants so heavily rely on this appeal, I should set out the trial judge's conclusion reached in relation to the delay in the completion of the transaction after 26 March 2014 and where the blame for it should be cast. In para. 80 of his judgment he stated as follows:

"… Given that the plaintiff was under immense financial pressure from AIB, given that the plaintiff had been ready willing and able at all times since 26th March 2014 to sign, given that the defendants had constantly delayed and added new conditions, it is clear that as at 31st July 2014 the defendants were in breach of the court order of 5th March, and had, in effect, acted in such a way as to add extra conditions to the court order and also to in effect frustrate the

enforcement of the court order. In those circumstances, the defendants' actions were clearly a breach of the agreement between the parties, and they were clearly a breach of the scheme of the court order because certain things had to be done by the defendants before the plaintiff could perform his part of the court order."

The text messages

53. Nobody besides Mr Reynolds and Mr Dolan was aware of these texts until they were provided much later by Mr Dolan to his co-defendants. The first time these texts were disclosed was when Mr Dolan prepared his witness statement around January 2015. There was no application made to amend the pleadings in the light of these text messages, but nevertheless Mr Dolan gave evidence in relation to them and was extensively cross-examined in relation to them. The defendants sought to rely upon these texts in the High Court to support their contention that while there was undoubtedly delay in completing this transaction, the principal cause of the failure to complete was that Mr Dolan was unwilling to execute the guarantee required of him, and that the content of these texts and the evidence of other contact between Mr Reynolds and Mr Dolan show that Mr Reynolds was engaged upon efforts to persuade Mr Dolan not to execute a new guarantee between June and August 2014, and that he acted in bad faith in this regard. It is submitted that in error the trial judge considered the question of fundamental breach only in the context of why the agreement had not been performed by the 26th March 2014, or even shortly thereafter in April 2014, and that instead he ought to have concentrated his attention on why the transaction was not completed between the date of commencement of these proceedings in April 2014 and the 30th July 2014, and that if he had done so he would have had to give consideration to the text messages and other contact between Mr Reynolds and Mr Dolan, and should have concluded that far from being anxious to have the matter completed, Mr Reynolds was pursuing a contrary agenda by trying to ensure that Mr Dolan did not sign the required guarantee and in this way ensure that the transaction did not complete, so that he would be free to pursue so-called Plan B.

54. The defendants submit on this appeal that the trial judge erred by failing to give any consideration and weight to these texts and other contact between Mr Reynolds and Mr Dolan after 14th May 2014, and that had he done so he could not have concluded that it was the defendants, and not Mr Dolan, who were responsible for the failure to complete the transaction in accordance with the terms of settlement, and ought in such circumstances have made an order in favour of the defendants requiring the plaintiff to specifically perform the agreement of the 5th March 2014 by executing the lease.

55. The trial judge expressed his conclusions on the question of whether or not the defendants were entitled to an order requiring the plaintiff to specifically perform the agreement of the 5th March 2014 in trenchant terms commencing at para. 143 as follows:

