William John Watkins and Raymond Gerard Connell v Richard Jepson Egglishaw

Jurisdiction:	Jersey
Judge:	H.W.B. Page, Jurats Le Brocq, Tibbo
Judgment Date:	31 July 2001
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Text

[2001] JRC 166

ROYAL COURT

(Samedi Division)

Before:

H.W.B. Page, **Esq., Q.C., Commissioner, and** Jurats Le Brocq **and** Tibbo.

Between
William John Watkins and Raymond Gerard Connell
Plaintiffs
and
Richard Jepson Egglishaw
Philip Jepson Egglishaw
Terence Ahier Jehan
STR Holdings Limited

Strachan Management Services Limited (by original action)
Defendants

Between:
Richard Jepson Egglishaw
Philip Jepson Egglishaw
Terence Ahier Jehan
STR Holdings Limited
Plaintiffs
and
William John Watkins
Raymond Gerard Connell and Dreamin Design Limited (by counterclaim)
Defendants

Advocate M. St. J. O'Connell **and Advocate** F.B. Robertson **for the Plaintiffs in the original action**.

Advocate M.M.G. Voisin **and Advocate** A.D. Hoy **for the Defendants in the original action**.

Authorities

Finance & Economics Committee of the States of Jersey v. Bastion Offshore Trust Company Limited [1994] JLR 370, C of A.

Royal Court Rules 1992: Rule 6/18.

Sibley v Berry (7th July, 1987) Jersey Unreported C of A; [1992] JLR N.4).

Extent of Plaintiffs' entitlement to shares in STR Holdings Limited.

Counterclaim by the Defendants against Mr. Connell alone for moneys allegedly due by him.

THE COMMISSIONER:

Introduction

1 This action arises out of the circumstances in which the Jersey Partnership previously known as Strachan & Co. (“Strachans”) was incorporated as STR Holdings Limited in 1986 and the two Plaintiffs, Mr. William Watkins and Mr. Raymond Connell, each came to acquire a 5% shareholding in the new company under the terms of what came to be known as the First Shareholders' Agreement (“the FSA”). This was a formal written agreement, dated 1st February 1986 though not executed until November 1986, between the first three

Defendants (Mr. Richard Egglishaw, Mr. Philip Egglishaw and Mr. Terence Jehan, to whom we refer, for convenience, as “the Defendants”), Mr. Watkins and Mr. Connell, Strachan Management Services Limited (“SMS”) and STR Holdings Limited (“STR”). SMS was a company previously owned by Strachans through which part of the partnership business was conducted and which became, under the new structure, a subsidiary of STR.

2 The principal issues in the action are:

(i) the true extent of the Plaintiffs' contractual entitlement to shares in STR;

(ii) whether, as Mr. Watkins and Mr. Connell claim, the discussions leading up to their acquisition of shares involved fraudulent misrepresentations by the Egglishaws and Mr. Jehan (or any of them) as to the state of the consolidated accounts of Strachans to 31st January 1986 (the partnership's final set of accounts before incorporation);

(iii) whether the terms on which those shareholdings were acquired involved any implied warranty as to the accuracy of those accounts and, if so, whether there was a breach of it.

3 There is also an issue as to whether or not Mr. Connell remains a shareholder in STR and a counterclaim by the Defendants against Mr. Connell alone for moneys allegedly due by him. (Mr. Watkins ceased to be a shareholder in 1990).

4 Determination of these issues involved extensive evidence of events and circumstances going back many years. The principal witnesses of fact who appeared in person at the trial were Mr. Connell, Mr. Richard Egglishaw, Mr. Philip Egglishaw and Mr. Terence Jehan. We also admitted affidavit evidence from Mr. Watkins. This we only did after hearing extensive medical evidence about his health, full submissions from both parties and the most careful consideration. The application made on his behalf for such affidavit evidence to be admitted was, not surprisingly, vigorously opposed by the Defendants. It is only in exceptional circumstances that it can be right to permit a plaintiff to give evidence other than in person and our decision to allow evidence to be given in this way in Mr. Watkins' case was expressed to be subject to a number of caveats, particularly as regards the weight that we would feel able to give to his evidence in such circumstances. At the time when we gave our ruling (at the conclusion of Mr. Connell's evidence) there appeared to be some slight possibility that Mr. Watkins might yet be able to appear in person, but in the event this did not happen. Our full reasons for admitting Mr. Watkins' affidavit evidence and the terms of our Order appear in an annex to this judgment. The Defendants, having initially indicated a wish to challenge this ruling, decided not to do so although, as it happened, the Court of Appeal was sitting in the Island at the time, and was available to hear any such appeal.

5 Expert accountancy evidence was given on behalf of the Plaintiffs by Mr. Alan Salsac of A.J. Salsac & Co. and on behalf of the Defendants by Mrs. Linda Vautier of Arthur

Anderson.

History

***Background to the FSA*.**

6 The events with which we are primarily concerned begin in the autumn of 1985 when Mr. Watkins and Mr. Connell were first approached with an invitation to become shareholders in the proposed new structure. But in order to understand those events it is necessary to know something of the background and we therefore summarise in the following section a number of the more important circumstances, as they emerged in the course of the trial, that have a material bearing on what followed.

7 Mr. Richard Egglishaw had originally acquired the business in about 1974 and was for a number of years the sole proprietor. Mr. Jehan had joined as an employee in 1976 and was followed over the next few years by Mr. Watkins in 1978, and by Mr. Philip Egglishaw and Mr. Connell in 1979. In 1981 Mr. Jehan and Mr. Philip Egglishaw had both been invited into partnership with Mr. Richard Egglishaw, but although Mr. Jehan had been with the firm for longer than Mr. Philip Egglishaw the latter, as Mr. Richard Egglishaw's brother, had been permitted to acquire a larger share of the equity than Mr. Jehan. To that extent Mr. Jehan had been leap-frogged by Mr. Egglishaw in terms of seniority within firm. The resultant percentage shareholdings within the partnership as at late 1985 were accordingly as follows: Mr. Richard Egglishaw 43.5%; Mr. Philip Egglishaw 39%; and Mr. Jehan 17.5%. One important consequence of this was that when it came to proposals for the introduction of additional shareholders, Mr. Jehan was particularly concerned to see that his 17.5% was not unduly diluted.

8 As at the autumn of 1985 Mr. Philip Egglishaw and Mr. Jehan were still substantially indebted to Mr. Richard Egglishaw in respect of their respective purchases of shares in the partnership.

9 Mr. Watkins and Mr. Connell were both very senior employees in the firm, but, unlike the three partners, neither of them was a qualified Chartered Accountant and in those days it was not permissible for Chartered Accountants to be in partnership with others not similarly qualified. Mr. Connell had been told some years previously that this was the only reason why he, too, had not been invited to become a partner; he had, however, been promoted in December 1981 to what was described by Mr. Richard Egglishaw in a memorandum to staff as “partnership status” with an annual “profit share” or “bonus” based on turnover above a certain figure (the subject of a separate action by Mr. Connell against the two Egglishaw brothers and Mr. Jehan and a separate judgment).

10 During the 1980's, Strachans' client base had grown very substantially and the nature of its core business had changed from that of a predominantly traditional accountancy practice to

that of offshore trust and company administration and advice, the roles of the principal figures in the case being, in short, as follows: Mr. Richard Egglishaw and his brother were very largely engaged in generating new business; Mr. Jehan was responsible for the book-keeping and accounts; Mr. Watkins was principally involved in specialist tax advice, which was his field of expertise; and Mr. Connell headed up the trust and company administration side of things.

11 As part of the development of their business in this way Strachans had, among other things, established special relationships with two separate United Kingdom firms of accountants, Kidsons and Alliott Peirson, under which the two Egglishaws (and, perhaps, Mr. Jehan) in addition to being partners in Strachans, were also co-partners, with representatives of these two firms, in Jersey partnerships operating from Strachans' premises in St. Helier.

12 In the course of 1984 the then partners in Strachans had discussions with Schroeders as to how best they might re-structure the business in order to release some capital from it and make long-term provision for their retirement. A number of possibilities had been considered and rejected. The most promising had appeared to be the progressive admission as co-partners of a number of senior staff and the corresponding sales by the existing partners of some part of their shareholdings. Mr. Watkins and Mr. Connell were the two most senior employees and therefore the natural starting point for any such exercise. (Regrettably, no discovery appeared to have been given or sought of documents relating to these discussions with Schroeders).

13 Alex Picot & Co., a Jersey-based firm of Chartered Accountants, was at one stage retained in connection with these discussions with a view to having the firm's accounts audited, but nothing came of it at that stage.

14 The relationship between Mr. Watkins and the partners appears to have been less than entirely harmonious in the year or so preceding the events with which we are concerned. Without having had the benefit of hearing evidence in person from Mr. Watkins we are unable to form any very clear view of what the problems were and the site and extent of responsibility for them, though the Defendants gave evidence among other things of a number of complaints from clients and associates which caused the Defendants, in late 1984, to reduce his salary and remove the turnover-related “bonus” or “profitshare” arrangement that Mr. Watkins – like Mr. Connell – had enjoyed. They also painted, more generally, the picture of a talented but difficult man who, as Mr. Philip Egglishaw put it, was always offering his resignation. Mr. Watkins, in his affidavit, acknowledged that complaints had been made but regarded them as unjustified; he spoke of deciding, in the light of this episode, that his future lay elsewhere and began to take steps towards setting up his own practice.

15 A major problem for Strachans that had surfaced in September 1985 and in which Mr. Watkins appears to have played a part is that of the Gritton-client fees. “Gritton” (to adopt

the impersonal appellation used by the parties throughout the trial) was evidently an important client with substantial off-shore interests whose account was “found” to have been charged by Strachans, over a four-year period, with fees in excess of those properly due to the extent of some £240,000. Mr. Richard Egglishaw in evidence before us gave an explanation of how this had come about which, in summary, was as follows. Strachans had proposed to adopt what he euphemistically described as a high-risk strategy for the off-shore protection of the Gritton-estate assets but their co-trustee, a bank, was not prepared to be associated with the scheme and resigned. The result was that Strachans were left in a position of abnormally high exposure which included having to give an indemnity to the bank. In these circumstances the Egglishaws felt entitled to charge fees to the client on a basis considerably in excess of what would normally have been the case. There came a point, however, when the “risk” factor disappeared and the level of fees should have returned to the normal level. Unfortunately, said Mr. Egglishaw, this was over-looked and fees continued to be charged, and collected out of client funds in Strachans' hands and without the consent of the beneficiaries, on the previous basis. The mistake had eventually been discovered by a member of staff who had reported the matter to Mr. Watkins. Mr. Watkins had in turn drawn Mr. Egglishaw's attention to the situation – but only after first going to seek legal advice – and Mr. Egglishaw had immediately declared that there must be a full refund of the over-charge and had instructed Mr. Philip de Figueiredo, another senior employee, to examined the accounts and calculate the appropriate re-payment, to include interest.

16 When it came to responsibility for this, Mr. Egglishaw placed the blame at Mr. Watkins' door saying that he should have been showing the client the fee notes but had failed to do so. He also said he could not understand why Mr. Watkins had gone to lawyers before reporting the matter to him. Mr. Philip Egglishaw sought to confirm this account, except that he accepted that the blame rested with the firm, including himself, rather than with Mr. Watkins in particular. By contrast, the thrust of Mr. Watkins' affidavit evidence (which was not all that easy to follow) appeared to be that he personally had discovered the overcharge; that, having taken legal advice, he was the driving force in securing a decision that the client should be refunded; and that this was only achieved following the tendering by him of his resignation. Mr. Connell was not, it seems, directly involved in these events and not therefore in a position to give firsthand evidence.

