

THE HIGH COURT

H.C. No. 2002/1249s

BETWEEN

DAVID PATTON AND ROBERT PATTON

PLAINTIFFS

AND

TEE PIGS LIMITED

DEFENDENT

JUDGMENT of Mr. Justice William M. McKechnie on the 11th day of July, 2013.

1. David Patton Ltd. ("DPL") was a company within a group of companies all bearing the David Patton name, until it was wound up a member's voluntary winding up in late 2002. Immediately prior to the appointment of a liquidator for that purpose, it had, by formal Deed of Assignment dated the 19th November, 2002, assigned in favour of the plaintiffs, both of whom were directors and shareholders of the company, any and all debts which the defendant company might owe to it. Although an issue was raised concerning the validity of this Deed, I am satisfied that the complaint made in this regard, resulted from a misreading of its provisions and that as correctly interpreted, it was effective in the manner intended. Accordingly, both Mr. David and Mr. Robert Patton are entitled to pursue this action as if DPL itself was the Plaintiff, although in a technical sense of course, that of course is not the case.

2. The company DPL, was involved *inter alia* in the manufacture and sale of animal feed stuff as well as having an interest in three pig farms. This interest was usually expressed by way of some joint venture or partnership with another entity or person, whose primary responsibility it was to run, on a daily basis, the pig farm in question. One such farm was owned by the defendant company ("Tee Pigs"), in which DPL held a 74% shareholding with one Mr. Charles Toal holding the remaining 26%. It was the role of the latter to effectively discharge the responsibility last mentioned.

3. Sometime prior to May, 2001 Mr. Toal approached the second named plaintiff, Mr. Robert Patton and inquired if DPL would purchase his interest in Tee Pigs. As the company itself wished to exit this area of its business, it declined the offer. Sometime later Mr. Toal made a reverse type proposal in which he offered to acquire DPL's interest in Tee Pigs; this the company agreed to. As a result, on the 18th May, 2001 an agreement in writing was entered into between DPL as Vendor, Mr. Charles Toal as Purchaser, Tee Pigs as the subject company and both Mr. Robert Patton and Mr. Charles Toal as directors of that company. The sale and acquisition was by way of share transfer, with the Vendor agreeing to sell its 185,000 shares to Mr. Charles Toal "or his lawful nominee", for the sum of £241,292. This figure was arrived at by reference to the net asset value ("NAV") of the company. The closing date was scheduled for the 1st June, 2001. The agreement had other terms and conditions but none are relevant to these proceedings.

4. All negotiations on behalf of DPL were conducted by Mr. Robert Patton.

5. On the morning of the closing Mr. Toal disclosed for the first time that he did not propose to acquire the shares in his own name, but rather had for that purpose identified a company called Lagan Pigs Ltd. ("Lagan Pigs"), as his lawful nominee. In fact, it later became clear that an arrangement had been made much earlier whereby that company would also acquire the 26% shareholding of Mr. Toal. In essence therefore, the full ownership of Tee Pigs, as and from the 1st June, 2001 vested in Lagan Pigs (save for one share which is not relevant), whose shareholders and directors were at the time one Mr. Oliver Leddy and one Mr. Ivan Fitzpatrick.

6. As part of its strategy to remove itself from this activity, DPL had previously agreed to dispose of its feed business to Paul and Vincent Ltd. by way of an agreement dated the 1st September, 1999, but which became effective only as and from the 1st November of that year. Nothing turns on the details of this agreement save for two points: firstly, Paul and Vincent Ltd. intended to establish a new company and through that, to continue the existing trading relationship which DPL had with its former customers and secondly, under the provisions of Clause 12 the purchasers undertook, via the new company, to collect on behalf of DPL for a period of twelve months the historical feed debt then outstanding. Apart from the provisions of this Clause, the new company had no other relationship with DPL.

7. On the 6th September, 2002 Mr. Robert Patton was advised by ASM Horwath, Chartered Accountants ("ASM") that as of the 30th September, 2000 the account, that is the intercompany account between DPL and Tee Pigs, showed a balance in favour of DPL in the amount of £192,014. Based on this information, Mr. Patton, evidently on behalf of DPL, made a demand in that sum from Tee Pigs on the 13th September, 2002. The breakdown as given was as follows:-

- the sum of £62,650, described as intercompany nominal balance; in effect these were monies advanced by DPL on behalf of Tee Pigs;
- £110,773 being the balance outstanding on the trading ledger in respect of feed supply; and
- the sum of £18,590 which was in reference to Sion Mills.

The description of these sums is taken from the accountant's note; Sion Mills was a trading division of DPL but not a separate legal person in its own right.

8. As a follow on letter from A & L Goodbody of the 19th November, 2002 failed to illicit payment, the within proceedings issued. These proceedings, subject to any special defence plea, were in reality debt collection proceedings and accordingly, at least in pleading terms, should have posed no great difficulties for either party. Unfortunately however this has not been the case. In yet another attempt to get its facts correct, the plaintiffs delivered a further amended statement of claim on the 5th June, 2009. The particulars as given, in several respects, are clearly incorrect. For its part, the defendant has fared no better. Several pleas were raised in its defence, some of which, being "unstateable", were expressly abandoned at trial. As late as the 14th November, 2012, Day

5 of the trial, Counsel on its behalf sought permission to include in the defence a plea of mistake, either common or mutual.

