Neutral Citation [2013] IEHC 289

THE HIGH COURT

[2011 No. 10923P]

BETWEEN

SRI APPAREL LIMITED

PLAINTIFF

AND

REVOLUTION WORKWEAR LIMITED, DONAL O'SULLIVAN, PAUL BOND AND SAFETY WORLD LIMITED

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 21st day of June, 2013.

The parties and their relationship

1. The plaintiff is a limited liability company incorporated in this jurisdiction. It is the holder of the worldwide distribution rights in Caterpillar (commonly referred to as CAT) Clothing merchandise. It acquired these distribution rights from a corporation which I understand is incorporated in the United States of America, Summit Resource Imports LCC. The plaintiff is apparently controlled by Mr. Sean Gallinger, who described himself as Vice President of Summit Resource Imports LCC when testifying. At the time the plaintiff acquired the global distribution rights in the Caterpillar Clothing merchandise there was already an arrangement in place since 2006 under which a company controlled by the third named defendant (Mr. Bond) and his family, J. P. Bond & Co. Ltd. (the Bond Company) held the right to distribute Caterpillar Clothing merchandise in Ireland. Mr. Bond was a director of the plaintiff. According to a Form B10 lodged in the Companies Registration Office (CRO) on 9th July, 2010, he resigned as director of the plaintiff with effect from 17th February, 2010. Strangely, the abridged financial statements of the plaintiff for the year ended 31st December, 2008, which were filed in the CRO on 25th March, 2010, show Mr. Bond and Mr. Gallinger as signatory directors in the Directors' Report, which was dated 18th February, 2010.

2. The third named defendant (Mr. O'Sullivan) has been in the business of retailing protective clothing for the construction industry for many years. Since 1982 he has carried on that business through the medium of a company, O'Sullivan Safety Limited. That company commenced purchasing Caterpillar Clothing from the Bond Company in 2007. The only significance of that is that the personnel of O'Sullivan Safety Limited became familiar with Mr. Bond. Mr. O'Sullivan was introduced by Mr. Bond to Mr. Gallinger in June 2009. It is clear on the evidence that the Bond Company was in serious financial difficulties at the time, to the extent that it owed the plaintiff €730,000 in respect of stock. What happened as a result of the introduction was that the first named defendant (Revolution) was incorporated with Mr. O'Sullivan as an eighty per cent shareholder and Mr. Bond as a twenty per cent shareholder. The plaintiff then entered into a distribution agreement with Revolution on 16th August, 2009 (the 2009 Agreement) in which Mr. O'Sullivan and Mr. Bond participated.

3. The fourth named defendant (Safety) is a company incorporated in the State through which Mr. O'Sullivan has carried on business. While the plaintiff seeks relief against Safety, its involvement in the issues which arise in these proceedings is peripheral. The principal proponents are the plaintiff on one side and Revolution and Mr. O'Sullivan on the other side.

The 2009 Agreement

4. There was no Irish lawyer involved in the drafting of the 2009 Agreement on behalf of the plaintiff, nor did Revolution or the other parties obtain any legal advice in relation to its provisions at the time. Mr. Gallinger's evidence was that it was drafted by a family member of his who is a lawyer in the State of Montana. In any event, the parties to the agreement were expressed to be –

> (a) the plaintiff, referred to as "Grantor",
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> (b) a company referred to as "Bond and Company", whose function was expressed at the commencement as "to evidence their consent to the appointment of the Distributor",
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> (c) Mr. Bond and Mr. O'Sullivan, referred to at the commencement as "Guarantors of the Distributor's performance", and
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> (d) Revolution (although "Limited" was missing from its name), followed by the words "Donal O'Sullivan Distributor herein".

5. The provisions of the 2009 Agreement which were invoked by the parties were the following:

> (a) Clause 1.1, which was part of Clause 1 which was headed "Grant of Exclusive Distribution Rights", set out the term of the agreement – the term commencing on its execution (16th August, 2009) and expiring on 31st December, 2014, with provision for extension, which is not relevant. For that term the plaintiff granted to Revolution the exclusive right –
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>> (i) to purchase "Merchandise Products", which expression was defined in Clause 14 as meaning "CAT brand apparel . . . limited to workwear products for men, women and children . . ." from the plaintiff and from vendors appointed by the plaintiff, and
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>> (ii) to sell at wholesale and to distribute that merchandise to "mid and upper tier retailers only within the Countries listed on exhibit A (Territory)".
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> In fact, there was no exhibit A attached to the 2009 Agreement. Clause 1.1 then provided that Revolution would be invoiced for goods "at published or commonly used list price paid by other distributors, less 25%". It was then provided as follows:

> "Additionally, [Revolution] shall pay an amount equal to 7% of the greater of Minimum Wholesale sales or net wholesale sales (Sales Compensation) as a service and product development fee, payable on the 10th day following the close of each calendar month, with respect to [Revolution's] sales in that month. Such 7% fee shall not apply to sales to approved sub distributors, provided [Revolution] shall not make any sales to sub distributors without first obtaining the consent of [the plaintiff] evidenced by an addendum to this agreement, which agreement shall provide for all fees, if any, which shall apply to sales to each sub distributor."

(b) Clause 14.4 contained the following definitions:

> "The Terms "Minimum Purchases" and "Minimum Wholesale Sales" shall have monetary value as set forth on Exhibit B. In each Contract Year, Minimum Purchases and Minimum Wholesale Sales for each year shall be as provided on Exhibit B."

A document headed "Schedule B", not exhibit B, which will be considered later, became annexed to the 2009 Agreement after its execution.

(c) Clause 2, which was headed "Payments to [the plaintiff]", contained an introductory paragraph in the following terms:

> "Prior to execution of this agreement the parties have conferred and reached agreement on the content of exhibit B, which is attached hereto and initialled as approved by the parties."

As I have stated, there was no exhibit B attached to the 2009 Agreement, but there was a Schedule B, but apparently it was not initialled by the parties prior to the execution of the agreement.

(d) Clause 2.1 dealt with "Minimum Purchases" and provided that Revolution agreed to make Minimum Purchases in each contract year as described on exhibit B "for each country within the territory for the products listed on exhibit B". Schedule B listed thirteen countries in the European Union and three other countries (Serbia, Russia and Turkey). It set out figures for each country for 2009, 2010, 2011, 2012 and 2013, but strangely not for 2014. The relevant currency is not indicated, but I understand that the figures were intended to represent purchases in euro. In the case of Germany, Italy and Russia zero appears for each year. No products are listed in Schedule B.

(e) Clause 2.2 dealt with "Minimum Wholesale Sales" and provided that Revolution agreed to make "Minimum Wholesale Sales in each contract year as described on exhibit C for each country [within] the territory". While no exhibit C was annexed to the 2009 Agreement a Schedule C became annexed to it after execution. It listed the same countries as Schedule B and once again covered the years 2009, 2010, 2011, 2012 and 2013. It also indicated zero sales for each year in relation to Germany, Italy and Russia. The relevant currency is not indicated but I understand it was intended to represent sales in euro.

(f) The term "Territory" was defined in Clause 14.1 as meaning the countries shown on exhibit A, subject to adjustment and changes provided by the agreement. As I have stated, there was no exhibit A.

(g) Clause 4 dealt with "Approved Sale Channels", and provided in Clause 4.3:

> "[Revolution] shall not export or permit to be distributed, either directly or indirectly, any Merchandise to any Person located outside of, or who [Revolution] knows, or reasonably should have known, intends to resell such Merchandise outside of, the Territory unless such sale is approved in advance in writing by [the plaintiff]."

(h) Clause 11 dealt with events of default and termination. The events of default were listed in Clause 11.1 from para. (a) to para. (k). For instance, paragraph (g) covered the eventuality of Revolution's purchases or sales failing to equal or exceed the Minimum Purchases or Minimum Wholesale Sales in any calendar year and Revolution failing to submit a business plan within thirty days acceptable to the plaintiff to cure or mitigate the breach or the eventuality of Revolution failing to pay "7% Sales Compensation according to Minimum Sales". Paragraph (j) covered the eventuality that the personal obligation of Mr. O'Sullivan or Mr. Bond "as co maker/Guarantor" of the 2009 Agreement not remaining in full force and effect.

(i) Clause 11.3 provided, *inter alia*, for automatic termination of the 2009 Agreement in the event of default under a number of paragraphs in Clause 11.1, including paragraphs (g) and (j).

(j) Clause 11.4, in broad terms, provided that on termination Revolution would no longer have the right to sell or otherwise transfer merchandise or use the CAT brand marks.

(k) Clause 12 dealt with Revolution's obligations in relation to financial disclosure. It was obliged to produce various financial statements to the plaintiff at the end of its fiscal year (Clause 12.1). Under Clause 12.2(b) Revolution and the guarantors (Mr. O'Sullivan and Mr. Bond) were obliged "collectively" to "maintain at all times a consolidated net worth of at least Euro US$5,000,000" (*sic*), which I assume was intended to refer to €5m. Clause 12(2)(c) provided for a deemed termination of the 2009 Agreement in the event of failure to comply with the financial covenants set out in Clause 12.2 on the three month anniversary of the first default, unless the plaintiff in its sole discretion should "waive such termination in writing specifically referring" to Clause 12.

(l) Clause 13 dealt with the effect of, *inter alia*, early termination of the 2009 Agreement and in Clause 13.2 conferred on the plaintiff the option, referred to as the "Inventory Purchase Option", to purchase all of the inventory of Merchandise of Revolution which remained on hand and which was not subject to orders from customers, for "an aggregate purchase price equal to the lower of cost or market".

(m) Clause 19 provided that the 2009 Agreement might not be "amended or modified except by written instruments signed by each of the parties" thereto.

(n) Finally, in relation to the general provisions, Clause 9, which was headed "Limitation on Consequential Damages" provided:

> "[The plaintiff] and [Revolution] agree that neither of us will make any claim against the other for lost profits or other consequential damages. [Revolution] agrees that in no event will termination of this Agreement by [the plaintiff] give rise to a damage claim by [Revolution] against [the plaintiff]".

6. The general provisions in the 2009 Agreement were followed by so-called "Special Covenants", which contained the following elements:

(a) A company referred to as "Bond Safety" executed the 2009 Agreement "as the incumbent distributor . . . to evidence its consent" to the appointment by the plaintiff of Revolution as distributor.

(b) Revolution, in consideration of its appointment, covenanted and agreed to assume the outstanding business being conducted by the Bond Safety and the plaintiff and to conduct that business in conformity with the 2009 Agreement. It also entered into a non-compete clause for two years following the termination or expiration of the 2009 Agreement.

(c) Mr. O'Sullivan and Mr. Bond "individually" executed the 2009 Agreement "as co maker with Revolution", and "individually" guaranteed all obligations of Revolution thereunder for the initial term, that is to say, until 31st December, 2014.

(d) There were further confidentiality and non-compete provisions which are not relevant for present purposes.

7. The manner of execution of the 2009 Agreement has been of some controversy. First, the date which appears on it is 16th August, 2009. It was signed on behalf of the plaintiff by Mr. Gallinger whose "title" is stated to be "President/Director". It was signed on behalf of Bond Safety, not "Bond and Company" as named at the commencement, by Mr. Bond, whose title was given as Director. It was signed on behalf of Revolution by Mr. O'Sullivan, whose title was left blank. There were then further signatures by Mr. O'Sullivan and Mr. Bond. In the case of Mr. Bond, he signed within the following statement:

"For and On Behalf of Paul Bond (individual co maker and guarantor

By:

Name: Individual co maker

Title: Owner."

Mr. Bond's signature appears on the second line after "By". In the case of Mr. O'Sullivan, the format of the execution clause was similar. However, the space for his name on the first line was left blank. He signed on the second line and he was described in the same manner as Mr. Bond, namely, as "individual co maker and guarantor" and opposite "Title" as "Owner". As an experienced businessman, in my view, Mr. O'Sullivan who executed the 2009 Agreement twice, on behalf of Revolution and on his own behalf, could have been under no illusion that he was signing for the second time other than as guarantor.

8. As I have recorded, there was no exhibit A attached to the 2009 Agreement. There is a dispute as to whether Schedule B and Schedule C were attached to it when it was executed by the parties on 16th August, 2009. In any event, it was acknowledged by Mr. O'Sullivan that he received copies of both schedules a few weeks after 16th August, 2009. I think it is probable that both schedules were attached to the 2009 Agreement some weeks after its execution.

9. Schedule B is headed:

"CAT workwear sales projections – Europe – 5 years – PB February 26th 2009."