17 Of one thing we are sure, and that is that the evidence presented to us, whether that of the Defendants or that of Mr. Watkins, was by no means the whole story and that it would be unsafe to make anything other than the most minimal findings of fact as to how the overcharge arose in the first place, how it came to light, and the precise chain of events that led to the subsequent refund. It is plain that it must, to put it at its mildest, have been a source of major embarrassment as regards the client and also of recrimination within the firm itself; but of this we heard virtually nothing. In particular no discovery of relevant client correspondence files was given or other evidence adduced of subsequent dealings with the client. There is also a number of observations and unanswered questions that spring naturally to mind but which it is unnecessary for this Court to pursue for the purposes of this litigation. Three things are, however, clear: (i) overcharging of the Gritton clients to the extent of some £240,000 was revealed in September 1985 or thereabouts; (ii) the extent of

the fee mark-up was of the order of 100%; (iii) Mr. Watkins was, on any view, involved in discussions with Mr. Richard Egglishaw about the matter; (iv) a refund of the order of £313,000 inclusive of accrued interest was eventually made to the client some eight months later in about May 1986; (v) but it was not until the loan from '3i' was secured and drawn down (in May 1986: as to which see below) that the firm was in a position cash-wise to make the refund. In cross-examination, Mr. Egglishaw agreed that this was an exceptional situation and that the firm had never previously had to borrow in order to repay a client.

18 We have dealt with the Gritton matter at some length partly because it is an important ingredient of the background to subsequent events and partly because it is one of the matters that features directly in the allegations of misrepresentation. There was also another client, known as Chofid, to whom a refund of fees of the order of £50,000 was established as due sometime in late 1985. This, too, is a matter to which we shall return later.

19 This, then, was the background against which Mr. Richard Egglishaw approached, successively, Mr. Watkins and Mr. Connell in the autumn of 1985.

The proposed restructuring of Strachans and involvement of the Plaintiffs

20 The essential corporate elements of the proposed restructuring of Strachans as developed in late 1985 were: (i) the incorporation of a holding company (STR) and transfer to it of the business of the former partnership; (ii) the cessation of Strachans as such; (iii) the establishment of SMS as a subsidiary of STR with a licence from STR to carry on part of the business; (iv) the issue to Mr. Watkins and Mr. Connell of minority shareholdings and corresponding diminution *pro rata* of the original partners' shareholdings; and (v) the new regime to take effect from 1st February 1986, being the day following the end of the close of Strachans' (final) financial year on 31st January 1986.

21 At the financial level (i) the scheme was to be financed by a loan of some £1.14 million, provided in the event by 3i; (ii) the loan was to be made to Sommerville Estates Limited, one of Mr. Richard Egglishaw's own companies so that it could be secured on Sommerville House, a property in St. Helier owned by that company; (iii) there was then to be a back-to-back loan in the same amount on to SMS; (iv) this was to be used in part to establish loan accounts to fund the purchase by Mr. Watkins and Mr. Connell of their shares and to enable Mr. Jehan and Mr. Philip Egglishaw to discharge their debts to Mr. Richard Egglishaw (arising out of their own acquisitions of shares in 1981), and in part to provide the means of making the necessary refund to the Gritton clients.

22 The proposals put to Mr. Watkins and a little later to Mr. Connell in October and November 1985 were substantially identical except in one important respect. In Mr. Connell's case, the proposal, initially, was that he should acquire a 5% shareholding in STR in return for an

investment of £400,000; the capital outlay being funded by means of a loan to Mr. Connell from the 3i moneys and the loan interest and capital repayments being covered by the dividends that Mr. Connell could expect to receive on his shares.

23 In the case of Mr. Watkins, however, it was proposed that he should, in effect, receive a 2 $^{1}/_{2}$% shareholding at no cost and a further 2 $^{1}/_{2}$% for a consideration of £200,000. The reason for this substantially more advantageous proposition was said by Mr. Egglishaw in evidence to be that Mr. Watkins, at 62, was significantly older than Mr. Connell and would be unlikely to be able to anticipate paying off a loan of £400,000 within an acceptable period of time. It was important, he said, to make the proposal appealing to Mr. Watkins as his acceptance would be the natural lead for others to follow: Mr. Connell initially, and other senior employees such as Mr. de Figueiredo and Mr. Evered at a later stage. But, whilst it may be that something on these lines was part of the Defendants' thinking, we have a strong suspicion that the substantial disparity between the two proposals had more to do with a desire to lock-in a potential troublemaker than any altruistic gesture. Why else would the Defendants have been so keen to offer a deal in these terms to someone whose salary they had reduced less than twelve months previously for causing trouble with clients and who, on Mr. Richard Egglishaw's view of things at least, had been principally responsible for the Gritton débâcle?

24 Both Mr. Watkins and Mr. Connell responded favourably to these proposals. A draft formal agreement was drawn up by Advocate Thacker of Viberts on the instructions of Mr. Jehan, writing on behalf of Mr. Richard Egglishaw, and the process of detailed negotiation began. In the event it was not until November 1986 that the final version of the FSA was eventually signed. In the meantime a number of significant events occurred:

The meeting on 1st April 1986 is to a large extent the crux of the whole case.

(i) There was a series of meetings between the parties in late December 1985 and early January 1986.

(ii) Strachan & Co., as such, ceased to trade with effect from its year end on 31st January 1986 and STR was incorporated with effect from 21 st February 1986.

(iii) By late March 1986 Mr. Jehan had completed work on his draft accounts for Strachans and SMS for the year just ended.

(iv) On 1st April 1986 a meeting took place in Mr. Richard Egglishaw's offence attended on the one hand by Mr. Watkins and Mr. Connell and on the other by Mr. Richard and Mr. Philip Egglishaw and Mr. Jehan.

(v) In or about mid-May 1986, the 3i loan was drawn down; loans of £200,000 and £400,000 were established in favour of Mr. Watkins and Mr. Connell respectively; an amount of some £313,000 was refunded to the Gritton clients; and some £600,000 was released to Mr. Richard Egglishaw (via his companies Valfar Limited and Sommerville Estates Limited) in part as payment by Mr. Watkins and Mr. Connell for

their shares and in part by way of discharge of the debts owed to him by Mr. Jehan and Mr. Philip Egglishaw for the shares acquired by them from him in 1981.

(vi) Mr. Watkins and Mr. Connell began to be credited with dividends and debited with interest.

The contractual entitlement issue

25 The nub of the dispute between the parties was whether Mr. Watkins and Mr. Connell were each entitled to:

This involved a consideration of both the FSA and the meeting on 1st April 1986.

(i) £400,000 worth of shares, whatever percentage that might be (as they contended), or

(ii) 5% of the issued shares, whatever they might be worth (as the Defendants contended).

26 The final text of the FSA, dated 1st February 1986 but signed in November 1986, provided in clause 6 for the acquisition of shares by Mr. Watkins and Mr. Connell in the following terms:

"(e) That on the 1 st February 1986, Mr. Watkins shall have irrevocably transferred into his sole name by the existing partners pro rata free of all charges such percentage of the issued share capital of STR Holdings which have a value of not less than two hundred thousand pounds (£200,000) sterling (such percentage being estimated to be likely to be approximately 2 1/2%).

(f) i) That on the 1 st February 1986, Mr. Watkins shall have the irrevocable option to acquire from the existing partners, pro rata, a further percentage of the issued share capital in STR Holdings in the same amount as he has acquired under (e) above for the sum of two hundred thousand pounds (£200,000) sterling. The said option shall be exercised when the final profit figures for the said firm [meaning Strachans] *and the said companies and trusts set out in Schedule One* [which included SMS] *for the year to 31st January, 1986 are available, which said profit figures shall be calculated as soon as reasonably possible*.

ii) That Mr. Connell on the 1 st February 1986 shall have the irrevocable option to acquire from the existing partners "pro rata", shares in STR Holdings which shall be twice the number of shares which would be acquired by Mr. Watkins if he exercised the option set out in (f) above and on the same terms for the sum of four hundred thousand pounds (£400,000) sterling."

There are several features of these provisions that require particular note: first, the key

phrase in clause 6(e):

> *"such percentage of the issued share capital of STR Holdings which have a value of not less than two hundred thousand pounds (£200,000) sterling (such percentage being estimated to be likely to be approximately 2 $^{1}/_{2}$%)."*

Secondly the absence in the text itself of any formula for inter-relating *value* and *percentage*. And, thirdly, the reference in clause (f)(i) to *final profit figures* for Strachans For the year ended 31st January 1986, which were *to be calculated as soon as reasonably possible*.

27 *Clause 6(e); the variable percentage:* Although clause 6(e) as such was concerned with the issue of Mr. Watkins' first 'free' tranche of shares, it was common ground that the words set out above governed his second tranche as well, and also Mr. Connell's entitlement (substituting £400,000 for £200,000 and 5% for 2 $^{1}/_{2}$%). It is also as plain as it can be, on a natural reading of the clause, that the monetary figure is fixed and the percentage is potentially variable: in other words that what Mr. Watkins and Mr. Connell were to get was £400,000 worth of shares, whatever that percentage might be. Despite this, and despite the Defendants' principal submission that the FSA was irrelevant (because, when the parties met on 1 st April 1986 they agreed a figure of 5% for each of the Plaintiffs), Advocate Voisin went to considerable lengths to endeavour to demonstrate that there had never been any question of the Plaintiffs being offered or entitled to anything other than 5%. This exercise, which involved a trawl through successive drafts of the FSA and a fair amount of evidence from each of the Defendants about his intentions (much of questionable relevance or admissibility), proved to be entirely counter-productive. The original draft produced by Advocate Thacker had indeed been cast in terms the other way about: with a fixed percentage and a potentially variable monetary value. But a manuscript note in Mr. Jehan's handwriting, belatedly produced on discovery by the Defendants shortly before the start of the trial, was observed to include the following words:

> *"confirmation that loans ex 3i as is and there [sic] shares will be issued on basis of profit ie poss not 5% but variable."*

And, faced with this note in cross-examination by Mr. O'Connell, each of the Defendants in turn accepted that Mr. Watkins had insisted on this change, to a variable percentage; that they had agreed to it at a meeting on 6 th January 1986; and that the previous draft of the agreement had as a result been amended to meet the point.

28 *The inter-relationship between monetary value and percentage*

For reasons that were never clear, the Defendants also originally made an issue of the formula which was to govern the inter-relationship between the monetary value of the shares to be acquired by Mr. Watkins and Mr. Connell and the corresponding percentage of the issued share capital. There was, however, never any doubt about the matter. Although there was nothing in the FSA itself dealing with the point, it was common ground from the outset of the negotiations that the value of the business was to be taken as eight times the

net profits for the current financial year, in other words to 31 st January 1986. It is also plain that the Defendants hoped to achieve net profits for this year of £1 million, that they told Mr. Watkins and Mr. Connell that this was what they confidently expected, and that this target was the source of the words in brackets at the end of clause 6(e)

> "(*such percentage* [that is, such percentage of the issued share capital as would have a value of £200,000] *being estimated to be likely to be approximately 2 1/2%)*".

