Neutral Citation Number: [2009] IEHC 613

THE HIGH COURT

COMMERCIAL

2008 5857 P

BETWEEN

ARNOSFORD LIMITED

PLAINTIFF

AND

JOHN HARMON

DEFENDANT

JUDGMENT of Ms. Justice Dunne delivered on the 21st day of July 2009

This is an action for specific performance of four written contracts for sale ("the contracts") made on 15th February, 2007 between the plaintiff and the defendant wherein the plaintiff agreed to sell and the defendant agreed to purchase for golf lodges, namely Nos. 11, 12, 13 and 15 at Kilkea Lodges, Kilkea Castle, Kilkea in the County of Kildare.

Background

I propose to set out the background to these proceedings by reference to an agreed outline of the case as set out in the case summary. There are one or two parts of the agreed outline which having regard to the submissions made and evidence given in the course of the case turned out to be in dispute and I will not refer to those issues at this point in time.

The plaintiff company is the owner of Kilkea Castle Hotel and golf club situated at Kilkea, Co Kildare. The hotel is leased to a separate entity and the plaintiff has retained certain of the lands surrounding the hotel including the golf course.

In 2006, the plaintiff commenced the development of the surrounding lands which involved the construction of 33 holiday homes in separate phases. It was envisaged that the properties would be registered with An Bord Failte and thereby acquire the benefit of s. 23 type relief, i.e. that a certain percentage of the capital cost of the properties would be deductible against rental income by the purchasers thereof.

The first phase of the development consisted of 10 properties and was completed by 31 December, 2006. The remaining 23 properties were to be constructed in the course of 2007.

Mr. Paul Browne of Browne Corporate Finance Ltd. was retained by the plaintiff to project manage the development and disposal of the properties.

In December 2006/January 2007 the defendant, who is a businessman and property developer based in Carlow, inspected the development in the company of Paul Browne and agreed to purchase five properties, being one property from phase 1 of the development, namely, No. 9 Kilkea Golf Lodges with the remaining four properties coming from phase 2 of the development and being Nos. 11, 12, 13 and 15 Kilkea Golf Lodges.

Five separate contracts of sale in respect of these properties were executed by the parties on or about 15th February 2007. In the case of each property the purchase price was the sum of €478,275 inclusive of VAT. The VAT element consisted of €58,275 and the VAT exclusive purchase price of €420,000 included a sum of €21,000 for fixtures, fittings and contents.

The memorandum of agreement in respect of No. 9 provided that the closing date was to be 1st April, 2007 and in respect of properties Nos. 11, 12 and 13 and 15, it is agreed that the closing date was to be 30th September, 2007. (The date of 30th September, 2007 was not inserted in the memorandum of agreement in respect of

No. 15 but the parties are agreed that that was the closing date intended by the parties.)

In each case, special condition 19 of the contract provided that the purchaser would prior to completion of the sale, enter into a letting agreement for the property in sale in the form set out in the booklet of title. The draft letting agreement provided for the lease of the properties by the purchaser back to the plaintiff for a term of 21 years at a rent to be calculated in accordance with the formula set out in the second schedule to the letting agreement which was based upon rental income actually received by the plaintiff in respect of the use and occupation of the property. The letting agreement also contained a guarantee on the part of the plaintiff to pay a net rental income of €16,000 for the first year of the agreement in the event that the rent actually payable for that year under the said formula proved to be less than that figure.

In respect of properties Nos. 9, 11 and 12, a contract deposit of €10,000 was paid in each case. In respect of the remaining two properties, a contract deposit of €10 was paid in each case.

The first sale due to close was in respect of No. 9. On 10th May, 2007, the plaintiff's solicitor wrote to the defendant's solicitor confirming that property No. 9 had been completed. Thereafter, certain correspondence took place between the parties solicitors in respect of the VAT element of the purchase price and also the VAT payable by the plaintiff on the grant of the 21 year lease.

