Neutral Citation: [2013] IEHC 526

THE HIGH COURT

[2012 No. 6741P]

Between:

THE LEOPARDSTOWN CLUB LIMITED

Plaintiff

-and-

TEMPLEVILLE DEVELOPMENTS LIMITED AND PHILIP SMYTH

Defendants

Judgment of Mr. Justice Charleton delivered on the 2nd of September, 2013.

Leopardstown racecourse was founded in 1888, at a time when it was in the countryside near Dublin. Now, it is surrounded by the city, becoming the only urban racecourse in Ireland. It is used for National Hunt racing and flat racing. There are 23 race meetings on the track every year. The most significant of these are the Hennessy Gold Cup meeting and the Christmas racing festival. For the purposes of this litigation, the racecourse is owned and controlled by the plaintiff company (hereinafter "Leopardstown"), though some portions of the land, particularly on the Carrickmines side, are owned directly by Horse Racing Ireland. The campus in which the racecourse is situated also contains a golf course, situated in the middle of the track, a nightclub towards the back of the main stand, a golf shop and a fitness club. This club is central to this litigation. The fitness club is on property leased by the first named defendant company Templeville Developments Limited (hereinafter "Templeville") from Leopardstown. The second named defendant Philip Smyth is the guarantor on the lease and on the agreement which is most central to this judgment. Templeville, despite being a limited liability company and having four directors, is totally controlled by Philip Smyth.

Leopardstown and Templeville are physically the closest of neighbours. The fitness club is branded as Westwood. There are other Westwood clubs in Dublin city. Unlike this situation, those others are situated on their own land. This club features gymnasium, tennis, swimming and other facilities to a very high standard. There is also a facility called Fit Zone and a children's party area. These are all located proximate to the racecourse grandstand. For whatever reason, the parties as neighbours do not get along. As with many such disputes, where people continue to live or do business side by side without severing the relationship by one party moving elsewhere, the dispute has continued over decades: in this instance for 14 years. I do not regard it as essential to rehearse every detail of the bitter disputes between the parties that have marked this time. Litigation in abundance has resulted.

Many sets of proceedings were ongoing in the Autumn 2011, when the parties decided that an attempt to put matters behind them would be a good idea. Hence, mediation was arranged. It was apparently successful. Having ostensibly settled their differences under a mediation painstakingly conducted by Paul Gallagher SC in October 2011, and having set out their mutual rights and obligations in a mediation settlement agreement dated the 26th of that month, the defendants Templeville and Philip Smyth no longer regard themselves as bound by the terms of that contract. In that regard, however, Templeville has had no independent say.

These defendants claim that the mediation settlement agreement has been brought to an end by the conduct of Leopardstown. They assert a breach of agreement so serious as to be a fundamental breach that terminated the rights and obligations of Templeville and Philip Smyth as innocent parties, returning them to a state that no such agreement existed. The defendants also claim that by virtue of misrepresentation, and or because of a mistake central to the mediation process as to the site of a major electricity cable, which was allegedly set up and exploited by Leopardstown, the mediation settlement agreement was void from its inception. The defendants further assert that if the mediation settlement agreement is valid and has not been terminated by the fundamental breach of Leopardstown, they have been grievously wronged under the terms thereof and are counterclaiming for damages. They also seek declarations that rights of way to their premises over and through the racecourse have been breached and claim appropriate declarations through this process. A claim is also made by Templeville and Philip Smyth to ownership through adverse possession of certain land on which three shipping containers are sited. Leopardstown asserts that rent and service charge due under the mediation settlement agreement has not been paid. Leopardstown seeks the termination of the lease under which the defendants hold their premises on the racecourse and argue that the conduct of the defendants has been so wrong that they are unworthy of equitable relief against forfeiture.

Background

About 40 years ago, Squash Ireland apparently leased premises from Leopardstown and organised a facility close to the grandstand. In 1993, Templeville leased that facility and some other land. There was another lease entered into in 1998. At that time, Leopardstown paid money towards the upgrading of the premises, including the installation of a swimming pool. As this is not central to the proceedings, detail is kept to a minimum. In consequence of whatever improvements were effected, the rent increased. It may be that prior to that time Philip Smyth had been involved in organising entertainments of various kinds on the premises of the racecourse. Whatever involvement he had, I am satisfied it was minor. It certainly does not give rise to prescriptive or any other legal rights. A separate agreement regulating access to the club facilities during race days, called a race day licence, was made by Templeville and Leopardstown in the same year as the 1998 lease. It was then anticipated that part of Leopardstown's lands would be compulsorily acquired by Dún Laoghaire-Rathdown County Council for the new M50 motorway. A very large inflatable dome containing seven tennis courts had been erected by Templeville, called Dome 1, and later a similar facility was erected called Dome 2. These are proximate to each other. The domes are held up by pressurised air, a bit like a balloon. Because the structures can blow away in high winds, these domes need heavy concrete foundations; possibly 450mm wide and over 1m deep, but Philip Smyth told the Court that the holding mass of the foundations was the important point. It was apparently agreed under a supplemental licence that should Templeville's holdings under the lease be affected by the new motorway, Leopardstown would provide a suitable site for the relocation of some facilities. A dispute arose as to Templeville's entitlement under the licence and ultimately the matter was referred to arbitration. On the 30th January, 2008 the arbitrator, Paul Gardiner SC, concluded that Templeville was entitled to a demise of a 'new site' of 5.5 acres, apparently in consequence of the motorway. Leopardstown never intended that this would be the effect of the licence. From the wording, however, the arbitrator felt constrained to so hold. This gave rise to the possibility that some land in the centre of the racecourse might have to be passed to the occupation of Templeville. The evidence at this trial of Brian Kavanagh, chief executive officer of Horse Racing Ireland, indicated that this would have been potentially disastrous for racing. Leopardstown

therefore commenced High Court proceedings seeking rectification of the relevant ostensible agreement. On the 29th January, 2010 Edwards J. found in favour of Leopardstown. This decision prompted an appeal by Templeville to the Supreme Court. In terms of litigation, that was far from all that was in dispute at that time. In addition, there were other proceedings between the parties. Briefly, Leopardstown was claiming substantial arrears of rent against Templeville; other proceedings embroiled the local county council in addition to those parties; there was a dispute as to the running of the Hennessy Gold Cup; the service charge was apparently in arrears; there was also a rent review issue in the offing, apparently also relevant to arrears; there was a dispute about signs to advertise the facilities of Templeville; and proceedings were threatened as to how to resolve water charges to the local authority since both Templeville and Leopardstown got their water through one common source. High Court proceedings as to arrears of rent and service charge had been managed through the commercial court process and had been listed for trial for the 14th November, 2011. This then imminent case involved a claim by Leopardstown for arrears of rent of €3.2 million and non-payment of water, service and other charges in the sum of €2 million. In addition, the hearing in front of Edwards J. had lasted for 22 days and the costs apparently amounted to €800,000. In the arrears of rent and other charges claim by Leopardstown, a defence had been entered and a counterclaim was mounted claiming that by reason of certain alleged wrongs by Leopardstown, Templeville were entitled to recover €5.4 million. Lengthy hearings were anticipated by both sides. In September 2011, while the appeal was pending against the judgment of Edwards J. and the imminent trial of the rent and service charge claim and counterclaim was looming, the parties resolved to appoint Paul Gallagher SC as mediator. Formal sessions took place over seven days commencing on the 27th September, 2011.

The purpose of the mediation process was to settle all the disputes between the parties that were then outstanding. At all stages, Philip Smyth alone controlled the Templeville side of the mediation negotiation while Leopardstown were represented by various officers. In the mediation process the subject of ESB cables running through a proposed site of seven new tennis courts proximate to Dome 2 never arose on either side. This cable has now become central to this litigation. There are two cables, one skirting the site and another traversing the site. At the first session, the mediator had identified the main issues on both sides and position papers and replies were exchanged between October 5th and 7th. A map was produced on the 4th October showing the layout of the site. This was done quickly by Ian Roberts, the engineer engaged by Leopardstown, and showed a jagged edge and a map accompanying it showed a major underground ESB cable skirting the site. No map produced during the mediation process showed another cable which traversed the site. Later I will discuss the issue as to whether Templeville or Leopardstown were aware of this cable. As will be seen, Templeville had applied for planning permission to lay out seven new courts in this exact place and this had been granted by the local authority. During racing days, this site was useful to Leopardstown as a car park as were the four outdoor tennis courts that had been laid out and surfaced beside this unfinished site. The racecourse used these too. Templeville put forward the argument that outdoor tennis was not popular and that they should be permitted to erect a further dome, Dome 3, to protect the new seven tennis courts when they were laid out. In the alternative, the plan was that the site could be used for indoor soccer. In doing so Templeville were prepared to cede back to Leopardstown four outdoor tennis courts to be used on a permanent basis as a car park. It would seem that on the 10th October, Leopardstown conceded that the site should be rounded off to its edges, thus removing the jagged boundary. Leopardstown agreed to give up the right to park on the new site of the seven tennis courts on race days and instead were prepared to take back the four outdoor courts as a car park to the benefit of patrons. There was discussion about the new site and the issue arose as to whether Leopardstown would concede the erection of a structure over the new seven tennis courts. Leopardstown were concerned about landlord and tenant rights possibly arising. After this meeting some heads of terms were generated and a further position paper was exchanged by both sides. Another meeting took place on October 18th. At this meeting it was agreed that Templeville could put on a covering over the site of the seven tennis courts; which Templeville contemplated as taking the shape of a dome. What was probably then conceived by both parties was that either an irregular, as opposed to rectangular, shaped dome or two interlocking rectangular domes could be erected. In the later agreement, this is reflected in the fact that Leopardstown agreed to support any planning application for an appropriate structure by Templeville.

In effect, the mediation process was finished by Friday, the 21st October, 2011. An agreement in principle had been reached. Again, no ESB cable was discussed. Engineering representatives on behalf of both sides met on the following Tuesday, the 25th October at the Westwood café. It appears that they did not walk the site. The mediation settlement agreement was signed that day on behalf of Leopardstown by Denis Brosnan. Between Friday the 21st and the following Wednesday, certain small issues had arisen that were supplemental to the agreements that had been guided to a conclusion by the mediator. These issues concerned signage; service charge; lighting in car parks; and an issue of cars using Leopardstown to bypass heavy traffic during rush hour. These small issues were discussed and made the subject of a solicitors' note that was appended to the agreement on Wednesday, the 26th October, 2011 and signed by both solicitors. Philip Smyth had signed the agreement on behalf of Templeville earlier and is the personal guarantor of Templeville's performance of it. The mediation settlement agreement was supplemented by a solicitors' note and by consent of the parties on the 3rd November, 2011 and was lodged as part of the announcement to the High Court that the monetary claim had been settled.

What perhaps has not been appreciated on the part of the defendants in this case is that whatever the rights and wrongs of any situation over the years of the relationship prior to this settlement, whatever litigation was pending and whatever disputes festered or remained to be resolved between these parties, all of these were entirely removed as justiciable controversies through the agreement thus entered into. An unnavigable barrier has been placed in the way of any controversy that the mediation settlement agreement embraced. That barrier is the terms of the settlement document.

The agreement

The mediation settlement agreement sets out the parties' obligations and responsibilities in respect of a number of divisive issues. Under Clause 1.1-2.2 it was agreed that a revised higher rate of rent of €499,310 per year from January 2012 as well as a fixed annual service charge of €45,000.00 would be payable by Templeville from the 1st January, 2012. Clause 4.1-4.7 provided that Leopardstown would develop four named car parking areas with tarmacadam, lighting and lining of spaces and non-exclusive parking rights as set out in the 1998 Lease, Licence and Race Day Licence, as to restriction to Templeville's parking entitlements, were confirmed. There was to be a new site for Templeville; the seven tennis courts site and the area covered by Dome 2. The parties contemplated that the seven tennis courts site would eventually become Dome 3 containing seven new tennis courts or indoor soccer facilities. An area where there were already four outdoor tennis courts was expressly excluded as part of this new site. This was to become a car park and, in return, Leopardstown agreed that it would not seek to exercise parking rights in certain areas. At this stage, the arrears of rent were very substantial. These had been ostensibly set off by the defendants against the many alleged wrongs of Leopardstown which Templeville claimed had caused monetary loss. In relation to arrears, it was agreed under Clause 14.1 that Templeville would pay Leopardstown the sum of €4,090,000.00 in two tranches, the first of which would be €2.5m payable by the 10th November, 2011 followed by a payment of €1.5m on the 10th August, 2012. Agreements were also reached in relation to, as the headings of the agreement state: 'Race Day Parking & Shuttle Bus'; 'Water Connection & Water Storage Tanks'; 'Signage'; and 'Containers'. Fresh disputes in relation to these issues since the execution of the mediation settlement agreement have since arisen.

