UNAPPROVED
THE COURT OF APPEAL

Record Number: 2022/114
Neutral Citation Number [2024] IECA 117

Whelan J.
Faherty J.
Binchy J.

BETWEEN/

ACTION ALARMS LIMITED TRADING AS ACTION SECURITY SYSTEMS

PLAINTIFF/
RESPONDENT

- AND -

EMMET O'RAFFERTY AND TOP SECURITY LIMITED

DEFENDANTS/
APPELLANT (SECOND DEFENDANT)

Judgment of Ms. Justice Faherty dated the 15th day of May 2024

1. This appeal arises from a judgment of the High Court (Humphreys J.) of 4 February 2022 and his Order of 21 February 2022 (perfected 8 April 2022) whereby the plaintiff/respondent (hereinafter "Action") was awarded a total sum of €148,324.89 (inclusive of VAT and Courts Act 1981 interest) in respect of its claim for commission payments from the second defendant/appellant (hereinafter "Top").

2. To best understand the claim brought by Action against Top and the decision arrived at in the court below, it is necessary to give some details about the business carried on by

each of the parties and the nature of the commercial dealings between each up to the time of the commencement of the within proceedings.

Background

3. Action is a company incorporated within the State and is an installer and maintainer of alarm systems, and latterly a provider of alarm monitoring services. Top is also a company incorporated in the State and is wholly or substantially owned and controlled by the first name defendant (hereinafter "Mr. O'Rafferty") and is in the business of alarm systems monitoring**.** Top set up its alarm monitoring station in or about 1986. It purchased a number of alarm installation companies in the early 2000s.

4. The evidence established that as monitoring companies were not allowed to actually go onto the alarm customer's premises and did not have engineers on the ground, it was the alarm installation companies (such as Action), who had the codes to the alarm panels and security systems, who did so when the need arose. Thus, if a problem arose with an alarm system, the relevant monitoring company would contact the relevant alarm company and the alarm company would send one of its engineers to the customer's premises in order to solve whatever problem arose. The evidence given by Action was to the effect that as of 1985, it was working with a number of monitoring centres on this basis. Its relationship with those centres was built up by Action having introduced its customers to the monitoring centres in the first place.

5. It was also established that as monitoring centres were effectively unable to procure business without the assistance of alarm installer/maintainers, it had been agreed at industry level that the annual monitoring fee which the monitoring companies charged alarm installation customers for their services would be divided (not necessarily equally) between the monitoring company and the alarm installer/maintainer. The split of the annual monitoring fee was often referred to as "commission".

6. In the mid-1980s Mr. Derek Mooney of Action and Mr. O'Rafferty (of Top) formed a business relationship, whereby Action would solicit customers for whom it installed and/or maintained alarms to become users of Top's monitoring centre.

7. This commercial relationship whereby Action would introduce alarm monitoring customers to Top for Top to provide the customer with monitoring services inured from 1986 to 2009. During this period Top paid Action commission, calculated as a percentage of the annual fee received by Top from its Action-introduced customers. As already explained, the basis of the fee portion being paid by Action to Top was on foot of Action having secured the introduction of the customer to Top and thereafter ensuring the maintenance of the physical connection between the customer and the monitoring centre as and when the need arose, over and above Action's own service and maintenance obligations to the customer as the installer of the alarm system.

8. In 1989, Action was anxious to have its position as introducer of customers to Top protected by limiting Top's ability to assign to third parties Top's interest in the monitoring contracts it had with those Action-introduced customers (as was provided for in clause 12 of the contract Top had with those customers). The parties entered into correspondence in this regard. On 25 October 1989, following a request from Action, Top furnished Action with a draft letter offering to limit Top's ability to rely on clause 12. This offer was agreed to and signed by Mr. O'Rafferty and accepted by Action on 3 November 1989 (hereinafter referred to as "the 3 November 1989 Agreement"). The terms of the 3 November 1989 Agreement were expressed as follows:

> *"Re Monitoring Contracts.*
>
> *We are writing to you regarding your customer connections with our control room. Clause 12 of the contract between Top … and your customers states that we are entitled to assign all or any of our rights in the contract. I therefore agree that Top*

… will, at your request, assign all or any of its rights under the agreement it has with your customers to you or your nominees without penalty to the subscriber or Action… There will be no penalty for allowing this transfer however, any annual renewals which have become due at that stage would be due for the full 12 months period and still remain owing if outstanding at that date. The three year contract in terms of these customers would in this instance would be waived. I further agree that Top Communications will not assign any or all of the contracts with your customers to any other party without prior written consent from you. Three months' notice is required in respect of any such assignments. In the event of Top… or any company to whom it assigns, going into liquidations, the contracts are automatically assigned to you or your nominees."

9. Following the 3 November 1989 Agreement, the arrangement which theretofore had pertained regarding the payment by Top of commission to Action continued save that on occasion, the annual monitoring fee charged by Top to the customers in question was revised, with the split due to Action then being duly adjusted to reflect the fee revision.

10. During the currency of the parties' dealings, Top ran regular marketing drives, which comprised encouraging alarm installers/maintainers like Action to introduce new customers to Top for each of which new customer the alarm installer/maintainer would receive a split of the monitoring fee charged by Top to those customers.

11. In 1992, Top ran a promotion which after nine months saw Action introduce 97 connections to Top with an annual monitoring contract value of £10,050 to Top, of which Action was entitled to £4,500 and Top, £5,550.

12. It is common case that for twenty years from 1989 – 2008, Top provided Action with a monthly "Commission Report" based upon which Action would then invoice Top for the amount owed to Action from annual monitoring fees collected in that month by Top. Thus,

commission payments to Action were made *via* the process whereby following the generation of monthly Commission Reports, Action raised invoices on foot of those Reports. Such Reports were readily capable of being printed by Top from its computer system until January 2015 when a new computer system was installed.

13. In the case of a small number of the relevant customers who wished to receive one invoice only for security services, it was Action rather than Top that raised invoices for Top's monitoring services, with Action then paying over Top's portion of the relevant fee to Top upon being invoiced by Top.

14. It also appears that Action requested and was given daily overnight customer alarm fault reports ("Activity Reports") from Top's system up until January 2009 albeit there was no suggestion that there was an enforceable agreement that those reports would be provided by Top to Action.

15. Checking the connection to the monitoring station was one of Action's obligations pursuant to the maintenance contract it had with the majority of its customers. Thus, Action was entitled to charge customers for servicing their system, *inter alia*, to ensure that the system was connected to Top's monitoring service.

16. By 2008, some 804 customers had been introduced by Action to Top and Action was entitled to part of Top's annual monitoring fee for each of them, in respect of which Action received such payments, via the process just described.

17. In 2008, Action informed Top that it intended opening its own monitoring station (through its associated company Action Alarm Control 24 Ltd.) and that Action intended to rely on the 3 November 1989 Agreement to seek that Top assign to Action Top's interest in the monitoring contracts in respect of as many of the 804 customers who had been introduced to Top by Action as might agree to transfer their monitoring contract to Action.

18. While in the 3 November 1989 Agreement it had not been envisaged that Action would establish a monitoring business, it is common case that Top was largely agreeable to complying with the terms of the 3 November 1989 Agreement as regards facilitating the transfer of Action-introduced customers to Action's monitoring service subject only to Action addressing Top's *"reasonable"* request that Action procure the customer's written consent authorising the cancelation of Top's monitoring service and the transfer to "Action Central Station", and a completed RC1C form in order to facilitate the transfers of the customers.

19. By letter of 25 February 2009, Dillon Solicitors, on behalf of Action, asserted that Top's requirement for a letter of consent and a completed RC1C form from each transferring customer was inconsistent with the 3 November 1989 Agreement and so Action threatened injunction proceedings to compel Top to comply with the terms of that Agreement.

20. On 3 March 2009, Top responded as follows, in relevant part:

> "*We fully intend to honour those commitments made to your client in our letter dated [3 November 1989]. This requires us to transfer the customers without penalty to a central station of Action Alarm's choosing, in this case their own."*

21. Action replied on 10 March 2009, confirming that it was glad that Top was agreeing to honour the 3 November 1989 Agreement and that Action would comply with its commitment to allow Top to collect the full year monitoring fee if it was the case that the contract with the relevant customer was renewed before the transfer to Action occurred.

22. It is not in dispute that some 700 or so of the 804 customers Action had introduced to Top duly transferred to Action.

23. In January 2009, after sending its monthly Commission Report for November 2008 to Action Top ceased sending such reports and it did not pay Action any fee in respect of

monitoring contracts after December 2008. However, in December 2009, Top did pay Action €10,000 in settlement of the amount owed by Top for the months of November and December 2008, net of an amount owed by Action to Top at the end of 2008.

The institution of proceedings

24. The within proceedings commenced on 21 March 2014 by which Action claimed damages for breach of contract in respect of the non-payment of commission after January 2009. As already stated, the last Commission Report generated by Top was in January 2009, and no written request was made by Action for Commission Reports until after the within proceedings issued. It is also the case that no written demand was made by Action for unpaid commissions from January 2009 onwards until a written demand was made on 27 May 2013.

The progress of the proceedings

25. As recorded in the High Court judgment, the case had a total of three separate substantive hearing dates the first of which was before O'Connor J. on 22 November 2017. It was however adjourned following a dispute between the parties about discovery and particulars and a possible amended defence. In response to Top's plea that the pleadings as to the contract were inadequate, by Order dated 22 November 2017, O'Connor J. directed Action to rectify this by way of additional replies to particulars and allowed for an amended defence to be delivered by Top. He also provided timelines for the making of voluntary discovery. On 20 December 2017, O'Connor J. made an Order (on consent) that Action and Top each make discovery.

26. The matter was again set down for trial on 14 November 2019 and was heard over a period of days following which judgment was reserved. It was not however possible for the then trial judge to finalise the judgment and in October 2021, it was decided that the matter would be listed for a fresh hearing. That hearing commenced on 11 January 2022

before Humphreys J. and the trial took place over a period of four days, resulting in the judgment and Order under appeal here. Action called two witnesses, Mr. Derek Mooney and Mr. Aaron Mooney. The defendants' witnesses were Mr. O'Rafferty and a Mr. Michael Lawless. For ease of reference, I will refer to Mr. Derek Mooney largely as "Mr. Mooney" and any reference to the other Action witness will be by his full name, Mr. Aaron Mooney.

