THE COURT OF APPEAL

APPROVED
Appeal Number: 2022/245
Neutral Citation Number [2024] IECA 6

Whelan J.
Noonan J.
Pilkington J.

BETWEEN/

ACE AUTOBODY LIMITED

APPELLANT

- AND –

MOTORPARK LIMITED, BRECOL LIMITED AND JDM AUTOMOTIVE LIMITED

RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 15th day of January 2024

Introduction

1. This is an appeal and cross-appeal against the *ex tempore* judgment delivered in the High Court on 2nd June, 2022, and consequential orders made 21st June, 2022, as amended and perfected on 6th October, 2022, dismissing the claim of ACE Autobody Limited (ACE) for a decree of specific performance of an alleged agreement with Motorpark Limited (Motorpark) and Brecol Limited (Brecol) for the grant of a ten-year lease of a panel-beating/body shop (the body shop), in portion of premises situate at Monksland, Athlone, Co. Roscommon, Folio 35841F, Co. Roscommon.

2. The claim was pursued by ACE on a number of alternative bases, including that the parties had concluded a binding agreement and/or based on sufficient acts of part performance. In the alternative it had sought a declaration of entitlement to a ten-year lease on grounds of estoppel including proprietary estoppel. ACE had contended that a binding and concluding oral agreement had been reached between ACE and Motorpark for the grant of the contended-for lease, on foot of which it had gone into occupation and possession of the unit on 16th January, 2017 and had assumed other obligations, including payment of rent and assumption of four employees pursuant to European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003) (TUPE). Brecol had counter-claimed for a declaration that ACE had no estate or title in the premises and sought an injunction that it vacate the premises and remove all equipment from same.

3. The High Court dismissed both the claim for a decree of specific performance and Brecol's counterclaim. The trial judge concluded that ACE occupied on foot of a periodic tenancy from year to year, which required 6 months' notice to terminate and had not been validly terminated.

Background

4. ACE is a crash repair company specialising in panel beating. Motorpark operated, *inter alia,* a motor vehicle dealership and allied activities and carried on trade at Monksland, Athlone, Co. Roscommon. Brecol was incorporated at the behest of Motorpark for the purposes of acquiring the freehold reversionary interest in the Monksland property, Folio 35841F, Co. Roscommon. In or about May 2018 JDM Automotive Limited (JDM) acquired the respective shareholdings of Motorpark and Brecol and thereby became beneficial owner of the entire freehold and leasehold interests, subject to the interests (if any) of ACE in the repair unit. JDM has taken over the defence and cross-appeal in the within proceedings.

5. At issue is the nature and extent of the rights (if any) of ACE in the body shop unit occupied by it as a collision repair body shop since 16th January, 2017, together with designated parking spaces, shared usage of kitchen and toilet facilities and an office on the ground floor, a shared office on the ground floor and an office on the first floor used by the body shop manager Mr. Brendan O'Gorman, one of four workers taken over by ACE when it went into occupation of the unit, and whether JDM is entitled to possession of same.

6. ACE contends that prior to entering into occupation of possession of the body shop unit, it had reached a concluded agreement with Motorpark, evidenced by a Term Sheet Discussion Document dated 24 August, 2016, for the grant of a lease of the unit for the term of ten years, subject to a break clause in favour only of the tenant at the end of the fifth year. ACE contends that it carried out substantial acts of part performance referable to the said concluded agreement which entitle it to a grant of specific performance of the lease contended for. Further or in the alternative, it contended that in light of direct representations made and conduct on the part of Motorpark and statements made by, *inter alia*, Mr. Michael Barry (Managing Director of Motorpark) and his son, Mr. Colin Barry (the Group General Manager and company director), and of Gerard Halloran, a retired group general manager and director of Motorpark, who had authority to negotiate on its behalf, the respondents were estopped from denying that there was a specifically enforceable agreement for same. The circumstances and legal consequences of the conduct and representations leading to ACE going into occupation of the unit is the subject of intense dispute between the parties. In the course of a 5 day hearing in late May 2022, three witnesses were called on behalf of ACE; Mr. Robin Sutton (General Manager of ACE), Mr. Paul Plunkett (Managing Director of ACE) and Ms. Carolanne Reidy (of ARM). Mr. Gerard Halloran, Mr. Michael Barry and Mr. Kevin McNamara (solicitor for Michael Barry/ Motorpark) were called as witnesses on behalf of the respondents.

***Ex tempore* judgment of the High Court**

7. An *ex tempore* judgment was delivered on 2nd June, 2022, with the judge observing: *"I am going to deliver this as an ex tempore judgment because it is not beaten into such shape as to justify it being delivered as a written judgment."* (p.3, lines 6 – 9). He identified the first issue as being *"whether in late.. December 2016 a contract was concluded between Motorpark.. and ACE… to lease to ACE the vehicle body repair unit.. for ten years in terms orally agreed."* (p.3, lines 11-17). He observed that most of the contract terms which ACE contended for *"were set out in document called 'Term Sheet Discussion Document Only'"*.

8. The second issue identified was *"whether the conduct of Motorpark or Brecol precludes them from either relying on the fact that no contract was concluded or on absence of an executed document complying with statutory formalities for the creation of a fixed term of more than a year… as required by section 51(1) of the Land and Conveyancing Law Reform Act, 2009."* He noted that *"ACE made the case that Motorpark encouraged it to occupy the premises and to act to its detriment by representing that the lease based on the terms agreed would be forthcoming and should result in either a declaration of a right to a lease on those terms or specific performance to give effect to the rights acquired by proprietary estoppel or promissory estoppel."* (p.4)

In regard to estoppel, the court noted that it:

> *"…may arise where the conduct of a party is relied on which estops a party from relying on absence of statutory formalities under the doctrine of part performance which prevents such formalities to be used as a vehicle of fraud in equity. It may also arise in the context of the legal consequences of an arrangement which gives rise to an interest in land as a result of a proprietary estoppel or a constructive trust. It may also arise to estop a party from relying on rights which that party would otherwise have at law. It does not necessarily follow that a proprietary estoppel will recognise*

that a party to an arrangement which has been relied on as the basis of a legal relationship should be given the same interest in land as that which would be enforced by an order in an action for specific performance of a contract." (p.4)

9. The court noted that ACE had argued that *"because nothing was said about a request by Motorpark for renunciation by ACE of any right to a new tenancy after the ten years under s.17(1)(a)(iii)(a) of the 1980 Act which was rejected by ACE, the effect of the subsequent requests that ACE occupy a unit on the promise of a lease and the terms agreed in 2016, Motorpark is estopped from raising absence of agreement on this point in answer to a claim for specific performance."* (p.5)

10. The court identified the third issue as: *"what is to happen if the claim by ACE fails. The claim might fail either on the basis that there was no concluded contract for a lease or on the basis that the proved facts are insufficient to justify a conclusion that ACE has acquired a proprietary right to occupy the body repair unit and ancillary easements for ten years.* The judge further asked *"What is the current legal status of the possession of ACE and is .. Motorpark entitled to succeed on the counterclaim that ACE is a trespasser and should be removed from the unit".*

11. The following conclusions reached by the trial judge represent his essential determination:

"…the evidence does not establish that there was a contract for a ten year lease in place between Motorpark and ACE when ACE took possession of the vehicle body repair unit in the Motorpark premises… on 16th January 2017." (pp. 5/6)

"The evidence may disclose a very limited basis on which conduct by Motorpark and Brecol could entitle ACE to equitable relief based on estoppel. This conduct consisted of bad faith in leaving ACE under the impression that Motorpark and Brecol would

move towards finalising the negotiations of the ten-year lease, which was envisaged at the time that ACE took possession of the unit.

This could only relate to the period of notice appropriate to determine the legal relationship created when ACE went into possession. At some stage after ACE took possession of the unit, Michael Barry changed his mind on whether he would proceed to give a lease.

ACE never had a legitimate expectation that it would be given a lease without a disclaimer, or to be put, by equity, in a position where it would end up with a right to renewal of tenancy under Part II of the Landlord and Tenant (Amendment) Act, 1980.

The bone of contention as to whether the proposed deal would include a disclaimer of such rights was never resolved.

The evidence does not establish any convention or representation which existed which could have the effect of estopping Motorpark and Brecol from relying on lack of agreement on this issue.

The fact that ACE jettisoned legal...advice given by its solicitor and chose to go into possession of the unit on the strength of vague assurances that a lease was 'agreed', or it would be forthcoming, but knowing at the same time that there is disagreement about the disclaimer and that the terms of the suggested agreement were not concluded could not give rise to a promissory or proprietary estoppel or an estoppel by convention.

The process of negotiating the agreement ended with a letter from ACE's solicitor dated 14th December 2016.

The evidence establishes that ACE is ... currently a tenant from year to year of the unit."

12. From p.7 onward there follows approximately 40 pages of observations, remarks and commentary which require consideration to identify the bases for the said conclusions.

General observations made by the High Court judge

Negotiations

13. The judge observed that the process of agreeing terms which may result in a contract;

> *"often involves protracted negotiation; during the course of negotiation both sides may agree a particular point and one side may then have a change of mind on what has been agreed… Parties have no contractual duty to negotiate in good faith… things may change if the parties begin to implement performance in advance of full agreement. At that stage the arrangement or relationship ceases to be wholly executory."* (pp.7/8)

He observed that *"where parties engage in activities and incur commitments implementing an arrangement which may not be enforceable as a contract, good faith may become relevant."* (pp. 7/8 of the judgment)

14. He returned on several occasions to the issue of negotiations, observing, for instance, at p.8, l. 29 - p.9, l. 4: *"In order to resist an action for specific performance it is sufficient for a party to identify any point which is the subject of negotiation on which the parties remain unagreed."* At p.9, l. 16-23 he observes: *"However one effect of negotiations through solicitors by means of correspondence using standard disavowals of agreement is that it would be difficult to establish that the parties have used this method of negotiation in reaching a concluded contract or abandoning it altogether and intend to conclude the contract between themselves."*

15. From p.24, l. 10 onward the judge returned to the issue of the negotiations and the relevance of the fact that solicitors had been retained subsequent to the Term Sheet having been prepared and the negotiations between ACE and Motorpark having been the subject of

an alleged handshake between their respective principals in September 2016. He observed (p. 24, line 10 *et seq.*):

> *"negotiation of detailed content of the lease element of the proposed deal and the investigation of proof of title to the unit had been passed over to the solicitors for the parties to carry forward. The proposed arrangements also involved the agreement by ACE to buy parts… for Motorpark and for Motorpark to use ACE for the bodywork element of its fleet maintenance contracts and other repair business."*

16. At p.25, l. 17-23 he observed:

> *"While certainly key elements were agreed in the oral negotiations, as set out in the evidence of Robin Sutton, which I accept, there was no overall concluded contract. The lease,… was part of the wider business relationship. There was no agreement on the date when the lease and the business arrangement would get up and running.*
>
> *While the understanding of the negotiators was that the lease would include full obligations of the tenant repair and insure, and a right to terminate the lease if the rent was not paid and the lease would have standard commercial terms, the details of those terms remained unagreed. There might be many issues, such as the extent of an obligation to insure and rebuild, or whether the lessor or lessee would undertake primary responsibility for such matters, which would require specific agreement."*

17. The court observed at p.8, line 10 *et seq.*:

> *"In order to arrive at a final agreement on the terms of a lease, the parties may have to negotiate and agree on a number of terms… These terms must be agreed with a sufficient degree of certainty to enable a court asked to grant specific performance to state with clarity what the express and implied terms of the contract which have been agreed are. It is not enough that… a particular term which has not been expressly agreed may seem reasonable."*

In order to resist an action for specific performance it is sufficient for a party to identify any point which is the subject of negotiation on which the parties remain unagreed."

Subject to Contract

18. On the relevance of "*subject to contract*" correspondence, the judge observed:

"Correspondence by parties and their solicitors will often be headed by disclaimers of authority to or disavowing any intention that their communications can be construed as intending to create legal relations… This, of course, will count for nothing if the parties themselves ignore what the legal people are saying and proceed to conclude the contract themselves. Similar consequences may flow where no contract is being concluded if the parties engage in a course of conduct towards each other as though they were bound. However one effect of negotiation through solicitors by means of correspondence using standard disavowals of agreement is that it would be difficult to establish that the parties have used this method of negotiation in reaching a concluded contract or abandoning it altogether and intend to conclude the contract between themselves." (p. 9, l.5 *et seq.*)

He observed:

"The requirements for a valid contract are that the parties have agreed on terms sufficient to give rise to a legal agreement as a result of a process of offer and acceptance accompanied by intention to create legal relations and supported by valuable consideration. If something fundamental remains unagreed or if there is disagreement on a particular matter which remains unresolved then there can be no contract."

The judge observed that *"matters become complicated when a deal has not been finalised, but the parties take steps in performance of aspects of the contractual relationship in advance of their conclusion of a contract which would underpin their relationship."*

He stated;

> " *... a party who makes commitments on assumption or hope that a formalised contractual structure governing an intended aspect of a business relationship will be put in place may find itself at a disadvantage if the other party pulls out of the proposed deal."*

The judge observed at p.10, l. 20:

> *"Unless the party can pray in aid a proprietary estoppel to enforce a property right, or a promissory estoppel to enforce a business obligation the law looks to what has been in fact agreed and allows the party to terminate the operating parts of their business relationship on giving reasonable notice."*

Authorities were not identified for any of those general assertions.

Relevance of equity

19. The judge rejected arguments advanced on behalf of ACE invoking various equitable principles in support of a decree of specific performance. The judge observed:

> *"The circumstances in which equitable principles replace certainties of the law of contract in business transactions are in my view limited. Save in exceptional circumstances, equity does not ripen a business arrangement which is not based on contract into a proprietary interest in land. Even in these exceptional cases, recourse to equitable principles cannot extend underlying rights and obligations of a party in a disproportionate manner, or fashion an interest in land unknown to law."*

No authorities are analysed as informing those observations.

The judge noted p.11, l. 29 *"where equitable rules are not applicable, the underlying contract governing the particular… matter will determine whether notice is required to determine any particular contractual relationship and the duration of that notice."*

Tenancy from year to year

20. It is evident from a consideration of the transcript that the trial judge found attractive the proposition of characterising the occupation by ACE of the unit as giving rise to a tenancy from year to year. At p.12, l. 23 *et seq*. he observed:

> *"Special rules exist where a person is given possession of land in return for payment of a periodic rent. In the absence of evidence of the parties of a common contrary intention or other evidence showing lack of intention to create a relationship of landlord and tenant the presumption of law is that this type of arrangement gives rise to a periodic tenancy which may be a yearly, quarterly, monthly or weekly tenancy by reference to the time basis on which rent paid is calculated. So, when an arrangement which may not be enforceable as a lease for a fixed term has resulted in one party giving exclusive possession of land to another in consideration of an annual rent the correct inference may be that the parties have intended a tenancy from year to year."*

He further observed: *"Obviously a presumption of this sort will be rebutted if there is an express agreement to the contrary or where the provided circumstances otherwise show that the presumption is inappropriate."* (p.13, ll. 24-27).

Term Sheet Discussion Document

21. At p.15, the judge observed (l.17 *et seq*.):-

> *"It is clear that in 2016, ACE and Motorpark reached agreement in principle, that ACE would take over the body shop repairs element of the Motorpark business in this unit on a ten year lease. A proposed deal also involved ACE buying parts for its crash*

repair business for Motorpark and also involved… a related company to ACE engaging in business with Motorpark to the advantage of Motorpark.

The proposed lease included easements or licenses to use car parking spaces and office and staff facilities on the retained lands for a period of ten years. With one qualification, I accept the evidence of Paul Plunkett and Robin Sutton of ACE in relation to their interactions with Gerry Halloran and Michael Barry of Motorpark in 2016 and 2017. An initial meeting took place between Robin Sutton and Gerry Halloran on 20th August 2016. Mr. Halloran … had some 'riding instructions' from Michael Barry. Gerry Halloran was General Manager of Motorpark and Michael Barry was Managing Director of Motorpark. These related to the annual rent for the unit and the duration of the proposed lease."

He found that (p.16): *"… the Heads of Agreement as orally agreed between Mr. Halloran and Mr. Sutton were set out for the most part in the 'term sheet' attached to the email sent by Mr. Halloran to Mr. Sutton on 24th August 2016."* He noted that the terms were *"discussed again at the Galway meeting … between Gerry Halloran and Michael Barry." "They were also discussed in detail… on 30th August 2016 at a meeting between Gerry Halloran and Paul Plunkett where they shook hands at the deal."*

Solicitors *"did not alter the bones of the deal"*

22. At p.17 the judge observed: *"Whatever function the solicitors for the parties had thereafter in putting together the legal framework to give flesh to these terms did not alter the bones of the deal".* The judge observed:

"The negotiators did not make reference to whether the lease would be a full repairing and insuring lease. They did not make reference to the rent which would be payable during the second five years of the term. Mr. Sutton gave evidence that he assumed that the lease would be full repairing and insuring lease where the tenant would be

responsible for outgoings relating to the premises. He assumed that if ACE failed to pay the rent it would be evicted." (p.17, ll.4-12)

He further observed:-

"I prefer the evidence of Mr. Sutton that the negotiators agreed that the lease would give a break option to the tenant only. I accept his evidence that he confirmed this with Mr. Halloran after he got the term sheet on 24th August 2016 it struck me as inherently unlikely that ACE would commit to a break clause after five years. Mr. Halloran accepted that the ten year term was agreed in order to give the tenant an opportunity to make a go of the business and a five year break option for the landlord would defeat this. Mr. Sutton also gave evidence, which I accept, that they agreed that ACE would have the shared use of an office on the first floor of the Motorpark building and the use of the valeting area."

23. Regarding engagement between the solicitors, the judge noted at p.18, lines 22-28:

"The state of play in relation to the completion of the Athlone deal rested with the correspondence of the solicitors in December 2016. There is no evidence that they were in contact with each other in the period leading up to 16th January 2016 as one would expect to happen if there was pressure from either of the clients to get the deal closed."

