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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**04/04/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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COMMERCIAL DIVISION

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Between:

STEPHEN McGOWAN
(Trading as McGowan Tree Services)

Plaintiff

and

GREGOR McARTHUR
(Trading as McArthur Forestry Services)

Defendant

_____

Keith Gibson (instructed by McCartan Turkington Breen Solicitors) for the Plaintiff
Defendant appeared as a Litigant in Person

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HORNER J

A. *INTRODUCTION*

[1] This case relates to the purchase and supply of a Plaisance Galotrax 400 Forestry Mulcher ("the Mulcher") by the plaintiff from the defendant in or about May 2016. It has a long and torturous history. Originally, the defendant failed to enter an appearance in 2017 and judgment was marked in default. An application was made by the defendant's then legal representatives to set aside the judgment. This was opposed by the plaintiff. The default judgment was eventually set aside and an appearance entered for the defendant. However, after the pleadings were closed, the solicitors for the defendant came off record and the defendant has continued to defend the plaintiff's claim as a personal litigant. As this is by no means a straightforward case involving as it does difficult legal, evidential and engineering issues, the defendant has struggled to make his case effectively.

B. *BACKGROUND*

[2] The plaintiff's business in Northern Ireland involves, inter alia, forestry management, forestry clearance, tree surgery, landscaping and general maintenance

work. The defendant carries on business from Hexham in Northumberland and he describes himself as a supplier of quality forestry and construction equipment.

[3] In the spring of 2016 the plaintiff decided to purchase a mulcher which he would be able to use as part of his business to mulch felled trees and various other shrubs found in any forest or shrubland. He saw the Mulcher, which was manufactured in 2002, advertised by the defendant on an online platform called "Agriaffaires.co.uk." It was advertised for sale for £47,500 excluding VAT and described as being "used – good condition", "has been looked after mechanically through it's (sic) life, including a service carried out in our workshop" and as being "a high class machine with a powerful mulcher that can be used across varying ground conditions."

[4] As I have noted the plaintiff was in the market for a mulcher and he was interested in the Mulcher as advertised by the defendant. Following communication with the defendant he agreed to purchase the Mulcher. An invoice was issued with the pro-forma date of 30 April 2016. This recorded the sale of the Mulcher "fully serviced" with "additional extras" for the sum of £36,000 exclusive of VAT. The machine itself cost £33,750 exclusive of VAT and there was £2,250 to be paid for extras. The plaintiff paid a deposit of £8,000. The plaintiff claims that he had a contractual obligation to Graham Farrans in respect of the carrying out of clearance work for the construction of the A6 Randalstown to Castledawson Road from July 2016 onwards. Consequently, delivery by July 2016 was made an express term of the agreement, the plaintiff alleges.

[5] On 8 July 2016 the defendant emailed the plaintiff and apologised that because of a number of setbacks they were way behind on their "revised pre-date of Monday 20 June." He acknowledged receipt of the £8,000 deposit and also that various works had been agreed to be carried out to the Mulcher on 6 May 2016. These included ensuring that the Mulcher was "mechanically operative." There were also additional extras which were to be charged for. The email recorded that due to the finance business terms upon which he operated "only goods with cleared funds are able to leave the premises and be delivered to site."

[6] On 13 July 2016 the plaintiff responded asking the defendant to ring him and stating:

> "I now have a job for the machine he's looking it done ASAP! Can you let me know date and time for def now! So I can let him know what day I will be there!"

So at the very latest by mid-July the defendant knew that the Mulcher was required to allow the plaintiff to carry out work and earn profits from its use.

[7] On 22 July 2016 an email from the plaintiff states:

> "I am confirming delivery of Galotrax Tracked Mulcher yesterday, however there are a number of issues noted upon delivery. As a result of these issues, payment of £15,200 will be withheld until resolved. I request the sale manager contact Stephen McGowan directly to discuss."

[8] The Mulcher was supplied in mid July 2016 but on 5 August 2016 the defendant had responded to the plaintiff regarding the withholding of part payment for the Mulcher and commented that he understood and appreciated the plaintiff's "frustration and anger towards the machine and the fact that the finishing touches have not been done." He also apologised for the extra time that it took to repair the machine from the original plan and pointed out that he had incurred extra costs and had also postponed his annual family holiday in order to get the Mulcher up to the point where it could be shipped out and that this had placed "a hell of a strain on the family." The defendant then put forward two options in respect of payment of the outstanding balance of £15,920. Neither of which could be considered reasonable and certainly did not put the plaintiff in the position he should have been in if the terms of the contract had been complied with.

[9] On 9 August 2016 the plaintiff replied indicating that he was willing to pay the costs of delivery of the Mulcher, namely £600 plus VAT and a remaining balance of £15,200 once the machine had been fixed as per a list which he set out including:

> "(a) PTO guard (safety critical);
>
> (b) PTO engaging in half revs (safety critical)."

