Neutral Citation [2016] IEHC 437

THE HIGH COURT

[2016 No. 3741 P]

BETWEEN

PETROGAS GROUP LIMITED

PLAINTIFF

AND

APPLE RED SERVICE STATION LIMITED

DEFENDANT

JUDGMENT of Ms. Justice O'Regan delivered on the 20th day of July, 2016

General background

1. The plaintiff is a limited liability company having been incorporated on 21st October, 1991 and in these proceedings is a supplier of branded fuel products supplied under the name of "Applegreen" (here and after referred to as Applegreen).

2. The defendant is a limited liability company and was incorporated on 9th February, 2011 and according to Company Registration Office details has its registered office at McKee Avenue, Finglas, Dublin 11.

3. The relevant premises central to the within proceedings is known as Red Apple Service Station, McKee Avenue, Finglas.

4. The within parties entered into an agreement which is governed by two documents in writing both dated 13th April, 2015, one of which is referred to as a Letter of Offer and the other referred to as a Written Agreement. The import of these documents was subsequently altered following discussions and negotiations between the parties and such alteration is recorded in a Compromise Agreement bearing date 18th March, 2016.

5. A number of weeks following the entry into the Compromise Agreement the defendant herein sought to avoid the effect of the agreement and for the purposes of these proceedings from the outset the defendant admitted a breach of the agreement governing the relationship between the parties, in April, 2016.

6. The plaintiff entered a plenary summons bearing date 27th April, 2016 wherein the plaintiff sought declarations to the effect that the defendant was bound by the agreements aforesaid and that his notice of 15th April, 2016 to the plaintiffs effectively constituted a breach of the agreement. In addition, the plaintiff sought specific performance of the agreement and interim and interlocutory orders together with damages for breach of the agreement and damages for unlawful interference with the plaintiff's economic interest.

7. A statement of claim was delivered on 23rd May, 2016 wherein the background aforesaid was set out and a complaint is made that the defendant did in fact breach the agreement on or after 27th April, 2016 by setting fuel prices, contrary to the agreements, higher than those set by the plaintiff. The plaintiff asserted that, by reason of the conduct on the part of the defendant, the plaintiff suffered both financial loss and other loss and damage to its commercial reputation.

8. The defendant served a Defence and Counterclaim on 1st June, 2016 wherein the defendant admits the documents of 13th April, 2015 however denies that there is a relationship of principal and agent between the parties and asserts in the alternative that if an agency agreement does exist the plaintiff is in breach by failure to indemnify the defendant in respect of all liabilities. The defence effectively sets out that if the agreement between the parties does not amount to a principal—agent agreement then it is in breach of EU and domestic competition law. The defendant goes on to complain that in or about the month of March, 2016, the plaintiff directed the defendant to retail fuel products at a specific price which was higher than the price retailed at the defendant's nearest competitor, as a consequence whereof the defendant had a reduction in fuel volume sales and this had a negative impact on the defendant's trade and reputation in the local market generally.

9. The defendant denies that it set prices greater than those directed by the plaintiff in or about March, 2016 and further denies that the plaintiff has suffered any loss. In addition to the foregoing the defendant has maintained a counterclaim. The counterclaim is to the effect that prior to entry into the agreement between the parties, the plaintiff made certain representations to the defendant which it has since breached, as a consequence whereof the defendant is seeking a declaration that the plaintiff has been guilty of misrepresentation and/or breach of duty to act dutifully and in good faith towards the defendant, as a result whereof the defendant is entitled to rescind the asserted agreements, and in the alternative the defendant claims relief under the Competition Act, 2002 (as amended) together with damages for breach of contract, misrepresentation, negligent misstatement, breach of agency and breach of duty to act in good faith together with other declaratory and/or interim or interlocutory relief.

10. The defence was subsequently amended on a date not clear to the Court however the amendment was to the effect that a new para. 12(a) was incorporated within the defence. This paragraph states that the defendant has provided and continues to provide the site and premises from which the plaintiff's fuel products are retailed and in so doing the defendant has incurred costs and expense and is committed to a fixed-term lease and is responsible for the payment of rates to the local authority. The defence states that on this basis it bears commercial and/or financial risk under the asserted agreements.

