Neutral Citation No: [2022] NICA 65 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* MAG11767 *ICOS No:* 2015/68050/A01 *Delivered:* 29/09/2022

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (COMMERCIAL)

Between:

NORTH SOUTH PIG COMPANY (NI) LIMITED

Plaintiff/Respondent

and

(1) MICHAEL McAULIFFE
(2) JAMES McGRATH
(3) JOHN HANRAHAN
(4) DAVID RONAN
(5) TRULY IRISH COUNTRY FOODS LIMITED

Defendants/Appellants

Mr Gerald Simpson QC with Mr Peter Girvan BL (instructed by Johnsons, Solicitors) for the Appellants
Mr David Dunlop QC with Mr Stuart Spence BL (instructed by A&L Goodbody, Solicitors) for the Respondent

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Before: Sir Paul Maguire, Horner LJ and McBride J

SIR PAUL MAGUIRE (*delivering the judgment of the court*)

Introduction

[1] In this appeal the original defendants, made up of four named persons and a single company, have appealed to the Court of Appeal against the judgment and orders of Huddleston J (hereinafter "the judge") arising out of proceedings in the High Court, Commercial Division, by a company as plaintiff. This company is known by the title North South Pig Company (NI) Limited.

[2] In the proceedings at first instance, the judge made the following awards which are summarised at paragraph [152] of the judge's first judgment delivered on 19 February 2021. Firstly, he awarded €189,856 for what he described as the "dividend" claim. Secondly, he awarded the sum of €40,000 in respect of what is described as "the Directors' Expenses" claim. Thirdly, he awarded for the loss of profits of the plaintiff what was quantified as the "reduced amount" of €944,469. Fourthly, the judge awarded as interest the cumulative amount which he said was to be calculated in accordance with section 33A of the Judicature (Northern Ireland) Act 1978. The total amount was to be converted at the date of issue of the judgment into sterling.

[3] The total awarded was therefore the total sum in Euros of (1), (2) and (3) as refined by the issues referred to at (4).

[4] At the date of the judge's first judgment, the judge said that "if required" he would hear the parties in relation to the issue of costs.

[5] As it turned out, the judge was required to deal with the issue of costs. Following a hearing on this issue, the judge issued a costs ruling on 9 June 2021 in which he awarded costs in favour of the plaintiff and against the defendants, on a standard basis, to be taxed in default of agreement.

[6] Overall, it is plain that the plaintiff was successful on some issues. But it is also plain that the plaintiff was unsuccessful on some issues, a point the court will return to later.

[7] The notice of appeal in this case appears on the face of it to have been filed on 19 July 2021. What the notice seeks is succinctly stated to be:

> "An order:
>
> (1) Setting aside the decision/order of [the judge] whereby he awarded the plaintiff/respondent the sum of €944,469.00 for loss of profits;
>
> (2) Setting aside the order of [the judge] whereby he awarded the entirety of the costs of the action against the defendants/appellants."

[8] There is a statement of the grounds upon which the appeal was to be made. It is, in our view, worthwhile to set out verbatim the description of the grounds of challenge which reads as follows:

> "**Issue 1 – Loss of Profits**

(1) The trial judge, having correctly identified (paragraph 141 of the judgment) the obligation on the plaintiff/respondent to mitigate its loss in relation to its claim for loss of profits, failed to take into account that obligation in his award of the sum of €944,469.00 for loss of profits

(2) In his examination of the quantum of the loss of profits claim and in setting out his reason for his award of the aforesaid sum (paragraph 143 of the judgment) the judge entirely failed to consider the obligation of mitigation of loss.

(3) Having identified (paragraph 141 of the judgment) that in January 2016 the plaintiff, acting through its Board of Directors, chose to adopt the model of enduring income into the company, the judge erred in not holding that the plaintiff had, from that date, failed to mitigate its losses.

(4) In the circumstances, the award of €944,469.00 for loss of profits was wrong in law.

Issue 2 – Costs

The judge erred in the exercise of his discretion in awarding the entirety of the costs of the action against the defendants/appellants for the following reasons:

5.1 The plaintiff/respondent lost entirely its claim for €2.8m plus interest, against the fifth defendant.

5.2 The issue relating to this claim took up a significant portion of the hearing time.

5.3 Notwithstanding this, the judge made no attempt to apportion the liability for costs of this issue.

5.4 The effect of this was that the defendants/appellants, are unreasonably condemned in costs, in relation to an issue which the plaintiff/respondent lost.

5.5 Further, under eight other separate Heads of Claim for Damages (paragraph 1 of the judgment) the

plaintiff/respondent claimed in excess of €7.165m (before) interest yet was awarded (paragraph 152 of the judgment) only €229,856.00 under two of those separate Heads of Claim.

5.6 The defendants/appellants were wholly successful in relation to six separate Heads of Claim.

5.7 In the circumstances, in the proper exercise of his discretion, the judge should have apportioned the costs, as between the parties, so as to reflect the reality of the outcome of the case brought by the plaintiff/respondent and the real "event/events" as decided by his judgment."