In other words, it was compiled by Mr. Bond, apparently, before he approached Mr. O'Sullivan. Schedule C is headed:

"NEWCO CAT workwear sales projections – Europe – 5 years – PB June 29th 2009. "

Schedule C was clearly prepared after Mr. Bond engaged with Mr. O'Sullivan, as the evidence makes it clear that the proposal was that Mr. O'Sullivan and Mr. Bond would operate the CAT distributorship through a new company to be incorporated. Frankly, it is difficult to link Schedule B and Schedule C to Clause 2 referred to earlier. It is worth recalling that "exhibit B" was intended to set out "Minimum Purchases", whereas "exhibit C" was to set out "Minimum Wholesale Sales". Schedule B and Schedule C, *ex facie*, both set out projected sales in Europe, Schedule B with apparently, some precision, whereas the projections in Schedule C was very much in round figures.

10. As regards the contents of the schedules, to take one example, the total projected sales under Schedule B for the year 2011 amounted to €5,316,754, whereas the corresponding figure in Schedule C amounted to €9,700,000. More significantly, it is difficult to link either Schedule B or Schedule C to the provisions in the body of the 2009 Agreement. For instance, one must assume that exhibit B as referred to in Clause 2.1 was intended to be different to exhibit C referred to in Clause 2.2. Moreover, to recapitulate, under Clause 1.1 the Sales Compensation at the rate of seven per cent was payable by reference to the greater of "Minimum Wholesale sales or net wholesale sales" every month. While it was obviously intended that "Minimum Wholesale Sales" would be set out in exhibit C, Schedule C contains sales projections and is not broken down on a monthly basis. While, no doubt, it would be a simple operation to divide the yearly figure by twelve, Clause 1.1 envisaged the Sales Compensation being paid monthly. However, as will appear later, on the basis that Schedule C represents exhibit C, in respect of the year 2011 the plaintiff is claiming sales compensation in the sum of €776,000 (representing eight per cent, not seven per cent, of €9,700,000) from Revolution for that year, which, as will appear later, in the overall scheme of things is utterly absurd.

Departure of Mr. Bond from Revolution

11. Before outlining the circumstances in which Mr. Bond departed from Revolution, I should make it clear that my understanding is that Mr. Bond is Paul Francis Bond who is named as a twenty per cent shareholder and a director of Revolution in the Annual Return (Form B1) for the period up to 23rd December, 2009 lodged in the CRO on 30th September, 2010. I am also assuming that he was one and the same person as Paul Bond, who, as I have already recorded, retired as a director of the plaintiff as per the form B10 referred to earlier, which was lodged in the CRO on 9th July, 2010.

12. The evidence of Mr. O'Sullivan was that Mr. Bond falsified an order for CAT merchandise, which he falsely represented came from a German client, which, in the belief that it was a genuine order, Revolution set about filling. When Revolution did not receive payment from the German client for the goods which were, apparently, shipped to the German client in three separate containers, Mr. O'Sullivan met with Mr. Bond, who confirmed to him that the entire transaction was falsified and that he had falsified all of the documentation in relation to it. The Court was informed that the matter was reported to An Garda Síochána and is being investigated by the Garda Bureau of Fraud Investigation. In any event, Mr. Bond left Revolution at that stage in October 2010, having resigned as a director of Revolution on 24th October, 2010. However, the consequences of what happened were very serious for Revolution. It succeeded in retrieving the stock which was supposed to go to the German client, but it was left with a significant amount of unsold stock. Moreover, its bank, which had provided a discounting facility, removed that facility. It was against that background that the 2009 Agreement was varied in 2011 by an agreement between the plaintiff and Revolution (the 2011 Agreement).

The 2011 Agreement

13. The 2011 Agreement is in the form of a letter, which was dated 16th February, 2011, from the plaintiff to Revolution. Once again, it would appear that neither side obtained legal advice in relation to it. The purpose of the document was expressed to be to modify the 2009 Agreement "including designated territories" between the plaintiff and Revolution "along with our agreement on credit, open balances and payment plan". The amendments to the 2009 Agreement were set out as follows:

> (a) There was an acknowledgment by Revolution of receipt of inventory as set out in Schedule A. Schedule A itemised merchandise to the value of US$55,872. It was provided that the plaintiff should retain title to the merchandise until such time as payment should be made, and, as Revolution tendered payment, the title would be released.
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> (b) A payment plan was then set out for the Schedule A inventory together with "outstanding fees totalling €64,542". . However, there was a later adjustment to the figure of €64,542 by the reduction therefrom of the sum of €7,000, in consideration of which Revolution agreed to transfer ownership of a certain CAT display stand to the plaintiff and the net figure (€57,542.00) was claimed in these proceedings as "Sales Compensation". The aggregate of those sums was to be paid in instalments of US$15,000 per month until the debt would be paid and the total sum was to be paid by 31st August, 2011. It was provided that the plaintiff could elect as to how to appropriate payments, whether to fees or goods. That provision turned out to be irrelevant, because, as it happened, the plaintiff only made one payment of €15,000. However, it was provided that the plaintiff would fully relinquish title to the goods to Revolution assuming the fees were paid in full and the goods under Schedule A were paid for in full.
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> (c) Another element of the agreement was that, as regards the goods set out in Schedule B to the 2011 Agreement, which were referred to as the "German" goods, the value of which was set out at US$75,131, Revolution agreed to tender payment in full for those goods no later than the fifteenth day of the month following the sale of the goods, but in any event no later than 31st August, 2011. Once again, it was provided that the plaintiff should retain title to those goods until payment should be made.
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> (d) Schedule C listed goods, the value of which was not stated, but in respect of which the plaintiff agreed to release the original bills of lading to Revolution on execution of the 2011 Agreement.
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> (e) The clause (Clause 6) varying the designated territories provided as follows;
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>> ". . . Revolution's territory designations are hereby amended to exclude United Kingdom (excluding Northern Ireland) and France."
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> It is interesting to note that the Workwear sales projections in Schedule C of the 2009 Agreement for the year 2011 in respect of France and the United Kingdom, albeit, including Northern Ireland, (€6m) represented approximately sixty two per cent of the total projections (€9.7m). Also of significance is that Clause 6 addressed the situation in relation to existing unfulfilled orders held by Revolution. It provided as follows:
>
>> "It is understood and agreed further that Revolution has existing unfulfilled orders with entities located in the territories revoked herein, and Revolution shall be entitled to fulfil the obligations under the open orders, as specifically detailed in Schedule D hereof."
>
> That provision becomes relevant later in relation to an element of the counterclaim of Revolution.
>
> (f) There was provision in Clause 7 in relation to inventory set out in Schedule E attached to the 2011 Agreement. Schedule E listed inventory to a total value of US$867,105.38 (after deduction of twenty five per cent discount). As I understand Clause 7, in the context of the evidence, that inventory had been ordered by Revolution. Some of it was held in Asia and some in the United Kingdom. The provision made in relation to it is anything but clear. However, my understanding is that the intention was that the plaintiff would use its best endeavours to sell the inventory in Asia to other distributors and would report the remaining inventory to Revolution on a monthly basis. Revolution was granted until 31st December, 2011 to pay for all remaining inventory in accordance with its original purchase order.
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> (g) It was provided that, subject to Revolution strictly complying with the provisions of the 2011 Agreement, the plaintiff would waive Revolution's breaches of the distributorship agreement (i.e. the 2009 Agreement).
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> (h) Revolution was required to furnish to the plaintiff by 1st June, 2011 revised purchase and sale figures for its "sales territory" for the balance of 2011 and for the years 2012 through 2014, which would be incorporated in the amendment to the distributorship agreement upon mutual acceptance by the parties.

14. There were a number of other provisions in the 2011 Agreement which are not in issue. However, it was expressly provided that all other terms of the 2009 Agreement would remain in full force and effect. The document in letter form was signed by Mr. Gallinger on behalf of the plaintiff. Mr. O'Sullivan acknowledged and agreed to the terms set out on behalf of Revolution by signing below Mr. Gallinger's signature.

The plaintiff's claim as pleaded

15. These proceedings were commenced by plenary summons, which issued on 30th November, 2011. Subsequently, the plaintiff brought an application for interlocutory injunctive relief, which was dealt with on the basis of undertakings given.

16. In the statement of claim delivered by the plaintiff on 20th January, 2012, the plaintiff sought the following reliefs:

(a) injunctions restraining the defendants –

(i) from exporting or permitting the distribution of CAT merchandise in France, Canada or the United Kingdom (excluding Northern Ireland) in the absence of approval of the plaintiff,

(ii) from exporting or permitting the distribution of CAT merechandise on the website www.amazon.co.uk in the absence of approval from the plaintiff, and from selling the CAT product to Brico Depot retail stores in France,

(b) mandatory orders directing Revolution –

(i) to furnish a complete customer list to the plaintiff,

(ii) to furnish to the plaintiff revised purchase and sales figures for their sales territory for the balance of 2011,

(iii) to deliver to the plaintiff certain statements of account for the fiscal year 2010, and

(iv) to furnish to the plaintiff certain statements of account for the first three quarters of 2011.

(c) an order preventing Revolution, Mr. O'Sullivan and Mr. Bond from seeking to reduce, transfer or otherwise dissipate their assets in this jurisdiction below €5m,

(d) damages for breach of contract, and

(e) judgment against Revolution, Mr. O'Sullivan and Mr. Bond for liquidated sums: US$458,565.70 and €96,542.

The sums claimed in respect of liquidated damages were subsequently varied. The plaintiff also claimed interest which must be Courts Act interest, because there is no provision for contractual interest in the contract documents. The foregoing reliefs were claimed on the basis that the defendants were in breach of their various obligations under the 2009 Agreement and the 2011 Agreement. The claims against Mr. O'Sullivan and Mr. Bond were against them in their status as guarantors. The only allegation against Safety, who was not a party to the agreements, was that it had contacted distributors in the Canadian market with a view to distributing CAT merchandise into Canada.

Mr. Bond's defence and his exit from the hearing

17. Mr. Bond's solicitors delivered a defence on 30th January, 2012. However, when the matter came on for hearing, counsel appeared on behalf of Mr. Bond. The Court was informed by counsel for the plaintiff that an interim agreement had been reached between the plaintiff and Mr. Bond and that the plaintiff was not interested in pursuing Mr. Bond at that stage. An order was sought by consent of the plaintiff and Mr. Bond adjourning the case against Mr. Bond with liberty to re-enter. Notice of indemnity and contribution had been served by Revolution, Mr. O'Sullivan and the fourth defendant on Mr. Bond and counsel for those defendants indicated that they were anxious to pursue relief on foot of that notice. Counsel for Mr. Bond indicated that he did not propose taking part in the proceedings on the claim between the plaintiff and the other defendants. The proceedings by the plaintiff against Mr. Bond were adjourned by consent with liberty to re-enter. The claim on foot of the notice of indemnity and contribution against Mr. Bond by the other defendants remains to be heard and determined, so far as is necessary.

18. Accordingly, this judgment relates to the plaintiff's claim against Revolution, Mr. O'Sullivan and Safety, which parties will hereafter be collectively referred to as "the Defendants".

The Defendants' defence

19. The Defendants delivered a defence and counterclaim on 26th January, 2012. In the defence it was pleaded as follows:

(a) As regards Clause 4.3 of the 2009 Agreement, it is in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and s. 4 of the Competition Act 2002 (the Act of 2002) and therefore is void and/or unenforceable.

(b) As regards the territorial limitation, the 2009 Agreement is void and/or unenforceable on the basis that it failed to define the territories into which Revolution was permitted to sell and distribute CAT merchandise. In the alternative, it was denied that Revolution was restricted to the territories listed by the plaintiff in the statement of claim. That list included all of countries listed in Schedule B which became part of the 2009 Agreement, other than Germany, Italy and Russia, in respect of each of which zero appeared for each year, and also Greece, in respect of which zero appeared for the year 2009 but not for the other years.

(c) It was pleaded that the 2009 Agreement had terminated automatically by operation of Clause 11.3, by reason of an event of default referred to in Clause 11.1.(g). In the alternative, it was pleaded that the 2009 Agreement automatically terminated by operation of Clause 11.3 by reason of an event of default referred to in Clause 11.1.(j), on the basis which will be outlined later, that Mr. O'Sullivan's personal obligation as guarantor did not remain in full force and effect.

(d) Breach of Clause 12.2(b) of the 2009 Agreement by Revolution and Mr. O'Sullivan was admitted, but it was pleaded that by operation of Clause 12.2(c) the 2009 Agreement was deemed to be terminated by reason of that breach on the part of Revolution and Mr. O'Sullivan after three months, the plaintiff having failed to waive such termination in writing. Alternatively, it was pleaded that Clause 12.2(b) was void for uncertainty.

(e) If the 2009 Agreement remains in force, it was alleged that the plaintiff is not entitled to maintain the claim for damages and/or for judgment by reason of Clause 9 of the general provisions of the 2009 Agreement.

