Neutral Citation Number: [2015] EWHC 660 (Ch)

Case No: HC13B00603

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/04/2015

**Before**:

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

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**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**

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**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 dates: 24-25 and 27 February, 2-6 and 13 March and 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

*The Dispute in Summary*

1. In these proceedings the claimants (who are sisters) claim against the second defendant and the third defendant (in his capacity as personal representative of Mr David Jonathan Berry Deceased ["DB"]) either damages for breach of contract by reference to an alleged failure on the part of the second defendant and DB, in their capacity as Trustees of the Swain Employees' Trust ("SET"), to pay the true *"fair value"* for the claimants' shares in the first defendant ("SPLC") under the terms of an option or options in their favour granted by the claimants or an Order setting aside an auditor's certificate as to the fair value of their shares and a declaration as to the true fair value of those shares.

2. In the alternative the claimants claim damages for loss alleged to have been caused by an unlawful means conspiracy by which it is alleged that the second defendant and DB conspired with the claimants' sister Ms Claire Swain-Mason ["CSM"] (who is not and never has been a party to these proceedings) and Mr Charles Wilson ["CW"] (who also is not and never has been a party to these proceedings) to procure the sale of the shares to the SET at an undervalue for the ultimate benefit of CW and CSM. At all material times. CSM was a director of, and shareholder in, SPLC, and CW was the managing director of and a shareholder in SPLC.

*The Trial*

3. The trial took place between 24-25 and 27 February and 2-6 March 2015. I heard evidence from the following witnesses of fact namely each of the Claimants and the second defendant and from three chartered accountants who were called by the parties to give expert valuation evidence. Neither CSM nor CW was called to give evidence. I acceded to an application by the second and third defendants (which was opposed by the claimants) that the expert evidence be taken concurrently in accordance with the procedure set out in CPR Part 35 and CPR Part 35 Practice Direction. Having decided to adopt that course I directed that the experts were to meet throughout the trial as often as was necessary in order to see whether any further narrowing of issues or agreement could be reached. In the event no further narrowing of issues occurred prior to the experts giving evidence.

4. In the course of the trial the claimants made various applications to amend their Particulars of Claim. Where these were consented to, or not opposed, I permitted those amendments to be made. On the one occasion when amendment was opposed, the application was withdrawn. The only amendment of substance was to Paragraph (3) of the Prayer to the Particulars of Claim. This was consented to by Mr Mitchell, counsel for the third defendant, and was not opposed by Mr Burroughs, counsel for the second defendant. As amended this paragraph now reads:

> "And the Claimants claim:

…

> (3) A declaration that the valuation and purchase of the claimants' shares pursuant to the exercise of the options by the Trustees was at an undervalue and should be set aside and the court should value the claimants' shares"

I acceded to this application even though made by Mr Marshall in the course of his reply submissions because the issues that arise had been fully argued and Mr Burroughs did not suggest that his clients would be in any way prejudiced by the proposed amendment. It is difficult to see how he could be prejudiced since the validity of the valuation had been fully canvassed in the evidence and submissions and the issue concerning true value fully explored in the course of the trial with the assistance of the expert witnesses.

*Evidential Burden and Standard*

5. The claimants' conspiracy case is one that is founded on inferences that it is said I should draw either from the primary facts or from the timing and sequence of events. Since the second defendant is, and DB was, a respected professional, and since the allegations made against them are ones that impact on their honesty and integrity, it is right that I should remind myself that (a) the legal burden of proof rests throughout on the claimants, who must prove their case on the balance of probabilities, but (b) whilst the standard of proof in a civil case such as this is always the balance of probabilities, the more serious the allegation or the more serious the consequences of such an allegation being true the more cogent must be the evidence if the civil standard of proof is to be discharged – see Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 per Lord Nicholls at 586, where he said:

> "The balance of probabilities standard means that a court is satisfied that an event occurred if a court considers that on the evidence the occurrence of the event was more likely than not. In assessing the probabilities, the court will have in mind as a factor to whatever extent it is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence…Built into the preponderance of probabilities standard is a generous degree of flexibility in respect of the seriousness of the allegation."

Finally, I remind myself that if and to the extent that the Defendants advance a positive case, the evidential burden of proving that positive case on the balance of probabilities rests on them.

## Background and Factual Findings

*Background Down to 17 February 2007*

6. Mr Swain inherited from his father a company that subsequently became known as Swains International Plc. The business of that company was the wholesale supply of photography equipment. Swains International Plc prospered under Mr Swain's stewardship.

7. At all material times, Mr Swain was supported and advised by DB and the second defendant, respectively as his solicitor and accountant. DB was at all material times one of two directors in a solicitors' practice called Berry & Walton Limited that operated principally from an office at 8 King Street, Kings Lynn, Norfolk. The second defendant was one of two directors of Kirby and Haslam Limited, a company that carried on business as chartered accountants, tax consultants and auditors from premises at 11 King Street, Kings Lynn, Norfolk.

8. It is common ground that both DB and the second defendant were long standing advisors and confidantes of Mr Swain. The roles that each came to play over the years reflected that level of trust. Both were Trustees of the SET; both (together with CSM) were Mr Swain's executors; both were personal advisors to Mr Swain; and Kirby and Haslam Limited was accountant to and auditor of Mr Swain's companies, while Berry & Walton Limited acted as their legal advisor. The second defendant says in paragraph 17 of his statement that Mr Swain always used a small circle of advisors who he trusted. This is not disputed and I accept it as correct. The second defendant says in the same paragraph that the SET was set up with him and DB as Trustees precisely because he was Mr Swain's trusted accountant and DB was his trusted legal advisor. This is consistent with how Mr Swain operated and I accept it as correct.

9. By 2001, Mr Swain wanted to diversify the business of Swains International Plc into telecommunications and SPLC was formed as the vehicle to carry on that business. Initially all the shares in SPLC were held by Swains International Plc. Mr Swain did not have the knowledge and experience to operate in the telecommunications industry and so he recruited CW. CW was and is very experienced in that industry. SPLC was a successful venture. It was not disputed by the claimants that much of the success that followed was the result of CW's knowledge, experience and activity. Mr Swain's contribution to the success of SPLC was as its funder.

10. In 2003, the SPLC shares were transferred by Swains International Plc as follows:

| **Shareholder** | **Number** | **Holding** |
|---|---|---|
| Mr Swain | 27,136 | 54.27% |
| CW | 12,500 | 25.00% |
| CSM | 2,420 | 4.84% |
| 1st Claimant | 2,420 | 4.84% |
| 2nd Claimant | 2,420 | 4.84% |
| 3rd Claimant | 2,420 | 4.84% |
| Employees | 684 | 1.37% |

11. Transferring shares to each of his daughters was the means by which Mr Swain could provide them with an income in the form of dividends in a tax efficient manner. However, Mr Swain was anxious to maintain control of the shares that he transferred to his daughters for two reasons. First, it is common ground that Mr Swain considered that non-executive shareholders in companies controlled by him should not interfere in the operation of the business of the company concerned. Secondly he was concerned that the shares should not fall into the hands of non – family members whether as the result of matrimonial breakdown or otherwise.

12. Mr Swain's chosen method of transferring shares to his daughters whilst at the same time retaining control was to require each of his daughters to sign an option agreement (dated in each case 15 February 2004) (collectively "the 2004 Options") by which the beneficiaries of the 2004 Options (DB and the second defendant in their capacity as Trustees of the SET) could require the shareholder concerned to sell his or her shares in SPLC to them. In order to ensure compliance each shareholder was required to sign a blank share transfer form as well as the option. The beneficiaries of the SET did not include either DB or the second defendant or any of the claimants, CSM or CW.

13. None of the claimants gave these arrangements any thought at the time. The first claimant told me and I accept that her father told her in effect that signature of 2004 Option and blank transfer form was the price that had to be paid if she wanted to receive the shares and the income that went with it and that she gave no thought to the implications of what she was being asked to sign in essence because she knew that her father would look after her interests. I am satisfied that had any of the claimants considered the position at the time they would (rightly) not have considered this arrangement as one that created any personal risk for them as long as their father was alive. Each relied on their father to look after their interests. None of the claimants thought or had any reason to think that either DB or the second defendant would act otherwise than in accordance with their father's directions.

14. Each of the 2004 options contained the same terms. The price payable to the shareholder concerned on the exercise of the 2004 option applicable to that shareholder was defined by clause 1.3 as being "*... the value of the shares at the date of service of the option notice ...".* What constituted "*value*" was defined by clause 1.3 as being:

> "… a fair value for each of the shares as determined by the auditors for the time being of the company acting as experts not arbitrators having regard to all the circumstances including but without derogation from the generality the Shareholders fund shown on such accounts of the company as they think appropriate. "

The option period was from the date of the option to 1 January 2023. The option was exercisable in any of the circumstances identified in clause 6 of the 2004 Options including if "*... the Trustees in their unfettered discretion consider it fit and proper to exercise the option because they consider it is in the best interests of the company and/or the trust."* It was by reference to this power that the Trustees exercised the options in the circumstances described below. Save in one immaterial circumstance,

the price was payable within 28 days of service of the notice exercising the option or the certification by the auditors of the price, whichever was later. As will be apparent from what I have said so far, each of the options was separate and could be exercised independently of the other. This is not surprising given the reasons why this structure was adopted. It is also obviously the case that if the structure was to work, the SET would need to have the funds necessary to pay the price in the event that the 2004 Options or any of them were exercised.

15. On 31 January 2007 a management buy out of the Swain family's interest in Swains International Plc took place ("MBO"). The detail surrounding this transaction is not material to these proceedings. However on 17 February 2007, Mr Swain died unexpectedly in the course of an elective surgical procedure at a heart hospital in Thailand, the country where Mr Swain then spent much of his time. Mills & Reeve had been retained to act on behalf of the Swain family in relation to the MBO and to provide some tax advice in connection with the MBO. The result of Mr Swain's death was that his estate became liable to pay tax of in excess of £1.2 million that would have been avoided had completion of the MBO been postponed until after completion of the surgical procedure during which Mr Swain died.

*The Mills & Reeve Proceedings*

16. Mr Swain's executors (DB, CSM and the second defendant) brought proceedings against Mills & Reeve ("the M&R Proceedings") alleging that Mills & Reeve had acted negligently by failing to advise Mr Swain as to the risk of adverse tax consequences in the event that he were to die in the course of the operation. The claimants were joined into the proceedings as co-claimants on the advice of DB. The solicitors who acted throughout on behalf of the executors and the claimants was Berry & Walton Limited.

17. There was no *Beddoe* application for sanction to commence or continue the M&R Proceedings, apparently on the basis that all the beneficiaries of the estate were of full age and consented to the commencement and continuation of the proceedings. There is a significant conflict in the evidence as to what advice was given to the claimants concerning the M&R Proceedings. It is not necessary for me to resolve that dispute in these proceedings and it is undesirable that I should do so given that there are proceedings on foot between the claimants, and Berry & Walton Limited, in which that issue will have to be decided.

18. It is sufficient to record that the M&R Proceedings proved to be a disaster so far as the claimants, CSM and Mr Swain's estate were concerned. The M&R Proceedings were listed for trial initially commencing on 23 November 2010. On 24 November 2010, the trial judge acceded to a submission on behalf of the claimants in those proceedings that they be permitted to amend their Particulars of Claim and the trial had to be adjourned to be re-fixed in order to enable M&R to meet the amended claim. The reasons leading to that outcome are contained in the judgment at [2010] EWHC 3198. This resulted in an appeal by Mills & Reeve. The result of the appeal ([2011] EWCA Civ 14 [2011] 1 WLR 2735) was that permission to amend was set aside. The trial then proceeded on the basis originally pleaded and failed – see the judgment at [2011] EWHC 410; [2011] STC 1177. An appeal followed but that also

failed. The claimants in the M&R Proceedings were ordered to pay a significant part of Mills & Reeve's costs.

*17 February 2007 – 28 October 2009*

19. Under the terms of his will, Mr Swain left his residuary estate, and thus his shares in SPLC, to his four daughters in equal shares. Following Mr Swain's death his shares vested in his executors (DB, the second defendant and CSM) who held them (or, if they were sold, the proceeds of sale) on trust for each of CSM and the claimants. The executors did not make a distribution of the estate pending resolution of an Inheritance Act claim by Mr Swain's wife and pending resolution of the M&R Proceedings. The claimants began applying pressure for the shares to be distributed in accordance with the terms of Mr Swain's will, principally so that they could become entitled to receive dividends. The claimants' requests for distribution of the shares were passed to the executors via CSM.

20. DB was opposed to the transfer of the shares to the claimants (and CSM). The reason, which the second defendant says DB gave for this stance, was that if the M&R Proceedings failed then the estate would be liable for Mills & Reeve's costs and if the shares were distributed then there would be insufficient assets in the estate to enable those costs to be met. If that was the position then the executors would become personally liable. It was in order to address this problem that the second defendant says DB devised what I refer to hereafter as the 2009 Options.

21. The 2009 Options were prepared by DB or someone at his firm. I describe the process in more detail below. In the result the claimants were told that they would receive the shares only if they signed the 2009 Options, they each signed the 2009 Options and the shares were transferred to them in the proportions they were entitled to under Mr Swain's will. Following those transfers, the respective shareholdings of the shareholders in SPLC were:

| **Shareholder** | **Number** | **Holding** |
|---|---|---|
| CW | 12,500 | 25.00% |
| CSM | 9,204 | 18.41% |
| 1st Claimant | 9,204 | 18.41% |
| 2nd Claimant | 9,204 | 18.41% |
| 3rd Claimant | 9,204 | 18.41% |
| Employees | 684 | 1.37% |

22. There are a number of obvious peculiarities about the 2009 Options scheme. First and foremost, the 2009 Options are made between the shareholder concerned on the one side and DB and the second defendant on the other – but in their capacity as Trustees of the SET not in their capacity as executors of Mr Swain's estate. The SET had no responsibility for any of the costs of the M&R Proceedings. DB and the second defendant were not entitled to an indemnity in respect of any personal liabilities they incurred as executors from assets acquired and held by them in their capacity as Trustees of the SET, CSM was not entitled to an indemnity of any sort out of the SET

since she did not fall within the classes of beneficiary entitled to benefit from the SET and the estate was likewise not entitled to an indemnity from the SET. It is common ground that at no material time did the SET have assets that would enable it to acquire the shares if the 2009 Options were ever exercised other than the sums received from SPLC in the circumstances that I refer to below. As the second defendant accepted in the course of his evidence, and as was common ground before me, if the concern was to ensure that the shares were available to meet the obligations of the estate, then that could have been secured by a charge over the shares in favour of the estate.

23. I now turn to the terms of the 2009 Options. There was a separate option agreement made between DB and the second defendant as Trustees of the SET on the one hand and each of the claimants and CSM. The option was an option to buy all the shares in SPLC owned by the shareholder party at the "*share price"* within a period between the date of the relevant option (in each case 21 October 2009) and 1 January 2015. The events entitling DB and the second defendant to exercise the option were set out in clause 6.1 and were the same as those set out in the 2004 Options. The price was payable within 180 days of the service of the option notice or "*... certification by the auditors of the price ..."* whichever was later. There is a drafting error in the 2009 Options in that the price payable is described in clause 1.2 as being "*... the share price ..."* but the defined expression is "*The Price ..."* – see clause 1.3. This is an obvious error and I construe the phrase "*... the share price ..."* in the definition of the 2009 Options as being "*The Price ..."* as defined in clause 1.3 of the 2009 Options – that is:

> " … 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 HM 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 [SPLC] acting as experts not arbitrators having regard to all the circumstances including but without derogation from the generality the Shareholders fund on such accounts of [SPLC] and such evidence of the value of the deduction as they think most appropriate"

24. There are two differences between the definition of price in 2009 Options and that contained in the 2004 Options. First, the 2009 Options definition provides for deduction from what is otherwise the fair value of the shares of a quarter of the costs payable to the defendants in the M&R Proceedings and of any Inheritance or Capital Gains Tax. Secondly it provides that the amount of the deduction (but not, at any rate expressly, what constituted fair value) was be determined by the auditors for the time being of SPLC acting as experts.

