Neutral Citation Number: [2015] EWHC 1183 (CH)

Case No: HC13B00603

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Civil Justice Centre
Manchester
M60 9DJ

Date: 2 June 2015

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

(1) ABBY ELIZABETH SWAIN **(2) CHRISTA JANE SWAIN** **(3) GEMMA LOUISE SWAIN**	**Claimants**
- and -	
(1) SWAINS Plc **(2) NEIL GORDON KIRBY** **(3) GRAEME EDWARDS (As Personal Representative of David Jonathan Berry Deceased)**	**Defendants**

- -

Mr Paul Marshall (instructed by **W Legal, Solicitors**) for the **Claimants**
The First Defendant did not appear and was not represented
Mr Nigel Burroughs (instructed by **Beale & Co**) for the **Second Defendant**
Mr Paul Mitchell (instructed by **Clyde & Co**) for the **Third Defendant**

Hearing date: 20 April 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. In paragraph 177 of my initial judgment in these proceedings I indicated that the damages recoverable by the claimants in respect of what I described in my initial judgment as the Special Resolution Conspiracy (hereafter "the Conspiracy") would be assessed at a hearing following the handing down of that judgment. Judgment was handed down on 20 April 2015 and the hearing relating to damages took place that day. The hearing ended shortly after 4 p.m and I indicated that I would reserve judgment and give directions for submissions concerning costs and any other outstanding matters that arose to be made in writing.

2. My findings and conclusions in relation to the conspiracy are set out in Paragraphs 137-146 of my initial judgment, and my conclusions in general terms as to the loss and damage that was caused to the claimants by the conspiracy are set out in Paragraph 146. The abbreviations used in my earlier judgment are used again in this judgment save where the contrary is indicated below.

Claimants' Pleaded Case

The claimants' pleaded case as to loss caused by the conspiracy is set out at paragraph 125 of the Particulars of Claim in these terms:

> "125 Further or in the alternative, by reason of the matters aforesaid the Claimants have suffered loss and damage.
>
> **Particulars**
>
> (1) The diminution in the value of the Claimants' shares at the time of the exercise by the Trustees of the options by reason of unlawful dividends paid by the Company contrary to the provisions of the Articles and the consequent reduction and diminution in the Company's assets.
>
> (2) The difference in value between the price paid by the Trustees for the Claimants' shares and their true value as voting shares (together with other rights) that together represented a controlling interest in the Company.
>
> (3) The sums taken by the Trustees under the amendment to the option agreements in respect of Mr Berry and Mr Kirby's costs in the litigation."

3. At the hearing the claimants sought damages under two heads being (a) that they should be entitled to recover damages in respect of dividends that were unlawfully paid out on and after the purported passing of the special resolution to be calculated

notionally by re-distributing the whole of the amount so paid *pari passu* between all the shareholders ("the Dividend claim") and (b) for the difference between the sum that the claimants maintain they would have recovered had they brought a petition under s.994 of the Companies Act 2006 and the sum that I determined in the first judgment was the fair value of the shares at the date when the options were exercised by DB and the second defendant. In effect, the claimants maintain that they should be awarded damages under this head that have the effect of eliminating the minority share discount that I applied when coming to a fair value for the shares ("the Discount claim").

Applicable Principles

4. The parties were agreed that the measure of damages recoverable for losses suffered as a result of an unlawful means conspiracy is the tortious measure as augmented by the principles that apply in relation to forseeability in deceit claims. They are also agreed that in relation to the assessment of damages in respect of an unlawful means conspiracy:

> "damages for conspiracy are at large; that this meant the court is not limited to awarding that amount of loss which can be strictly proven; and that, in coming to a view as to the level of damages which a defendant ought to pay, the court will consider all the circumstances of the case, including the conduct of a defendant and the nature of his wrongdoing."

- see Noble Resources SA v. Gross [2009] EWHC 1435 (Comm) *per* Gloster J (as she then was) at paragraph 223. It was contended by Mr Marshall that this meant in practice that the benefit of any doubt as to whether a particular claim had been sufficiently proved should be resolved in favour of a claimant rather than a defendant. This was not disputed by either Mr Mitchell or Mr Burroughs. However, that does not justify seeking to recover by way of damages for losses that have not been pleaded.