By late July 2007, the defendant had failed to close the sale of No. 9. In the course of this month, discussions had taken place

between the defendant and Paul Browne in which the defendant had expressed a wish that, in view of a change in circumstances, he would be released from his contractual obligations in respect of the remaining four properties. Ultimately, a telephone conversation took place between Mr. Browne and the defendant on 27th July, 2007. There is a dispute between the parties as to what precisely was agreed in the course of this telephone conversation but it appears to be common case that the defendant agreed to close the sale of No. 9 immediately and the plaintiff, through Mr. Browne, agreed to extend the closing date in respect of the remaining four properties for a period of time. (I should say at this point that although the agreed outline referred to the fact that the plaintiff, through Mr. Browne, agreed to extend the closing date in respect of the remaining four properties for a certain period of time, precisely what agreement was made by Mr. Browne in relation to the extension of the closing date was a matter at the heart of the dispute between the plaintiff and defendant in the course of the hearing before me.)

On 30th July, 2007 Mr. Browne wrote to the defendant a letter headed "without prejudice" outlining details of what had been discussed in the course of that telephone conversation. On the following day, the defendant's solicitor furnished the balance of purchase monies in respect of number 9 exclusive of the VAT element. Correspondence subsequently took place between the parties solicitors in respect of payment of the VAT. The letting agreement in respect of this property appears to have been signed on behalf of both parties but is undated and throughout the proceedings there was a dispute as to whether it had in fact become operative in view of the defendant's failure to pay the VAT associated with the purchase of the property. On 12th May 2009 the defendant's solicitor furnished a cheque for the VAT to the plaintiff's solicitor in favour of the plaintiff.

The remaining four properties which are the subject matter of the plaintiff's claim herein were completed by 30th September 2007. However, the plaintiff did not call upon the defendant to complete the sale of the properties at that stage. Instead, it endeavoured to achieve a certain number of independent sales in respect of other properties in the development prior to the end of the year. The target number of sales in this regard was fourteen. The plaintiff did not achieve this number of independent sales during the relevant period and therefore took steps to enforce the remaining four contracts in the spring of 2008.

On 18th April, 2008 the plaintiff's solicitor wrote to the defendant's solicitor notifying him that in respect of the remaining four properties the same would be "completed in the next 14 days" and seeking confirmation that the defendant would be in a position to close. The defendant's solicitor replied on 23rd April, 2008 advising that the defendant would not be proceeding to close in respect of the remaining four properties and asserting that he had completed the purchase of No. 9 on the basis that he would be released from his obligations under the remaining contracts.

On 6th May, 2008, the plaintiff served a completion notice pursuant to general condition 40 of the Law Society General Conditions of Sale (2001) edition in respect of each of the four properties. The defendant has failed to close any of the sales within the period limited by the Notice or otherwise.

List of those issues not in dispute
The case summary also contained a "List of those issues which are not in dispute" and at the outset of the hearing before me it was confirmed that that the list with the exception of one item was not in dispute. I will refer to the list of issues not in dispute save for the issue in respect of which the defendant indicated that there was no agreement:

> (i) That on or about the 15th day of February 2007, the plaintiff and the defendant executed five separate written contracts of sale whereby the plaintiff agreed to sell and the defendant agreed to purchase Nos. 9, 11, 12, 13 and 15 Kilkea Lodges situate at Kilkea Castle, Co. Kildare.
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> (ii) That the purchase price in respect of each of the said properties was a sum of €420,000 together with VAT in the amount of €58,275.
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> (iii) That in respect of property No. 9, that the sale had become due for completion on or before 31st May 2007.
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> (iv) On 31st July 2007, the sale in respect of property No. 9 was closed with the exception that the defendant did not pay to the plaintiff the relevant VAT in the amount of €58,275 until 12th May 2009.
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> (v) On 23rd April 2008, the defendant's solicitor wrote to the plaintiff's solicitor notifying him that the defendant would not be proceeding to complete the sale in respect of the remaining four properties.
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> (vi) Prior to execution of the four contracts of sale, an information pack together with a promotional brochure was furnished to the defendant which contained representations to the effect that the properties, when completed were to be registered with an Bord Failte and would thereby qualify for section 23 type income tax relief against rental income earned by the purchasers thereof.
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> (vii) Special condition 19 of each of the contracts of sale provided that the purchaser would enter into a letting agreement for the property in the form as set out in the booklet of title furnished with the contract.
>
> (viii) The said letting agreement provided for the grant of a 21 year lease of each of the properties back to the plaintiff at a rent to be calculated in accordance with the formula set out in the second schedule to the letting agreement with a guaranteed minimum rental income in respect of the first year of the letting of €16,000.