The High Court Judgment

27. As already referred to, judgment was delivered by Humphreys J. (hereinafter "the Judge") on 4 February 2022. The award of €148,324.89 in favour of Action was made up as follows:

(i) damages for breach of contract of €95,528.00;

(ii) VAT at 23% in the amount of €21,971.44; and

(iii) Courts Act 1981 interest of €30,825.45

together with an award of costs against Top, with a stay on costs pending the determination of the within appeal. There was no order as to costs against Mr. O'Rafferty (the first named defendant).

28. In broad brush, for the reasons set out in his judgment, the Judge preferred the evidence of Action's witnesses where they differed from Mr. O'Rafferty. Generally, the Judge found the evidence of the Action witnesses *"more internally consistent and more consistent with objective facts and left fewer unanswered questions or inconsistencies than the evidence of Mr. O'Rafferty"* (para. 133). He found that Mr. O'Rafferty's *"evidence, interpretations and positions were generally less convincing or persuasive than those of the plaintiff, where they differed"* (para. 134).

29. The first substantive issue addressed by the Judge was whether there was a contract between Action and Top. He commenced his analysis by stating that as far as commercial

arrangements are concerned, it is to be presumed that the parties intended to create legally binding contracts (per Fennelly J. in *McCabe Builders (Dublin) Ltd. v. Sagamu Developments Ltd.* [2009] IESC 31, [2011] 3 I.R. 480 at 492). He considered that the *dictum* of Wright L.J. in *Hillas & Co. Ltd. v. Arcos Ltd*. [1932] UKHL 2, (1932) 147 LT 503 (HL), as cited in *McCabe Builders*, had a certain resonance for the present case. As Wright L.J. put it:

> "*Business men often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects, but, on the contrary, the Court should seek to apply the old maxim of English law, 'verba ita sunt intelligenda ut res magis valeat quam pereat' ['words are to be so understood that the subject matter may be preserved rather than destroyed']…That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law".*

30. As far as the present case is concerned, the Judge noted that the only part of the agreement between the parties that was specifically drawn up in a contractual-type letter was the 3 November 1989 Agreement. Whilst this document did not refer to commission, he found that *"the clear and obvious"* background against which the 3 November 1989 Agreement was reached *"was the payment of commission"* (para. 136). He considered that both the element of transfer in the 3 November 1989 letter and the payment of commission were *"integral to the commercial relationship between the parties"* which to the Judge signified, in the words of Clarke L.J. in *RTS Flexible Systems Limited v. Molkerei Alois*

Müller Gmbh & Co. KG [2010] UKSC 14, [2010] 3 All ER 1, *"a consideration of what was communicated between them by words or conduct"*, and led 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"*.

31. Having regard to the totality of the evidence, and based upon his assessment of Mr. Mooney, the Judge considered that where Mr. Mooney had referred in evidence to a *"gentleman's agreement"* he had done so *"amateurishly"* and that what Mr. Mooney had meant *"was that there was not a formal signed legal instrument"* (emphasis added) between the parties. In the Judge's view, in describing the arrangement for the payment of commission by Top to action as he did, Mr. Mooney *"did not mean that he did not see the arrangement with Top as being an agreed and negotiated commercial arrangement that was binding and enforceable in the event of a breach"* (para. 137). Accordingly, the Judge concluded that *"the arrangement between Action and Top could not have been anything other than a contract"* (para. 138) and Mr. Mooney's *"maladroit"* use of the phrase *"gentleman's agreement"* did not change that.

32. The Judge found that there was clear evidence that alarm companies (such as Action) *"had some bargaining power"* (para. 139) given that monitoring companies were dependent on alarm installers for the introduction of business. It was thus *"fanciful"* to suggest (as had been put to Mr. Mooney in cross-examination) that alarm installers would make such introductions for purely *"discretionary"* payments. In the present case, the payments being made to Action by Top were significant, comprising as they did almost 45% of customer income. It thus made no sense not to view this as a contractual arrangement, albeit one that had not been reduced to writing in a detailed written document.

33. The Judge next considered whether the contract between the parties could be viewed as one limited to the letter of 3 November 1989. He concluded that that was not the case in view of Mr. Mooney's evidence (which he accepted), and in circumstances where it had also been expressly accepted by Mr. O'Rafferty that this was not the case. Thus, in the view of the Judge, *"[t]he payment of commission was the agreed background against which the specific term about assignment of customers made sense"* (para. 140). Accordingly, the Judge discounted Top's emphasis on the lack of reference to commission in the 3 November 1989 Agreement, predicated as that emphasis was on *"the false premise that the letter was the entire agreement".*

34. While he noted the attempts made by Top in cross-examination to pin Mr. Mooney to a position that the 3 November 1989 Agreement was the entire agreement, and that at certain points Mr. Mooney seemed to agree with this, the Judge opined that *"the witness box is not an oral examination in a litigant's understanding of the legal nuances of their case".* Thus, *"concessions or apparent concessions on legal matters, legal implications or nuances, or issues about the scope of one's case, made by a litigant in the witness box, don't normally carry much weight"* (para. 140). He considered that *"from Mr Mooney's evidence overall it was clear that he was stating that there was an agreement to pay commission as well as regarding the matters set out in the letter of 3rd November, 1989"* and that that was also *"a fairly obvious conclusion from the circumstances …"* (para. 140).

35. As to whether the payment of commission was a contractual term, the Judge concluded that it was *"obvious that payment of commission was a core part of the contract between the parties".* While this was not an agreement reduced to writing, it was *"certainly evidenced in writing and evidenced by the conduct of the parties and in particular the payment of commission for the best part of two decades".* Hence, this was not a case of needing to imply any terms into the contract by reference to the custom in a

particular trade, which would normally need to be proved by expert evidence. Here*, "the conduct and correspondence and actions as between the parties themselves clearly illustrate the terms of the contract between them, one of which was the payment of commission in respect of customers introduced to Top by Action"* (para. 141).

36. The Judge next turned to the question of whether the agreement requiring payment of commission had ceased to be binding. Answering that question in the negative, he found from the evidence that the parties had envisaged the payment of commission by Top to Action on the following bases:

> *"(i) That Action introduced the customer to Top. That is not written down, but is evidenced by the conduct of the parties and the general commercial environment that an alarm company has influence over which monitoring company to introduce the customer to.*
>
> *(ii). That the customer remains with Top. Again that is not written down, but is evidenced by the conduct of the parties in that commission statements only refer to current customers and because the commission is only paid from monies actually received, so that if the service ceases Top would cease to pay the fee.*
>
> *(iii). That the customer pays the fee to Top from time to time which is then split with Action as it is paid, in a negotiated proportion. Again that is not written down as a contractual term, but is evidenced by the conduct of the parties, the commission reports, the records of prices, and handwritten notes of negotiations between Top and Action on the split of fees.*
>
> *(iv). That Action continues to procure the maintenance of the customer as a customer of Top. There was much debate about how this concept of supporting or maintaining the relationship should be defined, but it is clear to me that the most appropriate understanding of Action's implied agreement to support the*

> *relationship with Top is in the sense of maintaining the physical connection with Top by servicing the alarm system so that the necessary connection is maintained. This is in the context of the entire monitoring service depending on their being a connection between the alarm company and the monitoring centre. Again that is not written down as a contractual term, but is evidenced by the conduct of the parties, the supply of activity reports and the call out visits by Action's engineers where connection issues arose above and beyond the regular scheduled maintenance checks on an annual or six-monthly basis. By contrast there is virtually nothing to support some alternative interpretation whereby Action were supposed to have agreed to jolly along the customer, to see if they were happy with Top, answer their questions about Top and so on. All that seems to me totally ephemeral, speculative and after-the-event. One searches in vain for actual evidence that this was ever agreed as a term of the arrangement, or that it was ever in fact done. Where are the records of Top trying to identify whether Action were answering customers' questions, encouraging them and so forth? There was no evidence that this ever happened or was ever inquired about by Top. What* **did** *happen was a servicing of the physical connection, and that, it seems to me, can only be what the arrangement and agreement to maintain and support the customer's connection was about."* (para. 142) (emphasis in original)

37. The additional work by Action in respect of the monitored alarms was reflected in the Activity Reports generated by the monitoring centre (Top) in cases where the signal failed to communicate from time to time or where some other fault was detected. On the *"totality"* of the evidence, the Judge rejected Top's suggestion that Action charged separately for call outs in response to the daily self-test connection and the argument that Action was the primary beneficiary of the Activity Reports. He considered that the

Action's provision of a continued connection between Top and the customer *"obviously provided a benefit to Top which Mr. O'Rafferty strangely denied but ultimately acknowledged"*. Action's continued maintenance of the physical connection as evidenced by the Activity Reports was *"clearly primarily of benefit to the customer, but secondarily of mutual benefit to both Action and Top who had a shared interest in seeing that the system worked properly"* (para. 144). As found by the Judge, *"[t]he evidence was that [Action] continued to provide the same service to the disputed customers after early 2009"*. Thus, Action continued to support the relationship between the customer and Top by maintaining the physical connection when called upon to do so (above and beyond the regular scheduled annual and six-monthly maintenance checks) and, therefore, satisfied the conditions for payment of commission even after January 2009. Accordingly, *"it was entitled to such commission under the contract"* (para. 145).

38. The Judge next addressed Top's argument that by seeking in 2008 the transfer of customers (who up to then had been monitored by Top) to Action's own monitoring centre, Action was either in breach of the parties' agreement *simpliciter*, guilty of a repudiatory breach, or that there had been a change of circumstances that resulted in the termination of the agreement.

39. Addressing Mr. O'Rafferty's evidence that the commission payable by Top to Action was conditional on Action encouraging the relevant customers to remain with Top, the Judge noted (citing established case law) that *"the court should be slow to infer terms into an agreement"* (para. 147). He quoted Finlay Geoghegan J. in *Irish Bank Resolution Corporation Limited v. Morrissey* [2013] IEHC 208 that *"it is well established that the courts must be extremely cautious about implying terms into a commercial agreement"*, and Fennelly J. in *Dakota Packaging Ltd. v. AHP Manufacturing BV T/A Wyeth Medica Ireland* [2004] IESC 102, [2005] 2 I.R. 54, at 106 that *"courts will not lightly infer terms"*.

