Neutral Citation No. [2011] NIQB 120 | *Ref:* **McCL8373**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **25/11/11**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISON

BETWEEN:

DOMESTIC SHEEPSKINS (UK) LIMITED

Plaintiff:

and

JOHN McDERMOTT
and
SEAN McDERMOTT,
Trading as J S HIDES COMPANY

Defendants:

McCLOSKEY J

I INTRODUCTION

[1] This action began as a deceptively simple claim for monies allegedly due and owing by the Defendants to the Plaintiff for goods sold and delivered. As both the proceedings and the trial advanced, the court was, ultimately, seised of the following claims:

(a) The aforementioned primary claim of the Plaintiff.

(b) A quite different case by the Plaintiff advanced in the alternative to its primary case.

(c) A counterclaim by the first-named Defendant.

(d) A different counterclaim by the second-named Defendant.

I record that (b) and (d) were introduced, with the permission of the court, when the trial had reached an advanced stage. I took this course in the interests of ensuring finality as regards all matters in dispute amongst the parties. I also took into account, following exchanges with counsel, that none of the parties would suffer any consequential unfairness of a tangible kind and I ensured that all parties were given the opportunity to adduce such evidence as they desired.

[2] The fundamental task for the court is to decide whether the parties have discharged their onus of establishing their respective cases on the balance of probabilities. The nature of the aforementioned claims and counterclaims is such that, individually, the only two possible outcomes are outright success or outright failure. No *via media* is possible.

II THE PARTIES' CLAIMS AND COUNTERCLAIMS

The Plaintiff's Claim

[3] The goods alleged to have been sold and delivered by the Plaintiff to the Defendants consist of 2,050 wet salted hides. It is claimed that the unit price of each hide was £28. The components of the Plaintiff's claim are the following:

(a) Principal sum claimed: £57,400.

(b) VAT at the rate of 17.5%: £10,045.

(c) Interest.

The Plaintiff's case is that the essential particulars of the relevant transactions and ensuing claim are contained in three separate invoices:

(i) An invoice dated 15th October 2007 specifying a total of 800 wet salted hides with a unit price of £28, totalling £22,400.

(ii) A second invoice dated 17th November 2007 specifying 850 wet salted hides with a unit price of £28, totalling £23,800.

(iii) A third invoice dated 7th December 2007 specifying 400 wet salted hides with the same unit price, totalling £11,200.

Relying on these invoices, the Plaintiff makes the case that during the period mid-October to early December 2007 a total of 2,050 wet salted hides was sold and delivered to the Defendants and remain unpaid, giving rise to the present claim.

The Plaintiff's Alternative Claim

[4] This is pleaded in the following terms:

> "*In the alternative and arising out of admissions and averments made in* [the first-named Defendant's affidavit] *the Plaintiff alleges and avers that the Defendants as bailees took into possession hides belonging to the Plaintiff …*
>
> *As a direct result of the unlawful conduct in or about the operating of unlicensed premises situate in Ardee, County Louth, the hides were thereafter confiscated and destroyed by DAFF in the Republic of Ireland and the Plaintiff claims* [the amount claimed] *as a true measure of the Plaintiff's loss*".

In the final version of the amended Statement of Claim (produced at the end of the trial) the gist of the Plaintiff's alternative case was that the second-named Defendant, by his illicit business operation in the Republic of Ireland, was responsible for the official destruction of some 700 hides baled to him by the Plaintiff for the purpose of processing at the rate of £2 per item. The pleading continues:

> "*As a direct result of the unlawful conduct in or about the operating of unlicensed premises … the hides were thereafter confiscated and destroyed …*
>
> ***Particulars of Loss and Damage***
>
> *700 hides at £28 per hide: £19,600*".

The Defences

[5] These proceedings are brought by the Plaintiff against "John McDermott and Sean McDermott, trading as J S Hides Company". The Defendants disputed that at the material time they were trading together, under this guise or at all. They are father and son. While they admitted to some joint commercial activities during the year 2007 in particular, they made the case that they did not begin trading together in any formal or concerted fashion until approximately May 2008, at which stage the necessary licence was procured for the first time. Throughout these proceedings the Defendants have had separate legal representation. I would add that, in this litigation, there is no issue between them. In particular, from beginning to end, neither Defendant has made any case against the other and neither has served any notice under Order 16, Rule 8 of the Rules of the Court of Judicature.

