Neutral Citation Number: [2011] IEHC 255

THE HIGH COURT

2006 1350 P

BETWEEN

WRIGHTS OF HOWTH GALWAY LIMITED

PLAINTIFF

AND

CANESTAR LIMITED AND DAN O'REGAN

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy dated the 7th day of June 2011

1. The Parties
The plaintiff (Wrights) carried on the business of fish processing, storage, distribution and sale and agreed to purchase the business and goodwill of the first named defendant pursuant to an Asset Sale Agreement (ASA) and employ the defendants as consultants pursuant to a Consultancy Agreement (CA).

The first named defendant (Canestar) carried on the business of fish purchasing, packaging and distribution under the trade name Fermoy Fish and at the time of the agreement, was indebted to the plaintiff in the sum of €889,682.

The second named defendant (Mr. O'Regan) is a director of the first named defendant.

2. Injunction
Canestar had withheld certain payments which it received on behalf of Wrights under the agreement. On the 27th March, 2006, the plaintiff was granted an interlocutory injunction freezing all transactions in the first named defendant's bank account.

3. Agreements
By a series of agreements made in writing on the 19th August, 2005, between the first named defendant and the plaintiff, the plaintiff purchased the business of Fermoy Fish including the name, assets and goodwill of the business.

By a Consultancy Agreement made on the same date, the first and second named defendants were appointed by the plaintiff as consultants to manage, inter alia, the firm of Fermoy Fish customer accounts on behalf of the plaintiff.

3.1 Asset Sales Agreement
The first named defendant formerly agreed on 19th August 2005, that the plaintiff would purchase part of the first named defendant's business as a going concern.

The consideration payable consisted of commission of sales, €400,000 for equipment, the value of stock at the transfer date to be agreed and a sum for goodwill. That was to be offset against the sum of €889,682 being the amount outstanding in respect of sums owed by Canestar to Wrights.

The sum calculated for commission was 12% of the monthly sales to existing clients as listed in the 10th Schedule to the Asset Sale Agreement and all new customers introduced by Canestar. In the event that the clients Dunnes Stores introduced a central distribution system the monthly sales should be discounted by Wrights historical sales to the Dunnes Stores clients listed on 11th schedule. Where stock was not available from Wrights and was available to Canestar from other suppliers to fill an order on their existing client list, at a price equal to or less than selling price to the customer, then it was agreed that Canestar could source the stock from other supplier and Wrights would discharge the cost of the stock. It was agreed that monthly payments due to Canestar up to the sum of €400,000 would be set off against the amount due from Canestar to Wrights.

The sums payable were to be calculated over a maximum period of twenty-four months from the date of the agreement and be based on the maximum aggregate sales figure of €10M. In the event the aggregate sales figure exceeded €10 million within the twenty-four month period, Wrights would pay the a sum representing 4% of the aggregate sales valued in excess of that sum arising exclusively from the business to be discharged thirty days after the expiration for the twenty-four month period. In the event of aggregate sale figure at the end of the seventh month from the date of the agreement was at least €2.3M, the vendor would be paid the sum of €130,000 which sum would be discharged thirty days after the expiration on the seventh month.

On the signing of the agreement €250,000 was to be paid to Canestar in respect of equipment.

A sum of €100,000 was to be paid in respect of stock set out in the 9th schedule, on the signing of the agreement and the balance in thirty days after the date of the agreement.

The sum provided for goodwill of €300,000 was also payable on the signing of the agreement.

Sums payable at the date of the agreement were €250,000, €100,000 and €300,000 or €650,000. Against this it was agreed that €489,682.24 of the €889,682.24 was payable by the vendor to the purchaser.

Accordingly on signing of the payment a figure of €160,317.76 was due by Wrights to Canestar.

The agreement included certain restrictions on Canestar for a period of three years from the transfer date.

The parties committed themselves to the spirit of the letter of the agreement. They would not for the duration of the agreement in any way directly themselves or indirectly, procure another or others to work towards undermining the agreement or the spirit thereof.

Wrights would not seek to have Canestar's agreed client list supplied in any way other than through Canestar and would conduct its affairs in such way, through pricing or otherwise, that would avoid the risk of that happening.

The agreement provided that:-

> "29.1 No substantial customer or supplier of the vendor (Canestar) has from the date the twenty four months preceding the date of the agreement ceased or indicated an intention to cease trading with or supply the vendor or is likely to reduce substantially its trading with or supply to the vendor and so far as they warrantor is aware the attitude or actions of customers, suppliers and employees with regard to the vendor will not be prejudicially effected by the execution or completion of this agreement.
>
> 29.2 The vendor has not within two years prior to the date hereof been and is not in prospect of being materially and adversely affected by the loss of an important customer or supplier or that abnormal fact or relation to a customer or supplier or by any disputed matter which would reflect the relationship of it with any of its customers or suppliers."

3.2 Consultancy Agreement
The Consultancy Agreement made between Canestar and Mr. O'Regan as consultant and Wrights as a customer (the company) agreed on the appointment for twenty four months of the consultant to provide the services to the company as set out in the 1st schedule or as agreed between the consultant and the board of directors of the company.

The consultancy fee was at a rate of €795 per week plus VAT, together with the weekly outlay as contained in the 2nd schedule in relation to the Fermoy Fish offices at Connolly Street, Fermoy. These included rent of €250 per week, wages of staff employed, ESB, heating, phone and fax, vouched costs of running and maintaining computer system, vouched insurance costs, rates payable and agreed decoration and to recent general repair costs.

The agreement also contained a standard reporting, confidentiality, intellectual property and restrictive covenants.

In addition the consultant agreed to indemnify and keep indemnifying the company against all losses, costs, demands, damages, actions, expenses and claims however incurred by the company relating to taxation treatment of the payments and as result of the breach by the consultant, with any provisions of the confidentiality intellectual property and restrictive covenant trusts.

4. The Plaintiff's Claim
The plaintiff pleaded that it was an express and or implied term of the agreements that the first named defendant would warrant that it would deal in good faith with the plaintiff and undertake to execute and deliver any documents and take any other steps as should be reasonably be required to vest the assets in the plaintiff and that the parties would commit themselves to the spirit and letter of the agreements.

It was further pleaded that the Consultancy Agreement provided that the first and second named defendants undertook to devote such time, attention and skills to their duties under the agreement as might be reasonably be required to bring the agreement to a successful conclusion.

It was pleaded that the plaintiff instructed the first and second named defendants to inform its customers to make all cheques payable to the plaintiff trading as "Fermoy Fish" but contrary to such instruction, and in breach of the agreement, the first and second named defendants failed to notify the relevant customers and continued to make cheques payable to the first named defendant.

It was pleaded that, on the 16th March, 2006, the defendants admitted for the first time that payments in the sum of €484,895.88 had been received by them from the plaintiff's customers but had been withheld by them from the plaintiff.

The plaintiff said that at diverse dates from January to February 2006, it raised queries with the second named defendant in relation to current arrears and customer accounts. In response the second named defendant said that there were delays in payments by some of its customers, one of whom had let staff go in the payments section. The situation would be rectified.

It was alleged that at the end of February 2006, the plaintiff discovered that his customers were not in fact in arrears. On the 9th March, it admitted that customers cheques received in respect of the plaintiff's customer accounts had not been lodged to the plaintiff's account. The second named defendant said that the money was being held in an escrow account pending clarification of monies alleged to be owing by the plaintiff to the first named defendant and assured the plaintiff that a cheque issued by Dunnes Stores on the 3rd March, 2006, for approximately €85,000 would be lodged with the plaintiff's account.

The plaintiff said that such representations and each of them were false and untrue and that it sustained loss and damage which it claimed together with all necessary accounts and inquiries.

5. The Defence and Counterclaim
The defendants denied that the terms, duties and conditions alleged to have been expressed or implied were represented or warranted by the defendants or either or them. The defendants admitted that, pursuant to the Consultancy Agreement, the plaintiff instructed the defendants to inform its customers and make all cheques payable to the plaintiff. It was denied that they failed to do so. There had been difficulties making payments directly to the plaintiff due to the length of its trading name or computer payments systems.

The defendants had denied that they had received the sums of €484,895.88 to the use of the plaintiff but agreed at the hearing that they are liable to repay that sum. They denied that they made false or untrue representations or conceal the true position from the plaintiff.

The defendants referred to clause 13.2 of the Asset Sale Agreement executed on the 19th August, 2005. This provided that the plaintiff, as purchaser, would rely on no other warranties, representations, covenants, undertakings, or other statements whatever other than those expressly set out in the 7th Schedule to the agreement and acknowledged that the defendants as warrantors had not given any such other warranties.

The defendants were entitled to set off the sum of €407,103.18 as from the 14th March, 2006, against the amounts claimed by the

plaintiff in the statement of claim. Those sums were due and owing by the plaintiff to the defendants pursuant to the agreement.

The defendants, in their defence, said that the plaintiff agreed to purchase equipment from the first named defendant for a sum of €400,000 pursuant to clause 4.1.2 of the Asset Sale Agreement but only paid a portion of €250,000 with the remaining €150,000 due in the event of the aggregate sales of figures at the end of the seventh month of the date of the agreement being at least €2.3m which would be due thirty days after the expiration of the seventh month (clause 4.4). At the end of March 2006, being the seventh month after the date of the agreement, the defendants had achieved a sale figure of €2.97m approximately out of the Fermoy/Crookstown branch of the business alone, and had surpassed the required aggregate sales figure, but the plaintiff failed to discharge the said sum of €150,000.

Pursuant to clause 4.1.3 of the Asset Sale Agreement, the plaintiff agreed to pay for the stock of the business as defined. €100,000 of the value of the stock was paid on the transfer date. The balance was to be paid thirty days after the agreement to be calculated as set out in the 9th Schedule to the agreement. This was to be furnished to the plaintiff on or before the 19th August, 2005. While the plaintiff did not dispute the details of stock or its value before the execution of the agreement, it would not agree the value of the stock on the transfer date. Unfounded reasons for the disputing and diminishing the defendants' calculations on the value of such stocks were put forward by the plaintiff including the assertion that stock that was beyond sales dates or was affected by freezer burns and unsaleable.

The defendants sold most the stock at the value they had correctly calculated but before the full total could be sold the plaintiff caused a portion of the stocks to be removed from the defendants' control. The amount now due and owing from the plaintiff in respect of stock was €155,225.55 which the plaintiff failed to deal with. The figure for stock was broken down in terms of fresh fish, and frozen fish and packaging.

The defendants allege that Stephen Foster, project manager of the plaintiff, had attributed undervalues in respect of fresh fish and frozen fish but even this was not paid by the plaintiff.

Under clause 7 of the Asset Sale Agreement and Schedule 2 of the Consultancy Agreement, the plaintiff had agreed to discharge certain monies in respect of fees and outgoings to include certain costs, consultancy fees, wages of staff, vouched business expenses, rates payable and insurance which the plaintiff failed to discharge to the defendants.

The second named defendant following the injunction of the 26th March, 2006, was obliged to fund the business outgoings of the first named defendant from his own personal funds and continued to do so and has suffered considerable loss, damage, inconvenience and expense.

The defendants say that the plaintiff is indebted to them in the sum of €407,103.18 as from the 14th March, 2006, which account continued to increase.

The first named defendant had been deprived of all means for ascertaining or calculating the sales figures since the 11th May, 2006, in respect of sales out of Crookstown and had not been furnished with figures for sales to the customer list out of other outlets. It was entitled under the Asset Sale Agreement to 12% of monthly sales by the plaintiff to the clients of the first named defendant as listed in the 10th Schedule and all new clients introduced by the first and second named defendants, allowing credit for the first €400,000 pursuant to clause 4.2, up to a minimum aggregate of sales figures of €10m and 4% above that figure limited to a period of two years from the date of the said agreement.

If not entitled to a set off as claimed the defendants would seek a counterclaim in the amounts owing to them as follows:-

Recovery of the sum of €407,103.18;

Recovery of the sum to be ascertained at the trial of the action as represents 12% of sales by the plaintiff since the date of the agreement, as stated above.

The defendants counterclaimed for breach of contract and for interest.

6. Reply to Defence and Counterclaim
The plaintiff's reply in defence to the counterclaim joined issue with matters pleaded and denied that the defendants were entitled to any set off or were entitled to the balance in respect of equipment, or for the payment as claimed in respect of stock.

Without prejudice if the plaintiff owed any sum to the first named defendant, the sums were limited, as of the 29th May, 2006, to:

Stock in trade: €61,136

Packaging: €11,498

The plaintiff was entitled to setoff and or credit arising from

(a) Breach of clause 12.2 of the Asset Sale Agreement in respect of a legal action by the County Council in the sum of €2,500;

(b) Breach of warranty under clause 25.2.1 regarding machinery in good working order - €11,424;

(c) Under Clause 26.2, particulars in respect of schedule of employees, €15,000;

(d) Under Clause 29.1, quality control system where Musgrave and Super Valu had reduced the first named defendant suppliers rating: €16,000;

(e) Income from sales invoiced after the 19th August, which should have been credited to the plaintiff's account: €33,000.

(f) The amount paid by the plaintiff to Musgrave's for freight on the defendant's sale delivered prior to the 19th August, 2005: €2,433;

(g) Stock delivered by the plaintiff prior to the 19th August, 2005: €8,439;

(h) Waste disposed of costs and disposal of the stock of the first named defendant: €3,438.

The plaintiff says that if the first and or second named defendant are due any sums pursuant to the provision of the Consultancy Agreement or the sub lease agreement then such sums were limited to the following:

Consultancy Agreement: €116,507.

The plaintiff acknowledges that it is liable for the vouched costs of outlay as was set out in Schedule 2 of the Consultancy Agreement, incurred by the defendants and reviewed and agreed on a monthly basis under clause 4.3 but says that the majority of those expenses had not been vouched despite demands.

7. Expert Reports
7.1 A report by Des Peelo, FCA prepared on the instructions of Frank Ward and Co. solicitors for the plaintiff and dated the 13th July, 2010, set out the claim for recovery of that amount due pursuant to the ASA dated the 19th August, 2005, and the CA dated the 19th August, 2005.

The summary and conclusions were stated as follows:

1. Within eight weeks of the ASA, Canestar commenced conversions of monies belonging to Wrights to its own use. By the date of the injunction 27th March, 2006, - 32 weeks after the date of the ASA – Canestar had converted a total of €484,895 of monies belonging to Wrights to its own use. This conversion was unknown to Wrights and was not an off set against any monies owed by Wrights to Canestar under the ASA or CA.

The calculation of that sum was not disputed by Canestar.

2. Wrights obtained an injunction against Canestar and Mr. O'Regan (DOR) in the High Court on the 27th March, 2006, restraining Canestar and DOR from reducing their assets below €484,895 pending the trial of the action.

3. Wrights incurred substantial costs due to (1) nondisclosure and adjustments re the ASA and CA and (2) due to the non performance of the consulting agreement by Canestar/DOR.

4. It is understood that that following the discovery in early March 2006, of the conversion of monies, Wrights took over sole responsibility for managing/generating sales. These sales generated commissions of €733,813 calculated as per the ASA. These commissions are shown as being credited to Canestar in the summary of claim

5. It transpires that Canestar was insolvent by more than €2.5m at the date of the ASA and was incurring trading losses of circa €100,000 per month. It was warranted by Canestar in the ASA (para. 22.2) that Canestar was solvent at the time.

6. A summary of claims following shows the net sums of €285,690 owed to Wrights (before interest). It appears reasonable to include interest. Wrights lost the use of cash converted by Canestar and the incurred costs. It is understood that Wrights or its parent company had substantial borrowings/interest at the time. This interest is calculated at the Courts Act rate of 8% (simple interest) on an average outstanding balance of circa €400,000 for 3.5 years (ie. €400,000 by 28% equal to €112,000)

7. The total claimed by Wrights for recovery of monies is therefore:

A summary of claims, following, €285,690.

Interest as calculated €112,000

Total claim for recovery of monies €397,690

The summary of claims that followed in the report were categorised as monies due to Wrights less offsets due to Canestar/DOR

(1)	Wrights was owed €889,682 by Canestar on open trading accounts as at 19th August, 2005, (the date of the ASA). Offsets (equipment, stock, goodwill) totalled €486,157 at 19th August, 2005.	€ 403,525
(2)	Conversion of monies by Canestar over a period 19th August, 2005, to 27th March, 2006,	€ 484,895
(3)	Costs incurred by Wrights arising from non disclosures and adjustments re the ASA and CA	€ 148,069
(4)	Costs incurred by Wrights, due to non performance of CA by Canestar/DOR.	€ 303,482
	Subtotal of being monies due to Wrights	€1,339,971
(5)	Commissions on sales to 27th March, 2006, (the date of the injunction)	€ 263,094
(6)	Commission on sales from 27th March 2006, to 18th August, 2007, (the final date for commission in the ASA)	€ 733,813
(7)	Payments that would be due to Canestar/DOR re the CA	€ 57,374
	Subtotal of (5) (6) and (7) above	€1,054,281
	Net monies owed to Wrights (before interest)	€285,690

Mr. Peelo referred to the plaintiff as a 100% subsidiary of Simro Limited (Simro), the main company of the Wrights Group. Wrights was the largest supplier and creditor of Canestar.

He noted that the debt of €889,682, was seriously overdue, in excess of agreed payment terms and a bad debt and that there was no possible recovery. Discussions between the parties, solely in the context of recovering as much as possible of the debt, culminated

in the ASA and the CA.

7.2 Tim Carty FCA of Duignan Carty and Neill prepared a report on behalf of the defendants dated the 5th July, 2010, on the instructions of J.V. Walsh and Co. solicitors to Canestar summarising the background.

Canestar Limited was established in July 1993, by Dan O'Regan. The Company's original shareholders were Mr. Dan O'Regan (DOR) and Jacinta O'Regan and the company was owned and controlled by DOR.

From 1993 to 2005, Canestar established a growing business in the distribution of fish products to retailers and wholesalers throughout Ireland. Canestar purchased fresh and frozen fish products and suppliers packaged and branded the product, and distributed to both wholesale and retail customers throughout Ireland. Canestar stored, packaged and branded products both under its own proprietary labels in accordance with specific instructions from its customers.

They operated from office premises McCurtain Street, Fermoy, and warehouse facilities in Connolly Street, Fermoy, and production facilities in Crookstown in Co. Cork.

The company sold fresh and frozen fish products to a range of food and wholesalers throughout Ireland, including many of the major businesses in the industry such as Musgrave's, Dunnes Stores, and in particular, to McDonagh Redsail, a company acquired, owned and controlled by Wrights. McDonagh Redsail subsequently changed its name to Wrights of Howth Galway (the first named defendant).

Over time McDonagh Redsail/Wrights became one of Canestar's largest suppliers and by 2005, purchases from Wrights constituted a significant proportion of all purchases.

As at August, 2005 the amount of agreed as owing by Canestar to Wrights in respect of purchase of fish products from Wrights was €889,682.

Wrights wished to purchase Canestar's business and in particular the valuable relationship that Canestar had established with its major customers such as Musgrave's and Dunnes Stores.

Accordingly, as set out in the Asset Sale Agreement (ASA) and Consultancy Agreement dated the 19th August, 2005, Wrights agreed to purchase the business assets of Canestar on the following terms:

(a) Goodwill €300,000 -100% payable on signing

(b) Stock at cost - €100,000 on signing balance payable in thirty days

(c) Equipment €400,000 - €250,000 payable on signing and €150,000 payable if aggregate sales (ie, sales to existing clients as listed in the 10th Schedule and all new customers introduced by Canestar) were at least €2.3m at the end of the seventh month after August 2005

(d) Commission €1.2m – 12% of aggregate sales (i.e. sales to existing customers as listed in the 10th Schedule and all new customers introduced by Canestar). In the 24 months after April 2005, (4% for sales over €10m)

(e) Consultancy agreement – payable monthly at approximately €50k per year for two years (€795 per week plus VAT. Reimbursement of agreed heads of outlay incurred on behalf of Wrights post acquisition (rent, wages, telephone, and other overheads).

It was also agreed that the amount of €889,682 was due from Canestar to Wrights at the date of signing and that this amount would be deducted from the contract payments due (€489,682 from amounts due on signing and €400,000 from commission payments due).

There is no disagreement of difference between Mr. Carty and Mr. Peelo in relation to the terms of the agreement.

Assuming that the expectations or both parties were met the contract payments might have been expected to be approximately as follows:

(€000s)	On signing	+30 days	+7 months	Monthly for 24 months	Total
dates payable					
Goodwill	300				300
Stock	100	150			250
Equipment	250		150	400	
Commission				1,200	1,200
Payment for Business	650	150	150	1,200	2,150
Consulting				100	100
Overheads (Estimated)				400	400
Balance due to Wrights	(490)			(400)	(890)
Net payment due	160	150	150	1,300	1,760

At the date of signing the agreement an amount of approximately €160,000 was paid by Wrights on signing (€101,000 by cheque to Canestar and €59,000 in repayment of equipment leases).

Within a short time of signing the contract a dispute arose as to the value of the stock on hand at Canestar premises for which Wrights was contractually obliged to pay. The stock was due be counted at closing and a value agreed by both parties. However, the count and valuation exercise was only partially completed, with the result that the value of the stock transferred by Canestar to Wrights is now in dispute.

The agreement also called for a statement of the net amount due between the parties to be agreed by them within 14 days of signing (ASA Clause 7.3). Mr. Carty understood that this was never prepared, although Canestar did prepare a statement of outstanding creditors as at the transfer date totalling €324,930, which they agreed to pay.

There were additional disputes regarding the calculation of sales commissions due to Canestar, with the result that, other than amounts offset against the trading account due by Canestar, no commission payments have ever made by Wrights to Canestar.

Some payments were made in respect of the Consultancy Agreement were made between August 2005 and January 2006. These amounted to approximately €96,000.

In the months immediately following the signing of the contract, much of the accounting function of the old Canestar business was maintained in Canestar's Fermoy premises. Despite efforts by Wrights to ensure that customer payments were paid to new bank accounts controlled by Wrights, many customers continued to pay directly to Canestar.

This difficulty arose principally because the length of the trading name proposed by Wrights ('Fermoy Fish Wrights of Howth Galway Limited') was incompatible with some customers' computerized accounting systems and these customers continued to pay by cheque or to implement the payment system in place prior to the acquisition.

In accordance with an understanding between the parties, Canestar was expected to pass over all payments received in respect of invoices issued after the acquisition date to Wrights and did so in all cases except for 11 payments received from Musgraves and Dunnes Stores between January and March 2006 totalling €484,896.

Canestar say that these receipts were withheld in lieu of payments due from Wrights under the contract in respect of commissions, stock, equipment and overhead costs due to Canestar.

Following this incident, relations between the parties deteriorated and no further payments were made under the contract. Wrights returned possession of the premises at Crookstown sometime between August and October 2006 (the exact date is disputed) and moved the business of Fermoy Fish from Canestar premises in Fermoy to their own offices in Kilmore Quay in about May 2006 (although Canestar claims reimbursement of costs it maintains continued to be incurred on Wrights business after this date).

Canestar claims that monies are owing from the August 2005 agreements as follows:

(a) Goodwill, Equipment, Fish and Packaging Stocks and Commissions due under the Asset Sale Agreement less certain payments and deductions made by and due to Wrights

(b) Additional trade debtors owing

(c) Consulting fees and reimbursement of outlay due under the Consultancy Agreement less certain payments received

(d) Additional costs to be incurred in order to remedy damage caused by Wrights to the Crookstown premises

(e) Less deduction for certain additional costs incurred by WoHG

(f) Interest on delayed payment of net amounts due under the contract over the period August 2005 to date.

Summary of amounts due

All amounts €Euro	Report para	Asset sale Agreement	Consultancy Agreement	Other Matters	Total
Gross amounts due					
Goodwill	32(a)	300,000			
Stock	58	232,492			
Equipment	32	400,000			
Sales debtors	89			12,051	
Commission	55	1,225,464			
Consulting fees	77		100,043		
Wages	77		161,905		
Crookstown rent	77		80,344		
Fermoy & Store rent	77		32,660		
Other "Heads of Outlay"	77			66,870	
Crookstown remediation costs	77			40,081	
Total amounts due		**2,157,956**	**374,952**	**125,002**	**2,657,910**
Less payments made					
Set-off amounts due to Wrights	45	(889,682)			
Supplier payment withheld	45	(484,896)			
Received from Wrights at closing	45	(160,318)			
Additional payments made by Wrights	45		(96,369		
Total payments and deductions		**(1,534,895)**	**(96,369)**		**(1,631,264)**
Net amount due under contract terms		623,060	278,584	112,951	1,026,264
Costs incurred by Wrights	91				933,783)

Net balance due (before interest)	**992,863**
Interest on late payment to Dec. 08	224,017
Net amounts due at 30th June 2010	**1,216,880**

Based on the information provided, Mr. Carty concluded that

(a) Invoiced sales to clients on the 10th Schedule for the 7-month period 19th August 2005 to 18th March 2006 were €2,817,795, which exceeds the €2.3m figure in Clause 4.4 of the Asset Sale Agreement.

(b) Total invoiced sales to clients on the 10th Schedule for the 24 month period 19 August 2005 to 18 August 2007 were €10,636,602.

(c) Based on the above sales figure of €10,636,602, be calculated that the commission payable under Clause 4.3 of the Asset Sale Agreement is €1,225,464.

8 Evidence of Mr. Swanton

Ian Swanton worked with Wrights of Howth Limited from August 2004. He worked with Wrights of Howth Galway, the plaintiff herein, when it was incorporated in September 2004 to take over the assets of McDonagh Redsail in Galway.

From November 2004, Wrights supplied to Canestar, trading as Fermoy Fish, with ninety days credit. The following year the debt increased and payments were not made with ninety days. Post-dated cheques were used.

Before the date of the agreements on 19th August 2005, there was a debt owing by the defendants, to the plaintiff of €889,000. There was extreme concern with regard to the increasing debt. Musgraves accounted for 65% of the defendants business, 20% was accounted by Dunnes Stores and the remaining 15% by others.

The plaintiff had invoice discounting facilities with the Bank of Scotland.

Mr. Swanton had visited Fermoy in the latter part of 2005. There was no reconciliation of debtors. He was told by Mr. O' Regan that Musgraves were behind their payments.

An injunction was obtained by the plaintiff against the defendant on 27th March 2006 at which time €776,000 was due to Wrights. A sum of €1.25M had been paid to the defendant leaving the balance of €884,896.00 during the date of the injunction.

He said that a management fee of €100,000 had been paid in respect of consultancy costs and outlay up and to the 25th February 2006.

Mr. Swanton said the defendant was claiming the balance of monies owed which was rejected by the plaintiff because of the wrongful conversion by the defendants to own use of monies due to the plaintiff.

He referred to Des Peelo's report in respect of the list of creditors and to the claim for rent at Crookstown.

He said that Wrights accepted liability for the rent of the Fermoy office in respect of which only €1,000 had been paid for one month.

He said that Wrights would accept some of the wages which he thought were grossly excessive.

He said that Fermoy was bigger than what Wrights needed and suggested paying 40% in costs for nine months use. Some of Canestar's employees had been employed by Wrights. He rejected two years wages for two accounts staff who were without money as they had misrepresented statements or did not sent the statements to Wrights.

He had no details but believed that there was another business being carried out in Fermoy. Some staff stayed on with Canestar.

Wrights paid Canestar up to January 2006. He referred to the report of Des Peelo and to the list of Canestar's creditors.

He said that the management fee had been paid up to January or 25th February 2006 and that further payments were withheld because of the defendant wrongfully converting money to his own use.

He acknowledged that some rent and wages were due but rejected excessive claims and claims for employees who wrongfully withheld money or misrepresented statements.

While he had no details he believed that there was other business being carried out in Fermoy by the staff who had stayed with the defendant.