The judge continued:-

"This is the normal way that transactions take place. If there's a pressure the parties put pressure on their solicitors, the solicitors pressure each other and one sees what happens. It was a striking feature in my view of the evidence in this trial that that didn't seem to be the evidence…." (p.19, ll.1-7)

24. Significantly, the judge observed:-

"While I accept the evidence of Gerard Halloran that he was not a plenipotentiary in his interactions with Robin Sutton at that time, it is clear that he referred back to Michael Barry at all stages. There was no change in the matters already covered by Gerard Halloran, Robin Sutton in the subsequent meeting between Paul Plunkett and Gerry Halloran on 30th August 2016, during which they went through the heads of terms line by line. There was also no push back on these terms when Paul Plunkett met Michael Barry and others in Galway on a date which is not quite clear, but definitely the meeting took place in Galway shortly after 30th August 2016." (p. 19, lines 9-21)

Findings as to what the parties directly agreed

25. Key findings regarding the outcome of direct negotiations between the parties include:

Going into possession

The judge held;

"I accept the evidence of Mr. Sutton and Mr. Plunkett that they are being pressed by Motorpark representatives to take over the body shop and that they were not being told that there was a difficulty in making title. This difficulty first arose in a concrete way at some stage shortly before or after ACE went into possession. The evidence does not make clear which, but I infer from Michael Barry's evidence that he knew about this problem before ACE took possession. An email from Colin Barry dated 22nd December 2016 showed at that stage the parties were 'putting an estimated closing date' or at least 'Colin Barry was putting an estimated closing date of Thursday 12th January on the deal with ACE and would hope to have you in the following the Monday, 16th January.' In other words that the deal would be closed and possession would be taken on the Monday afterwards." (p.21 ll.28/29, p.22 ll.1-5)

26. The judge observed (p.22, l. 17):

> *"This communication ties in with evidence of Kevin McNamara who was solicitor for Motorpark and Brecol at the time. Finance had been drawn down in anticipation of the closing of the sale. The sale did not close because Ulster Bank, as successor, to its subsidiary Lombard Ireland Limited now held the charge which was being relied on to make title, but had not been registered as owner of that charge in the Land Registry".*

Motorpark and Brecol were acting in concert

27. The judge continued:

> *"Motorpark and Brecol were acting in concert and they had sufficient interest in the unit to ensure that title could be given to ACE. There was no danger that Ulster Bank would prevent the deal by exercise of powers on foot of the charge registered as a burden on the freehold. The bank was funding Brecol for the purchase. Brecol was in the process of acquiring the freehold title on foot of the security conferred by the charge that was held at the time by Ulster Bank as successor to the registered owner of the charge."*

It is noteworthy that there has been no appeal from those findings of fact.

Business people… can forget about their lawyers and come to agreement without them

28. The judge went on to note that *"lawyers were engaged by ACE and Motorpark to formalise their arrangement. They corresponded with each other on 'subject to lease' basis. This meant that on behalf of their respective clients, they were representing there would be no binding agreement until all the details were agreed in a formal document executed by both parties. No such document was agreed."* (p.23, ll.9-15)

29. The judge then went on to modify those observations, noting *"Business people… can forget about their lawyers and come to agreement without them. They may also enter into*

an agreement ex post facto, as I have indicated, which formalises the basis of an existing relationship. This (sic) may agree matters which were left outstanding at the date when the relationship commenced. " (p.23, ll.17-23)

The common purpose of the parties

30. At p.23, ll. 25-29 the judge noted:

> *"The common purpose of the parties at 16th January 2017 was to put ACE into possession of the repair shop. The letting of the repair shop was part of this wider deal between ACE and Motorpark for the takeover of the Motorpark body repair business…as a going concern and the two parties did not worry about the fact that their legal people had not formulated a finalised lease for them to execute."*

The judge observed at p.24, lines 10-13:

> *"Negotiation of detail content of the lease element and the proposed deal and the investigation of proof of title to the unit had been passed over to the solicitors for the parties to carry forward."*

No overall concluded contract for the lease

31. The court noted (p. 24, line 19-22) *"The plan was that ACE would take over the vehicle body repair unit of the Motorpark business in Athlone along with the staff employed in that part of the business. The negotiators… were experienced businessmen who are familiar with commercial leases and the process of how these leases are usually put in place."* The judge observed at p.25, ll.1-5:

> *"Those involved in negotiations knew in August and September 2016 that there was no concluded contract for the lease on the terms orally agreed at the time. The key points as identified by the negotiators were agreed."*

Having considered the Term Sheet, the judge concluded;

"While certainly key elements were agreed in the oral negotiations, as set out in the evidence of Robin Sutton, which I accept, there was no overall concluded contract. The lease… was part of the wider business relationship. There was no agreement on the date when the lease and the business arrangement would get up and running." (p.25, l. 17)

"While the understanding of the negotiators was that the lease would include full obligations of the tenant [to] repair and insure and a right to terminate the lease if the rent was not paid and that the lease would have standard commercial terms, the details of those terms remained unagreed. There might be many issues such as the extent of an obligation to insure and rebuild or whether the lessor or lessee would undertake primary responsibility for such matters which would require specific agreement". (p.25, l.17- p.26, l.5)

"The parties referred the matter to their solicitors who thereafter corresponded on the basis that their respective clients disavowed the existence of any contract." (p.26, ll.7-14)

Solicitors' letters of 8th and 14th December 2016

32. The judge then considered the letter from the solicitors for ACE to the solicitors for Motorpark dated 14th December 2016 which had set out 26 requests for suggested amendments to a draft lease and a series of queries entitled "pre-lease queries". The court noted the following statement at the end of the said letter; *"... Please note we have no authority or instructions to bind our client to the proposed transaction and no contract shall be deemed to come into existence until such time as the approved contracts have been endorsed, executed and exchanged a contractual deposit paid."* (p.27, lines 2-7)

The judge observed (p.27, ll.9-14):

"This negated any intention of ACE to be contractually bound until everything was agreed and signed up. The letter from the solicitors from Motorpark made clear that the draft lease proffered on behalf of their client… was subject to the client's final approval."

33. He considered the earlier letter from Motorpark's solicitor to solicitors for ACE dated 8th December, 2016 which stated that Brecol was in the process of acquiring the freehold "*in the coming days*". The letter included a draft deed of renunciation. The judge observed (p.28, line 24) *"This is the first mention of a requirement by Motorpark that ACE renounce any right to a new tenancy of the unit under Part 2 of the 1980 Act…"* (p.28, l. 29- p.29 l. 3)

34. In regard to the acquisition of the freehold, the judge observed: *"It was obvious from all this information that Michael Barry also controlled Brecol. It was an unlikely scenario that he would give ACE a ten year lease without a renunciation."* He observed *"I agree with the evidence of Kevin McNamara [solicitor for Motorpark] on that."* The judge concluded at p.31, ll.5-9: *"No concluded contract to grant the proposed lease could come into existence unless either ACE agreed to provide the renunciation or Motorpark drop this requirement. The point was simply never agreed."*

35. The judge noted that the letter from ACE's solicitors Messrs. O'Donohoe dated 14th December, 2016 rejecting a suggested renunciation clause was provided to Mr. Michael Barry on 15th December, 2016 by his solicitor Kevin McNamara. There followed a series of direct negotiations in particular between Michael Barry and subsequently his son Colin Barry and Robin Sutton and Paul Plunkett without any involvement from their respective solicitors between 16th December, 2016 and 16th January, 2017.

<u>Representations made to ACE prior to going into possession</u>

36. The judge (p.31, l.15 *et seq*.) noted:

"Michael Barry was in contact with Robin Sutton by telephone and by email on 16th December 2016. Robin Sutton's evidence on this is that he raised with Michael Barry that a lease would not be signed and his reply was very much…. 'We'll get that sorted. We'll just get that sorted out, let's move on. The lease is something that is going to happen when it happens. That shouldn't be anything that should delay us in moving in was the message I was receiving from him. Very much, you know, that's all agreed, let's move on.'" – quoting direct evidence of Robin Sutton.

37. In regard to that evidence, the judge observed as follows: (p.31, line 28):

"In my view these vague comments could not amount to a binding assurance about anything. They gave no indication about what had been agreed. It was evident from the letters passing between the solicitors dated 8th and 14th December 2016 that everything was not agreed and that a number of matters relating to whether there would be a lease and what it would contain had yet to be attended to. These related to the title, to the property, the terms of the proposed lease and whether ACE would provide a renunciation."

The court noted the tenor of an email from Michael Barry on 16th December, 2016 following his conversation with Robin Sutton, which stated: *"ACE and Motorpark wish to move forward with the handover of the body shop in Athlone…on a lease which is presently being processed by our solicitors."*

The judge observed:

"This does not suggest that Michael Barry was stating to Robin Sutton at that point that the terms of the suggested lease were all agreed or that the process of going through the solicitors was being abandoned." (p.32, lines 22 – 25)

38. The judge noted at p. 42 of the evidence before him *"that it would be difficult for ACE to relocate to a suitable premises in the Athlone area without enormous cost."* The judge observed at p. 43:

> *"Remedies based on promissory and proprietary estoppel will not necessarily result in indemnification for loss for every commercial advantage lost by a party as a result of unfair behaviour of another. Equitable specific remedies include specific performance of contract and sometimes perhaps of obligations which may be considered as equivalent to contractual obligations. These remedies may include recognition or grant of enforcement of proprietary interests in estates or in another estates in land or property to meet equitable obligations arising from the conduct of another party. Such equitable interventions may be less appropriate in commercial dealings where the certainties of the law of contract generally govern relationships. Introduction of vague stuff which obliges courts to write contracts because parties in commercial relationships, who have all their wits about them and may have chosen not to protect themselves may undermine well established certainties of the law of contract. In my view the court should be cautious before going down that road."*

39. The court then noted the testimony of Robin Sutton in relation to a telephone conversation between him and Mr. Colin Barry, who did not give evidence at the hearing before the High Court. It found that that call had been initiated by Colin Barry. It noted that the said phone call had preceded an email sent by Colin Barry to Mr. Sutton. Mr. Sutton's evidence was there had been negotiations wherein Mr. Barry pressed that ACE would go into possession on 1st January, 2017. The court noted Mr. Sutton's evidence; *"Given the Christmas period, this was now unrealistic. Robin Sutton gave evidence that there a bit of negotiation from him to have the date pushed back. The general tenor of Robin Sutton's evidence was that Colin Barry was assuring him that he should not worry about the lease."*

40. The judge quoted from Mr. Sutton's testimony:

"And again I sort of touched off the lease thing and he, it was a case of 'ah don't worry we'll have it all sorted out for the 12th', but again it wasn't something that I have to worry about. It was 'let's just set the date and move you know, that's all done'. Which is a continuation of what I had heard from Michael Barry as well but was that he said 'ah we'll do our best to have that done by the 12th and move in on the 16th' but it was …the move in date but it took quite a bit of negotiation to push the date back from the 1st January to the 16th". (p.33)

41. The court noted that following the said telephone conversation, Colin Barry sent an email to Mr. Sutton which stated, *inter alia*,:*"…we are putting an estimated closing date of Thursday, 12th January on the deal and would hope to have you in for the following Monday, 16th January. ACE are to carry out an inspection to verify the schedule of condition before completion."*

42. The court found at p.36, l. 25:

"Paul Plunkett was being pressured by Colin Barry and Gerry Halloran to move in and was being assured by Gerry Halloran and Michael Barry on numerous occasions that the lease would be forthcoming. There had been considerations (sic) with them in November and December on this. It is important to remember that in December 2016 and up to some point in January 2017 there was a genuine belief by the Barrys and their solicitors that the freehold could be got in and that the outstanding matters would be addressed by the solicitors."

43. The judge concluded at p.37:

"When Paul Plunkett made a commercial decision to go in without a written lease there was no basis on which he could conclude that Motorpark was contractually obliged to grant a ten year lease to ACE. He knew what was outstanding. The parties

were using solicitors and negotiating and negotiations for the lease were on a subject to contract basis. There was no room for any proprietary estoppel to operate at that stage because there was always a danger that the deal would unravel. The parties might be unable to agree the terms and they might change their minds. He knew also about the lack of agreement in relation to the disclaimer."

44. The judge further observed:

"At the time point when ACE did go into occupation, no steps had been taken to apprise ACE of the fact that a problem had arisen with the title. Michael Barry, it appears, knew, at that stage that his company did not have title to the property and that title to the property would not be forthcoming in the near future. He wanted ACE in occupation and the benefit of their business relationship. Instead of disclosing the position about the title, he decided to keep this information which might discourage ACE from taking on the body repair unit to himself. He decided as he said himself that he would kick for touch. I said 'look we'll leave them come in and we'll worry about the legals when we get the thing done.'"

Legal jargon

45. The judge observed at p.34 *"The reference to 'completion' and 'closing date' are legal jargon."* The judge expressed the view that the communication *"does not indicate any intention to abandon the solicitors as a route to the contract whatever that contract might be."* The judge was of the view that in order to *"close the transaction"*, a number of steps were required;

"Firstly, the solicitors for Brecol and Motorpark needed to secure completion of the legal documents necessary to enable Motorpark to grant a valid lease to ACE.

Secondly, the solicitors for Motorpark and ACE needed to finalise outstanding matters relating to the terms of the proposed lease and have them signed off by their clients.

These issues included the issue of whether ACE would provide the renunciation. There could be no concluded contract… unless and until that matter was resolved."

46. The judge noted that Michael Barry had arranged funding from Ulster Bank to enable Brecol to complete the purchase of the freehold. Money to complete the transaction had been drawn down in December 2016. Title was contemplated to be made in exercise of rights under a charge registered over the relevant folio in favour of Lombard Ireland Limited. It would appear that the benefit of the charge had been transferred to Ulster Bank and this, in turn, gave rise to certain delays in completing the transfer of the freehold to Brecol. Motorpark/Brecol when they discovered that never divulged that material fact to ACE.

Evidence falling short of representations that Motorpark would not insist on renunciation

47. The judge observed at p.35:

"All of this evidence, in my view, in relation to what was going on there with Mr. Sutton falls very short of representations or other conduct by Michael Barry or Colin Barry that they would not insist on that renunciation, or which could possibly leave ACE under the impression that they had a binding contract or commitment for the ten year lease claimed when ACE in fact went into possession on the 16th January 2017."

The judge observed at p.36:

"The decision to go into occupation of the unit was taken by Paul Plunkett. He was in charge of the legal aspect of the transaction and he owned ACE. He decided to do this against the solicitor's advice, in the knowledge that the matters relating to the investigation of title, the finalisation of the terms of the lease and lack of agreement on renunciation had not progressed since December 2016."

Michael Barry

48. At p.16 the judge observed:

"Michael Barry's recollection of the relevant matters is poor. He had a lot on his plate at the time of the relevant events and was suffering from serious ill health. He had no memory at all of the Galway meeting with Paul Plunkett and the sequencing of the other key events is not in accordance with other evidence which I find to be more credible."

At p. 20 (ll.6-8) he observed:

"Mr. Halloran gave evidence he did not know that Michael Barry had come to any agreement with the receiver or Ulster Bank about buying in the freehold… It is clear from Michael Barry's evidence that he was in the process of doing this. Brecol which he described as his wife's company was the vehicle. Michael Barry gave evidence that he had a verbal agreement to acquire the property within three or four weeks but the matter became drawn out. He told ACE to move in. All this evidence I have to say from Michael Barry was very inaccurate. The correct position was set out in the evidence of Kevin McNamara. Michael Barry described his position after the Brecol title difficulty as 'kicking for touch and that he kept quiet about the title problem.'"

49. The court observed:

"At some stage which is difficult to pin point bad faith crept into Michael Barry's attitude towards ACE. He ceased to be interested in granting a lease to ACE. He decided that ... he would use the absence of the lease as a lever to increase the value of the property, which… he was now intending to sell on and eventually he ended up selling on to Joe Duffy Motors. He decided it was time to sell up and dispose of his interest in the property. At the same time, he was happy to have ACE occupying the unit and to get the benefit of the Motorpark supply contract which ACE and ARM directed towards Motorpark. Four employees in the unit were taken over by ACE

and cease to be the responsibility of Motorpark. His evidence in relation to the invoice for the rent issued by Motorpark to ACE in 2017 was unsatisfactory... I think his recollection on that matter is poor. He gave evidence that prior to the issuing of this invoice, he had already advised ACE … that they had no lease or entitlement to be in the body repair unit and that he wanted them gone. This is incorrect."

50. Having considered the invoices raised by Motorpark, and the payment of rent by ACE, the judge observed (p.40, line 6 -15):

" I accept the evidence of Paul Plunkett that he was not told by Michael Barry of his change of heart on this until February 2018. It is difficult to avoid the conclusion that Michael Barry's evidence that he told Paul Plunkett that there would be no lease prior to the October invoice wishful thinking. In my view it was an effort to explain away the invoice. He in fact regarded ACE as being Motorpark's tenant at that stage. I do not accept his evidence that he considered ACE a tenant at will."

The court further noted of Mr. Barry (p. 40): *"He was aware that ACE had invested in rebranding and retooling of the body repair unit. I am satisfied that the evidence given that this involves a substantial expenditure on machinery and setting up computer systems for stock control and remote management."* The court noted that Mr. Robin Sutton *"gave evidence that vehicles were provided for use with the unit. These sums and commitments might not have been expended if Michael Barry had disclosed the issue of the title at the time that ACE took possession."*

51. At p. 41 the judge noted the title *"was got in by May 2018 and it was always going to got in, in my view. The only … real complaint of bad faith which can be made is that at some point during this period Michael Barry changed his mind and decided that no lease would be granted."* The court noted *"I do not think that the evidence goes far enough to*

enable me to conclude that this decision was made by him in advance of the expenditure by ACE of the unit. I think it happened afterwards when he intended to sell up."

Expenditure by ACE

52. ACE had contended that it had expended sums of circa €350,000. The judge found that that expenditure had not been proven:

> *"It is difficult… to come to a view of the figure €350,000 as the total investment in getting the Athlone Motor body repair unit up and running because no real detailed evidence of breakdown of how that figure was arrived at was given … Mr. Sutton and Paul Plunkett gave evidence that some of this amount related to the value of management time devoted to the venture. I have to be careful here because any tenant taking a business unit will engage in capital and other expenditure."*

The judge further noted:

> *"A copy of ACE directors' report and financial statements for the year ended 31st December 2017 and signed by Paul Plunkett was put to him in cross examination and identified by him.*

The judge concluded: *"It is difficult to comment on all of this and I cannot comment on whether they are provided in the figures for finance leasing commitments and stocks of cars."* The judge concluded: *"I am prepared to accept the capital expenditure on plant and machinery and management systems, refurbishing and rebranding of the unit and providing management services was provided but it is impossible for me to hazard a guess on the approximate amount put into the venture with any confidence."* (p. 50)

Motorpark's title

53. It is to be noted that the evidence before the High Court was that Motorpark held the property on foot of a lease for the term of 15 years from the 25th November 2010. As such therefore the term under which Motorpark held was due to determine by effluxion of time

on 24th November 2025. The court noted that the Defence had pleaded the lease. As the judge observed:

> *"The unexpired element of the term was too short to support the grant by Motorpark of a full term of ten years. Motorpark had concluded a contract to buy out the freehold and this was expected to be completed within a few weeks. The plan was that Brecol would take a transfer of the freehold and would then lease it to Motorpark for a term sufficient to support the term of the proposed sub lease*." (p.21.ll.2-12)

54. The court noted that the correspondence passing between the parties' solicitors in December 2016 indicated that Motorpark *"expected to be in a position to show sufficient title to grant the ten-year lease in the very near future."* (p.21, lines 16-18)

55. At p.38 the judge observed:

> *"In my view, the title problem arising from the omission to register Ulster Bank as owner of the charge would inevitably be sorted out eventually. Motorpark continued to hold the facility on a 15 year lease. This had been granted in 2010 by a receiver appointed by Lombard Ltd. in exercise of the powers given by the charge registered on the folio. Michael Barry, in effect, captured the freehold interest in June 2016 when he got a contract to sell this property to Motorpark or its nominee. While there was a problem with making title, there was no real danger that the vendor would abandon sale. Ulster Bank was, in effect, saddled with a contract to sell the property to the only, if I might put it the only buyer in town. It was unlikely that any other potential buyer would be interested because Motorpark still had the benefit of the unexpired seven years of the fifteen year lease."*

56. Noting that once ACE went into occupation *"the urgency went out of the matter",* the judge observed at p.39 *"the queries raised by Kieran Roe in December 2016 were never replied to by Kevin McNamara."*

57. The judge observed of ACE at p.44:

> "*… their position was they were in inclusive (sic) possession of the unit and other facilities and indeed that ACE was performing obligations of payment of rent and making contributions for insurance and defraying outgoings in the manner which would be expected of an tenant in occupation of a separate unit under an insuring and repairing lease. The facilities which ACE enjoyed were in accordance with what was agreed back in August 2016 when the heads of agreement were agreed. Annualised rent was demanded and paid in the amount which had been agreed as applicable during the first year of the proposed ten-year lease. ACE rebranded and redecorated its unit and engaged in capital expenditure… of plant and machinery and investment in the business*."

