THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 290

[2015 No. 104]

The President
Finlay Geoghegan J.
Peart J.

BETWEEN

ADM LONDIS PLC

PLAINTIFF/APPELLANT

AND

RANZETT LTD, RAY DOLAN AND ANNALIESE MCCONNELL

DEFENDANTS/RESPONDENTS

JUDGMENT of the President delivered on 19th October 2016

Introduction

1. Ranzett Ltd. opened a local shop outside Drogheda under the Londis name in February 2007. The manager of the business was Mr. Ray Dolan, who, with his wife Ms. Annaliese McConnell, owned the company, Ranzett. An interlinked set of contracts governed the relationship between Ranzett and ADM Londis plc, the franchise owners, and Mr. Dolan and his wife. There was a franchise agreement, a product purchase agreement for the supply of almost all stock and there were standard conditions of trading with a retention of title provision. Mr. Dolan and Ms. McConnell were named as principals in the agreements. Joint and several guarantees by Mr. Dolan and Ms. McConnell covered anything owed by Ranzett to ADM Londis. No issue arises on the guarantees.

2. ADM Londis was entitled to terminate the franchise agreement "forthwith" if Ranzett or Mr. Dolan/Ms. McConnell were in breach of that or any other ADM agreement. A similar provision bound the parties in the product purchase agreement. The standard terms and conditions of trading provided that the relationship between ADM Londis and Ranzett, as the purchaser, was a fiduciary relationship and the purchaser was obliged to keep the goods supplied and the proceeds of sale separate to identify them as the property of ADM Londis and to account to ADM Londis for the proceeds of sale.

3. The business was not a success. It fell into arrears of payments for stock. By August 2008, after about 18 months' trading, the debt was some €300,000 and was continuing to increase. Mr. Dolan promised to put in place a security over property he owned and to make regular payments to reduce the debt.

4. The ADM Londis senior management in Dublin called Mr. Dolan to a crisis meeting on 3rd December 2008 to discuss the debt. He sent a message saying that he could not get anybody to mind the shop and so would not be able to attend. Nobody on his behalf was there. At that point, Ranzett's account with ADM Londis was in debit in an amount of €430,000. Ranzett was defaulting on modest direct debit payments that were agreed in late August. Mr. Dolan was not going to meet the deadline of 5th December to effect the security charge he had promised. The meeting proceeded and a senior manager phoned Mr. Dolan to tell him the outcome.

5. ADM Londis suspended credit facilities to the account immediately. The following day, ADM Londis personnel went to the shop premises and after an initial stand-off, took back a quantity of stock in reliance on the retention of title clause. Mr. Dolan told one of them that he was going to close the shop and put Ranzett into liquidation. The next day, ADM Londis arranged for the signage announcing the franchise to be removed because it was concerned about the impression that might be conveyed by closure that prevented people from getting to the Post Office facility that was located in the store. Subsequently, ADM Londis repossessed further stock but there was a balance of goods of the value of approximately €65,000 that ADM Londis did not collect but for which Ranzett was still held liable in their account.

6. ADM Londis sued for its debt and obtained summary judgment in the amount of €400,000. It then claimed an additional amount of approximately €161,000, as well as Courts Act interest and costs. The trial judge held that ADM Londis were entitled to judgment in the total sum of €561,283.91 together with Courts Act interest against all the defendants in respect of unpaid goods and services supplied to Ranzett and guaranteed by Mr. Dolan and Ms. McConnell.

7. Mr. Dolan and Ms. McConnell set up, by way of counterclaim, a case of breach of contract in respect of Ranzett of which they claimed to be entitled to benefit in their capacity as guarantors of the debts of Ranzett. The High Court held that Mr. Dolan and Ms. McConnell were entitled to rely on any counterclaim available to Ranzett; that ADM Londis wrongfully terminated its contract with Ranzett because it did not give notice in writing or adequate notice; that the relationship was a fiduciary one imposing obligations of utmost good faith, mutuality and a duty to look beyond personal interest on ADM Londis, which obligations it did not respect; that while ADM Londis was entitled in principle to exercise its retention of title powers, a series of misunderstandings and mishaps led to a situation where the premises remained closed for well over a week with disastrous consequences for Ranzett; that ADM Londis's actions in de-branding the premises were unauthorised under the franchise agreement and constituted a breach of duty and a breach of its fiduciary obligations. ADM Londis was required to give notice of at least two weeks to enable both parties to end their arrangements and permitting the retailer to make alternative supply arrangements in the meantime. The court declared that the damage was done by 5th December.

8. The court gave judgment on the counterclaim in favour of the personal defendants in the amount of €464,000, being €420,000 in respect of the destruction of the business and the forfeiture of the lease, plus €44,000 a sum representing two-thirds of the value of the ADM Londis goods that remained on hand uncollected in mid-December 2008. The court set off this award against the judgment

on the claim.

9. In subsequent judgments, the court awarded the preponderance of the costs of the hearing to Mr. Dolan and Ms. McConnell and then directed that the costs surplus accruing to them would be set off against the balance standing to the credit of ADM Londis because its judgment exceeded the award on the counterclaim by nearly €100,000.

10. It is apparent from this brief introductory sketch of the background to the appeal that the case represented a remarkable metamorphosis in the fortunes of ADM Londis, Mr. Dolan and Ms. McConnell. ADM Londis went from a situation where it was owed over €500,000 by Ranzett which was guaranteed jointly and severally by the personal defendants to a net zero entitlement. In the result, the two guarantors found themselves liberated from liability for the €500,000 debts that had been incurred by Ranzett in under two years.

11. The conduct by ADM Londis that led to this transformation occurred over a period of 48 hours in respect of which it argued at the trial and in this court on appeal that it was entitled to do so in pursuance of its entitlements at common law and under the contracts with the defendants. Summarising the essence of his findings, when introducing his second judgment, the trial judge recalled that "it was the very abrupt termination of the trading relationship which I found to be at the heart of the unlawful termination of the contract".

12. The High Court delivered no less than four separate written judgments in the course of this remarkable saga of litigation. We are concerned in this appeal by ADM Londis with the first and second judgments dealing, respectively, with the issue of liability on foot of the counterclaim and that of damages. The grounds focus, first, on the standing of Mr. Dolan and Ms. McConnell as guarantors and their capacity to invoke the claims of Ranzett in ease of their burden as sureties, in circumstances where Ranzett was not any longer a party, having been dissolved on 14th January 2011. The second area is the legal interpretation of the contracts that led the trial judge to his critical conclusion that ADM Londis was obliged to give the company at least two weeks notice, whereby he held that ADM Londis was under fiduciary obligations towards Ranzett to protect its interests so as to override the provision for termination forthwith. The final question is the basis for the judge's conclusions as to the demise of Ranzett, the assessment of the value of the company and the award of damages.