He gave evidence on long term agreements providing for a discount of 15% for Dunnes and 17% for Musgraves.

A problem had arisen in respect of Whelan's who bought on behalf of Dunnes which were apportioned by Simro (Wrights holding company) and Dunnes. There was a dispute regarding who were "existing clients". He said that eleven of the thirty-two of Dunnes Stores clients were existing clients of Canestar. Eight of the thirty two had no business with Canestar.

Mr. Swanton's evidence referred to the level of debt between the parties at the date of the ASA at €889,000. He explained there was obviously extreme concern about the position to recover the debt. Wrights managing director took on the responsibility of collecting the debts which were slow. Post dated cheques were used. The best chance of recovering the debt was taking over Canestar or, at least, taking over the assets of Canestar and dealing directly with its principle customer, Musgraves which accounted for 65%.

At some stage in February or March 2006 he spoke with Mr. O'Regan in relation to the delay in payment from certain customers. He

had been told that Musgraves were a bit behind in their payments and some had problems but at later stage Mr. O'Regan admitted to him in a telephone conversation that the monies had been withheld but that they were in an escrow account.

After the injunction on the 27th March 2006, he received access to the information and bank statements showed that the nett sum was €484,896.00. A larger amount had been lodged to the Canestar account and smaller sums were transferred to Wrights account to leave the nett deficit of €484,000. On analysis he found that €1,251,395 had been lodged to the Canestar account and, of that, only €766,499 was passed on to Wrights.

He referred to Des Peelo's report which indicated that part of the plaintiff's claim was for €148,069. The first element was a payment to the defendant by Polymoon Packaging, a Canestar creditor. Mr. Swanton says the problem with Polymoon was that Plymoon refused to supply Wrights because they were still owed money by Canestar. Wrights paid Polymoon to ensure supply of packaging. Polymoon credited Canestar's account with €23,000.

The next figure was €33,000 which related to repairs to a multi-pack machine in Crookstown.

The Musgraves quality control system cost €16,000.

The adjustment and commission of €11,642,000 related to a number of Musgrave's and Dunnes invoices.

Mr. Swanton gave evidence in relation to Wrights' claim for a figure of €2,500 in estimated management time arising out of an environmental prosecution in relation to the Crookstown premises.

Musgrave's freight charges of €2,433 which were levied by Musgraves for the collection and delivery of product to their depots covering the period from the 7th August to 3rd September 2005, were apportioned accordingly.

A waste disposal cost of €3,438 was also apportioned to waste disposal charges.

Additional staff payments of €15,000, was agreed in the independent experts reports.

The redundancy costs, of €14,497 were referable to the ASA which allowed employees that were transferred from Canestar to Wrights on the date of the ASA. Canester would take the share of the redundancy costs up to that date and Wrights would take the costs afterwards.

Canestar had claimed payments for consultancy fees and outlay in the sum of €441,822.00 and the further remediation cost of €46,081. Mr. Swanton agreed that these payments had been terminated on the last week of January 2006 for that month.

He agreed that serious concerns had arisen in relation to the handling of Wrights money by the defendants at the end of February which was five months into the two year agreement. Canestar claimed payments for the twenty-four months. Mr. Swanton said that the plaintiff's response was to reject the management fee because as Canestar had wrongly converted money due to Wrights to its own use, Mr. O'Regan had been charged with the management of the customers and he failed to do that as far as the plaintiff was concerned.

Mr. Swanton said that he was not aware whether the defendants were notified at the time.

Canestar's claim for rent for Crookstown was for sixteen months. Wrights accepted a charge for the year plus one month which was needed to clear the site before handing it back to the landlord. The claim was for an additional three months. Canestar had given credit for the amounts paid.

Wrights accepted liability for the period of time when the facilities were used in Fermoy up to May 2006.

The claim for wages to August 2007 related to wages of Canester staff that were being charged to Wrights who accepted some of them and rejected others.

Mr. Swanton said that the plaintiff was prepared to pay 40% of the insurance, phone and utilities for the period of nine months that the plaintiff was in the premises. This was on the basis that the building was larger than required to manage the administration of the accounts. The costs of outlay referred to were to be reviewed and agreed on a monthly basis but that did not happen.

Wrights had agreed to pay to the consultant the fee at the rate of €795 per week plus VAT during the term of the agreement together with weekly outlay incurred by the consultant as set out in the second schedule. This included an agreed rent of €250 per week of the Fermoy fish offices, Connolly Street, wages as the staff employed in the Fermoy fish business; ESB, heating, phone and fax cost for running the Fermoy fish office and vouched costs; vouched costs of running and maintaining the computer system on behalf of the customer; vouched insurance costs and supplies.

Mr. Swanton said that the work being carried out by personnel in Fermoy involved dealing with customers' and the passing of orders to the production facility at Crookstown. Some of the people that were included in the wages were clearly working full-time on the business. Some did actually transfer over to Wrights payroll such as the drivers.

Wrights rejected the payment of wages to the two employees who worked in the accounts as they said misrecorded customer receipts which were wrongfully transferred to the Canester account. He understood that the wages claimed included a claim in respect of personnel for a period after the Fermoy business had ceased.

The plaintiff accepted (payment for telephone calls up to the time they left the premises). They estimated a figure of €100,000 for insurance cover of the rental premises for the thirteen months rental on Crookstown.

While he had no details he said that there was other business being carried on in Fermoy that had nothing to do with Wrights.

He said that he accepted rates for the nine months as well as 40% of the rent. The petrol claim was accepted.

The balance of the second named defendant's expenses of €11,000 to July 2006 of which €2,200 was paid was rejected for the same reason as the rejection of the management fee.

The claim for €46,000 for remedial costs of lease at Crookstown was a "third party costs estimate" which Wrights did not accept. He had left the premises with payment to the landlord to his satisfaction.

A booklet of documents prepared for the purpose of Mr. Swanton's evidence referred to the commissionable sales under the calculations of each party which concerned the seventh month period after the ASA. The issue was whether there was an additional payment due of €150,000 depending on whether the threshold of €2.3M was met. The gross figure in the Carty report was at €82,933.91 whereas the figure in the Peelo report was €79,830.

Mr. Swanton referred to the long term agreement discount rate for Dunnes LTA, Musgraves LTA and Wrights invoices which was 17% for Musgraves and 15% for Dunnes.

That explains the difference between the gross and the nett figure which the plaintiff says is €7,983 whereas in Mr. Carthy's report was the cost of €2,093.

Whelans were a distribution company primarily or exclusively selling product to Dunnes Stores. These sales were supplied to Whelans by Simro in Dublin under Wrights of Howth's brand name, not Fermoy Fish. Total sales were €272,000. Mr. Swanton said he used a formula to calculate what were Canester's clients at the date of the ASA on the basis of discovered invoices for the years leading up to the ASA.

He said there thirty-two Dunnes Stores branches listed in the 10th Schedule as existing clients of the defendant ASA date. However, Canestar did not give the schedule until after the agreement was signed. In trawling through the discovery of Canester invoices for a five year period prior to the ASA and also with knowledge of what was sold from Fermoy Fish after the ASA he was able to identify that there were eleven of those thirty-two branches which were existing clients of Canester before and after the ASA. Of the remaining branches, eight included in the schedule had no business with the defendant in the previous twenty-four months. Therefore no commission was payable as they were not relevant. The remaining thirteen were regarded by Wrights as Simro clients. Canestar claimed commission on them in so far as they were included in the tenth schedule. That explained the difference between the parties in relation to the claim. Thirteen of the Dunnes Stores were Simro's, not common customers.

Mr. Swanton said that having gone through the invoices for five years that the defendant previously supplied Cornelscourt and Blanchardstown, branches of Dunnes, two to three years previously. Simro had supplied those branches and Parkway and Nenagh from February 2005, six months prior to the ASA on a six day week basis. He was at a loss to understand how the defendant could be claiming them as a customer of Canester. Mr. Swanton analysed sales by Canester to the thirty two Dunnes Stores branches in September 2001 to 19th August 2005, the date of the ASA.

In relation to the initial group of eleven which are accepted by Wrights as having been clients of Canestar at the latter date, in the year before the ASA there were no sales at all to any of them and accordingly were irrelevant for the purposes of commission.

In relation to the thirteen stores, including Cornelscourt, there were no sales in 2004 and 2005 and in 2002 and 2003 there was a small credit note but no sales.

In respect of the last listed of the thirteen stores, Clondalkin, there were no sales in 2004/2005; in 2003/2004 there was one sale in the amount of €13.63 and for the proceeding years 2002/2003 and 2001/2002 there were no sales at all.

In relation to the year proceeding the ASA, only two of the thirteen stores had any sales to them and in 2004 to 2005: Dunnes Stores in Castlebar with sales of a €8,420.23 and Terryland in the amount of €178.43.

Canestar had not been paid after the relationship was terminated in March of 2006.

Mr. Swanton said that after payment was made to Canestar under the asset sales, the sales agreement, it owed Wrights €400,000 being the balance of the debt of €89,000 which was due the day before the asset sale agreement.

He agreed that any commission in favour of Canestar was to be set off against that debt and that the amount of commission equalling €400,000 had actually accrued. Canestar had no entitlement to be paid any amount of commission prior to the granting of the injunction of 2006.

The total commission of sales estimated by Mr. Peelo's report in the sum of €141,654 for 2005 (four months) and of €121,441 from then to the injunction on 27th March, 2006 totalled €262,000.

He said that, the analysis of the figure of €126,000 claimed as commission on sales included returns and movement of stock, which involved double charging of relation to stock sold by Simro but supplied through Fermoy on its behalf.

In cross-examination Mr. Swanton said they didn't know when the defendants started trading with Dunnes Stores and agreed that his predecessor, Mr. Paul Bourke, (who did not give evidence) would have been in better position to give that evidence.

He was asked if he was looking for remittance invoices where Canester were supplying the stores. He replied that it was Fermoy Fish trading as Canestar which was listed as the supplier. He had not had an opportunity of seeing whether or not the fish that was supplied by Fermoy Fish was to Whelans, nor where those products went to. He explained that Whelans was the supplier to Dunnes Stores with whom they had an account which Dunnes purchased from Whelans and paid Whelans. He was not familiar with the practice whereby orders came from the individual branches of Dunnes Stores that Whelans wished to supply.

Mr. Swanton said that he did not know the history of McDonagh Redsail other than that it was sold by a liquidator, before he joined Wrights in August 2004.

He believed it was November 2004 when Wrights started Canestar. He believed that negotiations to buy out Canestar began in May or June 2005. He was then a director of the plaintiff and the negotiations were taking place between Mark Wright and Dan O'Regan. He was involved in the heads of agreement and the negotiation over fixed assets, stock, customers etc. He said that a due diligence was minimal. Mark Wright had a walk around the facilities in Crookstown with Dan O'Regan. He said that he went down to the Fermoy office and got some information on trading and trial balance figures from the accountants which were in draft and not audited or formatted.

He was given Eileen Hunt's accounts dated the 6th April 2005 which continued management accounts, trial balance and profit and

loss for the year ended October 2004 and an indication that sales were over €5.2m. He agreed that he had seen that document which included overheads and showed a nett profit and loss at a minus figure of €243,000. The debtors control account was over €1.2m. The document was sent to him again on 5th May 2005. Mr. Swanton said that he did not give that report to Mr. Peelo because they were not audited accounts. He said he could not comment on whether that information corresponded with the abridged accounts which appeared in the company's office with minimal differences. He said that the accounts were audited and that they knew that – suspected that – the sales were in decline and they were out of date as things were moving very quickly.

He said that in October 2004 there was very substantial fall in turnover in both years from 2002/2003 to 2003/2004 and even greater from that year to 2004/2005. He said that he had not seen that for definite that the sale had fallen so dramatically until they got the five year invoices under discovery in 2010.

It was put to him that having failed to show that information to Mr. Peelo as an independent expert, Mr. Peelo had reported that he knew nothing about the solvency of the company before August 2005. Mr. Peelo's report at pg 9 had said "the extent of the Canester and solvency was not then known to Wrights Howth of Galway".

It was put to him that it was not an accurate statement. He replied that he did not know that Canester was insolvent.

He said he remembered Mr. Eugene Garvey who had been the ex-general manager or plant manage of Wrights of Galway. He said he was not aware of a report that Mr. Garvey did for Mr. Wright in April or May of 2005. He agreed that if there was a report it would have been a further indication of the plaintiff investigating what they were buying. Mr. Swanton said that he remembered a disclosure letter which he got from the legal people which counsel said formed part of the closing documents. It included the statement "the disclosure of any matter of or document shall not imply any representation, warranty". They agreed that language was very plain.

It was put to him that the documents read together indicated a supply of information which disclosed exactly the financial position of the defendant for him to be able to make a determination of what they were buying. He replied that the turnover was rapidly declining for the twelve months leading up to the agreement but that they were not buying the company, they were buying specific assets. They did not want to buy the company. They were buying the business, the sales of the company which was the safer form of investment which was the same as buying McDonagh Redsails the previous year where they bought the assets. He said that he could stand over any the evidence he had given and that warranties were justified.

He was asked whether he differed from counsel for the plaintiff in relation to the warranties. He replied that he wasn't in court for a substantial part of the opening of the case. He agreed with counsel that the warranties were extremely important.

He was asked if he agreed with counsel for the plaintiff that no due diligence had been undertaken and that was why the company relied so heavily on the warranties.

He replied to that no form of due diligence had taken place and there were no independent accountants. He said that most of the due diligence was in relation to buying the customer base of the company and they were not allowed to see the customer list.

It was put to him that Mr. O'Regan, the second defendant, would say that they were given an opportunity to see the customers in Fermoy and an opportunity to browse it over on the computer. He said he couldn't understand why they didn't have the customer list. He said he didn't go down to Crookstown to go through the customer list. He went down for specific pricing information which was the key for his fellow directors. He agreed that he could have gone through the whole list and written it all down. The customer list on the computer was historic. He said he did not go through (the list). When he eventually got the list it had 349 accounts on it.

He was asked how he could complain about a list that he eventually got when he didn't take an opportunity to go through the list when he was given it. He replied that the key thing was the sales to the customers on the list. A list of customers per se did not mean a lot. It was sales related to those customers (that was relevant).

They were only sales to 61 of the 349 customers in the following six weeks after they took over the business. The customer list was inaccurate. He said that Wrights didn't get the list until after the agreement. Wrights knew that the main customer was Musgraves and to a lesser extent Dunnes Stores branches. The remaining customers were not significant. There were 23 customers on the list with no business at all in the past five years, particularly Super Quinn, for example.

It was put to him that the reason that Wrights took over Canestar's trading assets was because of the bad debt. He was asked what were the sales by Wrights to Canestar for May, June, July and August of 2005. He said he had not got the figures but that there were substantial sales each month and agreed, if counsel said so, that they were increasing. They were the main supplier to Canestar.

Counsel put it to the witness that in April 2005, the sales was €186,298 which was the figure that Eileen Hunt would prove in due course. In May the figure was €137,221, in June €174,000, in July €217,000, and from the nineteen days of August €215,231. It was put to him that the sales were increasing to the company which he said had a bad debt. He said that negotiations were ongoing. While there were no details of payments in those months they were substantially less than the sales.

Mr. Swanton was asked how sales by Wrights to Canestar were increasing, notwithstanding the bad debt. No contract had been signed during that period. Mr. Swanton said the negotiations were ongoing and the payments were substantially less than the sales. He believed the Mr. Mark Wright would give evidence regarding that. His understanding was that if they stopped supplying Canestar his supply to Musgrave's would have been interrupted and there would have been a serious problem. Musgrave's could well have ceased trading with Canestar and with Wrights.

It was put to him that the reason that Wrights was so interested in Canestar was because Musgrave's was its category partner. He agreed that a category partner was a step up from being an ordinary supplier. Their way out the debt problem was to buy the business. In early 2005 it was not the plan to take over Canestar. He said that "you are talking Musgrave's when you are talking supermarkets". Wrights started supplying Dunnes Stores in February 2005. The eight stores that they started supplying in 2005 were not being supplied by Canestar at the time. These stores included Cornelscourt, Blanchardstown, Nenagh, Parkway, Donagmeade, Newbridge, Portmarnock and Swords.

It was put to him that these stores were included in the 11th Schedule as to previous existing clients common to the vendor and purchaser. Mr. Swanton said that what happened in July 2005 that he was asked to give the list to the Canestar side of the branches of Dunnes Stores that they were supplying and would share customers. The plaintiff only found that not alone did the defendant not supply any of them at the time, but four of them were not even on the 10th Schedule and they had not done any business in the previous five years with those four. It was put to him that the defendants would say that those four stores were supplied through the

Whelan Distribution system. He replied that he did not know who Whelan's supplied. He agreed that Canestar were supplying Dunnes Stores directly. In the time leading up to the Asset Sale Agreement to Wrights was not supplying Whelan's. He said that John Hickey's evidence was that there were just eleven stores that were supplied by Canestar and that Wrights was the supplier to eight stores in the 11th Schedule. From the disclosed invoices he said that in July and August 2005 leading up to the Asset Sale Agreement the defendant had no sales to any of those stores and no sales to Whelan's either. There were no invoices to Whelan's or to Dunnes Stores. Between February 2005 and August 2005 there was just a minimal amount of sales to Whelan's by Canestar. Wrights was supplying six days a week to the larger stores and three days a week to the lesser stores, week in and week out and accordingly, that store was their customer.

It was put to him that the only reason that the plaintiff supplied Dunnes Stores was because of an introduction affected by the second named defendant. He was not aware of that. That would be a matter for Mark Wright.

Mr. Swanton was referred to the restrictions clause in the Asset Sale Agreement in relation to existing clients. Mr. Swanton said that it was the routine to have a non-compete clause. Restricting Mr. O'Regan, the second named defendant, from selling to somebody or increasing the sales did not make sense in relation to the commission that Canestar would be entitled to. He agreed that the €400,000 was due to the plaintiff at the date of the agreement and would be deducted from the commission.

He also agreed that he had come down to defendant every month and was given full access to the computer throughout the winter and up to March or May of 2006. He agreed that he was sent requests for payment throughout the winter in relation to utilities and rent for Fermoy. There was no dispute in relation to the rent on the Crookstown site nor to the management fees to Mr. O'Regan, but there were disputes in relation to other matters that had not been agreed with Mark Wright. Stephen Foster had written to Dan O'Regan seeking discussions and agreeing costs to be charged under the Consultancy Agreement.

Mr. Swanton said he did not remember Mr. O'Regan going to Howth looking for payment but he did have a meeting with Mark Wright in January and he had given Mr. O'Regan a cheque to cover rent for two months and two months management fees up to the end of February. He did not recall an invoice of approximately €12,000 due from Wrights. There was no funding issue after September, October 2005 once the plaintiff had invoices discounting finance. He agreed that there had been problems with under funding of the agreement but that did not lead to any non payment.

He agreed that at the time there had been layoffs by the plaintiff in Kilmore Quay arising out of the prawn business, but he was unaware of the plaintiff not being able to deal with the payment issue to the defendants.

He said that according to Wrights' figures the €100,000 paid at the date of the ASA fully covered the stock and an invoice for stock was not raised until March 2006. Stephen Foster had calculated the value of the stock. He could not recall having a discussion on the stock. It was his understanding that there was no attendance from Canestar personnel at the proposed stocktaking over the weekend following the ASA. He found that very strange that there would not be anyone to agree with what was good and what was not good. The stock take had been done on the 20th and 21st of August. Seven months later an invoice was raised on the value of that stock. He did not know that Canestar had alleged that it was being flooded with stock and had to ask Wrights' lorries delivering stock to stop coming into the premises. He was very surprised to see it being in the pleadings. He assumed that the €215,000 of stock supplied in nineteen days in August was ordered. He said he could not flood someone with fresh stock. He said that it was absolutely necessary to make sure that Musgrave's supply remained uninterrupted.

Counsel asked Mr. Swanton to deal with the letter of the 14th March 2006, which Canestar's solicitor wrote to Whitney Moore, the plaintiff's solicitors, indicating what the defendants' position was in relation to the payments that are due. The total that was due to Canestar was €497,659 including management fee, wages, personal expenses, rates, insurance, packaging, equipment and stock. Mr. Swanton said that he did not meet Mr. O'Regan because he was aware that €489,000 had been taken and that Canestar's figures were totally overstated.

The letter had said "There clearly has to be a set off achieved, a meeting would advance this. We await your proposal in the meantime". Mr. Swanton said that at that stage they had an injunction and the matter was between the legal people. In fact, the injunction was not granted until the 27th March, 2006.

Mr. Swanton said that people were dealing with the matter. He was not personally asked for a meeting and was not sent those figures with a view to having a meeting. He said that the seven months trading would expire on the 18th March and thereafter it would take some time to calculate exactly what the sales were to see whether the threshold of €2.3m had been achieved.

He said that the figures were overstated. Fresh stock was included at €56,000 while the current claim was now down to €19,000. His colleague Mr. Foster believed it to be €17,000.

He said that Wrights pulled out of Fermoy in May 2006.

He was referred to the letter from Stephen Foster to Dan O'Regan dated the 10th May, 2006, in relation to the Fermoy sales office and a replying letter from Whitney Moore referring to the letter and asking to confirm whether the plaintiff wished to terminate the Consultancy Agreement in its entirety. Mr Swanton could not say what Whitney Moore did or did not do.

Mr. Swanton agreed that the agreement was to buy the business rather than the company. It was quicker and safer that way.

Mr. Swanton said that he bought a share in a small company called Howth Fish Sales for Wrights but could not remember any other business that was bought.

He was asked whether he had known Mr. Dwane. He answered that he was a former plant manager of Wright's at Howth Galway Limited. They did not buy his business as such but employed him as plant manager in Galway. He had a small business of his own called Co-Op Seafoods Limited which supplied to hotels and restaurants. The plaintiff also supplied restaurants and hotels in the west of Ireland. He did not know where Co-Op Seafoods supplied. He had not got a list of Mr. Dwane's hotels and restaurants.

He was asked whether or not Wrights was in any way connected with Mr. Dwane's supply. He answered that he could not understand the question, he did not know where Co-Op Seafoods supplied. He then added: "and he was obviously bought in to use his customer base to develop sales to hotels and restaurants in Wrights of Howth Galway Limited". He said he was not in a position to say what his customer base was and he that he could have been brought in as a manager without any customer base. He said that Wrights was going to develop Dwane's customer base. He agreed that he was the financial controller at the time. Wrights got additional sales but there was a parting of the ways then after about a year to eighteen months. The relationship did not last very long. Wrights were

anxious to get some more business. Mr. Dwane primarily sold shellfish to the European market and it seemed a good fit to bring him in to get into the hotel and restaurant trade in the west of Ireland. Mr. Dwane left very suddenly by way of resignation letter by email. He was not aware of him competing with Wrights.

He said he knew nothing about the purchase of McDonagh Redsail by Wrights.

He said that Fermoy Fish had been disallowed discounting facilities by Bank of Scotland. He agreed that he informed Canestar that invoice discounting was in place and that the facility was set up for the full customer list, which would include Musgrave's as the main debtor, after the purchase of Canestar's business.

Mr. Swanton said that Wrights had acquired the debtors book out of the existing Galway business but were not getting paid. They got extra funding to help finance the extra working capital in the business after the acquisition. He agreed that Wrights had sold Canestar debtor invoices a month earlier. He said that payment had to be funded. They paid €250,000 of the assets and the other payments totalling €650,000. That had to be funded and one of the ways was through invoice discounting. It was put to him that Wrights was able to use the customers which they gained from the Asset Sale Agreement to get the invoice discounting from the Bank of Scotland. He said he would not agree with the term "use the customers".

It was then put to Mr. Swanton that commission on the sales meant the commission on sales by the purchaser to all existing clients of the vendor as set out in the 10th Schedule of the asset sale agreement. Mr. Swanton said the question marks over what was "existing". It was a list of customers but they had to be validated as to whether they were existing or not. The 10th Schedule would have listed every single customer of Simro Limited and Wrights of Howth Export and they would have to pay commission on everything. It was put to him that there was not qualification in the agreement as to validation of existing customers and he agreed that the reference was to existing customers in the 10th Schedule. He remembered a number of drafts between the respective solicitors. It was put to him that the reference to the 10th Schedule was on the 3rd August, 2005. Mr. Swanton said he did not know what version it appeared on but said that Whelan's were on the 10th Schedule.

Mr. Swanton confirmed that he allowed a percentage of 27% of Whelan's sales to Canestar. He said that Wrights was not entitled to some sales to Whelan's. He was reporting what the differences between the two reports were between the experts. The problem was that the sales to Whelan's were by Simro Limited who were not a party to the agreement and it was Wrights belief that Canestar was not entitled to any greater share of Whelans's. Wrights decided that in the interest of fairness and Mr. Peelo felt that it should make such allowance as Wrights did not know where the product ended up. He said he compared the total sales to similar clients of Dunnes Stores with the Canestar sales to their clients of Dunnes Stores and he got the percentage of 27% of Whelan's sales which were allocated the Canestar. He accepted that the defendant was entitled to claim commission on sales to Whelan's.

He agreed that the invoices which he brought to court were generated by Fermoy Fish in Crookstown to Wrights of Howth and indicated what branches of Dunnes Stores were being supplied directly after the agreement. They were rejected, because they were sales to Simro's clients and were not sales to Canestar's clients and the defendant was not entitled to commission.

It was put to him that Mr. Carty only dealt with customers on the 10th Schedule. He replied the Mr. Carty not have the breakdown of where those sales went to. He said that they were Simro accounts removed for logistical reasons into Crookstown in the Munster area. He identified one account, Childers, which was a Simro account. Whether Whelan's supplied to them or not did not enter into it. In any event there were no sales to Whelan's from either Canestar or Fermoy Fish after the 2nd August 2005. He said he had no information as to where Whelan's had delivered the goods that Simro had sold over the period of the agreement. That is why the used the apportionment basis. Where the column was blank it was because there were no sales and there were no Canestar invoices to Dunnes Stores in Cornelscourt in that year.

It was put to him that there were invoices to Whelan's but Dunnes Stores would generate an order form and send it to Canestar who would also send it to Whelan's. He replied that that was because Canestar was a supplier to Dunnes Stores in the same way as Simro was. He thought that the sales by Canestar and by Fermoy Fish to Whelan's ceased on the 1st August, 2005 and there were no further sales. The only sales to Whelan's in the two years of the agreement were by Simro.

Counsel submitted that because the witness was unable to identify any sales to Cornelscourt he left the columns blank. It was possible to show that Canestar was supplying Cornelscourt by reference to the particular form.

Mr. Swanton said that as far as he was concerned it was in 2006 when Wrights notified Canestar that the Multivac machine required repairs. He understood that Canestar had seen the documents (before the trial). He said that his colleagues would be dealing with the warranty and Canestar's statement that the machine was in perfect working order and would know the technical aspects of why it needed repair.

Mr Swanton said that the machine was supposed to be in working order and had been serviced and that they had to pay to put it in working order.

Mr. Swanton said that the plaintiff had costs in relation to the regulatory hearing. They had become aware that the County Council was taking an action against Canestar regarding water that was flowing out from the plant into a local river. Stephen Foster was involved in dealing with that matter. Mr. Foster would also deal with the waste disposal costs and the addition of staff payments or rather the redundancy payments arising from the transfer of undertakings.

He said that one of the main reasons for reduction in wages over the period was that the plaintiff paid the wages of three staff members that they took on after a period of about two months after the agreement.

Counsel in re-examination referred to Mr. Peelo's report summarising Canestar's balance sheets as of the 31st October, 2003 to 2007 which showed that Pisces appeared to be a wholly owned subsidiary of Canestar and that the balance showed that Canestar was insolvent by €652,867 as of the 31st October, 2004 and by €1,526,901 on the 31st October, 2005. That calculation was net of the goodwill payment of €300,000. Mr. Swanton said that at the time of the asset sale agreement the extent of the insolvency was not known to him and agreed that all he had were unaudited figures which related to a period to 2004. The unaudited accounts did not disclose the extent of Canestar's insolvency. He said that it was correct that the abridged financial statements for Canestar in respect of a year ending the 31st October, 2004, were signed by the directors and auditors on the 25th August, 2005 after the ASA and were filed in the CRO on the 29th.