5. Whilst neither defendant contends that the Dividend Claim is not available to the claimant as a matter of pleading – see the second defendant's written submissions in relation to the first head at paragraphs 4 to 16 and the third defendant's written submissions at paragraphs 3 to 8 - both contend that the Discount Claim is not available on the claimants' pleaded case – see the second defendant's written submissions at paragraphs 17 to 22, adopted orally by the third defendant's counsel at the hearing. Both defendants maintain that in any event claims under both heads fail on evidential and causation grounds.

The Dividend Claim

6. In his written submissions, Mr Marshall summarised the two ways in which this head of claim was then being advanced namely:

> "There are two possible approaches to the calculation of loss occasioned by the payments of unlawful dividend:

(a) to treat the aggregate as the amount distributed and to notionally redistribute the whole amount between 2010 and 2012 as redistributed *pari passu*.

(b) to assess the damage suffered by the Claimants as the differential between what the directors illegally paid themselves pursuant to the conspiracy and what the Claimants received, when they were contractually entitled to be paid the same amount as CSM and CW under the Articles, but for the conspiracy."

By the time Mr Marshall came to make his oral submissions the Dividend claim was advanced solely by reference to the approach referred to in (a).

7. The first issue between the parties concerned the degree to which if at all account ought to be taken of the remuneration that would otherwise have been paid to CW and CSM had they not received the higher dividends that in fact were paid to them. This arises because (a) it was accepted and I have found that a reason for CW and CSM wanting to create different classes of shares was to enable them to be paid by way of dividend rather than wholly by way of salary and bonus paid directly to them by SPLC and (b) on balance this is likely to be what happened following the purported passing of the special resolution.

8. In his written submissions Mr Marshall did not address this issue, as Mr Mitchell noted in paragraph 25 of his written submissions. Mr Marshall modified his position on this issue in the course of his oral submissions when he accepted that an allowance ought to be made against the total dividends paid out in each of the relevant three years for salary and that the proper allowance to make was the reasonable salary figure I adopted for the purpose of arriving at a fair value for the claimants' shares (£177,000 per annum – see paragraph 113 of my initial judgment) less any sum in fact paid to CW and CSM by way of salary during the relevant period. On this basis the claimants case under this head of alleged loss was quantified as follows:

(a) Directors' actual remuneration during each of the relevant years was:

2010 - £236,059

2011 - £171,592

2012 – £38,859

Total: £446,510

(b) Total notional remuneration at £177,000 pa = £531,000

(c) Total Dividends paid during each of the relevant years:

Year	CW and CSM	Class C Shareholders
2010	£520,896	£226,368
2011	-	£ 56,592

2012	£299,612	-	
Total:	£820,508	£282,960	
(i) Total Dividend:			£1,103,468
(ii) Div. / share	£37.80	£10.00	

(d) Amount of dividend attributable to salary:

(b) £531,000 – (a) £446,510 = £84,490

(e) Dividend net of salary element available for distribution:

(c)(i) £1,103,468 – (d) £84,490 = £1,018,978

(f) Amount of dividend per share:

(e) £1,018,978 -:- 50,000 shares = £20.38 per share

(g) Sum allegedly due to each claimant by way of damages:

((g) £20.38 – (c)(ii) £10.00) x 9204 shares = £95,533.47.

9. The claimants contend that there should be added to the figures referred to in paragraph 8(a) above the sums that each received from SPLC by way of pension contributions. The total pension contribution is agreed as a figure at £34,651.00. If the claimants are right then that increases the total referred to in (a) to £481,161 and thus would reduce the deductible referred to at (d). That assumes however that the sum of £177,000 (if otherwise an appropriate figure to use) includes pension payments. However, I do not accept that this is the position. That figure came from evidence from Mr Isaacs, the expert valuer called on behalf of the second defendant that I accepted. His evidence on this point is set out at paragraph 2.8.11 of his report. It is clear in context that he is referring to salaries. This is so because he refers in terms to salaries in the fifth line and combines that with national insurance to arrive at the relevant figure. That being so I reject the suggestion that the total referred to in (a) should be increased to £481,161.

10. The more difficult issue concerns whether £177,000 is the appropriate figure to adopt for the purpose of attempting to identify the true dividend element of the dividend payments made to CW and CSM. This issue is best addressed in the context of the submission made on behalf of both defendants that this head of claim fails on causation grounds.