During the course of the hearing before me, a number of other issues were raised on behalf of the defendant by way of defence, namely, that the plaintiff was not in a position to complete the sales at the time of the service of the completion notices herein by reason of a right of way problem and that the plaintiff had induced the defendant to enter into the contracts on foot of a misrepresentation as to the capital allowances available to the purchaser in respect of the properties for sale in the respective phases. These issues were not pleaded at any stage by the defendant and I ruled accordingly in the course of the hearing before me.

The issues
The issue at the heart of this case is the nature and status of the agreement made between the plaintiff and the defendant during the course of a discussion between Paul Browne on behalf of the plaintiff and the defendant on the 27th July, 2007 which was stated to have been reflected in the letter of Paul Browne dated the 30th July 2007. Did that agreement release the defendant from his

obligations under the four contracts if he closed the sale of No. 9 immediately? Did he have to wait until the plaintiff had achieved fourteen sales? Was it an agreement to release the defendant from the four contracts only when and if fourteen sales had been achieved by the end of the Autumn/Winter sales campaign of 2007? The status and interpretation of the letter of the 30th July, 2007 is also an issue.

The evidence
Witness statements were exchanged by the parties in advance of the hearing. Fergal Browne, Paul Browne and Dave Conway gave evidence on behalf of the plaintiff and Mr. Harmon was the only witness called on the defence side.

The evidence of Fergal Browne was in accordance with the witness statement furnished by him. He is a solicitor who acted for the plaintiff in the course of these transactions. He is a brother of Paul Browne who was acting on behalf of the plaintiff as the project manager of the plaintiff's holiday home scheme.

Fergal Browne furnished the contracts for sale and copy title to Fleming O'Flaherty, who then acted as solicitors for the defendant in respect of the property Nos. 9, 11, 12, 13 and 15. He dealt with the normal queries that arise in relation to property transactions. He outlined the circumstances in relation to the alteration of the closing date in respect of the various contracts. He confirmed that all of the contracts were returned duly executed by the defendant in February 2007. He also described the fact that there were issues in relation to the appropriate treatment of VAT. He described the correspondence that took place in respect of the VAT issue. On 18th July 2007 he wrote to the defendant's solicitor enclosing a copy letter from Ernst and Young Accountants, dated 29th June, 2006 setting out advices in relation to taxation and VAT elements of the transactions and on 27th July, 2007, he sent the defendant's solicitor the VAT Form 4B duly executed by the plaintiff. Thereafter the sale of No. 9 was closed on 31st July albeit the VAT payment in respect of No. 9 was not included in purchase money and as has been set out before that sum was paid shortly before the hearing of this action. He confirmed that he had been instructed to close the sale without the payment of VAT and that the issue of VAT would be resolved between Paul Browne and Mr. Harmon.

Subsequently, on 18th April, 2008 he put the defendant's solicitors on notice that property Nos. 11, 12, 13 and 15 were ready for completion. On 6th May, he served completion notices in respect of those properties on the defendant's solicitors. He received a letter on 7th May, 2008 from the defendant's solicitors disputing the entitlement to serve the completion notices. He confirmed that it was his understanding that the expenditure in developing the properties was substantially complete by 10th January, 2007.

I am satisfied that the evidence given by Fergal Browne was an accurate account of his involvement in these transactions.

Paul Browne then gave evidence. As I pointed out above, the issue at the heart of this case is the nature and status of the arrangement made between the plaintiff and the defendant during the course of a discussion between Paul Browne on behalf of the plaintiff and the defendant on 27th July, 2007 which was stated to have been reflected in the letter of Paul Browne dated 30th July, 2007. There were a number of aspects of his evidence to which I should refer.

