Neutral Citation: [2015] IEHC 609

**THE HIGH COURT**

**[2013/3755S]**

**BETWEEN**

**HSBC INVOICE FINANCE (UK) LIMITED**

**PLAINTIFF**

**AND**

**DAVIDE GARAVELLI AND PAOLO GARAVELLI**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Haughton delivered the 6th day of October, 2015**

**Introduction**

1. The plaintiff HSBC Invoice Finance (UK) Limited ("HIF") seeks to recover €2,937,914.56 by way of damages against the defendants being two former directors of TLT (International) Limited ("TLT") for breach of personal undertakings given in Deeds of Undertaking dated 27th January, 2012 ("the Undertakings") collateral to an Agreement for the Purchase of Debts which also encompassed its schedule and standard terms and conditions, between HIF and TLT dated 30th January, 2012 ("the Agreement"). The plaintiff claims that the defendants are liable on foot of their Undertakings for breaches of the Agreement, and of a floating charge dated 20th February, 2012 between HIF and TLT ("the floating charge"), which they caused TLT to commit.

2. Further and in the alternative, the plaintiff claims €100,000 from each defendant on foot of a Deed of Guarantee between HIF and the defendants dated 30th January, 2012 ("the Guarantee") by which the defendants agreed to pay to HIF on written demand all monies and liabilities due by TLT to HIF subject to an aggregate maximum payable amount of €100,000.

3. The proceedings were commenced by Summary Summons dated 13th November, 2013, and admitted to the Commercial List. On 19th December, 2013 a Mareva injunction was granted ex parte restraining the defendants from reducing their assets below €2,905,366.19, subject to draw downs for reasonable living expenses. This became an interlocutory order, but it was varied on a number of occasions, and ultimately discharged by order of this court on 3rd July, 2015. The proceedings were remitted for plenary hearing with appropriate directions for pleadings and discovery. The evidence was heard by this court over 15 days ending on 29th January, 2015. Written closing submissions were exchanged and final argument was heard on 27th February, 2015.

**Undisputed Facts**

4. The background facts to these claims are largely undisputed.

5. The defendants are the third generation of the Garavelli family involved in the agri-business industry, and which has operated in Ireland for over 30 years. The defendants were based at a farm owned by their father Sandro Garavelli in Mullingar, Co. Westmeath. In 1995 they incorporated TLT, a private limited company, to carry on the business. Both defendants are directors. Paolo Garavelli was at all material times the managing director. TLT grew to be one of Europe's largest specialist fleet operators, accounting for 70% of livestock exports from Ireland to Italy and Greece and over 90% of sheep exports from Ireland, and opening up markets for Irish farmers. Its average annual turnover in the five years up to the end of 2013 was in the region of €30-35 million, and it was a prominent buyer at Irish marts. The defendants prided themselves on the standards that TLT was setting in the industry, pioneering regulatory compliance in animal welfare, satellite tracking systems and other traceability regulations. TLT also developed a trade using its returning livestock trucks to import, primarily to the UK, products for sale in garden centres. TLT became a major employer in the local community.

6. Of relevance is that Davide Garavelli also ran his own business supplying livestock to Italian customers. This he did under the name Coget IT Di Garavelli Davide ("Coget"), a company incorporated and registered in Italy on 11th May, 2009. Coget is classified as an impresa individuale which is a form of sole trader acting under the specific style of its sole shareholder, and having direct liability to third parties with whom it deals. TLT supplied livestock to Coget – accounting for up to almost one third of TLT's turnover. Although TLT and Coget had some Italian customers in common, Coget tended to deal with smaller orders and smaller customers.

7. The nature of TLT's business was such that considerable time elapsed between the purchase of cattle in Ireland and the receipt of payment from the European purchasers supplied by TLT. Prior to 2012, TLT relied on term lending, or its overdraft facility with AIB plc, to provide working capital, but it did not find these arrangements satisfactory.

8. HIF is a UK based subsidiary of HSBC bank that specialises in providing invoice financing and factoring, and Paolo Garavelli negotiated with them in 2011 as a result of which TLT entered into the Agreement with HIF, which commenced on 31st January, 2012. While TLT did not regard this Agreement as perfectly suited to its requirements, it was the best arrangement available to it at the time.

9. The way that the Agreement was intended to work was that invoices would be raised by TLT up to two weeks after animals had been delivered. These invoices were then notified by TLT to HIF, usually in batches, by electronic communication to HIF's online platform. HIF would then make funding available against the invoices – 70% of the value of the invoices – the following day, with payment released automatically by HIF to TLT ("pre-payment"). Pre-payment was, and could be used for further purchasing of cattle or any other TLT expenditure. All remittances in respect of 'notified' invoices were then paid into an HSBC account held in TLT's name for the benefit of HIF ("the Trust Account"), either directly by TLT's customers or, if paid to TLT, by TLT cheque into the Trust Account. Under the Agreement, HIF earned a "Service Charge" of 0.35% of the notified value of each debt, subject to a minimum of €60,000 per annum.

10. The Agreement provided that certain TLT invoices/debt was "Non-Notifiable Debt", including debt payable by an "Associate". The reason for this was to avoid an obvious possibility of abuse of the Agreement by the generation of false or misleading invoices in order to obtain pre-payments. For this reason, HIF and TLT agreed that debt owed by Coget to TLT was non-notifiable. This meant that

remittances from Coget and other non-notifiable debtors to TLT did not fall to be paid into the Trust Account, and could not be the subject of pre-payments. Such remittances could therefore be banked elsewhere.

11. However – and critical to the case made by HIF – under the Agreement all TLT debt, including non-notifiable debt, became property of HIF as soon as the debt was created.

12. The Agreement operated satisfactorily in 2012, but in early 2013 trading conditions became difficult for TLT and others involved in the livestock business primarily because of the so-called 'horse meat scandal' resulting from the finding of traces of horse meat in processed beef and other products intended for human consumption. This led to loss of public confidence, reduced sales, and the prolonged holding of exported sheep and cattle in Italy and elsewhere by TLT customers, with consequential delay in remittances.

13. HIF undertook an audit of TLT's operation of the Agreement in June, 2013. Following this, HIF alleged breach of the Agreement that led to it requiring Paolo Garavelli, on behalf of TLT, to sign a letter on 24th June, 2013 (but dated 21st June, 2013) purportedly acknowledging breach of the Agreement. On the basis that TLT complied with its terms going forward and rectified the breach, HIF would continue with the Agreement. The defendants denied in these proceedings that there was any such breach, or if there was that the plaintiffs could rely on it having elected to continue the Agreement.

14. Thereafter, persisting delays in payment by TLT customers resulting in a poor 'debt turn' for TLT led to HIF imposing restrictions on pre-payments: in some cases 'credit limits' were reduced decreasing the monetary level of invoices from a particular customer that could be pre-funded, retentions were increased meaning a greater positive balance had to be present in the account before entitling drawdown, and in some cases pre-payments ceased altogether because of the delay in payment. In addition, instead of remittances leading to automated pre-payments, Paolo Garavelli on behalf of TLT had to contact the relevant member of the plaintiff's staff to secure pre-payment. This all led to a reduction in pre-payments to the point where they ceased altogether, the last pre-payment being made on 12th September, 2013.

15. From mid-2013 it became increasingly clear to TLT that it would have to arrange an alternative financing arrangement, but despite exploring options this did not materialise before the events next summarised.

16. In September, 2013 TLT started repossessing from its European customers sheep and cattle in respect of which payment was (allegedly) overdue, and issuing credit notes in respect of such sales. This repossessed stock was then resold by TLT to non-notifiable customers, the bulk of it being supplied to Coget (Davide Garavelli). The remittances from these customers were not payable into the Trust Account, and were paid into other bank accounts of TLT, particularly its AIB trading account and a Bank of Ireland account. The payments into those accounts enabled TLT to continue to buy cattle and to trade.

17. Such repossessions and resales increased in volume in October, 2013. The effect of the issuance of credit notes was to cancel out a large amount of TLT debt that the plaintiff claimed was the property of HIF under the Agreement. The resale to non-notifiable customers meant that as the remittances were not paid into the Trust Account, they were beyond the reach of HIF.

18. Concerns about this led to a meeting on the 14th October, 2013, and a further audit by HIF of TLT a week later. This in turn led HIF to issue a letter dated 1st November, 2013 informing TLT that it was going to exercise its right of recourse in respect of all outstanding debts, and seeking payment of the debt then due.

19. On 4th November, 2013 HIF appointed Gearoid Costelloe receiver ("the Receiver") in respect of a fixed charge over the book debts of TLT (under fixed charge dated 20th February, 2012 between the plaintiff and TLT), and on 6th November, 2013 appointed him receiver manager under the floating charge. When this became public knowledge it appears that sheep/cattle recently purchased by TLT and held in holding centres, including at TLT's facility in Mullingar, were repossessed by unpaid farmers or cattle marts or their agents and there were further repossessions from continental European customers of TLT.

20. The Receiver's attempts to trace or recover stock, or recover debt due to TLT have only succeeded in recovery of approximately €120,000.

21. HIF via their solicitors then issued a demand letter on 7th November, 2013 to TLT seeking payment of the sum of €2,937,914.56 being the balance claimed to be due at that point on the current account maintained by HIF for TLT.

22. By way of separate sets of letters dated 8th November, 2013 to the defendants, HIF sought to recover the monies claimed in these proceedings on foot of the Undertakings, and €100,000 on foot of the Guarantee, respectively.

**The Issues**

23. The defendants did not raise any substantive argument as to why they would not be liable to pay monies due on foot of the Guarantees. The disputes centred on whether they were liable (without monetary limit) on foot of their Undertakings for alleged breaches by TLT of the Agreement which were denied. There was also no dispute as to the quantum of the claim. As the evidence unfolded the following issues emerged:-

I (a) Prior to 24th June, 2013:-

(i) Was non-notifiable debt due by Coget to TLT notified to HIF and the basis for pre-payments by HIF to TLT; and/or

(ii)Were debts due by customers of TLT, which ought to have been paid directly into the Trust Account, paid instead to Coget and then paid by Coget into the Trust Account;

in breach of the Agreement?

(b) If so, was such breach of the Agreement admitted by the defendants in June, 2013?

(c) If so, did the plaintiff elect to continue the Agreement thereafter such that the plaintiff is now estopped from relying on prior breach as a basis for breach of the defendants' Undertakings?

II (a) In July, 2013, were payments due by TLT customer Baumann GmbH ("Baumann") paid into TLT's Bank of Ireland account rather than into the Trust Account and/or there credited as payments by Coget in breach of the Agreement?

(b) If so, were the defendants or either of them thereby in breach of their Undertakings, and if so was this material?

III (a) Was TLT in breach of the Agreement in respect of the issuance of credit notes in the period September/October 2013, and if so was this material?

(b) Was TLT in breach of the Agreement and/or were the defendants in breach of their Undertakings in relation to furnishing documentation including Coget bank statements to HIF during the same period, and if so was this material?

**The Agreements**

**The Debt Purchase Agreement**

24. The agreement for the purchase of debts, its schedule and the standard terms and conditions comprise the entire Agreement. The Agreement commenced on 31st January, 2012. The salient elements relating to the issues above are as follows:-

"2. ASSIGNMENT

2.1 On the Commencement Date, the Client (as beneficial owner) assigns to HIF (i) all Existing Debts and Future Debts and (ii) all Non-Notifiable Debts.

2.2 Each Debt created after the Commencement Date shall automatically belong to HIF the moment it is created."

25. Of particular relevance are the standard terms and conditions of the Agreement as it is under these that breaches are said to have occurred. Clause 6 of the terms and conditions concerns non-notifiable debts:-

"Notwithstanding any other term of the Agreement:

6.1 HIF is not obliged to make any Prepayment in respect of any Non-Notifiable Debt;

6.2 the provisions of Condition 13 (Trust) do not apply to Non-Notifiable Debts;

6.3 HIF will only manage sales ledgers in relation to Non-Notifiable Debts if HIF wishes to do so;

6.4 the Client may retain (as a payment against the purchase price of the Debt) any Remittance relating to a Non-Notifiable Debt unless HIF had told the Client to Notify the Debt prior to receipt of the Remittance;

6.5 the Client will not Notify HIF of any Non-Notifiable Debt until HIF tells the Client to do so, at which time the Client will hold the Non-Notifiable Debts and their proceeds on trust for HIF and, upon HIF's request, collect such Non-Notifiable Debts as HIF may specify as agent for HIF; and

6.6 if HIF makes a Prepayment in relation to a Non-Notifiable Debt the Non-Notifiable Debt shall automatically be a Debt for the purposes of the Agreement and HIF may designate it as an Ineligible Debt."

27. Clauses 13 and 14 are of particular import in these proceedings as they concern the Trust Account and the collection of debts, respectively:-

"13. TRUST

13.1 Immediately on receiving a Remittance the Client will deliver the original Remittance to HIF or pay it to a Collection Account.

13.2 Before delivery of a Remittance to HIF, the Client will hold it on trust for HIF and separately from the Client's own monies.

13.3 The Client will hold on trust for HIF any Debt and its proceeds which fails to be transferred effectively to HIF.

14. COLLECTION OF DEBTS

14.1 If the Client does not have Credit Management, the Client is appointed as HIF's agent for the collection of Debts and it will, at the Client's expense, collect and enforce payment of all Debts.

14.2 HIF may at any time give the Client notice to terminate its agency to collect all or any Debts. After termination of the agency the Client will not claim to be or otherwise hold itself out as being HIF's agent for any purpose.

14.3 HIF and not the client has the sole right to enforce payment of and collect any Debt, so long as HIF is the owner of it, and to compromise any Debt and to institute, defend or compromise proceedings relating to any such Debt in such manner and on such terms as it may require to enable HIF to collect, settle and enforce payments of Debts.

14.4 The Client will provide HIF with all assistance and co-operation that HIF may require to enable HIF to collect, settle and enforce payments of Debts."

TLT did not opt for 'Credit Management' and accordingly it was HIF's agent for the collection of debts.

28. Clause 16 of the terms and conditions details the warranties TLT provided under the Agreement:-

"16.1 The Client warrants that (a) it has disclosed and will disclose to HIF every fact which might influence HIF's decision to enter into or continue the Agreement, purchase a Debt or to accept any person as a Guarantor and (b) all facts and information disclosed to HIF by the Client were true and accurate at the time provided.

16.2 The inclusion of a Debt in a Notification is a warranty by the Client to HIF that:

(a) the goods or services have been Delivered and the Contract of Sale has been performed so that the Debt is an undisputed and enforceable payment obligation of the relevant Customer;

(b) the Debt is payable within the Standard Payment Terms or such other terms as agreed by HIF in writing;

(c) the Debt is owned by the Client and not subject to any Security Interest in favour of a third party;

(d) the Debt has not been previously Notified to HIF;

(e) the Debt is not a Non-Notifiable Debt;

(f) the relevant Customer is not Insolvent;

(g) the Debt is payable in a Debtor Currency and without retention, set-off, deduction or counterclaim except for any prompt settlement discount not exceeding five per cent of the Notified value of the Debt or such other percentage confirmed by HIF in writing;

(h) the Debt is freely assignable and is payable under a Contract of Sale governed by (i) English, Scots or Northern Irish law, provided that either the Client or the Customer is located in the jurisdiction whose law governs the contract or (ii) any other law approved by HIF in writing;

(i) if a Customer is located outside the United Kingdom, Ireland, the Isle of Man and the Channel Islands, the relevant Contract of Sale includes the relevant Incoterms and is in writing;

(j) the correct details of the Customer appear on documents evidencing the Debt;

(k) all details contained in the Notification are correct and complete; and

(l) the person signing or delivering the Notification has the authority to do so."

29. Also of importance for these proceedings are a number of undertakings provided by TLT under clause 17 of the terms and conditions:-

"17.1 The Client undertakes to:

(a) pay to HIF immediately on demand:

(i) any debit balance on all or any of the Current Accounts plus all other Liabilities;

(ii) any amount by which a Retention exceeds a Current Account credit balance at any time;

(iii) any payment made to the Client in error;

…

(c) immediately upon HIF's request (or such other time limits as HIF may specify):

(i) provide the Debt Records, evidence of the performance of a Contract of Sale and any information (certified if required) relating to a Customer, the Client or their operations;

…

(v) not issue any credit note without HIF's prior approval;

(e) provide HIF with details (in a form acceptable to HIF) of all credit notes issued to Customers within 1 working day of the credit note being issued;

…

(m) endeavour to immediately resolve any dispute.

17.2 The Client undertakes that it will not without HIF's prior written consent:

…

(c) subcontract to another person the performance of any of the Client's obligations to HIF…"

[Emphasis is added to the undertakings of particular relevance]

30. The termination events are outlined in clause 18, the most salient of these being that HIF may immediately terminate the Agreement where under 18.1 a breach of a finance document or an agreement between HSBC and either the client or an associate of the client has occurred; and under 18.4 where in the opinion of HIF there is a material deterioration in the Client's financial condition or operating performance.

31. Clause 19 sets out the rights of HIF following a termination event:-

"19.1 Following a Termination Event or *HIF's reasonable belief that a Termination Event may have occurred or may occur*, HIF may:

(a) without notice reduce the Prepayment Percentage (including to zero) or increase the Retention on all or any Current Accounts;

…

(c) demand repayment of any Prepayments made in respect of unpaid Debts;

(d) withdraw or reduce any Limit (including to zero);

(e) designate all or any Debts as Ineligible Debts;

…

(g) to the extent not already debited to a Current Account, net off Liabilities against sums due by HIF to the Client and/or demand payment of any debit balance on all or any Discounting Accounts from the Client;

(h) designate all Credit Protected Debts as Unprotected Debts;

(i) terminate the Agreement; and

(j) withdraw the Client's ability to use IIF.