[6] The first-named Defendant's Defence initially consisted of a bare denial. At the request of the court, it was duly amended, ultimately incorporating the following positive averment:

> "*The first Defendant's states that the pattern of business between the Plaintiff and the first Defendant was that the first Defendant would sell hides and skins to the Plaintiff, to vice versa. The first Defendant last purchased hides and/or skins from the Plaintiff in January 2003.*"

Similarly, the Defence of the second-named Defendant was amended to incorporate the following pleading:

> "*The invoices and commercial transit documents relied upon by the Plaintiff came into existence at the request of the Plaintiff. The second Defendant's signature was procured by the Plaintiff in order to make it appear that he had complied with the regulations relating to movement of animal by products. This was done to avoid the risk of the Plaintiff having his licence suspended on the basis that he was sending material to the Defendant's premises which were unlicensed.*"

The composition of these amended pleadings had the distinct merit of assisting the court in it task of disentangling the proliferation of factual issues which grew exponentially as this lengthy trial progressed.

The First-named Defendant's Counterclaim

[7] This is pleaded as follows:

> "*On or about 14th December 2007 the first Defendant agreed with Plaintiff* [sic] *that the Plaintiff would purchase the following hides from the first Defendant:*
>
> *(a) 150 casualty kip hides at £7 per hide.*
>
> *(b) 1,250 casualty calf hides at £7 per hide.*".

The essence of the first-named Defendant's Counterclaim emerges in the next succeeding paragraph of the Defence and Counterclaim:

> "*These are the hides referred to in the statement delivered by the first-named Defendant to the Plaintiff and dated 30th May 2008. The first Defendant states that he noticed these hides and skins were present on the Plaintiff's premises on 14th December 2007 and that they were missing on the day following*".

The second component of the Counterclaim appears in the following pleading:

> "*On the day following the 14th December 2007 the first Defendant noticed that 50 casualty hides which had been present on the Plaintiff's premises on 14th December were now missing. The first Defendant states that there was a verbal understanding between the Plaintiff and first Defendant that these hides also would be sold to the Plaintiff by the first Defendant. These hides are also referred to in the statement … dated 30th May 2008*".

The Counterclaim has a third component, reflected in the following pleading:

> "*The 1,600 domestic skins referred to in the* [statement dated 30th May 2008] *were transferred to the Plaintiff's premises in and around November to December 2007 …*
>
> *There was a verbal agreement in place between the first Defendant and the Plaintiff that the Plaintiff would purchase any such skins delivered to the Plaintiff by the first Defendant*".

The "Statement" which features in the Defence and Counterclaim (as amended) is, *on its face*, a statement of account addressed by the Defendant company to the Plaintiff company. It claims payment of £12,950 plus VAT of £2,266.25, totalling £15,216.25. It contains particulars of four different types of article, each having a different unit price and in differing quantities.

The Second-named Defendant's Counterclaim

[8] As recorded above, this was introduced, with the permission of the court, during the course of the trial. In essence, it is a claim for monies allegedly due and owing by the Plaintiff to the second-named Defendant for services rendered. As pleaded, the services in question consisted of the treatment (or processing) of raw hides. It is alleged that these were the subject of part payment only, giving rise to a balance of some £15,906. The core components of this belated counterclaim are (a) the quantity of hides in question – 12,642 and (b) a rate of £2 per treated hide. This late counterclaim was presented to the court on the basis of evidence given on behalf of the Plaintiff that the agreed rate for treatment of each hide was £2. The second-named Defendants made the case that there was no agreed rate of any kind. However, his position was that he would formulate his counterclaim on the basis of the Plaintiff's evidence to this effect.

III DISCUSSION

[9] As appears from the outline of the pleadings above the various claims and counterclaims in these proceedings were contested, in essence, on the ground that they are false and fabricated. The Plaintiff's claim was vehemently denied by the Defendants, while the Defendants' respective counterclaims were vigorously

contested by the Plaintiff. In the open warfare which unfolded before the court the parties became progressively entrenched and there was no middle ground of any kind.

