

Final but unapproved

No redaction required



AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2024:000075

[2026] IESC 9

Dunne J.

Woulfe J.

Murray J.

Collins J.

Donnelly J.

BETWEEN

ACE AUTOBODY LIMITED

Plaintiff/Respondent

AND

MOTORPARK LIMITED, BRECOL LIMITED AND

JDM AUTOMOTIVE LIMITED

Defendants/Appellants

JUDGMENT of Mr. Justice Maurice Collins delivered on 18 February 2026

INTRODUCTION

1. This appeal raises significant issues concerning the formation of contracts, the doctrine of part performance and the role of equitable estoppel in commercial transactions.
2. The High Court and the Court of Appeal differed sharply on these issues and also differed very sharply in their assessment of the evidence and the conclusions to be drawn from it. Assessing the evidence is, of course, generally a matter for the court of trial and one of the issues in this appeal is whether in this respect the Court of Appeal went beyond the permissible parameters of appellate review, as explained in decisions such as *Hay v O'Grady* [1992] 1 IR 210.
3. The Order against which the Defendants appeal (made on 15 January 2024) granted specific performance against the First Defendant, Motorpark Limited ("*Motorpark*") of an agreement to grant the Plaintiff, Ace Autobody Limited ("*ACE*") a 10-year lease of part of the Defendants' premises at Monksland, Athlone, County Roscommon ("*the Premises*"). The part in question comprises a motor vehicle crash repair facility or "*body shop*" (and certain ancillary facilities) and I will refer to it here as the "*Body Shop*". The High Court (Owens J) had earlier held that there was no concluded agreement for the grant of such a lease and had therefore dismissed ACE's claim for specific performance. Owens J had also rejected ACE's claim to be entitled to such a lease on the basis of a proprietary estoppel. On appeal, however, the Court of Appeal

(Whelan J; Noonan and Pilkington JJ agreeing) ([2024] IECA 6) upheld ACE's claim that it had, in the period between August and December 2016, negotiated with and agreed the terms of a 10-year lease with Motorpark and that a binding and enforceable agreement to grant such a lease had arisen on 16 January 2017 when, with Motorpark's consent and encouragement, ACE went into occupation of the Body Shop and took over the body shop business previously operated by Motorpark. The Court of Appeal also upheld ACE's alternative proprietary estoppel claim.

4. As of the hearing of the Defendants' appeal in this Court, ACE was still in occupation of the Body Shop. In the High Court, the Defendants had maintained that ACE was merely a licensee, but Owens J found that ACE was in occupation on a yearly tenancy. The Defendants challenged that finding before the Court of Appeal but, in light of that court's findings on ACE's appeal, its cross-appeal failed. Before this Court, the Defendants no longer challenged the finding of a yearly tenancy. The Court was told that Motorpark had served a Notice to Quit on ACE shortly after the High Court judgment and that, in response, ACE had brought proceedings under the Landlord and Tenant (Amendment) Act 1980 (as amended) ("*the 1980 Act*") asserting an entitlement to a new tenancy under Part II of that Act. As of the hearing of the appeal before this Court, those proceedings were pending in the Circuit Court and ACE remained in occupation of the Body Shop in accordance with section 28 of the 1980 Act. Thus, ACE has been in occupation of the Body Shop, and operating a business from it, for a period of 9 years. That is a significant fact, to which I will return.

5. I will start by setting out the uncontroversial facts and then summarising the decisions of the High Court and the Court of Appeal. I will then consider the case in contract made by ACE and the alternative case made by it on the basis of proprietary estoppel and, in doing so, I will express my views on the disputed evidential findings and the conclusions reached by the Court of Appeal.

The Uncontroversial Facts

6. As of 2016, Motorpark was operating a motor vehicle dealership, garage and related facilities (including a body shop) from the Premises. ACE operates a network of body shops at various locations in the State. The Ace Autobody Group is a substantial commercial enterprise with a combined annual turnover of *circa* €21 million.¹ In August 2016, Motorpark initiated discussions with ACE for the grant of a lease of the Body Shop to ACE, along with a licence to use other parts of the Premises for ancillary and related uses (parking spaces, offices, kitchen and toilet facilities). It appears from the evidence at trial that Motorpark's body shop operation was loss-making and, in any

¹ Day 1 (Counsel's opening). Robin Sutton's evidence was that there were 17 separate Ace Autobody premises throughout the country, some of which were owned and operated by related companies rather than by ACE. According to Mr Sutton, ACE operated 10 sites directly, all but two of which were leased. ACE had opened six sites in 2016, all held under "*full modern repairing lease[s]*". The Athlone site was the only one without a written lease.

event whether it was or not, it is apparent that Motorpark was anxious to exit the body shop business.

7. Motorpark held the Premises on foot of a lease granted by Michael McAteer, acting as receiver to the owner, C&R Auto Trading Limited, for a term of 15 years commencing on 25 November 2010. Accordingly, Motorpark was not then in a position to grant a 10-year lease to ACE (the term sought by it). However, the Second Defendant (“*Brecol*”), a company connected to Motorpark, was negotiating with the receiver to acquire the freehold reversionary interest in the Premises from C&R Auto Trading Limited (the relevant Folio (35841F) discloses that Brecol was registered as full owner of the Premises on 8 May 2018) and it was intended that Brecol would then grant a lease to Motorpark such that it would then be in a position to grant the proposed sub-lease with ACE.
8. The Third Defendant (“*JDM*”) is a company associated with Joe Duffy Motors, a large motor retail group. JDM acquired Motorpark and Brecol in or about May 2018 and now operates a number of car dealerships from the Premises. JDM has effectively taken over the defence of these proceedings.
9. On 20 August 2016, a representative of ACE, Robin Sutton, met with a representative of Motorpark, Gerard Halloran. Following that meeting, and a follow-up phone call, Mr Halloran emailed Mr Sutton a “*proposal for review*” on 24 August 2016. That

document, headed “*Discussion document ref takeover of Motorpark Ltd Bodyshop @ Monksland Athlone*” with the subheading “*Term Sheet Discussion document only*” (and to which I shall refer as the “*Term Sheet*”) set out 10 numbered points relating to the proposed lease and the transfer of the existing body shop operation to ACE (including the transfer of four employees from Motorpark to ACE under the “*Transfer of Undertakings legislation*”), the first of which was in the following terms:

“[ACE] undertake 10-year lease on the Bodyshop with 5-year break clause. The rental schedule as follows €15,000 nett year 1 and 2 €16,000 nett year 3 and €17,000 nett year 4&5.”

Other points in the Term Sheet related to the purchase by ACE of vehicle parts from Motorpark Group for use in Athlone and Galway (the location of another ACE repair centre) (point 10), the sale to ACE of the equipment in the Body Shop for a nominal sum (with a right to repurchase on completion or termination of the proposed sub-lease) (point 5) and provision for the installation by ACE, at its expense, of its own computer and CRM system (point 9). The Term Sheet also contemplated that Motorpark would assign certain vehicle repair contracts to ACE (point 2).

10. At the end of August 2016, ACE’s managing director, Paul Plunkett, met with Motorpark’s Mr Halloran and they went through the Term Sheet “*line by line*” and shook hands on it. There was a further meeting in early September when Mr Plunkett

met with Mr Halloran and Michael Barry (Motorpark's managing director and principal). Colin Barry (Motorpark's group general manager, director and Michael Barry's son) also attended that meeting. In his evidence to the High Court, Mr Halloran accepted that, at that stage, "*the key terms [were] agreed*" and the parties agreed to refer the matter to their respective solicitors to put what had been agreed orally into formal legal documentation.

11. Meanwhile, Motorpark announced to its employees that ACE would be taking over the body shop.
12. Early in November 2016, Motorpark's solicitor, Kevin McNamara of Kieran Murphy & Co, was instructed to deal with the proposed lease to ACE (Mr Barry indicating that he would deal directly with the other aspects of the proposed transaction). On 30 November 2016, Mr McNamara emailed ACE's solicitor, Kieran Roe (of O' Donohoe Solicitors) indicating that he was "*finalising the terms of a draft lease with our client*" and expected to be in a position to send the draft lease and copy title later that week. That email was headed "*SUBJECT TO LEASE/LICENSE*".
13. On 8 December 2016, Mr McNamara wrote to Mr Roe (in a letter headed "*Subject to Lease*") explaining that Brecol was in the process of acquiring the Premises and that the sale was expected to complete "*in the coming days.*" The letter went on to state that Mr McNamara would send on a copy of the lease between Brecol and Motorpark when in

final agreed form (such a lease being essential if Motorpark was to be in a position to grant a 10-year lease to ACE). The letter attached a number of documents including a “*Draft Lease of Body Shop v1*” (stated to be a “*draft ... subject to our client’s final approval*”) and a “*Draft Deed of Renunciation.*” The draft lease was in terms approved by Mr Barry and contained the usual terms that one would expect to find in a commercial lease. It did not, however, contain a commencement date and also did not include a break clause. The draft deed of renunciation was intended to exclude any entitlement that ACE might otherwise have to a new tenancy under Part II of the 1980 Act on the expiry of the term of the proposed lease.

14. On 13 December 2016, Mr McNamara had a discussion with Michael Barry in which Mr Barry instructed him not to carry out any further work for the time being in relation to the sub-lease to ACE, indicating that it might be that the “*transaction will not proceed due to the possibility of an entirely different direction for the business.*”²
15. On 14 December 2016 Mr Roe (ACE’s solicitor) replied to Mr McNamara’s letter of 8 December 2016. Mr Roe’s letter was headed “*SUBJECT TO LEASE/LEASE DENIED*” and raised a number of queries, including as to the agreement of the parties as to the terms of the proposed lease (paras 22-23) and whether the granting of the lease was subject to the consent of a lender (paras 1 and 29). Paragraph 16 of the letter stated that

² Day 4, pages 80-81 (referring to an attendance note of 13 December 2016).

“[o]n the basis that our Client is taking a 10 year Lease we do not believe a Renunciation is appropriate. Please confirm that no Renunciation will be required.”

The letter concluded with the following statement:

“[i]n the meantime please note that we have no authority or instructions to bind our client to the above proposed transaction and no Contract shall be deemed to come into existence until such time as approved draft Contracts have been engrossed, executed and exchanged and a contractual deposit paid. This letter is not to be deemed to constitute a note or memorandum for the purpose of the Land and Conveyancing Law Reform Act 2009.”

16. Mr McNamara sought Mr Barry’s instructions as to whether to reply to Mr Roe’s letter at that stage or whether to hold off until the New Year (as Mr Barry was going to be away over the Christmas period). On 16 December 2016, Mr Barry told Mr McNamara that he intended to proceed with the transaction with ACE and that Colin Barry would deal with matters in his absence. Mr Barry indicated that the transaction would not be completed until the New Year. Mr McNamara was to reply to Mr Roe’s queries on receipt of instructions. In the event, however, Mr McNamara never received any such instructions, and no reply was ever sent. There appears to have been no further correspondence or communication between the respective solicitors following Mr Roe’s letter of 14 December 2016. In particular, there was no further communication on the issue of the execution (or not) of a deed of renunciation by ACE.

17. Difficulties (and consequent delay) arose in relation to Brecol's acquisition of the freehold interest in the Premises. Lombard Ireland Limited had lent monies to C&R Auto Trading Limited and had registered a charge on the Premises in October 2008. Subsequently, that loan and the associated security had been sold or transferred to Ulster Bank Ireland. However, the charge remained registered in the name of Lombard Ireland Limited. Until registered as the owner of the charge, Ulster Bank and the receiver lacked power of sale. While these difficulties took time to resolve, Ulster Bank was not registered as owner of the charge until December 2017 — it was at all times evident that they could and would be resolved. In any event, Motorpark did not disclose those difficulties to ACE at the time.

18. Also on 16 December 2016, Michael Barry and Robin Sutton had a phone conversation, the substance of which was recorded in an email sent by Mr Barry to Mr Sutton on the same day. The email recorded that ACE and Motorpark wished to move forward with the handover of the Body Shop in Athlone to ACE *“on a lease which is presently being processed by our solicitors”* and referenced a meeting the following week *“to discuss the hand over from 1st Jan”*. In his evidence in the High Court (which was unchallenged on this point) Mr Sutton stated that, during his conversation with Mr Barry, Mr Sutton had brought up the fact that at that stage the lease was not signed, and that Mr Barry had responded along the lines of *“[w]e'll get that sorted out, that's all agreed. We'll*

just get that sorted out, let's move on" and had said that the lease was not anything that should delay ACE moving in.³

19. On 22 December 2016, Colin Barry sent a further email to Mr Sutton, referring to an earlier telephone call and stating that "*we are putting an estimated closing date of Thursday the 12th of January on the deal with Ace and would hope to have you in for the following Monday the 16th of January*", as well as noting that ACE was to "*carry out an inspection to verify the schedule of condition before completion.*" Mr Sutton gave evidence (also unchallenged) that, in the course of his call with Mr Barry, he had again referred to the fact that there was no lease in place and said that Mr Barry had assured him "*ah don't worry we'll have it all sorted out for the 12th*" and that it was not something that Mr Sutton was to worry about.⁴ Mr Sutton also gave unchallenged evidence that he received a call late in December from Mr Halloran "*to give me a definite reassurance*" and assuring him that there was "*no problem with the lease*".⁵
20. There was no "*completion*" and no lease (or agreement for a lease) was ever executed by the parties or either of them. Nevertheless, ACE entered into occupation of the Body Shop and the related facilities on 16 January 2017. In his evidence to the High Court,

³ Day 2, page 44.

⁴ Day 2, page 46.

⁵ Day 2, page 48.

Mr Plunkett acknowledged that Mr Roe had advised him against going into possession without a lease in place and accepted that “*it wasn’t the ideal situation or best practice.*” He explained that he had made a “*commercial decision*” in circumstances where ACE was under pressure from Colin Barry to move in, where there was a “*level of trust*” between the parties and where Michael Barry and Gerry Halloran had assured him that the lease would be forthcoming.⁶

21. ACE took over and rebranded the vehicle repair business being operated from the Body Shop. It also took over the employment contracts of the four employees previously employed by Motorpark in the business. ACE subsequently claimed to have incurred expenditure amounting to €350,000 in connection with the move. Although the High Court Judge was of the view that the evidence did not support such a figure, he accepted that there had been “*substantial expenditure*” on plant and machinery, management systems, refurbishing and rebranding of the Body Shop and on the provision of management services.⁷
22. In the language of the High Court Judge, the process of finalising the lease to ACE “*went to sleep*” as soon as ACE went into possession.⁸ In October 2017, Motorpark

⁶ Day 2, pages 130-131.

⁷ High Court Judgment, page 42.

⁸ *Ibid*, page 38.

invoiced ACE for €14,375 (ex VAT) in respect of “*Lease of Bodyshop in Athlone for Peroid (sic) 16/01/17 to 31/12/17. €15,000 per annum*”. In his evidence to the High Court (which the High Court Judge accepted), Mr Plunkett explained that this invoice had issued only because he was “*constantly chasing up Michael [Barry] and Gerry [Halloran] to get an invoice*”.⁹ The invoice was duly discharged by ACE.

23. At some point, Motorpark decided not to proceed with a lease to ACE. Instead Motorpark and Brecol decided to pursue a sale of the Premises, and the vehicle dealership being carried on from it, to JDM. ACE (in the person of Mr Plunkett) was first informed of the sale by Mr Barry at a meeting on 14 February 2018. Subsequently, there was some discussion about the possibility of relocating ACE’s business, but it came to nothing. By email from Mr Barry of 7 March 2018, ACE was notified that it was required to surrender vacant possession on or before 20 March 2018. In response, ACE (through Mr Roe) asserted that it had the benefit of a 10-year lease and indicated that it would take all necessary steps to defend that interest. Further solicitors’ correspondence then ensued in which the parties rehearsed their respective positions at some length and ultimately proceedings were issued by ACE.

⁹ Day 2, page 138.

HIGH COURT PROCEEDINGS AND JUDGMENT

The Proceedings

24. ACE issued these proceedings in December 2018 and delivered a Statement of Claim in March 2019. The Statement of Claim pleaded that ACE and Motorpark entered into an agreement “[i]n or around December 2016” whereby Motorpark agreed to grant, and ACE agreed to accept, a 10-year lease of the Body Shop, on the terms set out in the Term Sheet. In the alternative, it was pleaded that Motorpark had represented to ACE that, if it entered into possession of the Body Shop in January 2017, Motorpark would grant it a 10-year lease and that, in reliance on that agreement and on such representations, ACE entered into possession and acted to its detriment in doing so. It is further pleaded that “[u]nconscionably and in breach of good faith,” Motorpark had failed to grant a lease to ACE. On foot of these and the other pleas in the Statement of Claim, ACE sought (1) specific performance of “*the Agreement wherein [Motorpark] agreed to grant [ACE] a ten-year lease of the Body Shop ... together with other benefits*” and (2) a declaration as to ACE’s entitlement to a 10-year lease of the Body Shop “*by way of proprietary estoppel*” as well as equitable damages and damages for breach of contract, negligent misstatement, misrepresentation, defamation of title and injurious falsehood.

25. The Defendants pleaded a variety of defences in their Defence. For present purposes, it is sufficient to note that they denied that any agreement for the grant of a lease had been made, pleaded that any alleged agreement was unenforceable by reason of non-compliance with section 51 of the Land and Conveyancing Law Reform Act 2009 (“*the 2009 Act*”) and asserted that ACE had been permitted to enter into occupation of the Body Shop as a licensee, in circumstances where negotiations for the grant of a lease were ongoing. Reliance was placed on the fact that the solicitors’ correspondence was marked “*subject to lease*,” with particular reliance being placed on the statement in Mr Roe’s letter of 14 December 2016 to the effect that no contract would be deemed to come into existence until an approved draft had been “*engrossed, executed and exchanged and a contractual deposit paid*”, none of which had occurred. The Defendants also counterclaimed for a declaration that ACE had no estate, interest, right or title in or over the Body Shop and sought an injunction requiring it to “*vacate the premises and remove all of their equipment from same.*”

26. ACE then delivered a Reply pleading part performance in answer to the Defendants’ invocation of section 51 of the 2009 Act.

27. The action proceeded to trial before Owens J in the High Court, commencing on 24 May 2022. Mr Sutton and Mr Plunkett were the principal witnesses for ACE. Mr Halloran, Michael Barry and Mr McNamara (Motorpark’s solicitor in 2016) gave evidence for the

Defendants. The hearing took 5 days, concluding on 31 May 2022. Apart from the oral evidence, the parties made extensive written and oral submissions.