19.2 The Client's right to draw from any Current Account will be treated as ceasing immediately prior to any attachment or third party debt order against monies due by HIF to the Client." [Emphasis added].

32. Clause 20 provides:-

"The termination of the Agreement will not affect rights and obligations in respect of any Debts which were created before the Termination Date, including the accrual of the Discounting Charge and HIF's rights to set off monies or consolidate accounts. These rights and obligations will continue until all monies due under the Agreement have been paid."

33. TLT provides HIF with an indemnity under clause 23:-

"Unless expressly provided to the contrary in the Agreement, the Client indemnifies HIF against Liabilities incurred in relation to any Finance Document, including the costs of establishing title to and collecting Debts."

34. Under clause 24, TLT authorises HIF to communicate with its customers, guarantors, credit insurers, bank, auditors, accountants and other professional advisors in relation to any finance document between the parties to the Agreement. The clause also provides that "any communication by HIF with Customers will be for the purpose of confirming that Notified Debts comply with the warranties and undertakings given by the Client in relation to those Debts or any other purpose authorised by the Client."

35. Clause 29.1 allows HIF to amend any term of the Agreement:-

"29.1 HIF may change any term of the Agreement. HIF will tell the Client when the change comes into effect.

29.2 Without affecting HIF's rights under Condition 20 (Termination rights), if any change under Condition 29.1 to the terms of the Schedule to the Agreement is to the Client's detriment, then HIF will give at least 30 days' notice of the changes. At any time before the effective date of such change, the Client may give notice to terminate the Agreement of not less than the Notice Period and:

(a) the proposed change to the Schedule will not take effect; and

(b) if termination is within the Minimum Period, HIF will be entitled to the charges and/or fees described in Condition 10.6 that would have been payable had the Minimum Period been served."

36. Clause 34 outlines definitions for terms utilised in the standard terms and conditions, the most relevant to the current dispute are outlined below:-

"…

Debt any monetary claim or other obligation (including any tax, duty or interest), present future or contingent, of any Customer under a Contract of Sale and all Associated Rights other than an Excluded Debt

…

Debt Turn is the number of days between the Relevant Day and the End Day inclusive, where:

(a) Relevant Day is the last day of each calendar month

(b) End Day is the day on which OD is equal to ND

(c) OD is the aggregate value of all Debts outstanding on the Relevant Day

(d) ND is the aggregate value of Debts net of Dilutions Notified on days which immediately precede the Relevant Day

…

Eligible Debt any Debt which is not a Non-Notifiable Debt or an Ineligible Debt

…

Ineligible Debt a Debt which (a) is subject to breach of any warranty or undertaking given to HIF (b) following calculation of the Concentration Limit, is in excess of the Concentration Limit (c) is in excess of a Funding Limit (d) HIF considers to be materially overdue for payment (unless a Credit Protected Debt) or (e) HIF deems to be ineligible for a Prepayment until HIF has received sufficient evidence that it is not subject to breach of any warranty or undertaking given to HIF,

and HIF may also (i) designate any Debt in respect of interest an Ineligible Debt and (ii) save for any Debts which are Credit Protected Debts, designate all Debts of a particular customer as Ineligible Debts if HIF considers that a material proportion of that Customer's unpaid Debts are overdue for payment

…

Non-Notifiable Debt any Debt existing at the Commencement Date and which is more than 12 months old, or payable by an Insolvent Customer or disputed in any way and any other Debt which (a) is payable by an Associate (b) is due by a Customer to whom the Client is or may be indebted (c) relates to tooling which remained under the Client's control (d) is payable in cash or relates to a proforma sale (e) is payable by a Customer located in or operating from a country which is not an Approved Country or (f) relates to goods supplied on (i) approval or (ii) sale or return or (iii) constructive delivery or (iv) consignment or, in each case, similar terms, or any other Debt HIF may specify

…

Remittance cash, cheques, bills of exchange, negotiable and non-negotiable instruments, letters of credit, orders, drafts, promissory notes, electronic payments and any other form of payment received by HIF, the Client or any agent or representative of a Client in payment of a Debt, including monies recovered under any credit insurance policy, a refund of the VAT element of the Debt or a dividend payable in respect of the Debt".

**The Guarantee**

37. A joint guarantee securing the debt of TLT was signed by both Davide and Paolo Garavelli on 30th January, 2012 and is between the defendants and HIF. The Guarantee provides, *inter alia*:-

"The Debt

2. (a) You agree to pay HIF on written demand (subject to any limit in clause 4 below) the whole and each and every part of the debt mentioned in clause 3 below (the "Debt") and this Guarantee is continuing security for the Debt.

(b) Any sum or sums demanded from you under this Guarantee will carry interest from the date of demand until payment at an annual rate of 3% above EURIBOR from time to time computed and compounded monthly and/or according to HIF's then current practice. Interest as above applies before and after any demand or judgment.

3. The Debt is:

(a) all monies and liabilities whatever, whenever and however incurred, whether with or without your knowledge or consent, and whether now or in the future due, or becoming due, from the Client to HIF.

This includes, but is not limited to (whether as originally given or subsequently varied, extended or increased in any way):

(i) all monies and liabilities due from the Client to HIF under any facilities granted by HIF to the Client;

(ii) guarantees and indemnities to HIF and any of the Client's other contingent liabilities;

(iii) discount, commission and other lawful charges and expenses;

(iv) interest in accordance with any agreement between the Client and HIF and, if there is no agreement, interest on any money and liabilities due from the Client to an annual rate of 3% above EURIBOR from time to time computed and compounded monthly and/or according to HIF's then current practice. Interest as above applies before and after any demand or judgment.

(b) any amount due under the indemnity in clause 15 below.

(c) money agreed to be paid by you under clause 17 below….

Limit on your Liability (if any)

4. The aggregate amount payable by you under this Guarantee (which includes without limitation to the generality of the foregoing, the amount due under the indemnity in clause 15 below) shall be limited to the sum of €100,000 Euro (one hundred thousand Euro)

and interest on the sum as mentioned in clause 2(b) above together with money agreed to be paid by you under clause 17 below.

…

Determination of the Continuing Security of this Guarantee

7. (a) HIF may, if it reasonably requires, treat the continuing security of this Guarantee as determined if you, or if there is more than one of you, any of you, or the Client, enter into any composition or arrangement with creditors or are made bankrupt, or any step is taken for examinership, receivership, winding up (except with HIF's written consent for the purpose of reconstruction or amalgamation only) or dissolution, or similar proceedings are taken against you, or any of you, or the Client.

(b) From the date HIF treats the continuing security of this Guarantee as determined under clause 7(a) above, the Debt will (subject to any limit in clause 4 above) be limited to:

(i) so much of the Debt as is owing (whether actually or contingently and whether or not demand shall have been made) to HIF by the Client at that date; and

(ii) the amount due under the indemnity in clause 15 below and the money agreed to be paid by you under clause 17 below, whether falling due before or after that date…."

38. Clause 16 states:-

"This Guarantee shall not be affected as security for the Debt by any neglect by HIF, or by any agent or receiver appointed by HIF, in connection with the realisation of any other security (whether by way of mortgage, guarantee or otherwise) which HIF may hold now, or at any time in the future, for the Debt."

39. Terms relating to the provision of HIF's written consent and 'reasonable requirement' are outlined in clause 22:-

"(a) Where the words "without HIF's written consent" appear in any clause, HIF will not unreasonably withhold consent. You agree that it is reasonable for HIF to refuse to consent to something if, in HIF's reasonable opinion, it adversely affects or might affect:

(i) HIF's security under this Guarantee and HIF's ability to enforce this Guarantee; or

(ii) HIF's ability to recover the Debt.

(b) Where the words "HIF reasonably requires" appear in any clause, you agree that it is reasonable for HIF to require if, in HIF's reasonable opinion, it will or might assist in:

(i) the preservation of HIF's security under this Guarantee; or

(ii) HIF's ability to recover the Debt."

40. The Guarantee also provides a warning that it "is an important legal document. HIF strongly recommends that you seek the advice of your solicitor or other legal advisor before signing this Guarantee."

**The Undertakings**
41. The Undertakings provided by the defendants are dated 27th January, 2012 and are in identical terms. There is no limit on the defendants' liability for breach of same. The salient points of the Undertakings are as follows:-

"In consideration of [HIF] entering into or continuing with [the Agreement] with [TLT], I hereby:-

"1. *undertake to ensure that the Client has and will continue to have all appropriate controls in place to ensure the proper operation of the facility provided for in the Agreement and that the Client will not breach any warranty, covenant, condition or undertaking under the* Agreement; and

2. *irrevocably undertake to pay HIF promptly on HIF's written demand if the Client does breach any warranty, covenant, condition or undertaking contrary to paragraph 1 above, an amount equal to (as applicable):*

(a) the notified value of the relevant debt or the value of the prepayment amount attributable to a notified debt which has been drawn down by the Client;

…

(c) the value of any monies received by the Client and not paid to HIF;

(d) the value of any relevant credit note;

(e) *any other specific sum which the client is obliged to pay HIF under the relevant warranty, covenant, condition or undertaking;*

and

3. *agree that until all indebtedness of the Client to HIF has been discharged, I will provide all reasonable assistance required by HIF in obtaining payment of debts purchased by HIF under the Agreement even if the Client shall become insolvent or the Agreement shall be terminated; and*

4. agree that my liability to HIF shall be as a principal debtor and shall not be affected by: the giving of time to or HIF's failure to take action against the Client or me; any defect in or invalidity or unenforceability of the Agreement; variations or amendments made to the Agreement or the ending of the Agreement; and

5. confirm and understand the provisions of the Data Protection Act 1988 and 2003 and that I was advised to take and have been given due opportunity to take separate independent legal advice on the effect of this Deed…"

[Emphasis added in respect of the terms that are most relevant]

**The Floating Charge**
42. A floating charge was entered into by TLT on 20th February, 2012 over its entire undertaking and property in favour of HIF. It states:-

"Security given over the Client's Assets

4. The Client, as beneficial owner, and as security for the payment and discharge of the Debt, charges by way of floating charge, all the undertaking of the Client and all its property whatsoever and wheresoever both present and future. This will not include any part of the same which is, for the time being, effectively charged by way of legal mortgage or fixed charge in favour of HIF and recognised as effectively so charged under the laws of the jurisdiction in which the same is situated (collectively called the "charged property").

HIF's ability to convert Floating Charge

5. HIF may, by notice in writing to the Client, convert the floating charge created by Clause 4 above into a fixed charge in respect of such of the property of the Client as may be specified in such notice. It may do is if,

(i) on the happening of any of the events mentioned in Clause 8 below; or

(ii) it appears to HIF that such property is in danger of seizure, distress, diligence or any other form of legal process or that the same, and/or the security now created in respect of it, is otherwise in jeopardy.

In either event, the ability of the Client to deal in any way with such property shall cease except to the extent that HIF may otherwise agree in writing.

Restrictions on Client

6. The Client shall not, except with the prior written consent of HIF:

…

(b) part with, hire, lend, sell or dispose of all or (except by a sale or disposal in the ordinary course of the Client's business and for the purposes of carrying on the same) any part of, the charged property.

…

When the Floating Charge shall become enforceable

8. This Floating Charge shall become enforceable:

(a) if the Debt is not paid or discharged when due (whether on demand, at agreed maturity or earlier as the case may be); or

(b) if the Client is in breach of any of the obligations under this Floating Charge…

Appointment of Receiver

9. (a) At any time after the Floating Charge shall have become enforceable, HIF may from time to time appoint (i) by deed in writing under hand or seal or (ii) under the Land & Conveyancing Law Reform Act 2009 (the "Act"), any person or persons considered by it to be competent to be a receiver or a receiver and manager (hereinafter called a "Receiver" which expression will, where the context so admits, include the plural and any substituted receiver or receiver and manager) of any part of the charged property. The restrictions contained in Section 108 (1) of the Act will not apply to appointment of a Receiver under this Floating Charge. HIF may from time to time in writing under the hand of a duly authorised officer of or seal of HIF remove any Receiver of any of the charged property, each such person shall be entitled (unless the contrary shall be stated in the appointment) to exercise all the powers and discretions hereby or by statute conferred on Receivers individually and to the exclusion of the other or others of them.

(b) A Receiver so appointed will be the agent of the Client, and the Client will be solely responsible for his acts and defaults, and HIF will have power from time to time to fix the remuneration of any Receiver appointed by HIF and to direct payment thereof out of the charged property or any part thereof, but the Client will alone be liable for the payment of such remuneration. The provisions of sub-sections 108 (4) and (7) of the Act will not apply to the appointment of a Receiver under clause 9(a).

…

Liability of HIF and Receiver

10. (a) Neither HIF nor any Receiver appointed under this Floating Charge will be liable to account as mortgagee or motgagees in possession of any of the charged property or be liable for any loss upon realisation or for any neglect or default of any nature whatsoever (except to the extent that the same results from HIF's or the Receiver's gross negligence or wilful default) in connection with any of the charged property for which a mortgagee in possession might as such be liable, and all costs, charges and expenses incurred by HIF or any Receiver appointed under this Floating Charge (including the costs of any proceedings to enforce the security hereby given) shall be paid by the Client on a solicitor and own client basis and will be charged on the Secured Assets…."

**The Fixed Charge**

43. A fixed charge on purchased debts which failed to vest was entered into in favour of HIF over the book debts of TLT on the same date as the floating charge was signed on behalf of TLT by Paolo and Davide Garavelli, 20th February, 2012. It provides:-

"2. The Client will:

(i) on demand fully discharge by payment to HIF, without any deduction or set-off, all or any monetary liabilities included in the Obligations; and

(ii) duly perform all the Obligations other than monetary liabilities.

3. To secure payment and performance of the obligations as provided for in clause 2, the Client, as beneficial owner, hereby charges in favour of HIF:

(i) by way of fixed charge, all Purchased Debts excluding Non-Notifiable Debts which fail to vest effectively and absolutely in HIF pursuant to the Agreement;

(ii) by way of fixed charge, all Associated Rights relating to those Purchased Debts charged to HIF in clause 3(i) above;

(iii) by way of fixed charge, all Purchased Debts comprising Non-Notifiable Debts, which fail to vest effectively and absolutely in HIF pursuant to the Agreement; and

(iv) by way of fixed charge, all Associated Rights relating to those Purchased Debts charged to HIF in clause 3(iii) above.

4. The Client hereby warrants that, except as hitherto disclosed to HIF in writing, it is the beneficial owner of all the Charged Property and that all the Charged Property is free from any charge or other encumbrance or trust and undertakes that, except with the prior written consent of HIF:

(i) the Client shall not sell, mortgage, charge, pledge, assign, part with possession of or otherwise dispose of any of the Charged Property nor release, exchange, compound, set-off, grant time or indulgence in respect of any of the Charge Property except as expressly provided in this deed…"

44. Clause 7 of the fixed charge states:-

"Without prejudice to any of HIF's rights under the Agreement, HIF shall be entitled, on demand, to payment in full of all or any part of the monetary liabilities included in the Obligations and to exercise any or all of HIF's powers of possession and sale of and the appointment of a receiver over any or all of the Charged Property on the occurrence of any of the following events or at any time thereafter:

(i) any breach of any of the Client's obligations and undertakings hereunder;

(ii) the failure of the Client to pay any monetary liability included in the Obligations when it is due to be paid;

(iii) any event which gives HIF the right to terminate the Agreement whether or not HIF shall have exercised such right…"

45. The salient elements of clause 8 of the fixed charge are in similar terms to clause 9 in the floating charge concerning the appointment of a receiver. Clause 10(a) of the floating charge relating to the liability of HIF and a receiver also appear in like form under clause 9(a) of the fixed charge.

**Issue I – Breach prior to 24th June, 2013?**

46. This issue centres on certain activities between TLT and Coget prior to the meeting of 24th June, 2013, and associated events leading up to and including that meeting. The defendants' evidence was that within TLT Paolo Garavelli was based in Mullingar and attended to the financial affairs of the company, including the day to day operation of the discounting facility under the Agreement, while Davide Garavelli travelled between Ireland and Italy (and other countries in Europe and North Africa) where he dealt with customers of TLT, usually Italian farmers and livestock dealers.

47. Davide Garavelli also worked for Coget which had its own bankers and financial support, and Mr. Stefano Kyrkmayr based in Brescia acted as Coget's accountant. It was stated by both defendants that Paolo Garavelli had no involvement in the management or ownership of Coget. However, Coget had been a customer of TLT since its incorporation in 2009. Coget would frequently buy cattle from TLT for sale to its own customers, and these transactions would be fully invoiced and recorded in TLT's books. Davide Garavelli explained the advantages of Coget as follows in his witness statement (para. 5) which were echoed by Paolo Garavelli:-

"A properly structured Italian company conferred commercial advantages on prospective customers in the livestock industry. Some Italian farmers were not able to import certain livestock directly due to administrative requirements in relation to, inter alia, the status of their farms, the housing of livestock, restrictions on the quantities of orders and other import licensing concerns. As an independent trading entity accredited importer of livestock, Coget offered certain domestic farmers the ability to purchase nationalised livestock which a foreign exporter could not do."

48. They also explained that although Coget was a competitor of TLT, the two entities normally focussed on different customers. Coget dealt with smaller customers who wished to take advantage of its flexibility. In their witness statements they stated:-

"…Whilst TLT and Coget have customers in common, the invoicing and collection of monies was at all times separately handled. Coget maintains its own books and records and is independently audited by its auditors/accountants in Italy. Coget has always settled invoices issued to it by TLT. Crucially, it must be stressed that Coget has never collected any monies due or owed to TLT."