Leopardstown contends that the agreement represented a fresh start. It seems that for a short time thereafter business relations between the parties were positive, at least on the surface. Raymond Horan, director and company secretary of Leopardstown, was

tasked with overseeing the implementation of the agreement. Day-to-day interactions with Templeville concerning issues on the ground were delegated to Pat Keogh, the newly appointed chief executive officer of Leopardstown, and Nessa Joyce, racing and operations manager. Matthew O'Dwyer was also involved with matters on the ground, particularly lighting and car parking. The evidence on behalf of Leopardstown is that Leopardstown has at all times endeavoured to discharge its obligations under the agreement and remains fully committed to enforcing and abiding by the agreement. Philip Smyth and Templeville assert that almost immediately after the agreement was reached, Leopardstown began breaching the terms of the agreement and that these breaches were so detrimental to their ability to operate their business that they constituted a fundamental breach of the mediation settlement agreement. What was called a notice of termination for fundamental breach was served on Leopardstown by Templeville on the 15th June, 2012. All of these decisions were made by Philip Smyth. Templeville as an independent corporation were never consulted, much less made any decisions, as to any of this.

Correspondence
On the 2nd November 2011, approximately one week after the mediation agreement was reached, Philip Smyth wrote to the newly appointed chief executive of Leopardstown, Pat Keogh and enclosed a cheque for €2.5 million in respect of the first payment agreed under the mediation settlement agreement. Philip Smyth raised the issue of signage at the front gates of the racecourse and expressed his wish that this matter be dealt with as a matter of urgency. In his evidence Pat Keogh said that on the 4th November, 2011 he had a very cordial meeting with Philip Smyth during which he told him that he hoped any issues which arose could be dealt with between the parties without resorting to writing letters. On the 9th November, 2011 Philip Smyth again wrote to Pat Keogh thanking him for his courtesy at that meeting and expressing his optimism for the future. He set out in detail a number of issues relating to Leopardstown's conduct which were of concern to him and which, as he put it, "lets everyone down". It appears that it was around this time that relations between the parties began to rapidly deteriorate. By this stage, Philip Smyth had gone to New York for the opera season at the Metropolitan and had then overwintered in the south of France, returning in early May, 2012. By the time of his return the parties were at loggerheads. I am satisfied, however, that even though Philip Smyth was physically absent that he was directing everything that Templeville contributed to the dispute.

In his letter of the 9th November, 2011, Philip Smyth mentioned that the ladies who sell chocolate and fruit on race days had left rubbish near Dome 2. Barriers used to marshal horses through car park 1 and near Dome 2 had not been fully cleared, he asserted. He complained that during the recent heavy rain "a large amount of water came down from the grandstand's roofs and torpedoed on to the roof of" his facility. He complained that cars parking in front of the grandstand on non-race days had stickers put on them when they parked on double yellow lines. He complained that during a recent race day or days, very few racing enthused people had attended and that the car parks that he was normally entitled to use on non-race days had been underused. Photographs of some horse droppings were enclosed. No abundant amount of manure is involved.

What is extraordinary about this letter is that Philip Smyth had felt the need to write it at all. I am satisfied that it was made perfectly clear by Pat Keogh that if the parties were to resort to writing letters to each other then the spirit of the mediation settlement agreement would be undermined. He was right. Whereas Leopardstown drafted a reply, it was not sent for that express reason. Instead they attempted to reopen ordinary channels of friendly communication. I am satisfied that this effort was calculatedly rebuffed by Philip Smyth and, through his express direction and control, by Templeville.

Very quickly, also, the solicitors on both sides became embroiled as fresh disputes bubbled to the surface. In order to resolve these, it will be necessary to approach each issue on the basis of the degree of importance which a reasonable person would attach to whatever fault attaches to the party responsible. In terms of the correspondence, on the 7th February, 2012 the solicitors for Leopardstown wrote to the solicitors for Templeville complaining that some €156,827 in water rates remained unpaid. A without prejudice meeting was suggested. That meeting did not happen. I am satisfied that it did not happen because Philip Smyth had instructed Templeville not to engage. The 30th March, 2012, dawned with a letter from Leopardstown's solicitors to Templeville's solicitors complaining about an apparent attempt to drill a well on the racecourse with the erection of high fences. Also mentioned were the adhesion of advertising material to the sign of the Leopardstown Road entrance by Templeville; the spillage of sewage near the racecourse; a break in and changing of locks at the water meter service press inside the grandstand; and the lack of progress in the attempts by the engineers for Leopardstown to contact the engineers for Templeville with a view to progress in works under the mediation settlement agreement like the car park and the new site. The answer from Templeville's solicitors of the 3rd April, 2012 contained a bizarre lie, clearly properly based on instructions, in claiming that no well drilling attempt had taken place. On the 19th April, 2012 the Leopardstown solicitors complained about a very serious matter: rent for January and February had been paid by Templeville but at the lower rate that had ceased to apply under the mediation settlement agreement from the beginning of that year; furthermore, no payment in respect of service charge had been made. On the 27th April, 2012, the solicitors for Leopardstown suggested scheduling the works that were necessary to implement what was needed under the agreement. That letter was ignored. The evidence establishes clearly that this was because of the strategy on Templeville's part of ignoring any communication from Leopardstown in favour of constructing a case that they had been badly wronged. The origin of this strategy was Philip Smyth. On the 2nd May, the solicitor for Philip Smyth wrote to the engineer for Templeville in the following terms:

> I gave a Philip [Smyth] a very detailed letter of advice last Thursday, 26 April, as well as a draft letter which I prepared for sending to Kilroys [solicitors]. I suggested he would read these matters carefully and would meet with me early this week, to discuss and agree a strategy going forward. I have heard nothing so far. He seems intent on adopting the position that Leopardstown have now breached the settlement agreement, by interfering with car parking on race days and non-race days. (In fairness, there have been a number of incidents where car parking has been interfered with). So far, my instructions are not to engage, and this seems to be your instructions. I don't think there is much more we can do for the time being - but I do hope this changes. At least, if we could engage, we could make some progress. If there is a change of instructions, I shall let you know.

Philip Smyth should have followed this advice. As an independent corporation, Templeville should have had a chance to change this incorrect strategy. He did not and so Templeville could not either. On the 8th May 2012, a reminder was sent that €126,287 was now owed to Leopardstown. The next day, a letter was sent about the erection of speed ramps that had not been authorised by Leopardstown. On the 23rd May, 2012, the solicitors for Leopardstown sought the attention of the newly appointed solicitors for Templeville, who did act in this litigation, as to the marking out of the site on which Dome 3 was to be situated. This was followed up by a further letter of the 31st May, 2012. Both of these letters were ignored because of the strategy of Templeville that an artificial case against Leopardstown was to be constructed. That day, the solicitors for Templeville wrote a letter in which they complained about the employees of Leopardstown having run a "campaign of disruption of, and antagonism towards, our client's commercial interests". The letter complains of numerous supposedly serious breaches of the mediation settlement agreement including: rubbish; insisting on shutting car parks to Templeville patrons on race days; security barriers not being cleared away after race days; blocking off some areas of one car park during the farmers' market which normally happens on a Friday; cutting off a lawful interchange; stopping exploratory works for putting in water tanks; blocking a car park on the 16th March, 2012; closing of access to Templeville patrons early on the 28th March, 2012, a race day; leaving barriers on the 30th March, 2012; shutting off a car park at 7am on the

13th April, 2012; cutting off access to Templeville patrons to the car parks near their facilities early on the 15th April, 2012, a race day; leaving some rubbish behind afterwards together with barriers and bollards; Leopardstown proposing drawing a smaller site for the new area to be demised to Templeville on the 27th April, 2012; blocking a fire exit on the 3rd May, 2012; and removing a speed ramp on the 9th May, 2012. The letter demands the return of the €2.5 million paid under the mediation settlement agreement.

It is pointless to go through the rebuttal of this letter and the further fulsome correspondence which gushed out of the again-active dispute as the Court has had evidence of all the substantial matters which need to be addressed in this judgment. In addressing what I consider to be of importance, I have not forgotten or failed to have regard to any complaint. Thirteen extra long days of court time have been filled with these complaints and any answer there may be to them. It suffices to say, that only substantial complaints will be addressed; and these as to the essence thereof. It also suffices to note that the correspondence continued. On the 8th June, 2012 the solicitors for Templeville, not the solicitors in this litigation, who at all times acted professionally, claimed that Leopardstown was in fundamental breach of the mediation settlement agreement. This letter describes replying correspondence from Leopardstown as being a "crude, reactionary response". A further letter from these solicitors, dated the 13th June, 2012 reiterates old wrongs and makes new complaints. It ends in this way:

> Your client continues to exhibit extreme bad faith in its dealings with our client. We await your reply to, and explanation for, the matters raised in our letter of 31 May and in this letter. We know that your client has instructed you that it is not reasonable to conclude that it is in fundamental breach of the mediation settlement agreement. It is clear, however, that your client is in fundamental breach of the mediation settlement agreement. We now await our client's instructions on electing to terminate the mediation settlement agreement for that fundamental breach.

That letter was replied to in detail on the 13th June, 2012. Then on the 15th June, 2012 the following declaration was included in a letter from Templeville's solicitors:

> The mediation settlement agreement was founded and constructed upon an understanding of good faith between the parties and your client has exhibited the utmost mala fides in its repeated, continuing and aggravated breaches of that agreement. We will reply in detail to your letter of 13 June, which contains distortions and inaccuracies which we have been instructed to address, and to the reply you have now indicated you will give to our letter of 13 June.
>
> In the meantime our client is cognisant of its obligation to act promptly and decisively in this matter. TAKE NOTICE, therefore, that our client elects to terminate the mediation settlement agreement of the 26 October 2011 with immediate effect because of your client's fundamental breach of it. We shall be writing to you separately seeking remedy that breach.

In this brief chronology, an earlier date is of fundamental importance. Philip Smyth instructed the financial controller for Templeville to pay rent at the old rate with no service charge attached and in consequence Leopardstown received an underpayment that does not accord with the mediation settlement agreement on the 15th March, 2012. While that date is relevant, 19th April is when Leopardstown's solicitors raised the matter. Philip Smyth claimed an entitlement to so act in his evidence before this Court because of what he said were the serious breaches by Leopardstown of the mediation settlement agreement. In consequence of that, it must logically follow, Philip Smyth asserts that the mediation settlement agreement was effectively at an end as to the defendants obligations under it by that date. Thus, while the termination letter of the 15th June, 2012 formally purported to put an end to the mediation settlement agreement, the underpayment in deliberate breach of that agreement of the 15th March, 2012 if it is to be justified, must be underpinned by so grave a breach of the agreement by Leopardstown as to justify Philip Smyth contriving that Templeville would not abide by its terms.

Approach of the Court
The substantial matters in complaint between the parties will now be considered. As in any case, the court retains an entitlement to decide what is necessary for decision and what is trivial, insubstantial or insignificant in the context of the business relationship between the parties. The Court reminds itself in considering these issues and cross-issues that sometimes when people complain about other people they are, in fact, talking about themselves. In that context, having made finding of fact, the Court will go on to consider any legal ruling that may be necessary.

The map
An issue has arisen, which has taken up much time, as to whether Leopardstown during the mediation process were guilty of misrepresentation by attempting to chop off, with the aid of a map, a portion of the site to be given for the seven tennis courts by planting shrubs over some of the approximate area of the ESB cable traversing the site and by cutting off one end of the site with trees. I have carefully listened to the evidence of Philip Smyth in that regard. The map of which he speaks, he claims, has disappeared. I do not accept that. An approximately similar map was produced. There was some discussion about trees and I am satisfied that it occurred on the last Friday of the mediation and that Philip Smyth had another engagement. I do not accept that this was a fraught discussion where there was any attempt by Leopardstown to deceive. In the pleadings of the defendants, the solicitors' note which is appended to the mediation settlement agreement is alleged to have arisen out of this deception at the insistence of Philip Smyth. Whereas two distinguished solicitors gave honest but contradictory evidence, both were agreed that the necessity for an appended solicitors note arose from additional matters that had come into focus in the ordinary way that extra issues may be thought of and which needed attention after the mediation settlement agreement had been signed by one party. Insofar as I have to distinguish between the evidence of two genuine witnesses who are doing their best in accordance with their duty as officers of the court, the preponderance of the circumstances points towards a non-confrontational meeting on the Friday. There is no suggestion in the evidence of deviousness on the part of Leopardstown. I do not regard this issue as being in any way influential on my decision.

