THE HIGH COURT

[2013 No. 4143 P]

BETWEEN

PAT O'LEARY

PLAINTIFF

AND

VOLKSWAGEN GROUP IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Binchy delivered on the 9th day of December , 2016.

Contents

Introduction

1. The plaintiff is a motor dealer who carries on his business at Lissarda, Macroom, Co. Cork. In or about 1989, the plaintiff was appointed as an authorised dealer of Audi cars, Volkswagen passenger cars and light commercial vehicles. Initially, the plaintiff's appointment was made by Motor Distributors Limited ("MDL"), which company was the then holder of *inter alia*, the Volkswagen and Audi franchises in Ireland, but which subsequently, in July 2007, had its business taken over by the defendant, which is a subsidiary of the manufacturer of Volkswagen vehicles, Volkswagen AG, which is also proprietor of the Audi brand. The appointment of the plaintiff was placed on a formal footing from the outset, by way of written contracts with MDL. Those contracts were replaced in 1995, in order to have contracts that complied with the 1995 EU Block Exemption Regulation , EU Council regulation no 1475/95, (the "1995 BER"), applicable to vertical agreements. Those contracts were in turn, subsequently terminated by MDL on 12 months' notice to all its dealers, and replaced by contracts drafted by the defendant in order to take account of the requirements of EU Council Regulation 1400/2002 ("the BER"), which came into effect on 1st October 2003. The parties i.e. MDL and the plaintiff, entered into six contracts on this date, three of which concerned the plaintiff's Volkswagen dealership, and three of which concerned the plaintiff's Audi dealership. These proceedings are only concerned with the three Volkswagen contracts; one relating to the sale of passenger vehicles; one relating to the sale of commercial vehicles; and a third relating to what is known as the "Life" product group of the defendant, and all of which contracts I will hereafter refer to collectively as "the contracts". The contracts relating to the Audi dealership were for a fixed term and terminated in 2008.

2. Following upon the onset of the financial crisis, the defendant, which had taken over the business of MDL, including its rights and responsibilities under the contracts from in or about July 2007, undertook a review of its activities in the State, which ultimately led it to re-organise its sales network. This gave rise to the termination by the defendant, on 18th April 2011, of all its dealerships in the State, including that of the plaintiff, although the plaintiff remains appointed as an after sales provider for Volkswagen passenger car and commercial vehicles. In these proceedings the plaintiff claims that the termination of the contracts was unlawful, in breach of contract and was also in breach of express representations made to the plaintiff by the defendant and its predecessor, MDL. The plaintiff seeks the following reliefs (*inter alia*):

> *(i) A declaration that the defendant's purported termination of the said Volkswagen contracts is unlawful and of no legal effect;*
>
> *(ii) If necessary, an order reinstating the plaintiff as an authorised Volkswagen dealer on the terms and subject to the conditions prevailing at the date of the purported (and wrongful) termination of the contracts;*
>
> *(iii) Specific performance of the Volkswagen contracts;*
>
> *(iv) A declaration that the plaintiff's Volkswagen contracts are, and remain, valid and binding on the parties thereto, including the defendant;*

(v) A declaration that the defendant is estopped and precluded from terminating the contracts in the manner which it has sought to do and/or for the reasons specified by the defendant; and

(vi) Damages.

The Contracts Principle Terms

3. The conditions of contract in each of the contracts are identical and the principle terms thereof as are relevant to these proceedings are as follows:

(i) Article 16 provides that each contract is concluded for "*an indefinite term*".

(ii) Article 17 of each contract provides: "*This agreement may be terminated by either party by giving 24 months' written notice to the other party before the end of a month.*"

(iii) Article 18 provides that:

"*This agreement may be terminated by the supplier giving to the Dealer in writing, 12 months' notice of termination to the end of a month in the event that it is necessary for the Supplier to re-organise the whole or a substantial part of its distribution network.*"

(iv) Article 19 of each of the contracts provides:

"*This agreement may be terminated with immediate effect for good cause by notice in writing*"

and goes on to provide an illustrative list of circumstances justifying immediate termination, which are not relevant to these proceedings.

(iii) Article 20 of each of the contracts provides: "*Notice of Termination given by the Supplier must contain a detailed statement of reasons which shall be transparent and objective.*"

(iv) Article 22 of each of the contracts provides:-

"1. *Modifications and amendments to this agreement must be made in writing and notified by the Supplier to the Dealer. No ancillary oral agreements have been concluded.*

… 2. [irrelevant for present purposes] …

3. When this agreement comes into force all previous agreements between the parties relating to the business dealings governed by this agreement shall cease to be of effect save that any monetary claims and commitments arising under any such previous agreements that have not yet been completely performed shall not be affected."

(v) Article 23 of each of the contracts provides, *inter alia*,

"*Without prejudice to each party's right to make an application to the competent national court, either party is entitled to submit disputes concerning the fulfilment of their contractual obligation(s) to an arbitrator or an independent expert. Should either party request the appointment of an arbitrator or an expert the proceedings shall be governed by the laws of the Republic of Ireland and the place of the proceedings shall be Dublin…*"

(vi) Article 27 of each of the contracts provides:-

"*Each of the contracting parties shall bear its own corporate risks arising out of this Agreement and the implementation hereof. The Supplier shall therefore, in particular, not accept any responsibility for expenses incurred by the Dealer in the performance of this Agreement or for commitments entered into by the dealer in pursuing its business.*"

The BER

4. The contracts were prepared by the defendant for the express purpose of availing of the new block exemption regime following upon the passing into law of the BER. The purpose of the BER was to provide a framework for the exemption of vertical agreements in the motor industry from the application of Article 101(1) of the Treaty on the Functioning of the European Union. Provided the agreements concerned met the requirements of the BER, they were exempt from individual assessment by the European Commission as to their effect on competition in trade between Member States. As mentioned above, the BER was the successor to the 1995 BER and, for the purpose of these proceedings, one of the key differences between the two regulations was that the BER introduced a new requirement to apply upon the termination of a vertical agreement, i.e. the requirement to give detailed, transparent and objective reasons upon the termination of a distributorship agreement. The BER expired on 31st May, 2010, but was extended for a period of three years until 1st June, 2013 by another regulation, No. 461/2010. The effectiveness of the BER was reviewed by the European Commission which published a report entitled Commission Evaluation on Block Exemption Regulation 1400/2002 in May 2008. This review concluded that it was highly doubtful that the obligation to give such reasons upon termination of an agreement had effectively contributed to the protection of dealers or to the prevention of termination by manufacturers of contracts as a means to sanction pro-competitive behaviour. Accordingly, the Commission recommended the discontinuation of the requirement to give reasons for the termination of such agreements, with the result being that upon the expiration of the extended lifetime of the BER on 1st June, 2013, it was not further renewed and agreements relating to the distribution of motor vehicles have, since that time, come within the scope of the general block exemption for vertical agreements, Regulation No. 330/2010. The following provisions of the BER that are the most relevant to the these proceedings:

5. Recital 9 of the BER provides:

"*In order to prevent a supplier from terminating an agreement because a distributor or a repairer engages in pro-competitive behaviour, such as active or passive sales to foreign consumers, multi-branding or subcontracting of repair*

and maintenance services, every notice of termination must clearly set out in writing the reasons, which must be objective and transparent. Furthermore, in order to strengthen the independence of distributors and repairers from their suppliers, minimum periods of notice should be provided for the non-renewal of agreements concluded for a limited duration and for the termination of agreements of unlimited duration."

6. Article 1 of the BER Regulations sets out definitions. Of particular relevance to this case are the following definitions:

> (c) *"Vertical agreements" means agreements or concerted practices entered into by two or more undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain;*
>
> (d) *"Vertical restraints" means restrictions of competition falling within*
>
> *the scope of Article 81(1), when such restrictions are contained in a vertical agreement;*
>
> (g) *"Quantitative selective distribution system" means a selective distribution system where the supplier uses criteria for the selection of distributors or repairers which directly limit their number;"*

Article 2(1) of the BER provides:

> *"Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that the provisions of Article 81(1) shall not apply to vertical agreements where they relate to the conditions under which the parties may purchase, sell or resell new motor vehicles, spare parts for motor vehicles or repair and maintenance services for motor vehicles. The first subparagraph shall apply to the extent that such vertical agreements contain vertical restraints. The exemption declared by this paragraph shall be known for the purposes of this Regulation as "the exemption".*

7. Article 3(4) of the BER provides:

> *"The exemption shall apply on condition that the vertical agreement concluded with a distributor or repairer provides that a supplier who wishes to give notice of termination of an agreement must give such notice in writing and must include detailed, objective and transparent reasons for the termination, in order to prevent a supplier from ending a vertical agreement with a distributor or repairer because of practices which may not be restricted under this Regulation.*
>
> *(5) The exemption shall apply on condition that the vertical agreement concluded by the supplier of new motor vehicles with a distributor or authorised repairer provides*
>
> > *(a) that the agreement is concluded for a period of at least five years; in this case each party has to undertake to give the other party at least six months' prior notice of its intention not to renew the agreement;*
> >
> > *(b) or that the agreement is concluded for an indefinite period; in this case the period of notice for regular termination of the agreement has to be at least two years for both parties; this period is reduced to at least one year where:*
> >
> > > *(i) the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or*
> > >
> > > *(ii) the supplier terminates the agreement where it is necessary to re-organise the whole or a substantial part of the network.*
>
> *(6) The exemption shall apply on condition that the vertical agreement provides for each of the parties the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator. Such disputes may relate, inter alia, to any of the following:*
>
> > *(a) supply obligations;*
> >
> > *(b) the setting or attainment of sales targets;*
> >
> > *(c) the implementation of stock requirements;*
> >
> > *(d) the implementation of an obligation to provide or use demonstration vehicles;*
> >
> > *(e) the conditions for the sale of different brands;*
> >
> > *(f) the issue whether the prohibition to operate out of an unauthorised place of establishment limits the ability of the distributor of motor vehicles other than passenger cars or light commercial vehicles to expand its business, or*
> >
> > *(g) the issue whether the termination of an agreement is justified by the reasons given in the notice.*
>
> *The right referred to in the first sentence is without prejudice to each party's right to make an application to a national court.*

8. Article 4 of the BER sets out what are described as "hardcore restrictions" upon the application of the exemption. In other words, the exemption does not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any one or more of a dozen of such objects listed in Article 4. For the purposes of these proceedings, only 2 of these objects have any relevance:

> (i) Article 4.1(b) provides that the exemption shall not apply to agreements restricting the territory into which the distributor or repairer may sell goods or services (which restriction is in itself subject to qualifications); and

(ii) Article 4.1(d) states that the exemption shall not apply to the restriction of active or passive sales of new passenger cars or light commercial vehicles, spare parts for any motor vehicle or repair and maintenance services for any motor vehicle or repair and maintenance services for any motor vehicle to end users by users of a selective distribution system operating at the retail level of trade in markets where a selective distribution is used. The exemption shall apply to agreements containing a prohibition on a member of a selective distribution system from operating out of an unauthorised place of establishment. However, the application of the exemption to such a prohibition is subject to Article 5(2)(b);

Evidence of the Plaintiff

9. The plaintiff described how his parents started the business in the 1950's and carried out the business of repairing cars, tractors and trucks at Lissarda, Co. Cork, about twenty miles from Cork City and about six miles from Macroom on the N22 National primary route. The plaintiff took over the business in the early 1980's. He developed and expanded the business and in 1989, he was approached by a Mr. Larry Mooney of MDL, owners of the Audi and Volkswagen franchise in Ireland. Discussions ensued and the plaintiff was appointed a Volkswagen and Audi dealer. According to the plaintiff, written contracts of an indefinite duration were signed for both dealerships. These contracts were replaced in 1996, in order to take account of the requirements of the 1995 BER.

10. The plaintiff redeveloped his premises in 2002. He said that prior to commencing that redevelopment he had spoken with MDL representatives and was advised to build a single building, large enough to accommodate both Audi and Volkswagen vehicles. However, just as the redevelopment came to fruition, MDL called a national dealer meeting and dealers were informed that Audi had decided to reorganise its network in Ireland and that it wanted its dealers to have separate showrooms for Audi vehicles. According to Mr Bob O' Callaghan, then chief executive officer of MDL (who gave evidence on behalf of the defendant), this was because average sales per Audi dealer was, at that time, about 40/50 units per dealer per annum. It was decided that it was necessary to scale the network back and to require the continuing dealers to upgrade their premises. The plaintiff was particularly disappointed about this because he had originally intended to build two separate showrooms for Audi and Volkswagen vehicles. However, in recognition of expenditure incurred by dealers in developing their premises, Audi decided to give those dealers whose contracts were being terminated, five years notice of termination to enable them to recoup their investment. By the time this termination took effect in 2008 however, the dealers had actually received six years notice.

11. As indicated in paragraph 1, MDL required new contracts to be completed in order take account of changes to the block exemption regime introduced by the BER. At the same time, MDL took the opportunity to introduce new standards for its dealers, and in particular ISO standards. to which each dealer would in future be required to adhere. Having previously terminated existing contracts on 12 months' notice, MDL wrote to all dealers about the new contracts on 22nd July 2003, and informed the dealers they would be required to attend at the premises of MDL on 24th September 2003, for the purpose of signing the new contracts. The plaintiff requested sight of the contracts in advance of this meeting, in order to have an opportunity to considering the contents of the same. However, in reply he received an email from Mr. O'Callaghan, informing him that because the contracts were quite complex and might confuse, without explanation, it would be better for him to attend the meeting first and that he would have an opportunity to take the contracts away for further consideration, provided that they were signed no later than 1st October 2003.

12. In the course of his evidence, the plaintiff explained that at the time he had a number of concerns about the contracts:

(i) Firstly, the requirement to comply with ISO 9000; while he was not concerned about his ability to do so, he was concerned that the application of these standards can be somewhat subjective and represented, in his words, "150 or 200 new ways" to lose a contract. When he aired this concern, he claims that he was assured by Mr. Tom O'Connor, then Volkswagen sales manager with MDL, that the contracts were actually more secure than his previous contracts because, Mr O'Connor assured him:-

> *"they have the safeguard of the manufacturer now not being able to just make a decision that they no longer wanted to deal with a particular dealer, and that my contracts would not be terminated unless there was a fault or a reason on my side, standard not achieved, and they assured me, that, knowing how we ran our business in Lissarda, that would not be an issue."*

(ii) The second concern that the plaintiff had was in relation to his premises. The new contracts required his premises to be developed in accordance with plans approved by MDL. The plaintiff had recently reconstructed his premises and he was assured that the development that he had undertaken was appropriate and up to standard.

13. Following the acceptance of the contracts by the plaintiff in 2003, the plaintiff's business grew. In order to accommodate this expansion, he moved his farm machinery business across the road in 2003. In 2005, the plaintiff moved his forecourt and erected a topaz service station and shop. Also in 2005, the plaintiff ceased the farm machinery business altogether and moved his commercial vehicles business across the road.

14. In 2006, the plaintiff was informed of the purchase of MDL by the defendant. This took effect on 1st July 2007. Initially, the plaintiff continued to deal with the same personnel as previously. In September 2007, mindful of the fact that his Audi distributorship was to come to an end the following year, he approached Mr. O'Callaghan, (who remained working with MDL until the year end) with a view to seeing if he could continue as an Audi dealer. However, Mr. O'Callaghan informed him that this was not possible; that decision had been made and would not be changed. He said that Mr. O'Callaghan was concerned about the possibility that the plaintiff might take on another premium brand (as he would have been entitled to do) and Mr. O'Callaghan strongly encouraged the plaintiff to continue as an exclusive Volkswagen dealer. He said that Volkswagen were going on a product offensive and were going to expand their range of models, which would lead to a demand for greater showroom space for Volkswagen vehicles. According to the plaintiff, Mr. O'Callaghan said that in his opinion the best move for the plaintiff would be to remain an exclusive Volkswagen dealer, Mr. O'Callaghan also repeated what the plaintiff said he had been assured of at the contract signing i.e. that his contract was indefinite and more secure than previously. Mr. O'Callaghan said that Mr. Tom O'Connor, the Volkswagen sales manager, would be visiting soon to discuss the expansion of the Volkswagen range. The plaintiff's evidence about his discussion with Mr O' Callaghan was not materially disputed by the defendant or by Mr. O'Callaghan, when he gave evidence. The only matter that they did not agree upon was that Mr. O' Callaghan said that he told the plaintiff it was a matter for himself to decide whether or not to take on another franchise, and he had a contemporaneous note of the conversation. The plaintiff, who had his own contemporaneous note, did not recall or have any record of Mr. O'Callaghan saying this to him.

15. The plaintiff said that Mr. O'Connor visited him in December of 2007; the purpose of the visit being to encourage the plaintiff to remain exclusively a Volkswagen dealer. The plaintiff said that he again expressed concern about remaining exclusively committed to Volkswagen, having regard to his experience with Audi. He said that Mr. O'Connor stressed to him the security of the indefinite

duration of his contract and said that there was no possibility that Volkswagen would ever undertake a reorganisation such as had taken place at Audi and that Volkswagen would need more showroom place rather than less in the future. He said that Mr. O'Connor informed him that in future Volkswagen would require a ten car showroom of about 300 square meters. The plaintiff said that since his existing showroom was 350 square meters, he decided to stick with the brand for which he had become well known in previous years and decided against seeking an alternative franchise at that point in time.

16. Business continued to be good until the third quarter of 2008, when it became apparent to the plaintiff that there was a serious downturn in the economy. There was a meeting of dealers in the Clarion Hotel in Liffey Valley in 2008, and it was clear at that meeting that for a lot of dealers, things were not going as well as they had been for the previous number of years. The defendant then organised a meeting of regional dealers in Cashel, Co. Tipperary, in April 2009. This was the first meeting at which dealers were introduced to the new senior personnel of the defendant, including its new managing director, Mr. Paul Willis. According to the plaintiff, the main item on the agenda for this meeting was the economic crisis. The plaintiff said that those attending this meeting were very worried; many had undertaken substantial investment in their premises using borrowings, and that these borrowings had been based on sales levels which had fallen away very substantially. However, the plaintiff said that Mr. Willis was a calm and positive presence at the meeting. Mr. Willis stressed that this was a "*moment in time*" which the dealers and the defendant would get through, working together in partnership. Mr. Willis presented sales projections showing a gradual recovery of the market and he said that it was expected that a "*normal market*" would return some time in the period 2013 – 2015. While it was not anticipated that sales would return to the heady levels that they had reached before the economic crisis, the defendant was anticipating that the market nationally would recover to sales levels of between 130,000 and 150,000 units annually some time in the period 2013 – 2015.

17. The plaintiff introduced into evidence a slide show presented by Mr. Willis to the meeting. He said that he and all others present took particular comfort from page 7 of the slide show. This was a bar chart showing the average throughput per outlet for the years 2007 and 2008, and the predicted average throughput per outlet for the years 2009 and 2010. The final bar on the chart was not ascribed to any particular year but was simply entitled "*future normal market*". This suggested a throughput per outlet of 499 units and above the bar was a box containing the following legend: future normal market: 130,000 units at 15% market share. The reason that the plaintiff took significant assurance from this projection is that 15% of a market share of 130,000 units equates to 19,500 units, which in turn approximates to an average of 499 units per dealer in a dealership network of 39 dealers, which was the number of dealers in the network at that time (or, more accurately, by the end of 2009 because in mid-2009 there were 40 dealers, but one closed by the end of 2009). The plaintiff concluded from these projections that this meant that the defendant had no intention of reorganising the network, or, at least, reducing the size of the network.

18. Moreover, the plaintiff said, there was no suggestion at all at this meeting that there was any review of the network being contemplated by the defendant at that time. The plaintiff kept a contemporaneous handwritten note of this meeting which he introduced into evidence. These notes were consistent with the plaintiff's interpretation of the presentation made by Mr. Willis to the meeting.