(f) It was pleaded that the first defendant is entitled to rescind the 2009 Agreement by reason of non-disclosure by the plaintiff and/or Mr. Bond that on 16th August, 2009 that Mr. Bond was a director of the plaintiff. Such failure, it was contended, amounted to a breach of an implied term of the 2009 Agreement that the parties thereto were acting in good faith. It was also pleaded that such non-disclosure was a breach of s. 194 of the Companies Act 1963 (the Act of 1963). It was pleaded that had the alleged conflict of interest been disclosed at the time, neither Revolution nor Mr. O'Sullivan would have entered into the 2009 Agreement.

(g) As regards the 2011 Agreement, it was pleaded that it was not signed by all the parties and, in particular, was not signed by Mr. O'Sullivan in a personal capacity or by Mr. Bond. On that basis it was pleaded that the 2011 Agreement is inoperable and unenforceable because it did not comply with the requirement of Clause 19 of the 2009 Agreement, which I have outlined above.

(h) The various breaches of contract alleged against the Defendants were denied and it was denied that any money is due and owing by the Defendants to the plaintiff.

(i) It was alleged that Mr. Bond perpetrated a serious and significant fraud on Revolution while a director of the plaintiff, so that if the plaintiff suffered the alleged or any loss, it was caused wholly and exclusively as a result of Mr. Bond's actions.

(j) As regards the claim against Mr. O'Sullivan as guarantor, it was asserted that the guarantee is unenforceable by operation of law. Further, it was asserted that the guarantee was discharged by the substantial variation of the 2009 Agreement by the 2011 Agreement, which materially affected the ability of Revolution to meet its obligations under the 2009 Agreement, thereby significantly prejudicing Mr. O'Sullivan. That plea overlooks the fact that Mr. O'Sullivan executed the 2011 Agreement on behalf of Revolution.

(k) As regards the fourth defendant, the only wrongdoing alleged against it was denied and it was asserted that no cause of action is disclosed against the fourth defendant and that the plaintiff is not entitled to any relief against the fourth defendant.

(l) As regards the relief sought by the plaintiff, there was an allegation that the plaintiff has failed to mitigate its loss and that it failed to exercise the "inventory purchase option" provided for in Clause 13.2 of the 2009 Agreement.

Revolution's counterclaim

20. Apart from a claim for damages for breach of contract and/or wrongful interference with economic relations, interest pursuant to statute and costs, three claims were pursued by way of counterclaim at the hearing, being the counterclaim of Revolution solely. These were:

(a) A claim for a liquidated sum of €42,250 for alleged breach by the plaintiff of the provision in the 2011 Agreement to release to Revolution the original bills of lading for the goods set out in Schedule C of that agreement upon its execution.

(b) A claim for a liquidated sum of €128,347, which Revolution alleges represents the amount it would have earned if a stock swap arrangement which it had negotiated with a distributor in the United Kingdom had concluded, but which did not conclude because of what is alleged as wrongful intervention in the negotiations by the plaintiff, which resulted in the distributor in the United Kingdom reneging on the arrangement. In its defence to the counterclaim, the plaintiff denies any wrongdoing in relation to the stock swap.

(c) A claim for a sum of €57,644 for alleged breaches by the plaintiff of the provisions of the 2009 Agreement. This claim, which was not pleaded, is based on information which emerged from documentation procured by Revolution's solicitors two days prior to the commencement of the hearing. What emerged from the documentation was that the plaintiff had begun selling CAT merchandise directly to a company in the United Kingdom, Footsure Western Limited (Footsure), and a company in France, Covepro, in consequence of which Revolution was deprived of discount at the rate of twenty five per cent on the value of the sales in question, which was approximately US$310,000. The sum of €57,644 is the equivalent of US$77,500, which is twenty five per cent of US$310,000.

Structure of the judgment

21. As regards both the plaintiff's claim and the counterclaim of Revolution, the money (i.e. liquidated sums) elements of each evolved to a certain extent in the course of the hearing. Eventually, the position of each side on each money element of both the claim and the counterclaim was tabulated by agreement of the parties. I propose, in the interests of clarity, setting out in tabular form and addressing the money elements of the claim and the counterclaim before considering the legal issues.

22. In addressing the remainder of the issues, I will deal first with some miscellaneous defences raised by the Defendants and then with the Defendants' challenge to the enforceability of the 2009 Agreement, or particular clauses thereof, on the following three grounds raised by them in the defence:

(a) under competition law;

(b) for alleged material non-disclosure; and

(c) alleged automatic termination of the 2009 Agreement by default.

I will then address the remedies, other than the money judgments, sought on the claim and the counterclaim, including the claim for injunctive relief, except the remedies sought against Mr. O'Sullivan on the guarantee. Finally, I will deal with the claim against Mr. O'Sullivan on the guarantee.

The money element of the plaintiff's claim

23. Table A below sets out in tabular form the respective positions of the plaintiff and the Defendants in relation to the money elements of the plaintiff's claim.

TABLE A

ITEM	PLAINTIFF'S POSITION	DEFENDANT'S POSITION
1. Schedules A & B of the 2011 Agreement		
Schedule A:	US$55,872	US$55,872
Schedule B:	US$75,131	US$75,131
Payment made:	(US$15,000)	(US$15,000)
		(US$19,600)
Dollar Total	US$116,003	US$96,403
Euro equivalent	**€86,658**	**€72,050**
2. Schedule E of the 2011 Agreement		
Asia:	US$161,577	nil
UK:	US$168,000	US$20,789
Dollar Total	US$329,577	US$20,789
Euro equivalent	**€246,320**	**€15,845**
3. Sales Compensation (rebates)		
As per 2011 Agreement	€57,542	€57,542
Sales post 2011 Agreement	€776,000	€38,957
Total	**€833,542**	**€96,499**
TOTALS (Items 1,2 and 3)	**€1,166,520**	**€184,394**

24. Before embarking on the process of explaining the difference between the plaintiff's position and the Defendants' position, it is necessary to record that, while the Defendants set out their position in relation to the figures claimed by the plaintiff, the Defendants' ultimate position is that they do not owe any of the sums claimed by the plaintiff on the basis of the legal arguments which I will address later.

Item 1: Schedules A and B of the 2011 Agreement
25. As regards Item 1, I have already recorded the amounts set out in Schedule A and Schedule B of the 2011 Agreement earlier and I have recorded that only one payment was made by Revolution after the execution of the 2011 Agreement in the amount of €15,000, and there is no issue between the parties as to the relevant figures. The difference between the Defendants' position and the plaintiff's position in relation to Item 1 is that the Defendants claim that they are entitled to a reduction of US$19,600. This figure represents the value of goods which were purchased by Revolution at the request of Covepro for the French market prior to the execution of the 2011 Agreement. The Defendants' position is that the failure of the plaintiff to release the bills of lading in respect of the goods until after the signing of the 2011 Agreement had the effect of depriving Revolution of the only market into which the goods could be sold, because the 2011 Agreement excludes France from the territories to which Revolution can distribute. While Mr. O'Sullivan may not have appreciated that the execution of the 2011 Agreement on behalf of Revolution would have that consequence, the fact is that he executed the 2011 Agreement and, in my view, Revolution is bound by it. Revolution has no basis for seeking a reduction of, or a credit for, US$19,600 as it contended. Therefore, insofar as the plaintiff has a sustainable claim in respect of the Schedule A and Schedule B, the quantum of the claim is €86,658.

Item 2: Schedule E of the 2011 Agreement
26. In relation to Item 2, I have already commented on the lack of clarity in the 2011 Agreement in relation to the Schedule E merchandise. The pleadings, the evidence and the legal submissions have compounded that lack of clarity. Just looking at the relevant clause in the 2011 Agreement on its own, there is no mention of the "UK". What one learns from it is that Revolution had ordered merchandise to the value of US$1,156,140.50l, which is itemised in Schedule E, in respect of which it was obliged to pay the plaintiff US$867,105.38, having got the benefit of the twenty five per cent discount provided for in the 2009 Agreement. The essence of the relevant clause in the 2011 Agreement is that, without, to use a colloquialism, letting Revolution off the hook, the plaintiff would endeavour to sell the merchandise up to 31st December, 2011, at which point Revolution would have to pay for all the unsold inventory. Obviously, if Revolution was going to be required to pay for the unsold inventory, it would be entitled to receive that merchandise. However, that is not expressed in the 2011 Agreement and, having regard to what happened, it would appear that Mr. Gallinger had not taken on board that, if he was to get paid by Revolution for the remaining inventory, that merchandise had to be delivered to Revolution. In fairness to Mr. Gallinger when, on the third day of the hearing, he was being cross-examined in relation to the Schedule E goods, which are now in the United Kingdom, his response to counsel for Revolution was that, if Mr. O'Sullivan wanted them, he could take them if he had paid for them. In order to determine how feasible that proposition is, it is necessary to consider how this item of the claim has been addressed in the pleadings and in the evidence.

27. In the statement of claim the plaintiff claimed US$330,249.01 in respect of Schedule E merchandise. In response to a notice for particulars served by the Defendants' solicitors, the plaintiff's solicitors disclosed that some of the remaining Schedule E merchandise was stored in warehouses in China and that some of it was retained in a third party warehouse in the United Kingdom. A spreadsheet was furnished particularising the sales of Schedule E merchandise. As regards the costs incurred in relation to the storage of the merchandise, the reply was that the cost was ongoing and the plaintiff had not been invoiced in respect of it. To complicate matters even further, in a letter of 20th February, 2012, the plaintiff's solicitors informed the Defendants' solicitors that, having regard to the sales of Schedule E merchandise achieved by the plaintiff to other distributors, the balance due and owing in respect of Schedule E merchandise which remains in storage in Asia was US$215,436, as particularised on an attached spreadsheet, and US$234,581.15 (inclusive of freight and duty charges), as particularised on a second attached spreadsheet. The first spreadsheet was a replica of the spreadsheet which was attached to the reply to notice for particulars. The value of "Unsold Goods at Factory" (otherwise ATS, i.e. available to sell) was given as US$215,436 on that spreadsheet. The second spreadsheet contained merchandise extracted from the first spreadsheet (Deluxe Performance Jacket), which had been shipped from Asia. The total value of the goods was shown as US$224,320, which, together with duty and freight in the sum of US$10,261.15 made up the figure of US$234,581.15 claimed in the letter of 20th February, 2012. It was noted on the second spreadsheet that the sum did not include "storage and interest". That was

the state of play on the pleadings.

28. In opening the case, counsel for the plaintiff stated that the plaintiff had sold the considerable majority of the merchandise the subject of Schedule E. When the statement of claim was delivered, the amount due in respect of unsold inventory was US$330,249.01, the figure referred to in the statement of claim. At the time of the opening, that amount had increased to US$383,535 in respect of goods held in Asia and in the United Kingdom which had not yet been sold. However, Mr. Gallinger, in his evidence in chief, gave the figures set out in Table A as being the components of the amount the plaintiff claims is due under Schedule E of the 2011 Agreement. His evidence was that the plaintiff had to move some of the merchandise from Asia to the United Kingdom and the components of the claim were:

> (a) US$161,577 representing seventy five per cent of the list price (US$215,436) of the merchandise still in Asia, thus giving Revolution its discount of twenty five per cent; and
>
> (b) US$168,000 to cover the merchandise in the United Kingdom and freight and excise duty, but net of discount.

Mr. Gallinger's evidence was that the efforts to sell the merchandise had continued. His evidence was that the goods in Asia would probably be sold within the following twenty to twenty four months, although the merchandise in the UK was becoming more difficult to dispose of.

29. The factual position became even more complicated in the course of the cross-examination of Mr. Gallinger. As regards the merchandise in Asia, an analysis of the spreadsheet produced by the plaintiff's solicitors, which had been carried out on behalf of Revolution and which it was contended demonstrated that the plaintiff had realised approximately US$30,000 from sales already effected to third parties more than it would have realised from the sale to Revolution, was put to Mr. Gallinger. While I do not necessarily agree with the submission made on behalf of the Defendants that Mr. Gallinger accepted that proposition, it does seem to be irrefutable. One aspect of Mr. Gallinger's response was that the figure claimed did not cover warehousing and storage costs. The reality is that the plaintiff put no quantified claim for warehousing and storage costs before the Court.