In his evidence, Paul Browne set out how he became involved in the project management of the development of the 33 section 23 - type holiday homes. He explained that the development was to take place in three phases. He described the marketing campaign and the launch of the development. His evidence in this regard was in line with his witness statement and I do not think it necessary to set out his evidence in detail. There was one aspect of his evidence in respect of which I think he was mistaken. That relates to when he first met Mr. Harmon on site. He was of the view that the first meeting with Mr. Harmon took place in early January 2007. There is no doubt that Mr. Harmon was sent draft contracts by Fergal Browne in December 2006 and on that basis I am satisfied that Paul Browne and Mr. Harmon probably met to discuss Mr. Harmon's purchase of a number of properties towards the end of December 2006. Having regard to the evidence of Mr. Harmon and Mr. Paul Browne, I am satisfied also that a meeting did take place at the development in January 2007. I am also satisfied that a number of discussions took place between Mr. Harmon and Paul Browne in the early part of January 2007 in relation to a selection of the properties to be purchased by Mr. Harmon. I am also satisfied that Mr. Harmon was furnished with an information pack by Paul Browne setting out details as to the tax allowances available in respect of the scheme. Finally, I am satisfied that Mr. Harmon selected the properties numbers 11, 12, 13 and 15 because of their location in the development (being south-facing) and not solely by reference to the extent of the tax allowances available with the properties. (It appears that the houses in the first phase attracted a higher level of tax allowances than those in the later phases.)

As mentioned previously, there is no dispute that the sale of number 9 was due to take place on 31st May, 2007. The solicitor for Mr. Harmon was informed that the property had been completed by letter of 10th May, 2007. Correspondence and discussions then ensued between the parties as to the appropriate VAT form to be used. Paul Browne in his evidence indicated that advice was obtained from Ernst and Young and a number of discussions took place in relation to this issue. The issue that arose was in respect of whether VAT form 4A or 4B was appropriate. Mr. Harmon had had a previous difficulty in reclaiming VAT and consequently this was an issue of some importance to him. Paul Browne indicated that the matter was resolved by the letter of 29th June, 2006 from Ernst and Young together with a further letter of 13th July, 2007 setting out the tax procedure. The view from the plaintiff's side was that the procedure involved in the use of form 4A was more straightforward whilst that involved in the use of form 4B was more complicated. Ultimately the plaintiff decided to furnish a VAT 4B form and this was done by letter of 27th July. I am satisfied that there was a legitimate issue between the parties as to the appropriate VAT form to be used in respect of the transactions. However I am also satisfied that this issue was resolved by the furnishing to the defendant of VAT Form 4B by letter of 27th July. Thereafter, it seems to me that no obstacle arose to prevent the closing of the sale of No. 9.

It is at this stage that the evidence as to what occurred on 27th July, 2007 becomes crucial. In this context, it is necessary to consider carefully the evidence of Paul Browne and that of Mr. Harmon. Leading up to this time there had been a number of conversations between Paul Browne and Mr. Harmon. The market was beginning to soften and Mr. Harmon was concerned that he would have a difficulty in completing the sales of the other units. He wanted to know what could be done to help him. Paul Browne explained the plaintiff's position with its bankers. He also discussed the matter with Mr. Conway, the main shareholder in the plaintiff company. The view was that the plaintiff should try to assist Mr. Harmon. Paul Browne indicated that at this time he was focused on closing the sale of No. 9. He was also aware that Mr. Harmon was about to go on holidays. He stated that he specifically told Mr. Harmon that he could not release him from the four remaining contracts but that if the plaintiff could sell them on by January 2008, that the plaintiff would release him. The basis of the arrangement was that if fourteen of the properties could be sold, i.e., 10 other units plus the four units representing Mr. Harmon's contracts, then Mr. Harmon would be released from his contract. Paul Browne was

adamant that it was not his intention to release Mr. Harmon at that stage, it was only if the further sales were achieved that this would occur. Paul Browne was optimistic at the time that he would achieve the necessary sales which would result in the release of Mr. Harmon. On that basis it was indicated that the plaintiff would try to assist him.