40. The Judge went on to state, at para. 150:

> *"The defendant seems to think that it is up to the plaintiff to show that a term can be inferred to the effect that Action was permitted to seek to have customers avail of its own service and to continue obtaining commission for the customers that don't transfer. That is a complete misunderstanding and a reversal of the legal position. Given that it is clear that the agreement was …that Top would pay commission, it is up to Top to demonstrate an implied term allowing it to terminate such payments. This Top has failed to do."*

41. He concluded that it was *"up to [Top] to show that a term can be inferred that [Action] was prohibited from asking customers to avail of its own monitoring centre such that it would lose the right to commission even if [the customers] failed or refused to do so"* (para. 150). He found that *"no such term has been demonstrated"*. (Para. 152) In reaching this conclusion he applied the approach of Hoffmann L.J. in *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 10, [2009] All ER 1127, [2009] 1 WLR 1988 that *"[t]he question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls."*

42. The Judge rejected Top's argument that the duty on Action to *"support"* or *"maintain"* the relationship with Top went beyond the obvious and tangible maintenance of the physical connection. What Top was contending for was some sort of *"ephemeral loyalty test, bordering on a non-competition clause"*. This was rejected by the Judge firstly on the basis that there was*" no satisfactory evidence whatsoever that this was a*

term". Secondly, there was no evidence of any specific instances of steps by Action that could be said to arise from an alleged clause in the agreement between the parties requiring Action to support the relationship with Top. Thirdly, there was no evidence of how Top would monitor the alleged encouragement of the relationship or how this would really arise in practice. He further considered that *"most fundamentally of all, given that the commission was such a large percentage of customer income, 45% approximately for an indefinite period going forward, it is implausible that such large sums would be paid for such a nebulous alleged obligation"* (para. 152).

43. He considered that the term which Top required to be implied into the contractual arrangement between the parties to be *"fundamentally contradictory of Action's agreed right to assign the monitoring contracts of customers to itself, which implies a right to ask those customers if they want to be assigned. The 'no-attempted-poaching' clause proposed by [Top] is inconsistent with the express agreement as reflected in the letter of 3rd November, 1989 which explicitly allowed Top's interest to be assigned to action itself or its nominees without penalty"* (para. 154). It followed, therefore that it could not be a breach of contract for Action to ask a customer whether the customer wished to be assigned to Action's own monitoring service. Thus, the Judge rejected Top's plea, at para. 5 of its amended defence, that the commission payable to Action was in consideration for not procuring or seeking to procure the customers of Top for itself. Accordingly, where Action had transferred some customers to itself, it had not been demonstrated by Top that Action would lose the right to commission in respect of those other customers who remained with Top despite being asked by Action whether they wished to transfer.

44. The Judge considered that, overall, the law as explained in *Belize* applied. He stated:

> *"There was no explicit agreement as to what would happen if the plaintiff tried to move some of the customers to its own service. The general presumption is that nothing would happen and that the agreement would continue, and I think that general presumption applies here. Top certainly have not demonstrated an agreement that the pre-existing contractual arrangement come to an end on [Action] asking any customers to move or in any other circumstances here."* (Para. 155)

45. Top's repudiation argument was also rejected, firstly on the basis that it failed to establish the existence of a term which Action had breached. *Belize* thus applied. Thus, while commission no longer arose for customers who did transfer to Action, commission continued to be payable to Action in respect of customers who did not transfer and stayed with Top.

46. Insofar as Top had argued that there was no consideration by Action for payments by customers made after January 2009, the Judge found that that was not the case, stating:

> *"Consideration had already been provided in the form of the original introduction for which there would be ongoing payment, together with ongoing maintenance and service of the link between the customer and the monitoring centre in physical and engineering terms. There is no evidence whatsoever that the plaintiff failed in its maintenance duties and indeed its positive evidence was that it continued to carry on such duties. I do not accept that the parties treated the contract as at an end in 2009, and the exchanges between Mr. Daly and Mr. Lawless are best understood, in the light of the overall evidence as a squaring-off of the liabilities as of 2008 only."* (para. 157)

47. The Judge disregarded case law relied on by Top regarding the termination of commission for agents as irrelevant given the circumstances that arose in this case, namely

that the commission here payable by Top was in respect of a client that had been introduced by Action.

48. Whilst he accepted that there was *"something of a delay"* by Action in making the first written demand for the unpaid commission, the Judge broadly accepted Action's explanation that the delay stemmed from its preoccupation in setting up the new monitoring centre. In any event, the delay was not such that it outweighed the conclusion that Action had a legitimate complaint. (para. 159)

49. The Judge went on to state that even if he was wrong regarding his conclusions as set out above, he was satisfied that the specific agreement as to non-penalisation of Action in the event of customer transfer as set out in the letter of 3 November 1989 precluded Top from withholding commission that would otherwise be payable to action. In his view, withholding commission on this basis *"amounts to penalising [Action] from seeking to activate a right specifically granted to it by the agreement reflected in the 3rd November, 1989 letter…"* (para. 160). He went on to state:

> *"The net effect of having withheld the commission was to increase the portion of customer income taken by Top from 55% to 100%. That results in Top profiting from Action availing of the agreement that it was entitled to seek to assign its customers. It seems to me by withholding the commission in the case of customers that did not transfer, Top is in substance and reality penalising Action for having sought the transfer."* (Para. 161)

50. The Judge rejected Mr. O'Rafferty's interpretation of the meaning of *"penalisation"* and rejected any suggestion that either of the parties, as of 1989, or a hypothetical reasonable person interpreting the 3 November 1989 letter, would have applied such a narrow interpretation.

51. For the reasons set out in his judgment, the Judge was satisfied to make the award totalling €148,324.89 in favour of Action.

The appeal

52. Top now appeals and seeks that the Order of the High Court (including as to costs) be set aside. Action opposes the appeal in its entirety.

The issues in the appeal

53. From Top's notice of appeal, Action's respondent's notice and the parties' submissions, written and oral, the issues which arise for determination in the appeal can be summarised as follows:

(1) Did the Judge err in holding that Action and Top had a concluded and enforceable agreement in respect of an entitlement by Action to commission for Action-introduced customers?

(2) Did the Judge err in failing to conclude that there was an implied term in the contract between the parties that Top's commission obligation would come to an end should Action seek to migrate Action-introduced customers away from Top and, in reaching the conclusion he did, did the Judge fail to apply settled case law for the implying of terms into contracts?

(3) Did the Judge err in finding that Action continued to provide services to Top customers sufficient to amount to consideration for ongoing commission payments?

(4) Did the Judge err in the how he construed *"without penalty"* as contained in the 3 November 1989 letter?

(5) Did the Judge err in awarding Courts Act interest?

54. Each of the above issues will be considered in turn. Before moving to those considerations, it is apposite to say a few words about the function of this Court in an

appeal such as the present. As can be seen from the judgment, the Judge made a number of findings of fact. In so doing he had the advantage of seeing and hearing the witnesses in the case, an opportunity this Court did not have. As set out in *Hay v. O'Grady* [1992] 1 I.R. 210, at p. 217, this Court's role in reviewing findings of fact made by a trial judge is a limited one. An appellate court is bound by such findings made by a trial judge when they are supported by credible evidence. Writing for this Court in *McCormack v. Timlin* [2021] IECA 96, Collins J. opined that *"[t]he appellate self-restraint mandated by Hay v O' Grady has an important quid pro quo, namely the requirement for 'a clear statement … by the trial judge of his findings of fact, the inferences to be drawn, and the conclusions to be drawn'. The decision of the Supreme Court in Doyle v Banville [2012] IESC 25, [2018] 1 IR 505 has developed this aspect of Hay v O'Grady significantly"* (para. 57).

55. It will be recalled that in *Doyle v. Banville* [2012] IESC 25, Clarke J. (as he then was) emphasised the necessity for a trial judge to engage with *"the key elements of the case made by both sides".* However, as Collins J. cautions in *McCormack v. Timlin,* appellate courts *"must be astute not to permit Doyle v Banville-inspired complaints of 'non-engagement' with the evidence to be used as a device to circumvent the principles in Hay O'Grady",* citing in this regard *Leopardstown Club Limited v Templeville Developments Ltd* [2017] IESC 50; [2017] 3 IR 707 where MacMenamin J stated that only complaints that go *"to the very core, or essential validity, of [the trial judge's] findings will suffice in order to warrant the intervention of an appellate court"* (at para. 110).

56. It will also be recalled that in *Donegal Investments Group plc v. Danbywiske* [2017] IESC 14, Clarke J. considered that *"it is…important to emphasise that the exercise which an appellate court has to carry out when scrutinising the judgment of a trial judge is not one to be conducted in a mechanical way so as to encourage parties to attempt to find some element of the findings of the trial judge which is said to be insufficiently explained.*

It must be recalled that a judgment is arrived at the end of a very open and transparent trial process. The case will have been fully pleaded, the evidence fully heard and submissions made on both sides…Against that backdrop it will often be possible to readily infer why a particular finding was made even if there is no express statement in the judgment. The parties will know how the case ran. An appellate court can read the record of the case. The judgment needs to be read in the light of the case as made and defended before the trial judge." (para. 8.8)

57. Thus, what the case law makes clear is that very significant weight is to be given to the Judge's findings and conclusions, and, as MacMenamin J. emphasised in *Leopardstown Club Limited v Templeville Developments Ltd,* there is a *"high threshold"* for intervention on appeal. Bearing all the foregoing in mind, I turn now to the issues in the appeal and arguments advanced by Top.

Discussion and Decision

Issue 1: Was there a concluded and enforceable agreement which obligated Top to continue to pay commission to Action post 2009 in respect of those Action-introduced customers of Top who chose not to transfer to Action's monitoring service?

58. As is evident from his judgment, in respect of the 100 or so customers who did not transfer to Action's monitoring service, the Judge found that Action was entitled to be paid commission by Top. He found that this obligation arose on foot of a binding agreement that had been reached between Action and Top for the payment of commission.

59. Top contends that insofar as Action maintains that there was an agreement in place since the mid-1980s, it made no attempt in the court below to identify the terms of that agreement. Counsel suggests that it is not enough to say that the terms of the agreement were clear, in circumstances where Action has not pointed to where the Judge got evidence of the agreement upon which Action seeks to rely.