49. As was further explained (para. 17 of Paolo Garavelli's witness statement):-

"On foot of various guarantees by third parties, Coget was able to obtain attractive and flexible bank facilities in Italy, which were denied to TLT by Irish banks during the severe financial recession. Since Coget normally made payments well in advance of the delivery of animals, TLT also had the benefit of advance payments on invoices made to it by Coget. This allowed TLT to further increase its turnover because Coget was able to grant longer payment terms to its clients. TLT's trade with Coget was always significant. The monthly trade would vary between 25% and 33% of TLT's turnover."

Davide Garavelli added to this that the guarantees for Coget were given by his wife's family.

50. It was accepted by HIF's senior client credit manager Mark Osborne that before the Agreement was entered into the commercial relationship between TLT and Coget was brought to the attention of HIF. It was also common case that because of Davide Garavelli's roles in both companies debt owed by Coget to TLT was classified as 'non-notifiable'. This meant it should not have been notified and should not have been the basis for any pre-payments by HIF to TLT (although HIF still owned this debt because under clause 2 of the Agreement all 'non-notifiable' debt was assigned to/belonged to HIF).

51. Paolo Garavelli gave evidence that was not disputed that in the period from October, 2011 until June, 2013 the payments by Coget to TLT exceeded €10 million, and that over €9 million of this was paid after the Agreement came into operation in January, 2012. It seems that approximately €9.76 million of 'Coget debt' over this period was in fact notified to HIF under the Agreement, notwithstanding that it was non-notifiable debt. Trust Account statements in fact identify Coget as a paying debtor in some instances. These payments into the Trust Account of Coget debt continued notwithstanding a review of the account undertaken by Sue Whitehouse, a senior invoice finance manager with HIF, on 26th November, 2012, and an audit carried out by John McCoubrey on

behalf of HIF on 28th November, 2012.

52. Ms. Whitehouse was HIF's relationship manager with TLT. I found her to be a careful and honest witness, with good recollection of the main events in which she was involved. I am satisfied from her evidence that the fact that these Coget payments were non-notifiable did not strike the HIF staff at the time of the November, 2012 audits. One possible explanation for this was given by Ms. Whitehouse: she had carried out an earlier review of the operation of the Agreement, in March, 2012, which showed Coget payments to TLT going into TLT's trading account with AIB, which would have been the correct way to deal with non-notifiable debt. She also pointed out that their review did not involve seeing any Coget records or accounts for the very reason that Coget debt was non-notifiable.

53. I find that at least up to the end of May, 2013, this notification of Coget debt was technically in breach of the Agreement. However, I also find that at least some of it took place openly in that in respect of some payments to the Trust Account, Coget's name appeared on Trust Account statements as "Coget IT DI Garavelli Davide". This shows that notifications by TLT to HIF's electronic platform of remittances disclosed Coget as a payer of debt to TLT.

54. In May, 2013 Ms. Whitehouse, prompted by lengthening of the 'debt turn' from 60 days up to 100 days or more, which Paolo Garavelli attributed to the problems arising from 'the horse meat scandal', carried out a review of the Trust Account. On seeing the Coget name in one statement she undertook a look-back through earlier statements and observed "several instances where the name Coget was appearing on a trust account statement as payee" (Day 2, p. 52). She contacted Paolo Garavelli, and I accept her evidence that he explained that the reason why the name "Coget" appeared on the Trust Account was because it was merely a payment reference and did not indicate that Coget was making the payments into the Trust Account. In an email dated 21st May, 2013 she then wrote on HIF's behalf to Paolo Garavelli:-

> "Morning Paolo
>
> As we discussed yesterday. Please accept this email as confirmation of the following:
>
> Coget IT is an associated company and therefore falls outside of the HSBC Invoice Finance facility. All payments in relation to these sales should not come through us and should be paid into your normal Bank current account.
>
> If you need any further clarification, then please do let me know.
>
> Kind regards
>
> Sue"

Accordingly, at least from receipt of this email TLT and the defendants were aware that payments from Coget to the Trust Account were prohibited.

55. Ms. Whitehouse did not accept at face value Paolo Garavelli's explanation that "it was merely a payment reference". She decided to arrange an audit of TLT's account, and this was carried out by Richard McKenna from HIF's audit section. Ms. Whitehouse briefed Mr. McKenna in advance, and flagged the issue of Coget payments to the Trust Account for particular attention.

56. Mr. McKenna gave evidence of carrying out the audit on 11th/12th June, 2013 at TLT's office at Knockdrin, Mullingar, where he obtained information from TLT's computerised and written records, ledgers and bank statements, and inter alia from Paolo Garavelli, TLT's accountant Sean Buckley, and a post-audit conversation with Davide Garavelli. Mr. McKenna used a template report on his laptop during the audit. Certain parts of this template were pre-filled with information obtained from the previous audit and advice from Ms. Whitehouse, which provided context. He filled in most of the new TLT information at the time of the audit. He also jotted down notes which were routinely destroyed after he had prepared his report. This was identified in evidence and in my view did not detract from the relevance and admissibility of the information in the report. I am satisfied that Mr. McKenna completed his report immediately after his visit. Certain other content was added post-audit, and this was also self evident or identified by Mr. McKenna in his evidence. In the course of the audit Mr. McKenna studied TLT's AIB current account statements and the recorded payments into the Trust Account, and he sample tested two Coget receipts paid into the Trust Account. The printed version of the report formed the basis of his evidence to this court.

57. The following pertinent matters emerged from Mr. McKenna's report and evidence:-

> (a) There was deliberate banking of certain customer cheques of TLT to the AIB current account that should have been lodged to the Trust Account. Mr. McKenna noted the following explanation for some of these from Paolo Garavelli:-
>
> "Advised this will have been sent through in mix of round sum payment sent to HIF on 5/7 June. Paolo advised he will have done his workings out on the 'back of a fag box' hence the round sum payment. Was unable to provide any detailed analysis."
>
> (b) Payment from the AIB account to the Trust Account of sums that should have been banked direct to the Trust Account. The report noted payments on 5th-7th June, 2013 of €12,000, €13,103.64, €25,000 and €12,800 from the AIB account to the Trust Account. Mr. McKenna noted:-
>
> "Auditor unable to tie back values due to Paolo's poor record keeping in this area. Receipts thought to relate to the above orange highlighted receipts received throughout April/May and June."
>
> (c) Under the heading "Test of 2 'Coget' Receipts into Trust Account", two records of entries in the Trust Account marked as payments received from Coget for €30,310 and €14,452 on 10th June, 2013 and 7th June, 2013, respectively were examined. Mr. McKenna comments "Paying a debt for SOC. AGR. INVESTITURA (ACC INV01) transferred from Cogets account in Italy", and "Paying a debt for ADO01 – AGR. ADO DI DI MERLO MARIO transferred from Cogets account in Italy", respectively. In evidence Mr. McKenna stated (Day 9, p. 36):-
>
> "…Now in these two instances what I have been advised is that these are paying debts for notified customers that are being paid into Coget and then transferred across into the trust account, and that is why it is showing as Coget in the trust account."

It should be noted that these two payments post-dated Ms. Whitehouse's email of 21st May, 2013 prohibiting Coget payments into the Trust Account, an issue to which I will return shortly.

(d) In audit notes Mr. McKenna recorded the following:-

"The biggest issue identified [in] this audit is the identification of a large number of receipts into the [Trust Account] which appear to originate from associated company Coget. Such receipts over the past 5 months are seen to be:

June (to date) – 75,921 (38.6% of total cash collected)

May – 381,219 (28.4% of total cash collected)

Apr – 682,338 (43.5% of total cash collected)

Mar – 156,091 (14.7% of total cash collected)

Feb – 400,549 (28.1% of total cash collected)

First point of note the auditor wishes to make is that Paolo made this very difficult for the auditor to establish the actual situation regarding these, instead preferring to initially claim that these were just "reference numbers", and did not say anything different until confronted with the originator name showing as Coget. It was not until a conversation with his brother Davide in the car journey back home that the actual situation regarding this actually came to light! Auditor would therefore make all aware of the auditors concern at the lack of forthcoming shown by Paolo in this area. Paolos explanation once confronted with this was that Davide collects cheques from farmers as he spends a lot of time in Italy and is easier and faster for him to bank the cheques in Italy (claiming that this would be resolved if HSBC set up an Italian account).

However the situation as per Davide is as follows: He advised that when trading with debtors in Italy there is a premium charge attached to trading with debtors outside of Italy (c. 1 euro) therefore in order to avoid this 'premium' debtors need to be trading with an Italian company. As a result Davide advised that such invoices will be raised and sent out under the name of Coget and the subsequent payment will be banked into the Coget account in Italy before being transferred over.

Auditor requested client to provide statements for Coget so as to be able to establish the lag time upon which the client is sitting on the receipt however these have not been forthcoming. The further issue which this creates is that HIF will not have title to this debt given that invoices are being raised under a different name. Client was able to provide details of only 2 debtors who this will apply to albeit there will inevitably by more:

ALLEVAMENTO NEGRISOLI GIOVANNI - 71,544

SOC.AGR.SVEZZAMENTO BERTOCCHI – 58,769

However Davide advised that there were…a number of other[s] so auditor has requested client to provide details. Auditor discussed with [Ms. Whitehouse] on the evening of the audit with [Ms. Whitehouse] advising client is already off pre-payment therefore situation will require further clarification before being put back on pre-payment.

When discussing with client he advised that this is something that has not changed in the business and therefore questioned why the auditor was only raising the issue now. Auditor reviewed"

In his direct evidence Mr. McKenna confirmed the events that caused him to make this note. His recollection was that Davide Garavelli was not present in the same room when Paolo Garavelli was giving his differing explanations for the recorded Coget payments to the Trust Account. He stated that the only real way to find out to what extent TLT/Coget was "sitting on" money that should have been paid to the Trust Account was by looking at Coget bank statements (Day 9, p. 47).

Mr. McKenna also elaborated on the circumstances of his conversation with Davide Garavelli (Day 9, p. 49) recalling that David Garavelli was driving him back from Mullingar to his hotel. Mr. McKenna raised the issue of Coget because he remained unhappy about the amount of information that he got from Paolo Garavelli. He said he wrote up this part of the report the following morning prior to getting his flight back to Manchester.

The audit report "Summary and Recommendation" section listed three "Escalation Issues", the first of which related to the Coget collection of TLT debt and repeats in summary form the matters referred to above. It noted "Auditor has requested a full list from the client of all debtors who are operating in this manner."

(e) While Mr. McKenna was "with the assistance of Sean [Buckley]" able to get the TLT ledger to reconcile "to a difference of only 1k", which was within an acceptable parameter, his audit note stated:-

"…All to be aware that although this is showing a surplus in valuation auditor is unable to quantify what level of risk the Coget issue is and therefore cannot be counted in the Valuation (other than the 2 known debtors at the time of filing). Given that Italian debtors (who this affects) account for some 90% of debts this could have a detrimental affect on the Valuation in a collect out.

Auditor would also note that payments against oldest debts are also a feature and therefore this again could cause issues in a collect out."

(f) The second "Escalation Issue" raised by Mr. McKenna was as follows:-

"Direct Receipts (AIB) - May (€21k/1.6% of cash collected), April (€29k/1.9%), March (€53k/5%), Feb (€55k/3.9%). Lag times range from 1-36 days and record keeping deemed unacceptably poor mid month."

The Recommendation for this was:-

"Breach letter to be issued. Auditor has requested client start transferring EXACT amounts daily and keep a record of contacting re-offending debtors."

(g) The third "Escalation Issue" was:-

"Operational – Client still not retaining satisfactory day books of sales notified therefore notification dates still cannot be established. Also not keeping a credit note file as has previously been requested."

The Recommendation here was:-

"Auditor has again recommended that the client retain these going forward albeit Sean [Buckely] believes this to be too much work as only in 2 days a week and Paolo claims cannot be done due to the 14 day cooling off period."

58. In a prompt follow up to the audit there was a relevant exchange of emails. On 12th June, 2013 Paolo Garavelli sent Mr. McKenna the text of a letter that TLT was to send to all customers asking them to "…check the payment details that you have on file for TLT…", and giving their own bank details for future payments. TLT would also request "…if you are paying in Stirling please contact us or forward a cheque". I am satisfied that this was primarily prompted by HIF's insistence that TLT customers pay direct to the Trust Account, and only incidentally referred to concern over delays in the payment/encashment of Sterling payments. On 13th June Mr. McKenna emailed Paolo Garavelli:-

"Hi Paolo

I hope you are well.

Just a quick email to get an update from you regarding the outstanding information from the audit.

Have you been able to source the bank statements for Coget for those receipts we discussed?

Also when I was speaking to Davide I asked if he could provide a list of the TLT debtors whose receipts are being paid into Coget in the first instance, has he been able to supply this yet? If not is this detail you can provide me with please?

I would appreciate if you could supply this at your earliest convenience..."

Paolo Garavelli replied the same day:-

"Hi Richard,

Davide is in Tunisia so I am waiting for him to send info across to me asap, I will chase him up tomorrow.

With regards to a list of Debtors paying Coget – this is not a specific list but a case when cheques were paid instead of Direct Transfers

Davide collected occasional cheques and then transferred funds across particularly from smaller operators – which appear on the Trust account statement as Coget – This practice has now been discontinued forthwith by instruction from Sue – so all remittances will be forwarded to HSBC whether in cheque form or preferably transfer with immediate effect.

Coget will now be wound-down or sold and we will replace the need for a local presence with a TLT Italy subsidiary office – it's the only way to effectively alleviate any associated issues going forward.

K rgds

Paolo" [Emphasis added].

The words emphasised are only consistent with a practice of Coget collecting monies due to TLT by way of cheques made out to Coget, and then transferring monies across to the TLT or the Trust Account. That this is so was confirmed when Ms. Whitehouse emailed Paolo Garavelli on 19th June, 2013 dealing with nine matters, and at item 2 she stated "No further payments should be processed/cleared via Coget Bank account", to which Paolo Garavelli responded the following day:-

"This is confirmed as of the 7th no further payments have been handled by Coget, As explained Davide is now seeking advice on how to remove himself or Coget from the equation in the best possible fashion to serve all interests concerned. In any case ALL Italian cheques will be presented to HSBC direct-we will need some comfort that same day value is given so as not to adversely influence debt turn further – again a Topic for Monday's meeting".

59. Arising out of concerns over the audit report, a meeting was arranged between Ms. Whitehouse and other HIF staff and the defendants for 24th June, 2013. Before the meeting she asked Mr. McKenna to set out in writing the conversations that he had at the audit with the defendants and their accountant. Mr. McKenna did this in a detailed email to Ms. Whitehouse dated 24th June, 2013. This repeats much of the contents of the audit report set out above, but in it Mr. McKenna says it was only "[a]fter much procrastination" that Paolo Garavelli agreed that certain payments to the Trust Account originated with Coget. He also added:-

"[Paolo] eventually advised that this is because Coget are collecting cheques when Davide is in Italy (he subsequently noted that Davide spends a lot of time in Italy so he believes it speeds up the process of collecting the cheques for Davide to collect these and bank them rather than the time it may take for these to be correctly banked into the [Trust Account] (note the change in Paolos understanding of this at this point whereby he has changed his understanding of this from "just referencing" these receipts to it being a quicker way to get the cash in).

I asked how quickly these receipts are taking to come across from the Coget account to which Paolo and Davide advised will only be a couple of days however despite having asked several times for a Coget statement to prove this Paolo has not yet provided."

60. Mr. McKenna also referred in evidence to the need for trust in the operation of an invoice finance discounting facility. On Day 9, p. 64 he stated:-

> "…Now with an Invoice Finance discounting facility as this is, it is all heavily based upon trust. We need to have confidence that the people who are operating the facility have got integrity and because of the lack of information that was being given and then the changes in explanation, that's why I felt the need to kind of raise that on the front sheet just to make people aware of the kind of obstacles that I had on the day of the audit, which I wouldn't expect to have on an invoice discounting client."

61. The defendants, while accepting that Coget debt was non-notifiable, said that payments due by Coget to TLT were routinely paid into the Trust Account and that HIF must have been aware of this. They disputed Mr. McKenna's evidence and repeatedly denied that payments due to TLT by notifiable customers were invoiced by Coget or collected by Coget on its behalf and then paid by Coget into the Trust Account. They denied any admissions to that effect at the audit, by Davide Garavelli in the car, or in the follow-up emails.

62. Paolo Garavelli contended that the two payments identified by Mr. McKenna on 7th and 10th June, 2013 as payments by "Coget" to the Trust Account in respect of Di Merlo Mario and Investitura were not in respect of TLT customers, and that the customer names just appeared as a "reference" to the ultimate buyer from Coget. He asserted that these were payments by Coget to the Trust Account in respect of cattle purchased by Coget from TLT and delivered to Coget's customers. He said that TLT and Coget had customers in common and that frequently TLT would sell cattle to Coget for onward sale and delivery to buyers such as Investitura and Di Merlo Mario. He put in evidence two copy "CMR" or international consignment notes dated 5th January, 2012 to illustrate this: both referred to TLT as "sender" and Coget as "consignee" and then referred to the "Place designated for delivery of goods"; in one of these the name and address given was that of Investitura. He suggested that Mr. McKenna must have picked up the names of Investitura and Di Merlo Mario "…from the paper trail…" and said "…[i]n fact I would suspect that that is not the narrative that appeared on the bank statement…", adding "[s]o that is his own doing. But the narrative would have simply had "Coget" and perhaps a reference of his invoice number."

