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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE
(CHANCERY DIVISION)

BETWEEN:

RONALD LEWIS, TRADING AS RL SERVICES

Plaintiff/Respondent:

and

McNICHOLL HUGHES LIMITED AND EUGENE McNICHOLL

Defendants/Appellants:

Before: McCloskey LJ, Horner LJ and McAlinden J

Mr Michael Lavery (instructed by Shaw and Co, solicitors) for the Plaintiff/Respondent
Mr Keith Gibson (instructed by Reavey Solicitors) for the Defendants/Appellants

McCLOSKEY LJ (***delivering the judgment of the court***)

Introduction

[1] We shall, for convenience, continue to describe the parties in accordance with their descriptions at first instance.

[2] The Writ of Summons, issued on 29 July 2016, is indorsed with the following claim:

> "The plaintiff claims damages for loss and damage sustained by reason of the negligence and breach of contract of the defendants and each of them, their servants and agents, in relation to the hire and subsequent destruction by fire of a Manitou 1740 forklift truck at or about 72 Ballynahinch Road, Carryduff on or about dates between 8 to 11 November 2013."

(We shall describe the forklift truck as "the machine.")

[3] By her judgment and consequential order McBride J found in favour of the plaintiff, ordering the defendants to pay the plaintiff the agreed amount of £35,000 plus costs. The defendants appeal against this order. It is stated in counsel's skeleton argument is that the central focus of the appeal is that the trial judge erred in law in finding that an indemnity clause had been incorporated into the parties' agreement. It is contended that:

> ".. there was no evidence laid before the court upon which a reasonable tribunal could have come to that decision."

Chronology of Events

[4] The issues generated by these proceedings can be gauged by reference to certain uncontentious, or incontestable, facts and events rehearsed in chronological sequence. The narrative begins with a contractual document, entitled "Short Term Hire Agreement", dated 4 November 2013. The parties to this agreement are the plaintiff and a third party whom we shall describe as "GCC", a building contractor in respect of whom the name "Thomas Walsh" is recorded. The contract specifies a hire period from 4 to 5 November 2013 for a financial consideration of £350. It records that the value of the machine is £30,000. The only signatory of the agreement is the aforementioned Mr Walsh.

[5] The express "Conditions of Hire" include the following:

> (i) "This machine must be added to your insurance for all risks cover for the value stated above."
>
> (ii) "The hirer will indemnify [the plaintiff] against all claims and demands of whatsoever kind and by whomsoever made upon the Company ..."
>
> (iii) "The hirer will indemnify the company against any loss or damage caused to the truck while on hire and until returned to the company."
>
> (iv) "The hirer shall return the truck in good condition and the company shall not be responsible for any loss suffered due to any breakdown or stoppage of the truck."
>
> *(v)* "The hirer shall not sublet the truck or part with possession without the written consent of the company."

[6] On 12 November 2013 the defendants issued to the plaintiff a type of purchase order. This specified the defendants' premises, an amount of £400, the job number the hire period and described "hire of telescopic forklift." On the same date the second defendant completed and signed an insurance claim form in respect of the event described as " … the machine caught fire and burned out …"

[7] Next, on 30 November 2013 the plaintiff issued an invoice in respect of the hire of the machine for the period 4 to 19 November 2013 in the amount of "£300 per week plus £50 each way." The customer was identified as "McNicholl and Hughes." The initial description of the customer as "Thomas Walsh" was corrected. Between the dates 4 and 30 November there were various conversations involving the parties, Mr Walsh and one Mr Spiers (infra).

[8] On 19 February 2014 the plaintiff's solicitors corresponded with "McNicholl Hughes" in the form of a conventional pre-proceedings letter. This letter illuminates the interaction between GCC (Mr Walsh) and the defendants. It asserts:

> "The machine was subsequently sublet by [GCC] to yourselves without the written consent of our client being obtained. We understand that the machine has now been damaged as a result of a fire on 11th November 2013, which has resulted in the machine becoming a write off."

By subsequent letters dated 3 October and 15 December 2014 the plaintiffs corresponded with the second defendant in identical terms. On 28 February 2014 the plaintiff issued an invoice to GCC in the amount of £4392 in respect of the hire of the machine from 5 November 2013 to 28 February 2014.