25. The 2009 Options appear ill thought out in concept and defectively drafted. I have already drawn attention to one drafting error. More generally, the deductions are not in respect of any expense incurred by, or liability of, SPLC and thus it is not apparent why determination by the auditors of SPLC is appropriate or indeed necessary given that the costs would be assessed or agreed and the tax liabilities would be those agreed by the executors with HMRC, or assessed by HMRC. Secondly, any sum deducted from the price payable on the exercise of the option by DB and the second defendant in their capacity as Trustees of the SET would then became a SET asset. Such sums could not lawfully be made available by the Trustees of the SET to the executors of Mr Swain's estate either to meet taxes payable by the estate or to meet the costs of the defendants in the M&R Proceedings. None of the claimants, DB, the second defendant or CSM were within the SET's class of beneficiaries. It follows that the 2009 Options entirely fail to achieve their ostensible purpose namely to ensure that the executors could recall the shares from the claimants in the event that the estate did not have the means to meet all the tax liabilities and Mills & Reeve's costs of the M&R Proceedings. Finally it is worth noting that whilst the executors had duties to protect the interest of the claimants as beneficiaries of Mr Swain's estate, the Trustees of the SET owed no such duties to the claimants. The sole duties owed by the Trustees of the SET to the claimants were the contractual ones contained in, evidenced by, or implied into, the options. It is arguable therefore (though such is not an allegation pleaded in these proceedings) that the executors breached their duty to the claimants by requiring them to enter into the Options.

26. The definition of price in the 2009 Options does not make any express provision for the auditor to determine what fair value was whether as an expert or otherwise. It was conceded by Mr Marshall at the start of his closing submissions that this omission was a drafting error and that I should proceed on the basis that fair value was subject to an expert determination provision in similar terms to that contained in the 2004 Options. I am satisfied that this was a correct concession for Mr Marshall to have made because (a) clause 1.3 requires the auditor to have regard to the Shareholders Funds in the accounts of the company, which is a factor material to assessing the value of the shares not the value of the deductions and (b) because the price is made payable by clause 4 of the 2009 Options within 180 days of the service of the option notice or "... *the certification by the auditors of the price* ..." which implies that the auditor was responsible not merely for ascertaining the value of the deductions but also the fair value of the shares before applying the deduction. The omission of the reference to expert determination of the fair value to be attributed to the shares was simply incompetent drafting.

27. It is now necessary to consider another issue that developed no later than July 2009. In order to do so in the relevant context, it is necessary that I say something more about how the 2009 Options scheme came about.

28. As will be apparent from what I have said so far the effect of the transfers that took place in 2009 was that the claimants between them held 55.23% of SPLC's share capital and CW and CSM held 43.41%. The non-executive employee shareholders could not affect the relative positions of the claimants on the one hand and CW and CSM on the other. The result was that CW and CSM could not outvote the claimants and the claimants could block both ordinary and special resolutions proposed by CW and CSM. In effect they had control of SPLC as long as they voted together ("the

control issue"). Aside from the control issue it is common ground that it would be of benefit to the company in terms of the tax that it had to pay if CW and CSM were paid by or mainly by dividends. However, that could only be achieved if different classes of shares were created which allowed different dividend payments to be made to CW, CSM and the non-executive shareholders ("the remuneration issue").

29. In principle the remuneration issue could be addressed by creating three classes of shares each of which could be entitled to different dividends (one consisting of CW's shares, one consisting of CSM's shares and one consisting of the shares held by the non executive shareholders being the claimants and the shareholder employees of SPLC other than CW and CSM) but the control issue could only be resolved in favour of CW and CSM by total or partial disenfranchisement of the non executive shareholders or some of them.

30. I find that CW and CSM first started to consider the control issue no later than 29 July 2009. CSM and the second defendant thought that the shares should be transferred from the estate to the claimants and CSM by no later than 29 July 2009 – see the email from the second defendant to CW and CSM of that date timed at 13.21. In fact they were not transferred until the end of November 2009 as I describe below. As I have said the claimants were applying increasing pressure for the shares to be transferred. In her response email of the same date timed at 13.53, sent to the second defendant, CW and DB, CSM said this:

> "… Great news on the shares – Charles and I have decided that we will declare an £8 per share dividend when we are ready. I'm guessing [DB] is on the case with memo & art re voting reclassification of shares etc and the share option … We need to be booking a General Meeting for all shareholders, it would be useful if [CW] and I could meet you both directly prior to that meeting to ensure we all have our ducks in a row re the changes."

Three things are apparent from this email – first that in the minds of the sender and recipients of the email the issues concerning what became the 2009 Options and what CSM called the voting reclassification of shares were being considered at the same time and not later than the end of July 2009; secondly that division of the shares into different classes was not being contemplated at least at that stage as a tax saving mechanism but as a voting reclassification mechanism. If and to the extent that the tax saving benefits of paying CSM and CW by dividend rather than salary were considered as of importance at this stage it was not the primary consideration, which was the issue identified expressly namely voting reclassification. Finally, the email shows that it was recognised by the sender and recipients that a General Meeting of SPLC would be needed if changes of the sort being discussed were to be made. Inevitably that meant a general meeting to which all shareholders would be invited and entitled to vote. There is nothing within this document that suggests otherwise. Thus if and to the extent there was any conspiracy, it was not one that then existed as Mr Marshall accepted in the course of his closing submissions.

31. A draft of what became the 2009 Options was first produced by DB and sent to the second defendant on 12 August 2009 – see the letter of that date from DB to the

second defendant. The draft enclosed identified the company as being Swains International Plc. That of course was incorrect. This was a further example of incompetent drafting. The definition of price was in the same terms as that in the final version. The second defendant commented on the draft by letter of 18 August 2009 pointing out the error concerning the correct name of the company. DB sent the final version of the draft to the second defendant under cover of a letter dated 20 August 2009. What the purpose of this was is unclear though by implication it was to enable the second defendant to supply any further comments on the draft.

32. On 26 August 2009, a meeting of the executors took place. DB prepared an attendance note of the meeting. That note records that DB had been sent the stock transfer forms by which the shares were to be transferred from the estate to the claimants and CSM in July, that he had declined to sign them and was still unwilling to do so. It is striking that in relation to the 2009 Options (which by then were in their final form) DB records himself as saying that "*the contents were not a matter for the executors"*. Given that the ostensible purpose of the 2009 Options was to enable the shares to be recalled in order to meet contingent liabilities of the estate that might otherwise fall on the executors, and given the issue concerning the duties owed by the executors mentioned earlier, this was inexplicable. The note ends by recording that CSM was to liaise with her sisters over the signature of the 2009 Options and that the claimants "*... understood what was going on and they needed to get the Option signed if they wanted the dividend money ...".* Under cover of a letter dated 26 August 2009, DB sent the four option agreements to the second defendant. There is a note on the letter that says that the second defendant was to give the option agreements to CSM so that they could be signed at a meeting that was due to take place on 17 September 2009. The option agreements were passed to CSM.

33. On 2 October 2009, CSM emailed DB in these terms in relation to the 2009 Options:

> "… clause 6.1.4 seems to null any constraints on the Trustees … I am asking your advice as my solicitor should I sign this? If yes, please explain the potential consequences / protection of the Trustees not just taking over the business. …"

This was a reference to the clause that enabled the Trustees of the SET to exercise the option whenever "*... the Trustees in their unfettered discretion consider it fit and proper to exercise the option because they consider it is in the best interests of the company and/or the trust."* I have not been referred to any response by DB to this email. What CSM says in the part of the paragraph set out above is significant however. The contents of this letter are inconsistent with the existence of any sort of conspiracy at this date between CSM and CW, DB and the second defendant. Had there been such a conspiracy then CSM would not have been asked to sign one of the 2009 Options. This suggests to me that however wrong headed it might have been, the purpose of the 2009 Options was to protect the executors from any shortfall in the estate needed to cover tax and the costs of the M&R Proceedings. However, the letter reflects the fact that CSM understood that the block of shares to be held by the claimants and her amounted to a controlling shareholding of 73.64% - that is one that could block all resolutions and pass ordinary resolutions. It recognises that if the options were exercised then the Trustees of the SET would gain control of the company. It is therefore inconceivable that CSM did not know and understand at that

date that the shares vested or to be vested in her and her sisters carried full voting rights. The only comfort of any sort that appears to have been forthcoming appears to have been oral and as recorded on the email of 20 October that is that any decisions taken by the Trustees would be "*... for the benefit of the company and the individual ...*". This reflects an imperfect understanding of the duties of the Trustees of the SET.

*28 October – 10 December 2009*

34. The next event of importance was the preparation of a special resolution that was to be placed before a general meeting of SPLC which authorised a change in the Articles so as to create Class A, B and C shares and to make the Class C shares (which it was intended should consist of the shares held by the claimants and the non executive employee shareholders) non-voting shares.

35. It is common ground that this task was assigned by CW and/or CSM to the second defendant. It is or should be common ground that DB played no role preparing or reviewing the special resolutions in draft or the Notice convening the Extraordinary General Meeting ("EGM") at which the special resolutions amending the Articles were to be considered. I say this because there is no evidence that suggests that any of this material was sent to DB at any stage prior to the EGM. The evidence suggests that CW and CSM approached DB about the task but concluded that his fees would be too high and asked the second defendant to carry out the task instead. There is no evidence that suggests DB had any role to play concerning the amendment of SPLC's Articles.

36. The second defendant's evidence is that his company ("K&H") did not have the expertise to carry out the task of preparing the special resolutions or the Notice convening the EGM at which the special resolutions were to be considered and that it sub-contracted the task to Kestrian Company Services ("KCS"). I accept this evidence because it is corroborated by the documentation that is available including in particular correspondence and drafts sent by KCS to the second defendant.

37. There are no written instructions to KCS that have been disclosed and the second defendant maintains that the instructions were given orally. Under cover of a letter dated 24 November 2009, draft documentation was sent by KCS to the second defendant. That letter records that the second defendant was to "*... be responsible for calling the meeting of the company and recording the proceeds of the meeting"*. CSM chased for the relevant documentation in the course of a call to an employee of K&H that took place on 27 November 2009. CSM's chasing was reported on to the second defendant by the employee concerned on 27 November who described CSM as "*… clearly aggrieved …"* and added that "*... it might be good PR if you could find time to update Claire personally on this matter …"*. This suggests to me that by this date the amendment to the Articles was seen as an issue of primary importance by CSM and CW.

38. On 30 November 2009, the second defendant gave notice to the various shareholders of an EGM of SPLC to take place on 21 December 2009. It is common ground that both as a matter of law, and under the terms of SPLC's Articles, a minimum of 21 days notice of an EGM at which a special resolution was to be considered had to be given to each of its shareholders and that the Notice had to contain the terms of any

special resolutions that the meeting was to be asked to approve. It is also common ground that a 75% majority of those attending was required in order to pass a special resolution and that had any one of the claimants attended and voted against the proposed special resolutions they could not have been passed.

39. The first special resolution referred to in the Notice sent to shareholders was that the share capital be divided into A, B and C classes and provided for the allocation of the shares held by the current shareholders into classes A and C. It is probable that the document was not properly drafted because it placed the shares of both CSM and CW in the same Class A (notwithstanding that the purpose of the exercise included allowing for differential dividends to be declared for each of them as well as to the non- executive shareholders) and because it created a B class but did not reclassify any shares into that class.

40. The second special resolution provided that the A, B and C shares "*... shall rank pari passu in all respects except that the directors may at any time resolve to declare different dividends in relation to each class of shares and may also resolve to declare a dividend on one or more classes of shares and not on another class or classes."*. As is obvious, this failed to carry into effect what was plainly the biggest concern for CW and CSM namely a transfer of control away from the non-executive shareholders and principally from the claimants. I emphasise that there was nothing wrong in principle with SPLC's incumbent management wishing to remove control but, of course, in order to do so there had to be a lawfully passed special resolution.

41. Although these deficiencies do not appear to have been noted by the second defendant when he sent the Notice convening the EGM to SPLC's members, the absence of any mention of the disenfranchisement of the C shareholders was spotted soon afterwards. The second defendant maintains that it was he who discovered the defect. I reject that evidence. There was clearly a conversation between the second defendant and CW about this issue. This resulted in an email dated 4 December 2009 from the second defendant to KCS. In my judgment the terms of the email are clearly more consistent with the absence of any mention of the voting rights issue having been noticed by CW rather than the second defendant. After identifying that the terms of the notice and the special resolution to which it referred were defective because they do not specify a change so as to allow different dividends for different classes or disenfranchise the C shares, the email then continues:

> "This may well be to our advantage as I have just had a phone call from the managing director who is adamant that the "C" shares should have no voting rights. Will this cause a problem that the notice does not state the details of the "C" shares….
>
> … I would appreciate a reply in order put the managing director's mind at rest."

In my judgment the phrase "*I have just had a phone call from the managing director*" is consistent only with the problem having been spotted by CW and CW having initiated the call to the second defendant.

42. Under cover of an email and letter dated 8 December 2009, KCS sent a revised special resolution. It contained the following additional paragraph:

> "*As regards voting*
>
> The holders of the "C" shares shall not be entitled to receive notice of, or attend, or vote at any general meeting of the company."

In addition, KCS sent to the second defendant a Form SH10 that had to be signed as well as form SH8, which had been sent the second defendant with the original draft special resolution. The covering email and letter did not say that the revised proposed special resolution should be sent to members ahead of the meeting, nor did it say that the revised special resolution could not be passed without a new notice to members convening an EGM with the requisite minimum period of notice. The letter did however refer to conversations between the second defendant and KCS.

43. The second defendant accepted in the course of his oral evidence that he was aware that a notice convening an EGM had to contain the terms of any special resolution that it was intended should be put to the meeting, that the notice as sent out did not comply with this requirement having regard to the terms of the revised special resolution prepared by KCS and that he ought to have advised CW and CSM that the EGM be cancelled and a new Notice convening an EGM on a new date should be sent out. I accept this evidence because it is against the second defendant's interests and in any event it is inherently incredible that a chartered accountant of the seniority of the second defendant (particularly one who had undertaken the work of giving notice convening the EGM in the first place) would not know that to be so. I think it highly likely that this issue would have been discussed in the conversations that took place between the second defendant and KCS referred to in KCS's 8 December letter. It was an obviously likely topic of conversation in the circumstances.

44. So far as the disclosed written material is concerned, the next step is apparently an email from the second defendant to CW and CSM dated 10 December 2009 in these terms:

> "Attached amended resolution and another form that will now also need signing when meeting held and resolution passed.
>
> Please ring to discuss
>
> …"

The "*other form"* was the SH 10 sent by KCS to the second defendant at the same time as the revised draft special resolution.

45. This was a surprising email for the second defendant to have sent, given his state of knowledge concerning the defective nature of the notice that had been sent out and the need for a minimum period of notice to be given to all shareholders of an EGM at which a proposal for a special resolution is to be considered. It fails to advise that the revised special resolution cannot be passed at the EGM because the requisite minimum period of notice has not been given or that the meeting should be cancelled and a new meeting convened with a fresh Notice containing the terms of the special resolution that CW and CSM intend should be passed.

46. The second defendant maintains that there was no contact between him and either CW or CSM at any stage between the date of this email and the 21 December 2009 when the EGM took place. Given the importance to CW and CSM of the control issue, given that the second defendant knew that the notice convening the EGM was fatally defective so far as that issue is concerned, and given that his email of 10 December had asked CW and CSM to contact him about the revised draft Special Resolution that is surprising as well.

47. This is all the more the case because the second defendant ultimately admitted that there were a number of conversations between him and KCS prior to the delivery of the amended draft special resolution by KCS. He was cross examined about this issue, denied that there were any such conversations and when faced with the letter from KCS of 8 December that refers to such conversations then said that obviously he had spoken to KCS. There is no evidence as to the substance of these conversations from the second defendant. There is no attendance note of these or indeed any other conversation or meeting that the second defendant participated in, even though it is clear from other attendance notes disclosed in these proceedings that employees of K&H did keep such notes. I consider it highly likely that the need for a new or revised Notice convening the EGM was discussed by the second defendant in his conversations with KCS and also the fact that the EGM could not take place on 21 December as planned if a revised Notice was sent to SPLC's members.

48. At paragraph 44 of his statement the second defendant says that he did not have "*... the knowledge and expertise to do any form of company statutory work ... I certainly do not have any real knowledge of statutory requirements ...*". If this was intended to suggest that he did not understand the significance of the defect in the draft resolutions and Notice of EGM then I reject it because (aside from the points I have mentioned already) he accepted in cross examination that the EGM notice requirements were elementary and that once he received the revised special resolution he knew that a revised notice would need to be sent out and that he would require a new date for the meeting. Indeed, in my view that is likely to have been the subject of discussion between him and KCS in the conversations I have referred to above and I find that is why he included in his 10 December email a request that CW and CSM contact him by phone to discuss the revised draft special resolution.