He said it was correct that the list in the 10th Schedule contained no information in relation to sales to any of the entities on the list and that it was particularly relevant at the time of those sales. He recalled that they were not to get the list until after the

agreement was signed. Correspondence between the solicitors referred to the list of clients being available on the closing date not in advance.

The correspondence began with a letter on the 13th March, 2006, from the plaintiff's solicitors to Mr. O'Regan relating to "a most serious matter that has arisen arising out of the sale by you to our client of some of the assets of the company". Request was made for a meeting later that week in the reply from the defendants to the plaintiff's solicitor which referred to plant machinery and equipment; that all monies were to be lodged into the client account and based on joint deposit otherwise an application would be made to court.

The reply referred to a set off: "there clearly has to be a set off . . . vouched figures to you herewith".

Mr. Swanton would expect due diligence in relation to the purchase of shares of the company.

Counsel for the defendants had said that Musgrave's were paying Canestar and not paying into Wrights account and asked Mr. Swanton if the problem was with the length of the account name which Ms. Hunt had communicated to the plaintiff. Mr. Swanton said that his email had stated that all cash receipts were to be paid into the Bank of Scotland account with AIB (for the plaintiff). Eileen Hunt had emailed Mr. Swanton saying that she had communicated with Musgrave's regarding payment to the Bank of Scotland noting that the limit of the Oracle (software) was thirty (characters) and asked for a suggested abbreviation.

Mr. Swanton said he did not know if it was a written or verbal reply. The lodgement books that the plaintiff supplied were from the bank itself. Accordingly the cheques that merely had been lodged with the lodgement document provided by the bank.

9. Evidence of Mr. John Hickey
Mr. John Hickey was head of fresh food with Dunnes Stores group which included sea foods supply. Mr. Hickey had reviewed the remittance advice forms for the period 1st February 2005 to 31st August 2005 to identify the actual store that received deliveries from Canestar during the period. He identified eleven stores in the Cork, Kerry and Waterford area, another in Ennis and another in Galway. He said there were a number of other invoices and credit notes which referred to a number of deliveries to Castlebar and one delivered to Terryland in Galway in 2004. Castlebar was also 2004 with the exception of two deliveries of January 2005 as there had been queries in relation to these invoices and a delay in payment. However, the related two deliveries were pre-February 2005.

He said that he had a number of seafood suppliers. A designation of suppliers took place at the beginning of the financial year which was around 1st February to 31st March.

He said it was correct to say that it was Wrights who was the supplier to Dunnes Stores going back two years ago. In spring of last year (2009) Wrights were supplied about half of Dunnes business. At the time of the hearing they didn't supply any of Dunnes business and a number of other suppliers were designated with the same sort of the system as had been in operation in 2005.

10. Evidence of Ms. Liz Millward O'Donoghue
The witness was production manager for Wrights of Howth Exports Kilmore Limited and had been previously quality control manager. She referred to a report prepared for Musgrave's on quality of fish.

On the 13th September, 2005, she went to Crookstown to do an unannounced quality audit on the site. That involved examining the process and paperwork that corresponded with the process and to make sure that all the processing and paperwork was up to standard required legally and required by the retail business. She met Chris Connolly who was the production manager and who gave her a tour of the site and brought her to an office with all the quality control documents. She said she realised that the quality control had broken down within the site and that certain issues became very apparent. There was an issue with temperature control in one of the freezers, with control of process and an issue with the hazard analysis critical control point (HACCP) which in 2002 had become a requirement for food processors. It was a self monitoring hazard analysis system. She found that there was no HACCP manual in place though there was a plan but it did not include the process that was being put in place at that particular point. There were also prerequisites that were not in place before one could implement HACCP food safety system to a process.

She said that she prepared the report on the basis of her visit to Crookstown on the 13th September.

She said there had not been a designated person in charge of quality control. She broke down what she had found to be non compliance into headings of severe and minor non compliance. One item was complied with and seven were severe non compliance items.

Under the good management practice checklist she said it was correct to say that there were four issues of severe non compliance; two issues of compliance and eleven of severe non compliance in relation to pest control and because of an issue of payment with Rentokil.

She said that one of the freezers was running at minus 7 and agreed that there was severe non compliance in the areas of adequate storage facilities, hygiene conditions on temperature issues and uncovered loading facilities, while the minimum temperature of a freezer to maintain the quality and shelf life of a product should be stable at minus 18 at all times to prevent micro growth and deterioration of shelf life.

She said there were no hygiene audits of the process nor were there microbiological tests being done.

She said that EU legislation dictates that HACCP has to be in place with a manual. The hazard analysis on site was incorrect; the HACCP team was incorrect; there was not validation of an internal expert; there was no maintenance programme; the critical points identified were not enough to control the process. There was no evidence of calibration or of calibration procedures or documents regarding temperature probes.

The report listed items which required action and implementation.

She was not then aware of a quality control report undertaken by Musgrave's in June 2005, but became aware of it at a later stage. She agreed that the grading was less than 60% or grade E which was unacceptable. That report referred to a visit three months before her audit by Jennifer Boyle with whom she met. She said it was correct to say that the findings in that report reflected her own findings on the 13th September. Her response was to advise the production manager to remove the product from the freezer that was running at minus 7 and to report to Mark Wright.

She said it was correct that there was a second Musgrave report as a result of the visit on the 13th October, 2005, also by Jennifer Boyle put grading on hold, noting that grading had been achieved in the last audit. Ms. Boyle liaised with her regarding quality. HACCP was created, implemented and monitored. She received requests from Ms. Boyle regarding upgrading specifications for products that were supplied to Musgrave's and they communicated daily either by email, text or telephone. Conversations in relation to claims, specifications, HACCP and new product development. Her level of involvement with Musgrave's continued as the same level.

She produced a chart relating to the tasks involved, duration of hours and start and finish time. There was a further document showing travel time to travel expenses. A further document was the quality review of the year prepared for Musgrave's which they required, which gave details of the franchisees, claim for franchisee and an analysis of the top five claimants.

In cross examination, the witness was asked to comment on reference in an affidavit of discovery of Mark Wright sworn on the 24th June, 2006, that the witness was working daily with Musgrave's to sort out the problem.

Mr. Wright had quoted the Musgrave's report on the 13th June 2005, and the schedule of claim to include time for Stephen Foster and for the witness to include costs of painting of plant, recalibration, laboratory testing, staff wages to maintain the new quality system. The claim was for €16,000. Later the claim was notified of the witnesses expense together with Stephen Foster's claim of €77,000 sales plus €15,000 expenses and the salary of the witness €36,000 plus €6,000 expenses making a total of over €200,000 whereas two years before the claim was limited to €16,000.

The witness replied that €16,000 was an estimate regarding Crookstown and was what she called a "double up" which was removed because it was already included. The witness agreed that there were no receipts for any work that was carried out and said that she could not show receipts for any of the matters. She said that the food safety system was not adequate.

She was asked about "re-labelling" in the industry. Overlaying of labels, if done with intent, could be an illegal act, but in the case of Wrights was done by mistake.

The witness was asked to comment on some e-mails referring to re-labelling, and an e-mail of the 13th April, 2007 to Stephen Foster and Mark Wright in relation to over labelling on the 9th, 10th and 20th March. There was reference to a meeting with Musgrave's quality manager. There was a meeting in Bandon on the 3rd April, regarding concerns by the Caulfield Group of over labelling. On the 3rd April, there were two products which had been over labelled. A further e-mail said that on the 26th April, 2007, SuperValu and Caulfield Group received over labelled products. A photograph was attached. The reference to "this incident" shows that Wrights had continued the practice of re-labelling.

The witness explained that labelling supplies the product with required information regarding "use before" date and traceability codes, together with country of origin if it is a farmed product.

She was asked to explain why she was raising objections to Wright over labelling in the e-mails. She replied that there would be certain items during production which were left over for the following day so the label would be taken off and a new one put on. The quality of fish would still be within Musgrave's remit being two to three days old. She said she so advised Musgrave's. That was not illegal. What was illegal is if the product had two labels. She advised that it be stopped and that the label was to be taken off altogether and a new label placed on top and that the sticky white residue could be removed and taken off.

She said that it was correct that Wrights of Howth had been prosecuted and convicted. Details were given. The witness said that the issue of labelling/re-labelling was a practice that she had asked to cease. The label was to be taken off and a new label put on. She said that had nothing to do with the Fermoy Plant, it was situated in Galway and convictions were against Wrights of Howth Galway Limited. There was no mention of re-labelling of over labelling in the prosecution which related to false declarations regarding the catch area and place of processing, caught at sea whereas they were actually farmed.

In relation to the audit the witness said that she received a phone call from Mark Wright to do an unannounced audit in Crookstown to get a snapshot of the process. Mr. Wright did not tell her that he had already asked Mr. Eugene Garvey to carry out an audit. She had never seen his report.

It was put to her that the audit that she conducted was a manufactured document and asked whether she disagreed with that. She said she did. It was put to her that the defendants believed that her report did not refer to their premises. She instanced reports saying that there were no hand wash facilities in the toilets. She said the reason that she so reported was that the sinks were leaking and that they should not have been used. She said was telling the truth but she should have clarified it more in the report. It was put to her that the report referred to cross contamination between process and raw product when there was not processed product in the factory which dealt with raw fish all the time – a wet factory. The witness replied that processed did not mean cooked it meant filleted. The filleting room was separate to the packing and labelling room and therefore (had to have) compliance.

There was reference in the report to there being no extraction units. It was put to the witness that the report referred to extraction units provided for equipment which gives off fumes or steam when there were not any. The witness said that there was a polymonn sealer which used air which was part of extraction on the machine.

It was put to her that the defendant had not high care area – there was no cooking. The report had referred to high care area facilities and change of staff footwear and protective clothing. The witness replied that for the purpose of the audit she was using the processing area as a high care area and the premises were compliant with wearing the appropriate protective clothing and footwear.

It was put to her that there was no evidence of infestation of rats or rodents. The witness replied that there was no pest control in place. She was not saying that there was evidence of rat infestation as Mr. Foster had said, but there was no control in place and that there were soiled polystyrene boxes that could lead to pest infestation. She did not see any infestation.

She was asked about the comparison between her report and that of Ms. Boyle of Musgrave's regarding customer complaints. The witness had said in her report that there were no customer complaints procedures in place whereas Musgrave's report had said that there was handling procedure, documented, system for recording in closing out complaints and handling procedure.

The witness answered that when she did the audit there were no documented customer complaint procedures in the HACCP manual- there was no manual, no documented traceability audit, no list of approved suppliers. The Musgrave's report referred to supplier approval and performance monitoring in place. The witness said that obviously it was out of date.

It was put to her that her report had said there was no product recall whereas the Musgrave report said there was a product recall procedure. She replied that there was no adequate procedure: there was no product recall procedure in place that was compliant. She had seen no documented product recall system.

It was put to her that Jennifer Boyle for Musgrave's said that there was a supplier listing in the questionnaire. The witness said that at the date for audit there was none and had to be documented to be compliant. Musgrave's report said that there was a personal hygiene policy: she said there were none. She replied that there were no personal hygiene records.

She agreed that the audit was conducted six days short a month after the plaintiffs had taken over control of the factory. Ms. Boyle's report showed what the factory was like when the defendants were in control of it. She was not familiar with how long the defendant had been supplying Musgrave's.

Ms. Millward O'Donoghue said she could not say whether any of the matters were ever corrected as her audit was a snapshot on the day.

Her report had said that the air conditioning unit needed maintenance and was dripping profusely on the floor and on to the product. It was put to her that there was no air conditioning unit but that there as a defrost drain pipe from the chill unit. She said there was leakage followed by which she believed to be (part of) an air conditioning unit.

It was put to her that if she had shown that to the defendants these matters could have dealt with. She said it was known that Mr. O'Regan was not on site. She reported to Mark Wright. She was not aware of whether he spoke to Mr. O'Regan. She was not aware of Mr. O'Regan at that stage. She was not aware whether her report was being sent to Chris Kinneally (the plant manager).

She could not remember when she went back to the plant but, on consulting her notes she said it was the 21st September, a week later and she concentrated on implementing the procedures. She said that on the 10th and 11th of October, 2005, where she claimed 48 hours, that she had spent two days on site. She did not recall the exact times. It could possibly have been 11 to 13 working hours per day. She said it was correct that the defendants had to pay for that.

She was asked to comment on a report from Ms. Boyle in March 2006. She reported that "conclusions remained the same from the follow up audit on the 13th October, 2006". She was asked whether, despite her working 24 days, that the position regarding Musgrave's had not changed at all in the six month period. She said that there was a lot more to her working relationship with Musgrave's than the report. It was not correct to say that all her work was in relation to brand product that the plaintiffs were supplying to Musgrave's. It was put to her that he should produce nothing to justify the counsel termed exorbitant expenses claimed. She said she implemented all of the procedures that were listed and that there were ongoing issues with HACCP. She was not aware of audits by Dunnes Stores and by the Sea Fisheries Protection Authority.

It was put to her that Canestar were considered low risk because they did not have cooked food and that Canestar had a trading relationship with Musgrave's since 1988 and had achieved category primary status. She said she could not give a definition of that.

She said that part of her remit was dealing with complaint from customers in relation to quality of the plaintiff's supply of fish.

She said it was correct to say that she told Jennifer Boyle that she was a group technical manager, managing sites in Cork, Galway, Howth and Kilmore in September, October 2005 and March 2006. She was managing quality assurance systems in those sites. There was a quality controller in Galway and a quality assurance system in Howth, a quality controller in Kilmore. There was no quality controller in Crookstown since August 2005, and she put in a quality assurance system. It was her role to create and implement and monitor and police it. She said she would not assess the quality of the products going into Galway. The person in charge of running the factory and to assess quality. Customers claims were complaints. There were many different issues of claim some of which were rejected and some are accepted.

It was put to her that Mr. Eugene Garvey would give evidence that he worked for 26 years and would say that Wrights adopted a practice of bringing sub standard fish from Dublin to Galway and that he rejected it continually. She said she did not know anything about that. She could not recall a conversation but said that deliveries can be rejected by the manager if not happy with the quality of the fish on delivery.

She agreed that she was a director of Wrights and that, while she could not recall a specific incident, it might have happened.

She was referred to an e-mail dated 7th October, 2005 from Jennifer Boyle of Musgrave's which referred to "first time in three months back into the top five worst offending suppliers". She was not aware of that e-mail. The e-mail referred to fish which arrived on the 4th or 5th and were dated the 10th or the 12th where Musgrave's rejected the fish. This was at a time when she had been working many, many hours. She said that the e-mail did not say who supplied them, there was no traceability date.

The witness said that she went out to Crookstown in August 2006. She agreed that Musgrave's were unhappy about that. It was correct to say that a site inspection took place subsequently in Kilmore Quay. She could not recall Mr. O'Regan being there.

It was put to her that Mr. Garvey in the early part of 2005, found quality control issues amiss in Kilmore Quay and gave a report to Mark Wright. She said that she had never heard that.

On re-examination she said that there were no prosecutions in relation to the business conducted in Fermoy after the acquisition of the business by Wrights.

She said that she had a check list and standard form for use of audit off site. She agreed that it was not sufficient merely to have a policy but that there had to be a record of the policy being implemented for the purpose of HACCP. If the record is not there that constituted non compliance for the purpose of HACCP.

She said in relation to the work done that she had been paid on a salary basis and, when in Fermoy, would be away from Kilmore Quay. She was not claiming for periods she would be sleeping. She said that her claim for expenses was not a manufactured document.

Her affidavit of the 24th July, 2006, referred to the claim of €16,000 to include laboratory equipment repairs and her time and expense. It was put to her the next time a claim was made on the 12th May, 2010, weeks before the trial, the claim escalated to over €150,000 including almost €37,000 for her solely with €6,000 expenses. The witness believed that this was a "double up". She

could not refer to any receipts for laboratory equipment. She said that the amount included sums paid to Mr. Foster.

She said that the food safety system in Fermoy was inadequate and had completely broken down.

Teaselling could be a printer or human error, but not an illegal act unless done with intent. It was put to her that she sent e-mails to Mark Wright copied to Steve Foster and to Mr. O'Regan regarding over labelling which she asked to be stopped. Labels had been removed and new labels placed on packaging. She agreed that Wrights of Howth had been prosecuted and convicted for false declarations.

She said her audit of the 13th September, 2005, showed a serious non-compliance in Fermoy. There was no HACK manual in place.

She admitted that she should have clarified in her report relating to washing basins not being adequate. She did not see any evidence of rat infestation.

There were no personal hygiene records. She agreed that this was almost a month after the plaintiffs took over Fermoy. She was not aware that there was any change. Her audit was about what she had seen on the day.

11. Evidence of Jennifer Boyle
Ms. Boyle was a food safety and quality auditor with a remit for beef, lamb, pork, bacon, poultry and fish. She was now assistant trading manager for Fish Commodities which were dealt largely with seafood. In 2005 she had three years experience in that position and prepared a report for Musgrave's.

She referred to her audit at Crookstown during 2005. She had not carried out a previous audit. She agreed that she enclosed a copy to Chris Kinneally on the 7th June, 2005. Musgrave's had a system of grading their food suppliers based on audits. Grade E was the lowest grade and was unacceptable. That was the grade received by Fermoy who had previously a Grade C. She agreed that she identified 31 non compliances. She had not conducted the previous audit in November 2004, where there were nine non compliances, none of which were remedied in the intervening seven months.

Her report had referred to the company showing no signs of wanting to improve its food safety . . . a "blatant disregard for food safety", . . . the director being notified by the quality manager about concerns over a lack of micro testing . . . the quality of product being impaired, . . . and retailers constantly complaining about product received from Fermoy Fish. Fermoy had been in the top five worse performing suppliers in the last six months.

She was asked how she would have known, she said it was through their key performance indicators and claims. She agreed that Fermoy Fish was replaced with an alternative supplier. She also agreed that her next visit to Fermoy was in October where she met Ms. Millward-O'Donoghue on the 13th October, 2005. She said that 20 of the 31 non conformances had been closed out in that audit and that remaining 11 were non critical so the supplier was "Ok".

She said that in March 2006, the supplier was still satisfactory as referred to in the report. She agreed that in September 2006, the production facility moved from Fermoy to Kilmore Quay.

In cross examination she referred to the action plan drawn up following her report in June. Fermoy Fish had drawn up an action plan as relating to items of non conformance based on the audit report. She had a copy of the action plan. Post audit there was a corrective plan with which she was happy.

She did not have information on quality rejection by the plaintiff from winter 2005 to 2006, but did remember having received complaints regarding labelling. She was not suggesting that the fish industry had a system which permitted over labelling or that a product could have two best before dates.

Reference was made to the complaint on the 29th March, 2007. She said that all claims were sent to the supplier and were investigated. She based on the information referred to, she agreed that there were quality issues in relation to product with the plaintiff.

She said that Wrights did not tell her that they were moving from Crooksotwn to Kilmore Quay. She would rather have been informed in advance.

She said that she was happy with the HACCP team having been set up. The quality manual was to be reviewed within six months. She was happy that the defendant had got themselves out of the categorisation of the worst five.

In further examination, she said that the grade on the audit on the 13th October remained a grade E which was unacceptable. That was what "on hold" meant. She agreed that she was satisfied and was reassured in relation to quality in Fermoy in terms of it continuing as a supplier. She confirmed that the Quality Manager Rory Coughlin and the Acting Manager Chris Kinneally were present at the previous audit in June. She agreed that she had noted that the quality manager was not trained in HACCP and that there was no HACCP team operating on the plant. She agreed that the non conformance was major in relation to HACCP.

12. Evidence of Steve Foster
Mr. Foster was a director of Wrights having joined on the 19th August, 2005, after 23 years of experience in the seafood business. He was involved in operations and sales within the plaintiff company as an assistant to Mr. Mark Wright. He was a consultant to Simon, which was Wrights of Howth in Dublin. His first assignment was to conduct a stock take on Saturday 20th August, in Crookstown. He had no previous knowledge of that plant. The Crookstown plant was processing fresh fish, filleting and packing in bulk. When he arrived he met with Mr. O'Regan and together they took a stock take of fresh fish which was converted to the computer a few days later.

The stocktaking of frozen and packed fish was to have been taken on the following day but did not happen. Mr O'Regan had said that he would be on the site on Monday but as that was not happening and he was leaving on the Tuesday he began counting frozen stock take and the packaging stock with Gerard Lenihan, an operative with Fermoy Fish. The frozen stock was classified into good and poor stock. Ten items had a best before date of the 5th August, and fourteen had no information. The frozen stock was not reviewed with Mr. O'Regan. He sent Eileen Hunt four e-mails in October and November asking for stock figures and the values of the stock. No response was made until March 2006. He said that when the stock taking was done he had observed numerous lines which were dehydrated and of poor quality with a limited amount of good quality which could be used in the business.

The main part of the equipment was the Multivac, which pre-packed and sealed fish. It was not in working order. He was aware it was not working over the weekend.

The Multivac machine had not been serviced. The plaintiff organised for an engineer to put the machine in working order. Mr. Foster said that the machine had not run for approximately one year and required new chains as the timing was out. When they tried to start the machine it burnt the circuit board. Such machine was fast and efficient to produce pre-pack which accounted for up to 5 or 10% of the retail business.

The premises needed temperature control and parts of the plant needed upgrading. Schedules needed to be put in place for cleaning and staff training.

There was a large amount of packaging that they could not use in the business as it was obsolete, unusable, soiled and rodent infested. A high amount of packaging would not be required such as prawn trays and smoked salmon bags. He referred to photographs for "Anchors Away" which was a Fermoy Fish brand and some price specific labels. Only 3,000 of the 13,000 labels were usable.

He said he attributed the values by the cost price of fish on the day.

He said that all the produce in the internal cold storage which was at a temperature of minus 7, and could not be used and should be dumped. Stocks of black bean sauce had no value.

Mr Swanton had to credit €6,000 to the Fermoy account which was invoiced through Wrights of Howth, in order to get packaging from the suppliers who had been unpaid by the first named respondent. He agreed with the evidence of Mr. Swanton.

He said he reported back to Mark Wright on the issue of packaging and premises. Mr. Wright suggested he could add to upgrade the plant and look at the procurement of products for the customers.

He said that from October onwards he was there very much all the time though not every single day. He said that he stayed in Macroom. He was referred to sample invoices and to the claims he made for his consultancy fee at the time.

He said that after a trade show at Punchestown he introduced six new pre-packed products.

Ms. Millward-O'Donoghue told him about the safety audit in June 2005 and the 13th October, 2005. He made sure the staff were aware to all food safety issues and carried out the procedure set out by Ms. Millward-O'Donoghue.

The office in Fermoy was overstaffed on the administration and finance part.

He was referred to an e-mail of the 8th October, 2005, concerning "people costs". His request for estimated costs for the plaintiff to evaluate, discuss and agree was not replied to.

He said that Mr. Swanton had alerted him at the end of December saying that the Musgrave's payments were very slow and asked if he could chase it up. He sent an e-mail to Eileen (Hunt) in Fermoy on the 28th December asking when Musgrave's paid the last cheque. She replied saying that they received two cheques that week and that lodgments of €40,975.96 would be made on the 3rd January.

He referred to an e-mail from Chris Kinneally of the 24th November, 2005, referring to additional hours worked by staff in unpacking and dumping obsolete products from Glebe Cold Store.

He asked Musgrave's and Dunnes Stores not to make any further payments to Canestar.

He contacted Mr. O'Regan in early March and was told that the payments had been made to an escrow account.

On the 10th May Wrights moved the accounts away from Fermoy.

In cross examination Mr. Foster agreed that he was project manager for Fermoy Fish in March 2006. He said he had been assistant to Mr. Wright from the previous August, but not project manager as stated in the affidavit of Mark Wright.

It was put to him that claim made by Wrights against Canestar in relation to extra work, was limited to €16,000. He indicated that that would was so. He agreed that in May 2010, that sum had increased to nearly €150,000. It was put to him that his own affidavit described himself as project manager care of Unit 14, West Pier, Howth, rather than Aberdeen. He agreed he was based in Dublin.

It was put to him that the defendant's evidence would indicate that they were being "flooded" with stock from the plaintiff coming up to Friday 19th August.

Mr. Foster said that not all of the goods on the delivery dockets were supplied. On unloading the truck, Mr. O'Regan discovered that there were some pallets missing. He recollected speaking to Mark Wright and he spoke to Mr. O'Regan about it and the material would probably in Howth and would follow in the next delivery.

He said that the stock take was not complete in that the frozen stock was not covered. He said he did not recall either Mr. Dan or Liam O'Regan being present at the second stock take. He said he did not give his documented stock take to Canestar at any stage before March 2006. It would be correct that that was not given until the injunction. He added that previous to that, they met to sort out the stock values. He agreed that he asked Eileen Hunt for her stock value and asked to meet Mr. O'Regan regarding the stock. He agreed that he did not give Canestar his stock values although he said that the methodology would be that he would put values against their and the defendants stock take and hopefully could meet to resolve the difference. He said that the data had been generated onto the computer about the 24th or 25th August 2005.

He was referred to the comment regarding "acceptable stock" and explained that the stock was of unacceptable quality but needed to be used in rotation before more purchases are added to prevent further loss of product quality. Book values needed to be inserted to give total value stock on site.

The book value meant cost. He agreed that it would be correct to say that with fluctuating fish prices, stock value was not the same as what it cost the defendants to buy.

He agreed that stock was to stock needed to be reviewed to put a net realisable stock value in the accounts. Some stock had out of date freezer burn and jumbled back issue.

Stock was referred to in his report as having no value and had to dumped. He thought that the three or four tons with no value had been moved to Galway. He indicated that was half of the stock. He thought there was a document of a transfer to Galway but could not say whether it was discovered or not. He could not say how it was disposed of. If would have to be destroyed by the Environmental Authority and to be put into landfill and have the appropriate paperwork. He could not say how this was regulated.

It was put to him that the reason for that was that it was not dumped. He replied that he did not know: it could have come back. He did not say it was condemned. It was not a health risk to anyone but was of no use to Wrights. He agreed that Wrights had dumped it, but was not sure when it was dumped and had not details. It was put to him that Mr. Eugene Garvey would say that the stock was moved from Crookstown to Galway and sold out of Galway and nothing was dumped out of Galway in his time. The witness replied "Ok".

He said he did not know that blackbean sauce had been dumped. He said it was correct that there were dockets generated in Crookstown showing movement of goods including blackbean sauce to Galway and that that was the same blackbean sauce which the witness has said it was of no value.

He was referred to an invoice discovered by Ms. Hunt on the 19th October, 2005, showing product going from Fermoy Fish to McDonagh Redsail. He said that it was a transfer document not an invoice which was indicated. The value on the blackbean sauce was €7,884.

He was referred to an item of smoked cod, which, it was suggested, was the same smoked cod that he had also condemned. He agreed. He said that frozen fish could have a shelf life of predominantly eighteen months.

Counsel referred to the dispute between the parties in relation to certain equipment which Canestar say Wrights improperly removed from Crookstown in August 2006. The witness said that the dispute was about a filleting line and fork lift truck and compressor and a portacabin removed to the Kilmore. He said he was under instruction from Mark Wright that all of the goods had to be removed. Liam O'Regan had turned up and said there were certain items not to be removed that they were not the plaintiff's property. Mr. Mark Wright spoke to Liam and Dan O'Regan and he drew up a list of items which the plaintiff would take and asked Liam to sign and then they could proceed to clarify it the following week. He agreed that it was not quite as calm as that and that there was bit of banter going on. He said they did not threaten to move a jeep in which Mr. O'Regan's wife and daughter were in using a fork lift. He said he would have asked Liam O'Regan to move his jeep numerous times. He indicated that Mark Wright had instructed him to move the jeep, he agreed that if necessary he was to use the fork lift to move the jeep but added that it could have been in the heat of the moment that he would not have done it. It did not happen. He agreed he was acting on instructions. He said he honestly could not recall the conversation. He agreed that at that specific point the equipment it was disputed was left there and said it was correct that at a later stage it was removed.