Hearing before the Court

11. An interlocutory application was processed as well as a discovery application prior to the within matter coming before me on 28th June, 2016. On that date, by consent of the parties the issue before the Court was confined to, effectively, what is known as "Module 1". The issue to be determined in Module 1 is as follows:-

> "Whether the defendant can rely on s. 4 of the Competition Act and/or Art. 101 TFEU having regard to whether it is (a) an agent for the plaintiff; and /or (b) an agent for the plaintiff within the meaning of the Commercial Agents Directive and

implementing national legislation and/or (c) an agent within the meaning of the European Commission Guidelines on Vertical Restraints FEC (2010) 411."

12. The hearing before the Court took place over 7 days between 28th June, 2016 and 8th July, 2016. The plaintiff's claim concluded and the evidence on the part of the defendant commenced in that Donal Sweeney, who prepares accounts on behalf of the defendant, gave evidence and was cross examined. Part of his evidence was to demonstrate the asserted loss on the part of the defendant by virtue of the agreements between the parties over the 5-year period recorded within the agreements.

13. The hearing into Module 1 was suspended on 8th July, 2016.

14. On 8th July, 2016 the defendant was afforded liberty to bring a motion returnable for Tuesday, 12th July seeking an order pursuant to O. 31 and/or the inherent jurisdiction of the Court dismissing the plaintiff's claim for failure to comply with an order for discovery and in the alternative an order pursuant to the inherent jurisdiction of the Court to strike out the plaintiff's claim by reason of the plaintiff's abuse of process. This application was dealt with on Wednesday, 13th July and following oral evidence and submissions an order was made refusing the application of the defendant and reserving costs.

15. In addition, on 8th July, 2016, the plaintiff was afforded liberty to bring a motion returnable for 12th July, 2016 based upon the disclosure on 7th July by the defendant to the plaintiff of a document entitled "Renunciation of a tenancy" and executed by Mr. Flynn on behalf of the defendant.

16. The plaintiff brought such motion wherein the plaintiff seeks an order striking out the defendant's defence and counterclaim or, in the alternative, striking out the proceedings on the grounds that they constitute an abuse of process pursuant to the inherent jurisdiction of the Court and further seeks an award of costs of the proceedings to-date including the application to strike out. It is this motion on the part of the plaintiff bearing date 11th July, 2016 which is the subject matter of the within judgment.

Current issue

17. The plaintiff's motion was heard on 12th and 13th July, 2016. No oral evidence was given but rather the motion proceeded on the basis of a grounding affidavit of Daire Nolan on behalf of the plaintiff and was resisted on the basis of an affidavit of Alan Flynn on behalf of the defendant.

18. Mr. Nolan is head of dealer business with the plaintiff. Mr. Flynn is a director of the defendant company. The affidavit of Mr. Nolan includes 9 exhibits whereas there are no exhibits attached to the affidavit of Mr. Flynn.

19. The relevant renunciation which triggered the within application, aside from the execution clause thereof, consists of one page only. It is made between Sean Butler, being the relevant landlord, and the defendant, and is dated 29th May, 2014. Thereafter the document comprises of 4 paras. There are 3 recitals and the *habendum*.

20. In Recital Number 1 it is recorded that the parties have agreed a lease for a term of 4 years and 9 months from 26th October, 2011 and have negotiated a further term of one year added to the term of 4 years, nine months aforesaid.

21. In Recital Number 2 it is recorded that the defendant was instructed to receive independent legal advice in relation to the renunciation and "has received the said advice/waived this right and instruction."

22. In Recital Number 3 it is stated that the defendant has been advised prior to the renunciation under existing legislation it would probably, subject to the terms of the legislation, be entitled to a new tenancy in the premises, on the expiry of the proposed tenancy (an additional one year) unless it first executes a valid renunciation of that entitlement.

23. Thereafter the *habendum* is brief and merely states that the defendant, "prior to the commencement of the proposed tenancy and under the provisions of the Landlord and Tenant (amendment) Act, 1994, renounces any entitlement which he may have under the provisions of the Landlord and Tenant Acts to a new tenancy in the tenement howsoever arising, including where it has remained on in possession on the termination of the proposed tenancy for a term in excess of a 5-year period."

24. It is common case between the parties that in the events there is a separate document as between the landlord and the defendant herein also dated 29th May, 2014 incorporating a tenancy for a 1-year period. There remains some controversy between the parties as to the date of expiry of this 1-year period.