[10] The plaintiff further complained about the late delivery of the Mulcher and the difficulty he had in off-loading it. He said "it was extremely unsafe due to tracking which could have potentially caused damage or harm – this machine should not have been dispatched in this unsafe condition." He also complained that the first contact on behalf of the defendant had been on 8 August following his phone call to the defendant's business on 21 July. He wrote:

> "Eighteen days for a new machine to be sitting in our shed unable to use (sic) is completely unacceptable and we **need this repaired** and fully working by next week as it is currently booked out on to a client's site."
> [Emphasis added]

[11] The defendant responded on 11 August 2016. He made the following points for the record. These included:

> "(i) The Galotrax machine should not have left the premises until finished completely to the

appropriate standard but it took far longer than expected to carry out the agreed work.

(ii) The fact is it was a 15 year old used machine and was advertised 'sold as seen' but came serviced with all new filters and oils, plus with new windows. At this stage it 'had not been out in operation to test it, that was only done when you came to try it.'

(iii) The defendant claimed the plaintiff drove it for a couple of hours in a quarry and was satisfied enough to discuss further how to do the deal.

(iv) There was various discussion about further work which was mostly of a cosmetic nature to "sweeten the deal."

(v) The defendant emphasised that due to the age of the machine and its past history plus the time it had sat not working, it was 'no longer a frontline machine for full-time active service but for more specific jobs like a very wet site requiring low ground pressure but high horsepower.' More importantly the defendant alleges that the plaintiff 'knew this and continued with the deal.'

(vi) He further claimed that the guard for the PTO was an extra.

(vii) Although the defendant had kept telling the plaintiff it was not quite ready and more work was needed, the defendant insisted it be delivered. The defendant complained it was the plaintiff's demand to have the Mulcher when he did that was at the root cause of subsequent difficulties because otherwise all these problems would have been avoided.

(viii) The problem with the PTO engaged at half revs was nothing to do with the defendant and that the plaintiff "must take it up with Plaisance, the manufacturer."

[12] This response from the defendant, the seller, might best be described as a total abrogation of responsibility, given that he had sold and supplied a second hand

mulching machine that did not work because the PTO engaged only at half revs. For the defendant to claim that it had nothing to do with him, and that the plaintiff should direct his ire towards the manufacturer, displays a complete misunderstanding of his obligations under the contract whereby he sold the Mulcher to the plaintiff. His excuse appears to be that it was the plaintiff pressing for delivery, even though this was after the agreed delivery date, that was responsible for the Mulcher being delivered when all the work that had agreed to be done, had not been completed.

[13] That perhaps explains why on 12 August 2016 the plaintiff responded pointing out that he had hoped for the machine to be working next week and that this was a priority as "we have it out on jobs that have to be postponed due to us being at the bottom of your priority list." He went on to tell the defendant that if those jobs had not been started by 22 August, that he would lose them and that if he lost he would be expecting his costs to be reimbursed by the defendant. He goes on to say:

> "The Galotrax machine should not have left your premises in the state it is in. You are saying it is a 15 year old machine and it is not a front line machine, I told you it was going to be our frontline machine and you accepted that, hence why I done the deal with yourself and for you to carry out the work. … You are saying that the PTO guard is additional but under no circumstances is this correct without a PTO guard it is against the law for the machine to be used …"

[14] He then points out that he will not be "taking anything up with another company as the problem as outlined in my previous email is your responsibility and needs addressed ASAP." Finally, he points out that matters have gone on long enough and that he is under serious pressure "to get this machine out on site never mind the financial losses with the machine sitting idle."

[15] The next email according to the trial bundle is dated 3 October 2016 and it is from the defendant. He points out that the clutch is ready to collect from the manufacturer but it needs to be paid for before they will release it. He goes on to point out that work is being carried out on the machine and says that they now have a situation where they both want to get the machine up and running as quickly as possible for the plaintiff "to begin contracting the machine to earn money and fulfil imminent contracts" and for the defendant to "recoup some lost money as agreed." The defendant then requests money in respect of the repair to the clutch and he offers the plaintiff a compromise on the basis that they will go 50/50 on the cost of rebuilding the clutch, which was obviously in a defective condition when the Mulcher was originally supplied by the defendant to the plaintiff.

[16] The response from the plaintiff on 6 October to the defendant was that the machine had still "not been handed over to me in full working order, hence final payment has not been made." He complained that five months had passed since he had purchased it and that it should not have been sent over until it had been finished and field tested. He complained that he had to hire an alternative machine which was costing him £180 per hour and that he had paid an extra £6,300 in hire costs to date. He offered to hand back the machine if he was refunded all his money together with interest and costs. He set out a number of options to resolve the ongoing dispute and indicated that the last option, namely legal proceedings, would follow if there was not a positive response.