30. The position in relation to the merchandise shipped out of Asia and regarded as now being in the United Kingdom was even more complicated. The first point I would make is that, as a matter of simple arithmetic, the sum claimed, US$168,240 (rounded down to US$168,000 on Table A) represents seventy five per cent of the total value of goods as shown on the second spreadsheet annexed to the letter of 20th February, 2012 and does not include duty and freight. It transpired that the plaintiff had issued three invoices in respect of the entire complement of Deluxe Performance Jackets to the customers to whom they were shipped from Asia. Two invoices in the amount of US$67,105.77 each issued to Footsure on 9th March, 2011 and one invoice for US$11,613 issued to a customer in Gothenburg on 9th March, 2011. In relation to those invoices, the position adopted by Mr. Gallinger under cross-examination was as follows:

> (a) He acknowledged that the merchandise sold to Gothenburg should be deleted from the plaintiff's claim. However, this is not reflected in Table A.
>
> (b) As regards the merchandise shipped to Footsure, his contention was that, notwithstanding that invoices had issued, the merchandise had not been sold to Footsure and remained in the United Kingdom unsold. The invoices were issued "to keep track" of the merchandise. In cross-examination his explanation was that the plaintiff does not maintain inventory because its "business model" does not provide for that. He also explained the raising of the invoices on the basis that excise duty had to be paid in the United Kingdom and, as the plaintiff is not a registered importer in the United Kingdom, the merchandise had to be invoiced to Footsure. To further complicate matters, it is clear from the spreadsheet that Footsure paid half of the amount invoiced to it to the plaintiff. However, both Mr. Gallinger and Mr. James Gardiner, the Chief Executive Officer of Footsure, who testified on behalf of the plaintiff, stated that Footsure was to get credit from the plaintiff, if it did not sell the merchandise. Mr. Gardiner's evidence was that he had not sought a credit note, because he was still trying to sell the merchandise.

31. The Defendants' position is that, if the plaintiff has a sustainable claim under Schedule E of the 2011 Agreement it should be limited to €15,845 (as set out on Table A). The position of the Defendants is that the plaintiff has suffered, and will suffer, no loss in relation to the goods remaining in Asia because, as Mr. Gallinger testified, the plaintiff expects to sell those goods within twenty four months and the plaintiff will probably realise more from those sales than it would have realised if Revolution distributed the goods. In relation to the merchandise in the United Kingdom, the Defendants' position is that all the plaintiff is entitled to is the difference between the sum claimed (US$168,000) and the aggregate amount of the three invoices issued (US$147,211). Accordingly, all that is due in relation to Item 2 is US$20,789, equivalent to €15,845. This sum, the Defendants contended, should be set off against the gains the plaintiff will make, as a matter of probability, on the sale of the merchandise in Asia.

32. It has to be acknowledged that Mr. Gallinger adopted a pragmatic and sensible approach in addressing the Schedule E inventory in February 2011. However, it is unfortunate that what he had in mind was not formulated with greater clarity in the relevant clause of the 2011 Agreement. As the trawl through the pleadings, the evidence and the submissions reflected in the preceding paragraphs indicates, the plaintiff has pursued a claim under Item 2 on an ad hoc basis and without actually focusing on the loss, if any, which the plaintiff may incur in consequence of Revolution not taking delivery of, and paying for, the Schedule E inventory which it had ordered. If the Court were to allow the plaintiff's claim as formulated, the probability is that the plaintiff would be paid twice for some, if not all, of the merchandise in issue rather than suffer a loss in respect of it. Moreover, insofar as the plaintiff is incurring warehousing and storage costs and claims an entitlement to interest on the monies which should have been paid to it by Revolution for the goods until the sale thereof has been or will be achieved, the plaintiff has not put evidence before the Court which quantifies the plaintiff's claim. Therefore, the Court cannot assess such loss, if any, as the plaintiff has incurred or may incur. As regards so much of the Schedule E merchandise in Asia as was shipped to the United Kingdom, I am also of the view that Mr. Gallinger on behalf of the plaintiff took a pragmatic and sensible view, as evidenced by his e-mails from 28th February, 2011 to 9th March, 2011 to Mr. O'Sullivan. Mr. O'Sullivan, on the other hand, seems to have adopted a "head in the sand" approach. I wish to make it clear that I reject the Defendants' contention that the plaintiff's claim for US$168,000 in respect of the Schedule E merchandise which ended up in the UK reflects an attempt on the part of the plaintiff to maintain a "highly misleading and unmeritorious claim" and is "an exaggerated and grossly inflated claim that suggests bad faith" on the part of the plaintiff. I have no doubt that Mr. Gallinger was attempting to mitigate the plaintiff's loss in his dealings with Footsure. I also accept the evidence of Mr. Gardiner that Footsure had not been as successful in selling the merchandise as he had hoped. However, the only reasonable inference from his evidence is that he expected that Footsure would dispose of the merchandise and, as a matter of probability, that will occur.

33. Having regard to all of the evidence, aside from the legal issues which will be addressed later, I have come to the conclusion that the plaintiff has not established an entitlement to €246,320, or indeed any sum, for breach of the clause in the 2011 Agreement in

relation to the Schedule E merchandise.

Item 3: Sales compensation
34. The figure of €57,542 which appears in Table A represents the figure of €64,542 which Revolution agreed to pay to the plaintiff in respect of "outstanding fees", meaning sales compensation, in accordance with Clause 1.1 of the 2009 Agreement up to the date of the 2011 Agreement or, more correctly, up to the end of January 2011, less the sum of €7,000 by which the plaintiff agreed to reduce that sum in consideration of the transfer of the ownership of the CAT display stand to it, which reduction was eventually conceded by the plaintiff. Aside from the legal arguments which will be outlined later, the Defendants accept that €57,542 represents the figure due in accordance with the 2011 Agreement, but they deny that that amount is due to the plaintiff.

35. Having regard to the observation made earlier in relation to the plaintiff's claim for €776,000 in respect of sales compensation for the year 2011, it should come as no surprise that I have difficulty in finding any reasonable basis for it. Nonetheless, it is necessary to trace the evolution of this claim.

36. The first time a claim for sales compensation, other than for the figure stipulated in the 2011 Agreement, arose was in the letter of 20th February, 2012 from the plaintiff's solicitors to the Defendants' solicitors, in which it was stated that, having regard to the sales figures provided by the Defendants on discovery, further sums of €78,834 for 2009 and €149,665 for 2010 were due and owing by the Defendants. When counsel for the plaintiff was opening the plaintiff's case, he indicated that the plaintiff had not got figures for December 2010 or for 2011 and, accordingly, could not particularise their seven per cent claim. The plaintiff's position was that, if such figures were not provided, it would be reverting to the "minimum" figures in the 2009 Agreement. I think I am correct in stating that in his examination in chief Mr. Gallinger did not advance any figure for post-2011 Agreement sales compensation and I think I am also correct in stating that it was not explored in his cross-examination.

37. Mr. O'Sullivan, when giving evidence, produced a table setting out the actual sales by Revolution of the Cat product/merchandise since February 2011, the total amount being €556,534.76. The figure set out in Table A of €38,957 as representing the Defendants' position in relation to post-2011 Agreement sales compensation represents seven per cent of that figure.

38. In fairness to the plaintiff, the figure of €776,000 is a "fall-back" position. In replying to the Defendants' submissions, counsel for the plaintiff complained that Revolution had never provided the plaintiff with the accounts and financial information which Revolution was obligated to provide under the 2009 Agreement and the 2011 Agreement. All the plaintiff had seen was the single sheet table to which I have referred earlier. That being the case, the plaintiff had no option but to assert a right to fees on the basis of minimum wholesale sales as per Clause 2.2 of the 2009 Agreement, applied by reference to Schedule C.

39. There is absolutely no doubt but that the plaintiff cannot claim sales compensation for the period after the 2011 Agreement on the basis of Schedule C which became attached to the 2009 Agreement because, by virtue of the variation of the territories to which Revolution is entitled to distribute, Schedule C had no application after the execution of the 2011 Agreement. To allow the plaintiff claim sales compensation by reference to it, as I have demonstrated earlier, would amount to a complete injustice because Revolution agreed to relinquish the most valuable territories, which accounted for approximately sixty two per cent of the Schedule C projections for 2011. Apart from that, I am at a total loss to understand why the plaintiff has claimed sales compensation at the rate of eight per cent. Despite what is pleaded in the statement of claim, Clause 1.1 of the 2009 Agreement provides for sales compensation at the rate of seven per cent, not eight per cent.

40. It was not demonstrated through the evidence that the sales of the CAT product/merchandise by Revolution reached the levels for 2009 and 2010 set out in the letter of 20th February, 2012 from the plaintiff's solicitors, which formed the basis of the claims for sales compensation, which it is to be noted was claimed at the correct contractual rate of seven per cent. Mr. O'Sullivan in the course of examination said that there were no figures for 2010. While I appreciate the difficulty encountered by the plaintiff, having regard to the absence of the accounts and financial documentation which it should have obtained, at this point in time, there is no evidence on the basis of which it is possible to find that the sales compensation for the period after the 2011 Agreement was other than the figure conceded on behalf of the defendants, that is to say, €38,957. Finally, on this aspect of the plaintiff's claim, I would point out that it is common case that the last order placed by Revolution with the plaintiff was placed in February 2010, that is to say, a year before the 2011 Agreement was executed, which raises doubt as to the ability of Revolution to generate sales in 2011, particularly, having regard to the volume of stock that remained in Asia in 2011 and which has gone to other distributors.

The money elements of the counterclaim
41. In Table B which follows, the respective positions of Revolution and the plaintiff in relation to the sums claimed by Revolution under the counterclaim are tabulated.

TABLE B

ITEM	REVOLUTION'S POSITION	PLAINTIFF'S POSITION
1. Failure to release Bills of Lading – storage and interest charges	€42,250	Less than or equal to €10,562 (based on monthly charge of €5,281)
2. Stock swap Arrangement	€128,347	nil
3. Damages in respect of plaintiff's 2009 Agreement	€57,644	nil
TOTAL	**€228,241**	**€10.562**

The position of Revolution was that Item 3 of its claim in the second column above was without prejudice to its claim for general damages for breach of contract. I will deal with each element of the money counterclaims separately.

Item 1: failure to release bills of lading
42. As I have recorded earlier under the 2011 Agreement the plaintiff expressly agreed to release to Revolution the original bills of lading for the goods set out in Schedule C attached to the 2011 Agreement. It is common case that there was delay on the part of the plaintiff in complying with that term and the bills of lading were not, in fact, released until 25th April, 2011. In consequence, it is common case that, in the period between the execution of the 2011 Agreement, 16th February, 2011, and the release of the bills of lading, 25th April, 2011, just over two months, Revolution incurred loss amounting to €10,562 in respect of storage and interest

charges, because the goods were in a bonded warehouse in Dublin Docks. The plaintiff properly conceded that Revolution must get credit for the sum of €10,562.

43. The dispute in relation to this item stems from the fact that it was contended on behalf of the Defendants that they had not waived their entitlement to claim in respect of antecedent breaches by the plaintiff in respect of the bills of lading in the 2011 Agreement. The Defendants' position is that the goods arrived into Dublin Port on 15th October, 2010 and that they are entitled to recoup the cost of storage and interest charges from then until the bills of lading were actually released on 25th April, 2011. The response of counsel for the plaintiff was that the plaintiff was not obliged to release the bills of lading, unless it was paid for the goods. Part of the deal embodied in the 2011 Agreement was that certain goods would be deemed paid for, namely, the Schedule C goods, although other goods would not be deemed paid for, namely, the Schedule A and the Schedule B goods. It was on that basis that the plaintiff agreed to release the bills of lading in respect of the Schedule C goods. The explanation of the intention of the parties in relation to the Schedule C goods given by Mr. Gallinger seems to me to be logical and consistent with the totality of the agreement. Therefore, I do not accept that Revolution had any claim in respect of the goods the subject of the bills of lading when the 2011 Agreement was executed and I do not accept that any claim for storage and interest in respect of those goods was kept alive, notwithstanding the execution of the 2011 Agreement.

44. Accordingly, I find that the quantum of the Defendants' entitlement under Item 1 is €10,562.

Item 2: stock swap arrangement

45. The proposed stock swap which involved Revolution and Footsure arose in the following circumstances. In March and April 2010 certain merchandise was shipped on behalf of Revolution to Footsure, but Footsure had not ordered the merchandise. Footsure was invoiced for the merchandise, but did not discharge the invoices at the time. As appears from an e-mail of 9th November, 2010 from Mr. O'Sullivan to Mr. Gardiner of Footsure, at that stage the agreement between Revolution and Footsure was that Footsure would retain the merchandise and would pay Revolution for it when it was sold. When the matter had not been resolved by July 2011 Mr. Gardiner of Footsure proposed a settlement on a without prejudice basis which involved the stock held by Footsure being returned to Revolution and Revolution giving Footsure newer stock in place of it, hence the swap. It is not disputed that, if the arrangement had been implemented, this would have generated €128,347 for Revolution. However, by July 2011 the 2011 Agreement was in force and the United Kingdom was no longer a territory to which Revolution could distribute the CAT product/merchandise. Therefore, Mr. Gardiner sought Mr. Gallinger's approval for the arrangement. In an e-mail of 20th July, 2011 Mr. Gallinger made it clear to Revolution that, while he was willing to look at the proposal, any money which would be paid by Footsure would have to be paid directly to the plaintiff, at least to the amount necessary to clear Revolution's account with the plaintiff. As payment directly to the plaintiff did not suit Revolution, the proposed transaction was never implemented.