[10] During the trial, which occupied a total of ten days (some foreshortened, for various reasons), the court considered large quantities of documentary evidence in particular. Much of this was amassed in the discovery process prior to the trial and, in consequence, was contained in the trial bundle and was adduced as agreed documentary evidence. Other documents emerged as the trial progressed, under the aegis of late discovery by all parties and were adduced in evidence either by agreement or under the aegis of the Civil Evidence (NI) Order 1987. Ultimately, the evidence considered by the court consisted of the following, in summary:

(a) The aforementioned documentary evidence.

(b) The sworn testimony of Mr. Cubuk, proprietor of the Plaintiff company.

(c) The sworn evidence of Mr. Cubuk's wife.

(d) The sworn evidence of Mr. Quinn, Mr. Cubuk's landlord.

(e) The sworn evidence of the two Defendants.

(f) Affidavits sworn by and on behalf of the parties at an earlier stage of the proceedings, in the context of an application for summary judgment.

(g) An affidavit sworn by one Thomas Rocks.

[11] This lengthy trial was littered with allegations of falsification, fabrication, lies, skulduggery and sundry acts of deviancy. This was foreshadowed to some extent in the pleadings, outlined above. Both parties traded liberally and extensively in allegations of this nature. Of all those who gave evidence, the only witness who, *ex facie*, might be considered independent of the parties was Mr. Quinn. He was a defence witness whose evidence challenged many of the claims and assertions made by the Plaintiff and, in substance, supported the Defendants' case. I shall comment further on his evidence below.

[12] The detail of this case became progressively dense as the trial advanced. In the context set out immediately above many documents were the subject of microscopic and amateur forensic scrutiny. This applied particularly to those documents of which there existed, for whatever reason, more than one version. It is of particular note that there were two quite different versions of each of the nine key documents forming the cornerstone of the Plaintiff's claim against the Defendants. In short, the Plaintiff made the case that the Defendants were indebted to it in the

amount asserted by reason of three separate sale/purchase transactions each of which was evidenced by three inter-related documents: a sales invoice, a despatch note and a [EU] "Commercial Document". As regards "Transaction No. 1", these documents were dated either 15th October or 19th October 2007. As regards "Transaction No. 2", the documents were dated either 17th November or 20th November 2007. As regards "Transaction No. 3", all of these documents bore the same date, 7th December 2007. The Plaintiff adduced in evidence one copy of each of the three documents constituting all three alleged transactions. The Defendants adduced in evidence a corresponding version of all of these nine documents emanating from the Department of Agriculture, Fisheries and Food ["DAFF"] in Dublin. Each party's version of all nine documents was distinctly different. This became one of the main issues as the trial advanced.

[13] Taking into account, *inter alia,* the over-riding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature, it is neither possible nor appropriate for this court to make detailed and concluded findings about all of the issues which were exposed in the relentless and microscopic examination of certain documents played out during the trial. This is not a criminal court, in which forum there would undoubtedly have been expert forensic evidence. Nor is this a court of public inquiry. Rather, this is a civil court in which the civil burden and standard of proof are applied. This court, in my view, having regard to all the evidence adduced, is neither equipped nor required to attempt to make findings in respect of all of the minutely detailed factual issues which both parties sought to ventilate. The task for this court is to identify what it considers to be the main contested factual issues and to make findings and conclusions accordingly. Those factual issues which are not addressed in the following paragraphs I consider irrelevant or of at most trivial significance or so evidentially sparse that they do not qualify for detailed scrutiny and findings.

IV THE COURT'S FINDINGS

Mr. and Mrs. Cubuk's Evidence

[14] (a) The only person who can prove the alleged contract between the Plaintiff and the Defendants is Mr. Cubuk. On the basis of the Plaintiff's case, Mrs. Cubuk had no role in the transaction/s in question.

(b) Mrs. Cubuk's main role was to prove certain documents and explain certain events belonging to the period autumn 2007 to mid-2008.

(c) Throughout her examination-in-chief, Mrs. Cubuk portrayed herself, confidently and without qualification, as the secretary and administrator of the Plaintiff company. By the conclusion of her cross-examination, a central feature of her evidence had become an asserted inability to explain, illuminate or account for certain events and, in

particular, the contents of specified documents and the absence of other documents, the reason repeatedly proffered being her minimal and infrequent involvement in the secretarial and administrative affairs of the business. She progressively sought to distance herself from these activities. A noticeable contrast developed in this respect.