11. The second defendant maintains that the dividend claim should be approached as a loss of a chance claim and approached in that way the first and critical question is whether, as a matter of causation, the claimants have established a real and substantial chance that the directors would have recommended greater dividends in favour of the claimants but for the conspiracy – see paragraph 6 of Mr Burroughs' written submissions. He submits that such a chance has not been established because, he submits, the likelihood is that CW and CSM would have awarded themselves salaries equivalent to the dividends that in fact they declared for themselves. He submits that

this follows because the enhanced dividends were paid to CW and CSM in lieu of salary and bonuses as a tax efficient means by which they could each be remunerated. If correct this submission would lead to the conclusion that no loss has been suffered because the sum paid out by SPLC to CW and CSM would broadly be the same whether taken as dividends or salary.

12. Much the same submission was made on behalf of the third defendant save that it is not made by reference to a loss of chance analysis. As Mr Mitchell put it in paragraph 12 of his written opening submissions, "*... it is not at all clear whether there were any true dividends: rather it seems that the directors paid themselves in dividends that which they believed they were entitled to by way of remuneration , i.e. salary plus bonus"*.

13. There are two points that need to be made about this approach. First, it assumes that the whole of the sum paid out to CW and CSM by way of dividend (or at least so much of the dividend paid to them as exceeds *pari passu* the sum paid to the claimants) was in lieu of salary and bonuses which would otherwise have been paid to them but does not establish that to be so. Secondly, there is no evidence whatsoever as to the basis on which the surplus dividend - by which I mean the amount of dividend paid to CW and CSM after 21 December 2009 in excess of what was paid *pari passu* to the claimants and other C shareholders - was calculated. The only people who could give evidence on that issue were CW and CSM and neither were called to give evidence by either defendant.

14. In my judgment the question whether the whole of the surplus dividend paid to CW and CSM was paid in lieu of salary depends in the end on inferences to be drawn from such material as is available in the form of contemporary documentation, bearing in mind that following Mr Marshall's concession referred to above, the ultimate onus of proving that at least some of the surplus dividend paid to CW and CSM was not in lieu of salary and bonuses but was "true dividend" in excess of what was paid *pari passu* to all shareholders rests on the claimants.

15. In my judgment the concession made on behalf of the claimants by Mr Marshall, whilst clearly right as far as it goes, does not reflect reality. By the same token, I do not accept the submission made on behalf of the defendants that the whole of the surplus dividend paid to CW and CSM was or should be treated as remuneration. My reasons for these conclusions are as follows.

16. As I explained in paragraph 113 of my initial judgment, the figure of £177,000 per annum was used for the purpose of calculating maintainable earnings and was the sum that would have to be paid to a person or persons doing the job carried out by CW and CSM at the date of valuation. As I explained when considering the impact on the fair valuation assessment of the dividends paid out after the date when the special resolution was purportedly passed, that is different from an assessment of what CW and CSM would have paid themselves by way of salary assuming it was not open to them to pay themselves by way of enhanced dividends – see paragraph 126 of my initial judgment. However, I accept that the figure of £177,000 per annum is of assistance in ascertaining the likely basic salary element of what CW and CSM would have paid themselves as I explain further below.

17. As Mr Mitchell observed in Paragraph 12 of his written opening submissions relating to damages, as best it can be judged on the material available CW and CSM paid themselves a combination of basic salary and a bonus each year before dividends. The best evidence that this was the approach adopted is contained in the document identified by Mr Mitchell – that is the claimants' notes of the 1st April 2011 meeting referred to in Paragraphs 80, 157(ii), and 163 of my initial judgment. The relevant part reads:

> "The Chairman then gave a resume of the previous year's positions and how one set of dividends in fact bridged two dividend years in order to be tax efficient… The Chairman then clarified that until the 'C' Class shareholders had caught up with the 'A' Class shareholders in terms of true dividends, no more dividends would be declared though there may be 'A' Class dividends to reflect bonus's earned on top of the basic salary, which would reflect the agreed bonus structure…
>
> …The Chairman then said that in Swains International Plc the Directors share a salary bonus of 20% of turnover gross net profits, then there was a dividend. He said in this company the two directors took 15%. In these circumstances, there was no financial cap it all depended on the gross net profit…"

18. That suggests that the practice was for each director to be paid an un-quantified basic salary plus a share of a collective bonus pot of 15% of what CW is recorded as calling "*gross net profits"*. It is unclear what this phrase means but probably means profits net of costs and expenses but gross of tax. I have no reason to suppose that what CW is recorded as saying was wrong as a matter of fact. What he is recorded as saying probably explains why the total remuneration paid to SPLC's directors was higher than the sector norm identified by Mr Isaacs.

