

BETWEEN**LIAM MCCAWLEY AND EITHNE MCCAWLEY****PLAINTIFFS****AND****SWEEDON OIL LIMITED****DEFENDANT****JUDGMENT of Mr. Justice McDermott delivered on the 12th January, 2018**

1. The plaintiffs' claim is for the sum of €55,000, said to be due and owing in respect of an agreement concerning the purchase of the entire issued share capital of L&E McCawley Limited by Sweedon Oil Limited.

2. The proceedings were initiated by summary summons dated 1st March, 2012. An appearance was entered on 13th March, and a motion for judgment issued on 25th January, 2013. Following the submission of a number of affidavits by the parties, the matter was sent for plenary hearing. A statement of claim was delivered on 20th November, 2013, and a defence on 29th January, 2014. The Notice of Trial is dated 21st October, 2014.

3. By agreement made 19th June, 2008, the plaintiffs agreed to sell the issued share capital in L&E McCawley Limited to the defendant for the consideration set out at para. 3 of the agreement. The agreement was signed by the plaintiffs and by Michael Donoghue and John Sweeney, directors of the defendant company on its behalf.

4. Clause 3 of the agreement provides that:-

"The purchase consideration for the shares should be the sum of €383,973 (subject to adjustment to reflect net book value)"

5. Clause 3.3 of the agreement provided for a schedule of payments:-

"The purchase consideration shall be paid by the Purchaser to the Vendor in the following manner:-

The sum of €160,000 plus V.A.T. (if applicable) subject to adjustment to reflect net book value plus €30,000 plus V.A.T. to be paid on the completion date:-

(a) the sum of €33,973 plus V.A.T. to be paid no later than six months from the date of Completion;

(b) the sum of €80,000 plus V.A.T. (if applicable) to be paid on the day following twelve months after the Completion Date;

(c) the sum of €80,000 plus V.A.T. (if applicable) to be paid on the day following 24 months after the Completion Date..."

6. A detailed provision was inserted in Clause 3 whereby if sales fell below a defined threshold a penalty was to be deducted from the final payment of €80,000 which was due 24 months following the completion date of the agreement. In the event this contingency did not arise.

7. The plaintiffs claim that the purchase price included a sum of €320,000 in respect of the goodwill of the company and €63,973 in respect of its fixed assets. They claim that at all material times it was understood by both parties that the purchase price included a payment in respect of those fixed assets. This included a sum of €33,973 in respect of equipment and €30,000 in respect of lorries and vehicles.

8. The defendant paid the sum of €183,973, pursuant to Clause 3. It failed to discharge the sum of €80,000 due under Clause 3.3(b) which was payable twelve months after the completion date in June 2009. The plaintiffs sought payment of this amount by letter dated 14th July, 2009.

9. In the meantime, a calculation of the net book value of the company, as of 30th June, 2008, was prepared by Mr. Paul Devery, Accountant, which set out the appropriate adjustment which, it was claimed, should be made to the final payment of €80,000. A sum of €25,000 was deducted based on an agreed balance sheet adjustment and therefore, a sum of €55,000 was said to be due and owing in respect of the final payment pursuant to Clause 3.3(c). It should be noted that a net book adjustment was initially intended to be made in respect of the initial sum payable under Clause 3.3 but this was deferred pending the preparation of accounts and the determination of the relevant liabilities of the company. The terms of Clause 3.3(c) were never specifically altered by the parties and neither side pleaded that they were so altered in writing or otherwise. Though the dates of the agreed payments were altered the agreed consideration for the purchase of the issued share capital under Clause 3 was not.