Rent

58. With regard to the fact that rent had been paid by ACE in October for the year 2017, and thereafter, the judge observed: *"the evidence of Paul Plunkett - … he chased Michael Barry for an invoice for rent as he had not received any invoice. I accept this evidence."* The judge noted the invoice provided by Motorpark dated 18th October, 2017 *".. itself makes clear that Motorpark elected to invoice rent on a calendar year basis by reference to the annual rent..of €15,000 year per annum which was … the first yearly rent agreed in the heads of agreement."* (p.44, line 25 to p.45, line 1). The court noted that the invoice specifically stated: *"Lease of body shop in Athlone for period 16th January 2017 to 31st December 2017, €15,000 per annum."* The court observed *"The idea that all this activity betokened that the parties considered ACE to be nothing more than tenant at will is unrealistic."* (p.45, line 7 -9).

Tenancy from year to year

59. The judge concluded (p.45, l.11 *et seq*.):

"*The evidence points to the true implications of the common intention of ACE and Motorpark as being that ACE was a contractual tenant, only in a tenancy from year to year rather than as a licensee or tenant at will."*

Elsewhere he observed:

"… the evidence leaves me to conclude that the parties intended that ACE occupy the unit as tenant from year to year until such time as the lease was agreed. If that had happened, the terms of the lease would have been replaced by the tenancy…and retrospectively applied to the period from 16th January 2016 (sic)" (p.45, l. 17 – 24).

60. The judge observed *"I consider having regard to the conduct of both parties, any appropriate equitable intervention to give a remedy to ACE on the basis of the conduct of Motorpark and ACE gives rise to a proprietary or a promissory estoppel in favour of ACE is somewhat limited."* (p.45/46) He held that the underlying contractual arrangement between the parties constituted a tenancy from year to year and that the appropriate notice period was *"…that to determine a tenancy from year to year."* (p.46) He observed:

"Any inequitable behaviour of Motorpark and Brecol was not such as would make it proportionate to impose on Motorpark or Brecol a ten year lease, which this Court would be obliged to write out the terms of. Or to require that ACE be given a yearly tenancy of sufficient duration to enable ACE to obtain a new lease under Part II of the 1980 Act. ACE never had the benefit of a concluded agreement for a lease, which would enable it to get renewal rights under Part 2 of the 1980 Act, if there had been specific performance." (p.46, lines 4 -18).

61. The judge concluded: *"it would not be right to give equitable relief in the form of a declaration which has such a result, without insisting on a disclaimer as a condition of relief."* He noted *"…the finding that there is a tenancy from year to year is a matter of contract may mean that ACE is now entitled to a new lease in the event that periodic tenancy*

is duly determined. I see no evidence that the periodic tenancy has, in fact, been determined. In my view the proper course in this case is to dismiss both the claim and counter claim."

Notice of Appeal

62. The Notice of Appeal filed on behalf of ACE on 26th October, 2022 claims that the judge erred as follows:

(1) In finding that there was no concluded contract between the parties for a ten-year lease of the premises.

(2) In concluding that *"Subject to Contract"* correspondence by the solicitors for the parties had the effect of negating the existence of a concluded contract.

(3) In concluding that the introduction by the defendants of a request for a Deed of Renunciation from ACE meant that the parties were not *ad idem.*

(4) In concluding that the evidence fell short of establishing a convention or *"representation"* which could have the effect of estopping the defendants from relying on any asserted lack of agreement between the parties on the issue of renunciation of the tenant's renewal rights.

(5) In concluding that repeated assurances by the defendants to the plaintiff that a lease was agreed and/or would be forthcoming were too vague to support a proprietary estoppel or estoppel by convention.

(6) In concluding that ACE made a commercial decision to enter into possession in the knowledge that there was no final agreement between the parties on the question of renunciation.

(7) In failing to determine that the defendants had acted unlawfully in seeking to exclude the plaintiff from the relevant premises in circumstances where ACE was in lawful, exclusive occupation of the premises and had paid rent.

(8) In deciding that ACE had not been entitled to injunctive relief to restrain the defendants from excluding it from the premises.

(9) In failing to award damages for breach of contract, negligent misstatement, misrepresentation or injurious falsehood.

(10) In refusing to award ACE the costs of and incidental to the proceedings.

63. ACE seeks an order setting aside the parts of the judgment and order dismissing its claim and seeks an order for costs against the defendants but seeks to leave *"in place of the orders dismissing the defendants' counterclaim and awarding the costs of same as against the defendants"*. It seeks the following orders:

(a) Specific performance of the agreement of Motorpark to grant ACE a ten-year lease of the body shop and other benefits based on part performance and/or;

(b) In the alternative, a declaration that ACE is entitled to a ten-year lease of the body shop by way of proprietary estoppel together with other benefits agreed;

(c) An injunction restraining the defendants, their servants or agents from:

(i) interfering with or obstructing ACE and their servants or agents in their reasonable use and enjoyment of the said body shop and the other benefits granted under the agreement or

(ii) seeking to take possession of the premises or withholding the other benefits granted under the agreement.

The cross-appeal

64. In the first instance the respondents set out extensive grounds of opposition opposing all of the grounds of appeal advanced on behalf of ACE. Key issues raised in the cross-appeal include that the trial judge erred:

(1) In finding that ACE held the premises as a periodic tenant under a yearly tenancy. The respondents contend that it was allowed into occupation on 16th

January 2017 in circumstances where, during the course of the previous month, the respective positions of the parties as regards the contents of a draft lease and whether a Deed of Renunciation would be required of ACE had been set out in solicitors' correspondence. No resolution of or resiling from these negotiating positions had occurred by the time it went into occupation or when it began to make payments to Motorpark, later in 2017. There was no basis for finding that there was a tenancy from year to year as that had to be premised on the parties impliedly agreeing to such an arrangement. No such agreement could be implied where parties never moved beyond negotiations. The evidence did not support the implication of a common intention that it would be a contractual tenant under a tenancy from year to year.

(2) In declining to find that ACE was no more than a licensee and that such licence had been terminated by the demand for possession made on behalf of Brecol.

(3) In dismissing the counterclaim and awarding ACE the costs thereof.

65. The respondents seek an order dismissing ACE's appeal and cross-claim for orders granting Brecol the reliefs it specifically sought in the High Court:

(1) A declaration that ACE has no estate, interest, right or title in or over the Motorpark premises registered in Folio 35841F of the Register Co. Roscommon or any part thereof.

(2) A mandatory injunction directing ACE, its directors, officers, servants, agents and any other persons having notice of the making of same forthwith to vacate and remove all equipment from the premises.

(3) An injunction restraining ACE, its directors, officers, servants, agents and any other person having notice of the making of the order from continuing in

occupation of, using or otherwise trespassing on the premises or any part or parts thereof.

(4) Damages for trespass.

The respondents also seek an order varying the order of the High Court so as to grant to them the entirety of their costs of the counterclaim as against ACE and the costs of this appeal.

Submissions on behalf of ACE

66. In detailed submissions it is contended that ACE had reached a concluded agreement with Motorpark on the essential terms of a lease for a term of ten years of the body shop at Monksland and the said terms were evidenced by a Term Sheet Discussion Document dated 24th August, 2016, together with the subsequent discussions had between representatives on behalf of the parties. In the alternative ACE seek a declaration that it was entitled to a ten-year lease of the said body shop on foot of an estoppel. That estoppel was claimed based on representations and assurances said to have been made by or on behalf of the defendants as pleaded in the Statement of Claim and in the Reply and Defence to Counterclaim.

67. The respondents specifically denied the making of any representations to ACE and on an alternative basis contended that any such representations made were unenforceable by virtue of non-compliance with the provisions of s.51 of the Land and Conveyancing Law Reform Act, 2009 (the 2009 Act). The respondents argued that ACE had been permitted to go into possession in or about the 16th January, 2017 and to use the body shop unit in connection with its crash repair business solely on foot of a licence. It is contended that the evidence adduced by ACE supported the existence of a concluded agreement between the parties whereby the essential terms of an intended ten-year lease of the body shop had been agreed. ACE argue that Motorpark actively encouraged it to go into possession of the body shop on 16th January, 2017, to take over Motorpark's employees on foot of TUPE and to

otherwise generally act to its detriment on the strength of repeated assurances that the promised ten-year lease would be forthcoming.

68. ACE contends that the trial judge erred in his consideration of the legal consequences flowing from the evidence and drew impermissible inferences from the primary determinations. It contends that the trial judge failed to properly engage with the undisputed testimony concerning the existence of an agreement in respect of all essential terms of the lease contended for. The judge failed to properly consider the implications of the repeated assurances made by Motorpark to ACE which he wrongly characterised as being unduly *"vague".* It contends that this Court is entitled to substitute its own inferences in circumstances where findings on the part of the trial judge are not supported by credible evidence.

69. The key assertion on behalf of ACE is that prior to the date when matters where put into the hands of the solicitors, a final and concluded agreement had been reached between the parties in respect of all material terms of the intended lease.

70. A detailed review of the evidence adduced before the High Court is undertaken, including the undisputed evidence that Mr. Robin Sutton and Mr. Gerry Halloran met on Saturday 20th August, 2016 to discuss a proposal from Motorpark that ACE would take a lease of the body shop at the Monksland premises. A telephone conversation subsequently took place between the said parties and same is recorded in an email from Mr. Halloran to Mr. Sutton dated 24th August, 2016 at 10.55 entitled *"Motorpark Limited and the lease of the body shop"*. ACE attaches weight to the fact that amongst the terms agreed on foot of the *"Term Sheet"* was that it would take over the employment of four of Motorpark's employees in the body shop pursuant to TUPE. One of the issues that had arisen at the meeting on Saturday 20th August, 2016 was that it required a five-year break option exclusively exercisable at its election but not exercisable by Motorpark. This was "*not*

intended to be a landlord's break option and the trial judge so concluded." The evidence before the High Court was that all ACE lettings were held on foot of leases with tenant only break options. The testimony of Mr. Sutton as to the reasoning underpinning that business stance is cited in the written submissions of ACE on the following terms (Day 2, p.11):

> *"In most of the sites we would have taken over, we were taking them over because the previous body shop would have been possibly not trading well. And when we go in and put the ACE Autobody approach to it, there was a very substantial cost incurred in the first six months; that's when we have to make the big difference so that we can make it work, it is impossible to claw that back in the short term."*

Subsequently the witness stated:

> *"You need to be there for it. We need to make the difference early. The effect will start to kick in generally around the second or third year, and then you've got to try to recover your investment and that's got a number of years to do so and it cannot be done in a short period of time."*

Mr. Sutton's evidence was that Mr. Halloran had confirmed that Motorpark agreed to a tenant only break at the five-year stage: *".... It was accepted that that wasn't going to be a problem. I had also gone through the fact that tenant break clause is something we would always have and that we have never actually exercised it on any of our premises."*

71. Clause 1 of the Term Sheet states: *"ACE Autobody ... undertake ten -year lease on the body shop with five-year break clause."* It did not clearly state that the tenant alone is entitled to exercise the break clause. The testimony of Mr. Sutton on Day 2, p.24 was that subsequent to receipt of the email of the 24th August, 2016 from Gerard Halloran, Mr. Halloran in a telephone conversation clarified that the five year break clause was intended to operate solely for the benefit of the tenant. Mr. Sutton was strenuously cross-examined in that regard. However, Mr. Halloran did not cast doubt on that position in his evidence. It

appears from the evidence that other details were ironed out between Mr. Halloran and Mr. Sutton in the course of a phone call/s which took place shortly after receipt of the email of the 24th August, 2016 which clarified, *inter alia,* that Motorpark had agreed to provide ACE with space for valeting of motor vehicles.

72. ACE emphasises that on or about the 30th August, 2016 a meeting took place between Mr. Paul Plunkett and Mr. Gerry Halloran in the course of which they went through the Term Sheet line by line. Mr. Halloran's testimony accorded with that of Mr. Sutton that the break clause was agreed to operate solely for the benefit of ACE. It was very evident that Michael Barry was kept fully apprised of all steps and developments throughout the negotiations.

73. ACE asserts that at a meeting in Galway in early September 2016 between Mr. Paul Plunkett, Mr. Michael Barry and Mr. Halloran, the principals were introduced to each other. Mr. Michael Barry's son, Colin Barry, was in attendance. It asserts that Mr. Plunkett's testimony at the hearing was to the effect that in the course of that meeting, Mr. Michael Barry said to him that *"Gerry told me we have a deal in place. I am delighted. I wish ACE Auto will do very very well."*

74. ACE lays particular weight on the testimony of Mr. Halloran who gave evidence on Day 3. At p. 123, lines 11-15 where recalling events of the meeting in early September between the principles of the respective firms, Mr. Halloran stated in cross-examination:

> *"What was done, to be fair to both parties, they went through it, looked at it and said: there seems to the basis of some sort of agreement, we will pass it to the solicitors to draw up the papers based on what we have here."* (emphasis added by ACE).

The judge had observed:

> *"So the parties have contractually…. Not contractually, because you are saying there isn't a contract, but agreed the points of which they are to agree and that the solicitors will put what they have agreed orally into a document…*

Mr. Halloran: Correct.

Judge: Which embodies these terms?

Mr. Halloran: Yes.

Judge: But the key terms are agreed at that stage?

Mr. Halloran: Yes.

Judge: Lease for ten years break clause after five?

Mr. Halloran: Yes.

Judge: Rent to be as stated.

Mr. Halloran: Yeah.

Judge: In a relation to it, market rent after the first five years, all of that?

Mr. Halloran: Correct.

Judge: In other words, all that matters for a negotiation any more?

Mr. Halloran: Yes Your Honour."

ACE emphasises that at that point in the cross examination, the Discussion Document was handed to the witness who confirmed *"that's what I presented to Michael, yes."* He had further stated *"that would be the deal we would be based upon".*

75. ACE submits that Mr. Michael Barry did not dispute anything said to have occurred at this meeting with Mr. Plunkett in early September 2016, having instead maintained the stance throughout his testimony that he did not recall the meeting at all. It emphasises the testimony of both Mr. Sutton and Mr. Halloran that the sentiment of both sides was that the lease should proceed expeditiously: *"it was the case of how quickly could we get it to happen" – per* Mr. Sutton (Day 2, p.25 lines 8/9).

76. With regard to the terms, covenants and conditions in the lease, it points out that that Mr. Halloran confirmed that there had been no in-depth discussion regarding the lease. Mr Halloran had responded *"yes"* to the inquiry: *".. I take it the assumption was ACE was taking*

the property, the whole lot of it, and would be responsible – were going to take … rates and all the rest of it and insuring it? To counsel's query *"These were 'the givens' if you like"*, Mr. Halloran replied *"Yes, Your Honour".*

77. ACE contends that there was a concluded parol agreement with regard to all essential terms of the lease between ACE and Motorpark, evidenced by the Term Sheet, before either party ever attended their respective solicitors. It is contended that this is corroborated in the case of Motorpark by the evidence of Michael Barry and more particularly by the evidence of the solicitor, Kevin McNamara, who acted for Motorpark and Brecol. Reliance is placed on the attendances discovered and/or adduced in evidence by the solicitor and which were the subject of cross-examination. It asserts that the evidence of Mr. Halloran confirms the evidence of other witnesses and points strongly in the direction of a concluded agreement as to all key terms having been reached between the parties as of September 2016. It argues that the initial attendance taken by the solicitor Kevin McNamara with Michael Barry is confirmatory of a concluded enforceable agreement having been reached between the parties prior to any engagement by either side with solicitors to formalise a draft lease.

78. ACE attaches particular weight to the direct engagement by Mr. Michael Barry with Mr. Sutton, initiated by a phone call on 8th December, 2016 to Ms. Reidy, whose evidence regarding same was not contested. In the course of the phone call, Mr. Michael Barry emphasised that his son, Mr. Colin Barry, was available to address matters while Mr. Michael Barry was abroad over the Christmas 2016 period. Emphasis was placed by Mr. Michael Barry on the key objective that ACE would go into possession and take over the body shop unit with effect from 1st January, 2017.

79. On the issue of the requirement for a deed of renunciation, ACE emphasises in its submissions that Mr. Michael Barry was fully aware as of 15th December, 2016 that the proposal that it execute a deed of renunciation had been clearly rejected by it. There was no

evidence adduced on behalf of Motorpark that a deed of renunciation was required under the Brecol Head Lease and neither was evidence adduced that it was a term of any relevant loan agreement with Ulster Bank - which as of December 2016 was advancing funds to Motorpark/Mr. Barry for the purposes of the purchase of the freehold interest. It contends that it is noteworthy that in his direct evidence, Mr. Michael Barry did not offer any proof to support a contention that Motorpark was not in a position to grant a lease to it without a deed of renunciation.

80. ACE further asserts that the conduct of Mr. Michael Barry and Colin Barry, in the weeks subsequent to it rejecting the suggestion of a deed of renunciation and in circumstances where Motorpark/Mr. Barry were actually aware of that rejection, result in Motorpark not being entitled to rely on the issue of a renunciation now. It was submitted that whilst Mr. Michael Barry asserted that he would not have granted a lease without a deed of renunciation, he never informed ACE of this fact prior to it going into possession or indeed thereafter. Significant emphasis is placed on telephone conversations that took place circa 16th December, 2016 between Mr. Barry and Mr. Sutton, in the course of which assurances were given to Mr. Sutton that the lease was *"all agreed"* and in the course of which Mr. Barry sought to expedite ACE taking up possession of the premises with effect from 1st January, 2017. ACE placed emphasis on the language of the contemporaneous emails from mid-December 2016, arguing that same was indicative of Motorpark having concluded an agreement with it on all the essential terms of the lease. It further laid emphasis on the uncontested evidence of Mr. Sutton concerning telephone conversations with Mr. Colin Barry in mid to late December and unequivocal assurances allegedly given in the course of the said conversations that the lease would be *"done by the 12th"* [of January 2017]. It is further asserted that reassurances had also been given to that effect by Gerry Halloran to ACE in late December 2016 or early January 2017.

81. ACE emphasised the conduct of Mr. Michael Barry, particularly assurances and representations given on 17th January, 2017, when, according to the undisputed evidence of Mr. Paul Plunkett, Mr. Barry had stood in the forecourt and viewed the works being carried out by it to rebrand the entire building and in particular when asked by Mr. Plunkett as to the availability of the lease, gave a clear assurance *"that it was forthcoming".*

82. ACE asserts that there was a concluded oral agreement evidenced by the Term Sheet and all material terms in respect of a ten-year lease of the property to it had been agreed. It is contended that the agreement was sufficiently part performed by ACE once it went into possession of the premises, discharged the rent and performed the other obligations aspects of the agreement, so as to entitle it to a decree of specific performance.