60. Top's fundamental position is that the whole premise of the Judge's finding was not supported by the evidence in the case and that there are a number of errors in the findings made at paras. 135-150 of the judgment, not least the Judge's finding at para. 150 that Action was permitted both to seek to have customers avail of its own monitoring service, and to continue to obtain commission from Top in respect of those customers who chose not to transfer to Action's monitoring service. In essence, Top's overarching argument is that there was no evidence before the Judge of a binding legal relationship between the parties relating to the payment of commission, either arising from the 3 November 1989 Agreement or prior.

61. The real issue in the case, according to Top, is whether there was an obligation to pay commission to Action post 2009 when Action moved some 700 of the 800 or so Action-introduced customers to Action's own monitoring service pursuant to the agreement entered into by the parties on 3 November 1989.

62. Whilst Top agrees, the 3 November 1989 Agreement aside, that there was some form of understanding or arrangement between the parties from the mid-1980s as to the payment of commission, and that the High Court had to be in a position to understand the entire business arrangement between Top and Action pre-2009, it nevertheless argues that that did not mean as a matter of law that there existed a legally binding arrangement regarding the payment of commission. Top's position is that it could have terminated the commission arrangement at any time. It emphasises that the Judge was not being asked to adjudicate on historical arrangements between the parties, or whether there was a contractual arrangement between them, outside of the 3 November 1989 Agreement, at the time of the assignment by Top of the 700 or so customers to Action in 2009.

63. Counsel for Top submits that the proper way to assess whether Top was obligated to pay commission to Action in respect of the 100 or so customers who did not transfer to Action was for the Judge to address the matter as follows:

(1) Was a term that commission would be paid to Action in such circumstances a fundamental term?

(2) Was the term in writing?

64. In this regard, counsel points to the fact that the 3 November 1989 letter contains no reference to an obligation on Top to pay commission. Nor, he says, was there any discussion when the agreement about the transfer of customers was being concluded in November 1989 about a scenario whereby some customers might not transfer to Action. Counsel emphasises that in November 1989, Action and Top were working on the assumption that all customers would move to a different monitoring provider if called upon to do so. This, counsel submits, is what the letter of 3 November 1989 envisaged. It is said that all of this is critical in circumstances where the Judge made a number of erroneous assumptions based on the fact that there was some kind of pre-assignment arrangement regarding the payment of commission between the parties which, it is submitted, ought not to have been the starting point for the Judge.

65. Because the Judge wrongfully took it as his starting point that there was a binding contractual arrangement between the parties prior to 2009, over and above the terms of the 3 November 1989 Agreement, he imposed the onus on Top to demonstrate an implied term into the 3 November 1989 Agreement allowing it to terminate its obligation to pay commission. Top's submission is that the Judge erred in taking the approach he did.

66. It is also said that the Judge erred in disregarding Mr. Mooney's evidence that he was relying solely on the 3 November 1989 Agreement and that that Agreement represented the entirety of the commercial arrangement between the parties. Top maintains as a critical

consideration the fact that the 3 November 1989 Agreement did not, when that agreement was being concluded, envisage that Action would open up its own monitoring centre, as indeed acknowledged by Mr. Mooney in evidence. It is submitted that all that was in contemplation in November 1989 was that Action may want to sell on or transfer its business and that it wanted to protect that entitlement.

67. According to Top, it is not clear that Action had made a case in the court below that there was a previously concluded agreement evidenced by conduct in relation to Action's entitlement to commission. In this regard, counsel pointed to the testimony of Mr. Mooney on Day 1 that his case was based on the 3 November 1989 letter. (Q. 300) It is said that similar statements were again made by Mr. Mooney on Day 2 (Q. 231 - Q. 233).

68. Top also relies on the fact that Mr. Mooney denied that the terms of any agreement between the parties were contained in any of the other letters previously said by Action in its pleadings to contain expressly agreed terms. (Day 1 Q. 286)

69. As to the business arrangement between the parties for the payment of commission to Action, Top says that that arrangement was uncertain as regards the exact nature of the contract, and that there was uncertain and limited evidence given in the court below as to what had been agreed between Mr. Mooney and Mr. O'Rafferty in this regard. Moreover, it points out that the terms were not in writing. It maintains that even if there was such agreement, any commission payable was conditional on Action not seeking to procure the customer for itself as regards monitoring, and that once it did so any agreement between the parties came to an end. (This latter argument is addressed under Issue 2).

70. Reliance is also placed by Top on the fact that from time-to-time Top altered its fees to its customers, and thus altered the amount it remitted to Action as commission (as testified to by Mr. O'Rafferty on Day 2 (Q. 211), a factor which Top says is not consistent with a binding arrangement regarding the payment of commission.

71. Top also argues that, as demonstrated by the 3 November 1989 letter, while customers were tied to a three-year contractual term with Top, there was no minimum term under which Action was required to keep recommending its alarm-installation customers to stay with Top.

72. It will be recalled that the Judge referred to Action's implied agreement to support the customer's relationship with Top by maintaining and servicing the customer's physical connection with Top. He found that albeit not written down as a contractual term, this term was evidenced *"by the conduct of the parties"*. Top contends that this finding was based on a significant and material error by the Judge in his interpretation of the phrase *"procure the maintenance of the customer as a customer of Top"*, in circumstances where, counsel says, that phrase originated in Top's amended defence, yet appears to have been relied on by the Judge as if it had been a written term agreed between the parties, the meaning of which required interpretation. Top also says that there was no factual basis for the Judge to find this term to be evidenced by conduct, given that Top never paid commission to Action once Action took away the bulk of the customers it had introduced to Top.

73. Top relies on what it describes as Mr. Mooney's relatively clear evidence that the parties had never agreed what would occur if customers introduced by Action to Top stayed with Top in the event of Action starting its own monitoring centre. In this regard, Mr. Mooney testified as follows:

> *"The agreement from the industry, I know you are probably going to - the agreement within the industry is that whoever supplies - whoever installs the system and connects it into a monitoring centre, it is divided between them. Now, we are not saying, we never said that if a customer decided to stay with Mr. O'Rafferty he still owed us commission, he still owed us commission"* (Day 1 Q. 431 - Q. 433).

74. Whilst I note Mr. Mooney's response to Q. 431, I also note that in answer to Q. 434, which was phrased *"So…if a customer notwithstanding the fact that you asked the customer to go to a third party [for monitoring] in this case yourself. If the customer decided to stay with Top…who gets-do you still get your commission?",* Mr. Mooney replied *"Yes".* Accordingly, I fail to discern in that response Mr. Mooney's acceptance of Top's position, contrary to what counsel for Top advocates.

75. Top also says that while at various points Mr. Mooney claimed that fee splitting in the case of customers introduced by the alarm installer to entities offering monitoring services was common in the industry, notably no expert evidence was called to give evidence in support of the alleged industry practice upon which Mr. Mooney relied. Top thus argues that Mr. Mooney's evidence was insufficient to meet the test for implication of a term by custom as set out in McDermott *Contract Law* at para. 8.06:

> *"The basic question is whether 'there was in the trade, a uniform … practice so well defined and recognised that the contracting parties must be assumed to have had it in their minds when the contracted'".*

For reasons which, I hope, will become apparent, I consider that Top's submission in this regard does not sit easily with concessions made by Mr. O'Rafferty as to certain standard practices in the security industry.

76. Top also points to what it described as unprompted evidence given by Mr. Mooney regarding the absence of any legally binding contractual term as to the duration of the contract between Top and Action, beyond the initial three-year customer contract for customers introduced by Action to Top. When asked what he felt his legal obligations were regarding the monitoring agreement he had with Mr. O'Rafferty/Top, Mr. Mooney testified as follows:

"I didn't think there was any legal agreement insofar as, like obviously he wanted to, he had an agreement the first three years. It doesn't say in the agreement afterwards where it can continue on, as far as I'm aware, but we were quite happy for it to continue on" (Day 2, Q.211)

77. Relying on the factors to which I have just alluded, Top contends that in concluding as he did at paras. 137 – 139 of his judgment, the Judge wrongly disregarded what counsel for Top describes as Mr. Mooney's evidence as to the absence of an enforceable legal contract. It argues that given that Mr. O'Rafferty likewise did not give evidence as to a binding contract between the parties regarding the payment of commission, and where Mr. Mooney's evidence tended to support the position that no such contract existed, the Judge erred in finding that such a contract had come into existence in circumstances where there was simply no evidence on which to make such a finding. Top says that the approach of the Judge was contrary to the principle reflected in the case law that the courts should enforce the parties' understanding of an agreement as not being of binding legal effect (in this regard counsel for Top citing Laddie J. in *Prudential Assurance Company Limited v Prudential Insurance Company of America* [2002] EWHC 534 (Ch)).

78. Fundamentally, Top's argument is premised on the 3 November 1989 Agreement being the only binding contractual arrangement between the parties. That being the case, it is necessary to stress test that argument by looking at the evidence that was before the Judge in respect of the commission arrangements that existed between Top and Action both pre- and post 3 November 1989, followed by a consideration of whether the ultimate triggering by Action in 2008 of its entitlements under the 3 November 1989 Agreement had the effect of debarring Action from pursuing Top for commission in respect of any Action-introduced customer of Top's who chose to remain with Top instead of transferring to Action's monitoring centre. As I have said, this latter aspect is addressed under Issue 2.

79. On Day 1, Mr. Mooney testified as follows as to the agreement the parties arrived at in the mid-1980s regarding the payment of commission:

> *"Well, the terms for me throughout - before we opened our own monitoring service, with any monitoring company we didn't invent the whole situation, but saw from the very first monitoring company, which was SCRAM, they explained to us how it would work. Like: 'what do we do?' He says: 'You connect your system into us. We charge the customer a fee and we will split it with you not necessarily 50:50', but the reason for that was that we had to - if the system wasn't testing in on a daily basis they would contact the installing company to contact the alarm company - or, sorry, to contact the customer to see what the problem was. So the system is basically tested in on a daily basis. None of the monitoring companies were allowed go out. It was our customer. We had the codes. So obviously, it's a security product, so there is only - we had the codes to the alarm panel and to the system, that is how it worked."* (Day 1, Q. 14)

The reference to *"SCRAM"* was to the first monitoring company with which Action did business. As Mr. Mooney testified to, Action went on to have such arrangements with other monitoring companies, including Top.