> "143. The court will not grant an order of specific performance if, taking all the circumstances into account, it would be inequitable to do so.
>
> 144. In the present case I have no doubt that it would be inequitable to grant an order for specific performance because the defendants' conduct after 5 March 2014 amounted to bad faith. They unilaterally postponed the closing date; they delayed the closing date; they prevaricated; they said that one of the guarantors [Mr Anderson] was out of the country; they demanded engrossments of the lease when they had them in their possession of all time; they added entirely spurious new conditions which they accepted in evidence had been resolved in the first set of proceedings (e.g. the skywalk, the rear staircase and the water damage issue); they refused to close until these new conditions were agreed to by the plaintiff; they delayed in order to put pressure on the plaintiff whom they knew was in financial difficulties; they delayed knowing the plaintiff had withdrawn his planning objection and had therefore lost his main "negotiating card"; they refused to sign before the plaintiff signed when they knew that was entirely inappropriate; they forced the plaintiff to issue these proceedings because of their behaviour; they deliberately refused to accept service of these proceedings; they deliberately failed to comply with the direction of the court about filing their defence; they delayed in order to negotiate the exit of one of their members (Mr. Dolan) and allow Mr Clinton to replace him; one of their number [Mr Dolan] refused to sign the guarantee until early August 2014 until he received an indemnity from the other parties; they rooted the deposit monies through a murky and unexplained route; they filed misleading affidavits of discovery and a misleading witness statement; they concealed all their machinations about the exit of one member [Mr Dolan] and the entry of another member [Mr Clinton] from the plaintiff; they sent a copy of a signed lease dating from 2012 when they knew that that was irrelevant; they sent a copy of the signed lease despite the fact that one of the defendants' [Mr Dolan] own solicitors had stated that under no circumstance was this signed lease to be sent to the plaintiff's solicitors.
>
> 145. It is clear from all of the above that the defendants adopted a deliberate strategy of delaying, obfuscating, obstructing, adding new conditions, playing for time, concealing from Mr Reynolds what was going on behind the scenes, and seeking to wrest on new concessions from Mr Reynolds in his weakened condition. They carried on the strategy even after proceedings had been issued to force them to comply with the agreement and order of fifth of March 2014.
>
> 146. I have no doubt that the defendants, led by Mr Anderson, engaged in an entirely unscrupulous attempt to gain extra concessions from Mr Reynolds realising as they did, that he was in a weak financial position, that he had withdrawn his appeal from An Bord Pleanala, and that he was bound by a court order. This was all done deliberately by the defendants to try and force extra concessions out of Mr Reynolds to contribute to the cost of the water damage when they had quite clearly agreed to take the property in the condition it was in as at 5th March 2014.
>
> 147. I would therefore conclude that the actions of the defendants were unscrupulous and were acts of bad faith. The defendants were never ready willing or able to complete the transaction until early August 2014 at the earliest. But even then, it is clear that the defendants' agreement to execute the lease on or about 14th August 2014 was conditional on a number of matters including the condition that the plaintiff would contribute to the water damage. These conditions were set out in the defendant's counterclaim dated 30th June 2014 and were maintained at all times by the defendants up to and including the trial of these proceedings. Thus it is clear that the defendants were not ready willing and able to complete the agreement on the 26th March 2014 as stipulated by the agreement and as directed by the court order.
>
> 148. I also of the view that the defendants sought to use the existence of the court order for their own ends. They believed that Mr Reynolds now have to sign the lease not only because of the agreement but also because of the court order. Their actions subsequent to the court order of 5th March 2014 were not only acts of bad faith, they were also an abuse of the court order and therefore an abuse of process.
>
> 149. In those circumstances therefore I refuse the reliefs of specific performance sought by the defendant."

56. The defendants in their submissions accept that under Hay v. O'Grady principles, the trial judge's findings of fact may not be disturbed by this Court unless there was no credible evidence at trial to support them. However, they go on to submit that the trial

judge must be seen to have considered all of the evidence, and where it appears from his judgment that he did not consider what they submit to be the crucial evidence of these text messages and therefore failed to give any weight to them, nor to the other communications between Mr Reynolds and Mr Dolan during the period from May 2014 until the end of July 2014, including the hand-written indemnity given by Mr Reynolds to Mr Dolan when they met on that date, this Court is entitled to consider that evidence, and reach a conclusion that this evidence is sufficiently strong that if the trial judge had considered it, and given it due weight, he would have had to reach a different conclusion on the question of fundamental breach and who was responsible for it.

57. The series of text messages relied upon by the defendants to indicate egregious bad faith on the part of Mr Reynolds commence on the 4th June 2014, and therefore cannot speak to why the transaction did not complete on any date prior to that date, or at least prior to the 14th May 2014 when Mr Reynolds happened to meet Mr Dolan on the street and a conversation about the meaning of the guarantee took place. Mr Dolan stated in his evidence that if he had been asked to execute a guarantee at any stage prior to the 14th May 2014 he would have been willing to do so, but that he had not been asked. Insofar as the trial judge considered the question of fundamental breach of the terms of the agreement, and who was to blame for it, the defendants submit that the trial judge erred in considering the question of fundamental breach only in the context of why the agreement had not been completed by the end of March 2014, and that he ought more correctly have focussed upon that question by looking at why the transaction did not complete between the commencement of these proceedings on the 14th April 2014 and 30th July 2014. They submit that had he considered the question of fundamental breach in the context of that particular period, and had he given any consideration and weight to the text messages and other communications between Mr Reynolds and Mr Dolan during that period, he would have been forced to conclude that it was Mr Reynolds who had prevented the transaction been completed by the end of July 2014 and that therefore it was Mr Reynolds who was in fundamental breach of the terms of the agreement, such that he was disentitled to the reliefs which he sought.