What Paolo Garavelli was saying in effect was that the two payments identified by Mr. McKenna were not due from Investitura or Di Merlo Mario to TLT as TLT customers, but rather were due from Investitura and Di Merlo Mario to Coget as Coget customers, and were paid routinely (but he accepted incorrectly) by Coget into the Trust Account.

63. I found this evidence to be of little weight. The CMRs produced were old (January, 2012), in fact they were created prior to the commencement of the Agreement, and did not relate to the two payments in question. The defendants had ample time and opportunity to produce evidence that these were payments due by Coget customers to Coget, but failed to adduce any evidence to contradict Mr. McKenna's finding. Paolo Garavelli agreed that if these were Coget sales to Investitura and Di Merlo Mario there would have been "some sort of agreement with Coget", yet no Coget invoices or receipts were produced, and no part of any Coget bank statement was identified as relating to Coget's receipt of monies from these customers. Having heard the evidence of Mr. McKenna on this point the initial onus of proof on HIF was satisfied and it behoved the defendants to adduce evidence to refute him. Furthermore, the suggestion that Mr. McKenna "got the narrative wrong" was not put to him in cross examination.

64. Paolo Garavelli further explained that the two payments on 7th and 10th June, 2013 were "tail-end payments that were obviously already instructed and carried through" (Day 11, p. 122) which only hit the Trust Account after the prohibition on Coget payments to the Trust Account was given by Ms. Whitehouse on 21st May, 2013. This is not without difficulty. It does not fully explain a delay of over two weeks; it was not an explanation given to Mr. McKenna at the audit; and no bank statement or other documentary evidence was produced by the defendants to show that these payments by Coget to the Trust Account were initiated on or before 21st May, 2013. However, Davide Garavelli gave evidence that Paolo Garavelli notified him of Ms. Whitehouse's email (it was not copied to Davide Garavelli) and that he called Coget's accountant Stefano Kyrkmayr and told him "to stop paying the trust accounts" (Day 12 p. 167), although he could not say when this occurred. Davide Garavelli also explained that "[a]s the cheques were handed into the banks, postdated cheques from certain clients, the invoice also would be handed in, and the minute the cheque cleared the invoice would automatically be paid also. So that could have happened…That was probably in the pipeline and then it was just done in the normal course of business…".

65. I found this evidence plausible and supported by the fact that there were no recorded payments by Coget to the Trust Account after these last two payments. I tend to the view that the Investitura and Di Merlo Mario payments from Coget into the Trust Account could have been "tail end payments" that were initiated and completed before Ms. Whitehouse's instruction to TLT/Paolo Garavelli had been fully processed by Coget and its bankers. At any rate there was not sufficient evidence to conclude that these two payments were a breach of her particular prohibition on 21st May, 2013, and no attempt was made by the plaintiff's witnesses to identify the relevant inward payments to Coget from the Coget bank statements that were discovered by the defendants in January, 2014.

66. This, however, does not resolve the issue of whether these payments were TLT sales to Investitura and Di Merlo Mario, or Coget sales to them. For reasons given earlier I believe that as a matter of probability these were payments due directly to TLT from TLT customers in respect of TLT sales.

67. Furthermore, I found Mr. McKenna to be a credible witness with good recall and no reason to record or give evidence that was anything other than the truth. I was satisfied that the records of events and conversations in his audit report and from his subsequent briefing of HIF staff were accurate. I was satisfied with his account of how it was only after the 'just references' explanation was given, and further "procrastination" by Paolo Garavelli, and showing him the source of the payments recorded in the Trust Account statement as being Coget, that Paolo Garavelli admitted that the payments were from Coget. I am satisfied that while Paolo Garavelli wanted to hide the true source of these payments he ultimately accepted that they were payments due to TLT but paid through Coget.

68. In particular, I formed the view that Paolo Garavelli was misleading the court when, under cross examination in relation to an email from Mr. McKenna on 13th June, 2013 seeking "a list of the TLT debtors whose receipts are being paid into Coget in the first instance", he said "[t]here are no TLT letters with receipts being paid into Coget and no such debtor list was provided to him [Mr. McKenna]". He also pretended that he could not explain why Mr. McKenna was seeking this information (Day 11, p. 142), and later on he said of this practice "It simply did not happen" (Day 11 p. 149). This flew in the face of Paolo Garavelli's reply email at 8pm on the same day, in which there was no denial of Davide Garavelli's car conversation with Mr. McKenna, and in which he stated:-

> "With regards to a list of Debtors paying Coget – this is not a specific list but a case when cheques were paid instead of Direct Transfers. Davide collected occasional cheques and then transferred funds across particularly from smaller operators – which appear on the trust account as Coget – this practice has now been discontinued…"

This email was an express admission that this practice took place, and that it was reflected by the use of the Coget name in the

Trust Account. I reject Paolo Garavelli's suggestion that his spoken and email exchanges with Mr. McKenna referred only to customers of Coget making payments to Coget. This explanation was also inconsistent with Paolo Garavelli's email to Ms. Whitehouse on 12th June, 2013 suggesting options to "eliminate any concerns" about Coget, being to sell it, wind it up and establish a TLT Italy subsidiary, or Davide Garavelli removing himself as a shareholder or director of TLT. Given that Coget was a thriving company which accounted for a large percentage of TLT sales, these were extraordinary options to propose if they were not necessary to placate HIF, and they are consistent with the evidence of Mr. McKenna and Ms. Whitehouse. It was also inconsistent with the express confirmation given by Paolo Garavelli in his email of 20th June, 2013 to Ms. Whitehouse that "[n]o further payments should be processed/cleared via Coget Bank account."

69. Also, Coget never furnished the documentary evidence which it would have held and which would have proved that these payments resulted from Coget sales if that were the case. This was despite Mr. McKenna's requests, and the further request of Ms. Whitehouse in her email of 19th June, 2013. In an email the following day Davide Garavelli attached Coget bank statements, but these particular statements were less than satisfactory. First, they did not include statements from BCC Del Garda, a bank with which Davide Garavelli admitted Coget had a trading account. Secondly, although Davide Garavelli suggested the statements were exact print offs from banks Qui UBI and Credito Bergamasco S.P.A., they appeared to be redacted with no columns disclosing the payor name for payments in or the payee name for payments out, or at the very least the statements did not include this information in the first instance. They appear incomplete when compared with the Coget bank statements furnished on discovery in January, 2014. Paolo Garavelli also promised "…a separate email with the details of the payments and dates requested", but this information was not forthcoming, and indeed was never furnished by the defendants despite repeated requests up to the date of appointment of the Receiver. I am satisfied that the main reason HIF sought all of this information was to establish the 'lag time' between Coget receiving a TLT customer payment and remitting it to TLT or the Trust Account; in addition to establishing the extent of the practice of Coget collecting TLT debt, and checking that it was all transferred into the Trust Account. I am satisfied that the defendants were aware of the reasons why the Coget information was sought, and that they deliberately failed to provide all of it.

70. Paolo Garavelli in evidence made much of cashflow difficulties/time lag arising from issues with conversion of Sterling cheques – which had first to be lodged to the TLT account with AIB and then transferred to the Trust Account in euro. He claimed this issue was central in the lead up to and at a meeting on 24th June, 2013 with HIF. I do not accept this to be the case. TLT received relatively little payment by Sterling, so this was not a major issue. This was, as I am satisfied Paolo Garavelli knew, from HIF's point of view a minor matter compared to the Coget issue although it must be accepted that it was an irritant, and HIF failed in their promise to arrange for a Sterling Invoice Finance bank account to be opened for TLT to receive electronic payments in Sterling.

71. While Davide Garravelli denied under cross examination (Day 12, pp. 174 -175) having the conversation with Mr. McKenna in the car in the form recorded in the audit report, I found this to be unconvincing. When asked whether he said that he collected cheques from Italian customers due to TLT and lodged them to the account of Coget he replied "Never. Never." He was then asked whether he said to Mr. McKenna that he went to customers of TLT and told them that he would arrange for an invoice to be issued by Coget for a TLT animal, so that they could pay Coget and he answered:-

> "Never. I never said such a thing, and a conversation like that I think would have taken place in the office. I think Mr. McKenna would have probably asked me to step into the office and ask me these things. I don't think a conversation like that could take place in a car travelling up to Dublin in less than an hour and have such a lengthy conversation on how I could produce invoices of TLT cattle or bring back cheques and lodge them to this. Completely untrue. Completely untrue."

He also denied explaining to Mr. McKenna that the reason why he did this was because Italian customers prefer to trade with Italian companies, and Coget was an Italian company:-

> "No. What I did say to Mr. McKenna, and I explain it again, I said certain clients in Italy were dealing with Coget because of the various reasons regarding perhaps the VAT part of it, and also because of the residency. I remember about the residency. We were talking about cattle staying seven months in herds in order to get the €70. That was the advantage that some farmers may have that they cannot avail if they buy from a foreign company. That is the only advantage they can have."

72. I prefer Mr. McKenna's account of this conversation in the car because it was plausible that he would, as he averred, deliberately raise the topic to elicit information (because Paolo Garavelli had not been forthcoming), and because immediately afterwards he recorded his recollection. Davide Garavelli by contrast had no record, did not give any alternative account of what was said, and could only suggest that no such conversation would have taken place and that it was only Mr. McKenna's "opinion" and "wrong". He did not suggest that Mr. McKenna was lying but he was unable to give any reasonable explanation for what was entered in the audit report.

73. Further, Coget had a motive for collecting from TLT customers on foot of Coget invoices as this meant that the paying customers would pay less VAT in Italy because Coget was an Italian based company. I believe this is one reason why payments occurred in this fashion. Mr. McKenna mentioned this in his audit report as being the subject of conversation with Davide Garavelli in the car, but Davide Garavelli said that "residency and VAT was not mentioned in the car", and that "it was a two minute conversation" (Day 13, p. 57). I found his evidence somewhat contradictory, and I do not accept his recollection as correct.

74. I am not satisfied on balance of probability that the two June, 2013 payments recorded by Mr. McKenna as payments from Coget to the Trust Account were in respect of notifiable debt due by Investitura and Di Merlo Mario respectively to TLT. Nevertheless, I find proven that the defendants did routinely procure that TLT customer debts were collected by Coget/paid to Coget, whether by Coget issuing a fresh invoice to replace the TLT invoice or the customer simply making a cheque out to Coget, and were paid by Coget to the Trust Account at least up to 21st May, 2013.

**The Meeting of 24th June, 2013, and 'Breach' Letter**

75. An important meeting took place at TLT's UK base Fairfield Farm, Wiltshire, on 24th June, 2013 attended by representatives of HIF and both defendants. At this meeting Paolo Garavelli on behalf of TLT signed an "Acknowledgment" at the end of a "breach letter" acknowledging receipt and confirming "agreement to its contents". The letter is addressed to TLT and dated 21st June, 2013, but it is not disputed that it was signed by the second defendant on 24th June, 2013. The material part of the letter reads:-

> "It has come to light that remittances received by you were not delivered immediately to us which is contrary to Condition 17.1(a)(iii) which is in breach of the Agreement.
>
> However, upon your confirmation that you will properly comply with the terms of the Agreement [and rectify the breach of

the Agreement set out above], we agree in principle to continue to provide invoice finance facilities.

Please return a copy of this letter duly signed by way of acknowledgement to Sue Whitehouse at the address below within the next 7 days….

We further confirm that this letter is without prejudice to the Agreement which shall remain in full force and effect.

Yours faithfully, [etc]

Sue Whitehouse

Senior Invoice Finance Manager"

76. HIF rely on this letter as a (further) admission/acknowledgment by the defendants of breach of the Agreement in respect of the Coget payments. For a number of reasons I attach no weight to the letter as an admission:-

(a) The meeting was called by Paolo Garavelli and the main purpose was to discuss re-structuring of the HIF facility with TLT, but HIF also wished to discuss a change in 'relationship manager' with TLT that had taken place in HSBC Bank plc that month.

(b) No advance warning was given to the defendants that they would be required to sign a breach letter. Ms. Whitehouse in her evidence fairly accepted that it should have been furnished in advance.

(c) No advice was given to the defendants to seek legal advice, and they did not have a lawyer present. They were not advised as to the possible legal consequences of signing.

(d) The letter is worded in a standard format that gives the recipient 7 days to sign, and therefore time to consider it and obtain legal advice.

(e) I accept that it was presented at the start of the meeting for signature as part of an administrative exercise, but also as something that would have to be done for the meeting to proceed further – indeed Ms. Whitehouse accepted this (Day 4, p. 49).

(f) This prompted a heated argument in Italian between the defendants, because Davide Garavelli did not feel that they should sign it before taking legal advice. Paolo Garavelli was of the view that if they did not sign, the relationship with HIF would cease and no discussion on restructuring would take place. I accept that the defendants were, and felt they were, under immediate pressure to sign, and that had they refused to sign, the meeting would not have proceeded further.

(g) The wording in the letter does not refer expressly to the breach as relating to Coget collection and banking of TLT debt. Clause 17.1(a)(iii), the only breach clause cited, is an undertaking by TLT to "…pay to HIF immediately on demand… (iii) any payment made to the Client in error". It could therefore cover payments received by TLT to its AIB account (including Sterling payments) which should have gone straight to the Trust Account. The use of the word "immediately" suggests that it was more concerned with delay in payments from the AIB account to the Trust Account. However, it is far from clear that on its face it encompasses or is intended to refer to TLT debt paid to Coget and then transferred to the Trust Account, or to TLT's AIB account. Ms. Whitehouse accepted that she had requested HIF's legal department to prepare the breach letter, but Ms. Burstow who drafted it did not give evidence. It reads like a weak adaptation of a generic breach letter.

77. I find that the breach letter was sprung on the defendants unfairly, and they were required to sign the acknowledgment without the benefit of legal advice and *in terrorem* in that had they not signed the letter, the meeting would not have continued and early termination of the Agreement was highly probable. The signing was not in any real sense an exercise by the defendants of their free will, or the giving of an informed acknowledgment. It was signed under the type of economic duress identified by Charleton J. in *ACC Bank v. Dillon* [2012] IEHC 474, para.s 5.0-5.3. I therefore place no weight on the alleged admission, the terms of which are in any case opaque as to any factual breach alleged.

78. HIF alleges that further oral admissions were made at this meeting to the effect that cheques were collected from customers of TLT and cleared through Coget's bank account. Ms. Whitehouse gave evidence that early in the meeting:-

"The conversation went along the lines of, as Davide was in Italy he would go round the customers and collect the cheques from them and because they knew him and trusted him, the customers would make the cheques payable to who he asked them to and then he would process them through the Coget bank account in Italy. It was almost as if they felt they were doing us a favour by clearing these cheques quickly through the Italian bank system rather than returning them through to the UK." (Day 2, p. 88).

This was consistent with typed written notes that she made soon after the meeting concluded in which she stated:-

"Both brothers are aware that paying in 'HIF' cheques to Coget's Italian bank account has breached the HIF agreement."

The evidence of Mr. Hipwell, another HIF representative at the meeting but with less background knowledge at the time, lent support to this when he said (Day 10, p. 11):-

"We focussed mainly around the cheques being paid to, or made payable to Coget, and there was a discussion and debate around why those cheques were being made payable to Coget, how they were collected by Davide from the clients in Italy and why they were being collected…".

Mr. Hipwell made handwritten notes at the meeting. These were not discovered until late on in the hearing, and I accept that this was because he had genuinely forgotten that he had taken notes. These included a brief entry "Coget – HIF LTR". I accept that this was a reference to the breach letter and linked it to the Coget payments, and was consistent with Ms. Whitehouse's evidence.

79. Paolo Garavelli asserted that the breach referred to in the 'breach' letter was related to the Sterling payments. He did not say that he was told this at the meeting, but rather that he had surmised this to be the case. The defendants had no record of the

discussion at the meeting to support this assertion. The records from HIF did not assist them. There is no reference to the Sterling payment issue in the breach letter (which was read by Paolo Garavelli, who relayed its terms to his brother). Such surmise was implausible given that shortly before the meeting in the email of 19th June, 2013 Ms. Whitehouse had indicated that a Sterling Trust Account would be opened. Furthermore, as I have already found, Davide Garavelli had made the admission in relation to Coget banking TLT debt at the audit two weeks earlier, and the further admission at the meeting on 24th June, 2013 would merely have been consistent with the conversation in the car with Mr. McKenna. I therefore found the defendants' evidence on this issue to be lacking in credibility.

80. Accordingly, **Issues I(a) and (b)** are answered as follows:-

**I(a)(i)** Non-notifiable debt due by Coget to TLT was routinely notified to HIF and the basis for pre-payments by HIF to TLT, in breach of the Agreement.

**I(a)(ii)** Debts due by customers of TLT which ought to have been paid directly into the Trust Account were frequently paid instead to Coget and later paid into the Trust Account in breach of the Agreement. There was no facility for Sterling debt due to TLT to be paid into the Trust Account and the use of TLT's AIB account or other means for banking such cheques prior to transfer of monies to the Trust Account was not a breach of the Agreement.

**I(b)** While finding that HIF cannot rely on the 'breach letter' signed on 24th June, 2013 as an acknowledgment of breach, I find that admissions of breach of the Agreement were made at or soon after the audit both verbally and in email exchanges. As a matter of probability I find that further verbal admissions of breach were made at the meeting on 24th June, 2013 by the defendants to the effect that Coget had collected TLT debt and banked it with Coget before onward transmission to the Trust Account or TLT's AIB account.

