COURT OF APPEAL

Record Number: 2015 No. 308

Peart J
Irvine J.
Hogan J.

BETWEEN:

FINBAR TOLAN

PLAINTIFF/APPELLANT

- AND -

CONNACHT GOLD CO-OPERATIVE SOCIETY LIMITED

DEFENDANT/RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 5TH DAY OF MAY 2016

1. Mr. Tolan was at all material times a cattle dealer. He bought cattle at marts in Co. Mayo on several days each week and sold them immediately into Dawn Meats with whom he had what I will, in a neutral way, refer to as a long-standing "arrangement" to buy them. There is some controversy between the parties as to whether Mr. Tolan had a contract as such with Dawn Meats, but that question does not touch upon the issue arising on this appeal which essentially is whether a document prepared and signed at the end of a meeting which took place on 16th July 2012 between Mr. Tolan and representatives of Connaught Gold, constitutes a binding contract as contended by the plaintiff, or is merely an agreed note or memorandum of what was discussed at the meeting as contended by the defendant. Mr. Tolan maintains that it was a binding agreement as to the credit terms on which he could buy cattle at the defendant's mart, that he complied with the pre-conditions upon him, but that at a meeting on 9th August 2012 the defendant company breached the agreement by withdrawing the credit period, thereby putting him out of business since without credit he was unable to buy cattle at the marts. In these proceedings he claims substantial damages for breach of contract.

2. Some idea of the scale of the cattle dealing enterprise engaged in by Mr. Tolan by mid-June 2012 can be gained from the fact that in the seven months preceding June 2012 he had bought cattle to the value of about €3,000,000 at the defendant's marts. Indeed, there was evidence before the High Court that such was his importance to the business being done at marts in this area that farmers would contact Mr. Tolan in advance of mart dates to find out whether he would be attending the mart, as he was known to pay a good price for cattle they might wish to sell. He was also contacted by mart managers to find out if he would be attending. He was clearly an important player in the cattle business in the area, was well respected, and known to meet his financial obligations to the marts, even though the amounts that he might owe to a mart on any particular date would be large by any standards. That is simply a reflection of the quantity of cattle he would have bought in the previous three weeks, and not of any delay on his part in settlement of his account in accordance with credit terms understood between him and the defendant. Prior to the events giving rise to these proceedings he had by agreement three weeks credit on any cattle purchased by him at the marts.

3. Oral evidence was heard in the High Court over four days, and at the conclusion of the hearing Kearns P. in an **ex tempore** ruling found against Mr. Tolan and dismissed his claim for damages. It is against that dismissal that Mr. Tolan now appeals to this Court.

4. Before considering the basis upon which the President ruled against the plaintiff, I need to set forth some further detail in relation to the course of dealings between parties, and of certain meetings which took place in June, July and August 2012. These meetings were for the purpose of addressing concerns that the defendant had about the level of its exposure at any particular time which resulted not just from the three weeks' credit that the plaintiff enjoyed, but because of the gradual increase in the numbers of cattle being bought by the plaintiff, thereby increasing the level of its exposure should the plaintiff for any reason not be in a position to continue in business. There was always three weeks' cattle purchases unpaid for any particular date under the then arrangements. The defendant wanted to reduce that exposure.

5. Mr. Tolan had been dealing in cattle in this area for twelve to fifteen years prior to these events. During these years there was no written agreement in relation to credit terms, but business was done on the basis of three weeks' credit. What it meant in practical terms was that if he purchased, say, 100 cattle at the mart on a Saturday, he was required on the following Saturday to give the mart a cheque for the amount of that purchase. That cheque would in turn not be presented for payment for a further week. In this way he had the benefit of three weeks' credit which gave him sufficient time to sell the cattle into Dawn Meats, and get paid for them. That in turn would enable the cheque to be met. That *modus operandi* appears to have worked well and to have been mutually beneficial over a long period. Clearly it was an arrangement that depended upon trust, and there has been no suggestion that at any time prior to June 2012 this necessary ingredient in the relationship was missing.

6. By June 2012, however, there were some concerns. Mr. Tolan was called to a meeting where it was explained to him that the marts were worried about their level of exposure given the amount of animals being bought by Mr. Tolan. He was told that there would have to be some limit agreed both as to the numbers of animals being bought, and a reduction of the period of credit to two weeks instead of three. The explanation given to him at the time was that new regulations had come into force which had to be complied with by the marts. According to some of the evidence given, Mr Tolan immediately became very agitated at the suggestion of any limit to the numbers of animals he could buy, and threatened to walk out of the meeting. However, he eventually agreed to the reduced credit period, but requested that he be allowed a few weeks before the new terms would operate, so that he could arrange an overdraft facility to be put in place to replace the loss of one week's credit. That breathing space was agreed to, and a further meeting was arranged for 16th July 2012 to review the position.

7. Mr. Tolan immediately approached his bank and by 4th July 2012 he had received confirmation from his bank that subject to him fulfilling some usual conditions, such as arranging a life policy as part of the security for the facility, an overdraft of €200,000 would be put in place.

8. On 16th July 2012 that further meeting took place at which Mr. Tolan produced a letter of offer from his bank for an overdraft facility in the amount of €200,000. He explained to them that some conditions had yet to be satisfied but none that caused him any difficulty. There was general discussion about the new credit terms. He was informed that if he did not have his overdraft in place by 10th August 2012 he would not be able to buy at the mart. At the end of that meeting he was asked to sign a document, which he did, and the three representatives of the defendant who were present at the meeting signed also. Mr. Tolan says this document contains the new agreed credit terms which, he says, were to remain in place at least until the end of that year, and with a possible review for future years, though the document is silent in this regard.

9. The text of the document signed on 16th July 2012 is in the following terms:

> *"By the 10th Aug Finbar Tolan will have his overdraft in place to allow cheque to lodg [sic] on the Saturday for the previous Saturday week's purchase*
>
> *During Galway race week cheques will be lodged in the current way with no gap in holding cheques*
>
> *Ballinrobe cheques will continue to lodg [sic] in same way as in the past*
>
> *Finbar agrees that the above is acceptable and has to be in place by the 10/8/2012 or all offers are off the table.*
>
> *The only stock purchased will be dry cows and bulls and if any other stock purchased will be paid for on day.*
>
> *Signed*
>
> *[by various persons including Martin Walsh, Tom Jordan and Finbar Tolan]*
>
> *16th – 7th – 2012."*

10. The defendant says that this document was never intended to be a contract, and is simply a note or memorandum of what was discussed at the meeting on 16th July 2012 and that it could be revisited/revised at any time. Both Mr. Walsh and Mr. Jordan, who gave evidence for the defendant, stated that it was agreed that a further meeting would take place on 12th August 2012, even though this is not mentioned anywhere in the document. Mr. Tolan disagrees that any such further meeting was agreed, and says that in fact there was no need for a further meeting since they had reached agreement in relation to the reduced credit terms, and all that remained was for him to have his overdraft in place by 10th August 2012, so that he could continue to buy at the mart as usual. His bank statement was produced at the trial showing that on 25th July 2012 the sum of €200,000 was credited by his bank to his account, indicating that by that date his overdraft was in place and, therefore, that all pre-conditions had been fulfilled by him by that date.