The significance of this was that, if the net profits for the year were to be £1 million, then £200,000 and £400,000 worth of shares would represent 2 1/2% and 5% respectively of the issued share capital. But if they turned out to be less than £1 million, then, on the construction of the final version of the FSA discussed above, Mr. Watkins' and Mr. Connell's entitlements to shares would be correspondingly greater if expressed in percentage terms.

29 *Final profit figures for the year to 31st January 1986*

The agreement contained no definition of what was meant by *final* profit figures. In the context of this particular business – part partnership, part incorporated company (SMS) – there was, moreover, no obvious event to define the point of finality. In the first place, there was no obligation on the parties to have the accounts audited and it was not the Defendants' practice to do so. And in the second place, under the tax collection regime as it operated in the 1980's it was perfectly possible for a business such as Strachans to defer submission of a tax return for up to three years or so after a financial year end (the tax authorities being content in the meantime with a reasonable payment or payments on account). A consequence of this, which had important implications for the present dispute, was that it was the Defendants' practice (i) to keep the business' accounts open for two or three years before submitting them to the tax authorities, and (ii) to avail themselves of the opportunity that this situation created to continue to make such adjustments between 'open' years as they considered appropriate for much longer than would have been possible if an annual audit and report had been necessary or the requirements for filing tax accounts had been more stringent. The accounts of Strachans and SMS for the year ended 31 st January 1986 were not filed with the tax authorities until May 1989.

30 Against this background the Plaintiffs argued that *final accounts* for the purpose of clause 6(e) meant the tax accounts as and when delivered (in the event, in May 1989) and the Defendants contended that, if any accounts were relevant, they were the ones presented to the meeting on 1 st April 1986 by Mr. Jehan. For the reasons given later we regard the Plaintiffs' submission on this issue as untenable. To what extent, if at all, the Plaintiffs were aware in April 1986 of the Defendants' practice of delaying the submission of tax accounts was not explored in evidence. But clause 6(e) clearly contemplated that the relevant profit and loss account would be prepared within a relatively short time after the year-end and the only reasonable construction to put on the events that occurred, to our mind, is that, whatever the parties may originally have had in mind, in practice both sets treated the accounts presented to the 1 st April 1986 meeting as the relevant ones for the purpose of

clause 6(e). When, therefore, it comes to consideration of questions of misrepresentation and breach of warranty, it is these accounts that are primarily at issue.

Mr. Jehan's accounts for the year ended 31st January 1986

31 According to Mr. Jehan it was his practice to start work on the annual accounts within a matter of weeks after the end of the financial year and to provide a copy of his draft accounts to his two partners a day or two in advance of the partners' meeting at which the accounts were formally presented for approval. It was his custom to present these in the form of 'consolidated' accounts, in the sense that they combined the results of the partnership and the company (SMS). Separate accounts were filed with tax returns; but for internal purposes it was regarded as convenient to combine the two.

32 In this case he prepared, among other things, successively on 21 st and 22 nd March 1986, two different sets of accounts, each headed "Strachan & Co. – Income and Expenditure Account – For the Year Ended 31 st January 1986"; each consisting of a single manuscript page, each in largely but not wholly the same form, and each showing comparative figures for the previous year. There are, however, striking differences between the two, otherwise very similar, documents:

(i) In the first, dated 21 st March, the net profit figures for 1986 and 1985 respectively were shown as £904,907 and £942,109, whereas in the version dated 22 nd March they were shown as £1,068,614 (1986) and £873,358 (1985).

(ii) In the 21 st March version, the sub-heading listed under 'Expenditure' included a specific item entitled 'Bad debts provision' showing amounts of £12,035 (1986) and £104,781 (1985). But, in the 22 nd March version, this item – and this item alone – is omitted. The other twenty sub-headings, and corresponding figures, remain and have been written out in almost exactly the same form as in the 21 st March accounts.

(iii) The 21 st March version included, after the list of Expenditures in the 1986 column, a separate item of £137,207 entitled "Prior period adjustment", with no corresponding figure under 1985. But, here too, there is no equivalent item in the version of the accounts dated 22 nd March.

(iv) The Income figures (fees, disbursements, work-in-progress and bank interest) were shown respectively as follows:

21 st March version: £1,965,913 (1986) and £1,832,141 (1985); and

22 nd March version: £1,980,378 (1986) and £1,660,472 (1985).

(v) At the foot of each of the two versions, figures were given for the three partners' shares of the profit, the figures for 1986 being significantly higher in the 22 nd March

version than in that of the 21 st March.

33 Anyone presented with the 22 nd March version of the account, but not the earlier version, would therefore:

We return to this later.

The meeting on 1 st April 1986

(i) only see a net profit figure for 1986 of £1,068,614;

(ii) would not see comparative 'bad debt provision' figures for 1986 and 1985 showing what appeared to be a marked disparity between the two; and

(iii) would not know of the 'prior period adjustment' of £137,207.

34 It was common ground that the only set of accounts considered by the meeting was the version dated 22 nd March and that the earlier version was not tabled at the meeting or otherwise made available to Mr. Watkins and Mr. Connell. Beyond this, almost every material aspect of what took place was the subject of dispute, starting with the point at which copies of the accounts were supplied to the participants. Mr. Jehan told us that, in accordance with his normal practice, he would have circulated the accounts a day or two in advance of the meeting. But Mr. Connell was sure that they were only produced to him and Mr. Watkins at the meeting itself. In our view, while Mr. Jehan may well have given copies to his former partners in advance of the meeting, in the absence of any evidence of a covering memorandum or note drawing Mr. Watkins' and Mr. Connell's attention to the fact that the net profit shown in the accounts did not take account of an appropriate portion of the Gritton refund (to which we come shortly), it seems most improbable that Mr. Jehan would simply have left copies for them in an envelope in advance of the meeting.

35 Mr. Connell's account of the meeting was in summary as follows: The accounts were produced, but there was little discussion of them. Mr. Watkins asked whether they included an appropriate allowance for the portion of the Gritton refund referable to the year ended 31 st January 1986 and was told by Mr. Jehan that they did. Mr. Connell then asked the same question with reference to the Chofid refund and received the same answer. Mr. Jehan indicated that although the accounts under consideration were *draft* accounts it was not likely that any final amendments would result in a net profit figure of less than £1 million. Mr. Richard Egglishaw said that the net profit of £1,068,614 was higher than they (the former partners) had expected, but they were nevertheless content to allow Mr. Watkins and Mr. Connell to have a 5% shareholding each. Using a factor of eight times net profits, this meant that Mr. Watkins and Mr. Connell would each be getting, in effect, £28,000 worth of shares free. On this basis Mr. Connell was, he said, content to proceed without asking anything else.

36 Mr. Jehan, by contrast, said that it was he himself who volunteered information about the Gritton matter and that it was not a matter of his responding to a question from Mr. Watkins. He pointed out, he said, that no allowance had been made in the accounts for the Gritton refund and that this was so because he could, not at that point, calculate the final figure for interest (the actual refund not being possible until the 3i loan had been drawn down) and told the meeting that he estimated that an adjustment of around £60,000 for 1986 would be necessary. He denied saying that any further adjustments would not reduce the net profit below £1 million. Mr. Connell and Mr. Watkins appeared to be content with the figures and made no further inquiries. If they had wanted to wait until the tax accounts were ready they could, he said, have done so.

37 Mr. Jehan's account of the meeting was substantially supported by Mr. Richard Egglishaw and his brother. In addition, both sought to emphasise that the accounts were only ‘draft management accounts’ and, as such, not something to be relied on in the same way as audited accounts; that the net profit figure of something in excess of £1 million was in line with what they had all been expecting for some time; and that the meeting had concluded with everyone ‘shaking hands’, in effect, on the basis that the profits could be taken to be £1 million and Mr. Watkins and Mr. Connell should each get 5% of the issued shares. It was this version of events of the 1 st April 1986 meeting that appeared to form the basis of the Defendants' case that the FSA, in the event, was irrelevant, because it was overtaken by a deal between the parties at this meeting: a deal, in short, at £1 million and 5%.

38 Whatever the truth about the meeting on 1 st April 1986, it is clear that the parties proceeded thereafter to act on the basis that Mr. Watkins and Mr. Connell were 5% shareholders, even though the FSA was not finally signed until November 1986. (Precisely when and in what order the necessary formalities were completed, and whether this was all done strictly according to the book, remains a matter of some obscurity). As indicated earlier, the 3i loan was drawn down in mid-May 1986; Mr. Watkins' and Mr. Connell's loan accounts were established and debited with the purchase price of their respective shares (£200,000 in the case of Mr. Watkins and £400,000 in the case of Mr. Connell) together with contributions of £20,000 each towards working capital; dividends were credited and interest was debited to their accounts. At or about the same time as the FSA was signed in November 1986, each of the shareholders transferred his holding to a private company or trust. All seems to have proceeded relatively amicably for the next two and a half years or so.

1988: The County NatWest prospectus

39 We heard little evidence about the background to this document and saw little of the contemporaneous correspondence. But it appears to have been the case that sometime in 1988 the shareholders retained County NatWest to advise them on how best to look for a possible purchaser of the business. In the event, nothing came of this. But, as part of the exercise, County NatWest produced, in September 1988, a draft prospectus – or ‘Sale Memorandum’ as it was entitled – which included a comparative table of turnover and profit

for the years 1984 to 1988. The figures shown in this table for 1986 (that is, for the 12 months ended 31 st January 1986) were: Income £1,902,000 and Profit before Tax £956,000. Mr. Connell said in evidence that he first saw this document sometime in late 1988, but it was not until later that he appreciated its significance.

Summer 1989: The tax accounts for the year ended 1986

40 We were told by Mr. Jehan, and it does not appear to be disputed though we saw no correspondence with the tax authorities, that it was not until mid-May 1989 or thereabouts that Mr. Jehan finally submitted his accounts for the year-ended 31 st January 1986. Nor is it in dispute that it was not until sometime in June or July 1989 that Mr. Connell was first given sight of these accounts by Mr. Jehan. Exactly how this came about is unclear, but it was Mr. Connell's evidence that they were only given to him – not to Mr. Watkins – and he was expressly told not to show them to Mr. Watkins without the others' consent. This was probably because relations between Mr. Watkins and the Defendants had by this time deteriorated to the point where negotiations were going on for the re-acquisition of Mr. Watkins' shares by the Defendants, though this was never fully explained; but, whatever the reason, Mr. Connell did as he was requested at that stage, though he eventually showed them to him in late 1993 or so.

41 The tax accounts differed in form from the accounts produced at the meeting on 1 st April 1986 in that there were separate accounts for Strachans and for SMS. But in all other respects the structure of the former – which is where the bulk of the earnings were – was exactly the same as that of the 'consolidated' accounts dated 22 nd March 1986. Surprisingly, they too were in manuscript. The net profits shown in these documents were: Strachans £746,761 and SMS £209,606 making a total of £956,367. Both the County NatWest prospectus and the tax accounts therefore showed a profit figure for 1986 of some £113,000 below that stated in the 22 nd March 1986 income and expenditure account.

42 It is difficult to be sure of the precise sequence of events at this stage. At one stage of his evidence, Mr. Connell appeared to be saying that it was after he had had sight of these accounts that he went back to look at the profit figures in the County NatWest prospectus and observed that the 1986 figure was the same. But at another point, in cross-examination by Mr. Voisin, he spoke of raising queries with Mr. Jehan about the discrepancy between the 22 nd March 1986 figure and the County NatWest figure (in June 1989) *before* he had had sight of the tax accounts (in July).