[9] It is evident from agreed statements provided by the parties, at this court's request, that the issues which form the subject matter of the appeal engage only a limited part of the overall claims which the plaintiff had advanced against the defendants in the various versions of the plaintiff's statement of claim at first instance.

[10] What appears to have occurred is that the plaintiff had advanced multiple claims at the outset but by the conclusion of the evidence these had substantially diminished in number. In other words, the issues appear to have contracted during the course of what we were told was a 13 day trial. It therefore can be said that what has been appealed and which is the direct concern of this court, while important and substantial in money terms, reflects a closely targeted attack on the judge's conclusions in respect of a single issue *viz* that of whether the judge was in error in respect of the way he treated the issue of mitigation of loss on the part of the plaintiff. It seems to us, that it is this issue which is at the core of this appeal. While, as already noted, there is a second issue, that of costs, which focuses on the way the judge exercised his admitted discretionary power to deal with the fact sensitive issue of costs, it is not as important as the first issue.

The Background

[11] It is the court's view that it is not necessary for the disposal of this appeal for the court to seek to explain the complex background which has given rise to the protracted first instance hearing in this case. This has been the subject of the judge's 153 paragraph judgment, of which only a small element is in dispute for the purpose of these proceedings. Helpfully, the parties in this court were able to agree their own version of the background which itself runs to 21 paragraphs. Rather than set these out in the text of this judgment the court will append the agreed paper as Appendix A. The court, further, will adopt the same position in respect of a second document: at Appendix B the court will append a document compiled by the appellant alone

which sets out the claims which arose at first instance and the results of those claims. This last document is relevant primarily to the costs issue in the case.

Loss of Profits

[12] The judge dealt with this issue under the heading "remedies" but on the basis of the grounds of appeal in this court, the core of the matter now before the court is the question of whether the court, adequately or at all, took into account in reaching its conclusion in respect of alleged loss of profit, the requirement that the plaintiff mitigate its loss.

[13] What appears to be clear is that nowhere in the various versions of the statement of claim or defence is the issue of mitigation of loss referred to or pleaded. It first appears to have raised its head in the context of expert accountancy reports put forward on behalf of the parties dealing, *inter alia*, with the wider issue of loss of profits. The relevant documents in this regard consisted of a report filed on behalf of the plaintiff by a Mr Neill dated June 2018 and a reply thereto by a Mr Dwyer, on behalf of the defendant, on 10 July 2018.

[14] In respect of Mr Neill's report it had put forward the following calculation of the plaintiff's losses for two separate periods:

1 September 2011 to 30 April 2018	€1,549, 380
1May 2018 to 30 April 2028	€2,229,184
Total loss excluding interest	€3,778,564
With interest added	€4,095,531.

[15] In respect of Mr Dwyer's report the author commented "I am at present unable to recommend any loss figure in this case." He then proceeded to offer a substantial critique of Mr Neill's report.

[16] The court has been told that each of the two experts gave oral evidence at the trial but the court notably has not been provided with any transcript of each's evidence and cross-examination.

[17] In the judge's first judgment, he deals with the issue of loss of profits at paragraphs [135] to [145]. He offered no criticism of either party for the absence of any pleading dealing with the issue of mitigation of loss. While we consider that it would be important for the parties to have carefully and fully set out each's approach to the issue of mitigation of loss in pleaded form in advance of the hearing, this did not occur. The judge appears instead to have received little assistance from the parties as to how best to have approached it.

[18] Rather than quote the totality of the judge's remarks contained in these paragraphs, the court will simply note that the judge in respect of some of the aspects of the evidence as to loss of profit, in effect, dismissed these aspects of the plaintiff's claim. This occurred in relation to what was referred to as the "unquantified claim in respect of transport costs" and the future loss claim dealing with the period 2018-28. This latter claim involved a claim of €2,229,184. As the plaintiff has not cross-appealed in respect of these matters, there is no extant issue in respect of them.

[19] Overall, it is clear that the judge did not favour the approach taken by Mr Neill in his report. This is made plain at paragraphs [138] to [140] in particular. At the latter reference the judge said:

> "I do not accept the plaintiff's evidence as to the loss which has actually been sustained. The assumptions made in Mr Neill's report are too bold and, frankly, unsustainable."

[20] The approach the judge favoured was what he described as establishing the loss on ordinary principles, a phrase which he does not define. If this was done, he said, the plaintiff "need do no more."

[21] Again, there has been no cross appeal on behalf of the plaintiff to any of these matters.