10. The parties agreed to an adjustment of the payment schedule in September 2009. Under this revised schedule, the defendant agreed to pay the balance then acknowledged to be due of €135,000 in staged payments. This sum was calculated on the basis that there were two tranches still due under the agreement, one of €80,000 and a second of €80,000 less €25,000 in recognition of a sum to be allowed and deducted from that sum in accordance with the amount set out in the agreed balance sheet in respect of the 'net book value adjustment'. A total sum of €80,000 would be paid by August 2010, and the remaining balance of €55,000 by March 2011, in staged monthly payments. This proposal was accepted by the plaintiffs in a letter dated 3rd September, 2009. It provided that a number of post-dated cheques for September, October, November, December 2009 and January/February 2010 would be provided and that the remaining cheques from March 2010 to March 2011, would be furnished in February 2010. No issue was taken at this time in respect of the amount due and owing by the defendant as set out in the September 2009 Schedule. Cheques for September, October, November, December 2009 and January/February 2010, were furnished on 21st September, 2009. A further six post dated cheques were furnished by the Defendant's solicitors on the 22nd March 2010.

11. In August 2010, Mr. Malachy Stephens of M.A. Stephens & Co., the auditors to the defendant wrote to Mr. Devery who acted at all times as accountant to L&E McCawley Limited, concerning the calculation of the amount due and owing pursuant to the terms of the agreement. The letter received on 10th September 2010 stated:-

"When the share purchase agreement was signed, the only element of the consideration which was determined was the fixed assets and goodwill and accordingly the purchase consideration as shown in the purchase contract was the element of the consideration agreed at €383,973 (subject to adjustment to reflect net book value).

I understand that you in conjunction with Michael Donoghue of Sweedon Oil later agreed on the value realised for the current assets and the liability discharged on foot of the current liabilities, whereby the current assets realised a value of €382,361 and the current liabilities discharged were €591,334, leaving an overall deficit of the net book value of the current assets/current liabilities of €208,973.

I understand and have been provided with an email which you provided to the Vendors Solicitor...dated 9th August, 2009, whereby you attached a balance sheet showing the aforementioned values with a minor difference. However, in your email you appear to have a calculation error whereby you have advised your Clients' Solicitor that the deficit on the net book value of the current assets/current liabilities is €142,071, whereas the deficit should have been €206,044. Your error appears to have arisen by virtue of the fact that the calculation of the deficit of €142,071 is by including the value of the equipment in the sum of €63,973, in its computation, whereas the value of the equipment was already included in the purchaser consideration shown in Clause 3 of the shared purchase agreement in the sum of €383,973 as outlined above, which figure was subject to adjustment to reflect the net book value of the current assets/current liabilities.

I understand that the consideration was agreed to be paid by instalments and accordingly summarise the liability on foot of the Share Purchase Agreement as follows:-

Purchase consideration for equipment and
goodwill as set out in the Share Purchase Agreement €383,973
Adjustment to reflect net book value of current assets/
current liabilities (as provided in the Share Purchase
Agreement) €208,973
Amount due to be paid by instalments €175,000
Amount paid by Sweedon Oil to date €183,973
Overpaid/Amount repayable to Sweedon
by McCawley Oil €8,973"

12. By letter dated 30th November, 2010, Mr. Paul Devery of Devery Farrelly & Co. replied as follows:-

"We can assure you that the deal which your firm were not involved with, in any way, was agreed with Mr. Donoghue and the writer and there were no illusions that the net book value of the Company would exclude the value of the fixed assets at their agreed price in taking account of any adjustment that was required via net book value adjustment.

It is worth noting that in 20 years working in this industry, we have never come across a net book value of a company excluding a value for fixed assets, either at cost or an agreed price as in this instance.

On signing the Share Purchase Agreement, Mr. Donoghue was fully aware of the figures and we see this intervention by yourselves over two years later as a further attempt to avoid payment of the agreed amount."

13. Though the defendant accepts that it is obliged to pay the consideration set out in the purchase agreement of 19th June, 2008, this is said to be subject to adjustment to reflect the net book value. Mr. Donoghue on behalf of the defendant, claims that when dealing with Mr. Devery, in or about August 2009, he erroneously accepted the figure put to him by Mr. Devery for net book value and maintains that there was a common mistake at this point in the calculation of the net book value. He states that he only realised that this error had occurred following a communication from his company's newly appointed auditors in respect of an audit for the year ending 28th February, 2010. As a result of the error in calculation, the defendant now maintains that the sum of €55,000 is not due and owing to the plaintiff.