Facts as found by the Trial Judge

13. On 19th August 2008, Mr. O'Riordan of ADM Londis contacted Mr. Dolan regarding the deteriorating Ranzett account, which arrears stood at €310,000, resulting in two meetings taking place at ADM Londis headquarters on 22nd of August and 28th of August 2008.

14. On 22nd August 2008, Mr. Dolan agreed to put a direct debit in place to pay €3,800 per week and that he would secure finance of €150,000 by 22nd September 2008 in order to reduce the arrears. Following this meeting, and his agreement to the terms, Mr. Dolan realised that he was not going to be able to raise such a large sum in the time specified. At the meeting on 28th August, Mr. Dolan produced documents outlining his property interests and how they were charged. Another document listed different options. A different scheme was agreed in the result.

15. The agreement of 28th August 2008 set the bar for Ranzett and Mr. Dolan a great deal lower. First, ADM Londis was to take a second charge over one of Mr. Dolan's properties in Wicklow town. Second, Ranzett was to make weekly payments of €1,000 by way of direct debit. The trial judge rejected Mr. Dolan's evidence that it was also agreed that €250,000 of the arrears be reclassified as a stock loan.

16. The High Court held that there was "a slight delay" in processing the direct debit mandate, with the result that the first payment was made on 15th October 2008. Only five monthly payments were made. The process of giving security over the Wicklow property was also blighted because Mr. Dolan had given ADM Londis the wrong address for correspondence to him: solicitors wrote concerning the charge to No. 16 rather than No. 26, which the judge considered was by "an irony of fate". That was not all, however: "A further complication was that it had been assumed that the property had already been mortgaged to Allied Irish Banks, whereas it had in fact been charged to Bank of Scotland (Ireland) ('BOSI')".

17. At a review meeting in early October 2008, Mr. O'Riordan of ADM Londis made it clear to Mr. Dolan that the second charge had to be in place by 5th December 2008 at the latest. This was confirmed in an email from Mr. O'Riordan on 12th November:

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

18. The ADM Londis Credit Committee met on 19th November 2008 and resolved that there had to be progress on the charge and repayment plan, failing which the account would be suspended. The charge had to be in place by 5th December. The minutes recorded that there was to be a meeting for the following Wednesday, 3rd December at 3pm. An email from Londis on 26th November 2012 advised Mr. Dolan of the meeting "to review the operation of the account and repayment structure for arrears and progress on security". By this time, the amount unpaid on the Ranzett account had grown to €430,000 approximately and direct debits were being returned unpaid so the situation was very serious for ADM Londis.

19. Ms. Drew of ADM Londis telephoned Mr. Dolan on Tuesday afternoon 2nd December to ascertain that he was aware that the meeting arranged for the following day had been brought forward from 3pm to 8:30am by agreement between Mr. O'Riordan of ADM Londis and Mr. Dolan's accountant, Mr. McAleer. Ms. Drew assumed that Mr. McAleer had told Mr. Dolan about the time change. However, it appeared that Mr. Dolan was unaware of the change and said that he would be unable to attend the meeting because he could not get cover at that late stage to replace him in the shop the next day. Ms. Drew told him at 4pm that the meeting would proceed in the morning; that arrears on the account had increased; that direct debits were returning unpaid and the charge was not in place. She said that the meeting was urgent and asked that he make arrangements to attend it as scheduled. Failure to attend the meeting would result in immediate suspension of credit facilities for the shop.

20. The trial judge in his judgment addressed the question as to whether Mr. Dolan was truly unaware about the changed time of the meeting. That had been agreed with Mr. McAleer, Mr. Dolan's accountant, but he was not called to give evidence at the hearing. Obviously, he would have been in a position to say whether or not he had told Mr. Dolan about the new arrangement. More direct evidence on the matter was available in an email that Mr. Dolan sent to National Irish Bank just before 10am on Tuesday 2nd December, some five or six hours before the conversation with Ms. Drew. He asked the bank to send him something to show Londis in the morning when he had a meeting at 8am. The bank responded to his request later that morning. The judge accordingly held that Mr. Dolan "engaged in some dissimulation with Ms. Drew". He was, however, charitably willing to accept that the change of time was probably too late for Mr. Dolan to arrange replacement cover.

21. In the result, the meeting went ahead in Mr. Dolan's absence. Neither did Mr. McAleer attend. At about 8:45am on Wednesday 3rd December 2008, during the course of the Credit Committee meeting, Mr. O'Riordan telephoned Mr. Dolan to tell him that the Ranzett account was suspended. The trial judge referred to the memo of this conversation that Ms. Drew wrote. She recorded that Mr. Dolan advised that he was unable to discharge the arrears. Mr. O'Riordan told him that the decision of the Credit Committee was to suspend the credit facilities to the account immediately; that Londis intended to exercise its retention of title clause and would attend the shop the following day to remove stock and that the store would be de-branded and the Londis signs would be removed.

22. On Thursday 4th December, ADM Londis personnel attended at the shop for the purpose of recovering stock pursuant to the retention of title provision and eventually gained access at around 5:30pm, following something of a stand-off and urgent correspondence between solicitors for the parties. Mr. Devlin of ADM Londis gave evidence that when he spoke to Mr. Dolan at that time in the latter's office above the shop, Mr. Dolan said that he was going to put the company into liquidation and would speak to his solicitor on Monday 8th December. Mr. Dolan notified Ms. Drew of this conversation. Mr. Dolan's evidence, when it was put to him that he had decided that day to close the shop, was: "But sure I had to, to give the lads back their retention to their stock that they wanted. There was no other way of doing it". Counsel suggested that he could have purchased stock from somewhere else and but he replied that it would be impossible to divide everything up. In fact, he closed the shop at 9pm and it never reopened for retail business in any manner relevant to these parties.