43 It is reasonably clear, however, that it was round about June or July 1989 that, for one reason or another, Mr. Connell's concerns about the accuracy of those earlier accounts and the basis on which he had acquired his shareholding began to take hold, and that over the course of several weeks he conducted a series of exchanges, some written, some oral, with Mr. Jehan in which he set about trying to establish the reason for this substantial discrepancy.

44 We were shown a number of manuscript notes of a question-and-answer kind, the precise content, purpose and effect of which was not always easy to determine. But the burden of Mr. Connell's evidence on this part of his case was that he found it difficult to obtain any clear, consistent and satisfactory explanation from Mr. Jehan. At one stage, he said, he was told that the accounts in question related to a period when he was not a partner or shareholder and that he was not therefore entitled to the information that he sought; at another, that the explanation was to do with work-in-progress and disbursements; and, on yet another, that the difference was attributable to three items, (i) Gritton, (ii) travel expenses, and (iii) various other smaller adjustments, totalling £111,551. Given the piece-meal way in which the exchanges appear to have been conducted, there may well have been some scope for a degree of misunderstanding. Whether anything more devious on the part of the Defendants was involved is more difficult to be certain about; but in the view of the difficulty of reconstructing with confidence the dialogue that took place and the evident uncertainties of recollection on both sides, it would be unsafe to go that far. What can, however, be said with certainty is that Mr. Connell's concern was, on any view, a justifiable one and that it is regrettable that the matter was not dealt with more openly and coherently by Mr. Jehan at the time when it first arose.

45 Although he had not got to the bottom of the matter, Mr. Connell appears to have decided to let the matter ride for the time being, perhaps because he became more concerned with the possibilities of selling his own shareholding back to the Defendants. In this context it is necessary at this point to say something about Mr. Watkins' position.

Re-purchase of Mr. Watkins' shares by the Defendants

46 By mid-July or so Mr. Watkins had successfully negotiated to sell his shareholding back to the three Defendants for a sum of £700,000, although the formal contract was not signed until January 1990. Serious disagreements had arisen between them and there appears to have been a mutual agreement that they should part company as far as shareholding was concerned. (Mr. Connell said in evidence that he had twice been approached by Mr. Richard Egglishaw with a request that he should join the Defendants in getting rid of Mr. Watkins: on each occasion he refused). But despite this, Mr. Watkins remained a director until January 1990, when he resigned from this office but remained a ‘consultant’. This, however, was a short-lived arrangement: in March 1990, following further disagreements, he resigned from this position and finally severed all links with STR.

47 Meanwhile, Mr. Connell had begun to follow a similar path. The course of events becomes a little tortuous at this stage, but appears in summary to have been as follows. Apart from the concerns that he harboured about the 1986 accounts, by July 1989 Mr. Connell had other grounds of dissatisfaction. He was annoyed that, contrary to assurances given to him by the Defendants, none of the other senior employees had been promoted to director-shareholder status and he would like to have sold out, as Mr. Watkins had done, while continuing to be employed by the company. Mr. Richard Egglishaw was initially only

prepared to offer what Mr. Connell regarded as a wholly inadequate sum, but a figure of £600,000 was eventually agreed and Advocate Thacker was instructed to draw up the necessary agreement. This proposed agreement was, however, overtaken by events, when both sides had a change of heart. In mid-August 1989, the Defendants reversed their previous stance, offered to take in Mr. de Figueiredo immediately as a shareholder and others at a later stage and asked Mr. Connell whether, on that basis, he would be prepared to retain his shareholding. Mr. Connell agreed: to have disposed of his shareholding in these new circumstances would have left him lower in the pecking order that Mr. de Figueiredo; as he put it in evidence, he was in danger of "painting himself into a corner". The result, in short, was that Mr. Connell kept his shares, but it was agreed that they should be 're-valued' so as to create substantial parity between the terms on which Mr. de Figueiredo was acquiring his holding and the amount originally paid by Mr. Connell for his shares. Once again Advocate Thacker was instructed by the Defendants to draw up the necessary heads of agreement. Mr. Connell was also to have a new service contract. In the event, no such agreements were ever finalised and signed.

December 1991: Mr. Connell's resignation

48 Following the events of summer 1989, Mr. Connell remained unhappy and progress towards finalising the new agreements was slow. But there were no further major incidents or developments for over two years. In December 1991, however, things came to a head when Mr. Egglishaw insisted that the directors, including Mr. Connell, should take a cut in salary. Mr. Egglishaw explained in evidence that the business was by then suffering from the effects of recession and he regarded this as a necessary measure. Additional costs were also being incurred in connection with (i) new borrowing arrangements that had been required to finance the repurchase of Mr. Watkins' shares and (ii) the need to refinance the 3i borrowings so as to release the original security over Sommerville House. Mr. Connell, for his part, objected strongly, not least because such a cut would hit him, proportionately, much harder than it would the Egglishaws and Mr. Jehan with their much larger shareholdings and dividends. He suggested that they, instead, should take a cut in their dividends, but this was rejected. An impasse was reached and on 31 st December 1991 Mr. Connell wrote to Mr. Richard Egglishaw giving notice of resignation with effect from 1 st February 1994, adding "This is subject to all our new agreements being executed before 31 st January, 1992, which you indicated to me yesterday would be the case." The letter listed a number of issues with which Mr. Connell was unhappy, the general theme being that there had been repeated breaches of trust on the part of the Defendants. The final paragraph said that the letter was to be treated as "giving you all notice regarding the purchase back of my shares, as at 31 st January, 1994."

49 This letter was followed shortly afterwards by a second letter from Mr. Connell to Mr. Richard Egglishaw, dated 29 th January 1992 in which Mr. Connell voiced vigorous objection to the content of the circulated minutes of a particular meeting and said: "… I hereby withdraw the condition attached to my resignation letter of 31st December in the first paragraph, so that my resignation is not conditional on the new agreements being signed

by 31st January … I will not be prepared to sign the new agreements until the following points are reflected therein …" There was then further acrimonious correspondence, with accusations and counter-accusations being freely exchanged, the truth or falsity of which was not explored at the trial. On any view there was a degree of general confusion during this period, if only because of (i) the uncertain legal framework within which these events were taking place (the proposed new agreements remaining unsigned), and (ii) having decided, in the face of a requirement from the Defendants that he should contribute to the provision of security for the 3i loan (in place of Sommerville House), Mr. de Figueiredo had decided that he did not, after all, wish to be a shareholder.

50 Disputatious correspondence continued to flow between Mr. Connell and the Defendants and, at a later stage, between Mr. Connell and Advocate Voisin on behalf of the Defendants, throughout 1992 and much of 1993. There were, in addition, discussions from time to time as to the terms on which the Defendants might buy out Mr. Connell's shareholding, but nothing came to fruition. Meanwhile Mr. Connell continued to act as a director and employee. Then, in June 1993, Bailhache & Bailhache, who had been retained by Mr. Connell and had written to Voisin & Co. threatening litigation if certain action on the part of the Defendants was not forthcoming, received a reply dated 16 th June 1993, making it clear that Mr. Connell was no longer welcome in the office. After that he ceased to have any active involvement in the affairs of the business, although he continued to receive his salary up until 31 st January 1994.

51 By December 1993 at the latest, Mr. Connell was convinced that he had been cheated in connection with his acquisition of shares in 1986. As a result of the intervention of Bailhache & Bailhache, and after considerable prevarication on the part of the Defendants over a period of several months, Mr. Connell had eventually been given access by the Defendants to a considerable amount of documentation relevant to his concerns and he had spent several weeks in late 1993, back in the office examining it. This inspection process continued into 1994, though Mr. Connell continued to encounter difficulties in gaining access to everything that he wanted to see.

52 It was, according to Mr. Connell, sometime in December 1993 or thereabouts that he had dinner with Mr. Watkins and alerted him to his suspicions and the results of his researches, and that Mr. Watkins concluded that, if Mr. Connell had been cheated, he too must have been a victim.

The Alex Picot audits

53 One of Mr. Connell's demands during this period was that the recent accounts of STR and SMS should be audited as he was concerned about the validity of the accounts compiled by the Defendants. The Defendants' initial response to this was that they were agreeable to this being done, but only at Mr. Connell's expense and provided the audit was carried out by a non-Jersey firm (supposedly in the interests of confidentiality). In time, however, they relented and agreed to appoint Alex Picot & Co., with whom the Defendants had had

discussions some years earlier in 1985 with a view to becoming auditors of the then partnership (though the proposal was not in the end implemented). Alex Picot were accordingly instructed by the Defendants, sometime in the latter part of 1994, to conduct an audit of the accounts of STR and SMS to 31 st January 1994. They were also instructed to produce a valuation of Mr. Connell's shares as at that same date. On 16 th December 1994, Voisin & Co. wrote to Bailhache Labesse (as the successors of Bailhache & Bailhache) enclosing copies of the latest draft accounts as prepared by Alex Picot and a valuation of the STR group. It was not, however, until the end of March 1995 that the final audited accounts were delivered to the Defendants, and not until 22 nd May 1995 – some seven weeks later – that copies were supplied by Voisin & Co. to Bailhache Labesse (together with a valuation prepared by Alex Picot of Mr. Connell's shareholding as at 31 st January 1994).

54 Unbeknown to the Plaintiffs at the time, the Defendants also instructed Alex Picot to carry out an audit of the accounts of Strachans and SMS for the year to 31 st January 1986 and a valuation of a 5% shareholding in STR as at that date. Exactly when this exercise began is unclear, but it is evident that, by February 1996 it was well under way and that the final auditor's reports were not issued until 15 th July 1996. It is also evident that, in between, there was some considerable discussion between representatives of Alex Picot and Mr. Jehan (i) to which the Plaintiffs were not party, and (ii) of which we know, even now, little beyond what appears from the selection of documents compiled by the Defendants and produced in evidence in the course of the trial. The financial statements, the subject of the audit, were the accounts submitted to the Comptroller of Income Tax in May 1989 and subsequently copied to Mr. Connell. And, although the terms of the auditor's reports were qualified in certain respects, they were heavily relied on by the Defendants as confirming the substantial validity of those accounts and also as helping to substantiate the Defendants' explanation of the differences between those accounts and the 22 nd March 1986 accounts produced at the meeting on 1 st April 1986.

Institution of proceedings

55 On 22 nd January 1996 the Order of Justice in this action was served (proceedings in Mr. Connell's separate action against the Egglishaws and Mr. Jehan in respect of his profit share for 1984/85 and 1985/86 having been instituted in January the previous year). It is unnecessary to recite the history of these proceedings at length and sufficient to note the following points. By July 1996 all the principal pleadings had been served. On 4 th October 1996 further and better particulars of the Plaintiffs' Order of Justice were served. The Defendants' first – and wholly inadequate – list of documents was served in December 1997 and the Plaintiffs' list in January 1998. The Defendants were subsequently obliged to serve a further six lists, the last three during the course of the trial itself. At a brief hearing on 9 th January 2001 directions were given as regards Mr. Watkins' application to give evidence by affidavit, the exchange of experts' reports and the preparation of trial bundles and the like. The trial itself began on 5 th March 2001 and concluded on 26 th April. Trial of

the second action, between Mr. Connell alone and the Defendants followed in the second week of June.

