Neutral Citation No. [2011] NIQB 50 | *Ref:* **McCL8205**

Judgment: approved by the Court for handing down | *Delivered:* **10/06/11**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

GEORGE PATTERSON,
Trading as PATTERSON OIL

Plaintiff:

-and-

JAMES WALKER,
Trading as REDON FUELS

Defendant:

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McCLOSKEY J

[1] This trial was conducted in a chequered and heavily fragmented fashion between 6–9 June 2011.

[2] This is a commercial debt action. The Plaintiff carries on business as a distributor/supplier of oil products. Its customers are both traders and consumers. The Defendant also engages in the business of supplying these products. At all material times, the Defendant was the purchaser/recipient of oil products supplied/distributed to him by the Plaintiff.

[3] In this action, the Plaintiff alleges that the Defendant is indebted to him and claims the following sums:

(a) The principal amount of £52,194.48.

(b) Interest on the principal sum at the rate of 6%, computed as follows:

(i) £1,218.36, being 142 days at the rate of £8.58 per day from the date of the last invoice (22nd January 2009) to the date of issue of these proceedings (11th June 2009).

(ii) £6,220.50, being 725 days [calculated to the first day of trial viz. 6th June 2011] at the rate of £8.58 per day.

[The total amount being £7,438.86]

(iii) Continuing interest at the rate of £8.58 per day [being 4 days, to the date of judgment].

[4] I would observe that the Defence consists of a bare and unparticularised denial of the Plaintiff's claim. Although this was highlighted by the court both at pre-trial reviews and during the progress of the trial, no amended Defence materialised. At the outset of the trial, the court enquired of Mr. Brown (of counsel), representing the Defendant, the true nature and substance of his client's defence. This elicited a somewhat uninformative reply, the basic ingredients whereof were that there had been a previous course of dealing between the parties, spanning a number of years; the Defendant had always settled invoices raised by the Plaintiff; the monies claimed are not owed; and the monies claimed are not vouched by a "delivery docket" (which appeared to transmutate into "bill of lading" as the trial advanced). One may highlight that by letter dated 16th June 2010, the Defendant's former solicitors wrote to the Plaintiff's solicitors in the following terms:

> "*I confirm that I have taken full instructions from my client in relation to the correspondence you have sent us. He instructs me that the majority of business handled between our respective clients in the later stages of their relationship was by bulk delivery and that your clients went to the BP depot and lifted 38,000/40,000 litres and delivered it to my client's premises. The circumstances are that we require you to vouch your deliveries by way of the critical proof of bills of lading …*
>
> *It is absolutely critical to your client's ability to prove that he is owed this money that he produces the bills of lading that he had. As you are aware we have a court order against your client requiring him to produce bills of lading and it is commercially a requirement for your client's proper accounting procedures that he would have such documents in his possession so as to be able to account for his tax position.*"

In the correspondence contained in the trial bundles, I can find no specific reply to this letter. However, some ten months later, by letter dated 27th April 2011, the Plaintiff's solicitors represented as follows:

> "*We enclose herewith our further amended List of Documents together with copies of the additional documents referred to as "Delivery Transactions". You will note that this documentation from NuStar Terminals, Belfast further confirms our client's position and we hereby call upon your client accordingly to abandon his alleged defence to this case and discharge the sum properly due and owing to our client, together with interest and costs to date*".

This was preceded by a letter dated 18th March 2010 from the Plaintiff's solicitors containing the following passage:

> "*It is our understanding of the position that bills of lading are provided to drivers who pick up the fuel from the main depot. It is our understanding that your client's drivers would have picked up most, if not all, of the fuel from the depot and therefore the Bills of Lading that you seek would be in the control, possession and power of your client and not ours*".

I have highlighted this correspondence because, *inter alia*, the bills of lading issue proved to be one of the very few points of any discernible substance canvassed on the Defendant's behalf at the trial.

[5] It is necessary to say something about the topic of discovery of documents. The Plaintiff's first List of Documents is dated 3rd December 2009. By the date of commencement of the trial, the Plaintiff had served three amended Lists of Documents. On each of the four days of trial, further discovery was made on behalf of the Plaintiff. This arose out of the court's (unavoidable) questioning of the Plaintiff and his witnesses about his record keeping and invoicing systems. The court's questioning progressively elicited the existence of substantial quantities of unquestionably material documents which had not been identified in any of the four Lists served. On the third day of trial, a further amended List of Documents (the fifth) was served on behalf of the Plaintiff. These events and the sequence thereof speak for themselves. Sadly, a heavily fragmented and unnecessarily protracted trial ensued. This was pre-eminently avoidable and should not have occurred. The Plaintiff's legal representatives were driven to accept that this is inexcusable.