49. The second defendant's evidence in relation to the issue I am now considering is not satisfactory and in my judgment he has failed to give me a full and frank account of what occurred between 30 November and 21 December 2009. All this leads me to conclude that I should be cautious about accepting the evidence of the second defendant save where it is admitted, is corroborated by contemporaneous documentation or is against his interest.

50. I now leave the contemporaneous documentation because there is none between 10 and 21 December 2009 and turn to the evidence of the claimants.

51. In my judgment the claimants were each transparently honest witnesses who did their best to assist me to the best of their abilities and recollections concerning the events with which I am concerned. Having heard and seen each of them give evidence, I am satisfied that none of them are sophisticated business people with either knowledge or experience of corporate governance issues. They were almost entirely dependent on

their father in relation to most business issues while he was alive and I am also entirely satisfied that following Mr Swain's death they thought that they could rely on CSM in much the same way that they had relied on their father. Where there were inconsistencies demonstrated in their evidence I am entirely satisfied that this was the result of innocent mis-recollection of the detailed order of some events.

52. The claimants say and I accept that CSM acted throughout as the conduit between the executors, the Trustees and the directors/other shareholders in SPLC on the one hand and the claimants on the other.

53. The first claimant says at paragraph 30 of her statement and I accept that she raised the subject of the EGM with CSM sometime in "*... in early December ...*" after the receipt of the notice convening the EGM. I accept this not merely because CSM did not give evidence and thus there is no evidence to contrary effect but because in the circumstances that is precisely what I would expect to have happened. She says and I accept that in the course of the conversation between her and CSM concerning the EGM, CSM told her:

> "…the proposed resolution did not involve any real change to the existing arrangements, and that the resolution would go through and be passed in any event. Claire explained that the purpose of the resolution was to facilitate the payment by the company of remuneration for the directors by way of dividends rather than salary, and that this was considered to be more tax efficient. Claire said that this would make the company more profitable for all the shareholders. She said that in the event there would be no purpose in Christa, Gemma or I attending, as we had no voting rights. I had always understood from dad that our shares did not have voting rights and that only those who worked in the business had voting rights. I therefore believed what Claire was telling me. It seemed that Claire was discouraging me from attending."

54. I accept that Mr Swain's view was that only those who were executive directors of a company controlled by him should decide issues concerning the affairs and future of the company concerned. I also accept that this view was one of his motives for requiring each of his daughters to execute the 2004 Options as the price of receiving shares in and therefore dividends from SPLC. Although that is not the same as saying that the shares transferred to each daughter did not carry voting rights, I can well understand how, and I accept that, in the mind of at least the claimants this distinction was not apparent. As long as their father was alive, the point was simply immaterial to them because he looked after their interests and they knew and understood that to be so and at least one of the claimants said that while Mr Swain was alive, they were not invited to general meetings.

55. However, it had been entirely clear to CSM since at least 29 July 2009 that the shares held by her and her sister carried voting rights and that between them they controlled the company, as is apparent from her email to the second defendant of that date referred to above, from her email to DB dated 2 October 2009 seeking advice concerning the terms of the 2009 Options and from the fact that she was a party to the

instructions for the preparation of draft resolutions to split up the shares and disenfranchise the shares held by the claimants. The evidence is not sufficiently certain to enable me to say whether the conversation between CSM and the first claimant took place before or after the second defendant had sent his email of 10 December 2009 but it probably does not matter. In my judgment on the evidence available to me CSM plainly misrepresented the position to the first claimant in circumstances where what was proposed could benefit only CW and CSM, and that even one of the claimants had sufficient votes available to defeat the special resolution. It is not necessary for me to reach any conclusion as to whether CSM was acting dishonestly in saying what she said.

56. The first claimant told me and I accept that had she been told that her shares carried voting rights and that had she known that a special resolution was to be proposed that would disenfranchise her shares she would have attended the meeting and voted against the special resolution. As she said there is a clear difference between thinking you do not have a vote and being told that you have but the other shareholders want to deprive you of that vote. It would have been obvious to each of the claimants (had they been told that their shares carried voting rights) that between them they could control the company and that their votes were the only effective means by which they could protect their position as shareholders in the event of differences developing in the future. Appreciating this did not require either knowledge or experience of corporate governance – it was a matter of obvious common sense. Although it was suggested that the claimants would not have behaved in this manner because they were aware of their late father's views concerning the way companies should be controlled, I reject that suggestion. Whatever the position might have been when their father was alive, it would have been obvious to the claimants that if they consented to the removal of their voting rights they were at risk in the way I have described.

57. There was a similar conversation between the second claimant and CSM at or about the same time as the conversation between the first claimant and CSM. Her evidence is that CSM told her that the purpose of the special resolution was to facilitate the payment of the directors by dividend rather than salary which was more tax efficient, that the proposed resolution "*... did not involve any real change to the existing arrangements and that the resolution would go through and be passed in any event. She said there would be no purpose in Abby Gemma or I attending as we had no voting rights. It seemed to me that Claire was discouraging me from attending"*. I accept this evidence subject to the same qualification I applied in relation to the first claimant's evidence on this issue namely evidence is not sufficiently certain to enable me to say whether the conversation between CSM and the second claimant took place before of after the second defendant had sent his email of 10 December 2009. The second claimant says that had she known the true position she would have attended the meeting and would have voted against the special resolution, essentially for the same reasons given by the first claimant. I accept that evidence for the same reasons that I accepted the first claimant's evidence on this issue.

58. The third claimant told me that the first and second claimants passed to her information that CSM had supplied to them. I accept that evidence. She says that she had a conversation with Claire by phone prior to the meeting and that in the course of that phone call CSM told her that the purpose of the resolution was to facilitate payment to the directors by dividend rather than salary, that this was more tax

efficient, that the meeting was a mere formality. CSM also told the third claimant that her attendance would make no difference. I accept this evidence. Tellingly in my judgment the third claimant says and I accept that she "*... also held Claire in total trust and had no reason to think that Mr Wilson would try to harm us in the business"*.

59. The EGM duly took place on 21 December 2009. The meeting was attended by each of CSM, CW and the second defendant. None of the claimants attended. The resolution that was ostensibly passed was the draft amended special resolution sent to CW and CSM by the second defendant under cover of his email of 10 December 2009. It is common ground that the special resolution purportedly passed was entirely invalid and although it was declared void and of no effect only by an Order made much later, it was always void and of no effect.

60. The position prior to the EGM simply on the documentation available is that the second defendant had forwarded the amended draft special resolution to CW and CSM. The second defendant had not advised them in his covering email that the notice convening the meeting for 21 December was invalid other than in relation to the special resolution therein referred to, that there was insufficient time available to send out an amended notice prior to 21 December and therefore that the only resolution that could be validly passed at the meeting on 21 December was the defective one. His email of the 10 December requested CW and CSM to contact him to discuss the amended resolution but on his case they had not done so and he had not attempted to make contact with them.

61. There is no attendance note of what occurred at the EGM. The only evidence available to me as to what happened at the EGM comes from the second defendant because the defendants did not call only other attendees at the meeting (CW and CSM) to give evidence. It was not suggested to me that either were not available to give evidence and one of the claimants in the course of her evidence drew my attention to the fact that CW was present in court at that stage.

62. The second defendant maintains that there had been no discussion between him and either CSM or CW prior to the EGM notwithstanding that he had requested them in his email of 10 December to call him to discuss the amended draft special resolution. The second defendant's oral evidence as to what happened at the meeting was that he did not enquire whether a revised Notice had been sent to the members or say that the meeting could not consider the amended draft special resolution in the absence of all the members because a revised Notice had not been sent out to members and because at least 21 days notice of the revised special resolution had to be given. He maintains that he observed to CSM that he was surprised that the claimants had not turned up, that she said nothing and that no one suggested calling them to see if they had been delayed and that the meeting then proceeded to pass the draft amended special resolution.

63. In my view this makes no sense and I conclude that it is untruthful account of what occurred between 10 and 21 December 2009 and at the EGM on 21 December 2009. The second defendant had sent out the original Notices. On his case he knew of the need to send out a revised Notice setting out the amended draft special resolution and that there was insufficient time to enable the meeting planned for 21 December to be

effective. He maintains that he had not advised either CW or CSM that new notices were required and a new date for the EGM even though he accepted in the course of his evidence that he knew that a new date was required. He had no reason to suppose that either CW or CSM would know that they had to send out a new notice or fix a new date in the absence of advice from him. He could not rationally have thought that the amended draft special resolution would have been sent out by the company or its directors in the absence of advice from him to do so. He maintains that he was surprised that none of the claimants attended the meeting. However, their non-attendance ought to have been the stimulus for him to point out that the amended draft resolution could not be validly passed at that meeting, but on his evidence it was not.

64. The second defendant's case is that what occurred was the result of error. He points out that for all general practice accountants the end of the year is an incredibly busy time as the rush for the preparation of tax returns gathers pace. He maintains that when he attended the meeting he simply did not consider further the question of notice requirements and that he simply assisted the directors to conclude what he understood to be the business of the meeting. I reject that evidence for the following reasons.

65. The control issue had been live between the second defendant, CW and CSM from at least the end of July. The second defendant was fully aware that the issue was one that was a matter of great importance for at least CW – see the K&H internal notes of 27 November 2009 warning the first defendant that CSM was aggrieved by the failure to make progress and the email to KCS of 4 December 2009. He was also aware that CW was likely to be very angry if he became aware of any difficulty concerning resolution of the control issue. There is no doubt that SPLC was one of the second defendant's major clients. In the course of his oral evidence he explained to me that K&H was in substance a two-partner practice in a provincial market town. Each director had a portfolio of clients for which they were generally responsible and there is no doubt that SPLC was one of the second defendant's more substantial clients.

66. I fully accept that between July and 30 November 2009, the intention had been to proceed in a lawful manner. That is entirely clear from the email of 29 July, which refers to the "*voting reclassification"* issue and to the need for a general meeting in terms that suggest that all shareholders were expected to attend. Although there are no written instructions to KCS, I conclude on the balance of probabilities that the second defendant instructed KCS that a change to the Articles was required that not merely divided up the shareholdings into different classes in order to enable differential dividends to be paid but also disenfranchised what were to become the C shareholders. I reach this conclusion because there is nothing in the correspondence that emanates from KCS that suggests the voting rights issue came as a surprise when it received the second defendant's email of 4 December. Indeed there is a complements slip that appears to have been attached to the amended documentation sent to the second defendant by KCS that says "*Sorry about the inconvenience"*.

67. Whilst it is true to say that the second defendant forwarded this material to CW and CSM under cover of an email dated 10 December, that email did not contain any advice. In my judgment the overwhelming probability is that a professional in the position of the second defendant would either set out the necessary advice in the email or would have sought to discuss the implications of the defective notice orally either

at a meeting or in a telephone conversation in very early course. The email sent by the second defendant does not contain the required advice but requested CW and/or CSM to call the second defendant. If, as the second defendant maintains was the case, neither called him to discuss the revised special resolution then I consider it highly improbable (even allowing for other professional commitments at a busy time of the year) that someone in the position of the second defendant would not chase up for a response. Any other approach ran the risk of exposing the second defendant or K&H to a substantial claim or the end of an important professional relationship and is all the more unlikely because CW had spotted the problem initially and had specifically sought assurances in relation to the issue as is apparent from the email of 4 December 2009. If the first defendant had not been able to give the necessary advice orally on or after 10 December he would be almost bound to give that advice either in writing prior to the EGM or at the EGM itself. It is not, and could not credibly be, suggested that the need for notice was not known to the second defendant – on the contrary his evidence (at trial) was that he was aware of this requirement. As I have said already, I think it highly probable that the second defendant discussed this issue with KCS in one of the phone calls referred to in the letter from KCS to the second defendant of 8 December 2009.

68. The second defendant maintained that as far as he was concerned the problem was off his desk once he sent the revised special resolution to CW and CSM. However that was simply not the case given that the second defendant knew of the need for a new Notice and of the need for a new date for an EGM and had requested CW and CSM to contact him by phone. In those circumstances, I reject that explanation as untrue.

69. I think it probable that there was a discussion or discussions between the second defendant, CW and CSM in the period between 10 and 21 December 2009. If, contrary to that conclusion, there was no conversation between the second defendant and either CW and/or CSM prior to 21 December then in my judgment it is inconceivable that the second defendant would not have advised CW and CSM on 21 December 2009 that the meeting could not proceed in relation to the revised draft resolution in the absence of the claimants, however unpleasant the second defendant might fear the reaction of CW might be. As before, a failure to give such advice would expose the second defendant and his firm to the risk of a substantial claim in relation to any steps by the company taken thereafter in reliance upon the validity of the special resolution supposedly passed on 21 December 2009.

70. In my judgment it is probable that at some stage between 10 and 21 December, there was a discussion between the second defendant, CW and CSM during which the problem was identified and a decision taken to proceed notwithstanding the defects in the notice. Given that CSM had informed her sisters that there was no need to attend the meeting and that they did not have voting rights in any event, or could not affect the outcome, there may have developed a significant reluctance on the part of her and/or CW to run the risk of an adverse reaction from the claimants to the receipt of a revised notice that referred to the disenfranchisement of the C shareholders or, possibly, that CSM considered that her sisters would raise no objections to such a course because they had never been asked to vote at general meetings before and did not consider themselves entitled to vote at such meetings. The alternative is that a similar discussion took place on 21 December. At this stage, had the claimants or any of them voted against a special resolution disenfranchising the C shareholders, the

only option left to CW and CSM would have been to persuade the Trustees of the SET to exercise the 2004 Options. Since the SET did not have the means to purchase the shares, that would have meant that SPLC would have had to fund the purchase. Aside from the obvious technical difficulties posed by a company seeking to purchase its own shares, the cost would have been substantial on any view.

71. In my judgment, the result of the discussion was that whether willingly or reluctantly, the second defendant went along with the notion that the EGM should be held and the revised special resolution purportedly passed. I conclude that the second defendant was prepared to go along with it because he did not leave the meeting or disassociate himself from what he knew to be contrary to elementary company law. On the contrary he actively participated by attending the EGM and thereafter forwarding the forms SH08, SH09 and the Special resolution to KCS for filing – see the letter from the second defendant to KCS dated 8 January 2010.

72. There is one further reason why I consider that this analysis is correct on the balance of probability. In the next section of this judgment I refer to a meeting that took place on 21 October 2010 that was attended by each of the claimants and CW. It is the claimants' case that in the course of that meeting, the claimants, and principally the second claimant, who explained that they had discovered that the special resolution had not been passed in accordance with the requirements contained in the Companies Act 2006. They contend that CW said he would "*... take advice on annulling special resolution"*. For reasons that I explain below, I accept the evidence of the claimants in relation to what they say occurred at that meeting. I consider that CW's response in the face of assertions that the special resolution had not been passed in a manner that complied with English company law is instructive. Had he thought that the special resolution had been validly passed on 21 December 2009, he would not have offered to take advice about annulling the special resolution. He would have asserted (as is ostensibly the case) that the special resolution had been formulated by SPLC's accountants and passed in accordance with the procedure approved by them. His response is much more consistent with him knowing that the special resolution had not been validly passed. Nothing had changed between 21 December 2009 at the latest and 21 October 2010 that is material to the issue I am now considering. Thus if CW knew on 21 October 2010 that the validity of the Special Resolution was questionable, he knew that to be so by no later than 21 December 2009.

73. Although this involves jumping ahead in the chronology, it is convenient to close off the issue concerning the special resolution in this section of the judgment. Much later, the claimants retained solicitors to advise them in relation to the issues that arise in this claim amongst other matters. By an order made on 13 August 2013 by consent by Master Bragge on a summary judgment application in these proceedings, it was declared that the special resolution purportedly passed on 21 December 2009 "*... was void and of no effect"*. The effect of this Order is material in these proceedings only in relation to an issue concerning valuation to which I refer later in this judgment.

*22 December 2009 – 19 March 2012*

74. The next stage in the development of this dispute arose in September 2010, when the claimants discovered that markedly higher dividends were being paid to CW and CSM than was being paid to the claimants. This ought not to have come as a surprise

in principle because they well knew from the conversations that each had with CSM in December 2009 that this was the purpose of splitting the shares into different classes. This led the first claimant to request a meeting with SPLC's directors that in the end turned into a meeting between CW on one side and the claimants on the other. CSM did not attend nor did the second defendant and DB.