[22] The court will set out the judge's discussion starting at paragraph [141]:

> "[141] It is clear to me from the evidence that from September 2013 the plaintiff operated what was termed a 'group agreement' with Rosderra – initially for a period 2014 to 2016. I accept that in the immediate aftermath of the breakdown in relations between NSP and the Outgoing Board such a solution might have been required but, after a reasonable time, it was entirely open to the plaintiff to re-establish the former NSP business model or, if it wished, as an alternative to introduce a charge for the 'introduction' which it effected for the benefit of its members in securing advantageous pricing or, indeed, levy an administration charge. Having reviewed the evidence – most particularly the Board minutes of 20 January 2016 and others – it is clear that the new Board of its own volition chose…to adopt none of those approaches. That was a conscious choice on the part of the new Board and, under the ordinary principles of the calculation of damages, it flows against the obligation which that board faced to mitigate its loss. Instead, the plaintiff continues to assert that the pre-breakdown turnover of €5.3m was reduced to nil and that

> the continued cessation of business should form the basis of its claim.
>
> [142] That is a position which I simply cannot accept. On that basis I am therefore, firstly going to discount the claim for future loss … In my opinion it is both too remote and, further, completely ignores the plaintiff's obligation to mitigate.
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> [143] I am prepared, however, to accept that the sum claimed for the initial and direct loss of profits in the sum of €1,549,380 is a valid claim but I disagree with the quantum because of the following material caveats: (4 bullet points are then set out).
>
> [144] The consequences of these conclusions are dealt with in Appendix 8 and 9 of the Harbinson and Mulholland report [Mr Dwyer's report] which, after taking those issues into account, reduces the loss of profits claim to a figure of €997,700 (Appendix 9.1) and adjusting that to remove Mr Neill's 10% inflation of turnover reduces that figure by a further €53,231 (Appendix 9.2) leaving a net claim of €944,469.
>
> [145] I have concluded that in respect of the plaintiff's loss of profit that is the proper measure of damages under this head of claim."

The appellant's case

[23] The central submission put forward by the appellant in its skeleton argument was that the judge had failed to consider the issue of failure by the plaintiff to mitigate its loss. The matter is put thus at paragraph 33:

> "Having identified the duty on the plaintiff to mitigate its loss and finding that from January 2016 (at the latest) the company had determined to make no profit of its own volition or made a decision which 'flows against the obligation which that Board faced to mitigate its loss' he (the judge) did not examine how, if at all, the decision effectively to starve the company of income impacted on the claim for loss of profits."

[24] Put another way, it was suggested that none of the judge's reasons for awarding the sum he did for loss of profits, singularly or in the aggregate, justified a conclusion that the claimant had not unreasonably failed to mitigate its loss.

[25] In short, the judge while alluding to the concept of mitigation, in fact, did not consider its effects on the loss of profits claim.

[26] What should have happened was that the judge should have considered the effect of the company's decision on the issue of mitigation and should have held that the claim for loss of profits was not sustainable beyond the period of the immediate aftermath of the breakdown in relations between NSP and the Outgoing Board, a period which "clearly cannot extend beyond 20 January 2016" (paragraph 39) *supra.*

The respondent's case

[27] In relation to the respondent's skeleton argument it was submitted that the appeal was solely in relation to the question of mitigation of loss and that in this regard the dispute was a 'classic example' of a judge having to assess a complex and disputed body of factual evidence, including conflicting expert evidence, in order to exercise judicial discretion.

[28] The appeal court should, it was suggested, be slow to interfere with the judge's conclusions, especially as he had had to form his views in the context of a range of factors.

[29] In short, the court should respect a temporal cut-off of May 2018 as alternative arrangements should have been in place by that time and that by that time losses had become too remote.

[30] The defendant, it was submitted, had the burden of providing the necessary evidence to satisfy the court that: (a) there were such steps that the plaintiff could have taken in the period before May 2018 and (b) that if those steps has been taken, they would have reduced the loss. It had failed to acquit itself in respect of this burden

[31] The case of *Thompson v Kvaerner Govan Ltd* [2004] SC (HL) was cited and particular reference made to the speech of Lord Hope at paragraph 17:

> "It can, of course, only be in the rarest of occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge has formed a wrong opinion."

This court's assessment

[32] The members of the court have read and re-read the judge's treatment of the issue of mitigation of loss. In doing so, we have considerable sympathy for his position as there had been no pleadings dealing with the position of each party in relation to this issue in advance and there is relatively scant reference to this particular issue in the post hearing written submission of each party in relation to this issue.

Matters were, we consider, probably also made worse by the absence of any final oral hearing once each party's written submissions had been received.

[33] As already noted, the judge's first judgment runs to 153 paragraphs, much of which related to highly technical commercial issues and facts. It seems that it is only in the context of remedy (and to a lesser extent costs), as opposed to liability, that the judge's careful and impressive judgment has been made the subject of appeal despite there being a lengthy trial between parties in which each gave no quarter to the other.

[34] It seems to us that in the context of loss of profits there needs to be as structured an approach as can be identified. In this regard, there can be no serious doubt that once liability is established in favour of the plaintiff, as found by the judge or as conceded, the onus will then fall on the plaintiff to establish its loss. We have no doubt that in a case such as this, this will not necessarily be a simple or one dimensional task. There will inevitably be disputes about the range of alleged losses and whether in respect of each the existence of a loss of profit is established on the evidence available. In some cases, arriving at a conclusion may not be difficult. But it is easy to envisage that disputes in this sphere may be commonplace. A factor which often will arise is whether a claimed loss is too remote and where this is so there can be no recovery of an alleged loss of profit: the point in question fails for the reason that it cannot be made out.