[6] It is appropriate to highlight one further aspect of the Plaintiff's discovery process. On 22nd March 2010, the Plaintiff, in compliance with an order made pursuant to Order 24, Rule 7, swore an affidavit verifying the second amended List of Documents, which was exhibited thereto. There are two considerations to be highlighted in this respect. The first is that this purported discovery *on oath* proved wholly inadequate in the event. Indeed, the first manifestation of inadequacy materialised just weeks later, when the Plaintiff's solicitors served a further amended List. Secondly, this affidavit contains the following substantive averments:

> "*The Defendant has sought discovery of 'all bills of lading describing oil deliveries made by the Plaintiff to the Defendant during the period January to July 2008'. To the best of my knowledge, information and belief the Plaintiff holds no such documents. In fact it is my understanding that bills of lading are given to the drivers of the lorry tankers who pick up the fuel at the main oil supplier's depot. In this case it is my belief that the Defendant's drivers would have had possession of the same as it was they who picked up deliveries of oil from the depot. If any such bills of lading were given to any of my drivers, in the event that they picked up the product I can confirm that I do not hold same within my possession, custody or power*".

Admittedly, in his sworn evidence the Plaintiff adhered strongly to his averment that he has never had in his possession, custody or power any bills of lading relating to oil products supplied by him to the Defendant (whether directly or via the Defendant's own collections or through the services of a third party engaged by the Plaintiff). However, these averments are significantly incomplete and inaccurate when compared with the evidence of both parties of the collection and delivery practices founding the Plaintiff's claim. Furthermore, the need to swear an affidavit in these terms should have alerted the Plaintiff fully to the importance of every litigant's discovery obligations and should have impressed on the Plaintiff's solicitors the importance of interrogating their client appropriately. The court's questions, which became the genesis of the substantial further discovery made in the course of the trial, were both simple and pre-eminently predictable in nature.

[7] The final observation about the discovery of documents relates to the Defendant's List. This was not amended at any stage, notwithstanding that part of the cross-examination of the Plaintiff and his witnesses was based on the premise of certain documents, in particular a category of bills of lading possessed by him, none of which is identified in any way in the Defendant's List. Furthermore, it is unclear whether the Defendant's discovery included the full complement of "*delivery notes*" spanning the period November 2006 to January 2009 as foreshadowed in his List of Documents. The court received no satisfactory answer to this query.

[8] The evidence was that the parties traded during a period of some years. All deliveries of oil products by or on behalf of the Plaintiff or by the Defendant himself to the Defendant's premises were effected by the collection of the products from a storage depot. This was, during the material period, the NuStar/Topaz Terminal, located at Belfast Docks. According to the Plaintiff, in the supply of oil products to the Defendant, there were three basic scenarios:

(a) The first scenario entailed the collection being made by the Defendant's employee and tanker from the depot, followed by direct delivery to the Defendant's premises. Ultimately, both parties were agreed that this was the most typical of the three scenarios.

(b) The second scenario entailed the collection of the product by a third party contractor engaged by the Plaintiff and the supply thereof direct to the Defendant's premises. Both parties were agreed in substance that this scenario was less common than the first.

(c) The Plaintiff's own employees and tankers would collect the products from the depot and deliver same direct to the Defendant's premises. I find that this was, by some measure, the most uncommon scenario.

The Defendant treated the second and thirds scenarios as one. There are two factors common to all three scenarios. The first is that all collections were made from an oil depot - either that of NuStar/Topaz or BP, at Belfast Docks -where the products were stored. The second is that all deliveries were made direct therefrom to the Defendant's premises. I would add that NuStar/Topaz and BP are independent warehouses/terminals, engaged in the business of storage of oil products imported by major oil or trading companies. Such companies sell their products to businesses such as that of the Plaintiff. These are paper sales which do not entail any physical movement of the product. Hence the scenarios described above.

