Neutral Citation Number: [2012] IEHC 227

THE HIGH COURT

[2006 No. 4465P]

BETWEEN

STEPHEN MOFFITT LIMITED AND CARL SCARPA (GRAFTON STREET) LIMITED

PLAINTIFFS

AND

CARL SCARPA GROUP LIMITED AND GEORGE BRIAN SIGGINS

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on the 8th day of June, 2012.

1. Factual background

1.1 These proceedings arise out of a transaction in 2005 under which the first plaintiff (Moffitt) acquired by purchase the entire issued share capital in the second plaintiff (the Company) from the defendants. At the time the Company carried on the business of shoe retailer at No. 25 Grafton Street in the City of Dublin (No. 25) and that trade continued after the purchase. The Company's title to No. 25 was derived from a lease dated 31st January, 1999 made between John Simon and others of the one part and the Company of the other part (the Lease), whereby the premises therein described as "the shop including the roof at the rere thereof and basement of the house known as Number Twenty Five Grafton Street Situate in the Parish of St. Ann in City of Dublin" were demised to the Company for the term of twenty five years from 25th March, 1996 at an initial yearly rent of IR£60,000. After the change of ownership of its share capital, the Company remained in possession of the ground floor and basement ofNo. 25 and continued its shoe retail business there.

1.2 The acquisition of the entire issued share capital in the Company by Moffitt from the defendants was one of a number of transactions whereby Moffitt acquired various retail outlets and the business associated with the Carl Scarpa brand. In relation to most of the retail outlets apart from No. 25, as I understand the position, the acquisition was effected by Moffitt taking an assignment of an existing leasehold interest. It is clear on the evidence that there were good reasons why the transaction in relation to No. 25 was effected by the acquisition of the Company, which are not material to the issues the Court has to determine.

1.3 The solicitors on record for the plaintiffs in these proceedings, McKeever Taylor, acted in the transaction for Moffitt, as the purchaser of the shares in the Company, and a solicitors' firm based in Galway, Kieran Murphy & Co. (Murphy), acted for the defendants, as the vendors in the transaction. Since 7th March, 2007, the firm Ronan Daly Jermyn (RDJ) has acted for the defendants in these proceedings.

1.4 The purchase of the shares in the Company by Moffitt was effected by a Share Purchase Agreement dated 8th August, 2005 (the SPA) made between the defendants of the first part, Moffitt of the second part and the Company of the third part. I think it is true to say that the format of the SPA was typical of the format usually adopted for a share purchase agreement, containing the usual type of warranties and indemnities which one would expect in circumstances where a trading company was being acquired. The SPA discloses that the first defendant (Group) owned seventy five per cent of the issued share capital of the Company and the second defendant (Mr. Siggins) owned the remaining twenty five per cent. The SPA, in defining the expression "warrantor", provided that the defendants should be liable as warrantors on a several basis in the same proportions.

1.5 In the lead up to the execution of the SPA, McKeever Taylor investigated the Company's title to No. 25. By letter dated 12th July, 2005 the documentary evidence of title in relation to No. 25 was requested by them and also planning documents, to include the relevant architect's opinions on compliance with planning permissions and building regulations and a copy of "any relevant Fire Safety Certificates". On the following day, 13th July, 2005, Murphy furnished to McKeever Taylor copies of the Lease and of a planning permission dating from 1989 and an architect's certificate also dating from 1989. The letter contained the following statement:

> "No further or other evidence will be furnished and [Mr. Siggins] will warrant only that the Company holds the property in accordance with these documents and there will be no absolute warranties as to good and marketable title, compliance with statutory and regulatory requirements, etc".

This led to queries in a letter of 14th July, 2005 from McKeever Taylor, which were responded to on 15th July, 2005 by Murphy. Two of the matters raised, which are relevant to the issues in these proceedings, were raised and responded to in the following terms:

> (a) There was a query whether the property (No. 25) had been subject to any "development", other than the development to which the 1989 planning permission related, and, if so, the relevant planning permission, commencement notice and architect's opinion on compliance were sought. While the response was a bit unclear, I assume that the message it was intended to convey was that there was no other planning permission, which was not correct.
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> (b) There was a query whether or not any works had been carried out which "require a Fire Safety Certificate". The garbled, and as was acknowledged by the defendants' advisers long after the transaction was completed, the incorrect response was:
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> > "There was some question that a Fire Safety Certificate may be required for Numbers 24 and 25 comprised a single outlet but this is not now the case".

Murphy pointed out that, while their client had agreed to deal with the matter by way of "Share Sale", this was expressly "on the basis that there would be no warranties or indemnities given by our client personally".

1.6 Subsequently, on 4th August, 2005, McKeever Taylor submitted requisitions on title in the Law Society standard form (2001 Edition). The replies furnished by Murphy were dated 8th August, 2005, which was the date on which the parties met for completion

of the SPA. Standard requisitions were raised in relation to the Building Control Act 1990 (the Act of 1990) and the regulations made thereunder. In response thereto Murphy stated:

> "See Disclosure Letter- no warranties or representations".

The responses to the standard requisitions in relation to planning matters were, it is not unfair to say, uninformative, and in one respect unintelligible. However, what was represented by Murphy in relation to both the planning and building regulation status of No. 25 was overtaken by events at the meeting on 8th August, 2005 at which the SPA transaction was completed.

1.7 The warranties contained in the SPA, which, apparently, was drafted by McKeever Taylor, were set out in Schedule III thereto. For instance, in Clause 24 there was a general warranty in relation to compliance with the Planning Acts and in Clause 29 there was a general warranty in relation to compliance with statutory obligations. The so called Disclosure Letter, which was also apparently originally drafted by McKeever Taylor and furnished in draft form to Murphy with the letter of 12th July, 2005 and referred to in the replies to the requisition on title in relation to the Act of 1990 quoted above, given by both defendants, as vendors, in favour of Moffitt, as purchaser, and executed at the closing of the transaction by reference to the terms of the SPA, was also dated gth August, 2005 and was part of the transaction. It dealt with a wide range of matters. Its significance is apparent from the first lines of Schedule III to the effect that the representations, warranties and undertakings set out in the Schedule -

> "are given subject to the matters disclosed in the Disclosure Letter."

The expression "Disclosure Letter" was defined in the definition clause in the SPA (Clause 1.1) as meaning the letter of even date "disclosing items specifically referred to in the warranties".

1.8 As regards the issues the Court has to determine, the Disclosure Letter, under the heading "Special Disclosures", dealt specifically with, *inter alia*, the warranties contained in Clause 24.1 and Clause 29.1 of Schedule III. In relation to Clause 24.1 it stated:

> "The Vendor makes no warranties or representations regarding compliance with statutory or regulatory requirements and the Purchaser is referred to the planning documentation furnished *save that the vendor warrants compliance with planning permission and the Regulations under the Building Control Act 1990 including fire safety certificate (if applicable) relating to the works carried out on foot of permission references 1362/02 and 3478102".*

The words in italics were added in manuscript at the meeting held on 8th August, 2005 at which the transaction was completed. In relation to Clause 29.1 it stated:

> "The Vendor makes no warranties or representations regarding compliance with statutory or regulatory requirements insofar as concerns 25 Grafton Street Dublin. *The Vendor warrants to furnish the Landlord's consent to the alterations to 25 Grafton Street Dublin."*

The words in italics were also added in manuscript at the meeting on 8th August, 2005.

1.9 As will be outlined later, the plaintiffs, in their statement of claim, have invoked other warranties contained in Schedule III. However, I consider that the very specific alleged defaults which are the basis of the plaintiffs' claim against the defendants, that is to say, failure to procure a certificate of compliance with planning and building regulation requirements, including fire safety certificate requirements, in relation to No. 25 come within the parameters of Clause 24 and Clause 29 of Schedule III, and the defendants' contractual liability falls to be determined in accordance with those provisions, as varied by the Disclosure Letter. Of the other clauses in Schedule III invoked by the plaintiffs, only Clause 27, which was headed "Condition & Repair of the Property", could conceivably be of any relevance and it seems to me that even that clause could only be of peripheral relevance. The provision in the Disclosure Letter relative to Clause 27 effectively negatived it in providing-

> "The purchaser has inspected the property and is on notice of all matters resulting therefrom ...."

1.10 The limited warranties given by the defendants in the Disclosure Letter, which varied Clauses 24.1 and 29.1 of the SPA, were augmented on completion of the transaction when Murphy gave an undertaking dated 8th August, 2005 (the Undertaking) to McKeever Taylor for the benefit of Moffitt and the Company, which was in manuscript and part of which was in the following terms:

> "We undertake to place €50,000 on joint deposit with you to be held pending the furnishing of Architect's Certificate of Compliance (as agreed)."

The remainder of the Undertaking related to properties in Cork and Galway and is not relevant to the issues in these proceedings.

1.11 The manuscript amendments made to the paragraphs of the Disclosure Letter quoted above, as reflected by the words in italics, and the procurement of the Undertaking given by Murphy were obviously provoked by a planning search which McKeever Taylor had obtained on 8th August, 2005 in connection with the completion of the SPA. The search disclosed a number of post 1989 planning permissions, including two planning permissions which had been granted in 2002 and 2003 on foot of two applications made in 2002. The earlier of the two, which was dated 16th August, 2002 (application No. 1362/02), granted permission for the formation of openings in the party wall between the ground floor retail units at No. 25 and No. 24 Grafton Street. More or less contemporaneously with the grant of that planning permission Dublin City Council issued a fire safety certificate dated 16th September, 2002 under the Act of 1990 in relation to the proposed unification of No. 24 and No.25 Grafton Street. The later planning permission, which was dated 16th January, 2003 (application No. 3478/02), granted permission for a development consisting of the replacement of the shop fronts to the ground floor retail units at No. 25 and No. 24 Grafton Street with a single shop front.