(d) From an early stage of the trial, the court raised the question of the provenance and current whereabouts of the "original" documents from which all of the copy documentary evidence upon which the Plaintiff sought to rely was made. This enquiry was precipitated by, *inter alia,* the manifest differences between the two versions of the nine key documents (cf., paragraph [12], *supra*) and the Plaintiff's evidence that each of these documents was created by it and was photocopied in its offices at the time of creation. Notwithstanding, the Plaintiff's "original" [i.e. file or office copy] versions of these documents were at no time produced to the court.

(e) The Plaintiff's case was that, originally, the relevant invoices did not claim VAT due to an oversight. I find this explanation flimsy, unparticularised and unconvincing.

(f) The evidence concerning the "letter" dated 10th January 2008 from the Plaintiff (signed by Mrs. Cubuk) to the Defendant company is unsatisfactory. No convincing explanation of the timing or content of this letter was provided on behalf of the Plaintiff. Nor was the Plaintiff's "original" version [as explained above] of this letter produced. I have concluded that no weight can be attributed to this document and, ultimately, it casts a shadow which significantly undermines the Plaintiff's case.

(g) The Plaintiff's case was that the main *inter-partes* trading pattern from 2004 to 2007 consisted of sales by the Defendant to the Plaintiff. At an early stage of her evidence, Mrs. Cubuk claimed that during the period 2001 to 2004 there were frequent sales in the other direction viz. from the Plaintiff to the first-named Defendant – in her words "*nearly weekly at one stage*". Mrs. Cubuk was requested to produce these documents. This yielded, on the following day of trial, **a single invoice** of this *genre*, dated 30th December 2002, recording the sale of hides by the Plaintiff to the Defendant company during three successive weeks, in the sum of some £5,000 (inclusive of VAT). I find this discrepancy glaring in nature.

(h) As regards certain *other* documents, in particular a sales ledger, Mrs. Cubuk suggested that the Plaintiff's business had suffered water damage in the winter of 2010/2011. She undertook to take steps to ascertain whether this ledger and certain other significant

documentary materials still existed. As the trial progressed during succeeding days, the court received no satisfactory evidence relating to the steps promised or the outcome thereof. Ultimately, it became apparent that the Plaintiff was not placing before the court either the originals or the "original" office/file copies or duplicates of virtually any documents.

(i) With regard to the nine documents of critical importance, Mrs. Cubuk was asked to account for the substantial differences between the two versions of each. This related particularly to the differing versions of the three "Commercial Documents" which formed part of the Plaintiff's case. The documentary discrepancies are both manifest and multiple. I found Mrs. Cubuk's responses to this particular line of questioning wholly implausible. At one stage of her evidence, she began to suggest that *the Defendants* might have altered the documents. I found this suggestion feeble, speculative and unparticularised. I consider that it was espoused with a measure of desperation. These assessments apply fully to the equally implausible claim that the Plaintiff's versions of the three crucial "Commercial Documents" were the product of an operation involving extensive use of Tippex necessitated by the absence of any stock of new, unused forms.

(j) It is common case that the Defendants' business premises in Ardee, Republic of Ireland were raided in late 2007 by DAFF (Dublin). I readily infer that the DARD letter dated 11th January 2008 was composed some little time following the "Ardee incident". This is consistent with the evidence of Mr. Cuskerin, the DARD witness. Furthermore, I find that the Defendant informed the Plaintiff of the Ardee incident at the time when it occurred. Accordingly, the Plaintiff was aware of this matter and its potential implications prior to receipt of the DARD letter. Juxtaposed with these findings is the consideration that the Plaintiff/Defendant letter dated 10th January 2008 is the only letter of its kind in the voluminous documentary evidence before the court. The Plaintiff's file (or office) copy viz. the "original" upon which it was presumably based was not adduced in evidence and, indeed, there was no evidence whatever about its whereabouts or fate. Furthermore, there was no evidence that the Plaintiff, as a matter of business practice, had composed and transmitted a letter of this type *to any other customer* throughout the ten years of its business operations. Taking all of the foregoing into account, I am not persuaded that this letter was sent by the Plaintiff to the Defendant. I find that this letter was created by the Plaintiff at some subsequent date for an illicit purpose, connected with the fall out from the Ardee incident and/or in an attempt to bolster the present claim.