The opposing cases

56 The Plaintiffs' case, in short, is that the 22 nd March 1986 consolidated accounts substantially exaggerated the net profit in a number of respects; that this was the consequence of deliberate manipulation on the part of the Defendants for the purpose of deceiving the Plaintiffs into accepting a shareholding of 5%; and that, if the accounts had shown the true picture, the Plaintiffs would each have been contractually entitled, under the terms of the FSA, to a proportionately higher percentage of shares, taking the value of the business as eight times the net profits for the year to 31 st January 1986. Alternatively, they contend, the inaccuracies in the accounts involved the breach of an implied warranty that the accounts were accurate. (In the course of the trial, the Defendants challenged the Plaintiffs' pleadings on this alternative case, arguing that no such cause of action was pleaded. But, although the Plaintiffs were invited by the Court to amend their pleading so as to put the matter beyond any possible question, and did so, on a fair reading of the original Order of Justice the alternative case of breach of warranty was, in our view, always there. Even if this was not a correct reading, the amendment was plainly one that ought in the interests of justice to be allowed. Advocate Hoy on behalf of the Defendants very properly and readily conceded that no prejudice to the Defendants was involved). At the outset of the case, it was the Plaintiffs' contention that the true net profits for 1985/86 were some £493,566 rather than the £1,068,614 shown in the 22 nd March accounts and that on this basis their true respective entitlements were to 10.13% of the issued shares. Later, in Mr. Salsac's Supplementary Report the corresponding figures were revised to £569,092 and 8.79%.

57 Mr. Connell also contends that, on a proper construction of events since 1991, he has always remained a shareholder in STR and a director of STR and SMS.

58 The Defendants' case is that, whatever the FSA might strictly provide, that agreement was irrelevant as the parties had struck a bargain on 1 st April 1986 that the profits would be taken as £1 million and that Mr. Watkins and Mr. Connell would each get 5% of the issued shares; that Mr. Jehan had explained at the meeting that the accounts had yet to be adjusted for the Gritton refund; that, subject to this, the accounts were bona fide and as accurate as they reasonably could be at that time; and that the differences between the 22 nd March 1986 accounts and the later tax accounts were explicable and legitimate. They also argue that the effect of Mr. Connell's resignation letters in December 1991 and January 1992 was that as from 31 st January 1994 he ceased to be a director and became obliged to sell his shares to the Defendants on the basis of the revised arrangements agreed in principle in the summer of 1989 (notwithstanding that these were never formalised in a signed written agreement). On this basis, and (i) putting a value on Mr. Connell's shareholding at 31 st January 1994 of £178,435, as determined by Alex Picot, and (ii)

setting against this, his (alleged) indebtedness to, in effect, the Defendants on loan account and otherwise in a total amount of £224,172, and (iii) bringing into account an amount of £20,000 already erroneously paid to him in 1992, there was, the Defendants counterclaimed, a balance of £65,737 due by Mr. Connell to them (ignoring for present purposes the parties' respective trusts and companies).

Issues of law and mixed law and fact

59 The issues and our conclusions can be summarised as follows (in some cases we have already covered them):

(i) On a true construction of the FSA Mr. Watkins and Mr. Connell were each entitled to £400,000 worth of shares, whatever percentage of the issued share capital that might represent.

(ii) There was an implied warranty on the part of the Defendants that the “final profit figures” contemplated by clause 6(f) of the FSA would, when produced, be substantially accurate (applying *Sibley v Berry* (7th July, 1987) Jersey Unreported C of A; [1992] JLR N.4). This was plainly inherent in the contractual scheme of things, given that the Defendants alone were in a position to prepare the accounts and vouch for their accuracy, and that the FSA did not contemplate any independent audit or any opportunity for the Plaintiffs to verify the figures for themselves. The Defendants sought to play down the significance of the accounts that were eventually produced, repeatedly emphasising that they were no more than “draft management accounts”. The copy of the 22 nd March 1986 accounts to which reference was most frequently made during the trial was, it is true, marked “Draft” in manuscript, but it became clear that this had been added at a later stage and formed no part of the original document; and calling them mere “management accounts” was to ignore what was called for by the agreement. The Defendants also argued that there was no question of the Plaintiffs relying on the 22 nd March accounts because they had, by then, seen sufficient material, in the way of statements and budgets, to know how things were going. On any view Mr. Connell had been shown a certain amount of material of this kind. Exactly how much was disputed. But whoever is right on this particular point makes little difference: the important issue was always what the final profit figures actually showed. The fact that this was not entirely a foregone conclusion was well illustrated by Mr. Philip Egglishaw's statement that *“We were waiting for the 31 st January 1986 accounts to confirm the figures.* Until they were available we really could not conclude the matter”. Had this not been the case, the bargain could have been struck much earlier without waiting for Mr. Jehan's accounts. In practice it was common ground that the ‘deal’ was effectively done on 1 st April: according to Mr. Richard Egglishaw this was when the parties, metaphorically at least, shook hands.

(iii) The 22 nd March 1986 accounts produced for the meeting on 1 st April 1986 were the “final profit figures” for the purpose of clause 6(f). The Plaintiffs' contention that the final figures were those contained in the tax accounts filed in May 1989 is not realistic.

There was no suggestion at the meeting on 1 st April 1986, or on any other occasion, that it would be necessary to wait until the accounts to be submitted to the tax authorities had been finalised. And there is no evidence of Mr. Connell or Mr. Watkins ever having pressed for production of tax accounts so that they could know exactly where they stood as regards their shareholdings.

(iv) Equally unrealistic, however, is the Defendants' contention that the provisions of the FSA concerning the acquisition of shares by Mr. Watkins and Mr. Connell were overtaken by the events of 1 st April 1986. All that happened at that meeting was that the parties, anticipating that the FSA would eventually be finalised and signed, began to implement this particular aspect of the agreement before the formalities had been completed (such implementation being continued thereafter with the draw down of the 3i loan, the application of part of the loan moneys towards the payments due by Mr. Watkins and Mr. Connell of their shares, the issue of those shares and the crediting of dividends). The subsequent signature of the FSA in November, without further amendment to the agreement in this respect, was plainly a ratification, if ratification were required, of what was done on and after 1 st April. Were it otherwise, clause 6 of the FSA would, no doubt, have been amended.

Issues of fact: the Evidence

60 Before coming to the issues of misrepresentation and breach of warranty there are certain aspects of the evidence that require mention. As regards documents

(i) there was very little on either side in the way of contemporaneous memoranda or notes;

(ii) much of the evidence consisted of accounting records of one kind or another going back to the mid-1980's, largely in manuscript, sometimes indistinct, often undated and having little to indicate the precise purpose which they were originally designed to serve;

(iii) considerable difficulties were created by the Defendants' unsatisfactory performance of their discovery obligations, with the consequence, among other things, that substantial numbers of documents that should have been disclosed long since were only produced as the trial went along.

61 As regards the witnesses of fact, all those who gave evidence faced a common difficulty in trying to recall events that happened many years ago. But, in Mr. Connell's case, we found him for the most part a compelling witness. His command of the trial documents was impressive. Mr. Jehan acknowledged that he was an honest man. And it was as plain as it could be that he had a fierce and genuine sense of grievance against the Defendants. On the other hand, it was also plain that his preoccupation with the matter over a period of years had in some respects caused him to lose sight of the wood for the trees. Nor was he always good at conveying what he wanted to say in an entirely lucid manner, having a

tendency in particular to race ahead of the questions put to him and to omit some element in the story that was obvious to him but less so to those with no firsthand experience of events. While for the most part we, therefore, regarded him as a reliable, as well as a truthful witness, we also approached certain aspects of his evidence with a degree of caution.

62 In admitting Mr. Watkins' evidence in affidavit form, we warned that serious questions would be likely to arise as to the extent to which we would feel able to give weight to that evidence. And as the trial progressed it seemed to us that the need for caution was considerable, not because of any doubts about Mr. Watkins' veracity but simply because it was evident that he was an important participant in many aspects of the story that we had to consider and because, without his evidence being given in person, both in chief and in cross-examination, potentially important nuances, qualifications and subtleties were likely to be lost. On the other hand, where his evidence was corroborated by evidence from another source we saw no reason to disregard his evidence completely.

63 Mr. Richard Egglishaw was, by any standards, an unsatisfactory witness, with an all-too-frequent tendency to be arrogantly dismissive or evasive of matters that required explanation, and little appearance of serious interest in assisting the exploration of the issues before the Court. He has, no doubt, been considerably successful in building up his business; but he is plainly someone who is accustomed to having his own way and inclined to adopt a cavalier attitude to formalities and obligations that do not suit his purpose. We did not regard him as a reliable witness. Nor do we find Mr. Philip Egglishaw a helpful or reliable witness, appearing as he did, to have a similar approach to that of his brother to awkward issues. In addition, his evidence was marred by a propensity to argue the case rather than give evidence.

64 Mr. Jehan was a more difficult witness to assess. Like Mr. Connell he gave his evidence in what appeared to be a consistently careful and courteous manner, although, again like Mr. Connell, there was the odd occasion when the strain of the proceedings showed itself fleetingly. It would not be surprising if Mr. Jehan felt himself to be the involuntary occupant of the stage-centre, given that it was his accounts that were primarily in issue and that his two co-defendants made it clear in evidence that they had not been involved in the preparation of the accounts and that, if there was something amiss, this was Mr. Jehan's and not their fault. Mr. Philip Egglishaw's view on this, in the course of cross-examination by Advocate O'Connell, was particularly blunt: “Q: Would you blame Mr. Jehan if the Court finds that the 1986 accounts were inaccurate? A: Blame. Yes. Q: You would. So he is on his own is he? A: I am afraid so, on that”. We were, however, troubled by a number of important matters, on which we would have expected him, as a Chartered Accountant, to have had a more coherent and convincing explanation than appeared to be the case, and there were a number of issues on which we had little doubt that Mr. Connell's recollection was the more reliable.

Misrepresentation and breach of warranty

65 The Plaintiffs' case in fraudulent misrepresentation rested at heart on a combination of two things: First, a series of circumstances said to be indicative generally of deliberate manipulation of the relevant accounts and deceptive intention on the part of the Defendants, being principally the following:-

(i) The existence, undisclosed at the time, of the 21 st March 1986 version of the accounts to 31 st January 1986, and the differences between those accounts and the 22 nd March version produced for the meeting on 1 st April 1986.

(ii) The (allegedly) misleading statements made by Mr. Jehan at the meeting on 1 st April 1986 concerning the accounting treatment of the Gritton and Chofid repayments.

(iii) The material discrepancies between, on the one hand, the 22 nd March 1986 accounts and, on the other, the later tax accounts and the figures in the County NatWest draft prospectus.

(iv) The reluctance or inability of Mr. Jehan to give clear and convincing answers to Mr. Connell's questions in the summer of 1989.

(v) The Defendants' subsequent prevarication in giving access to documents, and, in the context of the trial itself, their repeated shortcomings as regards discovery.

66 Secondly, the Plaintiffs' case rested on a number of specific respects in which (they argued) the accounts presented at the meeting on 1 st April 1986 were demonstrably false. Leaving aside for the moment a number of relatively minor matters, the headings under which the main issues of this part of the case were fought out, and the extent of the falsity in money terms originally alleged by the Plaintiffs, were as follows:

Although it was the discovery of discrepancies between the 22 nd March 1986 accounts and the corresponding figures in the tax accounts and the County NatWest prospectus that had originally triggered Mr. Connell's suspicions, it is convenient to consider each of the specific heads of alleged falsity before coming back to the broader considerations referred to above.