83. ACE alternatively claimed entitlement to specific performance based on promissory estoppel, proprietary estoppel and/or estoppel by convention. It contends that the trial judge erred in concluding that statements made by Mr. Halloran, Mr. Michael Barry and his son Mr. Colin Barry on behalf of Motorpark/Brecol were *"vague"* and did not amount to *"a binding assurance"* regarding any material matter. It contends that the trial judge erred in concluding that any inequitable behaviour on the part of Motorpark/Brecol was not such as would make it proportionate to impose on Motorpark/Brecol a ten-year lease for its benefit.

84. ACE contends that the requirements for an estoppel were established on the evidence and in light of the findings of fact on the part of the judge that the failure of Motorpark to grant the lease was a breach of equity and good conscience.

Submissions on behalf of the respondents

85. It was argued that ACE was not entitled to specific performance as the parties had never reached consensus *ad idem* in their negotiations which had been placed in the hands of their respective solicitors but had fallen into abeyance subsequent to the exchange of correspondence in mid-December 2016. Thus, there was never any contract in respect of

which a decree of specific performance could be granted. The claim for specific performance based on acts of part performance was unstateable as a matter of law.

86. On the estoppel claim, it was contended that the trial judge was entitled to reach the conclusion that the evidence adduced as constituting representations were too vague to meet the requisite threshold for the existence of an estoppel. Reliance was placed on *Cosmoline Trading Limited v. DH Burke & Son Limited* [2006] IEHC 38 where Finnegan P. considered the essential terms required to be agreed for the creation of a specifically enforceable contract for the grant of a lease.

The respondents relied upon the observations of Finnegan P.:

> *"In order to obtain specific performance a party must first of all establish a contract and without this there can be no specific performance. … Where there is no contract part performance does not arise and if in reliance on an incomplete contract a party performs some or more of the matters on which agreement has indeed been reached that will not cause the negotiations which were otherwise incomplete to mature into a completed contract. Where as here there was no consensus on material and essential terms there cannot be a contract."*

The respondents contended that the doctrine of part performance had no application because, as the trial judge had found, *"the evidence does not establish that there was a contract for a ten year lease in place between Motorpark and ACE when ACE took possession of the vehicle body repair unit…"*

87. The respondents strenuously contested the suggestion that a concluded agreement had been reached prior to the retainer of solicitors by the parties and an email communication by Mr. McNamara on behalf of Motorpark to ACE's solicitors on 30th November, 2016 marked *"subject to lease/license".* The respondents emphasised that in its pleadings ACE had contended that the concluded agreement had been reached in or around December 2016.

This, it was argued, was inconsistent with submissions filed by ACE which sought to locate the date of the concluded agreement as being prior to the parties retaining solicitors.

88. The respondents contend that not alone was the fundamental issue of the commencement date outstanding, *"but specificity as to a range of matters fundamental to a commercial lease was also missing."* The respondents contend that the judge was correct in his observations, *inter alia,* that *"there might be many issues such as the extent of an obligation to insure and rebuild… which would require specific agreement."* The respondents emphasise the judge's observation that *"the parties referred the matter to their solicitors who thereafter corresponded on the basis that their respective clients disavowed the existence of any contract. There was nothing to prevent any of the terms which have previously been agreed be unagreed or to prevent either side from withdrawing. The terms of this correspondence made it clear that the clients did not regard themselves as contractually bound."* The respondents rely on the remarks of the judge concerning, *inter alia,* Michael Barry, that it was *"an unlikely scenario that he would give ACE a ten year lease without a renunciation. I agree with the evidence of Kevin McNamara on that point"* (judgment p.29, lines 16-21). It was contended that the absence of agreement between the parties as to whether there would be a renunciation is fatal to the claim that there was a concluded oral agreement entitling ACE to a decree of specific performance.

89. The respondents rely on the contents of a letter dated 14th December, 2016 from ACE's solicitor as indicative that a concluded agreement had not been reached between the parties as to the terms of a proposed lease. The letter had rejected aspects proposed on behalf of Motorpark and proposed amendments to terms contained in the draft lease submitted to them by Motorpark's solicitors on 8th December, 2016. It is contended that its terms are inconsistent with the assertion that there was a concluded agreement between the parties as of 14th December, 2016 capable of being the subject of a decree of specific performance.

90. The respondents argue that the ongoing process towards reaching a consensus in respect of outstanding matters fell into abeyance once ACE was allowed into occupation of the body shop and that the judge correctly so found.

91. The respondents further contended that the trial judge's findings in relation to the role of the parties' solicitors whose correspondence was *"subject to lease"* precluded any binding agreement coming into existence until all the details were agreed and a formal lease executed by both parties. This never occurred. The trial judge had correctly concluded that negotiation of the detailed content of the lease had been put in the hands of the solicitors. The respondents emphasise the clear language contained in correspondence from ACE's solicitor which was entitled *"Subject to lease/lease denied"* and alluded to a *"proposed transaction"*. It denied that a contract *"shall be deemed to come into existence until such time as approved draft contracts have been engrossed, executed and exchanged and a contractual deposit paid."* Reliance is placed on the decision of Clarke J. (as he then was) in *Greenband Investments v. Bruton* [2009] IEHC 67 as precluding the possibility of a concluded oral agreement having come into existence in circumstances otherwise than in accordance with the express statements contained in the solicitors' correspondence. Reliance is placed on correspondence from Kieran Murphy & Co. solicitors on behalf of Motorpark that the draft lease furnished on 8th December, 2016 was *"subject to the client's final approval"*. It is asserted that Motorpark did not waive the protection afforded by *"subject to contract"*.

92. It was contended, relying on *Doran v. Thompson & Sons Ltd.* [1978] IR 223, that ACE was not entitled to rely on estoppel absent a clear and unequivocal representation. The respondents cite *CF v. JDF* [2005] 4 IR 154 where McGuinness J. opined that to establish an estoppel *"... there must actually be a promise or at least a reasonably clear direct representation or inducement of some kind"*.

93. The respondents relied on authorities including *Re Hoare* [2016] IEHC 345 and *The Barge Inn Limited v. Quinn* [2013] IEHC 387, arguing that a party seeking to establish estoppel *"must do so by more than mere assertion"* and citing Costello J. in *Re Hoare.*

94. Reliance is placed on aspects of the correspondence which, it is said, the trial judge had correctly considered to be mere "*vague comments".* The respondents contend that the issue as to whether ACE would provide a renunciation of rights to a new tenancy was not the only matter outstanding and that the terms of the lease had not been agreed between the parties and accordingly the trial judge was correct in his conclusions in determining that the prerequisite of reliance was absent. The respondents contend that the trial judge was correct in stating (p.6, line 23 *et seq*.) that *"The evidence does not establish any convention or representation which existed which could have the effect of estopping Motorpark or Brecol from relying on lack of agreement on this issue."*

The Cross-Appeal

95. The respondents contend that in the event that ACE's appeal is dismissed, they are entitled to the reliefs sought in the counterclaim. The counterclaim is advanced on the basis that, in accordance with the evidence of Mr. Michael Barry, ACE had been permitted to enter into occupation of the premises as a mere licensee pending conclusion of negotiations in connection with a lease. The negotiations never concluded nor was an agreement in respect of a lease ever reached when the said license was said to have terminated on 7 March, 2018 and/or 11 April, 2018. It is contended that the trial judge erred in refusing the reliefs sought in the counterclaim and further in finding that ACE was constituted a yearly tenant of the unit. Citing Henchy J. in *Irish Shell and BP Limited v. John Costello Limited (No. 2)* [1984] IR 511, it was argued that a periodic tenancy cannot be implied where to do so would be inconsistent with the intention of the parties. However, I observe that Henchy J. had made clear that it was open to either party to give evidence as to the true circumstances in which

payments are made. It was submitted that the alleged failure by ACE to agree terms prior to going to into occupation leaves it with no substantive interest and thus under an obligation to vacate once a demand for possession was made.

Observation on the judgment

96. The *ex tempore* judgment was delivered with great expedition. The five-day hearing was conducted by highly competent and experienced senior and junior counsel on both sides and a very wide array of legal arguments and propositions were advanced, together with a significant volume of legal authorities. Nuanced arguments were advanced on various alternative basis on behalf of ACE and countered diligently on behalf of Motorpark. Those arguments were deserving of a significant degree of consideration.

97. The evidence of the various witnesses, in particular, Mr. Michael Barry, warranted careful scrutiny. The testimony of and attendances adduced by the solicitor Mr. McNamara were of great importance particularly in light of the fact that this was an equity suit. Whilst it is true that solicitors became involved in the transaction only on a transient basis and briefly exchanged letters and emails in late November/December 2016, together with a draft lease and deed of renunciation, the legal consequences of the termination of their involvement when the parties resumed direct negotiations with effect from 16th December, 2016 required to be more fully considered. In particular that that occurrence brought to an end the period of "*subject to lease*" negotiations was salient.

98. The trial judge erred in pronouncing broad statements of general principle without regard to the legal and equitable consequences of the cumulative acts, representations by words and conduct of Mr. Michael Barry and his son Mr. Colin Barry, as well as Mr. Halloran towards ACE to induce it to go into possession of the unit and expend money and take on 4 employees as proven in this case. The trial judge appears to have misunderstood the legal significance of the acknowledgement by Mr. Halloran in cross-examination that the

key terms had been agreed between the parties in August/September 2016. He misconstrued the substance of the representations clearly contained in the direct emails of December 2016 between the parties. He erred in considering as *vague* the repeated representations by the Barrys and Mr. Halloran that a lease would be forthcoming. He erred in not finding that the conduct of Mr. Michael Barry – including on 17th January, 2017 in standing back and allowing ACE to incur what the judge described as "*substantial*" expenditure was so unconscionable when considered against his solicitor's own evidence that he had stated his intention circa 15 December 2016 that the lease to ACE "*might not proceed at all*" was so unconscionable as to give rise to an estoppel.

Brief consideration of the evidence of the key witnesses

Mr. Sutton

99. On Day 2 of the hearing, Mr. Robin Sutton gave evidence on behalf of ACE. Regarding the initial meeting with Mr. Halloran on behalf of Motorpark on 20th August 2016, his evidence was that in the course of that meeting, issues such as the 10-year term of the lease, rent, parking, the break clause in favour solely of the tenant at the end of the first five year and rent review were discussed. With regard to the tenant-only break clause, he said; *"It was accepted that that wasn't going to be a problem"* (Day 2 p.18, lines 13-16). He outlined a subsequent telephone call circa 23rd August, 2016 between them and the ensuing document entitled *"Term Sheet Discussion Document"* prepared by Mr. Halloran and emailed to Mr. Sutton on 24th August, 2016. He gave evidence of subsequent meetings and emails between the parties and/or their principals. He confirmed receipt of an email on 9th September, 2016 from Mr. Halloran which stated, *inter alia, "On local level we are up and running strongly with you and looking forward to a parts purchasing starting."* This alluded to an ancillary agreement recorded at Term 10 of the Term Sheet whereby Motorpark would sell parts to ACE for use in its repair business.

100. Of particular note in the context of the issues of a concluded oral agreement, alleged acts of part performance and alleged conduct giving rise to estoppel is where the email states; *"The staff in Athlone have been fully briefed and are delighted and I want to set the time frame for execution. I officially finish here on 30/9/2016 but in light of the relationship just forming Michael Barry and I have agreed that I work with you to see the completion of the Athlone takeover..."* The clear evidence of Mr. Sutton was that as of that date *"Our terms were all agreed at this point and he had gone ahead and told the staff"* (Day 2, p.28, lines 28-29). Mr. Sutton (p.42/43 of the transcript) clearly recalled a telephone conversation with Mr. Michael Barry on the morning of 16th December, 2016; *"The initial part of the conversation was Michael making sure I was ready to go ahead on 1st January. The pressure to move in on 1st January was very high at this point from Motorpark's perspective ..."* He characterised Mr. Michael Barry's position as *"This conversation was pushing for that to happen"* (p.43, lines 19/20). At line 28, the witness stated:

> *"but the core of it was us moving in and I did bring up with Michael at this stage that the lease wasn't signed in Michael's angle or his approach to the lease was ... I can't tell you exact words, but if I was to say it was very much 'We'll get that sorted out, that's all agreed. We'll just get that sorted out, lets move on'... the lease was just almost something that was going to happen when it happened, that it shouldn't be anything that would be delaying us moving in was very much the message that I was receiving from him, very much, you know, 'That's all agreed, move on.'"*

101. Mr. Sutton was not challenged in cross-examination on this issue. It is very significant that Mr. Michael Barry in his evidence did not effectively either dispute or contradict this evidence, including the characterisation of the import and tenor of words spoken and statements made by him in the course of the phone call of 16 December, 2016. The characterisation of Mr. Michael Barry having said words to the effect *"that's all agreed,*

move on", "We will get that sorted out, that's all agreed." is consistent with his making representations to ACE that it was going into possession of the unit as tenant in accordance with the agreement.

102. No evidence was adduced on behalf of the respondents to contradict the key assertions of Mr. Sutton in that regard. The evidence of Mr. Sutton concerning his telephone calls and emails exchanged with both Michael Barry and Colin Barry are of no little importance, particularly in circumstances where the said testimony was neither disputed nor contradicted and indeed Colin Barry was not called to give evidence.

103. Of particular significance is a phone call of the 22 December, 2016 between Mr. Sutton and Mr. Colin Barry where Mr. Sutton had made clear that ACE was not in a position to move in and take up occupation on 1 January, 2017. Subsequently, as the uncontradicted evidence shows, Mr. Colin Barry actively encouraged it to go into possession with effect from 16 January, 2017. The evidence of Mr. Sutton (and, significantly not the subject of cross-examination) was that on 22nd December, 2016 Mr. Colin Barry had stated: *"We will have it all sorted out for the 12th", "We will have that done by the 12th", "Let's just set the date and move in…that's all done"* and elsewhere *"We will do our best to have that done by the 12th and you will move in on the 16th"*. It is noteworthy that in his email of 22 December 2016 to Mr. Sutton, Colin Barry stated *"ACE are to carry out an inspection to verify the schedule of condition before completion."* This language appeared to suggest or imply a completion date for the lease transaction was in contemplation.

104. According to Mr. Sutton, a further source of reassurance was a phone call received by him very late in December from Mr. Gerry Halloran who, as his email of 9 September, 2016 to Mr. Sutton had stated, had agreed with Michael Barry to work with ACE *"…to see the completion of the Athlone takeover…"*. Mr. Sutton in his direct evidence, (Day 2, p.48, ll. 23-25) stated of the said phone call *"…it was to give me a definite reassurance about that.*

There was no problem with the lease, that there was…something going on in their site in Sligo, where they were trying to do some settlement with either a bank or receiver or something…I think bank…It certainly gave me a bit of comfort the fact that he was very aware the lease wasn't signed and that the only reason it hadn't been done was because if that lease was well in place at that point in time it mightn't help them with their settlement that they were trying to do in Sligo." (Day 2, p. 49, lines 1-6)

105. With regard to the costs of the rebranding of the unit which ACE had taken possession of on 16 January, 2017, Mr. Sutton gave evidence of its *modus operandi:*

> *"branding the facility…the equipment hadn't been serviced, even the equipment we wanted to use hadn't been serviced for quite a long time and we would have service teams ready to go in immediately…so we would have that teed up, that the work would happen very quickly. We would have had welders…fairly heavy duty, costly pieces of equipment replaced very, very quickly. We would put…a branded van in because…we would want to have a presence around the area…We would have a car and a van servicing the equipment, the branding of the building…we would have KPI screens that I would be watching…very closely to see what was happening in the garage."*

The precise sums expended by ACE were never the subject of a formal proof.

106. Mr. Sutton was clear that a landlord's break option was not agreed and there had been no discussion or agreement between the parties in the course of direct negotiations to the effect that Motorpark required ACE to execute a Deed of Renunciation (Day 2, p. 59).

107. In cross-examination Mr. Sutton's evidence was that very little change was made to the initial draft *Term Sheet*, apart from clarification in connection with valeting space and that the break clause (Term 1) was to be exercisable solely by the tenant (p.62, lines 23-28). He clarified that the valeting space had also been discussed between the agents at their

meeting on Saturday 21 August, *"It was just…maybe it had been forgotten when Gerry was preparing this document"* (Day 2, Page 64, ll. 17-21). In cross-examination (Day 2, p.78) it had been put to him that he was *"effectively tying up your client to sign whatever written lease was put in front of him."* (Question 185, p.78). Mr. Sutton responded *"I wouldn't have thought I was tying up my client to sign whatever written lease. We had agreed the core terms of the lease and I would have expected and always did expect that to be signed by both parties. There was never a doubt in my mind that that would go ahead."* (p.78, lines 19-23, Day 2). Regarding covenants in the lease, including as to repairs, the witness observed at p. 80:

> *"On all times that we have entered into these things if a lease is greater than 5 years, it is a given that we are responsible for the building…that's also been my experience and if I even take Athlone, and I know this is miniscule, but there has been a couple of things which we have done there and I just take it as that's part of the terms of the 5 year plus lease."*

108. In the course of cross-examination, it had been put to Mr. Sutton or otherwise asserted that Motorpark was required to obtain a renunciation of rights from ACE or was under certain restrictions *"…by virtue of an Ulster Bank mortgage"* (Day 2, p.81, Q. 198). However, no evidence of any such contractual term, obligation or provision in respect of either the mortgage instrument or the Motorpark Lease restricting the capacity of Motorpark to grant the lease without a renunciation was ever forthcoming. On the contrary, the evidence of Motorpark's solicitor, Mr. Kevin McNamara, suggested that the funds advanced by Ulster Bank for the purchase of the freehold interest in the property were ultimately returned to Ulster Bank and not availed of by Motorpark/Brecol. Indeed, it appears that the grant of the lease by Motorpark to ACE was probably a term of the Ulster Bank Loan Facility letter in the first place, though nothing turns on that.

109. In response to a suggestion in cross-examination that ACE was let into occupation *"based on the lease which was been negotiated between the solicitors, not the Discussion Sheet of August 2016"* (Day 2, p.93, lines 13-16), Mr. Sutton was very clear that it placed reliance on the language contained in the email sent by Mr. Michael Barry to Mr. Robin Sutton on 16 December, 2016 at 12.13 which expressly stated that the lease *"…is presently been processed by our solicitors"*. Mr. Sutton stated: *"To me it was agreed and the solicitors were just doing their (inaudible) on it…and there were reassurances giving that there was no problem with the lease…you know, just move ahead, move in. So, 'been processed', I have been told it was delayed because the solicitor was very busy but there was no question over re-negotiating or re-discussing the terms that I believed to be agreed."* (Day 2, p.93, lines 17-27). Mr. Sutton reiterated that he was very clear as to what the outcome was to be: *"…It was to be a lease based on my agreement with Motorpark."* (Day 2, p. 96)

110. It was put to the witness by counsel for Motorpark that issues concerning repairs, maintenance, arrears of rent and so forth did not appear in the discussion sheet of August 2016. The witness was clear in his response: *"…you mentioned about the repairing and insurance and all that, forms, clauses in here and I am aware of all of those clauses and they were a given for me. You know, that was just, that's what all the long leases…that's the terms under which these long leases are issued"* (Day 2, p.97, lines 19-26). The alleged denial by Mr. Halloran that he had any discussions with Mr. Robin Sutton in December 2016 or January 2017 about ACE moving into the workshop was put to this witness who unequivocally disputed it, stating: *"That is definitely incorrect"* (Day 2, p.98, line 10).