75. Prior to that meeting, the second claimant undertook some research concerning the status of the claimants as shareholders in SPLC. She describes this research in paragraphs 34-40 of her witness statement and also fairly vividly in her oral evidence. In summary she reviewed SPLC's records on the Companies Register and noticed immediately that the Special Resolution recorded that the C shares had no voting rights. I accept this evidence. She says that this caused her to question the representations that CSM had made to her prior to the EGM held on 21 December 2009. I accept this as correct. She says and I accept that the resolution as passed was different from that of which notice had been given. She says that she carried out some internet research and discovered that these factors appeared to make the resolution invalid. She says that she put together what she called in her oral evidence a small package of materials that reflected the research that she had done and she took it to the meeting on 21 October 2010. She described what she had discovered and her feelings about it as her "*Nancy Drew*"[1] moment. This was challenged in cross examination on the basis that it is not referred to in the various witness statements and there appeared to be come confusion in the mind of the second claimant as to whether she mentioned it at the meeting on 21 October or at a later meeting that took place on 1 April 2011.

76. I was entirely satisfied by the nature of the evidence given by the second claimant that (a) she had carried out the research and made the discoveries that she claimed to have made, (b) that she mentioned them at the meeting on 21 October 2010 and (c) that it elicited a response from CW in broadly the terms mentioned in her email to CW of 26 October 2011 - that is that CW would "*... take advice on annulling special resolution"*. I reach that conclusion for the following reasons. First, concluding that this was not the case would involve concluding the second claimant made up the response she records. Having heard her give evidence I am entirely satisfied that she would not make up something like this and would not have the skills to do so. Secondly making up something like that invites a denial if it is untrue and thus is not something that is likely to happen. Thirdly, CW responded to this email by an email of 1 November 2010. The significant point that emerges from the response is that the assertion that he would take advice about annulling the special resolution was not denied. Finally, although the 26 October email (indeed the 21 October meeting) was concerned mainly with the question of differential dividends, that is not the point. The point I am concerned with is the invalidity of a special resolution, which was concerned with creating separate classes of shares to enable differential dividends to be declared but also the disenfranchisement of the C shareholders. Thus the cause of the Nancy Drew moment was not discovering the apparent removal of the C shareholders' voting rights but discovery that the special resolution was different to that referred to in the notice that convened the EGM at which it was purportedly passed and that in consequence it was probably invalid.

[1] A fictional female detective

77. The claimants say and it is not in dispute that in the course of the 21 October meeting CW informed the claimants that the company would be willing to make an offer to purchase the claimants' shares. He said that he would obtain an independent valuation and, following a further meeting in February 2011, on 8 March 2011, he sent the claimants a valuation by email. Prior to that there was some contentious correspondence that it is unnecessary for me to rehearse simply because it takes matters no further. The valuation in fact provided was provided by the second defendant at the request of CW. This valued the shares on a discounted net asset valuation basis at £6.67 per share and thus each of the claimants' shareholdings at £61,390. The basis of the valuation was a net assets valuation, which is a method of valuation all the experts in this case are agreed is entirely inappropriate for a company such as SPLC while it is a going concern trading profitably – see Paragraph 2.5 of the most recent Experts' Joint Report. The discount methodology is also criticised by all the experts. Presciently the second claimant rejected this valuation in an email dated 13 March 2011, in which she observed: "*... we are not happy with the valuation. It is far below our expectations based on Claire's comments in 2008 and not the right type of valuation for the type of company"*.

78. On or around 17 March 2011, DB became involved concerning the validity of the resolution purportedly passed at the meeting of 21 December 2009. Some handwritten notes prepared by him at the time suggest that he considered a number of possible routes of challenge and the effect of the Table A Regulations and s.281(2), s.283(3) and s.283(4) of the Companies Act 2006. What he does not appear to have considered was the effect on the validity of the special resolution of its not having been set out in the terms in which it was purportedly passed in the Notice convening the EGM. Ultimately this led to a letter from DB to CSM and CW dated 29 March 2011. In so far as it is material, that letter reads:

> "I have checked very carefully into the circumstances in which the articles were changed in anticipation that points may be raised, which you would have to deal with.
>
> The position is as I see it as follows:
>
> …
>
> 3. Under section 201(2) of the Companies act 2006 it is only at a properly convened General Meeting that the Articles of association of a Plc can be changed. This has to be done by special resolution. If it is intended to propose a special resolution, then the notice convening the meeting has to say so. This is provided by section 283(3).
>
> 4. I am pleased to say that the paperwork appears to me to be in order, and the Resolution is properly drafted and correctly says "Special Resolution"
>
> …
>
> I think the telling part here is that there was a meeting of the company before which the shareholders had unqualified rights

> and they declined to attend the company meeting. I think the resolution is relatively clear, even to a layman. If they had any doubts one would have expected them to have sought advice. I am of the firm view that as a matter of law the Resolution cannot be impugned. … "

79. There are a number of points that arise in relation to this letter. First, it is unclear what instructions were given to DB, and by whom they were given. In particular it is unclear if DB discussed the issue with the second defendant prior to giving his opinion. Secondly, it is noticeable that the letter avoids the only real issue, which is that which had been identified to CW by the second claimant in the previous year – that is that the Resolution purportedly passed was not the proposed resolution that appeared in the notice convening the EGM. Thirdly, DB overlooks the fact that s.283(3) is concerned with how a special resolution may be passed in writing rather than at a Meeting and s.283(6) which is the provision relevant and is in these terms:

> "(6) Where a resolution is passed at a meeting-
>
> (a) the resolution is not a special resolution unless the notice of the meeting included the text of the resolution and specified the intention to propose the resolution as a special resolution;
>
> …"

The best that can be said of this letter is that it appears to have been prepared by DB in ignorance of what the real issue was. That could only be because either he was not told what the real issue was by CW notwithstanding that it had been identified to him by the second claimant at the meeting on 21 September 2010, and/or CW and CSM did not tell DB that the resolution purportedly passed was not the proposed resolution appearing in the notice convening the EGM and DB had not discovered that fact from his own researches notwithstanding that he claimed in the letter to have "… *checked very carefully into the circumstances in which the articles were changed* …".

80. On 1st April 2011, a meeting took place attended by the claimants, CW, CSM, DB (supposedly as note taker although he participated in the meeting) and the second defendant. There are various versions of the minutes of this meeting in the trial bundle. In my judgment the significance of this meeting is limited. I conclude that the issue concerning voting rights was mentioned at some stage in the meeting because mention of them appears in all the versions available. Secondly DB advised that it was not possible to set aside the special resolution. This advice was consistent with the view contained in his letter referred to above.

81. CW remained keen that SPLC should purchase the claimants' shares from them. For that purpose he commissioned a valuation report from an entity called Assay Advisory ("AA"). It is right to observe that this report ("the AA Valuation") has been subjected to severe criticism by each of the experts who gave evidence before me. I make clear therefore that this report is not one that I have placed any reliance on for the purpose of the valuation exercise that I carry out at the end of this judgment. It is however material given the allegations that the claimants make concerning the conduct of DB and the second defendant in exercising the 2009 Options.

82. AA provided their report to CW under cover of a letter dated 14 December 2011. AA adopted a maintainable earnings approach to valuation. All the experts are agreed that this was, and I find was, the only appropriate way to value SPLC given that it was a going concern, profitable and that its value did not lie in its asset base. The AA value on this basis was £12.44 per C share. CW sought a meeting with the claimants by an email of 28 December 2011. This was not capable of being organised immediately and by an email of 4 January 2012, CW offered the AA value together with an additional premium of 10% subject to acceptance of the offer by close of business on 31 January 2012. All the claimants regarded this offer as unacceptable but the offer was not expressly rejected. Meanwhile CW sought to pressure the Trustees of the SET (DB and the second defendant) into exercising the Options. He arranged a meeting with the SET Trustees, which was scheduled to take place on 9 February 2012.

83. On 6 February 2012, CW wrote to the claimants in these terms:

> "…
>
> The offer made to you in January has now expired …
>
> Until the meeting with the Trustees, the original offer of valuation plus 10% will remain on the table subject to your acceptance prior to my meeting with the Trustees, and completion of the transaction within 10 days of the date of acceptance.
>
> Following my meeting with the Trustees, the original offer (valuation plus 10%) will be immediately and permanently withdrawn. The company will request the Trustees immediately exercise the share options at the valuation price, the 10% premium offered to you for an early acceptance will not be included. It is my firm belief that the company has a compelling case for calling in the shares and that the Trustees will act in the best interests of the company."

84. This email resulted in an email from the first claimant to DB and the second defendant in which she asked whether the Trustees could be bullied in the manner suggested by CW, that the claimants could not understand how this was possible and sought advice. This resulted in an email response from DB in which he said that neither he nor the second defendant intended to be bullied, that they had yet to make any decision or indeed have a meeting to discuss the proposal. This should be compared with a letter dated 9 December 2011 sent by the second defendant to CW prior to him commissioning the AA report. In reading this letter it needs to be borne in mind that the second defendant is the relationship partner managing the relationship between SPLC and K&H, and one of the Trustees of the SET. Under the terms of the 2004 and 2009 Options, the obligation of the Trustees was to pay fair value as certified by K&H as experts. The material part of the 9 December letter reads:

> "We understand that you wish to carry out a share valuation of Swains Plc. As you are aware the Share Option Agreements state that the valuation should be carried out by the current auditors, [K&H]. However, we have no objection to you

> carrying out the valuation and in fact we would encourage you to obtain a valuation from an independent source as [K&H] act for both [SPLC] and the individual shareholders.
>
> We understand that the valuation may be used in your negotiations with the other shareholders. The Trustees must make it clear that they cannot be bound by the valuation … The Trustees however will obviously use the valuation in looking at the overall determination of price to be agreed if the options are exercised and offered for sale but they are bound by the Option Agreement to use the auditors valuation. We are sure that any independent valuation obtained will likely influence the auditors valuation if there is not a great time difference between them.
>
> … "

This letter is potentially significant because it acknowledges the obvious conflict that existed because K&H acted both for SPLC and all the individual shareholders and, of course, because the second defendant was a director of K&H and the director responsible for K&H's relationship with SPLC. It also suggests that the Trustees would probably agree a price to be paid by SPLC to the trust equivalent to the valuation to be obtained by CW and that such a valuation was likely to "influence" the auditors (i.e. K&H's) valuation in the event that the Option was exercised.

85. On 8 February 2012, the first claimant again emailed DB. She requested information concerning how the SET worked and the responsibilities of the Trustees of the SET. She asked DB to speak to the solicitor then advising the claimants (Mr McAlister of Kingsley Napley) and explain how the SET worked and who the beneficiaries were. On the same day DB wrote to the first claimant in these terms:

> "So far as the [SET] Trustees are concerned they have taken the view that before they can begin to consider the offer they will need independent valuation evidence on aspects not touched upon by the valuation produced by Mr Wilson.
>
> Given that the Trust has no liquid assets to pay for such advice, it is hard to say when the offer could be considered, certainly not within the time suggested by Mr Wilson.

86. Notwithstanding the comfort that DB ostensibly sought to provide to the claimants, the second defendant was giving advice to CW concerning the ability of SPLC to buy back its own shares from the claimants and was doing so to the knowledge of DB – see the emails of 8 February from the second defendant to DB timed at 1350 and DB's response timed at 14.10. It is clear that CW sought to pressurise the SET Trustees to accept his revised offer (that is the AA valuation without the 10% premium that he had previously offered). This much is apparent from DB's attendance note of the Trustees' meeting with CW on 9 February 2010, which is to this effect:

> "1. Long discussion with Mr Wilson which at times became heated on the part of Mr Wilson who said that the Trustees would be in breach of trust if they allowed the company to collapse or stagnate
>
> DB + [second defendant] made no comment as to this.
>
> 2. Mr W said that if the 3 daughters were to control the company it would collapse because he and Claire would resign.
>
> 3. The Trustees asked if there was a covenant in the contracts of employment and were told no.
>
> 4. Mr W then said that the offer had been reduced to that of no benefit for voting rights. The Trustees said this was not acceptable.
>
> 5. After further debate Mr W said he would reinstate the offer.
>
> 6. Trustees said they would consider the position and read the letter sent by Mr W and make a decision."

87. This attendance note is interesting because it suggests that CW at least considered that the claimants would control the company unless the company acquired their shares. This implies that CW knew that the Special Resolution was not valid. DB is not recorded as saying that they do not control the company by reason of the Special Resolution, which suggests that by this stage if no earlier, he knew that the Special Resolution was defective. Paragraph 4 of the Note is also consistent with that being the view of both DB and the second defendant as well.

88. On 10 February 2012, CW wrote to the Trustees of the SET withdrawing his request that the Trustees exercise the options to purchase the C shares held by the claimants both because he had agreed that CSM should discuss the issue with the first claimant and also because he was "*... exploring alternative avenues"*.

89. On 13 February 2012, the first claimant on behalf of the claimants emailed CW say that the claimants were unable to respond by 5.30 that day because of the family and other commitments of the claimants and because of the need to take advice.

90. There is then a gap down to 20 February 2012. On 20 February 2012, the Trustees wrote to the claimants in these terms:

> " … There are three problems which have to be faced:
>
> 1. If we lose the appeal there will be an immediate need to raise a significant amount of money.
>
> 2. We, as Executors, have a personal liability which we are unwilling to continue to carry
>
> 3. The only possible buyer will not offer more (if indeed he is willing to offer anything).

> We only agreed to the sale of the Hall to Abby which needed distribution of the shares to facilitate it on the basis:
>
> (a) there was enough in the estate to cover any costs risk
>
> (b) we retained the then existing option and took a further option.
>
> If you can supply real evidence to support your valuation, please let us see it immediately. If there is no real evidence to support your valuation there may remain a very narrow window of opportunity to persuade the buyer to revive the offer he has withdrawn.
>
> Please also deal with how you would pay the costs if we lost on the assumption the shares are not sold."

The reference to the appeal was the appeal from the Order of Arnold J dismissing the M&R Proceedings . It was due to be heard on 1 March 2012. When in the event it became clear that the appeal had been lost, DB reported to the claimants in terms that referred to this result being "*expected*". I consider it probable that this was the state of mind of at least the executors as at the 20 February 2012. It is very difficult to see in what capacity this letter was written. It is not explicitly stated. The reference to the writers retaining and taking options suggest that the letter has been written by DB and the second defendant in their capacity as Trustees since the options were all in favour of them in their capacity as Trustees of the SET and no other. The references to executor liability suggest that it was written in that capacity as well although techncially, the executors had no right to recover any part of the estate's liabilities from the SET as I have explained. This letter suggests however that there were two issues of concern to the DB and the second defendant at this stage – the risk that CW would resign from SPLC and thereby destroy or severely damage its business which they perceived to be highly dependent upon him and the approaching appeal, which if lost would leave the estate exposed to a very substantial liability for Mills & Reeve's legal costs.

91. On the same day CW emailed the first claimant and her sisters withdrawing the offer that he had made to purchase their shares on the basis that she had made clear that she did not wish to sell the shares at the price that had been offered.

92. On 21 February 2012, Mr McAllister of Kingsley Napley wrote to DB on behalf of the claimants in these terms:

> "We spoke a week or two ago in relation to Swains Plc and the discussions I had had with Abby Swain in relation to the potential sale of her shares.
>
> There are a number of matters that I would like to discuss with you. However, there are two matters that we need to discuss as a matter of urgency, as follows:
>
> - Your letter of yesterday to Abby and her sisters;

> - The re-designation of ordinary share capital and alteration of class rights in Dec 2009, which from the documents that we have seen may be ineffective with the consequence that the C shares retain full voting rights and further that the re-designation itself may be ineffective and thus dividend payments since then may need to be unwound and distributed among all the shareholders pro rata.
>
> Clearly, if the points in para 2 above are correct, this will have a positive impact on the value of the C shares.
>
> I would like to resolve the above as quickly as possible as I understand there are a number of issues that are time critical related to these points.
>
> …"

DB acknowledged receipt of this email and in relation to the re-classification issue said "*... we took no part in this process, which happened after the Executors signed over the shares to the beneficiaries. Having taken no part in it we can express no opinion."*. This letter was disingenuous in the sense that to DB's knowledge the second defendant had participated in the process.