**Issue I(c) – Election/Estoppel**
81. The defendants argue that HIF is estopped from relying on the letter of 24th June, 2013 as an admission of breach. It is not necessary to address this because in that regard I attach no weight to the letter. The defendants then argue that HIF is estopped from relying on acts or omissions of the defendants prior to 24th June, 2013 as constituting breaches of the Agreement or of the Undertakings because the letter makes it clear that they are willing to continue to provide invoicing facilities, and they did in fact continue to provide such facilities over the ensuing months. They rely in their written submissions on case law relating to the doctrine of estoppel.

82. However, it seems to me that the doctrine of election is more relevant. Election at common law arises in situations where one party (A) is faced with two inconsistent, mutually exclusive courses of action arising from its relationship with another party (B). Where A unequivocally follows one course of action over the other and communicates same to B, A is bound to that course of action from the moment it is communicated to B, irrespective of whether there has been any detrimental reliance on the part of B arising from said communication. A cannot later go back on the election and choose the rejected course of action (Feltham, P., Hochberg, D. and Leech, T., *Spencer Bower Estoppel by Representation*, 4th edn, 2004, p. 359). Feltham *et al*. provide the rationale that the choice is binding upon its communication to B as parties in a "legal relationship are entitled to know where they stand" (4th edn, p. 359).

Lord Goff in *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391, considered at p. 398 that:-

> "[c]haracteristically, this state of affairs arises where the other party has repudiated the contract or has otherwise committed a breach of the contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform to the terms of the contract…[The innocent party] has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of [its] hands…".

Lord Aikens of the English Court of Appeal summarised the position as outlined by Lord Goff more recently in *Tele2 International Card Company S.A. & Ors v. Post Office Ltd.* [2009] EWCA Civ 9 where at para. 53 he stated:-

> "Lord Goff's analysis of the doctrine of affirmation of a contract by election can be summarised…as follows: (1) if a contract gives a party a right to terminate upon the occurrence of defined actions or inactions of the other party and those actions or inactions occur, the innocent party is entitled to exercise that right. The innocent party has to decide whether or not to do so. Its decision is, in law, an election. (2) It is a prerequisite to the exercise of the election that the party concerned is aware of the facts giving rise to its right and the right itself. (3) The innocent party has to make a decision, because if it does not do so then " *the time may come when the law takes the decision out if [its] hands, either by holding [it] to have elected not to exercise the right which has become available to [it], or sometimes by holding [it] to have elected to exercise it ".* (4) Where, with knowledge of the relevant facts, the party that has the right to terminate the contract acts in a manner which is consistent only with it having chosen one or other of two alternative and inconsistent courses of action open to it (ie. to terminate or affirm the contract), then it will be held to have made its election accordingly. (5) An election can be communicated to the other party by words or conduct. However, in cases where it is alleged that a party has elected not to exercise a right, such as a right to terminate a contract on the happening of defined events, it will only be held to have elected not to exercise that right if the party "has so communicated [its] election to the other party in clear and unequivocal terms"".

Where a repudiatory breach has occurred and the innocent party chooses to treat the contract as continuing and still valid, he is deemed to have affirmed the contract and cannot then use that particular breach later as a means of ending the contract. However, this does not mean that the innocent party has waived his right to claim damages for the breach. Whether this is so will depend upon the construction of the contract and how the innocent party has made the election (Feltham et al., 4th edn, 2004, p. 403). On this point, Lord Goff in *The Kanchenjunga* referred to the following statement of Devlin J. in *The Stork* [1955] 2 QB 68, at pp. 76-77:-

> "There is a difference between a contractor who does not discharge his obligation at all and one who does so imperfectly. In the latter case, the contract gives the other party the right to elect to treat the imperfect performance as if it were fulfilment of the contract (even if he knows that in fact it is not), and to claim damages if any result from the imperfection. This is a right which is, I think, common to every class of contract. The general principle is that the other party is entitled to proceed as he would have done if the contract had been properly fulfilled and the risk of any damage that flows from that must be borne by the wrongdoer."

83. In order for the defendants to show that HIF is bound by its election in the breach letter of 21st June, 2013, it must show that:-

(a) HIF had knowledge of the facts giving rise to the breach of contract, and had knowledge of the right to elect between two inconsistent rights;

(b) HIF made an unequivocal representation of its decision to choose one course of action over another; and

(c) the representation was communicated to the defendants.

84. As I have found, TLT was in breach of the Agreement prior to 24th June, 2013. In that the defendants were in charge of the operations of TLT and Davide Garavelli of the operations of Coget, they were intimately involved in the breaches and therefore in breach of their Undertakings. HIF had knowledge of breach arising from the look-back conducted by Ms. Whitehouse and in particular the audit carried out by Mr. McKenna – sufficient for HIF to know that it had the right to terminate the Agreement. It is clear from the breach letter, and the evidence of the HIF representatives of the course of the meeting on 24th June, that notwithstanding past breach HIF was prepared to continue to operate the Agreement and the Undertakings. While there was a reference in the letter to rectifying 'the breach', no stipulation as to rectification was made and no rectification was required.

85. In these circumstances, it is clear that HIF elected to proceed with the Agreement notwithstanding the breaches identified in the letter, and the breaches known to or suspected by HIF following the audit. This extended to all antecedent breaches of which it was or ought reasonably to have been aware arising prior to 24th June, 2013, and therefore included breaches related to all the payments by TLT customers that were 'banked' by Coget; all payments into the Trust Account by Coget in respect of TLT debt; all Sterling payments made by TLT customers to TLT's AIB account and transmitted after varying delay to the Trust Account; and all payments by Coget as a non-notifiable customer of TLT to the Trust Account.

86. The breach letter clearly communicated to the defendants/TLT HIF's election to continue the Agreement and Undertakings. However, neither in the wording in the letter nor in the evidence given of discussion at the meeting was there any hint that HIF was reserving a right to sue for damages for breach of Agreement up to that point in time. The bald reference to rectification of breach was not elaborated, and neither in the meeting nor its aftermath was there any suggestion that a right to damages for past breach was being preserved or pursued. This meant – and HIF did not seriously argue to the contrary – that breaches of the Agreement or Undertakings prior to 24th June, 2013 could not alone form the basis for any future termination of the Agreement.

87. This of course did not mean that monies due to HIF, or debt which was its property under the Agreement as it had operated up to that time, did not remain due or did not remain the property of HIF in accordance with the terms of the Agreement. Moreover, where the innocent party has elected to affirm the contract, this does not mean that they have waived the requirement of future compliance with the contract or affirmed it in perpetuity. It does not prevent the innocent party from claiming for a breach arising from similar conduct in the future - the election only applies to past conduct. Fultham et al. (4th edn, 2004, p. 404) provide *Rickards v. Oppenheim* [1950] 1 KB 616, CA as an example where the innocent party waived strict compliance with the time element of a contract, but it was considered that it was open to him or her to remake it a requirement. Whatever else may be said about the breach letter, it unequivocably warned TLT and the defendants that they would in future have to "properly comply with the terms of the Agreement".

88. It is also trite law that a party who waives his right to terminate a contract by virtue of his counterparty's breach of that contract may later terminate that contract where a subsequent breach arises where it is sufficiently serious, or where "the other party has continued to persist in the same breach" (Peel, "The Law of Contract" 13th edn, para. 18-078). The authorities cited by counsel for HIF in their written Closing Submission also show that notwithstanding the election to affirm a contract, if there is further breach the court is entitled to take into account the pre-election breach in assessing the seriousness of any post-election breach, and whether it is such as to justify termination – see *Bell Electric Limited v. Aweco Appliance Systems Gmbh & Co. K.G.* [2002] EWHC 872 (QB) and *Reinwood Limited v L Brown & Sons Limited* [2008] EWCA Civ 1090. I accept this as correct.

89. The extensive evidence given in relation to the operation of the Agreement up to 24th June, 2013, and my findings in relation to it, also has relevance to the overall assessment of the parties' respective witnesses when considering their evidence of subsequent events. Further, the requirement that Davide Garavelli/Coget furnish documentation relating to Coget dealings, that I have found was not satisfied by the bank statements furnished in June, later resurfaced as HIF's concerns over Coget continued, and the pre-24th June requests do not appear to have been waived by the letter of 24th June.

**Issue II – Baumann**

90. This issue concerns HIF's allegation that in breach of the Agreement and Undertakings, monies payable by Baumann to the Trust Account were diverted to TLT's Bank of Ireland account in July, 2013, and were credited as being paid in by Coget, instead of being paid directly to the Trust Account.

91. HIF relied principally on the evidence of the Receiver, Mr. Gearoid Costelloe who carried out investigations following his appointment, and prepared a report based on the records available to him including Bank of Ireland statements, AIB accounts, TLT's debtor ledgers, and the records of payments to the Trust Account.

92. The essential facts were not disputed. Baumann was a 'notifiable debtor'. In the month of July, 2013 11 payments totalling €838,592 which should have been paid by Baumann to the Trust Account were paid instead to TLT's Bank of Ireland Account, with invoice reference details showing that they were paid by Baumann. These 11 payments were then recorded in TLT's debtor ledger, the first four under the description "03-Bank of Ireland current a/c Coget BOI", and remaining seven under the description "03-Bank of Ireland current a/c Coget".

93. As the Receiver commented, this meant:-

> "…the debtor which received the benefit of the receipt of the monies was not Baumann but rather Coget and the monies that were received on foot of those collections were lodged not to the HIF collection account but to the Bank of Ireland account, which is not an account over which HIF have any control" (Day 6, p. 68).

He suggested (para. 4.10 of his witness statement) that this "…was a deliberate misposting which was intended to disguise that the Company ought to have paid these monies onwards to the Plaintiff but it instead paid them into its ordinary account with AIB".

94. The defendants' response was that:-

(a) the lodgements to the Bank of Ireland account were Baumann's error;

(b) the debtor ledger descriptions were "mistaken allocations" to Coget, or 'administrative mis-postings';

(c) that matters would be subsequently reconciled in accordance with TLT's normal accounting procedure, but this was delayed because their accountant Sean Buckley was on annual leave;

(d) that all Baumann monies due to HIF were in fact paid over by a combination of Baumann direct payments to the Trust Account, other "Baumann related third parties[']" payments to that account, and Credit Notes issue by TLT to Baumann for €390,367; and

(e) that as Coget was 'in credit' on TLT's ledger, "rather than reimburse the additional monies paid over, the over-payment by Baumann was compensated by the supply of lambs by Coget to the value of €838,592."

These points shall be considered in their turn.

**(a) Error**

95. Paolo Garavelli could not give any plausible explanation as to why Baumann should have paid these monies into the Bank of Ireland account in error, and in such large amounts. It was surprising that any mis-lodgement of payments should have occurred so soon after the June audit and meeting, and the warning as to future compliance in the letter of breach signed on 24th June, 2013. It was all the more remarkable for a number of other reasons. First, as we have seen in the email which Paolo Garavelli sent to Mr. McKenna on 12th June, 2013 he set out the wording of an email that he was about to send to all TLT customers to refresh TLT bank details. Secondly, AIB was TLT's main bank (apart from invoice financing) and as Paolo Garavelli admitted in evidence (Day 9, p. 148), the Bank of Ireland account was "largely dormant" and "used….for one off trades, financing leasing and lesser functions", although they had had it for "a very long time". Thirdly, when Paolo Garavelli initially said in cross examination (Day 12, p. 85) that "Baumann had been paying [into] a variety of accounts prior to the appointment of HIF" he was immediately asked:-

> "Q. Since the HIF arrangement was entered into Baumann paid all of its monies into that account [the HIF Trust Account]. That is the evidence given by Mr. Costelloe and I don't think there is any dispute about that, is there?
>
> A. If these are his findings I can't dispute them."

Fourthly, the pattern of payments by Baumann to Bank of Ireland in July, 2013 is broken by four payments to the Trust Account in the middle of the month. Thus, four lodgements were made to Bank of Ireland from 10th-12th July, 2013, followed by four payments by Baumann directly to the Trust Account on 16th, 17th (x 2) and 24th July (the amount of each payment reflecting Invoice no.s 107869, 107870, 107871 and 107905, respectively), followed by the remaining seven lodgements to Bank of Ireland from 24th-31st July, 2013 inclusive. This broken pattern is more consistent with Baumann lodging to the Bank of Ireland account or the Trust Account depending on what express direction was given by TLT. Fifthly, no witness from Baumann was called to explain why this happened or to support the suggestion that it had paid into the Bank of Ireland "in error". For these reasons I reject this explanation as being extremely unlikely.

Paolo Garavelli also suggested that the fact that the debtor ledger did not record Coget's account as being €838,592 overpaid shows that it was an error. This does not necessarily follow; such an omission would be equally consistent with an attempt to disguise the true source of the payment which allowed the excuse of 'error' to be used in the event that the matter was uncovered.

**(b) Administrative Mis-postings**

96. In relation to the 'administrative mis-posting' Paolo Garavelli explained this as follows:-

> "Mis-posting in that their name was not identified on our current account statement and Baumann should have direct[ed] the payment to the HIF account." (Day 12, pp. 84-85).
>
> Later (Day 12, p. 87) he explained "…if a narrative is missing the mis-posting can happen".

97. However, this does not stand up to scrutiny because on the Bank of Ireland statements each of the 11 payments in by Baumann under the column "Transaction details" gives an invoice number generated by TLT that relates to the sale to Baumann, and cross checking of these invoice numbers would have shown Baumann to be the payer. In the case of the first two payments in on 10th July for €228,479 and €118,231, these related to four invoices (dated 25th-29th June, 2013) and two invoices (both dated 2nd July), respectively; only one invoice number is given in the "Transaction details" column of the statement, but nonetheless this still showed a connection to one customer only, namely Baumann. The second lodgement is for a sum that is the exact tot of the two invoices that it covers. Moreover, in respect of these two payments in, and the next two payments in by Baumann (€58,374.50 on 11th July, and €58,300 on 12th July) not only are invoice numbers given but these are followed in the "Transaction details" by the reference "BA GP". It is reasonable to infer that the "BA" is an abbreviated reference to Baumann as it is common to all these 'payments in'.

98. The Bank of Ireland statements put in evidence in Mr. Costelloe's report also disclose that in the same period Coget made three payments into this account, on 4th and 19th July, 2013 and 1st August, 2013. In each instance the "Transaction details" refer to "1/COGET IT DI GARA GP". Accordingly, payments in made by Coget to this account were readily identifiable as such.

99. It is therefore impossible to understand how TLT staff working off the Bank of Ireland bank statements in question could have accidentally "mis-posted" the 11 payments and credited them as Coget payments. There was no difficulty in this task, which presumably was routine. I reject Paolo Garavelli's assertion that "narrative" was missing from the statements. I find that 'administrative mis-posting' in the circumstances, and on the scale suggested would be, to use Mr. Costelloe's description, "bizarre".

**(c) Reconciliation in TLT Records**

100. Paolo Garavelli repeatedly in his witness statements and in evidence suggested that lodgements to an incorrect account or mis-postings occurred occasionally and would be reconciled and rectified in TLT's books at the end of the month, or possibly the next month. However, under cross examination he accepted Mr. Costelloe's evidence that the mis-postings in issue were never in fact rectified in the books and records of TLT (Day 12, pp. 85-86).

It was also suggested that reconciliation would have taken place at year end, and that TLT's in-house accountant Mr. Sean Buckley was in the process of preparing this reconciliation when the Receiver was appointed. Mr. Buckley was said to be working in Alaska at the time of the hearing and for practical reasons was unable to give evidence by video link or otherwise (he had prepared a witness statement). I draw no adverse inferences from his absence as a witness but would observe that, other than Paolo Garavelli's mere assertion, there was no evidence to back up the 'reconciliation at year end' suggestion.

**(e) All Baumann Monies Paid to HIF**
101. Paolo Garavelli stated that even if the payments were not reconciled in TLT's books:-

> "…funds went across from TLT to pay the funds to HIF. So I am satisfied TLT had none of the funds, had no benefit for these funds, other than the period that it took to identify the mis-posting." (Day 12 p. 86).

In support of this Paolo Garavelli relied on figures from TLT records and bank statements that showed:-

**Total TLT sales to Baumann June-August, 2013 €1,120,290**
**Baumann payment to Trust Account:-**

28th June, 2013 €59,732

July, 2013 (total of four payments) €221,146

5th September, 2013 €162,265

16th September, 2013 €45,885

**Payments from third parties posted to the Trust Account:-**

6th August, 2013 'Credited with Recourse' €69,000

26th August, 2013 Angolana Carni SRL €70,082

25th September, 2013 Gemma Srl €49,115

26th September, 2013 Ets Lepoureau €45,885

Sub total payments €722,420

Credit Notes:-

8th October, 2013 (total of three credit notes) €390,370

Sub total payments and credit notes (€1,112,790)

Balance at 15th November, 2013 €7,500

102. No issue arises with regard to the direct payments by Baumann to the Trust Account. An issue arises in respect of the third party payments to the Trust Account relied upon as part discharging Baumann's debt. In his supplemental witness statement Paolo Garavelli describes these as payments from "third parties who had bought from" Baumann and whose remittances were paid directly to the Trust Account. However, Mr. Costelloe identified three of these third parties (all except 'Credit with Recourse') as being customers of TLT, and in his report at p. 29 he opined:-

> "These findings back up the possibility that payments from one customer were being posted against the account of another customer in order to reduce the Baumann balance per the debtor listing."

103. In the absence of any detail or explanation from Paolo Garavelli in evidence as to the circumstances of these third party payments it is hard to understand why Baumann's clients should pay TLT directly, and do so by payment into the Trust Account, rather than paying Baumann in the first instance. This is particularly so when it is apparent from the correlation of the TLT invoices with Baumann payments that it appears that Baumann was a prompt payer in the period June-July, 2013 with payment recorded one to two weeks post the date of the invoice. In this context the possibility suggested by the Receiver is plausible.

