THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2020] IECA 18

Record Number 2017/378

Baker J.
Edwards J.
Costello J.

BETWEEN/

PAT O'LEARY

PLAINTIFF/APPELLANT

- AND -

VOLKSWAGEN GROUP IRELAND LIMITED

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 3rd day of February 2020

1. This is an appeal and a cross-appeal against the judgments of Binchy J. on 9 December 2016 ([2016] IEHC 773) and 14 February 2017 ([2017] IEHC 74) and 20 July 2017 ([High Court Record No. 2013/4143P]). The case concerns the purported termination of motor distribution contracts between the respondent and the appellant.

Introduction

2. By notice in writing dated 18 April 2011 the respondent purported to terminate three contracts with the appellant with effect from 30 April 2013, thereby giving the appellant twenty-four months' notice of termination. The appellant argued that the notices of termination were invalid and sought a declaration that the contracts had not been terminated, were still subsisting and other relief.

3. The appellant contended that Article 20 of the contracts (which were in identical terms) meant that every notice of termination given by the respondent must contain a detailed statement of reasons which "shall be transparent and objective." The notice given by the respondent did not give detailed, objective and transparent reasons for the termination and, therefore, was argued to be in breach of the terms of the contract, invalid and of no effect. Consequently, the respondent had not terminated the contracts which, as a result, continued to bind the parties, unless and until the contracts were validly terminated.

4. The trial judge held that there had been a breach of the requirement to give detailed, objective and transparent reasons in the notice of termination, but that it was not appropriate to grant a declaration either that the purported termination of the contracts by the respondent was unlawful and of no legal effect, or that the contracts were, and remained, valid and binding on the parties. He held that damages were the appropriate remedy for the breach of contract and, in the circumstances where the appellant had

received two years' notice of termination, as required by the contracts, that he was only entitled to nominal damages.

5. Separately, the trial judge held that there had been a misrepresentation by one agent of the respondent to the appellant as to the future plans of the respondent, that the appellant had relied and acted upon that misrepresentation and that he was, as a result, entitled to damages for misrepresentation against the respondent. The trial judge rejected other alleged misrepresentations which the appellant claimed had been made to him by different agents of the respondent.

6. The trial judge held that the respondent had effectively defended the case, but he did not award it the costs of the proceedings. The trial judge held that there were special circumstances which required that he depart from the provisions of O.99, r.1(4) RSC and he made no order as to costs.

7. The appellant appealed the trial judge's refusal to declare that the contracts were, and remained, valid and binding between the parties, the award of nominal damages for breach of Article 20 of the contracts, the failure to find other instances of alleged misrepresentation and the failure to award him his costs of the proceedings. He also appealed an order made in favour of the respondent directing the appellant to cease making use of the Volkswagen trademarks and to remove all signs from his premises identifying him as an authorised Volkswagen sales dealer, and other ancillary relief.

8. The respondent cross-appealed the trial judge's finding that it had failed to comply with the obligation to give detailed, objective and transparent reasons for terminating the contracts, the finding that its agent misrepresented the plans of the respondent to the appellant and the order as to costs.

Background
European Union Law and the contracts of 2003

9. The trial judge has set out the facts of the case in a comprehensive judgment of over one hundred pages. I adopt his recital of the facts. For the purposes of this appeal, the salient facts are as follows. The appellant and his parents before him operated an Audi and Volkswagen car dealership in Lissarda, County Cork, on the road from Cork City to Macroom, pursuant to a succession of dealership agreements. Initially, the distributor agreements were with Motor Distributors Limited ("MDL") as the holder of the franchises for the sale and distribution of Audi and Volkswagen vehicles within the State. The appellant entered into written agreements with MDL. The contracts were replaced in 1995 to ensure that the contracts would comply with the 1995 EU Block Exemption Regulation, EU Council Regulation 1475/95, ("the 1995 BER") applicable to vertical agreements.

10. MDL terminated those contracts on twelve months' notice to all dealers in the State and replaced the contracts with new contracts. These were drafted by the parent company of the respondent in order to take account of the requirements of EU Commission Regulation (EC) No. 1400/2002 of 31 July 2002 on the application of Article 81(3) of the TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector

("the BER") which came into effect on 1 October 2003. There were six contracts in all, three in relation to Audi, which were for a fixed term and which terminated in 2008, and three in relation to Volkswagen, which were of indefinite duration. These contracts are the contracts in dispute. With effect from 2 July 2007, the rights and obligations of MDL under the contracts were transferred to the respondent.

11. MDL and the appellant entered into three contracts on 24 September 2003. The terms relevant to the issues in these proceedings are identical in each contract. MDL is identified as the supplier and O'Leary's Lissarda as the dealer. The basis of the contract is set out in Article 1 which provides:-

> *"Article 1 – Subject matter*
>
> *1. The sale of new vehicles of the 'Volkswagen' brand is effected within the framework of a distribution system with selection criteria in terms of quantity and quality, in accordance with the Commission Regulation (EC) No. 1400/2002 governing the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (hereinafter called "Regulation 1400/2002")."*

Part IV is headed:-

> *"IV. Term and termination of the agreement:*
>
> *Article 16 – Term of the agreement*
>
> *This Agreement shall become effective upon execution by the contracting parties on the 1 October, 2003 and is concluded for an indefinite term.*
>
> *Article 17 - Regular termination*
>
> *This Agreement may be terminated by either Party by giving 24 months written notice to the other Party before the end of a month.*
>
> *Article 18 – Termination with abbreviated period of notice*
>
> *This Agreement may be terminated by the Supplier by giving to the Dealer, in writing, 12 months notice of termination to the end of a month in the event that it is necessary for the Supplier to re-organise the whole or a substantial part of its distribution network.*
>
> *Article 19 – Termination with immediate effect*
>
> *...*
>
> *Article 20 – Requirement to state reasons*

Notice of termination given by the Supplier must contain a detailed statement of reasons which shall be transparent and objective."