[9] Mr. Bann, the terminal manager of NuStar/Topaz, Belfast gave evidence that every collection of oil products from the depot entailed the generation of an automated bill of lading which was collected and retained by the driver of the tanker in question upon departure. Mr. Bann testified that every bill of lading contains particulars of the terminal's name and address; his company's customer (viz. the oil importer); the haulier; the type of oil product removed; the quantity; the temperature; and the date and time of removal/collection. In short, NuStar/Topaz provides two basic services to its customers, consisting of storing the oil and facilitating its distribution to those who purchase it from the customer. Their record storage system was to retain bills of lading for a period of 65 days only. Mr. Bann's evidence did not speak to anything relating to events or sequences thereof from the removal of oil from the NuStar/Topaz depot or, indeed, *anything* external to the business carried on by his employer.

[10] Most of the evidence adduced at this trial related to the record keeping systems of NuStar/Topaz, the Plaintiff and the Defendant; the Plaintiff's system for raising invoices addressed to the Defendant; the Plaintiff's practices concerning statements of account despatched to the Defendant; and the Defendant's practice of making payment to the Plaintiff. The documentary evidence considered by the court and explained and illuminated by the witnesses included the following:

(a) A series of Plaintiff's invoices addressed to the Defendant spanning the period November 2006 to January 2009. It would appear that these dates reflect the total period of the parties' business relationship. I calculate that there were 381 invoices raised during this period. Thus, on average, the Plaintiff made deliveries of oil products to the Defendant approximately twice weekly.

(b) The Plaintiff's final statement of account addressed to the Defendant dated 3rd February 2009 (on which the claim is based).

(c) An Ulster Bank cheque dated 3rd October 2008, signed by the Defendant and specifying the Plaintiff as the payee in the sum of £45,915.48, which was stopped. [£45,915.48 is specified in the aforementioned final statement of account as being 61 days plus overdue, with the balance of £6,279 coming under the "30 days" umbrella].

(d) The final invoice directed by the Plaintiff to the Defendant, dated 22nd January 2009, in the amount of £6,279 (*supra*).

(e) A very small number (four) of Plaintiff's delivery notes recording the delivery of fuel products by the Plaintiff direct to the Defendant.

(f) Certain computer generated reports emanating from NuStar/Topaz.

(g) A computer generated summary of all of the *inter-partes* collections/deliveries of oil products during the period January to July 2008.

(h) The entirety of the NuStar/Topaz invoices to the Plaintiff during the year 2008.

(i) All "third party contractor" invoices to the Plaintiff relating to deliveries of oil products by such parties on the Plaintiff's behalf to the Defendant during the year 2008.

(j) The "bottom" copies of certain invoices from the Plaintiff to the Defendant in 2007 and 2008.

(k) Some sample copies of "Shell/Topaz – Patterson Oils" transaction records in respect of March 2008.

(l) A sample of a Plaintiff's faxed order/authorisation sent to NuStar/Topaz.

(m) Samples of the manuscript records compiled by the Plaintiff relating to each transaction between the Plaintiff and the relevant supplier.

[11] The Plaintiff's evidence about the trading practices between the two parties was, in essence, as follows. On each occasion when oil products destined for the Defendant's premises were collected at one of the oil depots/terminals at Belfast Docks, a bill of lading was automatically generated and this was physically retained by the tanker driver in question. The product was then delivered to the Defendant's premises. On the occasion of every delivery of oil products to the Defendant's premises (by whichever of the three mechanisms described above) the aforementioned bill of lading would be retained by the Defendant's own driver (first

scenario) or physically handed by the third party driver engaged by the Plaintiff to a representative of the Defendant (second scenario) or physically handed by the Plaintiff's tanker driver to a representative of the Defendant (the rarely occurring third scenario). In both the second and third scenarios, a delivery note was generated by or on behalf of the Plaintiff. Every delivery of oil products to the Defendant's premises (viz. all three scenarios) generated an invoice from the Plaintiff to the Defendant. Every such invoice was checked against each of the corresponding invoices described by the Plaintiff as "*purchase invoices*" transmitted by the supplier [NuStar/Topaz] to the Plaintiff, in order to ensure accuracy and consistency. Periodically, statements of account containing particulars of outstanding invoices were sent by the Plaintiff to the Defendant.