11. What happened between 16th July 2012 and 9th August 2012 is a matter of controversy between the parties, the latter date being the date on which Mr. Tolan contends the defendant reneged on the agreement reached and signed up to on 16th July 2012. He was informed at the meeting on 9th August 2012 that all credit was being withdrawn and that he was no longer permitted to purchase cattle at the defendant's marts as before. In other words, insofar as he might wish to purchase cattle at the marts in the future he would have pay for them that same day – something which Mr. Tolan says was tantamount to being told he could not buy, since credit was the only basis on which he had traded and could ever trade, and therefore he was put out of business altogether. It is clear that because of the credit terms on which he was buying cattle, it was necessary for him to keep buying and selling in order to keep the business afloat. If he stopped trading on a particular day for any reason, the cheques given for the previous two or three weeks would not be met. That was the exposure that was of concern to the defendant in the summer of 2012 and which it was trying to address by agreement if possible in relation to both a reduced credit period and a reduction in the number of cattle the plaintiff would buy.

12. The defendant says that nothing was finally agreed on 16th July 2012, and that it was entitled to decide as it did on 9th August 2012. They say also that it was always the case that a further meeting would take place on 10th August 2012 before anything was cast in stone. Mr Tolan refutes this completely. There was evidence given by each side before Kearns P. and he concluded that the document signed by the parties on 16th July 2012 was not a legally binding contract, and he dismissed the plaintiff's claim for damages for breach of contract. I will continue with the narrative of events subsequent to the meeting of 16th July 2012 as they form the contextual background against which the issues on this appeal must be considered.

13. As I have said, Mr Tolan says that no further meeting was envisaged to take place after he signed the agreement on 16th July 2012 and that all that remained was for him to make sure that by 12th August 2012 he had his overdraft in place so that he could meet the reduced credit terms agreed. The evidence was that his life insurance policy was in place by 18th July 2012 and the overdraft was in place by 25th July 2012. He refers to the fact that the document signed on 16th July 2012 makes no reference to any further meeting to take place on 10th August 2012, and he makes the point also that even if the defendant is correct that this document was simply a note or memorandum of what was discussed at the meeting, and that its purpose was to avoid any confusion or doubt arising as to what was discussed, it is surprising that it makes no mention of such a further meeting, if one was agreed to take place.

14. As to how Mr. Tolan came to attend a meeting on 9th August 2012 in circumstances where he says that no such meeting was contemplated on 16th July 2012, he stated in his evidence to the High Court that he happened to meet Martin Walsh by chance in Castlebar on 3rd August 2012 and that he told him that he had the overdraft in place. His recollection is that Mr. Walsh did not seem very happy with that information, and that it was then that Mr. Walsh said that there would have to be another meeting which was then arranged for 9th August 2012. He says that he was not told what the purpose of that meeting was, and did not know its purpose. He went to the meeting nevertheless.

15. Mr. Tolan's evidence was that when he got to the meeting he found that not only were the mart managers, Mr. Walsh, Mr. Murphy and Mr. Jordan, there but also Aaron Forde, the CEO of the defendant, whom he had never met before. He says that after the usual introductory pleasantries were over he was waiting to find out why this meeting had been arranged. He says that Mr. Murphy again mentioned that new regulations had been introduced for marts. He was surprised at this being mentioned again since that had been discussed at the meeting in June and again on 16th July 2012 when the document of that date was signed. It appears from Mr. Tolan's evidence that Mr Forde, the CEO, had not been made aware of that signed document or indeed the previous meetings. Mr. Walsh was able to produce a copy of the document for Mr. Forde, and it was read out by Mr. Walsh. According to Mr. Tolan, Mr. Walsh stopped reading the document at some point and said that it could be all changed at any time. Mr. Tolan says that he interjected and asked where in the document did it state that, to which Mr. Walsh said that it was not written into the document but

that it had been agreed on 16th July 2012. Mr. Tolan denied that, and indeed, according to him at least, if it had been included in the document he would not have signed it. It appears that Mr. Forde left the meeting quite quickly as he had to be elsewhere. Thereafter, there was some acrimonious conversation, and according to Mr. Tolan, it was made clear to him by Mr. Walsh that he was getting no credit terms whatsoever and that he was not permitted to bid for cattle at the defendant's marts, including on 11th August 2012 at Balla mart which Mr. Tolan had been planning to attend.

16. Mr. Walsh's evidence as to what transpired at the meeting of 9th August 2012 was somewhat different, and I will come to that. He was the general manager and head of communications of the defendant, and had been working with the company for some 40 years. He stated that the meetings in June and July 2012 had been preceded by a meeting with Mr. Tolan the previous year in August 2011. He said that the August 2011 meeting had arisen because, firstly, Mr. Tolan had countermanded a cheque in the sum of €119,000, and this had caused them to be concerned about their level of exposure given the level of business being done by Mr, Tolan at that time. They were also aware of the need to alter credit arrangements as a result of the introduction of S.I. 199/2011 – Property Services (Regulation) Act 2011 (Client Monies) Regulations 2012 which it was believed imposed obligations upon the mart to ensure when they paid the farmers for their animals, that the money was in their account from the purchaser. This meant that they had to alter credit period arrangements such as those enjoyed historically by Mr. Tolan. Hence they needed to bring him back to two weeks' credit instead of the three he enjoyed up to that. Those Regulations were not opened to the Court but were referred to in evidence and submissions. Mr. Walsh's evidence was that following the introduction of those Regulations there was a need to bring in better controls in relation to getting paid for animals sold at the marts, and paying monies out to the farmers whose animals were sold. Put simply, he understood that on whatever day the farmer was given a cheque, the mart had to be in funds from the buyer of the animals concerned.