[17] There then follows a letter from the plaintiff's solicitors. I assume it is the letter before action, but it has not been included in the trial bundle and I have not seen it. No explanation has been given for its absence. It then produces a response of 3 November 2016 from the defendant's then solicitors. The letter makes a number of points including:

(a) The plaintiff attended the defendant's premises on 6 May 2016 and tested the mulcher and was satisfied with how it functioned. Various additional cosmetic work was to be carried out and the plaintiff was to pay £36,000 plus VAT following the extra works being completed.

(b) The defendant had told the plaintiff that due to its age it was not suitable for work on the frontline, that it had sat on the premises for some time and had not been tested, it was only for specific jobs involving low ground pressure.

(c) The defendant knew all these limitations and yet agreed to purchase it because he was "testing the water" for a "possible business."

(d) The plaintiff told the defendant that he had no work lined up which required the use of the machine when it was first purchased. This was a speculative purchase.

(e) The machine was delivered on 22 July 2016 and at that time the defendant had fully complied with his contractual obligations.

(f) The machine was field tested subsequently and dirt/contamination was identified as being responsible for the problem with the clutch. On 12 September 2016 it became apparent that there was a fault in the clutch.

(g) The defendant did not consider a new replacement clutch to be reasonable and instead there should be an attempt to overhaul and rebuild the clutch.

(h) The cost of a refurbished clutch in any event would have been the sole responsibility of the plaintiff although as a gesture of good will the defendant

would consider contributing 15% of the cost of such a clutch, namely approximately £4,960 plus VAT.

The plaintiff in response issued proceedings on 27 October 2016 claiming damages for breach of contract and arranged to have a new clutch installed by Plaisance, the manufacturer of the Mulcher, which cost £18,831.37.

THE PLEADED CASES OF THE PLAINTIFF AND THE DEFENDANT

[18] The case made by the plaintiff in his Statement of Claim was that the plaintiff had identified in the spring of 2016 the need to obtain a forestry machine which could be used to mulch felled trees and shrubs found in any forest. Having seen the defendant's Mulcher advertised on the website, Agriaffaires, the plaintiff decided to go and visit the defendant at his premises in Scotland. A problem with the clutch was highlighted by the plaintiff following an examination and a promise was made that it would be fixed prior to delivery. The plaintiff agreed to pay £36,000 excluding VAT. At that time plaintiff informed the defendant that he had a contractual obligation to Graham Farrans, a joint venture company, in respect of clearing land to enable the A6 to be constructed from Randalstown to Castledawson. Consequently, the Mulcher would be required by the plaintiff from July 2016 onwards. It was an express term that the machine would be supplied in July 2016 and it would be of satisfactory quality, fit for the purpose for which it was purchased, free from defects, capable of moving under its own power and capable of mulching wood.

[19] The Statement of Claim then went on to say that the Mulcher was delivered one year late, it had a problem with the clutch which made off loading it from the low loader difficult. The clutch required repair and was taken away to be reconditioned. This was not a success and the Mulcher could not be used and the plaintiff has not had the benefit of its use. As a consequence the plaintiff has had to hire in alternative machines to do the mulching and suffered various losses which are set out in the Statement of Claim. The plaintiff then alleges quite separately that he had to hire alternative plant equipment and machinery to carry out the A6 sub-contract and that the defendant was aware of the plaintiff's contractual obligation to the joint venture company. However, the plaintiff does not specifically allege that he suffered any loss as a result of this, nor is any loss quantified. Further, there is a singular failure to identify, never mind quantify, any profit that the plaintiff lost as a consequence of having to fulfil the terms of the A6 contract without the Mulcher that the defendant had agreed to supply.

[20] The defendant, when he was represented, served a defence:

(a) Admitting that he agreed to supply the Mulcher.

(b) Denying that he was guilty of any breach of contract.

(c) Complaining of a failure on the part of the plaintiff to particularise any claim for loss and damage and thus being unable to plead further. He offered to amend his defence if such a pleading was forthcoming.

[21] The defendant went on to make a counterclaim alleging:

(a) The Mulcher offered was used and in a good condition and service.

(b) The sale was on an "as seen" basis and without any further warranty in the sum of £36,000 excluding VAT with the defendant to carry out certain agreed works to the machine of a cosmetic nature.

(c) The plaintiff had paid a deposit of £8,000 on 12 May and further sums of £20,000 and £5,000 respectively on 18 July 2016 and 8 September 2016.

(d) The plaintiff wrongly withheld £10,920 from the purchase price owed to the defendant.

(e) The defendant agreed to order a new clutch for the plaintiff which the plaintiff was liable to pay the full price of £4,963 plus VAT.

(f) The defendant ordered the clutch but the plaintiff has failed to pay his share of the cost of the clutch and the same remains due and owing.

[22] The plaintiff responded in his Reply and Defence to Counterclaim saying:

> "It is unclear from the defence whether the defendant is claiming that because the mulcher was sold "as seen" any implied term as to quality was excluded."

[23] The plaintiff denied that he owed £10,920 given that the Mulcher was of unsatisfactory quality and unfit for its purpose. Any obligation to pay any further sum was discharged by the defendant's repudiatory breach.