80. With regard to Top's contention that Mr. Mooney did not offer any evidence as to the date of the agreement, or the terms agreed between the parties, it is the case that on Day 1 (Q. 222 – 226) Mr. Mooney accepted under cross-examination that when he was asked at a previous hearing of the action if he could identify any specific date or specific terms for the agreement to pay commission, he had replied that he could not. As to when the agreement commenced, Mr. Mooney testified: *"We started installing, connecting systems to Mr. O'Rafferty's monitoring station around about 85, 86, yeah"* (Day 1 Q. 214).

81. However, Mr. Mooney went on to explain that the arrangement arrived at with Mr. O'Rafferty was on the same basis as the arrangements Action had with other monitoring centres at the time. He stated: *"I worked in the same basis that I worked with the other monitoring station I was already using"* (Day 1 Q. 217).

82. Top contends that Mr. O'Rafferty (of Top) gave similar evidence to that of Mr. Mooney of what counsel for Top described as the *"casual"* arrangement between the parties regarding the payment of commission, which was said to have begun shortly after Top began its monitoring operation in 1986 and which evolved over time. On Day 2 (Q. 500), Mr. O'Rafferty testified as follows in respect of the oral arrangement made between himself and Mr. Mooney:

> *"I don't remember the exact conversation but there would have already been conversations between us and we would have agreed that, look, if you put systems into us, we will pay you a commission. We would have a standard commission we would pay to alarm companies to do that. So we would agree, look, the typical approach we would make is, look, why don't you put a few systems into us, see how you feel about working with us, see how your client's feel, and from that, the relationship would evolve."* (emphasis added)

I do not accept Top's labelling of the arrangement arrived at by the parties in the mid-1980s as *"casual"* in circumstances where, as appears from the extract quoted above, Mr. O'Rafferty, like Mr. Mooney, clearly accepted that monitoring companies had regular engagement with alarm installing companies as regards taking on monitoring functions for the customers of such alarm installation companies and that the industry norm was that monitoring centres duly paid commission to alarm installers once the monitoring company secured the monitoring contract with the customer.

83. Overall, notwithstanding the myriad factors which Top highlighted in its written and oral submissions, I am satisfied that there was sufficient evidence before the Judge to allow him to conclude that the arrangement that obtained between the parties since the mid-1980s was a legally binding one which continued to obtain post the setting up by Action of its own monitoring centre. In my view, Top have not identified how the Judge erred in holding that there was a concluded agreement from the mid-1980s (and which continued to obtain thereafter) between two *commercial* entities regarding the payment of commission by Top to Action in respect of Action-introduced customers to Top's monitoring service. There was, therefore, an undisputed "commercial arrangement" in the sense considered by Fennelly J. in *McCabe Builders Ltd v. Sagamu Developments* from which it will be presumed that the parties intended to create legally binding contracts. Top has not pointed to any evidence from which alternative inferences could be drawn by this Court (and which the Judge ought to have drawn). As his judgment demonstrates, the Judge made his findings of fact based on the evidence before him. Quite obviously and for the reasons he set out in his judgment, he preferred the evidence of Mr. Mooney over that tendered by Mr. O'Rafferty. As *Hay v O'Grady* makes clear, that is the entitlement of the Judge.

84. As found by the Judge, from the mid-1980s there was an express oral agreement between two commercial entities, Action and Top, to the effect that once Action introduced customers for whom it installed, maintained and serviced alarms to Top for the purposes of Top monitoring those alarms, Action was entitled, as per that oral agreement, to something less than half of the fees Top charged those Action-introduced customers for its monitoring services. The testimonies of both Mr. Mooney and Mr. O'Rafferty was that arrangements of this kind were in accordance with industry norms. Moreover, the parties' oral agreement and their course of dealing over the next twenty years or so were given written expression in Activity Reports generated by Top, its monthly Commission Reports,

the invoices which Action issues on foot of those Commission Reports and the payments made by Top on foot of such invoices. It is not disputed that pre-2009, commission was paid by Top to Action in respect of each of the 800 or so customers in question i.e. those customers of Action's which Action had introduced to Top for the purposes of monitoring. Whilst Top in its submissions contends that the Judge failed to abide the test laid down in *Baird Textiles Holdings v. Marks & Spencer* [2001] EWCA Civ 274, I agree with Action's submission that the test laid out by Bingham L.J. falls to be applied where the conduct of the parties to an alleged contract is equivocal and *"no more consistent with an intention to contract than with an intention not to contract".* Here, it is palpably not the case that there was an *"intention not to contract"*, in light of the agreement reached between the parties in the mid-1980s and their course of dealing thereafter over a period of twenty years, all of which was evidenced in the documentation to which I have earlier referred.

85. Given those factors, there is no reasonable basis upon which it can be said that the Judge erred in discounting Top's contention that the parties' binding legal relationship commenced in November 1989. As the Judge opined, the *"payment of commission was a core part of the contract between the parties…The conduct and correspondence and actions as between the parties themselves clearly illustrate the terms of the contract between them, one of which was the payment of commission in respect of customers introduced to Top by Action"* (para. 142). It is abundantly clear that the Judge relied not just on the conduct of the parties but also "*the general commercial environment that an alarm company has influence over which monitoring company to introduce the customer to"*; *"the commission reports"*; *"the record of prices"*; *"handwritten notes of negotiations between Top and Action on the split of fees"*; and *"the supply of activity reports*", in respect of all of which there was evidence before the court. The underlying principle

enunciated in *Hay v. O'Grady* precludes this Court from supplanting those findings, based as they are on the Judge's assessment of the evidence before him.

86. It is true that in evidence Mr. Mooney acknowledged that at a previous hearing of the action he had described the arrangement between himself and Mr. O'Rafferty prior to 3 November 1989 as a *"gentleman's agreement"* (Day 1 Q. 310 - 312). Top contends that Mr. Mooney's answer on Day 2 of the within trial in response to a question on re-examination as to what he meant by the phrase *"gentleman's agreement"* again re-enforces the nature of the arrangement as merely a *"gentleman's agreement"*.

87. On Day 2, Mr. Mooney stated:

> *"I think back in 1989 or when Mr. O'Rafferty came to me in 1985 or 86, I cannot remember that date either, but he approached me to do business with him and we got on very well, I said all this before, and we agreed it. Now he didn't produce a document or an agreement and say look, these are the plans or these are the agreement. But we did shake hands on it and we moved on. That's the way we dealt together for five years until I asked for it, can we formalise this a bit and there was no real problem with that, although we did have to, there was a bit of negotiation and we wanted certain things put in and whatever, but it was agreed at the end as far as I was aware that there was no problem because we just worked away for the next 19 years or whatever. So, if he had a problem with it or I had a problem with it before, it would have been brought up well before we decided to open our monitoring centre."* (Day 2, Q. 210)

88. Top submits that Mr. Mooney's evidence in falling back only on a gentleman's agreement is critical in circumstances where after three trials, Mr. Mooney well knew what he had to establish in order to establish a binding contractual agreement for the payment of commission.

89. Contrary to Top's submission, I am satisfied that the above extract does not have the effect for which counsel contends. Insofar as Mr. Mooney described on Day 1 (Q. 402) the payment of fees by Top to Action as arising from a *"gentleman's agreement"* and effectively acknowledged on Day 2 that neither he nor Mr. O'Rafferty had produced a document or written agreement in 1985/86 , it is important to point out that on Day 1 Mr. Mooney had already elaborated on what had been agreed by them, in the following terms:

> *"It is about me starting a business, [Mr. O'Rafferty] starting a business. We were both able to work together for what … 29 years or 30 years and we had an agreement in place, call it [a] gentleman's agreement but an agreement and people can get on without signing a legal letter, that is my opinion of life anyway and we agreed and we worked very well together"* (Day 1, Q. 470). (emphasis added)

90. Thus, I cannot agree with the arguments Top seeks to advance in support of its contention that there was no binding legal agreement for the payment of commission to Action. In my view, Top's arguments are belied by Mr. O'Rafferty's own testimony. One only has to look at the evidence given by Mr. O'Rafferty under cross-examination on Day 3 where he described the arrangement between the parties in the following terms:

> *"On one hand our agreement to pay commissions, which [is] not catered for in [the 3 November 1989 letter] … They're the only two parts of the agreement"*. (Day 3 Q. 283).

Earlier on Day 3, Mr. O'Rafferty was asked whether he saw a distinction between a commercial arrangement and a contract to which he replied:

> *"A.I wouldn't, and I'm not being obtuse, I wouldn't be able to tell you the difference between a contract and an arrangement. I suppose to a layperson a contract is something which is very bound up in all kinds of legalese whereas*

an arrangement is something you reach between you. If that's incorrect fair enough.

Q. But based on agreement and understanding?

A. O yeah, I mean <u>I don't deny we had an agreement and an understanding with them. I don't deny that</u>." (Day 3, Q. 106-Q.107) (emphasis added)

91. In my view, viewed against the totality of the evidence in the court below, Mr. O'Rafferty's testimony demonstrates his unambiguous acknowledgment that there was an agreement between two commercial entities on going from the mid-1980s which, as the Judge found, amounts to a presumption of a contract when two commercial entities are dealing with one another. The oral agreement to which Mr. O'Rafferty testified to on Day 3 (at Q.106-107 and Q. 283) effectively corroborates Mr. Mooney's testimony on Day 1 where he described what had been agreed with Mr. O'Rafferty.

92. In essence, the commercial agreement between the parties was that the alarm company (Action) would install the alarm system and would then later maintain and service that same alarm which Top was monitoring (after securing the monitoring contract following Action's introduction of Top to the customer). Because the customer was introduced by Action to Top for monitoring and where the physical connection between the customer and Top continued to be serviced by Action, the monitoring fee which Top received from the customer was split with Action.

93. It is undisputed that for some 20 years from 1989 to 2008, Top provided Action with monthly Commission Reports based upon which Action would provide an invoice to Top for the amount owed to Action from the monitoring fees collected in that month by Top. As already referred to, sometimes it was Action who billed the customer on behalf of Top, in respect of which Top then billed Action for its portion of the monitoring fee. It is

noteworthy that *both* parties in their evidence referred to a fee splitting arrangement where monitoring was concerned, which, as I have said already, was the industry norm.