19. SPLC's profit before tax for the relevant years was £723,000 (2010), £594,000 (2011) and £915,000 (2012) – see Paragraph 2.6.1 of Mr Isaac's report. At 15% that equates to a collective bonus pot for each of the relevant years respectively of £108,450 (2010), £89,100 (2011) and £137,250 (2012), which totals £334,800.

20. If it is assumed that a total of £177,000 per annum was payable to CW and CSM as basic salary, that leaves the sum of £84,490 (see paragraphs 8(a), (b) and (d) above) to be added to the bonus figure of £334,800 to arrive at the salary and bonus that was payable on the basis of what CW said at the 1 April 2011 meeting. This gives a total figure of £419,290.

21. If this figure is applied using the methodology set out above then the result is that £1,103,468 less £419,290 gives a distributable dividend of £684,178. If that is divided by 50,000, that gives a dividend of £13.69 per share. If the £10 per share paid to the claimants is deducted that leaves the sum of £3.69 per share, which multiplied by the number of shares held by each of the claimants would suggest an under-payment to each of them of £33,963 after rounding to the nearest pound.

22. I have asked myself whether I should assess the joint basic salary paid to CW and CSM over the three year period as being the actual sums treated as salary by them.

Taking this course would eliminate the need to add £84,490 to the bonus figure thereby reducing the amount of the dividends paid to CW and CSM attributable to salary and bonus by that amount and thus the amount deductible from the total dividend paid over the period in order to identify the true dividend element.

23. In my judgment there is no evidence that enables me to adopt that course, even applying the approach set out by Gloster J referred to in paragraph 4 above. There is no evidence that would support a conclusion that it was only bonus that was taken by way of dividend during the relevant period. It is difficult to see how the salaries actually paid as such during the period I am considering could be true "*basic salary"* given the wild fluctuations in amount from year to year – see paragraph 8(a) above. Conventionally fluctuations in profit would affect bonus, not basic salary. CW is recorded as saying in the notes of the 1 April meeting referred to above that " … *one set of dividends in fact bridged two dividend years in order to be tax efficient* …" The year referred to is 2010, when the sum of the dividends paid to CW and CSM was £520,896. There is no obvious mathematical relationship between the amount of the salary actually paid and the amount of the dividend paid to CW and CSM over the relevant years even if the dividend for 2010 is divided by 2 to reflect the point made by CW at the meeting on 1 April. Had CW suggested that it was only bonus that had been taken by way of dividend (as opposed to him saying that would be the position for the future), then I might have been able to conclude that basic salary was limited to the sums received as such during the relevant years. However, that is not what he is recorded as saying and that was not the basis on which the multi class share structure was adopted, which was to enable directors remuneration (necessarily in this case including both basic salary and bonus) to be paid by way of dividend.

24. I have also asked myself whether I can safely assume that the salary element payable to CW and CSM would not exceed £177,000 per annum. In my judgment it is improbable that basic salary would have exceeded the figures identified by Mr Isaac given the way that directors' bonuses were provided for.

25. Mr Mitchell submitted that I should conclude that the whole of the sums paid to CW and CSM (or at any rate so much of it as exceeded the *pari passu* equivalent of the sums paid by way of dividend during the relevant period to the claimants) should be regarded as salary and bonus because the claimants had accepted that the directors were entitled to all the sums they had in fact received by way of dividend. He submits that a paragraph of the claimants' note of the 1 April meeting supports that contention. That paragraph is as follows:

> "A request was then made by the three shareholders for a short break to consider their position, and on their return it was said that all three of them accepted the explanation given…"

Mr Burroughs makes a similar point which he submits is supported by the willingness of the claimants to go along with the original formulation of the special resolution for the purpose of enabling the directors to be paid by dividend rather than salary. In my judgment each of these points is misplaced for the following reasons.

26. In relation to Mr Burroughs' point, whilst I accept that CSM explained to the claimants that the purpose of splitting the shares into different classes was to enable

CW and CSM to be paid by dividend rather than salary – see paragraphs 53, 57 and 58 of my initial judgment - I also found that CSM told each of the claimants that it would make no difference whether they turned up to the meeting or not because the resolution of which notice had been given would "*... go through and be passed in any event ...*" and that their attendance would make no difference – see paragraphs 53, 56, 57 and 58 of my initial judgment.