A letter from the plaintiffs to the defendants' solicitors on the 24th August 2006, referred to these removed items and called on their clients to return them. On the 29th August, the defendants' solicitor wrote again itemising the forklift, the filleting line, an air compressor and the contents of a portacabin and claiming certain damage, including rendering the wiring useless and potentially hazardous. It asked to note that the defendants would be holding the plaintiff liable for all costs. The witness agreed that there was no response by the plaintiff's solicitors. He said that he believed that the equipment was Wrights as it was in the asset sale agreement so it was not clear on certain items. He agreed that he was not in a position to deal with the evidence in relation to the property because he had left on the 20th August, 2006.

He agreed that Wrights could have used the "Anchors Away" packaging but had brought their own brand label. He indicated that the agreement was not confined to "stock Wrights of Howth required".

On re-examination Mr. Foster said that he rented accommodation in Howth for the whole year and he travelled from Howth to Crookstown regularly and stayed there.

He said his instructions were to evaluate the good stock. The definition in the ASA was "the stock in trade of the business at the transfer date including within limitation, goods and other assets purchase to resale, stores, raw materials and components purchased for incorporation into product of the restoration of the title by sellers or under the control of the vendor, together with the finished product of the business". He understood this to mean work in progress, stock or stock in trade.

He said that he had no part in the operation of the Galway plant as they needed to make room in their cold storage space on the Crookstown site for good product coming in to be used. The stock was obsolete to the business. He believed it was disposed of.

In further cross examination the witness said that at the start of the consultancy he had to stay in hotels in Dublin. It was put to him that the invoices went to Wright through into 2006 and included the Bailey Court hotel in Howth for the 21st March, 2006. He understood that those were his documents. He disagreed that the claims were exaggerated. Canestar understood the claim to be for €16,000 and knew nothing about it being otherwise until the 12th May, 2010. The claim was made by way of supplemental pleadings.

He identified Mr. Brian Everard as the person who was instructed by Mr. Wright to attend at the plant to address problems and answer queries after he had been there.

13. Evidence of Brian Everard

Mr. Everard was the managing director of Kingfisher Fresh in Wexford since the 15th October, 2007. Prior to that he worked as managing director for Wrights of Howth Exports Kilmore Quay Ltd. from 2002 to October 2007. He has been involved in fish processing for 35 years.

His main focus was on Kilmore Quay and he did not have a real awareness of the Asset Sales Agreement until Mark Wright contacted him and mentioned that the Wright Group had purchased Fermoy Fish. In mid September 2006, Mark Wright asked him to go to Crookstown where "some people" had stripped out certain stuff and the landlord was not happy with the way the premises was left. Mark Wright asked him to resolve the problem so that the landlord would be content. He said he went there with Harry Allen, an engineer from Southwest Marine and met Neilus Cronin, the landlord. They spent the whole day there basically tidying up and cleaning up and organising the removal of portacabins. Nelius Cronin was happy with that, but had one issue with the electrics. Mr Everard said he asked Nelius Cronin to get somebody local and gave him €500 to get the repairs done. That satisfied Mr. Cronin. As far as he was concerned there were certain wires that had been cut with pliers or pincers and needed to be made safe. Nelius Cronin gave him a

letter to say he was quite happy with the work. He brought that letter back to his office at Kilmore and it was collected and was delivered to the main office in Howth. The emptying of the effluent tank was organised on that day. He said there were a lot of polystyrene crates, but as far as he was concerned there had been a number of fish merchants in west Cork and Kerry coming to Fermoy fish and taking the boxes away repacking fish in them. Nelius Cronin had no problem with them.

Mr. Everard was not aware of the skip full of waste material being left. A fridge door was brought back to Kilmore Quay. There was no contact with him after that.

Counsel for Canestar said that the documentation referred to was not in the pleadings and she had not seen those documents beforehand.

The document was agreed.

Counsel referred to the document dated the 29th September, 2006, from Harry Hannon of South East Marine Engineering which referred to attendance at the processing plant in Crookstown and to the removal of the fridge units. Various jobs were priced at a total of €965.

A contractor, Frank McCarthy Haulage Ltd. was engaged on the 14th September, 2006, prior to his visit and to clean out the two effluent tanks, it arrived on the day that he was there. The work was carried out to the landlord's satisfaction.

In cross examination he was asked about a meeting with the landlord. He said that was the first and only time he met Mr. Cronin, but he had numerous conversations with him on the telephone. He said that was correct to say that €500 of the invoice of €965 related to the claim.

He agreed that none of it referred to Frank McCarthy Haulage Limited. He said that he had got that company to remove the portacabins from the premises to be stored in his yard in Cork, but he was not a 100% sure. He did not know what happened to the portacabins thereafter. He did not investigate whether or not he was paid for that work.

It was put to the witness that Mr. Cronin would say that he was far from happy with the way the building was left that it was in a dangerous condition, stripped bare. Doors and lockers had been taken, electric wires had been cut right throughout the factory leaving it in a desperately dangerous condition and that he did not accept €500 in full and final satisfaction. The witness disagreed.

Photographs were put to the witness who said that he could not comment on the €500 that was paid in respect of that job alone. He agreed that photographs that he was shown represented what he saw in September 2006. He did not comment on the photograph of the electrical cables but said that the sliding freezer door had been removed properly, there was no markings around the fridge when it was ripped out and that there was no damage on the panels. He did not know who owned the door. He said he did not know if that door was there nor when the door was taken out. Other photographs were put to him with regard to the wiring and the distribution board, the clock in card area and the position where the alarm and freezer were positioned and the temperature control panel. Counsel referred to the electrical cables being pushed back into the wall rendering it difficult for them to be accessed. He said he did not notice that. He said that he was not instructed to carry out any works in respect of the extent of that damage.

The witness was examined further with regard to the photographs as to whether the condition of the premises was similar to the photographs. He said that some of them were but that he would not be a 100% sure that they all were.

He said that the €500 was to make safe any electrical work that had to be done.

Submissions on Behalf of the Plaintiff
Counsel for the plaintiff submitted that the onus is on the defendant to prove all the elements of the counterclaim. It was clear that at the commencement of the proceedings that the defendants were indebted to the plaintiff. The defendants had deliberately sought to mislead the plaintiff as to what they had done with the plaintiff's monies. The first named defendant was insolvent despite the warranty to the contrary.

The plaintiff accepted that in the period between the commencement of the proceedings and the hearing that certain monies became due to the first named defendant under the Assets Sales Agreement. However, the evidence, it was submitted, clearly indicated that the first named defendant's claim was grossly over stated. It was based on an erroneous reliance on the historic list of clients. It was based on the historic list of customers, rather than on existing clients of the vendor as provided for a clause 44.2 of the Asset Sale Agreement. Commission should be calculated on the sales to existing clients to which the plaintiff calculated as €8.3m for the 24 month period. The 12% commission would, accordingly, be €969,907. Sales did not exceed €2.3m at the end of the seventh month nor €10m as provided for in Asset Sale Agreement.

The defendants were paid under the terms of the Consultancy Agreement up to February 2006. By reason of their wrongful acts the defendants had converted the plaintiff's money and to date these sums remained unpaid. The inequity does not allow the defendants to benefit from their own wrongs and to be entitled to the sums claimed, which, in any event, were required to be proved by the defendants.

The plaintiff identifies the issues as:-

Conversion of the plaintiff's monies;

The escrow account;

A breach of trust and of fiduciary relationship;

Breach of warranty;

Further claims.

Central to the defendants' counterclaim was the issue is of commission based on sales to existing clients. The Asset Sale Agreement should not be construed against the plaintiff in a manner that would permit the defendant to take advantage of its own ambiguity.

Reference was made to a letter the day the signing of the ASA where solicitors for the first defendant stated: ". . . we are now

taking over the draft and putting same forward on the basis of our clients understanding of what is finally been agreed by your client". The solicitor for the first defendant was not called as a witness.

Mr. Swanton's evidence was the breakdown of the actual sales and was not challenged. That showed that 23 of the customers on the list had done no business with the defendant for five years prior to the agreement. He had identified that only 11 branches of the 32 Dunnes Stores branches were existing clients of the first named defendant. This was supported by the evidence of Mr. Hickey of Dunnes Stores, which was uncontested. Mr. Swanton had identified 8 branches of Dunnes Stores that had done no business with the first named defendant in the two years prior to the ASA. Mr. Hickey confirmed that Simro Limited traded under the name of Wrights of Howth and had supplied Dunnes Stores. Mr. Swanton gave evidence that the remaining Dunnes Stores were including the two largest branches, Cornelscourt and Blanchardstown, were clients of Simro Limited who supplied them from February 2005, six months before the ASA. The date of those were not being supplied by the first named defendant at that time. While the defendant claimed the sum of €2.13m in sales to various Dunnes Stores branches it was submitted that it was only entitled to claim commission on sales of €313,219.

The plaintiff further submitted that the figures in Mr. Carty's report were gross prices. The evidence of Mr. Swanton was that long term agreements discounted those prices by 15%. This was accepted by the auditors over the years. Mr. Peelo accepted that approach and stated: "In accordance with normal accounting practice, the sales commissions in this report had been calculated on the price actually paid by Dunnes Stores and Musgrave's. Mr. Carty's evidence was that he was not sure how the agreements were intended to deal with the LTA.

The defendant had claimed that Dunnes Stores were supplied by the defendant through Whelan's and claimed commission on those sales. Whelans' name also appeared on the 10th Schedule. The defendant also sought commission on sales to Whelan's. The defendant was not entitled to claim commission twice. Mr. Swanton's evidence was that the first named defendant was due commission of €74,016 and not €272,373 in respect of sales to Whelan's. Mr. Hickey's evidence was that Whelan's supplied Dunnes Stores and were paid by them. He was not familiar with the practice of Whelan's ordering from the first named defendant indicating a list of the Dunnes Stores to be supplied. Mr. Swanton's' evidence, based on the invoices discovered for the immediate period before the ASA, was that there were no invoices to either Dunnes or Whelan's and that the first named defendant was not supplying Whelan's. No witness from Dunnes Stores was called by the defendants to support Mr. O'Regan's claim that the first named defendant supplied Dunnes Stores through Whelan's and that therefore the branches of Dunnes Stores were the first named defendant's client. There was no evidence called in relation to the claim that Mr. O'Regan introduced the plaintiff to Dunnes Stores and assisted in pricing for Dunnes Stores business in the eight outlets supplied by Simro from February, 2005. Mr. Swanton had no knowledge of this and Mark Wright denied any such arrangement.

The plaintiff relied on that evidence and the evidence of Mr. Carty and Ms. Hunt, none of whom knew of the details of the commercial relationship between Dunnes Stores and Whelan's. No contract existed between Dunnes and the first named defendant when Dunnes were supplied by Whelan's. Whelan's was the client of the first named defendant and not Dunnes Stores.

It was submitted that the judgment of *Whelan Frozen Foods Limited v. Dunnes Stores* [2006] I.E.H.C 171 applied.

The defendant claimed commission on sales to Simro Limited. It was submitted that for solely logistical reasons, Simro arranged for certain stores in the midlands to be supplied by the first named defendant. The plaintiff invoiced Simro and Simro invoiced Dunnes Stores. The branches were not among the eleven supplied by the first named defendant before the agreement and accordingly was not entitled to commission on those sales. The plaintiff relied on the evidence of John Hickey from Dunnes Stores who said that only eleven Dunnes Stores branches were customers of the first named defendant in the six months prior to the Asset Sale Agreement.

Of the sum of €126,000 claimed for commission, €101,575 related to those stores which were not among the eleven stores supplied by the first named defendant. The balance of €24,425 represented fish that was returned to Dublin where an invoice was raised rather than a credit note. It was not a proper sale and the defendants were not entitled to commission on the return of those goods.

The defendants had claimed a sum of €374,952 under the Consultancy Agreement and further claimed for €66,870 under "heads of outlay" and remediation costs in respect of Crookstown in the sum of €46,081 as detailed in the Carty report. This was dissented by the plaintiff.

The plaintiff submitted that Mr. Swanton's evidence was that payments of €96,000 were made and accepted by the defendants up to February 2006 when payments stopped and the injunction was applied for.

Mr. Swanton's evidence was that he calculated the balance due to the defendants at €57,374 being €153,743 less the €96,000 already paid. Costs were supposed to be reviewed on a monthly basis but no meetings were held. The management fee claim was rejected because of the mishandling of customer accounts.

The first named defendant claimed the sum of €232,492, which the plaintiff had calculated at €97,000. Under the ASA €100,000 was paid on signing and the balance as set out in the 9th Schedule was payable 30 days after the date of the agreement. It was common case that the 9th Schedule was never completed and remained blank in relation to stock.

The stock take on the weekend of the agreement was never agreed. There some dispute about Mr. Liam O'Regan, the second named defendant's brother, and Mr. Foster carrying out the stock take. Ms. Hunt gave evidence that she recorded stock take while Dan O'Regan called out the amounts. There was a dispute regarding packaging from Polymoon to the value of €32,648.66. Mr. Foster's evidence was that the stock take for packaging totalled €35,000 and the stock was valued at €44,000 and that a significant amount of stock was out of date, obsolete and suffered from freezer burns and was unusable.

In relation to plant machinery, the agreement provided for the sum of €400,000, of which €250,000 was payable on signing and the further €150,000 paid subject to aggregate sales in the seventh month exceeding €2.3m. The plaintiff's evidence was that sales to existing clients of Canestar was €2.178m. Accordingly the plaintiff submitted that the defendant was not entitled to €150,000 additional payment for equipment.

The claim for remedial costs in the sum of €46,081 was rejected by the plaintiff on the basis that the sum of €500 had been given to Mr. Cronin, the landlord to engage the services of an electrician and that he had accepted that sum. His evidence was vague. Mr. Warren, surveyor, admitted he did not know the state of the premises was at the start of the letting and his costing was based on photographs taken by Mr. Carty in relation to the electrical works was €12,000.

Decision of the Court

The proceedings arise out of an Asset Sale Agreement between the plaintiff and the first named defendant and a Consultancy Agreement between the plaintiff and the first and second named defendants.

The subject of the Asset Sale Agreement was the business of "Fermoy Fish" which was the business of the first named defendant.

At the time of the Asset Sale Agreement the debt owed by the first named defendant to the plaintiff in respect of supplies of fish was €889,682.24.

The Asset Sale Agreement provided for a series of payments. The payments in relation to equipment and good will were paid on the 19th August, 2005, the date of the agreement. Commission was agreed to be paid over a period of 24 months based on monthly sales and additional payments depending on certain sale levels being reached. Those sums were to be set off against the sums owing to the plaintiff with €489,682.24 being paid on the signing on the balance of €400,000 set off against monthly payments. The plaintiff paid a sum of €460,317.16 to the first named defendant on the 19th August, 2005.

The Consultancy Agreement required the first and second named defendants to manage the customer accounts for a period of 24 months in consideration for the sum of €795 per week plus VAT. The plaintiff agreed to pay weekly outlay incurred by the defendants in carrying out the services as set out in the Schedule to the agreement. That Schedule was to be reviewed and agreed on a monthly basis by the parties.

It was agreed that all the sales by Fermoy Fish became the plaintiff's sales. The plaintiff was entitled to payments made by the customers of Fermoy Fish. Invoicing and accounts were to be managed and controlled by the first and second named defendants from the Fermoy office.

The plaintiff claimed that in May 2005, and early 2006, it appeared there were delays in receiving payment from two major customers, Musgrave's and Dunnes Stores. These customers confirmed that they were up to date with payments. Payments received by the first named defendant on behalf of the plaintiff were not being lodged by the first and second named defendants to the plaintiff's bank account. The second named defendant informed that he was holding the plaintiff's money in an escrow account.

The plaintiff issued proceedings on the 24th March, 2006, and was granted an interlocutory injunction on the 27th of that month restraining the defendants and each of them from reducing or dealing in the plaintiff's monies below the sum of €484,985 in the defendant's bank account. It was further ordered that the defendants account for all the plaintiff's money received by them from the 19th August, 2005.

The second named defendant's affidavit stated that the sum of €451,576.91 had been paid to various creditors of the first named defendant including Ulster Bank, Revenue Commissioners, Pisces Limited and to himself. Smaller sums for bank fees and leasing costs were also paid. The plaintiff had claimed that these creditors do not appear in the Schedule of creditors attached to the Asset Sale Agreement. The plaintiff alleged that the wrongful conversion of the sum of €484,895 should be paid to them. Moreover, the statement of claim alleged that false representations were made by the second named defendant that the plaintiff's money was being held in an escrow account and that a cheque issued by Dunnes Stores on the 3rd March, 2006, for €85,000 would be lodged to the plaintiff's account.

It was further claimed that the recitals and schedules to the Asset Sale Agreement were not complete and inaccurate and in particular that the existing client list in Schedule 10 included parties who were not in fact existing clients of the vendor as covered by the warranty.

Of the Asset Sale Agreement
The plaintiffs also claimed that the plant, machinery, chattels and equipment were not in a good and proper state of repair and condition and had not been regularly and properly maintained contrary to the warranty contained at para. 25.2 of the agreement.

Paragraph 30
The plaintiffs maintain that the stock and trade of the vendor was not in good condition and capable of being sold in the ordinary course of business. The stock was excessive, obsolete, unusable and unmarketable, contrary to the warranty contained at paragraph 25.3.

What the plaintiff claimed was that Musgrave's, a substantial customer, had indicated an intention to cease trading with the first named defendant and that this was agreed to warranty at para. 29 dealing with suppliers and customers.

Paragraph 50
It was claimed that para. 22 dealing with insolvency was breached in that the defendant was insolvent.

The plaintiff referred to the report of Mr. Des Peelo, accountant, in relation to the sums due and owing to the plaintiff. The plaintiff conceded that certain sums were due to the defendants on foot of the agreements.

The defendant denied that they received the sum of €484,895 for the use of the plaintiff and that they were liable to repay the said sum.

The defendants further denied that the existing client list was inaccurate or that it included parties that were not in fact existing clients of the first named defendant as vendor.

They pleaded that it was an express or implied term of the agreements that the plaintiff would deal in good faith with the defendant and would commit itself to the spirit and letter of the agreement pursuant to clause 18.6 of the agreement.

Pleas in response to each claim by the plaintiff in relation to equipment and stock were made and the defendant counterclaimed against the defendant.

The court proposes to deal with the five issues suffered in conversion of the plaintiff's monies.

Counsel for the defendants submitted, at the opening of the trial, that the amount of €484,895 was due and owing to the plaintiff. The report by Mr. Tim McCarthy accountant on behalf of the defendants conceded that the supplier payments withheld was so payable to the plaintiff.

The evidence of Mr. Swanton, Chartered Accountant, and director of the plaintiff company, was that all of the Dunnes Stores and Musgrave's cheques, save direct lodgement to the plaintiff's account in January 2006, were lodged to the first named defendant's account in the sum of €1,252,395 and only €766,499 was passed on to the plaintiff. Mr. Swanton said that there had been a delay of one week to three months and that ultimately eleven cheques totalling €484,896 were not lodged to the plaintiff's bank account.

He said that this led to a complete breakdown of trust between the parties.

It was accepted by Eileen Hunt, on behalf of the defendants, that €105,000 was being withheld in October, 2005. The second named defendant justified the conversion of the plaintiff's money on the grounds that the defendants were owed money by the plaintiff on foot of the agreements. The plaintiff says that at that stage the first named defendant had not achieved any entitlement to be paid commission beyond €400,000 and that the plaintiff was entitled to set off the defendant's debt against the commission.

The plaintiff said that the defendants sales figures, disputed by the plaintiff, resulted in the commission of €338,135 and that sales had not exceeded €2.3m at the end of the seventh month so as justify a further payment of €150,000.

The court is of the view that, given the admission by counsel for the defendants at the opening of the case, that the sum of €484,895 is due and owing by the first named defendant to the plaintiff.

The Escrow Account
The term escrow refers to the fully executed deed or engagement to do or to pay something which is put into legal custody of a third party until some condition is fulfilled.

Both Mr. Swanton and Mr. Foster gave evidence that Mr. O'Regan, the second named defendant, had told each of them that money had been put into an escrow account. This was also the evidence of Mr. Wright. While neither Mr. Foster nor Mr. Wright were cross examined on that evidence, it was put to Mr. Swanton that the defendant never denied that he had the plaintiffs money and that there was a dispute as to whether it went into an escrow account and was asked whether he had met Mr. O'Regan. He said he was not specifically asked for a meeting nor was he sent the figures with a view to having a meeting.

Mr. O'Regan had said that he never mentioned an escrow account and that "Ian Swanton would have said to me that the accounts had to be held in an escrow account". He confirmed that nowhere in the correspondence was there any denial that he, Mr. O'Regan, had indicated that the money was in an escrow account.

The court is of the view that while it is unclear as to who introduced the concept of an escrow account, that the defendants did not deny the understanding that the plaintiff had that the monies were held or were to be held in an escrow account.

The court is of the view that leaving a misunderstanding or indeed a tacit representation it was not within the spirit of the agreement which should have applied to the defendants as well as to the plaintiff, see clause 18.6. Neither was it within the spirit of the agreement to withhold payments for a few weeks to several months on the basis that further monies would be owing from the plaintiff to the defendants.

The issue is more than the agreement now to pay the said sum outstanding, but whether the plaintiff was justified in refusing to pay the defendants in respect of monies owing under the agreement.

I have no doubt that the plaintiff was justified in taking over the management of the accounts themselves. I say this knowing that there were difficulties with regard the electronic payments to the plaintiff's account, given the length of the plaintiff's name. However, while this might have justified the delay in payments for a short period, it did not justify the withholding of payments. It was clearly an obligation on the defendants to ensure that monies would be lodged to the plaintiff's account.

However, it does not seem to me that whatever the degree of misrepresentation there may have been, that the plaintiff was justified in refusing to pay the defendants. There was no notification of rescission of the contract. Indeed the plaintiff acknowledges that some sums are owing to the defendants but there is a dispute as between the parties as to what these sums should be.

(Jim McCarthy's reports sets out the chronological list of payments due between the parties on the 19th August, 2005, and he equates the actual delay in non payment of monies due by the plaintiff to the defendants of monies due under the Consultancy Agreement and under the lease. No explanation was ever put forward by the plaintiff to explain why they delayed on these payments and/or did not make them. The plaintiff's indebtness to the defendants was increasing throughout the winter of 2005 until January 2006, which provoked the defendants retaining monies due to the plaintiff in respect of sales at this time. However, there is no evidence of the defendants informing the plaintiff of what they were doing and the reasons for so doing.)

(Mr. Swanton was challenged on the issue of the escrow account and the evidence of Dan O'Regan was that it was Mr. Swanton who had first mentioned the issue of an escrow account).

Breach of Trust
Breach of fiduciary relationship between the parties.

The plaintiff's submissions referred to a pattern of withholding and converting the plaintiff's money which showed a clear intention to use the plaintiff's money and, accordingly, was a breach of trust. Moreover, the plaintiff says that no commission was due or owing to the first named defendant at the time of the injunction or earlier. The end of the seventh month had not been reached and clause 4.4 of the Asset Sale Agreement was not triggered. No invoices had been received in relation to the stock until the beginning of March 2006. No agreement had been reached in relation to the stock take. Payments of €96,000 had been made by the plaintiff to the defendant on foot of the Consultancy Agreement and no other payments had been agreed between the parties.

The defendants say that Mr. O'Regan was never challenged on his evidence that he was working for the plaintiffs throughout the two year duration of the Consultancy Agreement as evidenced by his continuing interaction with Musgrave's' and other customers.

The court is of the view that clause 4.4 of the Asset Sale Agreement had not been triggered before the injunction was granted. It was also the view that thereafter, notwithstanding the injunction that the agreement was still in existence and had not been altered. It does not seem to the court that while the spirit as well as the letter of the agreement should have guided the parties, and that the defendants had not abided by that, the parties were not fiduciaries and that the delay and, indeed non payment, did not amount to a breach of trust, but was rather a matter that could be reconciled in relation to counter payments.

Breach of Warranty
It was expressly warranted at clause 31.1 that all information given by or on behalf of the vendor was accurate. The plaintiff pleaded that the evidence as in the 10th Schedule was not "in existing client list" but a historic list of every customer ever supplied by the first named defendant. Accordingly the information was neither true, complete nor accurate.

Clause 18.6 which deals with the spirit of the agreement to which has already referred, refers to the agreed client list and states:-

> "The purchaser will not seek to have the vendors agreed client list as scheduled hereto supplied in any other way than through themselves and will conduct its affairs in such a way, through pricing or otherwise, that would avoid the risk of this happening."

It is common case that the agreed client list was not supplied until the 19th August, 2005. The court is also mindful that the list was available when Mr. Swanton visited the Fermoy office. It may very well have been that he would not have been able to discern which of the clients was most important. The court nonetheless, accepts that a very significant volume of sales was made to relatively few clients.

The court is also aware from the evidence as to the method of supply to Dunnes Stores through Whelan's and, indeed, the supply of the plaintiff company to SIMRO Limited.

More importantly, the court is of the view that the bargain between the parties as of the 19th August, 2005, was that the plaintiff would require substantial customers supplied by the first named defendant and that the first named defendant would have a mechanism to discharge its debts to the plaintiff under the terms of the agreement. It seems to the court that this is an overarching element of mutuality between the contracting parties.

Moreover, the eleventh Schedule referred to "an agreed list" of common clients between the parties.

The contract as drafted by the solicitors on behalf of the plaintiff refers to the body of the agreement on two separate occasions to the fact that the existing client lists had been agreed.

It appeared to the court that the attempt to reject the defendants' claim in respect of compensation by suggesting that an analysis of the trading position of the first named defendant company prior to the Asset Sale Agreement showed that some of the clients on the list were not "existing clients". The defendants had submitted that the plaintiffs were attempting to change the terms of the contract and that the word existing was defined in the totality of the description, namely the clients as set out in the 10th Schedule.

(Thirteen of the clients referred to 80% of the sales, but how could this have been known).

The 10th Schedule says client list, not existing client list and does not give the amount of sales.

It seems to the court that the issue of existing client list did not arise until a dispute arose between the parties. It would appear that it was accepted in the contract and not dealt with until then.

14. Evidence of Mr. Mark Wright
Mr. Wright, is Managing Director of 'Wrights of Howth, ("the Group"). The Group, encompassed Wrights of Howth Galway, Wrights of Howth Export Kilmore Quay Limited and others together with Simro Limited trading as Wrights of Howth.

The Group's exports account for 70% of its sales. In addition to wholesale business it has a small retail business. In August 2004 the Group had acquired the business of McDonagh Redsail in Galway which exported live shell fish to France, Spain and Italy.

At the time they did not acquire Fermoy Fish from Canestar as "their aged balance was out of terms – they owed money for too long". Canestar had started to slip in February, when it was two weeks behind in payment, but by April 2005, it was at least a month in arrears. At that stage Mr. O'Regan put it to him that he might be interested in buying the business of Canestar. Wrights continued to supply to Canestar who was making post-dated payments. By May the debt was around €600,000 and Mr. O'Regan told him that the first named defendant was not in a position to pay and offered a solution to buy Canestar. He disagreed and had no interest in buying another company.

Mr. O'Regan explained that it was a category partner of Musgrave/SuperValu. They agreed to a deal.

At a meeting in June they thought that this deal would be concluded within two to three weeks.