94. In reaching the conclusion he did at para. 142(iv) of his judgment, the Judge relied on not just the preferred testimony of Mr. Mooney as to what had been agreed between him and Mr. O'Rafferty in the mid-1980s regarding the payment of commission, but also the course of conduct between the parties over the years, evidenced as it was by the production of Activity Reports, Commission Reports and invoices. The Judge was well entitled to do so, in my view. As I have said, the arrangement between the parties whereby Top collected its fees for monitoring the alarms of its Action-introduced customers and then relayed something less than half of those fees to Action was observed by *both* parties, and performed (unquestioningly, it would appear) until early 2009. The duration of years is testament to a concluded agreement for the payment of commission. The fees paid were for Action having introduced those customers to Top and its work in maintaining the physical connection between Top and customer's alarm systems.

95. I am also satisfied that on the evidence before him, it was perfectly within the remit of the Judge to reject the suggestion that the commission payable to Action was solely dependent on Action's continuing endeavours to entice alarm installation customers to remain with Top. Whilst counsel for Top queried why Top would continue to pay commission to Action, an entity who was no longer giving Top monitoring business and who was actually taking that business away from Top by the migration of some 700 customers from Top to Action, in my view, that query is not a legitimate one given the factual matrix that arises here. The fact of the matter is that there was a concluded agreement for the payment of commission. Moreover, the 3 November 1989 Agreement expressly provided for the type of transition of which counsel for Top now complains.

96. One of the matters with which Top takes issue was the Judge's indication during the hearing that Mr. Mooney did not need to give evidence that an indefinite entitlement by Action to commission was agreed between the parties because Mr. Mooney had clearly given evidence that he felt entitled to be paid such commission.

97. It is correct to say that the Judge did not consider Mr. Mooney's failure to adduce evidence of an indefinite entitlement to commission as a bar to the claim Action was making. He said as much during on Day 2 of the trial. The issue arose during the cross-examination of Mr. O'Rafferty when counsel for Action sought to elicit evidence from Mr. O'Rafferty as to the indefinite nature of the agreement to pay commission to Action. Following Top's counsel's objection to this line of questioning in the absence of Mr. Mooney having given evidence on the issue, the Judge opined that he did not consider Top's objection relevant since *"the whole case was based on Mr. Mooney thinking and asserting that he has an entitlement to commission…as long as the customer is connected"* (Day 2, p.180, lines 18-23). The Judge went on to say *"More generally, I do think the sting of it really is, the sting of the point was articulated in its own way by Mr. Mooney. His position clearly is that he felt he has an entitlement to continued commission as long as the customer is connected.* (Day 2, p.181, lines 14-19).

98. Top's contention is that given that Mr. O'Rafferty did not accept this factual premise when it was put to him in cross-examination before the Judge's intervention, there was simply no evidence before the court of the parties having agreed that the contract would continue indefinitely as long as customers continued to pay Top for monitoring services. Overall, I see no merit in Top's submission. This is in circumstances where the Judge duly found on the totality of the evidence before him that commission agreement between the parties was to pertain was for so long as Top received monitoring fees from customers introduced by Action. This finding was arrived at by the Judge having regard to the oral

agreement reached by Mr. Mooney and Mr. O'Rafferty in the mid-1980s (including concessions made by Mr. O'Rafferty to which I have alluded earlier) and the parties' course of dealing after the oral agreement. As found by the Judge, both the oral agreement and the course of dealing were evidenced over a period of twenty years or so by Activity Reports, Commission Reports, invoices and payments to Action in respect of every customer it introduced to Top for monitoring. In those circumstances there was more than a sufficient basis for the Judge to opine as he did on Day 2.

99. In short, there is no basis for Top's contention that the 3 November 1989 Agreement constituted the sole legal agreement between the parties. The agreement reached by the parties in the mid-1980s regarding the payment of commission was extant at the time the parties negotiated the 3 November 1989 Agreement and continued to obtain thereafter. What occurred in November 1989 was that one further written term was added to the oral agreement which the parties had earlier reached. That term provided for the transfer by Top of Action-introduced customers to Action if requested by Action to do so: it did not displace the already existing oral agreement regarding the payment of commission by Top to Action. The fact of the matter is that in November 1989, Top never sought to amend the basis upon which it had agreed to pay commission to Action. It is thus of no relevance that there was no reference to commission in the November 1989 Agreement. As essentially the Judge found (at para. 135), the 3 November 1989 Agreement, which made a specific agreement about the assignment of customers, came about and only *"made sense"* when view against the existing *"agreed background"* regarding the payment of commission.

Issue 2: Did the Judge err in failing to conclude that there was an implied term that the commission obligation would come to an end should Action seek to migrate Action-

introduced customers away from Top and, in reaching the conclusion he did, did the Judge fail to apply settled law for the implying of terms into contracts?

100. I turn now to the question of whether the transfer of customers to Action in 2009 on foot of the November 1989 agreement superseded or negated Top's obligation to pay commission to Action in respect of the 100 or so customers who remained with Top's monitoring service.

101. In disputing that it was obliged to pay commission to Action once a transfer to Action took place on foot of the 3 November 1989 Agreement, Top relies on the fact that the letter of 3 November 1989, which provides for the transfer, did not refer to commission, and the fact that there was no evidence of any such obligation having been orally agreed by the parties in November 1989. Top's fundamental position as regards this issue is that when the 3 November 1989 Agreement was concluded, both Action and Top were working on the assumption that all of Action's customers availing of Top's monitoring service would transfer to Action if and when Action triggered its entitlements under the 3 November 1989 Agreement.

102. Top argues, therefore, that an obligation to pay commission to Action could not be implied into the 3 November 1989 agreement notwithstanding the case made by Mr. Mooney in evidence that Top's continued obligation to pay Action commission was capable of being implied into the 3 November 1989 letter. Top says the 3 November 1989 Agreement *"in truth demonstrates the agreement of the parties that there should be no strict overarching contractual obligation between the parties because of their introduction-commission arrangement"*. It submits the parties had deliberately, and therefore intentionally, abstained from including any mention of continuing obligations regarding commission when they negotiated the wording of the 3 November 1989 Agreement.

103. It is in those circumstances that Top says the Judge wrongly imposed an onus on Top to establish that it was not obliged to continue paying commission, rather than concluding, as he should have, that the onus was on Action to prove that a term was to be implied into the 3 November 1989 Agreement that Top was to pay Action commission in respect of those customers who chose not to transfer to Action's monitoring service.

104. Top points to the fact Mr. Mooney in evidence openly accepted that in 1989 he had no intention of opening a monitoring centre by stating that *"it was never discussed ever with Mr. O'Rafferty about me opening a monitoring centre"*. It further points out that Mr. Mooney's evidence was that when the issue of assignment was considered in 1989, nobody addressed their mind to what would occur in a situation where Action-introduced customers decided not to transfer to a station nominated by Action (Day 1 Q. 479 - 488).

105. The first observation I would make is that 3 November 1989 Agreement addressed the issue of the transfer by Top to Action of *"its rights under the agreement it has with [Action's] customers"*: it did not address either the payment of commission or what would happen in the case of Action-introduced customers who chose to stay with Top, if and when Action sought the transfer of such customers (as it duly did in late 2008). The second observation to be made is that much of Top's argument in respect of Issue 2 is premised on the 3 November 1989 Agreement being the starting point as far as the court's consideration of the parties' dispute about the payment of commission to Action post 2009 is concerned, an argument which the Judge (and this Court (see Issue 1)) have rejected.

106. It is common case that the Judge placed the onus on Top to demonstrate an implied term in the contract between the parties that Top could terminate its agreement to pay the commission payments to Action once Action requested customers to transfer and avail of its monitoring centre even if there remained with Top customers who chose not to transfer to Action. As noted by the Judge, Top's route to proposing such term was to maintain that

Action's duty to "support" the relationship with Top lay not in the tangible maintenance of the physical connection between the customer and Top but rather on *"some sort of ephemeral loyalty test, bordering on a non-competition clause".* This was discounted by the Judge firstly on the basis that there was no satisfactory evidence that this was a term of the parties' agreement, secondly, that there was no evidence that Action had taken any steps consistent with Top's view of the relationship and thirdly, there was no evidence adduced of how Top would monitor Action's performance in this regard or how it might arise in practice.

107. Thus, the Judge rejected Top's argument that there was to be implied into the contract or agreement between the parties a term that Action's entitlement to commission would end in the event of Action relying on its right of assignment and asking customers to transfer to its monitoring centre including where some customers did not transfer. He did so on the basis that there was no explicit agreement between the parties as to what would happen if Action tried to move customers to its own monitoring service (paras. 150-154). In reasoning (para. 155) that the general presumption is that in the absence of an explicit agreement on the issue nothing would happen and that the agreement to pay commission would continue (once there remained with Top customers whom Action had introduced to Top), the Judge relied extensively on the decision of the Privy Counsel in *Belize* and the principle enunciated by Hoffmann L.J. as referred to at para. 41 above.

108. It is submitted by Top that the analysis in *Belize* (which concerned an attempt to imply terms into a shareholder agreement) was premised on the parties' agreement being contained in a document whereas, here, no document governed the relations between the parties save for *"the narrowly focused 3 November 1989 letter"*. It argues that in circumstances where the contract for the payment of commission was found to exist based

on conduct, as a matter of logic it was inappropriate for the Judge to apply the *Belize* decision to exclude the implied term alleged by Top.

109. Top also contends that the Judge's construction of the 3 November 1989 agreement as one to which the *Belize* precedent should apply was incorrect. It argues that the correct application of the *Belize* test to the 3 November 1989 letter would have resulted in no term being implied that commission remained payable by Top. This is so, Top contends, in circumstances where the parties had considered and negotiated what should occur if Action were to migrate its customers away from Top and reduced those terms to writing on 3 November 1989 and where that agreement made no mention of commission payments being payable in such an eventuality.

110. In those circumstances, Top contends that the authorities in fact lean in favour of not implying a term that such payment obligation continued.

111. Action's position in response to Top's argument is that its entitlement to commission post its triggering of the transfer provided for in the 3 November Agreement was not dependant on the issue of commission requiring to be addressed in that Agreement. It maintains that this is so given the arrangement that already pertained from the mid-1980's regarding the splitting by Top of its fees with Action which, as found by the Judge (with whose finding this Court agrees) was in the nature of a business/commercial arrangement between the parties. It says that whilst the 3 November 1989 Agreement certainly varied the earlier agreement, it did not do so in relation to Top's obligation to pay commission to Action as long as Top was monitoring the alarm systems of customers introduced by Action.

