Case No: HC/2013/000295

[2015] EWHC 2585 (CH)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday 24th June 2015

BEFORE:

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

BETWEEN:

SWAIN AND OTHERS

Claimants/Applicants

- and -

MILLS & REEVE (A FIRM)

Defendants/Respondents

MR PAUL MARSHALL (instructed by **W Legal Ltd**) appeared on behalf of the Claimants/Applicants

MR PAUL MITCHELL (instructed by **Clyde & Co & Co** appeared on behalf of the Defendants/Respondents

Judgment
(Approved)

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

HIS HONOUR JUDGE PELLING QC:

1. This is an unfortunate hearing which has been necessary because of a difference of opinion between the parties, being on the one hand the claimants' (represented by Mr Marshall) and both defendants (on this occasion, represented by Mr Mitchell) concerning the form of order that ought to be made in this case.

2. Some months ago now on 5 May 2015 an order was formulated, essentially by agreement between the parties, carrying into effect the main substantive judgment that I had delivered in these proceedings. The agreement between the parties, as carried into effect in the draft order provided at paragraph 1, that a valuation by Kirby & Haslam Limited, as experts, be set aside and at paragraph 2:

> "It is declared that the price payable by the Second and Third Defendants to each Claimant under the 2009 Option granted by her is £41,866."

3. The issue which arises is whether or not interest should be paid by the defendants and if so for what period in relation to the sums declared to be due. The submission which is made on behalf of the defendants in essence is: The only relief that, in truth, the claimants were entitled to was the declaration which they set out in the order that had previously been agreed between the parties. A declaration is incapable of carrying statutory interest and, therefore, the provision for interest sought by the claimants is one unknown to law and should not be incorporated into the order.

4. The submission made by Mr Marshall (on behalf of the claimants) was that this was always an action for the price. The price payable was fair value and fair value was not paid and, in consequence, there should be judgment for the sum which was due; the fair value (as assessed by me) and that interest should be entered in any such judgment from the period in 2012 when the auditors erroneously fixed a fair value.

5. It is necessary now that I refer to the contractual provision which lies at the heart of this dispute. Paragraph 1.3 of each option provided, insofar as is material for present purposes, as follows:

> "The price the Trustees will have to pay to the Shareholder for the shares when the share option is exercised being the value of the shares at the date of service of the option notice less (a) one quarter of the costs payable by the Claimants or any of them to the Defendants in the case of Claire Swain Mason and other Claimants and Mills & Reeve Defendants under Claim Number HC 09C00727 (b) one quarter of any outstanding liability for Inheritance or Capital Gains Tax as may be payable by the executors of CJ Swain deceased to H.M. Revenue & Customs (the deduction). The value of the shares (before the deduction) shall be a fair value for each of the shares and the value of the deduction

> shall be determined by the auditors for the time being of the company acting as expert not arbitrators…"

6. As will be apparent from this extract, the provision was incompetently drafted, as I highlighted in my main judgment in these proceedings. As I decided in my main judgment in these proceedings, the fair value obligation is one which applied, on proper construction, to the valuation of the shares. In those circumstances, as properly construed, the value of the shares that had to be paid by the trustees to the shareholder was fair value, but it was fair value, as determined by the auditors for the time being of the company, acting as experts not arbitrators.

7. What happened, as is apparent from my main judgment in these proceedings, was that the auditors arrived at what they certified to be their value. They did so using a valuation mechanism, which I concluded on the basis of the evidence available to me, was a mechanism that no reasonable auditor could properly have used in arriving at fair value for the shares. This resulted in me setting aside the valuation and arriving at a fair value in respect of the auditors. All of this is fully explained in the judgment that I gave. In paragraph 100 of my judgment I said this:

> "It was only following the amendment made to the Prayer that the relief claimed included a claim for an order that the K&H valuation be set aside and that the court should value the claimants' shares. In my judgment the breach of contract claim is bound to fail (given the concession on behalf of the claimants that fair value was subject to expert determination under the 2009 Options) unless the K&H valuation is set aside, since the only obligation resting on the Trustees is an obligation to pay the price certified by K&H unless its valuation is set aside. If it is, then the obligation of the Trustees is to pay a price based on the true fair value of the shares. "

8. The submissions which were made by Mr Marshall in relation to the issue I am now considering come to this - that the effect of setting aside the valuation certified by the auditors is that the valuation is void. That means it is void for all purposes, which means that the obligation to pay is an obligation which has never been satisfied or was only satisfied when the sum I found to be fair value was paid and thus there should be judgment for the sum concerned and interest should follow.

9. The submission which is made on behalf of the defendants is, in essence, this: There was no obligation that rested on the defendants, as trustees, to pay any sum other than the fair value, as certified by the auditors. Therefore, they could not be and were not in breach of contract at any time prior to the setting aside of the valuation and, therefore, there should be no judgment in relation to the sum concerned, or if there should, it can only relate to the period after the setting aside of the auditor's certificate.

10. In my judgment, in relation to the issues that I am now considering, the defendants' submissions are to be preferred over those of the claimants. The submission which Mr Marshall makes in support of his position involves reading the phrase "fair value for each of the shares" as being the value that has to be paid for shares when the option was exercised and ignores the words which follow that is: "The value is to be determined by the auditors for the time being." In my judgment, as long as the auditors have certified what their value is there is no obligation, as a matter of contract, on the defendant to pay any sum save the fair value certified by the auditors. When the auditors' certificate is set aside and the court fixes the value then plainly that is dealt with in the first instance by declaration. The notion that that should in some way relate back to the date at which the option is exercised, in effect, ignores the provision within the contract that fair value was to be fixed by the auditors and imposes on the defendant an obligation for breach of contract in circumstances where, down to the date when the valuation certificate of the auditors is set aside, they were, in truth, not in breach of contract.

11. In those circumstances, and for those short reasons, it seems to me that the proper analysis is that advanced by Mr Mitchell and that therefore the order should remain in its current form. In the course of his submissions on behalf of the claimant, Mr Marshall drew my attention to the decision of Gloster J (as she then was) in Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd [2006] EWHC 2896 and, in particular, what she said at page 4 of 11 of the judgment, namely:

> "I accept, therefore, Mr Gaisman's basic submission that absent express agreement, interest should generally be payable from the date of cause of action for the relevant payment arose because it is from and after that date that the claimant has been kept out of his money." (Quote unchecked)

12. That is with respect undoubtedly correct, but the submission made by reference to the principle set out by Gloster J takes no account or rather assumes as correct the proposition that the defendants are to be treated as being in breach of contract even though they paid the sum, or perhaps a little more than the sum, that was certified as due by the auditors and which was their only obligation unless and until the auditor's certificate was set aside.

13. The other authority referred to by Mr Marshall was Wentworth v Wiltshire County Council [1993] QB 655 and to the judgment of Stuart-Smith LJ at page 688(h) to 669(b) where he said:

> "The purpose of awarding interest under section 35(a) of the Supreme Court Act 1981 is to compensate the claimant for not having received money when he should have done. This will mean that during the period that the plaintiff has been kept out of his money, he has either had to borrow it or use funds available to him which might have otherwise been profitably employed. The

ordered interest is compensatory not additional damages." (Quote unchecked)

14. Again, that is undoubtedly correct, but must be read in the context of this case against the circumstances that the auditors had issued their valuation certificate and no breach of contract could possibly arise, so far as the defendants were concerned, unless and until the certificate was set aside. The argument that the effect of setting aside the certificate entitles the claimant to claim damages for breach of contract from the date when the obligation to pay the price first arose, seems to me to ignore the basic fact that unless and until the certificate was set aside, the only obligation was to pay that which was certified. In those circumstances, I direct that, on this issue, the defendants' version of the order is the one to be preferred and should be sealed.