[24] Finally, the defendant required the plaintiff to prove that he had agreed to pay the sum of £4,963 plus VAT for a replacement clutch for the Mulcher.

[25] The defendant responded to the plaintiff's Notice for Further and Better Particulars by:

(a) Confirming that the sale was made on 10 May 2016.

(b) The price was agreed for the Mulcher given its age and condition following an inspection of £36,000 plus VAT at the "Old Weighbridge." A deposit would be paid before the agreed works were carried out. These were minor superficial works.

(c) The plaintiff agreed to purchase the machine in the condition he inspected it subject to the agreed minor works being carried out according to the defendant.

(d) It was agreed that the clutch would be sent to a clutch specialist dealer in England for inspection to see what work had to be done. In October 2016 it was agreed that the best course of action was to rebuild the clutch rather than purchase a new one. However, the plaintiff had failed to pay for the costs of the clutch being repaired.

(e) Finally, the plaintiff had failed to pay the balance due to the defendant contrary to the representation that he would when there was evidence forthcoming of the Mulcher being placed on the loader at the defendant's premises.

THE PARTIES

[26] The only witnesses to give evidence were the plaintiff and defendant. As I will explain later in the judgment, this does have some significance. I did however have a good opportunity to watch both parties give their evidence before me. It is only fair to note that both parties were trying to remember events going back over five years. That is a long time. The human mind can play tricks. I had the distinct impression that both the plaintiff and defendant suffered from selective memories, remembering what happened in a way that best suited the case they wanted to make before me rather than what had actually happened. I will give an example in respect of each party by way of illustration.

[27] The plaintiff says that he knew in April 2016 he was going to be appointed a sub-contractor to clear the land of trees and shrubs so as to permit the A6 to be constructed. He had to make this case if he wanted to make a sustainable argument that he informed the defendant of being awarded the A6 sub-contract at the time he agreed to purchase the Mulcher. He needed to do that if he was going to be able to make the case that he had suffered a loss as a result of having to incur additional expense etc in fulfilling this sub-contract and thus recover his consequential loss. But the sub-contract was only awarded in October 2016 according to letters sent by Graham Farrans JV. The plaintiff could have called someone from Graham Farrans JV to explain this inconsistency but no one gave evidence about the circumstances in which the sub-contract was awarded to the plaintiff. On the evidence adduced in court I remain unpersuaded that the plaintiff knew in April 2016 he was getting the A6 sub-contract. On the evidence adduced before me it is more likely that A6 sub-contract was awarded sometime after the Mulcher had been sold and delivered to the plaintiff.

[28] The defendant said he told the plaintiff that the machine was not fit to act as a frontline machine before the plaintiff purchased and further that it was only suited

to more specific jobs such as "a very wet site requiring low ground pressure but high horsepower." But this claim is completely inconsistent with the defendant's own advertisement which described the Mulcher, inter alia, as a "high quality machine with a powerful mulcher that can be used across varying conditions" or his email of 8 July 2016 which described it as "mechanically operative" with no qualifications.

[29] I should emphasise in respect of both witnesses I did not consider them to be dishonest, simply that they were prepared to tailor their evidence, perhaps subconsciously, and no doubt assisted by the time that had passed, to suit the case they wanted to make to this court. They were both unreliable historians who, I considered, would require corroboration from other sources before their testimony on any particular issue could be accepted as a reflecting what had actually happened. Accordingly, when their oral evidence was contradicted or inconsistent with contemporary written evidence, I have generally preferred the written evidence.

THE EVIDENCE

[30] The court must decide any case on the evidence adduced before it. Legal practitioners and personal litigants alike must understand that in the Commercial Hub the obligation is upon each side to prove the case which it intends to make to the necessary standard, that is the balance of probabilities ("the civil standard"). Often when there are legal practitioners on both sides, agreement can be reached on an issue and formal proof may not be necessary of a particular fact. Uncontroversial invoices can be agreed and submitted to the court as proof of expenses actually incurred. However, this can prove more difficult if the other side is not legally represented and does not understand fully how the court process works. However, if, for example, agreement about a document such as an invoice, cannot be reached, then it must be proved to the civil standard, and that may, of course, also require proof of payment.

[31] Furthermore, it is not for the court to direct a party's proofs or to allow a party to call further evidence once it has closed its case in order that that party might mend its hand. As Gillen J (as he then was) said in *In the Matter of an Application by Sainsbury's Supermarket Ltd* [2012] NIQB 45 at para [23]:

> "[23] I am satisfied that after a party has closed its case, normally he cannot call another witness unless there are special circumstances justifying it. There must be a finality about proceedings and thus the rule is that set out by Valentine "Civil Proceedings the Supreme Court" at paragraph 13.54. In *Murray v The Sheriffs of Dublin* (1842) Arm Mac and OG 130 Brady, CB said:
>
> > 'I think the case had closed, but on the ground of public convenience, I cannot allow this

> witness to be recalled; there may be cases where such a course would be expedient, and if the point as to notice were the only point by which I were pressed, and the plaintiff had a strong case on the merits, it might be otherwise.'"