19. The plaintiff informed the Court that there were usually two regional meetings of dealers annually, and the second such meeting in 2009 took place in July, in Clonmel. Mr. Willis was not at this meeting, but dealers met for the first time the newly appointed sales manager of the defendant (who had replaced Mr. Tom O'Connor), namely Mr. Adam Chamberlain. Mr. Chamberlain made a presentation to the meeting and again there was a slideshow which, unsurprisingly, contained substantially the same information and projections as those presented to the meeting in Cashel in April. According to the plaintiff, the only change was that the defendant had now set itself the target of being the number one motor brand in Ireland by 2015. The plaintiff's interpretation of this was that it would involve achieving the same sales figures as mentioned above i.e. 15% of a predicted market of between 130,000 and 150,000 vehicles.

20. According to the plaintiff, Mr. Chamberlain was specifically asked at this meeting whether or not the defendant had any plans to carry out a network reorganisation. The plaintiff had a specific note of this in his notes of the meeting. He said that the question was asked by a dealer who was also an Audi dealer who was concerned that the defendant might undertake such a network reorganisation because Audi had decided to undergo a further network reorganisation in 2009, notwithstanding that it had undertaken such a reorganisation in 2002, and which had only fully come into effect in 2008. Mr. Chamberlain emphatically stated that the defendant had no plans for a reorganisation because it was satisfied that it had the best dealers in the best locations of any brand by comparison to Nissan, which had a lower market share and a larger number of dealers, and Ford which would have had a higher market share than the defendant, but also had a significantly higher number of dealers. The plaintiff also put into evidence a customer satisfaction survey which was presented by the defendant to the dealers at this meeting, and which showed that the plaintiff achieved fourth place in the country for the year 2009, notwithstanding that it had been a difficult year. The plaintiff said that he had made every effort to maintain standards and in particular to maintain staffing levels at the same levels as he had during better times. The plaintiff explained that he had avoided letting any staff go.

21. During cross-examination it was put to the plaintiff that Mr. Chamberlain's instructions were that there were no plans for a reorganisation *at that time*. The plaintiff denied that Mr. Willis qualified his reply to the question in this way, and stressed that he paid particular attention to what Mr. Chamberlain said in response to the question, for the reason mentioned above. No evidence was given on behalf of the defendant in relation to this issue.

22. A national dealers' meeting took place in Carton House, Co. Kildare, in October, 2009. The plaintiff explained that traditionally, the meeting in October was the "kick off" meeting for the following year, to introduce new models, new sales programmes and new sales incentives etc. The key presentations in this meeting were made by Mr. Willis and Mr. Chamberlain. So far as the plaintiff could recall, Mr. Willis gave an overview and Mr. Chamberlain gave a presentation about Volkswagen passenger cars. He could not recall if there was any presentation at this meeting about Volkswagen commercial vehicles.

23. The key projections and aspirations of the defendant as outlined to dealers at this meeting remained unchanged from the previous two regional meetings. It remained a key objective to overtake Toyota as the number one brand in the country. However, according to the plaintiff one additional message was delivered at this meeting and that was that this was a good time for dealers to invest in their businesses. The plaintiff stated:

> *"The message was that this was a good time for dealers to invest in their businesses and to make sure that their customers were looked after. If dealers did that, in conjunction with the model range available from Volkswagen, then collectively we would get through the difficult times. The final message from Mr. Willis at the meeting was that it was a good time to invest. There were two choices in a recession: one was to cut back and "batten down the hatches" and the other was to invest and try to go forward."*

24. The plaintiff gave evidence that he took this message to heart; he liaised with commercial vehicle representatives of the defendant with a view to bringing his commercial vehicle display up to date. As a result of this, he invested in the display area for

commercial vehicles, in the removal of fencing, site excavation, installation of bollards and the general site upgrade. Because of a previous order of this Court acceding to an application of the plaintiff for a modular trial, this hearing was not concerned with damages. Accordingly, evidence was not given as to the amount he claims to have expended but the amount claimed in the statement of claim is €200,000. However, on cross-examination on this issue the plaintiff agreed that plans for this development had been underway for some time, but that he only committed to doing the works after hearing Mr. Willis encourage dealers to invest.

25. The plaintiff had, since in or about 2003, conducted a used car sales business at Model Farm Road, Cork. He said that he did not use this for the sale of new Volkswagen vehicles as this would have been contrary to his contract. Occasionally, he would use it as a base from which to supply a vehicle to a customer either for test drive purposes or for delivery following a purchase, but the premises was not advertised as a Volkswagen dealership or used for that purpose.

26. The plaintiff said that he never received any complaint from the defendant or MDL about this, or indeed from the defendant itself until he received a letter dated 8th December 2009, from Mr. Chamberlain expressing concern about the use of the premises for the sale of new Volkswagen vehicles, contrary to the plaintiff's contractual obligations. The plaintiff responded to this complaint by letter of 15th January 2010, and further correspondence with Mr. Chamberlain on this subject ensued. The plaintiff denied that there were ever new Volkswagen cars for sale at Model Farm Road, and to the extent that the premises may have been used to field enquiries about new car purchases, Mr. O'Callaghan had been aware of this at all times and had had no difficulty with the plaintiff using the premises in this manner.

27. Mr. Chamberlain made a second similar complaint to the plaintiff by letter dated 25th March 2010. The plaintiff responded by contacting Mr. Chamberlain by telephone and also by writing to him on 1st April 2010. He heard nothing further from Mr. Chamberlain in this regard, but took the opportunity to ensure that the defendant had no further complaints under this heading when Mr. Chamberlain visited Lissarda for the first time, some time in or around September 2010. According to the plaintiff, Mr. Chamberlain informed him that the issue was "*closed*".

28. On 21st July 2010, a Mr. Mark Brady, sales manager of the defendant, wrote to the plaintiff expressing concern that the plaintiff had failed to achieve sales targets for the year to date. The letter also warned the plaintiff that under the terms of his contract he was obliged to keep in stock new vehicles from the current range of contractual products as set forth in Appendix 1 of his contract. This letter baffled the plaintiff because he had in fact exceeded his annual sales targets for the entire year as far back as February 2010, and this had been acknowledged by Mr. Chamberlain in a letter of 4th February 2010. In any event, the plaintiff queried why he received such a letter and Mr. Brady later explained to him that the letter was sent in error. The plaintiff also received a letter dated 4th August 2010, congratulating him on his strong sales performance and informing him that O'Leary's Lissarda was in the top 25% of dealers nationally. While nothing further came of the complaints that the defendant made to the plaintiff, the plaintiff wanted to draw these events to the attention of the Court because it later occurred to him that these were two incidents in the same year that the plaintiff wrote to him drawing his attention to his contractual obligations and in one case, threatening to terminate the contract on grounds of breach of contract.

29. The plaintiff again attended an annual meeting of dealers in May 2010. He said that there was no mention at this meeting of any plan to reorganise the network or to terminate his dealerships. The thrust of this meeting was that 2010 had been a better year and the general mood of the meeting was positive.

30. In April 2011, the plaintiff attended a meeting of dealers at Dunboyne. He had not had any contact of significance from the defendant since 2010. The plaintiff travelled to the meeting with a Mr. Leonard, who was the proprietor at that time of the Skibbereen Volkswagen dealership. Mr. Leonard expressed concern about the viability of his business and said he was concerned about his future.

31. Presentations were made to the meeting by Mr. Willis, who was followed by Mr. Chamberlain. Mr. Paul Burke gave a presentation in relation to commercial vehicles. Collectively, the presentations were entitled: "*Volkswagen Ireland Network Presentation, Passenger Cars Commercial vehicles, 15th April 2011.*"

32. A key element of the strategy outlined to the meeting was the formulation of what was called an "*ideal network*". During the course of this presentation the plaintiff learned for the first time that his dealership was not included in the future ideal network plan, either for passenger vehicles or for commercial dealerships. The plaintiff was of course in a state of shock at this turn of events. Until that moment, he had had no inkling whatsoever that his dealership was at any risk. Moreover the decision made no commercial sense at all to him, given the success he had enjoyed, and in particular, the level of sales achieved during difficult times.

33. The message delivered at the meeting however, was that the defendant needed to make changes to its network because of significant structural changes in the Irish car market, mainly brought about by the very significant downturn in the economy, but also contributed to by reduced driving times following the construction of a motorway network. The latter gives customers far greater accessibility to dealerships across the country. The script read by Mr. Willis to this meeting was admitted into evidence, and according it, the meeting was informed by Mr Willis that as a result of the changes referred to above:-

> *"it is necessary for Volkswagen to alter the dealer network to reflect the new economic and industry reality. As you will see from the chart, it is necessary for Volkswagen to reorganise the dealer network. We will therefore terminate all sales contracts under Article 17 of the Volkswagen dealer agreement giving 2 years notice."*

Mr. Willis informed the meeting that the defendant had been assisted in preparing its ideal network plan by GMAP, a global retain planning business.

34. Dealers were told that within the next few days they would receive formal written notice of termination of their contracts, terminating with effect from 30th April 2013. They were also told that they would be given an opportunity to submit expressions of interest to operate a dealership at any of the locations identified on the ideal network. Where a dealer applied for his or her existing location, and nobody else applied for that location, the dealer would automatically be reappointed. Where there was more than one dealer interested in an area, there would be tender process and interested parties would have to submit a business plan. While it was not intended that there would be a public advertisement of the opportunity to express an interest in the dealerships, expressions of interest from outside of the network would not be refused. The plaintiff said that in due course, this gave rise to the appointment of two new dealers in the Dublin area, but the plaintiff was not aware of any other "*outsiders*" being appointed to the dealership network. While the presentation made to dealers at this meeting was not made available to him, envelopes containing letters notifying dealers that they would shortly receive a notice of termination of their dealerships were provided, as well as pro-forma expressions of interest; these were made available to dealers at the back of the room at the end of the meeting.

35. The plaintiff described the news that Lissarda did not feature on the list of ideal locations as "*the equivalent of walking into a wall*", not least because the decision made no commercial sense to the plaintiff having regard to the excellent performance of his dealership in the previous couple of years. Furthermore, he said that the decision: *"flew in the face of assurances that had been received on many occasions and encouragement that we had got to grow our business and to expand our business."*

36. When the meeting concluded, he immediately sought out Mr. Chamberlain. He eventually located him, after a long time, and asked him for the reason for this decision. Mr. Chamberlain told him that the reason for this decision was the advice of GMAP (consultants retained by the defendant) that there was no place for Lissarda in the ideal network. The plaintiff said that Mr. Chamberlain suggested that if the plaintiff could make an exceptional business case, then the decision might be reconsidered, although Mr. Chamberlain did not hold out much hope of this.

37. The letter terminating the contracts ("the termination letter") was sent by the defendant to all dealers including the plaintiff on 18th April 2011 and stated as follows:-

> *"Further to our Volkswagen Ireland Network Presentation – Passenger Cars & Commercial Vehicles of 15 April 2011, the purpose of this letter is provide you with written notice of termination of the following Volkswagen Dealer Contract(s) between [VW Ireland] … and O'Leary's Lissarda Limited:*
>
> *Agreement:*
>
> *Volkswagen Dealer Contract: Passenger Cars*
>
> *Volkswagen Dealer Contract: "Commerce" Product Group*
>
> *Volkswagen Dealer Contract: "Life" Product Group*
>
> *As discussed at our presentation, it is necessary for [VW Ireland] to re-organise its dealer network in light of the recent structural changes to the market and due to the significant downturn in the Irish economy. As part of this network re-organisation, it is necessary to terminate all existing VW Dealer Contracts.*
>
> *Accordingly, this letter provides you with written notice of termination of your Volkswagen Dealer Contract(s) under Article 17 thereof, which termination will take effect on 30 April, 2013."*

38. The plaintiff subsequently expressed an interest in tendering for the Cork City dealership and also submitted a case for retention of the dealership at Lissarda. Because a number of parties expressed an interest in the Cork City dealership, interested parties were required to submit business plans. For this purpose they were provided with certain information, including projections as to the likely future market, by the defendant. The plaintiff expressed some concern in evidence that he may not have received the same projections as his competitors which would have affected in an adverse way, the business plan that he submitted.

39. In any event, the plaintiff (along with all with any other interested dealers) was afforded an opportunity to attend a meeting in Liffey Valley in relation to this tender, to enable him to obtain information and ask any questions that he had in connection with the same. On that occasion he had meetings planned with Mr. Willis and a Mr. Weisse of the defendant, and a separate meeting with Mr. Paul Burke and Mr. Nigel Rutherford of the defendant. Mr Rutherford was an assistant to Mr.Willis. He made it plain to the plaintiff that he (Mr. Rutherford) did not consider Lissarda to be a viable location. It was also made clear to the plaintiff that there was a requirement for the new dealer to have new premises up and running for Cork City within 24 months. The plaintiff asked for a copy of the Dunboyne presentation and Mr. Rutherford said that the defendant had no plans to share that presentation.

40. The plaintiff was informed that it was estimated that the cost of developing the new Cork dealership would be in the order of between €4 million and €6 million. The plaintiff said that he was aware that another party who might be interested in putting forward a tender might need financial support to do so, and so he asked Mr. Rutherford if the defendant had a plan to put in place what was known as a "*sponsor dealer programme*" in Ireland i.e. a facility that is tailor made by Volkswagen for its dealers for such purposes, and which would involve the defendant "*having a hold over the site*" of the dealership. However, Mr. Rutherford informed the plaintiff that there were no plans for such a programme in Ireland.

41. The plaintiff later met with Mr. Willis and Mr. Weisse. In response to questions from the plaintiff, Mr. Willis informed the plaintiff that there was nothing personal about the decision not to have a dealership at Lissarda, nor was it because Lissarda was too close to Cork City. He said the decision was made as a result of the GMAP recommendations, and those recommendations made it clear that all dealerships were to be terminated, and that there would be no special cases. The plaintiff recorded Mr. Willis' answers to questions in notes that he kept of the meeting. He asked Mr. Willis if he would share the GMAP report, and he said that Mr. Willis flatly declined to do so.

42. He also discussed with Mr. Willis the target market share of 15%, and Mr. Willis denied that there was ever such a target. He said that Mr. Willis said that the aim of the defendant, in implementing the GMAP proposals, was to have 80% of its customers within 25 minutes' drive of a Volkswagen dealer. Having obtained the GMAP ideal network plan by way of discovery in these proceedings, the plaintiff said that in his opinion this would not be achieved with just four dealerships in the entire of Co. Cork i.e. with Lissarda excluded. The plaintiff said that the GMAP report demonstrates that only 69.2% of customers would be reachable within 25 minutes.

43. The plaintiff subsequently made applications for dealerships both in Cork City and Lissarda. These applications were submitted on the basis that the plaintiff would self-fund the development of a Cork City dealership, with, if necessary, some assistance from the defendant by way of a car stocking facility. The plaintiff's applications were rejected on 30th June 2011. The successful applicant was Blackwater Motors, the incumbent dealer in Cork City and Fermoy. The plaintiff expressed a number of complaints about the defendant's handling of his tender. He considered that he did not get a fair hearing at interview and that the marks he received from the interview panel for the criteria that were set by the defendant to assist in determining and rating suitability of candidates, were inexplicable.

44. The plaintiff stated that Mr. Simon Elliott replaced Mr. Willis as Managing Director of the defendant in July 2011. He met with Mr. Elliott at the annual dealer conference in October 2011, and took the opportunity to discuss his situation with Mr. Elliott. He also invited Mr. Elliott to visit Lissarda. Mr. Elliott agreed to do so and he and Mr. Paul Burke met with the plaintiff at Lissarda in July 2012. He said that Mr. Elliott was very complimentary about the Lissarda operation and that, in contrast, he was very critical of the party who had successfully tendered for Cork City. He said that that party had not yet commenced development of a new premises in Cork City, either for Volkswagen, or for Audi for which it had also been appointed as a dealer. He said that Mr. Elliott was also critical of

the performance of that party in its other dealership. According to the plaintiff, Mr. Elliott said that if this poor performance continued, this would give rise to a review of the Cork situation and Lissarda in particular. It was agreed that the plaintiff would send to Mr. Elliott his business plans for Cork City and Lissarda which he did subsequently. When they were leaving, Mr. Paul Burke said to the plaintiff that Lissarda "*might be back on the table again".*

45. The plaintiff subsequently heard from Mr. Elliott at the end of September or early October 2012, when Mr. Elliott informed the plaintiff that having considered the matter, it was the view of the defendant that the viability of the Cork City dealership could be undermined if the dealership at Lissarda were to continue in operation, and therefore the defendant would be adhering to the ideal network plan.

46. The plaintiff did not give up however, and he responded to Mr. Elliott in October 2012, stating why, in his opinion, the outcome of the review was mistaken. Mr. Elliott replied in November, stating that there would be no change of position on the part of the defendant.

47. The plaintiff stated that notwithstanding the "*cloud*" hanging over the business, he and his staff continued to concentrate on sales and 2012 was a good year in sales of both passenger cars and commercial vehicles. The plaintiff was due to attend his last meeting of dealers in February 2013 and in advance of that meeting he wrote again to Mr. Elliott in the hope that the defendant might yet be persuaded to reverse its decision. He met Mr. Elliott at the dealers' meeting, and Mr. Elliott told him that he had a proposal to make, in which he felt he thought the plaintiff might be interested. Mr. Elliott suggested that they might have a meeting to discuss the matter the following week, however, that meeting never materialised.

48. Eventually, the plaintiff did receive a proposal from Mr. Elliott by letter of 27th March, but this was a proposal only in relation to used cars which was of no interest or value to the plaintiff. The plaintiff was both surprised and disappointed that Mr. Elliott could make such a meaningless proposal.

49. The plaintiff referred to an email sent by Mr. Elliott to other personnel within the defendant on 8th February 2013, which was sent on the same day as the dealer conference at which he met Mr. Elliott. In this email, Mr. Elliott expresses concern to his colleagues about the situation in Cork City and County. The email states as follows:-

> *"I am seriously bothered about Cork and our decision to terminate Lissarda our Cork performance is very poor, the worst County in Ireland and below market share average we have a dealer in Blackwater that failed to hit VW target in al 3 of his VW dealership in January, and has now sadly failed in his quest to find a site on which to relocate. Accordingly we are still operating from one temporary location! The answer from VWGI is to terminate a dealer in Cork (Lissarda) this can only make matters and performance worse. My recommendation is to engage in dialogue with Pat O'Leary (I would do this) and extend his termination period by 12 months due to delays in development in Cork, this is exactly the same as MSL. In 12 months we would review the Cork market and the total TIV. We are and have always been concerned that Pat O'Leary may challenge this legally and now he has a precedent in Dublin now that Blackwater too will be delaying (like MSL) the development I would like to discuss this as a matter of urgency.Simon."*

50. Subsequently, in or about 28th March 2013 the plaintiff received an email from a Mr. Blunden of the defendant discussing arrangements to wind down the dealership. At this stage, he knew that he had exhausted all hope of reversing the decision to close Lissarda and the effective date of termination was fast approaching. On 12th April 2013, the plaintiff wrote a very long letter to Mr. Julian Franke of Volkswagen AG in Germany. In this letter, the plaintiff sets out at considerable length and in considerable detail his complaints relating to the termination of his dealership and the manner in which it was effected.

51. Throughout his evidence, the plaintiff referred in considerable length to documentation delivered by the defendant by way of discovery in these proceedings. One of these was a document entitled a "*balanced score card*" which records dealer performance. The 2010 balanced score card records that the plaintiff performed within the top 20 dealers in the country, which would have entitled him to receive certain incentive payments from the defendant.

52. The plaintiff also obtained the GMAP report through discovery. This report was presented by GMAP to the defendant in September, 2009. A section of the report identified the defendant's dealers in County Cork. These were at the time: the dealership in Newmarket; Blackwater Motors in Fermoy; Leonard's in Skibbereen; Turner's Cross in Cork; and the plaintiff's own dealership in Lissarda. The document states that: *"O'Learys' Lissarda, Macroom and Newmarket Motors are not viable in any of the three markets…"* and went on to recommend that those dealerships should not be retained. (The markets to which the document was referring were theoretical sales markets based on different levels of assumed car sales in Ireland).

53. The discovered material also included an email dated 30th September 2009, from a Mr. Martin Conlon of the defendant, to a Mr. Matt Cawcutt of GMAP in which he indicated acceptance by the defendant of the closure of the plaintiff's dealership, but not for the closure of Newmarket.