9. Rightly or wrongly, I took the view that this case should be heard on the evidence given at trial, together with whatever admissible documentation was tendered in support. In effect this meant that the claim advanced was based on the report of ASM dated the 22nd October, 2009, the author of which was a Mr. Michael McAllister, a director of that company (para. 24 *infra*). Likewise, from the defence point of view, the case proceeded on the basis that the amendment as requested, which was not objected to, was in fact granted. In effect, this meant that the original pleadings were superseded. However, that does not mean that such have no value. It seems to me that useful reference can be made to the representations contained therein, so as to ascertain, even at the level of generality, what the individual parties truly felt their respective positions to be at that time.

10. By reference then to Mr. McAllister's report, the claim as advanced was broken down as follows:

	IR£
Feed invoices for foodstuffs supplied by David Patton Ltd. to the Defendant, TPL	
31/3/99	10,523.66
30/4/99	12,467.17
31/5/99	14,206.95
30/6/99	12,235.93
31/7/99	18,562.41
31/8/99	18,191.72
30/9/99	21,311.08
31/10/99	23,274.72
Total Feed invoices	130,773.64
Less payment received on 4/2/00	(20,000.00)
Total outstanding feed invoices	110,773.64
Opening intercompany balance at 1997	13,008.53
Payment to Irish Dairy Services by DPL to TPL- 31/7/99	30,000.00
Insurance recharged by DPL to TPL from 1997 to 2000	8,627.52
Audit fees recharged by DPL to TPL from 1997 to 2000	8,067.40
Plant and machinery purchased from Sion Mills by TPL in 1999	11,693.00
Fixtures and fittings purchased from Sion Mills by TPL in 1999	6,482.00
Motor vehicles purchased from Sion Mills by TPL in 1999	415.00
Sundry amounts	2,947.52
Total	192,014.61

11. Tee Pigs for its part raised several defences, the most pertinent of which are:-

(i) As part of the negotiations conducted between, on the one hand Mr. Charles Toal and Mr. Robert Patton, who was acting on behalf of DPL, and on the other, between Mr. Oliver Leddy and Mr. Ivan Fitzpatrick, an account was stated and settled of all and any debts which Tee Pigs owed to DPL; this account was discharged in full prior to, or on or about the first of June, 2001.

(ii) In such negotiations the said Mr. Toal and/or Mr. Robert Patton, again acting on behalf of DPL, expressly confirmed to Messrs. Leddy/Fitzpatrick, that Tee Pigs was not indebted to DPL in any sum as of the 1st June, 2001. Accordingly, if in fact any such debt existed, the defence of waiver and/or estoppel applies.

(iii) Again, if any such debt existed, which is denied, the same arose from a common mistake of fact, being that referable to the true net asset position of Tee Pigs as of the 1st June, 2001 (para. 3 *supra*); accordingly, such mistake relieves the defendant company of any obligation to discharge such debt.

(iv) The payments allegedly made or costs incurred by DPL on behalf of Tee Pigs, to Irish Dairy Services, to FBD Insurance Company ("FBD"), to the Auditors and in respect of the "sundry amounts", were not in fact so made or incurred. Further, the amount claimed in respect of the Sion Mills transaction lacked consideration as the subject assets of that division were never in fact transferred to Tee Pigs.

(v) Tee Pigs paid the new company (para. 6 *supra*) the sum of £110,773 on the 29th June, 2000, for the account of DPL, which, together with other sums paid, was sufficient to discharge the entirety of any indebtedness which it may have had with DPL.

(vi) Even if that sum of £110,773 was not so paid, such indebtedness was nonetheless otherwise discharged by a series of cash payments to either DPL or Mr. Robert Patton on its behalf.

All of these pleas were stated to be without prejudice and/or in the alternative to each other. On the basis of any one or more of them, it is alleged that the plaintiffs' claim is misconceived.

12. If I can commence then by first considering each item of claim as it appears in the lower part of Mr. McAllister's tabulation and to outline, where conflict exists on the evidence, my views thereon. I will then address the feed account.

Payment to Irish Dairy Services ("IDS"):

13. Mr. Robert Patton told the Court that Tee Pigs entered into an agreement with IDS to re-equip the farming area of the pig farm.

The total contract price was approximately £70,000. As Tee Pigs was experiencing cash flow problems at the time, DPL, on its behalf, paid £30,000 to IDS against that debt. A "remittance advice" form, raised by DPL at the time, was produced. This identified IDS as the payee, Tee Pigs as the entity on whose behalf the payment was made, the date when generated, namely the 26th July, 1997 as well as the amount involved. Mr. Gleeson of IDS offered supporting evidence in which he described the equipment in greater detail and confirmed both the delivery of the goods and the receipt and credit of the payment referred to. He also produced an invoice and statement from IDS which verified these details.