27. Two points arise from these findings. Firstly, whilst there is no doubt that the claimants were told that the purpose of the resolution was to enable CW and CSM to be paid by dividend rather than salary, they were not told that the mechanism would be used to declare dividends in favour of CW and CSM that was in excess of the salary and bonus to which they would otherwise be entitled, and the dividends paid *pari passu* to all shareholders. More importantly each was told either directly or indirectly that the resolution would be passed whether they attended the meeting or not, when, as CSM knew, that would not have been the case if they had attended the meeting and voted against the resolution. In those circumstances, I do not accept that it can be inferred from the claimants' non attendance at the meeting on 21 December 2009 that they approved payments by way of dividend to CW and CSM of any figure that they chose. The effect of being told that the resolution would be passed whether they attended or not is to prevent it being necessarily inferred from their non attendance that they supported that conclusion. Even if that is wrong, the most that can safely be inferred is that they approved payment by way of dividend to CW and CSM of the sum representing basic salary and bonus in addition to a dividend payable *pari passu* to all shareholders.

28. Mr Mitchell's reliance on what happened at the meeting on 1 April likewise does not support the inference for which he contends. The explanations apparently accepted were (a) one concerning a dividend bridging two dividend years ostensibly paid to CW and CSM in order to mitigate their tax liabilities, (b) that CW and CSM were entitled to a basic salary and a bonus based on a share of 15% of the profits made before tax but after costs and expenses, (c) that no more "*true dividends"* would be paid to CW and CSM until the C shareholders had caught up and (d) that any additional dividend paid to CW and CSM in future years would be limited to the bonus to which they would otherwise have been entitled. CW did not inform the claimants that the total of true dividend paid to CW and CSM exceeded that paid to the claimants other than in respect of the double payment in 2010. In my judgment, it cannot be inferred from the claimants' acceptance of the explanations given by CW at the 1 April meeting that they agreed, or did not object, to CW and CSM having received "*true dividends"* in excess of those that were received by the claimants and other C class shareholders. The only explanation or promise that refers to true dividends was only that no more true dividend would be paid to CW and CSM until the C class shareholders had caught up.

29. In those circumstances, I agree with Mr Mitchell's statement in paragraph 12 of his written submissions that the claimants' "*... objection was to the apparent inequality in "true" dividends ...*". However, for the reasons set out above, I do not accept the other proposition set out in that paragraph namely that there were not any true dividend inequality. There was, as I have explained above, albeit not of the magnitude suggested by Mr Marshall.

30. I do not accept the submission made by both defendants that it can be inferred that the claimants would not have objected to CW and CSM attempting to pay themselves by way of salary and bonus sums in excess of what CW explained they were entitled to at the meeting on 1 April. Had they realised that they were entitled to attend and vote at general meetings, I have little doubt that the claimants would have challenged CW and CSM much as in fact they attempted to in the years that followed, albeit from a position that they perceived to be weak. If that had happened then, unless and until CW and CSM resigned, they would have been paid basic salary, a bonus calculated in the manner described above and dividend paid to each of them pari passu with the claimants and other non executive shareholders. No greater bonus could be justified given what CW said at the meeting on 1 April and inflation of basic salary would have become apparent from basic shareholder enquiries and information.

31. There remains one issue in relation to this head of claim and that concerns the submission made by Mr Burroughs that this head of loss should be evaluated as a loss of a chance claim and thus that I should discount from the figure I have arrived at as set out above. Mr Burroughs submitted that this approach was justified because the "*... quantification of the loss was dependent on the actions of a third party ...*" – see paragraph 16 of his written submissions. The basis for his submission that there should be a discount of between 70 – 75% from the figure otherwise arrived at was that there was "*...little chance ...*" of CW and CSM recommending "*... the additional dividends ...*".

32. In my judgment this argument must be rejected. I do not agree with this approach at a factual level. There would be retained profits after basic salary and bonuses had been paid out to CSM and CW. It is highly unlikely that such profits would not have been available for distribution as a matter of law. None of the experts have suggested that such was or could be the case, nor have either of the defendants. In fact they were distributed as dividends, albeit differentially. Had there been a need to retain capital within the company for any purpose then that would have been as much a consideration when the differential dividends were declared as it would be hypothetically in the event that the special resolution purportedly passed had not been relied on. In those circumstances the interest of the claimants and CW and CSM would have been identical – that is to release as much of the profits made by the company as was lawful and commercially prudent. I think it highly probable in those circumstances that CW and CSM would have declared dividends to the maximum extent possible because such was in their own interests as well as those of the claimants. That being so, if this was a loss of a chance claim and if, therefore a discount had to be applied to the sums otherwise recoverable, the discount that I would have applied would be the minimum or close to the minimum that such an approach required.