25. It is common case between the parties that in or about the conclusion of the dealing between the parties in the month of April, 2015 leading to the execution of the initial agreements the lease under which the defendant held the within premises for a term of 4 years and 9 months from 26th October, 2011 was furnished as was the extension for a 1-year period executed on 29th May, 2014 however, as aforesaid, it was not until 7th July, 2016 during the course of Module 1 of these proceedings that the document headed "Renunciation of a new tenancy" was furnished to the plaintiff.

26. Irrespective of when the 1-year extension actually expired, nevertheless it is accepted between the parties that the combination of the initial leasehold period of 4 years and 9 months and the extension of 1 year amounted to a term in excess of 5 years for the purposes of potentially triggering a right to apply for a new tenancy under the relevant landlord and tenant legislation.

27. In the grounding affidavit of Mr. Nolan he sets out that initially it was intended between the parties that the advance commission payment of €100,000 by the plaintiff to the defendant was to be secured on the defendant's interest in the subject premises by virtue of a charge thereover and the consent of the defendant's landlord would be required to such charge. Ultimately the deal between the parties was not concluded on the basis of a charge over the defendant's lease but rather on the basis of a bank guarantee for the sum of the advanced commission. Nevertheless, because of the potential to create a charge over the defendant's interest, the defendant's solicitors were involved, certainly as of 20th April, 2015.

28. At para. 16 of Mr. Nolan's affidavit he states that, had the defendant disclosed and furnished to the plaintiff the renunciation document, there is no question but that the plaintiff would have immediately ceased negotiations with the defendant and would not have entered into a fixed 5-year term agreement. At para. 21 of his affidavit, Mr. Nolan states that the dealer—agent model agreement operated by the plaintiff is premised on a minimum fixed period of 5 years and because of this the plaintiff makes a significant capital investment in the order of €100,000 in the dealer—agent operational infrastructure. He states that the 5-year term agreement is crucial in developing and growing the dealer—agent model of the plaintiff and makes an important contribution to the plaintiff's brand and nationwide reputation. At para. 22 he states that the renunciation of the statutory entitlement, if it had been known, would have been fatal to a deal between the parties. At para. 24 he states that the withholding of this document was such

as to amount to a deceitful representation by the defendant that it had a legal entitlement to be in possession of the premises until July 2022. He further states that what he characterises as "unusual behaviour" on the part of the defendant during the currency of the agreement is explained by virtue of the content of the renunciation document. At para. 37 he states that the decision of the defendant to seek to terminate the agreement soon after Tesco pricing was lower than that of the plaintiff was entirely premature and disproportionate and he believes that the defendant was motivated at that time by virtue of the content of the renunciation as opposed to a justifiable grievance being in existence and he states that he believed that this pretext was orchestrated to enable the defendant to avoid the dealer agreement. At para. 38, Mr. Nolan states that had the plaintiff known of the renunciation they would not have instituted the within proceedings but would rather have sought to recover moneys expended by the plaintiff and would not have engaged in complex and costly arguments on competition law in response to the defendant's defence as it would have been disproportionate in all of the circumstances.

29. In a replying affidavit of Mr. Flynn, at para. 5, he states that the defendant did not receive any independent legal advice in relation to the deed of renunciation and he further states that at no time did he understand the purpose or effect of the document. At para. 8, he suggests that the lease documentation was not even considered by the plaintiff until after it had executed the dealer agreement of April, 2015 and therefore he is of the view that the leasehold tenure of the defendant had no impact on whether or not the plaintiff was to enter into negotiations with the defendant and/or conclude any deal with him. At para. 11 he states that Mr. Nolan knew that the term of the defendant's tenancy was 5 years and 9 months in duration and no issue was raised over the lease as it is excess of 5 years and was therefore believed that the defendant would be entitled to a new tenancy. Mr. Flynn again reiterates that he did not appreciate the consequence of executing the renunciation. At para. 12 he refers to his option to purchase the freehold title and further suggests that there is no difficulty in securing tenure for the balance of the 5-year period and in fact he has an agreement in principal with his landlord for a 35-year commercial lease in respect of the unit. In para. 14 he says that he did not provide a lease extension version which suggested that his leasehold estate enured until July, 2022. At para. 17 he reiterates that as far as both parties were concerned the defendant was entitled to a new tenancy in July, 2017. In paras. 18 – 21 inclusive he deals with why he believes the renunciation is void and of no effect and therefore he continues to be entitled to a new tenancy. Effectively this assertion is based upon his claim that he did not receive independent legal advice and therefore the renunciation is void. At para. 22 he states that the defendant was never issued with a letter of loan offer referring to a charge on the lease as has been suggested by Mr. Nolan on behalf of the plaintiff and he states that no documentation in support of Mr. Nolan's belief in this regard has been produced to the Court. At para. 26, he states that the assertion made on behalf of the plaintiff that, had they been aware of the existence of the renunciation they would not have entered into an agreement, is effectively undermined by their own evidence and in this regard Mr. Flynn's position is effectively that the dealer agreement was executed on behalf of the plaintiff on 13th April, 2015 in advance of sight of the lease under which the defendant holds the relevant unit. At para. 28 he utterly rejects the contention that he had sought a review because of any perceived difficulty with his tenancy and he states that he, like the plaintiff, was operating under the belief that the defendant's tenancy would continue beyond July, 2017. At para. 30 he states that insofar as there is a plea in the defence as to the risk associated with a fixed term lease, at no point in the defence has the term of the lease been pleaded. In addition, at para. 30, he also states:-