The well and the water tanks
A racecourse can use a gigantic amount of water. The course must be sprayed extensively during warm weather to ensure a suitable surface for horses. As a commercial enterprise, Leopardstown must pay the local authority for such water as they take from the municipal system. This amounts to tens of thousands of euros per annum. Since Templeville runs a swimming pool and has extensive showering and washing facilities for those exercising on its premises, it also uses water. Commercial enterprises must pay local authorities for water. It was perhaps not conducive to harmony between the parties that water came into the campus from a single source and was metered at a single location underneath the racecourse grandstand and that in this cupboard the distribution of water to Templeville, and hence their share of the cost, was also recorded. The mediation settlement agreement deals with water connection and water storage tanks at clause 10. The first subclause deals with Leopardstown agreeing to permit a separate supply of water to the premises of Templeville, subject to certain conditions. Clause 10.2 deals with water tanks and provides:

> Leopardstown agrees to permit the construction and installation of two underground water tanks, one for mains water and

> one for rainwater or recycled water, by Templeville on Leopardstown's land in front of Templeville's premises in the location identified and marked out on the map identified and provided by Templeville and attached to this agreement. Ref: appendix A. Leopardstown will allow their use for water storage and access, maintenance and repair as an easement.

This was subject to conditions making the installation at the expense of Templeville; full details of the tanks to be supplied to Leopardstown; the capacity of each tank not to exceed 5500 litres; details as to installation and maintenance to be approved by Leopardstown; access not to be allowed on or before race days; and the land to remain the property of Leopardstown. The location in question is just to the right of the grandstand and almost directly in front of the café premises of Templeville. The area is right beside the race track. It is also proximate to the loading areas at the front of the grandstand. It follows that were a spring to erupt in this area it could spoil the track for racing.

From France in February 2012, an instruction was received from Philip Smyth by Templeville that instead of proceeding with putting in water tanks, a well was to be drilled instead. In his evidence, he justified this instruction on the basis that if a well was successfully drilled that he would go and present the good news to Leopardstown: abundant free water, as he put it, would be to the benefit of everyone. It is also clear that he insisted that his intentions would be concealed by the ostensible purpose of installing water tanks. Apart from his own evidence, this state of affairs is evidenced in an e-mail from Brenda Flood of Templeville to George Farrell which states: "I spoke with Philip [Smyth] he said just go ahead and organise the drill for the well. No need for me [to inform] the racecourse". As with other matters, the unfortunate recipient of this instruction was Brenda Flood. She is the managing director of Templeville and together with Karen Polley and Philip Smyth, one of the three directors of Templeville who gave evidence. Brenda Flood is universally respected on all sides of this dispute and for good reason. She is a highly intelligent and reliably efficient manager who would clearly be an asset to any organisation that employed her. She was put in an impossible position on this issue and on other issues by Philip Smyth. On the 4th March, 2012 "a builder's skip for cleaning up after the drilling" was arranged within Templeville. On the 5th March, 2012, Matthew O'Dwyer, the general manager of Leopardstown, received notification that exploratory works for the installation of the two tanks were to be conducted at the appropriate location on the following Wednesday. He rang the Westwood club and left a message seeking details from the appropriate person. His telephone calls were not returned. This was under instruction from Philip Smyth. Matthew O'Dwyer then emailed the club forbidding works until consultation had taken place under the mediation settlement agreement. His approach was far from unreasonable as evidenced in his e-mail to Templeville of that date:

> Further to your e-mail ... regarding the matter of your proposed exploratory works next Wednesday, I took the liberty to call you to discuss the same. However following two phone calls with a message to return same I have not heard from you. In this event I must inform you that Ian Roberts (representing Leopardstown ...) in his capacity as an engineer is meeting with Toal Ó Muiré (representing [Templeville] next Thursday as March 2012 to discuss the relevant matter of the proposed works in composting carparks construction and water works respectively as arranged by both parties. Therefore I must ask you to desist from carrying out any exploratory works until you receive instructions from Toal Ó Muiré following the said meeting. Also I would be obliged if you would forward details of your proposed works so that I can forward them to Ian Roberts whereby they can be discussed at a meeting next Thursday. I would be obliged if you would call me to discuss the above matter.

At the express instruction of Philip Smyth, this communication was ignored by Templeville. At 08:00 hours on the 14th March, Matthew O'Dwyer was notified that two trucks had arrived to the front of the grandstand close to the area immediately in front of the Westwood restaurant that overlooks the racetrack. He went out and looked at the trucks. In addition the car park had been blocked off by Templeville the previous night in breach of every agreement between the parties. High fencing had been erected. The trucks were enormous. They were clearly drilling trucks and had no equipment for moving earth for the purpose of inserting tanks. The men in the trucks said that they were going to drill a well. While this is hearsay, photographs of the two trucks were produced in evidence. This makes the purpose obvious. Further, some time earlier a dowser with a divining rod had been seen near that location. It is obvious that the equipment brought onto Leopardstown was for the purpose of drilling down to find a supply of well water. It is further obvious that the equipment has nothing to do with installing two relatively small tanks to store mains water and rainwater. This was a serious breach of the mediation settlement agreement.

Had water been found and not controlled, the proximity to the racecourse of the proposed well could have ruined the surface of the gallops. Damian Kirby, maintenance caretaker, had met the men and they also proposed to construct a kind of French drain to take the silt from drilling. Leopardstown had not agreed to the drilling of any well. If Templeville had wanted it, they could have asked for it. Instead the approach was to enter into an agreement which, certainly as to this provision, meant nothing in terms of obligation. At this trial, instead of admitting that the defendants were about drilling a well, Leopardstown was left to prove this matter by evidence and the production of photographs of the equipment and the high fencing installed proximate to the gallops. Philip Smyth in evidence eventually admitted that well drilling was his purpose.

If neighbours behave in an underhand manner they cannot reasonably expect to be treated with anything other than distrust. What is worrying about this episode is that Philip Smyth instructed what he regards as his staff, but who in reality are employed by Templeville, to engage in evasion and obstruction. It is clear that while a well may have been a good idea, the appropriate approach would have been to honestly discuss the plans with Leopardstown and to avoid the kind of machinations that experience shows raises the emotional temperature of even the most sanguine of individuals.

The water meter cabinet
On Monday, the 19th March, Damian Kirby went to open the alarm cabinet underneath the grandstand which contains the water meter. The key did not turn the lock because the cabinet had been broken into and the lock had been changed. The usage of water was, as earlier indicated, of substantial concern to Philip Smyth. I am satisfied that Damian Kirby had spoken to Philip Smyth in July 2011 and told him that he could have access to this cabinet at any time. I cannot believe that the reason that this cabinet was broken into was because Leopardstown had changed the locks. If this had happened, it is clear that there was ample opportunity for Templeville to seek the new key.

The rubbish and horse droppings issue
For generations, Dublin women from particular families have been setting up stalls in Leopardstown from which they sell fruit, chocolates, drinks and sweets. These women have their origin in Moore Street as traders over generations. The women constitute an important tradition linking the people of the less affluent inner-city areas with those who have an interest in racing; sometimes referred to as the sport of kings. Any interaction with these women, experience has universally shown, will be pleasant and any purchase will be good value. Their service adds to the colour and variety of any outing to a race meeting. Naturally, some litter may be left behind but this is probably more due to the patrons then to the stallholders. It is churlish to complain that some litter may be left behind, as it probably has been, on the days following a race meeting. Leopardstown, naturally, have no wish to interfere with this tradition. Instead, when the occasion arises, a polite word has been offered as to the need for special vigilance in controlling any rubbish. This complaint is made in the context of Templeville having a huge rubbish skip proximate to their premises. On occasion, this

is not closed over and rubbish will blow out. While Philip Smyth did not seek in evidence to criticise the traders, the reality is that in correspondence this matter is mentioned more than once. I do not regard it as being of any importance at all. Leopardstown's approach has been unimpeachable.

A racecourse will of course have horses on it and horses will drop the waste from their digestive systems randomly as they walk around. The parade ring at Leopardstown is to the back of the grandstand. Racing personnel and punters congregate around this area in order to get a good view of the horses on which they are spending or are about to spend good money. The idea, apparently, is to see what kind of condition the horses about to race are in and whether they are worth a bet. Some gossip, no doubt, is exchanged together with tips as to form, of varying reliability, part of the currency of this gathering. To get to the parade ring, the horses must leave their stable area in the centre of the racecourse, proceed through the race track, exit the track by the side of Templeville's main premises and proceed through the car park which, for this purpose, has lines of fencing erected in the shape of movable barriers. These are essential so that if a horse panics it will not hurt members of the public. With five or six races on a card, there can be a considerable amount of droppings.

Some of the correspondence in relation to this issue has already been referenced. I am satisfied that Leopardstown make substantial efforts to clear all horse droppings as and when they occur and at the end of race meetings. On less than a handful of occasions, however, some residues of horse droppings have been left in the car park. Complaints were made about this in 14th January, 2007, two occasions in July, 2008 and in 2012 on the 4th February, the 8th June, the 13th October and the 4th November. From the photographs produced in court, on occasion the application of a hose as well as a shovel could well benefit the cleanliness of the area. As parents and children may be accessing the Westwood club belonging to Templeville, it is unfortunate when it happens that dung is walked into the otherwise scrupulously clean premises.

This is all a matter of give and take. As between neighbours who tolerate each other is a matter easily solved. In the context of Templeville's attitude to Leopardstown, the very small number of issues concerning horse dung has been seized upon as a major offence and a deliberate insult. This it is not.

Three containers and the blocking car
To the rear of Dome 1, Templeville have deposited three large shipping containers. No evidence was adduced as to what was in these. Clause 12.1 of the mediation settlement agreement provides:

> Templeville agrees no later than by 30 June 2012 to remove the three containers together with the barbed wire currently located between Dome No 1 and Dome No 2 and will generally tidy up this area to include the portacabin (which may remain in situ) to improve the visual aspect of this entrance.

No effort has been made to remove these substantial containers. During the course of his evidence, Philip Smyth explained why. He claimed adverse possession of the land on which these containers are situated and therefore asserted that he had no obligation to remove them but that if he did he would be entitled to, and intended to, replace them by a building. This startling piece of evidence came as a shock to the Court and, one may suspect, to everyone in the courtroom as well. His justification was that the containers were always there with the consent of Leopardstown. Once he vacated the three containers he would, he said, need the area to erect changing rooms for school children, as 60 or 70 kids might be coming into the club in order to play soccer. Yes, he intended under the mediation settlement agreement to move the containers but the land, he nonetheless asserted, was his!

Later in this judgment the court will deal, in so far as is necessary, with prescriptive rights. Characteristic of these is that no claim to any form of adverse possession can arise where occupation has occurred through force, concealment or permission. The claim made by Philip Smyth is that because Leopardstown gave him permission to site these containers where they now are, that adverse possession of the land thereby arises. This claim is self-contradictory. Nor was any evidence produced as to how long the containers were there. What is worrying about this claim is that it demonstrates that the person who made it as capable of making unsubstantiated demands on the property of another party without any justification. The claim had every appearance of arising simply out of whim while Philip Smyth was in the witness box. There may well be emotional impulses related to the past relationship in this, but with the intervention of the mediation settlement agreement, any past rights or wrongs can no longer form part of this litigation.

The area of the four tennis courts that are outdoors and at the rear of Dome 1, beside Dome 2, is under the mediation settlement agreement to be ceded by Templeville to Leopardstown for car parking purposes. David Harris, the general manager of the Westwood club, gave evidence that he was asked to park a car at the gateway which would give access to this area. Regrettably, his evidence is not reliable. The car has been there since the 14th June, 2012. In addition, despite the fact that under the agreement the tennis courts were to be repainted as car parking, the gateway was shut and locked and additionally secured. When access was asked for at an early stage, reference was made by Templeville to advance tennis bookings. The true reason for this excuse emerged in the evidence of David Harris. The origin of this instruction was Philip Smyth. The Court was asked to believe in the evidence of Alan Leach that the car had been parked there temporarily but "had died." The Court has heard of mechanics and of the Automobile Association and so have these witnesses. They look foolish. The car has now been parked there for over a year. On the 14th June, 2012, David Harris wrote to another Templeville employee:

> We've taken the locks off the tennis courts and moved Alan's car. Please put the locks back on and Alan's car back tonight once the tennis courts are empty. Keys for Alan's car are in the Ops safe and his car is parked in the lower car park.

