Neutral Citation [2013] IEHC 63

THE HIGH COURT

[2009 No. 2354S]

BETWEEN/

ADM LONDIS PLC

PLAINTIFF

AND

RANZETT LIMITED, RAY DOLAN AND ANNALIESE McCONNELL

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered the 15th day of February, 2013

PART I – INTRODUCTION

1. The role of the plaintiff company, ADM Londis plc ("Londis"), in delivering high quality retail services has been one of the striking features of the quiet revolution in the development of retail standards over the last fifteen years or so. The present case, however, arises from the effective termination of a Londis franchise at a retail outlet at the Black Bull premises, Dublin Road, Drogheda, Co. Louth in December 2008. What makes this dispute so unfortunate is that both sides commendably recognise the respective merits of their opponent. The witnesses for Londis (which included their chief executive and other senior personnel) acknowledge that the second-defendant. Mr. Ray Dolan, possesses acute retailing skills. Mr. Dolan for his part readily pays tribute to the quality of Londis as a brand and the assistance which he received in setting up his business.

2. How, then, did this dispute come about? In essence, the plaintiff's case is that the first defendant, Ranzett Ltd., was an under-capitalised company which was never sufficiently robust to trade successfully. At the time of its effective demise in December 2008, Ranzett (which was a franchisee of Londis) certainly owed Londis a significant sum in respect of its goods and services which it had purchased but for which it could not pay. Londis contend it could not reasonably be expected to trade with Ranzett in these circumstances and that for these reasons it lawfully suspended trading with that company on the 3rd December 2008.

3. The defendants take a different position. They say, in essence, that they were induced by misrepresentation to enter the franchise contract and, moreover, that the contract was unlawfully terminated without sufficient notice by the plaintiff.

The dramatis personae

4. Because the underlying dispute involved a variety of different participants, it may be helpful first to identify the main *dramatis personae* before proceeding to outline the relevant sequence of events, in particular the events which occurred from August, 2008 to December, 2008.

5. ***Ray Dolan***: Mr. Dolan is the central figure in this entire litigation. A much admired retailer, he opened and operated two Londis stores in Drogheda, Balls Grove and Black Bull. This litigation focuses on the debts which he incurred in respect of the second of these stores through the company Ranzett Ltd. and the circumstances in which his franchise with Londis came to an end in December, 2008.

Annaliese McConnell: Ms. McConnell and Mr. Dolan married in June, 2007. She and her husband executed personal guarantees in respect of the two businesses run by her husband. She otherwise played no direct role in the events of late 2008, but she is sued in her capacity as guarantor and she counter-claims both as a principal and as a guarantor.

Ranzett Ltd.: This was the company used by Mr. Dolan as the vehicle for running the Black Bull store and which operated under the Londis franchise. Mr. Dolan commenced trading at this store in February 2007, but by mid-2008 there were considerable trading difficulties. The endeavours to save this company between August, 2008 and December, 2008 are at the heart of this litigation. The company was formally dissolved in January, 2011, but it had effectively ceased trading on the 4th December 2008, the day after its credit terms were suspended by Londis.

Mattóg Ltd.: This was the company used by Mr. Dolan as the vehicle for running a Londis franchised store at Ballsgrove, Drogheda between 2004 and August, 2008. The store was sold in a share purchase agreement in August, 2008.

Paddy Devlin: Mr. Devlin was formerly a regional manager with Londis, but sometime around 2005/2006 he assumed the role of development manager. In the latter capacity he was responsible for the development of new Londis stores and the renovation of existing stores. He was very friendly with Mr. Dolan, but the unpleasant task of effecting the retention of title clause and the taking back of stock on 4th December and on succeeding days fell to him.

Paddy McGarry: Mr. McGarry joined Londis in 1972 and he became joint Manager Director in late 2003 before retiring in November, 2008. He became friendly with Mr. Dolan and had (and still has) a high opinion of him as a retailer

Mary Helen O'Dea: Ms. O'Dea is the chief financial officer with Londis. She was a member of the credit committee and reported to Mr. O'Riordan and to Mr. McGarry, the joint Chief Executive Officers of Londis.

Jackie Drew: Ms. Drew took up the position of finance manager with Londis in June, 2008. She reported to Ms. O'Dea and in September/October 2008 took over the functions which had previously been discharged by Ms. Smuts.. She had regularly monitored the Londis account and had important dealings with Mr. Dolan on the 2nd and 3rd December, 2008, in particular.

Deirdre Smuts: Ms. Smuts discharged the functions of credit manager until September/October 2008 when, following a re-organisation of duties within the Finance Department of ADM, her functions were taken over by Ms. Drew.

Paula Egan: Ms. Egan was the proprietor of the Black Bull licensed premises which adjoined Mr. Dolan's store and in respect of which she was also the lessor. Ms. Egan caused a forfeiture notice to be served on Ranzett after the store ceased trading after 4th December, 2008, and the lease was ultimately forfeited.

Stephen O'Riordan: Mr. O'Riordan was appointed joint Chief Executive Officer of Londis in January, 2004. He spoke with Mr. Dolan on 3rd December regarding the arrears in the account and took the decision to suspend credit facilities and exercise the retention of title clause on the following day.

Sean McEnroe: Mr. McEnroe was a friend of Mr. Dolan's who worked in the retail sector. He attended a retail function at a hotel in Dún Laoghaire on the evening of December 3rd and learnt from casual discussions with Londis personnel that it was proposed to exercise the retention of title clause on the following morning. He rang Mr. Dolan at 2am on 4th December on his way home from the function to advise him of this news.

Brendan Crosbie: Mr. Crosbie worked for Londis on a contract consultancy basis. He was friendly with Mr. Dolan and advised him in relation to the acquisition of the Black Bull premises. He assisted Mr. Dolan in the latter's application for a "stocking loan" from Londis in December, 2006 in anticipation of the commencement of trading at this premises in early 2007. He was driving Mr. McEnroe back from the function in Dún Laoghaire in the early morning of 4th December when Mr. McEnroe rang Mr. Dolan to advise him that Londis proposed to exercise the retention of title clause.

Shane McAleer: Mr. McAleer was Mr. Dolan's accountant.

Jeanne Kelly: Ms. Kelly was a solicitor in the firm of Dominic Dowling. This firm acted for Mr. Dolan. Ms. Kelly sought to have the second charge on Mr. Dolan's Pebble Bay, Friars Hill property registered in favour of Londis. She also gave Mr. Dolan advice on 4th December regarding the operation of the retention of title clause and corresponded extensively with the plaintiff's solicitors, Michael Nugent & Co., in the prior between 4th December and 23rd December.

The Credit Committee: The Credit Committee of Londis played an important role in making decisions regarding credit facilities for its franchisees. The Committee typically met every Wednesday morning at around 8.30am and the membership included Mr. O'Riordan, Mr. McGarry (up to his retirement in November 2008) and Ms. O'Dea. The Committee held important meetings and made critical decisions regarding Ranzett and Mr. Dolan on 26th November 2008.

PART II – THE PLAINTIFF'S ACTION

The course of the litigation thus far and the plaintiff's action for debt

6. The present proceedings initially commenced as an application by the plaintiff, Londis, for summary judgment in respect of unpaid debts by Ranzett as guaranteed by Mr. Dolan and Ms. McConnell by a contract of guarantee entered into by them on 13th December, 2006. The present proceedings had commenced by summary summons in May 2009 when the plaintiff demanded repayment of the invoices for goods and services which had remained undischarged following the effective collapse of Ranzett. On the 21st December, 2010, I granted summary judgment to Londis in the sum of €400,000 and remitted the balance of its claim to plenary hearing.

7. The proceedings were then case managed by me until the present case came on for hearing in November, 2012. At this point there were two general aspects of the case, namely, the balance of the plaintiff's claim and the defendants' counter-claim arising from the events of December, 2008.

8. At that hearing, evidence was given by Ms. O'Dea, the plaintiff's financial office, to the effect that the total sum which ADM Londis was owed was €561,283.91 in respect of unpaid invoices (which figure of course also includes the sum of €400,000 in respect of which I had already given judgment). The defendants did not seriously dispute this figure and I will accordingly give judgment against the second and third defendants qua guarantors (the first defendant having been dissolved) for the further sum of €161,283.91. ADM Londis is also entitled to Courts Act interest from the date on which payment was originally demanded, namely, 2nd June, 2009.

9. This, however, was all really a mere detail so far as the substance of the November, 2012 hearing was concerned. Virtually all the evidence was directed – on all sides – to the merits of the defendants' counter-claim for misrepresentation and breach of contract. The balance of this judgment is accordingly exclusively concerned with the defendants' counter-claim. It is, however, impossible to understand the contours of that claim without first narrating the events which led up to the effective collapse of Ranzett in December, 2008.

PART III- THE DEFENDANTS' COUNTERCLAIM

10. It is clear from all the evidence that Mr. Dolan has a real passion for retailing. Having worked as an assistant manager in a retail store in Dalkey in 1995, he than took on the position of assistant manager at a Crazy Prices outlet between 1997 and 2001. He then took over the franchise of a Costcutters store at Taylor's Lane in Rathfarnham.

11. At one point he had a brief involvement for a company called Maxworth Supermarkets Ltd. which had an outlet at the Boyne Shopping Centre and it was during that brief period that he came to the attention to Paddy McGarry of Londis. They later became good friends and Mr. McGarry often acted in the role of a sort of mentor to Mr. Dolan. It is a commendable feature of this litigation that despite their differences neither Mr. Dolan and Mr. McGarry concealed their mutual respect and admiration for the other's abilities.

12. This story really commences in 2004 when Mr. Dolan established his first store. At one point Mr. Dolan was considering acquiring a store with a Mr. Tony Ferguson, but this did not proceed. Mr. Ferguson did, however, advise Mr. Dolan in relation to the latter's acquisition of his first store at Ballsgrove, Drogheda. The premises in question were rather run-down, but Mr. Dolan acquired the premises through the corporate vehicle he had set up, Mattóg Ltd. Mr. Dolan originally operated the store as an independent retailer, but after a few months he joined the Londis franchise in June, 2004.

13. There is no dispute but that Mr. Dolan had been promised – and duly received – what is described as a "stocking loan" of €250,000 from Mr. McGarry on behalf of Londis in recognition of the fact that the Ballsgrove store was subsequently to be operated under the Londis franchise. This loan was repayable over 52 weeks on an interest free basis. The object of this type of loan was originally to provide working capital at the start of a new franchise operation to enable produce to be purchased for the shelves.