High Court Judgment

28. On 2 June 2022, Owens J delivered a lengthy *ex tempore* judgment. He began by identifying the following three issues:
- i. Whether or not in late December 2016 a contract had been concluded between Motorpark and ACE to lease ACE the Body Shop for 10 years on terms orally agreed.
 - ii. If not, whether the conduct of Motorpark and/or Brecol precluded them from relying on the fact that no contract was concluded or on the absence of any executed document complying with the requirements of section 51 of the 2009 Act.
 - iii. What was to happen in the event that ACE's claim failed and whether, in particular, ACE was a trespasser.
29. As regards the first of these issues, Owens J considered that the evidence did not establish that there was a contract for a 10-year lease in place when ACE went into possession of the Body Shop on 16 January 2017. As to the second issue, in his view

the evidence may have disclosed a “*very limited basis*” on which the conduct of Motorpark and Brecol could entitle ACE to equitable relief based on estoppel, that conduct consisting of “*bad faith*” in leaving ACE under the impression that it would move toward finalising the negotiation of the 10-year lease, as was envisaged when ACE went into possession. However, in his view, any such entitlement to relief could go only to the period of notice appropriate to determine the legal relationship created when ACE went into possession: ACE had no legitimate expectation that it would be granted a 10-year lease giving it a right of renewal under Part II of the 1980 Act nor in the Judge’s view did the evidence establish any convention or representation that might estop Motorpark or Brecol from relying on the fact that there was no agreement on the renunciation issue (referred to by the Judge as the “*disclaimer*” issue). The fact that ACE “*jettisoned*” its solicitor’s legal advice and elected to go into possession on the “*strength of vague assurances*” that a lease was agreed or would be forthcoming, in circumstances where it knew that there was disagreement about the disclaimer and that the terms of the proposed lease had not been concluded, were not, in his view, capable of giving rise to any form of estoppel (page 7).

30. Owens J emphasised the need for the terms of the lease to have been agreed:

“with a sufficient degree of certainty to enable a court asked to grant specific performance to state with clarity what the express and implied terms of the contract which have been agreed are” (page 8).

The fact that a suggested term might appear reasonable was not sufficient. If anything “*fundamental remains unagreed or if there was disagreement on a particular matter which remained unresolved, then there could be no contract.*” At any point prior to finalisation of a contract, parties were free to change their positions and free to “*pull the plug on a proposed deal*” (page 9). There was no duty to negotiate in good faith, although where parties incurred commitments implementing an arrangement which might not be enforceable as a contract, good faith might be relevant. In general, a party who made commitments based on an assumption or hope that a contract would be put in place was at risk that the other party might decide to pull out of the proposed deal. Equity, if it operated at all, only operated to prevent a party from exercising what would otherwise be an immediate legal right. Only in “*limited*” circumstances did equitable principles supplant the “*certainties*” of contract law in business transactions and only in “*exceptional circumstances*” did equity have the effect of ripening a business arrangement which is not based in contract into a proprietary interest in land (page 11).

31. Owens J then proceeded to consider the facts. He found that, in 2016, the parties had agreed “*in principle*” that ACE “*would take over the body shop repairs element of the Motorpark business on a ten-year lease*”. He accepted (with one qualification that is not material for present purposes) the evidence of Mr Plunkett and Mr Sutton as to their dealings with Motorpark and he largely discounted the evidence of Mr Barry, who had a poor recollection of events and whose evidence was “*very inaccurate*” in certain

respects. In the Judge's view, while certain terms had been agreed in August 2016 and further terms agreed orally subsequently, there was never an overall concluded contract and a significant number of issues remained to be agreed, including but not limited to the disclaimer issue (pages 25-26).

32. Returning to the issue of the renunciation, there was, as he put it, a "*world of difference*" between a lease that would end after 10 years and a lease for 10 years that could be "*extended indefinitely*" by the tenant. No concluded contract could come into existence unless either ACE agreed to provide the renunciation or Motorpark dropped the requirement for it: the point was "*simply never agreed*" (page 31). Furthermore, the terms of the solicitors' correspondence made it clear that the principals did not regard themselves as contractually bound. In particular, Mr Roe's letter of 14 December 2016 "*negated any intention of [ACE] to be contractually bound until everything was agreed and signed up*" (page 27). Owens J did not regard the emails of 16 and 22 December 2016, or the conversations they referred to, as amounting to anything more than "*vague comments*" which could not amount to a "*binding assurance about anything*" (page 31). They gave no indication of what had been agreed, and it was evident from the solicitors' correspondence that everything was not agreed and that a number of matters were yet to be agreed, relating to the title to the property, the terms of the proposed lease and whether ACE would provide a renunciation (page 32). When Mr Plunkett made a "*commercial decision*" to go into possession without a lease, he did so against the solicitor's advice and there was "*no basis*" on which he could have concluded that

Motorpark was contractually obliged to grant a 10-year lease to ACE: “[h]e knew what was outstanding” and “knew ... about the lack of agreement in relation to the disclaimer” (page 37).

33. The Judge found that, at the time that ACE entered into possession, no steps had been taken to apprise it of the fact that a problem had arisen with the title to the Premises (the fact that the registered charge remained in the name of Lombard Ireland Limited). Michael Barry did know of the problem but, instead of disclosing it, he kept the information to himself so as not to discourage ACE from proceeding. In the Judge’s view, that title problem would inevitably have been sorted out (as in the event it was). Matters then fell into abeyance and at some stage, which was difficult to pinpoint, “*bad faith crept into Michael Barry’s attitude towards*” ACE. He ceased to be interested in granting a lease to ACE and decided that he would use the absence of a lease to leverage the value of the Premises. At the same time, he was happy to have ACE occupying the Body Shop and to have the benefit of Ace buying parts from Motorpark (page 39). Mr Barry was aware of ACE’s investment in the Body Shop but, in the Judge’s view, the evidence did not permit him to conclude that Mr Barry had made the decision not to grant a lease to ACE, and instead to sell the Premises, before that investment was made. It happened afterwards, when the decision was made to sell the Premises (page 41).
34. The Judge then examined the state of the evidence as to the extent of ACE’s investment and expenditure. While he accepted that there had been “*substantial expenditure,*” in

his view the evidence did not support the figure of €350,000 asserted by ACE and it was impossible for him to hazard a guess as to the approximate amount involved. He accepted that it would be difficult and financially burdensome for ACE to relocate to another suitable premises in the Athlone area. However, in his view, remedies based on proprietary or promissory estoppel did not necessarily result in indemnification for loss for every commercial advantage lost by a party as a result of the unfair behaviour of another. Equitable intervention may be less appropriate in commercial dealings where the certainties of the law of contract generally govern relationships. For courts to write contracts because parties in commercial relationships who had “*all their wits about them*” may have “*chosen not to protect themselves*” could undermine “*well-established certainties of the law of contract*” and the court “*should be cautious before going down that road*” (pages 43-44).

35. Ultimately, the Judge concluded that the common intention of ACE and of Motorpark was that ACE would be a “*contractual tenant*” in a tenancy from year to year rather than a licensee. The starting point was the presumption that followed from the fact that ACE had been given possession in return for the periodic payment of rent, namely that a periodic tenancy arose. Even in the absence of such a presumption, the Judge was satisfied on the evidence that the parties intended that ACE should occupy the Body Shop as tenant from year to year until such time as the lease was agreed. That finding might mean that ACE had a right to a new tenancy, in the event that the tenancy was determined. However, the Judge did not consider it proportionate to impose a 10-year

lease on Motorpark or Brecol, which the court would have to write the terms of. In the circumstances, he considered that the proper course was to dismiss both the claim and the counterclaim.

36. The Judge subsequently made an order directing ACE to pay the costs of its claim and directing the Defendants to pay the costs of their counterclaim.

APPEAL TO THE COURT OF APPEAL

37. Neither side was happy with the High Court's decision. ACE appealed to the Court of Appeal on the basis that the High Court Judge had erred in finding that there was no concluded agreement to grant a 10-year lease and that the Judge had erred in concluding that the evidence fell short of establishing any form of estoppel. The Defendants opposed ACE's appeal and also cross-appealed the Judge's finding that ACE held the Body Shop as a tenant from year to year, maintaining that ACE had been no more than a licensee and renewing their claim for the reliefs sought in their counterclaim.

Judgment of the Court of Appeal ([2024] IECA 6)

38. The Court of Appeal allowed ACE's appeal and dismissed the Defendants' cross-appeal. Whelan J gave the only judgment (Noonan and Pilkington JJ agreeing).
39. In her lengthy judgment, Whelan J undertook a very detailed review of the evidence of the key witnesses. Before doing so, she made a number of observations about the High Court's judgment that indicated a general view that the Judge had failed to consider the evidence and arguments sufficiently and had erred in his analysis of the issues, both as regards the issue of whether there was a concluded agreement for the grant of a lease and as regards the issue of unconscionable conduct/estoppel (§§96-98).

40. In reviewing the evidence, Whelan J made a number of observations that had important implications for the determination of the appeal and cross-appeal. She was particularly critical of the evidence and conduct of Michael Barry. The assurances that he and his son had given to ACE prior to it going into occupation were, in her view, “*clear, unambiguous and not ‘vague’*” (§134). Mr Barry’s evidence that a renunciation had to be “*part of any lease*” was characterised by Whelan J as “*an unexpressed mental reservation*” which, objectively considered, formed no part or term of the contract between the parties and Motorpark therefore could not assert that a deed of renunciation had to be part of any lease (§135). Whelan J described Mr Barry as, in December 2016, “*attempting unilaterally to resile*” from what had previously been agreed (§141). Whether his conduct, and that of his son Colin, met the standard of the reasonable expectations of “*honest, sensible businessmen in contract formation*” was, in her view, “*central to the determination of [the] appeal*” (§151). That observation appears to have been prompted by Mr McNamara’s evidence that he had been told by Mr Barry on 13 December 2016 that the lease to ACE might not proceed at all. Whelan J did not, in her review of Mr McNamara’s evidence, refer to the fact that he had given evidence that subsequently (on 16 December 2016) he was told by Mr Barry that he intended to proceed with the transaction with ACE.
41. Whelan J next addressed the issue of whether there was a concluded enforceable agreement for the grant of a lease to ACE (§157 and following). Citing *Hillas & Co Ltd v Arcos Ltd* [1932] UKHL 2, (1932) 147 LT 503/504 and *RTS Flexible Systems v*

Molkerei Alois Müller [2010] UKSC 14, [2010] 1 WLR 753 (“*RTS Flexible*”), Whelan J framed the issue as being whether the parties had agreed “*on all the terms they objectively regarded or the law required as essential for the formation of [a] legally binding agreement for lease.*” The essential terms for such an agreement had been identified by Finnegan P in *Cosmoline Trading v DH Burke & Son Ltd* [2006] IEHC 38 (“*Cosmoline*”) as (i) the parties; (ii) the premises; (iii) the term; (iv) the commencement date and (v) the rent (§160). She went on to cite a number of passages from *Wylie on Irish Landlord and Tenant Law* (4th ed; 2022) (“*Wylie*”) including a passage to the effect that what is to be regarded as “*essential*” or “*material*” involves “*a subjective test, i.e. what the parties so regarded and not what the court might on an objective basis so regard*” (§163, citing para 5.07 of *Wylie*).

42. In Whelan J’s view, it was “*evident that there was a concluded agreement in place from the point in September where the principals on each side shook hands*” (§167). All of the essential terms of the lease were, in her opinion, agreed by the parties at that stage, including the commencement date which could be “*ascertained as being effectively as soon as was feasible with a horizon of weeks to completion envisaged by both sides as of late September 2016*” (*ibid*). Solicitors were subsequently engaged “*solely for the purposes of putting the concluded agreement into legal shape*” and while Michael Barry had attempted to use that process to “*extract new terms such as renunciation and vary the term regarding the break clause*” (by making the break clause mutual), he had “*abandoned*” that approach on 16 December 2016 (*ibid*).

43. As to the use of terms such as “*subject to lease*”, Whelan J emphasised that the matter had been put into the hands of solicitors for only a limited time and for the limited purpose of “*putting the agreed terms into formal shape*” and was thus only a “*temporary hiatus*” in what was otherwise a process of direct negotiations between the parties (§168). Once direct negotiations began, leading to ACE actually taking possession, the parties “*stepped down*” their solicitors’ engagement. Thus, the use of, the term “*subject to contract*” had “*no impact on the terms of the agreement already concluded or subsequently agreed directly between the parties*” (§169, citing *Silver Wraith v Siucré Eireann Cpt* [1989] IEHC 34 (“*Silver Wraith*”)). The parties themselves never used such a formulation in their negotiations. The facts therefore contrasted starkly with the facts in *Silver Wraith*. The “*subject to lease*” formulation and the ancillary language used in the solicitors’ correspondence was, in truth, introduced *ex post facto* by the solicitors “*after the parties considered themselves and held themselves out vis-à-vis each other as having concluded a binding agreement for the grant of the lease*” (§175). It was “*well-settled*” that the fact that the parties anticipated that their agreement would be incorporated into a formal legal document did not necessarily exclude the existence of a concluded and binding contract (§176). The High Court Judge had erred in approaching the negotiations between the parties as having continued on the basis of “*subject to lease*” after both sides discharged their solicitors and resumed direct negotiations (§177) and ACE had proceeded to conclude the contract by acts of part performance including going into possession at the behest of Motorpark (§181).

44. Whelan J then returned to the issue of the date of commencement. She had earlier cited Farrell, *Irish Law of Specific Performance* (1994) (“*Farrell*”), from §3.16, as authority for the proposition that the commencement date could be established “*inferentially*” (§166). Citing *Silver Wraith* to the same effect she expressed the view that the High Court Judge had erroneously disregarded a number of essential factors regarding the commencement date, namely that the parties had contemplated commencing the tenancy within weeks of the September 2016 handshake; the agreement by email on 22 December 2016 that ACE would take possession on 16 January 2017 and ACE’s entry into occupation on that date. On the evidence, the commencement date had been “*both agreed and performed*” (§181), by Colin Barry’s email of 22 December 2016, “*a date certain for commencement of the term had been fixed between the parties*” (§182) and the contract was, in her view, “*executed when ACE went into occupation on 16 January, 2017*” (§183).
45. Having held that there was a concluded agreement, Whelan J next turned to the issue of part performance (§184 and following). She noted that part performance “*assumes the existence of a concluded agreement which, by reason of the absence of a sufficient note or memorandum in writing, may not in law be specifically enforceable.*” In her view, even adopting a strict construction of the requirement that a commencement date be identified, that requirement was “*unequivocally established*” by ACE’s acts of performance, namely by taking possession on 16 January 2017 (§184). Whelan J next

cited a number of authorities, including passages from *Farrell* as well as the decision of this Court in *Mackie v Wilde (No 2)* [1998] 2 IR 578. In *Mackie v Wilde (No 2)* Barron J had identified as the essential elements of a successful plea of part performance that (i) there was a concluded oral contract between the parties; (ii) the plaintiff had acted in such a way that showed an intention to perform the contract; (iii) the defendant induced such acts or stood by while they were being performed and as such acquiesced in those acts; and (iv) it would be unconscionable and a breach of good faith to permit the defendant to rely on the terms of the statute (the Statute of Frauds 1695) to prevent the enforcement of the contract in question (§189).

46. In Whelan J's view, the High Court had erred in failing to consider and attach appropriate weight to the distinct acts of part performance undertaken by ACE at the instigation and urging of Motorpark and with its knowledge and consent, including (i) taking possession of the Body Shop on 16 January 2017; (ii) paying the yearly rent when invoiced; (iii) discharging service charges, rates, and outgoings; and (iv) assuming full legal responsibility for four Motorpark employees. Those acts were "*wholly consistent with the lease contended for by ACE*" (§191). In addition, the High Court Judge had "*erred in disregarding the substantial expenditures*" undertaken by ACE (§192) and had failed to attach appropriate weight to the conduct of Motorpark, and specifically the conduct of Michael and Colin Barry, which had induced ACE to go into possession, with the result that the agreement for lease was no longer executory.

That conduct precluded Motorpark and/or Brecol from relying on section 51(1) of the 2009 Act (§§193-194).

47. Under the heading “*Estoppel regarding the renunciation*”, Whelan J considered whether Motorpark was estopped from asserting that agreement by ACE to renounce its Part II rights was an essential term of the contract (§195 and following). Whelan J rehearsed certain aspects of the evidence, including the evidence of Mr McNamara as to Michael Barry’s instruction not to respond to Mr Roe’s letter of 14 December 2016 and Mr Barry’s statement to Mr McNamara that the transaction with ACE might not proceed (once again, Whelan J did not refer to his attendance of 16 December 2016 recording Mr Barry as confirming that the transaction would be proceeding). In her view, the High Court Judge had erred in attaching insufficient weight to

“the actual degree of bad faith or unconscionability exhibited in this case ... in determining the respective rights of the parties in equity where an objective approach is called for from the stand point of the reasonable expectations of honest and sensible businessmen” (§198).

She cited *McDonagh v Denton* [2005] IEHC 127 as authority for the proposition that where an issue arises in a conveyancing transaction, “*failure to reply by a solicitor is tantamount to a representation that the defendant is in agreement with the matter asserted by the other side*” (§198). Overall, Whelan J was satisfied that the High Court

Judge had erred in his treatment of the renunciation issue and that the decision to ignore ACE's rejection of the draft deed of renunciation, coupled with the conduct (acts, omissions and representations) of Michael and Colin Barry in persuading ACE to go into possession estopped Motorpark from subsequently asserting that renunciation was ever an essential part of the agreement (§198-200). Absent candour on the part of Motorpark as to material facts, the essential terms of the lease contemplated and agreed to were those provided for in the Heads of Terms, as clarified by the witnesses in the High Court (§200).

48. Finally, Whelan J addressed the issue of proprietary estoppel (§204 and following). In her opinion it was evident that the elements of such estoppel were established at the latest as of 22 December 2016, when the commencement date was definitively agreed. The evidence of ACE's reliance on the assurances repeatedly and expressly made by Motorpark was "*overwhelming*" and ACE had incurred "*significant*" expenditure (§204). Looking at all of the evidence in the round, and in light of authorities such as *Gillett v Holt* [2001] Ch 210, [2001] 3 All ER 945, it would be unconscionable to allow Motorpark to escape its agreement with ACE for the grant of a 10-year lease and thus ACE was also entitled to specific performance on the alternative basis of proprietary estoppel in addition to the primary ground of part performance (§205).

APPLICATION FOR LEAVE TO APPEAL AND DETERMINATION

49. The Defendants applied to this Court for leave to appeal. ACE opposed the application for leave but, by Determination dated 29 July 2024 ([2024] IESCDET 97), leave was granted. The Panel considered that the issues arising out of the phrase “*subject to lease*”, the sufficiency of the evidence asserted to constitute part performance such as to establish the existence of a binding contract, and the issue of estoppel were commercially important and likely to arise in other cases and that this area of the law would benefit from further consideration by this Court, particularly in light of the differences between the analysis of the High Court at first instance and that of the Court of Appeal on appeal.

DISCUSSION

The Issues to be Resolved

50. It appears to me that the various matters in controversy in these proceedings and in this appeal are all encompassed within the following three issues:

- (1) Whether an agreement to grant a 10-year lease of the Body Shop was concluded and, if so, when and on what terms (the effect of the use of “*subject to lease/licence*” and cognate formulations by the solicitors acting for the parties, and the role of those solicitors, falls to be considered as part of this issue, as does the question of whether Motorpark is estopped from relying on the absence of agreement on the issue of renunciation).
- (2) Whether, if there was such an agreement, it was enforceable by reason of part performance (ACE does not make the case that there was a note or memorandum of the alleged agreement for a lease such as could satisfy the requirements of section 51(1) of the 2009 Act).
- (3) Whether, in the absence of an enforceable agreement to grant a lease of the Body Shop, ACE should nonetheless be granted such a lease (or, in the alternative, some other form of remedy or redress) on the basis of proprietary estoppel.

Issue (1) – Whether an agreement to grant a 10-year lease of the Body Shop was concluded and, if so, when and on what terms.