This is a breach of the mediation settlement agreement. From the point of view of what is tolerable between neighbouring businesses, there seems to be no realisation on the part of Templeville through the direction of Philip Smyth that agreeing to do something means that you are bound to keep your word. Furthermore, the continual instruction to Templeville staff by Philip Smyth to act in breach of their better instincts has undermined the entire credibility of their testimony. Because they have had to justify their conduct, which in reality was not their conduct at all but the fulfilment of his orders, their position as witnesses has been considerably weakened.

Blocking a fire escape
David Harris told the Court of a number of occasions where the fire exits to the side and rear of the Westwood club have been impeded. The dates which he specified in 2012 were the 21st March, the 29th March, the 24th April, the 25th April, the 3rd May, the 14th May and the 15th June. An allegation was also made that a forklift truck was parked blocking a different exit. I am satisfied that Leopardstown do not own a forklift truck. I have carefully examined his testimony on this issue. On at least one occasion, Leopardstown have impeded a fire exit from Templeville's premises.

With every complaint from Templeville, the attitude in the background needs to be kept in mind. Matters were generally over-emphasised in evidence; what could have been sorted out through communication was shunned in favour of storing up a flavour of

bitterness to present to the court. No insight was present as to the effect that their own conduct would have on even the most stoic of neighbours. On the 25th March, 2012, on the express or implicit instructions of Philip Smyth, Brenda Flood e-mailed all the senior managers in Templeville in the following terms:

> I cannot stress this enough. If ANYTHING happens re the Raceboard I want to know. Even if the[y] sneeze. Check around the car parks, Fillies [bar and restaurant], staff car park etc. If the Raceboard have barriers, anything around take a photo and let me know. Important days to remember: 1. Farmers' Market day; 2 Racedays; 3 Any other events. Even if you think it is insignificant I want to know. Each manager is to let their staff know. Ops have departments tell the staff.

Any obstruction of a fire exit is a serious matter. As regards the tendency of those incidents complained of, what seems to have happened is that straw matting, put down in the car park so that the horses would not injure their hooves, came somewhat close to fire exit doors. From the evidence, it would still be possible to push open the door but any obstruction is undesirable in a panic. Templeville could have dealt with this matter by making an immediate complaint but in most instances the attitude taken was that it was better to have a complaint in order to cause trouble and in order to justify, on the instructions of Philip Smyth, not paying the appropriate rent. Furthermore, from inspecting the premises and from the photographs presented in court, matters could have been improved by Templeville more clearly signing the relevant exits as essential for fire escape.

What I am not satisfied of, on this issue, is that anything was done by Leopardstown in a malicious manner. When it comes to matters of fire, extreme caution is needed. That, however, is a matter for both sides. No reasonable person could countenance an attitude of preferring to take a photograph, rather than dealing with such a serious matter. On the 29th March, for instance, a bale of hay or straw matting was put where it should not have been put. The fault there is Leopardstown's; the fault in not following that up in immediate action is that of Templeville. The situation is not capable of exact analysis because of the lack of complaints. Damien Kirby, as maintenance caretaker of Leopardstown, believes that he never blocked an exit. He struck me as being an honest witness. Even still, from time to time there seem to have been some problems.

Barriers
On a number of occasions, barriers were not cleared away immediately after a race meeting but were either left in the vicinity of the car park and blocking some parking spaces or were untidily placed to one side rather than being removed into a store. On the 6th March 2012, and possibly the day before, barriers were left behind after a race meeting. This is one of the rare instances where a complaint was made of spaces being blocked for members using the Westwood club. Nessa Joyce of Leopardstown apologised and was clearly embarrassed by what had happened. On a number of Fridays, spaces in the vicinity of Fillies bar and café were blocked off. The owner of that establishment was expecting a good patronage for lunch. He was supported in that regard by Nessa Joyce. She claimed that this was a new policy which had been supported by Templeville, whereas it was not. This she accepted in evidence. This unfortunate approach by her did not help matters. In other respects, she dealt with complaints readily.

On the 9th March, the throughway beside Fillies that can lead to car park 1 beside Dome 1 was blocked. This happened again on the 30th March. Some degree of fault here must be ascribed to Leopardstown since no one from Fillies can be blamed. Again, with ordinary communication, this matter could have been sorted out.

I am not satisfied, as a probability on the evidence, that serious disruption was caused to patrons of Templeville by these incidents. People are used to coming to car parks and having to look around for a space. There is no right in the lease for Templeville to use any particular route as of right. On the express instructions of Philip Smyth, the reaction was to remove and dump barriers. The response of Templeville was utterly out of proportion. It showed a determination by Philip Smyth to escalate the situation from an early stage so that issues that could be seized on as grievances would always remain as a record about which he could later complain. On the instructions of Philip Smyth, which once again badly compromised the staff of Templeville, barriers and beautifully made wooden benches were damaged. A perhaps extreme protest in this context might be to carry the barriers and put them in a place which would cause them to be noticed by Leopardstown and perhaps thereby to learn a lesson. Instead, on the 30th May, barriers belonging to Leopardstown disappeared. This was followed up by 19 barriers and 3 benches being taken by Templeville staff and thrown over a wall down a ravine towards the M 50. The photographs demonstrate that many of these were wrecked. On the 12th May, a further 17 barriers went the same way. This is hooliganism. Little of this was the fault of Templeville staff who, under proper leadership, would have displayed restraint and common sense.

Stickers on cars
On the right-hand side at the front of the grandstand there is a large entrance into what is called the Tote Hall. On Fridays, this spacious area is used by farmers and traders to sell their wares; vegetables, eggs, meat, honey and the like. The double yellow lines in this area make it clear that there should be no parking. Some staff members from Templeville have parked there in the past and this has led to irritation from Leopardstown because the area is an entranceway. Small stickers were put on offending cars where no obstruction of vision would occur. By early 2011, putting stickers on to cars had ceased for some time. Apparently, according to Damian Kirby the maintenance caretaker of the racecourse, he had been putting stickers on cars parked on double yellow lines quite enthusiastically from September through to November 2011. Then, Pat Keogh asked him to cease. The inappropriate parking of cars was, as he described it and as I accept it, very inconvenient. Trucks have to move around in that area and the farmers' market vendors need to have access temporarily to set up stalls. He set up signs saying that the inlet was for emergency exit purposes. Because the situation became bad again, he started stickering cars from June 2012 but more recently he was asked to stop.

In evidence, Philip Smyth complained that putting stickers on cars was a terrible way to treat young staff. The entire matter has been exaggerated out of all proportion. Some samples of the stickers were produced to the court. These are about 8 cm x 18 cm. They were never plastered across somebody's windscreen, so they couldn't see, but were instead placed on the rear of the driver's window, or rear passenger window if it was a saloon car. Leopardstown staff were entirely within their rights in acting as they did.

Sewage
In March, 2012, on Leopardstown considering how to progress upgrading the area that is now the bus concourse carpark, a foul smell was noticed. This was because the sewage pumps that service some part of the Westwood club had broken down. This had not been noticed. An area of soil was contaminated with human waste. The response of Leopardstown was simply to dig away that area. No fuss was caused. Leopardstown completed the works by putting in the bus concourse car park. That is how neighbours ought to behave.

Wrongful denial of access
On a number of occasions, the variation to the race day licence agreement of 1998 has been deviated from by Leopardstown. Briefly put, whereas early forms of the agreement between the parties required Templeville to shut on race days, it is now the case that members and patrons of the Westwood club are to be treated in the same way as ordinary members of the public on race days. This differentiates them from race officials and owners who park closer to the stand.

A vast amount of evidence has been given on this issue. Most of it seems to have been proffered on the basis that the court should regard the mediation settlement agreement as at an end and should reassign the rights to the parties based upon the view of an independent mediator. That is not the function of the court. The parties are at large as to what agreement they reached and the court is not entitled to interfere with that agreement, absent an appropriate defence.

Clause 9 of the mediation settlement agreement governs race day parking and shuttle bus arrangements for those 23 racing days of the year. Complaints have been made that some race meetings are small and that car parking in the four designated areas, in the event that the four outdoor tennis courts ever get made into a car park, is poorly taken up. This is irrelevant. Sensible evidence was given that in the event that the Leopardstown car park was used that it might have proved more suitable on most of the race days than the arrangements currently in place: but this is not what was asked for, much as provided for, during the mediation process. Evidence has been heard of inconvenience to mothers with children, whereby five minutes was lopped off an agreed concession for those picking up and dropping children on race days, of a lack of complete knowledge by the security personnel and an attempt to allege to the court that these men were rude. A video with regard to the latter was produced which was not only entirely unconvincing but strong evidence that the security personnel were reasonably trained, polite and friendly. During race days, members of the public who are not important racing folk like jockeys and owners and commentators and administrators are not admitted to the car parks near to Templeville's Westwood premises and near to the grandstand and parade ring. Equal treatment is given to those using the Templeville facilities. Important horse people get to park in a privileged way. The entrances remain open during race days for all comers but members of the public, including those coming to the Westwood club, are required to park, if coming from the Leopardstown road entrance at the Horse Racing Ireland car park, and if coming from Carrickmines, in the Carrickmines car park. This is supposed to start four hours before the first race of the day and end two hours after the last race of the day. This may be irksome to either the public or to those using Templeville's services but it is what has been agreed. I note quote clause 9 of the mediation settlement agreement:

> The provisions of the race day licence concerning the parking arrangements for Templeville and the shuttle bus arrangements are hereby confirmed. Templeville hereby acknowledges and agrees that the parking and shuttle bus arrangements as set out therein that apply to Templeville's/Westwood's members on race days will apply for all race days at Leopardstown, including the "smaller meetings", unless both parties agreed otherwise in writing. The parties acknowledge that the normal courtesies will be given by Westwood members and Leopardstown security personnel to each other on race days. On race days, subject to availability, Leopardstown will permit access up the main avenue from Leopardstown Road to park in Car Park 1 and/or Car Park 2 and/or the Crescent Car Park for up to a maximum number of six members of Westwood management and/or nominated guests or visitors on the basis of a list of named individuals provided to Leopardstown in advance (or from time to time) together with any disabled individual.

The arrangements as to a Leopardstown shuttle bus at the Carrickmines car park and a shuttle bus provided by Westwood at the Horse Racing Ireland car park are adequate and reasonable and in conformity with the mediation settlement agreement and the race day licence. There have been some minor glitches where people going to Westwood have been asked to park in the Pavilion car park but I cannot understand, nor can I believe, that the Templeville bus would not pick them up. Again, this is a matter of give and take and there has been a complete absence of proof of malice or ill will or reckless disregard of agreements by Leopardstown.

There have been occasions when the security personnel were over enthusiastic and stopped people coming from the Leopardstown Road entrance into Templeville's premises of the Westwood club too early. A small incident of this occurred on the 28th and the 29th January, 2012. In addition, the International Thoroughbred Breeders Association met in Leopardstown on the 24th and the 25th February, and An Taoiseach, tireless in promoting Irish industry, attended. There was no provision for blocking off entrances and this was inconvenient. A complaint was made on the first day and any inconvenience was limited and entirely minimised on the second day. Philip Smyth had been invited to meet An Taoiseach but, as noted, was elsewhere. On another occasion, some energetic ladies from a nearby basketball club came and did a foot race around the racecourse, there were no fences apparently, with a view to raising money. The inconvenience of this is complained of by Templeville and it sounds, and it is, silly. The racecourse is entitled to use its facilities as it wishes. A student race day is complained of on the 28th March and it is said that drunken students attended "descending in buses". This strikes me as an exaggeration. On that day the four hour rule was broken. On the 15th April, the four hour rule was again broken. On the 14th June, there was another minor breach. None of these breaches were for a serious length of time and none of them were in consequence of a deliberate policy by Leopardstown. None of this would happen when the parties were in communication with each other. The correspondence clearly establishes that this situation is partly lack of attention by Leopardstown but, as to the vast bulk thereof, a result of the entrenched and entirely self -motivated attitude of Templeville as directed by Philip Smyth.