[35] Undoubtedly, in the course of such deliberations an issue may arise in the form of a claim against the plaintiff by the defendant that he, she or it has failed to mitigate loss. Unless fanciful, it seems to us, such a claim has to be recognised and dealt with on its merits. In this case, there was no dispute that in principle a claim based on mitigation could be made and could succeed, but whether ultimately it would do so inevitably depended on the particular evidence adduced in the case. The matter, ultimately, is one of fact and the onus will be on the defendant by evidence to prove its case to the satisfaction of the court. The task of the defendant will be to demonstrate that the plaintiff cannot recover a loss which arises out of the plaintiff's failure to take reasonable steps to reduce the loss. If the above cannot be demonstrated, the defendant's invocation of the alleged failure to mitigate loss will not succeed.

[36] It is, it seems to us, to be of high importance that a trial judge keeps in mind the need to treat the differing issues which may arise insofar as possible in separate compartments so that there is clarity about how he has arrived at his outcome.

[37] With respect to the judge in this case, we have had difficulty in being clear about how he has expressed himself in respect of the series of issues which were before him. He had before him the issue of the plaintiff's loss of profit. Unsurprisingly, this was multi-faceted. Among the issues before him was the case as presented by Mr Neill and the reply to it from Mr Dwyer. In addition, there was an issue about the length of time in respect of which the loss of profit was being sustained. Thirdly, he had to bear in mind that some claimed losses could not be made good because they were too remote. Fourthly, he had to adjudicate on the question of whether the

defendant had demonstrated that the plaintiff had failed to mitigate its loss. This list is not intended to be exhaustive but to be illustrative only.

[38] In respect of a structured approach, while there will always be a range of ways of doing things, we consider that it will usually be the case that the issue of the loss of profit will ordinarily be settled first or be *prima facie* determined.

[39] In the present context, it was for the judge to determine how he should deal with disputes between the experts which require resolution; issues about timescales within which losses of profit may be sustained; and the question of whether particular species of loss are too remote.

[40] It seems to us, that it will usually be after these exercises have been carried out that the judge will need to confront the issue of mitigation of loss. In argument, an issue was raised about whether a loss which is viewed as too remote needs to be mitigated. In our view, it does not. If the alleged loss is too remote it is not recoverable *simpliciter* and therefore does not form part of the plaintiff's loss. It becomes otiose for it to be considered again against the doctrine of mitigation of loss. Of course, we accept that a judge would not be acting wrongly if he was to hold that a particular loss is, in his view, too remote but for him then to address the scenario of mitigation of loss in respect of the same matter on a contingency basis in case he was wrong about the remoteness issue.

[41] Applying the approach above, this court has concern about some paragraphs in the judge's judgment where arguably he has intermingled issues and/or elided the issue of the quantum of the loss which has been demonstrated to exist with the separate issue of mitigation of loss by the plaintiff. In particular, this can be seen at parts of paragraphs [139], [140], [142] and [143].

[42] If the court is correct about this, the reader is left in uncertainty about (a) what the quantum of the loss as determined by the court actually was and (b) what reduction from that figure is being made, if any, on the basis of a failure by the plaintiff to mitigate its loss.

[43] As an example, the court is concerned about, in particular, paragraph [141]. In this paragraph it appears to us that the judge is considering the issue of the plaintiff's mitigation of loss. The question under discussion is about what happened as a result of the breakdown of 2013. The answer the court gives is that the breakdown led to losses over an extensive period through to 2018 but that in the period after 2014 the plaintiff was guilty of a failure to mitigate its loss. This is made clear where it is stated that there was a conscious choice on the part of the plaintiff not to adopt various approaches open to it and to stand back, resulting in unnecessary losses. This, the judge remarked, "flowed against the obligation which the Board faced to mitigate its loss." In other words, what the Board did was a classic example of a failure to mitigate its loss. It had, in short, neglected to avoid losses by failing to act reasonably.

[44] The question which is begged by the contents of paragraph [141] is where does the judge later in his judgment give effect to the plaintiff's failure to mitigate its loss? Unfortunately, the answer to this question is that this particular matter is not referred to again, at least directly.

[45] Indeed, paragraph [143], if anything, appears to cut across the finding made in paragraph [141] where it is stated by the judge that he is prepared to accept the sum of €1,549,380 as a valid claim. As is clear from paragraph [14] above, the figure mentioned in paragraph [143] is exactly the figure which had been put forward by Mr Neill as the loss which arose (he said) between 1 September 2011 and 30 April 2018 which, of course, includes losses claimed during a period when the judge has held that there has been a failure by the plaintiff to mitigate its loss.

[46] While it may be that the judge had his reasons for deciding on the route he chose to take at paragraph [143] and later at paragraphs [144] and [145], this court cannot engage in speculation about what these may have been.

[47] This court in these circumstances considers that it has little option but to accept that on its face there appear to be flaws in the way the judge has expressed himself in respect of salient parts of his treatment of the issue of mitigation of loss. We consider that this situation requires the court to intervene notwithstanding the many authorities which encourage an appellate court to be slow to take this step save in situations in which there is serious error.

[48] It has been submitted to us that we should ourselves determine on a course of remedial action and should substitute our view for that of the trial judge. However, we are firmly against this option.