1.12 The circumstances in which those planning permissions were sought and obtained by the Company were that at that time the Company acquired, under a separate lease from the lessors in the Lease, a leasehold interest in the ground floor and basement of No. 24 Grafton Street, which immediately adjoined No. 25. The Company then decided to make openings between the two properties with a view to having a retail unit at ground floor level which straddled No. 24 and No. 25. This was done. However, from Autumn 2004, the Company, acting through Mr. Siggins, was contemplating that No. 24 would revert to a single independent lock-up unit. Eventually, in early 2005, the Company agreed to sell off the leasehold interest in No. 24 to Meteor Mobile Communications Limited (Meteor) and, in connection with that sale, the openings between No. 24 and No. 25 were closed up, so that the ground floor and basement of No. 25 reverted to its pre-2002 state. It would appear that when that happened the existing fire safety certificate which had been granted in September 2002 continued to cover No. 24, which Mr. Siggins had been advised was not compromised in any way as regards fire safety. However, it was clear that alternative fire safety arrangements were going to have to be made in respect of

No. 25. It will be necessary to consider what steps were taken to effect those arrangements later.

1.13 At this point in the narrative what is significant is that, when Mr. Siggins endeavoured to get a certificate of compliance to satisfy the Undertaking which had been given for the benefit of Moffitt and the Company on 8th August, 2005, he ran into difficulties and those difficulties in due course gave rise to these proceedings. In order to ascertain what Group and Mr. Siggins, as vendors, had represented and committed to in the SPA, when read in conjunction with the elements of the Disclosure Letter italicized above coupled with the Undertaking, and their knowledge of their capacity to procure compliance with the Undertaking, it is necessary to trace the interaction of the parties, primarily through their respective solicitors, through the correspondence and documents subsequently exchanged between the parties and, most importantly, through the documents discovered by the defendants in these proceedings. It is appropriate to record that it was agreed between the parties that the documents discovered by the defendants be admitted in evidence.

1.14 Before analysing that documentation, in the interests of clarity, I think it is appropriate to record that, as a matter of construction of the three documents which are relevant to the issues in this case and which were executed by and for the parties at the closing of the transaction on 8th August, 2005, namely,

> (i) the SPA,
>
> (ii) the Disclosure Letter, and
>
> (iii) the Undertaking,

on the basis of a plain reading thereof, the only conclusion is that the terms of the SPA, insofar as they are relevant for present purposes, were varied by the provisions outlined in the Disclosure Letter to which they were subject, but were augmented by the Undertaking. On the same basis it is clear that, as regards planning, building control and fire safety issues, the only warranties the defendants gave were those set out in the Disclosure Letter, which have been quoted and italicized at para. 1.8 above coupled with the commitment in the Undertaking to furnish an architect's certificate of compliance "as agreed". It is the scope and content of the certificate of compliance which the defendants committed to which has to be ascertained through the evidence.

1.15 On 11th August, 2005 Mr. Siggins sought what he obviously considered to be the relevant certificates of compliance from the defendants' architects, Duffy Mitchell O'Donoghue (DMO'D), who had acted for the Company in relation to No. 25 before the sale to Moffitt. Mr. Siggins requested DMO'D to furnish "in relation to the work carried out on No. 25, Grafton Street" the following in the terms quoted below:

> "• Architect's Certificate of Compliance with planning permission and regulations under the Building Controls Act (if applicable).This refers to work carried out on foot of planning permission 1362/02 and 3478/02.
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> • 3478/02 refers to shop front. According to my understanding the regulations under the [Act of] 1990 (including Fire Safety Certificate) do not apply to the shop front or to the work under permission reference 3478/02 and the certificate should confirm this.
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> • The certificate should confirm that the blocking up of the Opes was exempted development."

The reference to blocking up of the opes obviously refers to the work done in the Spring of2005 before the sale of No. 24 to Meteor to separate No. 24 from No. 25.

1.16 DMO'D responded on 18th August, 2005 indicating that they would-

> (a) be in a position to issue an opinion on compliance with the Planning Acts, based on the two permissions from 2002 and, as regards the works carried out early in 2005, on the basis of certain advice which was obtained in February 2005 at the time of the carrying out of the works, to which I will return later, but noting that the erection of signage on the façade would be excluded from the opinion,
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> (b) as regards an opinion of compliance with the Act of 1990, they would be in a position to certify compliance with the works carried out about three years previously, but the relevant works had been reversed and they doubted "the relevance of an opinion on the compliance of a historical situation with the relevant regulations", and
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> (c) once the access ladder and fire-rated access hatch, which had been advised by the defendants' fire expert, Donal O'Keeffe, had been installed, Mr. O'Keeffe would be in a position to provide an opinion on compliance of the works with "part B of the Building Regulations".

As I understand it, no issue arises between the parties in these proceedings in relation to the signage on the façade of No. 25. The involvement of Mr. O'Keeffe and the reference to the access ladder and hatch will be explained later.

1.17 Subsequently, by letter dated 5th September, 2005 addressed to Mr. Siggins at Ballybane Industrial Estate, Galway, DMO'D furnished draft "Opinions of Compliance with both the Planning Acts and Building Control Acts", but added a significant caveat in the last paragraph of the covering letter in the following terms:

> "While I am sure that you are aware of the situation, I feel that it should be again noted that there are several outstanding items within No. 25 which are seriously deficient under both H & S and fire safety regulations and these areas are specifically excluded from the documents attached. We have discussed at length the specifics of works required to rectify these matters. Arrangements should be made for these to be carried out as a matter of urgency ...."

Moffitt had taken over the Ballybane premises from the defendants by this time. When the letter arrived at that address, it was opened by Mr. Keith Moffitt, who became aware that DMO'D thought there was a problem in relation to compliance with the fire safety provisions of the building regulations at No. 25.

1.18 How the problem was to be resolved was immediately the subject of correspondence between the defendants' advisers, Murphy and DMO'D. Two months later, on 4th November, 2005 McKeever Taylor, apparently for the first time since the completion of the SPA, wrote to Murphy stating that it had come to their attention that the defendants might not be able to procure the unqualified opinions on compliance which they were obliged to furnish under the Undertaking furnished on closing. They added that, on a more disturbing

note, it appeared that Mr. Siggins had facts within his knowledge that would have made him aware that he would not have been in a position to procure certificates of compliance from his architect. McKeever Taylor gave notice that they would require the sum of €50,000, which was the subject of the Undertaking and was held on joint deposit, to be released and refunded to Moffitt immediately, if the necessary documentation was not provided within seven days.

1.19 With a view to resolving the problem, around this time the works involved in installing the new access hatch and ladder referred to in the letter from DMO'D dated 18th August, 2005 referred to at para. 1.16 above were priced by a firm of quantity surveyors at €14,625 excluding VAT. In a letter of 14th November, 2005 Murphy informed McKeever Taylor that the defendants were willing to undertake the work, at whatever cost it would be, or to offer Moffitt an allowance of the projected contract sum, on the basis that Moffitt would undertake the work. Further, when the works would be completed, the defendants' architects would issue an opinion on compliance. As intimated in their letter of 9th December, 2005 in response, that proposal was not acceptable to McKeever Taylor, on the basis, as they asserted, that they had been assured on 8th August, 2005 that the defendants would be in a position to issue to them -

> "an unqualified architect's certificate of compliance with Planning Permission and Building Regulations together with a fire safety certificate if necessary in relation to any of the acts which appeared on our planning search on closing."

However, it was asserted, that was not the case. They sought the return of the sum of €50,000 on joint deposit immediately. In their reply, Murphy reiterated the offer to install the access hatch and ladder, but McKeever Taylor persisted in seeking return of the monies on joint deposit, contending that they had been misled on the 8th August, 2005, when there had been no mention of any works being required to be carried out to the property. Despite correspondence back and forth between the parties, and a meeting in Galway in February 2006, the same attitude prevailed until these proceedings were initiated by a plenary summons which issued on 26th September, 2006.

1.20 For completeness, I should record that on 14th September, 2005, Brian Bagnall & Associates, the agent of the lessors in the Lease, in that capacity issued a letter consenting to the alterations to No. 25 theretofore carried out, adding that it was a matter for the tenant to comply with any necessary statutory or regulatory requirements.

1.21 It appears on the evidence that the name of Moffitt has been changed to CS Calzature Limited since these proceedings commenced but that no application has been to amend the title of the proceedings.

2. The plaintiffs' case and the defendants' response as pleaded

2.1 When this matter came on for hearing, following a complaint by counsel for the defendants that the defendants were not in a position to deal with the quantification of the loss alleged by the plaintiffs, as asserted by counsel for the plaintiffs in opening the case (that the alleged loss should be assessed on the basis of the cost of relocation), having regard to the state of the pleadings and, in particular, the plaintiffs' responses to the defendants' requests for particulars, the Court ruled on the matter. The parties accepted the ruling that the Court should, in the first instance, determine the issue of liability as between the plaintiffs and the defendants as regards the matters alleged on the plaintiffs' claim. The defendants have a counterclaim against the plaintiffs. However, this judgment is not concerned with the issues on the counterclaim, nor is it concerned with the quantification of damages, if any, due either on the plaintiffs' claim or on the counterclaim.

2.2 In the statement of claim, having pleaded the SPA, it is alleged by the plaintiffs that certain matters were either an express or an implied term of the SPA and that the defendants duly represented and warranted those matters. Those matters are pleaded by reference to Clauses 24, 25, 26, 27, 29, 30 and 32 of Schedule III of the SPA, without any reference to the Disclosure Letter or the Undertaking, neither of which is referred to in the statement of claim, although subsequently when furnishing particulars the plaintiffs' solicitors made it clear that the plaintiffs would be relying on both documents. It is further alleged that the representations and warranties were made by the defendants in order to induce the plaintiffs to enter into the SPA and the plaintiffs, in reliance on those representations, duly entered into the SPA with the defendants. There then follows an allegation that, in breach of the SPA, the defendants failed to ensure that No. 25 is in compliance with the Planning Acts, Building Regulations, and Fire Safety Regulations and Fire Safety Requirements and that the defendants are in breach of contract in failing to comply with the specific provisions of the Clauses of Schedule III referred to. On the basis of the same representations, the plaintiffs also make the following allegations against the defendants:

> (a) that they owed a duty of care in making the representations to the plaintiffs and that they were negligent and in breach of that duty in making them;
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> (b) that at all material times when making the representations they intended, and they knew or ought reasonably to have known, that the plaintiffs would rely on them and would be induced thereby to enter into the SPA;
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> (c) that the defendants have been guilty of negligence in that they knew or ought to have known that the representations were false and untrue in that No. 25 was not in compliance with the provisions of the Planning Acts; and
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> (d) that Mr. Siggins made the representations on behalf of the defendants in the knowledge that the same were false, or reckless as to the truth of the same, and that Mr. Siggins is guilty of fraudulent misrepresentation.