(i) Over-charging of clients: £173,697.

(ii) Treatment of bad debts: £153,449.

(iii) Capitalisation of leasehold improvements: £85,300.

(iv) Work in progress: £37,590.

(v) Treatment of the Gritton refund.

Overcharging of clients

67 This particular issue occupied a large proportion of the trial. But the point on which it ultimately turned, and failed, was very short. As the trial progressed, it became plain that the Plaintiffs' case rested on two propositions. First, that the income in the accounts produced at the 1 st April 1986 meeting gave a false picture of the business's prosperity in that the figure for income included a substantial component, to the extent of £173,697, that had been derived from charging clients higher fees than were properly payable by them. And, secondly, that the Defendants knew that this "income stream" (to use Mr. Salsac's phrase) was not going to be sustainable in the following financial year, because it had been accepted by the Defendants that this practice should stop – as indeed it did (it was said). Accordingly, it was argued, there should have been some note or other indication in the accounts by way of disclosure of this state of affairs. Unlike the other items to which we come later, this head of claim did not involve allegations of "massaging" of the accounts, so much as concealment (allegedly) of an illegitimate and unsustainable source of profit. Nor was it suggested that the Defendants had deliberately set out to generate artificially-inflated earnings because of the Plaintiffs' impending investment in the business: Mr. Connell accepted that the practice of wholesale overcharging (if that is what it was) began long before it was suggested that Mr. Watkins and he should become shareholders. He suggested in cross-examination that there might have been deliberate inflation of this kind in the last quarter of 1985; but he accepted that this could not, on the figures, have amounted to more than some £18,000.

68 Irrespective of whether the Defendants' billing practices in 1985 could or could not be said to involve wholesale "overcharging" in the sense that that word would ordinarily be understood, the claim was fatally flawed in one fundamental respect: Mr. Connell readily acknowledged, in his evidence in chief as well as in cross-examination, that he was not unaware of the Defendants' practice in this respect. He was, he said, aware *to some extent*, of what was going on, but was not aware of the scale of it. According to him he was not happy about it; he raised the matter with Mr. Richard Egglishaw and was told that the billing of clients was his (Mr. Egglishaw's) business and he would deal with it. It is also clear that Mr. Connell considered that he had been given an undertaking that the practice would stop. It follows from this concession that, when presented with the net profit figure for the year ended 31 st January 1986 at the meeting on 1 st April that year, Mr. Connell would have known that it was *to some extent* at least inflated in the way of which he now complains. Advocate O'Connell in his closing submissions on behalf of the Plaintiffs, properly accepted that this must be so. The key question, then, is 'by how much?' To this there was, as Advocate O'Connell recognised, no ready answer. He suggested that one approach would be to treat Mr. Connell's knowledge as so minimal as to be of no consequence, but there is no warrant in the evidence for doing that; and, indeed, it would be difficult to reconcile such an approach with the fact that Mr. Connell (on his evidence) thought the matter of sufficient importance for him to express his concerns about it to Mr. Egglishaw. Alternatively, suggested Advocate O'Connell, we could attempt some rudimentary assessment in the same way that Courts frequently have to make apportionments of blame in personal injury cases. In the end, as he put it, *"this is an area where the Court is simply going to have to take a view on the evidence"*. But there is no basis on which this Court could even attempt a rational assessment here. This is not a case where, although the

evidence is less than wholly satisfactory and an assessment is difficult, there is sufficient material for a Court to reach a fair conclusion. This was a case in which there was virtually nothing to go beyond Mr. Connell's simple statement that he was aware of the problem to some extent, and in which the Plaintiffs had made no attempt to quantify an essential element of the claim.

69 Nor can we accept Advocate O'Connell's submission that, whatever the position may be as regards Mr. Connell, there was no evidence that Mr. Watkins was aware of any general policy of overcharging in the year to 31 st January 1986 and that there should in any event be no discount in his case. In the first place, it seems to us that this is inherently unlikely given what we have heard about this subject; secondly, it appears to be inconsistent with Mr. Connell's evidence in cross-examination to the effect that Mr. Watkins was given an undertaking that “wholesale overcharging would cease”; and, thirdly, Mr. Watkins' own affidavit is silent on this whole subject (other than as regards Gritton): nowhere does he say that he was misled in any way on this particular subject.

70 For this reason alone (knowledge), we have no alternative but to hold that the Plaintiffs have failed to make good this head of claim. This, more than any other part of the case, appeared to be an area in which Mr. Connell had lost sight of the wood for the trees on a grand scale and allowed his evident distaste for certain aspects of the Defendants' business practices to dominate his thinking to the detriment of sober reflection about the extent to which he himself could really be said to have suffered loss. In deference to the considerable amount of time and effort devoted to this part of the case, however, we summarise in the following paragraphs a number of the more important aspects of this matter.

71 First, as regards the allegation of “overcharging” itself, the evidence showed that for the first three billing quarters of 1985 fees actually charged to clients exceeded the amounts originally recorded as due in the internal Strachan billing schedules (i) because in a large number of cases the fees originally calculated and shown (in manuscript) as due, on the basis of time records and charge-out rates, had subsequently been altered and increased (also in manuscript), and (ii) because, in addition to these ad hoc increases, 5% upward adjustments were also made across the board. Mr. Richard Egglishaw explained that the way in which quarterly billings were done, as a matter of routine, was for him and his brother to closet themselves over a weekend and to conduct a client-by-client review of work done and fees to be charged (Mr. Richard Egglishaw concentrating on new clients and Mr. Philip Egglishaw on existing ones). And although time was a significant component in any such review, it was by no means the only one; they would look at a whole range of factors and arrive at what they regarded as an appropriate fee. The manuscript increases shown on the billing schedules represented the outcome of these exercises.

Mr. Egglishaw made it plain that he regarded the way in which a final fee was arrived at as his – or his brother's – sole concern and not something for which he was accountable to the client either as a matter of contract or otherwise: they fixed the fee at whatever they thought appropriate and it was up to the client to object if he did not like it. The essence of the

Plaintiff's case was that that might have been all very well if clients had been told that this was how fees were actually fixed, but they were not; they were led, instead, to believe that the fees charged were calculated solely by reference to time. In support of this contention they relied on a large number of fee notes which included, variously, the phrases “time costs”, or “time costs incurred” or, occasionally, “the fee is based on time costs incurred” (though very few gave any detailed breakdown of hours and charge-out rates), terminology which, to our mind, was partial and tenuous reflection of the way in which fees were actually determined. To what extent, in number or degree, this would have mattered in practice to the bulk of Strachan's clients, many of whom were (as Mr. Egglishaw was at pains to emphasise) entrepreneurs of one kind or another, can only be a matter of speculation: none was called to give evidence and little or no client correspondence was disclosed. But the evidence overall, and the Gritton incident in particular, does suggest that the Egglishaws' approach to fees could be a high-handed one, in which notions of contractual consensus between service-provider and client played little part, and which might well have come as a surprise to at least some clients had they known how fees were actually determined.

72 Secondly, as regards quantification of any “overcharge”, there were a number of sub-issues:-

(i) The detailed breakdown of Mr. Connell's alleged total of £173,697 “overcharged” fees was contained in a series of manuscript schedules prepared by Mr. Connell from a protracted examination of the Defendants' billing schedules for 1985. Although these had been prepared long before the start of the trial they were not, in the event, made available to the Defendants until the experts' reports were exchanged in early February 2001 (when they were supplied in the form of an attachment to Mr. Salsac's report). As far as we could see there was no good reason for holding back this material, earlier disclosure of which would have considerably shortened this part of the trial. On the other hand, the extent to which the absence of these schedules handicapped the Defendants was much exaggerated by them: the particulars of the Order of Justice given by the Plaintiffs in October 1996 told them the bulk of what they needed to know and would have enabled them to make a substantial start on addressing the overcharging issue had they wanted to do so; but they appear to have done little or nothing in this regard for the next four years or so. The result of this passivity by both parties was that detailed consideration of the extent of any “overcharging” became the subject of a series of unsatisfactory exchanges of supplementary experts' reports and computations at intervals throughout the trial.

(ii) It became apparent that the Plaintiff's calculation of the total “overcharge” alleged had, on any view, overlooked the need to deduct a substantial amount in respect of fee credits subsequently issued to clients. It also became apparent that, in some cases, mistakes had been made in transcribing figures from Strachans' original records to the schedules prepared by Mr. Connell and that, to this extent, Mr. Connell's schedules were not entirely reliable.

(iii) A considerable amount of time was wasted in examining a belated argument by

the Defendants, according to which it was permissible to set off an alleged overcharge to one member of a "Client Group" against an undercharge against another member of the same group – a proposition which appeared, to some extent at least, to involve a remarkable disregard of the separate corporate and trust structures that the Defendants had (presumably) been employed at some expense to establish in the first place, and which depended on discovery of a class of records that the Defendants declined to give.

73 Thirdly, even if Mr. Connell and Mr. Watkins had been entirely ignorant of what the Defendants' previous practice had been, or if we had had material on which we could properly have quantified the extent to which Mr. Connell and Mr. Watkins were and were not alive to these matters, we would still have been left in considerable doubt as to how far the 22 nd March 1986 profit figure could be said to have been misleading. The key question was to what extent the Defendants knew that the billing practices on which they had relied for much of 1985/86 were going to have to stop or be varied in future and, accordingly, that the income shown in the accounts presented at the 1 st April 1986 meeting was unrepresentative of what might be expected in future. But this question, as such, was only fleetingly touched on in evidence by either side and was never put directly to any of the Defendants in cross-examination. Particulars of the Order of Justice given in October 1996 had alleged "Following the decision to refund fees to the Gritton clients it was accepted by the First, Second and Third Defendants that the practice of overcharging would cease from the billing quarter to November 1985 onwards. The practice of overcharging did in fact cease as aforesaid (with the exception of the billing quarter to May 1990)". And, in his evidence, Mr. Connell spoke to this issue and testified that, with the exception of May 1990 (the billing quarter immediately after Mr. Watkins' final departure), the practice of "overcharging" did not continue into 1985/86. He was not, however, cross-examined about this and only very late in the trial did Advocate Voisin seek to introduce specific evidence on the issue through the medium of the Defendants' expert witnesses, a move that we refused to permit. We find as a fact, therefore, that the Defendants' practice of marking up fees (in the way in which it had previously been conducted) was, apart from the May 1990 billing quarter, discontinued from late 1985. Whether, and if so to what extent, that discontinuance resulted, in practice, in a significant decline in earnings or whether some alternative method of billing was adopted that achieved substantially the same result (perhaps by an increase in charge-out rates) is another matter.

Bad Debts

74 Three tranches of bad or doubtful debts were in issue, the Plaintiffs' contention being that the accounts to 31 st January 1986, as presented in the version dated 22 nd March 1986, had been "massaged" or manipulated so as to displace from 1985/86, either to the preceding year or to the subsequent year, write-offs or provisions that properly belonged in the 1985/86 accounts, thereby artificially enhancing the profits for that year by some £153,449. Although it was not the order in which they were dealt with at trial, it helps to take the three tranches in the following sequence:

(i) a bad debt provision of £61,792 in the 1986/87 accounts;

(ii) £50,101 written off against income in the 1984/85 accounts; and

(iii) a £40,556 “prior-year adjustment” carried back from 1985/86 to 1984/85.