111. In cross-examination the email from Colin Barry, 22 December 2016 at 12.35 was put to the witness. It spoke of the: *"estimated closing date of Thursday 12 January on the deal with ACE…"* and expressed the expectation: *"to have you in for the following Monday the 16th January"*. It was put to Mr. Sutton that *"There still wasn't a confirmed commencement*

date". "Not alone was there no commencement date fixed in what you regard as the entire agreement of 24 August 2016, as late as the 22 December you were effectively still negotiating?" Mr. Sutton responded: (p.99, lines 27-29): *"I was just trying to work in with what made sense at this stage. I don't really see it as negotiating. It was just practical logic – we needed time to get sorted out to get in there."*

112. When it was suggested to Mr. Sutton that Mr. Michael Barry's evidence would be that he had not heard back from the receiver and that Motorpark was not as of December 2016 in a position to show title or *"…to argue the toss on either a lease or rent"* and that remained the position even after ACE were in occupation, Mr. Sutton's response, which, significantly, ultimately was not disputed by any witness called on behalf of Motorpark, was *"…nothing like that was ever suggested to me because I simply would not have gone in there and spent that money if I thought there was that question mark hanging over it. No chance. I always put it down to whatever they were trying to resolve up in Sligo. But there was no suggestion and Michael Barry certainly never referenced any of these problems or complications when I spoke to him, and neither did Colin and neither did Gerry. There was no reference to these problems."* (p. 101, lines 7-15)

It is highly significant that the key aspects of this witness's evidence were not contradicted.

Mr. Paul Plunkett

113. Mr. Paul Plunkett's direct evidence to the court was that he had been assured by Gerry Halloran and Michael Barry on numerous occasions that the lease would be forthcoming. Mr. Plunkett stated that Mr. Gerry Halloran and Mr. Colin Barry had: *"…assured me that it would be forthcoming. There was never a mention of any issue whatsoever."* (Day 2, p.131, lines 24-26). He gave evidence of the steps taken to ensure compliance with TUPE. Evidence was given of the substantial works carried out upon taking possession of the unit. Mr. Plunkett stated on Day 2, p.135: *"Within the second day of us arriving there, the building*

was changing. The first thing we did was wash the building down from head to toe. We washed the entire forecourt area and we rebranded the building. The building turned into a black box within the next two weeks."

114. Crucially, Mr. Plunkett recalled meeting Mr. Michael Barry outside the unit on Tuesday 17 January, 2017: *"...I met with Michael, we were branding the building so we sat or we stood, we stood in the forecourt and discussed the ACE model and what we were doing with the building. He was quite complimentary of what we were doing..."*. When asked whether he had enquired regarding the lease, Mr. Plunkett stated *"Definitely... He assured me that it was forthcoming. At that stage, the first I knew he mentioned a company called Brecol."*

115. This witness was asked to consider a letter received from Motorpark's solicitors dated 11 April, 2018 which stated, *inter alia, "...your company when entering into possession was fully aware and on notice that our client did not own the premises, was an occupational tenant of a receiver and was not in a position to grant a lease."* Mr. Plunkett stated that such matters had never been discussed with him: *"Absolutely never discussed"* (p.52, line 22). He further elaborated at p.153: *"... we never knew there was a receiver. It was never disclosed to us, Judge."* The stance of Mr. Plunkett was made clear:

> *"We couldn't move out of the building. We have expended in excess of €350,000. We had built up a business there...so it was never our intention to move out of the premises. As far as I was concerned, we were relying on the Heads of Terms that we had. I shook hands with Gerry Halloran on that said agreement on 31 August. I shook hands with Michael Barry between 31 August and 27 September...I shook hands with the Group General Manager and I shook hands with Michael Barry himself and at no stage was it ever disclosed to me that it would not proceed."* (Day 2, p.154, lines 7-18).

116. Mr. Plunkett gave direct evidence that ACE had use of a reception area on the ground floor of the main Motorpark building, the use of an office on the first floor, the use of staff toilets and canteen. *"And we pay towards those in service charges. We get invoiced every quarter. So we do contribute. So we are invoiced for these facilities on a quarterly basis."* (Day 3, p.10, lines 21-27). Mr. Plunkett confirmed that it had access to the main showroom and had a key to the premises. *"So, for us to go into the body shop, we open the main gates for the motor park with a master key, we have to open the main motor park showroom and switch off the alarm. So, we have a main key to get into the showroom and switch off the alarm before we then enter the body shop. So, we have always had a key of the main premises."* (Day 3, p.17, lines 17-25)

117. A subsidiary element of the dispute between the parties concerned reciprocal business that ACE would direct towards Motorpark. Mr. Plunkett clarified the arrangement, confirming that he had met Mr. Halloran on 31 August, 2016: *"I met him to agree that ACE Auto Body will purchase parts…from the Motorpark for the Marques that they sell – it was Volvo and Ford, by memory, and Nissan maybe. So we would agree to buy parts from them for a number of our branches."* (Day 3, p.20-21, line 26-line 2). Under cross-examination Mr. Plunkett stated (Day 3, p.30, lines 5-9) *"I believe the deal was completed in the week 24 August to 31, no question. I accept what is in the document here. Is it a case that, you know we were getting ready for going into occupation, it was been referred to as December because we were moving in in January? I am not sure. But I believe the deal was struck in August."*

118. In cross-examination it was queried whether €350,000 had been expended in upgrading the premises subsequent to going into occupation on 16 January, 2017. Mr. Plunkett was not in a position to formally prove the expenditures incurred, stating (Day 3, p.49, lines 18/19): *"I rely on my financial controller for this advice… I have no issue if you*

would like the financial controller to come before you to give evidence on these". Mr. Plunkett gave evidence (Day 3, p.53, ll. 25-29) that one expense was *"the painting and decorating company that rebranded the building for us."* The judge held (p. 40 of judgment) that expenditures incurred by ACE were "*substantial*". That finding is not the subject of a cross-appeal.

Mr. Gerard Halloran

119. This witness gave evidence on Day 3. He confirmed that he had been the General Manager of Motorpark. Regarding his thinking when he first contacted Mr. Robin Sutton in June or July of 2016, he stated:

> *"I went through the premises and told him the background and outlined where we were and what our intention was in terms of long-term with the body shop. It was not part of our core business, we could never make anything out of it. And, obviously I was thinking part sales in the back of my head, because I said, look, Robin, if we end up doing business together, our forte is selling parts, not body shop so it could be a win, win for us all"*.

He explained that the use of the word *"Term Sheet"* in the document dated 24 August came from *"my banking background"* (Day 3, p.85, line 12). *"…There was no intention of any other meaning from that."* (Page 86, lines 17-18).

120. With regard to obligations to be assumed by ACE under the *Term Sheet* items, Mr. Halloran confirmed at p.90 in direct evidence, referring to the TUPE legislation, that it was intended that it would *"…take over all the contracts and all the rights and salaries in the terms and conditions of employment as set out by Motor Park Limited which obviously we had a duty to their employees and to make sure that they were looked after in the same way as they were heretofore."* He readily acknowledged the position that if ACE was going to

invest in the business: *"It was going to be on the basis of a ten year…"* term. (p.96, lines 21-24 and line 28).

121. He confirmed that Paul Plunkett had met with Michael Barry – (Day 3, p.99, lines 1-2). Mr. Halloran's direct evidence was: *"I had felt that…when Paul Plunkett and Michael had shook hands, that that was the basis of which a deal was going to be done and it was up to the solicitors to take it from there and off they go."* (Day 3, p.105, lines 16-20). In response to questions from the judge who asked: *".. the key terms were agreed at that stage"* (Day 3, p.124) Mr. Halloran responded *"Yes"* (Line 9). In cross-examination Mr. Halloran agreed that he had authority to sign off on the Heads of Terms.

122. With regard to ascertaining the existence of any common understanding between the parties as to when the lease would commence and the respective states of mind of the parties as of early September 2016, it was put to Mr. Halloran in cross-examination that an email was circulated on Thursday 8 September, 2016 by Brendan Gormley (manager of the repair unit ACE intended to take over) informing staff: *"We are been taken over by a new company in the next couple of weeks. I have been instructed by management not to book any new jobs as all WIPS must be closed off before this happens…"* On Day 3, p.132 in response to questioning from the judge and, in particular, the enquiry as to whether he had told Mr. Gormley *"that the new company was taking over in the next couple of weeks and to not to book any new jobs",* Mr. Halloran responded *"yes"* (Day 3, lines 12-17). This is indicative of the contemplated timeline of the parties and the expected date of commencement of the term as of 8 September, 2016.

123. That the takeover by ACE, including the transfer of undertakings, was imminent is separately stated in an email of the 9 September, 2016 Gerry Halloran to Robin Sutton. Mr. Halloran states: *"…I want to set the time frame for execution".* The entire email signals the state of mind on the part of Motorpark that the commencement of the tenancy was anticipated

to take effect imminently. The contemplated commencement date for the tenancy can also be inferred from the observations of Mr. Halloran that although he was finishing his time with Motorpark on 30 September 2016, he had agreed with Michael Barry, managing director of Motorpark: *"…that I work with you to see the completion of the Athlone takeover…"*. It can reasonably be inferred from the email exchanges that a time horizon for the commencement of the tenancy, from the perspective of both parties was implicitly agreed as being as soon as reasonably possible and some weeks subsequent to 30 September, 2016.

124. It is of significance that Mr. Halloran, author of the Term Sheet, responded to a question from counsel for ACE (Day 3, p.142, lines 14-17): *"…would it fair be say that so far as you were concerned the essentials of the deal had actually been agreed between the principals, between Mr. Plunkett and Mr. Barry?"* Mr. Halloran replied: *"Yes"*. In response to questions as to whether Mr. Plunkett and Mr. Barry had agreed the terms of the lease and the rent (Day 3, p.142, lines 25-27), Mr. Halloran stated: *"I am not disagreeing, but the discussion document was a basis on which a deal was to be completed which we discussed in evidence."*

125. Critically, when it was put to Mr. Halloran in cross-examination that the commencement date *"…was as soon as it could be done really?"*, he responded: *"Yes"*. In response to the query *"But there was no disagreement between you, was there?"*, he stated: *"No, there was no. I mean…"* (Day 3, p.143, lines 1-6)

<u>Mr. Michael Barry</u>

126. The evidence of Mr. Michael Barry is contradicted by Mr. Halloran's evidence in several material respects. In other aspects the judge rejects Mr Michael Barry's evidence. With regard to the Term Sheet/Heads of Agreement, Mr. Barry appeared to disavow that he had ever agreed to its terms as modified by agreement between Messrs Sutton and Halloran; (Day 3, p.153) *"…He [Mr. O'Halloran] did come back to me with the Heads of Terms and*

I remember there were two or three items in particular that I didn't agree with, and I told him. I think one of them was the situation of the pound for the equipment: I said: 'That's not going to happen, Gerry'". This appears to refer to Clause 5 of the Term Sheet. However, other evidence, accepted by the trial judge, confirmed that that clause was agreed to and approved by Mr. Michael Barry and that the principals shook hands in relation to same in early September 2016. Further, Motorpark had an entitlement to repurchase all of the equipment for €1 on completion or termination of the lease.

127. Mr. Barry disputed that he had agreed to give to ACE the use of space on the ground floor: *"...I said no, that whatever about giving one on the first floor, not on the ground floor"*. This appears to refer to Term 7. The clear evidence led on behalf of ACE was that it had keys to the main showroom and since it appeared to arrive first in the mornings it gained access to the main showroom. The user was intended to be *"in conjunction with Motorpark Limited for customer issues in relation to bodywork"*. The evidence adduced on behalf of ACE, including at Day 2, p.84, which clearly contradicts the assertions of Mr. Barry and was not contested in cross-examination, was preferred by the trial judge. At no time was it put to Mr. Halloran in his direct evidence that Clause 5 (the equipment would be transferred for €1 and transferred back at the end of the term) had not been agreed.

128. Mr. Barry disavowed the meeting in early September 2016 with Mr. Plunkett: "*According to Gerry: We met Paul Plunkett, I think, as he said, in August 2016. I don't remember the meeting"*. In response to probing from the judge Mr. Barry doubled down on his stance: *"I personally don't recall this"*. He was, however, in a position to clarify that a *"a parts gentlemen"* in attendance at the meeting was named *"Jimmy Gillespie"* [Day 3, p. 157, line 7].

129. In response to questioning from the judge, Mr. Barry said that Ulster Bank, the owner of the freehold, had not been registered as such which caused delay in resolving title. (p.159,

line 124) *"…it got quite embarrassing. Because…we were moving ahead with the basis that, you know, we would do a deal, subject to, as I say, final arrangement, which would come from the legals. And we couldn't complete, we were told every week it would be next week, next week, next week. And eventually, I mean, you know, I told them to move in."*

130. Although Mr. Barry sought to compare his treatment of ACE with his treatment of another occupant, Europcar, there was one fundamental distinction. He informed the court: *"…[Europcar] knew that we couldn't give them a lease and they were happy enough with that arrangement"*. The evidence before the court was that ACE never knew of any difficulties with Motorpark's title.

131. Mr. Barry offered no valid reason for withholding that information from ACE whilst at the same time urging and inducing it to go into possession of the unit. Mr. Barry acknowledged: *"I told them to move in."* (p.160, Day 3, lines 1/2). His characterised his approach as: *"…We were kicking for touch."*. *"I said: Look, we'll leave them come in and we will worry about the legals when we get the thing done"*. He characterised its occupancy as *"caretakers"* (Day 3, p.162, line 24).

132. Mr. Barry sought in his direct evidence to rewrite certain terms of the Term Sheet. His testimony was fundamentally inconsistent with the evidence of Mr. Halloran and Mr. Sutton and substantially rejected by the trial judge. Mr. Barry sought to contend in his evidence in relation to the five-year break clause: *"I was happy enough as long as both parties had the break clause."* (Day 4, p.9, Lines 23/25) - which the High Court rejected. Significantly, the trial judge's assessment as to the elements of bad faith and his adverse views regarding Mr. Barry's credibility are not the subject of a cross-appeal.

133. Mr. Barry's testimony regarding the introduction of a request for a Deed of Renunciation from the tenant is significant; *"I mean, it was a ten year situation that, I mean, I would want a Deed of Renunciation as part of the agreement. In other words, that at least*

at the end of ten years we have the right to finish the lease that we were entering." (Day 4, p.13, lines 3-7). In his direct evidence concerning the letter of 14 December, 2016 from the Solicitors for ACE rejecting the renunciation, Mr. Barry confirmed he saw the said letter: *"Absolutely, yeah. I discussed that with Kevin and…certainly when I saw where they rejected the Deed of Renunciation, I said no way. That has to be a part of any lease if we are doing a lease."* The evidence shows that he withheld disclosure of that fact from ACE.

134. The tenor of his answer, combined with the evidence and attendances of his solicitor, makes clear that conversations were held with his solicitor, Kevin McNamara circa the 14th/ 15th /16th December 2016. Mr. Barry's solicitor's evidence was that Mr. Barry had formed a clear intention on receipt of the O'Donohoe letter rejecting the Deed of Renunciation that there might be no lease at all. Mr. Barry's own evidence was that Motorpark would never grant the lease without a renunciation of tenant's rights by ACE. It is highly significant therefore that Mr. Barry expressly instructed his solicitor *not* to respond to ACE's solicitor's rejection of the proposed renunciation, stood down the involvement of Motorpark's solicitors in the transaction and instead immediately resumed direct engagement with ACE and, with Mr. Colin Barry, prevailed upon it to go into occupation of the unit with assurances concerning the lease such as that *"We will have it all sorted out for the 12th", "We will have that done by the 12th", "Let's just set the date and move in…that's all done"*. Contrary to the views of the judge, the assurances were clear, unambiguous and not "*vague*".

135. Active steps were taken by Mr. Barry on 15 December 2016 to countermand Mr. McNamara's proposal to respond directly to ACE's rejection of the suggested renunciation or otherwise to communicate to it directly that a Deed of Renunciation was of importance or that no lease would be granted without one. The fact that such steps were taken operates in the realm of an "*unexpressed mental reservation*" on the part of Mr. Barry/Motorpark which was never disclosed to ACE. Therefore, objectively considered, this forms no part or term

of the contract between the parties, being inconsistent with the governing criterion for determining whether parties intend to enter into a binding agreement and the true terms of such an agreement as understood in the context of the reasonable expectations of honest sensible businessmen as outlined by Clarke L.J. in *RTS Flexible Systems Ltd*. v *Molkerei* [2010] UKSC 14. Motorpark cannot now assert in all the circumstances that a Deed of Renunciation had to *"be part of any lease"* if Motorpark was *"doing a lease"*.

136. It appears that in the months subsequent to his September 2016 meeting and handshake with Mr. Plunkett, on 11 October, 2016 Mr. Barry emailed his solicitor, Kevin McNamara, stating: *"Hi Kevin, ACE, the company who are going to lease the body shop in Athlone their solicitor is… You should contact directly. We need to finalise a lease document for them."* The email does not suggest that any key terms of the agreement were under negotiation and makes no reference at all to a renunciation. There had been a consultation between Mr. Barry and his solicitor, Mr. McNamara, on 10 October, 2016. His solicitor's attendance records that Mr. Barry had provided him with documents including, *inter alia*, the term sheet of the 24 August, 2016 which is described as having been *"…signed off by Gerry Halloran relating to a proposed sub-lease and other dealings with ACE…"* The use of the words: *"signed off"* is strongly suggestive that the contents of the Term Sheet represented agreed essential terms as between the parties as of that date. The solicitor notes at the end of the attendance: *"Essentially Motorpark Limited is to grant a 10-year sub-lease of the body repair unit and first floor office to ACE Out of Body Ltd. with a sliding scale of rent for the first five years and a rent review at Year 5, also a break clause at Year 5. There will also be some car park spaces and it appears from the document at No. 1 above that there will be some transfer of undertakings implications. We will need to advise our clients in relation to its obligations under TUPE."*

137. Three weeks later on 25 November, 2016 Mr. Barry had a telephone attendance with his solicitor, the latter recording in the attendance:

> *"Motorpark Limited will grant a sub-lease to ACE Autobody in relation to the body repair unit we are to draft a sub-lease so that draft lease and title may issue as soon as possible to solicitors for ACE…"*

138. Four days later on 29 November, 2016 Mr. McNamara, the solicitor, records a telephone attention on Michael Barry who had *"asked what was the position in relation to ACE Autobody. I told him he had only approved the head lease the previous afternoon and that I would have a draft sub-lease to him by Thursday 1st/12/16. He wished to have a draft lease and title issued to the solicitors for ACE … by the end of this week…He asked that an email be sent to the solicitors for ACE…information (sic) them that we expected to issue draft documentation with copy title by the end of this week."* There is no mention of a renunciation.