[32] In *Taylor v Lawrence* [2002] 2 All ER 353 Lord Woolf CJ said at paras 54-57:

> "There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen."

[33] Gillen J (as he then was) said at [26]:

> "[26] In my view therefore the need to establish **special circumstances** to permit recall of a witness or the calling by one party of another witness after the case is closed, contains a strong element of the need to ensure that the interests of justice remain paramount." [Emphasis added]

[34] In the present case I drew attention after the parties had closed their respective cases to the absence of any evidence that the plaintiff had actually paid out in respect of almost all of the invoices upon which he relied to prove his loss. This was particularly important because the Trial Bundle had been rather chaotically assembled and was not numbered sequentially. It was then, apparently that the plaintiff appreciated that there was no proof of payment for almost all the invoices. There was, for example, proof relating to the invoice provided by the Mulcher's manufacturer who had carried out the repairs. An application was then made for leave to adduce further evidence of, for example, proof of payment of the others sums being claimed by the plaintiff in his Statement of Claim. However, there were no special circumstances present that would have permitted the court to grant the plaintiff leave to adduce further evidence of proof of payment for almost all of the invoices after his case had been closed. Certainly no special circumstances were drawn to the attention of the court. Indeed, it rather seemed that the plaintiff had laboured under the misapprehension that simply handing in an invoice proved both the invoice and payment of it.

[35] In the instant case given that liability had been comprehensively denied in the defence and counterclaim, the court could reasonably have expected the plaintiff to call:

(a) An engineer to prove that the Mulcher was defective, the nature of the defect(s), the fact that the defect(s) existed at the time of the purchase, whether or not the defect(s) would have been manifest, and what steps had to be taken to repair or replace the defect(s).

(b) A witness from Graham Farrans JV to prove that the plaintiff had been selected as a sub-contractor for the A6 contract and to explain why the date given to the court as having been told he had won the sub-contract was correct even though it was inconsistent with the tender documents and invoices which were submitted to the court.

(c) An accountant to prove the loss of profit, if any, suffered by the plaintiff if, because of the defendant's breach of contract, he was unable to carry out the A6 sub-contract or other contracts and earn profits he would otherwise have earned.

(d) A witness to prove that the invoices relating to consequential loss has both been incurred because of the defective condition of the Mulcher and duly discharged.

[36] I stress that one of the heads of financial loss claimed by the plaintiff here is the cost of paying contractors and this is not proved by providing an invoice which could relate to any work whatsoever. Nor, as I have noted, is it proved if there is no evidence as to whether the invoice was discharged. But more importantly, this is a claim for loss of profits. This is not a claim for re-imbursement of another subcontractor's costs because for the reasons previously explained that will not usually equate to the plaintiff's actual loss. It is a consequential loss which arises because the plaintiff cannot employ the Mulcher to earn profits he would otherwise have earned. Evidence would be required of, for example, the loss of profit resulting from being unable to perform the sub-contract with Graham Farrans JV, if this was a permissible head of damage. This loss is certainly different from the costs actually incurred because, to take but one example, the plaintiff is not operating the machine but bringing in another contractor and therefore he would be able to do other profitable work himself. He may not need to buy fuel oil for the contractor's plant.

[37] No explanation was offered to the court as to why these witnesses were not called. Indeed, at the present time, the court can order, if requested, that a particular fact may be given by video-link or telephone: see Order 38 Rule 3(2)(e). As I have said in circumstances where the court could expect to hear a witness give evidence, such as a witness from the JV Company, the court may be justified in drawing an adverse inference from the absence of such a witness. However, the fact remains the onus is on the plaintiff to prove his case. It is not an answer where there is in effect a blanket denial defence (as here) to claim that a personal litigant did not challenge the plaintiff's evidence on any particular point. The claims made in the Statement of Claim were not admitted and had to be proved.

[38] The court on the absence of such witnesses has a much more difficult task of assessing the evidence to see what the plaintiff has proved to the civil standard. There is a panoply of powers available to the court to permit evidence to be adduced

in different ways. It can, for example, order under Order 38 Rule 3(2) that any particular fact can be proved by:

(a) A statement on oath.

(b) The production of documents or entries in books.

(c) By the production of copies of documents or entries in books.

(d) By the examination of any witness by video link or telephone call or any other means of direct communication.

[39] The plaintiff could also have served a Notice to Admit Facts under Order 27 Rule 2. As Valentine makes clear in his book Civil Proceedings the Supreme Court, the court has a wide discretion as to what evidence it can accept to allow a party to prove its case, see Chapter 13. 32-34. The plaintiff chose not to put before the court admissible evidence to vouch for many of his alleged loss(es) of not being able to perform profitable contract(s).