17. Mr. Walsh stated that the document signed on 16th July 2012 does not contain a note of everything that was discussed at that meeting *"particularly credit and credit limits"* (Day 3, page 12/13). He went on to say *"… and the only reason they're not on that note is the fact that Mr Tolan would not agree to any limits".* This is a reference to limits on the numbers of animals that Mr. Tolan might buy on any particular day, which is a separate matter to the period of credit he would be allowed. The mart had apparently become concerned at the quantity of animals he was buying over the previous months, and wanted to discuss some limit on numbers as well as the curtailment of the credit period, so that its exposure at any particular time would be reduced. However, according to Mr. Walsh's evidence, Mr. Tolan refused point blank to discuss limits on numbers. Nevertheless by 10th August 2012 the level of exposure had been successfully reduced from about €400,000 to €154,000, but there are seasonal explanations for that too.

18. Mr. Walsh stated that as far as he was concerned what is noted as having been agreed in the notes of the meeting on 16th July 2012 was to cover only the period from that date until the parties would meet again on the 10th August 2012, and that on that date there would be further discussions as to what the position would be going forward. He also was clear that the purpose of the signed document was to ensure that there would be no confusion as to what had happened at the meeting. He also said that if he was entering into a legally binding agreement, he would have got their solicitor to prepare an agreement. He was asked in cross-examination why, if they were simply agreed notes, they were not headed as such, to which he responded that he had done his best in the circumstances, and that he was simply a mart manager. He went on to state *"I have indicated that the key items that I want to achieve are not in the notes because I had no choice because the man would not remain in the room if I put them on that"* (Day 3, page 33). It was put to him that it was in fact an agreement reached between them and Mr Tolan on that date to which he replied:

> *"It was not an agreement. It was notes pertaining to a discussion that took place that day and we had a number of other items that we discussed, like credit terms, that were unacceptable to be put on the notes." (Day 3, page 34)*

19. It was put to Mr. Walsh that there was no reference in the notes to any follow up meeting on 10th August 2012 at which any further discussion would take place for the future. He replied: *"Because anything else other than what I have there I had difficulty in getting Mr. Tolan to agree to. And we wouldn't have got this signed for the bit we got"* (Day 3, page 36). I take that to mean that they were glad to at least get his agreement to a reduction to two weeks' credit, and to get that noted, and that other matters still in controversy, such as some agreed limit of the numbers of animals he would buy on any particular day would have to await the further meeting which he says was fixed for 10th August 2012. Nevertheless that is not contained in the document, and Mr.Tolan says that there was never any mention of any further meeting until he met Mr. Walsh accidentally on 3rd August 2012 in Castlebar as already mentioned.

20. Mr. Walsh also gave his version of the accidental meeting with Mr. Tolan on 3rd August 2012 in Castlebar. He agrees that he had a conversation with Mr. Tolan, but disagrees that Mr. Tolan told him that his overdraft was in place as of 25th July 2012. He said that there was just small talk, and that he was glad of that because if there was to be any serious discussion he would want to have witnesses present. He also stated that he was unsure when Mr. Tolan was told that there was to be a meeting on the 9th August. He knew that there was a meeting arranged for 10th August in any event. He was asked how it came to be changed to 9th August and when that was done, and he explained that his daughter was emigrating on 10th August, and that Mr. Tolan had agreed to change the date to 9th August. That must have been in a subsequent conversation because Mr. Walsh confirmed that this had not taken place at the meeting in Castlebar on 3rd August.

21. As for the meeting on 9th August 2012, Mr. Walsh stated that after the usual pleasantries, he told Mr. Tolan that there were three issues that needed to be discussed:

> (1) limits on numbers of animals being purchased,
>
> (2) the credit period, and
>
> (3) the fact that Mr Tolan had countermanded a cheque for €131,000 since the previous meeting.

22. I should add that Mr. Tolan explained that countermanding on the basis that he had drawn the cheque on the wrong account and had immediately replaced it, and there was no loss to the mart on that account. Nevertheless, it was a worry to Mr. Walsh that it had happened at all, and gave rise to concerns about the level of exposure at any particular time. He went on to say that the meeting lasted only a short time because Mr. Tolan got up and walked out of the meeting at the mention of a limit being placed on the number of cattle he could buy. He was asked whether at this meeting he had requested sight of any documents to show that the overdraft was in place. He replied that he did not get the chance to ask that, because Mr. Tolan had walked out abruptly, and he had seen no evidence that the overdraft was actually in place.

23. Mr. Walsh denied ever having told Mr. Tolan that he was barred from attending the mart at Balla on 12th August 2012, or any other mart, and clarified that what he had said was that he was welcome to attend any mart he liked provided that he paid on the

day for any animals that he bought. It will be recalled that Mr. Tolan stated that if he was being given no credit (in breach as he sees it of the agreement signed on 16th July 2012) it was, in effect, putting him out of business and preventing him from buying. Mr. Tolan has stated that he walked out of that meeting when he realised that they were reneging on the agreement that he would have 2 weeks' credit provided that he had his overdraft in place by 10th August 2012.

24. Mr. Tom Jordan gave evidence also. He was at the time a manager at the Ballymote mart which had dealings with Mr Tolan. He attended the meetings that took place on 18th June 2012, 16th July 2012, and 9th August 2012. He confirmed that the concern was to reduce the level of the marts' exposure in relation to Mr. Tolan's dealings, and that they wanted to limit the number of animals he would purchase, and also rein in the credit terms to two weeks, and address the question of countermanding cheques. Without going into his evidence in detail, he stated that the very mentioning of any limits being imposed on the number of animals he could buy was something which made Mr. Tolan very angry and caused him to rise up and threaten to leave the meetings. It was a topic on which no discussion was possible as far as Mr. Tolan was concerned. He wanted to be able to come to the marts and buy as many animals as he wished. Mr. Jordan's evidence was, like Mr. Walsh, that on 16th July 2012 it was agreed that there would be another meeting on 10th August 2012 at which evidence of the overdraft being in place would be produced by Mr. Tolan. He agreed that at 16th July 2012 meeting, Mr. Tolan had produced a letter of offer from his bank, but that there were things that had to be put in place, and that he was given until 10th August 2012 to get his paperwork in order. He also believes that the contents of the notes signed on 16th July 2012 were only matters agreed for the period between 16th July 2012 and the next meeting to take place on 10th August 2012, and that if he had his overdraft in place by that date, they would discuss what was to happen thereafter. But he is clear that the notes were not intended to be a legal agreement as such, but rather something to make sure there was no confusion about what was discussed.