139. On foot of that instruction Motorpark's solicitor emailed Messrs. O'Donohoe solicitors deploying the standard conveyancing proviso *"subject to lease/license"* concerning (1) Body Repair Unit – Lease and (2) Office – License Agreement: *"We understand that you act for the above name (sic) company who intends to take a letting and licence of the above premises from our client. We are finalising the terms of a draft lease with (sic) our client and we expect to be in a position to send you a draft lease and copy title towards the end of this week."* That formula governed all communications between the solicitors but was never used in any direct communications between the parties.

140. It is clear from the cross-examination of Mr. Barry (Day 3, pp. 24/25) that in the first instance, the initial draft lease prepared for his approval included an option to surrender/break clause in favour of the tenant only, as expressly agreed between Mr. Halloran and Mr. Sutton. Mr. Barry gave instructions for the removal the clause from the

initial draft of the proposed lease which had been emailed to him for approval on 6 December, 2016 at circa 10.27am; *"Are you satisfied with the draft lease."* In cross-examination on Day 4, including at pp. 28/29, Mr. Barry disputed that the break clause was exercisable by the tenant alone, claiming it *"certainty wasn't in the Head of Terms"* and that he had required that it be taken out. The trial judge rejected that assertion which was contrary to the evidence of all other witnesses. On Day 3 Mr. Halloran in evidence confirmed that the break clause had been agreed between the parties for the tenant only and that Mr. Barry had agreed to that.

141. Mr. Barry's response to the initial draft lease is in the attendance of his solicitor of 7 December, 2016. He required that Clause 6 *"Option to Surrender he said that this should be removed."* As of 7 December, 2016 Mr. Barry was also attempting unilaterally to resile from the hitherto agreed tenant-only break clause and the licence to use office space. Mr. Barry's instructions to his solicitors on 7 December as recorded by the solicitor state: *"He also said that for the time being he is not going to issue the license so we should just proceed with the draft lease only."* This was at complete variance with the agreed terms and instructions previously given to his solicitors on 29 November, 2016 and the ensuing email sent by Kieran Murphy & Co., solicitors for Motorpark, to O'Donohoes, ACE's solicitors which made express reference to the proposed Licence Agreement for the office.

142. In a follow up telephone attendance on Mr. Michael Barry by Kevin McNamara on 8 December, 2016, the solicitor raised the issue of the Licence Agreement, reminding Mr. Barry that they had: *"previously referred to a Licence Agreement in the email to Kieran Roe, solicitor."* Mr. Barry is recorded to have stated *"..that this was not an issue as he would be speaking to his contact in ACE Autobody and they would discuss same and he is now aiming for the beginning of January for handover. I am to proceed with making the amendments as discussed the previous day to the draft lease and issuing same to the solicitor for ACE*

Autobody." This demonstrates that parallel negotiations were proceeding between the parties directly. There was no evidence that ACE was to be put into possession on any basis other than as tenant under a 10 year lease.

143. The primary amendment appears to have been directed towards the break clause - Clause 6 - which was varied to confer rights on both landlord and tenant contrary to what had been previously agreed in respect of which the evidence was that Mr. Barry had shaken hands with Mr. Plunkett in early September 2016 – albeit that Mr. Barry had no memory of such a meeting having occurred. Kevin McNamara amended the draft lease and removed the break option which had been drafted in favour of the tenant to reflect the concluded agreement of the parties, replacing it as instructed.

144. Mr. Barry had a telephone attendance with his solicitor on the morning of 16 December, 2016 where he indicated he would be abroad over Christmas and his son would deal with matters in his absence. The instructions from Mr. Barry were that his son was *"meeting Mr. Sutton of ACE…early next week in Athlone and he will revert to me following same. On receipt of instructions, I am to reply to the ACE solicitors' queries. …The five-year break clause in favour of either party to be included in the lease. The transaction will not be completed until the new year."* That same day at 12.13 in the afternoon Mr. Michael Barry sent an email to Mr. Robin Sutton *cc*'d to Colin Barry. It was confirmatory of:

> *"…our phone conversation this morning that ACE and Motorpark wish to move forward with the handover of the body shop in Athlone to ACE on a lease which is presently been processed by our solicitors.*
>
> *Colin and Dave will meet you in Athlone next week to discuss the handover from 1 January… Look forward to meeting up and finalising all details on my return in the new year".*

It is noteworthy that Mr. Michael Barry did not reveal to Mr. Sutton that he has countermanded the terms of the break clause previously agreed and instructed the insertion of a new break clause exercisable at the behest of either party. The High Court accepted ACE's evidence that it would never have entered into such a lease in the first place.

145. Mr. Barry acknowledged in cross-examination that in respect of the sale of the entire Motorpark property to JDM in 2018, replies to due diligence were signed off on by him. Clause 9 is instructive insofar as it records the position of Motorpark vis-à-vis the rights of ACE at a point prior to the instituting of these proceedings. It states:

> *"9. The company does not have sole an exclusive possession of the property it occupies at the Motorpark premises at Athlone and the company and Brecol Limited are in dispute with ACE…Arising from ACE's occupation and use of a part of the property and ACE's claim against the company. ACE has refused to vacate the property and is claiming an entitlement to a ten year lease and a right to use the canteen area and the first floor office of the building. Proceedings have been threatened in the event that steps are taken to obtain vacant possession."*
>
> *It was intended to grant a sub-lease to ACE…of the body shop, which is a self-contained unit separate from the main building at Motorpark Athlone. it was also intended that ACE…would take a license of an office on the first floor of the main building for dealing with customers etc. The "Term Sheet Discussion Document" only contained with the documents at No. 4 and 5 of the disclosure bundle contains details of the initial agreement with ACE… . Employees of Motorpark…(three in number) were to transfer to ACE Auto Body as part of the arrangement. ACE…were also to have the use of nine car parking spaces. There were other commercial arrangements to be entered into between the parties in relation to repair contracts and body shop*

work, but these were to be agreed separately between the parties. ACE Autobody was also to purchase the company's equipment in the body shop.

ACE…was allowed possession of and commenced operations in the body shop on the premises on 16.01.2017 and three of the company's employees transferred to ACE Autobody. On receipt of invoices from the company ACE paid the sum agreed for rent from 16.01.2017 to 31.12.2017. It has also paid ESB per meter readings for that period."

It is noteworthy that a primary concern of Mr. Barry in cross-examination when this document was put to him was how same had come into the possession of ACE: *"Well, the question I ask you: who sent it to you"* [Day 4, p.43, line 24]. There is no suggestion that it was in occupation as caretaker or licencee – as Mr. Barry claimed in the High Court.

Mr. Kevin McNamara

146. Mr. McNamara's evidence is significant and was that he had signed the contract for the purchase of the freehold of the premises *"in trust for Motorpark on 24 June 2016"* [Day 4, p.52, lines 1-3 and line 24]. He confirmed that, contrary to the suggestions of Mr. Barry to the High Court, the lease on foot of which Motorpark held the property had a tenant only break clause (Day 4, p.54). It appears that in relation to the acquisition of the freehold the initial proposed closing date had been 12 August, 2016 (Day 4, p.54, line 25). Brecol was a corporate vehicle nominated by Motorpark to acquire the freehold. The evidence of Mr. McNamara was that the Letter of Loan Offer to fund the purchase price for the freehold issued in November 2016.

147. Counsel for Motorpark explained to the court; *"What I am trying to make out of this is to explain that at various milestone moments in relation to the grant of this lease, Motorpark didn't have title."* (Day 4, p.64, lines 16-19). The judge responded *"But what it*

was telling the plaintiff was that it could get title. And it certainly had a contract in place under which clearly it could get title."

148. The evidence of Mr. McNamara was that Motorpark had an unconditional contract to purchase the freehold of the property as of 24 June, 2016 (Day 4, p.52 and also Day 4, p.66). Mr. McNamara confirmed that Motorpark had *"...the ability to nominate a third party to take title."* Significantly, in response to the trial judge's query *"But it wasn't dependent on finance or anything like that"*, the solicitor responded *"No, Judge,"* (p. 66, Day 4, Lines 21-23). It is apparent that the approach to the conveyancing transaction was driven wholly by considerations of tax and VAT and the optimisation of same.

149. The solicitor in his direct evidence (Day 4, p.73, lines 1-5) observed; *"I had advised Michael many times along that he couldn't enter into the lease until he had sorted out the purchase and the head lease because Motorpark Limited didn't have the requisite title to pass on or to grant a sub lease."*

The judge emphasised; *"Well, Mr. Barry said that but unfortunately he did not give any evidence that he told the purchasers at the time."* (Day 4, p.73, lines 15-17). When Mr. McNamara indicated that it had been his *"understanding in issuing the documents that they knew what hurdles we had to overcome before we could finalise the deal"*, the judge pointed out: *"...that may have been your understanding, but in fact there isn't evidence of it."* to which the witness responded: *"Oh, yeah."*

150. Mr. McNamara's evidence in answer to questions in cross-examination was that Michael Barry prior to his departure abroad circa the 16 December, 2016 was asked to comment on an email of 15 December, 2016, at 15.38. which stated: *"In light of our telephone conversations over the last few days, please let me know if I am to reply or if I should hold off in dealing with the matter until you return in the new year."*

Counsel asked: *"You were anxious to find out what the state of play is, isn't that right?"*

The solicitor responded (Day 4, p.79, lines 8-10): *"Well, it's more than that. At some stage over those few days Michael Barry had told me not to do anything else on it, that it may not proceed at all."*

He further added: *"So, things were quite fluid, even though we had issued documents."* (Day 4, p.79, lines 12-13).

The judge then queried: *"That what might not proceed at all?"*

The witness responded: *"The lease to ACE Auto Body"*(Day 4, p.79, line 16).

The judge invited Mr. McNamara to elaborate further on his evidence that he had been *"…told by Mr. Barry that it mightn't proceed at all"* – (Day 4, p.80, lines 1 to 6).

The judge asked: *"When were you told by Mr. Barry that the thing mightn't proceed at all."*

In response the solicitor stated: *"I'd a telephone conversation with Michael Barry on 13 December."*

He read out his Attendance Note of 13 December, 2013 on Mr. Barry; *"He instructed me at that stage that we were to complete the purchase at Monksland, Athlone"*. Then he read a further attendance note: *"Presumably the lease between Brecol and Motorpark is to proceed, giving that this is integral to the terms of the loan agreed with Ulster Bank, but I will need to check this with Michael Barry. He instructed me not to carry out any further work for the time being in relation to the sub-lease to ACE Autobody. He will be away for three weeks. He will inform his contact in ACE Autobody that they are now in for 1 February (sic). It may be that this transaction will not proceed due to the possibility of an entirely different direction for the business."*

151. Thus, we have laid bare on the fourth day of the hearing the true direction of travel of Mr. Michael Barry's undisclosed "*mental reservations"* and "*subjective expectations*", to borrow the language of Steyn L.J. in *Trentham v Archital Luxifer* [1993] 1 Lloyd's Rep. 25 and Clarke L.J. in *RTS Flexible* (*supra*) in relation to the lease with ACE – in particular that

it *"mightn't proceed at all… due to the possibility of an entirely different direction for the business."* Simultaneously, as is clear from the same attendance note, Mr. Barry had formed an intention as of 13 December to dispense with the solicitors' involvement and directly prevail upon ACE to go into possession *"they are now in for 1 February*" [possibly a typo for "January"?] whilst, unbeknownst to it, contemplating the option that Motorpark would never grant a lease to it but rather pursue *"an entirely different direction for the business."* This is precisely what transpired. As soon as Motorpark acquired the freehold it sold the entirety to JDM. Whether such conduct on the part of Mr. Michael Barry, and his son Mr. Colin Barry, objectively considered, meets the standard of the reasonable expectations of honest, sensible businessmen in contract formation is central to the determination of this appeal.

152. It is evident that after ACE took possession in 2017 Mr. Barry decided to effect the complete disposition of Motorpark. The solicitor further read from the attendance of 13 December where he had noted: *"In light of his instructions in the previous paragraph we are to hold off in dealing any further in connection with the license agreements for Europcar. We are also to hold off on the licence agreement for ACE Autobody."*

153. In a subsequent telephone attendance dated 16 December, 2016 by Mr. McNamara on Mr. Michael Barry the latter confirmed he was proceeding with the transaction to ACE. The attendance states *"He said that he will proceed with the transaction to ACE Autobody. Colin will deal with the matter in his absence…"*. There was no evidence that Mr. Barry ever discussed with his solicitor putting ACE into occupation on any basis other than the lease.

154. On the same day Mr. Barry telephoned Mr. Sutton, stating that Motorpark wished to move forward with the handover of the body shop *"…on a lease which is been processed by our solicitors"*. Read in the context of the course of dealings between the parties, there is nothing "*vague*" about the language in the emails. Viewed objectively by the standard and

reasonable expectations of "*honest sensible businessmen*", they are consistent with a concluded agreement for a lease which ultimately came into existence as a result of performance induced by Motorpark. The transaction was performed on both sides as outlined below. This is at fundamental and material variance with the suite of subjective options and unexpressed expectations Mr. Michael Barry attempted to reserve to Motorpark as to its future conduct, which included the possibility of never granting any lease of the unit to ACE.

155. Mr. McNamara acknowledged that he never responded to Messrs. Donohoe in relation to their rejection of the Deed of Renunciation. He indicated that Mr. Barry had come back to him in relation to the contents of O'Donohoes' letter of 14 December 2016 *"…and told him that he was going to go ahead with the lease… He also said to me that the five year break clause in favour of either party was to be included and that the transaction wouldn't be completed until the new year".* (Day 4, p. 84-85)

The Law

s. 51(1) of the Land and Conveyancing Law Reform Act, 2009

156. Section 51(1) of the 2009 Act provides that:

> "… *no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person's authorised agent*."
>
> "*(2) Subsection (1) does not affect the law relating to part performance or other equitable doctrines."*

The latter doctrines would include, *inter alia*, estoppels.

Was there a concluded agreement?

157. The first issue to be determined is whether there was a concluded, enforceable agreement reached between the parties for the grant of a lease on the terms contended for by

ACE such as would entitle it to a decree of specific performance based either on compliance with the requirements in s.51(1) of the 2009 Act or where it has demonstrated sufficient acts of part performance of the alleged contract - or the operation any relevant equitable doctrine - which, in light of the authorities would render it inequitable or a fraud on the part of the respondents to be permitted to insist on strict compliance with the statutory requirements in s.51(1) of the 2009 Act.

158. Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd*. [1932] UKHL 2, (1932) 147 LT 503/504 (HL) observed:

> *"Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail."*

159. Clarke L.J. in *RTS Flexible Systems* (*supra*) observes:

> "45. *Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to*

create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

160. In the instant case it is necessary to ascertain whether the parties agreed on all the terms which they objectively regarded or the law required as essential for the formation of legally binding agreement for lease. In *Cosmoline Trading Limited v. DH Burke & Son Limited & Anor.* (*supra*) Finnegan P. identified the key terms of an agreement for a lease:

"71. *The Courts will grant specific performance of an agreement for lease: Irish Shell & BP Ltd v Costello (1981) ILRM 66 at 70. It is well settled that to create an enforceable contract for the grant of a lease the following matters must be agreed –*

(i) The parties: Silver Wraith Ltd v Siucre Eireann Cpt. (High Court, 6 June 1989 Unreported).

(ii) The premises: Law v Murphy High Court 12 April 178 Unreported.

(iii) The term: Crane v Naughten [1912] 2 I.R. 318.

(*iv) The commencement date: O'Flaherty v Arvan Properties Ltd Supreme Court 21 July 1977 Unreported.*

(v) The rent: Shannon v Bradstreet (1803) 1 Schoales & Le Froy 52."

161. The UK Supreme Court in *RTS Flexible* analysed in significant detail various permutations where the existence of a contract is disputed including where the parties have reached agreement *subject to contract* but the issue is whether they have in truth waived the *subject to contract* stipulation in the course of their dealings. Lord Clarke in *RTS Flexible* indicated that where a contract has been performed on terms which were agreed to be *subject*

to contract, that may nevertheless, depending on the relevant circumstances, constitute evidence of an intention to enter into a binding agreement. He also considered circumstances where agreement in principle has been achieved but all terms have not yet been agreed and the court has then to determine, based on an objective assessment of the relevant evidence, whether the parties actually intended to enter into a binding contract.

162. In *RTS Flexible* Clarke L.J. also considered, *inter alia*, the decision in *Trentham v Archital Luxfer* (*supra*), observing:

> *"Before the judge much attention was paid to the Percy Trentham case, where, as Steyn LJ put it [at 26] the case for Trentham… was that the sub contracts came into existence, not simply from an exchange of contracts, but partly by reason of written exchanges, partly by oral discussions and partly by performance of the transactions. In the passage from the judgment of Steyn L.J. (at 27) quoted by the judge (at 66) he identified these four particular matters which he regarded as of importance.*
>
> *(1) English law generally adopts the objectives theory of contract formation, ignoring the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest sensible businessmen.*
>
> *(2) Contracts may come into existence, not as a result of offer and acceptance but during and as a result of performance.*
>
> *(3) The fact that the transaction is executed rather than executory can be very relevant. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations and difficult to submit that the contract is void for vagueness or uncertainty. Specifically the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively to it may make it*

impossible to treat a matter not finalised in negotiations as inessential. This may be so in both fully executed and partly executed transactions.

(4) If a contract only comes into existence during and as a result of performance it would frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance."

163. *Wylie on Irish Landlord and Tenant Law* (4th ed., Bloomsbury Professional, 2022) at 5.07 notes that sufficient written evidence of the existence of a contract for lease or tenancy:

"... may take any written form e.g. correspondence and come into existence after an oral agreement has been reached. The parties need not intend that the written document should constitute the evidence required, but there must be a complete agreement, so that one subject to some condition precedent remains unenforceable."

Wylie cites, *inter alia*, *Lord Ormond v Anderson* (1813) 2 Ba. & B. 363 and observes:

"*at the very least the written evidence must indicate the parties to the tenancy, the premises, the rent and any other provisions regarded by the parties as essential or material to their agreement."*

He further observes:

"*The courts have made it clear that what is to be regarded as 'essential' or 'material' in this context involves a subjective test, i.e. where the parties so regarded are not what the court might on an objective basis so regard*."