It is pleaded that owing to the negligence, fraudulent misrepresentation and breach of duty on the part of the defendants, the plaintiffs have suffered loss, damage and expense.

2.3 In addition to seeking a decree for specific performance, which is no longer being pursued, the plaintiffs seek damages "for loss, damages and expense suffered by the plaintiffs by reason of the breach of contract and fraudulent misrepresentations or negligence and/or conversion" of the defendants.

2.4 In the defence, each and every allegation made by the plaintiffs in the statement of claim is traversed, although it is stated that "where same recites the express clauses of the written agreement between the said parties said clauses are admitted". As I have already stated, in my view, only Clauses 24.1 and 29.1 are relevant and those clauses have been varied by the Disclosure Letter. It is also alleged that the plaintiffs have failed to mitigate their loss.

2.5 At the end of the defence there is a special plea, which is expressed to be without prejudice to the generality of what has gone before, that at the time of entering into the SPA it was agreed by the parties that €50,000 of the purchase consideration would be held on joint deposit pending the furnishing by the defendants of, *inter alia*, the architect's certificate of compliance. The defendants were advised that further additional works were required to be carried out and the defendants had repeatedly called on the plaintiffs

to permit the defendants to carry out those works but the plaintiffs had failed, refused or otherwise neglected to agree to the defendants carrying out the works. In addition, the defendants had offered to the plaintiffs that they take from the monies lodged on joint account the sums necessary to carry out the works, but the plaintiffs had failed, refused or otherwise neglected to do so. By reason of those matters, it is pleaded that the plaintiffs are estopped from seeking the reliefs they claim.

2.6 In summary, apart from denial of any liability in contract or in tort the defendants rely on two lines of defence: failure on the part of the plaintiffs to mitigate their loss; and estoppel. The defendants' counterclaim is founded on the factual elements of the special plea and the reliefs sought are directed to the sum of €50,000, which I understand is still held on joint deposit by the parties' solicitors.

2.7 Before outlining the case made on behalf of the plaintiffs at the hearing, I consider it appropriate to emphasise again the view I have expressed at para. 1.14 above in relation to the manner in which, *ex facie*, the three contractual documents are to be read together.

3. The case made at the hearing and the legal basis advanced for it

3.1 While there are two legal bases discernible in the statement of claim on which the plaintiffs claim to be entitled to an award of damages against the defendants - for a breach of contract and in tort, either for fraudulent misrepresentation or for negligence - at the hearing of the action the primary emphasis on behalf of the plaintiffs was on the claim based on fraudulent misrepresentation. Counsel for the plaintiffs, in opening the plaintiffs' case, referred the Court to the legal position in relation to liability in law for misrepresentation as outlined in the judgment of Keane J. (as he then was) in *Doolan v. Murray and Ors*. (High Court, unreported, 21st December, 1993) and, in particular, the following passage:

> "As to the liability that arises in law from a misrepresentation, whether innocent, negligent or fraudulent, and whether made by parties to a contract or made in other circumstances, the law in Ireland appears to be as follows. A fraudulent misrepresentation will unquestionably give rise to an action for damages for deceit. An innocent misrepresentation will not in general give rise to any action for damages, although it may afford grounds for rescission of a contract or a defence to an action for specific performance. There are, however, two broad categories of cases in which a person may be entitled to recover damages for an innocent misrepresentation. They are:
>
> > (a) Where a representation is made for the purpose of inducing a person to enter into a contract, and it actually induces him or her to act on it by entering into the contract;
> >
> > (b) Where the representation is made negligently by a person owing a duty of care in relation to the making of such a statement to the person to whom the representation is made."

3.2 Counsel for the plaintiffs also relied on the following statement of the law in the judgment of Denning L.J., as he then was, in *Bentley (Dick) Productions Ltd. v. Harold Smith (Motors) Ltd*. [1965] 1 WLR 623, which was later adopted in the *Doolan* case by Keane J.:

> "Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is *prima facie* ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon and was in fact acted on."

3.3 As I understand the reliance by counsel for the plaintiffs on the law as outlined in the two passages quoted above, it was to support a claim for damages on the basis of either-

> (a) a representation, which was untrue, which was made by Mr. Siggins for the purpose of inducing Moffitt to enter into the SPA and which did actually induce Moffitt to act on it by entering into the SPA; or
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> (b) a fraudulent misrepresentation wilfully made Mr. Siggins, in other words, as counsel put it, "a case of deceit".

3.4 As regards the plaintiffs' claim in tort, for deceit, counsel for the defendants emphasised that there are three components to be proved, referring the Court to a passage in McMahon and Binchy on *The Law of Torts* (3rd Ed.), where the authors explain what knowledge of falsity entails in the following passage at para. 35.10:

> "In *Ennis v. Butterly* [[1997] 1 ILRM 28 at 40], Kelly J. observed that '[t]he essence of the action [for deceit] is dishonesty'. It is essential for the plaintiff to prove that the defendant knew of the falsity of his or her representation, or was reckless as to its truth or falsity. A person who makes an honest mistake or who makes a careless statement will not be liable in deceit although nowadays there may be a liability for negligent misstatement under *Hedley Byrne*. In the leading case of *Derry v. Peek* Lord Herschell put the matter this way:
>
> > "I think the authorities establish the following propositions: First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.'"

Apropos of the reference in that quotation to the decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. [1964] AC 465, at the hearing no submissions were made by either side in relation to the ingredients of the tort of negligent misstatement.

3.5 As the main, although not exclusive, thrust of the plaintiffs' case as advanced at the hearing was the pursuit of a claim based on fraudulent misrepresentation, having regard to what Mr. Siggins knew, as evidenced by the defendants' discovery and Mr. Siggins' testimony, about the planning and building regulation, including fire certificate safety, status of No. 25 as at August 2005 from his dealings with his professional advisers in connection with the separation of No. 25 from No. 24, Grafton Street to enable the proposed sale of No. 24 to Meteor to proceed, it is necessary to consider the course of the dealings which led to the separation of No. 24 and No. 25 in 2005 prior to the negotiations for, and the completion of, the SPA. It is also necessary to elaborate on what transpired after the completion of the SPA beyond the matters outlined at paras. 1.15 *et. seq*. above, in order to make a finding as to what Mr. Siggins knew or ought to have known in relation to the planning, building control and fire safety issues in relation to the separation of No. 25 and No. 24.

4. Planning, building and fire safety issues in relation to the separation of No. 25 and No. 24.

4.1 In September 2004, Mr. Siggins sought advice from his architects, DMO'D, in relation to separating No. 24 from No. 25 and, in particular, the fire safety implications of so doing. The initial advice given by DMO'D at the time was that both planning permission and a fire safety certificate were required and it was pointed out that the building 'on No. 25 is a protected building. Around the same time, the architects sought advice from fire safety consultants who had been retained in connection with the integration of the buildings two years previously, namely, Mr. O'Keeffe, the fire safety expert referred to in DMO'D's letter of 18th August, 2005 the contents of which are outlined at para. 1.16 above, who operated under the name of Fire Cert Consultants. They also sought advice from a firm known as Carrig and described as "Building Fabric Consultants". By letter dated 2nd November, 2004 Mr. O'Keeffe indicated in general terms what would be involved in processing a "formal Fire Safety Certificate Application" and he indicated what his fee would be. Mr. O'Keeffe was given instructions by DMO'D on 7th February, 2005 to proceed with the preparation of the documentation for the application. Carrig, whose remit was to advise on the implications of the blocking up of the existing openings between No. 24 and No. 25, having regard to the protected status of the buildings, gave a report in December 2004. Under the heading of "Impact Assessment" it was stated in that report that, as the openings were modern, the proposed blocking up would not have "any negative impact on the character or the fabric of the protected structures". It was also noted that the ground floor and basement had no original decorative features. Carrig stated the belief that the works would have a positive effect on the structures by returning them to their original form.

4.2 Subsequently, Ms. Auveen Byrne, Planning Consultant, was consulted on behalf of the defendants. Ms Byrne, who testified at the hearing, gave her opinion on 9th February, 2005 as to the necessity for planning permission for the separation of No. 24 and No. 25. Prior to that, Carrig had made a submission to Dublin City Council as to the necessity for planning permission and Ms. Byrne had spoken to the Senior Planner in the Conservation Section of Dublin City Council. As a result, the Senior Planner issued the letter of 10th February, 2005 referred to below.

4.3 In her opinion of 9th February, 2010, in outlining her brief, Ms. Byrne stated that it was proposed to block up the opes which had been made in the party wall pursuant to Planning Permission 1362/02 to recreate two separate shop units with ancillary storage, one in each building, at ground floor and basement levels. She referred to her understanding that the Conservation Officer and the Planning Department of Dublin City Council considered that the works proposed to be an exempt development for the purposes of s. 4(1)(h) and s. 57(1) of the Planning and Development Act 2000 (the Act of 2000). The question she addressed was whether, notwithstanding the exempt status of the works, the sub-division of the former shop to create two shops constituted a development. She concluded that it did not, on the basis of a precedent - a decision of An Bord Pleanála on a reference to it under s. 5 of the Local Government (Planning and Development) Act 1963, where the question posed was whether a change of use of the premises 10112 Main Street, Bray, involving a change from use as a single shop to use as two shops, would involve a material change in the use of the premises. The decision was that such change of use would not constitute a development. She considered that the position in relation to No. 24 and No. 25 was analogous to the Bray precedent, notwithstanding the enactment of new planning legislation and the fact that No. 24 and No. 25 were protected structures, whereas the premises in Bray were not. Ms. Byrne's conclusion was that the proposal would create two planning units where there was then currently one, but no change of use would arise as long as the two units were used as shops, as defined in article 5 of the Planning and Development Regulations 2001. She did point out, however, that any works required to render the sub-divided units compliant with the requirements of building/fire regulations might require planning permission and that any alterations to the shop front arising from the separate user of the units might require planning permission, which matters were emphasised by two Planning Officers for the area to whom she had spoken by telephone and who had concurred in her opinion.