25. Mr. Jordan was able to give evidence of his recollection of the meeting which took place on 9th August 2012. He said that by that date another cheque had been countermanded. It had been in the sum of €131,000. It was replaced and no problem remained in that regard, but it was still something that was of concern especially at that quiet time of the year. He remembered that after pleasantries had been exchanged, and Mr. Walsh had outlined the three issues that needed to be discussed, the topic of limits to numbers of animals came up, and that the moment it was raised Mr. Tolan got up immediately, went over to the door and started shouting that he would be attending the mart at Balla that Saturday, and that as far as he was concerned he had signed an agreement on 16th July 2012 and he was sticking to that. He then left the meeting. Mr. Jordan stated that they never got the chance to find out if the overdraft was actually in place as Mr. Tolan simply left the meeting abruptly. He believes that if Mr. Tolan had conducted himself differently at this meeting something could have been sorted out but that Mr. Tolan gave them no opportunity to do that.

26. Mr .Jordan was asked in cross-examination if, at this meeting on 9th August 2012, Mr Tolan was asked if he had his finance in place. It is worth setting out his reply:

> *"I've already said and I'll repeat again. We didn't get the opportunity to ask him because he didn't sit there long enough. When we indicated what the subjects on our agenda were, once he heard credit limits he jumped from his chair, he went to the door. So, how could you ask him that? How could you ask him the question you've asked him three or four times? You couldn't ask him because you'd have to be in the room and understand that the man was on edge and was obviously under a lot of pressure, you know. As I've said before in our June meeting and in our July meeting he made it crystal clear that he'd agree to nothing. The only reason that he signed those notes with us, in my opinion, in July is because he needed to keep trading to keep his cash flow going. And here we were in September, if he had an overdraft, which I never saw, truthfully never saw. We didn't ask him, I accept that but we had no ways of knowing." (Day 4, page 39).*

27. Mr. Tolan was clearly extremely angered by this unexpected turn of events, as he saw them, and walked out of the meeting. He says that he expected that somebody might get in touch with him to try and resolve matters but this did not happen that same day. The following day he got a call from Mr. Murphy who had been at the meeting. He stated that he fully expected him to be calling so that they could sort something out, but in fact Mr. Murphy explained that he had been asked to phone him in order to arrange to get a cheque for everything that was owing at that date. It appears to have been in the sum of about €104,000, which through the ordinary course of trading had reduced from over €400,000 some weeks previously. Mr. Tolan said that he would give him that cheque at the Balla mart the next day. However, according to Mr. Tolan , Mr. Murphy went on to make clear that he had been told to tell Mr. Tolan that he was not permitted to attend the mart at Balla or any other mart, until further notice, and that if he attended and made a bid it would not be accepted. However, Mr. Walsh in his evidence has denied that he was ever told he could not attend, but rather that he could buy provided that he paid for what he bought on the day – in other words, there would be no credit period at all.

28. Mr. Jordan was asked how Mr. Tolan might have come to the idea that the agreement which was signed on 16th July 2012 was to last until the end of December 2012 as there was no mention of that in the document. Mr. Jordan said that it was never stated that it was to last until the end of the year. Mr. Jordan was certain that it was agreed that they would all meet again in August to allow Mr. Tolan an opportunity to get his overdraft in place. He feels that it was up to Mr. Tolan then to satisfy them that it was in place by the August meeting, and he never did that. He accepted that at the meeting of 16th July 2012 meeting the bank's letter of offer had been produced, which had mentioned certain conditions to be complied with before drawdown, but that Mr Tolan had left the meeting on 9th August 2012 abruptly at the mention of limits on numbers of animals he could buy, and therefore the meeting never got the opportunity to confirm the position about his overdraft.

29. There is no need to recount everything that followed, except to say that Mr. Tolan was extremely angered and upset by this turn of events. As he saw it, he was being put out of business, and his reputation within his family and wider community was being destroyed because rumours were spreading that he was in financial difficulties and could not attend marts to buy cattle and supply them to Dawn Meats and so forth as he had done for years. He sought legal advice from his solicitor thereafter.

30. The result of the withdrawal of credit terms meant that sums then owing to marts could not be paid, since without credit he could not buy cattle to sell into Dawn Meats as previously, and get paid for them. This meant that he could not pay the amount then owing. It appears that by 12th August 2012 a sum of €154,830 was owing and could not be paid. But as Mr. Tolan explained in his evidence this sum was only in respect of cattle bought over the previous few weeks under the old credit terms, and that if he had been permitted to continue to trade as before, this would have been discharged in the normal way.

31. I have set forth a summary of the evidence partly to provide a factual context for the legal issue that arises, and partly because the judgment of the trial judge was an ex tempore judgment given at the conclusion of the hearing, and therefore does not contain any detail of the evidence tendered. There is one aspect of the evidence that I have not mentioned. I will do so for the sake of completeness, but it is really a side-issue and not material to the issue for determination. In his evidence Mr. Tolan had floated the idea that in fact Mr. Walsh had an ulterior motive behind putting him out of business, which is that he objected to Mr Tolan bidding against some other unnamed dealer in respect of dry cows and heifers, and thereby raising the price which that dealer would have to

pay for such animals. Mr Walsh completely denied any such motive. I mention it because it was part of Mr Tolan's evidence.

32. I will turn shortly to the *ex tempore* judgment given by the President at the conclusion of the defendant's evidence on Day 4. Before doing so it is helpful to refer to a discussion between the President and Counsel at the conclusion of the plaintiff's case towards the end of Day 2. There was no application made by the defendant for a dismiss at that stage, but there was a discussion initiated by the President as to the nature of the plaintiff's claim and the legal issues arising as he saw them. That discussion ranged over issues such as whether the document amounted to a contract, and if so, to do what, for how long it was to operate, or whether it really amounted to some sort of representation by the defendant that if Mr Tolan put an overdraft in place he could continue to buy as previously, or whether some sort of legitimate expectation arose, though the President noted that no claim had been pleaded on the basis of any legitimate expectation. He noted also that no case was pleaded in relation to competition law i.e. a denial of access to a market.