[40] There were many ways open to the plaintiff to prove both the invoices and payment of those invoices, while giving the defendant a fair opportunity, if he wanted, to challenge them. The attempt by the plaintiff to adduce invoices which were of a generic nature and which, on their face did not relate to the A6 sub-contract, (or any other contract) and without providing any proof of payment of those invoices did not on any assessment constitute proof to the necessary standard. Furthermore, even if the court had permitted the defendant to adduce the invoices as proof the court could not have been satisfied that they had been paid or, more importantly that the sum of those invoices equated to the plaintiff's actual loss of profit.

DISCUSSION

[41] The plaintiff and the defendant entered into a contract for the sale of the Mulcher. The Sale of Goods Act 1979 sets out at sections 13, 14 and 15 the terms that will be implied as to description and quality of the goods supplied under such a contract. The power to exclude or restrict these terms as being considerably circumscribed by statute: see for example the Unfair Contract Terms Act 1977 ("UCTA"). Section 13 of the Sale of Goods Act provides:

> ***"13 Sale by description***

(1) Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description.

(1A) As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition.

14 Implied terms about quality or fitness

(1) Except as provided by this section and section 15 below and subject to any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied,

(a) appearance and finish,

(b) freedom from minor defects,

(c) safety, and

(d) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—

(a) which is specifically drawn to the buyer's attention before the contract is made,

(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or

(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—

(a) to the seller, or

…

any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller …

(4) An implied term about quality or fitness for a particular purpose may be annexed to a contract of sale by usage.

…

As regards England and Wales and Northern Ireland, the terms implied by subsections (2) and (3) above are conditions."

[42] On the basis of the evidence lawfully placed before the court the Mulcher did not measure up to its description in the advertisement. The Mulcher was neither in good condition nor could it be used across "varying conditions" as described. However, this is not the way in which the plaintiff has framed his case in the

Statement of Claim. There is no claim for misrepresentation in respect of how the Mulcher was advertised. The plaintiff has concentrated on the machine not being of satisfactory quality, free from defects and fit for its purpose. Its fitness for purpose is amplified by the claim that it needed to be capable of moving under its own power and mulching wood. I have no doubt that these terms were implied under the Act because the machine did need to be able to perform those functions to be of a satisfactory quality. Significantly, the defendant has provided a general denial in his defence but has not sought to argue that they were excluded by the terms of the sale. He simply denies that there was a breach of contract on his part. However, in the counterclaim the defendant has claimed that the Mulcher was purchased on an "as seen basis" without any further warranty. It is interesting to look at the email exchange, and in particular the email of 8 July 2016 from the defendant to the plaintiff where the defendant makes it clear that, inter alia, he will provide a machine which is, inter alia, mechanically operational. It is only on 11 August 2016 that the defendant choses to make the case that the Mulcher was advertised "sold as seen" but that is patently untrue. It was advertised, inter alia, as being in good condition. There was no mention of it being "sold as seen."

[43] The defendant also makes the case, although it is not expressly pleaded, that he had told the plaintiff that this was not a frontline machine fit for full active service, but was only able to perform specific tasks working on a "very wet site." I do not accept that the plaintiff knew this and continued with the deal. These claims owe everything to wishful thinking on the part of the defendant and nothing to the reality of what happened. Indeed, such a claim is inconsistent with the advertisement placed by the defendant. Further, I had the opportunity to see and hear the defendant give his evidence and I did not believe him on this issue. The Mulcher most certainly was not "sold as seen" nor was its limited capability disclosed to the plaintiff prior to the sale. I am wholly satisfied from the evidence, and in particular, the oral testimonies of both parties, that the plaintiff would not have purchased a machine whose ability to operate was so thoroughly circumscribed.

[44] On the basis of the evidence placed before the court, I have no hesitation in concluding that the Mulcher was sold with a defective clutch and accordingly its ability to carry out mulching work was severely limited. This rendered the Mulcher useless for all practical purposes to the plaintiff. By no stretch of the imagination, taking into account its age and working history, could this machine be described as of "satisfactory quality" or "fit for its purpose." The absence of a guard on the PTO also made the Mulcher dangerous, unsafe and clearly unfit for its purpose. The proposed sale by the defendant was therefore on the evidence one in which the defendant was selling a machine which did not comply with regulation 3 of the Agriculture (Power Take Off) Regulations (NI) 1988. There is evidence that the Mulcher was subsequently used without the guard. However, this does not provide a defence for the defendant. The Mulcher was still dangerous and not of a satisfactory quality. But the absence of the guard was not the main reason why the Mulcher was unfit for purpose. This was down to the defective clutch.

[45] Further, even if the Mulcher was "sold as seen", which it was not, that does not provide any comfort to the defendant for the following reasons, I find:

(i) Describing a machine as "sold as seen" does not act as an effective exclusion of warranties. It does not mean that all liability is excluded for any defect in the goods including, as here, the ability of the Mulcher to process timber. I find on the evidence that there was a latent defect in the Mulcher, namely a defective clutch, and this could not have been discovered and was unknown to the plaintiff at the time of purchase.