(k) It was common case that a highly significant incident, having the characteristics of a crisis, involving the Plaintiff's landlord occurred in late 2007. Mrs. Cubuk was asked to account for the averment in her affidavit that there was "*no pressure over storage and limited space on our premises*" and the omission from her affidavit of any reference to this incident. She was unable to provide a satisfactory explanation. Nor could she account for the failure to address the important issue of the lease in her affidavit.

(l) In her second affidavit, Mrs. Cubuk averred that a response was made by the Plaintiff to the DARD letter of 11th January 2008. There was no evidence of any such response and Mrs. Cubuk was unable to account further for this in her sworn testimony.

(m) In her evidence, Mrs. Cubuk described the Defendants as "*cash men*". When asked to explain the clear documentary evidence of five separate payments, effected by the mechanism of bank transfer, totalling some £7,000, made by the Plaintiff to the Defendant Sean McDermott during a one month period (November/December 2007) by the mechanism of bank transfer, Mrs. Cubuk had no satisfactory explanation.

(n) The evidence included a series of tabular documents recording loads, weights and categories in relation to the "Kill" on specified dates, spanning the period 1st October to 28th November 2007. Mr. Cubuk's evidence was that these were in the nature of "reports" compiled by the Defendant Sean McDermott [i.e. Mr McDermott Junior] who, to his knowledge, was making appropriate records. Mr. Cubuk asserted that these documents were important for stock purposes only. On this discrete, but important, issue Mr. Cubuk's evidence squared with that of Mr. Sean McDermott. This bolstered the credibility of Mr. McDermott's evidence as a whole. When questioned further about these documents, Mr. Cubuk claimed that they were kept in his workers' portakabin. However, nothing was produced by him in evidence to the court. At a later stage of his evidence, Mr. Cubuk, inconsistently, suggested that he did not keep these records at all.

(o) As regards the first group of key documents, the Plaintiffs provided no satisfactory or acceptable explanation of why the invoice predated both the despatch note and the "Commercial Document": on its face, this is incongruous. The same applies to the second group of key documents. With regard to the third group, the date displayed by all of the documents is 7th December 2007 and this too was not explained satisfactorily.

(p) It is appropriate to record, at this juncture, the evidence of Mr. McDermott Junior to the effect that, in a situation of crisis, *all* of the

aforementioned documents were created by the Plaintiff at its premises, in a hurry, in Mr. McDermott's presence, on 7th December 2007. I find it more likely than not that this occurred as asserted by him.

Mr. Quinn

[15] It is common case that Mr. Quinn was, at all material times, the owner and landlord of the Plaintiff's Portadown business premises. His evidence is of undoubted importance, for two main reasons. Firstly, it contradicts the sworn evidence of Mr. and Mrs. Cubuk regarding the events on the night of the blockade/stand off, in the immediate aftermath thereof and during the ensuing period. Secondly, it sounds on the nature of the business relationship between the Plaintiff and the Defendant during late 2007/early 2008 and, simultaneously, it bears on the parties' competing claims and assertions in this respect. The main challenge to the veracity of Mr. Quinn's evidence was that it was stimulated by some ulterior motive. This was to the effect that, at this stage of the contractual letting relationship between the Plaintiff and Mr. Quinn, the latter is in a position to exert some leverage to his financial advantage. I conclude that there is no basis for thus finding. There was no suggestion that Mr. Quinn is in any way in cahoots with the Defendants. Nor was it put that he might stand to gain anything by testifying for them. I find that Mr. Quinn was an independent witness who has provided an impartial, neutral and essentially accurate account of events during the period in question. I accept his evidence that while he had proper grounds for objecting to the conduct of the Plaintiff's business activities on the demised premises, this had to be balanced with his commercial interest in not losing a tenant. This fortifies Mr. Quinn's account of the relevant events.