In addition, on a number of occasions, specifically on the 14th May and the 22nd June, 2012, temporary signs indicating that there was no through road were left up along the Carrickmines entrance. In fact the road was functioning. This seems to have happened, but it was minor and there is no evidence of any inconvenience.

Breach of contract: reduction in rent

Many of the problems in the years leading up to the mediation settlement agreement in 2011 stemmed from the fact that when something went apparently wrong, Templeville, acting on the instructions of Philip Smyth, would withhold rent. The new rent was set in the mediation settlement agreement at €499,310 per annum together with an annual service charge of €45,000. The new rent was to be paid together with the service charge from 1 January 2012. The new rent has never been paid. This is because Templeville claim a right of set off due to the supposed wrongs of Leopardstown. As stated above, the operative date here is 15 March 2012 when rent at the old rate was paid on the instructions of Philip Smyth to Leopardstown. Section 3 of the mediation settlement agreement provides that there is to be no set off in the following terms:

> Templeville agrees that the lease will be interpreted to provide a Templeville would not be allowed to claim any legal or equitable right of set off of any nature whatsoever against the rent or the service charge due under the lease. Subject to Templeville's agreement that it will not be entitled to, and it will not claim, any right of set off as aforesaid, the parties agree that they will use their best endeavours to engage constructively and reach agreement in relation to any future disputes that may evolve between the parties, before resorting to proceedings or arbitration.

Construing this agreement in accordance with its plain language, even a serious breach of contract would not entitle Templeville to withhold rent or service charge. Instead, as the second paragraph makes clear, Templeville would have to resort to proceedings or invoke any entitlement to arbitration that they might have in contract. In essence, the clause provides security of rent and service charge to Leopardstown. As with many other aspects of the agreement, this Court has been asked by Philip Smyth to second guess the arrangements reached as a consensus between the parties and has been asked to consider the fairness of the repayment of arrears by Templeville, the car parking arrangements or the re-arrangement in land holding and occupation. The Court is not entitled to embark on such a course. Instead, any court must give this agreement such business efficacy as brings its plain terms into effect

as a series of binding obligations in respect of which the parties have reached a consensus.

In evidence, Philip Smyth was asked as to why he gave an instruction in early March that rent should be paid at the 2011, and not the 2012, rate. He gave a number of reasons. None of these amounted, even if correct, to a serious breach of contract. In the context of the agreement which he had entered into there was no entitlement to withhold rent. First of all, it was said that Willie Gibbons had confronted his staff. He is the racecourse manager and therefore is responsible for managing such things as barriers and ensuring proper cleanup after races. As with the staff from Templeville, he is a credit to his employer. Unlike the staff from Templeville, however, he does not labour under the burden of emotional mismanagement. When, on the 12th May, 2012, the barriers and seats were flung into the ravine, he rightly queried this matter by going to Westwood reception and asking for an explanation. He asked to speak to Brenda Flood; but she would not meet with him. He was very unhappy with what had happened. Notwithstanding that, I am satisfied that, within the measure of appreciation that must be allowed to human nature, he behaved properly and formally. His membership of the Westwood club was cancelled out of the blue. Philip Smyth seeks to justify this, as it was at his direction, but in reality this was nothing other than an act of spite. Even had set off been possible, Templeville was in the wrong. Further, no one can see forward in time. Secondly, Philip Smyth complained that the signs at the Leopardstown Road entrance were not properly done. This is wrong. While Leopardstown insisted on using blue, Westwood at their other clubs have paid the designer the compliment of copying her colour. There is nothing to complain about. Thirdly, he said that the well drillers had been put off the site. So they had, and rightly too. Fourthly, he said that priority had not been given to installing lighting in car parks 1 and 2. This was supposed to have been carried out under clause 4.4 of the mediation settlement agreement within six months and no later than nine months, with the possible delay because of planning permission difficulties. Further the public ownership of the space required public tendering. In reality, any delay is substantially explicable by the lack of cooperation by Templeville, as evidenced in the letter of 2 May 2012 quoted above, and in particular the emotion-driven instruction by Philip Smyth not to cooperate in any process involving Leopardstown. As a fifth matter, Philip Smyth complained that Leopardstown were not cutting the hedge and grass between car parks 1 and 2. As he was out of the country, I do not know how this complaint could rationally be made. No complaint is made anywhere about this in correspondence and, even if it were, this is a trivial matter. The sixth complaint concerns horse manure. That has been analysed above. As to the seventh issue, the question of barriers is raised. Actually, in the context of what was done, this complaint would be ironic were it not also groundless. Lastly, Philip Smyth complains that in reality he was dealing with the old chief executive of Leopardstown rather than with the new one. I reject that complaint. There was nothing wrong with the old chief executive and there is nothing wrong with the new one. It is also hard to imagine how someone can complain of having to deal with an individual when they are living about 1000 km away in France away from the dark Irish winter.

There was no basis for withholding rent. A clear breach of the mediation settlement agreement was wilfully engaged as of March 2012, by Templeville on the direction of Philip Smyth.

Car parks
The mediation settlement agreement provides at clause 4 that Leopardstown is to develop or upgrade car parking areas with tarmacadam lighting and lining of car parking spaces in a series of numbered and described car park areas: Dome 2; the existing four outdoor tennis courts with suitable car and pedestrian access and egress to Dome 2; the bus concourse car park; the access road car park. All of these are identified. The car parks are to be developed to a standard similar to the pavilion car park and with adequate lighting in accordance with an outline specification. Leopardstown was to do its best to complete these works within six months or, at the latest, within nine months of the first payment of €2.5 million due under the mediation settlement agreement. Clause 4.3 provides:

> Leopardstown (and its Engineers) agrees to consult, in advance, with Templeville (and its architect) and to give Templeville an opportunity to make observations and suggestions on all aspects of the development including the standard thereof, prior to the development of these car parking areas and the New Access route; provided, however, that Leopardstown will have absolute discretion with regard to the development of the said four car parking areas and the New Access route and need not accept or agree to any suggestions made by Templeville.

A number of complaints are made by Templeville. Firstly, it is said that there was delay in commencing the works. As against that, Leopardstown have spent in excess of €700,000 in pursuing what is in effect a joint project. Nor should the deliberate misuse of set off claims be ignored. As well as that, Leopardstown are subject to public procurement rules, a fact which Templeville does not appreciate. This has added 2 to 3 months to the expected time. The factor of most importance, however, is the complete lack of cooperation by Templeville at the direction of Philip Smyth. This unhelpful attitude has been referenced in the correspondence already detailed. In addition to that, it is clear from the evidence during the hearing that specific orders to ensure a lack of cooperation and to store up resentment for use in litigation constituted an impenetrable barrier to any form of rational discussion towards progress. Most disappointing has been an attitude that the professional persons engaged by Templeville were not to meet those engaged by Leopardstown. Secondly, it is said that the works were not completed as to the ground surface to an appropriate standard. Walking the site, I could see no evidence which would substantiate that claim. Having a neighbour is a matter of give and take: it is not a matter of take and take. Matthew O'Dwyer gave evidence that by the time the contractor came on site only two more days were to pass before the letter of the 15th June, 2012 whereby Templeville gave Leopardstown notice of termination of the mediation settlement agreement in respect of what they call the fundamental breach. Notwithstanding this, he instructed the contractor to carry on. Two car parks were upgraded in accordance with the agreement by tarmacadam, using patches where appropriate, and lighting was installed. The complaint is made is that a local lighting contractor was used. During all of this, while going for minimal disruption, Templeville were watching and taking photographs in order, I am satisfied, to later assert a claim disruption in legal proceedings.

The impenetrable nature of the problem faced by Leopardstown, whatever were the rights and wrongs of the situation prior to the mediation settlement agreement, is internally evidenced by emails inspired by Philip Smyth's direction which were exchanged in August 2012. A member of Templeville staff writes to a senior manager: "The potholes have not been repaired. Will I write to remind them would we prefer that they were left undone?" The answer is given the next day: "No don't send another letter. Take photos today with date. And say again in another week etc." Thirdly, the lighting is said to be substandard. As it turns out, the lighting is not quite the right standard. A probability is established, however, that the lighting would have reached the appropriate standard had Templeville allowed a professional person on their behalf to meet with the lighting contractor from Leopardstown. During the course of this hearing, agreed evidence was given as to defects and the commitment made in evidence to rectification would, I am completely satisfied, have been given to Templeville by Leopardstown absent this litigation.

Counterclaim
Coupled with the implicit submission that the court should rewrite the mediation settlement agreement, there has been a counterclaim based on damage to business. If you sign up for a particular arrangement, and Templeville did sign up for this, you cannot claim that your business has been damaged because your customers are put off from coming on 23 days a year to swim, or play tennis, or work out, or chill out, or drink coffee, or whatever. The facilities of Westwood are excellent. Members are privileged to be able to join a

club with such pleasant and efficient staff and facilities which are a credit to the Westwood brand. But, the normal ease of access ceases by agreement of the parties on race days. When such an agreement is negotiated, the rate to be paid for a lease of premises takes into account that on approximately 2 days a month patrons will have to walk or get a shuttle bus.

I have had regard to the opposing evidence that attendance is about 71% higher on non-race days, compared to race days. This statistic can be looked at in a different way, in which case it looks more like 30%. I have also taken into account references to international journals and perhaps not so reliable websites. The evidence from both experts, one on each side, was genuinely helpful. It is also irrelevant. The parties bargained for this and that is what they have got. The counterclaim has no basis. A loss is claimed by the defendants of €1.189 million. Members of Westwood sign a form on joining saying that there will be parking restrictions on race days. There is also a plaque on the wall of Westwood indicating this. In addition to any change that may be due to people not attending because there is racing on, there is a lot of competition among these kind of clubs and, regrettably, all but the best patronised leisure facilities have gone the way of so many other businesses have gone since the economic crisis manifest from 2008. The membership of Westwood through Templeville at Leopardstown has kept relatively steady which is a tribute to good management and the attractive nature of the product provided.

Rights of way
Rights of way are claimed by Templeville over the Leopardstown racecourse campus. The only evidence in that regard is given by Philip Smyth. None of this evidence establishes any probability that any right-of-way of any kind was ever granted by Leopardstown to Templeville or that any prescriptive right ever arose. Such a situation would be impossible. The relevant provisions of the lease of 1998 provide for access to the Templeville demised premises in the following terms:

> …the Landlord hereby demises unto the Tenant… a right of way for the Tenant and its licensees, invitees, servants and agents with or without passenger or good vehicles, at all times, to pass and repass to and from the public roadway and along such of the roadways, avenues and passages, built or to be built as may be prescribed from time to time by the Landlord, and as are for the time being used by the public attending race meetings, and on other than race days the driveway to the front of the main grandstand.

This is a matter of consent. Consent is completely incompatible with prescriptive rights unless that consent has been given so far in the past as to be rendered irrelevant. That issue does not need to be analysed in this case because that does not arise. Leopardstown continue to occupy the racecourse and have done so at every stage when Templeville has been there. They have directed the appropriate route. There seems to be a misunderstanding by Philip Smyth that just because someone once used, or because there was for a time some habitual use of, a route that a right-of-way becomes thereby established. As a matter of law, that is not so. Assertion of rights based on permission is untenable. The reality is that these routes changed and even were this contention tenable as a matter of law, these changes established the continuing nature of permission as to access. This claim is also vague as to route and is woolly as to where the alleged right over the servient tenement is supposed to begin and end. What is clear is that the essential quality of prescriptive rights must arise by reference to right and not by reference to permission. A user giving rise to prescriptive rights must be without force, without deception and cannot be based on permission from the owner of the land or, as early Norman French puts it *nec vi*, *nec clam*, *nec precario*: *Bland, Easements*, 2nd edition., (Dublin 2009) at paras. 16.52-16.53. I completely accept the evidence of Tom Burke of Leopardstown as to the permission given to Templeville to have access to their premises along particular routes. His knowledge in that regard, as the retired racecourse manager, is invaluable in establishing a complete absence of any basis for a claim of prescriptive rights. I prefer his evidence to any contradicting evidence.