75 *The £61,792:* The Plaintiffs' case here, as developed in evidence by Mr. Salsac, was that there was a group of debts which (i) by 31 st January 1986 was twelve months or more old, but (ii) was not written off against the profits for that year, but against those for 1987. The basis of this argument lay in a decision of the directors at a board meeting on 6 th June 1987 to adopt a new approach to accounting for debts, by automatically providing for all debts more than eleven months old. (There was, in fact, some uncertainty on the evidence as to whether the relevant criteria was eleven or twelve months, but in the light of what follows the point is immaterial). This, in Mr. Salsac's expert opinion, constituted a material change of accounting “policy” within the terms of SSAP 2 and required, in consequence, the adjustment and re-writing of the accounts for the year ended 31 st January 1986 so as to achieve consistency of accounting treatment: this, he submitted, would have been perfectly possible because, at the stage when this policy change was adopted, those accounts were still open, not yet having been submitted to the tax authorities. Mrs. Vautier disagreed. In her view the board's decision did not involve any change of policy within the meaning of SSAP 2, but only a change of the “basis of estimation” and, that being so, no retrospective adjustment of the 1986 accounts was appropriate. This difference of professional opinion is, however, not one that it is necessary to resolve, because it became clear (though, quite later in the trial) that the whole of Mr. Salsac's reasoning rested on the premise that the “final accounts” for the purpose of clause 6(e) of the FSA were the tax accounts submitted in May 1989 and it was these accounts that could and should have been adjusted in order to render them consistent with the revised “policy” (in his view) adopted in June 1987. But, for the reasons that we have already discussed, this premise was a false one: the “final accounts” were, as we have held, the accounts in the form in which they were presented at the meeting on 1 st April 1986, and on this basis there cannot, of course, be any question of those accounts being rendered false or inaccurate by reference to something that did not happen until fourteen months later. This part of the Plaintiffs' claim is, therefore, misconceived in our view.

76 *The £50,101:* This was made up of a list of debts which (i) were written off against the year ended 31 st January 1985, but (ii) were, at the time of such write-off, less than twelve months old. The Plaintiffs' submission here was, in short, that one would not ordinarily expect to see debts of this age written off at such an early stage and that there was no evidence whatever to indicate why it was thought appropriate to write any of them off so quickly. Mr. Salsac, giving evidence on behalf of the Plaintiffs, said he had been unable to find any bad debt analysis or other material to support the write-off of these debts in any of the account files disclosed by the Defendants; nor had he had any response to his requests of the Defendants, via Mrs. Vautier, for an explanation of these items. He was, accordingly, unable to say whether they were or were not justifiably written off against 1984/85 rather than 1985/86. Mr. Jehan, in response to this charge, produced a schedule prepared by him

following sight of Mr. Salsac's supplementary report (in which he had drawn attention to the difficulties that he faced in addressing this tranche of debts). He explained that this schedule, which contained a number of further details about the accounting treatment of these debts, had been derived by him from an examination of the debtors' ledger and the 1985/86 accounts file. In cross-examination by Advocate O'Connell, however, he conceded that it did nothing to explain the reasons for writing off these debts and could do not more than insist that the fact that they had been written off in the debtors' ledger was indicative of the fact that there must have been some good reason. When Mrs. Vautier came to give evidence it also became clear that Mr. Salsac had indeed asked for whatever information there might be to support the reasons for writing off these debts, but that there had – between Mrs. Vautier and the Defendants – been a regrettable failure to respond to that request in the way that might reasonably have been expected.

77 Up to a point, the Plaintiffs are, of course, right to say that the absence of any documented reasons for the write-off of these debts is unsatisfactory; but, given the passage of time, we would not regard this in itself as a sufficient basis on which to conclude that there was no proper basis for treating them in this way, much less any basis for finding that the 1985/86 accounts had been deliberately manipulated so as to remove these debts from that year.

78 *The £40,556*. This was a more difficult issue. The diversity and complexity of the accounting materials, calculations and conjecture as to what may or may not have happened, preclude any extended account of the evidence in this judgment. The essential points were, however, as follows. The figure of £40,556 was one of a number of items that went to make up the “Prior period adjustment” of £137,207 that was shown in the version of the Income and Expenditure Account for the year ended 31 st January 1986 dated 21 st March 1986 but not produced at the 1 st April 1986 meeting; the other main components of that £137,207 being the Chofid refund of £50,000 and an adjustment in respect of fee credits in an amount of £38,922. The £40,556 was in turn made up of two components: £18,625 and £21,930. The Plaintiffs submitted that there was no proper basis for carrying these amounts back to 1984/85 (and thus increasing the profit for the year ended 31 st January 1986). The Defendants argued that they were perfectly legitimate adjustments.

79 According to the Defendants, the £18,625 came about as a result of a review by Mr. Jehan, at the time of preparing the accounts to 31 st January 1986, of the appropriate respective bad debt provisions for both 1984/85 and 1985/86. The result of this review, which involved looking at the subsequent granting of fee-credits, write-offs, and debts successfully collected, was said to be that it was considered appropriate to increase the 1984/85 bad debt provision, and decrease the 1985/86 provision, by an amount of £18,625. The £21,930, on the other hand, was said to represent debts which (i) were written off in the course of the year to 31 st January 1986 but (ii) had not previously been provided for in the year in which the fee notes were first issued: in other words, the writing-off of the debts was carried back to the year in which the debts arose. The two experts were firmly divided as to the accounting correctness of such retrospective adjustments. Mrs. Vautier's view was that it was entirely appropriate where the accounts were still open; Mr. Salsac's that provision

should be made in the year in which a debt becomes bad or credit has to be given. Both invoked SSAP provisions; but we were not persuaded that, in the context of a Jersey partnership in the mid-1980's, any of these standards should be treated as authoritative, or that one approach was necessarily wholly right and the other wholly wrong. All other things being equal, one would expect, however, to have found broad consistency of accounting treatment from year to year, and it was on this point that the Plaintiffs relied most heavily, their argument being as follows. In the undisclosed 21 st March 1986 accounts, the column setting out the comparative figure for the previous year showed no “prior-year adjustment” equivalent to the £137,206 entered against the year ended 31 st January 1986. This in itself suggested that such an adjustment was abnormal, and this suspicion was confirmed when an extract from Strachans' Nominal Ledger dealing with bad debts was eventually disclosed by the Defendants, in the course of the trial, as part of the 1985 account file. This showed the £40,556 as an entry under 1985/86, against the legend: *“Adj re prior year adj”* (in Mr. Jehan's handwriting), but no corresponding item, in any amount, against 1984/85.

80 Mr. Jehan's response to this was one of the more troubling aspects of his evidence. As Advocate O'Connell emphasised in his closing submissions, there appeared to be a marked shift of position as his evidence progressed. At first he appeared to be adamant that he had not made any equivalent adjustment in 1984/85 because the amount involved was only some £7,000, an adjustment would have resulted in some small increase in tax, and was not therefore worth making. But later, in cross-examination, he claimed that he had in fact made an adjustment in that year of some £40,000 although it did not appear as such in the accounts. He endeavoured to explain this, but the intricacy and length of the explanation was such that it was clear that not even Mr. Jehan's own counsel was able to follow it. We acknowledge, of course, that Mr. Jehan would say that he was trying to reconstruct, long after the event, an accounting exercise of some complexity. But it was highly unsatisfactory, as well as unfair to the Plaintiffs, that it was not until cross-examination of Mr. Jehan that this explanation was first proffered. As long ago as January 1996 the Plaintiffs had alleged in particulars under paragraph 27(b) (where ‘(b)’ occurred for the second time) of the Order of Justice that this item of £40,556 had been wrongfully carried back from 1985/86 to 1984/85; in the prefatory words of that paragraph it had also been made clear that the basis of the Plaintiffs' objection to this adjustment was, among other things, inconsistency of accounting treatment with *prior accounting periods*. The Defendants were, accordingly, on notice from the very beginning that this item was in issue and of the basis on which it was challenged. They did not, apparently, feel the need at that stage for any further particulars of the allegation: unlike the immediately preceding and succeeding paragraphs, in respect of which they made requests for further details, they made no such request here until very much later. Nor, it seems, did Mrs. Vautier have any difficulty in tracing this amount of £40,556 and its two components of £18,625 and £21,930. But in spite of this, and in spite of the fact that it must have been perfectly obvious to Mr. Jehan at least that there was a *prima facie* inconsistency that called for explanation, Mrs. Vautier's initial report contained nothing by way of investigation of this specific issue, her comments being confined to a brief recitation of what she understood the two component amounts to represent (presumably on the basis of an explanation by Mr. Jehan) and a series of observations on general accounting principles.

81 The Defendants' approach to discovery in this area was also most unsatisfactory. Even without the specific allegation in the passage of the Order of Justice referred to above, the Defendants would have known that the subject of prior-year adjustments as between 1985/86 and the previous year was likely to come under scrutiny, if only because of the substantial adjustment of £137,206 that was in fact made and the apparent absence of any comparable adjustment in the preceding year. And faced with the pleading in paragraph 27(b), the issue could not have been clearer. This notwithstanding, not only was discovery of the 1984/85 accounts file not given as a matter of course, but its disclosure was resisted until well into the trial. We return, later, to consider what conclusions can properly be drawn as regards this amount of £40,556.

82 *Bad debts generally:* One of the main planks of the Plaintiffs' case on manipulation of bad debts was to point to the comparative “bad debt figures” (as they were described) as shown in the accounts of Strachans and STR for the years 1983/84 through to 1986/87 as follows:

— 1983/84 £104,033

— 1984/85 £140,759

— 1985/86 £ 12,035

— 1986/87 £203,220

This comparison showed, it was submitted, that there was something very odd about 1985/86 and illustrated all too clearly the effect of the Defendants' manipulation of the accounts so as to minimise the quantum of bad debts to be set against income in that year. In the case of the two middle years, the relevant figures were strikingly juxtaposed in the 21 st March 1986 version of the 1985/86 income and expenditure account (paragraph 32 above). At first blush these figures appeared to provide strong support for the Plaintiffs' case: on any view they called for explanation. In the course of the evidence, however, it became apparent that the legend “Bad debt provision” against these figures in the 21 st March 1986 accounts was something of a misnomer, in that the figures did not represent aggregate values of “provisions” in the technical accounting sense, but were arithmetical balances resulting from an accounting exercise involving a number of different figures: the opening balance brought forward from the previous year, debts written off in the current year, Mr. Jehan's assessment of the appropriate bad debt provision for the current year, and various other items. This balance, representing the net change of position over the previous year, was treated as the appropriate accounting provision to be made in respect of the total value of outstanding debts at that time, and was, accordingly, carried to the profit and loss account as a charge against income. The extract from Strachans' Nominal Ledger showed how this worked.

83 To this extent, therefore, the comparison between years made by the Plaintiffs was misconceived and was not, without more, a sufficient basis for the inference that the Plaintiffs invited the Court to draw. But it remains a fair point that the order of magnitude difference between the 1985/86 charge of £12,035 and the comparable figures for the

preceding and succeeding years is sufficiently striking to prompt an inquiry into how this came about, and that in turn focuses attention on the “prior-year adjustments”, including the £40,556 that we have already discussed.