58. The evidence was that on the 14th May 2014 (Mr Dolan thought it was the 15th May 2014, but that difference is neither here nor there) Mr Reynolds and Mr Dolan met by chance on the street, and a discussion ensued which included reference to the guarantee that Mr Dolan was required to sign. It appears that from whatever way the discussion went Mr Reynolds realised that Mr Dolan's understanding of the liability to which Mr Dolan would be exposed under the guarantee was different to his understanding. Mr Dolan considered the extent of his liability to be one half of one year's rent (i.e. the year of default), whereas Mr Reynolds believed that the exposure was to one half of the rent for every year of default which could be over a period of 20 years, being the term of the lease. While, in his judgment, the trial judge stated, correctly, that he was not required as part of the case to determine the true construction of the guarantee, he stated that it was clear that there were diverging views as to its meaning and that "this sent alarm bells ringing in Mr Dolan's mind and he decided to seek independent legal advice from his own solicitors". The trial judge also noted Mr Dolan's evidence that at this point he was getting confused about the guarantee because he had one version from Mr Anderson, one version from Mr Ormond, another from Mr Carty (the defendants' solicitor, and yet another from Mr Reynolds. There was evidence also that at this point Mr Dolan's own solicitor write to Mr Carty clearly stating that the guarantee which Mr Dolan had signed back in 2012 could not be now used without Mr Dolan's consent. It is worth noting also that the trial judge stated that in fact the opinion of Mr Dolan's own solicitor as to the meaning of the guarantee coincided with that which Mr Reynolds had expressed on the 14th May 2014, which if correct would mean that Mr Dolan's understanding as to the extent of his liability under it back in 2012 and still was up to that point incorrect.

59. The allegation arising out of the text messages that from the 14th May 2014 onwards until the end of July 2014 Mr Reynolds pursued a strategy of trying to scare Mr Dolan into not signing the guarantee so as to ensure that the transaction did not complete while at the same time commencing and pursuing proceedings for specific performance of the agreement, by putting into his mind an interpretation of the guarantee that was exaggerated and incorrect, has to be seen in the context that Mr Dolan's own solicitor was of the same view and instructed Mr Carty that the guarantee which Mr Carty had on his file and which was executed in 2012 by Mr Dolan could not be furnished to the plaintiff's solicitor without his express consent.

60. As it transpired, though this was never communicated to the plaintiff's solicitor as the reason why the transaction was not being completed, Mr Dolan was thereafter unwilling to execute the required guarantee until such time as he received a written indemnity from his co-guarantors, and for whatever reason this was not provided until the middle of August 2014 by which time the plaintiff had decided that he would seek rescission and damages in lieu of specific performance and so informed the defendants' solicitors as already stated.

61. The text messages themselves are difficult to summarise given their brevity and somewhat typical use of verbal abbreviation. There is no doubt that Mr Reynolds and Mr Dolan were in frequent touch during this period about a number of matters. There is no doubt that some of the texts related to the guarantee, and also the fact that Mr Dolan was in the process of disengaging from his previous involvement with the other defendants. That disengagement process is certainly relevant to the willingness or otherwise of Mr Dolan to provide a guarantee in respect of a lease for a premises to be used for a business in which he would have no involvement. The texts certainly suggest that Mr Dolan was discussing his business relationship with the other defendants with Mr Reynolds. When Mr Reynolds became aware of a text sent after the plaintiff's solicitor was sent the guarantee which Mr Dolan had signed in 2012 he texted Mr Dolan as follows: *"Colin I see you are proceeding with Alto etc. Your guarantee and signed lease just furnished to my solr … I take it with your approval."* Another text from Mr Reynolds stated: *"Colin have you read clause 2 in the guarantee … if Co is insolvent or in liquidation then then [sic] the 4 of you, jointly and severally take up the lease for the remaining period of the term. You should ask Carthy [a reference to Mr Carty, the defendants' solicitor] his view on that?"*.