54. One of the matters that concerned the plaintiff most in the documents discovered, and of which he only became aware upon delivery of those documents by the defendant, was that in conducting its analysis of the Irish market, GMAP had mis-located Lissarda; it placed Lissarda in Macroom rather in its actual location. The plaintiff considered this to have had a number of knock on effects. First, it appears that the defendant considered Lissarda to be a rural dealership, whereas the plaintiff in his own estimation considered it to be more in the nature of a suburban dealership. Secondly, it exaggerated the extent to which the plaintiff appeared to be making sales outside of his natural catchment area, referred to by GMAP as "pump-out". The GMAP recommendations appeared to place a significant reliance upon the concept of "pump out," Mr. O'Leary understood this term to refer to sales outside of the natural catchment area of a dealership, even though dealers did not have a specific territory and indeed are prohibited under the BER from having an exclusive territory; or perhaps more accurately, the exemption conferred by the BER does not apply to agreements appointing dealers to specific territories. In any event, GMAP, according to the plaintiff's interpretation of the documentation presented, appear to have concluded that more than 90% of the vehicles sold by the plaintiff occurred in the Cork City area, outside of the catchment of the plaintiff. However, since GMAP had mistakenly placed the location of Lissarda at Macroom, it necessarily followed that there was an increased and inaccurate rate of "*pump out*" ascribed to his sales.

55. Furthermore, the plaintiff made the point that Mr. Martin Conlon of the defendant had actually been to Lissarda as had Mr. Chamberlain, in September 2010, and therefore each of them were aware that Lissarda was not located in Macroom, and they did not take any steps to have the error, and what the plaintiff considered to be a consequence of the error (the termination of the contracts) corrected.

56. Another effect of this error was that other measurements used by GMAP in identifying the ideal network were distorted. One of

these was the number of customers that could be reached within 25 minutes which appeared to be a key factor in settling upon the ideal network plan.

57. The plaintiff also considered that the documentation discovered revealed a preference for favouring Blackwater Motors, the dealership that was ultimately successful in obtaining the Cork City dealership. Blackwater had been appointed to the Cork City dealership in 2008, following a successful tender. The previous incumbent MSL, had withdrawn from Cork. Blackwater were meant to have had a premises erected with two years, but had failed to do so. However, before the 2011 tender process, Blackwater had been succeeded in obtaining planning permission for the template premises required by the defendant.

58. The plaintiff also complained that other documentation discovered suggested Blackwater was operating in some kind of partnership with the defendant and that consideration was being given to the defendant acquiring the site upon which Blackwater would construct a premises.

59. The plaintiff stated that since 2012, sales nationally have increased by 50%, but the plaintiff's sales have dropped by 50% on account of the termination of his dealership. This has also affected the plaintiff's after sales business.

60. The plaintiff continues to source Volkswagen vehicles through other dealers, but the defendant has made this more and more difficult. He was asked if he had explored any other options, such as obtaining another dealership, but he said that the reality of the market in Cork is that there is no possibility of obtaining a brand of anything like the same substance as Volkswagen

61. During cross-examination, it was put to the plaintiff that the first time he complained that the termination of his contract was made contrary to assurances given to him by representatives of the defendant, was when he wrote to Mr. Franke of Volkswagen AG on the 12th April, 2013. The plaintiff agreed that this was correct, and he was asked why, if he placed such significant reliance upon the alleged assurances, he had made no reference to them at all in any previous correspondence or discussions with the defendant. The plaintiff had a number of explanations for this, depending on the point in time at which he was engaging with the defendant. In the first instance, he said that he did not wish to be or to appear to be contentious. He said it was more in his style to be measured and he hoped that he might yet persuade the defendant that its decision was in error and contrary to its own best interests. He thought that it would be better at this point in time to put his efforts into preparing the best application that he could to secure the Cork city dealership in the new ideal network, and/or to retain Lissarda.

62. Subsequently, when the plaintiff met Mr. Elliott for the first time at the first dealer conference in July 2012, after the termination of the contracts, he was encouraged by what he perceived to be a more favourable disposition on the part of Mr. Elliott, towards Lissarda, than that of Mr. Willis, and he felt that Mr. Elliott might yet be persuaded to reinstate the Lissarda dealership. Since Mr. Elliott did not actually visit Lissarda until July 2012, he did not wish to do anything in the intervening period that might upset Mr. Elliott's positive disposition.

63. He felt all the more encouraged in this regard following Mr. Elliott's visit to Lissarda in July 2012. Even though Mr. Elliott confirmed the defendant's position regarding Lissarda in October 2012, the plaintiff remained hopeful that he could still convince the defendant to retain the dealership. At this point he was encouraged by the fact that the implementation of the network plan did not appear to him to be proceeding in all respects; there was no sign of the successful Cork tenderer constructing a new premises and he had heard that the reorganisation in Dublin was being deferred and that there was a stay of execution upon the termination of the dealerships in Dublin.

64. At one point in his evidence the plaintiff said that he did not wish to appear critical of Volkswagen staff such as Mr. Chamberlain, Mr. Rutherford, or Mr. Elliott himself, and he said that that was a factor in not complaining sooner that he had been misled.

65. It was put to the plaintiff that he would have had numerous opportunities to mention to the defendant, even if only politely, the assurances he claimed to have received, i.e. in a way that would not have been harmful to his own interests, and in a way that would not have appeared critical of Mr. Elliott, between the time of the termination of the contracts and the time he eventually wrote to the defendant in April 2013, but for the reasons given above he chose not to do so.

66. Moreover, it was also put to the defendant that the letter before action of his then solicitors, Messrs. Hayes dated 22nd April 2013 made no reference to these assurances either. The plaintiff agreed that he would probably have approved this letter before it issued, but insisted that he would have instructed his solicitors about the degree of importance he attached to the assurances and the reliance that he placed upon the same.

67. The plaintiff was also asked when he first disbelieved the reasons given by the defendant for the termination of the network. He said that he did not believe the reasons given from the very outset because:

(i) None of the stated reasons were specific to Lissarda;

(ii) It was clear that most of the dealers in the network were assured of being retained; and

(iii) The termination was occurring two years after the awful market of 2009, and at this point the market was in recovery.

68. The plaintiff was asked whether he considered that the defendant was making an error of judgment, or that he was being misled. He said that he did not think about it in detail at the time but that subsequently, in particular following the defendant's discovery, he considered that he was misled by the defendant and that the reasons given by the defendant were not the real reasons for the termination of the entire network. On being asked what he thought were the real reasons for the termination of the entire network, he said that having had the benefit of reviewing the discovery documentation, he was of the view that there were four reasons:

(i) To facilitate the introduction of contracts more favourable to the defendant with its dealers;

(ii) To facilitate control of sites from which dealers traded in Dublin and Cork, which would account for approximately 50% of retail sales;

(iii) In order to implement a preferred dealer policy i.e. so that a single dealer could control a number of sites, for example Blackwater Motors in Cork, which by now has dealerships in Cork City, Fermoy and Skibbereeen; and

(iv) To increase the "bottom line" or profitability of the defendant.

69. The plaintiff said that when he met with Mr. O'Connor in December 2007, to discuss whether or not he should become an exclusively Volkswagen dealer, Mr. O'Connor assured him that a reorganisation of the Volkswagen franchise was not contemplated and would not occur, and that even if it did occur, that it would not affect the plaintiff i.e. his dealership would certainly be retained in any reorganised network. It was put to the plaintiff that he did not make this last point in his evidence in chief. The plaintiff said that he overlooked saying this in his evidence in chief. He also said that this was pleaded in the statement of claim as originally served, although the statement did not appear in the amended statement of claim.

70. It was also put to the plaintiff that Mr. Willis denied ever encouraging dealers to invest in their businesses, and that Mr. Willis would say in his evidence that he was always very careful to avoid encouraging dealers to incur expenditure, although he did exhort them to keep up their showroom standards, customer service standards and to have adequate demonstration models in stock. The plaintiff however, was adamant that Mr. Willis used the word "*invest*" and that he had specifically said that in a time of recession there were two choices: to invest in one's business, or to "batten down the hatches". The plaintiff said that while Mr. Willis did not specifically encourage dealers to invest in their buildings or premises, this was the implication of what he said.

71. The plaintiff's evidence was that in his view the discovery documentation clearly demonstrated a preference on the part of the defendant to reappoint Blackwater Motors, to the exclusion of the plaintiff and that this was evidenced in a number of ways such as: facilitating their takeover of the Skibbereen dealership, offering financial assistance in the development of a new premises and/or in site acquisition, even though the latter was not ultimately pursued. He also said that Mr. Willis, Mr. Chamberlain and Mr. Rutherford were the key personnel in the defendant who, in his opinion, were conspiring against him or, if they were not, they were conducting themselves so as to prefer Blackwater Motors, against the interests of the plaintiff.

Expert Evidence
72. Just prior to the trial, reports from three experts to be called on behalf of the plaintiff were given to the defendant's legal representatives. The defendant made an application to exclude the evidence proposed to be given on behalf of the plaintiff by these experts. The defendant moved the application on the grounds that the evidence was not relevant to the issues that were required to be determined in the proceedings, and also on the basis that there was a significant element of duplication in the evidence which the plaintiff proposed to adduce.

73. The plaintiff resisted the application strongly. Counsel for the plaintiff submitted that if the application was successful, it would amount to an interference with the plaintiff's constitutional right of access to the courts and would unfairly inhibit the plaintiff in making the best case available to him. Moreover, he said that, inevitably, a refusal to admit the expert evidence would give rise to an appeal.

74. Having considered the submissions made on behalf of both parties on the application, and having reviewed the reports of the experts, I decided to permit the plaintiff to adduce the evidence, but emphasised that the experts should avoid duplicating the evidence of each other.

Evidence of Dr. Greg Swinand
75. The first expert witness called on behalf of the plaintiff was Dr. Greg Swinand. Dr. Swinand is an economist and partner with Indecon International Economic Consultants ("Indecon"). Indecon were retained by the plaintiff to prepare a report concerning the termination of the plaintiff's dealership by the defendant. They were so retained in July 2015, and to assist them in preparing their report the plaintiff furnished Indecon with a selection of documentation obtained by the plaintiff from the defendant by way of discovery, including various drafts of the GMAP documentation, email correspondence between the defendant and GMAP, the termination letter of 18th April 2011, internal documents of the defendant concerning the reorganisation of its network, projections of Goodbody Consultants as regards the future car market in Ireland and other sundry documentation.

76. Indecon prepared a report dated 4th February, 2016. The following is a summary of the main conclusions of the report:

> (i) The reasons given for termination of the plaintiff's dealership were not detailed, transparent and objective, as required;
>
> (ii) The decision to terminate or retain different dealerships was based on subjective rather than objective criteria;
>
> (iii) The termination of the contracts was not justified based on the stated reasons;
>
> (iv) The need to change the network as a whole was not clear from the evidence, and no objective verifiable economic reasons were given as to why a change was needed;
>
> (v) The reasons given for reorganisation of the network such as structural market changes and what Indecon describe as "*the cyclical economic downturn*" are vague;
>
> (vi) The necessity for reorganisation of the network should be related to verifiable reasons linked to economic efficiency of the network, but no detailed, transparent or objective reasons were given;
>
> (vii) The termination of the contracts was not justified based on the stated criteria used in designing the revised network which were: performance, capacity, financial structure, management and division, Volkswagen heritage and modelled theoretical locations;
>
> (viii) A "*plausible*" alternative reason for the termination was that it was in order to promote an anti-competitive strategy including the promotion of a single dominant dealer in Cork and the formation of "*cohesive market areas*";
>
> (ix) The main reason for termination of the contracts was excessive pump-out which was thwarting the "*dominant dealer*" strategy."

77. Following a robust cross-examination, Dr. Swinand withdrew any allegation that the defendant was engaging in anti-competitive practices. He described as "weak" his conclusion that the reason behind the decision to terminate the contracts was in order to implement an anti-competitive strategy.

78. He agreed that there are no limits on the number of distributors that a supplier may appoint when establishing a quantitative selective distribution system or when reorganising that system. He accepted that the defendant is entitled to set up its network as it sees fits and, in particular, to create a flagship dealer in Cork city if it thinks that it is in its own best interests.

79. He also accepted that if the defendant terminated the contracts for the reasons that it gave, then the defendant was perfectly entitled to do so.

80. Dr. Swinand also confirmed that he was not alleging any breach on the part of the defendant of the BER generally, or Articles 4 and 5 thereof in particular. He also acknowledged that the BER is largely concerned with reinforcing competition between dealers in different Member States and that it is not concerned with intra-brand competition within Member States.

81. Dr. Swinand also accepted that, since he was no longer suggesting an anti-competitive motivation on the part of the defendant in terminating the plaintiff's dealership, it followed that the decision of Volkswagen to establish a flagship dealership in Cork City and to terminate the dealership in Lissarda is a matter for the commercial judgment of the defendant. He was asked:

> *"And I am suggesting to you that a rational, economic dealer, distributor could say, 'well, I don't need a dealership in Lissarda. Much of its sales are into Cork City, that will be covered by the dealership in Cork City and I want that dealership in Cork City to thrive and prosper in order to be more effective in inter-brand competition?'"*

To which he replied: "Yes". This was towards the end of quite a lengthy discussion on the point. This was all put to the plaintiff in the context that the defendant was quite entitled to consider the necessity for having a dealership in Lissarda, in circumstances where a very significant volume of its sales came from pump-out, and specifically sales in Cork city.

82. Dr. Swinand's conclusion that the termination of the plaintiff's contracts may have been motivated by an anti-competitive strategy was predicated on the proposition that the defendant enjoyed market power, as that term is understood by economists. That proposition in turn was based upon the market being the market for the defendant's vehicles only, and not the overall market in motor vehicles. Under cross-examination however, Dr. Swinand was forced to concede that this would make no sense at all, because if the market was as he defined it then no manufacturer would ever be able to avail of the BER, because all manufacturers would automatically control 100% of their own brand; and since it is case that, to avail of the BER, a manufacturer intent on establishing a quantitative selective distribution system may not control any more than 30% of the relevant market, it could not possibly be the case that the relevant market is the market in the manufacturers own vehicles, it must be the market for all vehicles.

83. Once therefore he accepted that the defendant did not have market power, Dr. Swinand's hypothesis that the defendant was engaging in an anti-competitive strategy on his own admission fell away, because it was constructed on the basis that the defendant enjoyed market power.

Evidence of Mr. Martin Moore

84. Mr. Moore occupies the position of data management team leader at Fehily Timoney and Company, Environmental Consultants. He has over twenty years in database and GIS application development for resources management.

85. He prepared a report on behalf of the plaintiff for the purpose of these proceedings dated February 2016. The report states that he was requested to consider the spatial analysis work undertaken by GMAP, and the manner in which that analysis was used by the defendant in its assessment of the plaintiff's dealership. He summarises his conclusions as follows:

> (i) The mis-location of the plaintiff's premises in Macroom had the effect of over stating "*pump-out*" and over stating travel distances to the plaintiff's premises. He states that this is a flaw so fundamental that it undermines the entire exercise undertaking by GMAP;
>
> (ii) Pump-out was also distorted by inaccurate geocoding by GMAP of many of the sale addresses of the plaintiff's customers;
>
> (iii) The figure of 97% pump-out is incorrect and by Mr. Moore's analysis would average 70% and not 97% as estimated by GMAP;
>
> (iv) The model used by GMAP to determine viability of dealers based on three market scenarios was flawed and impacted adversely on the conclusions insofar as they related to the viability of Lissarda;
>
> (v) The transparency of the process is undermined by poor document control and reporting standards, as well as the absence of descriptions of methods and techniques used;
>
> (vi) Objectivity of the exercise is undermined by analytical inconsistencies, including manipulating sale figures in favour of another dealer, Blackwater Motors;
>
> (vii) In the opinion of Mr. Moore, documentation discovered by the defendant suggests that the defendant sought to close the plaintiff's dealership for reasons not set out in the report and analysis.

86. Under cross-examination, Mr. Moore acknowledged that he only had the benefit of a small fraction of the 5,000 or so documents discovered by the defendant, but made the point again that his difficulty was in identifying the decision making process, which he felt was unclear.

87. While there was some confusion as to whether or not GMAP calculated the plaintiff's catchment by reference to a twenty-five minute or a twenty-five kilometre drive, he acknowledged that either way the vast majority of the plaintiff's sales were outside that driving time or distance.

88. He also agreed that if the strategy of the defendant was to construct a flagship dealership in Cork City, then the mis-location of Lissarda in Macroom would be unlikely to make a significant difference to such a strategy

89. He acknowledged also that he did not have the expertise to gainsay the commercial decisions of the defendant.

Evidence of Mr. Willis

90. Mr. Willis took over as managing director of the defendant in or about August 2008. He has worked in the motor industry all of his working life (more than thirty years) and currently holds the position of managing director of the Volkswagen Group in the United Kingdom.

91. He said that soon after his arrival in Ireland, he got what he described as "*the biggest shock*" of his life. Dealers in financial

distress were coming to him in panic looking for assistance. In one instance, a dealer requested him to advance a loan of half a million euro within 60 days in order to prevent the dealer from going bankrupt. Mr. Willis had one of his personnel verify that this was indeed so, and having conferred with Volkswagen AG in Germany it was decided to advance the loan to the dealer to ensure the survival of his business.

92. In another instance, a dealer sold three cars just as his company went into liquidation without having paid the defendant the amount due for the cars. The defendant was left with no option but to take that loss, as it did not consider it an option to seek recovery of the cars from the purchasers. Yet another dealer, a very prominent dealer, closed down altogether, in a blaze of bad publicity.

93. Mr. Willis said that MDL did not have adequate information to assess the financial situation of its own dealers. The defendant retained Goodbodys Consultants, to assist with projections for sales into the future, but Mr. Willis found himself in disagreement with Goodbodys as he considered their projections to be overly optimistic. The decline in sales between 2008 and 2009 was the single largest decline in cars sales since 1982, and at 62% was the single largest decline in any European country with the exception of one Baltic State. It was against this background that GMAP was retained to assist in, *inter alia*, identifying dealers of strategic importance as well as advising upon the most appropriate locations for the defendant's dealers.

94. When he addressed the dealer meeting in Cashel on 16th April 2009, Mr. Willis said that his focus at this meeting was to motivate and encourage the dealers, but he strongly disagreed with the evidence of Mr. O'Leary that he (Mr. Willis) said to the gathering that the defendant had a target of achieving a market share of 15% by 2012. The target was to become the number one brand in Ireland and this was achieved in 2012, with a market share of 12.76%, and continued throughout the 2013 and 2014, with market shares of 12.8% and 12.1% respectively.

95. He explained that the defendant put in place a financial support programme for the dealership network having a value of €15.5 million and it drew up plans to clear out old stock and to lessen the impact of VAT on dealers. He informed dealers at the Cashel meeting that the defendant was investing heavily in new products and that products were to be priced competitively in order to help dealers improve sales volumes.

96. Around this time, the defendant was forecasting that it would break even in 2009, but this forecast changed quickly to a projected €4 million loss, but the final loss for the year was actually €12 million loss . The defendant was forecasting a cumulative loss for itself over a four year period of €30 million.

97. Accordingly, it was necessary for the defendant to prepare a survival plan for itself. At the time Mr. Willis considered that the defendant had four options:

(i) do nothing;

(ii) close the business completely;

(iii) close Volkwagen Group Ireland and amalgamate that Group into Volkswagen United Kingdom;

(iv) Undertake a "detailed optimisation" of the business.

98. Following a meeting with the parent company in Germany, Mr. Willis put together a scenario to optimise Volkswagen Group Ireland. He stated that he wanted to minimise job losses, but that it was necessary to make 35 people in the defendant company redundant. All told, Mr. Willis said this was an extremely difficult time.

99. Mr. Willis vehemently denies that he encouraged dealers to invest in their businesses at the meeting of dealers in Carton House in October 2009. He said that he was very much aware of the process for capital investment in a business and that it was, in his words, "*completely ridiculous"* to suggest that he would recommend to the dealers to invest capital in their businesses when the industry was "*in the eye of such a storm*". He said that the defendant may have misunderstood what Mr. Willis was saying to the meeting about investment being made by the defendant itself.