12. Motor manufacturers such as Volkswagen AG, the German parent company of the respondent, habitually organise sales of their vehicles by a network of contracts with individual dealers throughout defined territories. These vertical agreements restrict competition and potentially infringe European competition laws (formerly Article 81, now Article 101 of the Treaty on the Functioning of the European Union). If the contracts incorporate terms which have been approved by the European Commission as complying with the requirements of EU law, then they are exempt from individual assessment by the Commission as to their effect on competition in trade between member states. The block exemption regulation applicable to the contracts in this case is the BER.

13. Recital 9 of the BER provides:-

"In order to prevent a supplier from terminating an agreement because a distributor or a repairer engages in pro-competitive behaviour, such as active or passive sales to foreign consumers, multi-branding or subcontracting of repair and maintenance services, every notice of termination must clearly set out in writing the reasons, which must be objective and transparent. Furthermore, in order to strengthen the independence of distributors and repairers from their suppliers, minimum periods of notice should be provided for the non-renewal of agreements concluded for a limited duration and for the termination of agreements of unlimited duration."

14. Recital 12 provides:-

"Irrespective of the market share of the undertakings concerned, this Regulation does not cover vertical agreements containing certain types of severely anti-competitive restraints (hardcore restrictions) which in general appreciably restrict competition even at low market shares and which are not indispensable to the attainment of the positive effects mentioned above. This concerns in particular vertical agreements containing restraints such as minimum or fixed resale prices and, with certain exceptions, restrictions of the territory into which, or of the customers to whom, a distributor or repairer may sell the contract goods or services. Such agreements should not benefit from the exemption."

15. The following are the articles of the BER relevant to the issues in this case:-

"Article 3

General Conditions

1. Subject to paragraphs 2, 3, 4, 5, 6 and 7, the exemption shall apply on condition that the supplier's market share on the relevant market on which it sells the new motor vehicles, spare parts for motor vehicles or repair and maintenance services does not exceed 30%.

However, the market share threshold for the application of the exemption shall be 40% for agreements establishing quantitative selective distribution systems for the sale of new motor vehicles.

Those thresholds shall not apply to agreements establishing qualitative selective distribution systems.

...

4. *The exemption shall apply on condition that the vertical agreement concluded with a distributor or repairer provides that a supplier who wishes to give notice of termination of an agreement must give such notice in writing and must include detailed, objective and transparent reasons for the termination, in order to prevent a supplier from ending a vertical agreement with a distributor or repairer because of practices which may not be restricted under this Regulation.*

5. *The exemption shall apply on condition that the vertical agreement concluded by the supplier of new motor vehicles with a distributor or authorised repairer provides*

   (a) *that the agreement is concluded for a period of at least five years; in this case each party has to undertake to give the other party at least six months' prior notice of its intention not to renew the agreement;*
   (b) *or that the agreement is concluded for an indefinite period; in this case the period of notice for regular termination of the agreement has to be at least two years for both parties; this period is reduced to at least one year where:*
      (i) *the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or*
      (ii) *the supplier terminates the agreement where it is necessary to re-organise the whole or a substantial part of the network.*

6. *The exemption shall apply on condition that the vertical agreement provides for each of the parties the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator. Such disputes may relate, inter alia, to any of the following:*

...

(g) *the issue whether the termination of an agreement is justified by the reasons given in the notice.*

The right referred to in the first sentence is without prejudice to each party's right to make an application to a national court.

...

Article 4

Hardcore restrictions

(Hardcore restrictions concerning the sale of new motor vehicles, repair and maintenance services or spare parts)

1. The exemption shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

…

(b) the restriction of the territory into which, or of the customers to whom, the distributor or repairer may sell the contract goods or services; however, the exemption shall apply to:

(i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another distributor or repairer, where such a restriction does not limit sales by the customers of the distributor or repairer;

…

(d) the restriction of active or passive sales of new passenger cars or light commercial vehicles, spare parts for any motor vehicle or repair and maintenance services for any motor vehicle to end users by members of a selective distribution system operating at the retail level of trade in markets where selective distribution is used. The exemption shall apply to agreements containing a prohibition on a member of a selective distribution system from operating out of an unauthorised place of establishment. However, the application of the exemption to such a prohibition is subject to Article 5(2)(b)

…

Article 5

Specific Conditions

1. As regards the sale of new motor vehicles, repair and maintenance services or spare parts, the exemption shall not apply to any of the following obligations contained in vertical agreements:

(a) any direct or indirect non-compete obligation…."