Date of Commencement of the Term

164. Wylie observes at 5.08:

"*There is also a long line of authority in Ireland holding that the written evidence of a contract for a lease or tenancy is not sufficient unless it indicates (a) the date of commencement of the lease or tenancy [citing, inter alia, O'Flaherty v Arvan*

Properties 21 July 1977 SC] and (b) the duration of the tenancy. However, the court will be satisfied if sufficient indication is given which enables it to work out the details required on the basis of the maxim id certum est quod certum reddi potest. In Phelan v Tedcastle [1884 15 L.R.IR.169] Chatterton V-C stated:

> *I am coerced by the authorities to hold that an executory agreement in writing to grant a lease for a term of years, which does not state the date from which the term is to commence, is not sufficiently definite to satisfy the Statute of Frauds, and cannot be enforced, and that the mere fact of the agreement being dated does not show from what date the lease is to run; but that is a principle which I do not feel any inclination to extend. The agreement before me now, in my opinion, contains sufficiently clear statement of the terminus from which the parties contracted that the lease should commence. It contains a description of two starting points the first being at which the defendant was to enter into possession for a temporary letting which is defined by the words 'I propose taking possession of said premises immediately after the execution of the habere in said ejectment, and continuing to hold same until the six months for redemption expires'. There is no more uncertainty in the terms of the agreement than there would be in an agreement to hold for a life."*

165. In the instant case ACE relies on the *Term Sheet*, together with the course of dealing between the parties including the principals - Mr. Plunkett and Mr. Michael Barry - together with their agents or active parties involved with the respective companies: in the case of ACE, Mr. Robin Sutton, and in the case of Motorpark, Mr. Gerry Halloran and Mr. Colin Barry.

Commencement date may be shown inferentially or from indications in correspondence

166. John Farrell in the leading Irish text *Irish Law of Specific Performance* (Butterworths, 1994) observes in regard to the specific enforceability of agreements for lease at 3.16:

> *"Agreements for lease need further essential terms to be agreed. It is well settled at the date of the commencement of the period for which a lease is to be granted is an essential term in a contract to grant a lease. There cannot be a concluded agreement without it. However, a commencement date may be shown inferentially or from indications in correspondence. The fact of an agreement for lease itself being dated is not enough on its own to avoid the commencement date of an intended lease. It may be ascertained referentially as e.g. from the expiry of the six month period for redemption which the current tenant had, from the time of payment of a sum of money when planning permission is obtained."*

Application of the above principles to the facts

167. It is evident that there was a concluded agreement in place from the point in September where the principals on each side shook hands. All the essential terms of the lease were agreed between the parties. The contemplated commencement date envisaged by both sides can be ascertained as being effectively as soon as was feasible with a horizon of weeks to completion envisaged by both sides as of late September 2016. Solicitors were engaged solely for the purposes of putting the concluded agreement into legal shape. Michael Barry attempted to use the process involving the solicitors to extract new terms such as renunciation and vary the term regarding the break clause but abandoned that approach on 16 December.

Subject to Lease/subject to contract

168. The matter was placed in the hands of solicitors by both sides, but I am satisfied that that was for a limited period of time only for the limited purpose of putting the agreed terms into formal shape and reflects a temporary *hiatus* in what otherwise was a direct process of negotiations between the parties. The only exchange of communications between the solicitors took place from late November culminating on 14 December, 2016. The key emails and letters include those dated 8th and 14th December, 2016. The evidence demonstrates that the concluded contract was executed by performance on both sides and sufficient acts of part performance on the part of ACE.

169. As already stated, from 16 December the parties "stepped down" their engagement with their respective solicitors whose involvement thereupon ceased and proceeded to engage directly leading to a series of events which culminated on 16th January, 2017 in ACE going into possession at the behest of Motorpark and with its knowledge and consent. The *"subject to contract"* formula on the solicitors' communications had no impact on the terms of the agreement already concluded or subsequently agreed directly between the parties, a principle stated by Keane J. in *Silver Wraith*. Neither could it thereafter preclude direct negotiation, emails, representations and acts of the parties from and after 16th December, 2016 from being constituted or operating to evidence essential terms or act of part performance of a concluded agreement for the grant of the lease .

170. Conventionally the words "subject to contract" would mean that what had been agreed was subject to a full contract being agreed or other terms specified in the correspondence in question. In *Thompson v. The King* [1920] 2 IR 365, Gibson J. observed:

> *"Where an offer and acceptance are made subject to a subsequent formal contract, if such contract is a condition or term which until performed keeps the agreement in suspense, the offer and acceptance have no contractual force. On the other hand, if all*

the terms are agreed on, and a formal contract is only contemplated as putting the terms in legal shape, the agreement is effectual before and irrespective of such formal contract."

171. The facts in the instant case contrast materially with *Silver Wraith.* There, the evidence adduced showed that there had been a direct course of dealings between individuals representing each side but at all times the correspondence from the vendor's representative maintained the position, expressed in the correspondence, that the discussions and negotiations were *"… subject to full lease being agreed"*. On the evidence before him, Keane J. observed: "…*there is no question here of the phrase being subsequently inserted by a party in order to protect himself from an agreement already arrived at.*"

172. In complete contrast with the facts in the instant case, the court noted that the official negotiating on behalf of the vendor in *Silver Wraith* was *"... not a solicitor coming into a deal which has already been concluded between others and saying: 'Well, I must protect these people because they have entered into an oral agreement. I will ensure that no note or memorandum comes into existence by heading the letter 'subject to contract'*.'"

173. The facts contrast starkly with the instant case where neither ACE nor Motorpark at any stage ever used the formulation *"subject to lease*" in their direct communication. *Silver Wraith* is of assistance as it clearly confirms that the introduction, subsequent to a concluded agreement having been arrived at by the parties, of the formulation "*subject to contract*" in solicitors' correspondence did not serve to undermine the efficacy and enforceability of the concluded agreement if a sufficient memorandum of same is established to exist.

174. It was made clear by Geoghegan J. in *Shirley Engineering Limited v. Irish Telecommunications Investments Plc* [1999] IEHC 204 that where a party seeks to rely on the formulation "*subject to contract*" to resist a claim for specific performance:

> *"…In considering whether the agreement arrived at is conditional on a written contract being entered into, the Court must assess all the evidence and look at all the surrounding circumstances and the entire context in which an expression such as 'subject to contract' was used*." (pp. 3/4 of judgment)

175. In the instant case it is self-evident that the formulation "*subject to contract*" and ancillary language used in the solicitors' correspondence was in truth introduced *ex post facto* by the solicitors after the parties considered themselves and held themselves out vis-à-vis each other as having concluded a binding agreement for the grant of the lease. As was observed by Gibson J. in *Thompson v. The King*:

> "*Where there is correspondence in the course of which it is alleged that a contract has been created the whole correspondence should be read; but if it appears that a final agreement was come to at any stage, subsequent attempts to introduce new and varied terms must be disregarded*."

176. It is well settled in this jurisdiction that where parties agree terms and thereafter for instance request the other side to "*forward a contract*" or state that they intend to "*have the terms put into form*", there is nevertheless a concluded contract and such formulations do not introduce any conditional element to a prior concluded oral agreement. In each case it is a matter of construction of the particular wording, in light of the context and all the relevant circumstances, as to whether it is consistent with a pre-existing binding agreement. The courts have found that the use of language such as "in principle" is not necessarily inconsistent with a concluded agreement having already been reached between parties which is merely intended to be embodied in a more formal document, as held in *Irish Mainport Holdings Ltd. v. Crosshaven Sailing Centre Limited* (Unreported, High Court, 16th May 1980). Keane J. cited *Branca v. Cobarro* [1947] KB 854, where communications between the parties referring to "… a *provisional agreement until a fully legalised agreement… is*

drawn up" were held not to prevent the coming into existence of a binding concluded agreement between the parties which was specifically enforceable. Similarly, in the instant case the parties anticipated that the agreement arrived at would be incorporated into a standard commercial lease.

177. The discrete phase of negotiations governed by "*subject to contract*" covered the weeks from late November 2016 – 16 December, 2016 where the parties were represented by solicitors. The trial judge erred in approaching the negotiations between the parties as continuing to be on the basis that it continued to be *"subject to lease/contract"* after both sides discharged their solicitors and resumed direct negotiations. The critical factor in this case is that the parties merely retained solicitors for the purpose of putting the agreement into legal shape.

178. Communications qualified as "*subject to lease/contract*" can become binding as between the parties where there is a subsequent agreement or understanding to remove or dispense with the qualification. The facts, evidence and solicitor's attendances proven in the High Court in the instant case are consistent only with both parties, by dispensing with their solicitors and assuming direct engagement including by phone and email, effectively dispensing with the qualification. Its effect governs the direct letters/emails between the solicitors. The qualification ceased when the solicitors' involvement ended on 16 December, 2016. The decision of Widgery L.J. in *Griffiths v. Young* (1970) Ch. 675 at p. 685 established that the formulation "*subject to contract/lease*" in correspondence between solicitors can amount to a suspensive condition which can be waived subsequently by oral agreement between the parties. Such occurred by the conduct of both parties from 16 December, 2016. There were 3 phases in the process:

(1) The course of dealings up to when the solicitors first communicated *inter se.*

(2) The finite period of time when the solicitors were retained in connection with the transaction by ACE and Motorpark when all correspondence used the formulation "*subject to contract/lease*" .

(3) The period subsequent to discharge of the solicitors from 16th December, 2016.

The formulation "*subject to contract/lease*" was not used at all in the first and third phases.

179. The period of time when the solicitors actively engaged *inter se* on behalf of their respective clients in November/ December 2016 and the communications including the formulation "*subject to contract/lease*" in the said correspondence cannot have the effect of altering or undermining the terms of the concluded agreement as subsisted prior to the said communication. Once the parties abandoned the solicitors and dispensed with their advices and inputs, the formulation ceased to govern the dealings between the parties.

180. The evidence of both Michael Barry and Kevin McNamara confirms that Mr. Barry formed an intention on 15th/16th December, 2016 to dispense with the services of his solicitor in connection with the sub lease. Mr. Plunkett admitted that he proceeded to conclude negotiations with Motorpark and go into possession on 16th January, 2017 against the advices of his own solicitor. Thus, both parties dispensed with their respective solicitors and their involvement in the course of dealings between the parties ended in so far as an assessment of the existence or otherwise of a concluded agreement is concerned, with effect from the letter of 16th December, 2016. Instead, ACE proceeded to conclude the contract by acts of part performance including taking possession of same at the behest of Motorpark.

Date of commencement of the term can be identified inferentially

181. Keane J. in *Silver Wraith* accepted submissions that the commencement date of the lease could be specified inferentially in a memorandum to satisfy the essential ingredients of an agreement for a lease. In the instant case, the judge erroneously disregarded a number of essential factors regarding the commencement date. First, the parties had agreed and

contemplated commencing the tenancy within weeks of the handshake between the principles in September 2016. Secondly, having dispensed with their solicitors, the parties agreed in the email of 22 December that ACE would take possession on 16 January, 2017 and finally it went into occupation on 16th January, 2017 and paid rent from that date. The trial judge erred in concluding that the commencement date was not agreed. It was, on the evidence, both agreed and performed. The trial judge erred in finding otherwise and arguments advanced by the respondents supporting the High Court's conclusions in that regard fall by their own weight since the date was ultimately identified and agreed by performance. The trial judge also erred in considering that the retainer of solicitors precluded a binding contract arising. As decisions such as *Rossiter v. Miller* (1878) 3 App. Cas. 1124, *per* Lord Hatherley, make clear, the mere fact that the parties wish to put their agreement into due form and involve solicitors for that purpose does not necessarily prevent a concluded contract from arising.

182. It is clear from the evidence that there was significant impetus on both sides for ACE to go into occupation of the unit and commence trading in early course. To that end, the three or four staff employed by Motorpark at the unit were notified in September that ACE would be taking possession *in coming weeks.* The position crystallised from and after 16 December 2016. By receipt of the email of 22nd December, 2016 from Mr. Colin Barry, a date certain for commencement of the term had been fixed between the parties – in light of decisions such as *Phelan v. Tedcastle* [1884] 15 L.R. Ir. 169, *Biggs v. Brennan* [1907] 41 ILTR 60, *Swan v. Miller* [1919] 1 IR 151 and *O'Flaherty v. Arvan Properties Limited* (Unreported, Supreme Court, 21st July 1977).

183. There was no indication from Motorpark that occupation would be on any different basis to what was previously agreed. There was no suggestion that Motorpark was not in a position to execute the lease or make title as agreed. The trial judge was correct in his

remarks that parties can elect to proceed without the involvement of solicitors, dispense with their advices and so conduct themselves as to create a specifically enforceable agreement between them. However, he erred in his analysis of the facts, context and circumstances and conduct of the parties *post 16th December 2016* and the legal consequences which flow from same. The contract was executed when ACE went into occupation on 16 January, 2017. Prior thereto the email of 22nd December, 2016 *"…contained references to circumstances from which the date can be clearly ascertained…"* in the language of Sir Edward Sullivan in *Phelan v Tedcastle* at p.175

Part Performance

184. The equitable doctrine of part performance is available to enable a contract which might otherwise be unenforceable to be enforced in equity by reason of conduct or dealings between the parties. Part performance assumes the existence of a concluded agreement which, by reason of the absence of a sufficient note or memorandum in writing, may not in law be specifically enforceable. The acts relied on should be performed in pursuance of the alleged agreement. Clearly ACE established a concluded agreement on the evidence. Even adopting a strict construction of the requirement that a commencement date be identified, by going into possession at the instance of Motorpark, that requirement was unequivocally established by ACE by acts of performance. Thereby on 16 January 2017 the agreement for lease was executed by the unequivocal acts of part performance by ACE in accordance with the intention of the parties which was established by their conduct.

185. The doctrine of part performance requires consideration in light of the facts, circumstances and conduct of the parties to evaluate if it ought to be applied as the basis for a decree of specific performance of the agreement for lease as contended by ACE. Farrell, *Irish Law on Specific Performance*, observes:

"A party who has permitted another to perform acts on the faith of an agreement is not allowed to insist that the agreement is bad and that he is entitled to treat those acts as if the agreement never existed. So where the party seeking relief has taken some step in pursuance of his contract which has left him in such a position that it would amount to a fraud or be inequitable for the other party to rely on the fact that there was no sufficient memorandum of the contra, the case is taken out of the Statute of Frauds and the courts will enforce the contract."

186. Citing the decision of McWilliams J. in *Howlin v. Thomas F Power (Dublin) Limited* (Unreported, High Court, 5th May 1978), Farrell observes at 6.01:

"*If in reliance on a contract a plaintiff conveys land to a third party, enters into occupation of premises agreed to be let or sold to him, ejects tenants at the request of the other part or begins to carry on business in partnership he may rely on part performance. If he has taken some 'conclusive', 'irrevocable' or 'prejudicial' step in pursuance of the contract that step is likely to be a sufficient act of part performance. The doctrine is applicable in any case in which a court of equity would decree specific performance."*

He cites Palles CB in *Crowley v. O'Sullivan* [1900] 2 IR 478 at 489 – 492 in that regard. Farrell notes the succinct analysis of the equitable basis for the doctrine of part performance adumbrated by Lord Reid in *Steadman v. Steadman* [1976] A.C. 536 at p.540:

"*If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable. Using fraud in its older and less precise sense, that would be fraudulent on his part and it has become proverbial that courts of equity will not permit the Statute to be made an instrument of fraud."*

187. Citing Andrews L.J. in *Lowry v. Reid* [1927] NI LR 142 at 154/5, Farrell observes:

> *"The question in each case is whether the plaintiff has an equity arising from part performance which is so 'affixed to the conscience' of the defendant that it would amount to fraud on his part to take advantage of the absence of writing. The equity arises from a plaintiff's part performance of the contract. The acts of part performance relied upon must be referable to a contract. Keane J. in Silver Wraith Ltd. observed that the acts which the plaintiff rely upon should be 'unequivocally referable to the type of contract alleged.'"*

188. Neil Maddox in *Land and Conveyancing Law Reform Acts: A Commentary* (Round Hall, 2009) observes in regard to part performance and s.51(2) of the 2009 Act at p. 278:

> "*…The acts of part performance must be referable to the oral contract which is the subject of the enforcement proceedings. That formulation represents the traditional view in this jurisdiction and is somewhat narrower than the views of the majority of the English House of Lords in Steadman v. Steadman 1976 A.C. 564 where a number of the judges approved a passage from the 6th Edition of Fry on Specific Performance, published in 1921 which suggested that the operation of acts of part performance required '… that the acts in question be such as must be referred to some contract and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged.'"*

189. In this jurisdiction *Mackie v. Wilde (No.2)* [1998] 2 IR 578 represents the Supreme Court's considered view on the doctrine of part performance. At p.587 Barron J. identified the essential indicia for a successful plea of part performance as follows:

(i) There was a concluded oral contract between the parties.

(ii) The plaintiff acted in such a way that showed an intention to perform that contract.

(ii) The defendant induced such acts or stood by while they were being performed and as such acquiesced in those acts.

(iv) It would be unconscionable and a breach of good faith to permit the defendant to rely upon the terms of the statute to prevent the enforcement of the contract in question.

Barron J. made clear that the traditional rigid approach, which suggested that the terms of the contract could not be considered until the court had first determined that the acts of the plaintiff were capable of constituting acts of part performance of the contract contended for, did not reflect the law in this jurisdiction:

> "*It is more logical to find out what the parties agreed, since in the absence of a concluded agreement, there is no point in seeking to find acts of part performance. The Court can only then begin to determine whether the behaviour of the parties justifies the application of the equitable doctrine to modify the legal rule.*" (p.587)

190. Wylie & Woods, *Irish Conveyancing Law* (4th ed., Bloomsbury Professional, 2019) observe that in cases where the creation of a specifically enforceable agreement for the creation or grant of a lease is contended for based on acts of part performance and where a tenant has taken possession of the property for the first time in the course of the said transaction, the tenant's act of initially taking possession constitutes an act of part performance. They cite Chatterton V-C in *Conner v. Fitzgerald* [1883] 11 LR Ir. 106 at 116 where he observed "*In the case of giving and taking possession de novo, this is part performance on both sides*."

191. The court erred in failing to consider and attach appropriate weight to the distinct acts of part performance undertaken by ACE at the active instigation and urging of Motorpark and with its knowledge and consent, including taking possession of the unit on 16 January, 2017, paying the yearly rent when invoiced, discharging service charges/rates/outgoings, assuming full legal obligations for the transfer of four workers under TUPE and the

corresponding acts of part performance by Motorpark in putting ACE into possession, invoicing for and accepting rent, service charges, transferring all legal obligations for four workers. Those acts were wholly consistent with the lease contended for by ACE.

192. With regard to the carrying out of works on a property as constituting sufficient acts of part performance, Wylie & Woods observe at 9.58:

> *"There have been several cases where expenditure incurred in respect of making alterations or improvements to the property the subject of the alleged agreement has been held to be a sufficient act of part performance. ... It is doubtful if the taking of possession need accompany the making of alterations or improvements, though it usually does so and, when it does, obviously strengthens the plaintiff's claim."*

Authorities cited include *Hope v. Lord Cloncurry* [1874] Ir. 8 Eq. 555 at 557 *per* Chatterton V-C where knowledge of the acts of part performance and acquiescence in their performance were held to be relevant. The trial judge erred in disregarding the "*substantial*" expenditures by ACE on the unit and the evidence that same were induced by Motorpark and carried out with its encouragement and knowledge. Same constituted further acts of part performance of the agreement. Further, the conduct of Michael Barry, Colin Barry and, to a lesser extent, Gerry Halloran was such that in equity it would be unconscionable and a breach of good faith to permit the respondents to escape performance of the contract on any ground advanced.