> "If such provision necessitated the institution of proceedings to secure declaratory or other relief in respect of the validity of the renunciation that is a course of action open to the defendant."

At para. 31 he explains how the renunciation was discovered, namely that he and his solicitor were attending at the defendant's premises on Saturday and Sunday, 2nd and 3rd July respectively, making a thorough search of all documents in the possession of the defendant and during the course of that search his solicitor discovered the renunciation. At that time, having reviewed the matter it was determined that the renunciation did not come within the scope of discovery. In the events it appears that the renunciation was furnished to the plaintiff during the currency of negotiations between the parties on 7th July when consideration was being afforded to the plaintiff acquiring the defendant's interest in the subject premises.

Additional information before the Court

30. In the course of the injunction application Mr. Flynn swore an affidavit bearing date 9th May, 2016 and at para. 2 thereof he identified that he was a qualified civil engineer since 2004 and when he returned from the United States he was a section's manager on a large PPP contract on the Port Tunnel and the M50.

31. Although the plaintiffs had executed the dealer agreement apparently in or about 13th April, 2015, nevertheless this document, originally executed, was not the subject matter of the ultimate agreement, as same dealt with the creation of a charge over the leasehold interest. As aforesaid in the events the security afforded to the plaintiff in respect of the advance on commission in the sum of €100,000 was provided by virtue of a bank bond. According to Mr. Nolan at para. 8 the amended offer and dealer agreement, although dated 13th April, 2015, was ultimately finalised during the course of the week commencing 11th May, 2015. This fact is not denied by the defendant. In Exhibit DN5, what appears to have been the dealer agreement initially contemplated and executed on 13th April, 2015, there is reference to mortgage over the leasehold estate that Clause 12 of the agreement states that the dealer charges the premises with payment to the supplier of all moneys loaned. The clause goes on to refer to a charge over lands and the dealer's undertaking property and assets. In addition, there is a schedule attached and it relates to mortgaged property the subject matter of a specific charge and it identifies the subject premises. In addition, there is an execution provision attached and same has been executed by Mr. Flynn and his wife on 16th April 2015. This exhibit clearly verifies the assertion made by Mr. Nolan in his grounding affidavit as to the fact that the parties did contemplate a charge over the lease in or about the time of entering into the dealer agreement and also clearly establishes that the assertion made by Mr. Flynn at para. 22 of his affidavit is entirely incorrect in that it is clear that the defendant was issued with a dealer agreement referring to a charge on the lease and documentation in support of this fact has in fact been produced to the Court.

32. Furthermore there is an e-mail from Daire Nolan to Alan Flynn of 16th April, 2015 exhibited in the affidavit of Mr. Nolan at Exhibit DN 7 in which Mr. Nolan confirms to Mr. Flynn that the consent from his landlord agreeing to the mortgage on the lease will be required. There is a subsequent e-mail from Mr. Nolan to Mr. Flynn stating:-

> "Just got word back from our solicitor. We're possibly not going to be able to go ahead as your lease is not dated and stamped."

33. A further e-mail of significance in my view during this particular stream of e-mails is an e-mail of 16th April, 2015 from Mr. Flynn to Mr. Nolan concerning the availability of the executed lease when Mr. Flynn states:-

> "I will check the original lease in the morning as I might have missed a page, front or back. This is where it is normally signed and stamped as it is in the current [extension] lease."