The Legal Framework for determining whether there was a concluded agreement

51. This is the first and fundamental contract issue. The *enforcement* of contracts relating to land, including contracts for the grant of a lease, is subject to the special rules in section 51 of the 2009 Act (similar though not identical rules apply to the grant of a lease by virtue of section 4 of the Landlord and Tenant Law Amendment Act Ireland 1860 (Deasy’s Act) but it is common case here that section 51 is the applicable provision).¹⁰ But no question of *enforcement* arises unless and until there is a *concluded contract*, or as Henchy J put it in *Lynch v O’Meara* (Unreported, Supreme Court, 8 May 1975) “*an entire completed contract*” (at page 1). Absent such a contract, there is simply nothing to be enforced: *ibid*, at 4 (a passage cited with approval by Geoghegan J in *Supermacs Ireland v Katesan (Naas) Limited* [2000] 4 IR 273 (“*Supermacs*”) at 288). As Keane J (as he then was) explained in *Silver Wraith*, compliance with the Statute of Frauds (now

¹⁰ That an *agreement* for the grant of a lease – as opposed to the *grant* of a lease – came within section 2 of the Statute of Frauds 1695, which section 51 of the 2009 Act effectively re-enacts, has long been established: see the discussion in *Wylie* at §5.02 & §5.06. Here ACE accepts that the requirements of section 51(1) were not complied with: written submissions, §48. It is of course for that reason that ACE relies on the doctrine of part performance, which is not affected by section 51(1): see section 51(2) of the 2009 Act.

section 51(1) of the 2009 Act) “*only becomes relevant if there is a concluded agreement in the first place*” (at 3). So too as regards part performance: see *Cosmoline* per Finnegan P at §75 (“*[w]here there is no contract part performance does not arise*”) as well as *Greenband Investments v Bruton* [2009] IEHC 67 (“*Greenband*”), per Clarke J (as he then was) at §11.1 (“*an act of part performance cannot create a contract where there was no contract in the first place*”).

52. It is often said that a completed contract requires agreement on all the *material* or *essential* terms: see for instance Farrell at §3.08 (there “*must be consensus on the material terms of the contract claimed*”). But as Geoghegan J explained in *Supermacs*, the use of such terminology in considering whether there is a concluded agreement is apt to cause confusion:

“That type of wording should have no place in that consideration. It is a wholly different matter when one comes to consider the sufficiency of a note or memorandum. Only the ‘material terms’ need be included in a note or memorandum for it to be sufficient but all the terms, whether they be important or unimportant, must be agreed before there can be said to be a concluded agreement” (at 286; my emphasis).

Later in his judgment, Geoghegan J reiterated the point: “[t]here cannot be a concluded agreement unless everything intended to be covered by the agreement has been either expressly or impliedly agreed”: *Supermacs*, at 288.

53. It is, therefore, more accurate to state the general principle as that a “concluded agreement requires agreement on all the terms of the contract”: Buckley et al, *Specific Performance in Ireland* (2012) at §4.10 (emphasis in the original). However, the substance of the analysis in *Farrell* remains good: it is for the parties, not for the court, to make their bargain (*Farrell*, §3.08). A court may regard agreement on certain contractual terms as essential for the existence of any concluded contract (and such is the case with agreements for lease, as is apparent from *Cosmoline*). Absent agreement on such terms as the law considers essential, there can be no agreement. But neither will there be a concluded agreement unless the parties reach agreement on *all* the terms which they regard as material or essential and the “question what is material or essential must be considered, at any rate primarily, from the point of view of the parties themselves” (*Farrell*, §3.10). It follows that the “test to be applied is a subjective one and the court is required to consider terms as essential to a contract which were so regarded by the parties themselves” (*ibid*).¹¹ This passage was cited with approval by the Court of Appeal (per Finlay Geoghegan J) in *Globe Entertainment Ltd v Pub Pool Ltd* [2016] IECA 272 and the court clearly (and in my view correctly) considered that

¹¹ The same point is made in *Wylie* in the passage cited by Whelan J at §163 of her judgment.

there was no difference in substance between the analysis in *Farrell* and the approach taken by this Court in *Supermacs*.

54. It follows that terms which the law may not regard as essential will nonetheless be essential to the conclusion of a contract where so regarded by the parties themselves.

55. The position is well-expressed by Lloyd LJ in his judgment for the Court of Appeal of England and Wales in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 ("*Pagnan*"), in a passage cited with approval by the UK Supreme Court in *RTS Flexible* (at §49) to which the Court was brought:

"[i]t is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, 'the masters of their contractual fate'"
(*Pagnan*, 619).

56. The issue of whether, in any given case, there is a concluded and binding contract falls to be determined objectively. *RTS Flexible* was cited in argument as authority for that proposition. At §46 of the court's judgment Lord Clarke stated that

"[w]hether there is a binding contract between the parties, and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective

state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”

But that principle is in any event well-established in this jurisdiction. So much is clear from the discussion in McDermott & McDermott, *Contract Law* (2nd ed; 2017) (“*McDermott*”), §§2.04-2.08. I did not understand Motorpark to contend otherwise and, in the circumstances, it is sufficient to refer to this Court’s decision in *McCabe Builders (Dublin) Ltd v Sagamu Developments Ltd* [2009] IESC 31, [2011] 3 IR 480 in which Fennelly J stated succinctly that the intention of the parties was “*to be gathered objectively from their exchanges of documents and not from their expressions of subjective intention as given in evidence at the hearing in the High Court* (§41 of the report).¹²

57. However, the outer bounds of this principle must be understood. The “*objective theory of contract formation*” (to use the language of Steyn LJ in *Trentham (G Percy) Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd’s Rep 25 at 27 (“*Trentham*”), also cited with

¹² Hardiman J agreed with the judgment of Fennelly J and, while Murphy J dissented in part, nothing in his judgment suggests that he disagreed with this aspect of Fennelly J’s judgment.

approval in *RTS Flexible*) does not entitle the court to impose on the parties its conception of an objectively “fair” or “reasonable” bargain or to override the fundamental principle that “[i]t is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant” (*Pagnan*, 619 cited in *RTS Flexible* at §49). Equally, it is also for the parties to decide what *form* their agreement should take. The court “should not impose binding contracts on the parties which they have not reached” (*RTS Flexible*, §47). Respect for these basic principles of contract law ensures that it is the parties – not the court – that remain the “masters of their contractual fate” (§49).

58. That the parties have not reached agreement on all contractual terms does not *per se* exclude the possibility that they have reached a concluded and binding agreement. The parties may intend to be bound by the terms they have agreed and to leave over any additional terms for further negotiation and agreement. Therefore, an “*agreement in principle*”, “*heads of agreement*”, an “*interim agreement*” or a “*provisional agreement*” may constitute a binding agreement even though terms remain to be agreed *provided that* the parties intended to be bound immediately by the agreed terms and did not intend that agreement on further terms should be a precondition to a concluded and binding agreement. In that event, provided that the agreed terms are sufficiently certain and include all terms that the law regards as essential for a binding contract, the court will give effect to the intention of the parties by enforcing their agreement: see *RTS Flexible*

at §45, as well as *Pagnan*, at 619, (§4) and (§6), per Lloyd LJ for the Court of Appeal, as well as the judgment of Bingham J (as he then was) in the High Court, at 610-611.¹³

59. Where a court finds that the parties have made a concluded contract even though further terms remain to be agreed, that is not on the basis of any assessment that such terms are objectively unimportant and may therefore be disregarded: rather it is on the basis of the court's assessment that the parties *intended* to be bound immediately by the agreed terms, irrespective of whether they had reached agreement on other matters. In enforcing such an agreement, the court is not overriding the intention of the parties or imposing a bargain on them to which they have not made: on the contrary it is striving to give effect to the bargain made by them. The principle is clear, even if its application in practice will be fact-sensitive and though it may be challenging to decide on which side of the line any given case falls.

60. Just as the parties may intend that there should be no concluded or binding agreement until agreement is reached on some further term or terms, they may intend that there

¹³ “Where the parties have not reached agreement on terms which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms” (at 611, citing *Rossiter v Miller* (1878) 3 App Cas 1124 at 1151). Bingham J continued: “[b]ut just as it is open to parties by their words and conduct to make clear that they do not intend to be bound until certain terms are agreed, even if those terms (objectively viewed) are of relatively minor significance, the converse is also true. The parties may by their words and conduct make it clear that they do intend to be bound, even though there are other terms yet to be agreed, even terms which may often or usually be agreed before a binding contract is made” (at 611).

should not be any concluded or binding agreement until the terms of their agreement are embodied in a formal written contract. But, again, it is clear that the fact that the parties contemplated that their agreement would ultimately take the form of a written contract does not *necessarily* mean that a concluded binding agreement cannot exist in the absence of such a contract. Again, it depends on what the parties intended: see, *inter alia*, *Irish Mainport Holdings Limited v Crosshaven Sailing Centre* (Unreported, High Court, Keane J, 16 May 1980), at pages 15-17; *Jodifern Ltd v Fitzgerald* [1999] IESC 88, [2000] 3 IR 321 (“*Jodifern*”), per Barron J at 330-331, and *Greenband*, per Clarke J at §§5.1-5.6.

61. However, it is well-established that where “*you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says, it is subject to and is dependent upon a formal contract being prepared*”: *Winn v Bull* (1877) 7 Ch D 29, per Jessel MR at 32. Where the agreement was not expressly stated to be subject to a formal contract “*it becomes a question of construction, whether the parties intended that the terms agreed should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail*” (*ibid*). In *Winn v Bull*, the parties had signed an agreement for the lease of a house which stated that the agreement was “*made subject to the preparation and approval of a formal contract.*” No such contract was ever executed and the plaintiff’s claim for specific performance failed, not because of any issue of compliance with the Statute of Frauds, but on the basis that there was no binding contract (*ibid*).

62. Jessel MR's statement in *Winn v Bull* was adopted and applied in this jurisdiction in *Thompson v The King* [1920] 2 IR 365 (KBD); [1921] 2 IR 438 (CA) where it was held that the use of the words "*subject contract*" in a telegram sent by the vendor's agent accepting an offer for the purchase of a munitions factory precluded a finding that there was a binding contract: see the judgment of Molony CJ in the King's Bench, at 382-386 (citing, *inter alia*, *Chinnock v Marchioness of Ely* 46 ER 1066, (1865) 4 De GJ & S 638; *Rossiter v Miller* (1877) 5 Ch D 648 (CA); (1878) 3 App Cas 1124 (HL) and *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 in addition to *Winn v Bull*), as well as the judgments of Gibson J at 390-391 and Gordon J at 393-394). In his judgment, Gibson J framed the issue thus:

"[d]id this expression 'subject contract' defer contractual obligation till a formal contract was settled, accepted and executed; or does it mean that the purchase terms having been fully and finally settled, a further contract was only contemplated for the purpose of putting the bargain into legal shape, without substantial additions or alteration?" (at 390).

He adopted the former construction: the expression conveyed "*an essential condition without performance of which the proposed contract is incomplete*" (at 391).

63. *Winn v Bull* and *Thompson v The King* were in turn cited and applied by the High Court (Keane J) in *Mulhall v Haren* [1981] IR 364. *Mulhall v Haren* was primarily concerned

with the question of whether a document stating that a transaction was “*subject to contract*” (or which was part of a chain of correspondence that was subject to such a stipulation) could constitute a sufficient note or memorandum so as to satisfy the Statute of Fraud, in circumstances where the fundamental issue was whether a concluded and unconditional oral agreement for the sale of land was enforceable or not. The purchaser subsequently instructed solicitors. Those solicitors initiated correspondence in relation to the conclusion of a sale contract which stated that the intended sale was “*subject to contract*”. Following a masterful survey of the authorities, Irish and English, on the effect of “*subject to contract*” – including this Court’s controversial decisions in *Kelly v Park Hall School* [1979] IR 340 and *Casey v Irish Intercontinental Bank* [1979] IR 364 (which Keane J read narrowly as confined to their own particular facts and as not laying down any principles of general application) – Keane J reaffirmed the orthodox position that a document stating that a transaction is “*subject to contract*” (or which is part of a chain of correspondence subject to such a stipulation) cannot evidence a contract for the purposes of the Statute of Frauds because it is “*normally inconsistent*” with the existence of a concluded contract (though he allowed that in “*rare and exceptional circumstances*” such as had arisen in *Kelly v Park Hall School*, the words “*subject to contract*” might be disregarded for that purpose): at 391. In his view, it was within the implied authority of a solicitor to stipulate that the transaction was “*subject to contract*” for the protection of clients (at 392) and he regarded as “*both good law good sense*” the statement of Lord Denning in *Tiverton Estates Ltd v Wearwell Ltd* [1975] 1 Ch 146 (“*Tiverton*”) (at 159-160) to the effect that a solicitor could thus ensure

“that the client is not bound by what has taken place in conversation” because *“for over a hundred years, the courts have held that the effect of the words ‘subject to contract’ is that the matter remains in negotiation until a formal contract is executed”* (at 393).

64. *Mulhall v Haren* was approved and applied by this Court in *Boyle v Lee* [1992] 1 IR 555. In *Boyle v Lee*, the High Court found as a fact that the parties had reached a concluded agreement for the sale of property and held that the requirements of section 2 of the Statute of Frauds were satisfied by a letter written by the vendor’s auctioneer to the vendor’s solicitors, notwithstanding the fact that the letter expressly stated that the vendor’s acceptance of the purchaser’s offer was *“subject to contract”*. On the vendor’s appeal, this Court reversed each of those findings. A majority of the Court considered that there was no completed oral contract, (Finlay CJ, with whose judgment Hederman J agreed, on the basis that there was no agreement on the deposit to be paid and O’ Flaherty J because that and a number of other issues remained to be resolved) and all members of the Court were of the view that, in any event, there was no note or memorandum capable of satisfying the requirements of section 2 of the Statute of Frauds: per Finlay CJ at 572-574; per McCarthy J at 576-578; O’ Flaherty J at 584-589 and Egan J at 594-596. In Finlay CJ’s view, certainty in what was or was not a sufficient note or memorandum for the purposes of the Statute of Frauds was a *“desirable aim”* and such certainty was achieved by a rule that no note or memorandum that contained any term or expression such as *“subject to contract”* could be sufficient, even where it could be established that such a term or expression did not form part of the originally

orally concluded agreement. Such a rule did not allow for the “*exceptional cases*” referred to by Keane J in *Mulhall v Haren*. Similarly, McCarthy J considered that “[n]o particular set of facts surrounding the making of the contract itself can relieve a plaintiff from giving the necessary evidence in writing” (at 578).

65. A majority of the Court (Finlay CJ and Hederman and McCarthy JJ) clearly considered that *Kelly v Park Hall School* and *Casey v Irish Intercontinental Bank* (which Keane J had read narrowly and distinguished in *Mulhall v Haren*) had been wrongly decided and should not be followed, whereas O’ Flaherty and Egan JJ appeared to take the view that they were confined to their own special facts (and, according to O’ Flaherty J, “*to the era in which they were decided*” (at 588)).

66. In his judgment, McCarthy J went on to express the view that the “*deal was incomplete*” not because the parties had not agreed the essential terms (in his view, they had) but because “*part of the deal between the parties was that the deal itself was subject to contract*” and the law did not “*recognise as enforceable a contract to enter into a contract*” (at 578). That analysis is, of course, entirely consistent with *Winn v Bull* and *Thompson v The King*. In his judgment, O’ Flaherty J surveyed the “*subject to contract*” cases, including *Chinnock v The Marchioness of Ely* (1865), *Winn v Bull* and the decision of the House of Lords in *Rossiter v Miller*, all of which indicated that a stipulation that agreement was “*subject to contract*” meant that no concluded contract could arise until a written contract was prepared and agreed. In O’ Flaherty J’s view, the

auctioneer's letter made it clear that matters remained "*in a state of suspension pending the execution of a formal contract; in other words the negotiations have not been concluded*" (at 587-588). Expressions such as "*subject to contract*" or "*subject to a formal contract being drawn up*" or the like were strong declarations that a concluded contract did not exist (though O' Flaherty J appeared to contemplate that there might be circumstances in which a contrary intention could be established). But, even where an oral agreement was concluded that was not "*subject to contract*", correspondence containing that or a similar phrase could not constitute a recognition, express or implied, of the existence of a binding contract (at 588).

67. An important strand of the decision in *Boyle v Lee* is its emphasis on the high value of certainty in this area of the law. Finlay CJ considered that "*the requirements of justice are that the law applicable to the formation of contracts for the purchase of land should be as certain as it is possible to make it*" (at 573-574). McCarthy J accepted that it might well be thought that a "*rigidity of construction*" as to the effect of "*subject to contract*" would result in genuine bargains not being enforced and that a court should, as it had in the past, "*to do a great right, do a little wrong*" (at 578). But he was clearly unimpressed by that argument. It was, he said, "*reasonable to assume that the writing requirement is well known to owners and buyers of land*" (*ibid*). Portia's rule of construction was, in

his view, “*the preferred alternative*” (*ibid*).¹⁴ Similarly, after noting that equity had ensured that the Statute of Frauds should not be invoked to bring about fraud by developing the doctrine of part performance, O’ Flaherty J stated that equity had now done its work and “*the statute should be looked at again because what it is now necessary to prevent is the burgeoning of actions based on subtleties and niceties to get around the clear wording of the statute.*” Advocating that the statute should be amended to require contracts for the sale of lands to be made in writing, O’ Flaherty J stated that he would rather “*the occasional gazumper go unbound than that people should be involved in needless uncertainty leading often to long drawn out litigation*” (at 589).

68. These observations have an obvious resonance here. It is in the general interest that the law applicable to the formation of contracts generally should be as clear and predictable as possible and that is particularly so in respect of contracts relating to land. That is, of course, the rationale underpinning section 51 of the 2009 Act (and, before that, section 2 of the Statute of Frauds). As the history of the “*subject to contract*” jurisprudence here and in England and Wales demonstrates in a very concrete way, it is important to resist the temptation to bend the rules so as to provide for a remedy in “*hard cases.*”

¹⁴ In Act 4, scene 1 of the Merchant of Venice, Bassanio beseeches the Duke to “[w]rest once the law to your authority. To do a great right, do a little wrong, and curb this cruel devil [Shylock] of his will” to which Portia (as Balthazar) responds “*It must not be. There is no power in Venice Can alter a decree establishèd. ’Twill be recorded for a precedent, And many an error by the same example Will rush into the state. It cannot be.*”

69. *Embourg Ltd v Tyler Group Ltd* [1996] 3 IR 480 (“*Embourg*”) was another specific performance case relating to the sale of a commercial property. The initial correspondence from the vendor’s auctioneer was headed “*subject to contract*” and the subsequent correspondence between the parties’ solicitors included statements to the effect that the solicitors had no authority to bind their respective clients and that no binding contract was to be deemed to exist between the parties until contracts had been executed and exchanged. Ultimately a contract was negotiated which the purchaser signed. The signed contracts were then sent to the vendor’s solicitor who acknowledged receipt of them and indicated that they were arranging for the contracts to be executed by the vendor. That letter did not contain any form of “*subject to contract*” stipulation. The vendor then decided not to proceed and the purchaser brought specific performance proceedings, relying on the letter enclosing the signed contracts and the vendor’s solicitors’ reply as constituting a binding agreement for sale. In the course of the proceedings, a director of the vendor swore an affidavit disclosing that he had in fact executed the contracts on behalf of the vendor but had subsequently instructed the vendor’s solicitors not to send the signed contracts or communicate the fact of their execution to the purchaser without express written authority.