46. It would obviously have been in ease of Revolution if the plaintiff had permitted the transaction between Revolution and Footsure to proceed without imposing the condition which Mr. Gallinger imposed. However, the question the Court has to determine is whether there was any legal obligation on the plaintiff to approve of the proposed transaction. What is pleaded is wrongful intervention by the plaintiff without good cause. When questioned by the Court as to the nature of the wrong alleged against the plaintiff, the response on behalf of the Defendants was that there was a breach of an implied term in the agreements between the plaintiff and Revolution that the plaintiff would facilitate Revolution and that Mr. Gallinger owed a duty, presumably a contractual duty, to Revolution to facilitate it. In my view, there is no way one can interpret the contractual relationship between the plaintiff and Revolution after the execution of the 2011 Agreement as imposing an implied obligation on the plaintiff to approve of the proposed transaction with Footsure. As outlined earlier, Clause 6 of the 2011 Agreement expressly addresses the issue of unfilled orders with entities in revoked territories. Apart from that, as regards Revolution operating outside permitted territories, Clause 4.3 remained in force. In my view, an obligation on the part of the plaintiff to approve of the resale or swap of merchandise by Revolution outside the permitted territories, as defined following execution of the 2011 Agreement, cannot be implied.

47. Accordingly, this aspect of the defendants' counterclaim, in my view, is totally unsustainable.

Item 3: breaches of the 2009 Agreement

48. While it was submitted on behalf of the plaintiff that the third item in Table B was not pleaded by the Defendants, there is a general plea in the counterclaim that, in breach of the 2009 Agreement and the 2011 Agreement, the plaintiff permitted other distributors to sell at wholesale and to distribute the CAT product/merchandise into territories into which Revolution believed it had the exclusive right to sell and distribute the CAT product/merchandise. Further, the evidence does support the Defendants' claim for the itemised sum of €57,644 set out in Table B. Mr. Gallinger acknowledged that in November and December 2010 the plaintiff had sold merchandise to the value of €310,000 to Covepro in France and to Footsure in the United Kingdom. At the time, it was unquestionably the case that Revolution had exclusive distribution rights in relation to France and the United Kingdom. It is reasonable to assume that, if the plaintiff had not made those sales, Revolution could have made them because there were customers for the merchandise. In the circumstances, I am satisfied that the plaintiff was in breach of the terms of the 2009 Agreement, in consequence of which Revolution was wrongfully deprived of the profit it would have made. The evidence is that the profit margin is twenty five per cent, which puts the loss incurred by Revolution at US$77,500, being the equivalent of €57,644. I am satisfied that Revolution is entitled to that amount as damages for breach of contract against the plaintiff. It follows that I reject the plaintiff's contention that, in selling to Covepro and Footsure, the plaintiff was endeavouring to mitigate its loss occasioned by Revolution's failure to discharge its indebtedness to the plaintiff. I also reject the submission that the stock sold to Covepro and Footsure would have come within Schedule E attached to the 2011 Agreement, if it had not been disposed of by the plaintiff directly, so that Revolution has incurred no loss.

Counterclaim for general damages

49. The Defendants have also persisted in their counterclaim for general damages and they have done so on two bases.

50. The first is that the plaintiff sold merchandise to a company in Portugal in contravention of Revolution's sole distributorship rights in relation to Portugal. The position of the plaintiff is that there was no breach, because what was sold directly into Portugal was CAT "Lifestyle" product and not CAT "Workwear" product. However, the Court was invited by the Defendants to infer that Mr. Gallinger's evidence was not correct. By way of general observation, I am satisfied that the plaintiff, through its witnesses and in making discovery, set out to present a true and fair picture of the factual situation to the Court. I am not prepared to find that the Defendants have established that there was a breach of contract by the plaintiff selling into Portugal. In any event, there is no evidential basis on which, if there was a breach, the loss to Revolution could be quantified.

51. The second basis is that there were multiple breaches of the 2009 Agreement by the plaintiff, which resulted in Revolution being forced into the position of having to enter into the 2011 Agreement, which had the effect of depriving Revolution of sixty two per cent of its market share. Taking an overview of the evidence, it is not possible to conclude that the financial difficulties which Revolution encountered in October and November 2010 resulted from the actions of the plaintiff in the operation of the 2009

Agreement. It is very clear on the evidence that Revolution's problems were much closer to home. The reality of the situation is that the breaches of the 2009 Agreement by the plaintiff, which have been conceded, for example, the sales directly to Footsure and to Covepro referred to earlier, were a reaction to, rather than the catalyst of, Revolution's financial difficulties, which manifested themselves in October 2010 and which Mr. Gallinger was endeavouring to deal with in the period immediately after Mr. Bond's departure. While Mr. O'Sullivan is understandably disappointed and aggrieved on account of the effective collapse of the business of Revolution, I do not think it is fair to accuse the plaintiff and Mr. Gallinger of cheating him or deceiving him. What Mr. Gallinger tried to do after Mr. Bond's departure was to retrieve the situation as best he could.

52. Accordingly, I am not satisfied that Revolution or any of the Defendants have established any liability on the part of the plaintiff for general damages for breach of contract. I reiterate that there is no evidential basis on which one could quantify the damages.

Miscellaneous defences

53. First, it is convenient to deal with a submission made on behalf of the Defendants, which I understand to be advanced as a defence to the plaintiff's claim. It was submitted on behalf of the Defendants that the breach of the 2009 Agreement on the part of the plaintiff by selling the CAT product/merchandise directly to Covepro and to Footsure amounted to a "repudiatory breach" of the 2009 Agreement. It was further submitted that these "fundamental breaches" had the effect of depriving Revolution of the whole benefit of the 2009 Agreement, in consequence of which the 2009 Agreement was either "automatically repudiated" or the Defendants were given "a right of repudiation and an action in damages". The decision of the High Court (O'Sullivan J.) in *Hearn v. Collins* [1998] IEHC 187 was cited, as I understand it, to obviate the difficulty created by the fact that the Defendants only learned of the sales to Covepro and Footsure when discovery documentation was exchanged two days before the hearing.

54. That submission is misconceived for a variety of reasons. However, for present purposes, suffice it to observe, as counsel for the plaintiff submitted, that the Defendants are relying on the 2011 Agreement and, as counsel for the plaintiff put it, they "cannot have it both ways". However, having said that, the plaintiff, in the paragraph of the statement of claim which should have been numbered as para. 23, referred to Revolution's "repudiation of the 2011 Agreement" (without having set out any foundation for that assertion). In response in the defence, the Defendants pleaded that, insofar as the 2011 Agreement had been repudiated, the plaintiff could not rely on alleged breaches thereof to ground its claim. That brings to mind the old adage that "what is sauce for the goose is sauce for the gander". That adage is equally apt in relation to the Defendants' plea that, if the 2009 Agreement remains in force and is operable, the plaintiff is not entitled to maintain a claim for damages or judgment pursuant to Clause 9 of the 2009 Agreement, the contents of which have been outlined earlier.

55. Secondly and for completeness, I consider that the plaintiff has not failed to mitigate its loss, as pleaded in the defence. In particular, the inventory purchase option referred to in Clause 13 of the 2009 Agreement, as the name indicates, was exercisable at the option of the plaintiff and the plaintiff was under no obligation to invoke that provision.

Defence based on alleged breach of competition law

56. As I understand it, the Defendants raised the alleged breach of competition law as an answer to the plaintiff's claim for a permanent injunction restraining the Defendants from exporting or permitting the distribution of the CAT product/merchandise on the website www.amazon.co.uk in the absence of approval from the plaintiff, which relief the plaintiff seeks in reliance on Clause 4.3 of the 2009 Agreement which has been quoted earlier. The Defendants' answer in the defence is that Clause 4.3 is in breach of Article 101 of the TFEU and of s. 4 of the Act of 2002 and, therefore, is void and/or unenforceable. I mention that to emphasise that it is Clause 4.3 which it is pleaded is void.

57. In their written legal submissions both sides deal with this aspect of the case comprehensively and there is a degree of consensus as to what the law provides. It is agreed that the 2009 Agreement is a vertical agreement which is subject to Article 101(1) TFEU. There is also consensus that, if, as it contends, the plaintiff can establish that Clause 4.3 comes within Commission Regulation (EU) No 330/2010 on the application of Article 101(3) to categories of vertical agreements and concerted practices, Article 101 does not apply. There is also consensus that, if Clause 4.3 contains a "hardcore restriction" as outlined in Article 4 of the Regulation, the block exemption shall not apply. On the application of Article 4, the position of the Defendants is that Clause 4.3 restricts passive sales, whereas the position of the plaintiff is that, in endeavouring to sell merchandise via the Amazon website, Revolution is engaging in active sales. As was recognised by counsel on each side in the oral legal submissions, the core issue is whether Clause 4.3 restricts passive sales. Counsel for the Defendants, emphasising the words "either directly or indirectly" in Clause 4.3, contends that it restricts passive sales. On the other hand, as I have stated, the plaintiff's position is that the actions of Revolution involve active sales.

58. In addressing the distinction between active sales and passive sales in this context, in my view, it is useful to have regard to the European Commission *Guidelines on Vertical Restraints* (C130/03 published in the Official Journal on 19th May, 2010). Point (51), having stated that the first of the four exceptions to the hardcore restriction in Article 4(b) of the Regulation allows a supplier to restrict active sales by a buyer party to the agreement to a territory or a customer group which has been allocated exclusively to another buyer or which the supplier has reserved to himself, goes on to set out the Commission's interpretation of "active" and "passive" sales. The interpretation of passive sales is as follows:

> "'Passive' sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are passive sales. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments (sic) also if they would not reach customers in other distributors' (exclusive) territories or customer groups."

The plaintiff contends that selling on the Amazon website constitutes active rather than passive selling, because Revolution is using a third party website which facilities the selling of products to end-users. It is not merely advertising products on its own website. Further, the use of the Amazon website by Revolution is a means of approaching and soliciting individual customers, so that customers contacting Revolution via the Amazon website cannot be considered as making unsolicited requests for the purposes of the definition of passive sales permitted outside territorial restrictions. Those arguments, the Defendants contend, simply ignore the fact that on its face Clause 4.3, by restricting direct or "indirect distribution", restricts passive selling.

59. In Dunleavy on *Competition Law* (Bloomsbury Professional), in addressing the distinction between "active" and "passive" sales, it is stated (at p. 222):

> "Active sales are those where the distributor seeks out customers. Passive sales involve unsolicited requests originating from the customer. The Commission considers that sales made through the Internet are generally passive sales so that,

for example, if a customer contacts a distributor having viewed its website, any resulting sales are passive. However, online advertising may give rise to active selling, for example, where the distributor pays a search engine to display advertisements specifically to users in a particular territory."

The Court was also referred to a recent European Court (Third Chamber) judgment delivered on 13th October, 2011 on a reference for a preliminary ruling from a French Court: *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence & Anor*. There, the Court was considering a clause prohibiting de facto the Internet as a method of marketing in the context of the Block Exemption Regulation (Regulation 2790/1999), which was replaced by the 2010 Regulation, and, in particular, in the context of the analogue of what is now Article 4(c) of the 2010 Regulation, which concerns selective distribution contracts. The Court held that the clause in issue, which required that the authorised distributor of cosmetic products would only sell the products at a location where a pharmacist was present and, which *de facto* excluded all forms of selling by internet, did not come within Article 4(c). In my view, that judgment does not assist in determining the issue which the parties have put before the Court for determination in this case.

60. Counsel for the plaintiff advanced a more fundamental response to the impugning of Clause 4.3 by reference to competition law. It was submitted that Clause 4.3 does not embody an absolute restriction. All it does is to restrain distribution outside the permitted territory "unless such sale is approved in advance in writing" by the plaintiff. It was submitted that, in effect, the Defendants are asking the Court to assume that, if Revolution sought advance approval in accordance with Clause 4.3, in dealing with the request, the plaintiff would act in a manner which is in breach of competition law and, therefore, would act unlawfully. It was submitted that, on the contrary, the plaintiff is entitled to the presumption that it would act lawfully and in accordance with law. The Court was also invited to consider Clause 4.3 in the context of Clause 4 generally. It was submitted that the provisions of Clause 4 generally are concerned with defining approved sale channels which correspond with the prestigious nature of the CAT product/merchandise and the brand marks. In that context, it was submitted that Clause 4.3 is concerned with ensuring that sales are made through appropriate outlets and there is no indication in it that it would be used to restrain possible sales.