FBD Insurance Recharged:

14. The evidence given in respect of this item shows that at the beginning of each year DPL discussed with its brokers the group's requirements for the following year and agreed an account with FBD for the required cover. The sum in question was then discharged by DPL and throughout the following months was recharged as appropriate to each relevant company within the group. This practice applied, *inter alia*, to Tee Pigs. The intercompany balance in respect of this item stood at £8,627.52 at the end of 2000, with the yearly breakdown for that and the previous years being as follows:-

- 1997 and 1998, £2,100.96 for each year;
- 1999 and 2000, £2,212.80 for each year.

15. The broker's employee with whom these arrangements were usually discussed, was Mr. John Wallace who gave evidence largely along the lines of what is above recorded. The figures which he produced however, being those which FBD assigned to Tee Pigs, were greater than those given by Mr. Robert Patton. The difference, whilst not great, was not in fact accounted for in detail, but in my view this is not relevant. It may be that Tee Pigs was undercharged. In any event, I am quite satisfied that DPL discharged the insurance premium correctly attributable to Tee Pigs over the period in question and as the amount claimed is the lesser of the two figures, there is no conceivable way in which the defendant has been prejudiced by this unexplained difference.

Audit Fees:

16. DPL operated the same practice with Tee Pigs (and other related companies) in respect of this item as it did with the insurance premium. The auditors to the group would produce fee notes or invoices from time to time, addressed to Mr. Nyhan, the financial director of, effectively, the David Patton group. If the note was specific to a named entity, the amount specified would appear in the appropriate intercompany account as applicable to that company. If however the note was general and the amount global, the auditors would be requested to break it down. Having done so, the specified amount would then be assigned to reflect this. The total attributable to Tee Pigs via this process, from the 30th November, 1997 to the 30th June, 2000 was £8,067.40.

17. It should be noted that the challenge to the evidence supporting these claims was very much of a general and non-specific nature. Mr. Patton was pressed as to why he had not told Lagan Pigs on the 1st June, 2001 that these sums were outstanding and why he had not demanded payment at that time. In reply he reiterated that he had no conversation whatsoever with Messrs. Leddy or Fitzpatrick on or about the 1st June, 2001 and that in any event he had assumed that Mr. Toal had paid them, as was his responsibility. This line of questioning in the context of the witness' explanation could not in any way disturb the credibility of the supporting evidence which I accept. It may however have some bearing on the legal defences as raised, a point which I will come back to later in the judgment.

Sion Mills; Plant and Machinery; Fixtures and Fittings and Motor Vehicle:

18. Having closed down Sion Mills, DPL brought whatever equipment was left back to its principle base in Monaghan. Mr. Charles Toal, the managing director of Tee Pigs, felt that some of this equipment could be of use to that company. He selected what he wanted and had this delivered to Tee Pigs. At the year's end, a sum of £18,590 was recorded in the intercompany account to reflect, from DPL's point of view, the disposal of these assets, which were valued at a depreciated book value.

19. Without objection, Mr. Robert Patton, who gave the above evidence, referred to an email which he had received from the Auditors about this matter on the 20th March, 2006. That read as follows:-

"Robert,

From the old Sion Mills files I can establish:

£11,693, £6,482, and £415 = £18,590.

This is the net book value of all Sion Mills' fixed assets (with the exception of that noted below) at 30th September, 1999 that were transferred to Tee Pigs. Only fixed assets not transferred were:

Power-washer £3,000

Stell £1,500

Portacabins £8,000

Dermot Carr

Assistant Manager."

20. Mr. Leddy in evidence said he knew nothing about these "so called" assets, which his Counsel had suggested were in any event, old and overpriced. From inquiries which he had made, someone could remember a "junk tractor" which was of no value, but had no recollection of anything else. Whilst this witness cannot be criticised for his lack of information in this regard, nonetheless, this bold statement is quite insufficient to dislodge the probity of the contrary evidence. Therefore on the balance of probabilities I am prepared to accept this claim.

Sundry Amount £2,947.53:

21. This sum is a collection of small amounts charged in respect of various items such as sow cards, Tas (software system), boar charts, travel expenses, phones, and in respect of tramore meats. A full breakdown per item and per cost for each year from 1997 to 2000 was tendered and received in evidence and fully supports the claim.

22. As the defendant company was unable to offer any contrary evidence on the existence of these items or their value, this part of

the claim must also be accepted.

23. The conclusion which I have reached on these matters is of course subject to any defence which Tee Pigs may have, which as a matter of law would absolve it from being responsible for the underlying sums or any of them. That issue is one which I will turn to in a moment.

Feed Account:

24. Since its establishment in 1995/1996, ASM have been the Auditors of the David Patton group with the exception of one company which is not relevant. It also became Auditors to Tee Pigs in or about 1996/1997 and continued as such until that company's disposal in June, 2001. Mr. Michael McAllister, as a director of ASM, has been the individual in charge of this responsibility. Prior to 1995, he was also in charge of this audit assignment when working with Coopers and Lybrand. In addition to providing these services, his firm has also furnished assistance to the group regarding software technology and bookkeeping duties and has also been responsible for the preparation of quarterly management accounts. As such, for all of the relevant period he was very familiar with the group, its business model, its accounts and how these operated.