Paul Browne confirmed that the letter of 30th July, 2007 reflected the discussion with Mr. Harmon although she described it as not being all embracing. He confirms that the letter was based on a conversation that took place between him and Mr. Harmon and that the letter was posted on the day he wrote it. Paul Browne indicated that the letter showed that there was a willingness not to enforce the four contracts with Mr. Harmon if the properties could be sold elsewhere. However the position was that the contracts were still extant. He also confirmed that there was a definite event provided for in the discussions namely a sale of the properties by January 2008. He agreed that there was nothing in the letter to point to a cut-off date. Unfortunately the position is that the fourteen sales anticipated by Paul Browne were not achieved. Paul Browne explained that he wrote the letter setting out the details of the conversation as a 'without prejudice' letter. It was a *bona fide* attempt to set out his understanding of what had been discussed. He was not setting out something that was not agreed.

In the course of his evidence Mr. Harmon indicated that he was prepared to close the sale in respect of No. 9 and was hopeful that if he closed that sale Paul Browne would release him from the remaining four contracts. He said that he wasn't going to close No. 9 if you couldn't get out of the others. As he put it "I might as well be sued for 5 as opposed to 4." He indicated that he advised Paul Browne that he would close the sale of No. 9 if he was released from the other four. On 27th July, Paul Browne left a phone message for Mr. Harmon and they then spoke. In the course of the conversation Mr. Harmon confirmed that Paul Browne stated that if he sold fourteen units he would release Mr. Harmon from the remaining contracts. Mr. Harmon said that he advised Paul Browne that if Mr. Harmon's solicitors were satisfied with that approach, he would be happy with that approach. There was no discussion as to this arrangement being open for a period of time. His view was that as soon as fourteen of the properties were sold he was released from the contracts but they remained on hold until then. He said that he then rang his solicitors and advised his solicitor that he was out of the contracts. There was a letter of agreement on the way to his solicitor. He went on to add that his solicitors told him that everything was in order on receipt of the letter of 30th July. Accordingly the money was made available to close the sale of No. 9 and Mr. Harmon went on holidays. As things turned out Mr. Harmon did not see the letter of 30th July, 2007 at that time. It was not until he returned from his holidays that he saw the letter. He was satisfied that the letter reflected the agreement between the parties.

During the course of cross-examination he confirmed that he and Paul Browne spoke on four or five occasions in the month of July 2007. As far as he was concerned he was using the difficulties over VAT to hold off the closing of No. 9 and then using the closing of No. 9 as a "negotiating device" to get out of the other four contracts. His view was that he would not close No. 9 if he could not get out of the other four contracts. As far as he was concerned, the position following the discussions on 27th July, 2007 was that he was to be released from the four contracts when fourteen other sales were completed. His view of the matter was that the contracts work extended until fourteen properties were sold. It was a matter of when, rather than if. There was some further cross-examination of Mr. Harmon in relation to the discussions he had with his solicitor on the on the Friday. He stated that the conversation with Mr. O'Flaherty, took place over the telephone and lasted about two minutes. In the course of that conversation he outlined the earlier conversation with Paul Browne. There was a further conversation later that evening and he dropped a cheque for the closing of the sale of No. 9 into his solicitor's office at 6:30 pm approximately. On the Monday, he went on holidays on a 7:30 am flight. He said that he had no contact with anyone on the Monday. He reiterated that he did not speak to his solicitor Mr. O'Flaherty on 30th July. His last conversation was on the Friday.

The issue as to conversations between Mr. Harmon and his solicitor is of some importance in the context of a memo kept by his solicitor. The memo is dated 30th July 2007 and states:

> "I spoke with Johnny Harmon at length in relation to the contents of the Paul Browne's letter dated 30th July 2007. It was confirmed that letter was drafted very much on the basis if they sold the units we would be released. The reason the letter was drafted in such format is that they were legally obliged to keep in the contracts until further sales were agreed because of their obligations to the bank.
>
> John confirmed this seemed to include everything he discussed with Paul and it did appear in the circumstances that it was the only deal available as we could not get an open letter repudiates in the contracts and were under immediate pressure to complete on the completion notice served in relation to No. 9. I was accordingly instructed to complete the transaction."