16. In 2003, Volkswagen AG prepared new contracts for all its dealers in all member states of the European Union. The agreements were drafted and introduced in order to comply with

the requirements of the BER. The purpose of preparing the new contracts was to secure the benefit of the exemption provided by the BER. The trial judge accepted that the introduction of the new regulation was the prompt for the introduction of the new contracts, and the purpose of introducing the new contracts was to secure the benefit of the exemption. The terms of the contracts were standard and applied to all Volkswagen dealers in Ireland.

The economic crisis and the car industry

17. The trial judge held that there was uncontroverted evidence as to the wide-scale collapse of the car industry during the economic crisis. There was an extraordinarily sharp decline in the sale of cars in Ireland, which was well under way by the last quarter of 2008. The actual decline in car sales in Ireland between 2008 and 2009 was 62%. The impact upon the respondent's dealership was enormous: there were bankruptcies occurring and apprehended in a number of dealerships and there were concerns about the viability of other dealerships.

18. In addition, the new road network, which had been developed in the 1990s and 2000s, had impacted upon the location of dealerships.

19. As a result, Volkswagen AG directed a review of the Irish market and dealerships in that market. The trial judge found that it had gone through an exhaustive process to determine what action it should take to reorganise its network by reason of the very sharp decline in the market, for both passenger cars and commercial vehicles, following the virtual collapse of the economy in 2008/2009, and the prediction that the market would not recover to anything like the same level of sales for a very long time to come, if at all, as well as taking into account the structural changes to the Irish road network. In 2009, the respondent was forecasting a loss of €4 million but the actual loss was €12 million. It was forecasting a cumulative loss for four years for itself of €30 million. The trial judge held that the respondent's review was an objective process, driven by a desire to create a sustainable network and to achieve the number one position in the Irish car sales market. He held that the review of the dealership network and network requirements was bona fide.

20. In 2009, the respondent instructed GMAP to assist, *inter alia*, in identifying dealers of strategic importance, as well as advising upon the ideal locations of dealerships in the Volkswagen network in the State. GMAP was to prepare a report identifying a theoretical baseline where the dealerships ought to be, onto which the respondent would overlay its commercial experience. The respondent would then decide whether to accept any recommendation of GMAP to discontinue any particular dealership, and any decision made by the respondent would have to be approved by Volkswagen AG in Germany.

21. The respondent undertook this in-depth analysis of the market and the issues arising between 2009 and 2011. On 26 August 2010, at a meeting of the board of the respondent chaired by Mr. Klinger, a representative of its parent company, it decided it needed to reorganise its network and reduce the number of dealers. It was decided to terminate the

entire network rather than simply terminating the contracts of those dealers whose locations were not included in the ideal network, which had been devised in light of the GMAP report. The trial judge observed that the reason for this approach was not recorded in the minutes of the meeting, though this observation must be treated with caution as part of the minutes were redacted and it is possible that the redacted portions were relevant to this decision.

22. It decided to implement the decision by:-

(1) terminating all existing dealerships;

(2) inviting all dealers to re-tender for a dealership contract in whatever area they thought fit;

(3) distinguishing between the location of different existing dealers which were in ideal locations from the respondent's perspective where it wanted to continue with dealerships in that location, and those dealerships which were not in ideal locations;

(4) in relation to the non-ideal locations, it intended to terminate the dealerships at those locations but to invite the dealers to make a business case for the continuance of a dealership at any of the seven non-ideal locations;

(5) after terminating all of the dealerships it intended to appoint dealers to its reorganised network in accordance with an assessment process involving a tender process.

23. Mr. Willis, the managing director of the respondent, emailed Mr. Klinger and the other directors of the respondent stating, *"As discussed, the method is Reorganisation with 2 years notice to minimise legal challenge, 33 Dealer contracts will be renewed, 7 dealer contracts will not be renewed."*

The termination of the contracts

24. The respondent held a meeting of all of its dealers on 15 April 2011 in Dunboyne, County Meath. Mr. Willis read a prepared script to the meeting. He did so in order to be absolutely sure what was and what was not said at the meeting. He prepared slides to accompany his presentation. He began by discussing the structural challenges facing the Irish economy at that time (unemployment, fiscal corrections and austerity budgets) and how these necessitated new thinking and long term, structural changes in the context of the motor industry. He set out, over a number of slides, how the motor industry had transformed radically in Ireland, particularly since 2007, resulting in the industry being fundamentally and irreversibly changed. He discussed how the overall number of dealers in Ireland had reduced by a third, and that there had been a substantial reduction in the size of the Irish car and LCV (light commercial vehicles) market since the economic crisis. In his script he said that "the reduced future size of the industry and the resultant impact on dealerships is a concern" of the company. He went on to set out the other key changes impacting the industry such as, less purchasing power and credit availability for the Irish

consumer, and how transport infrastructure had made dealerships less accessible for customers. The result of all the above, Mr. Willis stated, was that it was necessary for Volkswagen to reorganise its dealer network in order to reflect this new reality and, consequently, they decided to *"terminate all sales contracts under Article 17 of the Volkswagen Dealer Agreement giving 2 years notice."*