61. The application of competition law, both at European and at national level, is a specialised discipline and, understandably, there is a special Competition Case List in the High Court. Notwithstanding that, competition law issues find their way into cases listed elsewhere in the High Court. This is one such case, in which the competition law defence represents only one minor element of the many issues which have been raised by the parties. Nonetheless, I have considered all of the submissions made by the parties carefully. The conclusion I have come to is that the Defendants have not established that Clause 4.3 breaches either Article 101 or s. 4 of the Act of 2002. Looking objectively at the provision contained in Clause 4.3 in the context of Clause 4 in general, I find it impossible to conclude that it is intended to be anti-competitive, using that expression in a non-technical sense. Moreover, I cannot conclude that the use by Revolution of the Amazon website constitutes other than "active" sales within the meaning of Article 4(b)(i) of the 2010 Regulation. Therefore, the reliance on an alleged breach of competition law does not avail the Defendants as a defence to the plaintiff's claims.

Defence of alleged material non-disclosure

62. The factual basis of the alleged material non-disclosure on the part of the plaintiff is that the plaintiff failed to disclose to the Defendants that, at the date of the execution of the 2009 Agreement, Mr. Bond was a director of the plaintiff. The consequences which it is contended flow from such alleged non-disclosure are twofold, namely, that –

(a) Revolution is entitled to rescind the 2009 Agreement; and

(b) the guarantee given by Mr. O'Sullivan is unenforceable.

63. As regards the alleged entitlement of Revolution to rescind the 2009 Agreement, the Defendants' case is that the alleged material non-disclosure constituted either –

(a) a breach of an implied term of the 2009 Agreement that the parties thereto were acting in good faith, or

(b) a breach of s. 194 of the Act of 1963.

Before addressing those allegations, a number of general observations are apt. First, it must be emphasised that this judgment is concerned with the contractual rights and obligations of the plaintiff, on the one hand, and Revolution and Mr. O'Sullivan, on the other hand, inter se. Mr. Bond's contractual obligations to the Defendants are not in issue at this juncture. Secondly, the transaction which was ultimately embodied in the 2009 Agreement was a commercial transaction negotiated at arm's length. In my view, the Defendants have not demonstrated that there was any duty on the plaintiff to disclose that Mr. Bond was a director of the plaintiff or that the failure to disclose that fact amounted to a misrepresentation. As counsel for the plaintiff submitted, it was a matter of public record when the 2009 Agreement was executed that Mr. Bond was a director of the plaintiff, a fact which the Defendants could have ascertained by having a search carried out in the CRO. In any event, as was submitted on behalf of the plaintiff, the Defendants have not pleaded an entitlement to rescind, nor are they seeking to rescind the 2009 Agreement.

64. Turning to s. 194 of the Act of 1963, subs. (1) of that section provides:

"It shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company."

Under sub s. (6) of s. 194, failure to comply with s. 194 is a criminal offence for which the sanction is a fine. As is pointed out in the annotation on s. 194 in MacCann and Courtney *Companies Acts* 1963 – 2012, the contract generally becomes voidable at the instance of the company. The application of s. 194 to the 2009 Agreement required Mr. Bond to declare his interest in the contract proposed to be entered into between Revolution and the plaintiff to the board of directors of Revolution, assuming he had an interest in the 2009 Agreement within the meaning of s. 194, which is almost invariably construed as meaning a financial interest. Even if there was a breach of s. 194 by Mr. Bond, from the perspective of the civil remedy available, Revolution has not sought to avoid the 2009 Agreement and, even if it did, as *restitutio in integrum* is not possible, it could not do so. Therefore, in my view, the Defendants' reliance on s. 194 to meet the claim of the plaintiff against the Defendants is misconceived.

65. As regards the second consequence contended for, in support of their contention that the failure of the plaintiff to disclose to the Defendants what the Defendants characterise as the "unusual fact" that Mr. Bond was a director of the plaintiff constitutes a material non-disclosure sufficient to discharge Mr. O'Sullivan from his liability under the guarantee contained in the 2009 Agreement, counsel for the Defendants relied on a number of recent authorities.

66. The earliest chronologically was a decision of the House of Lords in *Royal Bank of Scotland Plc v. Etridge (No. 2)* [2002] 2 AC 773. I think it is not incorrect to suggest that the passages from the speeches of the Law Lords relied on by counsel for the Defendants on that appeal were obiter. In dealing with a creditor's disclosure obligation, Lord Nicholls stated (at para. 81):

> "It is a well-established principle that, stated shortly, a creditor is obliged to disclose to a guarantor any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect from what the guarantor might naturally expect. The precise ambit of this disclosure obligation remains unclear."

Lord Nicholls went on to say in the same paragraph that the issue before the House of Lords, the need to provide protection for wives who were standing as sureties, was a different issue. In his speech, Lord Scott probably brought more clarity to the situation of relevance here, in that he addressed the general law on the issue of disclosure to a surety. He stated (at para. 185) that a surety contract is not a contract *uberrimae fidei*, quoting the following passage from the judgment of Romer L.J. in *Seaton v. Heath* [1899] 1 QB 782 (at p. 793):

> "The risk undertaken is generally known to the surety, and the circumstances generally point to the view that as between the creditor and surety it was contemplated and intended that the surety should take upon himself to ascertain exactly what risk he was taking upon himself."

While Lord Scott then stated that, although a would-be surety is, in general, expected to acquaint himself with the risk he is undertaking, he quoted the following passage from the judgment of Lord Campbell in *Hamilton v. Watson* (1845) 12 Cl & F 109 (at p. 119) as illustrating that a creditor is under an obligation to disclose to the intending surety –

> "anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect . . . .."

Later (at para. 188) Lord Scott stated:

> ". . . in my opinion, the obligation should extend to unusual features of the contractual relationship between the creditor and the principal debtor, or between the creditor and other creditors of the principal debtor, that would or might affect the rights of the surety . . . .."

67. I have quoted that last passage because it was quoted by Clarke J. in *Moorview Developments Ltd. v. First Active Plc* [2009] IEHC 214. Clarke J. in that case stated that he was prepared to accept, for the purposes of argument, that the principle stated there applies in this jurisdiction, so that there may be circumstances in which a creditor is obliged to explain to a surety unusual features of the arrangements between either the creditor and the surety and the creditor and the debtor, which might have the effect of affecting the sureties position. However, on the facts of the case before him he went on to find that there was no basis put forward for establishing a prima facie case to the effect that the relevant guarantees in favour of First Active were void.

68. The Defendants also rely on a more recent decision of the Court of Appeal in England and Wales in *North Shore Ventures Ltd. v. Anstead Holdings Inc* [2012] Ch. 31. In his judgment, Sir Andrew Morritt C. has analysed the law on the duty of disclosure of a creditor to a surety over the span of the jurisprudence from the decision in *Hamilton v. Watson* in 1845 to the decision in *Royal Bank of Scotland Plc v. Etridge* in 2002 and he has set out his conclusions on the state of the law in England and Wales at paras. 30 and 31 as follows:

> ". . . the restriction on the duty of disclosure in the case of a loan guarantee is well established and justified by commercial necessity as illustrated by Lord Campbell in his speech in *Hamilton v Watson* ....
>
> 31. For these reasons I do not agree that the grounds given (by the trial Judge) justify his conclusion. The Guarantee was not a contract *uberrimae fidei* but was a loan guarantee. The authorities are clear that in such a case the duty of disclosure does not go further than the limit set by Lord Campbell in *Hamilton v Watson* . . . and by Lord Scott . . . in *Royal Bank of Scotland plc v Etridge* . . .. para 188. Accordingly, there is no duty to disclose facts or matters which are not unusual features of the contractual relationship between the creditor and the debtor, or between the creditor and other creditors of the debtor."

On the facts in that case, it was not disputed that the facts on which the guarantors relied were not unusual features of the contractual relationship between the creditor and the debtor, or between the creditor or other creditors of the debtor.

69. Adopting the approach adopted by Clarke J. in *Mooreview Developments Ltd. v. First Active Plc* in relation to the *dictae* in *Royal Bank of Scotland v. Etridge*, and assuming, for the purposes of argument, that the principles set out by Sir Andrew Morritt in the passages outlined above apply in this jurisdiction, the first step in considering their application, as urged by counsel for the Defendants, is to ascertain what precisely Mr. O'Sullivan guarantees in the 2009 Agreement. I have quoted the relevant part of the special covenants in the 2009 Agreement earlier. He guaranteed with Mr. Bond (probably jointly and severally, but it is not necessary to express a definitive view on that point) all obligations of Revolution under the 2009 Agreement. The second step is to consider to what extent the fact that Mr. Bond was a director of the creditor, the plaintiff, constituted an unusual feature of the contractual relationship between the creditor, the plaintiff, and the debtor, Revolution. I cannot see how that fact constituted an unusual feature in the context of a distributorship contract. Mr. O'Sullivan agreed to act as surety for the obligations of Revolution, which were its obligations as distributor under the 2009 Agreement. The fact that Mr. Bond was a director of the plaintiff to whom those obligations were owed did not make Mr. O'Sullivan's contractual relationship, to use the words of Lord Nicholls, "materially different in a potentially disadvantageous respect" from what he might have naturally expected from taking on the role of surety.

70. The reality is that Mr. O'Sullivan did not carry out the type of due diligence which it would have been prudent to carry out before he became involved in the 2009 Agreement both through the medium of Revolution and personally as guarantor. The problems which the Defendants contend they subsequently encountered through Mr. Bond's actions are a separate issue and, in my view, do not affect Mr. O'Sullivan's liability as guarantor.

Defence of alleged unenforceability due to uncertainty

71. To recapitulate, the Defendants have pleaded that the 2009 Agreement is void and unenforceable as it fails to define the territories into which Revolution was permitted to sell and distribute the CAT product/merchandise. There is no doubt but that the territorial ambit of the distributorship being granted by the plaintiff to Revolution was a crucial element of the 2009 Agreement. In the wording of Clause 1.1 the territorial ambit (Territory) was intended to be defined by the list of countries referred to as exhibit A.

There was no exhibit A. However, a Schedule B and a Schedule C, while not attached to the 2009 Agreement when it was executed on 16th August, 2009, were produced to Mr. O'Sullivan within a short time of execution of the agreement. Schedule C listed Newco's (that is to say, Revolution's) sale projections for each year from 2009 to 2013 by reference to the countries listed. I have no doubt that Mr. O'Sullivan must have understood from the outset that "Territory" only included the countries on Schedule C in relation to which there were sale projections indicated, in other words, all of the countries listed other than the countries in respect of which zero projections were shown. I so find. Indeed, in the replying affidavit sworn by him on 9th December, 2011, in response to the plaintiff's application for an interlocutory injunction, Mr. O'Sullivan averred that there was no exhibit A appended to the 2009 Agreement. However, he exhibited the copy of the 2009 Agreement which he had retained in his possession and that document contained both Schedule B and Schedule C.

72. The fact that, notwithstanding the absence of exhibit A, Mr. O'Sullivan was aware of the territorial ambit of the distributorship granted to Revolution by the 2009 Agreement is corroborated by his execution of the 2011 Agreement on behalf of Revolution. As I have already recorded, the 2011 Agreement contained an express acknowledgement and agreement to the amendment of Revolution's territory designations so as to exclude the United Kingdom (other than Northern Ireland) and France, and that all other territory designations would remain in effect for the duration of the 2009 Agreement. I am satisfied that Mr. O'Sullivan, an experienced businessman, would not have signed the 2011 Agreement, if he was not aware of the countries to which the 2009 Agreement permitted Revolution to distribute the CAT product/merchandise or if he did not understand how the 2011 Agreement was varying that permission.

73. Essentially, I am finding against the Defendants on the alleged material non-disclosure aspect of their defence on the facts. However, I consider it appropriate to comment briefly on the legal arguments advanced on behalf of the Defendants. The contention of the Defendants that the 2009 Agreement is unenforceable or void for uncertainty seems to be based on the premise that the plaintiff and Revolution were not *ad idem*. They cite a passage from the judgment of Fennelly J., with whom the other judges of the Supreme Court concurred, in *McCabe Builders (Dublin) Ltd. v. Sagamu Developments Ltd. & Ors*. [2009] IESC 31, in which he stated (at para. 43):

> "I agree with the statement in *Contract Law*, by Paul A. McDermott (Butterworths. Dublin 2001) at page 171, that in 'commercial arrangements it will be presumed that the parties intended to create legally binding contracts'. Lord Wright said in *Hillas & Co. Ltd. v. Arcos Ltd* (1932) 147 LT 503 at p.514:
>
>> 'Businessmen often record the most important agreements in crude and summary fashion. Modes of expression sufficiently 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 they are appropriate implications of law'."