(ii) In *Hughes v Hall* [1981] RTR 430 a car dealer's attempt to sell goods "as seen and inspected" which stated to be an invalid attempt to cut down the scope of his description duty. Bought as seen only meant that the purchaser had seen the goods. All exclusion clauses must be construed "contra proferentem." So in this case there is no doubt that the plaintiff saw the Mulcher but that did not exclude the defendant's responsibility for patent and latent defects.

(iii) Indeed, if liability is to be excluded for any warranty under the UCTA in respect of business liability, as here, then it must not fall foul of section 6 of the UCTA which limits the ability of a seller of goods to restrict his business liability in respect of sections 12-15 of the Sale of Goods Act.

[46] The exclusion clause has to satisfy the test of reasonableness. The defendant made no attempt to persuade the court that it was reasonable to exclude all responsibility for defects, even latent ones. Indeed, the court finds that if the clause did mean that all warranties and conditions were excluded, it was obviously unreasonable both in its width and in the nature of its exclusion. The Mulcher in the present case, as supplied by the defendant to the plaintiff was neither of satisfactory quality nor fit for the purpose, regardless of the fact that it was of some vintage. The Mulcher was defective, because the clutch did not work. It was also dangerous, because of the absence of a guard over the PTO. The court concludes on the evidence that the Mulcher which was supplied was manifestly neither of satisfactory quality nor fit for its purpose. That conclusion could be reached on the basis of either defect. However in this case it is most certainly a consequence of the defective clutch regardless of the absence of a guard for the PTO.

[47] In any event it is significant that the claim that the plaintiff agreed to take the Mulcher knowing that it was not fit for frontline use was first made belatedly in the email of 11 August 2016. I find it to be without any reasonable factual basis, owing more to what the defendant wished had happened rather than what did happen. Accordingly, on the basis of the evidence, I am satisfied that the Mulcher was not supplied in accordance with the terms of the agreement. Therefore, the plaintiff is entitled to proceed with his claim for damages for breach of contract against the defendant to be assessed by the court.

QUANTUM

[48] The function of damages is to put the injured party in the position he would have occupied had the contract been duly performed by the defendant: see the seminal decision of *Robinson v Harman* [1848] 1 Ex 850. It is important to remember that it is this principle which underlies any award of damages for breach of contract.

[49] Therefore, in normal circumstances the plaintiff would be entitled to recover the direct costs of:

(a) Repairing the clutch and the associated costs of transporting and off-loading the Mulcher to enable those repairs to be carried out.

(b) The cost of installing a guard for the PTO and any additional associated transport costs.

[50] Further, in addition, the plaintiff is entitled to any consequential loss which flows from the breach of contract. There is a dispute here. The defendant denies that he had any notice that the plaintiff had won a contract to carry out clearance work for the A6 from the Graham Farrans Joint Venture. I find after careful consideration of the contemporaneous correspondence that the defendant did not know that the plaintiff had won the A6 contract with the Joint Venture Company. Indeed, on the basis of the evidence submitted I do not consider the Joint Venture Company had awarded any contract at the time of the sale of the Mulcher by the defendant to the plaintiff. However, the defendant was aware that the plaintiff intended to use the machine on other contracts that were in the pipeline. For example, the plaintiff complained to the defendant on 12 August that the machine was "out on jobs that have had to be postponed …" There is no response from the defendant claiming that he did not know that the machine was going to be used to carry out clearance work and that this claim came as a complete surprise etc. The defendant's assertion that the Mulcher was bought by the plaintiff not with any contracts in mind but simply as a speculative venture, which required the plaintiff to advertise the machine in the hope of attracting work, is incredible and is inconsistent with the defendant's response to emails from the plaintiff e.g. see email of 3 October 2016 from the defendant where he makes no mention of the plaintiff informing him at a very late stage that he had been unable to carry out jobs because of the defective condition of the Mulcher. The evidence of the defendant on this issue was not credible and I formed the view that the defendant was tailoring his evidence to try and limit his exposure to an award of damages.

[51] The defendant knew that the plaintiff required the machine to do mulching work at the date of purchase, even if he did not know of the precise nature of the contract work the Mulcher would be engaged upon.

[52] I should say, however, that there was a failure on the part of the plaintiff to provide <u>any evidence</u> as to what his loss was in respect of those contracts that he

was unable to perform, including the A6 sub-contract. The plaintiff produced no evidence at all as to any profit which he could have expected to make on any of the contracts which he claims were lost or delayed. The evidence adduced in respect of the A6 sub-contract only details the costs the plaintiff claims to have incurred. However, there was no evidence that any of these costs had been paid. For the reasons given I have refused an application to allow the plaintiff to mend his hand on this issue for the reasons given above. But in any event, these expenses or costs are not the same as loss of profit, even on the plaintiff's own case. As I have commented no explanation has been offered to the court as to why the plaintiff was unable to adduce cogent evidence of the loss of profit he claims to have sustained as a consequence of the defendant selling him a defective Mulcher.