33. In any event I am not persuaded that this claim is properly to be regarded as a loss of a chance case. This is not a case where damages are sought for loss of an opportunity to participate in something that if the claimant had been able to participate would have exposed to him or her to a chance of recovering something, as for example where the person has lost the chance of success in a competition or litigation – see Wellesley Partners LLP v. Withers LLP [2014] EWHC 556 (Ch) [2014] PNLR 22 *per* Nugee J at paragraphs 183 and 187, following the statement of principle contained in

paragraph 21 of the judgment of Patten LJ in Vasiliou v. Hajigeorgiou [2010] EWCA Civ 1475.

34. In my judgment this case falls into the category of case identified by Nugee J in paragraph 188(4) of his judgment in Wellesley Partners LLP v. Withers LLP (ante) – that is not that the claimants have lost the opportunity of acquiring a specific benefit which was dependent on the actions of CW and CSM but rather that they have been deprived of the right to receive dividends paid to them *pari passu* to those paid to CW and CSM. Once it has been concluded that such is the case the remaining question is what on the balance of probabilities would the claimants have received had they been treated in this manner. In my judgment, for the reasons that I have explained above, they would have received by way of dividend what in fact they received plus their proper share of the remaining distributable profits after CW and CSM had received their proper salary and bonuses.

35. In those circumstances I conclude that each claimant is entitled to recover by way of damages in relation to the conspiracy the sum of £33,963 in relation to the Dividend Claim.

The Discount Claim

36. The claimants' case in relation to this head of loss was summarised in paragraph 39 of Mr Marshall's submissions on damages as being that "*... the most damaging consequence of the conspiracy ... was that the claimants were denied an opportunity to petition the court under s.994 ...*" and that had such a petition been presented, they would have recovered the value of their shares without any discount for their respective holdings being a minority interest, applying the reasoning of Lord Hoffmann in O'Neill v. Phillips [1999] 2 BCLC 1 at16*h* and Strahan v. Wilcock [2006] BCLC 555. In my judgment, his head of claim is unsustainable for the following reasons.

37. Mr Burroughs submitted firstly that this was a head of claim that was not pleaded, was not otherwise argued for until recently and thus was one that the claimants ought not to be permitted to rely on. Although Mr Marshall maintained that this claim (or at any rate the basis of it) was one that had been in issue throughout, in my judgment that submission is mistaken. My reasons for these conclusions are as follows.

38. The claimants' pleaded case as to damages is set out above. None of the three heads of loss pleaded in the Particulars set out in paragraph 125 of the Particulars of Claim even arguably include a claim formulated on the basis now relied on.

39. There was no mention of this as being the basis for a claim in damages in Mr Marshall's opening submissions. However, in his written closing submissions he set out at paragraph 66, under a heading of "*Discounting – Law*", a selection of quotations from Re Sunrise Radio Limited [2010] 1 BCLC 367 – a case concerned with the valuation of shares in the context of an unfair prejudice petition brought by a minority shareholder pursuant to s.994 of the Companies Act 2006 – before acknowledging in paragraph 67 that it might be anticipated that the defendants would object to such an approach being adopted in this case because Re Sunrise Radio Limited (ante) was concerned with relief under s.996 (which accords a wide discretion to the court) rather than the contractual position that applied under the

Options. Mr Marshall then continued: "*... the court is nonetheless concerned in doing justice in putting Cs, so far as payment of money can do this, in the position of (1) for damages for tort(s) of no conspiracy having been committed ... in which case Cs would still own their shares CW being unwilling to buy them out for any higher price – and they would have de facto control of the company ...*" and should also adopt such a course when assessing fair value under the Options.