[49] The course which we consider is the most suitable is that we should remit the issue of mitigation of loss to the trial judge for the purpose of reconsideration by him.

[50] We adopt this course because we are satisfied that inevitably this court's understanding of the loss of profits claim in this case would not be close to equalling the trial judge's understanding both of the litigation as a whole and in particular the targeted challenge directed at this aspect of the proceedings. It is the trial judge who had heard this case over an extensive period and who has also written a detailed judgment which on its merits has been largely accepted. He is in a far better position than this court to arrive at a just solution.

The costs issue

[51] The terms in which this issue arises have been set out in detail at pp. 4-5 *supra.* The court will not repeat what is said there. In essence, in the aftermath of the judge's first judgment, it appears that the parties were unable themselves to agree any costs order with the consequence that a fully contested second hearing was required before

the judge who, on 9 June 2021, provided a costs ruling running to four pages. He awarded costs to the plaintiff on the standard basis to be taxed in default of agreement.

[52] The court makes clear that it has not been provided with any transcript of the costs hearing but the broad thrust of the ruling can be gleaned from its contents.

[53] The position of the parties can be described thus: on the one hand, it was argued by the plaintiff that it should be awarded an order in respect of its reasonable costs. It had, it was said, been the successful party and costs should follow the event. On the other hand, the central submission on the part of the defendant was that, while the plaintiff had received a money judgment in its favour, the defendant had succeeded on more issues than it had lost. Further, the proceedings, due to the way they had been formulated and the exaggerated claims by the plaintiff, had been unnecessarily convoluted and protracted. In view of this, there should be, at the very least, an apportionment of the costs, the defendant contended.

[54] The judge's main conclusion, in the light of his consideration of relevant legal authorities, was to be found at paragraphs [16] – [18], which the court will now set out:

> "16. In exercise of the discretion which falls to me, my considered view is that the evidence of the parties and all of the substantive points at issue were so inextricably linked that the successful party (in this case the plaintiff) should not be denied its costs regardless of whether or not there was exaggeration of its claim. In any event, I am of the view, as the plaintiff contends, that even if there were an exaggeration it would not substantively have increased the costs and, from my perspective, I suspect it would be difficult to attribute the costs attributable to any particular exaggeration. On the facts of the case the pleadings, as ultimately presented, could be said to be no more than the plaintiff arguing its case at its height …
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> 17. By the same token it might be initially appealing to say that the general rule should apply in respect of Truly Irish Foods Limited as the fifth defendant (and against whom no order was made in the judgment) so that it also should be entitled to its costs as against the plaintiff. Whilst initially attractive that, in my view, is equally to ignore the linkage of the evidence and/or inter-connectedness between the parties in this case where the fifth defendant was joined essentially because of its historic linkage with the plaintiff but more particularly the fact that it was controlled by D1-D4. In any event no evidence was put before me as to how or on what basis

> costs should or could have been allocated. For the same reasons I find that the exercise would be almost impossible in itself because of the inter-connectedness of the evidence and the court's conclusions.
>
> 18. For all these reasons I have decided that on the facts of the case there is no reason to depart from the general rule."

[55] At the hearing before this court the submission of the parties were focussed and to the point.

[56] The appellant's main point related to the alleged imbalance between the ruling of the judge and the reality of the claim and its results.

[57] Helpfully, counsel provided the court with a two page document (which is appended hereto) entitled "The Claims and the Result." This document grouped the proceedings into two groups. The first (Group A) was headed "The dissipation of assets/funds" while the second (Group B) was headed "Conflict of interest/failing to promote Plaintiff/Truly Irish." Together these documents sought to set out the claims of the plaintiff and their outcome. The bottom line was that it was suggested that the defendant had been significantly more successful in defending the claims than the plaintiff had been in terms of the claims in which it had succeeded. In the document's summing up, for example, it noted that "… of the total damages claimed of €10,106, 681 the plaintiff was awarded €1,174,325."

[58] In its skeleton argument, the defendant's counsel argued that it was necessary not to treat the proceedings as a single event but to analyse them as being a series of events, in which predominately the defendant had been successful.

[59] In particular, it was submitted that what the judge had viewed as "linkages of evidence" and "the inter-connectedness between the parties" were not good reasons for the position the judge had adopted in respect of the position of the fifth named defendant (the corporate entity known as Truly Irish Country Foods) against which no plausible cause of action had been established.

[60] In the plaintiff's argument, it was suggested that the reality of the case was that the defendant had breached its duties as directors and engaged in wholly inequitable and self-serving conduct to the detriment of the plaintiff. In its submission "the lengthy evidence at trial was plainly directed to the conduct of the defendants and unpicking the surreptitious conduct they had engaged in leading up to September 2013."

[61] Additionally, the various heads of claim were, it was argued, based on the same evidential background so that even if the plaintiff had only sought to plead the claims

which ultimately proved successful, the same evidence relating to the defendant's conduct and actions would have had to be called.

[62] Of particular importance, counsel for the plaintiff argued that the judge was correct in viewing the issues as inextricably linked.