Fennelly J. went on to state that, in other words, the courts should seek to give effect to the apparent intentions of the parties to enter into binding contracts.

74. I have absolutely no doubt that what was intended by the plaintiff and Revolution was that they were entering into a binding contract under which Revolution would have permission to distribute the CAT product/merchandise in the countries to which a volume of merchandise was ascribed in Schedule C and the contract took effect from 16th August, 2009. Apart from the fact that the parties varied the contract by the 2011 Agreement, the reality of the situation is that they operated the 2009 Agreement for two and a half years before it was contended that it was unenforceable in these proceedings.

Defence of automatic termination of the 2009 Agreement by default

75. In advancing this defence, the Defendants pointed to various provisions of the 2009 Agreement, for example, Clause 11.1(g) referred to earlier, which is an event of default which, in accordance with the terms of the 2009 Agreement, results in an automatic termination thereof and also other provisions, such as Clause 12.2(a) and Clause 12.2(b) referred to earlier, which result in an automatic termination of the 2009 Agreement, which is deemed to terminate after three months unless the plaintiff waives such termination in writing referring to s. 12. The Defendants rely on their own breaches of the provisions of Clause 11 to contend that the 2009 Agreement is automatically terminated. They also rely on their own breaches of the provisions of Clause 12, coupled with the absence of any waiver in writing by the plaintiff, as also as having given rise to the termination of the 2009 Agreement at the expiry of the three month period stipulated. Counsel for the plaintiff, in their submissions, emphatically countered those arguments. Before considering the plaintiff's submissions, I would pose one rhetorical question: how can the Defendants maintain a counterclaim on foot of the 2009 Agreement, if it automatically terminated at some indefinite point in the past, probably on the Defendants' case, within a few months of its execution? It is easy to predict the plaintiff's answer: they cannot have it both ways.

76. Counsel for the plaintiff, in contending that the Defendants are not entitled to rely on their own breaches of the 2009 Agreement as they have sought to do, referred to the following passage in McDermott on *Contract Law* (at para. 21.97):

> "It is assumed, in the absence of clear words, that neither of the parties is entitled to benefit from their own breach."

The Defendants latched on to the qualification in that statement that the assumption applies "in the absence of clear words", suggesting that the plaintiff, for whom the 2009 Agreement was drafted, produced a document which clearly provided for automatic termination on the happening of an event of default stipulated. I do not accept that argument. McDermott has observed immediately after the sentence quoted above that it may be that the proposition in that sentence should properly be viewed as an implied term in the contract, rather than a rule of construction. I have no difficulty, taking an overview of Clauses 11 and 12, in concluding that it is to be implied that the defaulter, in each and every case identified as either Revolution or the guarantors (Mr. O'Sullivan and Mr. Bond), would not be entitled to rely on their own breach as terminating the contract. Any other interpretation would be utterly nonsensical.

77. Apart from that, in the 2011 Agreement Mr. O'Sullivan, on behalf of Revolution, expressly acknowledged that, subject to the variations of the 2009 Agreement agreed to in the 2011 Agreement, all other terms of the 2009 Agreement remained in full force and effect.

Plaintiff's remedies against the Defendants other than against Mr. O'Sullivan as guarantor

78. As the Defendants have not established any defence to the plaintiff's claim, the plaintiff is entitled to judgment for the amounts found to be due to the plaintiff by Revolution under Items 1 and 3 of the plaintiff's money claim, that is to say, €86,658 under Item 1

and €57,542 and €38,957 under Item 3, making a total of €183,157. Against that sum there must be set off the sums found due to Revolution under Items 1 and 3 of the money counterclaim, that is to say, €10,562 under Item 1 and €57,644 under Item 3, making in total €68,206. Accordingly, there will be judgment in favour of the plaintiff in the sum of €114,951 against Revolution.

79. In an affidavit sworn by him on 9th December, 2011 in response to the plaintiff's application for an interlocutory injunction, Mr. O'Sullivan on behalf of the Defendants, notwithstanding their primary contention that contractual provisions which the plaintiff was seeking to enforce were in breach of competition law and void for uncertainty, gave undertakings to the Court not to export or permit the distribution of the CAT product/merchandise in France, Canada or the United Kingdom (excluding Northern Ireland) or on the website www.amazon.co.uk or to Brico Depot retail stores in France. As Counsel for the plaintiff stated at the very end of his oral submissions in reply to the Defendants' oral submissions, it is not clear whether the Defendants were prepared to give a perpetual undertaking. That remains the position. I am satisfied that the plaintiff is entitled to injunctive relief in the terms of the prohibitory orders sought, which are summarised at para. 16(a) above, on a permanent basis, but the situation would also be met by the Defendants giving to the Court permanent undertakings in the terms sought. The mandatory injunctive relief sought by the plaintiff is effectively moot and, accordingly, orders in the terms sought will not be granted.

80. The Defendants argued that the Court should exercise its discretion not to grant equitable injunctive relief on the grounds that the plaintiff has not come to Court with clean hands and supported that argument by reference to the breach by the plaintiff in selling merchandise to Covepro in France and Footsure in England in November and December 2010. There was undoubtedly a breach of the terms of the 2009 Agreement by the plaintiff in effecting those sales, but the Court has afforded Revolution the appropriate remedy in damages under the counterclaim. In the circumstances, I do not consider that the plaintiff is precluded from enforcing the territorial restriction, as varied by the 2011 Agreement, against Revolution. Counsel for the Defendants referred the Court to a passage from the judgment of Scrutton L.J. in *Moody v. Cox* [1917] 2 Ch. 71, where, in addressing the meaning of the maxim that "any one coming to equity must come with clean hands", it was stated (at p. 87):

> "I think the expression 'clean hands' is used more often in the text-books than it is in the judgments, though it is occasionally used in the judgments; but I was very much surprised to hear that when a contract, obtained by the giving of a bribe, had been affirmed by the person who had a primary right to affirm it, not being an illegal contract, the Courts of Equity could be so scrupulous that they would refuse any relief not connected at all with the bribe. I was glad to find that it was not the case, because I think it is quite clear that the passage in *Dering v. Earl of Winchelsea* which has been referred to shows that equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for."

81. Revolution, acting through Mr. O'Sullivan, agreed to the variation of the 2009 Agreement in the 2011 Agreement and also affirmed the remaining provisions of the 2009 Agreement which were not varied. I do not consider that the previous breaches of the 2009 Agreement by the plaintiff in November and December 2010, for which, as I have indicated, the Defendants are being compensated, has an immediate and necessary relation to the equity for which the plaintiff is suing, namely, injunctive relief to enforce the varied terms contained in the 2011 Agreement.

Liability of Mr. O'Sullivan as guarantor

82. The defence of alleged material non-disclosure based on the failure to disclose that Mr. Bond was a director of the plaintiff and the contended for consequence that the guarantee given by Mr. O'Sullivan is unenforceable has been dealt with earlier. Having regard to the conclusion I have reached that the 2009 Agreement as between the plaintiff and Revolution is not unenforceable or void or terminated, the consequence of which conclusion is that the 2009 Agreement is still in being and binds Revolution, the only other pleaded basis on which it is asserted that Mr. O'Sullivan does not have liability to the plaintiff on foot of the guarantee contained in the 2009 Agreement which remains to be considered is that the guarantee was discharged by the substantial variation of the 2009 Agreement by the 2011 Agreement, which materially affected the ability of Revolution to meet its obligations under the 2009 Agreement, thereby significantly prejudicing Mr. O'Sullivan.

83. However, in the Defendants' legal submissions there was also an undercurrent of a plea of *non est factum*, in that it was recorded that Mr. O'Sullivan had given evidence that, on signing the 2009 Agreement, he understood he was guaranteeing the obligations of Revolution on behalf of Revolution and that he did not understand or appreciate that he was signing a personal guarantee. I am satisfied that Mr. O'Sullivan, as an experienced businessman, must have understand that he was executing the 2009 Agreement as a guarantor when he subscribed his signature for a second time, notwithstanding that his name was not inserted after "For and On Behalf of" before the words "individual co maker and guarantor". Accordingly, given that I am satisfied that Mr. O'Sullivan became liable as guarantor of Revolution on the execution of the 2009 Agreement, the issue which has to be considered is whether Mr. O'Sullivan's liability as guarantor has been discharged.

84. Counsel on both sides referred the Court to a wide range of authorities from various jurisdictions on the topic of the discharge of a surety. I think the most productive approach from the Court's perspective is to trace the development of the law chronologically.

85. The starting point is the decision of the Court of Appeal in *Polak v. Everett* [1876] 1 QB 669. In fact, the Court of Appeal in its judgment merely stated that the view taken by the Queen's Bench Division was correct, and affirmed the judgment at first instance for the same reasons. In his judgment at first instance, Blackburn J. stated (at p. 673):

> "It has been established for a very long time, beginning with *Rees v. Berrington* to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether."

Later, (at p. 674) Blackburn J. stated:

> "Now, in the present case the interference with the rights of the surety is not by giving time to the debtor, but it is equally as great an interference. The surety at the time he entered into the suretyship had a right to have these book debts appropriated to reduce the principal debt, and that right he has been deprived of by the act of the creditor in releasing the book-debts to the person collecting them. That equitable right has been taken away by his wilful act . . . ."

86. The long established principle that any material variation of the terms of the contract between the creditor and the principal debtor would discharge the surety, is sometimes referred to as the rule in *Holme v. Brunskill* (1878) 3 QBD 495. Unlike most of the authorities, that case did not concern the surety guaranteeing a loan by a bank or lending institution to the principal debtor. In that

case, the plaintiff had agreed to let to the principal debtor, as yearly tenant, a farm, including certain hill pastures and a flock of seven hundred sheep. The plaintiff gave the defendant a bond to secure re-delivery to him at the end of the tenancy of the flock in good order and condition. The terms of the tenancy were subsequently varied between the plaintiff and the tenant. After the tenancy terminated, it transpired that the flock was reduced in number and had deteriorated in quality and value. The plaintiff sued the defendant on his bond. Cotton L.J. in his judgment referred to the case of *Rees v. Berrington*, which had been referred to in *Polak v. Everett*, and stated that the cases as to discharge of a surety by an agreement made by the creditor to give time to the principal debtor were only an exemplification of the rule stated in that case. Cotton L.J. went on to state (at p. 505):

> "The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

On the facts, Cotton L.J. found that the surety ought to have been asked to decide whether he would assent to the variation, he never did assent and, accordingly, he was discharged from liability.

87. Counsel for the Defendants relied on a more recent decision of the Queen's Bench Division (Commercial Court) in *Bank of India v. Patel* [1982] 1 Lloyd's Rep. 507. The passage from the judgment of Bingham J. relied on by counsel for the Defendants (at p. 515) is in the following terms:

> ". . . I consider the true principle to be that where a surety is discharged if the creditor acts in bad faith towards him or is guilty of concealment amounting to misrepresentation or causes or connives at the default by the principal debtor in respect of which the guarantee is given or varies the term of the contract between him and the principal debtor in a way which would prejudice the interests of the surety, other conduct on the part of the creditor, not having these features, even if irregular, and even if prejudicial to the interests of the surety in a general sense, does not discharge the surety."

Earlier in his judgment Bingham J. had cited various authorities for each of the situations in which the surety would be discharged. For instance, in relation to the final situation (variation of the terms of the contract between the creditor and the principal debtor) he cited *Holme v. Brunskill*. As regards the situation where the creditor is guilty of concealment amounting to misrepresentation, he made it clear that the non-disclosure related to the time at which the guarantee was given.

88. The passage from the judgment of Bingham J., which I have quoted above, was quoted in *Bank of Montreal v. Wilder et al* (1983) 149 DLR (3d) 193. That was a decision of the Court of Appeal of British Columbia. In quoting the passage from the judgment of Bingham J. emphasis was added to the following words: "causes or connives at the default of the principal debtor". Lambert J. A. then referred to a decision of the Supreme Court of Alberta in which it had been decided "in forceful terms" that the conduct of the creditor towards the debtor was so serious a departure from the conduct that the surety had a right to expect that the surety should be discharged. It was then stated that the authorities in the United States were to the same effect, citing the following passage from *Williston on Contracts*:

> "Nevertheless, it is clear that the surety's risk may be varied by the creditor's conduct, and, if it is, the surety should be discharge. Therefore, any breach by the creditor of his contract with the principal, if he thereby varies the surety's risk, discharges him."

In that case, a loan by a bank to a company was guaranteed by certain individuals. The facts were quite complex and I do not accept the suggestion that they were on all fours with the facts in this case.