104. The particulars of payments above relied on by Paolo Garavelli also directly contradict his explanation that "…during the controlled periods of July and August these funds were paid across to HIF from TLT as soon as the mis-posting had been identified" (Day 12, p. 85). Indeed, in closing submissions counsel for the defendants accepted that the third party payments to the Trust Account did not come from the Bank of Ireland account.

105. In fact Paolo Garavelli was effectively obliged to place reliance on the three credit notes issued on 8th October, 2013 for €390,370 to make up the balance of Baumann monies that should have been paid directly to the Trust Account. These were issued over two months after the mis-postings, so a reconciliation in August or even September would still have shown a substantial deficit.

106. While the issue of credit notes generally is considered in more depth later in this judgment, in relation to these three credit notes Mr. Costelloe noted in his report (p. 29) that "No satisfactory explanation has been received for the posting of these credit notes". The defendants maintain that the credit notes were notified to HIF and that none of them were issued in respect of invoices which were the subject of pre-funding under the Agreement.

107. The advantage to TLT of the payment of these monies into the Bank of Ireland account also falls to be considered. Paolo Garavelli's evidence was that for a variety of reasons which will be addressed later, the level of funding that TLT could draw down under the Agreement reduced greatly during the summer of 2013, and from 12th September, 2013 HIF effectively refused further pre-payments. Accordingly, TLT had to rely on funding from elsewhere to fund cattle purchases and its operations generally. The AIB operating account had overdraft limits that were often exceeded. The TLT Bank of Ireland account statements for July, 2013 show that with the benefit of payments in from Baumann totalling €838,592 it was maintained in the 'black' and was used as an operating account recording many payments out to marts.

**(f) Coget Supply of Lambs to Baumann**

108. In a supplemental closing written submission provided by the defendants entitled "Misallocated payment by Baumann" it was explained:-

> "…Coget was in a position to supply the lambs to Baumann and it did so in order to correct the mistaken credit on its account with TLT, to the value of the overpayment on its account.
>
> Given that the payments made by Baumann to the Bank of Ireland account had been accidentally recorded as payments received from Coget in the TLT's debtor ledger, Coget was 'in credit'. Rather than reimburse the additional monies paid over, the over-payment by Baumann was compensated by the supply of lambs by Coget to the value of €838,592. This was subsequently reconciled to the Coget and Baumann ledgers."

109. This was in turn supplemented by oral submissions from counsel who stated:-

> "…the original payment that had been made went to the Bank of Ireland account, but what happened instead was that Coget supplied lambs and instead of Coget taking up the money, the money was paid by Baumann or by third parties on behalf of Baumann to the trust account."

110. While deciding to receive these submissions, to which objection was raised, I was and remain concerned at the absence of evidence actually linking the third party payments listed above, or the further payments to the Trust Account by Baumann in September, 2013, to the sale and delivery of lambs by Coget. Davide Garavelli refers in his supplemental witness statement (para.s 3-4) to substantial sales of lambs by Coget to Baumann in mid-October, 2013, for which Coget received payment from Baumann of €609,312 on 25th October, 2013. However, he is at pains to point out that these were sales by Coget "in its own right", and accordingly this evidence of deliveries does not provide a link.

As there was insufficient evidence to provide a basis for the submission, I cannot accept it as an explanation. Even if what is submitted happened did occur, it is very different to a 'reconciliation' of the account in the sense of that term used by the Receiver and indeed Paolo Garavelli in evidence.

111. I therefore find that in July, 2013 payments due by TLT customer Baumann were paid into TLT's Bank of Ireland account rather than into the Trust Account, and that these payments were credited in the TLT ledger as payments by Coget. This was clearly in breach of the Agreement because Baumann debt was notifiable under clause 2 of the standard terms and conditions of the Agreement, and under clause 13.1 remittances were required to be paid immediately on receipt into the "the Collection Account" i.e. the Trust Account. The handling of these payments by TLT in the Bank of Ireland was also a breach of sub-clause 13.2 of the Agreement which provides that:-

> "Before delivery of a Remittance to HIF, the Client will hold it on trust for HIF and separately from the Client's own monies."

This clearly did not happen as the Baumann payments became mixed with other TLT monies in the Bank of Ireland account and were used for TLT operational purposes.

**Issue II(b) – Were the Defendants or either of Them in Material Breach of their Undertakings?**

112. In their respective Undertakings the defendants undertook:-

> "1. …to ensure that the Client has and will continue to have all appropriate controls in place to ensure the proper operation of the facility provided for in the Agreement and that the Client will not breach any warranty, covenant, condition or undertaking under the Agreement; and
>
> 2. irrevocably…to pay HIF promptly on HIF's written demand if the Client does breach any warranty, covenant, condition or undertaking contrary to paragraph 1 above, an amount equal to…(e) any other specific sum which the client is obliged to pay HIF under the relevant warranty, covenant, condition or undertaking…".

Under clause 17.1(a) of the Agreement, one of the undertakings that TLT gave was to "pay to HIF immediately on demand: (i) any debt balance on all or any of the Current Account plus all other liabilities".

113. As the directors managing and centrally involved in the day to day operations of TLT, the defendants shared responsibility for ensuring that there were controls in place to ensure the proper operation of the HIF facility and that there was no breach of warranty, covenant, condition or undertaking. While I am satisfied that this responsibility was primarily undertaken by Paolo Garavelli who managed the finance and administration of TLT, I am also satisfied that Davide Garavelli was in regular contact with his brother and aware in general of what was happening, in particular in relation to the bigger shipments and accounts, and in relation to the funding difficulties faced by TLT in the summer of 2013. This awareness was probably heightened after the meeting on 24th June, 2013 when he disagreed with his brother over signing the breach letter. He therefore cannot escape legal responsibility for the breaches of Agreement arising from the Baumann payments to Bank of Ireland.

114. Having considered the evidence relating to these payments, I conclude that far from being accidental they were as a matter of probability orchestrated by the defendants. This was probably done with the intention of disguising the true source and avoiding payment – or at any rate immediate or timely payment – into the Trust Account, and with the intention of using the funds available in the Bank of Ireland account to fund cattle purchases and the on-going operations of TLT. It follows that the defendants by their acts or omissions frustrated rather then ensured the proper operation of the Agreement.

115. In their written closing submission counsel for the defendants argued that clause 2 of the Undertakings requires the plaintiff to specify not only the breach in question, but also the precise amount that the defendants are obliged to pay. This may be described as a 'pound of flesh' argument. No authority was cited for such a narrow interpretation of the effect of this clause, but reliance was placed on the words "any other specific sum" in sub-clause 2(e) compared to the more generic term "all indebtedness" in clause 3 (in which the defendants undertook to provide all reasonable assistance to HIF in the collection of debt until "all indebtedness" has been discharged).

116. Counsel for HIF responded that the Agreement had been terminated because of breach, and that there were no 'cure provisions' in the Agreement that mandated specifying the breach and giving an opportunity to rectify it. It was argued that it was sufficient for the specific sum claimed to be identified in the proceedings as the sum of €2,937,914.56 being the credit balance due by TLT under the facility, and remaining unpaid notwithstanding the demand made by letter dated 7th November, 2013 from Eversheds solicitors on behalf of HIF to TLT seeking payment of this sum. I also note that by separate letters from HIF to the defendants dated 8th November, 2013, the unsatisfied demand to TLT was recited and a copy furnished followed by demand on foot of the Undertakings for

€2,937,914.56.

117. I accept the plaintiff's argument as correct. On an ordinary reading of clause 2 the words "any other specific sum which the client is obliged to pay HIF" in the final sub-clause 2(e) is a 'catch-all' provision intended to refer to whatever amount is due, rather than to impose a separate requirement that that amount be specified as a precondition to enforcement for breach of the Undertakings.

118. I find that TLT breached the Agreement and its undertakings in the context of the 11 Baumann payments to TLT's Bank of Ireland account, and in the crediting of these payments to TLT's Coget ledger.

119. I find that this breach was not accidental or unintentional or nominal, but was a serious and material breach and one from which TLT and the defendants derived commercial benefit. While it was a serious breach on its own account, it bore similarity to the collection of TLT payments through Coget prior to June, 2013 insofar as it meant that HIF did not obtain payment directly to the Trust Account of debt due from notifiable customers, and the monies were lodged to an account over which HIF had no control. As such, it repeated the sort of invoice and debt mismanagement that HIF had made plain to the defendants was not to recur in the meeting on 24th June, 2013 and in the breach letter dated 21st June, 2013, and this heightened its seriousness and is a matter that the court is entitled to take into account.

120. In my view the nature, seriousness and timing of this breach alone entitled HIF to demand payment of the debt due under the Agreement. As TLT failed to pay, this in turn gave rise to the defendants' liability under their Undertakings, specific to the amount due by TLT and as identified in the letters of 8th November, 2013, further specified in these proceedings in the Summary Summons and in opening submissions, and in a sum, the amount and calculation of which was never disputed.

**Issue III – Credit Notes and Coget Bank Statements**

121. The Agreement allowed for the issuance of credit notes by TLT, but TLT undertook "immediately upon HIF's request (or such other time limit as HIF may specify) …(v) not [to] issue any credit note without HIF's prior approval" (clause 17.1(c)(v) of the standard terms and conditions). Further, TLT undertook to "provide HIF with details (in a form acceptable to HIF) of all credit notes issued to Customers within 1 working day of the credit note being issued" (clause 17.1(e) of the standard terms and conditions).

122. The effect of this was that prior approval for issuing a credit note was not contractually required unless and until HIF requested it or imposed terms, provided always that TLT was contractually obliged to furnish details of credit notes issued within one day. It may be commented that these requirements, and in particular the one day period for notification, show HIF's sensitivity to the provision of credit notes to TLT customers, and it is easy to see why this would be so: each note had the effect of cancelling debt which was the property of HIF, and of cancelling all or part of an invoice in respect of which HIF might have made a pre-payment (if the customer was 'notifiable').

123. There was no evidence prior to October, 2013 of any express or written request by HIF pursuant to clause 17.1(c)(v) that credit notes not be issued without prior HIF approval.

124. Prior to September, 2013 credit notes do feature in HIF's monthly Client Statements for TLT. These Client Statements were generated from the 'on line platform' to which were posted TLT's invoices, payments received to the Trust Account, funds drawn down by TLT, credit notes, HIF's charges and sundry items on a monthly basis. Paolo Garavelli gave evidence (Day 10, pp. 112-113) that credit notes:-

> "…are always a feature insofar that it is livestock, it is a perishable product, it is dependent on a number of variables. So some credit notes would always have featured and aren't a novelty in our business. We managed it particularly carefully though."

He confirmed that TLT did issue credit notes throughout the duration of the Agreement to notifiable customers: "Well the credit notes that I referred to in normal trading terms are, for example, an animal could die" (Day 10 p. 113).

125. On this issue evidence of relevant amounts given by the Receiver Mr. Costelloe was largely uncontroverted (in other respects the figures presented by Mr. Costelloe e.g. in respect of sheep and cattle returned to marts and farmers at the time of the appointment of Mr. Costelloe as Receiver, were contested).

126. His evidence was that prepayments totalling €4,185,485.98 were made by HIF to TLT in the period June to September, and the last prepayment of €140,000 was made on 12th September, 2013. I am satisfied that at this point in time the Agreement definitively ceased to be a satisfactory invoice finance arrangement for both TLT and HIF. I accept the defendants' evidence that the problems that arose had their root in trading difficulties and delayed payments caused by the horse meat scandal that broke in January, 2013 and that this was exacerbated by the fodder shortage that spring. More immediately the pre-payments slowed in the summer of 2013 and then ceased because the debt turn had not improved or reached the target of 85-100 days set by HIF after the meeting on 24th June, 2013, and increasingly because HIF placed restrictions on prepayments: some customers were disallowed because of their overdue debtor days; and "retentions" were increased on other customers such that a greater credit balance for the customer had to be in place before there could be drawdown. It should be emphasised that the defendants never suggested that in imposing these restrictions HIF acted in any way in breach of the Agreement. There is no doubt that this situation put increasing pressure on TLT's finances and credit, and its ability to fund cattle purchases. Paolo Garavelli readily accepted that from early summer 2013 onwards he was seeking to 'restructure' the invoicing finance arrangement with HIF, and, later that summer, seeking alternative sources of funding and planning to wind down the HIF facility. Indeed there was common recognition of this, as Mr. Richard Mullett, who took over handling the TLT account in August, 2013, indicated to Paolo Garavelli at a meeting on 9th September, 2013 that the invoice facility would have to be "re-banked" by the end of September, or converted into a factoring facility (to which Paolo Garavelli was completely averse as being unrealistic). The fact remains however that substantial prepayments were made by HIF up to 12th September, 2013 which enabled TLT to purchase cattle and sheep and continue trading.

127. Mr. Costelloe found that as of 12th September, 2013 the balance due by TLT to HIF under the Agreement was €2,771,777.79 On the same day TLT's ledgers showed the total value of TLT's debtor book i.e. the total amount of the debts due by its customers, was €6,205,683.70. Under clause 2 of the Agreement the entirety of this sum was the property of HIF. In theory therefore HIF was well-secured by the size of this debtor book.

128. In July, 2013 credit notes were issued for €34,813.42 (against receipts to the Trust Account of €1,711,805.57, invoices issued for €1,932,757.23 and funds drawn of €1,770,542.92). Ms. Whitehouse said this was "probably a bit higher than normal" and this is exemplified by the following month.

For the month of August, 2013 credit notes were issued to the value of €4,243.50 (against total receipts of €1.545m, total invoices of €2.1m and funds drawn down of €1.520m approximately).

129. For the month of September, 2013 the HIF Client Statement shows only one batch of credit notes totalling €1,608.84 (against total receipts of €1.464m, invoices of €1.379m and draw down of €1m). This batch was posted to the account on 10th September. No invoices were received/posted after 23rd September, 2013.

130. However Mr. Costelloe's investigation of the TLT Debtor Control Account and the relevant ledgers from which entries in the Debtors' Control Account were derived showed that the total value of credit notes entered in TLT's books for September was in fact €340,480. The accuracy of this evidence was not contested.

Of these notes two were issued on 24th September for €32,942 and €30,600 respectively (total €63,542) but these had not been notified to HIF by month end. It follows that TLT failed to furnish to HIF full details of these credits notes within one day, contrary to clause 17.1(e) of the Agreement.

131. On 30th September, 2013 (a Monday) credit notes were issued for the balance for this month totalling €275,037 in a single day. A strict application of the one day notice requirement would therefore have allowed notification on Tuesday 1st October. The HIF Client Statement shows that the next batch of credit notes for a total of €244,164.25 was posted to the on-line platform on Thursday, 3rd October. This appears to represent all but one of the credit notes issued on 24th and 30th September, the sole absentee being a note no. 162483 for €30,873 issued on 30th September. This late notification and omission were on their face further breaches of clause 17.1(e).

132. For the month of October, 2013 the HIF Client Statement showed credit notes of €820,615.05, against receipts of €130,738.69, invoices of €596,321.43 and €nil drawn down. These credit notes were posted in five batches – the batch of €244,164.25 on 3rd October (clearly relating to all but one of the notes issued on 30th September), and three batches on 8th October for €183,871.50, €106,932 and €99,566. Another batch was posted on 9th October for €186,081.30.

133. However from TLT's records Mr. Costelloe found credit notes issued in October, 2013 with an "extraordinary" total value of €3,453,325. Within this month it emerged that on 8th October, 2013 credit notes with a total value of €701,023 were issued, yet only credit notes to the value of €390,369.50 were posted on that day. In that details of all credit notes issued that day were not furnished within the one day period there was a further technical breach of clause 17.1(e).

134. It was also recorded that on 15th October, 2013 credit notes to the value of €2,346,094 were issued – or at any rate were dated with this date. None of the details of these were posted to the HIF on-line platform but Paolo Garavelli said that this was because the on-line platform closed down, and he pointed out that details of all of these were given at the audit carried out the following week (on 22nd October). On the same day i.e. 15th October, TLT invoiced cattle sales to Coget totalling €1,544,861. According to Mr. Costelloe's figures therefore credits notes issued in September and October amounted in total to €3,793,805.

135. Mr. Costelloe was not able to say with absolute certainty that the invoices which were cancelled by credit notes represented invoices in respect of which HIF had made pre-payments, but was of the opinion that it seemed likely that a large quantity of cancelled invoices were invoices which had previously been notified to the plaintiff for pre-payment. This was denied by the defendants, and Paolo Garavelli's evidence was to the effect that credit notes were only utilised in respect of selected non-notifiable customers, or notifiable customers where the credit limits had been exceeded for pre-payments when the invoices issued, such that the invoices could not have been the subject of pre-payments.

136. In circumstances where the onus was on HIF, if credit notes were used without justification in respect of invoices on foot of which pre-payments were made, in order to recover stock and resell it to Coget, I would have expected such a matter to be clearly demonstrated by reference to TLT invoices, credit notes, ledgers and other records, including CMRs (the despatch/transport documents for each load), AIB and Bank of Ireland bank statements, HIF documentation, and Coget records – and most particularly Coget bank statements, which were furnished on discovery in January, 2014 and covered some four Coget bank accounts during 2013. The Coget Credito Bergamasco bank statements show, for example, two payments out to TLT mirroring the payments made into the Trust Account on 7th and 10th June, 2013 discussed earlier in this judgment, but do not on their face show these payments in to the Coget account. Obtaining definitive information from the Coget bank statements would probably have required raising queries with Davide Garavelli/Coget and his accountant, but it is not evident that that process was undertaken. In my view in these circumstances it is not appropriate to ask the court to draw inferences on incomplete evidence. I was not satisfied on the balance of probabilities based only on the opinion evidence proffered by HIF that credit notes had been issued cancelling invoices in respect of which pre-payments had been made.