Mr. Wright explained that Wrights were selling to suppliers for Irish supermarkets and that it would be difficult for them to supply directly. Their objective was to develop the export market.

He employed Steve Foster who had huge experience, having been a buyer for a company sourcing products for Marks and Spencer. Mr. Foster was employed on a contract and after the first year became a salaried employee. On contract he received €70,000 a year and €77,525 as an employee.

Mr. Foster was sent down to Cork to evaluate the stock of the first named defendant: the fresh fish stocktaking was done on the Saturday and frozen stock on Sunday. When Mr. O'Regan did not turn up, Mr. Foster and an employee of Canestar did the stocktaking on the frozen produce.

Mr. Foster had some concerns about black bean sauce, stock out of date and stock which was freezer burned. The stock issue had not been resolved. He said he decided to send Ms. Millward-O'Donoghue who was their factory manager in Kilmore and who had experience in quality control to do a blind audit of the first named defendant. The evidence of Ms. Millward-O'Donoghue was that on the 13th September, 2005, she went to Crookstown to do an unannounced quality audit on the site of the first named defendant.

Mark Wright said that problems had arisen in the stock take and that Steve Foster had raised concerns on the Monday night 19th August.

Mr. Wright had the impression of a "terrible factory". He said that Mr. Foster and Mr. O'Regan had walked around the first day to look at the factory which was quite good and said that it was the systems and the things that were not obvious on view that had problems. The stock take had not been resolved.

The evidence of Ian Swanton was that Mark Wright had a walk around the facilities with Mr. O'Regan prior to his visit to get information on trading and had management accounts from 5th May, 2005.

He referred to the report of Ms. Millward-O'Donoghue and his concerns that the product was now being sold by the plaintiff and he was concerned about his public liability and the licence from the Department of the Marine which would remain with Canestar. He said that there were no systems within the plant, there was a breakdown of traceability which was referred to in Ms. Millward-O'Donoghue's report. She was an employee of Wrights who claimed two thirds of her salary for her time there.

He said that the relationship had broken down between the plaintiff and the defendants. Mr. O'Regan had taken €500,000 of the plaintiff's money and caused embarrassment with customers asking them for monies that were not financially due.

Mr. Wright said that the management accounts and the records in the office of Canestar were incorrect.

At the time of the injunction he understood that the monies that were owed to the plaintiff were in an escrow account but it transpired that the second named defendant had paid himself and a number of creditors that were not on the Asset Sale Agreement at the time. The office was staffed exclusively by staff of the defendant's whereas the factory was mostly staffed by the plaintiff staff.

The computer link with Musgrave's was based in the Fermoy office under the control of Canestar. Wrights decided to move it to the Howth head office in August 2006.

He referred to Mr. Peelo's report claiming Mr. Foster's salary or consulting fee, Ms. Millward-O'Donoghue's salary and the claim in respect of the transfer of accounts function.

He agreed that the claim in respect of the transfer of production and additional freight costs from Crookstown to Kilmore Quay had been withdrawn.

In cross examination, he was asked how much of that claim of €7,000 related to the transfer of the accounts function from Fermoy. While he agreed that the figure for the transfer was €3,312 the evidence of continuation was less clear and, indeed, somewhat confusing. In any event the claim was not being pursued by the plaintiff.

Mr. Wright was asked about the acquisition of McDonagh Redsail. Mr. Wright agreed he predominantly dealt with shellfish, but did not deal with any live product. Mr. McDonagh, before he joined with Redsail was involved in a shell fish operation exporting predominantly to France and the UK. Redsail had sold to Carrefour and to Gel Azure in France. The fish was sourced from small fishermen from Galway and Aran. McDonagh Redsail supplied a number of hotels and restaurants to Mr. Dwane who had been introduced to him by Mr. Garvey. He said that Mr. Dwane had contacts with hotels and restaurants and had great access to raw material which, with quota reductions, was critical to the plaintiff when they acquired McDonagh Redsail. He agreed that Mr. Duane had a customer as well as the supplier base and Wrights agreed that Mr. Dwane would be an employee of Wrights.

He was asked whether he knew the level of sales that the Canestar was making with Dunnes Stores and Musgrave's in September/October 2004 through April 2005. Mr. Wright said he was aware that Canestar was the category partners of SuperValu. He was not really aware what they did with Dunnes Stores at that stage. While he said he had no particular interest in getting into Dunnes Stores, he agreed that Simro started to supply Dunnes Stores in February 2005.

He agreed that the Simro document made no reference to supermarkets.

He said that it was incorrect to say that they wanted to expand into supermarkets in February 2005. Their distribution from Howth was to restaurants, canteens, hospitals and also to Shannon Airport.

He said that up to that time they did not supply supermarkets.

He said that Dunnes Stores had an issue with their current supplier at the time, Ocean Path which a category partner of Superquinn. Ocean Path started to supply about ten Dunnes Stores in December, 2004. Superquinn took issue and Ocean Path notified Dunnes Stores that they could not continue to supply the number of shops. Dunnes Stores contacted Wrights' wholesale side. Wrights supplied to two stores in the Dublin area. By the end of February 2005 they had taken another seven.

It was put to him that the evidence of Mr. O'Regan was that he gave Mr. Wright assistance in relation to supplying customers in Dunnes Stores. He said that was not correct and that it was ridiculous. He said that the proposition made no sense. Canestar was losing money.

He agreed that for the previous year that Canestar had sales of €5.2m which significantly dropped the following year. He said that there had been a significant drop in its turnover in the three years prior to the Asset Sale Agreement.

He agreed that he had seen the document which was sent to Mr. Swanton in April 2005, which showed sales to the end of October, 2004 of €5.2m. Mr. Wright said that the trial balance of profit and loss account did not show the balance sheet position.

Mr. Wright agreed that those accounts told him that the sales were €5.2m but added that Canestar were trading at a loss of €243,000 for the period.

Mr. Wright said that in April 2005, Mr. O'Regan proffered the information to ascertain if the plaintiff had an interest in buying his company. He said that there as no way of telling if the company was solvent. He did not want to buy the company. He said that the only asset in the company was the relationship of Mr. O'Regan with his customers. The only reason he entered into the agreement was to recover a debt.

It was put to Mr. Wright that in late May 2005, at a meeting in Dublin Airport, the first named defendant owed the plaintiff approximately €600,000 that Mr. O'Regan asked him if he was interested in buying his company. Mr. Wright agreed. He said that when the then current supplier withdrew from Dunnes Stores in December/January that he started supplying Dunnes in February, but said that they did not tender for it as such. He said that it was an accurate statement to say that Wrights had tendered for Superquinn and bought out the assets of the category partner of Musgrave's in June or July 2005 at which time he was negotiating with Canestar as category partner of Musgraves. He agreed that Wrights first supplied Blanchardstown and Newbridge and later in February 2005, Donaghmeade and Parkway Shopping Centre in Limerick as well as the airport shop in Shannon. He thought that the turnover was

around €50,000 in the first month and €50 to €60,000 in the second month.

He did not dispute that the total was €520,000 from the 13th February, to the 19th August 2005.

He agreed that both he and Mr. O'Regan, had tendered for Superquinn. He said that both parties had discussed the Superquinn tender in late July or August the week before the Asset Sale Agreement. They swapped their cost pricing and planned a joint presentation at Superquinn for the 17th August which he had planned to supply through Canestar's Crookstown plant.

Mr. Wright said that he was now in a situation where he was going into the business of supplying supermarkets in Ireland, not by choice but because of debt. He agreed that from August 2005 to August 2006 that supplies of €3,859,866 were "done from Crookstown". The question was asked in the context of the customer list the 10th Schedule of the Asset Sale Agreement. He agreed that Wrights bought a customer list and did sales of that sum. He agreed that €3.8m went a long way in achieving a target of €12 million. Mr. Wright said that these were not Simro sales, they were the sales of Wrights. Mr. Wright said he did not realise that Canestar had been threatened to be removed as a supplier of Musgraves but agreed that there was no disclosure in relation to the corrective action to which Ms. Boyle had referred. He said that he could not answer why Ms. Millward-O'Donoghue was unable to tell the court of that corrective action. He said there was no mention of corrective action in her October report.

Mr. Wright agreed that Ms. Millward-O'Donoghue did not know that action had taken place. He referred to the document which stated that new fly killers were to be installed in the canteen and that obviously that had not happened until after October.

There was some confusion in the evidence with regard to the Musgrave report in June 2005. Mr. Wright said that he did not see that until early 2006.

Mr. Wright agreed that the amount of sales effected to Musgrave's by Canestar from the 1st June, 2004 to the 19th August, 2004 totalled €423,000. Comparison for the same period from the 1st June 2005, to the 19th August, 2005, had similar figures showing an increase to €440,000.

Mr. Wright agreed that a claim was made for €85,000 in respect of Mr. Foster's time and expenses because of mismanagement matters. He agreed that Mr. Foster was to be his personal assistant and be employed in a consultancy basis in the first year, until his family moved over, but he became project manager to look after the Crookstown operation from the date of the stock take in August 2005 and to deal with issues with suppliers and stock and machinery and quality control and effluent. There was also an issue with pricing where a product had been put on special offer below cost. He referred to the monies being withheld and the need to take over control of that operation. It was correct to say that he had originally intended to be personal assistant but had to become project manager because of the defendants' actions.

Counsel referred to Mr. Wright's affidavit which seemed to indicate that Steve Foster had been engaged from the very beginning as project manager. Mr. Wright said that was two weeks after the Asset Sale Agreement. He said that in March 2006, he was the project manager. He said that only some of the problems had come to light in October. He would say that by the end of September 2005, he had been appointed project manager but had been in the defendants' premises as his personal assistant from the 19th August 2005.

Reference was made to Mr. Peelo's report which stated:-

> "Steve Foster, director undertook the full time regularisation of the mismanagement matters, in particular . . ."

€16,000 was claimed specifically in relation to breaches of warranty regarding Musgrave's. The €60,000 was claimed in respect of Mr. Foster's time together with the time of Ms. Millward-O'Donoghue. Mr Wright said that this was in relation to the work done in September 2005 and that his understanding was that the claim was in relation to both persons.

Counsel put it to him that the defendants could not find this out until May 2010. Mr. Wright referred to the ongoing costs and said that it was not correct to say that the document was false.

He agreed that it was correct that Wrights had been prosecuted by the Food Safety Authority during the currency of the contract, the subject matter of the present proceedings. He agreed that it was correct that a document had been produced out of Wrights Dublin operation one week after the inspection in relation to the traceability of scallops as a result of that he had changed his plea to guilty to the seven charges that he previously sought to defend. He agreed that the document was written later than it should have been.

Counsel then asked whether the agreement contained the equipment that was the subject of the Asset Sale Agreement. He agreed that the ASA referred to a THM forklift rotator and Hyster rotator forklift. There was only one rotator forklift in Crookstown which, counsel suggested, was belonging to Canestar. Mr. Wright said that it was unclear why it was removed from Crookstown.

There was no item of equipment listed as a filleting line. Mr. Wright said that a filleting line was the main piece of processing equipment. It was described to him as the former contents of Galley Seafoods. It was a number of pieces of equipment which together formed the filleting line.

He said that he held on to the portocabin until it was resolved as to who owned it. He said that it was never said to him that one of the portocabins was not belonging to Wrights. He felt at the time that Mr. O'Regan was trying to frustrate Wrights in its move to Kilmore Quay by blocking the entrance to the factory and so prevented the truck leaving. He agreed that he had not seen any correspondence in respect of this matter.

Mr. Wright said that initially he had thought that they would centrally relocate the plant to a green field site in Howth and that they would keep a depot in either Crookstown or Fermoy and have satellites in Cork, Galway and in Wexford. He said he believed he had asked Mr. Garvey to go to Crookstown between May or June 2005 to look at the possibility of moving the plant out of Crookstown to Galway. He disagreed that Mr. Garvey had been asked to check the Crookstown facility and that he had come back with a positive report. It was put him that Mr. Garvey would take issue with regard to the quality issues as a result of which he was suspended and subsequently fired. Mr. Wright said that the reason for the termination of his contract was not that. It was not correct to say it had to do with relabelling.

He agreed that there was a decision from the Employment Appeals Tribunal where Wrights had failed to defend. The judgment remained outstanding.

He said he was at neither meeting in Kilmore Quay when Mr. O'Regan and Musgrave's were present in September 2006. He was not aware of whether he received a reply to Mr. Garvey's solicitors in relation to the Consultancy Agreement.

In re-examination, he referred to his affidavit for the proceedings in March 2006 for an injunction where Wrights was trying to secure the €480,000 that was outstanding. He said that Wrights was trying to establish whether the monies were in the escrow account.

The volume of sales by Canestar to Musgrave's from 2003 to 2005 was falling from €3.7m in 2003 to €3m in 2004 and €2.8m at the time of the Asset Sale Agreement in 2005. He said that it was €3.1m in the first year and €3.6m in the second year after the Asset Sale Agreement when Mr. Foster took over the running of the account

15. Evidence of Mr. Des Peelo
Mr. Peelo, FCA had submitted a report on behalf of Wrights which has already been summarised above. He was asked about the solvency of Canestar.

He said that the accounts had not been audited at the date of the Asset Sale Agreement on the 19th August 2005, but had been provided in draft form for the year 2004. Subsequently accounts for the year ending 31st October, 2005, which would have encompassed nine and half months of trading for Canestar, were filed in abridged form with the Companies Registration Office.

In analysing the accounts and taking into the account the abridged accounts for the 31st October 2005, it was apparent during that year the first named defendant lost approximately €1.1m in trading terms. On a straight line analysis that suggested that the defendant had lost €1m in four and a half months. There was very little seasonal variation. He disagreed that you could tell from a trial balance, or profit and loss accounts, whether a company was solvent or not.

He agreed that the Asset Sale Agreement was an acquisition of assets and not the acquisition of the company.

Due diligence had two distinct parts, the first was "commercial due diligence". The term included the title to assets, liabilities, and contingent liabilities which may not always be obvious. In the fourth part of due diligence is tax compliance.

He said that in buying the asset one was not acquiring any liabilities. Contingent liability is something that could arise if one knew about it. The quality issue would have been a contingent liability. Tax was not an issue per se. There were warranties to protect both the buyer and seller. What was being bought was the trade. In effect the Asset Sale Agreement was a quasi partnership with contributions from both sides. He assumed that Canestar was going to continue to provide service to the business and to pay the debt to the plaintiff. He was aware that Mr. O'Regan had a material function in the two years envisaged in the agreement.

He believed that the solvency warranty was of particular importance for three reasons. First, by definition, it was quasi partnership relationship on a trust basis. Secondly, the plaintiff was owed almost €900,000 and was losing €130,000 a month. Thirdly, the plaintiff was lending the Wrights name to the transaction.

He said that there were not any matters identified in the disclosure letter regarding insolvency.

He referred to his report which showed that at the date of the injunction on the 27th March, 2006, the first named defendant owed €634,000 to the plaintiff. It did not include any offset on the Consultancy Agreement, which, on his calculation it did not exceed €100,000 at that date. It was, in fact, €485,000 which was the basis for the injunction.

His approach to the calculation of sales and commission would be on the same basis as any audited accounts. He was familiar with the food and hotel industry and believed that the supermarket business was not hard to understand in relation to buying and selling fish. By definition, supermarkets are fast moving. Existing and non-existing clients was a simple definition if goods were being supplied to clients. Existing customers involved an expectation of continuity of supply. A preferred supplier was either a preferred supplier or it was not. He expressed the test as:-

> "Even if you supplied two years or even if you supplied three months ago, you may not necessarily be listed. That is the test."

He believed it appropriate to order just The Courts Act interest rate on the €0.50m where the plaintiff was incurring interest from discount facilities with the bank.

In cross examination he said he had not heard the evidence of Mr. O'Regan telling Mr. Wright that he could not pay the debt of €600,000. He said liquidity and solvency were two different things. He agreed that Mr. Swanton had not given him the trial balance and profit and loss sheet that he had been given in April 2005.

He agreed that he had only been told that the figure of €204,000 in respect of site preparation of Kilmore Quay was no longer part of the claim. He had been told that in the previous few days.

In re-examination he said that it was correct that at the time he prepared his report he did not have the management account or figures available. The content of those management accounts did not alter the position of solvency.

16. Evidence of Tim Carty
Tim Carty, FCA was in practice for about 20 years, prepared a report dated the 5th July, 2010, which has already been summarised above.

The report referred to the agreement of the 19th August, 2005. Mr. Carty summarised what was to be achieved in the seven months when the balance of €150,000 was to be paid for equipment contingent on the sales target being met. Commission was in the total basis of twelve months at 12% of aggregate sales. 12% commission was due after the first 10 million of sales which was €1.2m. The lesser commission was paid on turnover over that figure.

The payment for the business was €650,000.

Under the Consultancy Agreement, Mr. O'Regan, was to be paid €100,000 over 24 months.

The debt of €890,000 due from Canestar to Wrights was offset against the initial payment by Wrights. €650,000 was originally due to be paid on signing. It was agreed that €490,000 of that would be offset against the debt due by Canestar.

He dealt with the stock figure of €91,000 together with packaging, labels, cleaning products, miscellaneous, office products and stationary.

The calculation on the value of frozen fish net €122,000 was based on the stock quantities as provided by the plaintiff at cost price. That was his understanding. Wrights had claimed a portion of the frozen stock was damaged and therefore unusable and of no value. Canestar had a real invoice price but he was not sure where the Wrights pricing came from.

His understanding in relation to the commission on sales by the purchaser to all existing clients and vendors as set out the in the 10th Schedule was that Mr. Swanton had access to a computerised version of the 10th Schedule before the signing of the agreement. He understood that the 11th Schedule was in relation to clients which were customers of both parties and related to Dunnes Stores branches which were being supplied by both parties. At some stage Dunnes Stores went to a central billing system and it was not possible to identify sales to specific Dunnes Stores branches.

He said it was more usual to have a number of suppliers supplying Dunnes Stores.

He examined a list of invoices supplied by Wrights. He did his calculations based on the gross invoices as there was no reference to long term agreements in Asset Sale Agreement. He said he also did a calculation based on the net invoices. He understood that Canestar was entitled to sales to some Dunnes Stores outlets but not to others. He supplied the same rationale to Whelan's sales. Canestar delivered fish to Whelan's on the instruction of Dunnes Stores outlets. He understood that either Canestar or Mr. O'Regan was involved in introducing Dunnes Stores to Wrights or Wrights to Dunnes Stores so that the genesis of the Dunnes Stores sales by Wrights came through Canestar. A number of the Dunnes Stores outlets appear on both the 10th and 11th Schedule.

Mr. Carty said that if the exercise was to say that there were direct sales or that were sales invoiced to Dunnes Stores, the answer would be that there were no direct sales to Dunnes Stores. However, Whelan's operated on the basis that Dunnes Stores would purchase from Canestar to be delivered to Whelan's. Unless one were to factor Whelan's sales into the analysis the (picture) would be incomplete. The result would be that one would end up coming to the conclusion that there were no sales to a particular Dunnes Stores during that period. Whelan's had their own mechanism for billing all of that onto Dunnes Stores. Whelan's were on the 10th Schedule as a customer themselves. Sales to customers not on the 10th Schedule were excluded from his calculations.

There was a difference of opinion as to when the premises at Crookstown were handed back and what rent was due to Canestar.

Mr. Carty believed that the Profit and Loss Account and Trial Balance was sent by Eileen Hunt to Ian Swanton in April or May 2005. The first was the Profit and Loss Account and Trial Balance for the year ending October 2004. The second was a similar Profit and Loss Account and Trial Balance for the first five months of the following year up to March 2005. It was clear from those Documents that Canestar was operating at loss of €243,000 for the full year ending October 2004 and of €142,054 for the five months to March 2005. An accountant looking at the trial balance would have seen that the company had accumulated losses of €870,000 which would lead to questions about the financial position of the company.

The other item that was significant was director's loans of over €1 million. The directors obviously had to put money into the company which needed cash. The Profit and Loss Account had risen to over €1m in the five month period up to March 2005, making the situation even more difficult than in the previous year. The director's loan was slightly above the previous years figure. The sales figure for the five months compared to the twelve months suggested that volume of sales was decreasing from €5.246m in 2004 from over €6m in 2003.

All of these would raise references to the financial position of the company and how it was trading.

He was not sure about the relevance of Pisces, a 100% owned subsidiary of Canestar, as the plaintiff was not buying the company Canestar. He was not sure what the relevance of Pisces financial state would be to the Asset Sale Agreement. Mr. O'Regan, had lent substantial money to Pisces. Canestar was insolvent but only because Mr. O'Regan had lent over €1 million to it.

A financial person from the plaintiff who looked at the management accounts that were provided up to October and then up to March should have been aware or at least have raised the questions themselves as to the financial position of Canestar. Canestar was not in a position to repay Wrights the money that they owed them immediately. If a purchaser were worried about the financial position and the insolvency of Canestar, it was surprising that they would continue to provide additional credit instead of increasing more products on credit and the debt was growing.

In cross examination Mr. Carty said that he had completed accounts for 2002 to 2004. The accounts for 2005 were not available at the date of the Asset Sale Agreement, but he had accounts up to March 2005. He said that the accounts showed that the annual sales of Canestar were declining from 2003. He agreed that his report stating that from 1993 to 2005 Canestar established a growing business was probably not correct for that period, but he was referring to the background where they had started from zero and had grown over the period of twelve or thirteen years. He agreed that he had to make assumptions from the instructions that were given to him. He said he did examine the stock take records but was not physically present at the stocktaking. He agreed that the date of Asset Sale Agreement was the relevant time for the stock take. He did refer to the fact that the records and stock taking exercise were somewhat confused as the packaging was counted on one day and that the fish was counted on two other days. He assumed that the handwritten dates on the piece of paper were the dates in which stock take occurred.

He said he remembered the warranty given by the defendant in relation to solvency. It was his understanding that Wrights were not acquiring the company and that nonetheless it was given a warranty that the company was solvent. He agreed that if they were acquiring the company, then that might be of special relevance. He was asked whether he disagreed with Mr. Peelo's evidence that one could not tell the solvency of the company from the Trial Balance. He said that while he may not be able to tell the exact solvency he would certainly be invited to ask a number of questions as to the solvency from the information provided. If this was the only information that was provided in relation to the company you would have to question whether the company was solvent. The documentation gave you very large hints, such as accumulated losses of €800,000 as compared to share capital of about €300,000. It did not tell you whether the company was solvent. Audited accounts served a different function to management accounts. They were less useful in relation to insolvency because they are by definition after the event and in some cases available many months after the event. Management accounts give a more up to date picture.

He said that the price he applied to stock was the price that had been invoiced or were not necessarily by Wrights, but that they were the prices that Canestar would have to pay if Wrights was the primary supplier to Canestar. He agreed that he did not have a detailed list of Whelan's sales. He understood that the sales were invoiced to Whelan's and believed that Whelan's was the debtor of Canestar in respect of those sales and was the supplier to Dunnes Stores. He did not have any direct knowledge of sales by Whelan's

to Dunnes Stores and did not have the knowledge of the sale price which Whelan's charged to Dunnes Stores.

He agreed that in the period before the Asset Sale Agreement the fact that there was no invoice to Dunnes Stores did not mean that there was no sale to Dunnes Stores.

He said that the calculation of commission was on the basis of a list in the 10th Schedule which contained a number of branches of Dunnes Stores. He agreed that the invoices for the sales in question were invoices from Canestar to Whelan's. His understanding and Mr. Swanton's evidence was that he did not take into account sales by Canestar to Whelan's. Mr. Carty said that Canestar sales to Whelan's were in response to orders directly from Dunnes Stores branches.

It was put to him that before the Asset Sale Agreement, there were eleven Dunnes Stores branches supplied and invoiced by Canestar in respect of which commission referable to sales was paid after the Asset Sale Agreement. A second category of Dunnes Stores branches, thirteen branches, were also being claimed as commissionable because prior to the Asset Sale Agreement, there were sales to Whelan's.

Mr. Carty said that the contract referred to the 10th Schedule clients. He agreed that this 10th Schedule referred to existing clients of Canestar.

It was put to him that he had distinguished between direct and indirect invoicing. He replied that he did not mention indirect invoicing and did not bring up that concept.

Mr. Carty said that Whelan's did not ask Canestar to deliver fish. Dunnes Stores asked Canestar to deliver fish.

He accepted that for very good commercial reasons, he would know nothing about sales from Whelan's to Dunnes Stores. Mr. Carty said that the 10th Schedule included Whelan's and did not refer to the invoicee. It referred to clients. His understanding was that if Dunnes Stores made an order directly into Canestar, then there was some relationship between them. The relationship was not exclusively between Canestar and Whelan's, it was a composite arrangement.

He was referred to the evidence of Mr. John Hickey of Dunnes Stores who had reviewed all the remittance and prices for the year 2005 from February to the date of the Asset Sale Agreement and, in that period, only eleven branches of Dunnes Stores were supplied by Canestar. Remittance advices would refer to payment that was Mr. Carty's understanding, so the invoices would have gone from Whelan's. Dunnes Stores would have paid Canestar in respect of these remittance advices. The other remittance advices would have been to Whelan's because Whelan's would have issued the invoice to Dunnes Stores.

He referred to the evidence of Mr. Hickey (on day 3, p. 27) who said:-

> "If I could just explain about Whelan's, Whelan's was a supplier to Dunnes Stores . . . our account was with Whelan's. We did not purchase product directly from the supply base. We purchased the product from Whelan's and paid Whelan's."

There followed a question by counsel for Canestar:-

> "The fact of the matter is and what happened was certainly when my client was operating his business, that what happened was the order came, came with a list of each of the stores he was to supply, that Whelan's' wished to supply and that order was then given over to my client. Are you familiar with that practice?
>
> Answer: I am not, no."

He was referred to invoices to Whelan's frozen foods. It was his understanding that Whelan's had a separate unknown arrangement with Dunnes Stores.

He was asked about references in his report to the figure of €484,896 which he characterised or described as an amount of a payment withheld. He said that from an accountant's perspective, this was a payment that was made to Canestar who withheld it from Wrights. He agreed that Canestar was supposed to pay them over to Wrights, but they did not, they withheld them. He said there were various affidavits and court proceedings which made reference to the monies paid to Canestar by Musgrave's and by Dunnes Stores which were withheld from Wrights. The term "withheld" did not meant to refer in any way to what Canestar did with the money. His understanding was that it was combined with other monies of Canestar and was just used for the purposes of running the business and paying whatever accounts they chose to pay. He had seen an analysis of that money being spent.

Mr. Carty agreed that there was a net amount due by the defendant to the plaintiff in March 2006 of €260,787. He was aware that there was a dispute regarding gross payments due under the contract. The figure of €132,492 in respect of packaging and fish stocks in September 2005, was referred to. He said he had not seen a formal invoice, but had seen correspondence and notification of the amounts claimed.

He agreed that he had included in his analysis the monthly figures referable to the Consultancy Agreement under the heading of Monies Claimed and Due under Contract. He said he was familiar with the provision of monthly review and agreement by the consultant and Wrights. He said that not all of the amounts that were communicated were invoiced or paid, even though some of them were agreed. He had seen some of the invoices.

He said that on reading the Asset Sale Agreement which referred to existing clients this gave a basis for the defendants being entitled to claim compensation and sales by Simro after the Asset Sale Agreement to pre Asset Sale Agreement clients of Simro. He said that his understanding was that the original relationship with Dunnes Stores arose from Mr. O'Regan introducing Mark Wright to Dunnes Stores and that the origin of Simro sales in February 2005 and March 2005 originated from Mark Wright's relationship with Dan O'Regan and Canestar. That was his understanding of the agreement and his understanding that Canestar was supplying Dunnes Stores through Whelan's. Until the date of the Asset Sale Agreement – in May or June, there were 30 separate deliveries to Whelan's which ended up in Dunnes Stores outlets on a regular basis. It seemed reasonable to him that they should be included as commission, because there were Canestar clients in addition to being Wrights clients. He was talking about a client and counsel was talking about a sale.