25. This witness told the Court that DPL was part of a very large group of companies in which because of that, very many transactions would have taken place centrally; for example, the discharge of the group's audit fees and its insurance payments. It possessed a very sophisticated computer system for dealing with feed stuffs. When any delivery of feed went across the weigh bridge, a weigh bridge docket would have been processed into the system as a delivery note, leading to a sales invoice which in turn went into a sales ledger and ultimately ended up in the account of that particular customer. This system applied irrespective of whether the customer was a related entity or not. In addition however, when another company within the group was the customer, the transaction should also have ended up with an intercompany balance being created. This was important as it allowed the company and the Auditors to keep track of and control over all intercompany transactions which took place.

26. On the Tee Pigs side, it would appear that firstly, when feed was ordered, an order form would have been accounted for through the purchasing process and secondly, the transaction would have ended up either in the purchase ledger or in some cases would have been directly posted to the intercompany account. Whichever of these really made no difference, for what was important from his point of view, was that one should look at both sides of the transaction to make sure that they reconcile. So when auditing the books of DPL and Tee Pigs, it was critical to look at both sides of the transaction for this purpose.

27. Mr. McAllister had available to him the primary books and records of both companies: these formed the basis of the audited accounts and financial statements later prepared and produced. According to the evidence of this witness the essential facts on this aspect of the claim were as follows. In the ordinary course of business DPL would supply feed stuff to Tee Pigs which would then be invoiced on a monthly basis for such supply. Relevant details were also posted to the debtors ledger. For account purposes the balances on this ledger were moved to that intercompany account and so were effectively treated as a loan from one company to the other. Generally speaking, all balances were discharged on a monthly basis up to and including February, 1999. However, from March until October of that year, the monthly amounts were not so discharged as they historically had been and accordingly remained as an intercompany debt.

28. As Auditors of both companies it was common practice for Mr. McAllister to conduct an exercise, which resulted in the intercompany balances between both companies being reconciled at each year's end. For the year ending 30th September, 2000, the reconciliation showed:-

Books of DPL:

- Balance on trade debtors' ledger with Tee Pigs: £110,774;
- balance on intercompany nominal with Tee Pigs: £62,650;
- balance on intercompany nominal with Tee Pigs (re Sion Mills): £18,590;

giving a total figure of £192,014.

Books of Tee Pigs:

- Balance on intercompany transactions, in account with DPL: £192,301.

29. This reconciliation resulted in a balance variance of £288 which has not been adjusted between the two companies. This however has no significant impact upon the accuracy of the claim. Consequently, this witness was satisfied that each item above claimed has been fully accounted for in the books of both companies and that the balances in respect thereof have also been fully reconciled. Therefore the amount herein claimed has not been discharged and remains due.

30. It should be noted, as is quite evident, that the intercompany account is not simply confined to feed stuffs.

31. The defendant's own accounts, all of which are in abridged form, support this view. Note 14 to those ending in September, 2000 explain that at year's end, Tee Pigs was indebted to DPL in the sum of £192,301. Part of this sum was said to fall due within one year (Note 5) but the remainder, namely the sum of £173,424, fell due for payment outside of this period (Note 6). This of course is of great significance given the fact that DPL had exited the feed business during that year.

32. The accounts for the following period, namely the 1st October, 2000 to the 31st May, 2001, show that the amounts falling due to group undertakings in both time periods had increased significantly. Whilst it is not possible to say with certainty that such figures include the relevant closing balance as disclosed on the accounts immediately preceding, it is most likely that they do. For if it were otherwise, the trading pattern giving rise to such figures would bear no relationship to that of the previous period and in any event if that was the explanation, the same would be deducible from elsewhere in the accounts. Consequently, it is most unlikely that these 2001 figures have resulted solely from greatly increased activity over the preceding 9 months. These figures therefore are consistent with the carry forward of the disputed amount.

33. This conclusion however seems even more likely when one looks at the accounts for year's end 30th April, 2003 and in particular Note 3 which reads:

"3. Disputed Creditor:

The directors dispute the liability to David Patton Limited or Robert and David Patton, brought forward in the accounts at

£243,406. The directors contend that this liability was discharged at, or prior to, 30th May, 2001. This matter is now the subject of court proceedings."

Adding further credibility to the underlying conclusion is the entry in the 2005 accounts which shows the amount falling due after more than one year, as being pretty much precisely the disputed amount. Consequently, whilst not being able to say with certainty that the amount was carried forward, it seems most likely that it was.

34. As will be seen from the evidence of Mr. McAllister and from the foregoing breakdown, the plaintiffs' claim, in respect of the feed account, is for the sum of £110,773.64. It is agreed between the parties that prior to the 31st March, 1999, one can proceed on the basis that the trading account in this respect had a nil balance (but see para. 56 *infra*). Equally so it is accepted that from the 31st March, 1999 to the 31st October, 1999 Tee Pigs received feed stuffs from DPL and thereby incurred a debt of £130,773.64. This sum represented the balance as it was, on the 31st October, 1999, when the agreement with Paul and Vincent Ltd. became operative.