33. On Day 4 at page 88 the President is noted as stating:

> *"Right, Mr Fogarty [counsel for the defendant].I don't need to hear you on [the] contract point. I'm satisfied there isn't a contract. There can't be a contract based on this document for the reasons I've just been discussing with Mr Flannery and no case has been made that Mr Tolan was induced by something said to act to his own detriment although a case of legitimate expectation might have been made. It hasn't been made. A case for damages in breach of principles of competition law, denial of access – that hasn't been made either".*

34. Having so stated, the President indicated to Mr. Fogarty (for the defendant) that he would need to focus on whether the document signed on 16th July 2012 could be seen as a representation by the defendant that for so long as Mr. Tolan complied with the new credit terms he would not be denied access to the mart under the control of the defendant at least up to the end of December 2012. Mr. Fogarty responded firstly by highlighting the fact that there was no basis put forward by Mr. Tolan for any contention by him that the terms of the document were to endure until the end of December 2012 as the document was silent in that regard, and there was no evidence that anybody had so stated at the meeting. Further submissions were made by each side, and ultimately the President concluded at that point (i.e. before the defendant went into evidence) as follows:

> *"I am satisfied at this stage of the case only, in other words the halfway stage on this particular issue, that no case in legitimate expectation having been made out and no claim for damages for breach of competition rules under the Competition Act having been advanced, that really the only case the plaintiff can advance [is] a claim for breach of contract …… or a representation …… that the defendants cannot as it were, walk away with impunity.*
>
> *In so far as the contract claim is concerned, I am quite satisfied that this document of 16th July cannot be regarded as a contract of the sort that Mr Tolan believes it is, whereby he could indefinitely continue to attend at the mart and buy and sell in the sense that he would have some sort of a claim against [the defendant] if he could not buy the cattle he wanted or something of that sort. The problem is that the underlying relationship was [where] there were a succession of one-off transactions each time he went to the market. He went to the market on a particular day. He did not have to buy anything nor did the mart have to sell anything, so what is sauce for the goose is sauce for the gander. Neither side had any binding obligations of a contractual nature arising out of their trading relationship.*
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> *On the other hand obviously by reason of an ongoing trading relationship one would expect, all would imagine in the ordinary course of events that trust would build up over the years between the parties and Mr Tolan has told me and he has not been challenged on this, that he was a big buyer in this particular market. His contention that other farmers were glad to see him arrive because he paid top dollar for the animals he bought. None of that has been challenged. He has given a version of events which apparently has not been given in correspondence, that he thinks there was ill-will towards him developing at co-op and management level because he was engaged in a bidding exchange with another gentleman going back to March 2011 whereby they would submit rival bids for bullocks and heifers and he feels that this in a sense contributed to the decision which he believes occurred by [the defendant] effectively to terminate the trading relationship and he says it has nothing to do with his finances that they terminated this association. It was entirely due to the fact that they either thought he was too big for his boots or they thought there was something going on and therefore they stepped in. First of all they called him to a meeting.*
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> *Now at this stage I have no reason not to accept what Mr Tolan says about the two swapped cheques which have been mentioned, that he substituted two cheques, so I do not in a sense see anything untoward about that but he has explained all that. He has in relation to the third cheque, the 18,700, said yes, he did to that in a moment of anger after he'd been shown the door as he says by the representatives of [the defendant] in August.*
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> *But what I have to do is put an appropriate construction on this document of 16 July which was not drawn up for no reason. It was drawn up for a particular reason because some understanding had been arrived at. Now, it may well be that I will hear in evidence that Mr Tolan was up to his eyeballs in debt not only to [the defendant] but to others. I have heard various figures mentioned which would suggest he was out to more than half a million, what he owed to various co-ops, but we will have to wait and see about that. But, by the very nature of the terminology of this document I think it can legitimately be seen as a representation that if he complied with its terms he would be allowed continued access to the market because it says as follows: "by 10 August Finbar Tolan will have his overdraft in place to allow cheques to be drawn on the Saturday for the previous Saturday week's purchase". In other words this sentence clearly envisages that the trading scenario is going to continue. "During Galway race week" – which was again a future event at the time of the drawing up of this document – "cheques will be lodged in the current way with no gap in holding cheques. Ballinrobe cheques will continue to be lodged in the same way as in the past". So here we are, this has no meaning except in the context of ongoing access by Mr Tolan to a particular mart. "Finbar agrees that the above is accepted and has to be in place by 10 August 2012 or all offers are off the table". In so far as that goes there was an arrangement in place whereby he would service the commitments which were outlined at the top and if the offer means anything it can only mean on that basis he would be allowed continued access to the mart. Now that isn't to say it was an endless access or that something else could have turned up that would have persuaded [the defendant] to cease dealing with them and that may well be, even the incident of the cancelled cheque might be ultimately regarded by this court as sufficient for the [defendant] to decide not to deal with any further. There also is the restriction on him to the extent that during the trading relationship that he could stock purchase only dry cows and bulls and any other stock purchase would be paid for on the day and that is signed by all relevant parties.*
>
> *So I can only construe this document in one way and that is an assurance and representation by [the defendant] that subject to Mr Tolan complying with these terms, that some form of continuing access to the market would be*

permitted. That is as far as this case goes. The plaintiff himself apparently has said he didn't himself feel that this would endure longer than the end of that particular year, so we're talking about a period of four or five months. So, on the plaintiff's own case, everything may have been up for grabs at that stage, but there is sufficient, in my view, to barely get the plaintiff over this only remaining avenue whereby the Court may have to consider if he has any entitlement. If of course it emerges that over that particular five-month or any five-month period he could not have made any worthwhile profit, any damages he might recover would be very small if that were to be the case and we certainly would not be talking about millions anything of that sort. For the moment I'm not going to dismiss the case, but I have to, in the interest of court time, I have to be satisfied as to what case can be made out on the material heard so far."