14. The evidence tendered established that stocking loans were not confined purely to start-up arrangements of this kind, but could

also be used for exceptional capital expenditures (such as renovating part of the store or up-dating equipment). In that sense, therefore, a stocking loan is really in the nature of a revolving credit facility. It is clear, however, that once it was repaid, then any further facilities of this nature would have to be sanctioned by the Credit Committee of Londis.

15. The evidence given by Ms. O'Dea and accepted by Mr. Dolan was that Mr. Dolan/Mattóg received four stocking loans. The first of these had been repaid by June, 2005. A further stocking loan for €98,675 was granted in January, 2006 and repaid by June, 2006. The third loan was for €100,000 in October 2006, but it was repaid by April, 2007. The final such loan was issued in April, 2007 and was repaid by April, 2008.

16. Here it may be observed that there is documentation in existence to vouch for the three later stocking loans. No documents have been found in respect of the first loan and counsel for the defendants, Mr. Cregan SC, urged me to draw the inference that this was because Mr. McGarry could – and did – sanction a loan of this kind on his own initiative without reference to the Credit Committee.

17. By mid-2006 Mr. Dolan thought about expanding and acquiring another store in Drogheda. His attention had been drawn to another store in the general vicinity known as the Black Bull store. The store was so named because it was right beside a major restaurant and public house situate on the Dublin road, The Black Bull Inn. Mr. Dolan acquired the lease of the premises for €600,000 and opened a credit account with Londis for the supply of goods and services for this store in December 2006. This store was to be operated in the name of the first defendant, Ranzett Ltd. and Mr. Dolan and Ms. McConnell executed the appropriate agreements (including personal guarantees) in relation to the franchise agreement. Mr. Dolan/Ranzett then obtained a stocking loan of €100,000 in respect of this premises to be repaid over a 26 week period.

18. Mr. Dolan/Ranzett commenced operations at the Black Bull premises in February, 2007. At first all went well, but by mid-2007 conditions had changed perceptibly. In September, 2007 Mr. Dolan had agreed to sell both stores for the sum of €4.8m. The purchase of Ranzett/Black Bull was ultimately to fell through because the purchasers could not raise the necessary finance, although the sale of Mattóg went ahead.

19. At all events, Mattóg was sold by means of a share purchase agreement on 19th August, 2008, for the sum of €3.4m approximately. Unfortunately, however, when the creditors – who were principally Ulster Bank and ADM Londis – were discharged, there was no remaining balance which might have assisted Mr. Dolan in keeping the affairs of Ranzett under control. But on the very day that the Mattóg deal was concluded, Mr. O'Riordan contacted Mr. Dolan regarding the deteriorating position in Ranzett, as the arrears now totalled €310,000. As a result of these exchanges, two meetings took place between the parties on 22nd August and 28th August at Londis head office.

20. The attendance at the first meeting included Mr. McGarry, Mr. O'Riordan, Ms. Smuts, Mr McAleer and, of course, Mr. Dolan. The object of the meeting was to address the arrears which had mounted in Ranzett. Ms. Smuts prepared a note of the meeting on the following day, 22nd August, which shows that the parties agreed that a direct debit arrangement would be immediately put in place providing for the payment by Ranzett of the sum of €3,800 per week. The note also recorded that Mr. Dolan was to secure finance in the sum of €150,000 in order to reduce the arrears balance on the account with a deadline of 22nd September, 2008.

21. It appears to have dawned on Mr. Dolan within a matter of days that it would be unrealistic for him to raise €150,000 within such a short period. He really could only have done this had he been in a position to sell a property, but given the way in which that market was in the course of collapsing, this was all but impossible.

22. At all events, a second meeting was held on 28th August, 2008. The same parties were present, with the exception of Mr. McAleer. On this occasion, Mr. Doland had prepared some documents for the assistance of Londis. The first document outlined his various property interests, together with the extent to which these documents were charged.

23. The second document then outlined various options. The first option involved Londis giving Ranzett some practical support. Other dimensions of this included obtaining a second charge on some of Mr. Dolan's rental properties in favour of Londis, securing the agreement of National Irish Bank to ensure that the loan would go interest only; to obtain the consent of his landlord, Ms. Paula Egan to reduce the rent and for Mr. Dolan to reduce overheads by working more on the shop floor.

24. The other options described in the document involved either the sale or leasing of the Blackbull premises in order to raise money quickly or, alternatively, the sale of the liquidation of the company. While a note attached to the document suggested that Mr. McAleer had recommended that Ranzett go into liquidation, Mr. Dolan said in evidence that liquidation was not really an option for him at that point.

25. As a result of that meeting, varied terms were agreed. In the first place Londis would take a second charge over one of Mr. Dolan's properties, namely, 75 Pebble Bay, Wicklow Town, as this property had the lowest loan to value ratio. It was further agreed that Ranzett would make weekly payments of €1,000 by means of direct debit. There was, however, a slight delay in processing the direct debit mandate, with the result that the first payment was made on 15th October, 2008. In the event, only five such payments were made.

26. Mr. Dolan maintained that it was also agreed that €250,000 of the arrears was to be re-classified as a stock loan, but this was stoutly denied in evidence by all the other parties to the meeting. If there were such an agreement, one would have expected that it would have featured in the contemporary correspondence along with, e.g., the references to the second charge on the Pebble Bay property. One would also have expected that Mr. Dolan would have made immediate claims to the facility by early September once it became clear that it was not otherwise forthcoming. None of this occurred and in the circumstances I find myself coerced to the conclusion that there was no such agreement regarding a €250,000 stocking loan at meeting on 28th September, 2008.

27. The plaintiff's solicitors, Michael Nugent & Co., wrote to Mr. Dolan on 1st September, 2008, seeking to progress arrangements with regard to the second charge. By an irony of fate, the letter was sent to what the plaintiff's solicitors understandably thought was his home address, but in fact Mr. Dolan had mis-stated his address in the documents he had supplied to Londis at the second meeting by referring to a "16 Avondale Crescent" rather than to "26 Avondale Crescent", the latter being the correct address. The upshot of this was that the letter regarding the second charge never arrived. Six weeks were unfortunately lost through a simple error, but, as we shall later see, this delay was later to have significant consequences. A further complication was that it had been assumed that the property had already been mortgaged to Allied Irish Banks, whereas it had in fact been charged to Bank of Scotland (Ireland) ("BOSI"). When Ms. Kelly realised this, she advised Mr. Nugent's office by letter dated 22nd October, 2008, that she had applied to BOSI for its consent to the second charge

28. Mr. Dolan had been very satisfied with the outcome of the second meeting in August 2008 and he emailed Mr. O'Riordan later that

evening to thank him and Mr. McGarry, saying that he "really appreciated your decision to help me going forward" and that he would not let them down. At a review meeting in early October, 2008 Mr. O'Riordan made it clear to Mr. Dolan that the second charge had to be in place by the 5th December, 2008, at the latest.

29. As we shall now see, matters came to a head in the first week of December, 2008. On 26th November, 2012, Ms. Drew sent Mr. Dolan an email to advise him that it was proposed to meet on 3rd December at 3pm "to review the operation of the account and repayment structure for arrears and progress on security". This date was important in the minds of Londis because 5th December had been the date fixed during the course of the review meeting in early October as the date by which the second charge over the Pebble Bay property was to have been put in place. This sense of urgency accelerated during the last days of November and the early days of December because the arrears on the Ranzett account had grown considerably and were now standing at some €430,000 approximately. The very fact that direct debits were being returned unpaid by the bank during this period was a matter which, very understandably, exercised the minds of Ms. Drew, Ms. O'Dea and Mr. O'Riordan at this time.

30. But Mr. Dolan was under no illusions as the importance of these developments and the imperative necessity to have the second charge in place, because on 12th November Mr. O'Riordan had sent him an email to the following effect:-

> "We need this charge FULLY in place by 5th December so real urgency needs to be put into it as a lot of legal work is involved. Failing that we will have no option but to close all accounts on that date."

31. The Credit Committee had met on the 19th November and the minutes of that meeting as recorded in the following week had stated:

> "Charge and repayment plan must see some progress. 19th Nov 200[8] – account to be suspended unless we have progress. Dolan – Stephen phoned Ray, the charge must be in place by the 5th December, a meeting was arranged for Wednesday next, the 3rd December at 3."

32. Mr. Dolan had originally understood that the meeting at Londis head office would take place at 3pm on Wednesday, 3rd December. But on the previous afternoon Ms. Drew phoned Mr. Dolan to ascertain whether he was aware that Mr. O'Riordan and Mr. McAleer (Mr. Dolan's accountant) had agreed among themselves to bring the meeting forward to 8.30am on the following morning. Mr. O'Riordan had informed Ms. Drew that the time of the meeting had been changed and Ms. Drew assumed that Mr. McAleer had duly informed Mr. Dolan of this change of time.

33. The memorandum prepared by Ms. Drew of her discussion strongly suggests that she formed the view when speaking with Mr. Dolan at about 3.30pm on 2nd December that he was entirely unaware of the change of time. Mr. Dolan requested that the meeting be rescheduled for sometime later that the following afternoon or on Thursday. His evidence was to the effect that given that he was now effectively in charge of the store by himself – given that some managers had been either recently made redundant or dismissed – he simply could not arrange for cover at short notice in order to attend the meeting. He had incidentally sent Ms. Drew an email at approximately 3.35pm that afternoon to like effect.

34. Ms. Drew agreed to speak with Mr. O'Riordan, but she told Mr. Dolan that she frankly doubted that the meeting could be re-arranged. Ms. Drew then spoke to Mr. O'Riordan who was unwilling to change the time of the meeting yet again. Ms. Drew spoke to Mr. Dolan again at 4pm telling him that:-

> "Arrears of the account had increased. Direct debits were returning unpaid and a [second] charge was not in place. Meeting was urgent and requested that Ray Dolan make necessary arrangements to attend the scheduled meeting. Failure to attend the meeting will result in immediate suspension of credit facilities for the shop."

35. Mr. Dolan sent an email to Mr. O'Riordan and Ms. Drew on 2nd December at 10.30pm in the following terms:-

> "….I apologise to you both that I cannot attend the meeting, as I have tried and can't get the cover in the shop tomorrow and I understand the consequences explained to me by Jackie if the appointment is not met.
>
> I have not got much to say to you bar two things:-
>
> 1. See attached letter to Robert Kearns from NIB. I have been pushing this as best I can.
>
> 2. Second charge: Bank of Scotland have come back today requesting how much is the second charge to be and they need a fixed amount. Again, I have been getting my solicitor to call every day and she says that they are a disaster to deal with as you can never get the same person. Also, my solicitor is off today and tomorrow because of family bereavement."