[16] Furthermore, there was no effective challenge to Mr. Quinn's assertion that the conduct of the Plaintiff's business activities on the demised premises remains a serious problem. Nor was there any dispute about Mr. Quinn's evidence that, from time to time, he was actively involved in the Plaintiff's business activities through the deployment of his forklift truck and, indeed, received payment from the Plaintiff for some of these services. Furthermore, there was no effective challenge to the gist of Mr. Quinn's claim that he was especially well placed to observe with frequency and at close quarters the comings and goings on the demised premises. One of the most important aspects of Mr. Quinn's evidence was his assertion that from October to Christmas 2007, there were daily removals of hides by the Defendants from the Plaintiff's premises for the purpose of salting, followed by "return" deliveries of salted hides. Part of this evidence included Mr. Quinn's claim that he was actively involved in loading the outgoing materials. All of this evidence was strongly contested by the Plaintiff's witnesses. I readily prefer Mr. Quinn's evidence on these particular issues.

The Defendants

[17] In brief compass, the central core of the Defendants' case was that neither Defendant purchased anything from the Plaintiff during recent years; in particular, it would not have been financially viable for Mr. McDermott Senior to contract to pay the Plaintiff the money now claimed; from late August/September to late November/early December 2007 the business of the Defendants consisted of salting the Plaintiff's sheepskins in Mr. McDermott Junior's premises in Ardee; that the Plaintiff's sheepskins were transported there from its Portadown premises and were returned to Portadown duly salted; that before this pattern began Mr. McDermott Senior worked on the Plaintiff's premises for remuneration for approximately one week, circa June 2007; that the "Ardee incident" in late November/early December 2007 was the impetus for a rapidly executed and urgent transportation operation entailing the removal of most of the stock on the Defendants' Ardee premises to the Plaintiff's Portadown premises; that a large percentage of these goods belonged to the Plaintiff; that the processing of the Plaintiff's hides was undertaken by the Defendants and their employees at the Plaintiff's (rather than the Defendants') premises thenceforth, from early December 2007, enduring for a maximum period of one month; that the Plaintiff (Mr. Cubuk in particular) was fully aware of the Defendants' operations in Ardee from around the commencement of their business relationship in 2001; that the Plaintiff was informed at once of the DAFF intervention in late November/early December 2007; and that during the critical period of some four months' duration, the physical and vehicular interaction between Plaintiff/Defendants and Portadown/Ardee was daily, between Monday and Saturday.

[18] I juxtapose the evidence of Mr. Quinn with that of Messrs. McDermott and, having done so critically, I find that a certain synthesis emerges. This relates particularly to the critical, contentious events belonging to the period August/September 2007 to early January 2008. The evidence of the Plaintiff and the Defendants relating to these events is diametrically opposed. Mr. Quinn's evidence, in substance, supports the Defendants' case. The evidence of the two Defendants was not without blemish or imperfection. Ultimately, however, the crucial question for the court is whether the essential core of the Defendants' case, upon which both Defendants were basically *ad idem*, is reliable and credible. I answer this question in the affirmative. Both Mr. Quinn and Messrs. McDermott have provided accounts of events to the court which, in their material respects, are consistent with each other. I find their accounts plausible and, simultaneously, I conclude that the competing assertions and claims on behalf of the Plaintiff are implausible, having regard particularly to the analysis and findings in paragraph [14] above.

Other Evidence

[19] As prefaced in paragraph [13] above, I do not propose to address *seriatim* every piece of documentary evidence ventilated and debated during the trial. In addition to, and consistent with, the findings rehearsed in the foregoing paragraphs, I make the following further specific findings:

(a) The Defendant's "Statement" and related document generated in May 2008 are authentic documents and were generated at that time.

(b) The key documents founding the Plaintiff's case were generated by the Plaintiff on 7th December 2007, in the circumstances alleged by Mr. McDermott Junior.

(c) These documents were then deployed in the manner claimed by Mr. McDermott Junior viz. they were furnished by him to DAFF (Dublin) – a step which was plainly in the interest of both the Plaintiff and the Defendants (and cf., the relevant e-mails, in this respect).

(d) The "J S Hide" entry in the Plaintiff's October 2007 sales ledger, purporting to record the full amount (without VAT) owing by the Defendants, carries no weight whatsoever: this contradicts all of the dates in the second and third groups of documents and vice versa, to the extent that the court has no faith in the authenticity of any of these documents.