He was trying to interpret what an existing client was in the legal sense. From a commercial sense it was somebody that Canestar had done business with in the recent past or might do business with regularly. There was a difference between a former client and an existing client.

Mr. Carty said he did his analysis on the invoiced sales amount.

He said that long term agreements or LTAs can vary and had many components. He said that the agreement did not make any reference to long term discounting or long term arrangements. It was not unreasonable. He simply used the invoiced sales amount.

He was not sure, from the evidence of Mr. Peelo, that Mr. Swanton's approach was the correct one. He understood that it might have been acceptable to the Revenue. It was not unreasonable to look on the invoicing sales amount.

17. Evidence of Dan O'Regan

Counsel referred to the evidence of Mark Wright that the only reason why Wrights ever considered the Asset Sale Agreement because Mr. O' Regan had told him specifically in May 2005 that he could not pay the debt owed to the plaintiff. Wrights were familiar with the through put that McDonagh Redsail had out of Galway. In November/December 2004 he had met Mark Wright on numerous occasions in Howth discussing the sales to multiples. They did not usually discuss the level of debt. There was never a problem in getting credit terms from Wrights as had been given to McDonagh Redsail. Mr. Wright was not interested in having vans driving around the country with small quantities: both of them wanted to get volumes into the multiples whether Dunnes or Whelan's or SuperValu. They were not alone able to get the business but to deliver the orders. They set up Dunnes for Wrights. They supplied Dunnes of Nenagh first on the 26th February 2005 charging €50 a drop.

He said that the credit terms were not under threat to be withdrawn. They never had a problem in getting stock from Wrights. Canestar may have had a problem getting the quality they were looking for. He agreed that in April Canestar were €100,000 over the credit terms.

Canestar was aware that Wrights started supplying Dunnes Stores in February 2005. He said he was able to put Mr. Wright into a position to meet the buyers, to price their products on their specifications. When Mr. Wright could not deliver to those stores, Canestar did the deliveries. That happened before Christmas 2004, while they were making hampers. He said they were supplying Dunnes Stores at all times through Whelan's.

He was asked whether Mr. Wright had the information or access to the delivery information. He said he could not say that Mr. Wright, knew what the LTA systems were or what the specification of the product were. The LTA was 15% for the period that he dealt with Dunnes Stores. They were packaging the product in Crookstown in February under Mr. Wrights invoice. He did not know at the time what Simro was.

He referred to a meeting with Mr. Wright at the Airport Hotel in April or May 2005. Based on a performance of percentage of sales, he believed that they could do a deal with Mark Wright. Ian Swanton came in immediately after the meeting. The level of indebtness was discussed. Canestar was overtrading, expanding and cash flow was a problem at the time. He felt that supermarkets were the only area Wrights had to conquer and if they had Crookstown they would have all the multiples except Tesco. Canestar was in the process of tendering for Superquinn. Their tender was out to everyone in the trade but really few could tender for it. Their tender went out in August or maybe September 2005.

He said Canestar owed Wrights money and had got 90 days terms from them and they extended those terms and worked with Canestar which was supplying the product for them. He agreed that the terms were exceeded and that Wrights were accommodating.

Canestar had big customers for a large number of years and had to agree that he was going to sign off on a non compete clause and have a factory that he was going leave idle in Fermoy. They had five or six, or whatever the number was, of clients that were common to both parties. They agreed a (turnover) of €10 million over 24 months.

Canestar's history of sales in 2001/2002, 2002/2003 was €6 to €6.5 million. It was €5.5 million in 2003/2004 and €4.4 million in 2004/2005. Canestar had a superior product and realised that they had to suffer a margin to keep up the market share.

Canestar had to get 12% of that sale so both parties would make money. He had the experience and the advantage of knowing those customers: he had the relationship with all the buyers. Under the agreement they had to generate sales from both Dunnes and Musgrave's who were blue chip clients. All the clients were listed in the 10th Schedule in the agreement. He had to give Wrights every client that Canestar had.

He said that Ian Swanton came down to the factory and looked at Canestar's customer list in the office in maybe June, July or August before the agreement. He was given full flow at the office and had access to all the computers. He was asked why he was not given a hard copy. Mr. O'Regan replied that they had to close their agreement and he had to protect his business until such time as he had signed an agreement. He could not hand over the list without getting the agreement signed. He agreed that there were 349 clients. Canestar had to hit a sales target to get 12%.

The provision of the ASA was that every customer that Canestar had had to go into the agreement whether they had bought or not. Canestar could not supply them for three years except under the Wrights name.

It was correct to say that in the event of stock not being available from Wrights and being available to Canestar from other suppliers that Canestar could source the stock form other suppliers and that Wrights would discharge the cost of that stock.

Mr. O'Regan said that he might have customers that would be Good Friday or Ash Wednesday customers or a small retailer in a little village. He had to include them. The list was computerised. Certainly there were customers who would not buy every day or every week or every year even. But the reality was that what was being bought were the blue chip customers that were buying the volume and who could meet the target of €10 million. There was a common list of both: that was factored.

He was referred to the 11th Schedule agreed list of existing clients. He said that he had introduced Wrights to those customers, he said that the last time he had invoiced Dunnes of Cornelscourt directly was in 2002. Whelan's was Canestar's customer listed in the 10th Schedule.

He was referred to para. 4.2(c) of the Asset Sale Agreement regarding Dunnes Stores introducing a central distribution system. In that case the value of sales should be discounted by Wrights historic sales to the clients listed in the 11th Schedule. At that point it looked like all Dunnes (supplies) would go through Whelan's. That was a huge concern for them and they had to cover that aspect of it together with Wrights interest in that number of stores.

Canestar was the best equipped to supply the volume for Dunnes. Wrights could not supply Whelans out of Howth.

He was referred to a document dated the 13th April, 2005, from Dunnes Stores dealing with the 52 week promotional year. It listed Fermoy Fish (Canestar) and Wrights of Howth. Mr. O'Regan explained that it was the standard procedure that suppliers would be notified in advance when a seafood promotion was being introduced. Fish is determined by seasonality factors where there were huge fluctuations in price. He agreed that Ian Swanton did not allow commission on sales to common clients. That included Cornelscourt and Blanchardstown. Mr. O'Regan explained that Irene Ronan of Dunnes would send us an order which Canestar would process and deliver to Whelan's and Whelan's would distribute it to all of the shops which are listed in the order. Mr Swanton said that Canestar did not deliver and could not and should not have commission. There was no question but that Canestar was supplying Whelan's who appeared on the 10th Schedule.

Mr. O'Regan was asked about his failure to disclose the insolvency of Canestar and said that everything that would have been asked were in the line of information was available to Wrights. He said that in June 2005 sales were tipping €130,000 to €180,000 and €200,000 to €210,000 in July 2005. In August they went over €200,000. He gave a number of reasons for this volume. He was paying a premium price for Wrights product. Stock was coming that would not be invoiced by him going out the other side and he was trying to draw a line to get the (agreement) finalised. But he said that they were certainly flooded with stock (from Wrights).

Mr. O'Regan was asked about the allegation that the quality system had broken down. He was also referred to the audit by Jennifer Boyle of Musgrave's in June 2005. Jennifer Boyle had taken over a new brief. Canestar did not do well in the audit which they accepted. They had a unit in the dispatch which was not working properly. They were cutting corners.

Chris Keannelly, the factory manager, had to cover a number of staff who left from that area. Following on the criticisms he spoke to Eamon Powell, who is director in Musgrave's and to Ms. Boyle. Corrective action was taken. Musgrave's were happy with that and continued to buy and order. He assured them that quality would not be comprised. He said they expended some €8,000 or €10,000 for corrective action at that time.

In June/July trade increased in respect of the same period in the previous year. They met their targets. The orders stayed there. It did not turn out to be an issue.

On the 19th August, 2005, contracts were signed and Steve Foster came to Cork. The agreement was that he would deal with the customers and sales to both Dunnes and Musgrave's. Mr. O'Regan said that Mr. Foster was very experienced in dealing with the multiples. Was familiar with the fish industry was a good operator.

The volumes which Wrights were sending on the Saturday was unusual but not so to Mr. Foster who was familiar with the supermarket trade. He said they were short three to five pallets of smoked coley. That problem was dealt with by Mr. Foster and they got credit for it. They had to stop the lorry coming in as they had excess stock. He said that it was difficult to do a stock take of fresh and frozen fish with volumes coming in. They did the fresh stock take and put the document in the office and were to return to the frozen on the Monday. He said he was not able to do it on Monday as an issue had arisen and he had to contact his brother Liam O'Regan.

Mr. O'Regan referred to a meeting on the 19th August 2005 in the Fermoy office with Eileen Hunt, Ian Swanton, Mark Wright and himself where it was decided that they would trade as Wrights of Howth Galway including Fermoy Fish. They notified Musgrave's and Mark Wright was to deal with Dunnes. There was no press release.

He said the problem arose with regard to the change of name which was 30 letters and could not be accommodated (on the computer). The client was asked what the involvement with Ian Swanton was in Fermoy over that period and he replied that he would visit once a month and do an audit on the procedures and the invoicing which would be discounted with the Bank of Scotland. Mr. O'Regan said that Mr. Swanton did monthly reconciliations.

Mr. O'Regan said that Mr. Swanton never informed him about rat infestation or broken machines. Discussions in that regard never happened.

He said that the first time he had sight of Ms. Millward O'Donoghue's audit report of September 2005 was in May 2006 in the exchange of pleadings.

He was asked about his recollection of Eugene Garvey visiting Crookstown in 2005 and said that he got a good full thorough viewing of the facilities and its workings before the date of the Asset Sale Agreement.

He did not see a copy of Mr. Garvey's written report to Mr. Wright.

He was referred to Ms. Millward O'Donoghue's documents regarding barrier hygiene and other matters and said that he would regard that as applying to a high risk area as in a cooked product or cooking area as opposed to wet fish plant which they had which was slowest. He said that Canestar did not have a high risk area. Her description did not describe their plant as they had a perfectly good entrance, canteen, toilets, separate cubicles, sinks and mirrors. He said there was never any issue of the type described by Ms. Millward O'Donoghue. Musgrave's or Dunnes would not be their customers if they had not the type of operation she described. He agreed that they had some problems but had passed plenty of audits with Musgrave's and Dunnes. They did not have extractions units. There was no drain in the dispatch chill room.

He agreed that wires and cables were hanging down from the over head processing hall which they could not function without because they had machines that would move depending on what process was happening. It was a wet area and would at all times have ice on the floor. The air conditioning had a pipe bringing water to the floor. That was the extent of the matter.

He was referred to the second audit on the 13th October, 2005 and said they had a problem dealing with the audit in June as major non conformances were dealt with. This was as a result of Chris Kinneally's efforts.

He said he never saw any receipts or evidence of money expended by Wrights of Howth in respect of dealing with quality control of the factory.

He referred to a further audit on the 10th March 2006 and said he was afraid that the conclusions remained the same and that there was an issue about the thermometer probe which Ms. Millward O'Donoghue did not get.

He said that the balance of stock was never paid for. There were problems where the stock was sold and moved to Galway. Canestar's stock of packaging was not processed for payment. He said he had to go to Dublin to get payments from Ian Swanton. He

collected the first cheque in September for €8,800 for his management fee and rent. He was not able to contact Mark Wright. Canestar found it hard to get money. Cash was tight with Canestar. Wrights money was coming in to Canestar's account from Musgrave's. Canestar still had an existing account with Musgrave's where they were paying into Canestar as well. The factory (rent) was on direct debit to Neilus Cronin and had to be met. The invoices were forwarded to Wrights of Howth Galway for processing by Neville O'Donoghue who, as he was in Australia, was not able to process them.

He said that cheques came in as they always did, made out to Fermoy Fish and were allocated to Wrights right up to the 1st January 2006.

The reality is that after that they had a situation where Canestar had not been paid for stock and was in a situation that if it did not keep its business going and keep those funds it would go under. At that stage Wrights would have owed him over €600,000. He said that Ian Swanton "would have said to me" that the accounts had to held in an escrow account. Mr. O'Regan said that payments had come in on a Canestar account and that Canestar was paying its trade creditors (Mr. O'Regan was not a trade creditor). There was a cheque to the Revenue for €25,000 and €170,776 paid to the bank. A sum of €141,960 was paid to him which he had lent the company. Mr. O'Regan said that €60,000 was advanced by him from the period August 2005 to the 27th April to keep the company afloat and keep his side of the agreement going.

Mr. O'Regan said that he was not reimbursed rent nor overheads for the Fermoy office nor for Crookstown. While Wrights were paying some rent for the later they but never paid for the former.

He said Canestar had looked for a meeting with Wrights to be held in a neutral venue preferably in Canestar's, solicitors' office to resolve issues. That meeting never happened.

He did the fresh stock take with Steve Foster. His brother Liam O'Regan and Steve Foster did the frozen stock take. The document recording the stock was mislaid for whatever reason. He relied on the figures furnished by Wrights and adjusted the prices that they paid for the raw material. On the 7th October, 2005, Mr. Foster wrote to Eileen Hunt asking her to forward him the Fermoy Fish stock book price values for weekend ending the 21st August, 2005. He agreed that that was not responded to. Canestar had a different figure and could only stand over what they had paid for the stock they had sold. Canestar had sold smoked cod to Wrights twice in the week of the agreement which was invoiced at €12,000.

There was a further invoice for €3,000 for smoked cod, yet it was put down as having no value notwithstanding that these goods were sent to Galway to the cold store, to Musgrave's shops and to Dunnes.

He disagreed with Mr. Foster who had said that they had been dumped. Mr. O'Regan said that Wrights would have had to notify the relevant authorities who would oversee the dumping of such volume of fish. It did not happen like that. There was an invoice referred to the transfer stock to the Galway plant being priced out and described as smoked coley, smoked haddock, cod, black bean sauce to the valuation of €43,584. He said that the black bean sauce was invoiced on the 19th October, but it was actually shipped from Crookstown on the 28th September, as per her handwritten dispatch document.

Matters of dispute had come to a head in March 2006 and litigation ensued. He said that Canestar and he had continued deal with multiples out of the Fermoy office. He dealt with customer calls, with Musgrave's and by way of conference calls each week with them. Steve Foster and Ms. Millward O'Donoghue were there. However they were not paid.

He said that he continued to carry on the work on behalf of Wrights of Howth for the 24 months until the consultancy agreement finalised.

Mr. O'Regan said that from the takeover of the Crookstown plant and the supply coming from or sourced through the plaintiff, the quality of product being supplied created enormous problems. The running of the Musgrave account, and he imagined, the Dunnes account, became extremely difficult. He said that the Musgrave and the Dunnes business required a lot of co-ordinating and daily attention. It required being in touch with the customers every day. The problem was quality, not orders.

Jennifer Boyle was not made aware of the move to Kilmore Quay in September 2006. It was a transfer from a plant that was audited to a plant that was not audited. It was not acceptable to Musgrave's until such time as they would have it fully audited. Musgrave's had the option of a factory in Crookstown if Kilmore did not conform to the needs of their business.

He said that the e-mails from the 7th September, 2006 onwards from Dunnes required confirmation of the LTA terms negotiated with Mr. Wright in Dublin. He was not privy to those meetings. There was a rejection from Jennifer Boyle to which he was not privy. On the 22nd October, 2006 there was an e-mail from Jennifer Boyle to Ms. Millward O'Donoghue regarding rejection of a delivery to Cork and Dublin under Wrights' management on the grounds of temperature.

The Fisherman's Choice labels bought from Canestar which Wrights claimed not to have used, were used by Wrights.

By e-mail Steve Foster had asked Chris Kinneally in November 2005 to organise a couple of boxes of recently whole frozen salmon in Galway to be taken to Crookstown. Mr. Foster queried how long it would take to defrost and what quality it would have when defrosted. Mr. O'Regan said that the purpose of that inquiry was that Wrights were looking at using a frozen product for the Christmas order to be sold as fresh which would create huge problems in quality.

In addition new lines listed by Wrights and on Steve Foster were not available when they came live on the system.

Counsel for the plaintiff submitted that if correspondence to or from any of the plaintiff's witnesses were thought to have any relevance to any pleaded issue in the case, he expected that that correspondence would be put to that witness during the course of their evidence. That did not occur. Mr. O'Driscoll accepted that those specific documents were not put, but what was put to Ms. Millward O'Donoghue was the continuing quality problems from Wrights which had nothing to do with Canestar after the Asset Sale Agreement.

Mr. O'Regan said that supplies to Musgrave's would be agreed a week in advance by way of conference call dealing with issues that may have arisen on any new line listed or promotions or problems. On that basis he called Dunnes and also Musgrave's every day dealing with deliveries and ongoing problems with quality. He said that in one case he had spent a week or more in Hurleys in Middleton serving behind the counter, correcting issues and growing their sales substantially with the help of Ms. Millward O'Donoghue and Steve Foster. All of that was contained in the e-mail. But he added, there were ongoing issues with quality. Had Canestar had the proper product coming in they could have grown their sales far more as opposed to fire fighting with the quality issues every day.

Wrights were buying in Dublin and the product was delivered via Dublin or via Galway to Crookstown.

He was asked to comment on the termination of his consultancy agreement. Steve Foster had written to inform him officially that due to the reorganisation of the company they did not require the services of Fermoy sales offices as of the evening of the 12th May, 2006, having relocated the sales and telesales office into their offices in Howth using their own employees. Canestar's solicitors wrote to Whitney Moore, Wrights' solicitors asking whether Wrights wished to terminate the consultancy agreement in its entirety notwithstanding clause 10. That clause provided for such termination to be with the consent of both parties and that all monies which accrued to the consultant became due and payable on termination. The letter also required proof of insurance of the premises at Crookstown. Mr. O'Regan said that the consultancy agreement was never terminated and that there was no response to that letter.

He said that the lease for Crookstown was a one year lease and that Wrights had served notice of intention to leave after one year. The landlord was very irate. Sean McCarthy, an engineer reported on the extent of damage to the plant. He did not think that Neilus Cronin, the landlord, was happy to accept €500 in respect of the damage to his premises. He was claiming the full costs to put the factory right as the extent of the damage was great. The €500 was to make safe the live wire which had been cut.

He said it was correct to say that there was a claim against him in relation to Cork County Council which he first heard about in May 2006. He did not feel that he owed anything in respect of that which was being dealt with by his solicitor.

He also said that he did not accept that there was waste. The stock was being transferred with a view to selling it, not with a view to dumping and rejected the costs claimed.

He had said that there was no documentation in relation to the Musgrave quality system where €16,000 was claimed.

He said it was correct that the calculation of commission had to be by reference to existing clients as appeared on the 10th Schedule shown to Mr. Swanton who had access to Canestar's computer. It was submitted that the list was not available prior to the signing of the Asset Sale Agreement. Mr. O'Regan's evidence was that prior to the Asset Sale Agreement Mr. Swanton was given the opportunity to view the list. This had been put to Mr. Swanton who had said he could not understand why they did not have a customer list and that he had to go down to Crookstown to go through the customer list but to get the specific pricing information. He agreed that the opportunity was there and that he could have written (the list down) if he wanted to spend long enough there. He could have gone through the whole list and written it all down.

Mr. O'Regan said that commission was based on the existing client list and that Mr. Swanton had full access to the customers on the schedule. He said he wanted to document the blue chip customers. He had full access to those customers.

Mr. O'Regan said that the parties to the agreement committed themselves to the spirit and letter of the agreement. The agreement restricted Canestar, beyond the duration of the agreement in any way directly themselves or indirectly from procuring trade with clients in the 10th Schedule. It also prohibited Canestar from undermining the agreement or the spirit thereof. He said that 12% commission on sales was a matter of getting paid by the customers in the schedule. Any sales that Wrights could get from those customers, was subject to commission to which Canestar was entitled. Those included Whelan's, Dunnes, and Musgrave's all of whom are on the 10th Schedule. Targets were met, deliveries were made.

He had a history of dealing with the multiples where there were long term agreements (LTA). These were in the hands of Mark Wright once the Asset Sale Agreement was taken over. Canestar had 15% LTA with Dunnes which eventually went to 18.5%. He had an LTA with Musgrave's of 17%. Musgrave's were invoiced net while Dunnes were invoiced gross.

Mr. O'Regan said that Wrights were not entitled to deduct €125,000 a large quality of which was sales directly to Dunnes Stores who were clients in the 10th Schedule and to sales to Whelan's. These were definitely a part of the €100 million sales agreed. They were invoiced. There were no returns from Canestar credit notes. Mr. Swanton was indicating that there might be doubly invoiced from Simro but that did not make sense. Canestar were asked to furnish invoices which they did. They had only one set of invoices. There were no claims made nor were there returns. He insisted that a sale is a sale as per the invoice.

When product being labelled and ready in the dispatch area, was not picked on a certain day, then rather than repackaging and relabelling through the system, it was being over labelled in some cases. This was an embarrassment for him. He had worked with Caulfield's who had eight Musgrave's stores and were trading under the SuperValu franchise. This practice arose on two or three occasions in March 2007 in Crookstown where Wrights had supplied products from Dublin to Steve Foster. He and his team in Crookstown would process it, pack it, date it, batch code it and put it for dispatch. If the product were slow selling he repeatedly relabelled it. It is an offence and illegal. It continued to happen. Jennifer Boylan, Musgrave's and Thomas Caulfield was brought in as it was a very serious issue. He said that fish had a critical shelf life.

He was referred to an e-mail to Ms. Millward O'Donoghue on the 13th April, 2007, regarding over labelling and a meeting she had with Musgrave's quality manager who was concerned over this over labelling.

He said that Ms. Millward O'Donoghue and he did his best endeavours to stop it, but that it was an ongoing occurrence and highly illegal.

Mr. O'Regan said that Pettit's, a major group with the Musgrave franchise, was making irate calls to Jennifer Boyle in relation to the service that they were receiving from Wrights. The quality of the fish not consistent and was mislabelled and underweight. There were questions made to Mr. O'Regan visited Petites stores and liaises with them.

He said that never in Canestar's trading history did they have an issue with over labelling. He referred to charges made against Wrights and convictions against them regarding the false declaration of a method of production and for catch area for salmon darns; false declaration or reporting the approval number and not being able to produce on inspection marketing or labelling in commercial documentation.

Mr. O'Regan said that there were no prosecutions levelled against him in the course of his trading history up to the Asset Sale Agreement. There was a prosecution in relation to effluent into the small river at the plant in Crookstown which was dealt with by his solicitor Jim Walsh. There was not any in relation to the production.

He said that the first time he received notice of a claim against him regarding quality issues, in the sum of €16,000 was in March 2006. He said it was in May 2010, that the claim before the court was in excess of €130,000. He did not see that document as being genuine. It arose out of a contract of Steve Foster who was originally engaged as a personal assistant for Mark Wright and then as

project manager of the plant in Crookstown.

He found it hard to see how the claim could go up from €16,000 and saw it as a fabrication. In Mr. Peelo's report there was a claim for site preparation in Kilmore Quay for the transfer of production and additional freight costs in the sum of €204,480. He first saw that when he came to court in May 2010, but it was withdrawn on the morning of the court.

In cross examination Mr. O'Regan was asked whether he regarded his company a successful company. He said he thought it was and that it had grown with the help of Roches Stores, Musgrave's, SuperValu and Dunnes. There was positive good growth. He was asked how many financial years prior to the Asset Sale Agreement with Wrights had Canestar lost money and he replied that it had levelled off in 2005 and 2004 and possibly 2003. It was put to him that it was also 2002 and 2001. He said he was not disputing that and agreed that the company had lost money in each of the financial years in 2001 to 2005. He believed it to be correct that there was a financial loss in the year ending 2001 of €438,000, in 2002 a further €443,000, in 2003 a further €258,000 and 2004 a further €199,000 and in the financial year to the 12th October, 2005, a further €873,000. That resulted in a cumulative loss over five years of €1.943 million.

He accepted the figures of profits for year ending 31st October, 2000, in the sum of £305,000. It would appear from this evidence that the move from Fermoy to Crookstown which facilitated their major clients such as Dunnes, Whelan's and Musgrave's required greater investment than a low cost plant. He had customers and had to invest in them. He described the target undertaken with Wrights to have a turnover of €10 million although his plant at Crookstown as opening the door for Wrights. He said he was not selling the company then, he was selling the customers – the blue chip of his business.

He agreed that not only did he owe Wrights some €900,000 but his sales had declined. He did not dispute that he did not meet the cost base directly that he would lose money. Canestar did not have the same buying power as Wrights.

He agreed that the sales to Musgrave's had declined between 2003 and 2004 by €700,000. In 2003 it was €3.7 million and contracted to €3 million in 2004. He said that that information was available when parties were calculating the €10 million target. He was taking the risk of achieving that target in selling his assets. Canestar reached the target. He did not dispute that the figures which spoke for themselves. They showed a substantial decline in sales to Whelan's between 2003 and 2004 (from €804,000 to €717,000).

It was €234,000 in the ten months of the financial year 2005 up to the Asset Sale Agreement date.

He agreed that he could be trading at a loss but still be solvent. He was asked whether it was correct to say that in August 2005, he was also insolvent. He disagreed saying that he had invested money in the company who owed him a substantial sum. He was asked that when Mr. Peelo gave evidence that he was insolvent, that was not challenged. Mr. O'Regan accepted that. He was not looking for the money he was owed from Canestar. He had a passion for the business and invested in it. He wanted to take a very successful business and partnership with Musgrave's and had other buyers looking at his business. He disagreed that unless the plaintiff or someone similar acquired his assets his company was finished. He said he was not going to walk away from it. The sales he was looking for commission on were only the sales that were achieved in the period from the Asset Sale Agreement.

He said he heard the evidence that monies were due to Wrights and not passed on to them that he said that he had never told anyone that they were in an escrow account. It was Mr. Swanton who mentioned escrow account. He said it was important that all other monies went into Wrights account. The only money that went into Canestar account is the cheque that could not be cashed anywhere other than in the account. The €484,000 was purely Musgrave's money and Dunnes money that was coming in. In the former case it was cheques made out to the wrong name, they were made out to Canestar. They had to go into the Canestar account. It was the situation in December that Wrights owed up to two months sales for staff which Canestar was carrying, eight staff for Wrights van drivers that had not been carried over. Canestar were owed €170,000 which was not paid for by Wrights.

He was referred to the first solicitor's letter from Wrights which referred to the misappropriation of the very substantial funds which were owing to Wrights in the sum of approximately €400,000. He was asked to comment on the statement in the letter which said:

> "And you indicated to our client that you had lodged this to an escrow account pending clarification in relation to the various sums which alleged are owed to our client to Canestar pursuant to the Asset Sale Agreement."

Mr. O'Regan said that he found himself in a situation where Mark Wright would not take his calls, would not meet him. He was left purely with Ian Swanton who told him that he would not pay him for various reasons (as) there was a short funding. He said he could only put the money into the Canestar account. It was put to him that nowhere in response to that letter was there a denial of the statement that the money was in an escrow account.

The letter of the 16th March, 2006, from the plaintiff's solicitors said that there was no basis whatsoever for the defendant's claim of €497,000 except for approximately €90,000 in respect of which no invoice was received nor any demands in writing or otherwise.

A meeting was suggested for Kilkenny. Wrights was concerned about substantial amounts of money moved from the Canestar account and were then, they believed, in an escrow account. Mr. O'Regan said he followed what was being said. He added that if they could have met and sorted the issues out they would have balanced. The monies were not in an escrow account but had been used by him.

He said he had heard Mr. Foster's evidence. Mr. O'Regan said that he had asked Mr. Foster to ring Musgrave's in relation to the account and find out the situation and to put the money directly into Wrights account. If that had happened they would never be in that situation.