[63] Overall, the matter was put by him in the following way:

> "The core question was whether the costs should follow the event. In circumstances where the defendant's conduct led to the need for proceedings, where the evidence presented by the defendants lacked credibility and where the defendants denied all liability from start to finish and caused material harm to the plaintiff resulting in a very sizeable award for damages, it cannot be said that the "event" was not resolved in the plaintiff's favour."

[64] The court has carefully considered the materials on both sides which has been placed before it.

[65] There was no real disagreement between the parties about the case law and about how an appellate court ought to proceed in relation to an issue of this kind.

[66] It is common case that the judge enjoys discretion in the context of the statutory provisions which were relevant. These the judge was fully aware of, and he alluded to them in his ruling on costs *viz* section 59 of the Judicature (Northern Ireland) Act 1978 and Order 62 rule 3 (3) of the Rules of the Court of Judicature. In respect of the latter, he clearly set out the key provision that:

> "If the court in the exercise of its discretion sees fit to make any Order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other Order should be made as to the whole or any part of the costs."

[67] A range of cases was mentioned in the course of the argument by counsel before us but it is not necessary to do more than refer to the following:

(i) The decision of this court, cited by the judge in his ruling, in the case of *Re Kavanagh's Application* [1997] NI 368 at 382. In that case Carswell LCJ said:

> "The award of costs is in the discretion of the trial judge, but the discretion should be exercised along well settled lines. The general rule governing the award of costs to a

successful defendant was laid down by Atkin LJ in *Ritter v Godfrey* [1920] 2 KB 47 at 60:

> "In the case of a wholly successful defendant, in my opinion, the judge should give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation or (2) has done something connected with the institution or conduct of the suit calculated to occasion unnecessary litigation or expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

(ii) The decision of the Court of Appeal in England and Wales in *Straker v Turner Rose* [2007] EWCA 398 where Waller LJ noted that the general approach in a case of this type is that the appellant bears a heavy burden in establishing that the judge's decision falls outside the discretion in respect of costs.

(iii) The decision of this court in the case of *Quinn v Quinn* [2020] NICA 41 where McCloskey LJ at paragraph [109] said that:

> "As a general principle, an appellate court will accord appropriate respect to how this discretion [that is that conferred by the rules] is exercised by the trial judge."

The court's assessment

[68] The court will leave to one side for the moment the question of what, if any, impact, its decision in respect of mitigation of loss may have on the costs issue. It will treat the costs issue at this stage as if its conclusion in respect of the issue was entirely separate.

[69] In our view, the costs issue must be considered in the light of the heavy burden on the appellant referred in *Straker*. It must also have regard to the respect it should afford to the trial judge recognised in *Quinn*.

[70] In our view the central factors referred to by the judge in his ruling were all factors he was entitled to give weight to for the reasons he gave. In this regard, the court respects his ruling especially as it is plain that the judge was very well placed to make an informed decision on costs as he had already a detailed knowledge of the case, formed over many days of hearing, involving the judge listening to the totality of the evidence. Moreover, he had by the stage of dealing with the costs issue written his liability judgment, which has largely not been challenged in these proceedings.

[71] In no sense, therefore, did the judge come cold to the exercise of his discretion on costs.

[72] On the contrary, the judge will have had an in-depth knowledge. He will have been well aware of the strong feelings the case will have engendered; the absence of any offer of settlement or lodgement by the defendant; how the various issues related to each other and the extent of exaggeration, if any, in the way witnesses gave their evidence.

[73] It is inconceivable that the judge will not have been well aware that the lengthy process of litigation is a very expensive one which necessarily will involve the reality that someone must in the end pay the costs or they may have to be apportioned.

[74] We have no reason to question the relative importance which the judge gave to the various factors in this case. In our view, he was entitled to view the plaintiff's case as not exaggerated; and he was also entitled to come to the view that the various issues were interlinked. It is perfectly evident that the judge did not regard the plaintiff's case as one in which the kitchen sink was being thrown at it. Indeed, his expressed view was that the plaintiff was doing no more than arguing its case at its height.

[75] We also are unconvinced that the judge failed to have regard to the position of the fifth defendant as he discusses it at paragraph [17] of his ruling.

[76] Our conclusion, all other things being equal, is that we, in the ordinary run of things, would dismiss the defendant's case on the issue of the costs order and uphold the judge's decision.

[77] Despite this court's view above, the court has, however, considered whether, in view of the court's referral of the mitigation of loss point back to the trial judge, we should defer making a final order. On this, we consider that there may be merit in doing so as we cannot say with certainty what may be the outcome of that step.

[78] In the end, therefore, while we have considered it important to provide the court's view in respect of the second issue to the parties for their assistance and guidance, we ourselves will not make an order in respect of this at this time.

Conclusion

[79] The court will refer issue one back to the trial judge for his reconsideration and, while giving its provisional views in respect of issue two to the parties will defer the making of its order until the resolution of the first issue or any further order of the court.