36. However, just before 10am on the morning of Tuesday, 2nd December, Mr. Dolan had sent a reminder email to National Irish Bank inquiring whether there was "sign of the new loan documents", as he was seeking to re-structure the Ranzett by switching to an interest only loan. He asked if NIB "could email me something that I can have to show Londis in the morning – I have [a] meeting at 8am". Mr. Kearns of NIB had, in fact, sent an email later on the morning of 2nd December 2008 which confirmed that NIB were willing to move towards an interest only facility for a twelve month period.

37. One of the issues of credibility which arose was whether Mr. Dolan had advance knowledge prior to the phone call later that afternoon with Ms. Drew of the fact that the time of the meeting had been changed. It is common case that Mr. Dolan did not actually attend the meeting with Londis which was held at around 8.30am on the morning of 3rd December. It is further agreed that Mr. Dolan became aware that the time of this meeting had been re-scheduled no later than about 3pm on the preceding afternoon when he received a phone call from Ms. Drew. But had he become aware of this re-scheduling before that time?

38. This question is potentially relevant to the general context of the events of the next few days, because Londis maintain that Mr. Dolan well knew the importance of the meeting and the potential consequences in the event that he did not give a satisfactory account. The very fact that Mr. Dolan did not attend the meeting was certainly a factor which may well have tipped the balance against him so far as the decision of Londis effectively to close the credit facility and to exercise the retention of title clause.

39. There is equally no doubt but that Mr. Dolan strove manfully to save his business against ever mounting odds. It is clear that he was (and is) an exceptionally hard working person who put in long hours. I also accept that it was all but impossible for Mr. Dolan to

leave the shop without appropriate cover and that it would have been extremely difficult to arrange for this if he only heard of the re-arranged meeting on the preceding afternoon. But did he know earlier than this point?

40. It is true that he was not cross-examined about the contents of the NIB email, but I gave the defendants liberty to have Mr. Dolan recalled on this point. This option was not, however, availed of and I cannot ignore either the fact that Mr. Dolan's accountant, Mr. McAleeer – who doubtless could have clarified some of these issues – was not called to give evidence.

41. In these circumstances I find myself coerced to conclude that Mr. Dolan probably engaged in some dissimulation with Ms. Drew when he told the latter that he was unaware that the time of the meeting had been changed to convenience Mr. O'Riordan. The objective evidence suggests that Mr. Dolan probably had been given a little more advance notice than he had been prepared to admit to Ms. Drew. At the same time, I am willing to accept that the change of time came late and probably was too late for Mr. Dolan to arrange replacement cover at his store.

42. At all events it is not in dispute but that neither Mr. Dolan nor Mr. McAleer attended the meeting on the following morning. It is further agreed that Mr. O'Riordan rang Mr. Dolan at about 8.45am on the following morning and interrupted the course of the meeting of the Credit Committee to enable this to be done. The Committee had agreed to suspend the Ranzett account and it is agreed that Mr. Dolan was immediately informed of this.

43. A memorandum of this critical conversation was prepared within a few days thereafter by Ms. Drew in the following terms:-

> "SOR [Mr. O'Riordan] advised Ray Dolan that the following had not happened:
>
> • Ray Dolan and Shane McAleer failed to attend a scheduled meeting with ADM Londis at 8am on the 3rd Dec 2008
>
> • Charge on the Pebble Bay property was not in place and would not be completed before the deadline of the 5th Dec 2008
>
> • Recent direct debits had been returned unpaid by the bank and the arrears position of the account had increased
>
> • SOR asked for immediate payment for the arrears.
>
> Actions:
>
> • Ray Dolan advised that he was unable to discharge his arrears
>
> • SOR advised that the decision of the credit committee was to suspend the credit facilities to the account immediately
>
> • ADM Londis intended to exercise its retention of title clause and would attend the shop tomorrow to remove stock.
>
> • SOR advised that the store would be de-branded and the Londis signs would be removed."

44. There is no doubt but that Mr. Dolan had been fully on notice that his credit facilities would be suspended if no satisfactory progress were to have been made with regard to the account and it is agreed that Ms. Drew warned him as much in advance. It is, however, also accepted that Ms. Drew did not tell Mr. Dolan *in advance* that Londis would exercise its retention of title rights.

45. While it is further agreed that Mr. O'Riordan advised Mr. Dolan of the suspension of credit facilities in view of his failure to attend the meeting and the failure to have the additional charge on Pebble Bay in place prior to the 5th December, there was disagreement as to whether Mr. Dolan had been told by Mr. O'Riordan that Londis proposed to re-take stock and to de-brand the store.

46. Ms. Drew who was present during this telephone conversation and who made a note of what she heard believes that this "was advised to Ray but unfortunately [she did not] have full recollection of that." Mr. O'Riordan was, however, emphatic that he had advised Mr. Dolan that Londis would exercise its retention of title rights on the following day and that steps would be taken to debrand the shop.

The events of Thursday, 4th December

47. In the early hours of the morning of Thursday, 4th December, Mr. Dolan received a telephone call at his home in Wicklow from a friend of his, Sean McEnroe. It is not in dispute but that Mr. McEnroe was a passenger in a car being driven by Mr. Brendan Crosbie. Both of them had attended a function in the Royal Marine Hotel where Mr. Crosbie had been Mr. McEnroe's guest. After dinner, it appears that Mr. McEnroe fell into conversation with some employees from Londis, including Mr. Devlin. Mr. Devlin and his colleagues indicated that they could not stay for much longer, because they all had to head home somewhat earlier than might have been their wont on a social occasion such as this as "they had to do a clear-out of Ray Dolan's shop the next morning".

48. At all events, Mr. McEnroe rang Mr. Dolan at approximately 2am. Mr. Dolan was asleep and missed the first call. But the phone rang again and Mr. Dolan answered the phone. It is accepted that Mr. McEnroe - who did not himself give evidence – then imparted this information regarding the actions which Londis proposed to take in the morning. Mr. Dolan insisted that this came as a complete surprise and an enormous shock to him. Having discussed the matter with his wife, he decided to get dressed and to travel immediately to Drogheda.

49. Mr. Dolan arrived at the premises at approximately 5.45am. He had rung his security company in advance and they arranged to have a security guard present at about 6.00am. Both of them opened the shop and Mr. Dolan sought to go about his normal business, while surely dreading what was about to come about later that day. At some point – probably after 9am - a Londis truck pulled up into the car park and some Londis representatives arrived separately in their own cars and also parked in the car park. (While these cars are company cars, they bear no Londis markings). At this point four representatives from Londis led by Mr. Devlin and Mr. Donoghue sought to enter the store with a view to retrieving stock pursuant to the retention of title clause. Mr. Dolan made it clear that their presence was unwelcome in the absence of documentation. While the Londis team had some invoices, Mr. Dolan was insisting on the production of all relevant invoices before he would permit them to exercise their rights under the retention of title clause. `.

50. The Londis team then agreed to send one of their number, Mr. Declan Kettle, back to the head office in Naas to retrieve these invoices. In the meantime both sides retreated to seek legal advice and the Londis team did not then seek to enter the shop. The respective solicitors for the parties exchanged correspondence during the course of that day (and on subsequent days), a topic to

which I will later return.

51. While the rest of the Londis team waited in their cars for much of the day, they made another effort to enter the shop at 1.30 pm when by this stage all the invoices were in their possession. Mr. Dolan again told them that this would not be permitted. Some cross words were exchanged at that point, but it should be recalled that this was a very difficult day for all concerned. Mr. Devlin had been a guest at Mr. Dolan's wedding to Ms. McConnell in the previous year and on that day friendships were probably at breaking point. During all this period the shop remained open and Mr. Dolan endeavoured to trade normally, insofar as it was possible to do so.

52. At around 3.30 pm Mr. Dolan came over to the cars in which the Londis personnel were sitting and expressed some regret over what had happened. He indicated that the solicitors were talking and that developments were underway. At about 5.30pm Mr. Devlin gained access to the shop and noted that it was fully stocked. He then went upstairs to Mr. Dolan's office and spoke with him. Mr. Devlin gave evidence that Mr. Dolan had said that he was going to put the company into liquidation and that he would speak with his solicitor on Monday, 8th December. Mr. Devlin rejected the suggestion in cross-examination that this was something which was merely said in the heat of the moment at the end of a difficult day or that Mr. Dolan had merely stated that he was consulting his solicitor. Rather, Mr. Devlin stated that he had been left with the impression that this was something to which Mr. Dolan was committed. Certainly, this was the view which Mr. Devlin communicated to Ms. Drew the following morning (Friday 5th) and this information certainly influenced the thinking of Londis management thereafter.

53. As it happens this point was not directly put to Mr. Dolan in cross-examination. While I indicated a willingness to allow Mr. Dolan's recall for this purpose, in the event this did not occur. It was, however, put to Mr. Dolan in cross-examination that he had made a decision on that day to close the shop:-

> "A. But sure I had to, to give the lads back their retention to their stock that they wanted. There was no other way of doing it.
>
> Q. Well, you could have purchased stock from somewhere else.
>
> A. But to divide it all up and go everything, it is impossible."

54. Mr. Dolan then closed the shop early at about 9pm that evening. The shop never re-opened for general retail business.

55. I should say at this point that I accept Mr. Dolan's evidence that he was unaware until he received the phone call in the early hours that Londis proposed to re-take its stock. This is not in any way to doubt the account given by Mr. O'Riordan and Ms. Drew, but I think what must have happened is that until he received that phone call in the early hours it simply did not register with him that Londis intended to take this step, irrespective of what Mr. O'Riordan may or may not have said to him. Any other conclusion would suggest a remarkable degree of calculation on Mr. Dolan's part.

56. In my judgment, his actions in travelling to Dundalk in the early hours of the morning are consistent only with the actions of a man who has just had this dreadful news imparted to him. If Mr. Dolan had realised the fate which was in store for him immediately after the phonecall with Mr. O'Riordan, it is impossible to believe that he would not immediately have taken immediate steps to protect his position. It is, of course, possible that Mr. Dolan knew already from the telephone call with Mr. O'Riordan at 8.45am on the previous morning that Londis would exercise its retention of title clause and that he reacted in the fashion which he did in order to self-corroborate his story that he had just learnt of these developments.

57. This latter possibility strikes me as inherently unlikely. After all, Mr. Dolan was not to know that a chance conversation at a social function where he was not present would prompt a phone call to him from a friend in the middle of the night. His actions accordingly have the inherent verisimilitude of spontaneity and I accordingly reject any suggestion that this account was some elaborate contrivance to bolster a story that he was unaware of what Londis were planning.