34. A further stream of e-mails has been exhibited by Mr. Nolan as between Mr. O'Donnell and Mr. Flynn, commencing on 23rd April,

2015 when Mr. O'Donnell enquires as to whether or not Mr. Flynn can arrange a bank guarantee for €100,000 from the bank. In a subsequent e-mail of 8th May, 2015 Mr. Flynn confirmed that a bank guarantee is approved as per the attached e-mail which attachment is dated 6th May, 2015 from Bank of Ireland to the effect that the guarantee had been approved. Finally, in this regard, by an e-mail of 15th May, Mr. O'Donnell scanned the bank guarantee for Alan Flynn to Mr. Nolan.

35. In e-mails exhibited under DN 9 it is noted that on 3 separate occasions Mr. Flynn served a termination notice in respect of the agreement between the parties. These notices are dated 18th January, 2016, 25th January, 2016 and 10th February, 2016. In addition, in respect of this particular e-mail stream, in an e-mail of 20th January, 2016, Mr. Flynn advises Mr. Nolan that the defendant has thrived since Applegreen has come to the site and in a subsequent e-mail from Mr. Flynn to Brian Rennick, being the solicitor acting on behalf of the plaintiff, Mr. Flynn stated, "Applegreen as a brand have been a huge advantage to the site."

36. The grievances which were raised by Mr. Flynn and addressed ultimately in the compromise agreement included:

a. on the sale of a specific level of fuel, a further advance of the commission payment should be made;

b. if there is a termination of the agreement in the future, then the plaintiff will over have to pay 50 % of the pro rata costs of the fit out on termination;

c. There should be a review of the contract after every completion of payback of the advance commission; and,

d. there should be a new dealer agreement

Legal principles to be applied

37. The plaintiff has referred to the textbook of Delaney & McGrath on "*Civil procedure in the Superior Courts*" (3rd Ed.), at para. 16-27 et seq. in relation to the ability of the Court to strike out proceedings as an abuse of process. The textbook suggests that such a strike out for abuse of process can be invoked in a wide range of circumstances and thereafter goes on to deal with certain headings under which such inherent jurisdiction might be invoked, and includes proceedings brought for an improper purpose and impropriety in the conduct of proceedings. In turn, the textbook also deals with the test for determining whether or not an abuse of process has occurred.

38. Both parties agree with the application of the principles identified in the textbook aforesaid, they merely disagree on whether or not the plaintiff has established the necessary threshold to invoke the jurisdiction. In addition and allied to the strikeout for abuse of process is the law applicable in relation to the tort of fraud or deceit. In this regard, the defendant urges that the rules and applicable law in establishing the commission of the tort of fraud or deceit had been identified by Shanley J. in his judgment of 18th June, 1997 in the case of *Forshall & Anor. v. Walsh & Ors*., at p. 64 of the judgment. The Court identified the following matters which must be proved by the plaintiff seeking to establish the commission of fraud or deceit:-

i. the making of a representation as to a past or existing fact by the defendant;

ii. that the representation was made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false;

iii. that it was intended by the defendant that the representation should be acted upon by the plaintiff;

iv. that the plaintiff did act on foot of the representation; and,

v. that the plaintiff suffered damages as a result.

39. Finally, under the heading of "Legal principles", the parties agree that if there is a conflict in the affidavits as between the parties this conflict can only be resolved on oral evidence unless there is sufficient documentation or other evidence before the Court enabling it to resolve the conflict.

Deceit

40. There is clear conflict in the affidavit evidence before the Court as to the provenance of the extension to lease document which identifies July 2022 as the termination date of the defendant's tenure and accordingly this conflicting evidence cannot be the basis for any finding on foot of the plaintiff's motion before the Court.

41. Insofar as production of the renunciation of a new tenancy in or about the month of April, 2015 is concerned, the plaintiff asserts that the defendant was intentionally deceitful in withholding the renunciation document and that Mr. Flynn could not have failed to appreciate that it was a document that travelled with the lease and was relevant (see para. 32 of Mr. Nolan's affidavit). On the other hand the defendant, through Mr. Flynn, in para. 5 of the affidavit of Mr. Flynn, suggests that Mr. Flynn at no time understood the purpose and effect of the renunciation. Furthermore, at para. 11 of his affidavit, Mr. Flynn states that he did not appreciate the consequence of executing the renunciation and at para. 17 he states that as far as both parties were concerned the defendant was entitled to a new tenancy in July, 2017.