25. Mr. Willis next set out the future network plan for passenger cars, detailing how it would be established through a number of criteria in order to select a new network that reflected high performance requirements and the ambitions for Volkswagen in Ireland, these criteria being: management and vision, performance, financial structure, heritage and location. He said the first step in the plan was driven by location, with GMAP being employed to create a theoretical "ideal network plan." The plan identified thirty-five ideal dealer locations; there were already forty existing sales locations, of which thirty-two were identified as ideal sales points and eight locations deemed non-ideal. It is worth observing that there was an unresolved inconsistency as to the precise number of ideally located dealerships throughout the documents, though nothing turns on this inconsistency. Mr. Willis then described the network selection process wherein dealers would be invited to submit an expression of interest application for the future network. If only one single expression of interest for a location from the incumbent dealer was received, and that location was one of the thirty-two, the intention would be to re-appoint that dealer without delay; he said that they hoped this would be the outcome for most cases. On the other hand, if there were multiple expressions of interest for a location then a business planning process would follow. He stated in his script that it was important to note that while the plan highlighted the ideal locations, they would accept and consider other expressions of interest from outside ideal locations in the context of all of the selection criteria; such applications would need to address why the location proposed was preferable.

26. He then set out the commercial vehicle network plan which followed the same criteria and theoretical ideal locations model as detailed above; however, he stated that, as the future projections for commercial vehicles showed considerably less growth, a smaller network would be needed. The existing network was made up of thirty-six commercial vehicle sales dealers and the ideal plan would support twenty-five dealers nationwide with the introduction of new dealer standards based on four dealer categories: Super Dealers, Large Dealers, Medium Dealers and Small Dealers. Within these categories, all dealers would have new minimum dealer standards, for example, four display vehicles, four demonstration vehicles and a dedicated sales specialist etc. The process for an expression of interest would be the same as with passenger cars. Two slides presented the ideal locations for each category; notably, Lissarda was one of the locations not included in the ideal plan.

27. Finally, Mr. Willis went through the timeline for events following the meeting on 15 April 2011. Formal written notice that the existing dealer contracts would be terminated in twenty-four months, on 30 April 2013, would be sent out following the meeting and a draft expression of interest was to be completed and returned to the respondent within

fourteen days thereafter, by 29 April 2011. For dealers whose current location was part of the ideal network plan, written confirmation of that dealer's selection was to be provided as soon as possible. Where more than one serious expression of interest for a location was submitted, a business plan would be required which needed to be completed and returned to the respondent within six weeks, by 27 May 2011, covering specified assessment criteria. A final decision would be made and provided in Letters of Intent by 30 June 2011.

28. By letter dated 15 April 2011, Mr. Willis wrote to the appellant, making reference to the presentation that had taken place that day, saying that the respondent was planning a reorganisation of its dealer sales network. It stated that the reorganisation followed a detailed assessment by the respondent of its ideal network in light of recent structural changes to the market and due to the significant downturn in the Irish economy. He invited the appellant to draft an expression of interest application to be part of the reorganised dealer network. The letter stated that the appellant would shorty be provided formal notice of termination of his Volkswagen dealer agreements.

29. By letter dated 18 April 2011, Mr. Willis wrote again to the appellant stating as follows:-

> *"Further to our Volkswagen Ireland Network Presentation – Passenger Cars & Commercial Vehicles of 15 April 2011, the purpose of this letter is to provide you with written notice of termination of the following Volkswagen Dealer Contract(s) between Volkswagen Group Ireland Limited ("VGIE") (successor to Motor Distributors Limited) and O'Leary's Lissarda Limited:*
>
> *Agreement:*
>
> *Volkswagen Dealer Contract: Passenger Cars*
>
> *Volkswagen Dealer Contract: "Commerce" Product Group*
>
> *Volkswagen Dealer Contract: "Life" Product Group*
>
> *As discussed at our presentation, it is necessary for VGIE to re-organise its dealer network in light of recent structural changes to the market and due to the significant downturn in the Irish economy. As part of this network re-organisation, it is necessary to terminate all existing Volkswagen Dealer Contracts.*
>
> *Accordingly, this letter provides written notice of termination of your Volkswagen Dealer Contract(s) under Article 17 thereof, which termination will take effect on 30 April 2013."*

The respondent maintained that the notice correctly set out the reason it terminated all the dealerships contracts by letter dated 18 April 2011. The appellant disputed this point vehemently. The trial judge held that if the respondent was happy with the dealers in thirty-three ideal locations, and really wanted to terminate the dealerships in the seven non-ideal locations only, it was not necessary to terminate all the dealerships. He went on

to hold that, because, in his view, it was not in fact necessary to terminate all the dealerships, the notice of termination cannot have set out the true reason for the termination of the contracts. Having rejected the stated reason for termination as the actual reason for the termination of all of the dealership contracts, he said he could not ascertain what, in fact, the true reason was. It followed, therefore, that the reasons given in the notice of termination were not detailed, objective and transparent.

Was the contract validly terminated?

30. The first issue for this court is whether the contracts were validly terminated. The appellant says they were not. He says the respondent did not give detailed, objective and transparent reasons, as required by Article 20 of the contracts and that the trial judge was correct in so holding. Further, as the respondent had not complied with Article 20, it followed that it had not given valid notice of termination.

31. The respondent argued that it did give a valid notice of termination. The contract was expressly entered into in order to comply with the BER. Therefore, the contract must be construed in that context. The issue for the court was whether the notice of termination complied with the obligation to give reasons, mandated by the BER. The obligation set out in Article 20 of the contract reflects, and gives effect to, the obligation in Article 3(4) of the BER and, therefore, must be construed in light of the BER. The purpose served in giving notice of termination in terms of Article 20 is to be found in Recital 9 of the BER.