Mr. Harmon agreed that the memo was at variance with his recollection.

It is important at this point to make a number of observations. The conversation that took place on 27th July, took place on a Friday. The following Monday was 30th July, the date of the letter. Mr. Harmon was adamant that he had a conversation with his solicitor on the Friday and dropped in a cheque at 6.30 p.m. to his solicitor to close the sale of No. 9. He denied that he spoke to Mr. O'Flaherty on the Monday and thus does not accept that the memo of the 30th is correct. I did not hear any evidence from Mr. O'Flaherty. He no longer acts for Mr. Harmon. However, I find it very difficult to accept that Mr. Harmon's recollection as to whether he spoke to Mr. O'Flaherty or not is correct. Mr. Harmon went to Spain on the 30th and I do not doubt that for a minute. That does not mean that he did not speak to Mr. O' Flaherty that day. The memo could only be understood to be a memo of a conversation after the receipt of 30th July letter. No other interpretation is open. Therefore, I accept that there was a conversation on the 30th between Mr. Harmon and his solicitor and that the memo accurately reflects the position of Mr. Harmon at that time.

Mr. Browne and Mr. Harmon gave evidence as to the events in 2008 which led up to the institution of these proceedings. I think it is fair to say that the plaintiff and Mr. Harmon attempted to reach some accommodation in the difficult circumstances in which they found themselves. It is clear from that evidence that there were a number of discussions in relation to the terms of the lease-back element of the scheme to make it more attractive to Mr. Harmon, or more accurately, to Mr. Harmon's bank. Mr. Harmon characterised these discussions as a request to "re-consider going ahead on a different basis". Despite the fact that the proposals were attractive, his bank would not lend the money on the basis of those proposals. Paul Browne described those discussions somewhat differently. He said he was not of the understanding that Mr. Harmon was not obliged to close. Rather, it was a case of Mr. Harmon enquiring as to what, if anything, could be done to help him out. Paul Browne's view of the situation was that by February 2008, no further units had been sold and therefore Mr. Harmon could not be released from his contracts. There was also evidence as to a conversation between Mr. Harmon and Paul Browne which took place on 23rd April, 2008. Paul Browne made a contemporaneous note of that conversation.

The note records the following exchanges:

> "I asked him if he had received the closing letters. He explained he had, I told him to assist, as before Arnosford could give him a five-year rent guarantee to assist, if he confirmed, he would close on time as previously requested. I advised we were under pressure to close from our banks. I explained if he did not close we would stick to the contract and seek its enforcement. He told me that he had told Brendan O'Flaherty it was his fault and he would be taking him to court to pay for the houses.
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> I told him that was his business, but unfortunately I told him we had to pursue Johnny. He asked what the process was and I outlined that it was to serve a completion notice and seek its enforcement through the courts. He said that would take us at least 18 months so we would have to wait for our money.
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> Johnny then said we had a 'verbal agreement' that I did not have to buy these properties. I said 'Johnny I won't get into an argument with you but you asked me to put matters in writing at the time and I did so and said that if we could sell your properties we would not seek to enforce and this was without prejudice and put in writing to that effect'. I said I was quite happy to be a witness in court on the matter if it proceeded to that. He said that was okay and we wouldn't fall out."

It is also important to note that on receipt of correspondence requiring him to close the remaining four sales, Mr. Harmon, through his solicitor, immediately contended that he had been released from those contracts.

Mr. Dave Conway also gave evidence. His evidence was consistent with his witness statement and I do not propose to outline it here save to note that Mr. Conway accepted that the plaintiff was willing to release Mr. Harmon from his obligations in respect of the four properties if sufficient other units were sold. He described this as granting an extension to Mr. Harmon.