35. It will be recalled that as and from the 1st November, 1999 a new company was established by Paul and Vincent Ltd. to conduct the acquired business (paras. 6 and 11(v) *supra*). This was called David Patton Feeds Ltd. ("Feeds"). That company, dealing with the feed side of its business, certainly in relation to Tee Pigs, ran a composite or combined account in that its opening balance with the latter carried forward the closing balance from the DPL account. As of 1st November, 1999 it therefore showed a debit in the sum of £130,773.64.

36. The reason for this method of approach may have been to enhance the goodwill aspect of the agreement by gaining the benefit of the relationship which DPL had with its customers or it may simply have been to reflect the provisions of Clause 12 of the agreement, whereby Paul and Vincent Ltd. agreed to collect the historical debt of DPL for a period of 12 months from November, 1999. Whatever the reason, it is clear that Feeds account with Tee Pigs was operated in this manner for some time.

37. Mrs. Wilson, who was an employee of DPL for some 30 years, was a bookkeeper by occupation and in November, 1999 acted in that capacity for both DPL and Tee Pigs. On the establishment of Feeds she became its bookkeeper but was made redundant by that company in or about June, 2000. She may have continued doing the books of Tee Pigs for approximately one further month, but thereafter ceased to have any involvement in matters of interest to this case.

38. Mrs. Wilson gave evidence that this composite account was operated with the aid of two distinct bank accounts; one in the name of DPL and another in the name of Feeds. She was instructed at the beginning that whatever monies were collected for DPL should be lodged to its account and likewise with monies collected on behalf of Feeds. However, this arrangement, to the best of her recall, changed after about 3 months, approximately at the end of February, 2000 when she was told that the sales representatives on the road were no-longer going to collect any monies for DPL. Thereafter, all monies that were collected were therefore to be lodged into the account of the new company. She was quite satisfied that she was so informed and that she carried out these instructions.

39. There are available copy statements for each month from November, 1999 to June, 2000 (and well beyond) issued by Feeds to and in respect of Tee Pigs. There are only four credit entries over this period which are of relevance: a payment of £20,000 on the 4th February, 2000; of £104,000 on the 7th April, 2000; of £25,670 (and an allowed discount of £7.75) on the 8th May, 2000; and a further £44,060.00 (and an allowed discount of £7.66) on the 9th June, 2000.

40. This witness told the Court that the first sum of £20,000 was credited to DPL as the collection agreement was still being adhered to in February, 2000. However, none of the other sums were, as thereafter the agreement had broken down. All monies were credited to Feeds, with the result that for feed received between the months of November, 1999 and March, 2000 Tee Pigs had discharged this entire bill by reason of the second and third payments above referred to. She was quite adamant that during this period the only Tee Pigs payment which was credited to DPL was the £20,000 in February, 2000.

41. I accept the evidence of Mrs. Wilson in this regard as being accurate and truthful. It is not only borne out by the accounts, in terms of what sums were credited to DPL, but also by the evidence of Mr. Robert Patton, which in a material way corroborates it. In response to a suggestion that under Clause 12(3) of the Paul and Vincent Ltd. agreement all monies collected were to be assigned to the oldest balance then appearing on the composite account, he explained what in fact happened: in the beginning of the run-off period that may have been the situation (and indeed may have continued but only in respect of non group debtors), but very soon thereafter Feeds saw no sense in having to collect DPL money from one of its related companies and to then have to lodge that money into the DPL account. Mr. Patton saw the logic of this and accordingly as a matter of practice, Feeds, apart from the February credit, no longer collected the historical debt from Tee Pigs, but instead simply concentrated on getting paid for feed which it supplied after 1st November, 1999. This seems both logical and reasonable and is entirely consistent with a substantial body of other evidence. The defendant however does not accept this and has repeatedly alleged, not only via the cross-examination of the plaintiffs' witness, but also by reference to the evidence of Mrs. Smith, that in fact all of these sums had been paid to DPL, or at least a sufficient amount to discharge the debt.

42. Mrs. Geraldine Smith was called as a witness on behalf of the defendant. This lady is an accountant and financial controller and at the relevant time was acting in that capacity with Paul and Vincent Ltd. and continued to so act after the establishment of Feeds. She confirmed what Mrs. Wilson had previously stated in that Feeds had operated a combined account after 1st November, 1999. When monies were received, all were lodged in the first instance to the account of Feeds and if therefrom money was to be paid to DPL, such was done by way of cheque. She gave evidence of what was the general practice in Feeds, of allocating monies which came to it when there was a balance running on the account. Unless the cash/cheque received was specifically assigned by the debtor to a particular invoice, it was credited against the oldest debt. The software used was programmed in this way. She seemed to say, or at least accept the suggestion put to her by defence Counsel, that this was how each of the four payments above referred to was dealt with, and by implication, that from the total of those sums the opening balance from the old DPL account was cleared in its entirety. In fact, if she is correct in this regard, only £6,000 remained due on this account after the 7th April payment of £104,000 and was fully cleared when the May payment was received.