4.4 The letter from Dublin City Council of 10th February, 2005 was addressed to Carrig. It was signed by Niall McDonnell, Senior Planner, Planning- Conservation Section. It was headed: "Query regarding the development status of proposed works to 24 and 25 Grafton Street, Protected Structures". Having referred to the submission of Carrig of 15th December, 2004 and to the phone call with Ms. Byrne, Mr. McDonnell went on to state:

> "I confirm that it is considered that planning permission would not be required for the blocking up of the two openings referred to. Please note that this does not include any other works e.g. particularly works to the shop fronts which would require permission."

4.5 In the letter dated 18th August, 2005 from DMO'D to Mr. Siggins, which is referred to at para. 1.16 above, the basis on which DMO'D indicated that they would be in a position to issue an opinion on compliance of the works carried out early in 2005 to No. 25 with the Planning Acts was by reference to the planning permissions granted in 2002 and 2003 and also the letter of 10th February, 2005 and Ms. Byrne's advice obtained in 2005.

4.6 Mr. O'Keeffe, in the context of the sale of No. 24, in a letter of 18th February 2005, which has been discovered by the defendants, gave confirmation to the addressees, a firm of solicitors, presumably the firm acting for Meteor in connection with the acquisition of No. 24, that the existing fire safety certificate which had issued on 16th September, 2002 still applied with respect to No. 24 and the proposed subdivision works did not alter the provisions thereof for No. 24. As regards No. 25, however, it is clear from a letter dated 21st February, 2005 from Mr. Siggins to Murphy that Mr. O'Keeffe had advised that an alternative fire escape for No. 25 would have to be found, which could be done. It would seem from that letter that it was Mr. O'Keeffe who suggested around that time that an escape hatch, which would take persons from the basement of No. 25 to the front of the shop, should be installed and that a fire safety certificate should be applied for.

4.7 The opes between No. 24 and No. 25 were closed up in the succeeding months; it is not clear when precisely. The question of the escape hatch was taken up by the defendants' architects, DMO'D, with Mr. O'Keeffe. In a fax of 2nd March, 2005 from DMO'D to Mr. O'Keeffe, which was copied to Mr. Siggins, it was noted that Mr. O'Keeffe believed that a fire safety certificate might not be required for No. 25 and that he would be in a position to write an opinion of compliance of the premises with fire engineering standards, subject to certain upgrades in relation to detection and monitoring, on which he was to advise in due course, and to the insertion of the fire hatch. The architects stated that they had obtained information from the supplier of a hatch which satisfied the fire separation requirements. However, they expressed concern in relation to the health and safety implications of the insertion of the hatch. They indicated that they could not instruct the carrying out of the works, meaning, presumably, installing the hatch, until they were satisfied that they were not creating an unacceptable safety risk in relation to staff and users of the building, with consequent liability exposure to their client. Despite several reminders from Mr. Siggins and from the architects over the next three months, apparently there was no response from Mr. O'Keeffe. It is clear that during that period, despite what he had stated in the letter dated 21st February, 2005, Mr. Siggins was unsure as to whether an application for a fire safety certificate required to be made in relation to No. 25 if the escape hatch was installed, as is clear from a letter he wrote on 21st June, 2005 to DMO'D, in which he recorded that Mr. O'Keeffe had told him "a couple of days ago" that once a fire escape had been installed "a fire cert can be issued", but expressed the view that "[m]aybe this is not necessary".

4.8 Some clarity was brought to the matter when, by a letter dated 27th June, 2005, DMO'D informed Mr. Siggins that they had been

advised by Mr. O'Keeffe that a particular type of hatch was required in order to bring No. 25 "into compliance with Part B (Fire Safety) of the building regulations" and that, on the installation of the hatch, Mr. O'Keeffe would "be in a position to certify that the works comply with the relevant regulations to the extent that they apply to existing premises", but without expressly commenting on whether an application for a fire safety certificate would have to be made or not, although I think the reasonable inference to be drawn from the tenor of the letter against the background of the previous correspondence is that it would not. I find support for that conclusion in what was subsequently stated by DMO'D in the letter of 17th October, 2005 to Murphy, the relevant portion of which is quoted at para. 4.10 below. However, in the letter of 27th June, 2005 the architects once again advised that the installation of the hatch would "raise issues in relation to Health & Safety", outlining the problems involved in the operation of the hatch, which the proprietors would be required to actively manage and the requirement that the staff would be comprehensively trained in its operation. It was stressed that due to the risks outlined, the hatch could only be used in the event of fire and not for any other operational purpose.

4.9 Mr. Siggins wrote to Murphy on 28th June, 2005 responding to queries which had been raised by the solicitors in a letter of 22nd June, 2005 in connection with the sale of the Company and No. 25, which was then under negotiation. In that letter Mr. Siggins stated:

> "I have written to the Architect who will be replying officially however, he feels that no planning permission is required as the shop has been reverted to its previous state. Should a fire certificate be required, then a file has been prepared by Duffy Mitchell O'Donoghue to install an escape hatch from the basement to the ground floor. This escape hatch has been specified for a building contractor. I gather that to install the hatch is not expensive."

On the same day, 28th June, 2005, Mr. Siggins wrote to DMO'D seeking an answer to a query raised by Murphy in relation to planning and building control matters and specifically quoting Murphy's query including their statement that they knew that there was "a question mark over whether or not" the Company needed to "provide a fire escape from the basement to the ground floor (inside the front door)" of No. 25. It was pointed out that Murphy had requested that the architects should in particular specify "any planning applications or applications for a Fire Safety Certificate" that applied to No. 25. There is no evidence that that letter was responded to. The foregoing appears to reflect the state of knowledge of Mr. Siggins in relation to the fire safety issues when the correspondence which I have outlined at para. 1.5 above between McKeever Taylor and Murphy commenced in July 2005.

4.10 After the execution of the SPA, the Disclosure Letter and the Undertaking and following the letter of 5th September, 2005 from DMO'D to Mr. Siggins referred to at para. 1.17 above, which Mr. Moffitt fortuitously opened, there was a stream of correspondence between Murphy and DMO'D dealing with the procurement of an opinion on compliance with planning and building regulations requirements, which was necessary to fulfil the defendants' obligations under the Undertaking, which commenced with a letter of 6th September, 2005 from Murphy. What clearly emerged from the correspondence is that DMO'D did not have any reservation in relation to planning and building regulation compliance in connection with the implementation of the 2002 and the 2003 planning permissions. However, the position of DMO'D was that the reversion of No. 24 and No. 25 to two independent retail units in early 2005 had "significant Building Regulation and Health & Safety implications", which required to be resolved immediately (*per* letter of 7th October, 2005 to Murphy). How those issues were to be resolved was addressed in a further letter dated 17th October, 2005 from DMO'D to Murphy. The crucial element remained the installation of a hatch, although DMO'D stated that they had sourced an alternative access hatch more recently, which would be more appropriate than the hatch previously under consideration. They summarised the position as follows in that letter:

> "Donal O'Keeffe of F.E.A.C. (fire engineering consultants) has advised us that the carrying out of the outlined works will bring the premises into compliance with Part B (fire) of the Building Regulations and that they will then be able to issue an opinion on compliance of the premises with the relevant sections of the regulations, facilitating our overall opinion of compliance. Donal has confirmed that there will be no need for any formal application for a Fire Safety Certificate."

Apart from obtaining the estimate, prepared by a firm of quantity surveyors, of the costs of the proposed works (€14,625), the involvement of the architects seems to have been sporadic thereafter until after these proceeding were instituted.

5. Inter partes proposals after the proceedings were instituted

5.1 After RDJ came on record, but before a statement of claim was delivered, on 8th June, 2007 they wrote to McKeever Taylor stating that the defendants had at all times been ready, willing and able to complete the agreement but Moffitt had continued to frustrate their compliance with the Undertaking. With a view to advancing matters, and strictly without prejudice to the defendants' denial of liability, it was stated that the defendants would pay for the required works to be carried out at No. 25, so that a certificate of compliance could be obtained and furnished, with the €50,000 held in joint deposit then being released to the defendants, as agreed. Alternatively, the defendants were agreeable to the costs of the necessary work being taken out of the sum of €50,000 held on joint deposit with the remainder being released to the defendants. There appears to have been no response, or at any rate no open response, to that letter.

5.2 Subsequently, on 21st April, 2008, after the statement of claim and the defence had been delivered, RDJ wrote to McKeever Taylor pointing to the fact that the plaintiffs were effecting significant refurbishment works to No. 25 and stating that, if the plaintiffs were carrying out fire safety works to enable safe access between the basement and the ground floor of No. 25, the offer in the letter of 8th June, 2007 stood. It was suggested that, if such safety works were not contemplated, it would be an opportune time to address the issue of the installation of a fire safety hatch. The response of McKeever Taylor of 23rd April, 2008 was that the plaintiffs were only carrying out cosmetic internal works, not significant refurbishment. The defendants' proposal was rejected by McKeever Taylor on a number of grounds: that the works proposed would require the lessors' consent, as well as a planning application and an application for a fire safety certificate, which had not been factored into the proposal; but, more importantly, that the plaintiffs had been advised that what was being proposed would not in fact "resolve the issues of non-compliance". The response of RDJ on 4th June, 2008 was that it was the defendants' architects' position that the required certificates of compliance could be furnished once the works that were proposed in the letter of 8th June, 2007 were completed. However, McKeever Taylor maintained the position as set out in their letter of 23rd April, 2008.