100. As regards GMAP, Mr. Willis said that the purpose of obtaining a report from GMAP was to ascertain a theoretical baseline as to where the major points of representation should be in Ireland, onto which the defendant would overlay its commercial experience. Amongst other things, the defendant wanted to identify these strategic points in its network in case any of the dealers at these points ran into financial difficulties and required support. Mr. Willis said that he had very little involvement in the GMAP process; he only became involved when the final report was delivered to him, and while he could not recall whether or not he knew as of the date of the Carton House meeting in October 2009, whether or not a decision had been made to accept the recommendation of GMAP to discontinue the dealership at Lissarda, he nonetheless felt that it would not have been appropriate to warn dealers of potential network changes at that meeting because he had not made any decisions by that time and any decisions that were to be made would also have to be approved by Volkswagen AG in Germany.

101. Mr. Willis did not think that the mis-location of Lissarda by GMAP was of any significance, or that the decision that was ultimately made to remove Lissarda from the network would have been any different had Lissarda been correctly located in the GMAP report. His rationale for this was that it was important for the defendant to have a flagship facility in Cork, the second City in the country, and in order for the defendant to do that it could not have another dealer nearby threatening the viability of the flagship. He said that it has been proven across Europe that when a company operates a flagship site, run by professional operators, the manufacturer gets a better result in terms of market share and the dealer gets a better result in terms of profitability. He said that what the GMAP report proved was that most of the sales from Lissarda were in Cork City, and if a dealer was required to invest between €4 and €6 million in Cork City (the estimated cost of developing a dealership in Cork City) it did not make sense to have another dealer "*down the road".*

102. As regards the network generally, he said that between 2001 and 2008, the average passenger car market in Ireland was 165,000, but from 2009 to 2015, it was 87,000. He stated that the defendant could not sustain the same distribution channel with that level of reduction, and that that was the most important point behind the re-organisation. He disagreed that a re-organisation with a reduction of five dealers did not reflect a re-organisation of a substantial part of the network. Dublin represented between 30 and 35% of the market. Cork City represented 7% of the total market share and Cork County represented 13% of the total market. He said that it was necessary to terminate all dealers in the network because they wanted all dealers to have the opportunity to compete for a dealership in the new network. This would not have been possible if only of the contracts of those whose locations were no longer considered ideal, were terminated. The defendant wanted to create a "level playing field" amongst dealers, giving all

dealers an opportunity for a new contract. This was very important to the defendant.

103. Mr. Willis denied that there was anything irregular in the treatment or marking of the plaintiff's tender or that there was anything wrong with the interview process. He also denied that there was any favouritism shown to Blackwater Motors and indeed he said that he had had a somewhat difficult relationship with the principal of that entity, although he respected that person as a businessperson. Mr. Willis confirmed that the defendant did consider acquiring the site for the Cork dealership, but in the end decided against doing so. He explained that this was a strategy occasionally deployed in other countries, to protect the brand against dealers terminating their dealerships to take advantage of increased property values, leaving the brand without a dealer in a key location. In any case having considered the possibility in this case, the defendant decided against acquiring a site for the Cork dealership.

Evidence of Mr. O'Callaghan
104. Mr. O'Callaghan was chief executive officer of MDL between 1995 and 2008, having joined the company in 1966. He said that prior to the BER, contracts could be terminated without reason, but all contracts contained notice periods. He said that the BER was the talking point in the motor trade in 2002, and that everybody was conscious of the imminent changes.

105. Mr. O'Callaghan said that dealers fully understood what was "*coming down the tracks*". Existing contracts were terminated on one year's notice. There was a long process of developing the new contracts which were prepared in Germany and translations furnished to MDL. MDL then engaged with its Irish legal advisers, following which the standard form of contracts for use in Ireland were finalised. MDL met with representatives of the Irish Volkswagen dealer council to discuss the new contracts. Arrangements were then made for Volkswagen personnel to meet with all forty dealers in the network.

106. A meeting was scheduled with Mr. O'Leary for 11th September 2003, but for whatever reason, that meeting did not take place and it was rescheduled to take place on 24th September. Mr. O'Leary asked for copies of the contracts in advance of that meeting, but Mr. O'Callaghan declined that request as MDL wanted to use a uniform approach to explain the provisions of the contracts to all dealers.

107. There was also scheduled to take place on 24th September an Audi "kick-off" meeting to prepare for the following year. Mr. O'Callaghan said that the plaintiff took the opportunity to discuss with Mr. O'Callaghan the possibility of continuing as an Audi dealer. He said that the plaintiff was the only one of the Audi dealers whose contract had been terminated who persisted in this manner, all of the other dealers who had that dealership terminated "*took it on the chin … and got on with the business*", according to Mr. O'Callaghan. On this date, the plaintiff was given a letter, which amongst other things, referred to the possibility that the contracts could be terminated by the defendant with immediate effect if the plaintiff did not comply with the defendant's standards.

108. Mr. O'Callaghan confirmed that he encouraged the plaintiff to remain as an exclusively Volkswagen dealer. He explained to the plaintiff that with new models coming on stream, Volkswagen dealers would require ten car showrooms. Under cross-examination, Mr. O'Callaghan agreed that the purpose of Mr. O'Connor's visit to the plaintiff in December 2007, was to encourage the plaintiff to remain as an exclusive Volkswagen dealer, and that opportunities arising through Volkswagen and new models in the brand were emphasised. Mr. O'Callaghan also recalled that the plaintiff had previously complained that when constructing his premises, he had been encouraged to build a universal showroom to accommodate both the Audi and Volkswagen brands. Mr. O'Callaghan said that there was no discussion of the contracts during his meeting with the plaintiff and he denied that he said anything to the plaintiff to the effect that the contracts could only be terminated if he was in breach of contract, or that he said anything to the effect that the contract would remain in perpetuity and would never be terminated. Nor was there any discussion about a possible reorganisation of the Volkswagen network or the termination of the plaintiff's contracts in the context of a reorganisation.

109. Under cross-examination, Mr. O'Callaghan disagreed with evidence given by Mr. Willis that MDL did not have proper data about its dealers, although he accepts that there was a lack of financial information about dealers, because, to the best of his recollection, MDL was not entitled to such information because of Revenue constraints. Mr. O'Callaghan also refuted the suggestion that there was a poor relationship between MDL and the dealers; he said that during his time, MDL had a good relationship with dealers.

110. While encouraging the plaintiff not to take on another brand, Mr. O'Callaghan recognised that the defendant had no legal right to stop the plaintiff from doing so if he wished.

Evidence of Mr. Himmer
111. Mr. Himmer is Chief Executive of the defendant, having been appointed to that position in January, 2015. Accordingly, he played no role at all in the termination of the contracts or the reorganisation of the network. He informed the Court that at the time of his appointment, new contracts had not yet been introduced since the termination of all contracts in the network and dealers had been operating under letters of intent in the meantime. This was because of a lack of focus and dedication of resources to getting new contracts in place and also because of the complexities involved. However, new contracts were finalised and signed by September 2015. Ireland was the only country in Europe in which all contracts were terminated upon the expiration of the BER.

Submissions of the Plaintiff
112. Counsel for the plaintiff submits that the evidence establishes that the defendant failed to give the plaintiff a detailed statement of reasons for the termination of his dealership that were both transparent and objective, as required by clause 20 of the contract between the parties. It is submitted that what is at issue in these proceedings is a measure of contractual protection that is afforded to people in their livelihoods and that if the defendant in giving a notice of termination fails in any way to meet its contractual obligations that the notice is ineffective. Therefore, if the reasons given are not sufficiently detailed, objective or transparent, there has been no valid termination of the contract.

113. It is submitted on behalf of the plaintiff that the defendant failed to explain satisfactorily, or at all, why it was necessary to terminate all of the dealer contracts, as distinct from terminating only those who were certain to be excluded from the ideal network. He submits that this itself constitutes a lack of transparency and that the only inference that the Court should draw is that there was a desire on the part of the defendant to avoid the restrictive provisions relating to termination, by terminating all dealerships in the network under the guise of a network reorganisation. Counsel submitted that the real reason for the termination of all dealerships was so that the defendant could introduce new contracts to avail of the more liberal regime following the expiration of the BER in 2013, and this reason is not stated in the termination letter, which means that the letter is neither detailed nor transparent. While accepting that there were significant structural changes in the market and a significant downturn in the Irish economy, counsel submits that it was never explained why these events gave rise to a need or necessity to do something as drastic as terminating the entire dealership network. He submits that specific concerns could have been dealt with in a much more focused way and if the defendant had specific concerns about the viability of particular dealers it could have intervened with those dealers as appropriate.

114. While agreeing with counsel for the defendant that there are no restrictions on the establishment of a quantitative selective

distribution scheme, and that the supplier does not need to have reasons for the appointment of dealers at that point, the supplier is obliged to have and to supply reasons upon the termination of a dealership both under the terms of the contract itself and under the terms of the block exemption regulation the provisions of which the contracts were designed to avail. Counsel submits that the defendant could have given any reason for termination of the dealership on 24 months notice, but that having chosen to give the reason of a network reorganisation the case law on this subject becomes relevant, even though it is concerned with the entitlement of suppliers to terminate on 12 months notice, by reason of a network reorganisation. Counsel also refers to recital nine of the BER

115. The obligation created by article 20 of the contracts is not an obligation not to terminate on account of pro-competitive behaviour, it is simply an obligation to give a notice, with detailed, objective and transparent reasons. Article 3(6)(g) of the BER provides that vertical agreements availing of the regulation must provide for the right of the parties to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator. Article 3(6)(g) refers specifically to the question of whether or not the termination of the agreement is justified by the reasons given in the notice. Therefore, it is submitted that the reasons given must also justify the decision to terminate. It is further submitted however that in this case the Court does not even need to go that far because the reasons given were not detailed, objective and transparent.

116. If the Court does embark upon a consideration of the issue however, it is submitted that the underlying reason for the termination of the plaintiff's dealership is that of "*pump out*" i.e. selling outside the plaintiff's territory. Since, however, the contract says nothing about territory, and since the plaintiff does not have an allocated territory, it is submitted that there is a lack of transparency about the issue. Moreover the BER itself provides that the regulation does not apply to vertical agreements which have as an object the restriction of the territory into which customers may sell, or the restriction of active or passive sales of new passenger cars, or light commercial vehicles, to end users by members of a selective distribution scheme. Therefore, it is submitted that the defendant has attempted to achieve these objectives by imposing the sanction of termination on the plaintiff by reason of the high level of "*pump out*". Counsel submits that the real reason for the termination of the plaintiff's dealership was because he was too good at selling cars and his location happened to be too close to Cork City and his dealership was therefore terminated in order to support the viability of the chosen dealer for Cork City, Blackwater Motors, and so that that dealership would not have to face intra-brand competition from the plaintiff whose dealership was just a short distance away. The reason that this reason was not stated in the letter of termination, it is submitted, is because it would be "*manifestly suspect*" as a reason for terminating an existing dealer.

117. Counsel relies on the opinion of the advocate general in the *V.W.-Audi Forhandlerforeningen v. Skandinavisk Motor Co. A/S acting on behalf of Vulcan Silkeborg A/S* (the "*Vulcan-Silkeborg*" case) C 125-05, in which the advocate general said that:

> *"It follows from the foregoing that the change in objective economic circumstances relied on must be so significant as to give sufficient cause for the rather drastic step of reorganising the whole or a substantial part of the distribution network."*

The advocate general further stated that:

> *"It should also be possible for the national court to verify this quantitative relationship."*

While this was a case involving a twelve month termination, it is submitted that the same rationale would apply in cases of 24 month termination i.e. a court must be able to establish that there is a relationship between the reasons given for termination and the act of termination and that the change in economic circumstances are so significant so as to justify a reorganisation of the network. The advocate general further stated that by this *"the dealer is at least protected against a mere change of mind on the manufacturer's part as to optimum arrangements of his distribution network, without a change of objective circumstances being involved."*

118. It is submitted that, when first considering the measures that needed to be taken in light of the downturn of the economy, the defendant did not originally contemplate a termination of the entire network. This was demonstrated in an email of 26th February, 2010 from Mr. Willis to Mr. Klingler of Volkswagen A.G. wherein Mr. Willis stated:

> *"Volkswagen will not terminate the entire network (strong share performance) but has planned a complete restructuring of Dublin and Cork (50% of national volume and low market share)".*

The decision to terminate the entire network evolved from an earlier decision to terminate selected dealers, into a proposal to bring about contractual change that could only be achieved by terminating all dealer contracts. Additionally, the network reorganisation appears to have been motivated by the desire to minimise potential legal challenges, by withholding from affected dealers i.e. the Dublin dealers and Mr. O'Leary in particular, the real reason for terminating their contracts.

119. It is submitted that, on the evidence of Mr. Willis the only reasonable and logical conclusions are:

> (i) That the plaintiff's contracts were terminated because, by virtue of sales into Cork City (i.e. pump-out), he was perceived to be a threat to the viability of the dealer in Cork City;
>
> (ii) That for the same reason, it was impossible to reappoint the plaintiff as a dealer at Lissarda;
>
> (iii) That the defendant had a policy or preference in the Dublin and Cork areas for dealers with multiple outlets – a flag ship and satellite outlets (also known as the "Market Area Concept or MAC") and therefore for this reason also it was impossible for the plaintiff to win the tender for Cork City because Blackwater Motors already fulfilled this criterion.

In addition, the defendant had a stated policy of favouring incumbents i.e. Blackwater Motors. It was submitted that there was never any real prospect that the plaintiff would be appointed to the Cork City dealership for these reasons, and also having regard to the assistance given by the defendant to BWM in the preparation of a business plan in July 2010, and the interaction between BWM and the defendant in relation to site purchase and a planning application, also in 2010.

120. The plaintiff also places heavy reliance upon the repeated statements of Mr. Willis during the course of his evidence, that the defendant wished to have a flagship dealership in Cork City and therefore it did not wish to have what he described as a "*small rural dealer, so close to Cork city*". In this regard Mr. Willis stated that he did not rely on the GMAP report which he described as being a "*useful baseline exercise*", and which merely served to confirm his own instinctive preference for a flagship dealership in Cork city.

121. It is submitted that the evidence clearly establishes that the reasons given for the termination of the plaintiff's dealership were not the real reasons and accordingly, were not transparent reasons, and nor where they detailed or objective. That being the case, it is submitted, the defendant has failed to fulfil a condition precedent of its contract with the plaintiff.

122. The point is made that Article 20 of the contracts should not be construed as though it is qualified by a purpose or intention i.e. as though it includes text such as: *"in order to prevent the supplier from ending this agreement with the distributor because of practices which may not be restricted under the BER".* The defendant could have incorporated such text had it wished to do so, but not having done so, Article 20 must be considered by reference only to the text of the article itself. Moreover, it is submitted, this is all the more so because it was the defendant who prepared the contracts for execution by the plaintiff and accordingly, any ambiguity of interpretation should be determined on the basis of the *contra proferentum* rule.

123. The plaintiff relies upon the cases of *Mardov Peach & Co. Ltd. v. Attica Sea Carriers Corp. of Liberia* [1977] AC 850 and *Afovos Shipping Co. S.A. v. Pagnam (R) and Fratelli* [1983] 1 W.L.R. 195. Both of these cases involved the termination of charterparties. In *Mardov* the charterers were late making a payment due under the terms of the charterparty, giving rise to the termination of the charterparty by the owners. The House of Lords held (per Lord Wilberforce) that:-

> *"a right of withdrawal arises as soon as default is made in a punctual payment, provided that the owners must within a reasonable time after default give notice of withdrawal."*

In *Afovos* the owners purported to terminate the charterparty in circumstances where the period for receipt of higher payment had not yet expired and accordingly the house of Lords held that the termination was ineffective because there could be no breach of the obligation to pay until the period for payment had expired. The owners had terminated the agreement in circumstances where banking hours had closed and it was almost certain that payment would not be made on time, but the Court held that where a person is under an obligation to do a particular act, he has the whole of the last date to do so and accordingly the right to terminate has not accrued.

124. The plaintiff also relies upon the decision of Lord Hoffmann in *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] AC 749 in which he stated, in relation to the service of a notice exercising a break clause in a lease:

> *"If the clause had said that the notice had to be on blue paper, it would be no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease."*

125. In their opening submissions, counsel for the plaintiff made the case that the contract between the parties must be construed in the context of the general surrounding circumstances or "*factual matrix*". They refer to the decision of the Supreme Court in *Igote Ltd. v. Badsey Ltd*. [2001] 4 I.R. 511 as well as the decision of the Supreme Court in England and Wales in the case of *BCCI v. Ali* [2002] 1 A.C. 251 in which Lord Bingham of Cornwell stated:

> *"To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used there natural and ordinary meaning in the context of the agreement, the parties' relationship and all relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."*

126. Reliance was also placed upon the decision of Lord Hoffmann in the case of *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 in which he summarised the principles of contractual interpretation. In the first of the principles he identifies he states:

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

127. It is submitted on behalf of the plaintiff that, at the time of execution of the contracts on 24th September 2003, the parties intended that the defendant should avail of the BER. The terms of the contract, it is submitted, were intended to incorporate into the private law contractual relations between the parties the requirements of the BER, as well as the explanatory brochure of the European Commission to the BER ("the explanatory brochure") relating to the same and the relevant jurisprudence of the European Court of Justice.

128. The explanatory brochure it is submitted forms part of the factual matrix against which the contracts were concluded between the parties. In the brochure, the Commission poses a series of questions and answers relating to the BER . Question 70 asks whether the regulation obliges the supplier to give justified reasons for terminating an agreement with a dealer or authorised repairer. The following answer is suggested:

> *"In order to be covered by the Regulation a supplier who wishes to terminate a dealer agreement must give detailed, objective, and transparent reasons in writing. This condition was introduced in order to prevent a supplier from terminating an agreement because a distributor or a repairer engages in pro-competitive behaviour, such as active or passive sales to foreign consumers, sales of brands from other suppliers or subcontracting repair and maintenance. In the event of a dispute, it will be for the arbitrator or national court to decide whether the reasons given justify the termination of the dealer agreement and, amongst other things, to choose an appropriate remedy if the reasons given do not justify the termination. In coming to a decision as to whether the reasons for termination are well-founded, the arbitrator or judge may have regard to a number of elements including the dealer agreement itself, the requirements of national contract law, as well as the text of the Regulation.*
>
> *The Regulation sets out a number of types of dealer behaviour that a supplier may not prohibit. If, rather than prohibiting these types of behaviour, a supplier were to seek to prevent such behaviour or bring it to an end by terminating a dealer agreement, this would amount to a serious indirect restriction of competition and would mean that the distribution agreement would no longer be covered by the exemption. The issue as to whether the supplier has chosen to terminate the agreement for the reasons given in the notice, or rather in order to bring pro-competitive behaviour to an end, is a question of fact that may be determined by the independent third party or arbitrator or national judge."*

129. While acknowledging that the explanatory brochure is not dispositive of the legal position, it is submitted that it is a helpful analysis of the provisions introduced by the BER, and indeed that it has been referred to in European case law including the *Vulcan-Silkeborg* case.. This case involved a consideration by the European Court of Justice of provisions governing termination of motor vehicle distribution agreements contained in the 1995 BER. That Regulation did not impose any obligation upon a supplier to give detailed, transparent and objective reasons or any reasons at all upon the termination of an agreement, but as with the BER, it did

permit the supplier to terminate the agreement on one year's notice in cases where it was necessary to reorganise the whole or a substantial part of the network. In May 2002, Audi AG approved a plan for the reorganisation of its distribution network in Denmark, in light of the imminent coming into force of the BER on 1st October 2002. The effect of the reorganisation was to reduce the network from twenty-eight to fourteen dealers. The plaintiff was an association comprising the dealers whose contracts had been terminated, and in the proceedings they claimed that the period of notice given should have been twenty-four months instead of twelve months. The court was required to answer a number of questions relating to the scope of a supplier to terminate an agreement by giving one year's notice where it is claimed that it is necessary to reorganise the whole or substantial part of the network. In answering these questions the court held:

> *(i) "That it is not for the national courts or arbitrators, in a dispute relating to the validity of the termination of an agreement with a reduced notice period … to call into question the economic and commercial considerations governing the supplier's decision to reorganise it's distribution network";*
>
> *(ii) "However, the need for such a reorganisation cannot, without depriving dealers of all effective legal protection in the matter, be a matter for the supplier's discretion, since the first indent of Article 5(3) of Regulation No 1475/95 provides that it is that need which allows the supplier, while retaining the benefit of the block exemption laid down under that regulation pursuant to Article 81(3) EC, to terminate an agreement without being required to comply with the regular period of notice of two years laid down by Article 5(2)(2)."*
>
> *(iii) That "having regard both to the purpose and the derogatory nature of the first indent of Article 5(3) of Regulation No. 1475/05, the need for a reorganisation for the purposes of the exercise of the right to terminate with one month's (sic) notice must, accordingly, be capable of being convincingly justified on grounds of economic effectiveness based on objective circumstances internal or external to the supplier's undertaking which, failing a swift reorganisation of the distribution network, would be liable, having regard to the competitive environment in which the supplier carries on business, to prejudice the effectiveness of the existing structures of the network."*

In other words, the supplier must be able to justify the reorganisation of the network, by reference to an identified prejudice if it fails to do so, in order to be able to avail of the reduced notice period of twelve months.