137. It is however clear that the credit notes were for very large sums of money and I accept Mr. Costelloe's evidence in his witness statement that their utilisation was "completely out of pattern with the way in which [TLT] had hitherto conducted its business". It was obvious from the volume of the credit notes that they could not have related to normal trading reasons for issuing credit notes such as cattle mortality, or issues such as defects in the product or delay in delivery. This was confirmed by Mr. Costelloe's direct evidence, which I accept, that not all the customers to whom these credit notes were issued were slow payers. He said (Day 6, p. 43):

> "…I carried out an examination of the customer accounts against which credit notes had been applied and quite a number of the larger customers for which credit notes were processed had significant balances that were current…Well the most significant one there is Baumann…Well Baumann appear to me to be relatively quick to pay their debts and certainly if there was a balance due that was within 30 days."

138. Critical to this evidence is that in tandem with the issuing of credit notes, the stock the subject of such notes was re-invoiced by TLT to Coget. From 8th October, 2013 to 7th November, 2013 the only invoices which TLT issued were to Coget, and it appears that the only trading was with Coget. Eighteen invoices to Coget all dated 8th October, 2013 total €603,247. Twelve invoices to Coget all dated 15th October, 2013, total €1,554,861. Between these are recorded two sales of lambs to Coget "on account" for a total of €317,860, and the evidence was that these were lambs delivered to Baumann. So for the period of October the total value of invoices issued to Coget was €2,868,072, and during this month Coget paid TLT €2,649,805. Mr. Costelloe observed that the credit notes had the effect of cancelling approximately 60% of the TLT debt (that was the property of HIF) standing at €6 million at the start of October. According to Mr. Costelloe's figures, €2,861,199 in payments was received by TLT during this month: €2,553,446 received into TLT's AIB account, €236,306 received into TLT's Bank of Ireland account, and only €71,447 received into the Trust Account (approximate figures).

139. I find that the sheep/cattle the subject of the credit notes were repossessed by TLT and re-invoiced to Coget and sold on by Coget. Coget paid TLT promptly in respect of these resales, and the money was largely paid into TLT's AIB account, over which HIF had no control.

140. Logistically a significant amount of work and planning over a short period of time – perhaps four weeks - must have been required to implement this scheme. While Paolo Garavelli handled the paperwork he was in frequent communication with Davide Garavelli who orchestrated and directed the TLT drivers in carrying out the repossessions and redeliveries on the ground in continental Europe and particularly in Italy. I have no doubt that this scheme was devised and implemented by the defendants as directors of TLT, and was one to which Davide Garavelli as owner and director of Coget was privy. I am satisfied that Davide Garavelli was kept fully informed and was in that sense party to the decision making, and he was critical to its implementation.

141. The scheme was cleverly designed to try to avoid the terms and strictures of the Agreement, and to provide working capital and enable the purchase and acquisition of cattle to fill orders – and in particular a substantial second trade between TLT and Libyan customers. I believe this strategy/scheme crystallised in the mind of Paolo Garavelli at or around the time he met with Mr. Mullet on 9th September, 2013, when it was made clear that the invoice facility would have to be 're-banked' by the end of September, and when pre-payments ceased on 12th September, thus creating a cashflow crisis for TLT. In his evidence (Day 10, p.118) he stated:-

> "…after the meeting of the 9th where factoring was simply not going to be something I was going to entertain, I put a mechanism in place, in full discussion with Mr. Mullett, into how we would go about winding up the facility, and in the meantime continue trading with the resources to hand."

Whether there was "full discussion" with Mr. Mullett was very much in dispute, and will be addressed shortly. Paolo Garavelli admitted that this was a strategy, and that it was:-

> "…specifically tailored and targeted on non-notified…clients who were either in disapproval or disallowed, insofar that they are clients that we could not continue to supply going forward, allowing that invoice discounting was the only facility available to us at the time. So we went to particular lengths to try and avoid credit notes that were subject to refunding." (Day 10, p.113)

He also accepted that the strategy was "…to source new markets, and the only way we could fund these, or supply livestock to these new markets was to take stock from existing clients and replace it new markets…" (Day 10, p.114). He also accepted that this was in effect selling the same animal twice.

142. I accept Mr. Costelloe's description of the effect of this scheme on HIF at para. 4.7 of his witness statement:-

> "On the basis of my investigations, I am satisfied that had the credit notes not been issued to the third party customers between 12 September and 16 October 2013, and had invoices not been issued to Coget between 8 October and 7 November 2013, the remittances that would have been paid to the Plaintiff by notifiable debtors, and hence which sums would have been paid into the collection account, would have been far higher potentially up to €2.3m...."

143. The defendants asserted that they had notified HIF's representatives that it was necessary to, and TLT was about to, issue the credit notes. There was a considerable conflict of evidence on this issue.

144. Paolo Garavelli asserted that from late August, 2013 he had indicated to HIF that as TLT couldn't match HIF's debt turn target they "…would simply have to remove the stock and have it resold…" (Day 10, p.119), and that he discussed it with Mr. Mullett on 9th September, 2013: "…I put a mechanism in place, in full discussion with Mr. Mullett, into how we would go about winding up the facility…". He maintained that through September, 2013 he "…had dialogue with Mr. Richard Mullett with regards to how the credit note issue would be handled and he said just it is a question of just keeping him informed, and that is what we did" (Day 10 p. 120), that HIF "…were firmly in the loop at all times. I reported everything I did to Richard Mullett" (p. 121), and that there was never any complaint about the issuing of credit notes.

145. Paolo Garavelli also relied on a telephone conversation that he had with Mr. Mullett on 2nd October, 2013 in which he referred to the issuing of credit notes, and his follow up email to Mr. Mullett on 3rd October which contains the first specific mention of credit notes:-

> "Morning Richard
>
> Following yesterday conversation
>
> We have agreed that a timely wind down of the ID line is the only way forward
>
> As discussed any clients who do not [meet] TLT's timeline will have stock removed and re-position.
>
> …
>
> Credit notes will be posted as they are raised and new client invoiced when agreed.
>
> ….
>
> K Rgds
>
> Paolo"

However it should be noted that the potential "new client" was not identified, yet the evidence is clear that all the re-invoicing from 8th October on was to Coget, and Paolo Garavelli must have been aware in early October that this was to be the case.

146. Paolo Garavelli also relied on the content of a meeting at HIF's headquarters in Birmingham that took place on 14th October, 2013, attended by Mr. Mullett and his superiors in HIF, Paul Housley and Mark Osborne, and a HIF legal representative Robert Shelley. He asserted that the issuance of credit notes came up at the meeting, but no objection was taken to the use of these as a way of funding TLT's continued trading. He said Mr. Mullett sought an update of the debtors' ledger to see what impact the credit notes would have on the final debtors' ledger (Day 10, p. 134), which request was repeated in a follow up email received from Mr. Mullett on

15th October. This was also required in the context of a further audit by HIF discussed at the meeting and planned for 22nd October. When asked by his counsel whether there was any suggestion prior to this audit that TLT was in breach of the Agreement in issuing the credit notes Paolo Garavelli replied:-

> "No, very much the opposite. I understood that I had the full agreement of everybody in the way I was managing the situation."

147. Paolo Garavelli also stated that he provided a ledger to Mr. Mullet, and had written beside it what credit notes were due to be issued (Day 14 p. 167). However, this ledger was never put in evidence and the other participants at the meeting never mentioned receipt of such a ledger. If such a ledger was indeed provided containing the full extent of the credit note issuance, either proposed or actual, I am satisfied on the evidence that HIF would not have accepted it, and at the very least would have queried why the full extent of the credit notes were not entered onto the online platform as only a select number had been so entered. It also contradicts the evidence which the court prefers that Mr. Mullet sought an update of the debtors' ledger to work out the effect of the credit notes on the ledger, and continued to do so after the meeting.

148. It should be recalled that at the time of this meeting credit notes from September to a value of €244,164 had been posted to the HIF electronic platform on 3rd October, and credit notes from 30th September to a value of €576,451 (as against €701,023 actually issued) were posted on 8th and 9th October. It will also be recalled that on the day following the meeting credit notes were issued (or dated 15th October) having a value in excess of €2.3 million.

149. HIF's main evidence on the notification of credit notes came from Mr. Mullett. He agreed that in their conversation on 2nd October, 2013 he had discussed with Paolo Garavelli the raising of credit notes in the context of slow paying debtors and resale to better paying customers, but he said "…That's not something I was happy with" (Day 5, p. 19). This was because the "…debts had been sold to HSBC, so he was not entitled to issue credit notes without our express permission…so if he wanted to go down that route he would have to have our agreement", something which he believed Paolo Garavelli understood (Day 5, p. 20). He said he was not aware of the scale of the credit notes being issued by TLT, and the quantity was not discussed with Paolo Garavelli on 2nd October, nor was any indication given of the level of notes being issued.

150. An internal email from Mr. Mullett to Mr. Osborne, copied to staff member Julie Sherriff, dated 10th October records that he had spoken to Paolo Garavelli the previous day, and this discloses his knowledge of credit notes at that time:-

> "Oct to date we have had £691k credit notes and this is in line with his assertion that they have been collecting stock back from poor payers. He is telling me also that because he has put customers on stop they are telling him he is going to the bottom of the payment pile.
>
> There will be another batch of credit notes shortly primarily for one of the Politikos accounts c€112k
>
> On 8/10 we had a £330k batch of credit notes but also £379k sales – this was reallocated stock picked up and sold to… better paying customers
>
> ….
>
> Julie is keeping the credit notes suspended…"

Mr. Mullett said that his reaction to being told of these figures by Paolo Garavelli was that it was "a breach of the facility".

151. Mr. Mullett said that in the telephone conversation with Paolo Garavelli on Friday 11th October, when arranging for Paolo Garavelli to attend the meeting on 14th October he asked him to bring in "…all the relevant paperwork regarding the credit notes he had raised, together with some other things as well, an Age Debt Report and the Coget statements, I think, but none of those things were brought in" (Day 5 p. 31). He sent an email to Paolo Garavelli at 14.45 on the 11th asking him to bring to the meeting "…both an open item aged debt report together with a customer name and address listing and a summary aged debt report which is the usual one we have. The documentation that supports the recent credit notes and re-invoicing would be helpful also please..." The contents of the telephone conversation and this request for documentation were both referenced in an internal email from Mr. Mullett to Mr. Mike Hirst (HIF's Head of Client Credit) on the same day. The opening paragraphs of this state:-

> "Mike,
>
> I have been pushing for docs and statements for sometime and Paolo has just confessed to me that they have banked our cash through Coget to support the business. He was under the impression he could re-bank and exit without it coming to light.
>
> He is coming in on Monday afternoon and he will be bringing in details of the customers and amounts of cash they have received as paid directs. He has told me that the recent credit notes are for genuine collection of stock and he will bring the ppw to support this too." [Emphasis added].

This was important evidence not just of an admission but also in light of the fact, not disputed by Paolo Garavelli, that he did not produce all of the documentation/information sought at the meeting, including evidence of extensive (and exclusive) resales to Coget on 8th October.

152. Mr. Mullett said that at the meeting on 14th October:-

> "…We talked through the raising of the credit notes and that we were unhappy with that. We talked through the payment of Coget cash and he said that he realised what he had done was wrong and that his business was important and he wanted the business to survive. We were looking at ways of working with him."

In part of a "Visit Report" prepared by Mr. Mullett after the meeting but on the same day he records, so far as is relevant:-

> "Paolo rang on Friday 11/10 to advise that he had been banking HIF cash again to Coget account which is why he had not provided the statements. [Mr. Mullett] advised that given he and his brother had provided indemnities this was a serious breach that would render them personally liable for any loss we incurred over and above their €100k PEG [Guarantee]. He was asked to call on Monday with details of the full amount of the PD and the true ledger position – open

item and name and address list also to be brought in.

He called today and met with the above members of staff.

The ledger total we have now is €5684k with FIU of €2914k.

Client has advised that the actual ledger is c €900k and he has c €900k stock

He is to provide a detailed aged debt report tomorrow but we expect to see a c€2M shortfall in our security.

In addition he has raised credits and resold the stock through Coget so that they could access the payment and customers are not as poorly paying as we had been led to believe.

He claims this has been done in the last month since the cross ageing was applied and he was hoping to be able to re-bank before this was discovered…."

Under cross examination Paolo Garavelli categorically denied the reported content of the telephone conversation on 11th October, and denied making the statements emphasised above, and he described the record in the last sentence as "pure nonsense". When pressed on cross examination he could give no rational explanation for why Mr. Mullett might give a misleading account. When asked specifically about the large value of credit notes issued on 15th October, 2013 Paolo Garavelli said (Day 12, p. 23):-

> "The value of these credit notes was discussed at the meeting of the 14th. They were dated the 15th to reflect the timing of our discussions and I gave all these particulars to Andrea Harper on her visit".

The visit referred to is the audit visit that took place on 22nd October, 2013. This response from Paolo Garavelli strongly suggests that these credit notes had already been issued by him before any discussion on the 14th October, but he later decided to date them 15th October.

153. In an internal document headed 'Request for Exchange Letters' created by Mr. Mullett on 15th October following the meeting the previous day he recorded "Breach Letter also required – credit notes raised to remove debt from the ledger and resell via Coget. Paid direct[s] with HIF cash redirected to Cogets bank account." In evidence Mr. Mullett explained that this last sentence reflected Paolo Garavelli's assertion that they had again been collecting cash to the Coget accounts for debts due to TLT. Mr. Mullett said that it was in the second week of October that he became aware that credit notes were being raised to remove debt from the ledger and resell via Coget (Day 5, p. 48).

154. Mr. Osborne, who was also present at the meeting on 14th October, gave evidence of his recollection of what was said (Day 8 pp. 22-23):-

> "Mr. [Paolo] Garavelli said that they, which I presumed to mean the two directors of TLT, had made some very bad choices and they had done so illegally. They had redirected proceeds of discounted debts into other bank accounts. They had issued a large value of credit notes which had yet to be notified to HIF, which had materially reduced the value of our security…"
>
> Mr. Osborne supported his evidence by reference to a handwritten note which he made during the meeting which noted *inter alia*:-
>
> "…
>
> Channelling money + sales through Coget.
>
> Unpaid invoices – stock reclaimed and re-sold.
>
> Invoiced via Coget.
>
> Sept sales 2.1m – mostly invoiced through Coget
>
> Oct 1.7m –
>
> ....
>
> DG 'We have made some very poor choices'
>
> DG 'We have done so illegally.'"

155. Mr. Osborne had not met either of the defendants before this meeting and admitted that he made an error in this record in referring to "DG" when he meant to refer to Paolo Garavelli. I accept his evidence that this was a simple mistake particularly as the name "Davide Garavelli" appearing with the other attendees at the top of the memo was amended by him in his handwriting at the end of meeting to read "Paolo Garavelli". In his witness statement, the contents of which he confirmed as his evidence, Mr. Osborne stated that HIF was not aware of the extent of the trade routed through Coget at any time until the meeting of 14th October, 2013 "when Mr. Garavelli explained that in excess of €2 million had deliberately been credited from the Company's books and re-invoiced through Coget specifically in order to prevent the Plaintiff receiving the proceeds of the said invoices." Mr. Osborne said in direct evidence "we were only aware of the issuing of large scale credit notes when Mr. Garavelli told us about them, because they hadn't at that stage, for the most part, been notified to HIF" (Day 8, p. 42) – and he pinpointed 11th and 14th October as the dates they were told about them.

156. It is evident from further email correspondence on 15th and 16th October, 2013 that after the meeting Mr. Mullett continued to press Paolo Garavelli for documentation updating the debt ledger and showing the current debt, in advance of an internal HIF 'breach meeting' which took place on 17th October, 2013 and following which an audit was undertaken on 22nd October, 2013.

157. In response to questions from the court (Day 8 pp. 103-106) Mr. Osborne confirmed that HIF should have been notified within 24 hours of each credit note being raised, "…but it became apparent that we were being notified of some, but not all." He accepted that

they were often not notified strictly the following day, but said that "…they should be notified together with each subsequent batch of invoices" which "…would be at least weekly". He also accepted that "…it would have been reasonable for [TLT] to continue to issue credit notes until we told them otherwise". However Mr. Osborne's understanding was that credit notes would "…be replaced with invoices raised by TLT and notified to HIF" (Day 8, p. 105).

158. HIF's evidence failed to establish that they put in place any express request to TLT to obtain prior consent for the issuing of credit notes. The impression that Mr. Mullett and Mr. Osborne had that prior consent was automatically requisite under the Agreement was mistaken. HIF also did not expressly prohibit the issue of credit notes, although I find that they did express grave disquiet and unhappiness on 11th and 14th October. It is extraordinary that notwithstanding that meeting credit notes were issued by Paolo Garavelli on behalf of TLT dated 15th October 2013 for €2.3million. The contractual requirement of one day's notice to HIF of every credit note appears to have been relaxed in practice to one of notifying credit notes along with batches of invoices twice weekly or at least weekly. However, TLT did not comply with even this more relaxed notification regime in respect of the credit notes raised on 24th September, which were not notified until 3rd October. These were significant notes as they were the first substantial ones and marked the beginning of the implementation of the strategy. The defendants also failed to provide the information in terms of ledgers and back up documents, including credit notes and Coget statements, that HIF required.