58. In this regard, I also accept that a letter was prepared by Ms. Drew for Ms. O'Dea to sign on the 3rd December, 2008, which stated that:

> "Due to the continued default in relation to payments, credit facilities for your accounts have been withdrawn immediately. ADM Lonis plc advises that we intend to exercise our retention of ownership clause and our stock will be repossessed on the 4th December, 2008"

59. While Ms. Drew and Ms. O'Dea believe that the letter was sent out, no formal proof of posting was available. Mr. Dolan maintains that he did not receive it (in part perhaps because the actual address on the letter was incomplete). But even if the letter had been posted, it seems unlikely that Mr. Dolan would have received it before 9am – Mr. Dolan gave evidence that his post normally arrived around mid-day -the time when the Londis representatives arrived to exercise their retention of title rights. Accordingly, nothing greatly turns on whether this letter had actually been received or not.

The events of Friday 5th December, Saturday 6th December and thereafter

60. Mr. Dolan returned to the store on Friday 5th and commenced to segregate the stock between Londis supplied goods and other goods. This process continued all day. In the meantime Londis personnel had been monitoring developments. A queue had materialised outside the shop on that Friday morning: these were mainly pensioners who were seeking to collect their pension entitlements from the An Post outlet which was operating within the premises. Several calls were then made to Londis head office regarding the question of whether – and when – the post office was re-opening.

61. It is clear from the evidence of Mr. O'Riordan that these developments caused some understandable alarm to Londis, since there was a real risk that this company might be blamed for the failure of the post office to open. In the fraught times which then prevailed, it even have raised questions in suspicious minds as to whether this was some early sign that Londis might be in financial difficulties.

62. Thus was a risk Mr. O'Riordan which – perfectly understandably – was simply unwilling to take. He then gave a direction that the shop should be "de-branded", so that all Londis marks and signs should be removed immediately. Mr. O'Riordan gave an instruction to this effect at about 3pm that afternoon and some time later evening the signs were removed from the outside of the shop. Some patrons of the nearby licensed premises saw these signs being removed and this fact appears to have been communicated to the lessor of the store premises, Ms. Egan, who was also the proprietor of the licensed premises.

63. Mr. Dolan attended the premises again on Saturday, 6th December to continue with the work of segregating the stock. He was confronted with the fact that, to his utter dismay, the signage had been removed. This was a final – if painfully symbolic - indication

for him that it was pointless to continue on.

64. The shop never opened for business again, save that Mr. Dolan arranged for premises to be opened for a few days in the following week to enable the post office customers to walk through the store to gain access to the post office. During this period the rest of the store was physically cordoned off, thus facilitating direct access to the post office from such customers.

The mis-understandings between the parties
65. Here, however, it is necessary to dwell on what seems to have been a number of mis-understandings between the parties which exacerbated the differences between the parties, contributed to an atmosphere of mistrust and recrimination and was ultimately to the advantage of neither party.

66. First, Londis personnel had clearly – and again understandably – ran out of patience with Mr. Dolan in the days leading up to the 3rd December. The arrears had escalated dramatically and quickly in the preceding few days and the second charge on the Pebble Bay property had proved as elusive as ever. Furthermore, Mr. Dolan did not turn up to the early morning meeting on December 3rd. While I think that his absence was pardonable in the circumstances, it caused ADM Londis nonetheless to form the view that he was deliberately refusing to confront the debt issue.

67. Second, Mr. Dolan over-reacted in not allowing Londis to enter the shop premises to re-take the stock pursuant to the retention of title clause. Yet Londis did not make clear to him in the following days that its team were only interested in high value boxed items (such as alcohol and cigarettes) and that full product segregation – which would *de facto* have involved a store closure over the several days (with inevitable and catastrophic effects) was not actually necessary.

68. Third, this mis-understanding caused another one. If the store had remained open – even with reduced stock levels – Londis would not have found it *immediately* necessary to de-brand the store because of the potential reputational issues associated with the fact that the Post Office branch could not open as a result.

69. Fourth, Londis did not make clear whether they were actually terminating the contractual relationship, something which caused the defendants considerable difficulties.

The correspondence between the solicitors
70. Several letters were exchanged between the respective solicitors on 4th December, 2008 on the days thereafter. Shortly after 1.00pm on 4th December Michael Nugent & Co., solicitors for ADM Londis, sent a letter by facsimile to Mr. Jeanne Kelly of Dominic Dowling, solicitors for Mr. Dolan. The letter provided in material part as follows:-

> "We specifically draw your client's attention and the attention of Ray Dolan and Annaliese McConnell, to clauses 2, 3, 4, 5 and 6 of the Standard Terms and Condition of Trading of ADM Londis Plc which contains both the reservation of title clause together with our client's right to repossess their stock.
>
> We have been advised that your client is obstructing our client from repossessing its stock and we would ask you to request your client to cease and desist from such obstruction. We request that these conditions be strictly adhered to and that your client now allows our client access to the premises immediately to repossess his stock. In the event [that] yours client does not allow our client entry onto premises to repossess their stock, our client will pursue Ranzett Ltd. for breach and will pursue Ray Dolan and Annaliese McConnell for conspiracy to breach these conditions and on foot of their guarantees, for any losses arising.
>
> If it is the case that your client remains in breach of these conditions and obstructs our client from entering the premises or obstructs our clients from repossessing their stock, we intend to apply to the High Court for injunctive relief and shall apply for all costs arising from such an application to be awarded against your clients. We hope that any such action will not be required. We await hearing from you as to whether your client will now allow our client access to the premises to repossess their stock."

Later that afternoon Ms. Kelly responded also by facsimile in the following terms:-

> "I have now taken my client's instructions. My client denies that he is trying to obstruct your client from repossessing stock. My client instructs me that a number of personnel from your client company arrived at my client's premises at the Dublin Road in Drogheda without any notice and informed my client that they were going to enter and seize all stock belonging to ADM Londis Plc.
>
> As you are no doubt aware from the Carroll Group case, goods the subject matter of retention of title claim must be identifiable. My client cannot permit your client to enter the premises and take stock without first ensuring that the stock properly and correctly belongs to ADM Londis Plc. My client must be afforded an opportunity to clearly identify any stock belonging to your client as some of the stock on the premises was supplied by suppliers other than ADM Londis Plc. My client may have breached Condition 4 of your client's trading terms. My client has confirmed that he is now in the process of trying to identify your client's stock and soon as he identifies same he shall revert to you further [and] he hopes to have identified all stock within the next 48 hours. My client further instructs me that without any notice he received a telephone call from your client's CEO, Stephen Riordan, who informed my client that he was closing all the accounts. This constitutes a fundamental breach of my client's contract with your clients, the effect of which may be to put my client out of business and I am meeting with my client to take full instructions in this regard. It may well be the case that my client will have to institute proceedings against your client in this regard. My clients will only be in a position to allow your clients access to the premises to repossess their stock when your client's stock is clearly identified. I trust that this clarifies the position."

71. Later that afternoon Messrs. Michael Nugent & Co. responded by saying:-

> "Further to our conversation this afternoon, we now enclose herewith copy of the standard terms and conditions of trading of ADM Londis Plc and we note that you will discuss the implications of these terms and conditions of your client.
>
> We specifically draw your client's attention, and the attention of Ray Dolan and Analiese McConnell, to clauses 2, 3, 4, 5 and 6 of the standard terms and conditions of trading of ADM Londis Plc, which contains both the reservation of title laws, together with their clients to repossess their stock.

> We have been advised that your client has obstructed our client from repossessing its stock and we would ask you to request your client to cease and desist from such obstruction. We request that these conditions be strictly adhered to and that your client now allows our client access to the premises immediately to repossess its stock. In the event your client does not allow our client's entry on the premises to repossess their stock our client would pursue Ranzett Limited for breach [of contract] and will pursue Ray Dolan and Analiese McConnell for their conspiracy to breach these conditions and on foot of their personal guarantees from any losses arising. If it is the case that your client remains in breach of these conditions and obstructs our client from entering the premises or obstructs our client from repossessing their stock we intend to apply to the High Court for injunctive relief and should apply for all such costs arising from such an application to be awarded against your client.
>
> We hope that any such will not be required.
>
> We await hearing from you as to whether your client will now allow our client's access to the premises to repossess their stock."

72. Before Ms. Kelly could reply to that letter, Messrs. Michael Nugent & Company then sent another letter on 5th December, in the following terms:-

> "We wish to address one matter in your letter of yesterday which we feel requires some clarification as it appears that you have only been partially instructed. That issue is the complaint that your client's accounts with ADM Londis Plc have been closed. We wish to explain that your client's trading accounts with ADM Londis plc. have been suspended only (which is a temporary closure rather than a permanent closure) because the accounts have been let run into dramatic and escalating arrears with a large balance due, because your client again on Monday of this week balanced a direct debit payment on the accounts and because your client refused to turn up for a meeting to be arranged for him with his accountant. Mr. Dolan was warned in advance if he failed to turn up for the meeting all of his accounts would have to be closed. It was his choice and the accounts have now been suspended.
>
> Even at this stage, if your client attends a meeting with our client and agrees a way a forward in bringing his accounts back within credit terms, the suspension can be lifted. Until such is arranged, the accounts will remain closed and Mr. Dolan will have to sort his stock for his shop elsewhere. You will understand that our client cannot continue to supply your client with stock for the shop without payment and particularly so if your client will not even meet to discuss payment.
>
> Whether or not your client closes the shop is a matter for your client. Our client continues to insist on payment for the stock supplied to date and will not supply any further stock until the current situation is addressed."

This letter seems to have been preceded by another letter from Michael Nugent & Company on the same day which stated unambiguously that:-

> "Your client's accounts have been closed as they are in breach of their trading terms to their client, including, *inter alia*, having run up in excess of approximately €500,000 in arrears on his accounts with our client."

The letter also stated:-

> "It is not our client's intention to repossess any stock belonging to any other person or supplier, and if your client can provide evidence of the ownership for any goods he suspects are owned by him or any other supplier, our client will not remove it. However, we believe that the amount of stock supplied by other suppliers is minimal and that this is only a tactic to delay our client from entering the shop to gain time to dissipate and remove our client's stock from the shop.
>
> You make reference to Condition 4 of the Terms and Conditions of trading with ADM Londis plc. and you flagged your concern as to whether your client is in breach of this condition or not. As you are aware, Condition 4 provides that if your client sells any products which have been purchased from our client which have not been paid for and which are therefore the subject of retention of title that your client must account to ours for the proceeds of sale of such accounts and that such proceeds must be lodged with separate accounts. We now demand that this condition be strictly adhered to and that your client now accounts to our client immediately for the proceeds of sale of all products purchased from our client which has not yet been paid for."