32. Recital 9 makes clear that a seller is required to give reasons which are detailed, objective and transparent for the termination of a dealership contract by a one-year notice in order (a) that it can be ascertained whether in fact the termination was for one year, and (b) that it can be ascertained that the termination was not in fact for a prohibited hardcore reason, in which case the notice of termination would be invalid. A seller who gives two years' notice of termination may terminate for any reason, or for none, save that it may not be for a prohibited hardcore, anti-competitive reason.

33. The respondent said it gave twenty-four months' notice. Therefore, it was at large whether to terminate all, or some, of its dealerships. It did not matter whether it was reorganising its whole network or some of it. It did not matter if it could have achieved the same end by different means. It was solely a matter for its commercial judgment and that judgment is not open to challenge by the appellant and may not be assessed by the court.

34. The respondent says that the notice set out the reasons for terminating the dealerships. It did not need to say why it decided that it was necessary to terminate all the dealerships. In so holding, the trial judge fell into error. Therefore, the notice was valid and, accordingly, the contracts were lawfully terminated as of 30 April 2013.

Discussion

35. The Volkswagen dealer contract commences with Part 1 "Basis of Contract":-

> *"Article 1 – Subject matter*

1. *The sale of new vehicles of the 'Volkswagen' brand is effected within the framework of a distribution system with selection criteria in terms of quantity and quality, in accordance with Commission Regulation (EC) No. 1400/2002 governing the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (hereinafter called "Regulation 1400/2002")."*

36. In opening the case, counsel for the appellant submitted that the contracts were intended by the parties to reflect and comply with the BER and so ought properly be construed in light of the legal principles applicable to motor vehicle distribution agreements. Counsel for the respondent submitted that the contracts should be interpreted and construed having regard to the factual matrix in which they were drafted and executed, *i.e.* for the purpose of giving effect to the BER. This meant that Article 20 cannot be construed as being divorced from the BER, and must be construed as giving effect to Article 3(4) of the BER. The trial judge agreed with the submissions of the respondent and held that the contract must be construed in light of the purpose of the contract: to give effect to, and benefit from, the BER.

37. It is trite law to state that the contract must be construed as a whole; each article may not be construed in isolation. Article 20 cannot be construed in isolation and must be given a purposive interpretation in light of both the express provisions of Article 1 of the contract, and the intention of the parties entering into the contract, to give effect to, and benefit from, the BER. This means that the requirement to give a detailed statement of reasons, which shall be transparent and objective, for termination of the contract, is not an end of itself. It is to fulfil a purpose. The respondent is required to give detailed, objective and transparent reasons for termination to enable an assessment to be made (whether by the recipient of the notice or any other party), (1) whether the respondent is correctly invoking the one-year notice period (if that be the case), and (2) whether the agreement is in fact being terminated for a prohibited hardcore reason, notwithstanding what is stated in the notice of termination. This is clear from the provisions of Recital 9 and Article 3(4) of the BER.

38. Furthermore, Article 20 must be interpreted in light of the fact that a seller, such as the respondent, is entitled to terminate a distribution agreement upon two years' notice for whatever reason it sees fit. The only restriction in these circumstances is that it may not be for a prohibited hardcore, anti-competitive reason.

39. The validity of the notice of termination served on the appellant must be assessed by reference to the correct interpretation of the obligation to give reasons set out in Article 20 of the contracts.

40. I accept the submissions of counsel for the respondent that, where a dealership agreement is terminated with two years' notice, the only grounds upon which this may be contested and, therefore, the only grounds of concern to a court (or an arbitrator as the case may be) is whether or not the termination was, in fact, for an anti-competitive reason, notwithstanding the actual reasons set out in the notice of termination. This is so

as the concern and focus of the BER, in relation to the termination of agreements, is the protection of dealers against anti-competitive behaviour by suppliers. The only scope for enquiry by the court is whether or not the agreement was terminated for a prohibited anti-competitive reason.

41. It has been expressly acknowledged by the Commission that a seller may terminate a dealer's contract by giving two years' notice simply on the grounds that it no longer has any need for a dealership in a particular geographic area, due for instance to a changed assessment of the optimal territorial coverage at that location (The Commission's Staff Working Document No.4 p. 36, published with the Commission Evaluation Report on Block Exemption Regulation 1400/2002 (May 2008)).

42. Further, even in the context of notice of termination upon twelve months' notice, in *Vulcan Silkeborg* (C-125/05) [2005] E.C.R. I-7665, the Court of Justice made it clear at para. 35:-

> *"that it is not for the national courts or arbitrators, in a dispute relating to the validity of the termination of an agreement with a reduced notice period under the conditions laid down in the first indent of Article 5(3) of Regulation No 1475/95, to call into question the economic and commercial considerations governing the supplier's decision to reorganise its distribution network."*

43. In the present case, the respondent gave two years' notice. It follows, for these reasons, that the only enquiry upon which the court may engage is whether the termination was in fact for a prohibited hardcore, anti-competitive reason. The court is not concerned with the economic or commercial considerations for the decision in question. The agreement may be terminated simply on the grounds that the seller no longer has any need for a dealer in that location. The need is to be assessed subjectively by the seller. It is not to be assessed on an objective basis.