(e) The bank records of Mr. McDermott Junior confirm unequivocally payments by the Plaintiff to him totalling £7,000 during a six week period beginning on 23rd November 2007. These payments were plainly for services rendered and I find that such services were as described by both Defendants.

(f) I reject the Plaintiff's speculative and unsubstantiated assertion that the "Rocks Transport" invoice is a fabrication. I find that this invoice supports key elements of the Defendants' case. Furthermore, I accept the averments in Mr. Rocks' affidavit.

(g) I further find that if the August/September to December 2007 salting operations had been undertaken at the Plaintiff's premises, rather than at the Ardee premises, there would have been no need for Mr. McDermott Junior to compile, meticulously and continuously, the tabular records of loads/weights/categories: records of this kind would, in my view, have been routinely generated by the Plaintiff at its own premises in the course of these routine daily activities. These records are clearly consistent with the claim that these operations were being undertaken in Ardee, rather than Portadown.

(h) I find that the Briody Transport manifest records [4 in total] are authentic.

(i) With reference to the objectively ascertainable events belonging to the period May to September 2008 (when letters and other documents were exchanged), I find that the sequence and manner in which the

parties' competing claims were asserted and traded favours the Defendants, rather than the Plaintiff.

V CONCLUSIONS

The Plaintiff's Primary Claim

[20] Giving effect to the findings rehearsed above I dismiss the Plaintiff's primary claim.

The Plaintiff's Alternative Claim

[21] I have found that the Plaintiff had full knowledge of the Defendants' unlicensed processing operation in Ardee from around the commencement of the parties' business relationship. It was accepted on behalf of the Plaintiff (by Mr. Gibson of counsel) – correctly in my view – that a finding to this effect would render unsustainable the Plaintiff's alternative case. I further find, taking the Plaintiff's alternative case at its zenith, that negligence on the part of the alleged bailee has not been established. As noted in Halsbury, a bailee is not an insurer and, accordingly, he is not liable for loss of or damage to the bailed goods in the absence of negligence on his part: Halsbury's Laws of England (5th Edition), Volume 4, paragraph 146. Furthermore, I find that it was an implied term of any contract of bailment that, given the Plaintiff's knowledge as found by the court, the Defendants would not incur any liability to the Plaintiff for the DAFF destruction of certain goods which eventuated. Finally, the Plaintiff's evidence fails to establish to the requisite degree that the goods destroyed were within its ownership. The intrinsic uncertainties infecting the Plaintiff's alternative case are exposed by the elementary consideration that it relied exclusively on the Defendants' affidavits, without any supporting evidence from either Mr. or Mrs. Cubuk.

[22] The Plaintiff's alternative case fails for all of these reasons.

The First-named Defendant's Counterclaim

[23] I conclude that the first-named Defendant has failed to establish his counterclaim on the balance of probabilities, on account of the following factors:

(a) The unexplained delay between December 2007 and May 2008 in asserting same, in circumstances where, according to the evidence, Mr. McDermott Senior had no business activities or work or income of any kind, was increasingly impecunious and badly needed money in consequence. Furthermore, the falling out with the Plaintiff which obviously occurred in early January 2008 should, objectively, have provided the perfect impetus for asserting the claim which did not surface until several months later.

(b) The confusion which plainly reigned during the period of the crisis which erupted in or about December 2007 and the ensuing uncertainty about the true ownership of substantial quantities of goods which, in my view, were unsystematically and sporadically deposited and scattered throughout the Plaintiff's premises.

(c) The consideration that the figures in the documentary materials put forward as supporting evidence do not tally with the contents of the May 2008 documents.

(d) Mr. McDermott Senior had every reason to pursue his counterclaim vigorously and proactively, from mid-December 2007. He failed to do so, has not satisfactorily accounted for this failure and the counterclaim is undermined in consequence.

The Second-named Defendant's Counterclaim

[24] The analysis set out immediately above applies also to the counterclaim of Mr. McDermott Junior. In my view, Mr. McDermott Junior was at all material times a businessman of at least average intelligence, insight and acumen. It is patent that there was a significant falling out between the Plaintiff and the Defendants in or about January 2008. This did not, however, stimulate any claim by Mr. McDermott against the Plaintiff. Nor was such claim generated by any one of a series of significant subsequent events – the generation and transmission of the May 2008 documents; the hostile inter-solicitors' correspondence of June to September 2008; the litigation period which ensued; and, finally, the commencement of this trial.