[12] According to the Plaintiff, during a substantial proportion of their trading relationship, the Defendant made payments of reasonable amounts with reasonable frequency, thereby enabling further collections/deliveries of oil products for his benefit to be made. However, during the latter stages of their business relationship payments were increasingly slow and the debt was escalating accordingly. The Plaintiff testified that he had several meetings with the Defendant to discuss the topic of his arrears. The outcome of one of these meetings was the Defendant's agreement to make a payment of £45,915.48, in part payment of the then outstanding arrears. This stimulated the personal delivery of the aforementioned cheque by the Defendant to the Plaintiff, following which it was stopped by the Defendant's bank. By virtue of the payment practices which became established between the parties, it was not possible for the Plaintiff to pinpoint any individual invoices as being unpaid. Rather, his claim is based on the final statement of account and all the other surrounding documentary evidence. Properly analysed, the Plaintiff takes his stand on the integrity, reliability and consistency of the record keeping and invoicing systems of his business.

[13] It is clear that each of the Plaintiff's invoices to the Defendant contained, *inter alia*, the following statement:

> "*Queries regarding this invoice must be made within seven days*".

The unchallenged evidence of both the Plaintiff and his credit controller, Mrs. Wilson, was that the Defendant at no time raised any query in relation to any invoice. Nor did he ever complain or assert that any bill or bills of lading had not been provided to him. Moreover, Mr. Patterson testified that the Defendant raised no issue about bills of lading during their several meetings concerning the arrears. This issue was first canvassed in the aforementioned letter dated 16th June 2010 from the Defendant's former solicitors (approximately one month following the initiation of proceedings). In cross-examination of the Plaintiff, the only issues raised were the following:

(a) A suggestion that where deliveries were made to the Defendant by a third party driver, there was some inconsistency in the provision of the relevant bill of lading to the Defendant or his employees.

(b) A claim that during the aforementioned "arrears meetings" the Defendant stated "*I have no bills of lading*".

(c) A suggestion that the aforementioned cheque was written by the Defendant in the teeth of aggression and intimidation by the Plaintiff and, further, that it was undated by virtue of an agreement that the Plaintiff would insert the date after he had provided the relevant bills of lading to the Defendant.

[14] The Defendant, in his evidence, made the following main claims or assertions:

(a) In the first of the three scenarios, whereby the relevant oil product was collected by his own driver/tanker and delivered direct to his premises, he acquired and retained the bills of lading.

(b) In both the second and third scenarios he "*never*" received a bill of lading.

(c) In both the second and third scenarios, he "*always*" received a delivery docket (formally entitled "*delivery note*") from the third party driver or the Plaintiff's driver.

(d) When he presented the aforementioned cheque to the Plaintiff, he did so under pressure, in a situation where, he claimed, the Plaintiff was nasty, said he would bankrupt the Defendant and threatened to stop oil supplies to the Defendant from other suppliers.

(e) He arranged to have the cheque stopped on the advice of his accountant, but did not inform the Plaintiff that he was doing so.

[15] There were certain notable features of the Defendant's evidence. While he floated vaguely that there might have been occasional discrepancies (unknown to him) between the metered recorded quantity of oil (i.e. as recorded by the delivery vehicle itself) he accepted, in answer to the court, that the drivers would have no reason to misstate the quantity recorded by them in manuscript in each delivery note. It is clear to me that they would have no incentive to do so and would gain nothing by doing so. The Defendant acknowledged that he had "*no idea*" of whether the drivers indulged in this disreputable conduct. Secondly, the Defendant readily agreed with the court that, notwithstanding the alleged absence of bills of lading, he was quite content to make payments to the Plaintiff throughout the greater part of the period of their trading relationship. Thirdly, he was unable to challenge the accuracy of any of the 381 invoices generated during this period. Fourthly, the

cheque which he allegedly furnished to the Plaintiff under threats was prepared in circumstances where his wife and sister were also present.

[16] Furthermore, at that time, the Defendant was receiving assistance in his business from a friend who, within days of the "cheque episode", prepared and forwarded to the Plaintiff a "without prejudice" table analysing (only) some six invoices, which suggested alleged discrepancies totalling a mere £1,000 approximately. Notably, on the same date, the Plaintiff replied, providing a simple explanation for these alleged minor discrepancies, attributing them to the cost of haulage. This explanation was at no time challenged by the Defendant. Moreover, the tone and tenor of the Plaintiff's written reply are suggestive of cordiality, rather than hostility. The Defendant acknowledged that his friend (Mr. McGookin) had some business experience and had been assisting him for some time. Finally, the Defendant readily acknowledged that, until recently, his business was operated in a disorganised and unprofessional fashion. Since the crystallisation of his dispute with the Plaintiff, he has taken specific steps to address this. In particular, this has resulted in higher standards of book-keeping and record keeping.