44. The appellant sought to establish that, in fact, his dealership was terminated for anti-competitive reasons. He relied upon the evidence of Dr. Greg Swinand. The trial judge found that, under cross-examination, Dr. Swinand withdrew any allegation that the respondent was engaged in anti-competitive practices. He accepted that the respondent did not have market power. It necessarily followed that his hypothesis, that the respondent was engaging in an anti-competitive strategy in terminating the appellant's dealership, fell away because it was predicated on the basis that the respondent enjoyed market power. He accepted that if the respondent terminated the contracts for the reasons that it gave in the notices of termination, then the respondent was perfectly entitled so to do. He also accepted that he was no longer suggesting an anti-competitive motivation on the part of the respondent in terminating the appellant's dealership. He agreed that there were no limits to the number of distributors that a supplier might appoint when establishing a quantitative, selective distribution system, or when reorganising that system. He accepted that the respondent was entitled to set up its network as it saw fit and, in particular, to create a flagship dealer in Cork City if it thought that was in its own best interest.

45. The evidence of the appellant's own expert witness does not establish that the true reason for terminating the appellant's dealership was a prohibited hardcore, anti-competitive reason. He in fact establishes that it could not have been so and, as a matter of fact, he accepted that it was not so.

46. It follows that the appellant in fact did not, and could not, establish that his dealership had been terminated for anti-competitive reasons. It had been terminated on two years' notice. Termination for impermissible reasons was the sole ground upon which the court could assess the validity of the termination. This did not arise on the facts in this case. Therefore, the court was not required, or entitled, to enquire further into the reasons for termination.

47. Specifically, the trial judge erred in questioning the necessity to terminate all of the dealerships. That was a matter for the respondent in the exercise of its commercial judgment and discretion, and not for the court to evaluate. Because he could not understand the commercial necessity to terminate all dealer contracts in order, as he saw it, to remove just seven locations out of forty from the network, he wrongly concluded that the explanation given in the notice of termination was not the true reason. From this inference, he then concluded that the notice did not give detailed, objective and transparent reasons for the termination of the appellant's contracts and, therefore, was in breach of Article 20 of the contract. The inference was not one which was open to him to make in the circumstances of the case. Once he had determined that the respondent did not purport to terminate the agreements for prohibited anti-competitive reasons, he had no further role in the assessment of the validity of the notice.

48. That being so, the remaining question on this issue in the appeal is: in light of this conclusion, did the notice comply with the requirements of Article 20 of the contract to give detailed, objective reasons for termination? In my judgment, the notice gave reasons for termination. Those reasons were objective and transparent. There was a major economic crisis in the country which impacted upon the Irish motor market. There was also a change in the structure of the Irish motor market arising out of the developments in the roads network. The respondent said that it was necessary to reorganise its dealer network in light of these structural changes to the market. The contemporaneous internal documents of the respondent, and evidence at trial, shows that these were the actual reasons for the decision taken by the respondent, and Volkswagen AG, to proceed with a network reorganisation in Ireland. How it was implemented was solely a matter for the respondent and its parent company.

49. The appellant criticised the notice as being insufficiently detailed. The notice expressly referred to and incorporated the presentation of Mr. Willis at the meeting of 15 April 2011, three days before the notice issued, and which was attended by the appellant. The appellant accepted, in evidence, that the reasons given in the notice for the network reorganisation represented the reasons given in the presentation.

50. When questioned by this court as to what level of detail would suffice to satisfy the requirements of Article 20 of the contract, counsel for the appellant said that it would

vary from case to case. If a contract was to be terminated for cause, it would be necessary to specify the cause; but if it was for network and commercial reasons, something along the lines of the business case for the decision was suggested.

51. In my opinion, that cannot be correct. It requires that each individual dealer, whose contract was to be terminated, would be given a notice of termination which effectively set out the business case for the entire reorganisation of the network. It would require the disclosure of highly sensitive, commercial information about the respondent's business and future plans. Potentially, it could involve legal advice, as in fact occurred in this case, where the approach adopted by the respondent was upon legal advice to reduce litigation risk. It clearly could not be required to give this advice to the individual dealers. It would also require the respondent to give individualised and, therefore, different notices to every dealer.

52. The requirement to give detailed reasons is not divorced from the requirement to give objective and transparent reasons and should be read in the light of the purpose of requiring a seller to give reasons. The detail given must be sufficient to understand the reasons. There has never been any suggestion that the appellant did not understand the reasons for the termination of his dealership contracts. It was argued by the respondent that the adequacy of the reasons given must be assessed by reference to the background knowledge of the person to whom the notice is given. In this case, the appellant had attended the meeting in Dunboyne, County Meath, where a detailed presentation had been given to all the dealers. The meeting was three days prior to the service of the notice of termination. The notice of termination expressly referenced that meeting, three days earlier, where it had been explained to all the dealers why it was necessary, in the opinion of the respondent, to terminate all of the existing dealerships and to invite them to express an interest to be reappointed as a Volkswagen dealer. It is not appropriate simply to read the notice of termination in a vacuum and to then assess the adequacy of the detail by reference solely to the words of Article 20 of the contract, without regard to the purpose for giving the reasons set out in Article 20, and the fact that all recipients of the notice had attended a detailed presentation three days earlier, where the respondent set out the situation with regard to the Volkswagen network and its future plans for the network in the state. This is the error underlying the appellant's case that the notice failed to give detailed, objective and transparent reasons for the termination.