93. An attendance note prepared by DB and dated 21 February 2012, records that there were three telephone discussions that day concerning SET. Although he does not identify in the note who the discussions were between, it is inferentially clear that they were between DB and the second defendant. It is likely that at least one of the calls involved CW. DB's handwritten note records that CW had increased the offer by 10% and that "*we must meet to discuss this ...".*

94. On the 22 February 2012, the Trustees of the SET met and resolved (a) to exercise the Options and (b) to request K&H (in its capacity as SPLC's auditors) to provide the valuations and deductions as provided for by the Options. The inference to be drawn from a further attendance note dated 22 February 2012 is that the Trustees' meeting lasted 3 hours. The draft of the letter to which the notices exercising the Options were attached included a paragraph to the effect that "*we have negotiated a price which does not make any deduction for the fact that the C class shares have no voting rights ...".* However, that paragraph was omitted from the letter as sent. For reasons that are entirely unclear, the letter also attached (a) a copy of the Notice by which the EGM had been convened for 21 December 2009 and (b) the Special Resolution that had purportedly been passed at that meeting. Viewing these documents side by side merely served to emphasise that the special resolution purportedly passed was not that set out in the Notice.

95. A notice exercising the Options was also sent to CSM. This resulted in a letter the same day from CW in which he said that in his opinion "*... the transfer of [CSM]'s shares to the trust would be highly detrimental to the reputation and operation of Swains plc"* and concluded by saying "*... I cannot support any action the Trustees may take regarding the acquisition of [CSM]'s shares and confirm that neither I nor the company would wish to be considered a purchaser of her shares and would almost*

*certainly view any other purchaser as "hostile" ..."* Ultimately SPLC bought out CSM's share option from the Trustees for the same price that it had agree to pay the Trustees for the other C shareholders' shares – see the email from CW to DB and the second defendant dated 13 March 2012.

96. As will be obvious from what I have said so far, and as the second defendant accepted in the course of his evidence, if K&H came up with a fair value figure that exceeded what SPLC acting by CW was prepared to pay then that would leave the SET (or its Trustees) having to pay the difference. It was accepted by the second defendant in the course of his evidence and is obvious from what is set out in the letter from DB to the first claimant dated 8 February quoted above that the SET did not have the means to meet any shortfall. As the second defendant accepted, that exposed the Trustees of the SET to a potential personal liability. I doubt whether these points would have been lost on either DB or the second defendant.

97. The shares were transferred to the Trustees by completion of the blank stock transfer forms that had been supplied by the claimants with the Options and, on 28 February 2012, DB sent them for stamping. On 29 February 2012, the Trustees wrote to CW purporting to "... *accept the Company's offer to buy the shares ..."* of the claimants and other C class shareholders excluding CSM. The company paid the purchase price purportedly payable to the Trustees of the SET by a transfer to K&H's client account (because, apparently, the SET did not have its own bank account) and on 6 March 2012, DB and the second defendant authorised K&H to transfer "... *the net sums ..."* – that is the whole of the sale proceeds less the payment of "... *outstanding invoices ..."* to the Executors' account. No account seems to have been taken of the fact that by that stage K&H had not been instructed to certify fair value or the value of the deductions much less had K&H done so or of the fact that there was no basis on which sums received by DB and the second defendant in their capacity as Trustees of the SET could be transferred to the executors of Mr Swain's estate without committing a breach of trust.

98. The second defendant maintained that he had no involvement in the valuation process. Formal instructions to K&H to provide a valuation were purportedly delivered by letter signed by DB and the second defendant addressed to the other director of K&H, Mr Haslam. The letter was in the following terms:

> "We enclose the documents listed below and invite your Company as Auditors of Swains plc to produce a valuation of the price our clients have to pay to the shareholders mentioned above.
>
> To assist you we enclose copies of the relevant options.
>
> …"

The reference to "*our clients"* makes no sense in a letter signed by the Trustees personally. I infer that the letter was drafted by DB and sent to K&H without him fully considering the terms of the letter. On 11 April 2012, K&H provided the valuation requested. It was in these terms:

> "Further to your instructions, I have carried out a valuation of the shareholdings in accordance with the Option Agreement. I enclose a copy of my calculation based on the management accounts which we have to date to 31 December 2011. You will note that the valuation of a minority shareholding of 9204 shares is £95,813.64.
>
> The Option Agreement states that this is the shareholding value prior to a reduction by the estimated court costs, Inheritance Tax and Capital Gains Tax due. The deduction I therefore believe in accordance with Berry & Walton's letter of 4 April 2012 for the court costs is £500,000 and the Inheritance Tax is in accordance with our letter to you dated 2 March 2012. I understand that a payment on account of the Inheritance Tax of £45,000 has been sent to HM Revenue and Customs this week and that there may still be a small amount of interest due on that instalment. The rest of the Inheritance Tax is due as per our letter of 2 March 2012.
>
> I trust this is the information you require for the valuation."

99. The second defendant maintains that he did not have any connection with those that carried out the valuation. However in answer to a question from me he accepted that he had a short discussion with Mr Haslam in which he warned him that he would shortly be receiving instructions to prepare a valuation. It is also to be noted that whoever carried out the valuation received some information concerning the payment of tax as is apparent from the terms of the letter of 11 April. The second defendant maintains that Mr Brown, an employee of K&H supervised by Mr Haslam, carried out the valuation. No working papers concerning the performance of the valuation exercise has been disclosed to these proceedings. The calculation of value attached to the letter was in very similar form to that provided some years earlier by the second defendant. The valuation was one based on the net assets of the company as set out in a balance sheet contained in its management accounts. It valued the shares on that basis at £10.41 per share. No attempt had been made to carry out a valuation of a maintainable earnings basis. This was so notwithstanding the second defendant's acceptance in the course of his evidence that this was the basis on which a valuation of shares in a company such as SPLC ought to have been carried out.

**Challenge to the Expert Determination**

100. The claimants' pleaded case on this issue is at Paragraphs 109-115 of the Particulars of Claim. There it is alleged that the valuation of the shares was in *"breach of contract"* because the shares were valued as non-voting minority shareholdings without rights to be given notice of and attend general meetings of SPLC as a consequence of what I refer to below as the Special Resolution Conspiracy. In the alternative it is alleged that Trustees acted in breach of contract by acquiring the shares at the value attributed to them by K&H because they knew or ought to have known that the shares had voting rights. It is not alleged that DB and the second defendant acted in breach of contract by exercising the option nor was it contended at the trial that the options ought to be set aside. There was no application to amend any

of these paragraphs. 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.

*Applicable Principles*

101. The general principle is that where the parties have agreed to an expert determination of value, the expert's determination cannot be challenged unless it could be shown that the expert has departed from his instructions in a material respect or that the expert's determination is tainted by fraud or collusion – see Jones v Sherwood Computer Services Plc [1992] 1 WLR 277 (CA). The court will interfere only if it can be shown that that the expert has gone outside the limits of his or her decision making authority as for example by asking himself the wrong question – see Nikko Hotels (UK)_ Limited v. MEPC Plc [1991] 2 EGLR 103 at 108. In Mercury Communications Limited v. DGT [1994] CLCC 1125 Hoffmann LJ (as he then was) concluded that:

> "Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. "

The House of Lords ([1996] 1 WLR 48) agreed with this approach. As Lord Slynn put it at 58-9:

> " What has to be done in the present case … depends upon the proper interpretation of the words "fully allocated costs" which the defendants agree raises a question of construction and therefore of law, and "relevant overheads" which may raise analogous questions. If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do. "

*Discussion*

102. All the expert witnesses before me are agreed on the meaning to be attributed to fair value. It is the definition provided by the International Valuation Standards Council

namely "*... the estimated price for the transfer of an asset or liability between identified, knowledgeable and willing parties that reflects the respective interests of those parties ...".* There is no mention of the requirement to value the shares on a fair value basis in the letter of instruction sent by the Trustees of the SET to K&A – see the terms of the instruction letter set out above. The instruction was to "*... produce a valuation of the price our clients have to pay to the shareholders ...".* Copies of the options were provided to K&H with the instructions. The report signed by Mr Haslam states that "*… I have carried out a valuation of the shareholdings in accordance with the Option Agreement* …" However, he makes no specific reference to the requirement to ascertain fair value or to the or any definition of what constitutes fair value. The calculation of value that is attached to the report shows that the valuation in fact carried out is a net assets valuation. None of the experts consider that is the valuation method that ought to be adopted in order to ascertain the fair value of a company where the purchaser intends to carry on the business of the company as a going concern. Even AA proceeded on a maintainable earnings basis not a net asset valuation basis. The second defendant said on this issue in the course of his evidence:

> "An independent valuation of these shares at the time would have valued the shares on the basis of the company as a going concern, would it not?
> A. It would have done, yes**.**"

On this material I conclude that no reasonable valuer asked to carry out a fair value valuation of the C shares in SPLC at the date when K&H were instructed to carry out the valuation would have valued them on the basis adopted by Mr Haslam. The reason for this is almost self evident – valuing shares in a company that is profitable and intended to be carried on as a going concern by the purchasers on a break up value prefers the purchaser at the expense of the vendor as was acknowledged judicially by Lord Millett in CVC/Opportunity Equity Partners Limited v. Demarco Almeida [2002] 2 BCLC 108. By preferring a purchaser in this way, the valuers could not provide a fair value, which, on the definition of that concept agreed by all the experts, required the valuation to reflect the interests of all parties to the transaction.

103. The balance sheet shows shareholders' funds as being the total of paid up share capital, a Revaluation Reserve and the balance on the profit and loss account. Shareholders funds were shown in the 2012 accounts for example at £1,023,268 of which £1,031,171 was the profits shown on the profit and loss account. Although there was a requirement in arriving at fair value to have regard to the shareholders funds shown in the accounts of the company, that was expressly said to be without derogation to the requirement to have regard to all the circumstances. The valuation adopted by K&H proceeded exclusively by reference to that factor. On that basis too, the expert has departed from his instructions.

104. Given the definition of fair value that all the experts agree is the correct one and given that the valuation method adopted favours the buyer over the seller, contrary to the requirement for a fair value to reflect the interests of all parties to the transaction both as a result of the definition that each expert adopted of that concept and as is obvious from the use of the word "*fair*", I conclude that Mr Brown and/or Mr Haslam cannot have asked themselves the correct question – namely what is the fair value to be attributed to each of the C shares. Further or alternatively I conclude that K&H

departed from their instructions by valuing the shares exclusively by reference to the Shareholder Funds shown in the accounts of the company rather than having regard to that factor and all the other relevant circumstances. K&H did not perform a valuation in accordance with its mandate. Accordingly, I conclude that the claimants are entitled to a declaration or order that has the effect of setting aside that valuation. Given that the question of what constitutes a full valuation was argued at length before me and was the subject of lengthy expert reports and oral evidence from three expert valuers, it is clearly in everyone's interest that I should declare what the true value of the C shares was. I turn to this below.

## Valuation

105. As a result of the efforts of the experts to narrow issues and further concessions made by the various experts in the course of the concurrent evidence exercise during the trial, the differences between the experts have resolved to a small number of key points. I address each under the subheadings. Before turning to that valuation issue I note that there has been no challenge to the assessment of the value to be attributed to the deductions that apply under the 2009 Options. It follows that the sum to be deducted from the price otherwise payable to each of the claimants is £175,781.25.

*Maintainable Earnings*

106. All the experts were agreed that the only appropriate way in which to calculate the value of shares in SPLC as at 22 February 2012 was one based on applying a multiplier to a multiplicand consisting of maintainable earnings being either a pre tax figure ("EBITDA") or a post tax figure ("P/E"). The only practical significance of the difference between the two is that the EBITDA figure will be higher than the P/E figure and for that reason the appropriate multiplier will be higher where the P/E convention is adopted than would be appropriate if the EBITDA convention was adopted. Mr Plaha (the expert retained by the claimants) favoured EBITDA but carried out calculations on both bases whereas each of the other experts (Mr Isaacs retained on behalf of the second defendant and Ms Ellis retained on behalf of the third defendant) used the P/E convention. I prefer to use the P/E convention although, obviously, in doing so it is important to apply the correct tax rate applicable to SPLC.

107. Although Mr Plaha considered that the maintainable earnings figure should be based on the 2012 accounts alone, he accepted in the course of his evidence that this was not appropriate. Each of the other experts had concluded in their respective reports that an average or a weighted average of the last three years results should be adopted in order to eliminate the effects of short term trading anomalies. In the course of the concurrent evidence exercise all the experts agreed that the appropriate course was to adopt a weighted average approach to the profits made during the 2010, 2011 and 2012 accounting period. I agree.

108. There remained a difference between the experts as to how the weighting exercise should be adopted. This turned on one anomaly that apparently occurred during the period covered by the 2012 accounts. The only evidence for this is a note in the 2012 accounts and a reference to the point in the AA valuation.

109. The point was identified in section 6, paragraph 4 of the AA valuation and related to an apparent increase in SPLC's profitability during 2011-2012 (the last of the three

years relevant for averaging purposes). This was said to be caused by a fall in the wholesale cost of calls from fixed line to mobile networks which resulted in a gain for SPLC caused by the benefit of reduced wholesale costs before retail charges dropped. AA quantified the amount of the "*windfall*" gain – but did not explain how the figure had been arrived at. The value of this "*windfall*" gain is not quantified in the accounts of the company. The experts approached this issue differently in their respective reports. Mr Isaacs adopted AA's figure and then deducted it from the profit in the relevant year to arrive an adjusted profit figure. The difficulty about that approach was that there was no evidence base that supported the quantification of the figure deducted and it is asserted (without reasoning to support it) in a report that has otherwise been severely criticised by Mr Isaacs.

110. Ms Ellis's approach was to reduce the multiplier that she otherwise considered appropriate. The difficulty about this approach stems from the fact that she had adopted an averaging methodology for identifying the maintainable earnings figure. The result was that there was to an extent double counting of the anomaly because averaging is meant to reduce or eliminate the effects of anomalies that are incapable of being quantified and thus reducing the multiplier would be addressing a problem that had already been addressed to a degree at least by adopting an averaging methodology.

111. By the end of the concurrent evidence exercise, all the experts were agreed that the correct way of addressing un-quantified anomalies was by adopting a weighted average methodology. The experts agreed that conventional valuation practice would be to adopt a weighting of 1 for the most remote of the three accounting periods used, 2 for the next year and 3 for the most recent year. This reflects the common sense that the most recent year is likely to be the most accurate as a predictor of future performance. In light of the particular anomaly that arises in this case Ms Ellis and Mr Isaacs considered that this approach should be modified. Mr Plaha considered that it should not. Mr Isaacs considered that a 1, 3, 1 weighting should be adopted whereas Ms Ellis considered the better approach would be to adopt a 1, 2, 2 approach.

112. In my judgment the approach adopted by Ms Ellis is to be preferred. Mr Isaacs' approach in my judgment accords to the anomaly a very significant value in circumstances where there is no evidence that enables even a rough approximation of its value to be made. There is no science about this. I prefer Ms Ellis's approach because it reduces the impact of a year where there appears to have been a material anomaly without altogether abandoning the point that the most recent year is likely to be the most accurate predictor of future performance. In the result therefore I conclude that maintainable earnings should be ascertained by applying a weighted average of 1(2010) 2(2011) 2(2012).

*Directors' Remuneration*

113. The next issue concerns how directors' remuneration should be treated. Mr Isaacs' view (with which Mr Plaha concurs) is that the directors drew remuneration at rates that did not equate with what would have been paid if the company had been managed by non-shareholders. Ms Ellis prefers to treat the earnings actually drawn as fairly reflective of what happens generally in small closely held companies. I prefer the approach adopted by Mr Isaacs and Mr Plaha on this issue in principle. The object of

the valuation exercise is to arrive at a fair value for the shares. In arriving at that figure ascertaining what the current directors have been paying themselves does not ask or answer the correct question. The correct question is to ask what the company would need to pay for someone to do the job currently being carried out by the directors. In my judgment once this is understood it becomes clear that the approach adopted by Mr Isaacs is the correct one. Mr Isaacs has arrived at an annualised figure of £177,000 for directors' remuneration. This is based on the upper quartile figure for companies with a turnover of between £5m and £8m. In my view that is an entirely fair basis for arriving what of necessity must be an estimate.

*Multiplier*

114. Ms Ellis identified the range of appropriate multipliers as between 3 to 10. I accept that this is correct. Mr Plaha considers a P/E multiplier of 7.5 is appropriate. Ms Ellis considered that a P/E multiplier of 4.5 was appropriate in part in order to adjust out the anomaly in 2012 that I mentioned earlier. She readily conceded that if that anomaly was to be adjusted for in another way then her P/E multiplier would have been 5 as reflected in her report.