40. This submission failed in relation to the assessment of the fair value of the claimants' shares for the reasons set out in paragraph 102 of my initial judgment, where I record the meaning of fair value in the context of a valuation in accordance with the terms of the Options, paragraph 122, where I record my conclusion that a valuation exercise that otherwise may be appropriate in the context of assessing relief under s.996 of the Companies Act 2006 is not the valuation exercise that I was (or the auditors were) required to carry out under the Options, and paragraph 129, where I record my conclusion that in context arriving at fair value required that value be assessed by reference to the interests of both parties in the transaction to which the assessment was relevant. However, I accept that in paragraph 66 of his closing submissions, Mr Marshall also identified the point I am now considering by reference to the damages recoverable in respect of the conspiracy claims at that stage. The point remains however that a claim on this basis was not pleaded and was raised for the first time in relation to damages only in the course of closing submissions. Prior to that the issue had been raised only in the context of an assertion that the assessment of fair value in the relevant contractual context required the exercise to be approached as if the claimants had succeeded in a s.994 petition.

41. Mr Burroughs submits that his client has been prejudiced by this approach. He submits that had they known that the claimants were seeking to establish that SPLC was a quasi partnership and that damages were to be assessed on the basis of any difference between what the claimants might have been entitled to recover under a s.994 petition and the claimants' entitlement under the Options, then (a) an application to lift the stay of the proceedings as against SPLC would have been made for the purpose of obtaining disclosure relevant to that issue and (b) additional evidence would have been adduced concerning the background of SPLC, the relationship between Mr Swain and CW and the relationship between Mr Swain and the claimants in relation to the latter's role as shareholders.

42. I accept Mr Burroughs' submission that had this issue been identified in the pleadings then the manner in which SPLC operated would have been explored in much greater detail before and at trial, and I also accept that it is probable that disclosure would have been sought from SPLC on matters going to this issue.

43. Even on the material that is available I consider it strongly arguable that SPLC was not a quasi partnership. I fully accept that where the family relationship is as important as the relationship governed by a company's articles of association, that may justify a conclusion that the company concerned is a quasi partnership even though some of the usual indicia of a quasi partnership may be missing; and I also accept that where one family member inherits shares in such a company from another family member that may entitle the person inheriting to maintain that the company remains a quasi partnership – see Fisher v. Cadman [2006] 1 BCLC 499. However,

whether that is so or not is a highly fact sensitive question – see Fisher v. Cadman (ante) at [89].

44. SPLC did not have the characteristics normally associated with a quasi partnership. Amongst other relevant considerations are that (a) SPLC was a Plc; (b) it had shareholders other than CW and Mr Swain and his family but all shareholders formed a single class – see paragraph 10 of my initial judgment; (c) none of the claimants at any stage had any managerial role to play within the company; (d) shares were transferred to the claimants solely as a means of providing them with an income and were accepted by them from him on that basis – see paragraph 13 of my initial judgment; (e) the structure insisted upon by Mr Swain was intended to ensure, and ensured, that *de facto* control was maintained by Mr Swain specifically because he considered that non-executive shareholders in companies controlled by him should not interfere in the operation of the business concerned – see paragraph 11 – 12 of my initial judgment. SPLC was not an association formed on the basis of mutual confidence between Mr Swain and his daughters – it was formed by Mr Swain who decided that his daughters should incidentally benefit from the fruits of that association. It is undoubtedly the case that the claimants trusted Mr Swain implicitly and thus to look after their interests as shareholders, but that is different from the sort of trust that is material when considering whether a company is to be treated as being a quasi partnership, where the focus is on the management of the company and its business activities. It was not the understanding that the claimants or any of them should participate in the conduct of the business. I accept that the relationship between CW and Mr Swain would have been a critical consideration in deciding this issue since it is difficult to see how a company could be a quasi partnership as between him and Mr Swain but not between the other shareholders. However, there is no evidence that the relationship between CW and Mr Swain went beyond the bounds of a close commercial relationship.

45. The issue I am now concerned with is different from that which arose in relation to the fair valuation issue. There the argument was that the principles that might otherwise apply in the context of a s.996 assessment should be applied by analogy and was resisted on the basis that such an approach was not applicable to a contractual assessment of fair value for the purposes of a sale under the Options. It is only in the context of a claim that damages recoverable in respect of the first conspiracy are to be assessed on the basis that its effect was to deprive the claimants of an otherwise winnable claim under s.994 that the question whether SPLC should be regarded as a quasi partnership becomes material.

46. All this leads me to conclude that Mr Burroughs' submission that the claimants should not be permitted to advance this claim ought to be accepted. If it was to be argued then it required much clearer and earlier identification than it received, and greater factual investigation than was undertaken before and at trial. Even if (as I think is probably the case, although the point was not argued on this basis) the Discount Claim is properly to be regarded as a claim based on loss of a chance, and thus that the claimants have to establish only a real and substantial chance that they would have succeeded in such a claim, Mr Burroughs's point remains a good one.