70. The claim failed in the High Court, Costello P holding that the signed contracts were effectively to be held in escrow and that it was intended that the contract would not have legal effect until such time as it was delivered to the purchaser’s solicitor (at 487). This Court (per Hamilton CJ; Blayney and Barrington JJ agreeing) dismissed the purchaser’s

appeal. Blayney J noted that it was not a case in which the plaintiff claimed that there had been a concluded oral agreement for the sale of the property: the claim at all times was that there was a written agreement. The claim advanced in the statement of claim was that the solicitors' correspondence constituted such an agreement but that was, in Blayney J's view, "*unstateable*" given that the vendor's solicitors had made it clear that they had no authority to bind their client and had not in any event said anything that could be construed as an acceptance of the purchaser's offer (at 488). The issue therefore was whether both parties had bound themselves to the contract signed by them. In Blayney J's opinion, the purchaser's contention to that effect had to be rejected because the purchaser's offer had never been accepted by the vendor. Such acceptance would have involved sending one part of the duly executed contract to the purchaser's solicitors but that had not occurred (at 489). But, secondly and separately, Blayney J agreed with the vendor's submissions that no binding agreement ever came into existence because contracts had not been exchanged (page 490). He cited with evident approval a passage from the judgment of Lord Greene MR in *Eccles v Bryant and Pollock* [1948] 1 Ch 93 in which the Master of the Rolls had stated (at 99) that "[w]hen parties are proposing to enter into a contract, the manner in which the contract is to be created so as to bind them must be gathered from the intentions of the parties express or implied". In *Eccles v Bryant and Pollock* the Court of Appeal had held that the manner of becoming bound that was contemplated by the parties was by means of an exchange of executed contracts and similarly, in *Embourg* Blayney J held that the manner in which the parties bound themselves was by an exchange of contracts and the correspondence between them and

their conduct established that their intention was that no contract should come into existence until contracts were exchanged (at 491). While the usual conveyancing practice in this jurisdiction did not involve any requirement for the *exchange* of contract, exchange was a requirement here and as contracts had not been exchanged, no binding agreement had come into existence. That conclusion followed from the particular facts and it did not follow that, wherever there was a sale “*subject to contract*”, a binding contract would not come into existence until contracts were exchanged.

71. While O’ Flaherty J suggested in his judgment in *Boyle v Lee* that the expression “*subject to contract*” has no “*talismanic quality*”, it is nonetheless clear from the authorities – not least *Boyle v Lee* itself – that the expression (and similar expressions to the same effect) have an established and particular legal status and effect. At least where used in writing (as opposed to being stated orally), it “*must in virtually all circumstances be construed as meaning that there was no binding agreement until a written contract was signed*” (*Shirley Engineering Limited v Irish Telecommunications Investments Plc* [1999] IEHC 204, per Geoghegan J at page 3).¹⁵ In *Jodifern*, Keane J referred to “*subject to contract*” as “*the fatal rubric*” (at 327) and in the same case Barron J noted that the

¹⁵ Geoghegan J went on to express the view that it was “*quite another matter to extend that principle to the use of the words ‘subject to contract’ in oral conversation.*” That comment was *obiter* and, with respect to that eminent judge, it is not evident why, as a matter of principle, if the evidence establishes that one or more of the parties to oral negotiations had stipulated that such negotiations were “*subject to contract*”, effect should not be given to such a stipulation in the same way as a stipulation to that effect set out in correspondence. That issue does not arise on the facts here, however, and so it is not necessary to consider it further.

expression was the one that was “*normally used*” and which had “*legal sanction*” when a party or their agent wished to communicate that “*there is not as yet any concluded agreement*”, at least “*when placed at the head of the letter or other writing so as to govern the entire*” (at 331).

72. The judgment of Clarke J in *Greenband* contains a helpful discussion of the different ways in which parties contemplating entering into arrangements for the sale of an interest in land may choose to put in place a binding contract:

“5.2 At one end of the spectrum it may be clear from the statements or actions of those involved that any discussions which parties may have concerning the terms on which they might be prepared to enter into contractual arrangements are not, themselves, intended to create a contract. Parties may enter into discussions for the purposes of identifying the terms on which they might be prepared to contract but may expressly, or by implication, do so on the basis that no contractual relations will be entered into until such time as formal written contracts have been executed by all of the parties. In such circumstances no oral agreement can be said to come into existence which amounts to a binding contract, for the parties do not have in their contemplation that their oral discussions will lead to contractual relations.”

5.3 In those circumstances it is only if the process leading to the finalisation of a written agreement reaches the stage where it can be said that that written agreement amounts to binding contractual arrangements between the parties, that there can be said to be any contract in existence. It will be necessary to return to this question in the context of dealing with the issues which have arisen between the parties arising out of the fallback position adopted by Greenband to the effect that there is a written contract in this case.

5.4 However, parties may also enter into oral discussions which can not be properly characterised as involving either an express or an implied intention that the discussions concerned should not, if successful, to give rise to a contract between the parties. In such circumstances, provided all of the relevant prerequisites for a binding contract are in place, then there is no reason why a court should not conclude that there is an oral agreement between the parties which amounts to a contract. It will, of course, be the case that any such oral agreement will not be enforceable unless and until there comes into existence a note or memorandum sufficient to satisfy the [Statute] of Frauds or a sufficient act of part performance to render it inequitable to allow a party resisting enforcement of the contract to rely on the absence of such a note or memorandum. However, these latter issues are, of course, only concerned with the enforceability of the contract rather than whether there is a contract in the first place.

5.5 It should be noted that the fact that the parties may contemplate the possibility (or indeed the likelihood) that their oral agreement may come to be formalised in a written contract does not, of itself, necessarily give rise to an inference that the parties did not intend their oral agreement to be a contract. There is nothing, in principle, wrong with parties entering into an oral contract but contemplating that the terms which they have agreed will be incorporated into a more elaborate document. Whether this can be said to have occurred on the facts of any individual case depends, of course, on the evidence. Amongst the factors that may well be relevant is the question of whether it might be reasonable for the parties to assume that further significant discussions or negotiations would be required to finalise the terms of any written agreement.”

73. In *Greenband*, the plaintiff (the purchaser) sued the Irish Coursing Club (ICC) (the vendor) for specific performance of an alleged contract for the sale of land. That claim succeeded on the basis that the parties had reached a concluded oral agreement and the requirements of the Statute of Frauds were satisfied by a letter written by the vendor’s auctioneer to the vendor’s solicitors which was copied to the purchaser. That letter was not headed “*subject to contract*” and while it concluded by requesting the solicitors to “*arrange for the necessary agreements*” to be sent to the purchaser’s solicitors, unsurprisingly Clarke J did not consider that language to amount to a denial of contract

(§5.10) and in his view the letter contained all the essential terms of the contract: §§10.1-10.3. In any event, Clarke J held that the agreement had been part performed: §§11.1-11.2. The purchaser was therefore entitled to specific performance.

74. Clarke J then proceeded to consider a “*fall back*” argument made by the purchaser which relied on the fact that formal contracts had in fact been prepared by the vendor’s solicitors and signed by the purchaser. However, in their correspondence the vendor’s solicitors had included statements similar to those in *Embourg* to the effect that they did not have authority to bind their client and that there would be no binding contract until contracts had been signed by both parties and exchanged (the formula used in their first letter) or until contracts were signed by the vendor (the formula used in a subsequent letter). In reliance on *Embourg*, the vendor argued that the exchange of letters and documentation did not give rise to contractual relations. That argument was accepted by Clarke J, who considered the case to be on all fours with *Embourg*. Signed contracts had not been returned to the purchaser’s solicitors nor had there been any other communication to Greenband of the vendor’s acceptance of what was properly characterised as its written offer to purchase the property (an offer constituted by returning the draft contracts signed by Greenband) and in the circumstances there was no binding contract: §§12.5-12.6. The “*fall back*” argument therefore failed.

75. In terms of Clarke J’s taxonomy, it is clear that Embourg’s alternative case came within §§5.2-5.3. The effect of the formula used by the vendor’s solicitors in their correspondence with the purchaser’s solicitors, was to make it clear that it was

“only if the process leading to the finalisation of a written agreement reaches the stage where it can be said that that written agreement amounts to binding contractual arrangements between the parties, that there can be said to be any contract in existence” (§5.3).

76. That is also the effect of “*subject to contract*”, certainly where such a stipulation is stated in writing *prior* to the point where a concluded agreement is reached. In that scenario, “*subject to contract*” “*means what it says*” (*Winn v Bull* at 32), “*the matter remains in negotiation until a formal contract is executed*” (*Tiverton* at 159) and there will be a concluded contract only when a written contract is agreed and executed. The execution of a written contract is in such circumstance a precondition (or condition precedent) to the coming into existence of binding contractual rights and liabilities.¹⁶

¹⁶ A “*condition precedent*” in the fundamental sense of a requirement which must be satisfied before any contract comes into existence: see the discussion by Murray J in his judgment in *Flaherty v The Revenue Commissioners* [2026] IESC 4, §38.

77. What of the position where a concluded oral agreement is reached without any reference to “*subject to contract*” but subsequent correspondence states that any agreement is “*subject to contract*”? Such correspondence cannot constitute a note or memorandum for the purposes of satisfying section 2 of the Statute of Frauds or section 51(1) of the 2009 Act and that is so even where “*subject to contract*” was not a term of the orally negotiated agreement: so much is clear from *Boyle v Lee*. That “*subject to contract*” is introduced by the legal advisers for one (or both) of the parties *after* the conclusion of an oral agreement does not constitute an exceptional circumstance and does not provide a basis for departing from the general rule that a document that does not acknowledge the existence of a concluded agreement cannot satisfy the requirements of the statute. Insofar as *Silver Wraith* was relied on here as an authority to the contrary – and it is not at all clear that it is such an authority – it must yield to *Boyle v Lee*.
78. But the question here is a different one — it is whether (as it is put in *McDermott*, §2.234) if the phrase “*subject to contract*” is added by one of the party’s legal advisers *after* a completed oral agreement has been reached, “*does the phrase retrospectively undermine what would otherwise have been a completed oral agreement?*” *McDermott* makes reference to the Law Reform Commission’s *Report on Gazumping* (LRC 59-1999) which, reasoning from first principles, expresses the view that there is “*no reason for permitting a subsequent act of a party to disturb an agreement*” (at §2.039) and suggests that support for the proposition that a concluded agreement still persists in such circumstances is to be found in this Court’s decision in *Supermacs*, specifically the

statement of Hardiman J (at 281) that it was “*plainly arguable*” that use of “*subject to contract*” by the solicitors did not preclude the existence of a “*done deal*” between the parties themselves and that, insofar as it was said that the plaintiffs were estopped by the use of that “*rubric*” from asserting a completed and enforceable agreement, that was plainly a matter for evidence at the trial.

79. *Supermacs* was a strike-out application, so the threshold faced by the applicants was a high one and it is clear from the judgment of Hardiman J that the point was not pressed with any vigour by the applicants. But, as a matter of principle, if parties have agreed oral terms that, at law, do not amount to an enforceable agreement (because of non-compliance with section 51(1) and in the absence of any acts of part performance), it appears to me to be difficult to identify any basis on which either party could be said to be irrevocably bound to such terms. If there is no *enforceable* agreement, then it surely follows that either party is free to abandon the transaction. If that be so, then either party must equally be free to impose – or seek to impose – new or varied terms (such as a higher price) as a condition of proceeding with the transaction (that is, of course, precisely what *gazumping* involves). That appeared to be common case between the parties.¹⁷ If the parties are free to renegotiate the substantive terms of the proposed

¹⁷ One of the questions raised with the parties prior to the hearing of the appeal was whether, in the period prior to 16 January 2017 (the date on which, according to ACE, an enforceable agreement for a lease came into existence) each of the parties was free to withdraw from any agreement and/or free to renegotiate its terms. ACE

transaction, it would seem to follow that, as a matter of principle, they are equally free to renegotiate the formal requirements for a concluded complete contract, such as by stipulating that any agreement is “*subject to contract*” – i.e. subject to the execution of a formal written contract by both parties – and declining to proceed other than on that basis. If that is not agreed, then there would be no binding or enforceable agreement.

80. That was the view of the High Court Judge here (see page 26 of his Judgment) and it appears to me to be correct as a matter of principle. In the circumstances here, however, it is not necessary to express a definitive view on this point. On the facts found by the High Court, it is clear that there was no complete or concluded oral agreement for a lease when the parties’ solicitors exchanged correspondence stating that any agreement was “*subject to lease.*” While the Court of Appeal took a different view of the evidence, for the reasons explained later, I do not consider that the Court of Appeal was entitled to interfere with the High Court Judge’s findings in this respect, which were in any event, in my view, compelled by the evidence.

indicated unqualified agreement with that proposition. While Motorpark was more qualified in its response – stating that it was “*reasonable to infer*” that if either party had withdrawn prior to 16 January 2017, where there had been no part performance or detriment on the part of ACE, “*the other party would not have been entitled to seek performance or any other remedy in breach of contract*” – it did not take issue with its substance.

Subject to Lease

81. The authorities considered above are concerned with the expression “*subject to contract*” whereas here the parties’ solicitors used the expression “*subject to lease*” in their correspondence. However, it was not suggested in argument that anything turned on that point or that the expression “*subject to lease*” might have any different effect in law to “*subject to contract*”. That position is consistent with the authorities.¹⁸

Waiver of “subject to contract/lease”

82. That, as a matter of principle, parties may waive a “*subject to contract/lease*” stipulation is clear. The court “*will not lightly ... hold*” that there has been such a waiver: *RTS Flexible*, §56. That general rule applies with particular force in relation to contracts relating to land.
83. In her judgment, Whelan J refers to *Griffiths v Young* [1970] Ch 675 as authority for the proposition that the formulation “‘*subject to contract/lease*’ ... *can amount to a suspensive condition*” which may be waived subsequently by oral agreement of the parties (Court of Appeal Judgment, §178). While, as I have said, it is clear that such a

¹⁸ See *Hill and Redman’s Law of Landlord and Tenant* (looseleaf), A[481], as well as the authorities referred to at footnotes 5 and 6.

term may be waived, it is not, in my view, correct to characterise that term as merely “*a suspensive condition*”. *Griffiths v Young* was not followed in *Tiverton* (and neither was *Law v Jones* [1974] Ch 112, which was to the same effect). As explained above, the import of *Tiverton* (in this respect re-establishing previous orthodoxy) is that “*subject to contract*” is not a mere “*suspensive condition*” but a term having the effect that “*the matter remains in negotiation until a formal contract is executed*” (per Lord Denning MR at 159-160). In other words, the correct analysis is not that there is a contract the effect of which is suspended; there is no contract. Again, that appears to me to underscore the requirement for any waiver to be clearly established.

84. As I shall explain – and contrary to the view taken by Whelan J in the Court of Appeal – there is in my view no basis for holding that there was any such waiver here.

The essential terms of an agreement for lease

85. There was little or no dispute as to the terms that the law considers essential for an effective agreement for lease. The judgment of Finnegan P in *Cosmoline* identifies five such terms (though noting that there may be others, depending on the circumstances) namely (i) the parties; (ii) the premises; (iii) the term; (iv) the commencement date; and (v) the rent.

86. The debate here centred on the commencement date. In *O' Flaherty v Arvan Properties Limited* (Supreme Court, 21 July 1977) this Court (per Kenny J) stated that it was “settled law ... that the date of the commencement of the period for which the lease is to be granted is an essential term in a contract to grant a lease if it is to be enforceable” (at 5). In *O' Flaherty*, there was no agreement as to the commencement date and thus there was never any enforceable agreement to grant a lease (“enforceable” here is clearly being used to mean binding or concluded rather than enforceable for the purposes of the Statute of Frauds).
87. In her judgment, Whelan J refers to the discussion in *Farrell* (at §3.16) in which the author states that “[t]here cannot be a concluded agreement” to grant a lease without agreement as to the commencement date. He goes on to state that a commencement date may be “shown inferentially or from indications in correspondence”(§166). *Silver Wraith* is cited as an authority for the proposition that the commencement date can be established inferentially. Unfortunately it is not evident from the judgment of Keane J precisely what had been agreed in relation to the issue of commencement, though it seems to have related to the granting of planning permission (and that is consistent with the further citation of *Silver Wraith* in *Farrell* as authority for the proposition that the commencement date may be ascertained “referentially” from when planning permission

is obtained).¹⁹ The “normal rule”, Farrell continues, is that “it is sufficient if it appears either in express terms, or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what date the term was to commence.” That formulation derives from *Phelan v Tedcastle* (1885) 15 Law Reports (Ireland) 169 in which the Court of Appeal for Ireland held that the commencement date had been sufficiently specified by the agreement of the parties that the lease should commence on the expiry of the 6-month period within which the existing tenant (who was being ejected) might redeem the premises.

88. How these principles apply in the circumstances here will be considered below.

Estoppel

89. Distinct from ACE’s proprietary estoppel claim (which is addressed separately in this judgment), an issue of estoppel also arises in the context of ACE’s contractual claim. It arises in the following way. In the High Court, Owens J held that the parties were never *ad idem* on the issue of renunciation/disclaimer. That finding was, in his view, fatal to ACE’s contractual claim (see, for example, pages 31 and 35 of his Judgment) (Owens J also held that there were other terms which had not been agreed but the focus in this

¹⁹ §3.16, footnote 142 and supporting text. It is apparent from the judgment in *Silver Wraith* that Mr Farrell had appeared as counsel and was therefore very familiar with the facts and evidence.

appeal was on the issue of renunciation/disclaimer). Owens J also rejected ACE's contention that Motorpark, by its representations and/or conduct, had led ACE to believe that it would not insist on a renunciation clause or that there was a binding agreement notwithstanding the absence of any agreement on that issue (High Court Judgment, pages 35-36).

90. As already explained, the Court of Appeal, per Whelan J, took a different view on the second issue, concluding that Motorpark's conduct precluded it "*from asserting that renunciation was ever an issue or essential term of the contract*" (Court of Appeal Judgment, §198; see also §135).

91. Before this Court, counsel for ACE took no issue with the High Court's finding that there had never been any actual agreement on the issue of renunciation but, he said, estoppel "*bridges the gap on that contractual issue.*"²⁰

92. This aspect of the case was not the subject of any significant *legal* argument: the principal battleground was in respect of the *factual* findings and inferences to be drawn from the evidence.

²⁰ High Court Transcript, page 62.

93. Only a limited number of authorities were cited. One was the High Court's decision cited by the Court of Appeal in this context, *McDonagh v Denton*. *McDonagh v Denton* is a case with particular – indeed singular – facts. Notably, it is clear from the judgment of O' Sullivan J that he regarded it as a case of proprietary estoppel rather than one of promissory estoppel or estoppel by representation. In any event, it does not appear to me that the judgment is authority for the broad proposition attributed to it at §198 of the judgment of the Court of Appeal. True it is that O' Sullivan J held that the defendant's failure to respond to, or take issue with, the plaintiff's assertion of title in correspondence amounted to a representation that there was no disagreement with that assertion (page 34) but, as the Judge was careful to emphasise, that finding was one made in the (very particular) circumstances of that case, involving a tangled history of dealings going back over a decade (*ibid*). O' Sullivan J did not articulate any general principle to the effect that, where an issue arises in a conveyancing transaction (or, for that matter, any other form of contractual transaction) a failure to take issue with an assertion by the other side is tantamount to a representation of agreement with that assertion, nor is such a broad principle supported by authority. In the absence of a duty to speak, silence is not generally to be regarded as a representation: *Chitty on Contracts* (34th ed; 2021) (Vol 1) (“*Chitty*”) §6-100; Feltham et al (eds) *Spencer Bower: Reliance-Based Estoppel* (5th ed; 2017) (“*Spencer Bower*”) §1.90 and following. The true position therefore is that silence *may* amount to a representation in certain circumstances: the issue will in every case be fact-sensitive.