23. The trial judge said that he did not in any way doubt the evidence of Mr. O'Riordan and Ms. Drew as to the phone conversation on Wednesday morning 3rd December, but he did accept that Mr. Dolan was not aware of ADM Londis's intention until he received a phone call in the early hours of Thursday morning from a friend who had heard from Londis people what they were planning to do. The judge decided that "irrespective of what Mr. O'Riordan may or may not have said to him" it did not register with Mr. Dolan.

24. The judge accepted that Ms. Drew prepared a letter for her colleague, Ms. O'Dea, to sign on 3rd December, expressing in writing that ADM Londis intended to exercise its retention of ownership clause and to repossess stock on 4th December 2008. Mr. Dolan denied receiving the letter and there was no formal evidence of posting, although Ms. Drew and her colleague believed that the letter was sent. In the normal course, the letter, if posted, would not have arrived before the Londis people presented themselves at the store. The court was of the view that in those circumstances, nothing greatly turned on whether the letter was actually received or not.

25. Located within the shop premises there was an outlet for An Post, and while the door was closed on Friday 5th December, people formed a queue outside wanting to use the Post Office to collect pensions. Mr. Dolan was within, engaged in separating stock that belonged to ADM Londis . Word reached Head Office and Mr. O'Riordan was concerned – understandably, as far as the trial judge accepted – as to the impact of having a branded Londis-franchised store remaining closed. Accordingly, he ordered that the Londis signage be removed from the shop immediately.

26. On Friday 12th December and Monday 15th December, stock to the value of €20,000 was repossessed. There was a balance of goods of the value of approximately €65,000 that ADM Londis did not collect, but for which Ranzett was still held liable in their account.

27. On 15th December, the owners of the neighbouring 'Black Bull Inn' served a forfeiture notice requiring the rent to be paid in order to avoid forfeiture. The rent on the lease was in fact not in arrear at the time although it was being paid weekly by agreement with the landlord. At para. 87 of his first judgment, the trial judge records that because the shop was closed, there was no money to pay the rent and "the lease was promptly forfeited on 22nd December". It is not revealed how a forfeiture notice in respect of rent could be justified when no rent was due or how relief against forfeiture did not arise or was not claimed. The court found that this event triggered a cascade of claims that put paid to the business. Thereafter, because its loan was not being serviced, National Irish Bank obtained judgment against Mr. Dolan and Ms. McConnell in the amount of €650,000. Friends First repossessed leased equipment, which they sold, leaving a balance due by the personal defendants.

28. On 23rd December 2008, Bank of Scotland Ireland wrote to Mr. Dolan's solicitor confirming the bank's agreement to the second charge over the Wicklow property, as agreed by Mr. Dolan, to have been put in place by 5th December.

29. Ranzett was dissolved on the 14th January 2011.

Reasoning and Conclusions on Counterclaim –First Judgment

30. The trial judge decided as follows at this stage of the proceedings:

> A. The unilateral withdrawal by ADM Londis of credit facilities; its actions in informing other suppliers of this fact; the exercise of the retention of title clause; and the de-branding represented a decision by ADM Londis to terminate the contractual relationship.
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> B. Under the terms of the franchise agreement de-branding cannot take place until the agreement itself is terminated: Clause 11 (1)(a). Pending termination, the franchisee is required by Clause 4.8 to display and maintain the authorised signage. Therefore, removing the branding is consistent only with termination of the agreement.
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> C. The damage was done by 5th December when the ADM Londis solicitors wrote referring to suspension rather than closure of the account.
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> D. It is not entirely clear what conclusion the judge reached about Mr. Devlin's evidence that Mr. Dolan said he was going to put the company into liquidation. At paragraph 124, the judge appears to accept the evidence and then says: "But at this stage Mr. Dolan must have felt that he had few other options left to him given the events of the previous 48 hours".
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> E. Clause 4 of the trading terms agreement described the relationship between the parties as a fiduciary relationship. That in itself was sufficient to impose obligations of utmost good faith and mutuality on both parties. That meant that if ADM Londis wanted to extricate itself from agreements that no longer made commercial sense it had to do it in a way that gave the other party or parties the maximum opportunity to find new suppliers to enable the shop to keep trading and to be kept open.
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> F. ADM Londis was in breach of contract because it did not give the necessary notice in writing as required by Clause 8 of the Product Purchase Agreement; the de-branding was wrongful under Clause 9 of the Franchise Agreement. All this is so notwithstanding that the contracts contain the word "forthwith".

G. ADM Londis was required to give notice of at least 2 weeks; the notice was designed to enable both parties to end their arrangements while also permitting the retailer to make alternative supply arrangements in the meantime.

Second Judgment

31. Following further legal argument in respect of the consequences of the court's findings, the judge delivered a second judgment on 15th July 2014.

32. In this judgment, the trial judge dealt with the losses flowing to Ranzett from the breaches of contract that he had found to be attributable to ADM Londis in his first judgment. At para. 5, he recalled that he had found that ADM Londis was in breach of contract in respect of giving of notice, abrupt termination of the agreement, closure of the trading account and de-branding of the Black Bull premises on 4th December: "It was the very abrupt termination of the trading relationship which I found to be at the heart of the unlawful termination of the contract".

33. The judge found three separate heads of losses:

(a) Losses resulting directly from the termination of the franchise and the inability of Ranzett to trade "during that critical period";

(b) Losses flowing from the subsequent forfeiture of the lease and

(c) Losses arising from the separation out of the ADM Londis goods from non-Londis goods for retention of title purposes.

34. The judge held that these breaches of contract by ADM Londis deprived Ranzett and the directors of the opportunity to trade during a critical period and to keep the shop open by securing an alternative source of supply. He held that it was clear from the evidence that the defendants would have secured an alternative supplier and could probably have continued to trade. ADM Londis would have pursued the defendants for the debts and the judge concluded that it was "unlikely that Mr. Dolan would have been able to meet these debts or secure alternative re-financing". Ranzett would have gone into liquidation at some stage within the following two years. However, ADM Londis did not allow the defendants the breathing space they needed in order to secure an alternative supplier. The court had held previously that the contractual relationship provided for and required a sufficient time to be allowed and the failure to observe that period of notice led to a financial catastrophe. The abrupt nature of the termination led to the cascade of claims. The defendants would, for example, have been able to sell or assign the leasehold. The judge recalled that the landlord was able to find a new tenant after the forfeiture of the Ranzett lease, but although the terms of the agreement were not known to the court, the lease must have had some residual value which was available to the defendants. The judge held that Ranzett was entitled to breathing space of at least two weeks.