Mistake and the agreement
Templeville and Philip Smyth complain that the mediation settlement agreement was undermined by misrepresentation by Leopardstown as to a transverse 220 kV oil-surrounded ESB cable that ran through the site of the seven new tennis courts that would be covered by a dome or domes. A brief word about this cable may put this matter in context. There are two cables running through the Leopardstown campus. One of them, which transverses the seven tennis courts site, is apparently there since the 1970s. This is the transverse cable. The second one, which goes along the edge of the car park and Dome 2 skirting the seven tennis courts site, was laid by the ESB in 2000 and commissioned in 2001. This is the skirting cable. Dome 2 was originally planned much closer to the new seven tennis courts site than it now sits. It was moved by Templeville so as to ensure that its foundations missed any cable. This dome now sits as to its foundations as close as just under 3 m to such a cable. These domes need an air pumping system. These sit outside the line of the foundations of the dome and push air inside. One of the air pumping stations in Dome 2 is over a cable. This establishes knowledge by Templeville that this cable existed and that no dome could be built above it or, according to the ESB position, no foundation could be laid within 5 m of it. Philip Smyth gave evidence that he thought that what was happening in 2000/2001 was that the ESB was decommissioning the original transverse cable, which is the inner cable for these purposes, and replacing it as to function with the skirting cable. This evidence is improbable. In addition, apart from all of this, it should be noted that on the site of the seven tennis courts there are three side-by-side ESB manhole covers, clearly marked with a lightning symbol. This establishes to anyone considering taking any interest in this site that there is a major ESB cable under the ground there. It is not possible to move any of these cables save with the expenditure of millions of euros. This site with the manholes so marked has been in the effective occupation of Templeville for many years.

In addition, the site was the subject of a planning application in 2007. At that stage Templeville were planning to construct seven outdoor tennis courts and to this application Leopardstown put in an observation. This was made by Ian McGrandles on behalf of Leopardstown through a firm called Tíros Resources. In the observation, he refers to an earlier planning application that had been made by Leopardstown in 2002 that included this site. This application showed both cables. It is inconceivable that Templeville did not have regard to this application which was lodged together with appropriate drawings on the 12th July, 2002. In it, drawing D 2443-11 C121 PL1 showed an alignment of two almost parallel 220 kV underground cables one of which traversed the application site. In the observation by Leopardstown on the planning application which was lodged on the 21st February, 2007, and directly relevant to the application being made by Templeville, the following was pointed out: "there are two 220 underground kV ESB cables and an associated wayleave at the western edge of the proposed site" and an observation was made that it was not shown on the site plan as required under the relevant Planning and Development Regulations. That is not all. The local planning authority then engaged by seeking additional information from Templeville, stating: "it will be necessary to consult with ESB regarding the potential impact of development on the ESB cables indicated as traversing the site. Please submit written evidence of consultation with ESB on this matter."

On the 19th July, 2007, Brendan O'Sullivan, on behalf of Templeville, responded to this request including a revised position of the access to the site showing the line of the ESB cable traversing the site marked in yellow and in ESB link box within the application site. Evidence was also submitted of consultation with the ESB by Templeville about the cable traversing the site. Following a meeting with John Daly, who is a manager for high-voltage cables, an e-mail was exchanged between them summarising their discussion as to this transverse cable and making the following points:

> • The proposed tennis courts have been generally located not to conflict with the line of the cable. However, there are possible conflicts on the access routes. Some trial holes were carried out, but it was agreed to carry out a further series to confirm both the position and levels of the cable, as the original levels have been changed, and as there would appear to be a discrepancy between ESB record of the cable and your drawing. Declan Mullen will arrange this with you. An outage of this cable is planned in any case over the summer to carry out annual maintenance testing
>
> • The curved pedestrian entrance will be redesigned to avoid a conflict with the cable circus at the steps, if it proves necessary
>
> • The lower vehicular entrance will be moved from the NE corner to the SE side to avoid conflict
>
> • The proposal to install low shrubs over part of the cable route is acceptable to ESB, provided no trees are installed
>
> • The cable was originally installed in this area in non-road construction, so at all traffic crossing locations, the back filling must be replaced to road construction standards. If the cable depth has been compromised, this may require special provisions to spread traffic loading, such as steel plates/concrete slabs
>
> • All planned signage and fencing posts must be designed to avoid the cable route
>
> • ESB Central Site should be re contacted to obtain an up-two-date record of all ESB services in the area.

This matter could not have been forgotten by Templeville as a corporate entity, nor could Philip Smyth as its controlling mind have been unaware of it or have forgotten it. It is far too important for that.

On the 26th May, 2008, a position paper was submitted by Templeville during the course of the arbitration to Paul Gardiner SC. Since this arbitration was about the land which Templeville claimed to be entitled to, the submission by Templeville described the land and at para.13.5 added:

> A further significant consideration in respect of this strip of land, which Leopardstown seems to have lost sight of, is the fact that an underground ESB cable runs through same. As part of Templeville's planning application process, Templeville has been in discussions with the ESB with regard to its proposed development. Templeville proposed plans to construct the graded embankment with no groundcover planting, the new footpath, the 4 m high fence and the pedestrian entrance gates and parts have been approved in principle by the ESB, subject to final approval at the time of the construction of these works. The ESB's primary concern is to preserve the integrity of this cable. This again is a further complication in relation to this site, and Templeville needs to be granted sufficient land to enable it to carry out the development. Further reference is made to this issue at the top of page 2 of the report prepared by ...

Whilst that arbitration process was ongoing in 2008, Philip Smyth swore an affidavit dated 10th June, 2008, in which he referenced an earlier hearing of April 21st, 2008 and enclosed a copy of the transcript in his affidavit by way of an exhibit. In that transcript, counsel for Templeville referred to a problem with an ESB cable and said: "It's a huge mains cable, apparently, and there are difficulties about building over it or around it." During the mediation process in 2011, a replying position paper was admitted to the mediator Paul Gallagher SC by Templeville. This refers to the new site as not being level and the difficulties concerning the site are specifically referenced to the position paper of the 26th May, 2008 which is appended to that paper. This document goes on to state that Templeville would like the opportunity to have the map within the mediation process, which only shows the skirting cable and not the transverse cable, reviewed by its own expert and compare it with what is marked out on the ground. The map there referenced, Arup 1004, shows a jagged and not a squared off edge to the site, though this was later conceded by Leopardstown, and the transverse cable is absent.

It is impossible not to be satisfied that Templeville had knowledge of the transverse ESB cable. I am satisfied that Philip Smyth, in claiming no knowledge of the cable is giving evidence that, in these circumstances, a court could not accept.

Unawareness of this transverse cable, of which Templeville clearly had knowledge, is blamed on Ian Roberts, the engineer who drew up the relevant map and who decided as a matter of subconscious prudence not to show any features on the interior of the site. Thus, the maps used in the mediation process, including for instance Arup D4352-20, show the skirting ESB underground cable in an approximate position. Ian Roberts was skilfully cross-examined. I entirely accept all of his evidence. In particular, whether conscious or unconscious, putting nothing on the inside of the sites that was to be devised to Templeville was entirely prudent and completely in accordance with a fair-minded desire to avoid trouble. As he put it in the witness box, if in marking the cable within the site he had been even inches out, the result would have been another court case. This is a prudent observation.

On the 27th March, 2012, Toal Ó Muiré wrote to the solicitor for Templeville in the following terms:

> Brenda [Flood] rang me to ask the question (which I could not answer) as to what Ian Roberts meant by mentioning a "well" in the draft agenda he sent me on 12 March. She was curious because that date was two days before Templeville's testing rig arrived at the racecourse. I said I did not know what Ian meant at the time, and I confirmed to her that I have been instructed by you to deal only with the setting out of boundaries and levels ... I also clarified that the Arup drawings I posted to Kieron [Flood] on 20 March are those which I received that afternoon from Ian [Roberts], which I trust are those Kieron is using to check boundaries and levels. Brenda says she will phone Kieron to check this, and will ask him to ring me to let me know what anomalies there may be between that latest set of Arup drawings and the Arup drawing Philip [Smyth] signed as part of the Mediation Settlement last year.

It is disturbing, and it also shows the prescience of Ian Roberts, that Philip Smyth would instruct a highly respected professional person to look for anomalies in an agreement that he had signed months earlier. On the 4th April, 2012, Pat Keogh invited Templeville to a meeting to review the car parking facilities upgrade. Templeville never turned up, and that was done deliberately.

While Philip Smyth was in France, on the 26th March, 2012, acting on an earlier instruction from him, Kieron Flood had walked site with a view to finding differences between the signed map in the mediation agreement and the latest general arrangement of map and he said, among other things: "the underground ESB lines now appear to be running within the site as opposed to along the access road and car parking on the signed map." Brenda Flood was again placed in an impossible position on the instructions of her employer. It is highly probable that she drew this to his attention during one of the several phone calls that she made reporting general and important affairs to him in France 2 to 3 times a week. Yet, in the correspondence, this is not at all mentioned. Philip Smyth did not claim that it was part of his reasoning for not paying the full rent to Leopardstown on the 15th March, 2012.

In terms of what is probable or improbable the situation as it ostensibly developed rules out any acceptance of his evidence. He claims that on June 14th, 2012, he walked the site and noticed blue lines. This happened only by accident, he says, because there was a race meeting on and he was stopped at the Carrickmines car park, which is a pleasant walk in good weather from Dome 2. He claims to have telephoned, through Brenda Flood, Kieran Flood and to have been surprised that there was a transverse ESB cable which might compromise the number of courts that he could put on that site. Kieran Flood described a recollection of Philip Smyth being apparently surprised. Brenda Flood had little recollection of the event. The next day the letter claiming termination for fundamental breach of contract went out. It, however, has no mention of the cable. If there was a horrible surprise, this was the time to mention it. Not until the 20th July, 2012, was the cable referenced in correspondence among a number of points of difficulty as to the site of the seven tennis courts. In the meantime, a letter of the 20th June, complained of a rainy 14th June, race day with only four cars in the Dome 2 carpark, rubbish, a forklift and security barriers. This, in comparison, would be trivial stuff. I regret that I cannot accept any evidence that the cable was first discovered on the 14th June, 2012. Nor can I accept that Ian Roberts acted dishonestly, or gave untruthful evidence, or that there was any kind of sharp practice by Leopardstown, or that Templeville made a mistake or that any misrepresentation of any kind was made by Leopardstown.

Although it is not essential to this decision, which would have been made in the absence of this principle, the failure by the defendants Templeville and Philip Smyth to call Brendan O'Sullivan makes it reasonable to independently reject this evidence.

Failure to call evidence
Making and inference on the basis of the failure of a litigant to call readily available and highly important evidence should only be engaged in sparingly.

Laffoy J. has analysed this matter in *Fyffes PLC v. DCC PLC and Others* [2009] 2 I.R. 417:

> The other issue which it is convenient to consider in the context of the burden of proof is much more difficult. It was the plaintiff's contention that the court should draw certain inferences from the failure of the defendants to call certain witnesses. The plaintiff made this argument in relation to the defendants' failure to call –
>
> (a) Kyran McLaughlin, a senior executive in Davy, whom it was contended was a critical witness in relation to the dealing issue and whose involvement will be outlined later, and
>
> (b) two of the non-executive directors of DCC, the chairman, Mr. Spain, and Mr. Gallagher, and two of the Dutch directors of Lotus Green, Gerard Jansen Venneboer and Henri Roskam, in relation what was characterised as Mr. Flavin's direct and controlling involvement in the share deals.
>
> While the plaintiff did not cite any authority of a court of this jurisdiction in support of its argument, it did rely on a number of English authorities, which it is necessary to consider in some depth in order to ascertain whether they support the proposition advanced by the plaintiff.
>
> The earliest authority cited by the plaintiff was *M'Queen v. Great Western Railway Company* [1875] L.R. 10 Q.B. 569. The plaintiff in that case sued for the value of a parcel of drawings which he had entrusted to the defendant railway company for delivery. The goods never reached their destination, having been stolen while in the custody of the defendant. The defendant pleaded a defence under the Carriers Act. The plaintiff responded that the defence was not available because the goods were lost by reason of having been taken feloniously by the servants of the carrier. The trial judge directed the jury that, if the facts, in their opinion, were more consistent with the guilt of the defendant's servants than with that of any other person not in their employ, that was sufficient to call upon the defendants for an answer, which not having been given, the inference might well be that a felony had been committed by some of the defendant's servants. It was held that the direction was wrong and that the jury's verdict in favour of the plaintiff was wrong. The principle relied on by the plaintiff is contained in the following passage of the judgment of Cockburn C.J., who, coincidentally, had been the trial judge, at p. 574:
>
> > "If a *prima facie* case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not as a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not disprove the *prima facie* case. But that always presupposes that a *prima facie* case has been established; and unless we can see our way clearly to the conclusion that a prima facie case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing."
>
> It was held that a *prima facie* case had not been made out that the defendant's servants, rather than somebody else, had stolen the goods. All that had been established was that the defendant's servants had a greater opportunity of committing the theft.
>
> In *Reg. v. IRC, ex p. Coombs & Co.* [1991] 2 A.C. 283, the issue was whether a notice under the taxation code issued by the Inland Revenue to a firm of stockbrokers to deliver or make available for inspection documents in their possession relevant to the tax liability of a taxpayer, a former employee, in connection with various named companies should be quashed. Against the background of a presumption of validity and having noted the sparseness of the evidence adduced by the IRC, Lord Lowry, with whom the other Law Lords agreed, stated as follows at p. 300:
>
> > "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."
>
> The IRC had relied on their general duty of confidentiality as a justification for their reticence. Lord Lowry accepted that, by reason of the principle of confidentiality, the general rule for taking account of a party's silence did not fully apply.