115. Mr Isaacs' approach was rather more tentative. In his report he applied a P/E multiplier of 5 according to Paragraph 3.6.2 of the Defendants' experts joint report, which he adopted simply because it equated to EBITDA multiplier of 4 used in the AA valuation. This struck me as a surprising approach given the wide-ranging criticisms that Mr Isaacs has made of the AA valuation. It was I think an approach based on caution resulting from the fact that he had not had access to SPLC's directors as would normally be the case when carrying out a valuation of this sort. He considered it likely that had he been given such access he would have arrived at a higher multiplier. He described 4 as being "*relatively low in the context of the levels of consistent profit that the Company was achieving"*. He referred to various sources for historical multipliers sued in other transactions. He rejected one complied by BDO because it related to much larger companies and transactions than the one I am concerned with. However he also referred to the SME Valuation Index. In my judgment this is a much safer source of guidance because it is relatively up to date (having been published in November 2011) and the average transaction had a value of about £3m. That Index disclosed a median (i.e mid range) P/E multiplier of 5.8 and a Mean (i.e. average) P/E multiplier of 6 for transactions that were the subject of the November 2011 edition of the Index.

116. In my judgment the correct P/E multiplier falls very clearly within the range of between 5 and 6. Where within that range is appropriate will depend on a number of factors specific to SPLC relevant to the various risks it faced in the future. Those included its dependence on CW, industry changes, fluctuating income streams and the opening up of new markets. However, these risks can be over stated. It would be possible to replace CW, if something untoward happened, with someone with equal skills although it would take some time to achieve and that might result in deterioration in performance. The company had shown itself to be adept at meeting and benefiting from changing market conditions. Taking all these factors into consideration I conclude that the appropriate P/E multiplier is 5.5.

*Allegedly Surplus Cash*

117. This issue is a short one that Mr Isaacs dealt with in Paragraph 2.8.27 of his report. The sum resulting from applying the appropriate multiplier to the appropriate multiplicand results in a capitalised value for the shares in a company. However, before calculating the value of each share, it is common ground between the experts that the value of any surplus assets must be added to the figure resulting from applying the appropriate multiplier to the maintainable earnings multiplicand. The resulting figure is then divided by the number of shares to arrive at a pro rated value for each share.

118. As Mr Isaacs demonstrates, there was a surplus of cash at bank disclosed in each of the end of year accounts for 2009 – 2012. However there are no cash flow statements available that would show how cash balances varied during the course of the year, as Mr Isaacs accepted. Ms Ellis points out that the company expends about £500,000 per month and in her experience most well run companies would expect to have a month's cash requirement in hand as working capital. This company is being valued on a going concern basis. There is no evidence available that permits me to conclude that the cash balance shown in an end of year balance sheet is a true cash surplus. Before I could be sure that was so, I would need to be provided with a cash flow analysis. The point to be remembered about a balance sheet is that it represents a snap shot of the financial position of a company at a particular moment. It is not a sound basis for concluding that the company has a true surplus of cash. On this issue I consider that it is has not been proved that the company has surplus cash that ought to be added back.

*Treatment of Dividends Paid since December 2009*

119. In my original draft judgment I had concluded that I should accede to a submission made on behalf of the claimants[2] and second defendant that a fair valuation required that all dividends paid out following the purported approval of the special resolution should be treated as repaid but with the claimants giving credit for the dividends that they had in fact received. The submissions of the claimants and second defendant were to the effect that even though the valuation of the shares required the court to arrive at the fair value of the claimants' shares on 22 February 2012, I should proceed on the basis that the special resolution was void as at either of those dates even though the order declaring the special resolution to be void was made only on 13 August 2013 and thus that the shares should be valued on the basis that the dividends were repayable to the company. Mr Mitchell on behalf of the third defendant submitted that I should approach the valuation ignoring the payment of the dividends on the basis that as at the relevant date the question whether the dividends were recoverable had not been resolved. In support of this submission, Mr Mitchell relied on Joiner v George [2002] EWCA Civ 169 where Sir Christopher Slade referred at [68] to the "*basic rule in valuing shares in a company*" as being "*to reject evidence of events which occurred after the valuation date…*"

120. On the basis of these submissions I had initially preferred the submissions made on behalf of the claimants and second defendant on the basis that dividends paid out by the company unlawfully should never have been paid out, that it was entitled to

[2] See in this regard, the submissions made by Mr Marshall at Transcript, Day 6, pages 111, lines 17-25

recover them from the directors and/or recipients and because it would be wrong in principle to ignore the fact that the special resolution was void simply because the order declaring it to be so was made after the date on which the fair value of the shares had to be fixed, applying by analogy the principles identified in by Harman LJ in Curwen v. James [1963] 1 WLR 748 (CA) and applied most recently in relation to the assessment of damages in Ageas (UK) Limited v Kwik-Fit (GB) Limited & Anor [2014] EWHC 2178 (QB). I concluded that the authority relied on by Mr Mitchell was not relevant either because the special resolution was always void (and thus was not an event that occurred after the valuation date) or because the information now available in the form of the consent order declaring the special resolution to be void relates to something that had occurred before not after the relevant valuation date.

121. On further reflection, I considered that this approach might be wrong not because of the point taken by Mr Mitchell but because it involved treating a contingency as something that had in fact happened for the purpose of arriving at a present value of the shares when in fact that event (repayment of the dividends) had not occurred and might never occur. On that basis I invited short further submissions on this point.

122. The further submissions came to this. Mr Marshall submitted on behalf of the claimants that I should embark on a valuation exercise that would or might be appropriate following the determination of a unfair prejudice petition brought pursuant to s.994 of the Companies Act 2006. That was a new submission and was in my judgment entirely mistaken simply because that is not the exercise that either the auditors were, or I am, required to carry out. What the auditors were required to do was to arrive at the actual fair value of the shares as at the 22 February 2012. At that date the company did not have a cash surplus represented by unlawfully paid dividends that had been repaid. At best, it had as one of its assets a cause of action to recover unpaid dividends. No valuation principle has been identified by any of the experts that requires such an asset to be taken into account when arriving at fair value using the maintainable earnings method.

123. Mr Burroughs maintained his submission made at the end of the trial that I should simply credit back to the company the whole of the sum paid out by way of dividends after the purported passing of the special resolution but with credit being given by the claimants for the sums they had in fact received by way of dividends. He submitted that there was no principled basis on which some but not all the dividends should be treated as repaid.

124. Mr Mitchell maintained his initial submission that the fact that the dividends were unlawfully paid is irrelevant and should be left out of account. On balance I now consider that I should accept that submission though not for the reasons identified by Mr Mitchell. In my view this conclusion is the better one for the following reasons. The maintainable earnings method adopted by all the experts started with a EBITDA or P/E multiplicand that had been calculated before, not after, taking account of the payment of dividends (whether lawfully declared or otherwise). All the experts were agreed that if and to the extent there was surplus cash then that should be added to the notional value arrived at having applied the appropriate multiplier to the EBITDA or P/E derived multiplicand. This makes sense in respect of any surplus cash in fact held by the company at the valuation date for the reasons identified by Mr Isaacs in Paragraph 2.8.28 of his initial report. I do not understand there to be any disagreement

concerning this as an approach. The difference was as to whether any and if so how much surplus cash had been proved by the materials available to the experts. However, there is a difference of principle between (a) surplus cash in fact held by the company at the valuation date and (b) surplus cash that the company might recover on some future date but has not. The first is plainly material to arriving at a fair value for shares in a company holding such a surplus. The second is not.

125. Mr Mitchell submitted however that if this was wrong, and account ought to be taken of the fact that unlawfully paid dividends were recoverable, then some but not all the unlawfully paid dividend should be treated as cash in the hands of the company. He submitted that there would have to be deducted from the sum otherwise to be treated as cash in the hands of the company, a sum equivalent to the salaries that would otherwise have been payable by the company to CW and CSM. He also submitted that no account should be taken of the portion of unlawful dividends received by the claimants. The justification for this approach was said to be that in arriving at a fair value it was necessary to take account only of the unlawful dividends that the claimants had not had the benefit of. This led to Mr Mitchell calculating the surplus cash figure that should notionally be added back (assuming, contrary to his primary submission, that any should be added back) as being £603,000 less the £177,000 that should notionally have been paid to CW and CSM as salary leaving an adjusted total of £555,000. The £603,000 is a calculated figure being the part of the total dividend paid to the claimants, CW and CSM (£1,103,468) in excess of the pari passu sum that would have been received by CW and CSM had they received by way of dividend the same as was received by the claimants. That calculation is agreed.

126. This point does not arise given the conclusion that I have reached on the issue I am now considering. However, in case I am wrong on that point I conclude that Mr Mitchell's secondary approach is mistaken essentially for the reasons identified by Mr Burroughs. Aside from the objection that this approach involves treating the company as having cash that it does not in fact have, it involves treating the claimants as not having had unlawfully paid dividends, when in fact they have, as well as assuming that CW and CSM would in fact have paid themselves salaries at the level I consider reasonable rather than at a higher level reflective of the element of dividends received by them that was in lieu of salary. This issue is different from the question I considered earlier namely the hypothetical salary that would be paid to directors for the purpose of ascertaining maintainable earnings. That question looks to the future, and by reference to those who would be hired to carry out the functions carried out by the existing directors whereas the issue I am now considering involves considering what would have happened in the past assuming it was not open to the directors to claim enhanced dividends in lieu of salary. None of these problems arise however, if the recoverability of the unlawfully paid dividends is ignored for the purpose of arriving at a fair value for the shares on 22 February 2012.

127. In the result I conclude that I should in effect ignore the question whether dividends had in the past been lawfully or unlawfully paid out when arriving at a fair value for the shares.

*Discounts*

128. It is now necessary that I consider what discounts ought to be applied given the claimants each held minority interests in SPLC. There are a number of related points that need to be considered. Before turning to them I should mention one possible construction point that arises from the terms of the Options. Each of the Options required the auditors to arrive at "*... a fair value for each of the shares ...*" In my view it is at least arguable that the effect of this language is to require a valuation to be arrived at without regard to whether the shareholding concerning was a minority shareholding or not. This is not entirely surprising given the purpose of the 2004 Options was to give effect to a family shareholding arrangement and given that the 2009 Option appears to have been an attempt to replicate the 2004 Options at any rate so far as the fair value provisions are concerned. This point was not argued however on behalf of the claimants and in those circumstances I leave it to one side.

129. The experts' position was that there should be a discount to reflect the fact that each of the claimants held a minority shareholding. The first issue that arises is whether and if so to what extent is it appropriate to take account of the fact that the ultimate beneficiaries of the sale of the shares was CW and CSM, who between them obtained control of the company when before the sale to them they did not have control. Whilst it is true to say that the agreed definition of "*fair value"* requires the value arrived at to reflect the respective interest of the parties, that is a reference to the parties to the transaction in respect of which "*fair value"* is relevant. In this case the relevant parties are each of the claimants (and the other C shareholders other than CSM) on the one hand and the SET acting by its Trustees on the other. On that basis it was submitted by Mr Burroughs that I should ignore the onward sale of the shares by the Trustees to SPLC and its effect on the control over SPLC so far as CW and CSM were concerned. I accept that submission as far as it goes but in my judgment it ignores the fact that the Trustees were acquiring about 55% of the company and thus a block of shares that unless sold on would enable the Trustees in effect to control the company. It would be exactly the situation that CSM was contemplating when she sought advice from DB by email dated 2 October 2009 concerning the effect of the 2009 Options referred to earlier in this judgment. As Mr Isaacs observes in Paragraph 3.2.2 of his report, "*... the fair value concept takes into account both the value of shares to the vendor and also the purchaser ...".* As he makes clear, a fair valuation in these circumstances is likely to be one that does not discount to the full extent otherwise expected for a minority interest but does not augment value to the full extent expected for sale of a controlling interest. As Mr Isaacs puts it in Paragraph 3.2.3 "*... an average, whilst crude, is the only practical means by which a fair value can be estimated".*

130. Contrary to the submissions made on behalf of the claimants I do not consider it appropriate to value the shares of the claimants on the basis that it is a single block of shares. There was not a single option but a series of options in respect of each shareholder's shares. The options could be exercised individually and were to an extent in this case in that the option in respect of CSM's shares was not ultimately exercised. There is nothing in the terms of the options that suggests that the shares should be valued on any basis other what fair value for the shares is, or was at the relevant date. The fair value concept requires the valuer to arrive at a value that reflects the respective interests of the parties to the transaction – that is the vendor on

the one side and the purchaser on the other. None of the claimants has any interest other than in the shares they owned. That they could control the company if they all voted together is not to the point – that will very frequently be the case where there are a number of minority shareholders.

131. All this leads me to conclude that in ascertaining fair value, the correct approach is to value each of the claimant's shareholdings separately (which means that each will in principle attract a minority interest discount) but taking account of the fact that by exercising the options together as in fact they did, the Trustees were acquiring a controlling interest in the company. Had the claimants' shares been acquired sequentially, it is likely that the fair value of the third tranche would have attracted a premium because it is that tranche that would have given the Trustees control. I am satisfied however that where the shares are being acquired at the same time the correct approach is that identified by Mr Isaacs referred to above.

132. In paragraph 3.3.2 of his report, Mr Isaacs identifies various categories of shareholding that in his view attract different levels of discount. His view was that each of the 18% holdings held by the claimants would attract a discount of 70% to reflect that fact that the holdings were un-influential minority holdings of 25% or less which were incapable of blocking special resolutions requiring a majority of 75%. He was prepared to reduce this to 67% by agreement with Ms Ellis. The assumption that he applied when arriving at this discount figure was that the special resolution was invalid. That is the basis that in my judgment should be adopted. Whilst this is all rather imprecise it seems to me that the reductions from 70% to 67% fail to take sufficient account of the benefit to the SET of acquiring a 55% interest in the company. This would attract (as between the SET and the company on sale by the SET to the company of the shares that the SET had acquired from ach of the claimants) a discount of 35%. As Mr Isaacs accepted, some account had to be taken of the benefit conferred on the SET if a fair value was to be arrived at. In my judgment a discount of the otherwise applicable minority discount rate of 70% to 67% does not sufficiently reflect the benefit to the SET of acquiring a controlling interest of more than 50%. An average of 70% and 35% would suggest a discount figure of about 53%. This is close to the 50% discount figure that Ms Ellis arrived at originally on the assumption that she was attempting to arrive at a fair value for an 18% shareholding in circumstances where the special resolution was void – see Paragraph 4.34 of her original report. This figure is also close to the figure adopted by Mr Plaha when making the same assumptions. In his comments on the statement of matters agreed between Mr Isaacs and Ms Ellis, Mr Plaha justified his 50% discount figure specifically by reference to the benefit of the SET of acquiring a 55% interest in the company – see page 13. In my judgment Mr Isaacs' original discount was too high given the requirements that apply when arriving at a fair valuation. I am not confident that discounting as low as 50% adequately takes account of the fact that the sale is not of an 18% interest to a purchaser who thereby will acquire a controlling interest but of an 18% interest as part of a set of simultaneous acquisitions which when completed would together give the purchaser (SET) a controlling interest. Doing the best I can I consider that a discount of 60% is appropriate.

*Fair Value - Conclusions*

133. Taking into account the conclusions set out above, I conclude that the fair value of each of the claimants' shareholdings as at 22 February 2010 before deducting the sums deductable under the 2009 Options was £217,647 and after applying the 2009 Option deductible was £41,866, calculated as follows:

| | | |
|---|---|---|
| Adjusted profits after tax and applying the weighted average methodology referred to above (the P/E multiplicand): | £ 537,431 | |
| multiplied by P/E Multiple referred to above (5.5): | | |
| Gross value: | | £2,955,872 |
| Pro – rata value of each claimant's shares | £544,117 | |
| Value after minority discount at 60%: | £217,647 | |
| Less deductible for Estate liabilities As provided for by 2009 Options (£175,781) | | |
| Net amount due to each Claimant: | | £41,866 |

**Conspiracy**

*Introduction*

134. There are two unlawful means conspiracies that have been asserted on behalf of the claimants - one concerning the purported passing at the EGM on 21 December 2009 of the special resolution that by consent was subsequently declared void and of no effect ("the Special Resolution Conspiracy"). The second alleged conspiracy is alleged to have been a conspiracy by which CW, CSM, DB and the second defendant conspired in the purchase of the claimants' shares in SPLC by the Trustees of the SET at an under value ("the Undervalue Sale Conspiracy").

*The legal Principles*

135. A conspiracy to injure by unlawful means is actionable where the claimant proves that (a) he has been caused loss or damage (b) as a result of unlawful action (c) taken pursuant to an express or tacit agreement or understanding between the defendant and another or others (d) to injure him by unlawful means (e) whether or not the intention to injure is the predominate purpose or not – see Lonrho Plc v. Fayed [1992] 1 AC 448 and Kuwait Oil Tanker Co SAC v. Al Bader [2000] 2 All E.R.271 *per* Nourse LJ at [108]. Knowledge of the facts that make the transaction unlawful is sufficient; it is not necessary for the conspirators to know that the transaction is unlawful – see Belmont Finance Corp. v Williams Furniture Ltd (No2) [1980] 1 All ER 393 per Buckley LJ at 404.