73. While there is no doubt at all but that Ranzett ordered and obtained stock - and indeed, for that matter, considerable quantities of stock - which it ultimately could not pay for, it should be stated immediately that there is no evidence at all that the defendants dissipated stock in the improper manner which ADM Londis – perhaps understandably - feared. It is likewise clear to me that Mr. Dolan was personally taken aback, and indeed, affronted that ADM Londis would seek to exercise its retention of title rights in this fashion and that his unwillingness to allow them access to the premises simply reflected these concerns. For the avoidance of any possible doubt, I should state that I am perfectly satisfied that the standoff which took place on 4th December 2008 was the result of a perfectly legitimate dispute as to the extent of Londis's entitlement under the retention of title clause and that it was not some contrivance on the part of Mr. Dolan to keep Londis's representatives at bay while their stock was dissipated or even pilfered. At the same time, one must also record that that ADM Londis did not receive payment for any goods sold on the last day of trading on the 4th December, so that Mr. O'Riordan's apprehensions were borne out – at least to some degree - by what ultimately transpired.

The actual repossession of the stock by ADM Londis

74. It was clear to Londis either late on the evening of Thursday 4th December, 2008 or, at the very latest, by early morning on 5th December, 2008, that Mr. Dolan had arranged with Mr. Tommy Devlin of Londis that he (Mr. Dolan) would allow ADM Londis access to the shop on Monday 8th December, 2008, once he was able to identify stock which had been sourced through another outlet, namely, ValuCentre: see here the email from Ms. Drew to Mr. O'Riordan to this effect sent at 11.00am on 5th December, 2008.

75. The correspondence then continued with a further letter from Ms. Kelly on 8th December, 2008, which set out the defendant's version of events and Michael Nugent & Company replied on 9th December, 2008, responding in kind. On 9th December, 2008, Ms. Kelly wrote a further letter stating:-

> "My client confirms that your client's stock is now available for collection and he is suggesting meeting your clients at the premises The Bull, Dublin Road, Drogheda on Friday 12th instant for the purpose of collecting same."

There then followed some further correspondence regarding the collection and repossession of the stock.

76. It was accepted that Mr. Dolan had at least €85,000 worth of stock in his premises on 4th December. While ADM Londis allow its franchisees to purchase up to 10% of stock from local and non-Londis suppliers, in the case of Mr. Dolan it was agreed that the actual figure for non-Londis stock was somewhere between 10% and 20%.

77. For my part, I fully accept the evidence given by Mr. Devlin that he and his team operate in very professional manner and that they would have been able to recover the most-coveted stock – such as alcohol and cigarettes – in a very discreet and low key fashion with minimal disruption to the retailer and customers.

78. There is no doubt, however, but that Mr. Devlin was presented with a difficult and most unusual situation. Not only was he very friendly with Mr. Dolan – he had, after all, attended the wedding of Mr. Dolan and Ms. McConnell in the previous year – but he had never previously encountered a situation where access to a premises had been refused to Londis representatives exercising retention of title rights. A further complication was that both sides had retreated to seek legal advice during the course of 4th December.

79. There was nevertheless some confusion and uncertainty within ADM Londis concerning both the manner in which the stock should be repossessed together with the extent to which it should be retrieved. Pressed on this point in cross-examination, Mr. Devlin fairly accepted that he had not made his intentions clear:-

> "Q ….You didn't say to him any any stage, 'Listen Ray, we are only here to take a few cases. We are only here to take the alcohol and the cigarettes, we are leaving everything else behind.' You never said that to him, sure you didn't?
>
> A. I never said that. Nor was I asked.
>
> Q. Wouldn't you accept, Mr. Devlin, that in the circumstances where you are going in to seize the goods, wouldn't it have been more reasonable for you to have told me what it was you wanted and what it was you didn't want?
>
> A. I didn't get the chance to say [those] things.

80. Mr. Devlin then accepted that he had had three conversations with Mr. Dolan during that day:-

> "Q …..And not once in those three exchanges did you ever say to Mr. Dolan….we are only here to take away a few cases?
>
> A. We were [doing] a retention of title. That is what we were doing. We were reserving our right to take what stock we wanted."

81. Mr. Devlin then gave evidence that his team really sought out the high value items and were not interested in either perishable or loose stock, even if that stock had originally come from ADM Londis. Nor was he interested in seeking the stock which had come from other retailers.

82. Mr. Devlin accepted that the task of segregating the stock between ADM Londis stock and stock which came from other retailers would take "some time". While he accepted that this process ultimately had to be done on the shop floor, he would not accept that it was reasonable for Mr. Dolan to have closed the store on December 5th for the purpose of segregating the stock, because it was necessary to keep "the store open at all costs." He did not, however, demur from Mr. Cregan SC's observation that all of this was rendered much more difficult by reason of the solicitors' correspondence which had threatened legal action if Mr. Dolan had sold any Londis goods. He further agreed that "in a small store like Mr. Dolan's he has first to get rid of the stock on the shelves before he can replenish the shelves with new stock".

83. As it happens, Mr. Dolan had appointed an independent stock taker and it was agreed in evidence that this process would take the better part of a working day. While Mr. Devlin accepted that he had told Ms. Drew in an email on 5th December, 2008, that gathering up the loose stock would take a week, his team were never interested in retrieving anything other than high value, boxed stock.

84. As it happens, the stock was ready for collection on Monday 8th and on Tuesday 9th Ms. Kelly sent a letter to Mr. Nugent's office to this general effect. Mr. Devlin's team then waited for confirmation from the lawyers that it was appropriate to collect the stock, but it was Friday 12th December before this could be done. On that day Mr. Devlin's team retrieved the full cases of groceries to a value of approximately €3,600 and €2,300 of loose cigarettes. Unfortunately, there was no lorry available on that Friday to repossess the alcohol, but this was ultimately done on the following Monday, December 15th when wines and spirits to the value of €14,000 were re-taken.

85. All in all, some €20,000 of stock was retrieved, leaving a balance of some €65,000 of stock or thereabouts. Mr. Devlin accepted that it was only then that Mr. Dolan was informed that it was not intended to repossess any more stock, with final confirmation coming on 23rd December, 2008, in a letter from Michael Nugent & Co. to the effect that ADM Londis had exercised its retention of title rights "to repossess the stock to the full extent that it wishes to do so" and that "it will not be seeking to take away the balance of the stock remaining in the shop."

86. The removal of the signage and the effective closure of the shop premises were to have other unhappy consequences for the defendants. The Black Bull Inn was, so to speak, wrapped around the back of the shop and the closure of the shop premises created huge difficulties in terms of public perception for the proprietors of this restaurant and public house. The proprietors accordingly caused a forfeiture notice to be served on the defendants on 15th December, 2008, requiring them to pay the rent or to suffer a forfeiture.

87. At that point, the defendants were not in arrears of rent which was, by virtue of a recent agreement with the landlord, Ms. Paula Egan, then being paid weekly. At that point, however, once the shop was closed, the defendants were totally without the benefit of any cash flow to service the rent. Since, therefore, the rental payments could not be kept up, the lease was promptly forfeited on 22nd December. This in turn led to a cascade of claims. The forfeiture of the lease meant that the National Irish Bank loan could not be served and this led to the bank seeking and obtaining a judgment against the second and third defendants for some €650,000. Likewise, Friends First took steps to re-possess the leasing equipment (such as refrigerators and air conditioning units) which they then sold and then pursued the second and third defendants for the balance.

88. On the 8th December Londis's media advisers prepared a draft statement dealing with the debranding issue:-

> "ADM Londis plc can confirm that on Wednesday 5th December, 2008, it ended its relationship with Ray Dolan due to the retailer's breach of franchise terms with the Londis Group. All store signage and existing ADM Londis property will be removed from the store over the coming days.
>
> The Post Office facility based in Dolan's Store is in no way connected with ADM Londis plc and is the sole responsibility of the retailer."

89. On 23rd December Bank of Scotland Ireland wrote to Ms. Kelly confirming their agreement to the second charge in favour of Londis. From Mr. Dolan's perspective this, unfortunately, was some three weeks too late.

PART IV – THE LEGAL ISSUES

90. So much for the history of these events. It is against that background that we can proceed to examine the legal issues which arise.

Can the second and third defendants qua guarantors assert a counter-claim on behalf of Ranzett?

91. Given that Ranzett has gone into liquidation, the first general question which now arises is whether Mr. Dolan and Ms. McConnell qua guarantors can rely on any claims which might have been available to Ranzett by way of equitable set-off. It is, of course, quite clear that a guarantor can generally rely on the *defences* which the principal could have asserted by way of defence. Thus, in Phillips and O'Donovan, *The Modern Contract of Guarantee* (2nd Ed.) the authors state (at 676):-

> "In order that the guarantors be exonerated from liability, they may seek to rely on any claims and defences which the principal has against the creditor."

92. But the claim advanced by the defendants is one of *counter-claim* and not by way of defence. While there is a very clear and close overlap in practice between claims going to defence on the one hand and those which go by way of counter-claim on the other, it is clear from the Supreme Court's decision in *Prendergast v. Biddle* (1957) that defence and counter-claim cannot be entirely assimilated with each other, at least so far as the scope of equitable set-off is concerned. Although *Prendergast v. Biddle* (1957) acknowledged these differences, the judgment of Kingsmill Moore J. also makes it clear that any court called upon to do so enjoys a discretionary jurisdiction derived from standard equitable principles so as to permit equitable set-off as between the plaintiff's liquidated claim and the defendant's general counter-claim.

93. It must, nevertheless, be acknowledged that, subtle theoretical differences notwithstanding, the manner in which equitable set-off operates in practice is not altogether different from that of defence, even if the operation of the former is contingent on discretionary factors

94. What has never been formally decided in this jurisdiction is whether a guarantor can qua surety advance a counter-claim by way of surrogate for the principal debtor. This point was admittedly raised in *ADM Londis plc v. Arman Retail Ltd.* [2006] IEHC 309, but Clarke J. in the course of holding that it could not be appropriately resolved in the course of an application for summary judgment, noted that the point had yet to be determined by either the Supreme Court or, for that matter, by this Court in this jurisdiction.