The earlier authorities were reviewed by the Court of Appeal in *Wisniewski v. Central Manchester Health Authority* [1998] Lloyd's Reports Med. 223. Brooks L.J. summarised their effect in the following passage from his judgment:

> "From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call witnesses.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

That case which concerned a claim on behalf of an infant who suffered irreversible brain damage before birth in the defendants' hospital, which it was alleged was caused by negligence of the defendants, illustrates the application of the foregoing principles. The trial judge had held that the defendants were negligent, in that the senior house officer should have attended and examined the plaintiff's mother about two hours before the birth. That led to an issue on causation, which turned on what the senior house officer would probably have done if he had attended the mother, read her notes and seen the cardiotachograph trace and, in particular, whether a Caesarean section would have been performed at that stage, which would have prevented the injury which was caused because, as the baby moved down the birth canal, the umbilical cord was wrapped around his neck and had a knot in it and he was effectively being strangled. The senior house officer, who was living in Australia, was not called, nor was the registrar who had been on call that night, nor the consultant with overall responsibility for the obstetrics unit. On an analysis of the evidence, Brookes L.J. identified the evidence on the issue as to what the senior house officer would have done which was adduced by the plaintiff as the evidence of two expert witnesses (whose evidence conflicted with the evidence of two expert witnesses called on behalf of the defendants) and certain text book references. The Court of Appeal held that the trial judge was entitled to adopt the course he chose to adopt, which was to infer from the failure of the senior house officer to attend the trial that he had no answer to the criticism made and to find that he would have done what the plaintiff's expert witnesses testified should have been done and that he would have proceeded to a Caesarean section. The Court of Appeal found that the plaintiff had established a *prima facie*, if weak, case as to what a doctor would have done in the hypothetical situation the court was required to envisage. The trial judge was entitled to treat the absence of the senior house officer, in the face of a charge that his negligence had been causative of the catastrophe which had befallen the plaintiff, as strengthening the case against him on that issue.

The court was referred to three recent decisions of the English High Court in which the application of the principles set out by Brooks L.J. in the Wisniewski case was considered: *Pedley v. Avon Insurance* [2003] EWHC 2007; *Rock Nominees v. RCO Holdings* [2003] 2 B.C.L.C. 493; and *Lewis v. Eliades (No. 4)* [2005] EWHC 488 (Unreported, England and Wales, High Court, Smith J., 23rd March, 2003). Having considered the judgments in those cases, I am of the view that decisions made in the last two cases to draw adverse inferences because of the failure to call witnesses turned very much on the facts of those cases.

While, as I have already stated, the plaintiff did not point to any Irish authority in which the basis on which adverse inferences may be drawn from the absence or silence of a witness whose evidence might be expected to be critical to an issue arose, I have no doubt that in practice, in the course of fact finding, judges do draw adverse inferences in such circumstances. The type of situation I have in mind arose in one of the earlier authorities considered in the *Wisniewski*: *Herrington v. British Railways Board* [1972] A.C. 877. Where an issue arises as to whether an adverse inference should be drawn, I consider that the principles outlined in *Wisniewski* are helpful guidelines for the court.

I regard this analysis as very helpful. I note that Laffoy J applied it in a case that was obviously different.

I regard the absence of Brendan O'Sullivan as a witness is fatal to the claim of surprise and misrepresentation made by Templeville and Philip Smyth. That determination is independent of the decision that I have already made on this issue by reference solely to the likelihood or otherwise of the evidence presented in testimony.

Mistake

It follows that the law as to mistake and as to misrepresentation does not require detailed analysis. Mc Dermott, *Contract Law* (Dublin, 2001) follows the traditional analysis dividing mistakes into three broad categories. Firstly, common mistake occurs where both parties to an agreement have the same mistaken perception. McDermott states that:

> A common mistake will not affect the formation of the contract since the parties are genuinely *ad idem*. However, if the mistake was a fundamental one the consent of the parties to the contract may be nullified. In *O'Neill v Ryan (No 3)* Costello J provided the following definition of what he termed a shared common mistake:
>
> > There is a category of cases in which it is accepted that there was an offer and acceptance reached between the parties but in which it is claimed that the parties shared a common mistake which has resulted in the agreement being void. For example, where both parties agree on the purchase and sale of a painting believing it to be a Gainsborough and it is subsequently established that this is not so, or where both parties agree on the sale of tenanted property and both believe that the tenant is affected by the Rent Restrictions Act and subsequently ascertain that this is not so…'

In considering the extent of this category of mistake, McDermott offers this view:

> A contract will be void at common law if there is a common mistake that is also fundamental. Traditionally this rule was quite restrictive and it was only if the mistake related to the existence of the subject matter of the contract or to the existence of a person or a relationship essential to the whole transaction that the mistake would be regarded as operative. It is clear that the rule now extends beyond the mere existence of the subject matter…However, the number of cases, other than cases of non-existent subject matter, which can be interpreted as cases of fundamental operative mistake is small…In *Associated Japanese Bank v Credit du Nord SA*, Steyn J Laid down the following five rules for mistake at common law:
>
> > (i) The law ought to uphold rather than destroy apparent contracts.
> >
> > (ii) The common law rules as to a mistake regarding the quality of the subject matter are designed to cope with the impact of unexpected and wholly exceptional circumstances on apparent contracts.
> >
> > (iii) In order to attract legal consequences the mistake must substantially be shared by both parties and must relate to the facts as they existed at the time the contract was made.
> >
> > (iv) The mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist.
> >
> > (v) The mistake must not consist of a belief which is entertained by a party without any grounds for such belief.

The second category is mutual mistake. This arises where both parties are mistaken but they do not share the same mistake; thus the issue is as to whether or not they have reached the necessary consensus for an enforceable agreement. Where parties to a contract mutually mistake the subject matter of what they are agreeing in a way that is fundamental so that its nature, and not merely one of its characteristics, is altered a consensus of minds, is avoided. That is not the case here.

The third category, unilateral mistake, may occur where one of the parties is mistaken as to some element of the agreement. This does not automatically render an agreement void: more is needed, such as an exploitation of that mistake by the other party. McDermott states:

> The courts will grant relief against… unilateral mistakes based on the concept of unconscionability. In *Commission for the New Towns v Cooper (GB) Ltd* the defendant tricked the plaintiff into believing that the terms of the contract which he was signing would achieve one object when the terms were so drafted as to achieve a different object. The English Court of Appeal held that the conduct of the defendant was unconscionable and that the plaintiff was entitled to rescission or rectification of the contract…The Court adopted the statement of principle set down by the High Court of Australia in *Taylor v Johnson*. In that case Mason ACJ, Murphy and Deane JJ said:
>
> > "…a party who has entered into a written contract under a serious mistake about its content in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension.

Fundamentally, the law upholds the bargains of parties. Contracts are arrangements of mutual convenience whereby the parties bargain to a consensus as to what each is to give the other. It is not the function of the courts to police agreements by rewriting those that later turn out to be unwise. Rather, parties to a contract are, by virtue of the process of bargaining that leads to a meeting of minds as to what each is to do for the other, assumed to exercising a reasoned judgment. The law will not interfere in commercial bargains absent defined situations which either demonstrate that consensus had never been reached or require intervention based on the principle that reasonable and honest people could not stand over the bargain in question. Jurisdiction as to mistake cannot be invoked in order to escape what is simply a bad bargain. In relation to this category of mistake, Treitel, *The Law of Contract*, 13th ed., (2011) states:

> …a mistake is not operative if the mistaken party, A, has so conducted himself as to induce the other party, B, reasonably to believe that A has agreed to the terms proposed by B. In particular, a person cannot have a contract set aside because of a mistake which he made because he failed to act with due diligence.

When one party to a contract realises that the other party is making a mistake and engages in sharp practice with a view to ensuring the benefit of that error to itself, the contract will be rendered void from its inception. An active misrepresentation as to the subject matter of the contract can be so serious as to have the same effect. There is simply no basis in evidence upon which I could hold that there was either misrepresentation or mistake. The nature of the difficulty with the ESB cable was known to Templeville. That company had negotiated with both the planning authority and the national electricity supply company about it. There are three manhole covers with the electricity caution symbol on them towards the middle of the site. People who buy or lease land, absent any such history, at the very least have a duty of reasonable investigation as to what they are taking on. Philip Smyth swore an affidavit about this issue in a legal context. I cannot accept that forgetting something, if that happened, which is very improbable, amounts to a lack of knowledge about it. Furthermore, there has been considerable debate as to what shape the dome, Dome 3, which might be put over the seven tennis courts site might be and what area it might encompass. It seems to me that a fair reading of the evidence is that there was enough room were the entire site to be used for six or possibly seven tennis courts within a dome. Now there is room for five. As to whether there is the business for that or not, no evidence has been led.

Breach of contract

Templeville and Philip Smyth claimed the right of set-off in respect of wrongs by Leopardstown whereby the rent appropriate to 2011 with no service charge is apparently to be paid and the defendants also claim that the mediation settlement agreement was validly terminated for fundamental breach of contract on the 15th June, 2012. The relevant correspondence has already been referenced.

The doctrine of fundamental breach of contract was developed to ensure that exclusion clauses which limited or excluded liability for breach could not be so wide as to deprive the innocent party of any redress under the contract. Two propositions were blurred. The first was that, by a rule of law, no excluding or limiting term was given force and effect by the courts in a context which ensured that an innocent party would be protected from any consequence that a party that had perpetrated a fundamental breach of contract would be able to sidestep obligations under the agreement. Secondly, in contrast to a rule of law, the interpretive power of the court would generally exclude all but the clearest cases, backed up by plain wording in unambiguous language, whereby liability could be denied notwithstanding that the contract had in an important, or fundamental sense, not been performed. With the passing of the

Sale of Goods and Supply of Services Act 1980, particularly s.22, resort to fundamental breach, or even to fundamental frustrating breach, a further development of the doctrine, has been rendered unnecessary where the parties deal one with the other as a consumer or, in other jurisdictions, through unfair contract terms legislation. The law has, similarly, modernised with regard to the old distinction between breaches of terms and breaches of condition but this has been done not by statute but through judicial reordering of the applicable case law. It used to be that a breach of a term would not entitle the innocent party to give notice of termination of contract but that party would be required to perform the contract and be left to a remedy solely in damages. A breach of condition, on the other hand, was more serious and entitled the innocent party to bring the contract to an end and claim damages based upon the loss suffered and what would be quantifiable as the benefit of the contract had it been properly performed. Some earlier written forms of contract had been scrupulous as to classifying particular obligations as either terms or conditions and in setting out preconditions on the exercise of the parties' entitlements thereby. Such clarity is admirable; and it is possible where people sit down with lawyers and think of every foreseeable event and provide for what is to happen should one come to pass. But it is unlikely. Human affairs and the use of language as a necessarily imprecise instrument pointed up this approach as both excessive and unlikely to yield clear results. What matters, as a principle of ordinary commonsense, is how serious any breach of contract is and whether on the basis of the parties mutual rights and obligations it can be classified as so striking at the heart of what the innocent party was to expect under the agreement as to entitle that party to bring the contract to an end.