[25] It is distinctly possible that each of the parties to these proceedings harbours the belief that the opposing, allegedly defaulting party is indebted to him morally. However, I find no legally sustainable foundation for any of the claims or counterclaims of which the court became seised.

Disposal

[26] (a) I give judgment for the Defendants against the Plaintiff.

(b) As regards each of the counterclaims, I give judgment for the Plaintiff against the Defendants.

(c) The general rule is that costs follow the event. In the context of these proceedings, the main event undoubtedly is the dismissal of the Plaintiff's principal case against the Defendants. In the particular context of this litigation, the various claims and counterclaims formed part of a unified whole, a single story, merging and intermingling with each other. Thus I approach the question of costs globally. I take into account that the prosecution of the Defendants' counterclaims has

increased the overall costs to some extent. I exercise the court's discretion by awarding the Defendants 75% of their costs against the Plaintiff in the main action, while making no order as to costs *inter-partes* as regards the counterclaims.

The Interpreter Issue

[27] With the trial well under way, it was intimated on behalf of the Plaintiff that interpretation facilities would be sought for Mr. Cubuk. The NICTS policy on this issue recites, *inter alia*, that in private cases this facility must be arranged and paid for by the litigant in question. This was brought to the attention of the Plaintiff's legal representatives. The next question which arose was whether the court should permit this facility. It was, effectively, assumed on the Plaintiff's part that the facility would be granted for the asking. The court disagreed, suggesting that this was a matter bearing on its inherent jurisdiction and giving rise to the consideration of a discretionary power which would be exercised by reference to two fundamental touchstones. The first is that of fairness to both parties. The second is that of control over and misuse of the court's process. This resulted in some research being undertaken, giving rise to certain considered submissions.

[28] The propriety of applying the criteria mentioned immediately above to a request of this kind is confirmed by the decision in ***Hartley –v- Fuld*** [1965] 2 All ER 653. In that case, Scarman J emphasized that parties to litigation must have the opportunity to present their case, attack the case of their adversary and to hear and understand the evidence. The judgment further notes the delay and increased cost associated with the involvement of an interpreter. Scarman J stated, at p. 655:

> "*I am engaged in hearing a contest of private interests. It is important in such a contest that I should be careful to observe that the principles of natural justice are maintained. Those principles, insofar as they are relevant to my present task, are that every litigant should have the right to be present, to hear the evidence, to challenge the evidence, to call evidence himself and to present his case to the court while hearing and, if necessary, challenging his opponent's case…*
>
> *Civil litigation always is a matter for the parties – they need not fight. If they do fight, then the court must see that they have their rights, including the rights of natural justice …*"

In a later passage, the learned judge explored certain of the practical options and associated negative considerations: see p. 656.

[29] In exercising the court's inherent jurisdiction in the present case, the factors which I took into account were the belated nature of the application; the inadequacy and timing of the supporting affidavit; the evidence, both direct and inferential,

suggesting that Mr. Cubuk had an adequate command of the English language; Mr. Cubuk's visible conduct in court; and the inference, readily made, that during a protracted litigation period the Plaintiff's legal representatives had experienced no communication difficulties in their dealings with Mr. Cubuk. I further took into account that while the principle of equality of arms may require that this facility be granted in certain cases, its gives rise to a certain inequality of arms, since the witness will typically have more time and opportunity to think about and answer questions put, particularly in cross-examination. I also took into account the loss of control over its proceedings which the court invariably suffers when granting this facility: there is no effective mechanism for supervising the interaction between the party/witness and the interpreter. While this is transacted visibly in court, it is effected privately and in a foreign language. For these reasons, I emphasized strongly that in any case of this kind the court will always have to be fully satisfied about the impartiality and independence of any proposed interpreter.

[30] Taking into account the factors highlighted above, I refused the application. The trial continued, Mr. Cubuk gave evidence during a period of several hours and, in the event, no difficulties of comprehension or communication ensued. This confirmed that if I had acceded to the application, an unfair litigious advantage to the Plaintiff, giving rise to a certain inequality of arms, would have materialised.