62. There is one particular text to which the defendants attach great significance in condemning Mr Reynolds's bona fides at this time, and to which I should refer to. It is the text sent by Mr Reynolds on the 26th June 2014 in which he tells Mr Dolan that he has spoken to a named senior counsel who Mr Dolan's solicitor knows well, and goes on to say that this counsel *"is v. clear that you have an agreement to 'let you out of Alto' then that is totally out inc. guarantees. And as such can't come back on you. [counsel] has said if [your solicitor] wants, he can ring [counsel] 'off the record' on this. Kind regards"*. It is accepted by Mr Reynolds that what he stated in this text message was a complete fabrication. He had had no such conversation with the named counsel at all. The defendants contend that this is particularly indicative of duplicitous and egregious conduct on the part of Mr Reynolds whereby Mr Reynolds was trying to ensure that Mr Dolan did not do the very thing which was holding up the completion of the transaction which Mr Reynolds was at the same time telling the Commercial Court coming up to the end of July 2014 he was at all times ready willing and able to complete. It is submitted that if the Commercial Court had been informed of these texts and communications taking place between the plaintiff and one of the defendants, the Court would have taken the view that it was the plaintiff himself who was intent on frustrating the finalisation of the transaction, and would have taken appropriate steps to ensure that the transaction was completed in July 2014.

63. It is true that the trial judge did not refer to these text messages in his written judgment despite the fact that they were the subject of evidence by Mr Reynolds and Mr Dolan. However, it cannot be presumed that he overlooked them. It is equally open to the inference that he considered them to be of peripheral significance only and not determinative of where the blame should be placed for

the failure to have completed this transaction in accordance with the terms of the settlement. In particular it is worth reiterating in this regard that they postdate by several weeks the agreed completion date of the 26th March 2014.

64. But that apart, it is not as clear and obvious as the defendants suggest that these texts evince such egregious, sinister and duplicitous conduct on the part of Mr Reynolds as to disentitle him to the relief that he sought. They have submitted that these texts were sent with the intention and objective of dissuading Mr Dolan from executing the lease and guarantee. I do not agree that such an intention is clear at all. It is certainly evident that they are sent against the background of the chance meeting on the 14th May 2014 when it became apparent to Mr Reynolds that Mr Dolan's understanding of the guarantee did not accord with Mr Reynolds's understanding of the document. It should be remembered that Mr Reynolds suggested to him that he take his own solicitor's advice in the matter. As it happens, that solicitor appears to have agreed with the understanding that Mr Reynolds had of the guarantee, and advised Mr Dolan accordingly and told the defendants' solicitor that under no circumstances should he furnish the 2012 signed guarantee to the plaintiff's solicitor without a specific consent from Mr Dolan in that regard. Given that Mr Dolan's own solicitor was advising Mr Dolan not to execute any new guarantee it is not open to the defendants to simply place all the blame for the failure by Mr Dolan to execute the guarantee on Mr Reynolds because of the text messages. In addition, I note that in his sworn evidence, when under cross-examination, he accepted that Mr Reynolds had never asked him to, or told him not to, sign the guarantee. I accept also that when so accepting Mr Dolan went further and stated that neither had Mr Reynolds asked him to sign the guarantee.

65. There were clearly unresolved issues or difficulties between Mr Dolan and the other Altomoravia parties which had to be resolved before Mr Dolan would execute the required guarantee. He was disengaging from that relationship. He clearly needed to be protected from exposure under the guarantee in circumstances where he was no longer being involved in the business venture that would happen at The Pod when the lease was signed.