94. While the decision of the High Court of Australia in *Waltons Stores (Interstate) Limited v Maher* (1987-1988) 164 CLR 387 was included in the authorities provided to the Court, no submissions were directed to it. Again, the facts in *Waltons Stores (Interstate) Limited v Maher* were rather particular: see page 390 of the report. In the belief that the terms of a lease had been agreed by the proposed lessee (W), the proposed lessors (M) demolished a building on their lands and began to construct a new building as per specifications agreed with W. Prior to commencing demolition work, M's solicitors had been told by their counterparts that W had orally indicated their acceptance of the terms of the lease, that formal instructions were being obtained and that, if there was any difficulty with any of the terms, W's solicitors would revert the following day. No issue having been raised within the time indicated, M executed the lease and forwarded it to W's solicitors. Despite having second thoughts about the transaction, W kept silent and allowed M to proceed. In these circumstances, the High Court was satisfied that W was estopped from denying that it was bound by the lease.
95. The judgments in *Waltons Stores (Interstate) Limited v Maher* are lengthy and complex and different members of the Court reached that conclusion by different analytical routes. Whether the decision – and in particular the central holding that promissory estoppel may be relied on to enforce a non-contractual promise in the absence of any pre-existing relationship – is consistent with English law is doubted by *Chitty* (at §6-115) and *Spencer Bower* (at §14.37 and following) refers to a number of decisions from England and Wales, including that of the Court of Appeal in *Baird Textile Holdings Ltd*

v Marks and Spencer plc [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, in which it has not been followed. So far as I can ascertain, the decision has never been considered by an Irish court. In *Courtney v McCarthy* [2007] IESC 58, [2008] 2 IR 376, Geoghegan J in this Court expressed the view that there is no difference between Irish and English law on estoppel (§25) but, in the absence of any Irish authority that has considered *Waltons Stores (Interstate) Limited v Maher* and in the absence of any argument directed to whether it ought to be regarded as good law here, it would be undesirable to express a definitive view on that issue and it is not necessary to do so. For reasons I shall explain, even if *Waltons Stores (Interstate) Limited v Maher* is good law in this jurisdiction – and I express no view on that issue – it does not avail ACE on the facts here.

96. The doctrine of promissory estoppel is, of course, an established part of Irish law, as is the “*overlap[ping]*” doctrine of estoppel by representation: *Courtney v McCarthy* [2007] IESC 58, [2008] 2 IR 376, per Geoghegan J at 388. The essential elements of both are a sufficient, clear, and unequivocal representation (whether by words or conduct), reliance and detriment. Estoppel by convention – the essential element of which is that the parties should have proceeded on some common assumption, whether of fact or of law – is also a well-established part of Irish law: *Ulster Investment Bank Limited v Rockrohan Estate Limited* [2015] IESC 17, [2015] 4 IR 37. That is not to say that there are no unresolved issues as to the precise parameter of these doctrines and the extent to which they differ. Fortunately, however, it is not necessary to enter into such questions here.

97. In dealing with this issue in her judgment, Whelan J also refers to the judgment of Steyn LJ in *Trentham* and the judgment of the UK Supreme Court in *RTS Flexible*. These are not estoppel cases — they are, rather, concerned with contract formation. As I have said, before this Court counsel for ACE made it clear that this part of its case was based on an asserted estoppel. There is, it seems to me, a material distinction between a contention that, applying the principles set out in *Trentham* and *RTS Flexible*, a court should find that there was in fact a concluded agreement and a contention that one party should be estopped from denying that there was a concluded agreement. As I understood ACE’s submissions, it makes the latter case. In any event, Whelan J cites a passage from *Trentham* in which Steyn LJ (at 27) expresses the view that the law “*generally ignores the subjective expectations and the unexpressed mental reservations of the parties*” and that “*the governing criterion is the reasonable expectations of honest men*” meaning that “*the yardstick is the reasonable expectations of sensible businessmen*” (Court of Appeal Judgment, §199). No doubt that is so, in this jurisdiction as in England and Wales. But, as I have explained, the “*objective theory of contract formation*” (which is what these observations of Steyn LJ were directed to) does not upend the fundamental principles of contract law: §57 above. It is the parties – not the court – that are the “*masters of their contractual fate*” (*Pagnan*, at 611) and the court “*should not impose binding contracts on the parties which they have not reached*” (*RTS Flexible*, §47). That is, in my view what the Court of Appeal did here.

*The Court of Appeal's Assessment of the Evidence and the Conclusions Reached
by it on Issue (1)*

98. As already mentioned, one of the issues arising in the appeal is whether in its assessment of the evidence the Court of Appeal went beyond the permissible parameters of appellate review.
99. The principles set out by McCarthy J in his judgment in *Hay v O' Grady* are too well-known to require detailed recitation. They reflect the fundamental fact that an appellate court does not have the opportunity of seeing and hearing the witnesses giving their evidence that the trial judge enjoys – that, in McCarthy J's vivid language, “[t]he arid pages of a transcript seldom reflect the atmosphere of a trial” – and emphasise that, provided that such findings of fact were supported by credible evidence, an appellate court is bound by them, however cogent the evidence to the contrary may appear to be (at 217). An appellate court should also be slow to substitute inferences of fact for those drawn by the judge, at least where such inferences depend on oral evidence or recollection of fact.
100. In its submissions, Motorpark also brought the Court's attention to *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 in which, in the specific context of a proprietary estoppel claim, a number of the law lords emphasised the advantage that the trial judge had in assessing the oral evidence of witnesses as to representation and reliance. In his

speech in that case, Lord Walker rejected the suggestion that the meaning of spoken words was “*a question of law*”, observing that “[w]hen a judge, sitting alone, hears a case of this sort, his conclusion as to the meaning of spoken words will be inextricably entangled with his factual findings about the surrounding circumstances ...” (§58).

101. *Hay v O’ Grady* must now be read in light of this Court’s subsequent decision in *Doyle v Banville* [2012] IESC 25, [2018] 1 IR 505 in which the Court (per Clarke J, as he then was) picked up on another aspect of the judgment of McCarthy J – the need for “*a clear statement, ... by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows*” (at 218) – adding that “*it is important that the judgment [of the trial judge] engages with the key elements of the case made by both sides and explains why one or other side is preferred*” (§10). But the limits of that duty to engage were emphasised by Clarke J himself. The trial judge’s duty is simply “*to analyse the broad case made on both sides*” and it is no function of an appellate court to rummage through the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument that arguably was not adequately addressed (§11). The obligation of the trial court “*is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides*” (*ibid*). This Court has subsequently emphasised the importance of not permitting complaints of “*non-engagement*” with the evidence to be used as a vehicle to circumvent the principles in *Hay v O’ Grady*: see, for instance, *Leopardstown Club Limited v Templeville Developments Ltd* [2017] IESC 50, [2017] 3 IR 707, per

MacMenamin J at §109. A trial judge’s decision may only be reversed on this basis where there is “*a clear non-engagement with essential parts of the evidence*” (*ibid*). Something “*truly glaring,*” going to “*the very core, or the essential validity*” of the trial judge’s findings is required. That is “*a high threshold*” (§110).

102. In his judgment in *Doyle v Banville*, Clarke J also made it clear that “*part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts.*” Such a situation was, he explained, different to that where the judge preferred one piece of evidence over another “*for a stated and credible reason*” — the appellate court having no function to second guess the judge’s view in the latter situation (§14).

103. Before considering the Court of Appeal’s assessment of the evidence in light of these principles, a number of points should be made as to the relevant factual context. Both ACE and Motorpark are significant commercial enterprises. Each obviously had considerable experience in negotiating commercial transactions. ACE in particular had significant experience in negotiating commercial leases, as is apparent from the evidence of Mr Sutton referred to earlier. Each party had legal advice available to them at all times and each retained solicitors to assist them in the negotiation of a formal written agreement for lease in relation to the Body Shop, intended to contain all the terms that one would expect to find in a standard commercial lease. This was, in short, an arms-length commercial transaction between two experienced and well-resourced commercial

actors, acting with the benefit of (if not necessarily in accordance with — itself a point of some significance) expert legal advice, with the common endpoint of the execution of a comprehensive written agreement for lease. That is the context in which the issues in dispute are to be considered and resolved.

104. ACE's contractual claim – at least as pleaded – rested on an assertion that it and Motorpark entered into an agreement “[i]n or around December 2016”. It was that agreement that ACE sought specific performance of. Owens J rejected the contention that there was ever any agreement for a lease: in his view, there was never a concluded agreement, and a significant number of issues remained to be agreed, including (but not limited to) the renunciation/disclaimer issue, which he regarded – correctly – as one of particular importance. The Judge also found that, as of August and September 2016, those involved in the negotiations knew that there was no concluded oral agreement for a lease (while key points had been agreed, other issues such as the commencement date had not been agreed) and further found that, at the time that it went into possession of the Body Shop in January 2017, there was “no basis” on which ACE could have considered that Motorpark was contractually obliged to grant a lease to it (High Court Judgment, at page 37). These findings by the Judge were made with the advantage of having heard the evidence of the principal actors involved in the negotiations (with the exception of Mr Roe, ACE's solicitor).

105. On the basis of her review of the transcripts, Whelan J took a very different view. In her view, there was a concluded agreement in place as of September 2016 (Court of Appeal Judgment, §167). That finding is key to her analysis of the contractual issue, forming the basis of her view that there was a “*final and concluded agreement*” prior to the date when matters were put into the hands of the parties’ solicitors (Judgment, §69), that the “*subject to contract*” language was introduced by the solicitors only “*after the parties considered themselves and held themselves out vis-à-vis each other as having concluded a binding agreement for the grant of the lease*” (§175) and that the parties “*merely retained solicitors for the purpose of putting the agreement into legal shape*” (§177).
106. The exercise undertaken by Whelan J effectively involved a *de novo* assessment of the evidence given in the High Court, with little or no regard given to the findings of fact made by the High Court Judge. *Doyle v Banville* makes it clear that it is the function of an appellate court to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. However, while Whelan J’s judgment sets out the High Court Judge’s findings of fact at some length (§§25-61) with some limited exceptions (such as at §§96-98) it does not meaningfully engage with those findings and instead proceeds to set out an entirely new factual narrative, as if at first instance. In doing so, in my respectful view, the Court of Appeal went beyond the permissible bounds of appellate review, having regard to *Hay v O’ Grady*. But that (fundamental) point aside, the findings made by the Court of Appeal are, in my view, unsustainable on the evidence.

107. It is worth recalling here that ACE itself did not make the case that a concluded or binding agreement had been reached in September 2016. That is perhaps unsurprising. It is clear from the evidence that, notwithstanding agreement on the matters set out in the *Term Sheet*, there were many other terms which required agreement. While the parties may have been confident that these would in fact be agreed (many would be relatively standard for commercial leases), it is nonetheless the case that they had not been agreed as of September 2016. Critically, there was no agreement on commencement date, absent which there could not be a concluded agreement. Even if it was the case that the parties envisaged completion/commencement “*within weeks*”, as Whelan J suggests at §167 and §181 of her judgment – and it is not clear what evidential basis there is for that suggestion or how the parties might ever have had any such expectation given that it was at all times contemplated that a detailed contract for lease would be prepared by the parties’ solicitors and executed by the parties – that would not be sufficient to satisfy the requirement for agreement as to the commencement date. The principle that the commencement date can be ascertained “*inferentially*” or “*referentially*” cannot be stretched so far as that. It must be possible to ascertain a date certain, even if that date is not stated expressly and even if that date is contingent (as where the lease is to commence by reference to the date on which planning permission is granted). The commencement date must be certain, or at least capable of being made certain. An agreement that a lease should commence “*as soon as ready*” (as ACE put it

in response to a written question from the Court) or “*as soon as was feasible*” (as counsel put in argument) is simply too vague to satisfy the law’s requirements in this respect.

108. In my view, it is clear that the earliest point at which it could be said that there was agreement on a commencement date was 22 December 2016, when it was agreed that ACE would go into possession of the Body Shop on 16 January 2017. Indeed, Whelan J herself appears to acknowledge that to be the case at §§181-182 of her judgment. Therefore, the *earliest* point at which there could have been a concluded and binding (if unenforceable) agreement for lease was 22 December 2016.

109. On that basis, key elements of the Court of Appeal’s analysis fall away. It is not the case that the solicitors became involved only after a concluded agreement was in place. It is not the case that the parties merely retained solicitors for the purposes of “*putting the agreement into legal shape*” if by that it is meant that the parties had reached an agreement prior to that point (Court of Appeal Judgment, §177). From the outset of their involvement, both sets of solicitors clearly indicated in their correspondence that, as far as their respective clients were concerned, any agreement was “*subject to lease*.” In the words of Jessel MR in *Winn v Bull*, that meant “*what it [said]*”. Mr Roe, went further, stipulating as per *Embourg* that no contract should be deemed to come into existence “*until such time as approved draft Contracts have been engrossed, executed and*

exchanged and a contractual deposit paid.”²¹ Such a stipulation was within the implied authority of the solicitors (*Mulhall v Haren*) and, as Motorpark observed in submission, it was not in any event ever suggested that Mr Roe was acting outside his instructions or beyond his authority in proceeding as he did. Thus, *both* parties, putative lessor *and* putative lessee, clearly communicated their intention to be bound only upon the execution of a formal contract for a lease. That is a wholly unsurprising approach for legally represented commercial enterprises to adopt: as Mr Sutton confirmed in his evidence, all of the other leasehold premises occupied by ACE, including the six sites opened in 2016, were occupied on the basis of modern commercial leases.

110. It is also evident from the correspondence between the solicitors that they were not of the view that a concluded agreement had been made. Notably, while Mr Roe pushed against the proposed deed of renunciation – suggesting that it was not “*appropriate*” because his client would be taking a 10-year lease (which seems rather a logical and legal *non sequitur*) – he did not suggest that Motorpark was improperly seeking to “*extract new terms*” by asking for such a deed (as is suggested at §167 of the Court of Appeal Judgment). The parties were clearly still in negotiation at that stage. Neither did Mr Roe suggest that a requirement for a deed of renunciation to be executed might be a deal-breaker for ACE and, while he asked for confirmation that a renunciation would not be required, no such confirmation was forthcoming. Mr Roe was also aware from

²¹ Day 5, High Court hearing.

Mr McNamara's correspondence that Motorpark was not then in a position to grant any 10-year lease to ACE and would not be able to do so until Brecol granted a lease to Motorpark or at least had agreed the terms of such a lease.

111. Central to the Court of Appeal's conclusions on the contractual claim is its finding that the parties dispensed with their solicitors in mid-December 2016, "*thereby effectively dispensing with the ['subject to contract/lease'] qualification*" (Court of Appeal Judgment, §178; see also §§179-180). However, that finding does not appear to have any basis in the evidence. Contrary to what is stated at §180, neither Mr Barry nor Mr McNamara (Motorpark's solicitor) gave evidence to the effect that Mr Barry intended to dispense with Mr McNamara's services in connection with the proposed lease to ACE. No such suggestion was put to them in evidence and the evidence given by them, in particular the evidence of Mr McNamara was not consistent with any such suggestion.²² Neither was there any evidence that Mr Roe's services were ever dispensed with. No suggestion to that effect was made by Mr Plunkett (Mr Roe did not give evidence). Mr Plunkett did of course give evidence that ACE went into possession of the Body Shop against Mr Roe's advice but so far from suggesting that Mr Roe's

²² Mr McNamara gave evidence that at some point in mid-December 2016 (possibly 13 December) Mr Barry had told him that the transaction might not proceed and not to carry out any further work "*for the time being*" in relation to the lease to ACE but he went on to explain that Mr Barry had subsequently told him that he wished to proceed with the transaction (Day 4, pages 80-84). The terms of Mr McNamara's attendance note of 16 December 2016 (Book of Documents, tab 42) are also inconsistent with any suggestion that his services had been dispensed with.

services had been dispensed, that clearly indicates that he was continuing to advise ACE (even if his advice was not accepted). The fact that Mr Plunkett and ACE elected to make a “*commercial decision*” to go into possession without a lease being in place against Mr Roe’s advice does not provide any basis for suggesting that the “*subject to contract/lease*” stipulation had somehow been waived. In the first place, ACE was not in a position to waive that stipulation unilaterally. Whatever may have been the position had ACE been the only party to have imposed such a stipulation, the fact is that Mr McNamara had, on Motorpark’s behalf, made it clear that there would be no agreement unless and until the terms of the proposed lease were agreed in writing. While that position could of course have been waived by Motorpark, it could not be waived by Mr Plunkett or ACE on its behalf. Secondly, and in any event, it is clear from Mr Plunkett’s evidence as to the advice given by Mr Roe that the continuing understanding and intention of the parties (including ACE) was that there would be no agreement unless and until the terms of the proposed lease were agreed in writing. Mr Plunkett and ACE knew that there was no written agreement in place but nonetheless elected to go into possession in spite of Mr Roe explicitly advising of the risk of doing so. They did not do so on the basis of a belief that the requirement for a written contract was being waived: they did so despite knowing (and being advised) that the requirement remained operative.²³

²³ For completeness, I note that Owens J did not suggest in his judgment that the parties had dispensed with their solicitors: on the contrary, see page 34 of his Judgment.

112. That is fatal to the contractual claim. The parties had agreed that there would be no agreement unless and until a written agreement was signed and executed. None was. ACE went into possession knowing that to be the case and having been advised of the potential risk of doing so. It made a “*commercial decision*” to take that risk. That distinguishes this case from *Waltons Stores (Interstate) Ltd v Maher*.
113. Furthermore, the parties were never *ad idem* on the renunciation issue. That was clearly an important issue to both parties.²⁴ According to Mr McNamara (Motorpark’s solicitor) renunciations were included in nearly all commercial leases, landlords not wishing tenants to acquire rights to continue at the end of the term.²⁵ I respectfully disagree with the Court of Appeal’s finding that Motorpark is estopped from relying on the absence of agreement on the issue of renunciation in defence of ACE’s contract claim. I do not think it apt to characterise Motorpark’s requirement for the execution of a deed of renunciation as “*an unexpressed mental reservation*”. Motorpark’s solicitors had drafted a formal deed of renunciation and sent it on to ACE’s solicitors. The significance of the issue to Motorpark must have been obvious to both ACE and Mr Roe. While Mr Roe

²⁴ In his evidence Mr Plunkett initially said that he would go on the advice of his solicitor as to whether to agree to a Deed of Renunciation or not (Day 2, page 128) but later suggested that he would not have been prepared to provide a “*renunciation of any description*” (Day 3, page 61). According to Mr McNamara, the renunciation issue was one on which his client (Motorpark) could not give way, and it was “*just not up for debate*” (Day 4, page 85). Mr Michael Barry’s evidence was to the same effect (Day 4, pages 12-13).