130. While in this case the defendant decided to give the plaintiff and all others in the network twenty-four months notice of termination, notwithstanding that the reason given was the need to reorganise the network, the plaintiff submits that *Vulcan Silkeborg* establishes that where the need to reorganise the network is given as the reason for the termination of contracts, the supplier must be able to justify that reason on grounds of economic effectiveness, based on objective reasons, in light of the requirement contained in Article 3(4) of the BER to give detailed, objective and transparent reasons for termination of contracts. In other words, since it is clear that a supplier must be able to justify termination on such grounds in order to avail of the reduced notice period of twelve months, similarly, a supplier must be able to justify the same reason in order to meet the requirements of Article 3(4) of the BER, to give detailed, objective and transparent reasons.

131. It is submitted that this argument is supported by the comments of the advocate general in the *Vulcan Silkeborg* case, where he stated that a termination of contract would not satisfy the requirements of the 1995 BER in the absence of reasons being given for that termination. Accordingly, he concluded that a party wishing to terminate an agreement in a manner provided for in a block exemption, must show that the conditions for doing so are satisfied.

132. Reliance was also placed by the plaintiff upon the case of *City Motors Group N.V. v. Citroen Belux ("the City Motors Group case")* Case C-421/05 [2007] ECR 1-00653. In this case the defendant terminated the distribution agreement of the plaintiff with immediate effect. Much of the decision was taken up with the question of whether or not an express termination clause could circumvent Article 3(6) of the BER by depriving the dealer of his right to review of the termination of his contract. The court held that the BER did not prohibit the parties from providing for an express termination clause, and stated at para. 29:-

> *"29. However, as regards termination of an agreement falling within the scope of Regulation No. 1400/2002, account must be taken of the fact that, pursuant to the very terms of Article 3(4) thereof, the block exemption is to apply solely on condition that the agreement provides that a supplier who wishes to give notice of termination of an agreement must give such notice in writing and must include detailed, objective and transparent reasons for the termination, in order to prevent a supplier from ending an agreement because of practices which may not be restricted under that regulation. That would be the case, according to recital 9 in the preamble to the regulation, if a supplier terminated an agreement because a distributor engaged in pro-competitive behaviour, such as active or passive sales to foreign consumers.*
>
> *30. It follows, as CMG and the Commission of the European Communities submit and as Citroen itself indeed concedes, that where a supplier terminates an agreement under an express termination clause, compliance with the conditions for application of the block exemption introduced by Regulation No. 1400/2002 requires not only that the supplier indicate in writing the reasons for termination but also that the independent expert, arbitrator or national court to whom the distributor has the right under Article 3(6) of that regulation, to refer a challenge to the validity of that termination, should be in a position to exercise an effective review of those reasons.*
>
> *31. It is for the national court to verify that such effective review is ensured by the national law applicable where an agreement is terminated by a supplier under such an express termination clause.*
>
> *32. In light of the objective of Article 3(4) of Regulation No. 1400/2002, the effectiveness of such review requires, at the very least, that the independent expert, arbitrator or court is in a position to verify that the termination by the supplier was not motivated by practices on the part of the distributor falling under the hardcore restrictions referred to in Article 4 of that regulation.*
>
> *33. Furthermore, in the event of a breach by a supplier of the condition for application of the block exemption set out in Article 3(4) of Regulation No. 1400/2002, the national court must be in a position to draw all the necessary inferences, in accordance with national law, concerning both the validity of the agreement at issue with regard to Article 81EC and compensation for any harm suffered by the distributor where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC …"*

133. The plaintiff also places reliance upon the decision of the Federal Court of Germany in civil cases in a case referred to in these proceedings as the "*Nissan case*", reference VIII ZR 150/08. This was a case involving the abbreviated notice period of 12 months. The manufacturer (Renault – Nissan) had operated a two tiered dealership structure and it had decided to conduct a very extensive

reorganisation of both the network and the structure of the network. As a result, it terminated the contracts of all of the primary dealers in the network, who, in turn, terminated the contracts of all the secondary dealers in the network. In the old network, there had been 638 dealer locations. In the new network, there were to be 535 dealer locations of which 286 were existing dealerships. The plaintiff was a secondary dealer on whom notice of termination had been served by the primary dealer. Renault – Nissan terminated all authorised dealer contracts (i.e. those of the primary dealers) for two stated reasons, the first being to change to a new one tier distribution network and the second being to introduce new quality criteria. Renault – Nissan also wrote to the secondary dealers stating that they would soon receive a notice of termination from the primary dealer because of the decision that it, Renault – Nissan had made to restructure the distribution Nissan vehicles. These reasons were stated both in the notice of termination issued by Renault – Nissan to primary dealers and, in turn, by notices from the primary dealers to the secondary dealers.

134. A very detailed letter explaining the need to restructure the network. It stated:-

> *"The previous two tiered dealer network is cancelled as a result of this restructuring. Renault – Nissan Deutschland AG will now collaborate with dealers that derive their distribution right directly from Renault – Nissan Deutschland AG.*
>
> *Based on the results of intense observations and investigations of the purchasing behaviour and purchasing habits in the Federal Republic of Germany in the past few years, Renault – Nissan Deutschland AG developed a completely new dealer network with approximately 535 locations for dealership operations. These locations were structured in such a way that these fulfil the regional purchasing behaviour and purchasing habits of the potential Nissan customers in an optimal way. The newly devised 535 locations are not covered with the existing dealer network….*
>
> *…the decision on marketing policy described above, imperatively requires a complete restructuring of the currently existing distribution network. Therefore it is necessary that all existing contracts are terminated at the same time to enable us to establish the newly structured distribution network with the termination of the current contracts.*
>
> *Against this background you will soon receive a termination from your Nissan contractual partner effective as at 31st January, 2007. Since it is not planned to integrate your company in our new and restructured dealer network, we will contact you in due time prior to the termination of the contract, to discuss a liquidation in conformity with the contract."*

135. The plaintiff failed in his challenge to this termination of his contract. The court found that:-

> *"It is evident from the letter that all authorised dealer contracts are terminated to facilitate the existing two tiered distribution network in favour of a one tiered distribution network with new locations and new quality criteria. This justification upon which both the intervener and defendant have based their terminations is objective and transparent."*

136. The court went on to say that the restructuring was significant from a spatial point of view. The court also noted that it is not for the national courts, when dealing with a dispute about the lawfulness of a termination for restructuring purposes, to question the economic and commercial considerations of the manufacturer/supplier. However, the court also noted that:-

> *"On the other hand, the need of such a restructuring cannot be subject to the free assessment of the supplier in the event that dealers do not lose every effect legal protection in this matter. Taking into account both the purpose and exceptional nature of the provision about the termination for restructuring purposes, it is therefore necessary but also sufficient according to the jurisdiction of the court, that the necessity of the restructuring can be justified in a plausible manner with reasons of economic efficiency that are based on internal or external objective circumstances of the company of the supplier, which can influence the efficiency of the existing structures of the distribution network."*

137. The plaintiff refers to *Nissan* principally as a contrast to the circumstances that gave rise to the termination of contracts in this case. *Nissan* involved an extensive reorganisation with a substantial number of the original dealerships being eliminated from the network, as well as the introduction of a substantial number of new distributors to the network. The court found the re-organisation to be significant, both geographically and financially and that the defendant had justified its reasons in a plausible manner. The reasons given to dealers in *Nissan* provided a great deal more information to dealers about the reorganisation of the network and termination of contracts, than did the defendant in this case.

138. It should be observed that in their closing submissions counsel for the plaintiff placed no reliance at all on the evidence of the experts called on behalf of the plaintiff.

Submissions of the Defendant

139. In their opening submissions, counsel for the defendant argue that the outcome of these proceedings turns on the following two questions:

> (i) Did the defendant have a contractual right to terminate the contracts?
>
> (ii) Did the defendant validly exercise that contractual right?

As regards the second of these questions, if it is submitted that the answer to it lies in the answer to the following further question:-

> *"Did the defendant terminate the contracts in order to punish "precompetitive behaviour" by the plaintiff or dealers generally and / or "because of practices which may not be restricted under the BER?"*

In relation to the first of these questions, it is submitted that, under the terms of the contracts, the defendant has an unfettered entitlement to terminate the contracts upon the giving of two years notice, and that there is no dispute that the defendant gave the plaintiff the requisite notice. As regards the requirement under Article 20 of the contracts to give detailed, transparent and objective reasons for the termination of the same, it is submitted that obligation must be construed, not in isolation as a stand-alone contractual obligation, but in the light of its purpose as expressed in recital (9) and Article 3(4) of the BER.

140. Accordingly, it is submitted that the scope of the obligation to give reasons for the termination of a distributorship is defined by the purpose of that obligation and that the purpose of this requirement is to prevent suppliers from attempting to achieve outcomes which they are not permitted to pursue either under the BER or under the contracts themselves.

141. The defendant argues that it is entitled under the BER to establish a quantitative, selective distribution system with as many

dealers in whatever locations it considers appropriate; that it is entitled to vary the number of dealers and locations at its sole discretion, and for this purpose, to terminate dealership contracts in accordance with the appropriate notice period provided for in the contracts, which obviously cannot be any less than that prescribed by the BER. The defendant contends that the requirement to give detailed, objective and transparent reasons does not require a semantic analysis of each of those words. The reasons given should be considered in the light of the purpose as described above and should also be considered in the light of the knowledge that the plaintiff had at the time that he was given the reasons, i.e. the information given to the plaintiff and all other dealers in the network at the Dunboyne presentation.

142. Moreover, the Court has no role in assessing commercial decisions of the defendant, or in assessing whether or not the reorganisation of the dealership network was objectively justified. The defendant also relies on the case of Vulcan Silkeborg where the court stated, at para. 35:-

> *"It is true that it is not for the national courts or arbitrators, in a dispute relating to the validity of the termination of an agreement with a reduced notice period under the conditions laid down in the first indent of Article 5(3) of Regulation No 1475/95, to call into question the economic and commercial considerations governing the supplier's decision to reorganise its distribution network."*

While this case does not involve termination of an agreement with a reduced notice period, nonetheless this part of the decision of the court in *Vulcan Silkeborg* would apply with equal force to circumstances where an agreement has been terminated on full notice, but where the reason that is stated for termination is the reorganisation of the network.

143. The defendant submits that in *Vulcan Silkeborg*, the ECJ applied a stringent test, by requiring the supplier to justify the grounds upon which the network was being reorganised because the contracts in that case were being terminated on the reduced notice period of twelve months; and since therefore the supplier was availing of a derogation in the 1995 BER from the requirement to give regular notice of twenty-four months, the court held that the need for the reorganisation must be convincingly justified, and made the remarks quoted above. It is submitted on behalf of the defendant if that is the standard applicable in circumstances where contracts are being terminated with reduced notice, it necessarily follows that the same standard does not apply where contracts are being terminated on full notice.

144. The defendant submits that Article 3(6)(g) refers to termination of agreements where abbreviated notice of termination is given by a supplier and the dealer challenges that termination on the basis that the grounds for availing of the abbreviated termination procedure did not apply. In the case of a regular termination made on foot of a two year notice of termination, the issue for the arbitrator or the Court is the negative issue of whether the reasons given disclose one of the prohibited rationales for termination (imposing a hardcore restriction of the kind referred to in Article 4). In the case of a regular termination, the Court is entitled to verify that the termination by the supplier was not motivated by such practices, but apart from this, no other justification of the regular termination is called for and it is submitted that the authorities make it clear that the Court has no function in second guessing the suppliers' commercial reasons as to why it decides that it does not need a dealership in a particular location or why it wants to reduce the number of dealers in the network as a whole.

145. Counsel for the defendant also relies upon the case of *City Motors Groep* case, and in particular paragraph 32 of that decision, to which I have referred in my summary of the plaintiff's submissions. It is submitted that the use by the Court in that paragraph of the phrase "*at the very least*" indicates that in cases involving a regular termination, the only function of the Court under Article 3(6)(g) is to verify that the termination by the supplier was not motivated by practices on the part of the distributor falling under the hard core restrictions referred to in Article 4 of the BER; and that it is only in cases where an abbreviated notice is involved that the Court is concerned with ensuring that the specified preconditions for such termination have been met by the supplier. It is submitted that this is a point of critical importance because the plaintiff did not plead that the defendant terminated the contract because of practices which may not be restricted under the BER or because the plaintiff was engaged in pro-competitive behaviour. If the Court is satisfied that termination of the contract was not motivated by such reasons in terminating the contracts, then, in the submission of the defendant, that is the end of the plaintiff's case as the defendant has terminated the contracts on two years notice and in doing so has stated reasons that are sufficiently detailed, objective and transparent for the purposes of Article 20 of the contracts.

146. The defendant relies upon the decision of the European Court of Justice in the case of *Auto 24 SARL v. Jaguar Land Rover France SAS* C-158/11. In that case the plaintiff, whose dealership contract had been terminated by the defendant, challenged the refusal of the defendant to reappoint it as a dealer in the defendant's network. In holding against the plaintiff the court held that:

> *"in order to benefit from the exemption provided for by that regulation, it is not necessary for such a system to be based on criteria which are objectively justified and applied in a uniform and non-differentiated manner in respect of all candidates for the authorisation".*

This case is cited by the defendant in aid of the argument that the number of, and location of, dealers in a distribution network is a matter for the commercial judgment of the supplier, and that this applies as much to termination of dealerships as it does to appointment of dealers in the first place, subject only to two limitations:

> (i) Specific conditions apply where the supplier seeks to terminate a dealer on less than two years notice and
>
> (ii) Reasons must be given so as to ensure that termination is not being effected for anti-competitive reasons.

147. The defendant also relies upon staff working document no. 44 of the European Commission on the BER published in May 2008. The working document analyses the seven objectives of the BER on the basis of market data presented in a previous working document, as well as the enforcement experience of competition authorities in the European courts. In this document the Commission stated:-

> *"A supplier may terminate a dealer with two years' notice, simply on the grounds that it no longer has any need for a dealership in a particular geographic area, due for instance to a changed assessment of the optimal territorial coverage at that location."*

148. The defendant draws a distinction between the decision to terminate all dealerships in the network and the subsequent reappointment of dealers to the network. It is only the former which requires reasons under Article 20 of the contracts. Where a supplier makes a decision to terminate all dealership contracts in its network, the reason given to each dealer must be the same; and in the present case, no dealership had its contracts terminated for reasons that were specific or peculiar to that dealership. The reason given for the termination of all existing contracts was that the action was a necessary *"part of"* the planned network

reorganisation. The evidence of Mr. Willis was that this was deemed a necessary part of the reorganisation by the defendant upon the basis of commercial considerations and legal advice.

149. It is not for either the plaintiff or the Court to investigate, or to reconsider whether the reasons given for the network reorganisation were good or sound reasons, or whether they were commercially wise reasons, or whether a network reorganisation involving the termination of all dealer contracts was a commercially appropriate response to the economic crisis and the structural changes which had taken place in the car market. It is submitted that the defendant does not have to justify the decision that it made; it merely has to have correctly recorded the substantive reasons for the decision so that the Court can verify that the decision was not motivated by a desire to achieve any of the "*hard core*" anti-competitive restrictions in Articles 4 and 5 of the BER.

150. Moreover, termination of contract did not depend on whether or not a dealer was operating from one of the locations identified as being ideal. Accordingly therefore, the reasons why particular locations were or were not selected as ideal locations by the defendant were not in fact, and could not have been the reasons for the termination of any particular dealer's contracts, including those of the plaintiff. At the time that notice of termination was given to all dealers on 18th April 2011, the defendant simply did not know how many dealers would submit expressions of interest and business cases or for which ideal locations they would do so and therefore it did not know who would thereafter be appointed for each ideal location. Nor did the defendant know who might present a business case for a non-ideal location (such as the plaintiff did for Lissarda). Accordingly, it is submitted that the decision of the defendant to terminate all dealers' existing contracts should not be conflated with any later decisions by the defendant not to appoint a dealer to the new network. For these reasons, it would not have been possible for the defendant to give different notices of termination to dealers in April 2011(with different sets of reasons) on the basis of whether or not they were to be appointed as dealers in the new network when no decisions had yet been taken on such appointments.

151. The defendant contends that in the case as pleaded, the plaintiff makes no allegation that the defendant had made its decision to terminate the network for reasons that were anti-competitive in nature or as a cover up or as a "*smokescreen*" to disguise the real reason for the termination of the plaintiff's contracts. Not only that, such allegations were not made by the plaintiff in his email to Mr. Franke of 12th April 2013, or in the pre-action letter from his then solicitors on 22nd April 2013. It is submitted that this is not just a pleading point, but goes to the question of the plaintiff's credibility by reason of choosing to make such serious allegations for the first time at trial.

152. In any case, the defendant denies those allegations and submits that they are unsupported by evidence or unstateable as a matter of competition law and are irrelevant.

153. The defendant submits that the reasons given for the termination in the termination letter of April 2011, were detailed, objective and transparent and were supported by the evidence, and therefore met the requirements of Article 20 of the contracts. The defendant does not accept the submissions of the plaintiff that "*objective*" for the purposes of Article 20 of the contract, means "*objectively justifiable*" but in any case, it is submitted, that the reasons given were objectively justified, and that the error made in the GMAP did not influence the decision of the defendant to terminate all dealers' contracts. The defendant submits that this was borne out by the evidence of Mr. Willis, who made it clear that the defendant wished to have a flagship dealership in Cork City and not in either Lissarda or Macroom, which, by comparison, are "*smallish places*".

154. It is denied that the defendant had any "*animus*" towards the plaintiff or that there is any evidence of such animus. Specifically, it is denied that the correspondence sent by the defendant to the plaintiff in relation to the allegation of a sale of vehicles from the Model Farm Road premises was sent with a view to finding a reason to terminate the plaintiff's dealership. The defendant points out that Mr. Willis gave evidence to the effect that that kind of issue was not unique to the plaintiff and letters of the kind sent to the plaintiff were not unusual.

155. The defendant denies that any of its representatives made promises or representations to the plaintiff of the kind alleged. The defendant also submits that if the plaintiff contends that the contracts do not reflect the agreement actually reached by the parties on 24th September 2003, then the appropriate remedy is to pursue a claim in rectification, which the plaintiff did not pursue. Moreover, it is submitted that the plaintiff does not satisfy the principles governing implied terms as laid down by the Supreme Court in *Sweeney v. Duggan* [1997] 2 I.R. 531, where the Supreme Court held at p. 539:-

> *"Whether a term is implied pursuant to the presumed intention of the parties or as a legal incident of a definable category of contract it must be not merely reasonable but also necessary. Clearly it cannot be implied if it is inconsistent with the express wording of the contract and furthermore it may be difficult to infer a term where it cannot be formulated with reasonable precision."*

156. It is submitted that the implied terms contended for by the plaintiff are clearly incompatible with Articles 17 and 18 of the contracts and also with Article 22 which requires any amendments to the contracts to be made in writing.