View of the evidence

There are a number of points to make in relation to the evidence. I am satisfied that Fergal Browne and Dave Conway were truthful and reliable witnesses. Crucial to this case is the evidence given by Paul Browne and John Harmon. As mentioned previously, there was one issue in the evidence of Paul Browne as to the date of a meeting where he could not have been correct. I do not think that Mr. Browne was attempting to mislead the court in any way. His recollection was simply mistaken. Apart from that one issue, I found Mr. Browne to be a reliable and truthful witness. It is clear that he at all times was anxious to secure the completion of the sales of the five properties. In particular, I think it is clear from his evidence that by July 2007, he was very anxious to achieve the completion of the sale of No. 9. It is also clear from his evidence that he was willing to give whatever assistance could be given to Mr. Harmon in respect of the remaining four contracts.

As I have said before, the events surrounding the discussions that took place on 27th July 2007 are crucial to this case. I have a difficulty with the evidence of Mr. Harmon as to his version of events. I have no doubt that he wanted to be released from the four remaining contracts. I also have no doubt that he discussed the matter with his solicitor on 27th July and later on that evening, he provided the funds to his solicitor to close the sale of No. 9. However, I find it impossible to accept that he did not discuss the letter of 30th July with his solicitor. That discussion was outlined in the memo of 30th July, 2007. It referred to the letter of 30th July expressly. It is impossible to conclude that the conversation reflected in that memo could have occurred on the 27th and it is not suggested that it could have occurred at a later stage. The memo is consistent with the interpretation of Paul Browne as to the discussions between himself and Mr. Harmon. In any event, even if the memo was not taken into account, I am satisfied from the evidence that the discussions between Paul Browne and Mr. Harmon on the 27th did no more than to outline the circumstances in which Mr. Harmon could be released from the contracts. Mr. Harmon's view of the matter is inconsistent with the fact that the plaintiff was giving him a concession that in the event of fourteen sales being achieved, he would be released from the contracts.

I wish to deal briefly with the evidence referred to above in relation to the discussions that took place in 2008, prior to the commencement of the proceedings. The first point to note is that there were discussions in relation to the possibility of more favourable terms in relation to the lease back arrangement. I prefer the version of the discussions given by Paul Browne to that given by Mr. Harmon. It is my view that the evidence as to those discussions is consistent with the plaintiff's approach throughout the various discussions that took place. It seems to me that Mr. Harmon was seeking some or any improvement in the terms of the holiday home scheme which would enable him to obtain the necessary finance from his bank for the completion of the sales. I doubt very much that Mr. Harmon would have gone to the trouble of seeking finance from his bank in the light of the changed economic circumstances, if in fact he was correct in his view that he had been released from his obligation under the four contracts. It is fair to say that the plaintiff was willing to facilitate Mr. Harmon to a considerable extent in order to obtain the closing of the sales. Nonetheless I am satisfied as I have indicated above that the approach of the plaintiff at all times was on the basis that the contracts were extant and subsisting and required to be completed following the failure to sell fourteen other units as envisaged by the arrangement made on 27th July, 2007.

The letter of 30th July 2007

That letter was headed "without prejudice". There was some argument as to whether the letter could be relied on in evidence before me. In the end, both parties agreed that it could be relied on in the course of the hearing. Not to have done so would have been like seeing a performance of Hamlet without the prince! The letter included the following paragraphs:

> "Arnosford Ltd. will undertake not to seek closing of these contracts on the due date for closing (30th September, 2007) but instead will extend the contract closing date until such time as Arnosford Ltd. has achieved fourteen (14) independent sales contract (independent and exclusive of the contracts for Johnny Harmon). Once 14 of the independent sales contracts are achieved for these contracts can be used to replace your remaining four contracts viz a vie (sic), we can revoke or cancel your contract on the remaining four units.
>
> It is anticipated that this will be achieved in the run-up to December 2007 and into January 2008. Nonetheless immediately upon signing off 14 independent contracts; Johnny Hartman's contracts can be terminated."