47. The pleading point is however something of a distraction because even if I am wrong in my conclusions concerning that point I am in any event satisfied that the claim

advanced under this head should fail because the loss of the right to commence s.994 proceedings was not caused by the Conspiracy.

48. Mr Marshall submits that to be able to present a s.994 petition, a petitioner must be a registered holder of a share or shares in the company concerned – see Eckerele v. Wickeder Westfalenstahl GmbH [2014] Ch 196. I accept that submission. Indeed, for as long as someone is registered as a holder of a share or shares in a company, he or she has standing to make a claim under s.994 – see Baker v. Potter [2004] EWHC 1422 [2005] BCC 855. There is no evidence as to when the claimants ceased to be registered holders of the shares. The evidence establishes only that (a) the Options were exercised on 22 February 2012, and (b) the stock transfer forms signed and supplied at the time the Options were signed by the claimants were submitted for stamping on 28 February 2012. It is alleged in paragraph 97 of the Particulars of Claim that the C shares including those owned by the claimants were transferred to SPLC on 19 March 2012. When if at all the claimants ceased to be the registered holders of the shares is unclear. On any view the claimants had between January 2010 and 22 February 2012 to present a s.994 petition but did not do so even though they were advised by lawyers intermittently throughout that period and even though whether the shares carried voting rights was entirely immaterial to whether the claimants had standing to present such a petition. For much of that time the claimants were aware that the special resolution had not been validly passed and were complaining that they had been treated unfairly by being paid lower dividends than CW and CSM.

49. If and for as long as the claimants remained registered shareholders they could have commenced s.994 proceedings. If and to the extent they ceased to be registered shareholders, and thus lost the right to bring such proceedings, that occurred because the 2004 and 2009 Options were exercised. As I noted at paragraph 100 of my initial judgment, it was not alleged by the claimants at trial that the Options were exercised in breach of contract or duty owed to the claimants, or that the Options ought to be set aside. In the absence of such a challenge the sale of the shares and the loss of the claimants' ability to bring s.994 proceedings was the result of the exercise of the Option not the Conspiracy.

50. The Conspiracy is not and never has been alleged to have been concerned with the exercise of the Options. The allegations made by the claimants are pleaded in paragraphs 63 – 67 of the Particulars of Claim. The Conspiracy has always exclusively been alleged to have been for the purpose of depriving the claimants of the rights that attached to the shares they were allotted or which were transferred to them following the death of Mr Swain. It has never been about them ceasing to be registered shareholders or even owners of the shares. As is pleaded in Paragraph 63 of the Particulars of Claim:

> "In or about December 2009 Mr Wilson, Ms Swain Mason, Mr Kirby and Mr Berry or any two of them, with intent to divest the Claimants of their lawful rights in the shares as provided by Table A, conspired and combined together to seek to divest the Claimants of their rights under the Articles in the shares bequeathed to them by their father and to obtain for Mr Wilson and Ms Swain Mason the voting rights in all the issued share capital in the Company …"

None of the unlawful means alleged thereafter refer to the exercise of the powers conferred on the trustees by the Options. As I have said already, it was open to the claimants to present such a petition at any time after 21 December 2009. That the claimants believed the shares carried no voting rights was entirely immaterial because they had standing to present such a petition by virtue of being registered shareholders in SPLC. In those circumstances I conclude that the claimants' claim for damages under this head fails.

Disposal

Damages

51. Each claimant is entitled to recover as damages for conspiracy the sum of £33,963 being a total sum of £101,889.

Interest

52. In relation to interest, Mr Marshall submits that the claimants should be permitted to recover interest at the rate of 3%. Mr Burroughs submits that the claimants should be permitted to recover interest at the rate of base rate plus 1%. Conventionally interest is awarded at a commercial rate. This is almost invariably treated as being a percentage in excess of current bank rate. The authorities suggest that a range of between 1 and 3% above bank rate is appropriate with large and sophisticated commercial entities recovering usually a lower uplift than others. There is no evidence as to the rates at which the claimants can borrow commercially or as to their status for such purposes. Working on the basis that they are individuals who are solvent but not very wealthy, I conclude the appropriate rate to adopt is base rate plus 1½%.