53. In my judgment, the notice complied with the requirements of Article 20, as properly construed in the light of the BER. It gave detailed, objective and transparent reasons for the termination of the appellant's contracts. There was no breach of contract by the respondent and I would, therefore, allow the respondent's appeal on this ground.

54. This conclusion means that the contracts were validly terminated and, accordingly, disposes of the appellant's grounds of appeal in relation to the refusal to grant declarations that the contracts were, and remained, binding on the parties and the award of damages.

55. I, therefore, would dismiss those appeals accordingly.

Alleged representations made to the appellant

56. The decision on the validity of the notices of termination does not dispose of the appeal and cross-appeal in relation to the appellant's claim for damages for negligent misrepresentation. The appellant sought damages for misrepresentation from the respondent based upon representations as to the security of his contracts with the respondent (and its predecessor, MDL). He said that in September 2003, Mr. Tom O'Connor, of the respondent, told him that the contracts he was to sign were more secure than his previous contracts as the respondent would not be able to just make a decision that they no longer wanted to deal with a particular dealer, and the contracts would not be terminated unless there was fault or reason on his side. He said that in November 2007, Mr. Bob O'Callaghan, of the respondent, confirmed that the appellant's contracts with the respondent were indefinite and more secure (than his previous contracts), and that the appellant need have no fears that the contracts would be terminated. He said that in December 2007, Mr. O'Connor assured him of the unlimited (in the sense of being of indefinite duration) nature of the contracts, that he was more secure with the contracts, that there was no possibility of the respondent undertaking a (nationwide network) reorganisation and that even if it did, it would not affect the appellant. In April 2009, Mr. Willis, of the respondent, at a dealer network meeting in Clonmel, advised dealers to invest and grow their business and in July 2009, Mr. Adam Chamberlain, the sales manager of the respondent, responding to a specific question from a dealer in a question-and-answer session, advised dealers that, despite the dramatic shortfall in the market, dealers who invested in their premises had nothing to worry about as the respondent had no plans for network rationalisation, and that the respondent had the best network team and the best network location. In October 2009, the appellant alleged that Mr. Willis had given as his final message to dealers, including the appellant, that it was a good time to invest.

57. Mr. O'Leary's evidence was that, on the strength of these assurances he proceeded with planned investment to upgrade the commercial vehicle display area on the opposite side of the main road from his main Volkswagen dealership. His case, as pleaded, was that he undertook these works sometime after October 2009, in reliance on the statement allegedly made by Mr. Willis in October 2009. It was not his case, nor his evidence, that he did so in reliance on an answer given by Mr. Chamberlain to a question posed by another dealer at a meeting in July 2009.

58. The trial judge found, as a matter of fact, that Mr. Willis did not make the statement alleged by the appellant to dealers in 2009 at para. 227 of his judgment. Instead, he concluded that it was much more likely that the appellant took encouragement from Mr. Willis' presentation in October 2009 and from the investment that the respondent itself was making in the business. The trial judge concluded that the appellant had decided that it was an opportune moment to carry out some work to his premises, which he had planned before the economic collapse. This primary finding of fact is binding upon this court. This means that the trial judge rejected the appellant's own pleas and evidence and held that he did not, as a matter of fact, rely upon anything said in October 2009 when making his decision to develop his display areas for commercial vehicles. Therefore, his

claim for damages for negligent misstatement, insofar as it is based upon representations allegedly made in October 2009, must fail.

59. The trial judge concluded, contrary to the appellant's own evidence, that he had relied on Mr. Chamberlain's answer in July 2009 when deciding to incur the expenditure on the commercial vehicle site across the road from the main show room. The trial judge concluded that Mr. Chamberlain's answer to the question was "disingenuous" and, therefore, constituted a misrepresentation for the purposes of *Headley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

60. The respondent submits that Mr. Chamberlain's answer to the question was not intended, and could not reasonably have been understood as intending, to be something affecting any decision which any individual dealer might make on discretionary expenditure on his premises. Neither Mr. Chamberlain, nor the respondent assumed any responsibility to the dealers, nor the appellant in particular, in respect of future investment decisions. The respondent did not owe a duty of care to the dealers, generally, to alert them of the fact that the GMAP study was underway, and so Mr. Chamberlain's answer could not give rise to a cause of action in negligent misrepresentation. The respondent argued that no dealer could reasonably have understood Mr. Chamberlain's answer to mean that the dealerships were "secure" as of 2009, when the country and the motor industry were in the depths of an economic crisis of unparalleled severity. There could be no reasonable reliance by the appellant upon any such assurance in the circumstances.

61. Furthermore, according to the respondent, the evidence of the appellant showed that he had incurred significant expenditure on engineers' fees in 2007 and 2008, prior to any alleged statements or answers in 2009, relating to the upgrade of the site opposite the main premises. This was a relevant factor in assessing whether, in fact, the appellant had actually relied upon the assurances or representations alleged when deciding to incur the expenditure of upgrading his commercial vehicle site.