35. Following these remarks by the President the defendant went into evidence, as I have described to some extent above. At the conclusion of that evidence, the President gave his judgment. In it he referred to his earlier conclusion that there was no evidence of any contract, and he re-iterated that having heard all the evidence his view in that regard was unchanged. In that regard he stated:

> *"… I want to re-state it now at the end of the case that the document dated 16 July 2012 cannot be taken by the court as a contract in the sense that it obliged the mart to be available to Mr Tolan and to supply him with for purchase a limitless number of cattle for as long as – for as long as he was able to meet the credit terms to which the discussion on 16 July related. I am quite satisfied there was no contract in the sense normally understood between the parties but there was a history, a pattern of trading between them".*

36. He went on to refer to that pattern of trading up to 2011, where balances were cleared at year end. He then noted that in 2012 there had been a significant change in the level in the indebtedness of Mr Tolan at any particular time, due to the increased numbers of animals that he was buying in 2012. He drew particular attention to the fact that by the time the discussions between the parties were taking place in June and July 2012 he owed what the President described as "a staggering sum" of €464,000. He went on to state that it was not surprising that there was a sense within the defendant that something had to be done about this level, and that this concern gave rise to the meetings which have been described. The President stated that there was no question of the defendant trying to *"do down Mr Tolan"* because he was bidding against another cattle dealer in relation to heifers and bullocks, and that this seems to be something that Mr Tolan mentioned only at the hearing and not in any prior correspondence or in any particulars provided while pleadings were being exchanged. The President went on to note the purpose of the meetings which were arranged during the summer of 2012 as far as the defendant is concerned, namely to discuss the level of indebtedness, the numbers of animals being purchased, and the countermanded cheques. He accepted that the first meeting was inconclusive on 18th June 2012 and that a further meeting was set up for 16th July 2012 which generated the document at the centre of this case. He went on in that regard to state:

> *"… I am quite satisfied having heard all the evidence, that this document simply recorded – is a record of a work in progress in terms of the dealings between Mr Tolan and the defendants. Certainly it is not to be taken as a contract, for the very simple reason [it is] non-specific as to time, non-specific as to limits, non-specific as to virtually everything. I was told and I accept the evidence of Mr Walsh and Mr Jordan that it was time specific as far as they were concerned until the meeting which was due to take place on 9th of August when everything would be under consideration. I accept that Mr Tolan was told to try and get his overdraft facility in place. And in fairness to Mr Tolan, he did go off and make arrangements for an overdraft facility and he was able to actually show, produce at the meeting of 16 July a letter of offer in that regard. But a letter of offer is one thing, the completed loan arrangement does not appear to have come into being until 24 July in this particular case.*
>
> *But going back to the undertakings, as I previously referred to it, the very terminology of it is short-term because it indicates one of the items addressed in it is the upcoming Galway races, and as Mr Walsh himself said, [if] this was to be some sort of contract which would govern the parties behaviour towards each other for years to come or even months to come it would be drawn in a proper legal form as such. I'm quite satisfied this was not meant. Firstly it was never intended to have a legal effect. It was a note of certain topics that were touched upon – a holding operation, to use the expression I put counsel, until they would meet again on the 9th of August at which stage it had been hoped that Mr Tolan would be in a position to meet the requirements of the mart in a manner that would enable a trading pattern to continue. The unfortunate meeting of the 9th of August, as we have heard, terminated very quickly, and it seems, and it is not really I think seriously in contradiction, but that Mr Tolan was not prepared to agree limits. As far as he was concerned if he met his end of the bargain and had the overdraft facility he should be allowed to continue as before at least until Christmas. Now, I have asked Counsel where he got this idea of the arrangements continuing until Christmas. I can only think, in the absence of any evidence on this specific point, that what Mr Tolan was thinking was he had a breathing space, he might have had a breathing space to get his liabilities down to 0 by the end of that particular year. Nothing appears in writing along those lines and I do not believe that any kind of lifespan of that sort was discussed at any of these meetings. Rather they were concerned to – the defendants were concerned to see in place some sort of reassurance for them which, to quote Mr Jordan, "would reduce their exposure on this particular relationship".*
>
> *So, in so far as I say that the meeting of 16 July is concerned, I do not regard the undertaking that was given on that occasion as being anything other than a holding position until they would meet again on 10th of August, that was a date mentioned at the first line of the notes even though, as we know, the meeting which did eventually derail the relationship took place on the 9th ."*

37. Mr. Tolan submits that the President was wrong to conclude that the document which was signed on 16th July 2012 was not a contract, and that it was never intended to have any legal effect, and that it was simply a note of certain topics discussed and some sort of holding document for a short duration which could be revisited on 0th August 2012 when the parties would meet again. He concluded that it was what he described as a work in progress.

38. The President was not entitled to reach his conclusions based on what either of the parties stated was their subjective intention when putting their signatures to the document. There is nothing in his concluding remarks which would indicate that he did so. In fact it was at the conclusion of the plaintiff's evidence, and without having heard the defendant's evidence at all, that he first stated that he was not satisfied that there was a contract, and that what he was leaving over until after he heard the defendant's evidence was whether the document constituted some sort of representation that the plaintiff would be allowed access to the marts if he fulfilled certain conditions by the 10th August 2012. He then heard that evidence, and reached his final conclusions as set forth above, maintaining his earlier view that it was not a contract but rather a note of a work in progress, and to be revisited before the 10th August 2012 when the overdraft was in place.

39. In my view, when looked at objectively, but against the contextual background described above, this was a correct interpretation. If the President was not privy to the contextual background, where there was a clear wish on the defendant's part to

reduce its potential exposure to losses, not just by reducing the credit terms but also by placing a limit on the numbers of cattle Mr. Tolan could buy in any one week, one might possibly be able to consider the document of the 16th July 2012 as a complete agreement to the effect that provided that there was an overdraft in place by the 10th August 2012 Mr. Tolan could buy as many cattle as he wished at the marts provided that he paid for them within the new two week credit period. In such a case the absence of any statement as to the duration of such an agreement might be filled by implying a necessary term that reasonable notice of any alteration or termination of those terms would have to be given to Mr. Tolan.

40. Viewed in isolation from the overall context, one might consider that there was an offer in the sense of a two week credit period, and an acceptance of that period by Mr.Tolan, as well as his performance of the only condition mentioned, namely getting his overdraft in place. One might see also a form of consideration passing which could be expressed in terms that in consideration of Mr. Tolan agreeing to a reduction in the terms of credit, the defendant would permit him to continue to buy animals at its marts. Finally, being a document drawn up in the context of a commercial business relationship and setting out certain terms of trading, an intention to create legal relations could be presumed, and there is certainly nothing in the document to indicate that it was not intended to create legal relations between the parties. In this respect, I note a passage in Chitty on Contracts, 29th edition at para. 2-153 which states:

> ***"Burden of proof****: express agreements. In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations. The onus of proving that there was no such intention 'is on the party who asserts that no legal effect is intended, and the onus is a heavy one'. In deciding whether the onus has been discharged, the courts will be influenced by the importance of the agreement to the parties, and by the fact that one of them acted in reliance on it."*

41. Whether it is or is not a contract must be judged objectively, but against the background context, and not by reference to any subjective intention on their part. There was ample evidence from the defendant's witnesses of the general background of concern as to the level of indebtedness of Mr. Tolan and its wish to address that concern against which the President was entitled to consider the document's effect and meaning. It wished to address these concerns in two ways, firstly by a reducing the number of weeks' credit he would have, and secondly by placing a limit to the number of cattle that he would buy at any particular mart. It is clear that without the second element, the reduction in the credit period alone would not achieve the defendant's purpose.