[53] In the circumstances I am not persuaded that I should award any compensation for any financial loss alleged to have been incurred by the plaintiff in carrying out the A6 sub-contract or any other contract because of the defective condition of the mulcher. My reasoning is as follows:

(a) The defendant had no knowledge that the plaintiff (as he claims but the court does not accept) had won the A6 until months after the sale had taken place.

(b) In any event in respect of other contracts which the plaintiff was unable to carry out, or had to defer, there is no evidence of the plaintiff's actual loss of profit in respect of any other contracts.

(c) Any evidence provided relates to invoices which have not been proved to the court's satisfaction and there is no evidence that almost all of these invoices have been paid in any event.

(d) The plaintiff's consequential costs was quite clearly not the costs incurred in carrying out the work. There is no evidence whatsoever to what profits, if any, the plaintiff has lost as a result of the defective condition of the Mulcher.

[54] The plaintiff has proved his entitlement to the following heads of damage:

(a) The cost of the actual repair to the Mulcher to put it into working order and the condition it should have been in when supplied by the defendant to the plaintiff. I consider that the plaintiff acted reasonably on the evidence in having the Mulcher returned to the manufacturer to have it repaired. For the avoidance of doubt the offers made by the defendant were not reasonable.

(b) All the costs of transporting and off-loading the Mulcher to get it repaired and then redelivered to the plaintiff.

(c) The cost of providing and installing a guard for the PTO. But it has not been proved any such guard was installed.

To be offset against this is any outstanding balance due by the plaintiff to the defendant in respect of the agreed price of the Mulcher, which has been with-held, that is £10,920.

[55] The plaintiff has not proved or indeed claimed any loss of profits because of the unsatisfactory condition of the Mulcher. He has not proved any other consequential loss.

[56] I asked the parties to agree a schedule of losses on the basis of the court's findings. The parties were also asked to try and agree the appropriate rate of interest and the appropriate period for that interest to run. I directed that an agreed schedule or, if a schedule could not be agreed, separate schedules were to be produced within 7 days of this judgment being handed down setting out the losses alleged to have been sustained by each party, the interest accrued due to date on those losses, and the interest which continues to accrue due on those losses. These sums should be exclusive of VAT. No agreement was reached

CONCLUSION

[57] On the basis of the admissible evidence adduced before me I conclude that:

(i) The Mulcher supplied by the defendant was not of satisfactory quality or fit for the purpose for which it was supplied to the plaintiff. The clutch was defective and the Mulcher could not work properly. In addition, there was no guard fitted to the PTO, which made it dangerous. For the avoidance of doubt the award of damages is made on the basis of the defective clutch. Indeed, I am not satisfied from the evidence that any guard was installed by the plaintiff or that he ever intended to do so.

(ii) It is too late now for the Plaintiff to call further evidence and mend his hand in respect of quantum as the case was closed. There are no special circumstances which would entitle him to re-open the case.

(iii) The defendant was not on notice that the plaintiff had been appointed as a sub-contractor to carry out work on the A6 for Graham Farrans Joint Venture Company. Indeed, the court is doubtful on the basis of all the evidence that the plaintiff had been awarded such a sub-contract at the time as he now claims.

(iv) However, the defendant was on notice that the plaintiff had other jobs lined up and the failure to deliver a Mulcher of satisfactory quality would have likely resulted in the plaintiff being unable to carry out those jobs. As a consequence the plaintiff was likely to suffer loss of profits

(v) The loss the plaintiff suffered as a consequence to the Mulcher being unfit for purpose include the loss of profits he would otherwise have made.

(vi) However, the submission of generic invoices from, for example, Gorthill Contracting, for work alleged to have been carried out on the A6 did not prove any loss of profit because:

- The invoices do not equate with loss of profit.
- There is no evidence of the invoices being paid.

Accordingly, I disallow the invoices from Tree and Land Solutions, Glendale Tree Services, Gorthill Farm GF Contracting, NG Bell (Fentd) and Legacy Habitat.

(vii) The plaintiff is entitled to the costs of repairing the Mulcher and the direct costs associated with off-loading and transporting the Mulcher to and from the workshop where it was repaired to the plaintiff's place of business. I am satisfied from the evidence that these costs were incurred. I award £26,831.37 less £10,920 producing a final sum of £15,311.37.

(viii) The plaintiff will also be entitled to interest. I will award this at 5% from 27 October 2017. I make this 4 years and 158 days to 4 April. I calculate the sum due to be £3,389.47. So the award will be £15,311.37 damages and £3,389.47 interest. There will be a three week stay. Costs will be awarded to the plaintiff who I adjudge to be the victor in these proceedings. Those costs will be measured on the appropriate County court scale given that the value of the plaintiff's claim is within the County Court jurisdiction.