[9] By letter dated 4 March 2014 a loss adjuster, on behalf of "HSB Engineering Insurance Limited", replied to the pre-action letter directed to the defendants. This identified "McNicholl Hughes Limited" as the insured party and stated:

> "…. The insurance provided indemnifies the insured to the extent required by the Model Conditions For The Hiring Of Plant recommended by the Construction Plant Hire Association… or conditions not more onerous or specific conditions previously agreed by insurers in writing and endorsed on the policy. In the event of a loss involving hire conditions which are more onerous than the model conditions, the indemnity provided is limited to the liability as would have been applicable under the model conditions …

> **The insured .... have advised that the machine in question was not hired by them. Our principals thus view that their insured has no liability in the matter.**"
> [Emphasis added - the judgment will employ the abbreviations "Model Conditions" and "CPHA"]

This was followed by another letter to like effect.

[10] The pre-action letter directed to GCC elicited the following response from their solicitors:

> "Our client hired the equipment in question from your client for one day in order to lift steel into place at the premises of Eugene Hughes, whose firm McNicholl Hughes, was carrying out the building works. When our client finished using the forklift, he was approached by Eric Spiers about transferring the hire to Eugene Hughes. Our client refused to do so and telephoned Ian Lewis of RL Services to request his agreement to the forklift being taken off hire in the name of our client and then being hired to McNicholl Hughes. Ian Lewis agreed to this whereupon our client informed Eric Spiers as to the content of the conversation with Ian Lewis and thereafter our client left the site with the forklift having been transferred into the power and control of McNicholl Hughes with your client's express agreement. Under the circumstances it is clear that our client is not responsible to your client for the loss of the forklift as he was not hiring this vehicle at the time it was destroyed."

[11] Eric Spiers, who describes himself as a self-employed structural steel estimator, swore an affidavit on behalf of the plaintiff dated 5 August 2014. His role was that of supplying some steel beams for the building work in question to the defendants. He was then further involved when Mr McNicholl contacted him about the possibility of a specialist firm carrying out certain steel work installation. This resulted in Mr Walsh meeting Mr McNicholl on site, they evidently struck a bargain and, as a result, Mr Walsh (GCC) hired the machine from the plaintiff and carried out the work on 4 November 2013. Mr McNicholl then asked Mr Walsh about the possibility of the machine remaining on site to facilitate certain further building works. This was followed by a further telephone conversation involving Mr McNicholl and Mr Spiers and a conversation between Mr Spiers and Mr Walsh:

> "Thomas Walsh said that he did not believe that there would be any difficulty with that and that he would contact Ian Lewis of RL Services to organise that."

While this completed Mr Spiers' involvement in the episode, he learned some days later that the machine had been destroyed by fire. Mr Spiers did not testify at the trial.

The issues at first instance

[12] The exercise of considering the main documents and the various letters, coupled with the affidavit, rehearsed in paras [4]–[11] above, without any consideration of the pleadings or the impugned judgment, would suggest that at first instance the issues to be determined were the following:

(i) Was there an agreement between the plaintiff and the defendants?

(ii) If "yes", what were its terms and, more specifically, by its terms were the defendants obliged to compensate the plaintiff for the loss by fire of the machine?

[13] When one turns to consider the pleadings it emerges that the Statement of Claim, in its original form, did not reflect the foregoing analysis. In particular, it did not identify any asserted contractual relationship between the parties or any contractual terms and was founded on negligence rather than breach of contract. In the further particulars of the plaintiff's claim, it is averred that the contract "was in writing." An amended Statement of Claim, evidently served on 21 October 2019, contained an alteration confined to the amount claimed. The main averment in the Defence is that "… there was no contract as between the plaintiff and the insured [sic]." There are further averments that upon the arrival of Fire Service personnel the site was secured by fencing and a locked gate which had to be broken open to gain access.

[14] In its search for illumination this court has considered the skeleton arguments exchanged between the parties at first instance. In counsel's skeleton argument the plaintiff's case is put in the following way. The machine was initially hired by the plaintiff to GCC for work at the defendants' premises. Upon completion of the relevant work Mr Walsh of GCC was approached by Eric Spiers acting as agent of the defendants. Mr Spiers requested that the hire of the machine be transferred to the defendants. Mr Walsh contacted the plaintiff who agreed to this. As a result, a transfer of hire occurred on 5 November 2013. In this way there was a hire agreement between the plaintiff and the defendants. It contained the terms specified in para [5] above. The machine was destroyed by fire six days later. By this occurrence the defendants became contractually liable to indemnify the plaintiff for its financial loss of £35,000, being its pre-destruction value. The plaintiff highlights the defendants' admissions that at the material time the machine was on their premises and had been used by them for work purposes, in a context wherein they believed that they were insured against the event which occurred.