159. The audit which took place on 22nd October, 2013 and finished on 23rd, was undertaken at TLT's Mulingar premises by an audit manager Andrea Harper who was present for the first day only, who gave evidence, and by John McCoubrey, who was present for both days but was not called because of illness.

The Audit Report lists a number of "Escalation Issues" with "Recommendations". These included:-

> "2) Banked Direct by Coget – declared by client at c€800k cheques cleared through Coget since 16/9. Not validated at audit. No Coget bank statements provided to support. Client stated he would continue to collect via Coget.
>
> [Recommendation:] Sight of Coget bank statements. All banked monies to be paid across. Coget to no longer collect on behalf of client.
>
> 3) Credit notes not notified – total €3,448k raised from 8/10 to 15/10, of which only €821k notified.
>
> [Recommendation:] all credits to be notified
>
> 4) No day books – manual records kept were limited in number, undated, did not necessarily tie in with HIF notification values & hence of no value
>
> [Recommendation:] Reliable day books must be retained
>
> 5) Banked Direct - €421k sale into Tunisia Advised notified piece meal, client unable to confirm when & how much Client also unable to confirm receipt of monies
>
> [Recommendation:] reserve recommended
>
> 6) Minimum 737 cattle & 663 sheep despatched since 9/10. Invoices still to be raised & notified. (378 state Coget as consignee)
>
> [Recommendation:] Invoices to be raised to end customer (not Coget) & notified immediately
>
> 7) Operationally – ledger not posted up to date. HIF Sept. [month end record] not completed etc
>
> [Recommendation:] Independent accountants assigned immediately to address. Ledger brought in house.
>
> …
>
> OTHER MATERIAL ISSUES:
>
> 1) €440k o/s debt against customers credited & re-invoiced to Coget. As paying Coget, this debt is not fundable
>
> [Recommendation:] €440 reserve required
>
> 2) Post dated cheques – at least €124K, believed to be held by Coget
>
> [Recommendation:] to be forwarded to HIF immediately
>
> 4) Bank – client has reinstated AIB current account
>
> [Recommendation:] AIB current account to be closed
>
> In the "Summary of Audit" the auditors wrote:-
>
> "Greatest obstacle at audit was limited support from client/Paolo (delayed audit; no Coget bank statements; limited pods etc) plus client having fallen behind operationally (no invoices raised since early October; credit notes raised not notified; HIF m/e return not completed; lack of day books; no utd cash books; No MI etc). Net result is audit visit was inconclusive in validating much of the objectives of the visit.
>
> Paolo would not confirm all future remittances would be routed through HIF. He stated Coget would continue to collect direct, an element of which will be used to "look after creditors" the rest paid across to HIF.
>
> In auditors opinion we need a reliable financial person in this business to get an up to date position as a matter of utmost urgency, both for HIF & potential investors, along with an up to date debtors reconciliation. Validation of the ledger back to paperwork is a lengthy exercise – it will validate livestock movement & location but will not evident whom has title when routed via Coget. Suggest quickest option is for the ledger to be brought in house asap & validated.

Evidence of growing creditor pressure. Failure to pay suppliers and, without stock, client is quickly out of business.

Flight a concern – Advised the Ireland farm is owned by parents, and TLT merely lease. Appears cattle easily transferred to Coget. Highlights the dangers where there is an associated business abroad engaged in the same business."

In the body of the Audit Report it is also noted:-

"Credit notes – At audit we were copied with 48 credit notes, net total of €2,629k, that client has still to notify. Raised between 8th & 15th October. ref Dilution comments."

160. Although the Audit Report was actually prepared by Mr. McCoubrey, Ms. Harper said it reflected her recollection and record of the audit work carried out on 22nd October. She also kept contemporaneous notes of the audit on the 22nd October, which she made on her laptop while sitting opposite Paolo Garavelli, and which were put in evidence, along with her written "Summary" of the audit prepared just after the audit. The Audit Report tended to tally with the content of these documents. In her Summary Ms. Harper recorded evidence of what was said:-

"….Paolo stated that approx. €800k to 900k of cheques have been cleared via the Coget bank account from the 16th of Sept. He stated that approx. €200k to [€]300k of this has been applied to the debtors but a further €600k to €700k is yet to be posted…Paolo clearly stated he is & will be continuing to bank cheques into the Coget bank account, advising this was the only way he could continue to run his business. He stated that if the bank did not support him he would continue to bank through Coget. Andrea questioned why Paolo was paying direct into Coget account. Paolo claimed this was as a consequence of HSBC Invoice Finance applying the cross ageing reserve in September.

We requested Coget bank statements. Paolo stated he did not hold any Coget bank statements. This, and all other Coget information, was held by his brother, David, in Italy & that we should request these from David direct.

Paolo was asked about any other transactions. We were advised postdated cheques were held by David in Italy.

…Paolo then produced a pile of credit notes, totalling €3,449k, claiming they were raised after his meeting with Richard Mullet; Paul Howsley & Mark Osborne. When questioned what these credits related to, [Paolo Garavelli] stated approx. €2m had been re invoiced to the associated business, Coget, and that this stock still remains at the customers sites. Paolo stated this debt was good debt, that was collectible from customers & that he will merely collect this debt through Coget rather than TLT. The rest of the stock was animals collected back from customers & held by Coget in Italy, to be sold into Libya on pro forma basis. Paolo then produced a pro forma invoice for approximately €1m."

161. Ms. Harper did not resile from this evidence under cross examination, when it was repeatedly suggested that Paolo Garavelli did not say various things that she recorded him as having said. I found her to be a good record keeper, and I accept her evidence as an accurate representation of what was said and transpired at the audit meeting on 22nd October. She also gave evidence that at this meeting Paolo Garavelli was presented with various documents for signing by him and by Davide Garavelli. This included a "breach letter" and new personal guarantee, increasing the defendants' personal exposure from €100,000 to €2 million. It is common case that Paolo Garavelli declined to sign these documents without first obtaining legal advice on them.

162. Ms. Whitehouse also gave evidence of speaking to Paolo Garavelli at about 4pm on 24th October, 2013 and having a conversation that she recorded in part in contemporaneous handwritten notes, and later more fully in an internal email sent to colleagues around 10pm on the same day. This email reads in part:-

"Additionally, I spoke to Paolo this afternoon and thought it worth updating you with the conversation.

Firstly, his tone and words were very different from yesterday and today he has acknowledged that what he has done is wrong, but he was simply trying to protect himself and his business. The company has been around for a long time and managed to survive the foot and mouth health issues and BSC, but as a result of the horse-meat scandal, the industry has been affected. He stated again that he genuinely expected customers payment terms to improve quicker than they have done, and his actions were as a result of trying to protect his business.

…

He also made the comment ..whether you come after me with your sharp knives, I know the debt has to be repaid and I need to safeguard my company, reputation and integrity.

I told him that I was at a loss as to why he had banked our funds again, stated that I believed he had understood the severity of his actions, when our funds were previously banked to the Italian Company and had committed to all at HSBC that this would not happen again. At this point, he again stated that he had made a big mistake…."

When this was put to Paolo Garavelli he accepted that he said some of the above, but absolutely denied that he had admitted any wrongdoing to Ms. Whitehouse, or mentioned "sharp knives", or admitted to any mistake, but could give no rational explanation for why she would include these references in her record of the conversation. Ms. Whitehouse was cross examined largely on the basis that her handwritten record made no reference to wrongdoing, "sharp knives" or mistake. However, I found her to be a truthful witness, and in particular I accept that the words "sharp knives" were words spoken by Paolo Garavelli that stuck in her mind.

163. The overall impression from the evidence on the issue of credit notes and resales through Coget, including Paolo Garavelli's demeanour in the witness box, was that from September, 2013 to the date of the audit, and even at and after the audit on 22nd October, Paolo Garavelli deliberately avoided being promptly or fully forthcoming with HIF in the notification of all credit notes and the re-invoicing to Coget, and in relation to the true nature and extent of the strategy which the defendants, TLT and Coget were pursuing.

164. In particular, this is evident from the late notification of credit notes, and the failure or tardiness in providing itemised debtor ledgers, details of invoicing to Coget, and Coget statements. The latter were requested on many occasions but it is not disputed that they were sought by Mr. Mullett in his emails of 24th September, 2013 and 1st October, 2013 to Paolo Garavelli; in the telephone call on 11th October and at the meeting on 14th October; in emails from Mr. Mullett to Paolo Garavelli on 15th and 21st October; in a telephone call to Paolo Garavelli on 18th October; at the October audit; and post audit in advance of an anticipated follow up with TLT's accountant Sean Buckley that never took place (Coget bank statements for 6 months were also sought by letter dated 22nd

October from Mr. Mullett to Davide Garavelli but it was averred that this was not received until 21st November, 2013). Despite these requests they were not produced by the defendants when required (they only emerged on discovery in January, 2014), and the excuse given by Paolo Garavelli that he was endeavouring to get them and that these were in Italy and a matter solely for Davide Garavelli/Coget was disingenuous; the request through him was also to Davide Garavelli who could have supplied them and also failed to respond to received direct requests. As had been demonstrated by Davide Garavelli in supplying limited bank statements earlier in the summer, it was certainly within his power to arrange for these to be delivered. Paolo Garavelli also sought to blame the absence of his accountant Sean Buckley on leave for the fact that the records were not up to date or documents were not available, but this was not supported by evidence. The promise that more information and documentation would be available a few days after the audit – made to the auditors and to Ms. Whitehouse – when Mr. Buckley returned, was never fulfilled. I am satisfied that Paolo Garavelli was well aware that if the Coget statements had been produced timeously HIF would have fully appreciated the scheme being pursued and would have sought to stop it at once, and this would have prevented TLT's continued trading.

165. In clause 17.1(c)(i) of the Agreement, TLT undertook "immediately upon HIF's request…[to] provide the Debt Records, evidence of the performance of a Contract of Sale and any information (certified if required) relating to a Customer, the Client or their operations". I find that HIF repeatedly, and reasonably in all the circumstances, requested the provision of relevant records and information from TLT and the defendants. I find that in failing to provide the information and documentation sought by HIF, TLT was in material breach of this undertaking, and the defendants were in turn in material breach of their own Undertakings.

166. I also prefer the evidence of Mr. Mullett as to the admissions made by Paolo Garavelli in the telephone conversation on 11th October, and of the HIF witnesses as to the admissions that he made at the meeting on 14th October, 2013, in particular because of the records generated by Mr. Mullett and Mr. Osborne at the time. I also prefer Ms. Harper's recollection and record of what was said by Paolo Garavelli during the audit on 22nd October, 2013, to his account. I do not accept Paolo Garavelli's evidence that the scheme was "fully" discussed with Mr. Mullett on 9th September or at any time thereafter – I find that Paolo Garavelli did not disclose the wholesale manner in which he intended to use credit notes, and in particular he failed to disclose the plan to resell all stock to Coget, rather than to notifiable customers. To the extent that there was some disclosure at the audit on 22nd October, particularly of the credit notes, this was, from HIF's perspective, too late.

167. I believe that the nearest Paolo Garavelli came to admitting the truth about the scheme in general terms was in his telephone conversation with Ms. Whitehouse on 24th October, 2013, and I find that her evidence of that conversation as recorded in her email prepared later that day is likely to have been accurate.

168. I am satisfied that the effect of the limited or late notification and provision of information and credit notes was to prevent HIF from knowing or appreciating the full extent of the cancellation of debt until it was too late to take effective measures to stop it.

169. Accordingly, I conclude on the evidence that TLT was in breach of clause 17.1(e) of the Agreement, even on the basis that some leeway was in practice allowed such that credit notes would be notified in batches at least twice weekly. Moreover, in the context of the scheme being pursued by the defendants I find that this was a material breach intended to avoid HIF obtaining full information at an early stage, and that such breaches underpinned an abuse of the normal and bona fide contractual use of credit notes.

170. The defendants argued that HIF did not suffer any harm from this scheme because the TLT invoices cancelled by the credit notes were not, and have not been shown by HIF to have been, the subject of any pre-payments. It may be questioned whether there is any obligation on HIF to prove 'harm' – the onus on it is to prove breach of contract sufficient to justify an entitlement to recover debts due under the Agreement. Aside from that I do not agree that HIF cannot show that it suffered harm from the scheme adopted by the defendants, notwithstanding that it has not proven the pre-payments were made in respect of invoices where credit notes were issued. Each time a credit note was issued it cancelled debt which was the property of HIF under clause 2 of the Agreement. Credit notes were clearly appropriate where, for instance, cattle were returned because they were not in accordance with contract, or undersized, or where they were repossessed for non-payment. But as the history of dealings showed the scale of credit notes in the normal course of business prior to September, 2013 was relatively low. What occurred in September and October, 2013 was on an extraordinary scale that could in no circumstances be described as the use of credit notes *bona fide* in the ordinary course of business.

171. When allied to the resales to Coget it must be concluded that the "mechanism" (the word used by Paolo Garavelli to describe the scheme) was a deliberate misuse of credit notes and that it had the effect of harming HIF in that monies that would have been paid to the Trust Account ended up in TLT's AIB account and were utilised there for trading purposes and funding new markets. This was a subversion of the Agreement. The Agreement was intended to facilitate HIF advancing money to TLT on foot of genuine and notifiable invoices to customers on the basis that HIF owned all the debt owed to TLT, and would recover the advances with interest and commission in due course. The credit note strategy pursued by the defendants had the effect of removing most of this debt from TLT's books, and the resales to Coget produced money that was put beyond the immediate reach of HIF, and which was used by TLT to buy cattle or discharge creditors other than HIF. It was, as I am satisfied Paolo Garavelli admitted to Mr. Mullett and Ms. Whitehouse, a re-banking of the debt through Coget. I am therefore satisfied that HIF suffered a loss directly as a result of the use of credit notes as a device that prevented monies being paid into the Trust Account, and that this was a fundamental breach of the Agreement. While HIF's loss from the misuse of credit notes may not have been as great as €2.3 million, I am satisfied that it was substantial.

172. As TLT's failure to comply with clause 17.1(e) and/or its misuse of credit notes was a breach of the Agreement, and TLT was further in breach of clause 17.1(c)(i), HIF was entitled under clause 18 to immediately terminate the Agreement, and to demand and recover payments due to it under the Agreement.

173. The entitlement to terminate can also arise under clause 19 "Following a Termination Event or HIF's reasonable belief that a Termination Event may have occurred or may occur". I am satisfied that HIF personnel held a reasonable belief, both before and after the audit of 22nd October, 2013, that TLT was in breach of the Agreement. Therefore, even if I am wrong about the existence of actual breach, HIF was still entitled to terminate the Agreement.

174. There can also be no question but that these breaches were designed and orchestrated by the defendants. Thus, far from putting in place appropriate controls in accordance with their Undertakings, the defendants' acts led directly to fundamental breach of the terms of the Agreement and TLT's undertakings. In that the defendants failed to pay to HIF the specific sums claimed by HIF from TLT, initially by letter of demand dated 7th November, 2013 from HIF's solicitors to TLT, they were in direct breach of their Undertakings as well as their personal Guarantees. By way of said letter, HIF demanded payment of €2,937,914.56. By letters dated 8th November, 2013 HIF demanded payment of €100,000 from the defendants on foot of their Guarantee. By separate letters also dated 8th November, 2013 HIF demanded from each of the defendants the sum of €2,937,914.56, pursuant to their Undertakings,

threatening proceedings in default of payment. Payment was not forthcoming and these proceedings were commenced by Summary Summons on 13th November, 2013. The amounts claimed, as set out in this correspondence, are not disputed.

175. Mr. Costelloe was appointed receiver of the fixed charge on 4th November, 2013, and receiver manager under the floating charge on 6th November, 2013. Much additional evidence was given in witness statements and at hearing in relation to the alleged lack of cooperation by the defendants with Mr. Costelloe and his staff. Evidence was provided in relation to the alleged removal of stock from TLT without monies being received in return, and the export of cattle on 7th November, 2013. It was also provided with regards to payments made from TLT's AIB and Bank of Ireland accounts to family members at or shortly after the time of his appointment (in the period 6th-8th November, 2013), which it was suggested by the plaintiff were fraudulent preferences and/or made at a time when the defendants knew or ought have realised that TLT was insolvent. The plaintiff relied on this evidence to back up its case that the defendants did not, as they suggested, act at all times properly and with probity, and that the plaintiff's evidence of breach of the Agreement ought therefore be preferred. I do not find it necessary to adjudicate on this evidence because, as indicated in this judgment, I have found ample evidence core to the operation of the Agreement and the allegations of breach of Agreement, from which I have been in a position to assess the credibility of the defendants and determine the relevant facts.

176. Similarly because I have found that TLT was in breach of Agreement and the defendants in breach of Undertaking it is not necessary to further consider whether in law the issuance of the credit notes was an act of conversion, or a breach of the Floating Charge.

**Conclusion and Orders**

177. In conclusion, I have found that TLT was in breach of the Agreement, and that the defendants were in breach of their Undertakings and Guarantee, and that the defendants are liable to pay HIF accordingly. I will therefore order:-

> 1) that the plaintiff do recover judgment jointly and severally against the defendants for €100,000 on foot of the Guarantee jointly signed by them with the plaintiff and dated 30th January, 2012.
>
> 2) that, concurrently with the said judgment on foot of the Guarantee, the plaintiff do recover judgment against the first named defendant for the sum of €2,937,914.56 on foot of the Undertaking signed by him with the plaintiff and dated 27th January, 2012.
>
> 3) that, concurrently with the said judgment on foot of the Guarantee, the plaintiff do recover judgment against the second named defendant for the sum of €2,937,914.56 on foot of the Undertaking signed by him with the plaintiff and dated 27th January, 2012.