43. Furthermore, she was of the view that far from the Clause 12 agreement breaking down, Feeds in fact continued to collect, on behalf of DPL, their historical debts well into 2001, at least until June of that year.

44. I am not satisfied that Mrs. Smith's memory of this composite account and how it operated in practice, is accurate. Firstly, on several occasions throughout her evidence, when asked about the distribution between DPL and Feeds, she responded almost verbatim by stating "if it was belonging to David Patton it was given over to David Patton: if it was belonging to us, obviously we held on to it". This type of response confirmed my view that this witness had no particular memory of specific events, but rather was relying on what she recalls the general practice should have been, as distinct from what in fact actually happened. This was in stark contrast to Mrs. Wilson, who it must be remembered was the actual person who dealt with the four payments in issue. Secondly, it is

difficult to imagine Feeds continuing to collect DPL's historical debts, not only for the contractual period but on a voluntary basis for a further 7 or 8 months beyond that. This at a time when presumably Feeds was also anxious to get paid for their feed supply, which by June, 2001, had been on-going for almost 20 months. Certainly given what Mr. Patton has said, this would make no sense for any period not covered by legal compulsion. In addition, if what has been described as the general system of allocation applied to the above payments, it would have been quite an extraordinary coincidence to have found the following: as shown by Mrs. Wilson, the total of the monthly invoices issued by Feeds to Tee Pigs from November, 1999 to March, 2000 amounted to £129,677.75, which sum, to the cent, is matched by the April payment of £104,000 and the May payment (including discount) of £25,677.75. The plaintiffs also suggest that a comparable exercise for the months of April to June 2000 produces the same result. Whilst one can never say that such is purely coincidental, nonetheless, it certainly renders the evidence of Mrs. Smith in this regard highly unlikely.

45. There was one further entry made by Mrs. Wilson, which during the case the defendant placed repeated and major reliance on: an entry debit of the 29th June, 2000, again shown in the feed statement, indicating that a credit of £110,773.64 had been posted to its account. Tee Pigs says that this figure, which it paid, together with the sum of £20,000 shows that the historical debt due by it to DPL has been fully discharged and accordingly, at least in respect of the feed account, there is no balance due. The validity of this argument is dependant on an understanding of what this entry means and of the background to its creation.

46. Mrs. Wilson, who made this entry under the direction of the accountant to Paul and Vincent Ltd. explained: she was being made redundant in June, 2000 and was told to clear from the accounts of Feeds any historical debt still showing as due to DPL, not only from Tee Pigs, but indeed from any other creditor as well. As Feeds had ceased all collection activity on behalf of DPL, so also the Feeds account should be clear of such debt. So, from an opening balance of £130,773.64 (paras. 34 and 35 supra) and giving credit for the payment of £20,000, the remaining figure which should be removed was therefore £110,773.64. She did as she was instructed on the 29th June, 2000 and termed it as a "sundry credit". Accordingly on that evidence, the step so taken did not and was not intended to reflect any payment of this sum by Tee Pigs, but rather served an accountancy purpose as part of Feeds' total disengagement from DPL.

47. Mrs. Smith, who takes issue with this explanation by Mrs. Wilson suggests that the sum was in fact paid and that the sundry credit was a "contra". She did not however provide any evidence for this assertion, nor did she refute the proposition that the balance of £110,773.64 was the same as the opening balance of £130,773.64 (from DPL) less the payment of £20,000. In addition, this witness accepted that the "sundry credit" entry showed a credit to the account which was not always the same as a payment to it.

48. So I ask; was the sum of £110,773.64 paid?

49. From all of the witnesses called on behalf of the plaintiffs it is clear that in the view it was not. Such view is largely based on the documentation available to them which includes all of the primary material upon which the audited accounts of DPL are based. If payment has been made it has not been recorded. Inadvertance or deliberation in this regard is not suggested. Mr. McAllister has searched on many occasions, in great depth and yet has found no sign, entry or note of its receipt. He stands over his audit which unconditionally verifies the intercompany balance. So from their point of view, the only conclusion is that the sum has not been paid, with the explanation for the entry of the 29th June, 2001 as offered by Mrs. Wilson being quite plausible.

50. As between the conflicting evidence of Mrs. Wilson and Mrs. Smith, I prefer the former, not only at the general impression level, but also because her memory is tied into an important event, namely her redundancy from Feeds in June, 2000. Moreover, the only interpretation of Mrs. Smith's evidence is that the sum has in fact been paid: this is entirely inconsistent with the very considerable body of evidence to the contrary. In coming to this conclusion I have considered what might appear to be a difference in their evidence as to how the combined account worked, with Mrs. Smith's suggestion that all collected money would firstly be paid into Feeds' account, seeming the more likely. If that amounts to a distinction between their evidence, which is not at all clear, the same does not impact upon my overall assessment of each witness. Therefore I accept the explanation as offered for this entry.