157. As regards the plaintiff's arguments about estoppel, the defendant replies upon the decision of McGovern J. in *Bank of Scotland plc v. Kennedy* [2013] IEHC 420, where McGovern J. stated, following a review of the authorities, as follows:-

> *"It is clear, therefore, that whether one is to characterise it as 'detriment" or "reliance", there must be conduct on the part of the party seeking to raise a promissory estoppel such as to render it unconscionable for their counterparty to resile from representations purportedly altering the state of legal relations between them. Indeed, the authorities opened by the plaintiff make it clear that it is incumbent upon the representee to demonstrate that his conduct on foot of the representation caused him a detriment that is, in the words of Kinlen J. in* McGuinness v. McGuinness , *'… substantial although not necessarily confined to monetary considerations. It must be tested against the principle that it would be unjust or inequitable to allow the assurance to be disregarded'."*

158. As regards the reliefs sought by the plaintiff in the proceedings, the defendant obviously submits that the plaintiff is not entitled to any relief but without prejudice to that submits as follows:-

> (i) the reliefs sought are wholly inappropriate having regard to the very significant and unexplained delay on the part of the plaintiff in commencing these proceedings and having regard to the fact that the contractual relationship between the parties ended more than three years ago;
>
> (ii) the plaintiff should not obtain the reliefs sought having regard to the fact that the governing regulatory framework changed following the repeal of the BER; and

(iii) there has been a fundamental breakdown in the relationship of trust and confidence between the parties.

159. The defendant also submits that even if it is the case that the defendant failed to comply with the contractual requirement relating to the termination of the contract, it does not follow that the termination is null and void. The courts have recognised that it is not appropriate to compel parties to continue with contractual relationships in circumstances where the relationship has broken down.

160. The defendant further submits that even in the event that the Court should find that the defendant failed to comply with the requirements of Article 20, the appropriate relief in such circumstances is in damages, and not in a finding that the contracts have not been terminated. It is clear that Article 17 of the contracts has been complied with and there is no qualification on the exercise of the power to terminate the contracts other than the giving of two years notice, about which there is no dispute. The defendant relies on the answer given to question 70 in the explanatory brochure of the BER which states:-

> *"In the event of dispute, it will be for the arbitrator or national court to decide whether the reasons given justify the termination of the dealer agreement and, amongst other things, to choose an appropriate remedy if the reasons given do not justify the termination."*

161. It is argued that the charter party and lease cases relied upon by the plaintiff, all turned upon "option" clauses which expressly contained their own pre-conditions. The courts were not being asked to read a separate clause in the contract as if it were a pre-condition on the valid exercise of the option or power. In this case, the only conditions contained in the termination clause, is the requirement to give two years notice, which was given by the defendant.

162. It is further submitted that even if there has been a breach of Article 20, the failure to state any of the reasons complained of by the plaintiff would amount to a failure to state reasons that are in their own right lawful and legitimate and it would therefore be disproportionate and irrational to hold that a breach of Article 20 on such grounds should result in a finding that the termination is void *ab initio*. It is submitted that the Court should have regard to the fact that Article 20 is not an end in itself; its function is to prevent a termination of the contracts for reasons prohibited by the BER. If the Court is satisfied that the contracts were not terminated for such reasons, it would be disproportionate to deem the termination invalid.

163. The plaintiff is also seeking specific performance of the contracts, or alternatively an order reinstating the plaintiff as an authorised Volkswagen dealer on the terms and subject to the conditions prevailing at the date of the purported termination. It is submitted that in considering the relief sought, a key consideration for the Court is whether or not damages would be an adequate remedy, and that there is no evidence before the Court to demonstrate that damages would not be an adequate remedy. It is further submitted that this case falls squarely within the principles recognised and applied by the Supreme Court in the case of *Ó Murchú Trading As Talknology v. Eircell Limited* (Unreported, Supreme Court, 21st February, 2001) where the Supreme Court stated:-

> *"First of all there is the well known principle that in general the courts will not grant an injunction which would involve ongoing supervision. A court, therefore, is very slow to grant injunctions in either service contracts or trading contracts because it is very difficult to assess, at any given time thereafter, as to whether such injunctions are being obeyed or not. It is also usually impracticable and undesirable that two parties be compelled to trade with one another when one, for reasons which are perfectly rational, does not want to carry on such trading. The appellant's bad debt situation and the unsatisfactory nature of his relationship with the respondent make it prima facie reasonable, that the respondent would not want to continue trading with him and I doubt that it would be practicable for a court to force such continued trading."*

164. It is submitted that there can be no doubt in the circumstances of these proceedings, in which the plaintiff has made very serious allegations in relation to the conduct of the defendant, that the relationship between the parties is, to put it mildly, unsatisfactory.

165. Insofar as the plaintiff is seeking the equitable reliefs of an injunction and specific performance, it is submitted that such reliefs should also be refused on grounds of laches; the plaintiff waited in excess of two years from the date of receipt of notice of termination of his contracts before issuing proceedings. Not only that, it is submitted, he at all times acted in a manner which was consistent with an acceptance on his part that the contracts had been validly terminated, in particular when tendering for the Cork City dealership. Even when unsuccessful in that tender, he did not purport to challenge either the result or the termination of the contracts.

166. In addition, it is submitted that the plaintiff would have been aware that another party had been successful in the tender and that that party would have assumed substantial financial commitments in order to meet the obligations of its appointment. 167. It is submitted that the plaintiff could have availed of the arbitration procedure provided in the contracts for the speedy resolution of disputes, and by invoking that mechanism, he could have had the legality of the termination of the contracts determined by an independent arbitrator well in advance of the termination date, but for reasons which he never explained, he did not do so. Not only that, in failing to do so, he effectively deprived the defendant of the opportunity to do so because the first indication that there was a dispute as to the termination of the contracts was the letter before action of the solicitors for the plaintiff dated 22nd April 2013, more than two years after notices of termination had been given to the plaintiff, and just over a week before the termination date. It is submitted that the plaintiff, by failing to challenge the termination of the contracts or even to indicate that he did not accept the termination, did so in the knowledge that the defendant would be proceeding with its plans for the reorganisation of the network. If the plaintiff is granted the relief that he now seeks, it would have a significant adverse effect not only on the defendant's commercial concerns, but also on commercial arrangements it has entered into as part of the reorganisation.

168. The defendant relies upon *Nissan* and to which I have referred above in the submissions of the plaintiff. The defendant submits that in *Nissan*, the termination letter did not provide any explanation to dealers as to why they were not to be reappointed to the new network, and the court expressed no concern about this submission. The termination letter to dealers stated simply:

> *"Since it is not planned to integrate your company in our new and restructured dealer network, we will contact you in due time prior to the termination of the contract to discuss a liquidation in conformity with the contract."*

The defendant submits that the only inference to be drawn from the apparent lack of concern of the court about the omission from the termination letter given to each dealer, of reasons specific to each dealer, is that the court considered that the general reasons given were sufficient to provide a plausible explanation as to why a reduction in the size of the network was taking place.

169. The defendant also relies upon the decision of the German Federal Court of Justice in the case *Jaguar HSGmbH v. Jaguar Land*

Rover Germany SAS KZR 14/14. The defendant makes the point that in the letter of termination in that case, Jaguar gave very brief and general reasons for the termination of contracts, but nonetheless the Court regarded the reasons given as being sufficient and did not consider that it was necessary to examine the reasons further. The reason given by Jaguar for the termination of contract in that case was expressed as follows:-

> *"Our parent company, Jaguar Cars Limited with registered offices at Gayden, Warwick, England has set itself the goal to reorganise the Jaguar service network in Europe in order to satisfy even more the justified expectations and requirements customers have not only as regards Jaguar brand products but also as regards the services that the Jaguar brand provides.*
>
> *The intention is to promote the effectiveness of the Jaguar service network in the European internal market to the greatest extent using uniform contractual framework conditions. The aim is that global standards in all service areas should contribute to ensuring a uniformly high level of service partners in all the markets."*

170. The defendant further submits that the German court considered the requirement to give detailed, transparent and objective reasons in light of the meaning and purpose of that requirement as expressed in Recital 9 of the BER, and submits that that approach reflects the settled interpretive approach of the European Court of Justice that provisions of the EU treaties and of EU legislation should be interpreted with regard not only to their wording, but to the context in which they occur and their underlying or expressed objects and purposes. It is submitted that the decision of the German court does not require reasons for termination to be objectively justifiable.

171. The defendant submits that the *Jaguar* case is authority for the proposition that the reasons given for termination should reflect the grounds of the terminating party for doing so and that on that basis the question for the Court in the present case is whether, as a matter of fact, the defendant was of the view that it was necessary to terminate all existing Volkswagen dealer contracts for the reasons stated in the termination letter. The defendant submits that this is consistent with the decision of the same court in *Nissan*, to which I have referred above, in which the Court also upheld a notice of termination as valid even though it did not contain any reasons specific to the complainant dealer explaining why it was not proposed to reappoint the dealer to the new network.

172. The defendant also submits that the Court in *Jaguar* made a very clear distinction between the decision of a supplier to terminate a contract and the decision not to reappoint a dealer to the network following termination. At para. 46 of its decision, the court stated:-

> *"Accordingly, the reasons given by the defendant are sufficient. It is clear from them that the termination was issued to all previous contractual partners of the defendant and was based on the desire of the parent company with the most uniform possible contractual framework to promote the effectiveness of the Jaguar service network in the European internal market and to ensure an equally high level of all service partners in all markets on the basis of global standards in all service areas. Although this does not justify why the plaintiff should be excluded from the new service network… that is irrelevant in this case. The question whether the plaintiff should not have been included in the new workshop network because it failed to meet the standards established for this purpose, or whether it has been denied admission even though it met or was able to meet the qualitative conditions that are required for inclusion in the new workshop network, has nothing to do with the termination of the old contract, but only with the question whether the plaintiff is entitled to conclude a new contract on the current conditions."*

173. The defendant also relies upon the statement by the court that:-

> *"…an ordinary termination of a workshop contract in principle requires no justification…The justification is sufficient under Recital 9 of the Regulation and the meaning and purpose of the justification requirement if the reasons given accurately and fully reflect the grounds of the terminating party…. and it has been clearly established why the contract is being terminated is not because the workshop has engaged in competition promoting behaviour."*

174. The defendant also cited a decision of the Paris Court of Appeal in the case of *Badat, Foucque Automobiles (SAS), Investment and Management Company Foucque (SAS), Foucque (SAS) v. Automobiles Citroen (SA)*, a decision of that court dated 24th June, 2015. In that case, the second named plaintiff was an authorised importer of Citroen vehicles and spare parts in the Island of Réunion, pursuant to a contract dated 30th June, 2004. That contract was terminated by Citroen by letter dated 30th June, 2004, giving the second named plaintiff two years notice. The plaintiffs argued that the letter of termination did not give adequate reasons for the termination of the contract. In the termination letter, Citroen simply referred to "implementation of its new policy of growth and development, supported by the brand project" as the reason for the termination of the contract. Citroen argued that since the termination was on regular notice, the reason given was sufficiently objective and transparent.

175. The court held in favour of Citroen, holding that the objective of the obligation to give reasons is:

> *"To allow the judge to verify that the agreement has not been terminated for reasons which constitute in reality anticompetitive practices; such as, for example, conditions which would prohibit the dealer from selling the branded vehicles of competing producers on its premises; given that in view of this objective, the termination letter of the Citroen automobile company is sufficiently precise; that, indeed, it allows one to verify that the reasons evoked do not contain any forbidden competition restrictions … the Citroen automobile company did not need to prove the need to reorganise the entirety or part of its network, having not chosen to terminate the agreement with the advance notice of one year."*

176. The defendant submits that this case is authority for the proposition that there was no need for the defendant to prove the necessity to reorganise all, or a part of its network, or to terminate all contracts in the network, for the purpose of such re-organisation having given all dealers two years notice.

The pleadings

177. The plaintiff delivered an amended statement of claim on 11th September, 2015. It amended the original statement of claim delivered on 24th June, 2013, having regard to the discovery of documentation made by the defendant in the intervening period.

178. The following is a summary of the case made by the plaintiff in the amended statement of claim:

> (i) paragraph 5(b) – That the contracts were to be performed in accordance with the BER;

(ii) that the contracts were for an indefinite term and would not be terminated but for *cause shown* (para. 5(e)) – [emphasis added];

(iii) that the contracts would not be terminated save in accordance with their express terms and in accordance with law;

(iv) that any notice of termination of the contracts would contain a detailed statement of all of the reasons for the termination and would be transparent, objective and justified by the reason given in the notice (paras. 5(h) – (j));

(v) that the defendant would not implement a nationwide network reorganisation in the future or that if it did, it would not affect the plaintiff (para. 8(d));

(vi) that the defendant informed the plaintiff that the defendant would not seek to terminate the contracts with the plaintiff, save for cause (para. 8(e);

(vii) that in July, 2009 and again in October, 2009, the defendant represented to the plaintiff that the defendant had no plans for network rationalisation and that dealers ought to continue investing in their premises for the future growth of the brand and that in reliance on those representations, the plaintiff acted to his detriment (paras. 10 and 11);

(viii) that in reliance on the said representations, the plaintiff did not multi-franchise and expended considerable monies in improving his premises (para. 12);

(ix) that on 15th April, 2011 the defendant wrongfully terminated the contracts in a manner that was not in compliance with the express terms thereof or in compliance of the BER, and in contravention of the express representations made to the plaintiff by the defendant (paras. 14 and 18);

(x) that in purporting to terminate the contracts, the defendant was guilty of breach of contract, negligence, breach of duty and/or misrepresentation and that accordingly the purported termination is of no legal effect and furthermore that the defendant is estopped and precluded from seeking to terminate the contracts in the manner that it has sought to do and/or for the reasons specified, by reason of the aforementioned representations. (para. 19)

179. Particulars of breach of contract, negligence and breach of duty as set out in the amended statement of claim may be summarised as follows:

(i) termination of the contracts was neither necessary nor justified whether for the reasons given in the letter of termination of the same, or for any other reason;

(ii) insofar as the termination was based upon the ideal network plan as drawn up by GMAP, that plan was based on incorrect data or an incorrect understanding of data and therefore was not objective or transparent;

(iii) the defendant did not implement the proposed dealer network reorganisation which was announced as being necessary;

(iv) the defendant did not give detailed, objective or transparent reasons for the termination of the contracts, and such reasons as were given were not *bona fide* reasons;

(v) the true reasons for the termination of the contracts were as follows:

(i) to standardise Irish dealership contracts and to have contracts put in place that were no longer subject to the BER;

(ii) to achieve site control in some locations;

(iii) to form "cohesive market areas" in some parts of the country, including the greater Cork area i.e. an area where a number of dealerships are operated by a single principal;

(iv) to pursue a "metro" dealership model in the urban areas of Dublin and Cork.

180. The defendant delivered an amended defence and counterclaim on 17th December 2015. This amended the original defence delivered on 29th July 2013. At the outset therof the defendant pleads that the plaintiff ought not be permitted to maintain his claim by reason of *laches*/delay. The defendant pleads that the plaintiff had ample opportunity to have any dispute as to the validity of the termination of the contracts determined, prior to the expiry of the notice period given by the defendant.

181. The following is a summary of the case pleaded by the defendant in its amended defence:

(i) The defendant denies a number of the alleged express and/or implied terms of the contracts as set out by the plaintiff including: that the contracts were for an indefinite term and would not be terminated but for *cause shown*; that the plaintiff was more secure under the contracts than under pre-existing dealer contracts; that the contracts would not be terminated save in accordance with their express terms and in accordance with the law; and that any termination would be justified by the reasons given in the notice. The defendant also pleads that the terms set out by the plaintiff at paras 5(e), (f), (g), (j) and (k) are insufficiently certain to constitute valid or enforceable contractual terms. (para 5-6);

(ii) The defendant denies that an independent expert and/or arbitrator or Court would determine any issue regarding whether the termination of the contracts was justified by the reasons given in the notice (para 5);

(iii) It is also denied that the defendant owned a duty of care to the plaintiff (para 7);

(iv) The defendant denies that the alleged representations made by the plaintiff at para 8-10 of the amended statement of claim were made, including, *inter alia* that the defendant would not implement a nationwide network re-organisation in the future, or if it did, it would not affect the plaintiff; that the defendant informed the plaintiff that it would not seek to terminate the contracts with the plaintiff, save for cause; that the defendant represented to the plaintiff that it had no

plans for network rationalisation and that dealers ought to continue investing in their premises for future growth of the brand (para 8)

(v) The defendant pleads that any such statements, if made, were not capable of affecting, and did not affect the contractual position of the parties and did not give rise to causes of action on the plaintiff's part (para 9)

(vi) It is denied that the plaintiff relied on the alleged representations and/or acted to his detriment in reliance on them. In particular it is denied that *inter alia* the plaintiff did not multi-franchise and expended considerable monies in improving his premises; (para 10);

(vii) It is denied that the defendant knew, or ought to have known that the plaintiff would rely on the alleged representations and it is denied that the defendant owed the plaintiff a duty of care (para 12);

(viii) It is also denied that the defendant wrongfully purported to terminate the contracts and the defendant pleads that the contracts were terminated in accordance with their terms and two years notice was given (para 14);

(ix) It is denied that the termination was not in compliance with the express terms of the contracts or the BER and was in breach of any representations made to the plaintiff (para 15);

(x) It is denied that the defendant was in breach of contract, negligence, breach of duty and/or misrepresentation. The defendant also denies that the termination is invalid and that it is estopped from terminating the contracts. It is also denied that the reasons given for the termination were not genuine; the reason for the termination was set out in the relevant termination notices. The defendant denies that it is required to justify the termination of the contracts (para 20,21);

(xi) It is denied that the reason for termination did not justify the termination and the defendant also denies that there is any obligation to provide reasons for the termination; it is denied that the reasons given in the notice of termination were not detailed, transparent or objective (para 22, 23);

(xii) The defendant also denies that it has not genuinely re-organised the whole, or a substantial part of its dealer network. The defendant pleads that if any loss was suffered by the plaintiff, the alleged loss and damage is the inevitable consequence of the termination of the contracts; the plaintiff knowingly accepted the commercial risk of such termination when he entered into the contracts (para 29).

182. The defence was followed by a counter-claim in which the defendant claims various reliefs including an order directing the plaintiff to remove from his premises, any and all Volkswagen signs and to cease to make use of the Volkswagen trademark. The defendant also seeks damages for breach of contract.

Discussion and Conclusions

183. It is not a little bit ironic that these proceedings, which were at hearing for a period of twenty-one days, revolve around a condition of contract that comprises just one sentence and two lines of text, which owes its origin to a regulation that has since expired, not least because the protection intended to be afforded to motor dealers by the condition was found by the European Commission to be of such little consequence that its continuation was not merited. Be that as it may, much of significance in these proceedings hinges upon the answer to the question whether or not the plaintiff received from the defendant detailed, transparent and objective reasons for the termination of the contracts.

184. It is submitted on behalf of the plaintiff that article 20 of the contracts is clear in its own terms and that it should not be interpreted, as urged by the defendant, in light of recital 9 and Article 3(4) of the BER as though it included reference to the objective of the requirement to give reasons. It is submitted that insofar as the defendant failed to include in the contracts text reflecting this objective, the contracts must be construed against the defendant on the basis of the *contra proferentum* rule. So therefore, the plaintiff submits, if the court finds that the reasons given to the plaintiff for the termination of the contracts were not sufficiently detailed, transparent or objective, the plaintiff must succeed , even if the court is otherwise satisfied that the contracts were not terminated because of pro-competitive behaviour on the part of the plaintiff. On behalf of the defendant it is submitted that the contracts should be interpreted and construed having regard to the factual matrix in which they were drafted and executed i.e. for the purpose of giving effect to the BER and, so far as article 20 is concerned, for the purpose of giving effect to Article 3(4) thereof.