[17] In my view, the main issue in these proceedings concerns the integrity, reliability and robustness of the Plaintiff's record keeping and invoicing systems. These were examined exhaustively during the trial and, while I have reproached the Plaintiff and his legal representatives for their handling of their discovery obligations, I am satisfied that, ultimately, all material documentary evidence was produced. I found the Plaintiff's evidence about his company's systems and processes, duly augmented and supported by the evidence of his credit controller, credible and convincing. I find further that there is no reason to doubt the accuracy or reliability of the final statement of account on which the Plaintiff's claim is based. Furthermore, it was abundantly clear from the cross-examination of the Plaintiff that the Defendant's instructions to his legal representatives were vague and flimsy. No issue of real substance was ventilated on his behalf. Moreover, his own evidence was both unimpressive and inconsistent with suggestions put in the cross-examination of the Plaintiff. I also take into account the bare denial in the Defence (which the Defendant had ample opportunity to address and rectify, given the court's proactive observations at pre-trial reviews and subsequently), coupled with the consideration that, in the history of the dispute and ensuing litigation, the "bills of lading issue" was not raised in writing on the Defendant's behalf until June 2010 viz. one and a half years after generation of the final statement of account. Furthermore, this letter contains no assertion that the Defendant had previously requested bills of lading or had complained about their absence. I find that the Defendant did not raise this issue until June 2010 and that, when he did so, he was motivated by speculative hope rather than substantial expectation. His failure to raise this issue earlier reinforces the Plaintiff's case and undermines the defence.

[18] The Defendant's claim that he *never* received bills of lading in either of the second or third scenarios outlined above during his trading arrangements with the Plaintiff is simply not credible. I accept the Plaintiff's evidence that in the second

and third scenarios neither the relevant driver nor the Plaintiff had any reason either to withhold the bills of lading from the Defendant or to retain them for any business purpose. Furthermore, it is of no little significance that the Defendant, suddenly and unexpectedly, took over the business at the beginning of June 2006, with no previous experience and no relevant expertise. Until comparatively recently the business was operated by the Defendant, his sister and a nephew: this prevailed throughout the period in question. The most likely explanation for the Defendant's belated queries about bills of lading is the absence of proper record keeping systems, coupled with a speculative hope that the Plaintiff might be persuaded to reduce the amount claimed. I have no doubt that the Defendant received all bills of lading and I disbelieve his assertions to the contrary. Finally, I find that the Plaintiff acted timeously and proactively in pursuing the Defendant for the claimed arrears and I accept fully the Plaintiff's evidence about the various meetings and telephone calls. These are additional factors in the Plaintiff's favour. While I have some human sympathy with the Defendant and while mindful that no onus rests on him, I find that he has raised no defence of any substance.

[19] For the reasons summarised above I conclude that the Plaintiff has established his claim, to its full extent, on the balance of probabilities. The Plaintiff will, accordingly, have judgment against the Defendant in the principal sum of £52,194.48, together with interest thereon calculated as follows:

(a) Interest thereon at the rate of 6%, to run from 22nd February 2009, having regard to the 30 days period of grace specified in every invoice and the date of the last invoice, 22nd January 2009. The trial ended yesterday and judgment is given today. I calculate that the total period consists of 841 days.

(b) Interest accruing at the rate of £8.58 per day for a total period of 841 days produces a total sum of £ 7,215.78

The Plaintiff will have judgment against the Defendant accordingly [the sum being £ 59,410.26] . The judgment rate of interest applies from today.

[20] Finally, I deal with the issue of costs. I have recorded above the highly unsatisfactory progress of this trial. This occurred due to the default of the Plaintiff and/or his legal representatives. This trial ultimately occupied four heavily interrupted and fragmented days, in the context of a simple debt claim and sworn evidence from just four witnesses. I conclude unhesitatingly that proper preparation, including timely and complete discovery, would have ensured a maximum trial duration of one day. The overriding objective promulgated in Order 1, Rule 1A of the Rules of the Court of Judicature became a major casualty. Accordingly, while the Plaintiff is entitled to his costs against the Defendant, none of the costs associated with the second, third and fourth days of trial will be recoverable. This represents, in my view, the fair and equitable exercise of the court's discretion under Section 59(1) of the Judicature (NI) Act 1978, while giving

due effect to the general rule enshrined in Order 62, Rule 3 that costs are to follow the event.