[15] In the skeleton argument on behalf of the defendants the account of events rehearsed in para [11] above is reproduced in full. It is further stated that the defendants' insurers withheld indemnity on the ground that there had been no contract of hire between the plaintiff and the defendants. It is contended that as a matter of law the plaintiff could not rely on any of the terms of the agreement between the plaintiff and GCC. Any suggestion that this agreement had in some way been subject to assignment or novation is contested. The case is made that a fresh hire agreement was made between the plaintiff and the defendants, containing only one express term namely that the plaintiff would hire the machine to the first defendant. An implied term that the defendants would pay reasonable hire charges is conceded. Insofar as the correct prism is that of bailment it is contented that the defendants' obligation was confined to taking reasonable care in their custody of the machine and did not extend to any loss unless "caused by its own want of due care or that of its servants."

[16] What was the crucial issue dividing the parties? It would appear to have been twofold. First, their agreement contained no express term that the defendants "… would be under a duty to protect and insure the [machine] against malicious damage, improper use and theft whilst it remains under his/her control" (per counsel's skeleton argument). Secondly, there was no implied term to this effect.

Judgment of McBride J

[17] In her judgment McBride J rehearsed the agreed facts outlined in para [11] above. The judge recorded that no documents were executed or signed on behalf of either plaintiff or defendants in respect of the continued use of the machine on the defendants' site. The parties' agreement that the cause of the fire could not be ascertained was noted. Having highlighted that a substantial quantity of the material facts were not in dispute, the judge identified the following contentious issues:

(i) Whether the machine was hired by the defendants from the plaintiff.

(ii) If "yes", the terms of the hire.

(iii) Whether the terms were breached.

(iv) If the machine was not hired, whether the defendants' negligence caused the loss of the vehicle while it was in their care and custody.

[19] The judge resolved the contractual issue first and foremost. She rejected the second defendant's evidence that he did not know that the machine was owned by the plaintiff and believed that it was owned by GCC, and he was "just getting the lend of it." The judge specifically found that the second defendant made an agreement with the plaintiff for the hire of the machine. The judge gave clear and cogent reasons for thus finding. These revolved around several identified

unsatisfactory aspects of the testimony of the second defendant, together with the affidavit evidence of Mr Spiers. The judge further identified other aspects of the evidence buttressing this conclusion.

[20] The judge then turned her attention to the issue of the terms of the agreement between the parties. She recorded that the plaintiff's case in this respect was advanced in the alternative. The primary case made was that the terms of the agreement were those contained in the hire contract made between the plaintiff and GCC. The alternative case made was that the agreement between the plaintiff and the defendants was subject to the CPHA Model Conditions. The legal foundation of this would be "custom and practice."

[21] Next, the judgment contains the following self-direction in law:

> "The basis for implying terms on the basis of custom and practice is that they are notorious, certain and reasonable."

The terms of clause 13 of the CPHA Model Conditions were then recited. This provides in material part:

> "… the hirer shall ……… make good to the owner all loss or damage to the plant from whatever cause the same may arise, fair wear and tear excepted …"

[22] The key passages in the judgment are in paras [32]–[33]:

> "When Mr Lewis met Mr McNicholl he assured him that he had insurance. I am satisfied that this indicates that he was accepting the terms of the insurance covered him for the liability that he had agreed to enter into when he took on the hire of the vehicle. Further, I am satisfied that he was someone who had been involved in the construction industry over a long period of time and had industry knowledge of the custom and practice which applied to the hire of vehicles. In particular, I am satisfied that he would have been aware in broad terms of what the construction plant hire conditions were.
>
> It also appears from the evidence of the other witnesses that the construction plant hire model conditions were standard throughout the industry and indeed the insurance brokers indicated that the insurance covered situations to which the construction plant hire conditions applied."

The Appeal

[23] The Notice of Appeal does not engage with the findings and conclusions of the judge relating to the CPHA Model Conditions: these do not feature anywhere in the pleading before this court. By a process of deduction and interpretation this court is driven to assume that the phraseology "an indemnity clause", "the indemnity clause" and "such a clause" is designed to describe clause 13 of the CPHA Model Conditions. There is no challenge to the judge's finding that the use and custody of the machine had been undertaken by the defendants pursuant to an agreement between the parties. Developing the assumption noted above, the judge's conclusion that clause 13 of the CPHA Model Conditions had been incorporated by implication into the parties' agreement is challenged on the grounds that (a) it "was not supported by the evidence laid before the court" and (b) "was perverse."