193. The court erred in the weight he attached to the conduct of Mr. Michael Barry and Mr. Colin Barry. There was evidence – viewed in light of the attendances of the solicitor adduced in evidence – that both Michael and Colin Barry had induced ACE to go into possession. The emails, communications, representations and conduct the Barrys from 16 December 2016 – 17 January 2017 and of Mr. Michael Barry on 17th January 2017 contained repeated assurances and representations that the agreed lease would be forthcoming. Motorpark

acquiesced in the substantial performance of the agreement for lease which as of the 17th January, 2017 was no longer executory and which the parties had by their conduct proceeded to execute. Findings to the contrary and of *vagueness* by the trial judge are difficult to understand and contrary to the weight of the evidence.

194. As Wylie, *Irish Landlord and Tenant Law* observes at 5.16, most judicial comment:

> *"… favours the principle that the court does not 'charge' the defendant with a contract lacking the evidentiary requirements laid down by Statute, but rather upon the 'equities' arising from the acts of the plaintiff in which he has acquiesced, thereby affecting his conscience in equity and denying him the defence of pleading the statutory requirements."*

Reliance is placed by Wylie on *Lowry v. Reid* (*supra*) at 154/155 *per* Andrews L.J. and also the decision of Lord Selborne in *Maddison v. Alderson* (1883) 8 App Cas 467 at 475. The court erred in failing to attach relevant weight to the conduct of Motorpark which induced ACE to go into occupation in performance of the contract for a lease. The said conduct in equity precludes Motorpark/Brecol from purporting to rely on s. 51(1) of the 2009 Act as pleaded at para. 3(b) of the Defence.

Estoppel regarding the renunciation

195. The letter of 14th December, 2016 from O'Donohoes Solicitors on behalf of ACE which unequivocally rejected the proposed renunciation was never responded to. Mr. Michael Barry was clearly fully aware of that rejection when he embarked upon a course of dealing with Mr. Plunkett and Mr. Sutton. He had countermanded his solicitor from responding to ACE's rejection of the renunciation.

196. Under cross-examination Motorpark/Mr. Barry's own solicitor read from an email sent to his client on 15th December, 2016 at 15.38:- *"In light of our telephone conversations over*

the last few days, please let me know if I am to reply or if I should hold off in dealing with the matter until you return in the new year."

197. It is clear that from the evidence given by Mr. McNamara that neither option was required by Mr. Barry. Instead, he gave clear instructions not to respond to the letter of 14th December, 2016 from O'Donohoes. This witness provided the court with a very material piece of evidence: *"at some stage over those few days Michael Barry had told me not to do anything else on it, that it may not proceed at all. … so things were quite fluid even though we had issued documents*." Clearly, Mr. Barry had decided not to involve his solicitors in his contemplated course of dealings with ACE with effect from mid-December 2016. Simultaneously, Mr. Barry had in contemplation the option that Motorpark would never grant a lease to it. Separately, he planned that ACE would be put into possession of the unit in January, 2027 with the advantage of parts being sold by Motorpark to it and the latter taking over Motorpark's burdens such as TUPE, running costs and rates.

Presciently, the judge probed the solicitor "*that what might not proceed at all?*"

Mr. McNamara answered: "*the lease to ACE Autobody*".

The judge returned to the issue (Day 4, p.80) and sought clarification from the solicitor. In particular as to the words in the email sent by Mr. McNamara to Michael Barry on 15th December 2016: "*in the light of our telephone conversations over the last few days"*.

198. While it may be the case that Mr. Barry had no obligation of good faith towards ACE, the court erred in attaching insufficient weight to the actual degree of bad faith or unconscionability exhibited in this case - and expressly alluded to by the trial judge - in determining the respective rights of the parties in equity where an objective approach is called for from the stand point of the reasonable expectations of honest and sensible businessmen. The decision in *McDonagh v Denton* [2005] IEHC 127 is authority for the proposition that where an issue arises in a conveyancing transaction, failure to reply by a

solicitor is tantamount to a representation that the defendant is in agreement with the matter asserted by the other side. The decision to ignore the rejection by ACE's solicitor of a renunciation of rights, coupled with subsequent conduct of Motorpark, precluded Motorpark from asserting that renunciation was ever an issue or essential term of the contract.

199. Such words and conduct must be considered by this Court in the context in which they took place, having due regard to the objective theory of contract formation which requires that the court disregards all unexpressed mental reservations on the part of either party and any subjective expectations of either. As Steyn L.J. observed in *Trentham v Archital Luxfer Ltd.* (*supra*): *"…in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead, the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessmen."* Those observations were further distilled down by Lord Clarke in *RTS Flexible* (*supra*) to *"…the governing criterion is the reasonable expectations of honest sensible businessmen".*

200. The trial judge erred in his treatment of the renunciation. The conduct – acts, omissions and representations - of Mr. Barry and his son in persuading ACE to go into occupation estopped Motorpark from thereafter asserting that renunciation of tenant's rights was ever an essential term of the agreement. There was active engagement by Mr. Halloran and also Mr. Colin Barry in providing repeated assurances to ACE that the lease would be forthcoming in the course of the process of prevailing upon it to go into possession. The "*reasonable expectation of honest sensible businessmen*" would be that if Motorpark was insisting on a new term, renunciation, it would have ensured that ACE was apprised of that fact prior to being put into possession. Its own conduct was inconsistent with such an assertion. Its failure to do so necessarily excludes renunciation of statutory rights by the tenant as ever having constituted an essential term of the agreement. Absent candour by

Motorpark as to material facts, the essential terms of the "*lease*" in contemplation and agreed to were those provided for in the Term Heads, as clarified by the witnesses in the High Court.

201. The unconscionable nature of Motorpark's conduct towards ACE is exemplified in the evidence of its own solicitor who read from his attendance of a telephone conversation with Michael Barry on 13th December 2016, noting that he *"... instructed me not to carry out any further work for the time being in relation to the sub-lease to ACE Autobody. He will be away for three weeks. He will inform his contact in ACE Autobody that they are now in for 1st February. (sic) It may be that this transaction will not proceed due to the possibility of an entirely different direction for the business*."

202. That attendance records, in the same breath, Mr. Barry took it upon himself to proactively engage with ACE to prevail upon it to go into possession of the property whilst simultaneously countenancing a course of action whereby no lease would ever be granted to it. Closer scrutiny of that conduct was warranted by the trial judge in light of the events that transpired thereafter, particularly from 16th December 2016 and 16th January, 2017 and the fact that Michael Barry never divulged or disclosed his true intentions to ACE.

203. The evidence accepted by the trial judge was that ACE would not have gone into possession had it been told that Motorpark was countenancing options that included never granting any lease to it. In the decision of *Salvation Army Trustee v. West Yorkshire Metropolitan County Council* (1981) 41 P & CR 179, evidence of specific and detailed representations, including causing the plaintiff to go into possession, combined with conscious silence, were held to give rise to an equitable obligation to perform the agreement based on proprietary estoppel– in light of *Ramsden v Dyson* (1866) LR 1 HL 129.

Proprietary estoppel

204. Viewing the evidence in its context, it is evident that the elements of proprietary estoppel were established; the evidence as to the quality and strength of the assurances

repeatedly expressly made by Motorpark that it would grant at ten-year lease of the unit was significant. The essential terms were established at the latest as of 22 December, 2016 when the commencement date was definitively agreed. The silence of Motorpark and its solicitor at ACE's rejection of the renunciation was conscious and rendered any assertion that it could be a term of the agreement unconscionable. The evidence of ACE's reliance on the strength of the assurances given was overwhelming. The judge accepted the evidence of Mr. Sutton and Mr. Plunkett that the issue of the lease was continuously raised, including by Mr. Plunkett directly with Mr. Michael Barry on 17 January, 2017, and that repeated assurances were given that the lease was forthcoming. No impediment to the grant of the agreed lease were ever divulged. The judge found the expenditures incurred by ACE were *"significant".*

205. Looking at all the evidence in the round, in light of the authorities, including *Gillett v Holt* [2009] 3 All E.R. 945, *Bohemian Football Club Ltd v. Albion Properties Ltd.* [2008] IEHC 447 and *Coyle v. Finnegan & Anor* [2013] IEHC 463, the extent and quality of Motorpark's assurances are such as to render it unconscionable that it should escape from its agreement with ACE for the grant of the agreed 10 year lease. Thus, on the evidence ACE is also entitled to specific performance on the alternative basis of proprietary estoppel in addition to the primary ground of part performance.

Conclusions

206. The judge delivered his *ex tempore* judgment with commendable speed but regrettably overlooked material aspects of the evidence and fell into error, including in positing almost from the outset that the relationship between the parties was that of tenancy from year to year. This in effect caused the judge to attach undue weight to a scenario that could have potentially arisen under the doctrine in *Walsh v Lonsdale* (1882) 21 Ch D 9, whereby, pursuant to common law, when the formalities for the granting of a lease have not been complied with but the prospective tenant is put into occupation and possession of the

property with the consent of the owner and where rent is paid and discharged, a tenancy from year to year can be deemed to exist. If an equitable right to specific performance based either the doctrine of part performance or promissory estoppel had not been established by ACE - and both bases have been clearly established as outlined above - then the evidence as to conduct by the parties could be consistent with the creation of a tenancy from year to year.

207. Although the judge correctly expressed a view that conduct on behalf of Motorpark/Brecol *"consisted of bad faith in leaving ACE under the impression that Motorpark and Brecol would move towards finalising the negotiations of the ten year lease"*, he failed to evaluate same in a holistic manner or have sufficient regard to its unconscionability where the elements of assurance, reliance and detriment were all clearly established.

208. The judge erred in ultimately discounting his own analysis that disclaimers such as "*subject to Lease" "…will count for nothing if the parties themselves ignore what the legal people are saying and proceed to conclude the contract themselves."* When, as here, both sides have abandoned their engagement with solicitors, it cannot be said that a subsequent course of direct dealing thereafter can be cloaked with the protections one might expect in the process of negotiation which is in truth *"subject to lease"*. That device was waived when the agreement for lease was executed by performance, as *RTS Flexible* illustrates.

209. The trial judge erred in his analysis regarding the involvement of the solicitors. In particular, his assessment that *"there is no evidence that they were in contact with each other in a period leading up to 16 January 2016 as one would expect if (sic) happen if there was pressure from either of the clients to get the deal closed"* is clearly inconsistent with and disregards the evidence. Each side dispensed with the involvement of their legal advisors.

210. The trial judge found that Mr. Barry had told ACE to move in and also noted his acknowledgment that in his dealings with ACE, he was *"kicking for touch"* and *"he kept*

quiet about the title problem." The judge erred in his analysis as to the quality of Motorpark's assurances and the gravity of its conscious silence and express representations and assurances that a lease was forthcoming which induced ACE to act to its detriment.

211. The trial judge erred in considering that renunciation could be an essential term of the agreement for all the reasons stated above and in light of Motorpark countermanding its solicitor's request for instructions to respond to the letter on behalf of ACE of 14 December, 2016 rejecting the renunciation of statutory rights. In all the circumstances, the only reasonable inference to be drawn from the conduct of Mr. Barry is that he abandoned attempts to have a renunciation.

212. On 8th December, 2016, Michael Barry telephoned Robin Sutton and a message was taken by Carolanne Reidy, which was sent on 8th December, 2016 at 17.38. Mr. Barry stated that he was *"now managing the deal that he was going away at the end of the next week for three weeks but his son Colin would be able to sign all and every document that it needed." "He said he would let solicitors work away on all the detail…" "He said he sees no impediment to a 1/1/17 kick-off and that he would be happy to move work to ACE Galway etc. in the interim*." The trial judge erred in disregarding these clear and undisputed representations in their context and further erred in disregarding Motorpark's unconscionable conduct in simultaneously giving diametrically opposite instructions to its solicitors. Reference to working out *"the practical issues"* could only be relevant to practical issues in connection with the lease as agreed. Mr. Barry's statement that he saw *"no impediment to a 1/1/17 kick off"* could only be intended to suggest that same was the intended commencement date for the letting. There was no suggestion ever made that ACE would go into occupation of the property on any basis other than on foot of a ten-year lease as agreed.

213. The language in the email of 16th December, 2016 at 12.13 from Michael Barry to Robin Sutton – confirming an earlier phone call - is at fundamental variance with the intentions conveyed by Michael Barry to his own solicitor in the previous days, including that a lease to ACE might never proceed. The trial judge erred in failing to have sufficient regard to the evidence of Mr. McNamara.

214. The use of the phrase "*the handover from 1st January*" was consistent, in the context of the course of dealings between the parties, only with the Motorpark putting ACE into possession as a 10 year tenant - no other basis was ever discussed between the parties.

215. The clear evidence of Mr. Sutton was that in the course of the said conversation on 16th December, 2016 Mr. Barry represented to Mr. Sutton that everything was agreed – (Day 1, p.84). Motorpark's position was further copper-fastened in the email sent from Colin Barry on 22nd December where he speaks of *"an estimated closing date of Thursday 12th January"* in respect of "*the deal with ACE"*.

Part performance

216. The court overlooked or downplayed material steps and actions undertaken by ACE which constituted sufficient acts of part performance. ACE's major acts of part performance were not meaningfully contested by Motorpark and included: (a) it went into occupation and possession of the property and (b) it took on the obligations of a tenant with effect from Thursday 12th January, 2017 including obligations pursuant to TUPE. The assumption of these obligations is consistent only with part performance of the agreement for lease.

217. The intention of the parties must be identified based on an objective assessment of the context and relative state of knowledge of each with regard to the intention of the other. All the indications and representations on behalf of Motorpark from 16th December, 2016 to 16th January, 2017 were consistent only with an intention to enter into and perform the agreement for a lease at the earliest opportunity. There was no suggestion that material terms remained

to be negotiated or that Motorpark was holding out in regard to any particular term, including the renunciation of rights by ACE. Each party understood that both sides had dispensed with the services of solicitors. A reasonable and fair-minded businessperson, looking at matters from the outside and considering the exchange of emails and communications passing between the parties from 16th December, 2016 onward, would reasonably conclude that the renunciation was no longer in issue.

218. The objective intention of Michael and Colin Barry, as expressly communicated to ACE, is ultimately found in the email of 22nd December, 2016 at 12.35 from Colin Barry to Robin Sutton. It confirms an earlier telephone conversation held between Mr. Barry and Mr. Sutton in respect of which Mr. Sutton gave clear evidence on Day 2, p.45 *et seq*. As previously stated, it is significant that Mr. Colin Barry did not give evidence at the hearing. Mr. Sutton's recollection with regard to the telephone call in question and the representations and assurances repeatedly made by Colin Barry is significant. The representations, considered above in detail, include the following:

1) That Motorpark identify the *"closing date"* as 12th January, 2017 *"on the deal with ACE"*. The only *"deal with ACE"* was the lease on the terms negotiated.
2) That ACE would go into occupation on Monday 16th January, 2017.
3) ACE would carry out an inspection to verify the schedule of condition "*before completion*". Use of the words "*completion*" connoted a conveyancing transaction.
4) The intention of the parties can be ascertained from their unequivocal course of conduct which from 16th December, 2016 excluded the involvement of the solicitors and was performed. Thus their intention could no longer be said to be that no contract would come into existence until contracts had been exchanged.
5) Payments throughout ACE's occupation are recorded as "*rent*" for a *"lease*".

6) TUPE letters sent to worker with the approval of Motorpark stated that "*As of Monday 16th January 2017 Motorpark will cease to own and run your current place of employment and instead ACE Autobody Limited will become your new employer.*", is consistent only with the lease becoming operative as of that date.

The trial judge erred in disregarding these factors.

219. The evidence required the application of the objective theory of contract formation as outlined in *RTS Flexible* (*supra*). It was required to disregard the subjective intentions and unexpressed mental reservations of Motorpark contemplating "*an entirely different direction for the business*". The trial judge's approach to contract formation was wholly erroneous.

220. Having had the opportunity to consider Mr. Michael Barry's demeanour, the trial judge was satisfied that at a certain point bad faith was an element of his conduct towards ACE. The judge finds this at three separate points in the judgment:

(1) *"This conduct consisted of bad faith in leaving ACE under the impression that Motorpark and Brecol would move towards finalising the negotiation of the ten year lease which was envisaged at the time that ACE took possession of the unit."* (p.6, lines 8-15)

(2) *"At some stage, which is difficult to pinpoint, bad faith crept into Michael Barry's attitude towards ACE."* (p. 39, lines 10-13)

(3) *"The only really real complaint of bad faith, which can be made is that at some point during this period Michael Barry changed his mind and decided that no lease would be granted."* (p. 41, lines 4-7)

The trial judge erred insofar as he attached insufficient weight to those findings in the context of the claim based on equity including proprietary estoppel and unconscionable conduct.

221. The trial judge indicated an erroneous view that the principles of equity, including the doctrine of part performance and/or equitable estoppel, were not of general or limited

availability in the context of establishing a claim in equity to a decree of specific performance of a contract for lease. The correct approach is clearly established in the jurisprudence, as demonstrated by cases such as *Mackie v Wilde (No. 2)* (*supra*) – which is binding on this Court and on the High Court - and *Plimmer v. Wellington* (1884) 9 App. Cas. 699. ACE had established an entitlement to a decree of specific performance on either basis on the evidence adduced and authorities opened.

222. With regard to the commencement date of the lease, the trial judge erred in failing to have sufficient regard to the import of decisions such as *Silver Wraith* and leading textbooks such as Farrell on *Specific Performance,* which make clear that express specification of the exact date for commencement is not an absolute prerequisite in all cases. At all events the date was identified on 22nd December, 2016 and ultimately crystallised by performance and execution on 16th January, 2017.

223. The assumption of employment contracts and obligations in respect of four staff pursuant to TUPE was a significant undertaking by ACE which alleviated Motorpark of all legal obligations in regard to the said employees, the burden of which was assumed by ACE. This ultimately took effect on 16th January, 2017.

224. The order of the High Court dismissing ACE's claim is to be set aside. In lieu it is entitled to a decree of specific performance of the agreement by Motorpark to grant it a 10 year lease of the body shop portion of the premises in Folio 354815F, Co. Roscommon, situate at Monksland, Athlone, Co Roscommon, together with the other benefits agreed and promised thereunder. The order dismissing the respondents' counterclaim is affirmed.

225. Regarding the injunction sought by ACE, in circumstances where JDM, its servants or agents, would not appear to have been directly implicated in the conduct complained of and it is inferred that Mr. Colin Barry is not now involved with any of the respondent companies, the court's provisional view is that no perpetual injunction is required. If ACE contends for

a different order, short written submissions identifying the basis for same should be provided to the respondents and the court within 21 days of this judgment being delivered, with a like period of time being afforded to the respondents to furnish a submission in response. Such submissions to be no longer than 2,500 words in length.

Costs

226. The order as to costs made in the High Court falls to be set aside. The appellant, having succeeded entirely in its appeal, is entitled to its costs in the High Court, together with all reserved costs and an order for the costs of this appeal, same to be ascertained in default of agreement. If either party contends for a different costs order, short written submissions identifying the basis for same should be provided to the other party and the court within 21 days of this judgment being delivered, with a like period of time being afforded to the other party to furnish submissions in response. Same to be no longer than 2,500 words in length.

227. Noonan and Pilkington JJ. concur in this judgment.