51. This view is also supported by the accounts of Tee Pigs itself. The amount of the entire claim appears in the September, 2000 accounts, which were only lodged with the company registration office on the 5th September, 2003, more than two years after the share purchase agreement and almost one year after the institution of the within proceedings. The later financial statements of that company provide even stronger

52. The defendant's response via evidence obtained either through cross-examination or by way of direct evidence, has been largely to focus on disproving its non-payment, rather than providing any affirmative evidence of actual payment. In addition, if paid, the only entities apart from DPL who could have benefited were either Paul and Vincent Ltd. or Feeds; and yet no step has been taken in relation to either. Although the onus of proof at all times rests on the plaintiffs, nonetheless, once a defendant engages with the evidence, one might reasonably expect that its best evidence would be tendered. I assume that it has been.

53. It is also instructive to consider the defendant's position as represented by its pleas in the defence. In many respects it is very difficult to know what to make of this document. It is said that the amount in question (in fact all sums) was paid, even suggesting that the discharge was by way of cash. It is then said that the account was stated and settled and by the discharge of that sum, whatever it might have been, the debt was paid. On the other hand, it is also pleaded that nothing was due as of the 1st June, 2001, either because of an earlier discharge or because of representations to that effect made to Messrs. Leddy/Fitzpatrick, by Messrs. Toal/Patton. Further, it is also claimed that even if monies were due, then by some combination of waiver or estoppel, the defendant should not have to pay them. In addition, the same result should follow from common mistake as to the NAV of the company.

54. These matters are not being highlighted simply for the sake of it or merely to technically fault the pleading. I have every sympathy with Counsel who is faced with this type of situation. The pleas are mentioned only to indicate that in reality the defendant company had no fixed position whatsoever on the claim, either in its entirety or by reference to this particular element of it. Instead it is clear that, in approach to drafting it has its consequences, one of which is that when the defence is viewed as a whole, it could hardly be considered as a confident endorsement of the defendant's position in relation to this sum or indeed any sum.

55. Having considered all of the above matters therefore, I am satisfied that this sum has not been paid. Consequently it clearly forms part of the total amount claimed.

56. It should also be noted for the sake of completeness, that the opening company balance as of 1997 in the sum of £13,008.53 has not been materially challenged or put in issue.

57. Finally on this aspect of the case, it is necessary to make a general point about the documentation which has been generated. I do so without having to attribute responsibility, at least for now. For a case of its nature, controls were lost as to necessity,

relevance and balance in this regard. The Tas books are a prime example of what I have in mind, which in reality, despite so much reliance being placed on them, produced effectively nothing. No doubt there are many reasons for this, but personal history between parties should never be allowed to dictate the litigation process or dominate its course.

The Share-Purchase Agreement of 18th May, 2001:

58. As this action is constituted it is not in any way clear to me that this transaction is relevant, let alone decisive. And yet I should say something about it, having heard orally from both Mr. Robert Patton and Mr. Oliver Leddy in relation to it. There are some findings which emerge from this evidence which I believe are uncontradicted:-

- (i) Mr. Robert Patton's deal at all times was with Mr. Charles Toal. Mr. Patton believed that Mr. Toal's true intention was to sell on DPL's share in Tee Pigs, as well as his own, to Lagan Pigs.
- (ii) He became aware of this for the first time only on closing. As the share-purchase agreement allowed Mr. Toal to have DPL's shares transferred to a "nominee" of his, Mr. Patton could not prevent Lagan Pigs from becoming the owner of Tee Pigs. If he could have legally done so, I am satisfied that he would have: his relationship with Mr. Oliver Leddy and vice versa was the foundation for this obvious and declared hostility.
- (iii) His belief that the agreement was solely with Mr. Toal is made obvious by his insistence on changing a draft of a resolution at the time of closing in order to indicate that the sale was to Mr. Toal "on behalf of" Lagan Pigs and not directly to the company.
- (iv) This witness never met, communicated, nor discussed this deal with Mr. Oliver Leddy and Mr. Ivan Fitzpatrick or with either individually; not at the time of closing or at any time. It follows that no representation of any kind was made by him either in a personal or representative capacity about Tee Pigs or its relationship with DPL. Mr. Leddy now accepts both of these points, despite an averment in an affidavit sworn by him in May, 2003 which gives the distinctly opposite impression.
- (v) Mr. Patton had no discussion with Mr. Toal, in the context of this agreement, about the intercompany balance, which he assumed had been discharged by the latter, as that was part of his responsibility. This of course included the feed account.
- (vi) The consideration for the shares as agreed with Mr. Toal was based on the NAV of the company which assumed the intercompany debt to have been paid. The price so agreed had nothing to do with what sum Mr. Toal was receiving, as evidently this witness was not even aware of such an arrangement.
- (vii) Mr. Patton did not know that the intercompany balance in fact existed at the time of closing. He was aware of intercompany trade but as I have said, thought that the incurred debt had been paid. Unfortunately, whatever ledger he was looking at at that time did not show it. Further, he would have had no cause whatsoever to engage with Lagan Pigs or their representatives on the issue.
- (viii) Mr. Toal had no authority to act for or represent DPL or the plaintiffs in any aspect of this transaction.