42. I am satisfied from the affidavit of Mr. Flynn, in particular the extracts aforesaid, that at the time of entering into the dealership agreement he did effectively represent to the plaintiffs that he had an entitlement to a new tenancy and that effectively there was no other document in existence which might adversely impact on the defendant's capacity to secure the relevant new tenancy.

43. The next question to be addressed therefore is as to whether or not Mr. Flynn made such representation knowingly, or without belief in its truth or recklessly careless as to whether it be true or false and in this regard, in my view, the following matters are relevant:-

a. Mr. Flynn's e-mail of 16th April, 2015 wherein he states, "This is where it is normally signed and stamped as it is in the current [extension] lease" demonstrates a familiarity with legal documents;

b. the renunciation was signed on the same day as the extension of leasehold period was signed and was made between the parties relative to the same property. It is clear that Mr. Flynn had no difficulty whatsoever in understanding the import of the extension period;

c. as previously set out, the wording of the document of renunciation is not complicated nor unduly lengthy and the defendant, through Mr. Flynn, does not identify any particular portion of the document which caused him a difficulty in understanding;

d. Mr. Flynn clearly knew that the document had some significance as he maintained same with his company records;

e. Mr. Flynn, in his affidavit, suggests that both parties proceeded on the basis that the defendant had a statutory entitlement to a new tenancy as and from July, 2017. This demonstrates that at the time of entering into the agreement with the plaintiff the defendant was familiar with the concept of a new tenancy and when rights might arise in favour of an occupier;

f. as aforesaid the plaintiff qualified as a civil engineer in 2004 and therefore enjoyed the benefit of an education and there is no provision within the document of renunciation which in my view would give rise to any failure to understand the import of the document;

g. although the deed of renunciation is ambiguous as to whether or not the defendants in this action did or did not secure legal advice, nevertheless Mr. Flynn, in his grounding affidavit, states that he did not secure any legal advice on the document until on or after 2nd or 3rd July, 2016 when the document was discovered by his solicitor. This assertion is not countered and therefore must be accepted as accurate. However I do not see how this fact is of any great assistance to the defendant. The plain and straightforward meaning of the short and clear document is that the defendant had renounced any entitlement which he may have under the provisions of the Landlord and Tenant Acts to a new tenancy in the tenement howsoever arising. It might be argued therefore that the lack of independent legal advice at that time merely demonstrates that the defendant could not have known that an argument was available to him to avoid the implications of the deed of renunciation on the basis that no prior legal advice was afforded to him prior to executing the deed.

h. I believe it appropriate, in the totality of the within review, to bear in mind that the assertion made by Mr. Flynn at para. 22 of his replying affidavit is false and in my view opportunistic.

44. Taking the totality of the above into account, therefore, I am satisfied that there is sufficient objective information before the Court to find that notwithstanding the content of the affidavit of Mr. Flynn, the aforesaid representation on the part of the defendant as to its tenure in the property in or about April, 2015 was made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false.

45. Insofar as the balance of the applicable proofs in order to establish the tort of fraud or deceit or concern, I am satisfied that it was intended by the defendant that the representation aforesaid should be acted upon by the plaintiff and in fact the plaintiff did act on foot of that representation and I am further satisfied as asserted in the grounding affidavit of Mr. Nolan that the plaintiff did suffer damages being the capital sums applied to the development of the instant premises together with the cost of these proceedings.

Dismissal

A - General
46. The plaintiff suggests that because of the deceit aforesaid then the proceedings or alternatively the defence and counterclaim of the defendant should be struck out as an abuse of process. This abuse is according to the plaintiff available under the headings of:-

i. proceedings brought for an improper purpose or, in the alternative,

ii. impropriety in the conduct of proceedings.

B - Improper Purpose
47. The defendant suggests that it would be impossible to strike out the proceedings on the basis that they were brought for an improper purpose as his client is a defendant rather than the promoter of the proceedings.

48. The text book open to the court included reference to the case of *Seán Quinn Group Limited v. An Bord Pleanála* [2001] 2 ILRM 94. In that case Quirke J. indicated that in order for the defendant's claim to be successful it would have to be established:

a. The plaintiff had an ulterior motive in commencing the proceedings.

b. The plaintiff seeks a collateral advantage for itself beyond what the law offers.

c. The plaintiff has instituted the proceedings for a purpose for which the law does not recognise as a legitimate use of the remedy which has been sought.