42. The President was entitled to have regard to that contextual background when considering whether all the necessary indicia of a legally binding and complete agreement were present, or whether it was simply a note of a holding arrangement covering the period between 16th July 2012 and when the parties would meet again – originally on 10th August 2012, and in fact, on 9th August 2012. That is simply the context against which the document must be objectively considered in relation to its contents and whether there was an intention to create legal relations. The President heard the parties' evidence, and having considered the document he concluded that it was not a contract and that it simply reflected matters that were discussed and agreed upon to cover a short period until the parties would meet again. He relied in part for this conclusion on the fact that there was reference to arrangements to cover the upcoming week of the Galway Races when marts and much else in the area would be closed down.

43. Mr. Tolan however submits that the four necessary constituents of a contract are present, namely an offer, its acceptance, consideration, and an intention to create legal relations. To the contrary, the defendant submits firstly that there is no evidence of any intention to create legal relations; secondly that there is no consideration, and thirdly that while it does not state for how long the alleged agreement was to last, it can be inferred from the document and the surrounding circumstances that it was to operate up to the 10th August 2012 when at a further meeting it would be established if Mr. Tolan's overdraft was actually in place, and then see if more long term arrangements could be agreed and put in place, which would ensure a reduction in Mr. Tolan's indebtedness at any particular time, including by agreeing some limit on the number of animals that he would buy in any one week – something which Mr. Tolan had not been prepared to even discuss on the 16th July 2012. .

44. The document ought not to be construed as simply a note or memorandum of what was discussed at the meeting on 16th July 2012 just because the Court might prefer the evidence of the representatives of the defendant as to what they intended by the document. Their subjective intention does not aid its construction by the Court. That, as I have said, must be determined on an objective basis, albeit against the backdrop of the surrounding circumstances to give it context since no document exists in a vacuum. That is clear from a number of authorities, including the judgment of Murphy J. in the Supreme Court (Keane C.J. and Denham J. concurring) in *Igote Limited v. Badsey Limited* [2001] 4 I.R. 511. The issue in that case was not whether the document signed by the parties was or was not a legally binding agreement, but rather what meaning should be given to one particular clause of what was clearly a share subscription agreement. Having stated at p. 513 that *"the purpose of construing a document entered into between two or more persons is to ascertain their common intention"* he went on to look at what exactly was meant by "intention" and referred to what was stated by Lord Shaw in *Great Western Railway v. Bristol Corporation* [1918] 87 L.J. Ch. 414 at p. 424 as follows:

> *"… one hears much use made of the word 'intention', but courts of law when on the work of interpretation are not engaged upon the task or study of what parties intended to do, but of what the language which they employed shows that they did: in other words, they are not constructing a contract on the lines of what may be thought to have been what the parties intended, but they are construing the words and expressions used by the parties themselves. What do these mean? That, when ascertained, is the meaning to be given effect to, the meaning of the contract by which the parties are bound. The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion."*

45. Murphy J. went on to refer to the development of the concept of the 'factual matrix' and what Lord Wilberforce stated within his speeches in *Prenn v. Simmons* [1971] 1 W.L.R. 1381 and *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989 about the utility of looking at those surrounding circumstances (or factual matrix) as a tool or aid in ascertaining the intention of the parties. He referred also to the dangers identified by May L.J. in *Plumb Brothers v. Dolmac (Agriculture) Ltd* [1984] 271 E.G. 373 when he warned:

> *"There is the danger, if one stresses reference to the factual matrix, that one may be influenced by what is in truth a finding of the subjective intention of the parties at the relevant time, instead of carrying out what I understand to be the correct exercise, namely, determining objectively the intent of the parties from the words of the documents themselves in the light of the circumstances surrounding the transaction. It is not permissible, I think, to take into account the finding of fact about what the parties intended the document to achieve when one is faced with the problem some five, ten or many years later of construing it. In deciding what the document did in fact achieve, all that one can look at are the general circumstances surrounding the making of the document and in which it was made, and deduce the intention of the parties from the actual words of the document itself. The contract between the parties is*

what they said in the relevant document. It is not for this or any court to make a contract for the parties different from the words that the documents actually use merely because it may be that the parties intended something different."

46. However, before one gets into the business of construing a contract, there must in the first place be a contract to construe. In my view the first question is whether this document is a contract. If it is then the Court can enter upon the next question of determining what it means, and that is done objectively, and not by reference to the subjective intention of the parties.

47. It is too simplistic just to consider whether the four classic indicia of a contract are present in this case, namely offer, acceptance, consideration, and an intention to create legal relations, without taking into account the context in which the document arose. The Court must have regard to the overall context when deciding if this document is the complete agreement between the parties, or whether it was intended to be a partial agreement in the sense that it dealt with just one of the issues which fell to be agreed between the parties, with the remainder of what had to be discussed and agreed in some fashion being left to another day. Was it in other words an incomplete agreement? There is a fine distinction between an agreement on all matters at issue between the parties which is temporary pending the putting in place of a longer term agreement, and an agreement on part of what is at issue between the parties, be that on a temporary or a longer term basis, but a distinction nevertheless remains.

48. In the present case there was no evidence given by the defendant's witnesses or indeed Mr. Tolan from which the Court could have concluded that on the 16th July 2012 all the issues between the parties had been agreed, since Mr.Tolan had refused to even discuss the question of limiting the number of cattle he would buy in any one week at the earlier meeting in June 2012. That absolute refusal on his part to discuss a limit on numbers is confirmed by the evidence of his behaviour at the meeting on the 9th August 2012 once that issue was raised. The fact that it was raised again by the defendant at this meeting is clear evidence that it remained an issue to be sorted out between the parties, and there is nothing in the document of 16th July 2012 or even in Mr. Tolan's own evidence to indicate that the defendant had on that day abandoned its ambition of achieving agreement on a limit to the number of animals Mr. Tolan would buy. Mr. Tolan simply would not discuss that. That is part of the overall context against which the document must be considered, and in my view that it not to offend against the principle that the document must be construed objectively.