95. Before examining briefly the case-law from other jurisdictions touching this question, it is worth noting that the standard remedy available to the surety in this situation suggested in some of the case-law (see, e.g., *Cellulose Products Pty. v. Truda* (1970) 92 WN (NSW) 561, per Isaacs J.) - namely, to join the principal debtor to the proceedings – is in practice unavailable to the second and third defendants in the present case for the very good reason that in the immediate aftermath of my granting summary judgment against it for the sum of €400,000 in December 2010, Ranzett was dissolved. It is, of course, possible to envisage a state of affairs whereby Ranzett might have been restored to the register for the purpose of joining in the litigation, but this would seem to be an unnecessary and, indeed, a rather pointless, formality.

96. Next, it may be noted that whereas all are agreed that the surety can avail of all possible defences available to the borrower, some of the Australian case-law – commencing with the decision in *Cellulose Products* – denies that this extends to cross-claims which might otherwise be available by way of equitable set-off were the lender a defendant. If this were indeed the law, it would mean that much would turn on the characterisation of a particular claim as going strictly to matters of defence as distinct from that of counter-claim. Yet that distinction is itself so fine that it defies ready and consistent characterisation and, in any event, begs the question as to whether the right of the surety should remain so precariously contingent on so slender and elusive a distinction.

97. One might also observe in passing that the experience of the legal system with questions of characterisation has in general not been altogether a satisfactory one. Whether it be the law/equity divide prior to the enactment of the Supreme Court of Judicature (Ireland) Act 1877 or the procedure/substance divide for the purposes of determining what law should be applied by the *lex fori* by reference to conflict of laws rules or the public/private divide in the context of the scope of O. 84, experience has shown that to permit the resolution of issues by reference to abstract characterisation principles has rarely been to the advantage of the legal system. Quite the contrary: the resolution of these questions has consumed large amounts of judicial time and has tended to produce unprofitable litigation, often with a confusing and inconsistent jurisprudence as its end product.

98. This whole point may be illustrated by the analysing the claim in relation to the stocking loans and taking this as a representative example. The defendants contend that Ranzett entered into its contractual relationships with ADM Londis by reason of misrepresentations made to the former regarding the availability of a stocking loan as large as those extended in relation to Mattóg. Supposing – contrary, as it happens, to my view of the evidence – it were to be concluded that Ranzett entered into the contract by reason of misrepresentations of this kind. Is then to be said that the right of the surety to rely on such arguments is to depend on whether this is a matter which should be regarded as a matter of defence or whether it is nature of a separate counter-claim? But misrepresentation itself covers a spectrum of possibilities ranging from that which is a properly matter of defence strictly so-called (as in a plea of *non est factum*) to that which might be regarded in strictness a counter-claim arising from a collateral contract. Yet even the most fastidious of contract lawyers rarely stop to characterise contractual claims in this fashion, not least given that the evolution of the law of equitable set-off – certainly in this jurisdiction since the Supreme Court's decision in *Prendergast v. Biddle* (1957) - means that, for the most part, equitable set-off operates in a practice like a defence and generally has the same practical results, even if the party asserting it must also successfully invoke the discretion of the court for this purpose. So why should the right of the surety to advance the point be dependent on such a characterisation?

99. One could, of course, posit a cogent theoretical case against admitting cross-claims of this kind brought in the name of a mere surety as distinct from the principal obligor. Drawing on the judgment of Isaacs J. in *Cellulose Products*, the relevant arguments are

set out thus in Andrews & Millett, *Law of Guarantees* (5th Ed.):-

> "There are a number of justifications for this restriction. These are that:-
>
> a. the cross claim is not a mere failure of consideration but is an independent claim, and not being due to surety cannot be invoked by him;
>
> b. the principal has a right to decide whether to bring his claim in his own action or by counterclaim in an action by the creditor;
>
> c. if the surety is allowed to set up a counterclaim it must bar a future action by the principal, and that since the amount of the gross claim might be greater than the creditor's demand under guarantee, the mere setting up as a defence would deprive the principal of his right to recover the whole amount;
>
> d. the surety should not be allowed to assert the cross claim to the exclusion of his co-sureties, and among them there should be a parity of treatment; and
>
> e. the claim by the surety for unliquidated damages may deprive the creditor of the right to full recovery, since the principal would be able to set up the unliquidated damages claim himself against the creditor subsequently, not being bound by any judgment between the creditor and the surety.
>
> The surety can, however, utilise the principal's cross claim for unliquidated damages against the creditor in his defence if he join the principal as a third party to the action brought by the creditor against him, claiming his indemnity."

100. It may also be noted, however, that the authors note the divergence between the English and Australian case-law on the topic, suggesting that the "Australian authorities to the effect that the surety has no defence to the creditor's claim based on the principal's rights of set off should be approached with a degree of caution."

101. In the present case, however, objections of the kind summarised by Andrews & Millett remain largely speculative and theoretical, for the very good reason that there is no prospect at all that Ranzett would be in a position to take such a case. There is, moreover, the fact that Mr. Dolan and Ms. McConnell have not been drawn into this litigation by reason of a contract of suretyship with only a distant connection to the performance by the principal of its contractual obligations. Rather, they (especially Mr. Dolan) were at the centre of all of these transactions and were, moreover, contractually bound in their own right by many (if not all) of the self-same contractual obligations which bound Ranzett. As we shall presently see, the claim against them as guarantors is interwoven with the performance by them (and by their corporate vehicle, Ranzett) of their contractual obligations.

102. Besides, many of the argument in favour of such an approach as summarised by Andrews & Millett (which, in turn, reflect the arguments contained in the leading judgment of Isaacs J. in *Cellulose Products*) can, in any event, be addressed in other ways, at least again so far as the facts of this case were concerned. After all, a defendant seeking to invoke an equitable set-off must himself or herself do equity (*cf*. here the judgment of Clarke J. in *Moohan v. SR Motors (Donegal) Ltd.* [2007] IEHC 435, [2008] 3 IR 650) and in the present case I will direct that it will be a condition of permitting such a claim by the guarantors that the defendants do not permit Ranzett to be revived for the purposes of advancing such a claim by the company. One might also observe that any moneys received by the second and third defendant by way of cross-claim which exceeded the plaintiff's claim for a liquidated amount would be held by them under a constructive trust for the benefit of Ranzett.

103. One might in any event observe that even Isaacs J. allowed in *Cellulose Products* that the insolvency of the principal debtor was an exception to the rule which he propounded. For good measure, I would also note that while *Cellulose Products* has its admirers (*cf*. the judgment of Slade L.J. in *National Westminster Bank plc v. Skelton* [1993] 1 WLR 72, 79 who described this reasoning as "impressive"), yet others have doubted whether such a rule should be adopted: see, *e.g.*, O'Donovan and Phillips, *The Modern Law of Guarantees*, para. 11.59, *BOC Group Ltd. v. Centeon* [1999] 1 All ER (Comm.) 53, *per* Rix J. and *DWA Ltd. v. Gillam* [2012] NZHC 1875, *per* Matthews J. Indeed, it should be noted that even in *Skelton* Slade L.J. had noted the existence of the insolvency exception and he observed, moreover, that a statement in Halsbury's Law of England (4th., Vol. 20)(1978) at para. 190 to the effect that a surety could step in the shoes of the principal debtor to advance a counter-claim when sued on the guarantee by the creditor had itself been previously approved by the English Court of Appeal in Hyundai Shipbuilding & Heavy Industries v. Pournaras [1978] 2 Lloyd's Rep. 502.

104. For all of those reasons, I reject the argument that Mr. Dolan and Ms. McConnell cannot rely on any cross-claim which Ranzett might have been able to advance by way of equitable set off as against ADM Londis. In view of this conclusion, it is unnecessary to address any objection based on *Foss v. Harbottle* (1843), because the contract of guarantee allows Mr. Dolan and Ms. McConnell in effect to step into the shoes of the company and to advance any argument qua guarantor which the company could have advanced in its own right.

Was there any collateral contract regarding the provision of a stocking loan?

105. One of the principal arguments advanced by Mr. Dolan is that he had been promised that he would be afforded the same credit facilities with regard to Ranzett as he had been afforded with regard to Mattóg and that Mr. McGarry had frequently made a commitment of this kind. I have already dealt with (and rejected) the claim with regard to the contention that there was an agreement at the meeting of 28th August, 2008, to re-classify arrears as a stocking loan. I will now deal with the balance of the claim regarding the provision of a stocking loan of €250,000 to Ranzett.

106. It may well be that prior to the establishment of Ranzett in 2006 Mr. McGarry gave generalised assurances to Mr. Dolan regarding future credit terms, but I cannot accept that he did so in such unequivocal terms as admit only of the conclusion that he gave a definite promise such as would have induced Mr. Dolan (and, by extension, Ranzett) to enter into contractual relations with ADM Londis. Here it may be observed that not only has no documentation been advanced by the defendants in support of this contention, but one must also note that when Mr. Dolan signed the relevant contract documentation with regard to Ranzett in December 2006, the stocking loan applied for was €100,000. Mr. Dolan likewise applied for two further stocking loans for lesser amounts in respect of Ranzett, but at no stage prior to December, 2008 did he ever assert an entitlement of the kind in question.

107. Moreover, I accept the evidence of Mr. McGarry to the effect that while he was prepared to offer the same credit terms to Ranzett as he had for Mattóg, the size of the stocking loan was an entirely different matter. This was well put in the following exchanges between Mr. McGarry and Mr. Cregan SC in the cross-examination of the former by the latter:-

"Q. …Mr. Dolan gave evidence that you said to him on many occasions that if he set up another store he would get exactly the same credit terms as you had given to Mattóg.

A. Credit terms, yes but not stocking loans. That's I disagree with Mr. Dolan…I don't disagree with stocking loans, I disagree with the size of the stocking loan.

Q. …do you accept therefore that what you did say to Mr. Dolan was that if he bought a second store and if he entered into a second franchise agreement with Londis that you would offer him exactly the same credit terms?

A. With the exception of the stocking loan.

Q. …but you did not carve out that exception, if I could put it that way, when you were talking to him, sure you didn't?

A. We had no store at the time when we were talking to him…

Q. But you indicated to him that if you found a second store that Londis would offer him the exact same credit terms; isn't that right?

A. No, Londis would offer him a stocking loan, 28 days credit and a central billing account. The size of the stocking loan would never have been discussed.

Q. …what I want to put to you, Mr. McGarry, in fact is that no store has been identified that you did not actually go into the full details of the situation; isn't that right?

A. No, no. I would have offered him the terms…but until we find the store we wouldn't be able to say whether it needed 50,000, 100,000, 200,000 or 250,000.