Discussion

62. The trial judge accepted that in July 2009, in response to a question from a dealer other than the appellant, Mr. Chamberlain informed those present at the meeting (including the appellant) that the respondent had no plans at that time to carry out a network reorganisation. While the appellant disputed whether the answer was qualified by the reference to "at that time", it is critical that the trial judge made no finding that the appellant relied upon this answer when he decided to proceed with his plans to carry out work to his commercial vehicles premises. He noted that the appellant made a specific note of the reply, but the only step the appellant took following this meeting was to make every effort to maintain standards and to avoid letting any staff go. This was not part of his claim for damages for misrepresentation.

63. When he came to consider the claim for misrepresentation, the trial judge held at para. 230 as follows:-

"For as long as matters remained uncertain, it is quite understandable that the defendant would not wish to unsettle its network of dealers by informing them that this study was underway. On the other hand, faced with a direct question as to whether or not a reorganisation was contemplated, it was somewhat disingenuous not to inform the dealers present of the GMAP exercise, and that there was at least the possibility of a degree of reorganisation when that exercise was concluded. Had the plaintiff being aware of this, it seems highly unlikely that he would have undertaken expenditure in the carrying out of works at his premises until the shape of the new network was determined. I have little doubt but that the plaintiff drew significant comfort from what Mr. Chamberlain said on this occasion and quite reasonably relied upon it in deciding to proceed with works that he had been contemplating doing for some time. Not only that, I am satisfied that it is foreseeable that dealers receiving an assurance of the kind that they did from Mr. Chamberlain were likely to be influenced by such an assurance in the making of their own commercial decisions, including decisions relating to expenditure. In my view there was reasonable reliance by the plaintiff on the representations made by Mr. Chamberlain at this meeting, and there was no need for the plaintiff to make further enquiries as to whether or not there might be a reorganisation of the dealership network, before undertaking expenditure on his premises. This brings the statement made by Mr. Chamberlain at this meeting within the principles identified in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465, and as subsequently affirmed and developed in Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605. Those authorities have of course been adopted and followed in this jurisdiction in Wall v Hegarty [1980] ILRM 124 and more recently in Wildgust v Bank of Ireland [200] IESC 10."

64. Upon close analysis, the decision is not actually supported by the evidence. He states that, had the appellant been aware of the GMAP exercise "it seems highly unlikely that he would have undertaken expenditure in the carrying out of works at his premises until the shape of the new network was determined. I have little doubt that the [appellant] drew significant comfort from what Mr. Chamberlain said on this occasion and quite reasonably relied upon it in deciding to proceed with the works that he had been contemplating doing for some time." However, the appellant did not give this as his evidence and it is inconsistent with the actual findings of fact by the trial judge. In the absence of actual evidence of reliance, the trial judge cannot fill that gap in the evidence. There is no basis for inferring that the appellant relied upon Mr. Chamberlain's answer. If the appellant did not prove that he relied upon the representation, and acted upon the representation to his detriment, then he has failed to make out a case for damages for negligent misrepresentation.

65. It is important to note that the appellant's case was that he decided to proceed with his planned upgrade of the commercial vehicles premises on the basis of an alleged representation by Mr. Willis in October 2009 that "now" was a good time to invest in their (the dealers') businesses – not on the basis of an assurance in July 2009 that the respondent had no plans to reorganise its network of dealers. The trial judge rejected the

appellant's case in relation to this alleged representation. He accepted Mr. Willis' evidence that the appellant may have mistaken something that Mr. Willis said about the respondent, itself, as an encouragement to dealers to invest, but that he would have stayed well clear of encouraging the dealers to invest capital in their premises, or in their businesses.

66. It follows that the trial judge erred in law when he held that the respondent was liable to reimburse the appellant the expenditure he incurred in carrying out works to his premises following the meeting in July 2009. For this reason, I would allow the appeal of the respondent in relation to the award of damages for misrepresentation.

67. It, likewise, follows that the appeals of the appellant in relation to the earlier alleged representations must also be rejected. It is difficult to conceive how the earlier representations could be relied upon as inducing the appellant to carry out his investment plans after the meeting of October 2009 when those representations alleged to have been made at a time much closer to the investment have been rejected. The appellant has not made out a case for overturning the trial judge's rejection of his claims of negligent misrepresentation by Mr. O'Connor in 2003 nor Mr. O'Callaghan and Mr. O'Connor in 2007. The appellant gave no evidence that had he been aware of the terms of the contracts in 2003 he would not have entered into them. Mr. O'Callaghan merely sought to persuade the appellant to remain exclusively a Volkswagen dealer, and this was entirely a matter for the appellant to decide. In relation to the claim regarding Mr. O'Connor in December 2007, while noting the implausibility of the representation alleged, the trial judge held that the appellant had failed to make out a case that he relied upon the alleged representation to his detriment. Accordingly, I would refuse the appeals of the appellant in relation to the rejection of his other claims for misrepresentation.

Conclusion

68. The notices of termination given by the respondent to the appellant on 18 April 2011 gave detailed, objective and transparent reasons for the termination of the contracts and, as such, were valid notices of termination and complied with the requirements of Article 20 of the contracts of 2003. Accordingly, the contracts were validly terminated on 30 April 2013.

69. The appellant is not entitled to damages for alleged breach of contract or to a declaration that the contracts are subsisting and binding on the parties.

70. The claim for damages for misrepresentation is rejected as the appellant did not establish that he acted to his detriment in relying upon any alleged misrepresentation by any agent of the respondent and, accordingly, is not entitled to recover damages from the respondent for same.

71. The court will hear the submissions of the parties in relation to costs.