²⁵ Day 4, page 85. The Judge accepted that evidence: page 29.

pushed back against the need for such a deed (on a stated basis which, frankly, makes little or no legal sense), he certainly did not convey that such a deed was wholly unacceptable to his client. Significantly, he expressly sought confirmation that Motorpark would not require a deed, but no such confirmation was ever provided. Notably, Mr Plunkett never suggested in his evidence that he had been led to believe or understood that Motorpark had abandoned its request for a deed of renunciation or that he made the decision for ACE to go into possession on that basis. Mr Plunkett knew that the renunciation had not been agreed and while he may have hoped and/or expected that Motorpark would yield on the issue (though he did not say that in his evidence either) that does not suffice to found any form of estoppel, whether promissory or by convention. No “*clear and unequivocal*” representation was made by Motorpark, by words or deed, capable of being characterised as a promise to ACE that it would not rely on its legal rights in this respect (an essential element for any promissory estoppel) nor did the parties proceed on any mutual assumption of fact or law (a prerequisite for any estoppel by convention): see generally the discussion in McGhee et al (eds), *Snell’s Equity* (34th ed; 2020), Chapter 20. There is, on the facts, no parallel with *McDonagh v Denton*. On this basis also, the contractual claim fails.

114. The parties here were substantial commercial entities, with access to expert legal advice. They agreed that there would be no binding or enforceable agreement for a lease unless and until a written agreement was executed by them both. That never altered. No such agreement was ever signed. Nor were the parties ever *ad idem* on the terms of their

intended agreement. ACE's contractual claim effectively invites the court to remake the bargain made by the parties and to impose on them an agreement they did not in fact ever make. But that is not the court's role: the parties, not the court, are the "*masters of their contractual fate.*" Applying the rules adopted by the parties, it is clear that there was never a concluded agreement for a 10-year lease of the Body Shop. ACE may well have entered into possession in the expectation that such an agreement would be finalised and Motorpark may well have created that expectation for the purpose of inducing ACE to do so but, while that may well be relevant to ACE's alternative proprietary estoppel claim, it does not give rise to a concluded contract where there was none.

115. I would therefore set aside this aspect of the judgment and order of the Court of Appeal.

Issue (2) — Whether, if there was such an agreement, it was enforceable by reason of part performance (ACE does not make the case that there was a note or memorandum of the alleged agreement for a lease such as could satisfy the requirements of section 51(1) of the 2009 Act).

116. In the absence of a concluded agreement, this issue does not arise. However, the acts of part performance relied on by ACE are also relevant to issue (3) and will be discussed further in that context.

Issue 3 — Whether, in the absence of an enforceable agreement to grant a lease of the Body Shop, ACE should nonetheless be granted such a lease (or, in the alternative, some other form of remedy or redress) on the basis of proprietary estoppel.

117. Again, the High Court and the Court of Appeal differed sharply in their analysis of this aspect of the case and reached very different conclusions on it.

118. According to one commentator, the term “*proprietary estoppel*” was effectively unknown prior to its usage in the 26th edition of *Snell’s Equity* in 1966: McFarlane, *The Law of Proprietary Estoppel* (2nd ed; 2020) (“*McFarlane*”), at §1.01. However, the roots of the doctrine go back considerably further.

119. *Ramsden v Dyson* (1866) LR 1 HL 129 exemplifies one strand, characterised in *McFarlane* as the “*acquiescence-based strand*” (§§1.06-1.09) and in *Spencer Bower* as “*standing by*” (§§12.13-12.18). The principle for which *Ramsden v Dyson* is authority is succinctly stated in the headnote, as follows: “[i]f a stranger begins to build on land supposing it to be his own, and [the real owner], perceiving his mistake, abstains from setting him right, and leave him to persevere in his error, a Court of equity will not allow [the real owner] afterwards to assert [his] title to the land” (at 140-141). While in *McMahon v Kerry County Council* [1981] ILRM 419 *Ramsden v Dyson* was described by Finlay P (as he then was) as the “*locus classicus*”, the principle in fact goes back much further to *The Earl of Oxford’s Case* (1615) 1 Rep Ch 1, 21 ER 485.
120. *McFarlane* suggests that, when the term “*proprietary estoppel*” first came into general use, it was “*essentially equated with the application of the acquiescence principle*” (§1.08). But very significant doctrinal development has occurred since then, much of which can be traced back to views expressed by Lord Kingsdown in his speech in *Ramsden v Dyson*. There he formulated the applicable “*rule of law*” as follows:

“[i]f a man, under a verbal agreement with a landlord for a certain interest in land, or [what amounts to the same thing], under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without

objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation” (at 130; my emphasis).

121. Spencer Bower characterises the principle thus articulated by Lord Kingsdown as “*the misprediction form of proprietary estoppel, where A, without any mistaken belief in a present entitlement, acts to his detriment in reliance on an unenforceable expectation, created or encouraged by B, that B will grant him an interest in the future*” (§12.19).
122. *Plimmer v Wellington Corp* (1884) 9 App Cas 699, which has frequently been cited in this jurisdiction and to which we were referred, is an early application of that principle. Plimmer had erected a wharf and jetty in Hamilton harbour with the permission of the local government. In 1856, following an earthquake, he had (on the encouragement of the government) expended monies on the extension of the jetty and reclaimed land on which he erected a warehouse, facilities which were subsequently used by the government. The land was subsequently vested in the respondents by statute and the issue that arose was whether Plimmer had an estate or interest in the land entitling him to compensation. Although the licence granted to Plimmer was revocable at will, the Privy Council found that it had become irrevocable because of the 1856 transactions “*because those transactions were sufficient to create in his mind a reasonable expectation that his occupation would not be disturbed*” and he was to be regarded as having an estate or interest in the land for the purposes of compensation (at 714). In

reaching that conclusion, the Board rejected the respondent's contention that *Ramsden v Dyson* was confined to cases of mistake (at 711-714).

123. This strand of *Ramsden v Dyson* – what *McFarlane* characterises as the “*promise-based strand*” of proprietary estoppel – was largely forgotten before being revived by the Court of Appeal under Lord Denning MR in *Inwards v Baker* [1965] 2 QB 29 (which did not use the term “*proprietary estoppel*”) and, somewhat later, in decisions such as *Crabb v Arun District Council* [1976] Ch 179 (which did). In *Inwards v Baker*, a father encouraged his son to build a house on his (the father's) land. He did so with financial assistance from the father. Many years later the father died without having transferred the land to his son. Under the father's will, the land vested in trustees for the benefit of third parties. On the trustees' application for possession, the Court of Appeal unanimously found that the son had an equity to remain in possession of the house as long as he wished to live there as his family home. In *Crabb v Arun District Council*, the Court of Appeal upheld the plaintiff's claim to be entitled in equity to be granted a right of access to the public highway by the defendant council, arising from assurances it had given to him that such access would be given, in reliance on which the plaintiff had sold other lands without reserving a right of access for his benefit. At this remove, *Crabb v Arun District Council* is most frequently cited for a statement made by Scarman LJ on the issue of remedy. An equity having been established, two questions arose — the extent of the equity and the relief needed to satisfy it (at 193). There “*being no grant, no enforceable contract, no licence*”, Scarman LJ stated that he would “*analyse the*

minimum equity to do justice to the plaintiff as a right either to an easement or to a licence on terms to be agreed.” The court could determine “*on what terms the plaintiff should be put to enable him to have the benefit of the equitable right which he is held to have*” (at 198-199): since *Ramsden v Dyson* the courts had acted on the basis that they have to determine not only the extent of the equity “*but also the conditions necessary to satisfy it*” (at 199). The reference by Scarman LJ to “*the minimum equity to do justice to the plaintiff*” has given rise to much subsequent debate, which is still far from settled.²⁶

124. As already noted, *McFarlane* characterises this strand of the proprietary estoppel doctrine as the “*promise-based strand*” (§§1.15-1.23). It is, the author suggests, the most practically important of the three strands of the doctrine (the third strand being the “*representation-based strand*”),²⁷ applying “*where A makes a promise that B has or will acquire a right in relation to A’s property and B, reasonably believing that A’s promise*

²⁶ In *Lett & Co v Wexford Borough Council* [2012] IESC 14, [2012] 2 IR 198 O’ Donnell J (as the Chief Justice then was) expressed the view that there was much merit in Scarman LJ’s approach “*where he considered the question to be what was the **minimum** remedy necessary to address the equity of the situation*” (§51, emphasis in the original). O’ Donnell J noted that, like estoppel, a legitimate expectation claim was often raised in default of more precise legal arrangements between the parties and because it would simply be unjust to abandon the other to its legal remedies or lack of them. On that basis, it would be wrong to treat the parties as if they had bargained for any particular form of assessment of compensation (*ibid*).

²⁷ Which, in *McFarlane*’s analysis, operates as a true estoppel, preventing A from denying the truth of a state of affairs represented by them but not conferring any cause of action on B. *Spencer Bower* disagrees with this characterisation of this form of estoppel – estoppel by representation of fact – as a species of proprietary estoppel (§12.3, fn 16; §12.71 and following) but that disagreement need not detain us here.

was seriously intended as a promise on which B could rely, adopts a particular course of conduct in reasonable reliance on A's promise." In such circumstances, then "if, as a result of that course of conduct, B would then suffer a detriment were A to be wholly free to renege on that promise, A comes under a liability to ensure that B suffers no such detriment" (§1.15).

125. According to *McFarlane*, promise-based proprietary estoppel may apply in the commercial context as well as the domestic context.²⁸ It provides an independent cause

²⁸ *McFarlane* cites a number of decisions in support of this statement. Of these, a number pre-date the decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752. In one of those decisions, *Sutcliffe v Lloyd* [2007] EWCA Civ 153, the Court of Appeal accepted the argument that the court should be slow to attach legal consequences to dealings between businessmen who anticipated entry into a contract but never achieved it, had "some validity" and endorsed the statement of Etherton J (the first instance judge in *Cobbe*) to the effect that it "will only be in exceptional cases that a claimant will be able to satisfy the requirements of proprietary estoppel in a case of continuing negotiations towards a possible contract" (§40). Clearly, the court considered *Sutcliffe* to be such an exceptional case. *Herbert v Doyle* [2010] EWCA Civ 1095 was a constructive trust case that appeared to turn on its particular facts but the Court of Appeal acknowledged that it followed from *Cobbe* that "if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding" neither party could "utilise" the doctrine of proprietary estoppel or the doctrine of constructive trust "to make their agreement binding on the other party" (§57). That is, in essence, what ACE seeks to do here. The final decision referred to by *McFarlane* in this context is *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782. There the court accepted that the context was commercial, rather than domestic or family. But the parties appear to have engaged informally, without legal representation, and the court itself noted that the circumstances of the case were "unusual" (§91). In any event, the point is not that a commercial context necessarily excludes the application of the doctrine of proprietary estoppel, it is that the normal incidents of a

of action (an important point of distinction from other forms of estoppel) and is confined to property. Where the promisor (A) comes under a liability to the promisee (B), A “*may be required, for example, to transfer property to B, to grant B a particular right in property, to hold a right on trust for B, to allow B to make particular use of A’s property, or to pay a sum of money to B*” (§1.16). I will return to the issue of remedy and in that context consider the significant decision of the (UK) Supreme Court in *Guest v Guest* [2022] UKSC 27, [2024] AC 833.

126. Keane, *Equity and the Law of Trusts in Ireland* (3rd ed; 2017) (“*Keane*”) contains an illuminating discussion of the development of proprietary estoppel from *Ramsden v Dyson* onwards. The author notes that the courts and academic commentators have, on occasion, expressed differing views as to what should be regarded as the critical factor in the “*expectation limb*” of the doctrine (what McFarlane characterised as “*promise-based estoppel*”, §1.15). One view was that the court should ensure that the “*expectation*” should be satisfied: the other focused on compensation for the detriment. However, the author continues:

commercial transaction – commercial sophisticated parties with access to legal advice – will ordinarily defeat any assertion that it is unconscionable for one party to rely on its legal rights. As one commentator puts it “*it is not impossible to show unconscionability in commercial cases ... but the very nature of a commercial relationship makes it more difficult ... It is not because the case is ‘commercial’ per se that there is no estoppel, it is because commercial situations often dispel unconscionability*” (M Dixon, “Painting Proprietary Estoppel: Howard Hodgkin, Titian or Jackson Pollock?” [2022] *Conv.* 30).

“whether the ‘expectation’ or ‘reliance’ factor is the more critical, the consistent thread running through most of the authorities is that there must be an assurance, express or implied, that the other party will at some stage acquire an interest in the property and some degree of detriment suffered in reliance on that assurance, for which a proportionate remedy should be available” (§27.52).

127. *Keane* goes on to emphasise the importance of context. Referring to criticisms of the House of Lord’s decision in *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 (“*Cobbe*”) – in which a proprietary estoppel claim arising from a large scale commercial property transaction had failed (*Cobbe* is referred to further below) – the author suggests that “[t]o treat the absence, not merely of a contract in writing, but of any concluded agreement, as of crucial significance in a property development transaction involving millions of pounds is simply to recognise commercial realities” (§27.61). The author then notes that in *An Cumann Peile Boitheimeach Teoranta (Bohemian Football Club Limited) v Albion Properties Limited* [2008] IEHC 447 – a case with a “striking resemblance” to *Cobbe* – the court had not discussed in any detail its apparent view that, even in a purely commercial context, the absence of a concluded agreement was not fatal to the existence of a proprietary estoppel (§27.64).

128. Biehler and Gavin, *Equity and the Law of Trusts in Ireland* (8th ed; 2025) (“Biehler”) also provides a comprehensive survey of the jurisprudence and the issues arising from it. The authors refer to the identification by Lord Walker of the three “*main elements*” of proprietary estoppel (in his speech in *Thorner v Major*) as “*a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance*” (at 1059). Biehler also emphasises the importance of context and the fact-sensitive nature of the inquiry (at 953-954). “*Clearly*” – so the author states – “*different considerations will apply where the relationship between the parties is arm’s length and commercial on the one hand and familial or personal on the other hand. In the former case, the parties would be expected to enter into a contract but may have chosen not to at that point in the transaction whereas in the latter, the entering into a formal contractual relationship may never have been envisaged at any stage*” (at 1085-1086).
129. Biehler also contains a helpful discussion on the question of remedy. The authors state that the case-law demonstrates “*that the remedies granted by the courts range dramatically*” (at 1089) and while there was authority from England and Wales indicating that the appropriate remedy was the “*minimum equity*” necessary to do justice to the claimant (the statement of Scarman LJ in *Crabb v Arun District Council* referred to above) that had not led to any uniformity of approach, with tension between the

expectation-based and reliance-based approaches.²⁹ The authors go on to suggest that “*the court now tends to ask ‘what is the minimum equity necessary to do justice’ and to avoid an unconscionable and disproportionate result*” (at 1091). The authors go on to develop their analysis in some detail, referring to developments in England and Wales and elsewhere, as well as to Irish authority. However, it seems sensible to defer further discussion of the issue of remedy until the prior question of whether ACE has established any equity to be satisfied is addressed.

130. While a number of decisions of the Irish courts have considered the doctrine of proprietary estoppel, in few if any of those decisions has it been necessary for the court to engage in detail with it. The jurisprudence from the United Kingdom is considerably

²⁹ The reference to the “*minimum equity*” is, in this context, ambiguous. It may be understood to mean the minimum necessary to prevent the promisee from suffering detriment as a result of his or her reliance on the defendant’s promise (i.e., their reliance loss) or, conversely, it may be understood to refer to the minimum relief necessary to fulfil the promisee’s expectation: *Biehler*, at 1090, fn 215, citing (*inter alia*) A Roberston “Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*” (1996) 20(3) *Melbourne University Law Review* 805. That continues to be the essential fault line, reflecting different conceptions of the fundamental purpose of proprietary estoppel which are in turn reflected in the division between the majority and minority in *Guest v Guest*.

more developed, particularly as regards the role of proprietary estoppel in the commercial context, and it may make sense to begin with it.

131. While there are a great many earlier decisions on various aspects of proprietary estoppel, the decision of the Privy Council in *Attorney General of Hong Kong v Humphrey's Estate (Queen's Garden) Ltd* [1987] AC 114 ("*Humphrey's Estate*") seems an appropriate starting point. In *Humphrey's Estate* the Hong Kong government entered into negotiations with a company (HKL) to acquire a large number of flats owned by HKL on the basis of an exchange of property, with HKL taking property owned by the government (and agreeing to make a substantial monetary payment representing the difference of value between the two properties). An agreement in principle was reached "*subject to contract*", which expressly provided that the agreed terms could be varied or withdrawn prior to formal execution of a contract and that there would be no binding agreement until formal documents were executed. The government was permitted to go into possession in advance of the execution of a contract and did so, expending money on fitting out the flats. HKL took possession of the government's property and demolished it for redevelopment and made the agreed monetary payment to the government. Negotiations proceeded and agreement was reached on all issues, but no contract had been signed when HKL decided to withdraw. The government sued, asserting that HKL was estopped from seeking to withdraw. That claim was successful at trial and that decision was upheld by the Court of Appeal of Hong Kong.

132. On HKL’s further appeal, the Privy Council reversed. The Board accepted that the government had acted to its detriment and, to the knowledge of HKL, in the hope that HKL would not withdraw. But that was not enough to found an estoppel. The government was required to show, firstly, that HKL created or encouraged a belief that it would not withdraw from the agreement in principle and, secondly, that it had relied on that belief or expectation, but it failed on both counts (124D). While the government had acted “*in the confident and not unreasonable hope*” that the agreement in principle would come into effect, HKL had never indicated or implied that it had surrendered its right to withdraw at any time prior to the execution of a formal contract (124H-125A). Furthermore, it was apparent from the evidence that the government did not believe that HKL was bound to proceed: in fact, the government had been expressly advised of the “*possible danger in proceeding*” in the absence of an executed agreement (126D-F). The government had relied on *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1980) 41 P & CR 179 as an instance of where an agreement “*subject to contract*” had been enforced but, in the Board’s view, the fact that the arrangement in that case was “*subject to contract*” was irrelevant. The Board stated the essence of its analysis at the end of its opinion:

“In the present case the government acted in the hope that a voluntary agreement in principle expressly made ‘subject to contract’ and therefore not binding would eventually be followed by the achievement of legal relationships

in the form of grants and transfers of property. It is possible but unlikely that in circumstances at present unforeseeable a party to negotiations set out in a document expressed to be 'subject to contract' would be able to satisfy the court that the parties had subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transactions envisaged by the document. But in the present case the government chose to begin and elected to continue on terms that either party might suffer a change of mind and withdraw” (127H-128A).

133. *Humphrey's Estate* was considered in detail in *Cobbe*. The claimant, Mr Cobbe, was an experienced property developer who had made an oral (and unenforceable) agreement to purchase a substantial residential property (owned by the first defendant) for the purposes of redevelopment. The first defendant was to obtain vacant possession of the property (which was in a number of flats) and the claimant would then develop it. The purchase price was agreed, and it was also agreed that the first defendant would have a share of the proceeds of sale of the redeveloped property if those proceeds exceeded a certain agreed threshold. Cobbe spent significant time and money obtaining planning permission but, as soon as permission was granted, the first defendant resiled from the agreed deal and sought more favourable terms.