Q. …but you had offered him the same terms; isn't that right?

A. I would have offered him a stocking loan suitable for the store.

Q. You would have offered him the same terms, the same credit terms including a stocking loan, isn't that right?

A. Yes, and I did that for Ranzett.

Q. So in other words what you were saying is that you accept that you did say to Mr. Dolan that if he went with Londis that Londis would offer him first of all the same credit terms, you would agree with that?

A. 28-30 [days] is standard for everybody in our company.

Q. And secondly they should offer him a stocking loan; isn't that right.

A. Correct.

Q. But you believe you didn't agree…

A. No.

Q. The size of the stocking loan, isn't that right?

A. No, we never agreed the size of the loan because it has to go before a credit committee and it is done in conjunction with the area manager."

108. These exchanges compel me to conclude that there was no such representation in the manner suggested by Mr. Dolan. Nor was there any evidence which would objectively bear out his claim that at the second meeting on 28th August, 2008, ADM Londis had agreed to classify the arrears as a stocking loan if a second charge on the Pebble Bay property could be put in place and weekly payments of €1,000 were made by Ranzett. There was, at most, I think, a fond hope on his part at various stages between 2007 and 2008 that ADM Londis would facilitate him by granting a similar sized stocking loan to Ranzett as had been granted to Mattóg, but as both Ms. O'Dea and Mr. O'Riordan pointed out, ADM Londis were in the business of retail and not in the business of banking.

109. In view of these findings, the issue of a collateral contract or a misrepresentation whether on the part of Mr. McGarry in particular or ADM Londis in general simply does not arise.

The retention of title clause

110. Clauses 2, 3, 4, 5 and 6 of Londis' standard terms and condition of trading ("the trading terms agreement") dealt with the issue of retention of title. Clause 2 provided that title to the goods remained with ADM Londis until the latter entity was paid in full and clause 3 provided that pending payment the retailer was to hold the goods as ADM Londis' agent or bailee.

111. Clause 4 provided that:-

"The relationship between ADM and the purchaser is a fiduciary relationship and the purchaser is obliged to keep both the goods supplied and the proceeds of sale of those goods separately from the purchaser's own goods and monies and in such a way as to clearly identify them as the property of ADM. The purchaser shall also account to ADM for the proceeds of sale of all goods supplied by ADM to the purchaser."

112. Clause 5 provided that pending payment of the price of the goods the retailer was at liberty to re-sell them, but subject to the conditions therein specified.

Which party terminated the contract?

113. In addition to the standard terms and conditions of trading, there were two other documents which governed the contractual relationship between the parties: the standard terms and conditions of the ADM Product Placement Agreement ("the Product

Placement Agreement") and the standard terms and conditions of the Londis Franchise Agreement ("the Franchise Agreement"). Many of the obligations contained in these agreements were of the standard kind, but it suffices to draw attention to a number of key clauses.

114. Clause 6(b) of the Product Placement Agreement imposed an obligation on the purchaser (*i.e.*, Ranzett) "to promptly pay to ADM all monies due to ADM".

115. Clause 8 of the same agreement deal with termination by ADM. This provided in relevant part:-

> "ADM may terminate this Agreement forthwith by giving notice thereof in writing to the purchaser in any of the following events:-
>
> a. if the purchaser or the principal fails to perform and observe any of the obligations or breaches any of the terms or provisions or conditions or warranties or conditions herein contained.;
>
> b. if the purchaser or the principal fails to perform and observe any of the obligations or breaches any of the terms or provisions or conditions or warranties or conditions under any other ADM Agreement…."

116. Clause 15 bound the principals (i.e., Mr. Dolan and Ms. McConnell) to the performance of the obligations by the purchase (*i.e.*, Ranzett) and they thereby warranted that they controlled the purchaser company. Thus, clause 15(b) provided that the principals shall:-

> "…at all times hereafter be answerable and responsible for and hereby unconditionally and irrevocably guarantees the due and prompt payment by the purchaser in accordance with the covenants, provisions and terms contained in this Agreement of all monies falling due hereunder…."

It is, perhaps, significant that Clause 8 provides for an express procedure whereby ADM Londis might terminate the contract even in the face of conduct (such as non-payment) which would have entitled it to terminate for repudiatory breach at common law. It may be noted that McDermott, *Contract Law* (Dublin, 2001) observes at para. 21.96

> "Generally, contractual rights of termination are treated as additional rights not given in substitution for common law rights….However, in some cases a termination clause will be interpreted as providing an exhaustive scheme that displaces common law rights."

117. In my judgment, Clause 8 comes within the latter rather than the former case. Clause 8 does not reserve the right to terminate at common law and, moreover, as we have just seen, it deals with contractual termination in circumstances where there clearly would have been the right to terminate at common law independently of any express contractual term. All of this clearly invites the inference that the power to terminate on this ground is that which is provided for in the contract itself and not by reference to general common law principles regarding repudiatory or even anticipatory breach.

118. Put another way, if the situation were otherwise, it would mean that ADM Londis could terminate these agreements at common law without, perhaps, the necessity for any notice whatever. Such a construction, if admitted, would not only set at naught the notice provisions contained in Clause 9, but this would be at odds with the entire structure of the very carefully drafted contractual agreements between the parties: *cf.* the not dissimilar analysis of the notice provisions contained in a charterparty arrangement found in the judgment of Lord Hailsham L.C. in *Afovos Shipping Co. v. Pagnan* [1983] 1 WLR 195, 199-200.

119. Broadly similar obligations were contained in the Franchise Agreement. Specifically, Clause 9 provides that "ADM may terminate this Agreement forthwith by giving notice in writing to the Franchisee" in a number of specified events, including 9.3:-

> "if the franchisee or the principal fail to perform and observe any of the obligations, or breach any of, the terms or provisions or conditions or warranties or covenants of any purchase agreement or the standard terms and conditions of trading of ADM."

120. There is no doubt whatever but that Ranzett was in material breach of its obligations under these contracts by reason of the fact that it was failing to pay as required for goods and services with the result that ADM Londis was entitled to terminate. Yet I find myself compelled to hold that ADM Londis was also guilty of a breach of contract in the manner in which it terminated these agreements.

121. It is true that counsel for ADM Londis, Mr. Buttenshaw, argued strenuously that his client had not, in fact, terminated these agreement, but I fear that I cannot agree with this. The modern retail business cannot operate – save at a most rudimentary level – without the supply of credit by the supplier. The unilateral withdrawal by Londis of credit facilities, its actions in informing other suppliers of this fact, combined with the exercise of the retention of title clause and the "de-branding" of the shop, cannot be viewed otherwise than as the decision by Londis to terminate the contractual relationship.

122. Here it may be recalled that under the terms of the franchise agreement the de-branding of the store cannot take place until the agreement is itself terminated. Not only is this so stated in express terms by Clause 11(1)(a) of the franchise agreement, but pending termination, the franchisee is bound by Clause 4.8 of the same agreement to display and maintain "the authorised ADM signage and imagery ...including the proprietary marks under the direction of ADM". In these circumstances, the removal of the ADM Londis branding is in itself consistent only with a decision to terminate the contractual relationship.

123. It is true that on 5th December 2008, Messrs. Michael Nugent wrote to Dominic Dowling and Co. indicating that Londis might be prepared to treat the account as "suspended" rather than "closed." But by that stage the damage had been done, as a traumatised Mr. Dolan was sitting alone in the store engaged in what must have been (for him) the soul destroying task of segregating out the Londis products from non-Londis products, as he surveyed the wreckage of his hopes and dreams. Even if that letter suggested that a possible way back, the decision taken later that day to de-brand the store must have immediately dashed whatever forlorn hopes he might otherwise have had.

124. The suggestion that the decision to close the store was the unilateral action of Mr. Dolan alone cannot be accepted. It is all too obvious that Mr. Dolan had no wish to close the store. I certainly accept Mr. Devlin's evidence that their late evening conversation on December 4th left him with the clear impression that Mr. Dolan was (at the very least) contemplating the immediate liquidation of Ranzett. But at this stage Mr. Dolan must have felt that he had few other options left to him given the events of the previous forty-

eight hours.

125. Certainly, if perhaps matters had been handled differently, then Mr. Dolan would (or, at least, might) have been left with the option of keeping the store open (by, for example, sourcing product elsewhere from a wholesaler). Here it must be recalled that Clause 4 of the trading terms agreement described the relationship between the parties as a fiduciary relationship. That in itself was sufficient to impose obligations of utmost good faith and mutuality on both parties.

126. In this context, while ADM Londis was certainly entitled to take steps to protect its position in those critical days in early December 2008, the fact that it also owed Ranzett a fiduciary obligation meant that it was obliged to do so in a fashion which also took account of the latter's interests. All of this meant that that if ADM Londis wished to extricate itself from agreements which no longer made commercial sense, it was required to do so in a fashion which ensure that its erstwhile partners – in essence, the defendants – were the given the maximum opportunity to find new suppliers to enable the shop to keep trading and to be kept open.

127. In effect, therefore, Londis' ability to act unilaterally and without giving notice in writing was heavily circumscribed. In the first place, the decision by Londis to terminate the contract was wrongful because it did not give the necessary notice in writing the manner required by Clause 8 of the Product Purchase Agreement and, so far as de-branding is concerned, by Clause 9 of the Franchise Agreement. It is true that both of these provisions permit ADM Londis to terminate the agreement in question "forthwith" by notice in writing, but this makes compliance with the requirements of notice in writing all the more imperative. In this context the notice requirement cannot be regarded as some form of supererogatory legal formality. Compliance with this requirement is rather of the essence since it indicates a decision to terminate the contract, while still allowing the parties an opportunity to find new suppliers and to make alternative trading arrangements.

128. The word "forthwith" certainly conveys immediacy and urgency, but its precise meaning will depend on the immediate context in which the word has been used and underlying objective of what is thereby sought to be achieved. In *O'Brien v. Special Criminal Court* [2008] 4 IR 514, the Supreme Court was required to examine the meaning of this word in the (entirely different) context of s. 30A(3) of the Offences against the State Act 1939 (as amended). This sub-section which provided that persons to whom the section applied could be arrested for the purposes of charging them "forthwith". In this case, certain persons were arrested at 8.35pm on a particular evening, but were only charged before the Special Criminal Court at 12 noon on the following day.