136. It is of the nature of such claims that the existence of the agreement from which all else must flow must in most if not all cases be established by inference but the parties

to the alleged conspiracy must be shown to have been sufficiently aware of the relevant circumstances and shared the same objective before it can be inferred that they were acting in combination at the time of the acts complained of - see Crofter Hand Woven Harris Tweed Co v. Veitch [1942] AC 435 at 479. That said, as Nourse LJ said in Kuwait Oil tanker Co SAC v. Al Bader (ante) at [112]:

> "In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself"

*The Special Resolution Conspiracy - Discussion*

137. The Claim Against DB

This alleged conspiracy is pleaded at Paragraph 63 of the Particulars of Claim. The opening lines of that paragraph allege that "*in or about December 2009, [CW], [CSM], [the second defendant] and [DB] or any two or more of them … conspired …"*. As I have made clear already, neither CW nor CSM are or ever have been parties to these proceedings. Thus demonstrating they alone conspired together will not serve any useful purpose in these proceedings unless it can be shown that they or either of them conspired with either the second defendant and/or DB.

138. As I have also explained, DB played no part whatsoever in the preparation of either the Notice convening the EGM held on 21 December 2009 or the Special Resolution or the conduct of the EGM (which it is now common ground he did not attend) or the filing of the relevant notices with the Registrar of Companies thereafter. His first involvement with the special resolution issue appears to have been in March 2011, when he gave the advice concerning validity referred to earlier. For those reasons I am satisfied that on any view the allegation of conspiracy I am now considering cannot be advanced against DB. In my view this allegation should not have been persisted with once it became apparent that DB played no part in the events complained of. It follows that unless the claimants can prove that the second defendant conspired with either CW and/or CSM in the period between 10 and 21 December 2009, this claim must fail

139. The Claim Against the Second Defendant

In summary it is alleged against the second defendant that he conspired with CW and/or CSM to deprive the claimants of their rights as shareholders under SPLC's Articles and to obtain all shareholder voting rights for CW and CSM by the following unlawful means namely:

i) Failing to provide the claimants with notice of the amended special resolution;

ii) providing the claimants with the original draft special resolution (which did not refer to disenfranchisement) and substituting the amended draft special resolution (which was designed to achieve disenfranchisement of the C shares) without telling them;

iii) disenfranchising the claimants without notice or their consent;

iv) proposing and passing a resolution disenfranchising the C shares in circumstances where Ds knew Cs had a right to attend and vote against the special resolution, but knowing that the right was not capable of being exercised in the absence of knowledge of what was being proposed; and

v) conducting meetings of the company unlawfully other than in accordance with the provisions of the Companies Act 2006 and SPLC's articles.

140. In Paragraph 66 of the Particulars of Claim it is alleged that had the claimants been told of the intention to remove their voting rights the claimants would have attended and voted against the amended proposed special resolution. For the reasons given earlier in this judgment I find that allegation proved.

141. In paragraph 22 and 23 of his closing submissions Mr Burroughs submits that in order to succeed, the claimants have to show that the second defendant agreed with CW and CSM that they would send out a notice of the meeting and resolution which did not mention the removal of the claimants' voting rights and that they would then hold a meeting at which a different resolution removing voting rights would be passed and that the claimants have got "*nowhere near"* proving this conspiracy. In my judgment this misstates the nature of the claimants' case as pleaded and as advanced at trial. It was not alleged and on my findings could not be alleged that any unlawful means conspiracy came into existence prior to 10 December 2009, being the date when the second defendant sent the amended draft special resolution to CW and CSM.

142. The claimants' pleaded case is consistent with the allegation of a conspiracy coming into existence after 10 December – see Paragraph 63(a) (c) (d) and (e) of the Particulars of Claim summarised in paragraph 110 (i) and (iii)-(v) above. I accept entirely that it is not open to the claimants on the facts as I have found them to be to allege that the original notice and proposed special resolution were provided to the claimants deceptively – that is with the intention at that time (that is 30 November 2009) that an amended draft resolution would be approved at the meeting, which had the effect of disenfranchising the C shareholders. As I have said all the material dated prior to 10 December is consistent with the intention being to hold an EGM to which all shareholders would be given proper notice at which disenfranchisement of the C shareholders would be proposed. If and to the extent that Paragraph 63(b) of the Particulars of Claim (summarised in paragraph 110 (ii) above) makes such an allegation I reject it. If and to the extent that it does not then it does not appear to add anything to what is alleged in the other sub-paragraphs.

143. As set out earlier in this judgment, I conclude that an agreement or combination between CW, CSM and the second defendant was arrived at in the course of a conversation or conversations that took place between 10 and 21 December 2009. I accept that this is an inference that I have drawn but in my judgment it is an inference that is close to being obvious. The second defendant accepted in the course of his evidence that he knew that an amended Notice setting out the amended special resolution was required and also that a new date for the EGM was required because a minimum of 21 days notice was required. I think it likely that this was an issue that was discussed between the second defendant and Mr Swinburne of KCS in

conversations between them between 4 and 8 December 2009. It is inconceivable that a professional of the experience of the second defendant would not draw this problem to the attention of CW and CSM. In my judgment that is why his email of 10 December to CW and CSM asks them to ring him to discuss the amended draft special resolution. There was no other reason for him to ask them to call him.

144. I reject the suggestion that there was no discussion prior to 21 December for the reasons that I have given earlier. In summary, it is inconceivable in all the circumstances that the second defendant would not call CW or CSM if one of other of them did not call him, given the importance of the issue to CW and that the second defendant knew of its importance to CW. It is absurd to suppose that he would have gone to the EGM knowing of the existence of the problem without first having alerted the directors to the existence of the problem. Whilst I accept that it is possible that the second defendant might simply have decided to ignore the problem, that is inconsistent with his request that CW and CSM call him contained in his email of 10 December. It is inherently highly improbable that the second defendant could have forgotten about the issue. Finally, it is relevant to note that neither CW nor CSM were called to give evidence. Had the position been that they thought the special resolution could be passed without notice of it being given and that the second defendant did not advise them at any stage to the contrary, then they could and should have been called to give evidence to that effect.

145. I conclude therefore that sometime after 10 December an express or at least a tacit understanding was reached between CW, CSM and the second defendant to the effect that the EGM would proceed and the revised draft special resolution would be put to the members at the meeting notwithstanding that the notice required by law had not been given and notwithstanding that all the members were not present. Given that notice had not been given as required it follows that this action was unlawful. The predominant purpose of this activity was to enable CW and CSM to assert control of SPLC. Of necessity this meant purporting to deprive the claimants of the voting rights that attached to their shares in SPLC. The only means by which CW and CSM could purport to declare different dividends for different classes of shareholder was by reference to the special resolution.

146. Loss and damage was caused to the claimants as a result of them not being treated *pari passu* with CW and CSM, by the company making unlawful dividend payments and by their inability to influence or control the management of the company or the approach of its directors to the declaration of dividends. This was the basis on which the claim was opened on behalf of the claimants and the contrary was not suggested on behalf of the second defendant, whose defence at trial was limited to a contention that the necessary agreement or understanding had not been proved. Given the conclusions that I have reached concerning fair valuation, I will hear from the parties further as to what if any damages award ought to be made in relation to this finding.

*The Undervalue Sale Conspiracy - Discussion*

147. The alleged conspiracy as pleaded in Paragraph 116 of the Particulars of Claim is alleged to be a conspiracy to obtain the claimants' shares at an undervalue by unlawful means for the benefit of either SPLC or CW and CSM. As I said in my initial draft judgment, the key allegations made by the claimants are that the Trustees

(that is DB and the second defendant) caused the shares to be valued as non-voting shares when in fact they were voting shares coupled with the allegation in Paragraph 117 of the Particulars of Claim to the effect that each of CW, CSM, DB and the second defendant knew that the K&H valuation was at an undervalue as a result of the first conspiracy – that is as a result of purporting to pass and then rely on a special resolution by which the C shares had been disenfranchised that they all knew had not been validly passed.

148. I concluded that this allegation was unsustainable for the following reasons. First, there is no evidence at all that the K&H valuation was in any way influenced by the voting issue. That valuation was entirely misconceived for the reasons that I gave when concluding that the K&H valuation had to be set aside. However, the method adopted was a net asset valuation - that is the value of the Shareholders Funds as shown in the management accounts balance sheet for the company current at the date when the valuation was carried out. It then proceeded to devalue the claimants' shares by what K&H call the "*Rule of 81"* which would appear to be a rule of thumb favoured by Mr Swain as a mechanism for arriving at the discounted value of a minority shareholding.

149. It was common ground between the experts that if each claimant's shareholding was to be valued separately then the presence or absence of voting rights was immaterial because the discount to be applied when valuing an un-influential minority shareholding was the same whether the shares were voting or non – voting. Such a discount is inappropriate where shares are being valued on a net asset valuation basis but that is immaterial for present purposes. What is clear is that the auditors' valuation did not take any account of the absence of voting rights. The auditors did not value the claimants' shares on the basis that they were non-voting shares.

150. Although it is alleged in Paragraph 116(b) that the Trustees misrepresented to K&H that the shares were non-voting shares, there is no evidence that such is the case. First, as I have said, that is not the basis on which the shares were valued. Had the auditors valued the shares on the maintainable earnings basis but taken no account of the fact that the Trustees acquired a controlling interest by acquiring all the C shares other than those belonging to CSM, this point might have been arguable. However that is not the basis on which the auditors proceeded.

151. Secondly, the letter referred to by the claimants in Paragraph 116(b) is the letter containing the K&H valuation. It states that K&H is valuing a minority interest but that is a different and unconnected point. Nowhere does it refer to the absence of voting rights; much less that such is material to the valuation they arrived at. Indeed it is difficult to see how whether the shares were voting or non-voting could ever be material to a net assets valuation because what is being valued are the assets of the company not the value to be attributed of shares being sold to a purchaser who wishes to carry on the business of the company. Thirdly, the letter of instruction contains no reference to the absence of voting rights and although copies of the options were included with the letter of instruction, a copy of the special resolution was not included. Even if the valuers obtained a copy of the special resolution from another source such as the files maintained by K&H there is no evidence that the information contained in it played any part in the valuation K&H arrived at, which as I have said

was one arrived at on a net assets valuation basis discounted to reflect a minority interest.

152. I concluded that the conflict point referred to in Paragraph 116(f) does not assist the claimants. The Options required that instructions be given to K&H as auditors of SPLC. The Options were freely entered into and the claimants do not allege otherwise. The price payable was the price fixed by the auditors, which was then binding on all parties. Although there is no evidence from Mr Brown or Mr Haslam about how the valuation was arrived at, there is no evidence from which it can safely be inferred that the second defendant used his position to persuade Mr Haslam or Mr Brown to adopt a valuation methodology that would lead to an undervaluing of the shares. I had said there is no such allegation pleaded, much less that he did so pursuant to an agreement or understanding involving CW, CSM and/or DB.

153. I repeated that I was satisfied that the second defendant knew that the special resolution had not been validly passed and was also satisfied that DB came to appreciate that such was the position. However, that too was immaterial in my judgment because the Trustees were obliged to pay fair value as fixed by the auditors. Unless it can be shown by evidence or inferred that K&H produced their valuation on the basis of a belief that the shares were non-voting when in fact they were voting shares the state of knowledge of DB and the second defendant as to the status of the special resolution does not assist the claimants. I concluded that it could not be demonstrated that K&H proceeded on that basis for the reasons that I had given. I added that this knowledge might theoretically have enabled DB and the second defendant to get a much better price from CW on behalf of SPLC than it had to pay the claimants but in my judgment that too is immaterial – the obligation of the Trustees of the SET was to acquire the shares for fair value and if then selling them on to sell them for the best price they could obtain. As long as the price that they paid was not depressed by false representations by them concerning the voting rights attached to the shares then what price they were able to get for the shares is not material. In fact what they were able to get for the shares was no more than the AA valuation plus 10%, which was the maximum that CW had made clear he and therefore SPLC was prepared to pay.

154. All this led me to conclude that the second conspiracy allegation failed. There is no basis on which it can properly be inferred that CW, CSM, DB and the second defendant conspired to use unlawful means to obtain the claimants shares at an undervalue either for the benefit of CW and CSM. If and to the extent that the claimants received an undervalue for their shares that was the result of the terms of the Options or failures on the part of the auditors in arriving at a valuation that accorded with its mandate.

155. In my initial draft judgment, having identified the alleged purpose of the alleged conspiracy I am now considering, I summarised the pleaded allegations of unlawful means alleged as being accurately summarised by Mr Burroughs in his closing submissions in these terms:

> "(a) the Trustees exercised the options at the instance of the company and/or the directors all of them having been parties to the First Conspiracy;

> (b) the Trustees misrepresented to Cs and to the auditors that the shares were non-voting when that was false and known to be false, or ought to have been known to be false;
>
> (c) the Trustees purchased Cs' shares deceiving them as to the nature of the shares purchased, knowing that the shares carried voting rights and constituted a controlling interest in the company;
>
> (d) the Trustees caused the shares to be valued as non-voting shares when the only basis for such a view was the First Conspiracy;
>
> (e) the shares were valued on a false basis that was known and intended to be false by reason of the First Conspiracy; and
>
> (f) the Trustees acted in conflict of interest in giving instructions for the valuation of Cs' shareholdings to KHL when Mr Kirby was both purchaser of the shares and a director of KHL."

156. Following circulation of my initial draft judgment, Mr. Marshall contended that this was not an accurate summary of the unlawful means alleged, because it takes no account of the Voluntary Particulars of paragraph 116 of the Particulars of Claim. The Voluntary Particulars give further particulars of the alleged conspiracy by pleading facts and matters from which the alleged combination might be inferred but do not add materially to the unlawful means alleged in Paragraphs 116 and 117 of the Particulars of Claim.

157. As will be apparent from the Voluntary Particulars relied on by Mr. Marshall, the claimants relied on the following facts and matters:

i) That on 29 March 2011, DB had provided written advice to SPLC concerning any challenge by the claimants to the amendment of the Articles, that in that letter DB had said that the claimants had an unqualified right to attend the EGM but had chosen not to do so, that the terms of the resolution are reasonably clear and that if they had any doubts they could be expected to have sought advice, and that the recipients of the letter knew that notice of the special resolution purportedly passed had not in fact been sent to the claimants prior to the meeting. I refer to this letter in detail at Paragraph 78 above;

ii) DB's attendance at the meeting on 1 April 2011, the advice that he gave in the course of that meeting to the effect that the special resolution was effective and that he did not make clear in the course of the meeting that he was expressing that view in his capacity as the solicitors for the company and not as a neutral giving disinterested advice. That meeting is referred to in Paragraph 80 above;

iii) That in the course of a meeting on 21 February 2012, between CW, DB and the second defendant it was agreed that SPLC would acquire the claimants' shares from the Trustees for a purchase price of £13.68 per share. In fact there were no meetings. The documentary evidence available suggests there were a

number of telephone conversations. Those are referred to in Paragraph 93 above;

iv) That sometime on 21 February, Mr. McAlister of Kingsley Napley wrote to DB on behalf of the claimants suggesting that the special resolution may be ineffective, which it was alleged challenged to advice previously given by DB to the directors. That letter is referred to in Paragraph 92 above;

v) That with knowledge of the challenge threatened by Kingsley Napley the decision to exercise the options was taken on 22 February 2012

vi) The shares were not to the knowledge of DB and the second defendant valued having regard to all the circumstances because they failed to inform them that the special resolution was ineffective, the claimants retained full voting rights and the dividends declared after and in reliance on the special resolution might be recoverable as money unlawfully paid away;

vii) The price at which the shares were to be sold on to the company had been fixed and thus operated as a ceiling on the value to be attributed to the shares by K&H.