Appendix A

The Background to the Litigation document prepared and agreed by the parties to the Appeal

> "1. In the late 1990s and 2000s, a number of pig farmers in both Northern Ireland and the Republic of Ireland decided to adopt a cooperative approach to pig processing to redress, firstly, a reduction in pig processing capacity in Ireland, and, secondly, a concentration of profit margin with the pig processors at the expense of the pig producers/farmers.
>
> 2. A Cooperative was formed in 1999 on an all-Ireland basis with the objective of improving pig prices for pig farmers but, ultimately, with the objective of slaughtering and processing pigs and retailing the final product itself – essentially cutting out the "middleman" processors – a "Farm to Fork" concept.
>
> 3. In October 2002, the Cooperative, named North South Pig, identified its longer-term objectives broadly as:
>
> - The securing of an outlet for pig sales;
>
> - Direct involvement in slaughtering and marketing;
>
> - Securing the benefit of "Farm Gate to Consumer Control" otherwise known as a "Farm to Fork" concept.
>
> 4. The Co-operative venture secured rent assistance from the Department of Agriculture and Rural Development in Northern Ireland to conduct a feasibility study which led to the appointment of Matrix Business Services Limited. As a result of Matrix's conclusions, a decision was taken to incorporate the North South Pig Cooperative into a company under the name "North South Pig Company (NI) Limited." It was incorporated in May 2005 in Northern Ireland. The second, third and fourth defendants together with Oliver Leddy, Rory O'Brien, Charles Beverland, Liam McGuckin and Paul Gilmore were its initial Directors.

5. The initial business model of the company was to raise funds from participating pig farmers. The decision was taken initially to focus on culled sows as an introduction into developing the wider market for pigs. At that stage the culled sow market represented just two percent of the total pig market in Ireland. At that time a farmer received approximately €30-€40 for a culled sow if sold at livestock compared to €200 per sow if that sow was slaughtered, processed and then exported. The most lucrative market for culled sow meat was in Germany which took 80% of the finished product. To access the market the company entered into a supply contract with a German company, Westfleisch, with whom some of the producers had a good relationship.

6. The process was that pig farmers arranged for the transportation of culled sows to a nominated meat plant where they were slaughtered, after which the company was responsible for transporting the carcasses to Germany for sale. The proceeds of that transaction were received by the company who made a number of deductions to pay for:

(a) The transportation of the carcasses to continental Europe;

(b) At various times an administration cost for the running of the company;

(c) The purchase of shares in the company;

finally, remitting a net amount back to each supplier.

7. The aim was that each supplier would, through that approach, fund the company at the same time as becoming a paid-up shareholder in it and would also receive, overall, a higher price for its sows. The ultimate intention was to roll this approach out to the wider and more lucrative pork pig market.

8. A draft Shareholders' Agreement was prepared by L'Estrange & Brett. Its purpose was to configure the agreement between the company and the producers as shareholders. L'Estrange & Brett put a draft of the Shareholders' Agreement into circulation in July 2005, which document was reviewed by a number of directors and approved in July 2006. At a meeting with pig farmers

on 25 August 2006, the Shareholders' Agreement was presented. Some pig farmers signed the Shareholders' Agreement at that meeting. However, it transpired that there were a number of versions of the Shareholders' Agreement.

9. The obligation of those producers who entered into agreement with the company was that they would supply their sows to the company as indicated above.

10. However, it became apparent that the obligation to supply was honoured by some, but not by other producers, and some only in part or not at all. This increased tensions between the shareholders and also between the shareholders and the Board.

11. By October 2007, competitive pricing had lured more suppliers/shareholders to sell their sows elsewhere and that, as a result, a theme of "loyal" v "disloyal" shareholder suppliers had crept into correspondence.

12. By 7 May 2010, a circular issued by the then Chairman, Mr Jim McGrath, drew specific attention to Clause 5.1.1 (the obligation to supply sows) in the Shareholders' Agreement and contained veiled threats to shareholders/producers that the Shareholders' Agreement was a "legal document which you have signed and may have legal implications in the future" in an effort to ensure that they continued to supply sows.

13. Distrust grew between one group of shareholders (headed by the then existing Board) and another group (led by what is the current Board of the plaintiff). The grew from initial concerns over a lack of transparency in the then Board's reporting on the affairs of the company followed by the deductions made and payments issued to farmers in respect of sows slaughtered.

14. The "Truly Irish" trademark was registered in the Republic of Ireland on 24 August 2009 and is applied to a number of finished pork retail products such as bacon, black pudding and so on. As indicated above, the "Farm to Fork" concept had its origins as far back as 2001. Truly Irish Country Foods Limited was incorporated in April 2008 in the Republic of Ireland with the first to fourth

defendants, together with Mr Rory O'Brien as Directors. The shareholding was divided as follows:

(a) Five ordinary shares which incorporated full voting rights were issued to those five initial Directors.

(b) A class of "A" ordinary shares was created on the basis that those shares could be subscribed for by pig producers at the rate of €15 per sow supplied to the plaintiff. The "A" shares did not carry voting rights.

(c) Fifty thousand preference shares were also created at this time and issued to the plaintiff in exchange for a cash injection of £50,000. This sum with interest was redeemed prior to the change in the Board in September 2013.