49. There were two legs to the solution to the defendant's concerns as to its level of exposure, and while these were both raised for discussion at the meeting in June 2012, progress could be made on only one, namely the reduction of the credit period from three weeks to two weeks. Clearly the agreement on that matter could go some way to easing the defendant's concern, but it alone would not achieve a long-term reduction in the exposure of the defendant unless there was some limit on numbers, because the very purpose of Mr. Tolan having a period of time to get an overdraft in place was to avoid the consequences of the reduction in the credit period so that he could continue to trade at the same level as previously. The overdraft was necessary for Mr. Tolan in order to cover the effect of the one week reduction in the credit period. In my view that general background in respect of which there was evidence can be taken into account in determining, not so much the meaning of the words used in the document, but whether or not the document was intended to represent a complete agreement as to the issues between the parties.

50. In my view all the evidence indicates that the document signed on 16th July 2012 evidences only that an agreement had been reached at that meeting that Mr Tolan would have two weeks' credit instead of three going forward . It also evidences that at Mr Tolan's request this reduction in the credit period would not commence before the 12th August 2012 as he wanted time to put an overdraft in place. There was agreement reached also as to what was to happen during the week of the Galway races, and in relation to two incidental matters, namely the buying of dry cows and bulls on a no credit basis only, and the lodging of Ballinrobe cheques. In the overall context of the purpose of the meetings in June and July 2012 this document cannot be seen as other than one recording an agreement on one aspect of the defendant's concerns only, with the other being parked until the further meeting which was clearly envisaged so that the defendant could be shown evidence that the anticipated overdraft was in place in time for the new reduced credit period to commence on 12th August 2012. In my view the President was correct to so conclude. If evidence is needed to emphasise that the document signed on the 16th July 2012 simply evidenced agreement on one leg of the defendant's concerns, it is provided by the evidence of the meeting on the 9th August 2012. The defendant attempted to raise its remaining concern again, namely some limit on the number of animals that Mr. Tolan would buy, but Mr. Tolan simply walked out of the meeting thereby preventing any discussion of that question.

51. The consequence of that impetuous behaviour on Mr Tolan's part, and before he had even provided any evidence at that meeting that his overdraft was in place, was that he had no agreement as to credit terms after 12th August 2012. This consequence is in accordance with the clause in the document signed by him on 6th July 2012 which stated:

"Finbar agrees that the above is acceptable and has to be in place by the 10/8/2012 or all offers are off the table."

52. His behaviour took everything off the table. Had he remained he would certainly have satisfied the defendant that his overdraft was in place, because there was no doubt that by 9th August 2012 it was in place. Had he been prepared to discuss the other concern which the defendant had, and which he knew they had a concern about, namely some limit on numbers some agreement might well have been reached. But to simply walk out of the meeting as he did led in my view to a consequence of his own making where *"all offers were off the table"*. I am satisfied that the President was correct to conclude as he did. I too am satisfied that the document signed on the 16th July 2012 is a note of what had been agreed up to that date, but in the overall context cannot be seen as a document intended to dispose of all issues of concern to the defendant. T here is nothing in the document to indicate that what was agreed on the 16th July 2012 was to endure until the end of the year. It clearly envisaged a further engagement between the parties before the 12th August 2012 because the defendant was entitled to know that the overdraft was in place . But that further engagement was not necessarily to be confined to that question alone. The second leg of the defendant's concerns had yet to be addressed and the only reason why it had not been even discussed was because Mr Tolan was not prepared to discuss it. He had no entitlement to dictate such an exclusion of the topic. If he chose to, there could be consequences, as in fact occurred. In such overall circumstances it is not open either on the facts or as a matter of law to conclude that the document signed on the 16th July 2012 determined the contractual relations between the parties for some indefined period into the future beyond the 12th August 2012.

53. Even though I have concluded that the document is one where the parties must be taken as intending to create legal relations, albeit that it is an incomplete, it is not enforceable as a stand-alone agreement because it lacks essential details such as, by way of example only, how long it was to endure, and how many cattle the plaintiff was allowed to buy, for example, during any one week or other period of time.

54. It is therefore unenforceable because it is imprecise in its terms. It lacks the certainty necessary for it to have the consequences contended for by the plaintiff. One could say that it is imprecise because it is incomplete. I consider that the context against which the document is to be considered suggests clearly that an agreement as to numbers was contemplated in addition to the reduction in the period of credit. I emphasise that this is in my view evident from the context in which the document came to be prepared, which

is admissible for that purpose, and it is not placing reliance on any subjective view of the defendant's officers as to what they intended.

55. The agreement noted in this memorandum of 16th July 2012 needed something more before one could say that it contains within it the certainty and precision that would permit it to be enforced. In *Cadbury Ireland Ltd v. Kerry Co-operative Creameries Ltd* [1982] I.L.R.M. 77, Barrington J. had to consider Clause 19 of a particular agreement whereby certain creameries were transferred to Kerry C-operative Creameries Ltd by Dairy Disposal Co. Ltd. That clause contained an undertaking from Kerry to Dairy that adequate supplies of milk would continue to be provided to the plaintiff's factory at Rathmore subject to certain stipulations. It is unnecessary to venture further into the facts of that case, save to say that Barrington J. concluded that the clause was so imprecise as to fall short of business efficacy. He stated his view that the draftsman of the agreement assumed that Clause 19 would be followed by a further agreement between Cadbury and Kerry where details necessary for that efficacy would be supplied. He stated at p. 85:

> *"It appears to me that the imprecision of the language in Clause 19 is explained by the fact that that clause was concerned with policy considerations and that the draughtsman assumed that Clause 19 would be supplemented by a bilateral agreement between the plaintiff's and the first-named defendants in which the precise rights and duties of both parties would be set out. Put another way one could say that Clause 19 contemplated a further agreement between the plaintiff and the first-named defendants to give it business efficacy."*

56. I do not overlook the factual differences between that case and the present one. In the present case the further agreement necessary for business efficacy would have been between the same parties, unlike in Cadbury where that company was not a party to the agreement containing Clause 19. But Cadbury contains the common feature that it was an incomplete agreement on its own, just as in the present case what was agreed on 16th July 2012 was incomplete when taken in isolation. In my view it contemplates a further agreement before it had business efficacy. If Mr Tolan had not walked out of the meeting on 16th July 2012 when the question of limiting his numbers was raised, the document might well have contained sufficient detail to be enforceable. Even if on 9th August 2012 he had been prepared to discuss numbers, some further agreement might have emanated to reflect with sufficient precision the entire of what was being agreed. But on its own the agreement reached as to the credit terms as reflected in that document imprecise and uncertain as to its terms.

57. For these reasons, I would dismiss this appeal.