The modern law as to how serious a breach of contract must be to justify the innocent party bringing an agreement to an end and seeking damages was considered by Costello J. in *Irish Telephone Rentals v. ICS Building Society* [1992[2 I.R. 525. The plaintiff had rented to a financial institution a telephone system which was impossible to use and which caused astonishing delays in those seeking to access the business from outside due to the backing up of calls blocked within the system. The defendant counterclaimed for damages on the basis that it was entitled not to pay the rental for a system which did not do the job that any reasonable person would have expected it to. The comments of Costello J. are instructive:

> The issue which arises now for consideration is one which arises in many cases. It does not follow that because one party is guilty of a breach of contract that the other may treat himself as discharged from obligation further to perform the contract.
>
> There may be many cases in which the court, when presented with a problem of this sort, may be required to consider whether the term which was broken was 'a condition' or a 'warranty' or, a 'fundamental term' of the contract but, as the frequently cited case of *Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Limited* [1962] 1 Q.B. 26 shows, this is by no means a necessary exercise to be undertaken in every case. I think the approach suggested by the judgment of Diplock L.J. at pages 65 and 66 of the report is appropriate to this case. In answer to the question 'In what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done?' he said:-
>
> > "The contract may itself expressly define some of these events, as in the cancellation clause in a charter party; but, human prescience being limited, it seldom does so exhaustively and often fails to do so at all. In some classes of contract such as sale of goods, marine insurance, contracts of affreightment, evidenced by Bills of Lading and those between parties to Bills of Exchange, parliament has defined by statute some of the events not provided for expressly in individual contracts of that class; but where an event occurs the occurrence of which neither the parties nor parliament have expressly stated will discharge one of the parties from further performance of his undertakings, it is for the court to determine whether the event has this effect or not.
> >
> > The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"
>
> If this question is posed in this case there can be only one answer to it. The 'event' which occurred in this case is the development of a situation in which the installation which the defendants had hired significantly failed to fulfil its purpose. This 'event' has deprived the defendant of the whole of the benefit which it was intended the defendant would obtain from the hiring agreements. The defendant was therefore, in my opinion, discharged from further performing the hiring agreements and was entitled to treat the contract as being at an end and request the plaintiff to take back its installations. It follows therefore that the plaintiffs are not entitled to rely on clause 11 of the contract and that its claim for damages for breach of the hiring contracts relating to the telephone installations also fails.

A similar analysis was engaged in by Clarke J. in *Parol Limited and Carroll Village (Retail) Management v Friends First Pension Funds Limited and Superquinn* [2010] IEHC 498 (Unreported, High Court, Clarke J., 8th October, 2010).

Posing the test as to whether there has been a breach of obligation by Leopardstown which is so serious as to entitle Templeville and Philip Smyth to bring the mediation service agreement to an end, I conclude that there is evidence of some minor lack of attention by Leopardstown and nothing more than that. Most of the problems that have arisen could have been easily sorted out. They were not sorted out because Templeville, under the direction of Philip Smyth, retreated with no reasonable cause into an entrenched attitude of exploiting every grievance and storing up resentment under the misplaced belief that it could provide evidence of serious breach of contract in a later legal case. There is no tenable evidence of misbehaviour under the mediation settlement agreement by Leopardstown.

On the other hand, Templeville has demonstrated no commitment to the mediation settlement agreement. The agreement was carefully worked out. It could have operated to the benefit of both parties. Instead of that, the attitude of Templeville has been one of non cooperation from the outset. While it is true that there have been a number of lapses from the obligations of Leopardstown, these are entirely minor. Any reasonable assessment of the evidence presented would indicate that had Templeville kept open the channel of communication that was vaguely present like a ray of sunshine on a wet December day, from the end of 2011 into 2012, there was more than sufficient goodwill on the part of Leopardstown to allow the parties to work together. Instead of that, the attitude of Templeville has been one of seeking to vacuum up the least grievance with a view to litigation, a lack of any reasoned response through communication as to its difficulties and the justification of the destruction of property, the non-payment of sums due and the invasion of rights of realty through subterfuge. Even had everything that Templeville claims to have gone wrong with the mediation settlement agreement been proved in evidence, and that has not happened, the substance of what Templeville had bargained for was available to them. On the other side of the contract, Leopardstown have been deprived of substantial money and has had the unpleasantness of dealing with a company directed away from plain dealing. It is clear that Templeville has not been deprived of the substantial benefit of the mediation settlement agreement.

Sums outstanding
When rent was paid at the rate appropriate to 2011, with no service charge, through the proffering of a cheque on the 15th March, 2012, from Templeville to Leopardstown, it was cashed by Leopardstown. The relevant officers in Leopardstown were then under the impression that a clerical error had been made. When it dawned on Leopardstown that Philip Smyth was deliberately paying an undervalue and was, again, claiming some kind of set off, when thereafter cheques continued to be proffered from Templeville to Leopardstown, these were not accepted. That was reasonable. Leopardstown were entitled as a matter of law to insist on Templeville and Philip Smyth fulfilling their side of the bargain. Therefore a debt has built up. It will be recalled that clause 3 of the mediation settlement agreement provides that there is no legal or equitable right of set-off in favour of Templeville as and from the 26th October, 2011. Detailed provisions as to rent are contained in clause 1 of the mediation settlement agreement. I quote:

> The rent reserved under the lease of the 5th June 1998 … as amended by the License Agreement for Works of the 5th June 1998 and is further amended by virtue of rent reviews is in a total sum of €499,310 per annum. The said rent… will be paid by Templeville in the manner provided for in the lease as and from the 1st day of January 2012. For the purpose of avoidance of doubt, Templeville will continue to pay the existing rent (being €58,599.68 paid every 2 months) to Leopardstown in the manner provided for in the lease up to the 31st day of December 2011.

In addition, the service charge contribution was agreed under clause 2.1 at €45,000 excluding VAT annually payable every two months in equal parts as and from the 1st day of January 2012.

Whether it was in respect of arrears, or was somehow otherwise apportioned to outstanding obligations, the obligations as to payment under the mediation settlement agreement cannot be re-written. Under clause 14 of the mediation settlement agreement, Templeville was to pay Leopardstown the sum of €4,090,000 in two tranches: the first being €2.5 million by the 10th November, 2011, and the second, taking into account the release of €90,000 held jointly between the parties, being €1.5 million was to be paid on or before the 10th August, 2012. The first tranche was paid, I imagine but do not know because I was not told that the €90,000 was also released to Leopardstown, but the second tranche of €1.5 million was never paid. Clause 14.2 of the mediation settlement agreement provided that in the event that Templeville should default on either of the payments it consented to Leopardstown marking judgement against it. Philip Smyth agreed that such a default would require him to pay within seven days thereof any amount then due up to a maximum of €1.5 million, with no extension of time.

These obligations have been badly defaulted on by Templeville and by Philip Smyth. Therefore, in accordance with the mediation settlement agreement, Leopardstown are entitled to judgement as against Templeville and as against Philip Smyth, as guarantor. There is no dispute as to the manner of calculating interest on rent or the service charge. The sum outstanding in respect of rent and service charge and the interest thereon amounts to €688,793.11. Together with the sum outstanding as of the 10th August, 2012, of €1.5 million, the sum due as of the 30th April, 2013, is €2,188,793.11. There will be judgment in that amount as against Templeville. As to any further sum outstanding that will be adjusted as of the date of judgment hereof. There will be judgment as against Philip Smyth in the amount of €1.5 million.

Forfeiture and relief against forfeiture
It is clear that Templeville is a dysfunctional company. *Wallersteiner v. Moir* [1975] Q.B. 373 is mainly treated as an authority for the circumstances under which the corporate veil may be drawn back to establish liability against those controlling a company. It is also authority for the proposition that the incorporation of a company establishes duties on directors to ensure its independence as a legal entity separate from whoever may be its main investor. In speaking, as Lord Denning MR did, of the corporate creations of the main promoter of the relevant one-man companies dancing to his bidding and of his pulling the strings of his puppets, anything other than strict corporate governance in accordance with the code of company law is condemned as unacceptable. Templeville has one entirely formal meeting of its board of four directors once a year. Philip Smyth, as one director, tells them what to do. Two other directors gave evidence, Karen Polly and Brenda Flood. They have been prevented from exercising their legitimate voice. It is not relevant that unusual provision may be made in the articles of association of Templeville. Whatever may be cleverly devised, the code of corporate governance cannot be overcome through internal reordering of a company. No company can legitimately offer corporate protection on the one hand and be, on the other, the alter ego of an individual director. There is no structure in company law whereby the benefits of incorporation are entitled to be assumed through deviation from the norm that the board of directors of a company carry the responsibility for its direction and governance subject to the rule of the shareholders in general meeting. Notable, in this regard, is the entire absence of any input from the practical, intelligent and experienced voices of Brenda Flood and Karen Polley on any decision as to whether the new seven tennis courts site was viable or useful to Templeville; as to whether the car parking arrangements might gravitate towards the Leopardstown car park; as to whether as of March or April 2012 any wrong in contract had been committed by Leopardstown; as to whether set off was somehow available notwithstanding the clear term to the contrary in the mediation service agreement; and as to whether monies should be withheld in that regard. On that point, it is astonishing that neither of these directors had any knowledge, apart from the most superficial, as to what the mediation settlement agreement had obliged the company to do.

Templeville must be restructured. At least two new directors need to be brought in from outside the sphere of influence of Philip Smyth.

There have been deliberate breaches of the mediation settlement agreement. There has been a lack of objectivity on the part of Philip Smyth. There has been the direction of Templeville in a manner not entirely beneficial to the corporation by him. This is all deeply regrettable. Philip Smyth is a determined businessman who has made a truly valuable contribution to Irish life. It is not for the court to exercise personal judgements beyond recognising that his exceptional qualities of concentration and attention to detail are perhaps the origin of some of the unfortunate decisions made through the agency of Templeville. A corporation cannot be the agent of one of its directors. No neighbour should have to put up with the conduct evident in this case from Templeville. The court would have no hesitation in ordering forfeiture of the 1998 lease but for the fact that the intelligent and sensible direction of Brenda Flood and of her colleagues as directors offer a final chance. The court would order forfeiture in this case were only Philip Smyth involved as lessee. But he is not even the lessee. He is a party to the mediation settlement agreement and he is the guarantor under the relevant lease.

In *Campus and Stadium Development Ltd v. Dublin Waterworld Ltd* [2006] IEHC 200 (Unreported, High Court, 21st March, 2006), Gilligan J. set out that the equitable nature of relief against the legal remedy of forfeiture. Relief in equity, following that judgment, should be approached thus:

> I take the overall view that in order to exercise my discretion fairly, I must take into account the conduct of the parties, the wilfulness of any breach by the tenant, the general circumstances particular to the issue, the nature of the commercial transaction the subject matter of the lease, whether the essentials of the bargain can be secured, the value of the property, the extent of equality between the parties, the future prospects for their relationship, the fact that even in cases of wilful breaches it is not necessary to find an exceptional case before granting relief against forfeiture and then

apply general equitable principles in reaching a conclusion.

Gilligan J. refused relief. In the principles so outlined, as to conduct, the risk of repetition, whether such conduct was deliberate or mistaken, whether bargains were overturned for no valid excuse, whether the contract might be secured without forfeiture, whether an extreme remedy that might destroy jobs should be ordered, relief against forfeiture could not be granted were Templeville incapable of reform. But that company can, and should, be reformed and if it is then the prospects for a working relationship with Leopardstown into the future are reasonable. I propose to grant relief against forfeiture but on the Court giving the defendants time to consider how Templeville may be properly restructured in order to function as a company subject to the rule of law. Two additional and experienced directors are required. Templeville should have at least monthly meetings of its board. Decisions in aid of proper management of the company must be made through such meetings. No director is to have any say outside of that structure. All important issues beyond day to day arrangements are to be referred to the board of directors. Absent an undertaking that Templeville will henceforth act as a corporate undertaking subject to the law, forfeiture will be ordered. Time will be given to put new directors in place and for the new arrangements to be bedded in. If that undertaking is forthcoming that the board of directors of Templeville will now take charge of its corporate governance, the matter of forfeiture can be left in abeyance.

I would be compelled otherwise to refuse relief against forfeiture. There is no comprehension on the part of Templeville of the solemnity of an agreement arrived at through a process of considerable care and much expense. An attitude of non-cooperation and the seeking out of grievances does not show an attitude which would enable any agreement to work. I will give time to Templeville to consider giving a solemn undertaking to the court. Absent an undertaking in the terms indicated, the approach I must take is clear.

Conclusion
There will be judgment for the plaintiff against the defendants in the amount indicated. The issue as to forfeiture will be left over for four weeks pending brief evidence and brief oral submissions as to the conclusions reached in this judgment and the possible solution to the difficulties in their origin.