35. The judge concluded that the value of the company was comprised essentially in the value of the lease, the good trading position of the shop just outside Drogheda and the capacity of the shop to deliver an income from the retail business. He deduced that the weekly turnover of the business would have declined in 2009 to €42,000 and he applied a multiplier of 10 to give a figure of €420,000. The judge awarded that sum in respect of the destruction of the business and the forfeiture of the lease, but he did not say how those elements each contributed. He added a figure representing two-thirds of the value of the Londis goods that remained on hand uncollected, which was €44,000. The end result, accordingly, was judgment on the counterclaim in favour of the personal defendants in the amount of €464,000 which the judge set off against the current balance of the award in favour of Londis.

The Appeal by ADM Londis

36. ADM Londis did not proceed with all the grounds set out in its notice of appeal. The basis on which it sought to challenge the judgements and orders of the High Court were as follows:

(i) Ranzett was dissolved on 14th January 2011 and the appellant's case is limited to the sole point as to whether Mr. Dolan and Ms. McConnell were entitled to rely on the equitable set off that was available to Ranzett in the absence of the company from the proceedings.

(ii) ADM Londis contends that the High Court was in error in its interpretation of the provisions of the contracts between the parties. Specifically, the termination provisions in the contracts were in addition to common law rights; the relationship between the parties was not a fiduciary one notwithstanding the use of the word in one contract; the word "forthwith" meant that notice was not required.

(iii) The High Court made findings of fact for which there was no credible evidential support, in particular concerning the termination of the agreements between the parties, there was no causal connection between the alleged losses sustained by Ranzett and the conduct of the plaintiff and neither was there evidence to support the findings of the quantum of loss as determined.

Submissions of ADM Londis, the Plaintiff Appellant

37. The appellant submitted that the respondents are not entitled qua guarantors to rely on all arguments which Ranzett could have advanced in its own right, not simply as a matter of defence, but also by way of counterclaim, in the absence of Ranzett. The appellant contended that so long as it is possible, however unlikely it may seem that the cross-claim giving rise to the set off may be ventilated for a second time by the principal debtor, a guarantor should not be permitted to rely upon the same in the absence of the principal debtor. The only exception to the rule should be that where the principal debtor has been dissolved and can no longer be reinstated, the defence can be raised in its absence.

38. The appellant submitted that the respondents ought to have ensured that Ranzett was not struck off. That is not to impose an additional burden on them but to require them to comply with their existing duties under company law. Having failed to take steps which they were legally obliged to take, with the result that Ranzett was struck off, they should have had it restored to the register so as to ensure that it was before the court.

39. The respondents asserted an entitlement to maintain a claim in respect of damage allegedly suffered by Ranzett arising from legal wrongs allegedly committed by the appellant against Ranzett. However, they did not seek to argue that they were entitled to rely on some exception to the rule in *Foss v. Harbottle*: rather, they contended that they had a contract with the appellant and they had

suffered loss as a result of the appellant's breaches of the terms of that contract.

Contractual Interpretation
40. The appellant submitted that the entitlement to terminate at common law arises on breach of a fundamental term of a contract whereas the specific contractual provisions apply where there is a breach of any term of the agreement. The trial judge was in error in construing these clauses as displacing the appellant's common law right to repudiate.

41. In addressing the manner in which the appellant was entitled to exercise rights under the retention of title clause, the trial judge was influenced by his determination that the relationship between the parties was a fiduciary relationship. However, this determination was not based on an analysis of the rights and obligations of the parties under the agreements, but rather on the label placed on that relationship in the appellant's Standard Terms & Conditions of Trading. The appellant submitted that whether the relationship between the appellant and Ranzett was a fiduciary relationship does not depend on how the parties describe the relationship, but rather on the incidents of the relationship itself.

42. Having determined that the appellant's rights to terminate the contract were circumscribed by the aforesaid clauses, the trial judge then interpreted the word "forthwith" as meaning "upon giving not less than two weeks' notice". It is submitted that "forthwith" necessarily means precisely the opposite of this *i.e.* without the necessity for notice, and that the interpretation favoured by the trial judge amounted to the rectification of the parties' agreement rather than the construction of the same.

Findings of Fact
43. The appellant contends that there was either no evidence, or no credible evidence, to support the trial judge's determination, firstly, that the applicant had determined its franchise arrangement with Ranzett and that this constituted a breach of contract, or, secondly, that there was a causal connection between this alleged breach of contract and the losses identified by the first respondent in his evidence. The appellant further contends that there was either no evidence or no credible evidence to support the trial judge's assessment of damages in the sum of €464,000.

Submissions of Mr. Dolan and Ms. McConnell, the Second and Third Defendants Respondents
44. The respondents submitted that, in principle, a guarantor can rely on any defences available to a principal by way of a defence and that the trial judge was correct as a matter of law and fact in finding that the respondents qua guarantors were entitled to prosecute a counterclaim and avail of the equitable right of set off, where the company/principal debtor had been dissolved following the proceedings having been instituted against it and the guarantors.

45. It is submitted the trial judge was correct in law and on the facts in finding that the appellant was guilty of breach of contract with regard to the failure to give any notice and the unlawful termination of the agreements entered into between the parties through the closure of the trading account, repossession of stock and the de-branding of the 'Black Bull' premises on 4th December 2008.

46. The respondents submitted that the appellant, in drafting this agreement itself, quite deliberately created a fiduciary relationship between itself and all of its franchisees in its standard terms and conditions. This was in order to ensure for its part and for its own benefit that the relevant parties act in good faith in managing the repossession of stock. Fiduciary duties imposed on the respondents were explicit. The trial judge was correct in finding that equally there were certain fiduciary duties imposed on the appellant.

47. The respondents submitted that the trial judge correctly held that the actions of the appellant in closing the respondents' accounts, exercising retention of title over its stock and de-branding the 'Black Bull' store terminated the agreements between the parties. Furthermore, the trial judge was correct as a matter of law and fact in finding that it was unsustainable for the appellant to argue that it had not, in fact, terminated the contractual relationship.

48. With respect to the question of whether there was a requirement to give notice, the trial judge correctly interpreted the agreements as providing the respondents with an entitlement to a two-week period of notice within which it could complete the segregation of stock. In arriving at this conclusion, the trial judge correctly noted that the appellant had created a fiduciary relationship and provided a period of notice in the termination provision. For that reason, the arguments of the appellant, that the term "forthwith" extinguishes any requirement of "notice" was correctly dismissed.