15. On 9 September 2013 the Acting Directors (Messrs McAuliffe, McGrath, Hanrahan, Rowan and Plunkett) ("the outgoing Board") resigned with effect from 1800 hours on 10 September 2013. An interim Board from the leadership group of the disgruntled shareholders was approved at the EGM.

16. The new Board wrote to the shareholders in its next circular on 1 October 2013 indicating that they would investigate the affairs of the company under the control of the outgoing Board and that they were trying – with limited success – to get information from the previous directors and that they had suspended all payments from the company's bank accounts which included a dividend that had been paid by the outgoing Board just prior to his departure. Also, it said that they were looking for an alternative for the supply of sows.

17. Prior to the resignation of the outgoing Board in September 2013, it approved payment of a dividend and also certain directors' payments.

18. The outgoing Board also recorded in the minutes of the Board Meeting on 3 September 2013 that they had agreed to take a termination payment of €10,000 each and that "each director should invoice the company for €10,000 per year for every year spent on the Board to cover expenses etc as this was agreed at the beginning but

directors never sent invoices." The outgoing Board individually did issue invoices for earlier years (each for the sum of €60,000) that were not in fact paid.

19. The outgoing Board also decided to allocate share capital as loan capital. In mid-September 2013, it purported to distribute to shareholders:

(i) A dividend of €8 per share; and

(ii) A refund of €19 per share as a repayment of the designated "loan capital" making a total distribution of €27 per share - €3 more than contemplated by the Board when Tughan & Company were asked to advise (in mid-late August).

20. A sum of €1,533,654 was paid by cheques issued to shareholders including substantial payments to the directors as shareholdings prior to their departure as the outgoing Board. As stated above, the "Truly Irish" concept had its origins as far back as 2001. In April 2008, Truly Irish (the Fifth defendant) was incorporated in the Republic of Ireland with the first to fourth defendants and Mr Rory O'Brien appointed as the initial directors.

21. The plaintiff's case was that in the setting up of Truly Irish:

(a) The manner in which it was incorporated;

(b) The manner it was funded by the plaintiff's shareholders; and

(c) The diversion of trade that resulted individually and collectively

constituted a breach of both the Shareholders' Agreement and the fiduciary duties which the ongoing directors owed to the company and its shareholders."

Appendix B

The Claims and the Result

Document provided by the appellant to the court dealing with the claims and the result.

Grouping (a) "The dissipation of assets/funds"

Paragraphs 127-134 of the judgment – commencing at page 47 appeal bundle

1. €189,856 (first identified at paragraph 1(f) of the judgment at page 6 of the appeal bundle; and mirrors paragraph 11(f) in the most recently amended Statement of Claim at page 133).

   Decision at paragraph 134 – the plaintiff won (and see paragraph 152)

2. €40,000 (first identified at paragraph 1(a) of the judgment at page 5; and mirrors paragraph 11(a) Statement of Claim at page 133).

   Decision at paragraph 134 – the plaintiff won (and see paragraph 152).

3. €50,000 (paragraphs 66 and 127 of the judgment; and mirrors paragraph 8(e)(iv) of the Statement of Claim at page 131).

   Decision at paragraph 129 – the plaintiff lost

4. €84,000 (first identified at paragraph 1(d) of the judgment; and mirrors paragraph 11(e) of the Statement of Claim at page 133).

   Decision at paragraph 134 – the plaintiff lost.

Therefore:

The plaintiff won in relation to claims 1 and 2;

The plaintiff lost in relation to claims 3 and 4.

The Claims and the result

Grouping (b) "Conflict of interest/failing to promote the Plaintiff/Truly Irish

Paragraphs 134-151 of the judgement – commencing at page 49 appeal bundle

5. €397,210 (first identified at paragraph 1(e) of the judgment; and mirrors paragraph 11(e) Statement of Claim at page 133).

   Decision at page 50 appeal bundle, second Roman (i) – the plaintiff won.

6. €4,095,531 (first identified at paragraph 1(h) of the judgment; and mirrors paragraph 11(h) Statement of Claim at page 133; and includes haulage costs identified at paragraph 1(g) of the judgment; paragraph 11(g) of the Statement of Claim).

   Decision at paragraph 144 – the plaintiff was awarded €944,469 (and see paragraph 152; and note that haulage costs claim rejected at paragraph 136, page 51).

7. €2,359,100 (first identified at paragraph 1(i) of the judgment; and mirrors paragraph 11(h) Statement of Claim at page 133).

   Decision at end of paragraph 146 – the plaintiff lost.

8. €2,890,984 (first identified at paragraph 1(j) of the judgment; and mirrors the unquantified claim at paragraph 11(i) Statement of Claim at page 134).

   Decision at paragraph 151 – the plaintiff lost.

9. Interest

   Decision at paragraph 152 – the plaintiff won

Therefore:

The plaintiff won less than 25% of claim 6; and won claim 9 (interest)

The plaintiff lost claims 5, 7 and 8

Of the total damages claim of €10,106,681 the plaintiff was awarded €1,174,325

No findings were made against the fifth defendant, Truly Irish

See paragraph 152 of the judgment – at page 55 appeal bundle

And paragraph 17 of the costs judgment – at page 59 appeal bundle