14. Mr. Devery, for his part, is clear that Mr. Donoghue and he agreed that the net book value of the company would exclude the value of the fixed assets at their agreed price when taking account of any adjustment that was required via net book value adjustment. The plaintiffs claim that the defendant's present stance is simply to avoid payment. It is said that whatever about the accounting practices in calculating net book value, it was agreed between the parties that the sum of €63,973, would be payable in respect of the equipment, lorries and vehicles, and would not be deducted in any adjustment to be made in respect of the purchase price upon the determination of the value of any fluctuating assets or liabilities of the company. This, it is claimed is evidenced by the agreement by Mr. Donoghue as advised at the time by other professionals, to accept and agree payment under the revised schedule. The professionals then advising Mr. Donoghue and the defendant were not called to give evidence in relation to what transpired at that time.

15. The court has heard extensive evidence from Mr. Devery, Mr. Donoghue, Mr. Malachy Stephens and Mr. James O'Hara, Chartered accountants.

16. Mr. Devery states that he met and communicated with Mr. Donoghue and a Mr. Gordon Ryan who advised Mr. Donoghue on financial matters throughout. Mr. Ryan was the financial controller of companies owned and operated by Mr. Donoghue's partner originally in this matter, a Mr. John Sweeney. A balance sheet was prepared in respect of the company and a final agreement was reached in respect of fourteen items between Mr. Donoghue and Mr. Ryan on the 1st September, 2009. This final balance sheet on

foot of which the schedule of payments was agreed in September 2009 is endorsed "final agreed balance sheet at 13/6/08 agreed by Paul and Michael". The revised schedule of payments was calculated on the basis of an agreement to pay the balance of €55,000.00 as the outstanding amount due in respect of the purchase price.

17. Mr. Devery accepted that the goodwill of the company valued at €320,000.00 was not included in this balance sheet. However, he maintained that the items agreed representing the fixed assets such as equipment valued at €33,973.00 and lorries and vehicles valued at €30,000.00 were properly included. Together with the good will the total purchase price was therefore €383,973.00. The only outstanding issues related to the current liabilities of the company which were to be assessed which would likely result in an adjustment of the agreed purchase price. He did not accept that he was obliged in this case to include the goodwill as a fixed asset for the purpose of this exercise. He noted that the goodwill was excluded from the balance sheet by agreement in correspondence. He rejected the proposition that there was a mutual mistake in relation to the inclusion of the sum of €63,973.00 concerning the fixed assets of the company. He also claimed that he and Mr. Donoghue and his advisers were agreed on the proposed calculation for the amounts outstanding when adjustments were made in respect of the liabilities set out and that when Mr. Donoghue agreed to make these payments he was already in default of payments as set out at Clause 3.3(b) of the Agreement.

18. Mr. Donoghue stated in evidence that he had thirty years' experience in the oil industry and as an accountant technician for eight years. He had basic accountancy knowledge. He and his partner John Sweeney were advised by Mr. Gordon Ryan a financial expert on these matters. He stated that the valuation of the goodwill, vehicles and equipment was assessed and negotiated with the help and advice of Mr. Ryan. The share purchase agreement set out the price as agreed in respect of the goodwill, the vehicles and plant and equipment of the company. They did not agree the valuation of current assets and current liabilities which were to be determined at a later stage. These were fluctuating matters and had to be determined by a review of the company's finances as of 30th June 2008. He accepted that the figures in respect of the balance sheet were agreed. He said that there was no discussion regarding an agreed price for the fixed assets prior to June 2008. He did not discuss how they were going to be recorded. He had a vague basic understanding of the net book value calculation. In respect of the balance sheet agreed on 1st September, 2009 nobody made him aware that the goodwill valuation had been omitted. He accepted that the share purchase agreement was negotiated with Mr. Ryan over many months and that various matters were "thrashed out". Mr. Ryan and Mr. Donoghue were involved in these negotiations. However, Mr. Ryan was not involved in the balance sheet issues. He accepted that he agreed to the payment schedule but claimed that he was mistaken in doing so having been advised by his present company auditors as per the figures set out by Malachy Stephens & Co. in the letter of August 2010 quoted above. These issues arose after advice received from Mr. Stephens.