5.3 There was very little interaction between the parties, other than at procedural level within these proceedings, after the proceedings were initiated. The plaintiffs retained Mr. Brendan McGing, a fire safety consultant, to advise them in relation to the fire safety aspects of No. 25 early in January 2008. The first meeting at which Mr. McGing met the defendants' professional advisers was held at No. 25 on 7th December, 2009. Mr. John Mitchell, architect, of DMO'D, and Mr. O'Keeffe attended the meeting on behalf of the defendants. Mr. McGing was the only person present at the meeting who testified at the hearing. His evidence was that Mr. O'Keeffe put forward a proposal in outline, which would involve the installation of a hatch and that the hatch would be located within the floor construction which separated the ground floor from the basement and would be located towards the front of No. 25. There would also be a "ship ladder" with the hatch to provide for vertical ascent. Mr. McGing's evidence was that he advised Mr. O'Keeffe that, before

he could consider his proposal in any detail, he would require a written report including drawings setting out in detail how his proposal complied with the fire regulations current at the time. However, Mr. McGing never received that material.

5.4 The next serious interaction and proposal was, apparently, prompted by the fact that the proceedings were in the Court list to fix dates to get a date in the Trinity Term 2010 on 18th May, 2010. On that day RDJ wrote to McKeever Taylor stating that they had been just informed by the defendants' fire safety expert, who had been recently engaged, that, "in order to resolve the substantive issue in the plaintiffs' claim", it would be appropriate to apply for a "Regularisation (Fire Safety) Certificate under Section 20(C)(1) of the Building Control (Amendment) Regulations 2009". In order to make an application for such certificate, a survey of No. 25 would have to be carried out and consent to carrying out such survey was sought. An adjournment of the proceedings was also sought. In the event, the Court did not fix the case for hearing during the Trinity Term. The fire safety consultant then recently retained by the defendants was Mr. Jim Kinsella, who testified at the hearing.

5.5 On 2nd June, 2010 a meeting took place at No. 25 and a joint inspection of the premises was carried out by Mr. Kinsella, on behalf of the defendants, and the plaintiffs' advisers, being an architect and Mr. McGing. Mr. McGing described the purpose of the meeting as being to provide access to the premises to the defendants' adviser, Mr. Kinsella, so that he could formulate a proposal. In fact, as the correspondence discloses, the purpose of the inspection was to enable Mr. Kinsella to prepare an application for "a Regularisation Certificate", the application form for which would have to be executed on behalf of the Company as the occupier of No. 25. Subsequently, at the end of June 2010, RDJ furnished to McKeever Taylor a "Form of Application for a Revised Fire Safety Certificate" prepared by Mr. Kinsella, together with a compliance report prepared by him and a set of fire drawings. The response of McKeever Taylor was that an application in the proposed format only addressed fire safety issues, not the other issues which were the subject of the plaintiffs' claim, namely, non-compliance with Building Regulations and the planning legislation. It was suggested that the procedure for obtaining a revised fire safety certificate did not apply to the circumstances which prevailed. Finally, it was contended that the works proposed would not ensure compliance with Part B of the Building Regulations.

5.6 By that stage, the defendants were no longer pursuing Mr. O'Keeffe's original proposal for a safety hatch, coupled with the fire stairs, at the front of the building to provide a means of egress from the basement to the ground floor. Instead, they proposed enclosing the only existing means of access available from the basement of No. 25 to the ground floor, a stairs at the rear of the premises, in fire rated construction, with a fire rated door at the terminus at each level. The position of the plaintiffs, as set out in a letter of 9th July, 2010 from McKeever Taylor, was that the proposal, although potentially making the stairs safer, did not reduce the longest travel distance from the lower to the upper level, i.e. from the front of the basement to the door at ground floor level on Grafton Street, which was then far in excess of the maximum distance permitted under the relevant regulations. It was contended that the only work which would "ensure compliance with Part B of the Building Regulations" was the installation of a protected stairs to the front of the premises "discharging directly out on to Grafton Street". McKeever Taylor invited Mr. Kinsella to consult with the plaintiffs' advisers, Mr. McGing and their architect, Mr. Steven Ward. Any application for a fire safety certificate would, of course, have to be made in the name of the Company, as the occupier of No. 25, it was pointed out. While I have outlined the defendants' issues with Mr. Kinsella's proposal from a fire safety perspective, McKeever Taylor also contended that the proposal would not resolve "the issues in relation to non-compliance with Planning Permission, Building Regulations and Fire Safety".

5.7 On 27th July, 2010 the proceedings were listed for hearing on 20th October, 2010. On 20th October, 2010 the proceedings did not get reached. At 4.15pm in the afternoon, the Court directed that the proceedings should commence on the following day. On 21st October, 2010 there were submissions on behalf of each side, which lasted approximately a half an hour. At the outset, counsel for the plaintiffs suggested, and effectively applied for, an adjournment of the proceedings to enable the defendants to submit a "full blown" application for a fire safety certificate, although it was made clear that there was disagreement between the experts on either side as to whether the application proposed by Mr. Kinsella after the meeting in June 2010 was a "meritorious application" or it was not. While counsel for the defendants took issue with all of the points made by McKeever Taylor in their letter of 9th July, 2010, and, in particular, their contention that an application for a "revised" fire safety certificate was not appropriate, he did accept that, if the application made by the defendants was successful, a major issue in the proceedings would be moot, and he acknowledged that the process for applying to Dublin City Council for such a certificate was a more convenient forum than the High Court in which to have the matter dealt with. However, the defendants were seeking their costs against the plaintiffs. Counsel for the defendants outlined the provisions of the Act of 1990 and the Building Control Act 2007 which he submitted demonstrated that an application for a "revised" fire safety certificate was the appropriate application. Strangely, at the substantive hearing there were no legal submissions whatsoever as to the statutory basis of an appropriate application to ensure compliance with statutory fire safety requirements in relation to No. 25.

5.8 In any event, the outcome on 21st October, 2010 was that the matter was adjourned to the next list to fix dates on the basis that the defendants would make "the appropriate fire safety application", which counsel for the defendants believed to be an application for a "revised" fire safety certificate. Counsel for the plaintiffs informed the Court that the plaintiffs would sign the relevant application, if presented, even if it was an application for a "revised" fire safety certificate. The question of costs was reserved to the trial Judge. The Court directed that counsel for the parties produce a comprehensive note of what transpired on 20th and 21st October, 2010. As it happens, in addition to the agreed note of what transpired on 20th October, 2010, there is a also transcript of the proceedings before the Court on 21st October, 2010. Unfortunately, the adjournment did not produce any practical outcome.

5.9 On 29th October, 2010, RDJ wrote to McKeever Taylor referring to the fact that the defendants' counsel had informed the Court on 21st October, 2010 that "parameters would have to be agreed in respect of the application" and some modification might be required before the application could be submitted to the Fire Officer. In fact what counsel had informed the Court, as appears on the transcript, was that there might be some parameters to be agreed in respect of the application and there might be some slight modification. In any event, in the letter of 29th October, 2010, RDJ stated that their fire safety expert had advised that certain steps required to be taken immediately "to remove certain serious fire risks" before the application could be made. Those steps, and the position adopted by McKeever Taylor in relation thereto in their letter of 12th November, 2010 in response, which were harbingers of the absence of constructive engagement on each side which ensued, were the following:

> (1) It was stated that the "tea-room/canteen/cloakroom that had been created since August 2005 must be removed and the area returned to storage". The response was that those facilities were in situ in their then current location when Moffitt purchased the Company, stating that it had been agreed that an application would be made on the basis of the premises as they existed on 8th August, 2005. The photographs of the basement of No. 25 put in evidence indicate that the reference to "tea-room/canteen" grossly misrepresented what is on the ground, namely, a wooden table and some wooden shelves to accommodate some electrical appliances, crockery and such like.
>
> (2) The combustible material stored on the egress/access to the staff toilet would have to be removed. The defendants' response was that it had been done.

(3) The combustible material (to include boxes and other such material) in the rear store under Grafton Street and over the escape stairs should be removed. The response was that the plaintiffs' fire safety expert, Mr. McGing, had confirmed that the area was designated as a store under the fire safety certificate issued in 2002 and was to be separated from the main storage area with a sixty minute fire rated wall construction and a FD30S fire rated door set. It was queried why the prevailing position could not remain. Further, it was stated that the area remained the same as it had been on 8th August, 2005.

(4) The "middle isle storage area" (presumably, intending to refer to the "middle aisle storage area") required to be removed as it was a significant hazard and blocked vision to the escape stairs, as well as blocking the emergency light and increasing travel distance within the basement. It was submitted that the area had been maintained free of any racking of stock by the defendants. The plaintiffs' response was that, when they took over in August 2005, shoe boxes and other merchandise were stacked on top of one and other along the area of the floor where the central shelving was installed and the construction of the shelving unit ensured that the merchandise could be stored safely. The increase in the travel distance was disputed by the plaintiffs' expert but it was stated that he was of the view that the most appropriate solution would be to retain the central shelving, but to limit the height to which merchandise could be stacked.

5.10 RDJ also sought sight of various documentation in their letter of 29th October, 2010 and further access to No. 25. Those queries were dealt with and it was stated that the plaintiffs were prepared to co-operate in relation to the application, but it was suggested that it would be more appropriate for Mr. Kinsella to consult directly with Mr. McGing. Thereafter it would appear that Mr. Kinsella and Mr. McGing were in direct communication. However, the parties remained in dispute and ultimately, by letter dated 9th December, 2010, RDJ informed McKeever Taylor that they considered that there was little point in Mr. Kinsella engaging further with Mr. McGing or their firm engaging with McKeever Taylor and intimated that they would be seeking an early hearing of the matter. The plaintiffs were accused of being obstructive.

5.11 Two applications for fire safety certificates were submitted by Mr. McGing on behalf of the plaintiffs to Dublin Fire Brigade after the proceedings were given a hearing date but before they came on for hearing. The applications were lodged without reference to the defendants, their solicitors or their other professional advisers. Neither application had been adjudicated on when the hearing of the liability issue commenced.