66. Despite these text messages there was ample credible evidence upon which the trial judge could and did rely for his conclusion that it was the conduct of the defendants and not Mr Reynolds that prevented the agreement from being implemented either by the 26th March 2014 or indeed any later date. He explained his reasons for reaching this conclusion in a lengthy and considered written judgment, and after hearing evidence and submissions over some fourteen days. While it is true that the text messages did not feature in the judgment, and while it would have been referable that this should have occurred, I am completely satisfied that those text messages when considered in their overall context do not have the significance for which the defendants contend on this appeal, even allowing for the fact that Mr Reynolds admitted that one of the texts was a complete fabrication. They do not show what the defendants would contend that they show. They are not such as to set at nought the findings of fact made by the trial judge. He clearly set forth the evidence which he accepted for the purpose of his findings. That evidence supports his findings and conclusions.

67. Before concluding I should mention one other matter, namely the fact that on the evening of the 30th July 2014 after this matter had been before the Commercial Court and when that Court was told that it was expected that the required documents were expected to be executed during the course of that day, Mr Reynolds and Mr Dolan met. Obviously there must have been some discussion between the two about the transaction and the guarantee which had not been signed. In any event, it appears that Mr Reynolds wrote out and signed a document in the form of an indemnity in the following terms and gave it to Mr Dolan:

> "30th July 2014
>
> I, John Reynolds, confirm that I will not take any legal action against Colin Dolan in respect of "Alto Moravian/Pod deal" at any time now or in the future.
>
> I also confirm that Colin Dolan has no liability personal or otherwise to me in relation to the above named deal, now or in the future.
>
> Any legal action that may arise in relation to the above proposed deal Colin Dolan will be fully indemnified against any costs or damages by myself.
>
> Yours sincerely,
>
> John Reynolds."

68. In his evidence Mr Dolan stated that he wanted an indemnity from everybody if he was to sign the guarantee, including from Mr Reynolds. He stated that Mr Reynolds gave him this indemnity on the 30th July 2014. Mr Reynolds in his evidence confirmed that he and Mr Dolan had met by arrangement in the afternoon of the 30th July 2014, and that during their meeting Mr Dolan had asked for this indemnity.

69. I mention this Indemnity because the defendants have suggested that this also is something to which the trial judge gave no attention in his judgment, that he ought to have done so, and had he had due regard to it together with the text messages, he would have reached different conclusions. It is stated in their written submissions, and was stated in oral submissions, that Mr Reynolds had failed to instruct his solicitors on the 31st July 2014 before the matter was once again before the Commercial Court, that on the previous evening he had given Mr Dolan "a full indemnity against any claims which might be made against him by the [Altomoravia parties] for failing to execute the Lease with Guarantee". The submissions go on to state:

> *"The fact that Mr Reynolds should elect to give a full indemnity to Mr Dolan is wholly inconsistent with Mr Reynolds assertion that as of the 25th July 2014 he held a genuine intention of securing specific performance of the Settlement Agreement and compliance with the Order of the Commercial Court dated 6th March 2014. Moreover, it is submitted that Mr Reynolds through his communications (including text messages to Mr Dolan) had contrived a state of affairs whereby he had dissuaded Mr Dolan from executing the Lease with Guarantee. The only reason why the Lease with Guarantee was not finalised by 30th July 2014 was because of Mr Reynolds surreptitious and duplicitous conduct."*

70. In my view this paragraph of the submissions mischaracterises completely the indemnity that was given to Mr Dolan. First of all, the evidence of both Mr Reynolds and Mr Dolan was that Mr Dolan requested it. Secondly, the document does not hold the meaning contended for by the defendants. It is not a document designed to dissuade Mr Dolan from executing the guarantee in an effort to ensure that the agreement was not performed. If anything it endeavours to achieve the opposite by giving an assurance to Mr Dolan that Mr Reynolds would not at any stage in the future come after Mr Dolan on foot of the guarantee if he signed the guarantee. It should therefore be seen as an encouragement to Mr Dolan to sign the only document that was holding up the completion of the transaction. In my view, even if the trial judge had considered the document and made reference to it in his judgment it is not such a document as should, along with the text messaging, lead to a setting aside of the trial judge's findings of fact and his conclusions on foot of them.

71. For all these reasons I would dismiss this appeal.