185. I am satisfied that the defendant's submission in this regard is correct. Indeed, in their opening submissions, counsel for the plaintiff submit that the contracts were intended by the parties to reflect and comply with the BER and so ought properly be construed in light of the legal principles applicable to motor vehicle distribution agreements. Article 20 of the contracts has a purpose that is reflected in recital 9 and Article 3(4) of the BER. There is no difficulty in understanding or interpreting the meaning of article 20 the words of which are clear. The question is whether the clause should be applied in a vacuum without regard to its purpose or with due regard to its purpose. In my view it is the latter - the plaintiff's previous contracts had been terminated specifically so as to permit the preparation of new contracts to reflect the terms of the BER. It would make no sense at all to interpret and apply article 20 in isolation of its purpose. As to its purpose, that of course is so as to enable an independent expert, arbitrator or court, to whom a dispute on the issue is referred, to review the reasons given in the light of all the evidence and to determine whether or not termination of the contract has taken place for the reasons given in the notice by the supplier, or for one of the prohibited hard core reasons, or so as to put an end to pro-competitive behaviour on the part of a dealer.

186. Mr. Willis took up his position in Ireland as managing director of the defendant in October 2008, although he actually started working for the defendant in or about August 2008. In his evidence he stated that upon or soon after his appointment, he had the biggest shock of his life, by which he was referring to the extraordinarily sharp decline in Irish car sales that was well underway by the last quarter of 2008. This of course had an enormous impact upon the defendant's dealership network, and many of them now contacted Mr. Willis for assistance. The first of those requested almost immediate assistance in the form of a loan of €0.5 million, without which the dealer said he would become insolvent. Mr. Willis verified that this was indeed true, and having regard to the importance of the dealer in question the defendant advanced a loan of €0.5 million to the dealer, with the approval of the parent company in Germany. Mr. Willis said that the defendant had to deal with the fall out of a number of insolvencies. The actual decline in car sales in Ireland between 2008 and 2009 was 62%, which was the most drastic of any country in Europe with the exception of one Baltic State.

187. Against this background it is scarcely surprising that the defendant felt it necessary to consider appropriate remedial action.

Indeed at around this time, or very soon afterwards, virtually every business in the country was forced to undertake measures to combat the drastic effects of the collapse of the economy, whether in the form of restructuring, laying off of staff, cutting of salaries or a combination of these and/or other measures. In an email of 20th March, 2009 from a Ms. Christiane Friese, European Regional Manager of Volkswagen AG to Mr. Philip Sheridan of the defendant, Ms. Friese stated:

> *"As we expect the economic crisis in Ireland to continue and to recover slowly over the next few years we should prepare for a number of our current network to be unable to survive. If the situation arises that a dealer (or several) faces bankruptcy/administration a decision has to be made how and if you as importer and we as manufacturer react. To be able to decide whether or not to support this partner we need to know if this dealership is of strategic importance for our network coverage in the coming years and whether he is the strategic partner we are unwilling to lose or not. Therefore the ideal network plan needs to consist of two elements: the spatial analysis of which geographic points needs to be covered and the performance aspect which partners we definitely need to keep."*

188. On direction from Volkswagen AG, GMAP were subsequently instructed by the defendant to undertake the preparation of a new car sales network analysis for the defendant. In its quotation to the defendant, GMAP stated that it would "*build catchments for each of the dealers in order to analyse dealer performance against site potentials*". It went on to say that it would:

> *"use its network optimisation tools to establish the number of dealers required to meet VW's future planning forecasts, ignoring any existing locations and picking ideal locations as if starting a fresh new network".*

189. There can be no doubt that from this time the defendant undertook a *bona fide* review of its dealership network, aided by GMAP. The correspondence produced to the Court in this regard demonstrates an iterative process, with GMAP sending drafts of its report to the defendant for consideration and feedback, as one would expect. It appears that from the earliest drafts of its reports, GMAP identified Lissarda as an outlet for closure. It also appears that this recommendation was accepted from the outset by those within the defendant engaging with GMAP, although they were not operating at decision making level, and a decision was not actually made by the defendant in this regard until, at the earliest, 26th February 2010, when Mr. Willis wrote to Mr. Klingler, Group Board Member Sales and Marketing (to whom Mr. Willis reported) of Volkswagen AG, advising Mr. Klingler of a plan to restructure the network in Dublin and Cork. Although in his evidence Mr. Willis described this e mail as "the beginning of a discussion", he wrote:

> *"Volkswagen will not (Mr. Willis' emphasis) terminate the entire network (strong share performance) but has planned a complete restructuring of Dublin and Cork (50% of national volume and low market share)".*

190. In his evidence, Mr. Willis stressed that no decisions of this kind were taken without the approval of Volkswagen AG. Therefore, it appears that by this time the defendant had decided, at least to a significant extent, upon the structure of its ideal network, subject to the approval of Volkswagen AG, but that it had decided to achieve that network not by way of a full reorganisation of the network, but instead to terminate dealerships where necessary.

191. The principal reason for GMAP's conclusion as regards Lissarda appears to have been based upon its view that the plaintiff was selling the vast majority of his cars outside of a notional catchment area attributed to the plaintiff by GMAP, and specifically into Cork City. There was no problem with the plaintiff's sales volumes; the problem was where he was achieving sales, or "pump out". While the mis-location of Lissarda by GMAP moved its notional catchment area approximately six miles west of its actual location, and almost certainly had the effect of incorrectly increasing the pump out rate to some degree, nonetheless this obviously would not affect the fact that the vast bulk of the plaintiff's sales were into Cork city. While GMAP described the sales of the plaintiff into Cork City as "pump out", Mr. Willis in his evidence characterised it somewhat differently:

> *"Because of the geographical proximity and because of our desire to have a flag ship site in Cork city, we did not need a small rural dealer so close to Cork city."*

Mr. Willis emphasised that in his view, it was important for the defendant to establish a flagship dealer in Ireland's second city. He also said that the GMAP report was no more than a useful baseline by which to assist the defendant in determining its ideal network. He himself was of the view that a dealership in Lissarda made no sense, and that it might well threaten the viability of a flagship dealer in Cork city.

192. There was a special board meeting of the defendant on 26th August, 2010, chaired by Mr. Klingler. The minutes of this meeting record, *inter alia*, the following:

> *"1. Key Requirements (Mr. Klingler)*
>
> *(i) Site control not to be pursued for Cork.*
>
> *(ii) Drive time of 45 minutes for Audi customers considered too long. Alternative calculation with shorter drive time assumption should be provided.*
>
> *(iii) Improved synergies for brands to be investigated, specifically in the countryside.*
>
> *(iv) [Redacted text].*
>
> *(v) Follow up within two to four weeks.*
>
> *2. General Network Measures*
>
> • *Network reorganisation deemed necessary.*
>
> • *Standards to be enhanced (financial reporting, websites, change of ownership, dedicated brand staff etc.) and to contractually supported/enforced (sic).*
>
> • *In case of general cancellations, procedures should be established in compliance with regulations to assure dealers as early as possible of their future role in the network. A cautious approach to minimise general distribution should be pursued.*

- *[Redacted text]."*

193. Mr Willis confirmed in his evidence that it was at this meeting it was decided to terminate the entire network. The minutes do not record any reason for the decision to proceed in this manner, rather than simply terminating the contracts of those whose locations were not included in the ideal network. In his direct evidence about this Mr Willis said:-

> *"well of course we had a lot of - a great deal of internal discussion, how we would carry this termination out, but there were two very important points, as far as I was concerned. The first important point was that we would give everyone two years notice, not the one-year notice. And the second important point was that we would give everyone a chance to re- tender in whatever area they thought appropriate or fit".*

194. Preparations for the re-organisation continued; it was scheduled to take place in mid-2011. By email of 23rd March, 2011, Mr. Willis again wrote to Mr. Klingler (and other directors) on this occasion stating:

> *"As discussed, the method is Reorganisation with 2 years' notice to minimise legal challenge. 33 dealer contracts will be renewed 7 dealer contracts will not be renewed."*

195. While it is not difficult to see why the defendant considered it necessary to take steps to ensure that it had the most efficient and effective network possible, it is not readily apparent why it was "*necessary*" (as it was put in the termination letter to all dealers) to terminate all dealer contracts in order to remove just seven locations out of forty from the network. The first time any explanation for this is given is by Mr.Willis in his evidence in chief is the passage referred to above. Upon cross examination on this issue, Mr. Willis stated that it was decided that it was necessary to terminate the entire network in order to place all dealers "*on a level planning field" i.e*. to enable all dealers in the network to have the opportunity to tender for an ideal network location. If the defendant confined itself to terminating the contracts of only those dealers whose locations were being eliminated from the network, then they would have no opportunity to tender for an ideal network location with a view to being reappointed as a dealer.

196. At the time of Mr. Willis' letter of 26th February, 2010 to Mr. Klinger what was under consideration was the termination only of dealerships that were not considered to be suitably located in an ideal network i.e. termination of all dealership contracts was not originally contemplated. It is unsurprising that in an exercise such as this there will be constant changes to proposals and that the final product will be the result of much deliberation and discussion amongst those involved and will almost certainly involve some material changes from what was originally proposed or under consideration. In this case however, there was no material deviation between February and August 2010, in what was considered to be the ideal network plan, but what did change was the means by which the plan would be attained. Instead of terminating only those dealerships whose locations were no longer considered to be suitable, it was now decided to terminate all dealerships in the network, and to invite all dealers to tender for appointment to a location in the reduced network .

197. There is no dispute between the parties about the entitlement of a supplier in a quantitative selective distribution system to decide for itself the number of dealers, the locations of those dealers and the configuration of its network generally. Nor is there any dispute about the entitlement of suppliers to terminate the contracts of either individuals in the network or of the entire network on two years notice, provided the reasons for doing so are not anti-competitive in nature, and that detailed, transparent and objective reasons are furnished to those whose contracts are terminated. In this case, the defendant went through an exhaustive process to determine what action it should take to reorganise its network by reason of the very sharp decline in the market for both passenger cars and commercial vehicles following the virtual collapse of the economy in 2008/2009 and the predictions that the market would not recover to anything like the same levels of sales for a very long time to come, if at all, as well as structural changes in the Irish road network. By any standards, this was an objective process driven by a desire to create a sustainable network and to achieve the number one position in the Irish car sales market.

198. The ideal network included the termination of eight existing network points, and the creation of three new ideal locations in Dublin. It is a matter entirely for the commercial judgement of the defendant as to how to implement its ideal network plan. Moreover, it is not a matter for the court to gainsay the commercial judgement of the defendant, as stated by the European Court in *Vulcan Silkeburg*. Nor is it necessary to provide the kind of justification for the reorganisation that it must do in circumstances where termination is on 12 months notice. But a considerable part of the problem in this case is that the reasons given for termination do not even purport to explain why the defendant considered it *necessary* to terminate all contracts in the network, in circumstances where it appears that its purposes could be served just as readily by terminating only the contracts of those whose locations were deemed superfluous to the ideal network. Not only that, in all the large number and variety of documents produced on discovery and opened to the Court, there is nothing to explain clearly, or at all, why it was considered necessary to terminate the entire network. It is not referred to in correspondence, presentations for meetings, minutes of meetings, or drafts of any of the foregoing. Nor is it mentioned in the email of Mr. Willis of 23rd March, 2011 to Mr. Klingler, where Mr. Willis stated: "*as discussed, the method is reorganisation with two years notice to minimise legal challenge*." While dealers were aware that everybody in the network was being given an opportunity to tender for any point in the new network, they were at no stage informed that this was the reason for terminating all contracts in the network. It is only mentioned as the reason for terminating the entire network, by Mr. Willis in his evidence.

199. Moreover, a number of documents indicate an expectation on the part of the defendant to reappoint those dealers whose locations were within the ideal network, which would suggest it was not necessary to terminate all contracts, but only those of dealers whose locations were not considered ideal. These documents include, but are by no means confined to the following:-

> (i) The letter of Mr Willis to Mr.Klingler (and others) dated 23rd March 2011,wherein he states 33 contracts will be renewed, and 7 will not be renewed. Mr.Willis in evidence stated that this is what happened, and that is just the point. There was an expectation that those at ideal locations would have their contracts "renewed", and those at non-ideal locations would not, notwithstanding the entitlement of dealers to compete for points in the new network;
>
> (ii) The script of Mr Willis' presentation to the dealers meeting at Dunboyne, in which he stated:
>
> *"We are inviting dealers to submit an application which we will refer to as an expression of interest, for the future network. Should we receive a single expression of interest for a location from the incumbent dealer and that location is one of the 32 ideal network locations, it is our intention to reappoint that dealer without delay and we hope that this would be the outcome in most, if not all, such instances.*
>
> *Where we receive multiple expressions of interest and business planning process will follow for which we will supply*

guidelines in line with criteria outlined on the previous chart.

It is really important to note that although this plan has highlighted our ideal locations, we will accept and consider in the context of ALL of our selection criteria expressions of interest from outside ideal locations.

In practice this means that we would encourage all dealers in ideal locations today to apply for their locations quickly as we would like to reappoint these as soon as possible. Dealers in Dublin, Cork, Kildare and Limerick will ideally apply for an ideal location, however as per my previous point we will accept expressions of interest for points outside this ideal network plan. In this case applications will need to address why the location proposed is preferable."

(iii) A document entitled "*Volkswagen Ireland network presentation*" 11th of November 2010.This is clearly a working document proposing a timeline and methodology for the reorganisation. Under the heading " *reorganisation timeline*" it is proposed that in June 2011, there should be cancellation of sales contracts on two years notice for non-ideal network plan territories only. It is further proposed that there will be meetings for the eight affected dealers, with the five Dublin dealers to be afforded an opportunity to tender for new locations and the remainder simply to be given two years notice of termination. The same document refers to the 32 dealers in strategic locations being given the opportunity to "*exchange current contracts for new contracts"*

(iv) A document entitled *Video Conference*: *Volkswagen IRL Network Plan* and dated 15th of November 2010 in which similar terminology appears: "*33 dealers contracts will be renewed. 7 dealers contracts with not be renewed."* There is also a separate reference to 33 dealers contracts being exchanged.

200. All of this creates the very strong impression that dealers at ideal points in the network were almost certainly going to be reappointed if they applied (as in fact occurred) and that the only real competition for places was going to be for new points in the network, in the Dublin area. It is argued on behalf of the defendant that the decision to terminate the contracts in the old network and to appoint dealers in the reorganised network are two different decisions and that at the time of making the first decision, the defendant did not at that stage know the identities of the new appointees to the network. Accordingly, the argument goes, it is only the first decision that falls to be assessed for compliance with article 20 of the contracts, and the plaintiff has no right to challenge his non-appointment to the new network. While that argument would have merit if all dealers were on an equal footing after termination of all contracts, I think it must fail if it was the case that, at the time of termination of the entire network, thirty two dealers were assured of reappointment to the network, while in contrast the seven dealers whose locations had been deemed non-ideal were not. (By this time the number of dealers in the network had reduced to 39 by reason of the insolvency of one dealer). I say this for the simple reason that it could not have been necessary to terminate all of the contracts in the network if as many as 39 contracts out of 40 were certain to be renewed, unless there was another reason or reasons for doing so. It is only fair to observe that Mr. Willis in his evidence was adamant that the plaintiff (and others in his position) had a real chance to compete for and be awarded a position in the new network. However, I have come to the conclusion that all of the other evidence strongly suggests otherwise. It follows from this that there must have been other reasons that made it necessary, in the eyes of the defendant, to terminate all contracts in the network. It may have been a desire to effect contract change or a desire to minimise legal risk. There was evidence of both although a desire to minimise legal risk could hardly be a valid reason to avoid complying with a legal obligation. Alternatively, it may have been a desire to avoid giving to individual dealers such as the plaintiff, the real reason for the termination of their contracts. Or it may have been a combination of all of these things, but whatever the reason or reasons, the contracts were not, in my view, terminated because the defendant considered it necessary to afford all dealers an opportunity to tender for a new contract.

201. Even if I am incorrect in this conclusion, all of this merely serves to underscore that the reasons given for termination of the contracts were neither sufficiently detailed nor transparent, because it was impossible to tell from those reasons alone why it was necessary to terminate all contracts in the network and therefore whether or not the reason given was the actual reason for termination of the contracts. It follows from this that it is not possible to know *from the reasons given in the termination letter* whether or not the contracts were terminated on account of pro-competitive behaviour on the part of the plaintiff. The defendant is, in effect, asking the Court to accept its explanation as to why it was necessary to terminate all contracts in the network (which explanation was not even given in the termination letter) in circumstances where the explanation provided is, in my view, highly implausible. By any standards, all of this lacks both detail and transparency.

202. While the giving of reasons for termination of such contracts is now entirely academic in the post BER world, at the time of termination of the contracts the issue was of some significance. If a supplier wished to avoid giving individual dealers the reasons for the termination of their contracts, it could avoid doing so by terminating the entire network for general reasons of reorganisation. Worse, if the real reasons for termination of contracts were reasons prohibited by the BER, it could conceal those reasons by taking this course. It was for this very reason that the BER required in all circumstances giving rise to termination of a contract, that notice of termination should be in writing and should provide the dealer with detailed, objective and transparent reasons for the termination. In the event of a challenge to the termination, the Court would then be able to review those reasons and the circumstances giving rise to the termination of the contract in order to be satisfied that, without further elaboration, the reasons given were the real reasons for the termination, and that there was no anti-competitive or prohibited motivation involved.

203. In three of the authorities to which I was referred, the question as to whether or not a re-organisation of an entire network was actually taking place was discussed. I should say that these were all cases involving abbreviated notice. While I am acutely aware that cases involving the abbreviated 12 month notice period necessarily involve much greater scrutiny of the reasons given for termination (because that is a derogation from the 24 months notice to which the dealer would otherwise be entitled), nonetheless whether or not a reorganisation of a network is in fact taking place becomes relevant in cases involving 24 months notice termination when that is the reason given for termination of all contracts in the network. In *Brunsteiner GmbH v. Autohaus Hilgert GmbH* C-376/05 and C-337/05, the advocate general queried if a reorganisation of a network in which 90% of dealers were to be reappointed really constituted a reorganisation of a network. In *Vulcan Silkeburg* the European Court stated that a reorganisation plan, to avail of the abbreviated termination provisions of the 1995 BER must involve a substantial part of the network, both substantively and geographically. The Federal Court of Germany in Nissan, similarly made the point that a reorganisation, to avail of the abbreviated notice period, must involve a change of distribution structures both spatially and financially. In this case, I am of the view that the defendant implemented a reorganisation of part only of its network, in the manner it appeared to envisage originally. Economically, it was a significant part, as Dublin and Cork between them at the time accounted for a very significant percentage of sales nationally. The percentages given for this in evidence varied. It was suggested that between them it came to about 50%, but more specifically there was evidence that Dublin accounts for 30- 35% of sales nationally and Cork City 7%, and Cork county 13%. Whatever about percentage sales, by my calculations Dublin and Cork accounted for approximately 17% of the sales points in the networks before termination of contracts. All of this lends support to my conclusion that the defendant needed to say why it was necessary to

terminate the entire network in order to achieve the desired level of re-organisation.

204. For all of these reasons I have come to the conclusion that the reasons given by the defendant to the plaintiff for the termination of the contracts were neither transparent nor sufficiently detailed, *and* they failed to fulfil the purpose of article 20 because it was not apparent from the stated reasons that the termination of the contracts was not for an anti competitive purpose; to make this apparent, the stated reasons should have made it clear why it was necessary to terminate all contracts in the network. Accordingly, the plaintiff did not comply with Article 20 when terminating the contracts.

205. Nonetheless, I am absolutely satisfied that the defendant did not terminate the contracts because the plaintiff was engaged in pro-competitive behaviour of any kind, including active or passive sales. It is abundantly clear that the defendant carried out a review of its network in response to the downturn in the economy and what it identified as structural changes in the market, i.e. for the reasons stated in the termination letter, and that this review resulted in a reorganised and contracted network, more suited to the needs of the defendant. In choosing to implement this reorganisation in the manner that it did, i.e. by terminating all dealer contracts rather than only those of dealers most directly affected, the defendant was not in my view purporting to conceal any anti-competitive motivations.