5.12 The first was submitted at the end of January 2011. It was Mr. McGing's own proposal. It provided for the installation of a new staircase from the front of the basement to the front of the ground floor of No. 25, which would be enclosed at both levels within fire rated construction and which would emerge at the ground floor less than three metres from the front elevation of No. 25, that is to say, the door of No. 25 on Grafton Street. Mr. McGing's position was that implementation of this proposal would be the solution which would satisfy the relevant requirements of the applicable building regulations. In essence, it was the plaintiffs' case, based on Mr. McGing's expertise, that this approach is the only viable solution to the fire safety issue to which the reversal of the integration of No. 24 and No. 25 as one retail unit gave rise. However, the plaintiffs contended that a problem would flow that proposed solution, if it were to be implemented; that it would wreck the commercial viability of No. 25 as a retail unit, because it would result in an area of approximately 5.5 sq. metres in the prime retail location on the ground floor being enclosed and effectively sterilised. In fact, there was consensus on the part of the witnesses on both sides, including Mr. McGing who submitted the application, that such would be the case. Mr. Ian Galvin, who has expertise in the retail business and who was consulted by the plaintiffs about ten days before the hearing, was called as a witness by the plaintiffs and he expressed a similar view.

5.13 The second application was submitted at the beginning of February 2011, and, while it was submitted by Mr. McGing on behalf of the Company, it was a replica of the draft application prepared by Mr. Kinsella and furnished to McKeever Taylor at the end of June 2010 which, as described by Mr. McGing, is essentially the enclosure of the rear staircase in its existing position in fire rated construction.

6. The issues having regard to the evidence

6.1 The only witnesses of fact who gave evidence in relation to the transaction and the dealings between the parties were Mr. Keith Moffitt, on behalf of the plaintiffs, and Mr. Siggins, on behalf of the defendants.

6.2 Apart from Mr. Galvin, the expert witnesses who were called can be divided into two categories. First, there were the experts who primarily addressed planning matters, whether historical or arising from the implications of the reversion of No. 25 and No. 24 to two separate retail units in early 2005, or the implications of the physical changes to No. 25 necessitated by the separation of No. 24 and No. 25, in particular, the physical alterations necessary for No. 25 as a separate retail unit to be fire safety compliant, having regard to the fact that No. 25 is a protected structure. Mr. Ward gave evidence on behalf of the plaintiffs and Ms. Byrne gave evidence on behalf of the defendants. Secondly, there were the experts whose speciality is fire safety and who addressed the fire safety requirements consequent on the separation of No. 25 from No. 24 early in 2005. In this category, Mr. McGing testified on behalf of the plaintiffs and Mr. Kinsella and Mr. John McCarthy testified on behalf of the defendants. Mr. McCarthy was retained by the defendants approximately a fortnight before the hearing.

6.3 Before considering the evidence of the experts, it is necessary to identify -

(a) what precisely the defendants' contractual commitment to Moffitt in relation to furnishing an architect's certificate of compliance was as a result of the execution of the SPA, as varied by the Disclosure Letter and coupled with the Undertaking, as a prelude to considering whether the defendants are in breach of that contractual obligation, and

(b) what representations were implicit in the defendants' contractual obligations and what, if any, other representations were made by the defendants, as vendors, to Moffitt, as purchaser, as to the planning, building regulation and fire safety compliance in relation to No. 25 and whether such representations were made fraudulently or negligently, so as to give rise to liability on the part of the defendants in tort.

7. The defendants' obligation in contract to furnish architect's certificate of compliance

7.1 Having carefully considered all of the relevant documents put before the Court in the context of the evidence adduced at the hearing, I have come to the conclusion that the only contractual obligation undertaken by the defendants in connection with the SPA in relation to planning, building regulation and fire safety matters concerning No. 25 arises from representations made and the commitments given in the Disclosure Letter coupled with the Undertaking. I am satisfied that the defendants gave no warranties and assumed no contractual liability whatsoever in the course of the negotiations leading up to the execution of the SPA. At the risk of

unnecessary repetition, I reiterate that, of the warranties contained in Schedule III of the SPA, only clauses 24 and 29 would have affected the planning, building regulation and fire safety status of No. 25 on 8th August, 2005, if their application had not been varied by the Disclosure Letter. I consider that the other clauses (Clauses 25, 26, 27, 30 and 32) of Schedule III referred to in the statement of claim are of no relevance to those matters, subject however to what is stated in para. 1.9 in relation to Clause 27. Moreover, I think it is reasonable to infer that at the closing of the transaction on 8th August, 2005 that was the view of the lawyers on both sides, because, in imposing obligations on the defendants in relation to planning and like matters, the Disclosure Letter only dealt with clauses 24 and 29. In short, the only warranties given in relation to the matters in issue are the warranties set out in italics in the variation of clause 24.1, which I have quoted earlier, read in conjunction with the Undertaking, the relevant part of which I have also quoted earlier.

7.2 The principal task for the Court in construing the SPA, as varied by the Disclosure Letter but coupled with the Undertaking, in the light of the evidence is to determine what was intended by the parties and, in particular, what had been agreed by them as to the scope of the architect's certificate of compliance. Neither the testimony of Mr. Moffitt nor the testimony of Mr. Siggins is of much assistance in that regard, and that is understandable. The issues being addressed were very technical issues, which I think it is reasonable to infer both sides left to their legal advisers and other professional advisers. Apart from that, the closing of the transaction by the execution of the SPA and the other documents, which took place in Murphy's offices in Galway, was a very long and arduous event. Mr. Siggins' testimony was that it started on the morning of 8th August, 2008 and finished at around 2am the following morning. It is interesting to note that, in referring to the range of topics which had to be addressed, both Mr. Siggins and Mr. Moffitt referred to credit notes and gift vouchers and such like, which I believe highlights their area of interest. As regards Mr. Moffitt's recollection of what transpired on the planning and building regulation issue, which I believe is broadly speaking accurate, he remembered that an issue arose in relation to planning documents, which had not been produced, and he remembered Mr. Siggins giving an assurance that it was "purely an oversight", that everything was "above board", that there was "nothing untoward" and the plaintiffs would get the documents, although he did not explain what documentation was involved. Mr. Siggins' testimony was that he understood that a certificate of compliance had to be furnished and he believed he could furnish it and that is why he signed the documents he signed, although he made it clear that he relied on his solicitor to allow him sign the documents.

7.3 I have come to the conclusion that the letter of 11th August, 2005 from Mr. Siggins to DMO'D, which was written just three days after the completion of the SPA transaction, is the most reliable indication of what Mr. Siggins and his solicitors understood Mr. Siggins had signed up to on 8th August, 2005. Before dispatching that letter, Mr. Siggins faxed a draft to Murphy. Certain amendments appear on the draft. I think it is reasonable to infer that the amendments were made in Murphy's office. As to the contents of the architects' certificate of compliance which the defendants were committed to furnish, I think the letter demonstrates Mr. Siggins' understanding as to what "as agreed" in the Undertaking entailed; that it was intended that there would be two elements to it. The first was certification of compliance with the planning permissions obtained and the building regulations in relation to the implementation of the works the subject of the 2002 planning permission and the 2003 planning permission, so far as applicable. The other element was dealing with the planning and regulatory requirements in connection with the reversal in 2005 of the works carried out in 2002, which, as regards planning permission was understood to be an exempt development. Although the letter does not spell this out, I think it is reasonable to conclude that the defendants were also committed to furnishing evidence of compliance with the requirements of the building regulations, including fire safety obligations, arising from the blocking up of the opes which had taken place shortly before the sale to Moffitt was agreed, for which the Company, as occupier of No. 25, was responsible. Subsequent events support that conclusion.

8. Representations giving rise to liability in tort

8.1 By way of general observation, what emerges from the evidence given by Mr. Siggins, as reflected in his dealings with his professional advisers, is that he is a man who is fastidious about ensuring that, in the course of the conduct of his business affairs, the law is complied with. I have no doubt, on the basis of the evidence, that he is an honest man, and that he acted honestly in his dealings with Moffitt and its advisers. I have dealt comprehensively with the communications which illustrate his state of mind prior to the closing of the transaction on the 8th August, 2005, with a view to demonstrating that, in committing to furnishing an architects' certificate of compliance with the building regulations in relation to No. 25 consequent on the closing of the opes, he did not commit the defendants to doing something which he knew could not be done nor in relation to which he had not taken the necessary steps to ascertain whether the defendants could or could not meet the obligations they were assuming. On the evidence I am satisfied that Mr. Siggins was not acting dishonestly or recklessly in committing to procure the architect's certificate of compliance. Moreover, immediately following 8th August, 2005, Mr. Siggins set about procuring the certificate which the defendants had committed to furnishing, from which it is reasonable to infer that he honestly believed that he could deliver on the commitment which had been given in the Undertaking. Having regard to the foregoing, I find that the plaintiffs have not proved, on the balance of probabilities, that, when Mr. Siggins represented that the defendants would furnish the certificate of compliance, he knew that the representation was false or that he was reckless as to its truth or falsity.

8.2 Looking at what transpired in greater depth, it is true that Mr. Siggins had been advised before 8th August, 2005 and he knew that work would be necessary to No. 25 to render it fire safety compliant. There was genuine confusion, however, as to whether an application for a fire safety certificate was necessary. What the vendors' side knew about the necessity for those works was not disclosed at the meeting on 8th August, 2005. However, in my view, it is fair to attribute that to an accidental omission, rather than to a deliberate policy to mislead, as was subsequently alleged on behalf of the plaintiffs. Subsequent events, and in particular the actions Mr. Siggins took on 11th August, 2005 and subsequently to ensure that the Undertaking would be complied with, bear this out.

8.3 Similarly, in my view, the course of events both before and after 8th August, 2005 demonstrates that the commitment given by the defendants via Mr. Siggins on 8th August, 2005 was not given for the purpose of inducing Moffitt to enter into the SPA. The procurement of an architects' certificate of compliance of the type envisaged was only one element of a very complex transaction. The solicitors for Moffitt were prudent to pursue it at the closing. However, the commitment expressed in the Undertaking, the scope of which I have outlined in para. 7.3 above, in my view, was not the factor which induced Moffitt to execute the SPA. The reality of the situation, as the evidence discloses, is that it was Moffitt which was eager to acquire the Carl Scarpa business and brand and it had been in pursuit of it for a number of years. I consider that the commitment which was given in the Undertaking on behalf of the defendants and in favour of the plaintiffs is an express term of the contract, which was embodied in the SPA, as varied by the Disclosure Letter coupled with the Undertaking, the scope of which has been outlined, and no more.