49. The trial judge's finding that the unilateral closure of accounts without notice was an unlawful breach of agreement was correct as a matter of law and fact and in respect of which the trial judge clearly had sufficient evidence upon which to base his finding. Furthermore, he was correct to find that the manner in which the appellant exercised its right to retention of title terminated the agreements between the parties based on the evidence adduced in the High Court.

50. The respondents submitted that the trial judge was correct to find as a matter of fact and law that the appellant's unilateral removal of all signage and associated de-branding of the 'Black Bull' premises was an unlawful termination of the Franchise Agreement.

51. The trial judge was entirely correct as a matter of law and fact in awarding the respondents the sum of €420,000 in respect of damages arising from the value of the retail business and forfeiture of the lease, together with the sum of €44,000 in respect of damages arising from stock the respondents were unable to sell by virtue of the unlawful retention of title by the appellant.

52. The sum of €420,000 was awarded to the respondents as damages in respect of the value of the retail business including its assets.

Discussion—Standing
53. The appellant accepts that there is a general principle that guarantors can rely on claims and defences available to the principal debtor, but questions first whether the rule applies to a counterclaim and second whether the guarantor can avail himself thereof when the principal debtor is not a party. ADM Londis submits that the correct position must be that so long as it is possible, however unlikely it may seem, that the cross-claim giving rise to the set off may be ventilated for a second time by the principal debtor, a guarantor should not be permitted to rely upon the same in the absence of the principal debtor. The only exception to the rule should be that where the principal debtor has been dissolved and can no longer be reinstated the defence can be raised in its absence.

54. The trial judge did not consider that it was desirable to establish a rule in Irish law on the line proposed by the appellant, being of the view that such a limitation on guarantors would lead to unprofitable arguments before the courts regarding the distinctions between defences and counterclaims and pointless applications to restore companies to the register merely for the purposes of overcoming a technical legal formality, detached from the practical realities of modern commercial relationships and litigation which other common law jurisdictions have refused to follow. The respondent submitted that the court retains a jurisdiction to permit a guarantor advance a cross claim in the absence of a principal and that, in this case, the jurisdiction was properly exercised where the

principal was in liquidation.

55. In *Hyundai v. Pournaras* [1978] 2 Lloyd's Rep 502, the Court of Appeal in England endorsed a statement in *Halsbury's Laws of England* (4th Ed.) at page 508:

> "On being sued by the creditor for payment of the debt guaranteed, a surety may avail himself of any right to set off or counterclaim which the principal debtor possesses against the creditor, and any division of the High Court can give effect to it or to any equitable defence raised".

In the recent English High Court decision in *Stemcor UK Ltd v. Global Steel Holdings Ltd.* [2015] EWHC 363 (Comm), Hamblen J. noted at para. 29:

> "For the purpose of the present application Stemcor accepted that a guarantor can rely on a set off in respect of an unliquidated cross-claim belonging to principal debtor. Although the decisions of Finlay LJ in *Wilson v. Mitchell* [1939] 2 KB 869 and Isaacs J in the Australian case of *Cellulose Products v. Truda* [1970] 92 WN (NSW) 561 suggest otherwise, there is a strong body of more modern English authority that such rights of set off may be relied upon".

56. The court referred to the Halsbury citation above and also noted that the House of Lords had previously allowed a guarantor to raise an equitable right to set off in the absence of a principal stating (at para.39):

> "Further in *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] 1 AC 199 the House of Lords held that a guarantor was entitled to leave to defend on the basis of the principal's right to equitable set off, without imposing a condition that the principal be joined, although there does not appear to have been argument on the issue".

57. *ADM Londis plc v. Arman Retail Ltd & Ors* [2006] IEHC 309 was an application for summary judgment. Clarke J. then in the High Court was of the view that the issue raised important and difficult questions of law which were not capable of resolution on a motion for judgment without there being a real risk of injustice but for the purpose of the application before him accepted that it was arguable that a surety is entitled to rely, at least in some circumstances, upon a counterclaim which might have been available to the principal debtor.

58. There are indeed issues of principle and practice on this question on which there are differing views in other common law countries. The courts are concerned about the possibility that the surety may be able to take advantage of a claim which the principal debtor may subsequently seek to raise again. In those circumstances, the creditor plaintiff would potentially face a second claim for the same alleged legal infraction. Insisting on having the debtor as a party to the action ensures that it is bound by the result. The fact that the principal debtor may be a company in liquidation does not immunise the creditor plaintiff from proceedings by a liquidator subsequently appointed.

59. I think that the trial judge was correct in exercising discretion of the kind recognised in the English decisions, having regard to the facts of the instant case. It is unnecessary to try to state a general rule or to express any view on the submission made by the appellant that the trial judge went beyond the limits of any of the authorities in his conclusions on the law.

The Contracts
60. As the trial judge observed in the early part of the second judgment, the essence of his decision in the case is that ADM Londis did not give Ranzett any or any sufficient breathing space in which to put an alternative supplier in place. The relevant contract provisions that we have to consider in light of the facts of the case are the following.

ADM Londis Franchise Agreement 13th December 2006
61. Clause 9 of this agreement is headed "TERMINATION BY ADM" and provides as follows.

> "ADM may terminate this Agreement forthwith by giving notice in writing to the Franchisee in any of the following events:
>
> 9.1 If the Franchisee or the Principal fails to perform and observe any of the obligations praetors any of the terms or provisions or conditions or warranties or covenants herein contained.
>
> 9.2 If the Franchisee or the Principal fail to perform and observe any of the obligations, or breach any of, the terms or provisions or conditions or warranties or covenants of any other ADM Agreement."
>
> Clause 11 is headed "EFFECT OF TERMINATION"
>
> 11.1 Upon termination of this Agreement, all rights of the Franchisee hereunder shall thereupon terminate and the Franchisee shall immediately thereafter:
>
> (a) cease to use (by advertising or otherwise) the Londis name or any other trademark of ADM (including the Proprietary Marks) . . . and shall remove from the premises and deliver to ADM all of the foregoing within a period of twenty one days of the termination of this Agreement;
>
> (b) pay any and all amounts due to ADM; and
>
> (c) cease operation of the Business.
>
> 11.2 If the Franchisee shall fail to deliver the signs, fascia and other materials referred to in clause 11.1 (a), then ADM and its authorised representatives may, on giving seven days notice to the Franchisee enter upon the premises and remove same at the expense of the Franchisee . . ."