206. Moreover, the only anti-competitive motivation pleaded on behalf of the plaintiff is that the contracts were terminated because of "pump out", or alternatively to protect the viability of the flagship dealership in Cork. In this regard, it is argued on behalf of the plaintiff that such an objective, whether expressed in terms of "pump-out" or a threat to the viability of a Cork city flag ship dealer, constitutes a breach of Article 4(1)(b) and (d) of the BER. Even if this is the real reason for termination of the contracts however, I do not accept the argument that it is in breach of article 4 of the BER.

207. Article 4(1)(b) of the BER prohibits those wishing to avail of the BER from restricting the territory into which the distributor may sell goods. It is argued that termination for pump-out amounts, in effect, to just such a restriction because it penalises the dealer for selling outside a territory. There is, however, a very clear distinction between allocating a dealer a specific territory and prohibiting the dealer from selling outside that territory on the one hand, and structuring a network in such a manner as to ensure, as best possible, the viability of dealers within the network. It is accepted by all parties that a manufacturer is at large when establishing a quantitative selective distribution system and is free to choose the number of and the locations of all its dealers within the network. It is argued on behalf of the plaintiff however that once the network is established, the manufacturer/supplier is subject to restrictions in relation to subsequent alterations to the network, and in particular, when terminating contracts, must comply with the requirement to give detailed, objective and transparent reasons for doing so. While that is of course true, that is not a restriction on a manufacturer/supplier reducing the size of its network if it considers it to be in its best interests to do so. In considering how best to organise its network, a manufacturer/supplier is always going to be concerned about the viability of its dealers, and in a market in which the volume of sales has reduced considerably, it is almost inevitable that there will be a reduction in the number of dealers. It would be preposterous if a manufacturer/supplier was not free to reduce the size of its network because legitimate concerns about viability could also be construed as a restriction of sales into a territory, and therefore contrary to Article 4(1)(b) of the BER.

208. Article 4(1)(d) of the BER refers to the restriction of active or passive sales of new passenger cars or light commercial vehicles. It is argued that a termination of a contract that is based upon the location of where the sales are taking place constitutes just such a restriction. Although Article 4(1)(d) does not refer to foreign consumers, it is clear from recital 9 of the BER that it is intended to prevent restrictions on sales to foreign consumers. It will be recalled that Recital 9 opens with the following text:

> *"In order to prevent a supplier from terminating an agreement because a distributor or a repairer engages in pro-competitive behaviour, such as active or passive sales to foreign consumers, multi-branding or subcontracting of repair and maintenance services ..."*

209. The view that Article 4(1)(d) refers to sales to foreign consumers was echoed in *City Motors Group* where the court referred expressly to recital 9 in saying that termination of an agreement because of sales to foreign consumers is in practice restricted by the BER. It is also echoed in the Explanatory Brochure, where, in answer to question 70, the commission explains that article 3(4) *"was introduced in order to prevent a supplier from terminating an agreement because a distributor or a repairer engages in pro-competitive behaviour, such as active or passive sales to foreign consumers…"*

210. So for this reason even if it is the case that the contracts were terminated owing to "pump-out" or to protect the viability of a new flagship dealer in Cork City, this would not in my view constitute an anti-competitive reason for termination of the contracts, or termination for conduct that may not be restricted by Article 4 of the BER.

211. The defendant also argues that if the Court is satisfied that the contracts were not terminated by reason of pro-competitive behaviour on the part of the plaintiff or by reason of practices that may not be restricted under the BER, then the plaintiff is entitled to no relief. Principle amongst the authorities relied upon by the defendant are the decisions of the federal court of justice in Germany in *Jaguar* and the Court of Appeal in Paris in *Foucque*. In *Jaguar*, the supplier wanted to introduce new contracts with its dealers. In order to do this, it was obviously required to terminate all existing contracts. The court was satisfied that the stated reason for termination was genuine, and that even though it was brief, the reason given accurately and fully reflected the grounds of termination. In this case, for the reasons already stated I have not been so satisfied. Furthermore, in *Jaguar* there was not a contractual requirement to give detailed reasons upon termination of the contract, as was the case here.

212. It is more difficult to distinguish *Foucque*, mainly because there is very little detail in the report of the case. In particular, the report does not record the terms of the contract between the parties. The reason given for termination was very general, and the court appears to have accepted at face value, without further inquiry (or at least without recording such inquiry in its judgment) the reason for termination as set out in the letter terminating the plaintiffs contract. I find the decision is of very limited, if any assistance.

Consequences of failure to comply with Article 20

213. Having found that the defendant failed to comply with article 20 of the contracts, the question arises as to what redress is appropriate in respect of this breach of contract by the defendant. It has been submitted on behalf of the plaintiff that the Court should treat article 20 of the contracts as a condition precedent to the exercise of the right of termination of the contracts in Article 17. This of course is somewhat different to the concept of a condition precedent as generally understood, meaning an event which must take place before a party to a contract must perform his/her obligations under the contract.

214. The plaintiff relies upon the charter party cases of *Mardof Peach & Co. Ltd*. and *Afovos Shipping Co. S.A*. referred to above, as well as *Mannai Investment Co. Ltd*. The plaintiff contends that all of these cases are authority for the proposition that a substantive condition in relation to termination of a contract must be fulfilled precisely. However, that was not the issue for determination by the

court in either case. In *Mardof* the charterer was late with a payment and the issues for determination were whether or not the owners' bankers had authority to accept a late payment and whether the bankers had rejected the payment as quickly as possible. The court found in favour of the owners and held that the right of withdrawal from the charterparty had accrued to the owners. In *Afovos* it was held that the right of termination had not accrued at all.

215. In *Mannai* what occurred was that the tenant made an error in the notice that it served exercising the break clause, stating that the lease was to determine on 12th January, 1995, instead of 13th January, 1995. The landlord claimed that this error in the notice rendered it ineffective. While the passage quoted earlier in this judgment, from the decision of Lord Hoffmann might lead one to think that anything other than a rigid compliance with the contractual term applicable to the notice of termination would render the notice served void, it seems to me that the case is not authority for such a rigid proposition. The majority of the law lords in that case, including Lord Hoffmann, considered that the notice served by the tenant exercising the break clause was clear and unambiguous. Lords Steyn and Hoffmann considered that the notice served should be construed against the background of the terms of the lease itself, and since it was clear what the lease intended, and since no reasonable person could be misled by the terms of the notice, notwithstanding the error contained therein, the court upheld the validity of the notice served. The following extract from the decision of Lord Steyn makes it clear that there is no special rule as regards notices of this kind:-

> *"There is no justification for placing notices under a break clause in leases in a unique category. Making due allowance for contextual differences, such notices belong to the general class of unilateral notices served under contractual rights reserved, e.g. notices to quit, notices to determine licenses and notices to complete: Delta Vale Properties Ltd. v. Mills* [1990] 1 WLR 445, 454E-G. *To those examples maybe added notices under charter parties, contracts of affreightment, and so forth. Even if such notices under contractual rights reserved contain errors they may be valid if they are 'sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate'."*

216. In this case of course the issue is not about the interpretation of the notice served, but about compliance with a separate condition of the contract which must be complied with when serving the notice to terminate the contract under either article 17 or article 18. If the defendant had failed to give any reasons at all at the time of service of notice of termination then there could hardly be any doubt but that the notice of termination would be invalid. Similarly, if it were found that the defendant had terminated the contract for any of the "*hard core*" reasons described in Article 4 of the BER, I think it likely that that would inevitably lead to a declaration that the termination was invalid. But I have found that the contracts were not so terminated, and that they were terminated by the defendant following a *bona fide* review of its network requirements. The only difficulty is that in terminating the contracts the defendant has failed to give reasons that are sufficiently detailed and transparent for the purposes of Article 20 of the Contracts. When viewed in the light of my comments at para 202 above , I do not think that this failure can be considered as being entirely technical, but since it occurred against the background of a *bona fide* review of the network, nor can it be considered as an egregious failure on the part of the defendant. It must also be viewed in the light of the entitlement of the defendant to terminate the contracts for any reason (provided it is not an anti-competitive reason) upon two years notice which the defendant gave to the plaintiff. And finally, regard must also be had to the delay on the part of the plaintiff not just in issuing legal proceedings, but in failing to give any indication to the defendant that he did not accept the termination of the contracts and that he would, if necessary, challenge the termination of the same, until the very end of the notice period. Regardless of his reasons for not doing this, the effect of his not doing this was that the defendant pressed on with the reorganisation of its network in the Cork area and that construction of the new flagship dealership proceeded and, albeit after considerable delay, it is due to open for business in April, 2017. Needless to say this involves considerable expense on the part of the incumbent dealer. Had the plaintiff indicated his intention to challenge the termination of the contracts in a timely manner, it seems to me to be quite likely that the roll out of the flagship dealership in Cork would have been deferred pending the outcome of these proceedings. For all of these reasons, I consider that it would be wrong to declare the termination of the contracts to be void *ab initio* as the plaintiff seeks. The appropriate remedy in this case lies in damages.

The Estoppel and related arguments

217. I turn next to the representations which the plaintiff alleges were made to him at different times by Mr. O'Connor, Mr. O'Callaghan, and Mr. Chamberlain and Mr. Willis. The first of these representations, the plaintiff claims, was made at the time that he signed the contracts with the defendant. The plaintiff claims that Mr. O'Connor assured him that the contracts were more secure than the previous contracts because, in the event of termination by the defendant, the defendant would have to give reasons and that there would have to be fault on the part of the dealer to justify the termination of the contracts.

218. There are a number of features to this particular allegation. Firstly, the plaintiff was told at this meeting that he could take the contracts away for consideration before he signed them. He had previously asked for sight of the contracts before this meeting with a view to doing just that, but now he decided, on the strength of the representations of Mr. O'Connor, to go ahead and sign the contracts without reading them or taking them away to get legal advice or, apparently, without even asking Mr. O'Connor to identify the provisions which gave the plaintiff this additional security.

219. Mr. O'Connor did not give evidence and no explanation was proffered to the Court as to why he did not do so. In any case, it would hardly be surprising if Mr. O'Connor encouraged the plaintiff to sign the contracts. If he went further than he should have and told the plaintiff that the contracts could only be terminated for cause, this was something that the plaintiff could have verified before he signed the contracts. He could have taken them away for his own review and/or for legal advice and he could have asked Mr. O'Connor to identify the relevant clause in the contract which gave him this additional protection. The plaintiff did none of these things.

220. Alternatively, if Mr. O'Connor did not go as far as the plaintiff claims, but merely said that the contracts put dealers in a stronger position than the previous version of the contracts, then arguably this was correct. In either case however, the plaintiff had the choice of reviewing the contracts himself before signing them rather than simply relying upon Mr. O'Connor's word as to their contents. Moreover, the plaintiff did not give evidence that had he been aware of the actual terms of the contracts, he would have decided against entering into them with the defendant.

221. The next representations that the plaintiff relies upon are those made by Mr. O'Callaghan, when he and the plaintiff met at around the time the Audi contracts were coming to an end. There is no significant disagreement between the plaintiff and Mr. O'Callaghan as to what Mr. O'Callaghan said on this occasion. Mr. O'Callaghan was concerned that the plaintiff might take on another brand, and was concerned to persuade the plaintiff not to do so. Mr. O'Callaghan informed the plaintiff that the defendant was going on a "*product offensive*" and that it was going to expand its range of models and that there would be a greater requirement for showroom space for Volkswagen dealers. It was not suggested by the plaintiff that this did not occur. The plaintiff also asserted that Mr. O'Callaghan stated that the plaintiff's contracts with the defendant were indefinite in nature and more secure than previously. Even if Mr. O'Callaghan did say this, it seems to me that there is nothing particularly inaccurate about this statement.

222. It seems to me that the nature of the discussion that the plaintiff had with Mr. O'Callaghan was no more than an effort on the part of Mr. O'Callaghan to persuade the plaintiff to remain exclusively a Volkswagen dealer, and that it was a matter entirely for the plaintiff to decide where his own best interests lay in this regard. It was of course open to the plaintiff to take on another brand, and he may well have been influenced by Mr. O'Callaghan in deciding against doing so, but there does not seem to me to be anything in what Mr. O'Callaghan said, or even in what the plaintiff claims that Mr. O'Callaghan said, that was in the nature of a promise from which the defendant resiled, to the detriment of the plaintiff.

223. The third representation which the plaintiff alleges was made to him was a representation subsequently made to him by Mr. O'Connor, as a follow on to his meeting with Mr. O'Callaghan, when Mr. O'Connor attended at the plaintiff's premises in December 2007. The plaintiff again expressed concern at this meeting about remaining an exclusively Volkswagen dealer, and he says that he received certain assurances from Mr. O'Connor similar to those outlined above. More significantly however, on this occasion, the plaintiff alleges that Mr. O'Connor said that there was no possibility that the defendant would ever undertake a reorganisation such as had taken place at Audi, and that even if it did, the plaintiff had nothing to fear as he would never be affected by such a reorganisation. Mr. O'Connor is also alleged to have informed the plaintiff that in future Volkswagen dealers would require a ten car showroom of about 300 sq/m.

224. There can be no doubt but that this would be quite an extraordinary promise for any employee of the defendant to make to the plaintiff. In effect, it is alleged that the plaintiff was assured that his dealership would never be terminated (other than for cause). The plaintiff knew that he had written contracts with the defendant. He also knew that these were standard form contracts entered into between the defendant and all dealers, and that therefore his contracts with the defendant did not contain anything specific to the plaintiff, such as that he would not be affected by a future reorganisation of the defendant. In these circumstances, if the plaintiff was relying upon an assurance of the defendant that it would not enforce its contractual rights against him, it would have been prudent for him to seek this assurance in writing, or at a minimum, to record it in writing himself by way of written communication to the defendant. I do not think that the doctrine of promissory estoppel goes so far as to permit the amendment of written contracts in such a casual manner, contrary to the express terms of those contracts. This would, in my view, amount to an extension of the doctrine of promissory estoppel that would have the capacity to create great uncertainty in contractual relations.

225. That aside, it is an essential ingredient in any claim of promissory estoppel that the person asserting the claim must have acted to his detriment on the strength of the promise made by the other party. In this case, the furthest that the plaintiff can put this is that he elected to remain exclusively a Volkswagen dealer on the strength of the representation made by Mr. O'Connor. But I think that to sustain this claim, he would have to be able to put forward something more; he would have to be able to show, at a minimum, that he would have obtained another dealership but for electing to remain exclusively with Volkswagen. The plaintiff gave no such evidence.

226. The plaintiff also relies on a statement he claims was made by Mr. Willis, at the dealer network meeting in Cashel in April 2009, when the plaintiff claims that Mr. Willis encouraged dealers to invest in their premises/businesses. Mr. Willis very strongly denied this allegation. His evidence was that he was very acutely aware of the difficulties being experienced by dealers and that he would have been very careful to avoid encouraging them to invest capital in the infrastructure of their businesses. There is no doubt that at this meeting, Mr. Willis was attempting to bolster the dealership network and to encourage the dealers that they would get through these difficult times. He informed the dealers at this meeting of the defendant's initiatives to strengthen the brand and to improve sales and of the investment that the defendant itself was making in its business, which was of the order of €12.5 million. In his evidence, Mr. Willis speculated that the plaintiff may have mistaken something that Mr. Willis said about the defendant itself as an encouragement to dealers to invest, but Mr. Willis was adamant that he would have stayed well clear of encouraging the dealers to invest capital in their premises or in their businesses.

227. I am inclined to accept the evidence of Mr. Willis in this regard. There can be no doubt that he was acutely aware and had direct personal knowledge of the financial difficulties being experienced by dealers. It is highly unlikely that, having regard to this knowledge and also to the fact that he knew the market was not going to recover for a very long time, that he would have encouraged dealers to invest in their businesses. I think it much more likely that Mr. O'Leary took encouragement from Mr. Willis's presentation and from the investment that the defendant itself was making in the business and decided that it was an opportune moment to carry out some work at his premises which he had planned before the economic collapse. But even if Mr. Willis did directly encourage dealers to invest in their premises, as suggested by the plaintiff, it was no more than that i.e. an encouragement. Whether or not to do so was a decision to be made by each individual dealer.

228. Finally the plaintiff also claims that on the strength of representations made by Mr. Chamberlain at the dealers' meeting in Clonmel, in July 2009, that he was encouraged to proceed with his plans to carry out external improvement works to his premises. He claims that at this meeting Mr. Chamberlain, assured those present, in response to a specific question from one of the dealers, that the defendant had no plans for a network reorganisation, because it considered that it had "*the best dealers in the best locations*". No evidence was brought forward by the defendant to rebut this allegation, but in cross-examination it was put to the plaintiff that Mr. Chamberlain had said (presumably by way of instruction to the defendant's legal team in preparation for these proceedings) that, while he did say that no reorganisation was planned, he was careful to add the words "*at this time".*

229. At the time of his presentation Mr. Chamberlain was very new to the employment of the defendant, having recently assumed the position of sales and marketing manager. Notwithstanding that he was new to the position however, it would seem very unlikely that he was unaware of the retainer of GMAP and its role in helping to shape the defendant's network into the future. Although the plaintiff strongly refutes that Mr. Chamberlain qualified his answer to the question in any way, if he was, as was put to the plaintiff by the defendant's counsel, taking care with his answer to this question by making sure to qualify his answer with the words "*at this time*", that would to my mind indicate a degree of awareness of the importance of his answer to this question. Clearly if dealers thought that a reorganisation was on the way, it could be very unsettling for them and damaging to the interests of the defendant for as long as matters remained uncertain. On the other hand, the defendant was undertaking an exercise through GMAP which was specifically intended to result in the design of an ideal network, and it would have been surprising if it did not result in recommendations for changes in the network. In other words, it was predictable that the GMAP study would result in some changes to the network.

230. For as long as matters remained uncertain, it is quite understandable that the defendant would not wish to unsettle its network of dealers by informing them that this study was underway. On the other hand, faced with a direct question as to whether or not a reorganisation was contemplated, it was somewhat disingenuous not to inform the dealers present of the GMAP exercise, and that there was at least the possibility of a degree of reorganisation when that exercise was concluded. Had the plaintiff being aware of this, it seems highly unlikely that he would have undertaken expenditure in the carrying out of works at his premises until the shape of the new network was determined. I have little doubt but that the plaintiff drew significant comfort from what Mr. Chamberlain said on this occasion and quite reasonably relied upon it in deciding to proceed with works that he had been contemplating doing for some time. Not only that, I am satisfied that it is foreseeable that dealers receiving an assurance of the kind that they did from Mr.

Chamberlain were likely to be influenced by such an assurance in the making of their own commercial decisions, including decisions relating to expenditure. In my view there was reasonable reliance by the plaintiff on the representations made by Mr. Chamberlain at this meeting, and there was no need for the plaintiff to make further enquiries as to whether or not there might be a reorganisation of the dealership network, before undertaking expenditure on his premises. This brings the statement made by Mr. Chamberlain at this meeting within the principles identified in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. [1964] A.C. 465, and as subsequently affirmed and developed in *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605. Those authorities have of course been adopted and followed in this jurisdiction in *Wall v Hegarty* [1980] ILRM 124 and more recently in *Wildgust v Bank of Ireland[200] IESC 10.*

231. It was submitted on behalf of the defendant that article 27 of the contracts makes it clear that the commercial risks assumed by the dealer in the performance of the contracts or for commitments entered into by the dealer in pursuing his business under the contracts is for the dealer alone, and that the clause exempts the supplier from any liability for the same. However, I do not consider that this clause could be used to exempt the defendant from a liability to the plaintiff for misinformation conveyed by the defendant to a general meeting of its dealers or for a failure to be appropriately forthcoming in response to an express question. Accordingly, the defendant is liable in my opinion to reimburse to the plaintiff the expenditure incurred by the plaintiff in carrying out works to his premises following upon the meeting in Clonmel, but with due allowance being made for any value accruing to the plaintiff arising out of the carrying out of those works.

232. In summary, I consider that the plaintiff is entitled to a declaration that the contracts were terminated contrary to Article 20 thereof; and:-

(i) that the plaintiff should secure damages for breach of contract to be assessed by this court;

(ii) that the plaintiff should secure damages to be assessed by this court in respect of the expenditure incurred by him on his premises.

I will hear counsel in relation the costs incurred by the parties in the proceedings.