[24] There is a free-standing challenge to the judge's finding at para [35] of her judgment that in the wake of the fire the second defendant assured the plaintiff that he had insurance for the event and loss in question. This quintessentially factual finding is challenged on the vague and unparticularised ground that it was "erroneous." It is further suggested that the judge "gave undue weight and influence" to this finding. It is further suggested, again without particularisation or elaboration, that this finding "… either ignored or properly failed to take into account the first named defendant's evidence on the issue." The remaining grounds in the Notice of Appeal are perfunctory and repetitive.

Analysis and Conclusions

[25] The judgment of McBride J contains one key conclusion, namely that as a matter of implication the contract between the parties was constituted by the CPHA Model Conditions. The effect of this conclusion is that in accordance with clause 13(b) the defendants are obliged to indemnify the plaintiff in respect of the loss of the machine, which entails a payment in the agreed sum of £35,000. Logically, this conclusion had to be (and was) preceded by an anterior conclusion which was that the parties had made a contract for the hire of the machine. The existence of this contract was disputed by the defendants at first instance. This issue was resolved in favour of the plaintiff. It is not challenged before this court. The challenge mooted to the finding noted in para [24] above was not developed.

[26] The exercise for this court is to review the basis upon which the impugned conclusion was made. We remind ourselves firstly of the legal principles which govern an appeal of this kind viz one in which the first instance judge has considered the sworn evidence of a substantial number of witnesses, has evaluated such evidence and has made certain findings accordingly. These principles are conveniently summarised in the judgment of Lord Kerr in *DB v Chief Constable of PSNI* [2017] UKSC 7, at paras [78]–[80]:

“**Review by an appellate court of findings at first instance**

78. On several occasions in the recent past this court has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. For the purposes of this case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. In para 1 of his judgment he referred to what he described as “what may be the most frequently cited of all judicial dicta in the Scottish courts” - the speech of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's discourse on this subject continued with references to decisions of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, [1919] UKHL 303, 36-37, where he said that an appellate court should intervene only it is satisfied that the judge was "plainly wrong"; that of Lord Greene MR in *Yuill v Yuill* [1945] P 15, 19, and that of Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that:

> ‘It can, of course, only be on the rarest 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 had formed a wrong opinion.’

79. Lord Reed then addressed foreign jurisprudence on the topic in paras 3 and 4 of his judgment as follows:

> ‘3. The reasons justifying that approach are not limited to the fact, emphasised in *Clarke's* case and *Thomas v Thomas,* that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the

United States Supreme Court in *Anderson v City of Bessemer* (1985) 470 US 564, 574-575:

> 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" ... For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'

Similar observations were made by Lord Wilson JSC in *In re B (A Child)* [2013] 1 WLR 1911, para 53.

4. Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, para 14:

'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'"

> 80. The statements in all of these cases and, of course, in *McGraddi* itself were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in *Anderson* that the first instance trial should be seen as the "main event" rather than a "tryout on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent. In the present appeal, I consider that the Court of Appeal should have evinced a greater reluctance in reversing the judge's findings than they appear to have done."

[27] In appeals of this kind it has frequently been observed that challenges to the kind of findings and conclusions made at first instance in this case are notably difficult because of the differences between the exercises carried out by the trial judge and the appellate court respectively. The key difference is that, as in the present case, the trial judge's findings followed her consideration of the sworn evidence of several witnesses and in particular the protagonists, namely Mr Lewis and Mr McNicholl. This is an issue of unmistakable importance in the present appeal. These passages serve as a reminder of the sharp differences between the adjudication of a trial judge at first instance and the adjudication of this court upon appeal. In particular, as the passage quoted from the decision of the US Supreme Court makes clear, this court on appeal is required to treat findings of fact with deference and to recognise the experience and expertise of the first instance judge. In short, the appellate court must act with restraint.

[28] The issue of law at the heart of this appeal is the implication of contractual terms by custom and practice. The governing legal principle is formulated in these terms:

> "If there is an invariable, certain and general usage or custom of any particular trade or place the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party in conformity with such usage or custom, provided there is no inconsistency between the usage and terms of the contract. To be binding, however, the usage must be notorious, certain and reasonable and not contrary to law; and it must also be something more than a mere trade practice."
>
> [Chitty on Contracts, Volume 1, 34th ed, para 16-035.]