19. Mr. Devery described that letter sent as a 'strange play' in the light of the fact that Mr. Donoghue and his financial advisor Mr. Ryan had expressed their satisfaction with the manner in which the balance sheet which would ultimately determine the final amount to be paid was compiled. All fourteen items set out in the balance sheet were agreed over a period of two to three months. No issue was ever taken with the inclusion of the trucks and equipment as fixed assets valued at €63,973.00 prior to the agreement of the Schedule of September 2009. It was first raised in the letter from Mr. Stephens after legal proceedings were threatened for non-payment. He accepted that he had initiated the first draft of the balance sheet which omitted the goodwill of €320,000.00. He stated that while one might normally include goodwill and the fixed assets in a balance sheet, for the purpose of this exercise it was accepted by Mr. Donoghue that the goodwill should not appear in the balance sheet. It was accepted by both parties at the time that the €63,973.00 entry for fixed assets for equipment and lorries should appear.

20. The court notes that Clause 3 of the Agreement provided that the purchase price would be reduced by an agreed amount if the customer list upon which the goodwill figure was based did not purchase a specified number of litres of fuel within the first year from the date of commencement of the Agreement. The agreed payment structure provided under Clause 3.3 extended for a period of twenty four months beyond the date of the Agreement. The final payment of €80,000.00 provided for at that stage, (which was later varied) was to suffer a deduction as specified in Clause 3.3 if the amount of sales did not achieve the target envisaged. Mr. Devery indicated that both sides were satisfied that the figure for goodwill should not appear therefore in the balance sheet. It was fixed and the contingency for any change was clearly set out in the agreement. The court notes that there were elaborate provisions in relation to the independent determination of any dispute in relation to the sales figures during the relevant period.

21. Mr. Devery stated that all the agreed figures in the balance sheet were subsequently accepted and acted upon by the defendant's solicitor as correct. However, Mr. Devery accepted that a balance sheet should normally include all fixed or fluctuating current assets and liabilities. He accepted that goodwill was an asset but did not accept that its exclusion in this balance sheet was an error. The balance sheet represented the agreed figures arrived at over a period of months between the parties in circumstances where they had agreed to exclude the goodwill figure from it. Goodwill could be calculated in different ways from deal to deal. Mr. Donoghue was not under any misapprehension as to how the purchase price was calculated. The goodwill had been agreed before the preparation of a balance sheet for the purpose of adjustment of the price. Mr. Donoghue was well aware of its exclusion from the negotiations and from the balance sheet itself.

22. Mr. Devery accepted that he did not respond to Mr. Stephens' letter. He was satisfied that the position was quite clear and Mr. Stephens had all relevant figures. He accepted that Mr. Stephens as auditor to the defendant had only become aware of these issues when the books were presented to him in August 2010 and that there was no delay on his part in raising them. Mr. Devery accepted that as a matter of good practice in the preparation of a balance sheet the concerns expressed in Mr. Stephens' letter were understandable. However, the letter did not take into account the course of dealing between the parties in relation to these matters and the understanding that had been reached between them as to how the figures would be treated. His letter did not take into account the context in which the fourteen items had been agreed and the subsequent schedule of payments.