112. I agree with Action's submission. In seeking commission post-2009 in respect of those customers who chose not to transfer to Action's monitoring centre, what Action was doing was consistent with what had been agreed in the mid-1980s, and with the situation

regarding the payment by Top of a portion of its monitoring fees to Action that had continued to obtain for nigh on twenty years following Mr. Mooney's and Mr. O'Rafferty's negotiated agreement in the mid-1980s. Once there remained with Top Action-introduced customers availing of Top's monitoring services, the setting up by Action of its own monitoring service in late 2008 and the transfer of some 700 or so customs to Action's monitoring service in 2009 had no bearing on the agreement between the parties for fee splitting that was in place since the mid-1980s, save of course in respect of the 700 Action-introduced customers who actually transferred to Action (when logically the entitlement of Action to receive commission in respect of those customers ceased). Provided that there remained with Top Action-introduced customers availing of Top's monitoring service, the obligation to pay commission continued.

113. At the risk of repetition, there is no merit in Top's arguments in circumstances where there was an oral agreement between the parties regarding the payment of commission by Top, coupled with a course of dealing involving the payment of commission for nigh on twenty years, of which there is written evidence by way of Activity Reports, Commission Reports, invoices and payments. Moreover, Top has not pointed to any evidence which could be said to undermine the Judge's comprehension that Action's obligation to maintain and support the relationship with Top was in *"physical and engineering terms, that is, to maintain the physical connection between the customer's alarm and Top through ongoing maintenance of the system for so long as the customer was monitored by Top"* (para. 153). Accordingly, there is no basis upon which to impugn (as Top seeks to do) the Judge's finding at para. 150 of the judgment that it was up to Top to demonstrate an implied term allowing it terminate commission payments to Action solely on foot of Action acting on foot of the 3 November 1989 Agreement. Contrary to Top's argument, having regard to

the factual matrix that presented, the findings of the Judge did not amount to a reversal of the onus of proof.

114. As correctly determined by the Judge, the 3 November 1989 letter did not displace the fee splitting arrangement that was extant from the mid-1980s: the November 1989 Agreement related only to transfers. Thus, given that the fee splitting agreement which was in place had not been displaced at any point from when it was first entered into, and that post 2009, there remained a 100 or so customers of Action's availing of Top's monitoring service, the Judge properly relied on *Belize* - in other words, he was correct in saying the onus rested with Top to explain its argument that it was a term of the 3 November 1989 Agreement that the payment of commission would cease upon the transfer to Action from Top of Action-introduced customers irrespective of whether some Action-introduced customers chose to remain with Top. This, Top signally failed to establish.

115. Accordingly, for the reasons set out above, the Judge did not err in finding (applying *Belize*) that Top had failed to imply a term into the 3 November 1989 agreement that its commission obligation would come to an end once Action triggered its entitlements to seek the transfer of customers to its monitoring service.

116. I should add, at this juncture, that there is equally no basis upon which the setting up by Action of its own monitoring centre can be regarded as a repudiatory breach of contract (as alleged by Top). Rather, the establishment of Action's monitoring service, and the ensuing migration of customers from Top to Action (at Action's request), simply reflected the effect of the 3 November 1989 Agreement.

Issue 3: Did the Judge err in finding that Action continued to provide services to Top customers sufficient to amount to consideration for ongoing commission payments?

117. It will be recalled that the Judge rejected Top's argument that the consideration for Action's receipt of ongoing annual commission was the latter's encouragement of the customer to stay with Top's monitoring service. The Judge stated that there was no evidence that this was a term of the agreement, or that Action had in fact encouraged customers to stay with Top's monitoring centre. The Judge found as a fact that, separate to its obligations to its customers as alarm installer, Action carried out *"additional work"* in maintaining and servicing monitored alarms and that this additional work was reflected in Activity Reports generated by Top. He agreed with Action's contention (accepting the evidence of its witnesses) that it provided consideration for the commission both by having introduced of the customer to Top and, post 2009, by its continued physical maintenance of the customer's connection to the monitoring centre in response to call outs when a problem arose in the physical connection between Top and the customer.

118. On the basis of the *"totality"* of the evidence, the Judge rejected Top's suggestion that Action charged separately for "*call- out in response to failure in the daily self-test connection, at least as a general or routine practice, even assuming arguendo that they had a right to do so under their contract with their customers"* (para. 144).

119. Top in its submissions says that Mr. O'Rafferty's consistent position in evidence was that whilst Action was paid commission per customer, the arrangement between the parties was *"an overall arrangement whereby they would support us both in terms of connecting us [to the customer], supporting the customer and giving us new business as well. That was the basis of it. That basis ended in January 2009"* (Day 3, Q.171**)**.

120. It is said that the Judge's finding that consideration for the commission was present post 2009 because Action continued to provide services to Top's customers by calling out to them on foot of Activity Reports was erroneous in circumstances where the Judge did not engage with the concession by Mr. Aaron Mooney in evidence that maintaining a

connection with the monitoring centre was part of Action's obligations under its maintenance contract with its customers (Day 2 Q. 457 - Q. 459). Top says the Judge failed to engage with this evidence despite it having been highlighted in Top's submissions.

121. Albeit acknowledging that Mr. Derek Mooney testified that Action had *"never ever charged customers for a self test"* Top contends that his evidence regarding whether Action charged separately for call outs in response to failure in the daily self-test connection was far from clear, and that the height of his evidence appeared to be *"that wouldn't necessarily mean we might ring them to see if everything is okay but we wouldn't necessarily just call out to make money out of it"* (Day 1, Q. 587).

122. Top also contends that the Judge did not address the evidence of Mr. Aaron Mooney who, it says, acknowledged that Activity Reports from Top ceased after 2009. It points to the testimony of Mr. Aaron Mooney in this regard: *"Now, like the information that came into Top was very sporadic. Sometimes we got these invoice, sometime we didn't. Like stuff was not sent to us on a regular basis. We provided the activity reports that we got, we would have got that every day, we then stopped getting it"* (Day 2, Q. 437). Whilst the Judge specifically found (at para. 113 of the judgment) that Mr. O'Rafferty in his evidence was uncertain as to whether Activity Reports continued after 2009, according to Top's written submissions, the Judge *"simply failed to engage with a significant element of the evidence of a witness called by Action in support of their case".*

123. It is in these contexts that Top contends that, the Judge did not engage with key elements of the case made by both sides, contrary to his obligation to do so as set out by Clarke J. in *Doyle v Banville*.

124. I do not find merit in any of these arguments. As is clear from his judgment, the Judge was fully cognisant of Top's argument that maintaining Top's physical connection with customers comprised part of Action's contract with its customers. However, as is

evident from paras. 142-144 of his judgment, the Judge was also cognisant of *"call out visits by Action's engineers where connection issues arose above and beyond the regular scheduled maintenance checks on an annual or six-monthly basis"* (para. 142(iv)). Such call out visits were *"additional work"* which was reflected in the Activity Reports Top generated when the signal failed to communicate from time to time. At para. 145, the Judge found that the evidence established that Action continued to make call out visits post 2009. As can be seen from its submissions as recited above, Top takes issue with this and contends that there was no evidence from which the Judge could make such a finding. I disagree. As recorded by the Judge at para. 54, Mr. Mooney's evidence was that Action continued to provide services to customers during 2009-2013 *"and occasionally Top still notified them of faults on certain customer's lines".* Mr. Aaron Mooney gave similar evidence that Action continued to service the alarms and, more significantly, maintain the customer's connectivity to Top's monitoring centre (Day 2, Q. 394-399). This evidence was corroborated by documentary evidence before the High Court in the form of letters and indeed sporadic Activity Reports, including for example an Activity Report dated 18 September 2014 which, as Mr. Derek Mooney testified to, evidenced that Action's engineers had attended at the premises of a customer in response to a call out (Day 1, Q. 192-Q. 202).

125. Insofar as counsel for Top points to the response of Mr. Aaron Mooney at Day 2, Q. 437 (as recited above) to argue that the Judge did not engage with this evidence, it is instructive to note that Mr. Aaron Mooney (who at Q. 437 was being questioned about discovery made by Top which indicated that Action were active on the ground in respect to call outs relating to Top's monitoring of the 100 or so Action-introduced customers that remained with Top) prefaced the answer upon which Top relies by stating that the documents under discussion on Day 2 *"shows that the relationship was still ongoing and*

that [Action] were providing the services" (Day 2, Q. 437). As already referred to, the Judge duly found that Action continued to support the relationship between the customer and Top post 2009 and, so, satisfied the conditions for commission to be paid post 2009. As the Judge put it, *"the evidence was that [Action] continued to provide the same service to the disputed customers after early 2009 as it had provided before"* (para. 145).

126. Overall, it seems to me that rather than it being a case of the Judge failing to abide the obligation (per *Doyle v. Banville*) to engage with the key elements of the case, it is Top who is *"rummaging through the undergrowth"* (to borrow the phraseology of Clarke J. in *Doyle v. Banville*) in an attempt to pick holes in the Judge's reasoning, which, as Clarke J. states, is an impermissible approach.

127. It will be recalled that Top's argued in the court below that Action's obligation under the commission agreement was to support the relationship with Top by essentially remaining loyal to Top (and, presumably therefore not poaching the customers it had introduced to Top when it established its own monitoring centre in 2009). As the Judge put it, on Top's case, Action's maintenance of the customer as a customer of Top required Action to, *"jolly along"* the customer to see if they were happy with Top. The Judge found no actual evidence that this was ever an agreed term of the agreement between the parties, describing it as *"totally ephemeral, speculative and after-the-event"* (para. 142(iv). He rejected the suggestion that supporting Top's connection to the customer meant that Action's obligation was to *"jolly along"* the customer on the ground that Top did not adduce any evidence that this was the basis of the agreement reached between the parties or that in fact Action had indeed "jollied along" the customers. He concluded that the agreement between the parties to maintain and support the customer's connection to Top could only pertain to Action maintaining the *physical* connection between Top and the customer.

128. Whilst at para. 77 of its written submissions, Top acknowledged that the Judge rejected its argument that the consideration for Action's receipt of ongoing annual commission was Action's encouragement of the customer to stay with Top's monitoring service, it goes on to argue that in circumstances where the Judge accepted that the consideration for the payment of commission was the introduction of customers to Top as well as maintaining the physical connection, the Judge ought to have addressed whether the benefit of that introduction was clearly negated by Action's attempts to convince Top customers to move to Action's monitoring service. This argument is advanced in support of Top's contention that the Judge erred in finding that Action continued post 2009 to provide services sufficient to amount to consideration for ongoing commission payments.