In *Con Stan Industries of Australia v Norwich Insurance* [1986] 160 CLR 226 the High Court of Australia elaborated on this general principle in the following terms, at p485:

> "(1) The existence of a custom or usage that will justify the implication of a term into a contract is a question of fact ….
>
> (2) There must be evidence that the custom relied on is so well known and acquest in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract …
>
> However, it is not necessary that the custom be universally accepted, for such a requirement would always be defeated by the denial by one litigant of the very matter that the other party seeks to prove in the proceedings ….
>
> (3) A term will not be implied into a contract on the basis of custom where it is contrary to the express terms of the agreement ….
>
> (4) A person may be bound by a custom notwithstanding the fact that he had no knowledge of it ….. nothing turns on the presence or absence of actual knowledge of the custom; that matter will stand or fall with the resolution of the issue of the degree of notoriety which the custom has achieved."

[29] Mr Gibson, representing the defendants/appellants, agreed with this court's suggestion that the trial judge's self-direction is impeccable in law. Further judicial questioning elicited from Mr Gibson that the defendants are not making the case that the trial judge had no foundation for the impugned conclusion. Rather, the contention advanced is that the conclusion was insufficient, coupled with the related contention that the judges made perverse findings.

[30] In these circumstances it is incumbent upon this court to identify all material ingredients in the conclusion under challenge. These are a mixture of uncontentious documentary evidence and judicial findings of fact. The most important elements of the former are, firstly, the letters from the defendants' loss adjusters to the plaintiff's solicitors, noted in para [9] above. It is properly to be assumed that the loss adjusters brought to bear their experience and expertise in the compilation of these letters, taking into account in particular the context namely the threat of legal proceedings. Furthermore, the letters bear all of the hallmarks of careful preparation. In the judgment of this court these letters provide a clear indication of the status and influence of the CPHA Model Conditions. The correspondent was at pains to emphasise that these provided the model for the indemnity clause in the contract of insurance to which the defendants were party. This contract was described as a "*standard Contractors All Risk Indemnity.*" Furthermore, the correspondent saw fit to reiterate this in a subsequent letter. In addition, these letters were written by an agency which stood apart from the parties and had a birds-eye view of standard industry practice. All of this impels to the assessment that the CPHA Model Conditions are the industry standard.

[31] The further important feature of the aforementioned letters is that they were uncontentious evidence at first instance. This occurred in circumstances where they clearly supported one of the two alternative bases upon which the plaintiff's case was framed and featured in the oral evidence adduced, particularly the evidence of the second defendant. Thus, to take one example, there was no attempt by the defendants to contest the letters by putting in evidence their actual contract of insurance in an attempt to demonstrate material differences between it and the model conditions.

[32] We preface our consideration of the judge's material findings with an outline of some of the transcribed evidence. The judge heard the evidence of eight witnesses in total. These included the protagonists – Mr Walsh of GCC, Mr Ian Lewis and Mr Ronald Lewis and Mr Eugene McNicholl, the second defendant.

[33] Mr Walsh, principal of GCC, was asked certain questions and provided answers in both of which the issues of indemnity and insurance were conflated. He testified that "that" had always been "the practice." Reading the bare print of the transcript suggests that his evidence was ambiguous. However, one has to contrast the differing positions of trial judge and appellate court in matters of this kind. What matters is what the trial judge understood to be the effect of the evidence.

[34] Another of the witnesses was Mr Ian Lewis, on behalf of the plaintiff. He testified that the plaintiff had been carrying on business as a small plant hire operation for over 40 years. He indicated that hire arrangements did not always involve the execution of the "paperwork." The phrase "the custom and practice in the trade" was employed in the questioning of this witness. "Cross hire" arrangements did not invariably involve the execution of the standard hire agreement. The witness was also asked about "insurance arrangements." He testified:

> "It's common, in construction, anybody in construction knows whatever machine you hire ….. you're responsible for that machine ……
>
> You know that you have to take care of that, whatever it is …….. once it comes off the back of the lorry it's then the responsibility of the hirer."

To the question "And has that been the common practice in the industry ...?" The witness replied "yes."

[35] Evidence was also given by the plaintiff's daughter who was, in effect, a part-time book-keeper. She was asked about "those conditions of hire" and replied:

> "Those are our conditions. They're like right across the hire trade … more or less they use all the same conditions."