8.4 Having regard to the foregoing analysis, I consider that, insofar as the defendants have not honoured the commitment given in the Undertaking, they are in breach of an express term in the contract between the defendants, as vendors, and Moffitt, as purchaser. I am satisfied that they have no liability in tort for deceit and, although as I have already indicated, in reality this aspect of the case as pleaded was not explored, they have no liability in tort for negligent misstatement. It remains to consider whether, on the basis of the contractual obligations assumed by the defendants, they are in breach of contract as regards establishing compliance with planning permission or establishing compliance with the Act of 1990, including fire safety requirements, having regard to the

state of No. 25 when the SPA transaction was completed on 8th August, 2005. I consider it appropriate to address compliance with the building regulations, including fire safety, requirements, separately from compliance with the planning requirements.

9. Compliance with planning requirements- breach of contract?
9.1 As I have recorded, as early as 18th August, 2005, DMO'D confirmed, that they were in a position to furnish an opinion on compliance with the Planning Acts, not only in relation to the works carried out on foot of the planning permissions granted in 2002 and 2003, but also in relation to the works carried out in 2005. Indeed, I consider they were wholly justified in implicitly questioning the necessity of certification of compliance with the building regulations in relation to the works carried out pursuant to the 2002 and the 2003 planning permissions, given that the relevant works had been reversed, although, in any event, they were in a position to certify compliance. However, Mr. Ward, in his evidence, did not take such a pragmatic view in relation to the historical situation.

9.2 For instance, by reference to planning permission 1362/02, Mr. Ward raised questions about compliance with conditions 2 and 3 thereof. For example, condition 3 required that, prior to commencement of the development, a report containing historical information pertaining to the protected structures and a detailed survey of all existing fabric and its condition should be carried out and submitted to Dublin City Council. Further, that condition required that the historical report, as well as the survey drawings and photographic survey, should be lodged for archive purposes with the Irish Architectural Archive. Mr. Ward testified that there was no evidence of such a report on the planning file in the offices of Dublin City Council, which, of course, does not mean that none was submitted. It was DMO'D (then Duffy Mitchell) which had acted for the Company in applying for and obtaining that planning permission. As they were prepared to furnish a certificate of compliance, which would have fulfilled the defendants' contractual obligation, one must question the motivation of the plaintiffs in seeking to look behind it.

9.3 It is true that the position in relation to the closing of the opes in 2005 was not so clear cut. Mr. Ward was not prepared to accept the letter of 10th February, 2005 from Dublin City Council, in conjunction with Ms. Byrne's opinion, as establishing that the works carried out in 2005 constituted an exempt development. His position was that, in the case of No. 25, as a protected structure within an architectural conservation area and within an area of special control, even internal works would not be an exempt development and would require planning permission or at least the issue should be clarified by bringing an application under s. 57 of the Act of2000, as amended, or engaging in the planning process in the normal way. In view of what we know of the history and use of the building, while Grafton Street, to use Mr. Ward's words, as far as Dublin City Council is concerned, may well be "the jewel in the crown", I think it is highly unlikely that the ground floor or basement of No. 25 could reveal, again to use Mr. Ward's words, "untold treasures", notwithstanding that a check in the Architectural Archive disclosed that the tiles in the basement area are over one hundred years old. Presumably, the source of that information was information that was archived in compliance with the relevant condition of planning permission 1362/02 discussed in the next preceding paragraph, which should have allayed Mr. Ward's concern as to compliance with conditions 2 and 3 thereof.

9.4 Mr. Ward was also of the view that the precedent relied on by Ms. Byrne (the decision in relation to 10/12 Main Street, Bray, which was a decision of An Bord Pleanála dated 22nd May, 1986) was not a true precedent, because the premises in Bray did not constitute protected structures within an architectural conservation area and within a special planning control area. However, as has been recorded earlier, the reliance by Ms. Byrne on the Bray precedent focused on the issue as to whether there was a material change of use giving rise to a development for which planning permission was required, when No. 24 and No. 25 were changed back from one retail unit to two retail units.

9.5 Finally, there is the question whether planning permission would be necessary if the works envisaged in either of Mr. McGing's applications for a fire safety certificate were to be embarked on. Ms. Byrne, having emphasised that works to protected structures may be an exempt development if they do not interfere with the character of the structure or any essential feature which contributes to that character, expressed the opinion that there would be very little additional interference to the protected structure in implementing Mr. Kinsella's proposal. Further, on the basis of an inspection of the premises she had not seen anything of a sensitive nature therein. In cross-examination she clarified the position and expressed the view that there was good reason to hope that planning permission would not be necessary. She expressed a similar view in relation to Mr. McGing's own proposal.

9.6 Having taken an overview of the evidence as to the nature of the premises and the work involved in separating No. 24 from No. 25, I have come to the conclusion that, as a matter of probability, the works involved in such separation, but excluding internal works necessary to comply with fire safety requirements, constituted an exempt development and that planning permission was not required for the works. That overview is based on the advice and guidance obtained by Mr. Siggins in early 2005 from a range of professional experts, namely, DMO'D, Carrig and Ms. Byrne, the comfort given by the planning authority, Dublin City Council, in the letter of 10th February, 2005 and Ms. Byrne's evidence at the hearing.

9.7 Having regard to the readiness of DMO'D to furnish the certificate of compliance in relation to planning requirements and the fact that I am satisfied that such a certificate would have been properly given, I find that there has been no breach by the defendants of their contractual obligations in relation to planning requirements up to and including 8th August, 2005, save that the certificate of compliance agreed to has not been handed over by the defendants to the plaintiffs. I assume, however, that that omission, which it is reasonable to ascribe to the dispute between the parties in relation to the fire safety status of No. 25 on 8th August, 2005, can be rectified. However, that conclusion could not, and does not, cover prospective works which, on the evidence, will have to be executed to address compliance with the Building Regulations and, in particular, the requirements in relation to fire safety and the procurement of a fire safety certificate. If planning permission is necessary for such works, in order to comply with the planning element of the Undertaking, it will have to be obtained and compliance with the permission in implementing the works will have to be certified by an architect.

10. Compliance with building regulation/fire safety requirements- breach of contract?
10.1 Given that DMO'D indicated in their letter of 18th August, 2005 that they were in a position to certify compliance with the Building Regulations in respect of the works carried out to integrate No. 24 and No. 25 in 2002 and 2003, the core and, in fact, the only real issue which has to be addressed in determining whether the defendants are or could be capable of furnishing an architects' certificate of compliance to the plaintiffs which would fulfil their commitment under the Undertaking is whether they could procure an architects' certificate of compliance with the requirements of Part B (Fire Safety) of the Building Regulations 1997, as amended (the Building Regulations) following the separation of No. 24 and No. 25 in early 2005. As things stand they have not done so and they are not in a position to do so. However, since August 2005 they have sought to address the problem and the question as to whether they are, or could be, capable of fulfilling that commitment can only be answered by identifying what steps were proposed to be taken and what works were proposed to be carried out within No. 25 with a view to achieving compliance.

10.2 The defendants' ultimate proposal to resolve the fire safety problem, which was advanced by the fire safety experts who testified on behalf of the defendants, was not the access hatch and ship ladder solution proposed by Mr. O'Keeffe in 2005 which, as Mr. Kinsella put it, was not "followed through", and which Mr. McGing opined would not have been regulation compliant. Therefore,

that solution need not be considered further. Rather, the ultimate solution was a refined version of Mr. Kinsella's proposal, which was presented to Mr. McGing at the end of June 2010. The suggested refinement emerged in the course of the evidence of Mr. Kinsella and Mr. McCarthy at the hearing, although it had been obliquely signposted in the documentation furnished to Mr. McGing in 2010. However, the defendants' experts in their evidence differed as to the manner of implementation of the refinement. The Kinsella proposal recognised that under the Building Regulations a fire safety certificate was necessary as a consequence of the separation of No. 24 and No. 25 in early 2005 and Mr. Kinsella in his evidence was absolutely clear as to the necessity for an application for such a certificate. So, eventually, both sides were ad idem on that point. A fire safety certificate was not obtained and, consequently, there was undoubtedly a breach of the Building Regulations, which is continuing, and compliance with the Building Regulations cannot be certified until the position is rectified.

10.3 Mr. Kinsella's position was that the application produced by him in June 2010 embodying his proposal was merely a draft, which, indeed, was acknowledged by Mr. McGing. Mr. Kinsella pointed to the fact that the refinement or modification suggested at the hearing had been signposted, albeit vaguely, in it, in that it recorded that Section 1.0.11.2 of Technical Guidance Document B (the TGD) published in 2006 in connection with the Building Regulations provides for a deviation from the recommendations in that document in circumstances where "there are compensating Fire Safety measures proposed including enhanced fire detection and alarm, reduced travel distances, enhanced fire rating of doors, increased compartmentation etc". Mr. Kinsella's evidence was that in the draft application he prepared in June 2010, he had not proposed the appropriate compensating measures, because he had to have a meeting with Mr. McGing to discuss them. Mr. Kinsella testified that, if his application had been made after October 2010, that is to say, before the defendants' solicitors, to use a colloquialism, effectively pulled the plug by their letter of 9th December, 2010, he would have included compensatory measures and he would have produced design documentation to support the measures. It is not necessary to outline in detail the approach to refining his draft proposal or the compensatory measures which were suggested in Mr. Kinsella's evidence, because the reality is that he did not produce an application embodying such measures. However, his professional opinion was that a fire safety certificate would have issued had he submitted an application in the form of his draft but including the compensatory measures discussed, because he would have demonstrated that No. 25 was a safe place to work.

10.4 Mr. McCarthy was of the view that Mr. Kinsella's proposal in its original form, without modification or compensatory measures, would not have been likely to be approved or granted a fire safety certificate. However, he expressed confidence that, if compensatory measures were included, the application would be successfully processed and a fire safety certificate would issue. However, a total absence of convergence of views as to the appropriate compensatory measures emerged during the evidence of Mr. McCarthy and the evidence of Mr. Kinsella. In broad outline, Mr. McCarthy suggested sterilising part of the front of the basement to reduce travel distance from the basement, the provision of fire suppression (for example, a sprinkler installation) or a combination of both, whereas Mr. Kinsella expressed a preference for what he referred to as "an FM 200 gas system".