Standard Terms & Conditions of Product Purchase Agreement
62. Clause 6 is entitled "PURCHASER'S GENERAL OBLIGATIONS. Paragraph f is "to comply fully and at all times with the Standard Terms & Conditions of Trading of ADM (as amended from time to time).

63. Clause 8 is headed 'TERMINATION BY ADM' and provides: "ADM may terminate this Agreement forthwith by giving notice thereof in writing to the Purchaser in any of the following events:

> (a) if the Purchaser or the Principal fails to perform and observe any of the obligations or breaches any of the terms or provisions or conditions or warranties or covenants herein contained;
>
> (b) if the Purchaser or the Principal fails to perform and observe any of the obligations or breaches any of the terms or provisions or conditions or warranties or covenants under any other ADM Agreement;"

Standard Terms and Conditions

64. This agreement provides that all goods and services are supplied subject to the following terms and conditions:

> "1. The risk in all goods passes on delivery by or on behalf of ADM to the Purchaser.
>
> 2. Notwithstanding the passing of risk, title in the goods shall remain with ADM and shall not pass to the Purchaser until the amount due by the Purchaser to ADM for those goods (including interest) has been paid in full.
>
> 3. Until title passes to the Purchaser, the Purchaser shall hold the goods supplied as ADM's agent or bailee.
>
> 4. The relationship between ADM and the Purchaser is a fiduciary relationship and the Purchaser is obliged to keep of the goods supplied in the proceeds of sale of those goods separately from the Purchaser's own goods and monies, and in such a way as to clearly identify them as the property of ADM. The Purchaser shall also account to ADM for the proceeds of sale of all goods supplied by ADM to the Purchaser.
>
> 5. Pending payment of the price of the goods, the Purchaser is at liberty to re-sell them, but only subject to the conditions set out here and, in particular, subject to the condition that the Purchaser must account to ADM for the proceeds of sale of the goods, and the Purchaser must keep the proceeds of sale of the goods separately from the Purchaser's own monies.
>
> 6. ADM may at any time before title passes and without any liability to the Purchaser repossess the goods or sell or sell all or any of them and by doing so terminate the Purchaser's right to use or sell them or otherwise deal in them, and for this purpose ADM may enter any premises owned or occupied by the Purchaser. By taking the goods subject to these terms and conditions, the Purchaser irrevocably authorises permits ADM to enter such premises for the purpose of taking such action. . . .
>
> 9. All invoices must be paid in full within four weeks from the date of such invoice. In no circumstances shall the Purchaser be entitled to make any deduction or withhold payment of the amount stated on invoice for any reason at all."

Fiduciary Duty

65. The retention of title clause above provides that relationship between ADM Londis and Ranzett as purchaser of the goods is a 'fiduciary relationship'. Ranzett was under specific obligations, firstly in relation to protecting the property, which is the stock as supplied by ADM Londis, and secondly in regard to the proceeds of sale. The intention behind this provision was to protect the position of the supplier in regard to the goods themselves before they were sold and thereafter to give the supplier rights over the money that was taken in by the retailer in respect of the goods.

66. There is a neatly expressed legal aphorism about the obligations of a fiduciary. Dr Paul Finn (later a Justice of the Federal Court of Australia) in Fiduciary Obligations (1977) said that a person "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary." That was subsequently adopted by the Court of Appeal in *Bristol & West Building Society v Mothew* [1998] Ch. 1 CA at 18. That means that there is not a general category under that heading and the word itself is not decisive but there are certain circumstances that gave rise to obligations in the nature of a trust and that is when a person has obligations that place him under a fiduciary duty. What is it about the obligations that existed between ADM Londis and Ranzett that may have created a trust or a similar kind of obligation by ADM Londis to Ranzett?

67. The conclusions of the trial judge are based upon his finding that ADM Londis owed fiduciary obligations to Ranzett or to put another way it was a fiduciary of Ranzett. In many established classes of fiduciary relationships one person acts as the fiduciary of another e.g trustee/beneficiary and director/company but it is not reciprocal. Only one person in the relationship owes fiduciary obligations to the other. Partnership is different, having mutual duties; each partner owes fiduciary obligations to the other.

68. The leading Irish authority on retention of title is *Carroll Group Distributors Ltd v. G and JF Bourke Ltd* [1990] I.R. 481. The judgment of Murphy J. in the High Court was recently applied by this Court in *Unitherm Heating Systems. Ltd. v. Wallace* [2015] IECA 191. Each of those cases was concerned with whether the purchaser of the goods was a fiduciary of the seller.

69. The first point that is apparent from *Carroll Group Distributors* is that the court is slow to infer the existence of a fiduciary relationship in the context of normal commercial activities. Murphy J. said at p. 484: –

> "Obviously one would be slow to infer that a vendor and purchaser engaged in an arms-length commercial transaction undertook obligations of the fiduciary nature want to the other. On the other hand if one postulates that in any context one person is selling the goods of another the assumption of fiduciary obligations in relation to the sale and in particular the proceeds thereof might well be appropriate. It seems to me that the question must be asked how does a party come to sell the property of which he is not the owner? Is he selling as a trustee in pursuance of a power of sale? Is he selling as the agent of the true owner? Does the sale constitute a wrongful conversion? If any of those questions were answered in the affirmative it seems to me that the law would impose a trust on the proceeds of sale which would confer on the true owner the right to recover those proceeds from the actual seller or, if the proceeds were no longer in the seller's hands, to trace them into any other property acquired with them. If the new asset was acquired partly with such proceeds and partly with other monies provided by the seller then the right of the true owner would be to a charge on the new asset or mixed phoned to the extent of the proceeds of sale of his property. This is the rule enunciated in *In re Hallett's Estate, Knatchbull v Hallett* (1880) 13 Ch.D 696."

Therefore, if it happens, as it does in this case, that the purchaser of the goods is able or required to sell them on in his own name, that is inconsistent with an obligation on the purchaser's part of the nature of fiduciary duty.