89. The principal authority from this jurisdiction to which the Court was referred was the judgment of the High Court (Clarke J.) in *Danske Bank A/S trading as National Irish Bank v. McFadden [*2010] IEHC 116. That case also concerned the enforcement of a personal guarantee given by the defendant to the plaintiff bank in relation to a "bridging facility" in respect of which the defendant asserted he no longer had liability to the plaintiff bank on a number of grounds, one being alleged variation of the underlying contract. Clarke J. dealt with the relevant legal principle in relation to that ground in para. 6.1 in the following passage, which was relied on by counsel for the plaintiff:

> "The entitlement of a guarantor to be discharged as a result of a change in the underlying contract which is guaranteed derives from equity. In order to be able to place reliance on the discharge, the guarantor must himself do equity. In follows that a guarantor who agrees or assents to such a change will not be able to claim discharge. However, it does appear on all the authorities that knowledge alone of the change is insufficient."

90. As an example of the last proposition, Clarke J. (at para. 6.2) quoted the following passage from the judgment of Moore-Bick L.J. in *Whittmann (U.K.) v. Willdav Engineering S.A.* [2007] EWCA Civ 824 (at para. 27):

> "Moreover, I think it is at least arguable, even in relation to a variation of the underlying contract which does not alter the obligation guaranteed, that when Cotton L.J. said that 'the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged', he had in mind that the surety must in some way communicate his consent to the creditor before he can be held to the guarantee under the changed circumstances. That would be consistent with the remarks of Blackburn J. in Polak v. Everett . . . drawing a distinction between knowledge of a variation and assent to it, and indeed if he has not done so, it is difficult to see why as a matter of principle he should be held to his contract or how in practice the creditor can know where he stands."

91. Having referred to Canadian authorities on which the plaintiff relied (*Grubbs v. Bouwhuis* [2007] BCSC 887; and *High Mountain Feed Distributors Ltd. v. Paw Pleasers Ltd. et al.* [2004] MBQB 220), Clarke J. summarised the position as follows (at 6.5):

> "It would seem, therefore, that at the level of principle a guarantor will not be discharged where the guarantor actually agrees or assents to a change which might otherwise give rise to a discharge. In addition, a guarantor will not be discharged where that guarantor is an active participant in arranging the alteration concerned, albeit not in the capacity

of guarantor but rather as a significant player in the entity that is the principal debtor."

That last sentence is of particular significance having regard to the facts in this case.

92. The only other authority which I consider it is necessary to advert to is the decision of the High Court of Australia in *Ankar Pty Ltd. v. National Westminster Finance (Australia) Ltd.* [1987] 162 CLR 549. In brief, the factual position there was that the surety, Ankar, entered into a guarantee, which was secured, with National Westminster for the performance by another company of its obligations under a contract for hiring of machinery from National Westminster. As the head note in the report discloses, by Clause 8 of the guarantee the owner of the machinery (i.e. National Westminster) agreed to notify the surety (Ankar) if the hirer proposed to sell or assign its interest in the machinery. By Clause 9 the owner (*i.e.* National Westminster) agreed to notify the surety (Ankar) if the hirer was in default of the contract, whereupon the surety (Ankar) and the owner (National Westminster) would confer about the course of action the owner would take pursuant to the default. The owner committed breaches of both clauses. On those facts, the High Court of Australia held that the surety was discharged from liability on the ground that Clause 8 and Clause 9 were conditions the breach of which, at the surety's election, discharged it from liability and the surety had so elected. The key to understanding the decision is to identify what was the core issue before the High Court of Australia. This is identified in the first sentence of the majority judgment (at p. 553) where, after stating that the appeal raised an important question of principle, that question was identified as: "In what circumstances does a creditor's breach of a contract of guarantee discharge the surety from liability under the contract?". It is true that the majority judgment analysed a range of authorities in relation to suretyship contract, for instance, *Holme v. Brunskill* and *Polak v. Everett*, as well as the general principles of the law of contract in the context of considering whether the clauses in issue could be regarded as conditions the breach of which relieved the surety from liability. In my view, that decision does not advance Mr. O'Sullivan's case, because the decision concerns the breach of the contract of guarantee not the underlying contract between the creditor and the primary debtor.

93. Before addressing the specific arguments on the basis of which it was contended that Mr. O'Sullivan was discharged from liability on foot of the guarantee contained in the 2009 Agreement, it is useful to consider what the position was when the 2011 Agreement was executed. Revolution had primary liability to the plaintiff under the 2009 Agreement. By that stage, the alleged fraud by Mr. Bond had been discovered. It is pleaded in the defence that "the [discovery] of this fraud prompted the resignation of [Mr. Bond] as director of [Revolution] on 24th October, 2010. It is not clear whether Form B10 recording Mr. Bond's resignation was filed in the CRO, nor is it clear what happened to Mr. Bond's twenty per cent shareholding in Revolution. What is clear is that, by February 2011, Mr. Bond had departed from Revolution and Mr. O'Sullivan, who was at least an eighty per cent shareholder thereof, and a director, was operating and managing Revolution.

94. The factual basis on which it is contended that Mr. O'Sullivan has been discharged from liability on foot of the guarantee contained in the 2009 Agreement is as follows:

(a) The terms of the 2009 Agreement were materially varied by the 2011 Agreement.

(b) The variations were to the prejudice of Revolution and the guarantors, because, with the removal of the United Kingdom and France from the territories to which Revolution was entitled to distribute the CAT product/merchandise, sixty two per cent of the market of Revolution was removed, which prejudicially affected the ability of Revolution to satisfy its contractual obligations to the plaintiff.

(c) While Mr. O'Sullivan participated in the 2011 Agreement, he did not do so with full knowledge of all material facts relevant to the material variation. For example, he was unaware at the time that the plaintiff had sold merchandise directly to distributors in the United Kingdom and France in fundamental breach of the 2009 Agreement in November and December 2010, which actions it was alleged amounted to a repudiatory breach of the 2009 Agreement by the plaintiff.

(d) The plaintiff was guilty of concealment amounting to misrepresentation by reason of its failure to apprise Mr. O'Sullivan of the ongoing repudiatory breach and by its failure to apprise Mr. O'Sullivan of Mr. Bond's involvement as a director of the plaintiff, which was also characterised as misrepresentation by counsel for the Defendants;

(e) As Mr. Bond is not being pursued as guarantor in these proceedings at this juncture, Mr. O'Sullivan is not being afforded fairness of treatment, reference being made to the fact that Clause 11.1(j) of the 2009 Agreement provided that, if the personal obligation of either Mr. Bond or Mr. O'Sullivan as guarantor did not remain in full force and effect, that constituted an event of default which would give rise to automatic termination.

Having regard to the conclusions I reached earlier in relation to alleged discharge by automatic termination, I cannot see how reliance on Clause 11.1(j) could relieve Mr. O'Sullivan of his liability as guarantor.

95. As the authorities illustrate, the contractual relationship of a surety with the creditor is a complex relationship, because not only is there the suretyship contract between the surety and the creditor but there is also the underlying contract between the creditor and the primary debtor which, as a general proposition and subject to the terms of the suretyship contract, determines the liability of the surety to the creditor. So in any particular case, the contractual liability of the surety may fall to be considered by virtue of the operation of the suretyship contract, as happened in the Ankar case, or, alternatively, may be impacted on by the operation of the underlying contract as between the creditor and the primary debtor. The authorities illustrate a range of situations as to the manner in which the operation of the underlying contract would render it inequitable to hold the surety to liability on the guarantee, for instance, if the creditor unilaterally acts in a manner which deprives the surety of his right of subrogation.

96. In this case, as between the plaintiff, on the one hand, and Mr. O'Sullivan and Mr. Bond, on the other hand, the suretyship contract is uncomplicated: both guarantors guaranteed the obligations of Revolution for the initial term of the contract. As between the guarantors, there may be issues and, in particular, there may be an issue as to what "individually" means. I suggested earlier that it may mean that they are jointly and severally liable, but that is not an issue in which the Court can express a definitive view at this stage. The key factor in this case is that there is nothing in 2011 Agreement which resulted in the variation of the guarantee provision in the 2009 Agreement. On the contrary, the guarantee provision was one of the "other terms" which were expressed to remain in full force and effect.

97. The variations to the 2009 Agreement brought about by the 2011 Agreement affected the underlying contractual relationship between the plaintiff and Revolution. There is a serious dispute between the plaintiff and the Defendants as to whether a variation of the terms of the 2009 Agreement as between the plaintiff and Revolution are prejudicial or non-prejudicial to the interests of the surety. However, the jurisprudence, going back to the case of *Holme v. Brunskill*, lays down that, if it is not self evident that the variation is unsubstantial or cannot be prejudicial to the surety, it is not for the Court to embark on the determination of the effect of

the alteration in the type of dispute which has arisen here, that is to say, an action against the surety. As Moore-Bick L.J. explained in the passage from his judgment in the *Whittmann* case, which was quoted by Clarke J. in *Dankse Bank v. McFadden*, what the Court has to determine is whether the surety in some way communicated his consent to the creditor to the variations and, if he did, he can be held to the guarantee notwithstanding the variations. What flows from the authorities, and what was clearly stated by Clarke J. in the passage from *Dankse Bank v. McFadden* (at para. 6.5) quoted earlier, is that a guarantor will not be discharged if he has actually agreed or assented to a change to the underlying contract which may otherwise give rise to a discharge or, alternatively, where he was an active participant in arranging the alteration concerned, albeit not in the capacity of guarantor but as a significant player in the entity that is the principal debtor.

98. Applying that principle to the facts of this case, the reality of the situation was that Mr. O'Sullivan was not merely a significant player in relation to the variation of the terms of the 2009 Agreement as between the plaintiff and Revolution; he was the prime mover on the Revolution side. That being the case, he cannot have been discharged as guarantor from his obligations under the 2009 Agreement which remain in force.

99. Having considered all of the bases on which it was alleged that Mr. O'Sullivan has been discharged as guarantor, I am satisfied that he has not been so discharged. I am satisfied that he remains secondarily liable for the indebtedness of Revolution to the plaintiff, which has been determined at €114.951 above. Mr. O'Sullivan is liable for that sum to the extent that it is not discharged by Revolution.

100. Of course, Mr. O'Sullivan's ultimate liability as guarantor may be affected by the fact that Mr. Bond also joined in the 2009 Agreement as guarantor. In the absence of Mr. Bond, it would be wholly inappropriate for the Court to express any view on that point. However, that factor and what I have stated in the next preceding paragraph means that at this juncture the only finding I propose making in relation to Mr. O'Sullivan's position as guarantor is that he has not been discharged from his liability as guarantor to the plaintiff on any of the bases alleged on his behalf.

101. Finally, it is appropriate to comment on a factual matter raised to by counsel for the Defendants. By an e-mail dated 11th January, 2011, Mr. Gallinger stated that the plaintiff would "need a personal guarantee" from Mr. O'Sullivan. It is true that the e-mail was written in the context of negotiations prior to the 2011 Agreement. However, it is contended that Mr. O'Sullivan refused to provide a personal guarantee. In cross-examination, Mr. Gallinger stated that he did not know why he was looking for a personal guarantee from Mr. O'Sullivan. It was put to him that it was because he knew that the changes to the 2009 Agreement would require another guarantee. Mr. O'Sullivan's evidence was that he signed the 2011 Agreement as a director and he gave no guarantee. However, there is no evidence that, following the e-mail of 11th January, 2011, there was a discussion between Mr. Gallinger and Mr. O'Sullivan in relation to Mr. O'Sullivan guaranteeing the 2011 Agreement, nor is there evidence that Mr. O'Sullivan made it clear that he was refusing to guarantee the 2011 Agreement. In the circumstances, I have not attached any weight to the reference to the need for a personal guarantee in the e-mail of 11th January, 2011. I am satisfied that, for the reasons outlined earlier, Mr. O'Sullivan has not been discharged from the guarantee he gave in the 2009 Agreement.

Order

102. The order of the Court will contain the following elements:

(a) there will be judgment in favour of the plaintiff against Revolution in the sum of €114,951;

(b) unless the defendants give a permanent undertaking to the Court in the terms of the orders for prohibitory injunctive relief sought by the plaintiff, there will be orders in those terms;

(c) there will be a declaration that Mr. O'Sullivan has not been discharged as a guarantor under the 2009 Agreement on any of the grounds alleged by him; and

(d) the defendants' counterclaim will be dismissed.

General observation

103. This case was at hearing for seven days in all. From the outset, it was clear that the contractual relationship between the plaintiff and Revolution was at an end and, indeed, counsel for the plaintiff so indicated in opening the case. It is difficult to understand why the parties, who were represented as being experienced businessmen, could not have settled the outstanding matters between them and avoided the costs of these proceedings.