It was put to him that he had received €96,000 under the consultancy agreement to February 2006 as stated by Mr. Swanton. He disagreed with that figure and it had never been agreed let alone invoiced prior to the discovery of Mr. O'Regan taking the monies. Mr. O'Regan said that they were due €91,000 for packaging and for fish stocks which Wrights were not in a position as to finalise despite knowing the volumes involved. Eileen Hunt had to deal with the invoices and the stock figures.

Mr. O'Regan said it was correct that a claim for €150,000 gross only if sales over a seven month period of the agreement reached a certain figure. He said it was corrects that the seven months had not yet expired at the time he took Wrights' money. He said he heard what counsel was saying that the €2.3 million sales being disputed.

He said it was correct to say that the €484,000 of the plaintiff's money had been spent in discharging trade creditors. He referred to a list of €100,000 of trade creditors. He agreed that a substantial part of the €484,000 was paid to Ulster Bank. He had sworn an affidavit and the matter was before Mr. Justice Clarke and he described what he had done with the money. Reference was made to

schedule C in his affidavit. He said that Eileen Hunt would deal with the apparent over payment of the trade creditor. He agreed that the €484,000 was no longer there at the time of the injunction he thought there was €20,000 remaining.

At the time of the Asset Sale Agreement on the 19th August, 2005, he said he was complaining about flooding of stock. Canestar needed to keep the stock to a minimum for the purpose of doing the stock take.

He had no problem with Mr. Swanton having access to the 10th Schedule list just that he could not take it from the office. The list was valuable and was available on the closing date. He agreed that there 349 names. He said that 80% of the business coming from 20% of the customers: Musgrave's, Dunnes, Whelan's and the Hospital contract.

Mr. O'Regan agreed that it was the intention to describe a list of the existing clients. He agreed that it included every client he ever had. He said it was correct that it included clients with whom he had not done business with for years. He agreed that the sales records would tell what client was active and what was dormant. He agreed that the list itself was simply a list of 349 names. He did not agree that no sales records or analysis of sales was furnished to Wrights. All the information would have been available on the accounts system. They had given Wrights the facility to go in and look and see. He agreed that those sales records were important when it came to the question of commission on sales. Mr. O'Regan said that if a name was on the 10th Schedule it was a client. Mr. Swanton could have gone through the client list to agree who would go on the 10th Schedule. The list of customers was made available to Mr. Swanton on Wrights behalf so that they could complete the agreement for the purpose of getting paid for the business and the assets on the basis of 12% of the commission on sales. That was his understanding. They would not have signed the agreement other than they were taking this to be so.

Mr. O'Regan recalled that Mr. Carty accepted that there was a difference between an existing client and a former client. It was put to him that the way he discovered that was by looking at the sales records. Mr. O'Regan did not agree. He said that he signed the agreement to hand over his clients and had to take into account that he would not sell any product going forward for the duration of the agreement and afterwards. They were a customer who had to be there. That was the agreement.

It was put to him that one of the clients on the 10th Schedule was Whelan's which he agreed that Whelan's was a client of Canestar prior to the Asset Sale Agreement. Whelan's were on the list, Dunnes were on the list. Dunnes would furnish the order and they would invoice it. He said that it was correct that had delivered products to Whelan's and invoiced them for that product and were paid by Whelan's. They were on the list for the non compete (clause) as well as being a client. He explained that Dunnes discussed with him the potential and growth that there would have been in order to get all the stores buying through the central distribution mechanism as in Musgrave's. Whelan's was on the client list in the 10th Schedule but was also a common client in the 11th schedule for central distribution.

He was asked what he knew about the terms of the sale by Whelan's to Dunnes and said that he needed Eileen Hunt to answer that. He did not know what Whelan's would be paid by Dunnes. The product was ordered by Dunnes. He was asked if Whelans were existing customers and he replied "they were only transporters, shall we say".

He was asked if he knew the terms of the contractual arrangement under which Whelan's sold to Dunnes or whether he knew the credit terms between Whelan's and Dunnes. He said he could not answer that and did not know what the LTAs were. Eileen Hunt could answer that. He said that Canestar were responsible to Dunnes for the product liability issues but to the best of his knowledge Dunnes would return the product to him through Whelan's and they had to credit that return of the orders, which came for Irene Ronan of Dunnes. He said that it was correct and that they were delivered to Whelan's who were invoiced and who paid Canestar. However the prices were agreed with Dunnes buyers.

It was put to him that the buyer was Mr. Hickey of Dunnes Stores. Mr. O'Regan thought that he gave the impression that he had no experience in dealing with Whelan's. It was put to him that it was quite the opposite and he replied "Well then, I misunderstood it". He said that Dunnes had a fish counter or that would sell fish for branches to which Canestar was a listed supplier. He said that Whelan's was also on the 10th Schedule. They supplied to the Dunnes franchise. That was why he contradicted the evidence of Mr. Hickey who was not in the position to give that evidence because he was dealing with localised suppliers for the smaller Dunnes stores. In the bigger context Whelan's would have access to every store and were customers of Canestar's. He agreed that Mr. Hickey was currently head of fresh food. It was put to him that he was in fact a designated supplier to eleven specific stores in addition to the supplies Canestar was making to Whelan's. He did not entirely agree with counsel and said that where Whelan's might not deliver they would deliver. He said that he was a designated, listed supplier to eleven Munster Dunnes stores and many more. He was not restricted to those eleven. Once Canestar had the franchise for Dunnes, they were his customers. He agreed that Mr. Hickey had given evidence that Whelan's were a supplier to Dunnes stores. Mr. O'Regan gave an example of an order from David O'Connell who preceded Mr. Hickey at Dunnes stores. Mr. O'Regan gave an example of a business in Macroom which became a customer after the agreement and accordingly he did not "put in for commission on the advice of my accountant". He said he could not prove he introduced it. He firmly believed that he should get commission on every store under the franchise of Musgrave's and Dunnes. He was saying yes to the question that he was so entitled because he had supplied fresh fish to Whelan's. He said that Wrights had access to the port in Howth, Kilmore Quay and Galway and Canestar was sourcing from Castletownbere. Wrights had the possibility of acquiring raw material at far cheaper prices and they could achieve there were huge synergies when Wrights took over the assets of Canestar.

It was put to him that he was claiming an entitlement to two clients at the same transaction. He replied that he would be paid once. He said there could be a situation where Canestar "would go in twice to that store, to Whelan's and with their own truck" and then he "would expect a commission twice but he wanted (commission) once". He said that, in the context of the 10th Schedule, where Canestar had both Whelan's and Dunnes as a client, it was entitled to commission.

Mr. O'Regan agreed that the 11th schedule, dealing with common clients, was of no relevance to his commission.

He said that Eileen Hunt would say that cheques came in with amounts for both parties.

Mr. O'Regan, in being cross examined on Mr. Carty's report, referred to the evidence to be given by Eileen Hunt. Mr. O'Regan did not dispute that monies paid by customers of Wrights remained outstanding. Mr. O'Regan understood what counsel was saying in relation to that was being retained earlier than the dates from that appearing in Mr. Carty's report. That was the evidence of Mr. Swanton but had not been sent to Mr. Carty.

Counsel referred to the warranties regarding substantial customers or suppliers not having indicated an intention to cease trading with or supplying the vendor Canestar.

Mr. O'Regan remembered giving that warranty in relation to a period of three years prior to the Asset Sale Agreement. He disclosed the contents of Musgrave's audit carried out two months before the execution of the Asset Sale Agreement which had recommended that Canestar be replaced with an alternative supplier. Mr. O'Regan said that while the audit of Ms. Boyle was hugely important. She had made a recommendation to the buyer of Musgrave's and a meeting took place in relation thereto. Corrective actions were identified and were addressed. Ms. Boyle, in her evidence, accepted that she was happy with her visit on the second audit.

Counsel for Wrights put the letter of the 20th August, 2005, from the defendants solicitors for the consideration of Mr. O'Regan. That letter referred to was a satisfactory explanation having been given as to why funds were not in the plaintiff's bank account the previous day or that morning. The letter was headed: "Subject to contract, contract denied". The letter referred to there being no clients list furnished until the full funds were deposited with Canestar. There was further reference to Wrights not having an opportunity to check the stock taking.

The letter of reply was dated the 22nd August, 2005 and referred to the plaintiffs numbered queries.

18. Evidence of Liam O'Regan
Liam O'Regan, the second named defendant's brother, gave evidence of having worked in the business from 1980. He had run Crookstown with his brother and with Chris Kinneally.

On the 19th August, 2005 he was involved with the stock take of frozen fish. The stock taking had already commenced with Steve Foster and Ger Lenihan. Mr. O'Regan said that he took a note pad, took it back to the office to be computerised. However, when Eileen Hunt looked for the docket a couple days later and could not locate it.

He said he dealt with the frozen fish stock. He did not agree with the description that the stock was of no value, for dumping. There had been no word about anything being wrong with the stock when the stock take was in progress.

He refereed to the smoked cod which was sold on the 16th August to Wrights of Howth. He referred to an invoice that was being subject to payment under the Asset Sale Agreement. The black bean sauce was perfect. There were sixteen boxes of smoked cod sold on the 16th August invoiced for €3000 the quality was good. He personally delivered some of the stock to Mr. Garvey in Galway on two occasions. He said that to destroy fish you would have to get it incinerated in a plant in Killybegs and have paperwork done.

Mr. Liam O'Regan was asked about the claim for €126,000 which appeared in Mr. Carty's report and which Mr. Swanton said that Canestar was not entitled to. Mr. O'Regan said that a large portion of it was supplied to Dunnes stores from Crookstown and that more of it was supplied to Whelan's. The bottom left hand corner of the invoice read "Delivered by Liam to Whelan's". It went to Parkway, to Jetland, and to Nenagh.

Mr. O'Regan said that the Multivac machine was in perfect working order.

He said he never heard a word that the machine was allegedly not working or about rat infestation. He only found out that a claim was being made in relation to the Multivac machine after the injunction was granted. He described it as a very efficient machine which could seal twelve polystyrene trays fish at a time. About 1,800 packs were sealed by the machine in the week before and the week after the Asset Sale Agreement.

Counsel for the plaintiff said that none of that was put to Mr. Foster and Mr. O'Regan said that the question was not asked. He referred to the equipment wrongfully removed on a Hyster fork lift, a filleting line, a compressor and the full contents of a portacabin owned by Canestar. Mr. O'Regan said that he received a call from one of their staff prior to the Asset Sale Agreement who said that the filleting line was being taken. He went to Crookstown and made "them unload the filleting line and put it back into the factory". Steve Foster agreed and said that it was Mark Wright who had given him the instructions. Mr. O'Regan said he had parked his jeep with his wife and daughter in front of the lorry. Steve Foster, he said, had asked them to vacate the jeep that he was going to move it with the forklift but he did not do so. He said that he agreed that the equipment subsequently removed in the middle of the night and taken away. He agreed that there were two forklifts in Crookstown, one owned by the plaintiff, which was taken away by Mark Wright.

He said that the filleting line was made up of several stainless steel of 4 x 4 tables used as filleting benches and not 8 x 4 as stated by Mr. Wright.

Mr. O'Regan 8 x 4 stainless steel table before the Asset Sale Agreement there were signed items described as the filleting line which filleters use as stainless steels tables of 8 x 4 that is eight individual tables being the cutting tables of the filleting line, a motorised conveyor, floor mounted scales, black rollers. It was the red compressor rather than the black compressor which was owned by Wrights.

Mr. O'Regan referred to the refrigerated units and to the Jennifer Boyle's audit. The unit was broken and there was a receipt there for fixing the unit which was a major issue on the day. The temperature was wrong in that room. The temperature equipment had to be calibrated.

In cross examination he confirmed that the refrigeration unit was repaired.

Referred to the action plan which included the fixing of the fridge unit. He believed that there was a HACCP team in the factory and that the official audit would be in October. Ms. Boyle would have had to get ongoing reports on work in progress. He said he was happy with the progress. It was put to him that they had failed in the audit and that the whole categorisation of the factory had broken down. The HACCP plan, if there was one, certainly was not working. Mr. Liam O'Regan agreed that it was not 100% up to date. He also agreed that the only matter which he could give evidence one was in relation to purchasing. The first meeting he had with Mr. Foster was on the Monday (following the Asset Sale Agreement) when Mr. Foster carried out the frozen stock take. A solicitor had called his brother back to Fermoy so he had to turn and do the stock take with Steve and Ger Lenihan – it was not a big job doing stock take as the fish was all palletised with maybe twenty pallets in a reefer. Ger Lenihan was the fork lift driver. He did not think he took a note, the product could not be left outside in the sun for long although they were counting it and he was putting it back into the freezer. He himself had taken a handwritten stock take in a note book but the book was gone when Eileen Hunt looked for it a day or two later to take it to Fermoy. They were under the impression that Steve Foster had his own note. He was aware of the importance of the stock take he said there was a lot of money riding on it. He did not know why he did not ask Mr. Foster for his note when he found out that he could not find the book. He said they accepted Mr. Foster's stock take and never disagreed with it. Only his interpretation of the stock was not agreed. They took all his weights and figures. He was asked about the problems, freezer burn, out of date, best before dates gone that each item of stock had been discounted. Mr. Liam O'Regan said that

he thought it would be usual if Mr. Foster would take it up with him or with Dan O'Regan. He was there everyday. He agreed that that was time to sort out the problem. He said the Mr. Foster had all the values, had everything, had his own list.

He said it (seemed) convenient that Mr. Foster asked Eileen Hunt for the stock values on the 7th October and looked for her stock take. He said that on the 25th to the 27th September there was almost €60,000 of that stock moved to Galway before they ever got an e-mail looking for their stock figures. There was €47,000 worth in one load and €20,000(?) in another load. He agreed that they had already been paid €100,000. He agreed that there was no stock figures put into the schedule of the Asset Sale Agreement but said had there been a problem with stock on the day of the stock take it would have been referred to someone.

He agreed that their stock take was given to Wrights in March 2006, just prior to the commencement of the injunction proceedings. Canestar's book could not be found and they were not going to manufacture stock takes. It was put to him that Canestar's figure for frozen stock was a €122,000 where Mr. Foster and the plaintiff say the value was €43,000. He said that they were not disputing Mr. Foster's stock quantities of fish, they were just disputing his definition of quality.

He said that every pack in the freezer had a production date and a best before date. It can be seen during the stock take the boxes are sealed and strapped. You have to open them. They do not get freezer burn when they are sealed and strapped unless there is a broken box where one fillet might get freezer burn. He said that the smoked coley and the smoked haddock had a special box with a plastic cardboard. The smoked coley is frozen in a press to get air out of it and is blast frozen and wrapped. Unless the box was broken there would not be freezer burn.

Liam O'Regan asked why Wrights waited for six months to raise questions about quality of stock as the stock was being sold every day and that €60,000 of it went to Galway. There was maybe €5,000 or €10,000 worth a week going out of Crookstown. They generally did a stock take every month. However the only figures that mattered was the figure on the date of the agreement, the date that Steve Foster was there and if he said he was not involved in the stock take of the packaging and had not involvement in it. Chris Kinneally was dealing with that as factory manager. He was referred to an e-mail on the 24th November, 2005, sent by Mr. Kinneally to Steve Foster in relation to obsolete stock. The e-mail referred to the additional hours worked by certain staff in the unpacking and dumping of obsolete product from Glebe Coastal. The witness understood that at the time Chris Kinneally could not send e-mails and even if he could he would not send it. This was, of course, a matter for evidence on Mr. Kinneally. However he agreed that the e-mail ended: "Regards, Chris".

Mr. O'Regan said that that had nothing to do with Crookstown as they never sold products out of Glebe's to Wrights. There was no place in the Asset Sale Agreement where there was product in Glebe sold to Wrights. The stock take was done in Crookstown and the product was in Crookstown not in Glebe which was a cold store in Little Island in Cork.

Mr. Liam O'Regan agreed that there had been quite a lot of frozen stock on the day of stock taking, and which were taken into Canestar's factory prior to the Asset Sale Agreement. He added that smoked cod did not come in on those days. He agreed that there was two references to smoked cod in the obsolete audit.

It was put to him that there was nothing on the invoice to indicate that it was the same as the stock that had been described as obsolete. He replied it was the only smoked cod they had on the premises and that the two lots had been from one batch, one purchase. He said that he had been in Crookstown for twelve months with Steve Foster and if there had been any stock dumped he would surely have heard about it. Steve Foster was the boss who was sent in by Mark Wright to run the factory. If they wanted something they went to Steve Foster. He would not agree that he was sent down purely to do the stock take. He started work on the same day after the Asset Sale Agreement. Mark Wright never even telephoned. He was asked about seven tons of fish which should not have been invoiced but should have been dealt with by way of (transfer documents) he said that was a matter for office staff. He had driven the lorry and had an invoice and moved the stock to Galway.

He disagreed that the Multivac machine was not working.

Returning to the Multivac machine which had never given any trouble for four or five years other that replacing cutting blades and a few spring parts that they had. When he asked what happened to the machine he was told that some fool had turned it off. It was in a damp environment. They were told when the machine was purchased it should never be turned off. It had to have hot water running through it all the time to keep warm. Mr. O'Regan said that on the week of the Asset Sale Agreement there were 1,885 prepacks which had gone through the machine and 1,760 the week after. The smaller prepack machine processed only two packs at a time.

Mr. Foster had given evidence of infestation in the premises. He disagreed that there was any rodents of any kind in the factory. There were bait points filled with poison but he never saw a rodent there in his five years.

It was put to him that the filleting line and its components were in the machinery listed as part of the assets in the Asset Sale Agreement. He said they were not in the 3rd schedule.

Counsel for the plaintiff referred to the Musgrave/SuperValu audit carried out in June 2005 before the Asset Sale Agreement. Mr. O'Regan said he had not anything to do with the audits and gave evidence regarding the HACCP team not operating in the plant. He said that there was obviously something wrong on the 3rd June when the audit was taken and clearly (quality) was not up to scratch in that he said that they were buying off Wrights at the time and were having problems with quality. He agreed that the cod was over seven days old and that the whiting was eight and eleven days old. But it would depend on the type of fishing boat which could be out for a week. He agreed that it was clear from the audit that there was old stock on the premises at that stage and that Mr. Foster had no problem with the fresh fish and did not raise any issue at that stage.

Mr. Liam O'Regan agreed that Canestar's claim for €126,000 as invoiced to Wrights were supplied out of the Crookstown plant. He did not agree that they were Simro clients. It was put to him that Mr. Hickey gave evidence that there were only a number of Dunnes Stores who were customers of Canestar's and it excluded Parkway, Limerick, Nenagh and Jetland. Mr. O'Regan said they were customers.

He would not agree that the €34,425 transfers were not sales as he had the invoices and there were no credit notes or purchase return dockets for them. They were sales. They were purchased.

He said that the black bean sauce was not obsolete. Restaurants served fillet steak and black bean sauce and Mr. Swanton needed to go back to the shops to check. It was part of the load he took to Galway. The total value of the sauce was €7,084 being €1480 priced at €3.85 each. There was an invoice that was shipped to Galway to Crookstown on the 19th October, 2005.

It was put to him that the stock in trade for the business was the sale of fish as per the definition section in the Asset Sale Agreement (and not black bean sauce).

He said he was afraid that they had to disagree on that point. In re-examination, it was submitted that the black bean sauce was capable of being sold in the ordinary course of events in business and the test was the vendors test.

In re-examination Mr. O'Regan was asked who owned the filleting line and he said that it was the Bank of Ireland or someone. He said the fish filleting line, the Hyster fork lift, the portocabin and the compressor were not included. He said that when he heard that Wrights were moving from Crookstown to Kilmore Quay and there was a lorry coming for "stuff" he got a list of the stock that was Wrights and the stock that was not Wrights and took Steve Foster around the factory and showed him the stock. This had not been put to Steve Foster.

19. Eileen Hunt's Evidence
Eileen Hunt had been employed by Canestar since 2001 with day to day knowledge of the accounts. She dealt with McDonagh Redsail when that account was closed. She referred to Canestar's purchases from Wrights which had risen from €1,876 in September 2004 to €217,298 in July 2005. She agreed that from the 18th August 2005, the sum was €215,231. She agreed that the total purchases from Canestar to Wrights in the period just short of a year was over €1.7 million.

She referred to house management accounts which were for the benefit of Ian Swanton. Mr Swanton came to Fermoy once, possibly twice, to view the computers in their office and the information was available on them and the customers and clients. He spent the most part of the day there with access to the computers and any information that was there. The whole accounts package was available to him. He was interested in the pricing and the customers that Canestar was dealing with. The turnover for each individual customer was there together with the individual invoices to which he had access. She said there was an agreed list of customers or clients as they were called which Mr. Swanton had access to. There was never any query or dispute or any comments made on it. She sent a hard copy of the list to Wrights solicitors around the 19th August, 2005, which was the date of the agreement. There was definitely not any dispute raised. She became aware of a dispute when legal proceedings had been instituted in March 2006.

That question appeared not to have been put to Mr. Wright or Mr. Swanton.

She was asked about the criticism levied against Canestar in withholding monies that were rightly owed to the plaintiff. She said a letter was drafted by Mark Wright by Dan O'Regan to tell Musgrave's of the change of name to Musgrave's, Dunnes and SuperValu. However there were too many oracles in the name and she suggested to Ian Swanton you will have to abbreviate it. At that stage Mr. Swanton called every month, regularly to do reconciliations in the Fermoy office. He did not come back to her on that suggestion.

She described the Fermoy staff retained by Canestar. Rent was paid by direct debit from Dan O'Regan's bank account to the landlord.

She said that she invoiced Neville O'Donoghue of the accounts in Wrights premises in Galway. She understood that Ian Swanton also visited Mr. O'Donoghue on a regular basis. She said they were probably slow in paying that she used to get on to him regularly and he would send on money. The invoices would be passed by Ian Swanton each month. She had two accounts; one for the rent and the management fees and the rent for the offices in Connolly Street, Fermoy. The second account was for such overheads as telephones, ESB, diesel. She explained in detail the monthly statements.

The wages were not paid by Wrights for Fermoy after the Christmas. The lorry drivers and van drivers were taken over by the plaintiff as well as the other staff in Crookstown. The office staff and Liam O'Regan (in Fermoy) were left. She said that Dan O'Regan's expenses were given to her and that she passed them on to Neville in Galway. She explained that if the orders were taken in Fermoy they were put on the computer and would be seen in Crookstown where the order was produced and all the statements to the customers went our from Fermoy.

Eileen Hunt was asked to comment on a number of e-mails over the two year period from the Asset Sale Agreement onwards. She said there were a lot of stores being supplied and issues arising about orders being short late or issues involving van drivers breaking down. Mr. O'Regan might be in Wexford or Galway and would relate back.

Ms. Hunt was asked to comment on Wrights contention that they were refusing to pay wages to March 2006 because she was a conspirator to the withholding of the plaintiffs monies. She said she sent the bills and the information on wages to Neville O'Donoghue in Galway. Nobody came to her and said that she should not doing it that way. The precedent had been set for the first two months. They were paid. There was never a query saying it must be allocated on a pro rata base or anything else. She said there was an awful number of outstanding invoices unpaid and referred to details of insurance as apportioned on a daily basis and wages. The latter which was sent on a monthly basis on an excel sheet. The cheque was paid on the 2nd November for wages for 22nd August 2005 in the sum of €11,818. The employees had been paid weekly by Dan O'Regan who was to get paid by Wrights. She wrote and telephoned in relation to a Texaco diesel card on the 31st May, 2007, but got no reply.

Ms. Hunt agreed that the fresh fish stock take on Canestar's estimate was €56,260 and the frozen stock was in excess of €95,000. She said she did the stock taking in respect of the packaging on the 16th August with Dan O'Regan which were priced on an excel sheet. This was sent to the plaintiff in October 2005. There was no response. She was told later that it would be agreed between Mark Wright and Dan O'Regan. She agreed that the packaging was €91,450 broken down between different types of material including labels or packaging and cleaning (materials).

Ms. Hunt described the orders from Dunnes Stores who would request various products where there would be big orders for bank holidays, Dunnes would give a detailed list and specify what stores that deliveries were to go to. The order would be processed in the factory and Whelan's would collect it. Queries, such as price or product problems would come from Dunnes. Dunnes would, she understood, contact Whelan's in the event of complaints and Whelan's payment would be reduced accordingly. Dunnes issued a pink docket stating the reasons raising the credit issue. She said that the figure €4.6 million were the sales that were disclosed by Wrights for the purpose of calculating the commission on sales to the various customers on the list on the 10th Schedule. She said that, one year into the sales agreement the accumulative total of sales was €4,678 million.

She said that the credit terms with Wrights in the spring of 2005 when negotiations had started was 90 days.

She said that the €126,000 – which included the black bean sauce – was invoiced to Wrights of Howth in Crookstown included approximately €75,000 of that in relation to deliveries to various Dunnes Stores. There were no credit notes generated to cancel those.

In cross examination, Ms. Hunt said that she was familiar with the sales figures of Canestar. She agreed that sales had been declining prior to the Asset Sale Agreement from €6.5 million in 2001/2002 to €4.4 million in 2003/2004 with cumulative losses of approximately €1.94 million. In 2005 sales were roughly €3.3 million and if, while he was not being put in there would have been major financial problems.

She said that the draft accounts for October 2004, were unaudited. They did not show the extent of the decline in sales. She said she sent more updated figures to Mr. Swanton and was not asked for anything further. Canestar traded after that. Sales to Musgrave's increased after the Asset Sale Agreement.

Ms. Hunt agreed that Musgrave's was one of the major customers whose sales were declining. She did not see the relevancy of insolvency to the sale of the client list. Mr. Swanton had the opportunity of view it. There was a very small proportion of the 300 listed that related to having turnover. Even if they had not bought for a week or two or a few months, she would contact those on the list in the hope of generating sales. They were potential sales customers and could be actual sales customers. She was not in a position to determine what "existing clients" was and could not define that. She did not know when the list began. It may have been that 23 of the customers on the list had done no business for five years prior to the Asset Sale Agreement. Superquinn was a more recent addition following contact from Superquinn to Mr. O'Regan to tender for their contract. She did not think there were any sales to Superquinn prior to the date of the Asset Sale Agreement.

She said that Canestar invoiced Whelans were prices were agreed by Dunnes Stores and the quantities delivered into their individual stores. Where there was a fault, Dunnes Stores came back to them. Whelans paid Canestar. She presumed Whelans got paid. There was a commercial relationship between the three parties. She had not any commercial documentation from Whelans or Dunnes Stores. She was never in any consultation with Dunnes or Whelans concerning the commercial relationship. She assumed that Dunnes had many suppliers.

Mr. Garvey said he did not have an axe to grind. He was not involved in the charges relating to the Galway factory. His son, David Garvey, who already gave evidence was.

20. Evidence of Neilus Cronin
Mr. Cronin was the landlord of the premises in Crookstown and, in 2004/2005 he had leased the premises to Dan O'Regan and Canestar. There was a sub lease from Canestar to Wrights.

He said that in October/November 2006 the premises was vacated and he saw that the electric wire had not been up to standard and told Brian Everard. Mr. Everard told him to get somebody to make the electric works safe and paid him money for it. He described a wire going from the main building to the portocabins which was cut and had been left bare. Machinery had been taken off the walls with the wires hanging. He had his own electrician do the work to make safe. He said he got €500 from Wrights at the time to have the work done. That was wholly and solely to make the electrics safe. The effluent tanks were emptied by Wrights and the portocabins were taken away. He said a sliding door was missing on a freezer. He was not happy about the state of the premises. He could not remember whether his solicitor had written to Mr. O'Regan. He agreed that he had carried out some cleaning up work himself.

In cross examination he said he could not remember when he examined the premises but, when it was put to him that Mr. Emerald's evidence was that that was on the 25th September, 2006, he said that 2006 was right but he could not give a date, but it would have been very soon after (the premise being vacated) as he was worried about the state of the wiring.