This evidence was unchallenged and can be linked to the evidence, also uncontested, about the CPHA Model Conditions.

[36] We now turn to the judge's material findings. These begin with a finding that the second defendant was not a credible witness. This finding is contained in a carefully and clearly reasoned passage. One of the significant effects of this finding is readily identifiable in the transcript of the evidence of Mr McNicholl. In the course of his cross examination the judge sought to clarify certain issues and questioned him closely in doing so. One readily ascertains from these passages (and others) the trial judge's assessment of this witness as unsatisfactory. Inter alia, it is clear from these passages and confirmed by relevant correspondence – that the sole reason tendered by his insurers for repudiating liability was based on the claim made by this unsatisfactory witness that he had no contract with the plaintiff. This, on any showing, was a manifestly untenable claim.

[37] It is in the foregoing context that a discrete passage of the transcript beginning with a question from the judge relating to "what goes on in the industry" falls to be considered. In the course of these exchanges the judge asked:

> "Once you take the machine, what [counsel is] saying to you is the custom and practice in the industry is that you're responsible for everything, howsoever it arises. What do you say about that?"

Mr McNicholl replied "I disagree." Pausing, it is to be remembered that this was the reply of a witness who the judge found to lack credibility. Next the witness was asked about the express indemnity clause in the plaintiff/GCC short term hire agreement. "Was this an unusual clause?" The question was repeated. Mr McNicholl dealt with it firstly by (a) claiming that he was "not an expert on it" and (b) stating, and repeating, that he "couldn't comment."

[38] The judge then questioned Mr McNicholl about the CPHA Model Conditions. The response was "I'm not an expert in terms." At a later stage he sought refuge in his description of insurance companies as "big beasts." In re-examination the issue of the CPHA Model Conditions was explored in questions from his counsel. The focus was on the loss adjuster's letters (*supra*). Further questions from the judge ensued. Counsel too was involved in these exchanges. In this context the judge made the observation:

> "So there seems to be an acceptance of the CPA conditions …. an acceptance of the insurance company that CPA are the relevant conditions."

While counsel initially seemed to agree with this, at a later point the qualification that the Model Conditions could be "implied" was added, coupled with an acknowledgement that this would be "a matter for the court."

[39] The judge's further material findings of fact are set out in paras [32]–[33] of the judgment: see para [22] supra. The judge made a key finding that the second defendant:

> "… was someone who had been involved in the construction industry over a long period of time and had industry knowledge of the custom and practice which applied to the hire of vehicles."

This finding is clearly linked to the documentary evidence and transcript passages considered in the immediately preceding paras hereof. The submission on behalf of the defendants that the phrase "the hire" does not encompass "the terms and conditions of the hire …." is unrealistic and rejected accordingly. It is further confounded by the sentence which follows:

> "In particular I am satisfied that he would have been aware in broad terms of what the construction plant hire conditions were."

[40] In the next ensuing para the judge makes two findings." The first of these relates to the judge's invocation of the "evidence of the other witnesses." Arguably the strongest argument on behalf of the defendants (appellants) is that the judge did not particularise this finding and its foundation is difficult to discern from an examination of the transcribed evidence of other witnesses. However, the judge used the language of "appears from." In other words, this finding was based on an evaluative assessment of the evidence of witnesses, a judicial impression formed by reference to all of the evidence adduced. We refer particularly to those passages in the transcript highlighted above. The second of these findings relates to industry practice on the issue of a hirer's indemnity, as expounded in the loss adjuster's letters. This is unassailable on any showing.

[41] Notably, the argument advanced to this court was that the judge's findings and ensuing conclusion required evidence from witnesses (in the language of the governing legal principle) that the terms which the judge determined to imply were "notorious, certain and reasonable." This submission we consider misconceived. The task for the judge was to decide how this principle should be applied in the light of all the evidence received and specific findings made. The exercise of standing back, surveying all of the evidence panoramically and making a finding by inference was one which lay exclusively within the domain of the trial judge. It is not for this court to trespass thereon.

[42] The challenge before this court is, unambiguously, that the material findings of fact made by the judge are unsustainable because they are perverse. We are satisfied that this self-evidently elevated threshold has not been overcome, by some margin. In a sentence, this court considers that there was sufficient foundation for the impugned conclusion.

[43] For all of the foregoing reasons this court dismisses the appeal and affirms the order at first instance.