23. Mr. Donoghue accepted in evidence that Mr. Ryan, a financial controller of Mr. John Sweeney's companies, was engaged in the share purchase agreement negotiations with the plaintiffs on behalf of Mr. John Sweeney and the witness. He was also involved in work to ascertain the value of the goodwill and fixed assets namely the lorries and equipment of the company. He accepted that the figure of €320,000.00 constituted the agreed sale price in respect of the goodwill. A balance sheet had to be produced as of 30th June, 2008 which reflected the current assets and liabilities of the company. This included fixed assets and variable assets and liabilities which were subject to fluctuation. Mr. Donoghue accepted that all of these figures were ultimately agreed with Mr. Devery by him. He saw the balance sheet in respect of 30th June, 2008 for the first time in August 2009. He was reluctant to accept that Mr. Ryan continued to have any involvement in the negotiation of these figures notwithstanding an email from Mr. Donoghue to Mr. Devery on 9th June, 2009 which attached a comparison of Mr. Devery's draft balance sheet with his draft which, he acknowledged, agreed with it for the most part. He stated in that email that he tried to contact Gordon Ryan that evening to arrange a meeting later in the week. He said in evidence that this meeting did not take place prior to a meeting in Mr. Devery's office at which he agreed the final figures.

24. I am satisfied that Mr. Ryan was engaged in the discussions and negotiations not only in relation to the share purchase agreement but also in relation to the calculation of the goodwill figure agreed, the figure for the fixed assets and the final determination of the

sums agreed based upon the balance. The court is satisfied that at all material times Mr. Donoghue was fully advised and accepted the figures proposed which ultimately formed the basis on the demand for €55,000.00 the subject matter of these proceedings. I do not accept that he had a vague understanding of these figures.

25. A great deal was made of the absence of Mr. Ryan as a witness to these events. It was suggested that Mr. Ryan would not have supported Mr. Donoghue's version of events. Mr. Donoghue acknowledged that no effort was made since August 2009 to contact Mr. Ryan about the case concerning what was agreed or discussed with Mr. Devery concerning these matters.

26. Mr. Donoghue retained a different firm of accountants prior to August 2010 as auditors and advisors. He did not obtain any advice from that firm in respect of any ongoing issues in relation to the share purchase agreement. He then retained Mr. Stephens as auditor to his company in August 2010. Mr. Stephens made him aware that the goodwill had not been included in the balance sheet produced by Mr. Devery. He also stated that he had not sought any advice in relation to the financial difficulties which the defendant had in discharging the amounts due to the plaintiffs as set out in an email of the 1st September, 2009 to the plaintiffs' solicitors. He stated in that email that having reviewed his cash flow requirements he was in a position to propose a payment schedule for outstanding monies due. At this stage High Court proceedings had been threatened in relation to the balance due which was €135,000.00. The Schedule set out payments extending from September 2009 to March 2011. His solicitors wrote to the plaintiffs' solicitors on 3rd September, 2009 accepting the proposed cheque payments. A number of the cheque payments were made in September, October, November and December 2009. On 5th January, 2010 the plaintiffs' solicitors wrote seeking the sum of €55,000.00 then outstanding. Mr. Donoghue did not consult Mr. Stephens about the payment schedule or the demand made for €55,000.00 before retaining him or following his retention as auditor. He rejected the proposition that he was now using Mr. Stephens as a convenient excuse for his continuing failure to honour the amount which he agreed to pay and accepted as due on foot of the share purchase agreement and the balance sheet figures agreed by him and his advisors with Mr. Donoghue.

27. Mr. Malachy Stephens, the author of the letter of August 2010 is a chartered accountant of thirty years' experience in corporate finance activities. He stated that the net book value should indicate the fixed assets of a company based on a historic cost thereof and the necessary professional advice required to ascertain their market value. It should also include any intangible assets such as goodwill and a statement of any current assets including debtors and liabilities including creditors as of a given date because of the nature of fluctuations that may occur in respect of such figures. He gave a share valuation report in respect of the company based on the figures which had been agreed between the plaintiff and the defendants. He valued the fixed assets as follows, the goodwill €320,000.00, equipment €30,000.00 and vehicles €33,973.00 giving total fixed assets of €383,973.00. When current assets of stock, trade debtors and cash were taken into account the total asset value of the company was €766,334.00. The liabilities of the company including trade creditors, Valued Added Tax and other taxes, bank loan and lease liabilities totalled €591,334.00. This gave a net asset value of €175,000.00 and in his opinion this constituted the value of the entire issued share capital of the company as of 30th June, 2008.