70. The second point arises from the nature of the account that is required by the retention of title clause. Murphy J. addresses this question in general terms without reference to the particular circumstances of the case. He approaches the matter by analysing the terms of the agreement that requires a separate account to be maintained. He concludes that:

> "Such an arrangement properly implemented would result in a bank account with sums of money credited thereto which would probably be in excess of the amounts due by Bourke's to Carroll's. This would arise partly from the fact that the goods would be resold at a marked up price and partly from the fact that the proceeds of sale would include some goods the cost price of which had been discharged and some of which it had not. In other words the bank account would be a fund to which Carroll's could have recourse to ensure the discharge of the monies due to it even though it would not be entitled to the entire of that fund. Accordingly the fund agreed to be credited would possess all the characteristics of a mortgage or charge as identified by Romer LJ in *In re George Inglefield Ltd* [1933] Ch.1 at pages 27 and 28."

71. If the contractual arrangements in this case are to be characterised in the same way as in the judgment of Murphy J., it follows that there is not even a fiduciary obligation on Ranzett in regard to the proceeds of sale of goods supplied by ADM Londis. It does not matter that the contract uses the word fiduciary if that is not in fact the relationship. The characterisation arises out of the duty, not the other way round. It also seems to be clear that there is no question of a fiduciary obligation on Londis in regard to Ranzett because there is no basis for it. It is an ordinary commercial relationship of vendor and purchaser of grocery and other store items and the courts are very slow to ascribe a special character to the relationship that is laden with heavy legal responsibilities.

72. The provisions in issue here are in essence the same as those considered by the court in *Carroll's* case. The purchaser of the goods, Ranzett, is at liberty to sell in its own name and to give good title to its customer. In respect of the fund represented by the proceeds of the Ranzett sale to its customer, even assuming that a separate designated account is actually maintained, it is bound to contain some elements of marked up profit to which Ranzett is entitled. It will also have the purchase price of some goods that have already been paid for. That is the situation considered by Murphy J. which led him to reject the suggestion of a fiduciary relationship and to conclude that there was instead a fund over which the supplier was entitled to a charge. Similarly, the circumstances of this relationship are not in their nature fiduciary. More specifically, although the contract evidently intended to create fiduciary obligations on the part of Ranzett it is doubtful that it actually have achieved that purpose and certainly did not impose fiduciary obligations on ADM Londis in relation to Ranzett.

73. There have been issues in the cases on retention of title about the nature of the interest that the supplier gets over the fund that the retailer takes in. There can be complexities in that regard when a fund has not been separately maintained and disputes arise following liquidation or otherwise as to whether on the true interpretation of the contract of sale between the original supplier and the seller of the goods the seller holds the price on trust for the supplier. However, that is the limit of the fiduciary/trustee relationship. It does not operate in the other direction. The supplier of the goods does not normally have a trust or general fiduciary relationship with the purchaser/retailer. ADM Londis did not have to behave as a trustee of Ranzett or its property or its interests. The terms of the agreements with Ranzett did not impose obligations on ADM Londis which required it to act as fiduciary for Ranzett in its commercial relationship with it pursuant to the agreement. Therefore, in my view, the judge was mistaken in considering that because the relationship was described as a 'fiduciary' one the contractual arrangements should be construed as imposing "obligations of utmost good faith and mutuality on both parties" in relation to the general conduct of the contract as between the two.

74. I conclude, therefore, that the use of the word fiduciary in the standard terms and conditions of the supply of goods by ADM Londis to Ranzett to describe the relationship did not give rise to the imposition of fiduciary obligations on ADM Londis to Ranzett; the provision was intended to impose obligations on Ranzett alone in relation to the goods while they remained the property of ADM Londis and the proceeds thereof for its protection; the nature of the obligations is quite specific; in the circumstances there is nothing in this feature of the contractual arrangements between the parties to impose on Londis a duty to protect Ranzett. Specifically, this clause did not introduce into the contracts a requirement for a notice period before termination provisions could be activated.

75. I am, accordingly, of the view that the nature of the relationship between the parties was a normal commercial one and did not impose an obligation on ADM Londis to act a fiduciary for Ranzett. There was not any obligation therefore created by the contracts to give notice of termination so as to override the contractual entitlement to do so forthwith or immediately on the occasion of a breach.

Clauses 8 and 9

76. The High Court found that ADM Londis was in breach of contract because it did not give the necessary notice in writing as required by Clauses 8 and 9 of the different agreements.

77. Clause 9 of the Franchise Agreement and Clause 8 of the Product Purchase Agreement are in similar terms, providing that ADM Londis may terminate forthwith by giving notice in writing to the Franchisee in the event of failure of compliance by the Franchisee or the Principal with any of the terms of the agreement or of any other ADM agreement. The wording of these clauses and the context in which they appear in the different agreements makes it clear that they give ADM Londis the power of immediate termination. They do this by using the word 'forthwith'. The provision for notice in writing does not create an obligation on the party terminating the contract to give a period of notice before the decision takes effect. It does specify that termination is to be done by giving written notification; that is the meaning of notice. To read the clauses otherwise appears to me to be contrary to the sense of the agreements and to contradict the meaning of the word "forthwith". The trial judge treated the provision as to notice in the two agreements as being a requirement to allow a period of moratorium prior to the coming into effect of the termination of the agreement. I take the view that notice in writing meant a communication in writing of the fact of immediate termination. When the contracts in each provision speak of forthwith giving notice in writing that means that ADM Londis was able to decide immediately to terminate the contract, but it was obliged under those terms to give written notice or information to the other party. Therefore, there is a requirement to communicate the decision as to termination in writing, but that does not mean that there has to be some waiting time during which the supplier gives notice to the retailer that it is going to terminate the contract.

78. The High Court held that the withdrawal of credit facilities by ADM Londis and its notification to other suppliers, the exercise of the retention of title power and the de-branding of the shop amounted to termination of the agreements. It is worth mentioning in passing that there was nothing exceptionally hostile or malicious in the notification to other suppliers. The evidence was that ADM Londis supplied some goods to Ranzett from its own stores. In the case of other goods that were supplied directly from the manufacturer or distributor, ADM Londis made arrangements for such company or business to supply them to Ranzett. ADM Londis then became liable to the distributor/supplier and the money was debited to the account of Ranzett in the running account. When ADM Londis cut off credit on its own running account, it had to notify the direct suppliers also that they were no longer to supply

Ranzett.