There was much discussion as to the interpretation of those passages. Paul Browne and Mr. Harmon both accepted in evidence that the letter reflected their agreement on 27th July, 2007. Mr. Hayden S.C. on behalf of the defendant argued that the use of the word "Nonetheless" meant that the intention of the parties was that the release of Mr. Harmon would take place on the completion of the 14th sale regardless of when that occurred. To put it another way, he contended that the arrangement was open-ended. Paul

Browne in his evidence had said that the effect of the paragraph was that the sales were to be achieved no later that January 2008, but if they were achieved sooner, Mr. Harmon could be released from the four contracts at that time. I have to disagree with Mr. Hayden on this point. I think the letter is clear in its terms. If fourteen sales were achieved by January 2008, Mr. Harmon would be released then. If that occurred sooner, Mr. Harmon would be released from his obligations sooner. If fourteen sales were not achieved in that time-frame, then the contracts for sale remained in force. In any event, the letter was simply intended to record the discussions between Paul Browne and Mr. Harmon. To that extent, I have already indicated that I accept the evidence of Paul Browne as to what was discussed on that occasion. The letter was in the nature of a "letter of comfort" to Mr. Harmon. No doubt had the fourteen sales of other units taken place and had Arnosford sought to enforce the sale of Mr. Harmon's four units, the issue of estoppel would have been raised.

At an earlier stage in this judgement, I identified the issues that required to be determined, namely, did the agreement on 27th July, 2007 release the defendant from his obligations under the four contracts if he closed the sale of No. 9 immediately? Did he have to wait until the plaintiff had achieved fourteen sales? Was it an agreement to release the defendant from the four contracts only when and if fourteen sales had been achieved by the end of the Autumn/Winter sales campaign of 2007? The status and interpretation of the letter of 30th July, 2007 is also an issue. Given the findings and conclusions, I have set out above, I am satisfied that Mr. Harmon was not released from his obligations under the four contracts by reason of the closing of the sale of No. 9. He was under a legal obligation to close that sale and by 31st July, 2007, any issue as to VAT had been resolved by the plaintiff in furnishing VAT Form 4B. The discussions leading up to the closing of the sale of No. 9 had the effect of postponing the closing date for the remaining four units. I do not accept the evidence and arguments of Mr. Harmon that the sale of No. 9 was completed on the basis that Mr. Harmon was being released from his obligations in respect of those units at that time or indeed, indefinitely. I re-iterate that I am satisfied that Mr. Harmon would only have been released from his obligations under the four contracts when and if fourteen sales of independent units had been achieved by the end of the Autumn/Winter sales campaign of 2007. In order to have been released from his obligations under the 4 remaining contracts on 27th July, it would have been necessary to have evidence of an unequivocal statement to that effect. There was no such evidence.

There were helpful submissions by both sides herein in relation to the issues which arose from the pleadings and from the evidence. This is a case where the plaintiff was under no obligation to extend the closing date of the four units but did so to facilitate Mr. Harmon. No exact date was given for the closing but it was clear from the discussions that he would not be called on to complete until the sales campaign in 2007 had been completed. The arrangement as to closing was not a term of the contract for the sale of the four properties but was one of those matters which are usually left by the parties to a contract to be arranged. It did not in my view amount to some kind of collateral contract. There is nothing to suggest that the closing date in respect of the four units was a material term of the contracts between the plaintiff and the defendant. As pointed out in Farrell on Irish Law of Specific Performance, at p. 50:

> "The prima facie position in sales of land other than special cases such as licensed premises appears to be that agreement on a closing date or date for possession is not a material term."

In all the circumstances I am satisfied that it is not necessary to consider all of the submissions made herein as to the status of the arrangement made between the parties on 27th July, 2007; whether that arrangement amounted to a new contract; whether there was consideration for a new contract and so on. As I have made clear, I am satisfied that the defendant was at all times bound by the original four contracts. The closing of the sale of No. 9 did not change that position. The plaintiff did agree not to enforce the remaining four contracts if 14 independent sales were achieved by the end of the Autumn/Winter campaign. That did not occur. Accordingly, the plaintiff is entitled to the relief claimed herein.