134. Mr Cobbe sued, asserting that the defendants were estopped from denying that he had a beneficial interest in the property because they had acted unconscionably in knowingly inducing him to believe that the property would be sold to him and he had acted to his detriment in reliance on that belief by undertaking the process of obtaining planning permission. He contended, in the alternative, that the property was held on a constructive trust. These claims succeeded at trial and the defendants' appeal to the Court of Appeal was unsuccessful. Cobbe had initially made a claim in contract also but had abandoned that claim at the start of the trial (in the course of his speech in the House of Lords, Lord Scott described the contract claim as "*untenable*" given the absence of a written contract capable of satisfying section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("*the 1989 Act*").
135. The House of Lords reversed (although holding that the claimant should be reimbursed for the expenditure he had undertaken in obtaining planning permission). According to Lord Scott (giving the principal judgment) Cobbe had the "*wrong sort of expectation*" for proprietary estoppel purposes. It was not an expectation that, if planning permission was granted, he would become entitled to a "*certain interest in land*" (that being a reference to the speech of Lord Kingsdown in *Ramsden v Dyson*). His expectation was that he would at some stage sit down with the defendants and agree the outstanding contractual terms which would then be incorporated into a written contract of sale along with the core financial terms that had already been (orally) agreed (§20). Accordingly, to the extent that the claimant had any expectation of a "*certain interest in land*" it was

always a “*contingent one*”, contingent not simply on the grant of planning permission but also “*on the course of the further contractual negotiations and the conclusion of a formal written contract*” (§71).

136. Lord Scott went on to consider a line of cases in which a claimant had expended money on land on the basis of an “*informal or incomplete agreement*”, including the decision of the Privy Council in *Humphrey’s Estate*. Having set out the passage set out above, he stated that “[t]he reason why, in a ‘subject to contract’ case, a proprietary estoppel cannot ordinarily arise is that the would-be purchaser’s expectation of acquiring an interest in the property in question is subject to a contingency that is entirely under the control of the other party to the negotiations... The expectation is therefore speculative” (§25). While he accepted that a subject to contract reservation made in the course of negotiations could be withdrawn, that was *nihil ad rem* in the circumstances. No such reservation was needed to make an oral agreement unenforceable given the statutory requirement for a written contract. Mr Cobbe had not spent his money and time on the planning application in the mistaken belief that there was an enforceable agreement: he knew that the defendants were not legally bound (§27). Proprietary estoppel required “*clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that the denial, or assertion, would otherwise defeat.*” Unless those were recognised “*proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable, if it has not already become so*” (§28). Lord Scott went on to suggest that

proprietary estoppel could not “*be prayed in aid in order to render enforceable an agreement that statute [section 2 of the 1989 Act] had declared to be void*”— equity surely could not contradict the statute (§29).

137. Lord Walker wrote separately. He began by sounding a warning note. While equitable estoppel was a “*flexible doctrine*” which the court could use “*to prevent injustice caused by the vagaries and inconstancy of human nature*”, it was “*not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side.*” Certainty was important in property transactions and equitable estoppel therefore had to be formulated and applied “*in a disciplined and principled way*” (§46). Noting that any formulation of the principle must, if it is to be comprehensive, “*be expressed in such general terms as to give little idea of what it is really about*”, Lord Walker undertook a survey of the authorities, ending with *Humphrey’s Estate*, where, in his words, “*the parties’ knowledge that neither had any enforceable rights was fatal to the Government’s claim to rely on equitable estoppel*” (§61). While the Privy Council had placed some reliance on the use of the phrase “*subject to contract*” in the correspondence, that was simply a “*routine acknowledgement*” of what both knew very well in any event — that they were involved in a complex negotiation which might come to nothing. The government itself had been at pains to emphasise that it was not committing itself in any way and it could not be unconscionable for the developer to follow a course that the government had repeatedly insisted was open to itself (§62).

138. According to Lord Walker, it was not enough to hope, or even to have a confident expectation, that the person who has given assurances will eventually do “*the proper thing*” (§65). That point had been made most clearly in cases with a commercial context, of which *Humphrey’s Estate* was the most striking example. Distinguishing between cases with a commercial context and those concerned with “*domestic arrangements*”, in the former category of case, the claimant was typically a businessperson with access to legal advice “*and what he or she is expecting to get is a contract*” (§68; original emphasis). In *Cobbe*, neither party (all very experienced in property matters) had regarded themselves as legally bound. That was, in Lord Walker’s view “*the simple but fundamental point*” on which Mr Cobbe’s claim failed: “*as persons experienced in the properly world, both parties knew that there was no legally binding contract, and that either was therefore free to discontinue the negotiations without legal liability – that is, liability in equity as well as at law*” (§91). The claimant “*ran a commercial risk, with his eyes open*” (*ibid*). The estoppel claim therefore failed.

139. In the course of his speech, Lord Walker also made some brief but important observations about the role of equitable estoppel in the context of commercial transactions. In his view, the courts below had stretched the boundaries of the doctrine of equitable estoppel too far in granting relief. In his opinion “*the Court of Appeal’s decision, if it were to stand, would tend to introduce considerable uncertainty into commercial negotiations, and not only in the field of property development ... Equity*

has some important functions in regulating commercial life, but those functions must be kept within proper bounds...” (§85).

140. Concerns about the uncertainty that may arise in the operation of the doctrine of proprietary estoppel, given its essentially discretionary nature (including as to remedy), have often been expressed, particularly but not exclusively in relation to commercial cases or cases involving property.³⁰ That concern was put powerfully – and colourfully – by Judge Weeks QC in *Taylor v Dickens* [1998] 1 FLR 806, 820 (in a passage cited by Lord Leggatt in *Guest v Guest*):

“there is no equitable jurisdiction to hold a person to a promise simply because the court thinks it unfair, unconscionable or morally objectionable for him to go back on it. If there were such a jurisdiction, one might as well forget the law of contract and issue every civil judge with a portable palm tree. The days of

³⁰ See for example S Gardner, “The remedial discretion in proprietary estoppel - again” (2006) 122 LQR 492-512. Robert Walker (Lord Walker), “Which side ‘ought to win?’—Discretion and Certainty in Property Law” (2008) 6(3) Trust Q Rev 5, republished in *Singapore Journal of Legal Studies*, Vol 2008, Issue 2 (2008), at 229-24; Lord Neuberger, “The Stuffing of Minerva’s Owl? Taxonomy and Taxidermy in Equity” (2009) 68(3) *The Cambridge Law Journal* 537-549. Philip Sales (Lord Sales), “Proprietary Estoppel: Great Expectations and Detrimental Reliance” (Modern Studies in Property Law Conference, Oxford, 29 March 2022). In his article, Professor Gardner suggests that decisions in this area should be “*susceptible to audit*”, a point picked up by Lord Leggatt in *Guest v Guest*.

justice varying with the size of the Lord Chancellor's foot would have returned"
(§163).

That is, of course, why in the recent jurisprudence there is such emphasis on the need to identify a principled basis for determining whether to grant relief, and if so, for identifying what the appropriate relief is. But there will inevitably be ongoing tension – if not conflict – between the values of flexibility/discretion on the one hand and that of certainty and predictability on the other; that tension is an inherent feature of the relationship between equity and law.

141. In any event, the distinction between claims involving family/domestic arrangements and claims arising from failed commercial transactions is an important one, which has obvious resonance here. Seeking to reconcile *Cobbe* with the later decision of the House of Lords in *Thorner v Major* (a typical family/domestic type case), one commentator has stated:

"[t]he context of the claims appears to be decisive, with the doctrine of proprietary estoppel being applied differently depending on whether the context is commercial or domestic. In the commercial context, if the claimant takes the risk that a contract to sell land will be forthcoming, this should not be sufficient to defeat proprietary estoppel. In that context, the claimant must act in the belief that they had already obtained a legally enforceable right to property. If the

claimant takes the risk of such a right arising subsequently, then it should not be for Equity to assist them, because the claimant should have ensured that there was an enforceable contract with the defendant. So, if the claimant and the defendant had entered into an agreement that was 'subject to contract', there is no role for proprietary estoppel, because the risk of no contract being made has been placed on the claimant. If the claimant acts to their detriment in the belief that a contract will be made, it is not appropriate for them to obtain a proprietary interest with the assistance of Equity. Further, the introduction of equitable concepts into this commercial context would introduce unacceptable uncertainty. In the domestic context, however, where, for example, a relative is led to believe that they will inherit land, there is a relationship of trust and confidence between the representor and the representee such that, even though the representee takes a risk in relying on the representation to their detriment, this should not defeat proprietary estoppel. In this domestic context, the parties would not normally enter into a contract, so there is a role for Equity to assist the claimant."³¹

³¹ G Virgo, "The Propriety of Proprietary Estoppel: What *Guest v Guest* Reveals about the State of Equity" (University of Cambridge Faculty of Law Legal Studies Research Paper 18/2024, 16 April 2024) ("*Virgo*"), pages 22-23.

142. Essentially the same point was made by Lord Leggatt JSC in his judgment in *Guest v Guest*. Although in the minority on the issue of remedy in that appeal, that does not appear to me to undermine the force of his observations on this more general point. Lord Leggatt noted that Lord Neuberger, who had sat on both *Cobbe* and *Thorner v Major*, had addressed the distinction between the two cases in his speech in *Thorner v Major*, observing that in *Cobbe* the relationship between the parties was such that they could be expected to enter into a contractual relationship and they had in fact intentionally left their relationship to be negotiated on the understanding that neither was legally bound (§186). That was in contrast with the position in *Thorner v Major*, where the relationship was familial and personal and, in the context of that relationship, no contract could have reasonably been expected even to be discussed between them (§186). Observing that the leading speeches in *Thorner v Major* had emphasised the importance of assessing the relevant words or actions in their context, Lord Leggatt continued:

“In a commercial setting, parties typically (though not invariably) deal with each other on the understanding that, if a party chooses to rely on a promise that is not legally binding, it does so at its own legal risk. But in some contexts such an approach does not match social reality. Promises are made, particularly in domestic situations, that are reasonably understood as commitments in which trust is invited and can reasonably be placed, even though the promise is not legally enforceable. To ask for the commitment to be embodied in a legally enforceable written contract would be regarded as at best

superfluous and at worst offensive (because implying rejection of the trust which has been invited). In such cases, even though reliance on the promise cannot make it legally enforceable, the reliance may still be reasonable and give rise to an 'equity' which a court should protect” (§187; my emphasis).

143. Here, of course, the parties (both substantial and experienced commercial operators, with ready access to legal advice) were involved in the negotiation of a complex and substantial commercial transaction on the *agreed* understanding that neither party would be bound unless and until a written agreement for lease was executed. That was a stipulation that *both* parties, through their solicitors, insisted upon. Furthermore, when ACE decided to go into possession, it knew that there was no concluded agreement for a lease. The High Court Judge found that Mr Plunkett clearly knew that to be the position, and it was in any event reinforced by the advice given to him by Mr Roe. ACE made a “*commercial decision*” to proceed but inherent in that decision was an awareness that it had no legally enforceable agreement for a lease and there was a risk that an agreement for lease would not be concluded.

144. Writing extra-judicially, Lord Neuberger has suggested that “*before he can establish a proprietary estoppel claim, a claimant must show that he acted in the belief that he has something which can be characterised as a legal right – at least in a commercial arm’s*

length context".³² If that is so, then clearly ACE's proprietary estoppel claim cannot succeed in the circumstances just referred to.

145. Whether, even in a commercial context, there is any rule precluding B from relying on any promise by A that B does not believe to be legally binding is questioned in *McFarlane* (§2.17). But even if that is correct as a general proposition (and *Spencer Bower* also states that there is no strict requirement that the promisee must believe (mistakenly) that he has a present right, though without adverting to the possible distinction between commercial and domestic cases: §§12.65-12.66), the fact that ACE proceeded against its own legal advice is, on any view, a hugely significant factor here. Furthermore, and generally, even if (as *McFarlane* states) "*the elements of a promise-based proprietary estoppel claim are the same in both the domestic and commercial contexts*", the context is clearly critical to the *application* of the relevant principles and any suggestion otherwise simply cannot be reconciled with the authorities discussed above, particularly the decision in *Cobbe*.

146. As noted in *Keane*, virtually all of the Irish cases have been domestic/family type cases: see, by way of example, *Smyth v Halpin* [1996] IEHC 56, [1997] 2 ILRM 38, *McCarron v McCarron* (Unreported, Supreme Court, Murphy J, 13 February 1997),

³² Lord Neuberger, "The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity" (2009) 68(3) *The Cambridge Law Journal* 537-549 at 542.

MF v JDF [2005] IESC 45, [2005] 4 IR 154, *Naylor v Maher* [2012] IEHC 408 and *Finnegan v Hand* [2016] IEHC 255. As an exception to that pattern, the decision of the High Court in *Bohemians Football Club v Albion Properties Ltd* warrants particular attention.

147. The transaction at issue in *Bohemians Football Club v Albion Properties Ltd* was undoubtedly a significant property transaction (involving the proposed redevelopment of Phibsborough Shopping Centre and the relocation of Bohemians in order to facilitate such redevelopment). Negotiations had broken down and the defendant property developers sued for specific performance (on the basis that a concluded contract had been made) and, in the alternative, claimed that in the circumstances a proprietary estoppel arose in their favour. It appears from the judgment that, in their dealings, the parties had stipulated that any agreement was “*subject to contract/contract denied*” or “*subject to agreement/agreement denied*”. For the reasons set out in his judgment, Edwards J found that there was no concluded agreement: at 115-116. The basis for that decision appears to have been that there were outstanding terms that had not been agreed (and which could not be readily agreed). Surprisingly, the fact that the parties had apparently agreed that any agreement was “*subject to contract*” and that no agreement had been signed, does not appear to have been an operative factor in the court’s analysis (notwithstanding that the court had been referred to *Boyle v Lee*).

148. The court then turned to the proprietary estoppel claim. One might have anticipated that, in resisting that claim, the club would rely on the fact that the parties had negotiated on the basis that their dealings were “*subject to contract*” / “*subject to agreement*” and that, having agreed that they would be bound only if a contract was concluded, there was no scope for equity to intervene. However, no such argument appears to have been made. The defendants did, however, rely on a number of authorities which, they said, demonstrated that a finding of proprietary estoppel could properly be made in contractual cases, including for the sale of land, where the contract was unenforceable (by reason, for example, of the Statute of Frauds) or where the contract was incomplete (page 119).
149. The first of these cases was *Yaxley v Gotts* [2000] Ch 162. It involved a transaction between friends which appears to have been negotiated informally and without reference to section 2 of the 1989 Act (remarkably, it was first mentioned on appeal). The Court of Appeal held that the oral agreement that had been made, though void as a matter of contract law (by virtue of section 2), could still give rise to a constructive trust (which, by virtue of section 2(5), were not affected by the section). But, as even that briefest of summaries makes clear, the facts in *Yaxley v Gotts* were very different to the facts here.
150. Next, there is *Kinane v Mackie-Conteh* [2005] EWCA Civ 45. In that case, there was a written agreement to grant a charge over land for a loan which was unenforceable because it did not comply with section 2 of the 1989 Act. Again, the agreement had been

negotiated directly between the parties, without the involvement of solicitors. Again, the Court of Appeal held that the mere fact that the agreement was unenforceable as a matter of contract did not exclude a finding of a constructive trust, provided all the components of proprietary estoppel were established. Notably, the court made it clear that, in a case of that kind, the claimant had to show (and did in fact show) that the defendant had represented to the claimant, by his words or conduct, including conduct in the provision or delivery of the agreement, “*that the agreement created an enforceable obligation*” (per Arden LJ, §29). Similarly, an essential feature of the case as far as Neuberger LJ was concerned was the fact that “[*t*]here was a common understanding between the parties that a certain relationship existed between them (namely that of mortgagor and mortgagee)” (§44). Again, it will be seen immediately that the facts here are different: the parties, and in particular ACE, did not understand that there was any enforceable agreement. It knew – and was advised – to the contrary.

151. The third and final case to which the High Court was referred was the decision of the Court of Appeal in *Cobbe* [2006] EWCA Civ 1139, [2006] 1 WLR 2964. That decision was subsequently overturned by the House of Lords. While the House of Lords gave its decision before Edwards J gave judgment in *Bohemians Football Club v Albion Properties Limited*, it appears that he was not aware of it (probably because the decision post-dated the hearing). In his judgment, Edwards J (at page 123) cites a passage from the judgment of Mummery LJ in *Cobbe* to the effect that “[*e*]ven the use of the expression ‘subject to contract’ would not ... necessarily preclude proprietary estoppel

if the claimant established” a subsequent representation by the defendant “*that he would not withdraw from the ‘subject to contract’ agreement or rely on the ‘subject to contract’ qualification*” (*Cobbe*, §57). But even if that was the applicable test, it would not avail ACE here, having regard to the High Court Judge’s findings. But, as Lord Walker stated on appeal, “*the simple but fundamental point*” on which Mr Cobbe’s claim failed was that “*as persons experienced in the property world, both parties knew that there was no legally binding contract, and that either was therefore free to discontinue the negotiations without legal liability — that is, liability in equity as well as at law*” (§91). That was the position here and, as was the case in *Cobbe*, ACE “*ran a commercial risk, with [its] eyes open*” (*ibid*).

152. Edwards J did not have the benefit of the House of Lords’ analysis in *Cobbe*. It would not, of course, have been binding on him and neither is it binding on this Court. But, in my view, its reasoning is persuasive and, as will be evident from the discussion above, the approach adopted in it is, in my view, the approach that should be adopted here.
153. The High Court’s judgment in *Bohemians Football Club v Albion Properties Limited* did not advert to the commercial context and, in upholding the defendants’ proprietary estoppel claim, the court did not address the fact that the parties had evidently proceeded on the basis that there would be no enforceable transaction unless and until their agreement was incorporated into a written contract. The order made by the court effectively set out that shared understanding at nought. It is not evident to me that such

an approach was justified on the facts of *Bohemians Football Club v Albion Properties Limited*.

154. In his judgment in these proceedings, Owens J expressed the view that “[t]he circumstances in which equitable principles replace the certainties of the law of contract in business transactions” were very limited and only “in exceptional circumstances” would equity “ripen a business arrangement which [was] not based on contract into a proprietary interest in land” (High Court Judgment, page 11). Later in his judgment, he emphasised the need for caution before, in pursuit of equity, taking steps which “may undermine well-established certainties of the law of contracts” (pages 43-44). While these observations were criticised by the Court of Appeal on the basis that they were uninformed by any analysis of the authorities, it appears to me that they are entirely consistent with principle and authority. Certainty is an important value in all property transactions (as this Court emphasised in *Boyle v Lee*) and certainty and predictability in commercial transactions are also important interests.