129. There is, however, no basis for Top's complaint. In my view, this purported criticism of the Judge falls away in circumstances where the Judge clearly (and properly, to my mind, for the reasons already set out earlier in this judgment) rejected any suggestion that there was a term in the parties' agreement to the effect that any transfer of Action-introduced customers from Top's monitoring centre to Action's monitoring centre put an end to the parties' agreement on commission including where not all Action-introduced customers transferred to Action.

Issue 4: Did the Judge err in how he construed the term "without penalty" as contained in the 3 November 1989 agreement?

130. It will be recalled that at para. 160 of his judgment, the Judge stated that even if he was wrong as to the basis (paras. 135-150) upon which he found for Action, he was satisfied that the specific non-penalisation references in the 3 November 1989 Agreement in any event precluded Top from withholding commission post 2009.

131. Top takes issue with this and argues that the presence in the 3 November 1989 Agreement of the term *"without penalty"* did not preclude it from withholding commission and it maintains that the term should be read in the context of the document of 3 November

1989 which, it is argued, detailed the specific concession allowed to Action in terms of customers being permitted to cancel their contract with Top within their three-year contract period. Top contends that *"without penalty"* as it appears in the 3 November 1989 Agreement was not intended to address a situation which neither party considered at the time as likely or capable of occurring, namely Action's establishment of a competing monitoring centre. It says that Mr. Mooney's evidence did not support the interpretation the Judge put on the phrase in circumstances where Mr. Mooney testified that in November 1989 there was no discussion of what would occur should Action open its own monitoring centre. Top thus contends that the term *"without penalty"* could hardly have the meaning contended for by Action and argues that there was an insufficient factual basis for the Judge's alternative finding that the letter of 3 November 1989 amounted to an agreement regarding non-penalisation that precluded Top from withholding commission received from those customers who did not transfer to Action's monitoring service.

132. On the other hand, Action says, as regards the interpretation to be put on *"without penalty"* as it appears in the 3 November 1989 Agreement, that it is clearly recorded on the face of the document is that there would be no penalty for *Action* when it decided that the transfer of customers from Top would take place.

133. I agree with Action. On any reading of the 3 November 1989 Agreement, the intention of the parties is clear. The agreement the subject matter of the letter of 3 November is between Top and Action. As expressly recorded in the letter of 3 November 1989, Top agreed to transfer all or any of its rights under the agreement it had with Action's customers to Action *"without penalty to the subscriber or Action…"* (emphasis added). The undertaking as to *"no penalty"* is then almost immediately repeated. There follows only a condition that any customer annual renewal fees that would be due to Top at the time of the assignment would be due for the full 12 months, albeit the three-year

contract proviso would be waived. Whilst this condition, directed as it is to Top's entitlement to recover annual renewal fees is certainly a feature of the 3 November 1989 Agreement, its presence does not, in my view, in any way limit or detract from the recorded agreement between Action and Top whereby Action secured the entitlement to have Top assign its rights to Action, *"without penalty"* to Action. To my mind, the Judge was correct in stating that neither the parties as of 1989, nor a hypothetical person interpreting the letter in 1989, would have applied the narrow interpretation to *"without penalty"* for which Top contends.

Issue 5: Did the Judge err in awarding Action Courts Act interest?

134. Top says that the Judge erred in finding that interest pursuant to the Courts Act 1981 should apply from the institution of the proceedings. It submits that in circumstances where a contract was ultimately found to be evidenced by conduct and where the terms of that contract were a matter of significant debate, it was incorrect to treat the failure to pay as a matter which was akin to failure to pay a contract debt.

135. I cannot agree with this argument. In the first instance, it is not the case, contrary to Top's submission, that the Judge found a contract solely evidenced by conduct. As he stated at para. 140, *"there was an agreement to pay commission as well as regarding the matters set out in the letter of 3rd November, 1989".* Secondly and more significantly, the Judge's conclusion that the situation here was more akin to a contract debt was bolstered by his findings of fact including the concessions made by Mr. O'Rafferty in evidence and by substantial concrete factors which the Judge identified as evidencing Action's entitlement to commission, such as the Activity Reports, Commission Reports, invoices and payments that were generated over a twenty-year period.

136. Thus, I am satisfied, from the evidence in the court below, and the conclusions the Judge drew therefrom (which this Court has upheld) that the Judge had a sufficient basis

upon which to conclude that *"where there is a clear contractual arrangement to pay commission, this is closer to the case of the defendant refusing to pay the contract price rather than the alternative scenario of a genuine dispute with some merit on each side to which O'Donnell J. referred in Reaney v. Interlink"* (para. 169).

137. Top's more fundamental submission as regards the issue of Courts Act interest is that the Judge did not engage with Action's delay of four and a half years before first seeking payment of outstanding commission or the fact that it waited a further eight months before issuing a second letter. Furthermore, having instituted proceedings in March 2014, Action did not bring its claim to trial until November 2019.

138. It is common case that save the interaction that took place in September-December 2009 regarding payment of commission for November-December 2008, there was no further steps taken by Action to recover commission until May 2013. What occurred in September 2009 was that post the setting up of Action's own monitoring centre, Mr. Paul Daly of Action wrote to Mr. Michael Lawless of Top advising that some €16,728.85 was owed by Top to Action by way of commission in relation to the months of November and December 2008. That correspondence also advised that Action owed Top €6491.11. In December 2009 Action was paid a sum of €10,000 in respect of the commission owed for November and December 2008, net of an amount Action owed Top.

139. When asked in the court below why no demand was made by Action for commission in the intervening years to May 2013, Mr. Mooney stated that this was because Action was not getting any response to its calls. Top contends that despite Top's witnesses denying having received any such phone calls or messages from Action in relation to outstanding commission, the Judge found as a fact that such efforts were made. Top submits that the Judge's finding was not supported by any evidence save for a vague assertion by Mr.

Mooney that certain unidentified employees (who did not give evidence) may have called Top looking for commission.

140. Whilst, as recorded in the High Court judgment, Mr. O'Rafferty in evidence denied that he had received telephone messages from Mr. Mooney after Top stopped issuing Commission Reports post 2009, it is the case that the Judge preferred the evidence of Mr. Mooney that Action's attempts to contact Mr. O'Rafferty by telephone were not being entertained by Top, in the same way as letters of demand from 2013 onwards went unanswered. As the Judge noted, Top *"did bring the shutters down in many respects as of January, 2009"* (para. 90). In my view, again based on the totality of the evidence, the Judge was entirely within his prerogative in opining as he did and preferring the evidence of Action's witnesses over that of Mr. O'Rafferty in relation to the attempts made by Action to contact Top, post the cessation of the Commission Reports.

141. It is further submitted by Top that the Judge did not otherwise address the credibility of Action's explanation for not formally seeking to enforce its rights in late 2009, a time when its solicitors were writing to Top regarding the transfer of customers, and when the parties' accounts departments were reconciling the sums due between the two companies (as evidenced by the correspondence between Mr. Daly and Mr. Lawless in September-December 2009). Top also says that the Judge failed to engage with the evidence of Mr. Lawless (for Top) who testified that he considered the interaction he had with Mr. Daly of Action in September-December 2009 as an indication that the relationship between the parties was at an end. Top points out that that Action did not call Mr. Daly to contradict Mr. Lawless' evidence.

142. Top thus maintains that there were insufficient reasons for the Judge to prefer Action's justification for not seeking payment until May 2013 in circumstances where, as the evidence demonstrates, Action, through its solicitors, was in fact engaging with Top in

2009 regarding the transfer of customers to Action. Counsel for Top says the question that must be asked is why Action would delay until 27 May 2013 in seeking commission if there was an enforceable contract. He contends that the Judge ought to have considered this a relevant factor when considering whether to award Courts Act interest. In those circumstances, Top says it was *"manifestly insufficient"* for the Judge to reason that the relevance of Action's delay was negated by the fact that it was only seeking Courts Act interest from the initiation of the proceedings.

143. In the first instance, contrary to Top's argument, the Judge clearly engaged with the delay by Action in pursuing its claim for commission. As evident from para. 166 of his judgment, he was clearly cognisant of the fact that post December 2009, Action took no steps to recover commission until May 2013. This was clearly a factor he considered in the exercise of his discretion under the Courts Act, as reflected in his statement that if Action had applied for interest from the accrual of the cause of action, he *"would not have considered that to be particularly appropriate in the absence of a written demand".*

144. As far as the delay in the progression of the litigation is concerned, the Judge noted that some delay was outside the control of the parties. Insofar as it was attributable to them, he attributed the bulk of the delay to Top and gave reasons for his finding in this regard (paras. 167-168). Top does not say why this was incorrect save to refer to the fact that Action could not progress its case at the first listed trial by reason of the paucity of its pleadings and to suggest that the delay attributable to the second trial should not be laid at Top's feet. While Top may not like the outcome of the Judge's engagement with the delay in the progression of the litigation, in my view, in circumstances where the Judge took cognisance of the delay in progressing the litigation and gave reasons for the decision he made in exercise of his discretion, the factors upon which Top relies are not sufficient for this Court to substitute its assessment for that of the Judge.

145. Here the Judge expressly engaged with the discretionary nature of the jurisdiction to award interest, citing in this regard *First Active Plc v. Cunningham* [2018] IESC 11 and *Reaney v. Interlink Ireland Ltd.* [2018] IESC 13, which define how the court's discretion to award such interest should be exercised. I see no basis to impugn how the Judge applied the relevant legal principles to the case before him. There was, firstly, ample evidence for the Judge to exercise his discretion to award Action Courts Act interest given his finding that there was *"a clear contractual arrangement to pay commission"*, which was *"closer to the case of a defendant refusing to pay the contract price rather than the alternative scenario of a genuine dispute"* (para. 169). Secondly, he gave a reasoned and logical analysis as to why the delays both in relation to Action pursuing its claim for commission, and in relation to the progress of the litigation, should not debar the award of interest. Like Top's other grounds, this ground of appeal is not made out.

Summary

146. For the reasons set out above, I would dismiss the appeal and affirm the High Court Order.

Costs

147. Top has not succeeded in its appeal. It would seem to follow that Action should be awarded its costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 21 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 21-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

148. As this judgment is being delivered electronically, Whelan J. and Binchy J. have indicated their agreement therewith and with the orders I have proposed.