28. It followed in his opinion that this was the appropriate purchase price pursuant to Clause 3.3 of the Agreement. Since the defendants had paid €183,973.00 to date, he concluded that they had overpaid by €8,973.00 and were entitled to a refund in that regard. He also objected to the inclusion of the figure of €63,973 twice in Mr. Devery's calculations which as he claimed in his letter was an error.

29. It should be noted that all of the figures in respect of current assets and liabilities contained in his valuation are the same as those set out in the balance sheet as of 30th June, 2008 prepared by Mr. Devery. The combined current assets and liabilities total €206,044.00. The difference in his share valuation report of 22nd February, 2016 is identified by including the goodwill value at €320,000.00. If that is not included the net book value is -€145,000.00. Mr. Devery also accepted and agreed that in normal circumstances the items listed by Mr. Stephens should appear in a balance sheet showing net book value.

30. Mr. Donoghue complained in evidence and through his counsel in cross-examination of Mr. Devery that the sum of €320,000.00, the goodwill valuation, was not included as a fixed asset in the balance sheet produced for June 2008 even though this was not the subject of complaint by Mr. Stephens in the letter ultimately written to Mr. Devery in October 2010 setting out grievances on Mr. Donoghue's behalf.

31. In the course of their dispute the respective solicitors each agreed to retain an independent chartered accountant to review the figures and advise as to the outstanding liability, if any, of the defendant to the plaintiffs under the terms of the agreement. Mr. O'Hara, a chartered accountant was retained for the defendant and a Mr. Fox for the plaintiffs. There was no formal mediation procedure agreed and it was not a submission to a form of arbitration. Nothing came of this save that Mr. O'Hara was called as a witness on behalf of the defendant. He agreed substantially with the assessment made by Mr. Stephens. However, in his calculation he concluded that the figure of €18,150 contained in the balance sheet as a figure due for value added tax was incorrect. The correct figure was €2,994. This gave rise to a difference of €15,156. He adjusted the balance sheet to accommodate this conclusion and stated that there was therefore an outstanding liability on the part of the defendant to the plaintiffs in the amount of €6,183 as reflected in para. 14 of the defence.

Conclusions

32. It is clear from the statement of claim that the sum of €55,000 is said to be based on the terms of Clause 3 of the original agreement to provide for a consideration of €383,973 "subject to adjustment to reflect net book value". That adjustment though originally to be made on the completion date was deferred by agreement between the parties until the fluctuating assets and liabilities of the company could be measured as of 30th June, 2008. The sum of €320,000 goodwill was agreed subject to an elaborate performance Clause involving a financial penalty if the turnover upon which the goodwill figure was based was not reached in the first year following the agreement. A balance sheet was produced by Mr. Devery with which both sides and their respective legal financial advisors were satisfied. On that basis the defendant agreed that the sum of €55,000 was due and owing to the plaintiff. The defendant agreed through its solicitors and following negotiations over appropriate adjustments that the amounts outstanding would be paid pursuant to a schedule submitted by the defendants in September, 2009. The defendant having been properly advised was clearly satisfied at that time that the outstanding sum of €55,000 which was the subject of the second tranche of payments to be made in the schedule was due and owing to the plaintiff. This process of adjustment took place within the structure provided by Clause 3. It was open to either party to agree to or object to the inclusion of any figure in the balance sheet ultimately produced and agreed by both sides. This applies also of course to the figure of €25,000 by which both sides were content to reduce the defendant's outstanding liability.