155. The Judge recognised that there might be exceptional circumstances in which these interests might be outweighed but, on his assessment of the evidence, this was not such a case. His findings, particularly his characterisation of the assurances made by Motorpark to ACE as “vague assurances”,³³ were successfully impugned in the Court

³³ High Court Judgment, page 7.

of Appeal and were again challenged in argument here. However, I cannot identify any basis on which those findings might properly be set aside, consistent with the well-established principles in *Hay v O'Grady*. It has not been demonstrated that the Judge overlooked or disregarded any material evidence in making the findings that he did. He referred extensively to the oral evidence given by Mr Plunkett and Mr Sutton as to what was said to them by Michael and Colin Barry. He had the advantage of seeing and hearing the witnesses and his findings as to the nature and character of what was said were informed by the findings he made about the surrounding circumstances (the point made by Lord Walker in *Thorner v Major*). That is well-illustrated by what the Judge said at page 7 of his judgment: the essential point being made there is that the evidence did “*not establish any convention or representation*” that could estop Motorpark from relying on the lack of agreement in circumstances where (1) ACE had disregarded its own legal advice; (2) it knew that there was disagreement about the renunciation (or, as Owens J referred to it, the disclaimer) and (3) more generally it knew that no agreement had been concluded. That was the context in which the Judge characterised assurances that a lease had been “*agreed*” (which ACE knew was not the case) or “*would be forthcoming*” as “*vague*”.

156. The Court of Appeal was invited to set aside the findings of the High Court Judge on the basis of its review of the transcript – or, more correctly, selected extracts from the transcript – with particular emphasis on statements attributed to Motorpark to the effect

that a lease was “*all agreed*” and/or “*all done*”.³⁴ But such parsing of the transcript is precisely the exercise deprecated by *Hay v O’ Grady*. A number of different statements were attributed to Motorpark, capable of conveying different meanings and in any event none of the witnesses purported to have a *verbatim* record of what was said to them. No doubt, as the Judge accepted, ACE anticipated that an agreement for lease would be finalised in due course but took the risk that that might not happen (the “*commercial decision*” referred to by Mr Plunkett in his evidence).

157. In these circumstances, the Judge was entitled to find that, although ACE had acted to its detriment in undertaking the investment that it did in the Body Shop, as well as taking on the personnel previously employed by Motorpark, it had failed to establish any equity that the court should protect. Detriment is a necessary element of any proprietary estoppel claim but it is not sufficient in itself to establish such a claim. On the facts found by the Judge, it was not unconscionable for Motorpark to rely on its legal rights (the right to assert that it was not contractually bound to grant a 10-year lease to ACE) and Motorpark was therefore not estopped from asserting that it was not bound to grant such a lease to ACE.

158. Woulfe J departs from my analysis on this point. There are, I think, two particular points of difference between us. In the first place, I attach greater weight than Woulfe J would

³⁴ Per Robin Sutton, Day 2, pages 44-46.

to the commercial context here, involving as it did the (intended) arm's-length negotiation of a commercial agreement for lease, with both parties represented by solicitors and both parties indicating that they did *not* wish to be bound to any contract unless and until written down and executed. The second point of difference relates to the High Court Judge's assessment of the assurances given to ACE as "*vague*". I agree with Woulfe J that such a characterisation was not in itself a finding of primary fact. But it was an inference of fact drawn from the oral evidence that the Judge heard as to what was said, the circumstances in which it was said and the other evidence that the Judge heard as to the dealings between the parties. In my view, the Judge's assessment of these statements was "*inextricably entangled*" with his findings as to the circumstances and context in which they were made and understood and I therefore take a different view of the status of the High Court Judge's findings than my colleague.

159. I would therefore set aside the judgment and order of the Court of Appeal insofar as it upheld the proprietary estoppel claim.

160. I would add that, even if ACE *had* established an equity to be protected, a significant issue would arise as to the remedy granted by the Court of Appeal. The effect of that order was to require Motorpark to grant a 10-year lease to ACE, which was not subject to any renunciation clause. The issue of remedy was not discussed in any detail in the judgment of Whelan J, which appears to have proceeded on the basis that, once ACE succeeded in establishing an equity, it followed that Motorpark should be compelled to

grant a lease to it. A notable feature of the Court of Appeal's order is that it was an order for specific performance in precisely the same terms as the order made on foot of ACE's contractual claim. But not even at the high-water mark of ACE's estoppel claim was it suggested that Motorpark had ever represented to ACE that it would grant a lease on such terms. On the contrary, the High Court Judge specifically found that ACE was aware that the issue of renunciation had not been agreed and that Motorpark had never made any commitment to grant such a lease or left ACE under the impression that it would (High Court Judgment, pages 35-36; also at page 6).

161. Given the fundamental importance of the renunciation issue, and the diametrically opposed positions of the parties on it, it is not readily apparent how any expectation-based remedy might have been fashioned here. Nor is it evident that, in the circumstances here, any expectation-based remedy would have been appropriate. That was, I expect, why the High Court Judge suggested that, if equitable relief had been appropriate, it would have related only to the period of notice appropriate to determine the legal relationship created by ACE's entry into possession (a licence according to Motorpark, a yearly tenancy according to the Judge). The rationale for granting such relief would presumably have been to allow ACE sufficient time to recoup its investment (that investment constituting its "*detriment*"). The same objective could have been achieved by a monetary award, assessed by reference to such investment costs.

162. The question of the proper approach to remedy in promised-based proprietary estoppel claims has much occupied judges and commentators alike in recent years. The issue is considered in detail in *Biehler* (at 1089) and also in a recently-published article by Mee, “Choosing the Remedy for Proprietary Estoppel” (2025) 9(2) *Irish Judicial Studies Journal* 20-53 (“Mee”). Both analyses are perceptive and valuable. Summarising the position disclosed by the Irish cases, *Biehler* states that

“although the Irish courts have yet to set out the principles that influence the conclusions they have reached in relation to remedies, it seems clear that they are using an expectation-based model as a starting point, but also scaling this back where necessary in order to achieve a fair and proportionate outcome having regard to the plaintiff’s detrimental reliance and other relevant facts such as the impact of any order on the defendant or third parties” (at 1115).

Similarly, *Mee* states that “[w]hile there has been very little explicit analysis, the Irish case law, like that of England and Wales up to *Jennings v Rice* ([2002] EWCA Civ 159, [2003] 1 P & CR 100), shows a straightforward preference for expectation remedies” (at 43).

163. The leading Irish case is the Court of Appeal’s decision in *Naylor v Maher* [2018] IECA 32. *Naylor* was a family farm case. The deceased had promised to leave the family farm to the plaintiff, his son, who had worked on it for many decades for very low wages. The

father did in fact make a will devising the farm to his son but before his death he made a new will, leaving the farm to the defendant, his daughter and the sister of the plaintiff but leaving €150,000 to the son. The son sued, unsuccessfully claiming duress and undue influence and successfully asserting an estoppel (curiously, referred to in the judgment as a claim based on “*promissory estoppel*”). The High Court judge directed that the plaintiff should be awarded the entirety of the lands (while also keeping the €150,000). The defendant did not appeal against the finding of a “*promissory estoppel*” but she did appeal against the order directing the transfer of the lands, contending that a proportionate satisfaction of the equity would have been to compensate the plaintiff monetarily for the amount he had lost by moving home to assist his father on the farm (there had been evidence that €163,000 represented that loss) or, in the alternative, the transfer of something less than the entire farm.

164. The Court of Appeal (per Peart J; Ryan P and Hogan J agreeing) upheld the transfer order, subject to requiring the plaintiff to disclaim the testamentary bequest. Peart J referred to the discussion in *Snell's Equity* (33rd ed), §12-048 (repeated in the 34th ed, at 12-049) which identified the two competing approaches (an order protecting the expectation of the promisee as the starting position, with a departure from that default position permissible only where such a disproportionate burden was on the promisor versus there being no assumption in favour of making good the expectation, with the extent of the reliance determined by the need to do no more than to ensure that the promisee does not suffer any detriment). However, he did not accept that it was

necessary to make the “*binary choice*” represented by those differing approaches in order to achieve a just result for the plaintiff in accordance with equitable principles. The facts of each case would determine how that objective was to be achieved; it was not necessary “*to shoehorn the Court’s overall disposition of the case into one or other approach*” (§13). Peart J agreed with the trial judge’s assessment that simply recompensing the plaintiff in purely monetary terms would be a sufficient satisfaction of his claim: he had “*altered the course of his life*” by moving back to the family farm and that could not “*be justly reflected in mere money terms*” (§14; also §16).

165. That part of Peart J’s analysis can be readily understood. However, he went on to state that the representations made to the plaintiff, and the reliance placed on those representations, amounted “*to a contract which ought to be fulfilled. The deceased should be kept to his contract - ‘pacta sunt servanda’*” (§15). As Mee points out, there is an obvious difficulty with that reasoning: there was no *contract* and the deceased had no *contractual* obligations to the plaintiff (at 49). Otherwise, the plaintiff would have been entitled to a *contractual* remedy, one which would have been based on the value of the contractual promise to the plaintiff. Even where a contractual claim results in a monetary award (rather than a decree of specific performance), that award is assessed by reference to the benefits that would have flowed to the claimant had the contract been performed. That is a fundamental rule of *contract* law. However, in the absence of a *contract*, that rule would appear to have no application.

166. Such an approach to the identification of the appropriate remedy in proprietary estoppel claims – at least, those that are promise-based – would suggest that an expectations-based remedy is appropriate in virtually every case or, at a minimum, that such should be the starting position or default assumption. Yet Peart J appeared to reject such a “*binary choice*” earlier in his judgment and later stated that there will be other cases where the circumstances may suggest that it is just that the particular equity would be satisfied by a “*pecuniary award*” which, in its context, seems clearly intended to refer to a remedy assessed by reference to the detriment suffered by the claimant (§16).
167. On the facts, the outcome in *Naylor v Maher* is, perhaps, unsurprising. The plaintiff had committed his adult life to working the family farm on the strength of his father’s promise that he would inherit it on his death. “*Mere money*” – even if assessed by reference to the value of the farm, as opposed to the value of the plaintiff’s labour – would not satisfy his claim adequately. The facts here are, clearly, very different to the facts in *Naylor v Maher*. Overall, I do not read the judgment of Peart J as intended to lay down any broader principle than that the remedy is fact-dependent.
168. The issue of remedy in this context was considered in detail by the UK Supreme Court in *Guest v Guest*. There were significant differences between the approaches of Lord Briggs (with whom Lady Rose and Lady Arden agreed) and of Lord Leggatt (with whose judgment Lord Stephens agreed), reflecting divergent views “*as to the appropriate value*

to which proprietary estoppel responds.”³⁵ As one Irish commentator perceptively observed, “both judgments take significant but very different views of the history of proprietary estoppel. One might say the distinction between the majority and the minority stem from taking a different view of history.”³⁶ The dispute as to *history* reflects a corresponding dispute as to *purpose*. For Lord Briggs the aim of the remedy is “to remedy unconscionability mainly by satisfying expectation” (subject to that remedy not being “out of all proportion to the detriment”) (§68) whereas for Lord Leggatt the “*basal purpose*” of the doctrine is to protect against detriment: the “*equity is to be protected from detriment that [the promisee] will suffer if the promise is not kept*” (§§188-190).

169. I do not propose to undertake any detailed analysis of their stimulating judgments here. Although Lord Briggs and Lord Leggatt would start from different assumptions or default positions as to what the appropriate remedy is likely to be in any given case, it was common case that there was no hard and fast rule and that the issue of a remedy should be approached by reference to the facts and circumstances of the individual case. While Lord Briggs considered that “*the specific enforcement of the promise or assurance is the primary remedy for the unconscionability threatened or occasioned by its breach*” (§5), he also acknowledged that a more limited remedy may be appropriate

³⁵ G Virgo, *op. cit.*, 14.

³⁶ W Dunne, “Case Note: *Guest v Guest* [2022] UKSC 27, *Conveyancing and Property Law Journal* 2024, (1) 2-7.

on the facts and that in some circumstances the appropriate remedy may be a monetary award as compensation for the detriment suffered. Conversely, while Lord Leggatt's starting point was that "*the minimum award necessary to*" avoid detriment was the appropriate remedy (§256) and, where the reliance loss is quantifiable in monetary terms, a monetary award compensating for such loss should be the presumptive remedy (§273), he equally acknowledged that justice may, in the particular circumstances of a given case, require enforcement of the expectation. That is, of course, a simplification of two sophisticated and nuanced judgments and tends to understate the real differences between the approaches of the majority and minority.³⁷ But it is certainly the case that there will be cases where the different approaches would nonetheless yield the same result.

³⁷ The decision has generated significant academic commentary, some expressing support for one side or the other, some lamenting the residual uncertainty that the decision has left behind. *Mee* gives a close reading of the judgments before offering the view that Lord Leggatt's approach is the more plausible, even if he questions Lord Leggatt's willingness to grant an expectation-based remedy in cases where it is difficult to quantify the monetary loss suffered by the promisee (at 43). As *Mee* explains, Lord Briggs' approach appears to involve a more restricted role for consideration of proportionality as a factor in determining the appropriate remedy than had been understood to the law in England and Wales prior to the decision in *Guest v Guest*. (*Mee*, at 35-38). A similar point is made in A Waghorn, "Promises in Equity and at Law: Proprietary Estoppel after *Guest v Guest*" (2023) 86(6) *MLR* 1504-1516, 1513-1514. Further commentary is referred to in *Biehler*, including H Sanderson, "Proprietary estoppel in *Guest v Guest*: equity at its most flexible?" (2023) *LQR* 139, 187-193. After observing that "[a]cademics purchase ink by the barrel to engage in bitter debates" (at 188) the author observes of Lord Briggs' focus on unconscionability that it is "*a conclusion rather than a test*" (at 190).

170. There have also been significant developments in Australia, New Zealand and Canada which are discussed in *Biehler*. The authors commend the approach taken by the New Zealand Court of Appeal in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 where the court eschewed any presumptive or *prima facie* approach one way or another and emphasised the need “*to achieve a just and proportionate outcome*” (*Biehler*, at 1112-1113).
171. As *Mee* explains, there are different remedial models. No jurisdiction appears to have adopted either a pure expectation approach or a pure detriment approach. Some intermediate approach has been adopted in the various common law jurisdictions. *Mee* suggests that this jurisdiction has adopted the “*non-committal approach*” and suggests that, ultimately, the development of a satisfactory theoretical framework requires the court “*to take **some** position on the role of expectation and detriment in the process of determining the remedy*” (*Mee*, at 50) (my emphasis).
172. That may well be so. Here, however, I have already found that ACE’s proprietary estoppel claim fails. The issue of remedy does not therefore arise as an issue requiring determination on this appeal. Furthermore, the remedy issue was not debated to any significant extent on the appeal and is hardly touched upon in the judgments below. In these circumstances, it is not necessary, and does not appear to be prudent or appropriate, for the Court to embark on the difficult exercise that divided the UK Supreme Court in

Guest v Guest and that has resulted in varying approaches being taken in other common law jurisdictions.

173. What is clear both from the (albeit) limited Irish jurisprudence, and from the approach adopted in other jurisdictions, is that the court has a discretion as to remedy: in every case, the court must make a judgment as to what is the appropriate remedy to grant, having regard to all the circumstances of the case. There is no rule either requiring, or excluding, an expectations-based remedy in all cases; equally, there is no rule requiring, or excluding, a detriment-based remedy in all cases. Nor does the caselaw appear to support any default or presumptive rule either way. Whether there ought to be such a rule (whether rigid or default) and, if so, what that rule should be, must await further debate in a case in which the issue requires determination and can be the subject of detailed submission.
174. Because of the difficulties in formulating any expectations-based remedy here, the circumstances point to a more limited remedy. The commercial context points in the same direction. Unlike the claimant in *Guest v Guest* (which, as its name suggests, was another family case, arising from the repudiation by the parents of the claimant of assurances given to him that he would, after a lifetime of underpaid work on their dairy farm, inherit a substantial interest in the farm), ACE is a commercial operator. The costs it incurred in going into possession of the Body Shop and setting up its outlet are quantifiable in principle, even if the evidence before the High Court did not permit the

Judge to do so reliably. If it had been established that it was unconscionable for Motorpark to allow ACE to undertake that expenditure, a monetary award reflecting the expenditure would fully compensate ACE and adequately remedy such unconscionability. That would not, of course, provide ACE with any return on its investment but that is hardly the function of equity in this context.

175. However, any monetary award to ACE would have to reflect the fact that it has at this stage been in occupation of the Body Shop for 9 years. Furthermore, it is *prima facie* entitled to a new tenancy under the 1980 Act. The evidence here is that ACE was unwilling to accept a landlord break clause after 5 years because that was not a sufficient period to recover the investment costs of establishing a new ACE business. It has now had 9 years in which to recover those costs. The overwhelming likelihood is that it has by now fully recovered its investment costs (and more). Thus, even if ACE had succeeded on this appeal, it was very unlikely that the resulting remedy would have been of any value to it.

176. In any event, for the reasons I have set out, I would set aside the Court of Appeal's judgment and order, and, in the circumstances, the issue of remedy does not arise.

CONCLUSIONS

177. I shall summarise my principal findings briefly:

- (1) Context is important to the resolution of the issues on appeal. The parties here were substantial commercial entities, with significant experience of transactions (such as the transaction here), with access to legal advice, who were engaged in arms-length negotiations intended to lead to a comprehensive written contract setting out in detail their respective rights and obligations.
- (2) The High Court was correct to hold that there was never a concluded agreement for lease here.
- (3) First, *both* ACE and Motorpark expressly stipulated that their engagement was “*subject to lease*”. As a matter of law, it followed that the matter of an agreement for lease remained in negotiation until a formal contract was executed and there could be no concluded agreement until a written contract was agreed and executed. No agreement for a lease (or lease) was ever agreed or executed. ACE was aware of that at all material times.

- (4) The parties did not waive the “*subject to lease*” stipulation at any point and the Court of Appeal’s finding that there had been such a waiver had no basis in the evidence and was not open to it.
- (5) The parties did not reach a concluded agreement to grant a lease prior to the involvement of their respective solicitors in circumstances where (*inter alia*) they had not reached agreement on the commencement date.
- (6) Second, and in any event, the parties were never *ad idem* as to the terms of an agreement for lease. In particular, there was never agreement on the issue of renunciation.
- (7) Motorpark never led ACE to believe that it was dropping its stated requirement for a deed of renunciation and ACE did not give evidence of any such belief. In the circumstances, the Court of Appeal erred in holding that Motorpark was estopped from asserting that there was no agreement for lease because the issue of renunciation had not been agreed.
- (8) ACE elected to go into possession of the Body Shop knowing that there was no agreement for lease/lease in place. It made a “*commercial decision*” to go into possession, against the advice of its solicitors. ACE thereby took the risk that an agreement for lease would not be agreed. In the circumstances, the High Court

was entitled to conclude that ACE had failed to establish any equity that the court should protect.

- (9) In any event, even if such an equity had been established, a significant issue would have arisen on the issue of remedy. Given the fundamental importance of the renunciation issue, and the diametrically opposed positions of the parties, it was not readily apparent how any expectation-based remedy might have been fashioned here. The difficulties in formulating an expectations-based remedy indicated that any remedy should be more limited, and the commercial context pointed in the same direction.
- (10) If it had been established that it was unconscionable for Motorpark to allow ACE to undertake the expenditure it did in going into possession of the Body Shop and setting up its outlet, a monetary award reflecting that expenditure would fully compensate ACE and remedy such unconscionability.
- (11) However, ACE has in fact been in occupation of the Body Shop for 9 years. Furthermore, it is *prima facie* entitled to a new tenancy under the 1980 Act. The overwhelming likelihood was that ACE has by now fully recovered its investment costs. Thus, even if ACE had succeeded on this appeal, any remedy was very unlikely to be of any value to it.

178. I would therefore allow Motorpark's appeal and set aside the Order of the Court of Appeal. I would give the parties an opportunity to be heard as regards the issue of costs.