49. I cannot see how the plaintiff can come within the foregoing roles. In this regard the plaintiff instituted the proceedings seeking specific performance and the defence of the defendant is effectively resisting the order sought by the plaintiff and further seeking declaratory relief concerning the contract.

C - Impropriety of Conduct
50. In the events, it is my view that in order for the plaintiff to succeed in striking the defence and counter claim of the defendant or alternatively the entirety of the proceedings based upon the deceit of the defendant at the time of entry into the initial dealers agreement and indeed up to the 6th July, 2016 it would be necessary for the plaintiff to come within the jurisprudence of striking out proceedings as an abuse of process by reason of impropriety in the conduct of proceedings.

51. Under this heading the plaintiff relies on the case of *Cavern Systems v. Corporation of Dublin*, a judgment of Costello J. delivered on 28th February, 1983. The defendant accepts the relevance of the case, however, denied that the circumstances of that case are sufficiently similar to the instant circumstances so as to enable the plaintiff to rely on same to persuade this Court to strike out the defence and counter claim or in the alternative the entirety of the proceedings.

52. In that case Cavern Systems had applied for and secured planning permission from Dublin Corporation. A residents' association

sought to appeal the decision to An Bord Pleanála and requested an oral hearing. Three inspectors were appointed and a hearing date was set. At the commencement it was indicated on behalf of the residents' association that they were participating on a without prejudice basis and the ultimate explanation for this was that the residents' association had instituted proceedings in the High Court challenging the validity of the Corporation decision, the summons having issued on the 23rd September, 1982, however by the date of hearing of the An Bord Pleanála matter, namely the 28th January, 1983, the summons had not been served. An application was thereafter processed to strike out the residents' association proceedings on the basis of the inherent jurisdiction of the court to dismiss the pleadings because of an abuse of process and the court was satisfied that it was incontrovertible that the court had such a jurisdiction and all that remained was to be determined whether or not on the facts of that case the jurisdiction should be exercised in favour of the defendants. In or about the exercise which the court was undertaking it was not necessary to express any opinion on the merits of the plaintiff's claim and the court noted that the defendants had not shown that the plaintiffs had no reasonable cause of action, rather, the defendants were relying upon the point that the proceedings had been conducted in a vexatious manner so as to justify the court in dismissing them. The court identified the very extensive preparations for the hearing and noted that if the appeal went on and the decision upheld however the residents' association were subsequently successful then the time of the officials would have been wasted and very substantial costs would have been incurred. The court noted that had the plaintiffs served the summons after it had been issued such a situation could have been avoided and the court accepted that Dublin Corporation if it had known of the proceedings would have had applied for an adjournment of the appeal. Costello J. posed the query as to whether or not the failure of the plaintiffs to serve the summons or otherwise make its existence known to the defendant amounted to conduct which could be regarded as an abuse of the court's procedures to justify dismissing the claim. The court found that the answer to the question was to be identified within s. 42 of the Planning and Development Act 1976 and expressed the view that the limitation period for instituting High Court proceedings was reduced in the legislation to a period of 21 days for the purpose of avoiding the very situation which had arisen in the case and the object of the section was to require the proceedings to be instituted at a very early date to ensure that uncertainty would be dispelled and to make the applicants for the development aware that the legal validity of the decision was being challenged so as to afford them an opportunity to apply for an adjournment of the planning appeal and to avoid the possibility of unnecessary costs. Costello J. found that by issuing the proceedings and deliberately taking no steps to serve it or disclose its existence that the objectors were taking advantage of the rules of court for their own purpose and consciously rendering the section useless and thereby flouting parliament's will. Costello J. found that such conduct was an abuse sufficient to enable him to exercise the inherent jurisdiction to dismiss the claim unless there are reasonable grounds to justify what was done. In the events the court was satisfied that the explanation forthcoming did not disclose reasonable grounds for the non service of the summons.

53. The defendant in resisting the plaintiff's application in the instant matter suggests that there is a world of difference by reason of the time limits imposed by the planning and development legislation and the purpose behind those time limits which do not arise in the instant set of circumstances. On the other hand the plaintiff suggests that the principle under which the court operated in the *Cavern Systems* matter can, notwithstanding no legislation similar to the planning and development legislation applying, be relevant in the instant circumstances and be applied accordingly.

54. I am of the view that having considered the *Cavern Systems* judgment the principal applied was not dependant on the planning and development legislation but rather in answering the question the court posed of itself it was able to identify the planning and development legislation as providing the answer.