33. Paragraph 8 of the statement of claim states that the demand for the sum of €80,000 was made on 19th June, 2010 and that €55,000 was payable pursuant to Clause 3(3)(c) of the agreement. This was said to be the final sum of €80,000 less €25,000 "overpayment based on the net book value adjustment (€55,000)". The court is satisfied on the evidence that the defendant agreed with the figure advanced by the plaintiff as the appropriate net book value adjustment pursuant to Clause 3. This followed

considerable negotiation and an exchange of information between the parties as to what that figure should be and what figures should be considered as appropriate to its calculation. It is also clear that having reached that agreement as to the appropriate adjustment, the defendant agreed to discharge the sums outstanding which totalled €135,000. The first payment was made of €80,000 followed by the furnishing of a number of cheques in the sum of €55,000. The court is therefore satisfied that this calculation of 'net book value' was made on a basis which was acceptable to the parties and which both were satisfied was reasonable and appropriate in the circumstances of the case. Therefore the court is satisfied that absent any other reason in law or equity the defendant is indebted to the plaintiffs in the sum of €55,000. The defendants however, submit that this calculation was agreed by the defendants on the basis of a mistake of fact.

34. The defendant essentially asked the court to ignore the process of dealing between the plaintiffs and defendant in respect of the calculation of the appropriate net book value in the period leading up to the agreement of the scheduled payments in September 2009 and to interpret net book value in the limited sense set out in Mr Stephens' letter. However, it is clear that the parties engaged in a process whereby they agreed that certain figures would be included in the final calculation and others would not to their mutual satisfaction. This was a process carried out with legal and financial advice on both sides. It is a process in which Mr. Stephens and Mr. O'Hara were not involved. The court is also satisfied that it was a process which Mr. Donoghue on behalf of the defendant fully understood and having obtained appropriate advice he instructed the solicitors to furnish the post dated cheques to complete the defendant's obligations under the agreement.

35. The court does not accept the evidence of Mr. Donoghue that he first became aware of the significance of the phrase "net book value" in Clause 3.3 following his appointment of Mr. Stephens as the auditor of the defendant company. It seems to me likely that the parties for whatever reason decided to abjure a narrow interpretation of the phrase "net book value" in the calculation of the defendant's outstanding liability to the plaintiff and the agreed schedule of payments. I accept the evidence of Mr. Devery that the figures he used and relied upon in the final determination of the defendant's liability under the contract were mutually agreed and fully understood by both sides. I do not accept that there was any element of mistake or misunderstanding by Mr. Donoghue in respect of the defendant's outstanding liabilities to the plaintiffs. The court notes that neither Mr. Devery or Mr. Donoghue has offered the court a detailed account as to how it was determined that the figure of €25,000 should be deducted from the last tranche of €80,000 though clearly both accept that this occurred. Apart from the bald assertion advanced on behalf of the defendant via Mr. Stephens and Mr. O'Hara that the standard professional understanding of "net book value" was not applied no analysis was offered by either party as to how the agreed figure was determined. However, at no stage did Mr. Donoghue complain about that aspect of the calculation in correspondence or otherwise. The previous auditors of the company were not consulted about this matter nor were they called in evidence. In my view whatever agreement on the outstanding sum was reached was based on a full understanding and acceptance by the parties as to how that calculation was reached. Mr Donoghue does not suggest that this is not so and clearly understood the agreed figure to be correct at the time.

36. In the circumstances therefore, the court is satisfied that the late assertion by the defendant that there has been a miscalculation which was not in accordance with Clause 3 fails to take account of the course of dealing between the parties in calculating the outstanding sum and arranging a schedule of payments for its discharge. In essence, I do not accept the evidence of Mr. Donoghue that there was a *bona fide* error on his part much less a mutual mistake by the parties as to the appropriate method by which the outstanding amount should have been or was calculated.

37. The court is satisfied on the balance of probabilities that the plaintiffs are entitled to succeed in their claim for the outstanding amount of €55,000.

38. The court does not consider that the law of mistake is in the circumstances of this case of any assistance to the defendant having regard to the course of dealing between the parties. I do not accept that there was a mistake in this case regarding the calculation of the balance due or the nature and quality of the subject matter of the agreement. No issue arises from the impact of unexpected or exceptional circumstances on the contract. The mistake claimed was not shared by both parties and does not relate to facts as they existed at the time the contract was made. The suggested mistake did not produce a radically different agreement from that which the parties believed to exist. The parties were clearly satisfied on legal and financial advice to agree the figures due and owing which were calculated on an agreed basis in the course of a detailed engagement which continued for a number of months.