158. The Voluntary Particulars change the emphasis of what is pleaded in Paragraph 116 of the Particulars of Claim from an allegation that DB and the second defendant had misrepresented to K&H that the shares were non-voting shares for the purpose of enabling either SPLC or CW and/or CSM to acquire the shares at an undervalue to an allegation (set out most clearly in Sub-Paragraph (o) of the Voluntary Particulars given of Paragraph 116 of the Particulars of Claim) that when instructing K&H to carry out a valuation, they should have but as a result of the conspiracy failed to inform K&H that the special resolution purportedly passed on 21 December 2009 was or might be invalid and in consequence (a) the shares held by the claimants retained or might retain full voting rights and (b) the dividends declared following the 21 December 2009 might be recoverable as money unlawfully paid away by the directors. In consequence, Mr. Marshall submitted, I ought to make findings concerning the alleged conspiracy that I had not made because of the conclusions that I had reached concerning the manner in which the valuation had been carried out by K&H.

159. I remain un-persuaded that these points make any difference to the conclusions that I had reached previously. The question whether the shares carried voting rights is immaterial to the valuation to be attributed to them for the reasons already given and whilst the availability to the company of a cause of action enabling it to recover unlawfully paid dividends might be material to a valuation on the net assets basis, it is not material to a valuation on the maintained earnings basis for the reasons given above. However, I set out below my conclusions concerning the genesis of the alleged conspiracy in case I should be wrong in the conclusions that I have reached.

160. The facts and matters pleaded in the Voluntary Particulars start with a reference to an email from DB to CSM dated 25 March 2011 enquiring as to what had been said to the claimants concerning the value of their shares. I am not able to read anything into this email of itself. It is not a necessary inference to be drawn from this email that a

conspiracy of the sort alleged had been formed or was in the course of formation at that stage.

161. The next event referred to concerns the provision of advice by DB to SPLC concerning the special resolution purportedly passed on 21 December 2009. On 29 March 2011 DB provided the advice to which I have referred. The advice proceeds on a false premise namely that the special resolution referred to in the Notice was that which was passed when in fact that was not the case. As I read this letter, it appears to be defective advice. This is consistent with much of the other legal work carried out by DB that I have referred to in the course of this judgment. The numerous drafting and other errors I have referred to above together tend to support a submission made by Mr. Mitchell that at any rate as concerns DB much of what happened was the result of incompetence. The letter I am now considering suggests that either DB had failed to notice that the special resolution purportedly passed was different from that which is set out in the text of the Notice convening the EGM, or understand the significance of that difference if in fact he had noticed it. Indeed the part of the final paragraph of his letter where DB states that " *…I think the telling point here is that there was a meeting of the company before which the shareholders had unqualified rights and they declined to attend the company meeting. I think the resolution is relatively clear, even to a layman …"* really puts that beyond doubt.

162. I can think of no reason why at this stage it would have been in DB's interests intentionally to give misleading advice, or to set out in a letter to the directors suggested responses to challenges from the claimants that he knew or believed would not provide a proper answer. It is not suggested that this letter was intended to be, or was, sent to the claimants. It is much more probable either that DB was not instructed specifically that the special resolution that was purportedly passed was in terms that were different from the terms of the draft appearing in the Notice convening the EGM, or that he had failed to notice, or appreciate the significance of, that difference.

163. I find that DB should have made clear to all parties at the meeting on 1 April that any legal views that he expressed were given in his capacity as the lawyer acting for the company. The need to expressly state something like that is to a degree contextual but here it was necessary given the presence of the claimants and the various capacities in which DB acted. That said, I do not conclude that the advice given was dishonest or given with the intention of misleading. I think it is simply reflective of the advice that DB had given a few says earlier in writing to SPLC and its directors. That advice was defective for the reasons that I have given but is not material from which the alleged conspiracy can safely be inferred. If he was told of the point that the resolution purportedly passed was not that of which notice had been given at that meeting, his response reflects his failure to understand the consequences that followed.

164. In relation to this last mentioned point, the evidence of the claimants as to what was said at this meeting on this issue is unclear. Whilst I have found that the first claimant drew attention to the difference between the resolution purportedly passed at the EGM and that contained in the Notice in the course of the meeting on 21 October 2010, I am not able to find that she mentioned it again on 1 April 2011. There is no mention of this issue in the various versions of the contemporaneous notes of that meeting other than in paragraphs that were then deleted. There appears to have been some mention as I have said of voting rights but the main focus appears to have been the

question of the perceived unfairness of the declaration of different dividends for different classes of shareholder. DB's comment that the clock could not be wound back is highly likely to have been made in the context of an issue concerning differential dividends that had been paid out by the date of the meeting. In my judgment the probability is that the focus of the discussion was the perceived unfairness of the dividends declared in favour of CW and CSM when compared with those declared in favour of the C shareholders. Even if that is not so, and the comment was made in the context of an assertion that the special resolution was invalid, it is s comment reflective of a misunderstanding as to the legal consequences, rather than an attempt to mislead as to what those consequences were.

165. The next event referred to in the Voluntary Particulars is what is alleged to be a meeting on 21 February 2012. I turn to what happened on 21 February in a moment. However what happened then has to be seen in the context of what occurred between 1 April 2011 and 21 February 2012. In essence, the evidence establishes that during this period (a) trust had broken down between the claimants and at least CW or was perceived by CW to have broken down, (b) the continued presence of the C class shareholders as members of SPLC was perceived by CW to be a significant barrier to the development of the company in a technologically and commercially fast changing sector, or to his personal best interests, or both, (c) the claimants had challenged the differential dividends that were being declared in favour of CW and CSM, which CW saw as a direct threat to his well being as is apparent from the terms in which he expressed himself in a meeting between him and the first claimant in January 2012, which was recorded by the first claimant and (d) judgment dismissing the M&R Proceedings had been delivered by Arnold J and an appeal was due to be heard in March 2012, which it would appear that DB at least had no confidence would succeed. I say that because he said in a letter to the claimants that this outcome had been expected, when he reported the outcome to the claimants. CW had threatened to resign from SPLC in company with CSM and there was an entirely credible risk that if that was to occur then the fortunes of SPLC would decline, and in consequence the value of the C shares, and thus the contribution they could make to the costs of the M&R Proceedings in the event that the appeal failed, would also decline. I have no doubt that by February 2011, this issue was the primary concern of DB and the second defendant, because it had the potential to impact adversely on their personal fortunes. Indeed, the evidence is clear that it was to protect against this risk that DB had insisted on the 2009 Options being entered into by the claimants and CSM as the price of obtaining Mr Swain's shares in SPLC.

166. From at least 21 October 2011, CW had made it clear to the claimants that SPLC was willing to purchase the claimants' shares. As far as I can see the claimants were not opposed in principle to the notion of their shares being purchased but were anxious to obtain the best price that they could for them, as plainly they were entitled to be. Their objections thereafter were all focussed not on the concept of sale but on the value that CW was prepared to attribute to the shares held by the claimants. Ultimately CW had made an offer for the claimants' shares at the value attributed to them by the AA Valuation together with a premium of 10%. That offer was not acceptable to the claimants and CW then turned to the Trustees for the purpose of persuading them to exercise the 2004 or 2009 Options.

167. All this led to the meeting between CW and the Trustees (DB and the second defendant) on 9 February 2010. The attendance note of the meeting does not have the flavour of one recording a meeting between co-conspirators, or of a sham document designed to disguise the existence of such a conspiracy. It is reflective of what appears to have been a hostile meeting in which CW was plainly threatening to resign "*... if the 3 daughters were to control the company ...*" and that if that occurred the likely result would be that that SPLC would collapse or stagnate. It is not suggested that this would not have been the result if CW and CSM had resigned. CW is recorded as having asserted that the Trustees would be in breach of duty if they allowed this to occur. He is recorded as having said that he would reduce the offer "*... to that of no benefit for voting rights ...*", which the Trustees are recorded as having rejected as "*... not acceptable ...*". Neither trustee is recorded as having denied that the claimants had control if they acted together. Had they disputed it then that is likely to have been recorded by a note similar in terms to that appearing at the end of Paragraph 1 of the note. Had they considered that the claimants did not have control, it was in their interests to say so for the purpose of pacifying CW. Their comment that the offer being reduced to that of "*... no benefit for voting rights ...*" was unacceptable is consistent with them being aware that the shares at least arguably carried such rights. As noted earlier this implies that each of CW, DB and the second defendant were aware that there was at least a prospect that the special resolution purportedly passed on 21 December 2009 was invalid. If that is the correct interpretation, it is the first document from which such knowledge on the part of DB can be inferred.

168. On 10 February 2012, CW withdrew his request that the Trustees exercise the Options so that CSM could discuss things further with the first claimant. The documentation suggests that the Trustees were continuing to consider the position notwithstanding that request. This provides further support for my conclusion that it was the position of the second defendant and DB that concerned them rather than the position of CW and CSM. It suggests that there was not a conspiracy between DB and/or the second defendant and either CW and/or CSM. The reasons for that are set out in the letter of 20 February to the claimants referred to above. Unless this letter was a very clever attempt to disguise the true concerns of the Trustees at that stage then this letter is reflective of their concerns at that time. Those concerns were that if the appeal in the M&R Proceedings was lost (as apparently was anticipated) then the estate would require a substantial sum to meet the costs bill that would follow, that the purpose of the 2009 Options was to enable the Trustees to recover the shares and realise their value in such an event and that *"... the only possible buyer will not offer more ..."* which in the context could only be a reference to the offer from CW albeit that his offer was made on behalf of SPLC.

169. There are any number of legal difficulties that this letter fails to address. It misses the point made much earlier that on the face of it money receivable by the Trustees of the SET in that capacity could not be transferred to the estate account without committing a breach of trust, and that the company could not purchase the shares from the Trustees without complying with the various requirements of the Companies Act relating to such transfers. Whether and if so to what extent DB in particular considered those issues is unclear. The documentation available suggests that he did not. The documentation that is available suggests that from a very early stage he was unwilling to sanction the transfer of the shares because he was concerned about the costs position in the event that the M&R Proceedings were lost. It is clear that by the

date I am now considering he thought it more probable than not that the appeal would be dismissed and that he was concerned to recover the shares, realise what could be realised for them and credit the proceeds to the estate account so that the costs shortfall could be reduced significantly if not eliminated. I have no reason to suppose that the second defendant was any less concerned with this issue than DB.

170. I have no real doubts that both were concerned too that CW and CSM would resign from the company as CW had threatened at the meeting on 9 February 2012 and thereby (a) cease to be interested in purchasing the shares in the name of the company and (b) destroy or damage the substance of its business, and thus their ability to make good any shortfall in estate assets by realising the shares that had been transferred from the estate to the claimants. It was not about benefitting CW or CSM. It was about protecting themselves in their capacity as executors of Mr Swain's estate from losses that could otherwise be made good from the estate. This letter is not reflective of a conspiracy to obtain the claimants' shares at an undervalue. It is reflective of DB being out of his depth, of he and the second defendant being concerned for their own financial security and anxious to recover the shares that DB had not wanted to part with in the first place pursuant to a mechanism that (however flawed) he had devised to cater for such an eventuality.

171. On 21 February 2012, there were three events of central importance. It is unclear in what order they occurred. There were three telephone conversations during that day concerning the SET. I conclude that at least two of them were between DB and the second defendant but that at least one was with CW or included him as a participant. There is a hand written note on the attendance note that suggests CW had agreed to increase his offer by the 10% that he had previously indicated was withdrawn.

172. The second event was the receipt by DB of the email from Kingsley Napley. The email was forwarded to the second defendant by email from DB. This was the first written indication from anyone acting on behalf of the claimants to DB that the special resolution purportedly passed on 21 December 2009 might not be valid and that all the dividends paid since it was purportedly passed might " ... *need to be unwound and distributed among all the shareholders pro rata ...".* Clearly if that was correct then it could have a potentially damaging effect on what in my judgment was the main if not the only real concern of DB and the second defendant at this stage namely the ability of DB and the second defendant to sell the shares that they wanted to recover from the claimants to the only purchaser willing to purchase them so that they could reduce or eliminate any personal losses they would suffer as a result of the loss of the M&R Proceedings appeal. The voting issue was not what was important: what mattered was the likely reaction of CW and CSM if faced with the prospect of having to repay some or all of the dividends that had previously been paid over to them following the purported approval of the special resolution.

173. It is not alleged on behalf of the claimants either in the Particulars of Claim or the Voluntary Particulars that the second defendant used his influence to procure a valuation from K&H that undervalued the shares. This is a very serious allegation that impacts on the integrity of the two people who carried out the valuation – namely Mr Brown and Mr Haslam. What is pleaded in Sub-Paragraph (o) of the Voluntary Particulars is an allegation that DB and/or the second defendant did not inform Mr Brown or Mr Haslam that (a) the 21 December special resolution was invalid, (b) that

the claimants retained full voting rights and (c) the dividends paid out following 21 December might be recoverable as money unlawfully paid away by the directors. That is not in dispute. Although it is pleaded in Sub-Paragraph (o) (ii) of the voluntary particulars that the price that had been agreed between CW for SPLC and the Trustees "*... operated as a constraint (ceiling) upon the actual value ...*" that is not an express allegation that the second defendant used his influence to procure an under-valuation of the shares. In fact there is no evidence that this factor had any role to play in the valuation that K&H eventually arrived at. Indeed, the valuation that K&H did in the end come up with did not reflect either in methodology or value the approach adopted by AA notwithstanding that the second defendant had anticipated that such would probably be the outcome in his letter to CW written before the AA Valuation was produced, and notwithstanding the second defendant's evidence that those within K&H who had carried out the valuation would have had access to the AA Valuation because it was on SPLC's file maintained by K&H. Had the second defendant brought his influence to bear, it is much more likely that the valuation arrived at would have reflected the AA Valuation given what the second defendant had said in his letter of 9 December 2011. In my judgment it is much more probable that Mr Brown simply took the valuation that had been prepared previously and sent to the claimants on 8 March 2011 and updated it to reflect the most recently available management accounts. This suggests to me that the second defendant did not have the influence on the K&H valuation that the claimants contend should be inferred.

174. Although reliance is placed by Mr Marshall on the fact that neither Mr Brown or Mr Haslam were called to give evidence as supporting an inference that this had occurred, in my judgment this point lacks reality in the absence of a pleaded allegation to the effect that they provided a valuation either in accordance with instructions provided by the second defendant to value on the basis they adopted whilst ostensibly acting independently. In this context it should be noted that the second defendant had pleaded in Paragraph 76.3 of his Defence that the valuation had been carried out by Mr Brown. I was told that Mr Brown was an admitted member of either the Institute or the Association. It is not suggested that the claimants' solicitors could not have obtained his contact details. It was open to the claimants to approach Mr Brown and seek evidence from him if they had chosen to do so. Since he no longer works for K&H, there is no reasons to suppose that his evidence would not have been honestly given.

175. The pleaded conspiracy is a conspiracy between one or more of CW, CSM, DB and the second defendant to obtain for the benefit of SPLC or its directors (CW and CSM) the claimants' shares at an under value by exercising the option. In my judgment the inference of such a conspiracy is not justified by the primary facts. In my judgment the reason why the second defendant and DB were concerned to exercise the options was for the purpose of securing what had been intended at the time when the 2009 Options were sought from the claimants and granted by them – to obtain the return of the shares so as to minimise the losses resulting from the incidence of tax on Mr Swain's estate but primarily by the M&R Proceedings. The interests of DB and the second defendant at this stage lay in obtaining as much as could be obtained for the shares from CW and CSM, not purchasing the shares at an undervalue from the claimants in their capacity as Trustees of the SET. Any margin between the notional purchase price and sale price was likely to be of importance only to the SET. Had they approached the matter in the manner alleged – that is treating CW's offer as a

ceiling – then their interests would have been best supported by ensuring a value by the auditors that came as close as possible to what CW was prepared to pay. Both DB and the second defendant considered that whatever was obtained could be set off against the estate's tax and costs liabilities. Neither of them had any reason to suppose that the true value of the shares exceeded what CW was prepared to pay. None of the valuers who gave evidence considered the presence or absence of voting rights had any impact on the value of the shares.

176. Neither DB nor the second defendant caused the shares to be valued as non-voting shares as opposed to voting shares. The shares were valued by K&H on a basis that could not be justified but did not turn on whether the shares were voting or non-voting. There is no evidence from which it can be inferred that either the second defendant or DB instructed K&H to value the shares on the basis that they were non-voting shares. In my judgment if such an allegation was to be made it was required to be pleaded in clear terms. It was not. Even if I wrong to take that view, in my judgment it cannot be inferred that the second defendant used his influence with either Mr Brown or Mr Haslam to obtain an under- value. He simply had no reasons to suppose that the shares had any greater value that the value placed on them by CW on the advice of an apparently competent independent valuer.

## Damages

177. What if any damages are recoverable in relation to the special resolution conspiracy is to be the subject of further submissions following the handdown of this judgment.