55. I am satisfied that by withholding knowledge of the renunciation document the defendant was taking advantage of the plaintiff's requirement to have a five year agreement in place.

56. Within twelve months of the dealer agreement into affect (May, 2015) the defendant served three termination notices and secured a compromised agreement (8th March 2016) and in addition shortly after securing the compromise agreement went on to breach the agreement (April 2016) to trigger the within proceedings.

57. Although in the instant circumstances the plaintiff cannot identify an act of parliament flouted by the defendant nevertheless the plaintiff has made out a claim in deceit in the suppression of the renunciation document both at the time of initially entering into the dealership agreement and in advance of the commencement of lengthy litigation.

58. I accept the contention made by Mr. Nolan on behalf of the plaintiff to the effect that the plaintiff would not have entered into this dealership agreement had he known of the deed of renunciation as a five year term was critical to them.

59. I do not accept the defendant's assertion that this claim on behalf of the plaintiff is inaccurate because the plaintiff had executed the dealership agreement by the 13th April, 2015 in advance of securing the documentation which was thereafter forthcoming from the defendant which suggested that the defendant's tenure in the property was not going to be an issue, by reason of the fact that prior to any conclusion of the document signed on 13th April, 2015 by the plaintiff it was clear that the defendant's tenure in the property was critical to the plaintiff and the plaintiff would not complete the transaction without being satisfied in this regard.

60. It is clear to me therefore that the issue of tenure was raised in advance of any concluded executed agreement between the parties and the exchange of emails on the 16th April, 2015 demonstrates the critical nature of the defendant's tenure insofar as the plaintiff was concerned. The defendant further suggests because of the entitlement to terminate the agreement as provided for in the leasehold document then tenure was never a certainty. The plaintiff counters that there would be a forfeiture clause in most leases which does not avoid commercial dealings based upon a leasehold estate and on the assumption that the lease will enure for the term of the lease as opposed to being the subject matter of an early termination.

61. The defendants further argue that the renunciation deed is ineffective by reason of the failure on the part of the defendant to secure independent legal advice in advance of the execution thereof.

62. On the basis of the jurisprudence in the *Cavern Systems* decision I am not, in order to dismiss the proceedings obliged to find that the defendant has no reasonable hope of success but rather the query to be addressed as to whether or not the defendant's conduct in the proceedings has been so vexatious as to justify the court in dismissing them.

63. In relation to the defendant's conduct I find the following to be relevant:-

> 1. Clearly the defendant wished to extricate himself from the DoDo – within twelve months he had served three termination notices, a supplementary agreement was entered into on the 8th March 2016 and a breach was committed within a number of weeks (April 2016) based on, at that time, a circa. €1,200 differential between the highest and lowest income yield from the business.

2. I accept Mr. Nolan's sworn evidence at para. 38 of his affidavit that the plaintiff would not have embarked on the litigation had they known of the renunciation deed.

3. The defendant has acknowledged that a court application may be necessary to avoid the renunciation deed (para. 30 of Mr. Flynn's affidavit). Given the defendant's clear wish to avoid the DoDo agreement,

a. how could such application be policed by the plaintiff who would be dependent on the good will and cooperation of the defendant which I would not be at all confident would be forthcoming.

b. a security for costs application made by the landlord would potentially jeopardise the application.

4. The plaintiff has sought specific performance in circumstances where the defendant was in possession of a document which on its face and potentially in due course (because of, for example, application for security for costs, estoppel or any other ground of defence) would mean tenure would cease in July 2017, rendering specific performance for the full five year term impossible. The defendants' conduct in not advising the plaintiff of the renunciation deed by the date of the defence, at the latest, has caused the plaintiff to pursue these proceedings without being aware of a significant exposure to a frustration of any decree of specific performance.

64. By reason of the foregoing, the defendant has conducted these proceedings in what the law recognises is a vexatious manner so as to justify the Court in dismissing the defence and counterclaim unless there are reasonable grounds to justify what was done.

65. The only ground put forward, without developing the point, or giving an explanation as to why (see para. 43 hereof) is that Mr. Flynn did not appreciate the significance of the renunciation deed. I must conclude that this explanation does not constitute reasonable grounds in the circumstances.

66. The plaintiff is entitled to an order dismissing the defence and counterclaim. However, in the instant circumstances, and given the notice of motion, the most appropriate order is to strike out the entirety of the proceedings.