79. In my view, the trial judge was entitled to come to the view that ADM Londis had terminated the contract. He considered the significance of the correspondence from ADM Londis's solicitors, but concluded that the facts demonstrated the intention of ADM Londis to terminate and held that its actions warranted that conclusion. I do not see any basis on which that finding by the judge is unsound. Having said that, I take issue with the consequential holding by the judge that this represented wrongful termination in breach of contract because it did not give adequate notice. It is of course true that there was no written notice in the sense of formal written notification which was in breach of the terms of the agreements but on the evidence and facts found it seems to me that nothing happened by reason of the failure to put the termination in writing which could give rise to a claim for loss by Ranzett. There is no doubt that the relevant parties were duly informed as to what was happening. It seems to me, accordingly, that the mere failure to put in writing what was communicated orally in the clearest terms is not something that gives rise to a cause of action. No loss flowed from it and there was not even a failure of communication or a misunderstanding in the result. Mr. Dolan was fully aware of the ADM Londis position.

80. ADM Londis would have been in a position at the meeting at 8.30am on Wednesday 3rd December 2008 to tell Mr. Dolan of their decisions and to give him a letter containing written notice if he had attended. In fact, they phoned him and then prepared a letter that they believed was sent. What difference did it make that they told him orally of their decision rather than handing him a notice in writing, assuming that he did not receive the letter dated 3rd December 2008? The only difference is that ADM Londis terminated the contract (as the trial judge held) but failed to comply with the procedural requirement in the contract to give notice of termination in writing but no loss flowed from this breach. It would only be substantively different if the requirement of written notice in the agreement is read as being notice that at a future time termination will happen, and in order to do that you have to ignore the word 'forthwith'.

81. There is no doubt and it is not in dispute that Ranzett was hugely indebted to Londis, a circumstance which constituted breaches of the various agreements and that Londis was fully entitled to invoke the termination provisions. The only case made is that Ranzett was entitled to some notice of termination in order to put another supplier in place and the trial judge assessed the time needed as being a minimum of 14 days. Such a construction of the agreements is not consistent with the use of the word 'forthwith'.

82. The defendants could have been under no misapprehension from August 2008 of the peril facing the business. From that time up to 3rd December, Londis spelled out what its intentions were in the event of default of the second August agreement, which did not inhibit the creditor from invoking its rights otherwise to respond to the escalating debt. In view of this written notification of what would happen in the stated circumstances, it is not plausible to plead nullity when it did happen, on the ground that a written notice did not accompany the threatened outcome when it came and when Mr. Dolan had done nothing to avert it.

De-branding

83. The trial judge found that Londis was in breach of contract also in the manner in which it effected the removal of signage from the shop. Counsel for the appellant protests that characterising what happened as de-branding mis-described the removal of six letters from a wall but the fact is that the name was taken down. Under the contracts, on termination the company was obliged to cease trading under the Londis name and was obliged to return signs and marketing material in due course as provided. These provisions in the contract were intended for the protection of the licensor and not the retailer. As the judge found, Londis became alarmed that its own brand might be damaged above and beyond the closure of this particular store by the fact that residents of the area could not get access to the Post Office facility located in the store. This is why they took swift action to remove their connection with the business. It is clear that they did not give appropriate notice as required before their personnel attended and removed the sign. Such conduct represented breach of contract and also constituted trespass insofar as it happened without the consent of the owner. However, it is not clear how Ranzett could establish any loss arising from this conduct. At the time when it happened, the contract as the trial judge found was terminated and Ranzett was no longer permitted to use this brand. The suggestion that the signage should have been left in position during a moratorium period depends on there being a delay between the decision to terminate and the act of termination. In my judgment, there was no contractual entitlement to a period of notice and I cannot see how the removal of the signs albeit in breach of contract gave rise to any loss by Ranzett.

Losses

84. In his second judgment, the trial judge assessed damages for breach of contract by reference to the value of the business. The judge endeavoured to calculate the value of the business as it would have stood if termination had not taken place in circumstances of the breach of contract as he had found, that is, if the business had received the 14 days notice that the judge held it should have got. He held that the business had a value of €420,000 which the judge ascribed to two elements, namely, (a) the value of the business and (b) the value of the lease. It follows from my decision that ADM Londis was entitled to terminate the contract immediately that such loss is not recoverable.

85. Although it is not necessary to do so for the purpose of this judgment, some further observations on the issue of damages may be appropriate in view of the submissions and arguments that were made in the appeal. These comments relate to the business generally and the prospect of proceeding with the business using another supplier, the value of the lease and the goodwill of the business.

86. The fact is that Ranzett was unable to pay its debts as they fell due. It could not pay for its stock in course of business so the debt due to Londis ADM mounted inexorably. The supplier was owed close to half a million Euro when termination came. It follows that it was improbable to say the least that the company would be able to get somebody else to fulfil the Londis role of supplying the shop in circumstances where the reason for the latter's departure was long-term, non-payment for the goods it was supplying. As to a cash and carry wholesale, there was nothing to stop Mr. Dolan from using such a facility, but he had to have the money to buy the goods; that was the whole difficulty. It is worth recalling the trial judge's pessimistic view that the future prospects of the company assuming that Londis had given two weeks' notice were of liquidation.

87. The lease was an expensive one, but there is a more important point. The company did not hold the lease from the lessor; it was held by Mr. Dolan. The claim is made on Mr. Dolan's behalf only in his capacity as guarantor suing with Ms. McConnell in respect of losses that can be ascribed to Ranzett, the company. This is not a loss that can be considered to be that of the company. There is therefore a misunderstanding here in regard to the lease. Furthermore, in regard to the lease there is no real evidence as to the circumstances in which it came to be forfeited or whether relief against forfeiture was claimed.

88. The High Court also awarded damages representing two thirds of the value of the Londis goods that remained on hand uncollected following the repossession of most of the stock, which was €44,000. On this head, ADM Londis submits that there was no basis for the finding of loss since it is not obliged to recover or take everything that it owned and give credit therefor. It also questions the mode of calculation.

89. In regard to losses arising from the exercise of the retention of title power, this depends on there being an obligation on the supplier when recovering its goods to ensure that it takes back everything. I do not consider there was any such obligation under the contract. Neither do I think that a defaulting purchaser is entitled to claim for the inconvenience of having to separate the goods belonging to the seller from other goods acquired elsewhere. The contract requires that the seller's goods be kept separate and not mixed indiscriminately with others so as to facilitate recovery if that should happen. In the circumstances, I would not allow for this loss.

Conclusions

90. For the reasons set out above, I would allow the appeal by ADM Londis against the judgments and orders of the High Court and would dismiss the counterclaim.