129. The Supreme Court held that this was unlawful. Denham J. held ([2008] 4 I.R. 514, 527) the requirement that the person be arrested "forthwith" imposed a more onerous obligation than "as soon as practicable":-

> "The word "forthwith" is not a technical term, nor a term of art. It should be given its common and usual meaning. It is defined in the *Concise Oxford Dictionary* as: "immediately; without delay". Thus the law requires that a person in the position of the applicant be charged immediately, without pause or delay. The term "forthwith" requires immediate action. This is in contrast to the pragmatic requirement in the term "as soon as practicable…"
>
> ….He was arrested at 8.35 p.m. on 8th April, 2004, and charged before the Special Criminal Court shortly before 12.00 noon on 9th April, 2004. In all the circumstances this was "as soon as practicable", but this is not the requirement of the law. The law required that he be charged "forthwith", and that was not done. Therefore his detention prior to charging was unlawful."

130. As we have already noted, the context of the decision in *O'Brien* was admittedly completely different and concerned the liberty of individuals by reference to a penal statute and did not at all involve (as here) the interpretation of a contract governed by private law. In my judgment, however, in the present context, the use of the term "forthwith" meant that while Londis could take immediate action, they were nonetheless obliged to give sufficient notice in writing. While Clause 9 requires the purchaser (*i.e.*, in this instance, the defendants) to give three months written notice of termination to Londis, the parties clearly intended that a much lesser period of notice be given by the franchisor to the franchisee, as the length of notice must be informed by the fact that Londis could give that notice "forthwith".

131. Yet it would be unreasonable to suggest that the notice in question could for be less than two weeks, *even if* the triggering event (*e.g.*, default of payment) enables Londis to send the notice *immediately*. The notice is designed to enable both parties to end their arrangements, while also permitting the retailer to seek to make alternative supply arrangements in the meantime. It would accordingly be unreasonable to suggest that ADM Londis could terminate at almost a moment's notice, because this could have catastrophic implications for the franchisee and its ability to continue trading. It was, I think, common case that enormous damage will be done to a retail outlet of this nature if it is obliged to close suddenly during normal trading hours and certainly if (as here) that closure lasts for more than a week.

132. While the ever escalating level of debts at Ranzett were obviously a matter of deep concern and Londis was perfectly entitled to take all reasonable steps to protect its own interests, yet the fact that it owed Ranzett a fiduciary obligation under the trading terms agreement meant that it was required to exercise its contractual entitlements in a manner which also took account of the purchaser's interests.

133. How, therefore, could this have been done? In the first instance, ADM Londis would have been entitled to suspend (but not to close) the account, so that any immediate purchases thereafter would have to have been made on a cash on delivery basis pending the expiry of the notice period contained in the termination notice. Here it may be observed that the correspondence from ADM Londis from 3rd December onwards indicated - if only by inference – that it would not even supply Ranzett on a cash on delivery basis.

134. Second, it behoved ADM Londis to exercise its retention of title powers in such a fashion as ensured the minimal possible inconvenience and disruption to Ranzett. This did not mean that advance notice, as such, had to be given to Ranzett. But it did mean that ADM Londis were required to make it clear to Ranzett that the entire exercise would have been carried out in an efficient and effective manner without either the necessity to close the store (or, at least, close the store for the shortest possible period) while the products which ADM Londis actually wanted to retrieve were segregated and repossessed as quickly as possible.

135. I am not convinced that this is what actually happened, in part due to a series of misunderstandings on all sides. If Mr. Dolan had no right to block Mr. Devlin and his team from entering the store at 9am on the Thursday, 4th December, he was nonetheless within his rights in seeking legal advice on the matter. By that afternoon following the initial exchange of solicitors' correspondence, it seemed that ADM Londis was insisting on strict compliance with the terms of the retention of title clause in respect of *all* of its products. In those circumstances, Mr. Dolan could not safely have sold any Londis product.

136. The practical effect of all of this was that Mr. Dolan had to close the store for several days with results which, as we have

seen, were disastrous. As Mr. Devlin fairly confirmed in his own evidence, the final confirmation that ADM Londis did not intend to repossess any further stock was not to come until the letter from Michael Nugent & Co. on 23rd December, although this perhaps had also been informally signalled by 17th December.

The de-branding of the store

137. Clause 11(1) of the franchise agreement provided:-

> "Upon termination of this agreement, all rights of the franchisee hereunder shall immediately terminate and the franchisee shall immediately thereafter:-
>
> a. cease to use (by advertising or otherwise) the Londis name or any other trade name of ADM (including the proprietary marks) or any combination of words, symbols or logos similar to the Londis name or any other trade name of ADM (including the proprietary marks) and shall remove and deliver to ADM, all signs, fascia marks, goods, descriptions (both interior and exterior), price labels, carrier bags, materials of every nature and character which are in the franchisee's possession or control at termination which bear any likeness or semblance of the Londis name or any other trade name of ADM (including the proprietary marks) and shall remove from the premises and deliver to ADM all of the foregoing within a period of 21 days of the termination of this agreement…"

138. Clause 11(2) further provided:-

> "If the franchisee shall fail to deliver the signs, fascia and other materials referred to in Clause 11.1(a), then ADM authorised representatives may, on giving seven days notice to the franchisees enter upon the premises and remove the same at the expense of the franchisee, which expense the franchisee shall reimburse to ADM on demand. The franchisee hereby gives an irrevocable licence to ADM to enter upon the premises to remove such materials as aforesaid. The franchisee further agrees to take such steps as ADM may reasonably require for removing all telephone numbers and trade or other directory entries which contain or advertise the Londis name or any other trade name of ADM (including the proprietary marks)."

139. The effect of these provisions is quite clear. Upon receipt of the termination notice and the expiration of the notice period contained therein, the franchisee would have to cease using all ADM Londis proprietary marks, symbols and advertising material. It would then be obliged to return this material to ADM Londis within 21 days and if this did not happen, ADM Londis were entitled on giving seven days notice to the franchisee to enter upon the latter's premises and to remove same at the latter's expense.

140. While I fully accept the rationale and the thinking behind the decision to debrand the store on 5th December, 2008, this did not make it lawful. While the senior management at ADM Londis must have been understandably frustrated and at their collective wits' end when presented with yet another headache posed by the fact that the store had not re-opened on the morning of 5th December, the fact remains that under the franchise agreement ADM Londis were first required to give notice of termination and it was only thereafter (and indeed sometime thereafter) that the question of its entitlement unilaterally to enter upon the premises of the franchisee to remove the signage could arise.

141. If, echoing the famous words of de Valera, it is sometimes hard for the strong to be just to the weak, this nonetheless cannot take from the fact that the conduct of ADM Londis in de-branding the store was *ex facie* unlawful and completely unauthorised by reference to the franchise agreement. This was especially so given the fiduciary nature of the relationship between the parties.

Consequences of the breaches of contract

142. It is important to note that all that I have decided so far as this part of the counter-claim is concerned is that ADM Londis have been guilty of breach of contract in the manner that I have indicated. The extent to which (if at all) such breaches of contract led to the losses to Ranzett of which the Mr. Dolan and Ms.McConnell complain and, if so, the extent to which such losses are recoverable by way of counter-claim remains to be ascertained and will require a further hearing to determine.

PART V - CONCLUSIONS

143. It remains, accordingly, to summarise my principal conclusions. I would therefore conclude as follows:-

> A. ADM Londis are entitled to judgment in the sum of €161,283.91 in addition to the sum of €400,000 for a total sum of € 561,283.91 (together with Courts Act interest from 2nd June, 2009) in respect of its primary claim for judgment as against all defendants in respect of unpaid goods and services supplied to Ranzett Ltd. and as guaranteed by the second and third defendants, Mr. Dolan and Ms. McConnell.
>
> B. In the circumstances of the present case, Mr. Dolan and Ms. McConnell are entitled qua guarantors to rely on all arguments which Ranzett could have advanced in its own right, not simply as a matter of defence, but also by way of counter-claim. Any other conclusion would lead to endless and unprofitable arguments regarding the characterisation of particulars claims on the question of whether they went to defence or to counter-claim and would be at odds with the underlying reality of the position of these guarantors whose contractual rights and obligations were interwoven both in fact and in law with that of the company.
>
> C. The claim that Ranzett and Mr. Dolan were induced by representations made by Mr.McGarry to enter into franchise agreements with ADM Londis on the basis that Ranzett would get a stocking loan of €250,000 is not borne out by the evidence. In this regard, I accept the evidence of Mr.McGarry that while he had promised Mr. Dolan the same general credit terms, the size of any stocking loan would have to have been agreed and ultimately sanctioned by the Credit Committee.
>
> D. The actions of ADM Londis between the 3rd and 5th December, 2008, cannot be viewed as other than a decision by it to terminate the contract. Thus the effective closing of all credit facilities, coupled with the exercise of the retention of title clause and the de-branding of the Black Bull store admit of no other conclusion.
>
> E. While Ranzett's failure to pay for the goods and services supplied by ADM Londis amounted to a serious breach of contract which would have amply justified the termination of the former's contracts by the latter, the contract was nonetheless terminated in a wrongful manner by ADM Londis.
>
> F. While the notice provisions contained in the franchise agreements entitled ADM Londis summarily to terminate the

contract forthwith by giving notice in writing to the franchisee, no such notice was given. Moreover, bearing in mind that the relationship between franchisor and franchisee was designated by contract as fiduciary in nature, this underscored the necessity for notice in writing and for adequate notice.

G. The obligation to give notice is of supreme importance in this context, because the abrupt termination of a contract deprives the franchisee of the opportunity to seek alternative supplies and may (as here) force the closure of the shop premises, often with disastrous consequences for cash flow and trading momentum.

H. Given that the relationship was a fiduciary one, this also imposed obligations of utmost good faith, mutuality and a duty to look beyond personal interest. While ADM Londis were fully entitled in principle to exercise their retention of title powers, a series of mis-understandings and mishaps led to a situation where the shop premises remained closed for well over a week, with disastrous consequences for Ranzett.

I. While ADM Londis faced a difficult situation on the morning of 5th December when the shop premises did not re-open and effectively locking out customers who wished to gain access to the Post Office (many of them pensioners who wished to collect their pension entitlements), its actions in de-branding the store were nonetheless unauthorised under the franchise agreement and amounted to a breach of duty and a breach of its fiduciary obligations.

J. All that has been determined is that ADM Londis have been guilty of breach of contract in the manner that I have indicated. The extent to which (if at all) such breaches of contract led to the losses to Ranzett of which the Mr. Dolan and Ms. McConnell complain remains to be determined and will require a further hearing to determine.

144. It remains for me only to thank the witnesses (all of whom gave fair and comprehensive evidence which, subject only to specific and individual findings which I have found it necessary to make, I entirely accept) and the legal teams on both sides who each presented a difficult case in a most professional and even-handed fashion.