10.5 Mr. McGing was of a different view to Mr. Kinsella and Mr. McCarthy as to the likelihood of Mr. Kinsella's proposal, even if modified to include compensatory measures of the type discussed, leading to the issue of a fire safety certificate. In his written report dated 8th March, 2011, which was put before the Court, he stated that, in his opinion, Mr. Kinsella's proposal did not comply with Requirement B1 of Part B of the Building Regulations, which states:

> "A building shall be so designed and constructed that there are adequate means of escape in case of fire from the building to a place of safety outside the building capable of being safely and effectively used."

He went on to state that to comply with Part B, in terms of means of escape from the basement accommodation, an escape staircase would be required to be constructed towards the front of the basement accommodation to ensure the maximum permissible travel distance prescribed in Table 6 of BS 5588 Part II, which is referred to for guidance in the TGD, is not exceeded. As I understand his evidence, the application of what is therein prescribed to No. 25 would require that the stairs from the basement, being the only means of escape from the basement, whether enclosed in fire rated construction or not, should discharge onto the ground floor no more than three metres from the front entrance door (final exit). He pointed out that in Mr. Kinsella's proposal the actual travel distance from the door of the stairs enclosure at ground level, which is at the rear of the retail unit, to the final exit (the front door) is approximately 19.1 metres. That, as I understand it, was the kernel of Mr. McGing's objection to Mr. Kinsella's proposal, and the basis on which he was of the view that an application based on it would not result in the issue of a fire safety certificate, although he had other quibbles, some dealing with the historic situation before and after the integration and separation of No. 24 and No. 25. Moreover, he laid particular emphasis on the fact that compensatory measures, which might be deployed, were not identified in the Kinsella proposal.

10.6 Mr. McGing's opinion, expressed in his report, that Mr. Kinsella's proposal did not comply with the Building Regulations was based on the proposal in its unrefined format, which did not set out any of the compensatory measures which Mr. Kinsella and Mr. McCarthy referred to in their evidence, and did not explain how the deployment of all or any of such measures would enable Mr. Kinsella's proposal in relation to enclosing the rear stairs to achieve fire safety certification. The question of compensatory measures arose for the first time at the hearing of the action. In fairness to Mr. McGing, when it was put to him in cross-examination that Mr. Kinsella's proposal would achieve certification, he was justified in responding that a detailed proposal incorporating the compensatory measures would have to be put forward before he could express an opinion on them. This is particularly so, as there was no consensus in the evidence of Mr. Kinsella and Mr. McCarthy as to what measures should be incorporated in Mr. Kinsella's proposal or how such measures would achieve compliance with the Regulations. Mr. McGing did express the opinion that the inclusion of compensatory measures in the Kinsella proposal would not eliminate the additional 16.1 metres travel distance over and above the permitted maximum of 3 metres.

10.7 However, one must question the motivation of Mr. McGing and the persons from whom he took his instructions in submitting each of the two applications he submitted for a fire safety certificate, having regard to the fact that clearly his own proposal was never going to be implemented by the Company and his replication of Mr. Kinsella's proposal was submitted even though he was of the view that could not achieve the objective of obtaining a fire safety certificate. It is not unreasonable to conclude that the motivation was related more to gaining a perceived advantage in these proceedings than to rendering No. 25 as a safe environment for the Company's staff and customers. Accordingly, it is not unreasonable to question the bona fides of the plaintiffs in pursuing that course.

10.8 On the other hand, having regard to what transpired between the parties after 21st October, 2010, when the defendants were afforded an opportunity to apply for "the appropriate fire safety certificate" and to have the problem resolved in what their counsel described as a "more convenient forum", and the plaintiffs agreed to allow the application to be made in the Company's name, but the defendants terminated their engagement with the plaintiffs within approximately six weeks, it is not unreasonable to question whether the defendants *bona fide* intended to take the necessary steps to have the fire safety status of No. 25 rectified, which on the evidence of their own experts required to be done.

10.9 There is no doubt that the defendants are in breach of the SPA, as varied by the Disclosure Letter and augmented by the

Undertaking. On the basis of the evidence adduced on behalf of the defendants it is incontrovertible that the position as at 8th August, 2005, when the defendants agreed to furnish an architect's certificate of compliance, was that -

(a) No. 25, following its separation from No. 24, did not comply with Part B of the Building Regulations,

(b) in order to rectify that infringement, an application for a fire safety certificate required to be made, and

(c) the use of No. 25 then and now in accordance with the law is dependent on certain works being carried out thereto which will enable Dublin City Council to issue a fire safety certificate and ensure compliance with any conditions attached thereto.

10.10 Counsel for the defendants was quite correct in submitting, as he did on 21st October, 2010, that bringing "technical matters of fire safety engineering before the Court to be resolved by the Court ... was not a desirable burden to be placed on the Court if there was an appropriate forum for it in terms of a fire safety certificate application". The failure of the defendants to proceed with the application means that the burden is left with the Court. Having identified the scope of the commitment given by the defendants to the plaintiffs in the Undertaking, there is no difficulty in finding that, as regards the building regulation status of No. 25 as at 8th August, 2005, the defendants have not complied, and are not in a position to comply, with the Undertaking by furnishing an architect's certificate of compliance. The difficult question to determine is what works need to be executed in No. 25 to procure a fire safety certificate. On the evidence, I find it impossible to conclude that, having regard to the passage of time since the TGD was published, the fact that BS 5588 has been replaced in the United Kingdom by BS 9999 would have a significant bearing on the steps needed to be taken to obtain a fire safety certificate, as suggested by the defendants' experts. On the other hand, it is impossible to conclude that the implementation of Mr. McGing's proposal is the only means by which No. 25, which was used as a separate retail unit before 2002/2003 when it was integrated with No. 24, could be granted a fire safety certificate for use as a separate retail unit following the separation of No. 24 from No. 25 in early 2005. At the heart of the Court's burdensome task is the question whether Mr. Kinsella's refined proposal would have resulted in the issue of a fire safety certificate as both Mr. Kinsella and Mr. McCarthy contended. That is a total imponderable, not only because an application was not submitted for a fire safety certificate as the Court was told would be done in October 2010, but, apparently, the application was never prepared.

10.11 Therefore, while I find that there has been a breach of contract on the part of the defendants, on the basis of the evidence it is impossible to form a view as to what must be done to remedy not only the breach of contract, but also the continued infringement by the plaintiffs of the Building Regulations.

10.12 At the end of the evidence, during the very brief closing submissions, counsel for the defendants contended that it had not been agreed by the parties that, in determining liability, the Court would address the issue raised on the defence as to whether the plaintiffs have failed to mitigate their loss. There were no legal submissions in relation to the defendants' principal lines of defence: the failure of the plaintiffs to mitigate their loss; and estoppel. Notwithstanding that, I consider that it is appropriate to make some general comments on the issue of mitigation and the plea of estoppel in the defence, which is premised on two propositions. The first is the defendants' readiness to carry out the additional works which they were advised were required to be carried out in order to be in a position to procure an architect's certificate of compliance in accordance with the Undertaking, but they were stymied by the plaintiffs' failure to agree to the defendants carrying out the works. The second proposition is that the defendants offered to allow the plaintiffs to use the monies on joint deposit to carry out the works, but the plaintiffs failed to take up the offer. Like many aspects of these proceedings, the implications of the existence of the sum of €50,000, which I understand is still held on joint deposit in accordance with the Undertaking, was not explored in the submissions. On the basis of the finding which has been made that the defendants are in breach of contract, unless that breach is rectified, the plaintiffs' remedy lies in damages for breach of contract. Lest there be any misapprehension on this point, the measure of damages to which the plaintiffs are entitled is not in any way limited to the amount of €50,000 which was placed on joint deposit in accordance with the Undertaking. The measure of damages to which the plaintiffs are entitled is for another day, as is the extent, if any, to which the plaintiffs have failed to mitigate their loss or, conversely, by their actions in lodging the two applications for fire safety certificates have attempted to exacerbate the problem and to magnify their losses.

11. Going forward

11.1 While I have found that the defendants are not liable in tort, I am satisfied that they are liable for breach of contract in failing to comply with the Undertaking to furnish an architect's certificate of compliance. However, I have found that No. 25 was planning compliant as of 8th August, 2005 and that DMO'D could, as they offered to do, have furnished an architect's certificate to that effect. In order to narrow the remaining issues in the case, I would suggest that an architect's certificate that No. 25 was in compliance with planning permission as of 8th August, 2005 should be obtained by the defendants and furnished to the plaintiffs, with a view to bringing to an end any further unnecessary debate in relation to historic planning issues.

11.2 As I have found, the breach of contract relates to the failure of the defendants to comply with the commitment to furnish an architect's certificate of compliance with the Building Regulations, including fire safety requirements, in relation to No. 25 which, as the evidence has established, having regard to the state of No. 25 on 8th August, 2005, could not have been done without certain works being carried out to render No. 25 as a separate retail unit compliant with the requirements of the Building Regulations and the appropriate sanction for the necessary works being obtained in the form of a fire safety certificate. In the light of the comments I have made earlier as to the inability of the Court, on the current state of the evidence, to determine the nature and extent of the works which are required to render No. 25 compliant with the Building Regulations and to procure a fire safety certificate, I would suggest that, even at this stage in the proceedings, a commonsense approach would be for the parties to make an application for a fire safety certificate on a basis which is likely to be successful but which involves the least adverse impact on the commercial viability of No. 25. Apart from the commonsense inherent in that approach, which is clearly going to be less costly than spending several more days in the High Court, the legal position on the basis of the finding I have made is that the defendants are liable in damages to the plaintiffs for breach of contract, whereas the plaintiffs have an obligation in law to mitigate their loss.

11.3 When the parties have had an opportunity to consider this judgment, I will re-list the matter for further submissions. At that stage, the issue of amending the title to the proceedings arising from what is outlined in para. 1.12 above can be dealt with.