He said he did not know whether the photographs were taken before or after his electrician came. It was put to him that it was possible the electrician came after that. He said he did not know. The electrician could have spoken to him a couple of times on the phone. He agreed that the effluent tank had been emptied. The polystyrene boxes should have been taken away. He had a problem with them being there. He could not answer when he last saw the sliding fridge door. He did not know before hand if the sliding door was there. Only Wrights were in the factory at the time. He had not seen Mr. O'Regan there at that time.

He agreed that he accepted €500 in cash for the electrical works to be carried out. It was correct to say that he got an electrician of his own to look after it. He agreed that Mr. Everard had said that the €500 in satisfaction of the electrician doing the electrical works.

In re-examination he said the €500 was for the electrical work as the wires were bare on the ground.

When asked what further electrical work required to be done, he said that different wires were hanging from the ceilings when there were machines and that there was a panel on the wall. They would not have been a threat because the main wire would have been made secure.

He referred to several photographs in relation to other electrical work that he was looking for.

In re-cross examination he agreed that he accepted €500 to make any wire that was alive safe but not for general wiring overall.

It was put to him that he had the opportunity to go to the works that had been carried out and had walked the premises with Mr. Everard when the money was handed over. He replied that he could not remember whether he did or did not walk the premises with Mr. Everard.

In further re-examination he referred to lockers missing.

The court is not satisfied that any further works were required by Mr. Cronin and that, while he did not remember, he is in all probability, likely to have agreed to the payment of €500 from Mr. Everard even if he had not seen the work done.

The evidence regarding the sliding door is unsatisfactory from Mr. Cronin's point of view. There may, indeed, have been some lockers missing but these were not the subject of any complaint by Mr. Cronin and, indeed, his reply that there were some missing is not, in the view of the court, specific enough to base a claim.

It is critical that no evidence was given as to the state of the premises before the lease to the defendants or the sublease to the plaintiff.

In the circumstances, the court is not satisfied that there was any remediation work required on the premises. No evidence of any

remedial work was indicated to the court nor was there any evidence of demand at the time. The court is of the view that this is a claim that was made in the context of litigation long after the event.

21. Evidence of Sean McCarthy
Mr. McCarthy, a Certified Consultant Engineer, examined the property in Crookstown on the 25th October, 2006. He gave evidence that electrical cables had been cut and either tape or junction boxes had been put to the end of the cables but that there were many that were left bare and exposed which would be a danger to anyone in the plant if the power were turned on. He referred to photographs.

The photograph of the locker area was referred to. He said he did not how many lockers had been there previously.

There was no evidence of cables having been removed entirely from the premises – it was quite possible that the cables were pushed through the holes but he did not open the partitions to see that.

He referred to the area where the temperature control panel was positioned in the freezer room. There were a series of holes which could have been electrical cables coming from the freezer room to this control panel. There was no evidence of the cables that went to the six or seven holes so (he assumed) that the cables were buried within the wall.

There were a series of cables lying on the floor in the entrance to the ESB sub station.

A further photograph showed a coil of cable wound around pipework.

He referred to a sketch which did not show the portocabins.

It was his opinion that the disused electrical cables should either have been removed or the ends of the cables should have been fitted with junction boxes to make sure the ends were not exposed. Where cables were pushed through the core of the wall they should have been located and the ends of them made safe with a junction box or their entire removal.

He was aware of a costing being done by John Warren.

In cross examination he said that he did not know what the plant looked like on three years prior to that date of inspection nor could he say with any degree of certainty where each and every cable was cut.

He was referred, in cross examination, to the photographs. He said he could not say with any certainty when lockers were removed. Mr. O'Regan accompanied him on the inspection but Mr. Cronin, the landlord, did not. He could not comment on the whether the works had been carried out or who carried out the electrical work.

He said when he inspected the premises in October 2006, the plant was not safe. It was extremely dangerous. Some works were carried out but were totally insufficient. If somebody was disconnecting a plant, they should make absolutely certain that when the plant is disconnected that the premises are safe and that no issues within the premises would expose persons coming into the premises to risk of injury.

He said he did not know what the state of the premise was at the moment or whether any works had been carried out since October 2006.

22. Evidence of John Warren
Mr. Warren, Chartered Quantity Surveyor, carried out an inspection of the premises on the 24th October, 2008 and produced costings which were not put to any of the plaintiff's witnesses. The witnesses had the report.

Counsel on behalf of the plaintiff said that they did not have a quantity surveyor nor an engineer. The engineer's evidence had been put of Mr. Everard, not the costings.

The court allowed the evidence to be put as in the report.

In cross examination, the witness said that he did not know what the position was prior to the visit in October 2008, which was two years after the photographs had been taken. He met with Mr. Liam O'Regan only and not with Mr. Cronin, the landlord whom he had never met. He did not know the condition of the premises prior or the letting. He referred to a quotation in respect of electrical work of the €12,000 on the basis of 2008 figures. Despite the reduction in costs since, he thought that that would only have a minimal effect. The estimates were based on what he saw on site and on Mr. McCarthy's report. He had only one quotation for electrical work.

He gave a figure of €10,000 for the removal of rubbish left behind at the rear of the premises but was not aware if the rubbish had been there in 2006. He agreed that it was possible that rubbish had arrived in the intervening period.

The court is not satisfied with the basis of the quantity surveyor's estimates. He did not know what the position was prior to his visit in October 2008. He did not know what the pre-existing position was in 2006 or beforehand.

The court confirms that both the engineering and the quantity surveying evidence is, accordingly, unrelated to the original state of the premises or the state of the premises in October 2006.

Moreover the court is satisfied that, whatever change of mind that there had been afterwards, that Mr. Cronin had accepted €500 for electrical work in satisfaction of his then claim.

In the circumstances the court will disallow the claim for remediation.

23 Decision of the Court

23.1 Canestar's Conversion and solvency
This dispute arose where, some months following the Asset Sale Agreement of the 19th August 2005, Canestar wrongfully converted monies due and owing to Wrights.

There had, undoubtedly, been a lack of follow up by both sides in relation to the implementation of the agreement. This was evidenced by the lack of follow up in the stock taking of frozen fish. No issue had been raised regarding sales to existing clients under the 10th Schedule to the agreement. I think it is fair to say that both parties were more concerned with the volume of trading being done by Canestar on behalf of Wrights. There was an incentive to increase sales to reach the targets on which commission would be paid to Canestar and which would discharge its substantial indebtedness to Wrights of Howth. It was also, undoubtedly, in Wrights interest to expand into Musgrave's and Dunnes Stores and thereby to have increase sales which added to their profitability. This justified their entering into the asset sale agreement and consultancy agreement which employed both Canestar, Mr. O'Regan and Canestar's staff.

The Court is satisfied that the asset sale agreement was a method of ensuring that Wrights acquired the business without having to deal with the liability of Canestar. Wrights of Howth had already bought over the assets of McDonagh Redsail in Galway in a similar manner. Indeed, the plaintiff in this case, Wrights of Howth Galway Limited, (Wrights) was the vehicle used to take over the assets of McDonagh Redsail in a similar manner.

The Court is satisfied, given the debt of Canestar to Wrights of Howth, which had been allowed to rise well above the terms of credit, that Canestar was in a precarious financial position. So long as Wrights of Howth did not press for repayment of their debt there was no imminent danger of collapse. Indeed, under the assets sale agreement, Canestar had the potential of paying off all of that debt by way of commission of 12% up to a turn over of €10 million and 4% on the turnover above that figure.

There is no doubt that Canestar, at the date of the Asset Sale Agreement, could not pay its debts as they fell due if Wrights refused to extend credit. The analysis of Mr. Peelo is clear. Canestar's turnover was declining and its losses were increasing. Director's loans were part of its financing but represented only a fraction of its indebtedness.

The court is satisfied that Wrights were aware of Canestar's insolvency though not of its exact extent.

The management accounts were indicative of the precarious position of the company. These were given to Ian Swanton, the recent analysis of Mr. Peelo shows insolvency of €2.3 million. The Court is satisfied, on the evidence at Wrights were aware and negotiated on the basis, of Canestar's insolvency.

Canestar had given a warranty as to solvency in the 7th schedule to the Asset Sale Agreement which, even with the forbearance of Wrights and, indeed, of the directors, was not true.

Mr. Carty did not believe that the warranty was relevant to the sale of assets. Wrights were not taking over the shares of Canestar. Rather, Wrights were throwing a lifeline to an insolvent company to enable it at least to discharge its debt. Not withstanding the express warranty, I am inclined to agree with Mr. Carty in this regard. In the circumstances the warranty made no sense.

The court deprecates the conversion by Canestar of sums properly due to Wrights all the more in the light of breach of warranty of insolvency. The court is satisfied that on its own, such a breach was not critical to the mutual obligations under the agreement. No loss had been sustained by Wrights in relation thereto. The breach did not justify recission. Notwithstanding the withholding of monies due to Wrights neither the Asset Sale Agreement and the Consultancy Agreement was notified nor treated as being at an end..

Wrights did not seek termination of the agreements. The termination of the Consultancy Agreement could have triggered a claim for payment of all fees and outlays.

In these proceedings Wrights claimed for damages for non disclosure and for non performance to be offset against commission. Most of the claims were not notified until after litigation ensued.

While Wrights were entitled to look to the letter of the agreement in relation to warranties, it seems that such an indemnity was somewhat formulaic in so far as the agreement was for assets and the indebtedness of Canestar was known generally to Mr. Wright and more particularly known to Mr. Swanton from the management accounts and the books and records of Canestar to which he had access before the agreement was signed.

23.2 Canestars's existing clients as in 10th Schedule: Commission
One of the major issues of dispute was the extent of existing clients. The definition of commission on sales was based on sales by Wrights to all existing clients of Canestar as set out in the 10th Schedule to the agreement and all new customers introduced by Canestar. It was to include the commission on sales of all pending contracts, orders and engagements and the associated right to all lists of customers and suppliers.

There did not, at the time of the negotiation of the agreement, seem to be any difficulty with regard to the list not been given prior to the signing of the agreement. It was, in fact, agreed that the list would be given on the signing of the agreement. Mr. Swanton, had, of course, previous access to the list but not on the sales on Canestar's computer. Musgrave's and Dunnes were on the list as "existing clients". They were key customers and crucial in the sale of goodwill. Wrights were anxious to expand into the areas covered by Canestar, in particular in relation to the supply to the Musgrave chain. When the list was given on the signing of the agreement no issue was taken in relation to the extent of that list, and, in particular, to the inclusion therein of Munster branches of Dunnes Stores which were immediate or past clients or customers of Canestar. Mr. O'Regan and Eileen Hunt had given evidence that the list included all customers that it had dealt with irrespective of whether these were customers that Canestar had continuously or recently dealt with. The Court, indeed, accepts that the inclusion of clients under the warranties and non compete clauses limited the ability of Canestar to deal with those clients itself as distinct from managing those clients on behalf of Wrights. Canestar had potential to canvas those clients under the agreement and to earn commission on them.

The most compelling fact is that Wrights did not raise any objection to the list at the time. No objection was taken, for example, of the fact that the list did not indicate the volume or dates of supply nor indeed the turnover to each of the so called existing clients, though the overall sales turnover was ascertainable in the management accounts. If the use of the phrase "existing clients" is ambiguous such ambiguity should not prejudice Canestar.

The ambiguity could have been remedied at the negotiation stage and qualified in the agreement itself. The definition did not confine existing clients to immediately existing clients nor to any particular volume of business. The court is satisfied that, applying the contra proferentem principles that a broad definition of existing clients should be in inferred

Canestar's existing client list simply listed the customer address list of Fermoy Fish, the business name of Canestar. There is no ambiguity if those on the list had been invoiced by Fermoy fish.

The Court has also had regard to the 11th Schedule which was the agreed list of existing clients common to lender and purchaser. That list referred to eight Dunnes Stores, six of which were in the greater Dublin area, together with Nenagh and Parkway in Limerick. Mr. O'Regan was of the view that Canestar was not entitled to commission on sales to common clients.

It is not clear that from the agreement itself as to whether or how commission was to be calculated on sales by Canestar to common clients. It would seem that the only discount was in relation to the sales by Wrights. The dispute between the parties, as reflected in the reports of Mr. Peelo and Mr. Carty, centre around the sales to Whelan's, which was "the centre of distribution system" referred to, as well as to direct sales by Canestar on behalf of Wrights.

Commission was not calculated on monthly basis as provided for in the agreement and that, indeed, Wrights acknowledged that commission was due and owing. It would appear that the only workable method was to calculate the commission on sales to customers in the 10th Schedule as evidence by invoices. Mr. Carty enumerates these in Appendix 4(c) of his report in the sum of €8,293,391 over the 24 month period of the agreement.

Clause 42(e) of the ASA provided that monthly payments due to Canestar from Wrights up to sum of €400,000 would be set off against the amount due from Canestar to Wrights. That did not, of course, excuse the failure by Wrights to calculate commission on a monthly basis. Having postponed the calculation there was no determination of commission which would have reduced the amount due by Canestar to Wrights. While this, in turn, did not excuse Canestar in withholding monies, it may have been a precipitatory factor.

The Court has also considered the evidence given by the parties in relation to the provisions of Clause 4.3. The sums payable were to be calculated over a period of twenty-four months on a maximum aggregate sales figure of €10 million. This was not based on a minimum threshold for commission but for a maximum over which a turnover of only 4% would be paid.

The court notes that there was no provisions for interest on the amount of debt owed by Canestar nor, indeed, on any interest due on late payment of commission.

The court does not think it appropriate, notwithstanding the deliberate withholding of money due, to make any order in relation to interest on any balance due.

Another provision under the Clause 4.4 was that at the end of the seventh month, March 2006, if the aggregate sales figures were at least €2.3 million then Canestar would be paid €150,000 on or before the 19th April 2006. No calculation appears to have been given in evidence of whether or not this target had been achieved or no on the 19th April, 2006.

Mr. Carty, in his detailed report and on the basis of his understanding of the agreement, says that Canestar did achieve that turnover and, accordingly, was entitled to be paid €150,000. Even if this were not so it would seem unfair to deny such payment of an arbitrary provision which allowed for no graduated payment.

The Court has expressed its concern regarding the withholding of sums due and owing to Wrights from Canestar. However, it does not believe that this amounts to a fraudulent conversion given that monies were owed by Wrights to Canestar in respect of commission and other payments. The explanation of Canestar was that the conversion resulted from difficulties for the computer reading of such cheques which continued to be paid to Canestar by Musgrave's. The court finds that did not justify Canestar withholding the monies due.

The Court cannot condone the non-compliance with the agreement and the wrongful conversion of funds due to Wrights, together with the misleading and unconnected reference, albeit by way of suggestion that Mr. Swanton, to an escrow account by which was not denied by Mr. O'Regan. However, the Court does not believe that this action disentitles Canestar to a proper calculation and discharge of commission due to it to be off set against the debt which it owed to Wrights. The terms of the injunction preserving the status quo was an interim measure which was justified but does determine matters that required to be resolved as between the parties in relation to the mutual indebtedness one way to the other.

The court is satisfied from the evidence of Eileen Hunt the withholding of monies due under the consultancy agreement that it did not justify the non payment of wages to her and to the administrative staff by Wrights.

23.3 Offset due to Wrights
Me. Peelo's evidence was summarised in his report of the 13th July, 2010 in terms of money due Wrights less offsets to Canestar and Mr. O'Regan.

There would seem to be no issue with regard to what Wrights was owed at the 19th August, 2005, the date of the Asset Sale Agreement. Wrights was owed €889,682

Mr. Peelo calculates, however, that offsets under the Asset Sale Agreement as €486,157. The court is not satisfied, for the following reasons, that this figure is justified.

These offsets include equipment, stock and goodwill. Mr. Peelo's calculation for equipment was predicted on the target of €2.3 million not being met for seven months; and on stock being useable stock valued at €96,475. A payment of €100,000 had been made for stock €250,000 for equipment and €300,000 for goodwill. Accordingly, nothing further was due after the Asset Sale Agreement.

Mr. Carty calculates these categories from the Asset Sale Agreement and stock take in the sum of €400,000, €232,494 and €300,000 respectfully giving a total of €932,493. The sum of €250,000 for equipment, €300,000 for goodwill and €100,000 for stock was paid on signing. The remaining €150,000 for equipment was to be paid after seven months when sales to Canestar customers were at least €2.3 million. Mr. Carty, on the basis of the wide definition of existing clients, which the court accepts, is of the view that this turnover was achieved by March 2006.

Disputes arose when Wrights moved from Crookstown and Fermoy as to what equipment had been purchased. There was a further dispute as to repairs to the Multivac machine. The court is satisfied that this did not affect Wrights obligation to pay the balance of what was a round figure agreed by the parties.

The court is not satisfied that Canestar is entitled to the value of the filleting line and other items while not specifically itemised it would appear that the components of the filleting line were included under "equipment".

There was a further dispute as to the valuation of stock which arose many months after the stocktaking. The balance was to have

been paid 30 days after the agreement. Mr. Carty analysed the difference between Canestar and Wrights in relation to packaging (€91,000 - €35,000), frozen fish (€122,000 - €44,000) and fresh fish (€19,000 - €18,000).

Wrights used some packaging but subsequently changed packaging and said that only €30k was good stock and only a small volume of labels was useable. In the absence of further evidence the court allows €80,000.

While there is no significant disagreement regarding fresh fish, the court allows €19,000. There is a difference in frozen fish valuations. The court is not satisfied that a significant volume of frozen fish was unusable or obsolete. Following the detailed analysis of Mr. Carty that the two internal invoices dated 19th October, 2005, of €47,494 and €21,315 the court is of the view that this represented stock that was not destroyed. It almost makes up for the difference in valuations. The court is satisfied from the evidence of David and Eugene Garvey that the stock was sold or transferred. The court allows Canestar's valuation of €122,000 and ignores movements over the weekend of the stock take on the 21st August, 2005

The conversion of monies by Canestar over the period the 19th August, 2005, to the date of the injunction on the 27th March, 2006, is agreed at €484,895.

23.4 Non-Disclosure and Adjustments
A difficulty arises in relation to the costs which Wrights claims adjustments. Canestar agreed a sum of €10,344 in respect of sales at the contract date. The court prefers this figure to Wrights rounded figure of €33,000. Additional staff payments and Galway stock delivered have been agreed by Canestar at €15,000 and €8,439.

The court is satisfied that Wrights are entitled to an adjustment in relation to commission for unpaid invoices to Musgrave's and Dunnes and a 20% discount to Tom Singleton which is an adjustment of €11,642. The court is also satisfied that the Musgrave's freight charge in the sum of €2,433 relating to pre acquisition deliveries is also justified.

Problems regarding quality control were not disclosed by Canestar. It was not put to any of Wrights' witnesses that they were apparent on inspection before the agreement. The implementation of the Musgrave's quality control system in the sum of €16,000 would seem to be justified and, indeed, was notified to Canestar even if not particularised. The court will allow this sum.

However, the court is not satisfied that the repairs to the Multivac machine should be allowed on the basis that the court accepts the evidence that, although old and, perhaps temperamental, it was in working order at the time of the Asset Sale Agreement.

The costs of the regulatory hearing which was not disclosed by Canestar poses a difficulty in relation to a matter arising after the Asset Sale Agreement but relating to alleged breaches of environmental legislation pre acquisition. While the court understands that there was no demand made by Wrights, nonetheless, given the impasse with the injunction on the 27th March, 2006, it may be understandable that it was left outstanding. I am not satisfied with the estimate of €2,500 in respect of management time and would allow a figure of €1,000. It was unclear whether that claim was for Steve Foster's time. The court notes that Wrights have separately claimed for his time for managing Canestar.

I would disallow the waste disposal costs regarding the disposal of excess Canestar's stock. I am not satisfied insofar as it relates to frozen fish that this was, in fact, disposed of.

There is no provision for redundancy costs in the agreement. If these costs were, in fact, incurred by Wrights then it was in respect of employees of Canestar that had become employees of Wrights.

The court has some difficulty with regard to the payment by Wrights to Polimoon packaging, a creditor of Canestar. It was not disclosed by Canestar. There was no provision in the agreement that any creditor be paid. It was a debt of Canestar and not of Wrights who had purchased the assets and not the liabilities of Canestar. On the other hand I accept the evidence that Wrights could not get a supply from Polimoon while Canestar's debt was outstanding in relation to the supply. Even if Polimoon was the only supplier I accept that a commercial decision had to be taken by Wrights in relation to the continuation of supply. While there would appear to have been no notification of this prior to the injunction proceedings on the 27th March, 2006. Canestar however, has the benefit of the payment of its debts. The court will allow that claim in the sum of €23,838,

Accordingly, I measure the costs incurred by Wrights arising from non disclosure in the sum of €88,696 and not €148,069 claimed by Wrights.

23.5 Claims for Non Performance
Mr. Peelo's report calculates costs incurred by Wrights due to the non performance of the consultancy agreement by Canestar and Mr. O'Regan in the sum of €303,482.

The breakdown of that relates to salary and expenses of Steven Foster and Ms. Millward-O'Donoghue. The claims for site preparation in Kilmore Quay €204,480 and transfer of production and additional freight costs €7,000 were not pursued by Wrights.

The court has considered the evidence of Steven Foster in relation to his involvement which required a transfer to Cork. The court is not satisfied, however, that this necessarily arose from the non performance by Canestar which in any event only became known in 2006. It would seem that Wrights necessarily had to have some degree of management in relation to the business assets and goodwill that they had bought on the 19th August, 2005.

The Asset Sale Agreement is silent in relation to the payment of any salaries of the staff of Wrights. Moreover, the consultancy agreement provided for Canestar and Mr. O'Regan to manage the business on behalf of Wrights. While acknowledging that there was a breakdown in relation to the withholding of monies that were due to Wrights, it does seem to me that Mr. O'Regan continued to be involved in the business. The court is not satisfied the he was required full time in relation to the management of the business despite his evidence that he continued to deal with Musgrave's on a day to day basis.

The court, notwithstanding, acknowledges that there were elements of non performance which necessitated Mr. Foster's involvement after the withholding of monies. It would measure the costs that one half of the claim that is the sum of €46,000.

The court has some concerns with regard the issue of quality control. It is extraordinary that the expenses for Ms. Millward O'Donghue in the sum of €16,000 was not disclosed to either of the defendants at the time they were incurred and not until the pleadings were closed.

There are two issues in this regard: first was the issue of quality control itself and the performing nature of Ms. Millward O'Donoghue's report which would appear to have been a standard form report which was, in some instances, inappropriate to the premises at Crookstown. The fundamental assumption was that there high risk areas where there was no processing by way of cooking. While there were some problems such as the floor and the dripping from the air conditioning these did not appear to be major issues. In any event, these problems could have been seen by Mark Wright and Ian Swanton in August 2005 before the agreement was signed.

While undoubtedly there was not adhesion to all of the necessary standards and that the report appeared to be over exacting, the court is satisfied that the report was not ignored. It would appear that Chris Kinneally, the manager dealt with some of the issues. Musgrave's continued to order after the audit by Jennifer Boyle.

In relation to the claim for Ms. Millward-O'Donoghue (salary €36,917 and expenses €4,000) the court has to have regard to the €16,000 for quality control and matters which was dealt with and allowed under costs incurred from non disclosure. The court is also aware of the important auditing role of Jennifer Boyle, Musgrave's' quality control officer, and her degree of satisfaction with Canestar's progress. The court has not been given evidence of any expenditure incurred in relation to quality control. The claim would appear to be based on extensive reorganisation and upgrading of the Crookstown plant following recommendations regarding Musgrave's quality issues.

In the circumstances the court having allowed €16,000 will disallow the claim for salary and expenses for Ms. Millward O'Donghue

Accordingly the court will measure the costs incurred due to non performance by Canestar in the sum of €46,000.

23.6 Calculation of Net Position
Mr. Peelo's summary is that, before the adjustment of costs incurred arising from non disclosure and from non performance, that there was a balance of €99,487 due to Canestar on the basis of commission on net sales. This was on the basis of a more restrictive interpretation of sales that the court does not believe justified.

Mr. Carty had distinguished between supplying and invoicing clients on the 10th Schedule. While the Asset Sale Agreement did not refer to invoicing the court is of the view that the only workable implementation of commission due on sales was to determine those sales as invoiced sales from Fermoy Fish. This is provided from the analysis of Mr. Cary in Appendix (c) to his report in the sum of €8,293,391 for the 24 months of the agreement. 12% gives a figure of 4995,160 for commission. The court will not allow sales through Simro, which had begun supplying certain Dunnes Stores in early 2005 before the Asset Sale Agreement, not through Whelan's or Wrights in Galway.

It is common case that the fees due up to the date of the injunction, from the 19th August, 2004, to the date of injunction in the sum of €25,440. It seems clear to the court that Canestar and Mr. O'Regan are entitled to that sum. In addition the court is satisfied that Mr. O'Regan did perform work in accordance with the Asset Sale Agreement up to the time of the move to Kilmore Quay. The court allows half of the balance due of €57,240 to the end of the agreement, (€28,620). The court will allow this sum together with the sum of €25,440 being a total of €54,060.

Other elements of the consultancy agreement include rent, rates, wages, insurance and miscellaneous. The calculation in Mr. Peelo's report is €153,743 in respect of which €96,369 had been paid laving a balance of €57,374. Mr. Carty calculates rent of €113,004 for two years. As Wrights were entitled to and did leave after one year, the court determines rent as €56,502.

Wages claimed by Canestar in Mr. Carty's report amount to €161,905. On the same proportionate basis the court allows one half or €81,000.

Other heads of outlay (insurance, fuel, rates and expenses) as detailed in Appendix 6 of Mr. Carty's report appear to have been vouched and sent to Neville O'Donoghue of Wrights. The court will allow €66,870. Notwithstanding the evidence of Sean McCarthy BE and John Warren QS the court will not allow €46,081 in respect of remediation works to Crookstown as there was no evidence of the state of those premises at the commencement of the tenancy and no demand by Mr. Cronin, the landlord. The court expresses no view on the adequacy of the unvouched payment to Mr. Cronin to make wiring safe other than to confirm that Mr. Cronin accepted that in full satisfaction of the unsafe wiring and did not notify any other claim to Mr. Everard.

The net position accordingly is as follows:

Where gross invoice sales for Fermoy fish was €8.293 million from the 19th August, 2005 to 19th June, 2006, commission at 12% is €995,160

As appears from the following table, goodwill, stock and equipment together with commission due under the ASA is determined at €1,916,160. Consultancy wages and rent are measured at €191,565, debtors at €12,051 and outlay at €66,870. The total owed to Canestar is, accordingly, €2,186,643.

The court notes debts due to and payments made to Canestar under the ASA of €1,534,896 and €96,369 under the CA of (€1,631,264).

The sum the court allows €88,696 in respect of non disclosure costs and €46,000 for costs of non performance.

Gross Amounts Due	**Asset Sale Agreement**	**Consultancy Agreement**	**Other**	**Total**
Goodwill	300,000			
Stock	221,000			
Equipment	400,000			
Debtors			12,051	
Commission	995,160			
Consultancy		54,060		
Wages		81,000		
Rent		56,512		
Outlay			66,870	

TOTAL	**1,916,160**	**191,562**	**78,921**	**2,186,643**

Less payment made to Canestar

Due to Wrights	889,682			
Payment withheld	484,896			
Payment on closing	160,318			
Additional payments		96,369		
DEDUCTIONS	**1,534,896**	**96,369**		**1,631,265**

Less costs incurred by Wrights

Non disclosure				88,696
Non performance				46,000
TOTAL COSTS				**1,765,961**

Balance due to Canestar 2,186,643 – 1,765,961 **420,682**

The balance due to Canestar is, accordingly, €420,682. The court will order accordingly.