59. This summary is, I am satisfied, entirely representative of Mr. Patton's position and his knowledge as of 1st June, 2001. In particular I accept that he did not know of the intercompany balance at the time and indeed thought that it had been discharged. This is borne out by his insistence upon a small debt of under £500 being paid to a building company within the group by Tee Pigs, before closing. There is no doubt in my mind that had he been aware of the balance he would have insisted upon it being discharged.

60. Mr. Leddy's evidence was heavily influenced by his dealing with Mr. Charles Toal who unfortunately was dead by the time of trial. As a result the admissibility, and dare I say it, the relevance of much of what he said was questionable. In any event, the following is a summary of what he did say with my views thereon:-

- (i) He had worked with the Patton group for about 20 years and in fact had set up Tee Pigs which he managed until about 1997/1998. He finally disengaged from the group in November, 1999.
- (ii) His relationship with Mr. Robert Patton, at that time had evidently broken down and at the date of trial remained distinctly uneasy. Self-restraint in graphically describing this relationship was an effort, but in fairness, sensing the court's view, was achieved by both.
- (iii) All of his dealings in relation to Tee Pigs were with Mr. Toal, from whom he got some information about the company: he supplemented this with his own knowledge. He had stock sheets and looked at the farm and its buildings; he had some details about the feed, but overall he was vague about what precise information he had as of 1st June, 2001. He did however say that he had a good general view of what the company was worth.
- (iv) On the 1st June, 2001 however his nominated accountant, Mr. Gerard Kelly, received from ASM draft accounts for the year ending 30th September, 2000 together with a number of other financial documents, including bank reconciliations and ledgers, all attached to an email of that date. Apparently the plaintiffs thought that Mr. Kelly was acting for Mr. Toal. In any event, as previously stated, those accounts disclosed an intercompany balance in the amount of the existing claim. This information, which Mr. Leddy and his accountant knew of, was not further pursued because, in the words of Mr. Kelly, it was dated. As events turned out, that was not correct and such should not have been so presumed. A simple phone call to the Auditors would have clarified matters. Overall it is clear that, for whatever reason, the level of due diligence conducted by Mr. Leddy, was in his own words, somewhat lax.
- (v) The witness claimed that had he known the true position, he would not have paid Mr. Toal the consideration which he did; in effect, he would have deducted from that sum the intercompany balance. That may or may not have been so, but even if he had, one will never know what Mr. Toal's reaction to such a move might have been. But what is clear however is that neither the plaintiffs nor DPL played any effective role in that arrangement.
- (vi) Finally he asserted that the NAV, as a result, was calculated on the wrong basis. It is not clear however on what basis he can make this point, as the use of the NAV was a matter between DPL and Mr. Toal and on its face was unrelated to Mr. Leddy or Lagan Pigs.

61. What flows from the evidence of these witnesses can be further considered in the context of the submissions, with regards to the various pleas raised in the defence. A number of these have already been dealt with and others can immediately be disposed of. That relating to an account being stated and settled was expressly abandoned at trial. That resting on waiver lacked any evidential basis whatsoever. That alleging the making of representations or the existence of some form of estoppel must likewise be discounted. As previously stated, it is clear that, in all of his discussions with Mr. Leddy, Mr. Toal was acting solely in his own interest: this applied to the shares in Tee Pigs which he owned and also those over which he had disposing power. This represents a finding of both fact and law. He was not at any relevant time acting on behalf of the plaintiffs or as a representative of DPL. His right as against the latter was to compel a transfer of its shareholding either to him directly or to his "nominee". Having named Lagan Pigs in this regard, that was the only relationship between the Vendor and that company.

62. Likewise I am satisfied that neither DPL nor the plaintiffs had any discussion whatsoever with the owners of Lagan Pigs about DPL's shareholding in Tee Pigs or about that company's financial relationship with DPL. In addition and at the level of principle they had no responsibility to the nominee company.

63. The plea of mistake is in my view not open on the facts of this case. It will be recalled that the only defendant is Tee Pigs and that neither Lagan Pigs nor its shareholders are parties to this action or any counteraction. There can be no question of the defendant as named being in a position to assert any mistake as of course it was the subject matter of the agreement and not a contracting party to it. Tee Pigs is a legal entity in its own right and thus has a separate legal personality from Lagan Pigs and from Messrs. Leddy and Fitzpatrick. I can therefore find no legal basis for evaluating the situation other than in the manner in which I have.

64. In conclusion, I am satisfied that the amounts claimed are owed by the defendant company to DPL. Evidently therefore I am also satisfied that this debt has not been discharged either by express payment or by the loose, vague and entirely unsupported suggestion of cash payments. As I cannot see any other defence to this action, I must grant the decree as sought.

65. Mr. Leddy may feel somewhat aggrieved by this conclusion, but if that sense of grievance should exist, it surely stems from the manner in which Lagan Pigs acquired its interest in Tee Pigs and not otherwise.