Leasehold improvements

84 In the course of the year ended 31 st January 1986 some £85,300 was spent on improvements to Strachans' offices at Sommerville House. At much the same time, new arrangements were made as regards the lease of the premises, the old 1982 lease being replaced by a new one. This new lease, although not passed before the Court until June 1986, had in practice been treated as operative from June the previous year.

85 The issue here was the correct accounting treatment of these expenses. Mr. Jehan, in drawing up his accounts for 1985/86, capitalised the expenditure, showing it as an asset in the balance sheet and making no provision for depreciation or amortisation in the income and expenditure account. The Plaintiffs challenged this, their original case being that the whole of the £85,300 should have been treated in the accounts as expenditure. The basis of this argument was that, the old lease (in favour of Strachans) having terminated in June 1985 and the new lease being in favour of a different tenant (STR) with a different demise, the improvements became the property of the landlord (Sommerville Properties Limited) and could not therefore have existed as an asset of Strachans as at 31 st January 1986. The Defendants argued that, whatever the technical position might be, the substance of the matter was that the improvements were for the benefit of Strachans and that the accounts as drawn up by Mr. Jehan were entirely correct. On this aspect of the matter, the experts were divided and we were not persuaded that it was necessarily wrong in principle to have capitalised this expenditure. What was, however, plainly wrong was the omission from the income and expenditure account of any element of amortisation: on this Mrs. Vautier and Mr. Salsac were agreed, as were Alex Picot. If one leaves aside the complications arising out of the change of lease, the normal accounting treatment of expenditure of this kind would include writing-it-off over the remaining period of the lease and entering an appropriate proportion as an item of expense against income in each year's profit and loss account. On this basis an amount of between £2,146 and £9,475 (depending on how the period of amortisation was calculated) should have been included as an expense in the accounts to 31 st January 1986.

86 A further, more important question also arises, as to how it was that no allowance of any kind for amortisation was made in the accounts to 31 st January 1986. When he came to give evidence Mr. Jehan claimed that the whole topic had been the subject of discussion at a meeting in December 1985 between the Defendants and the Plaintiffs and that it had been agreed that no such write-off was appropriate. In support of this claim he relied on an undated manuscript note in his handwriting, disclosed by the Defendants shortly before the start of the trial, which included the words *“Do not w/off leasehold improvements in a/c's £80,000”*. He accepted that it was unusual to capitalise an asset without amortising it or otherwise allowing for depreciation, but said that the matter had been the subject of five or

ten minutes' discussion and that there was general agreement that this was the appropriate thing to do. There were several problems with this evidence: First, there was nothing on the face of the note itself (which was little more than a series of jottings) to link it to any meeting involving Mr. Connell and Mr. Watkins. Secondly, the relevant words, which were the last of four items on the note, were written in a different colour ink from the rest of the note. Thirdly, although he insisted that the matter had been the subject of agreement, Mr. Jehan was unable to explain on what basis that decision was arrived at. And fourthly, this was the first occasion on which there had been any suggestion on behalf of the Defendants of any such discussion and agreement. There had been nothing to this effect in the Defendants' pleadings or in the evidence of Mr. Richard Egglishaw or Mr. Philip Egglishaw; no such suggestion had been put to Mr. Connell; nor, it seemed, had it previously been mentioned to the Defendants' counsel or to Mrs. Vautier. In these circumstances, we were wholly unpersuaded that any such discussion involving the Plaintiffs ever took place: whether the note reflects some decision arrived at by the three Defendants is another matter, on which we can only speculate.

Work in progress

87 The Plaintiffs' case as originally formulated included an allegation that the value attributed to work in progress in the accounts to 31 st January 1986 was overstated by an amount of £37,590. This was subsequently reduced to £27,158 in Mr. Salsac's report. In the course of the trial, however, it became apparent that the Plaintiffs' argument was founded on an analysis of computer print-outs dated July 1987 which had been disclosed by the Defendants on discovery but which did not include those who had ceased to be clients of Strachans between 31 st January 1986 and July 1987. Such former “Category 9” clients had, by July 1987, been deleted from the computer records. The result was, in effect, that the Plaintiffs abandoned this item as a substantive claim, blaming this state of affairs on the failure of the Defendants to disclose other computer print-outs, dated December 1984, which would have shown the existence of these Category 9 clients. This, then, developed into a dispute as to whether the latter print-outs had been present among the Defendants' original discovery all along, or whether, as Mr. Connell alleged, they had been inserted at some later stage. This may be a matter that has to be re-visited in the context of costs, but it is not something on which we need to spend further time for the purposes of this judgment.

Accounting treatment of the Gritton refund

88 In addition to the four specific heads of claim referred to above, there is the cardinal matter of the Gritton refund. The story of how this was treated in the accounts, following the decisions in the autumn of 1985 that a substantial repayment to the client would have to be made, can be summarised as follows:-

(i) According to Mr. Jehan it was agreed at a meeting on 19 th December 1985, attended by all five Defendants and Plaintiffs, that no adjustment to the profit and loss

account to 31 st January 1986 would be made in respect of either the Gritton, or the Chofid, refund. In support of this he referred to another manuscript note in his handwriting listing seven separate points, the last of which read in part: “Adjustments to P & L for computation … no adj. for Gritton/Chofid ……” This note, to which reference has already been made in another context, was also disclosed by the Defendants just before the start of the trial. In this case it was headed *“Meeting 19/12/85 R/T/P/W/R”* but there was nothing on its face to indicate whether it was intended to be an agenda for, or a record of, any such meeting. Mr. Connell denied that any such discussion ever took place and we are satisfied that his evidence on this is to be preferred to that of Mr. Jehan and the other Defendants.

(ii) The accounts subsequently prepared by Mr. Jehan dated 21 st March 1986 and 22 nd March 1986 did not include any adjustment for Gritton (though they did for Chofid). There was no accompanying footnote or memorandum making it clear that this was the case.

(iii) According to Mr. Jehan and the other two Defendants, at the meeting on 1 st April 1986 Mr. Jehan, unprompted, explained that no allowance had yet been made in the income and expenditure account for the Gritton refund because he was not yet in a position to calculate the final interest figure. He expected the proportion of the total referable to 1985/86, and thus appropriate to be included in the accounts under consideration, to be about £60,000.

(iv) Later, when it came to preparation of the tax accounts for the year 31 st January 1986, there *was* an adjustment for Gritton but the amount included was £78,600. Although these accounts were not submitted to the tax authorities until May 1989, Mr. Jehan thought that this and other adjustments would probably have been made in or around March 1987.

(v) In the course of their audit of the 1985/86 accounts ten years later, Alex Picot initially adopted this same figure of £78,600, but were subsequently told by Mr. Jehan that this was erroneous and that the correct figure should be £59,884. They appear to have accepted this.

89 Mr. Jehan was unable to give any explanation for the original decision (according to him) that there should be no adjustment for Gritton or for the subsequent departure from this position in the tax accounts. Nor did he offer any explanation of why it was thought appropriate to produce an income and expenditure account for consideration by the Plaintiffs at the 1 st April 1986 meeting which neither on its face, nor in any accompanying note, made reference to the fact that an adjustment of the order of £60,000 would be required when the final interest figure was known. His explanation for the inclusion in the tax accounts of an amount of £78,000, an increase of 30% over his previous estimate, was – he said – pure laziness, that being the balance left over when he had made appropriate adjustments for the proportions of the refund that were referable to earlier years. What prompted him to revisit the subject and recalculate the figures when Alex Picot came to audit the 1986 accounts, ten years on, was unexplained.

The broader issues

90 Of the specific challenges by the Plaintiffs considered in the foregoing section, three therefore appear to this Court to be of some significance: the treatment of the Gritton refund, the absence of any element of amortisation in respect of the leasehold improvements, and the prior-year adjustment of £40,556. Each, in its way, leaves a trail of imperfectly answered questions and a sense of unease. With these in mind we now turn to the broader considerations previously referred to (paragraph 65 above).

91 What conclusion should we draw from the undisclosed 21 st March 1986 version of the accounts? Mr. Jehan explained that the reason why the “Bad debt provision” figures of £12,035 (1986) and £104,781 (1985) appeared in the 21 st but not the 22 nd March version was because it was his practice to deduct bad debts, fee-credits and adjustments, and any change in bad-debt-provision from one year to the next, from the gross fee income, and to include in his final accounts only the resultant net-income figure; this, he said, was the reason that no bed debt item as such is apparent in any of the tax accounts or final Strachans or STR group accounts. This explanation appeared to be consistent with the corresponding accounts for other years that we saw and we accept it as truthful as far as it goes. It does not, however, explain certain other features about this document, which Mr. Jehan described as his first attempt at draft accounts, or a “trial balance”. In particular, if he knew that an amount of £137,201 had got to be adjusted back to the preceding year (and it was this item that principally accounted for the difference between the net profit figures in the two versions of the accounts), why (i) include it at all as a deduction from the current year's income; (ii) show a net profit figure of £904,907, and (iii) (most notably) go to the length of calculating the three partners' respective shares of that profit on the premise that that was the relevant amount?

92 As regards the conflict of evidence as to what was or was not said about the Gritton refund at the 1 st April 1986 meeting, our conclusions are very much influenced by the fact that the accounts produced contained no reference of any kind to the Gritton refund, either on their face or in any accompanying memorandum. To produce accounts for this important meeting that showed a net profit figure (and, once again, partners' corresponding profit shares) that apparently ignored this adjustment appears to be perverse. Mr. Jehan's explanation that he did not include a figure because he did not know what the final amount of interest would be is difficult to accept. He could perfectly well have inserted a provisional figure on the basis of his best estimate (whether of £60,000 or otherwise) or added a qualifying note. On any view, the accounts as they stood were not an accurate statement of the net profits for the year to 31 st January 1986. We would have found this deficiency surprising in any event; but it is all the more so given Mr. Jehan's evidence that he would have supplied copies to the others, including Mr. Watkins and Mr. Connell, several days in advance of the meeting but that it was only at the meeting itself that (according to Mr. Jehan) he had sought to correct this otherwise misleading presentation of profit. With these considerations in mind, we find Mr. Connell's evidence, that it was Mr. Watkins who raised the matter of the Gritton refund and not Mr. Jehan, the more likely of the two conflicting accounts. That said, we do

not think we could properly conclude that Mr. Jehan deliberately gave a false answer to Mr. Watkins' question: to have done so would have been foolhardy in the extreme. It is not difficult to see how, according to the precise way in which the question and answer went, there might have been some misunderstanding. But we are satisfied that, whatever Mr. Jehan did say, he failed to make clear to Mr. Connell and Mr. Watkins that the profit figures shown in the 22 nd March accounts were going to have to be reduced by an appropriate proportion of the Gritton refund. We also accept Mr. Connell's evidence (i) that Mr. Jehan said that although they were draft accounts, it was not likely that any final amendments would result in a net profit figure of less than £1 million, (ii) that Mr. Richard Egglishaw said something to the effect that although the profit figure of £1,068,614 was higher than expected, the Defendants were still content to let Mr. Watkins and Mr. Connell have 5% each of the shares, and (iii) that Mr. Connell was left with the impression that an appropriate proportion of the Chofid refund had also been taken into account.

93 As to the difference between the net profit figure of £1,068,614 in 22 nd March 1986 accounts and the corresponding aggregate amount of £956,367 in the later tax accounts and the County Nat West prospectus (paragraph 65 (iii) above), Mr. Jehan explained, and we accept, that this was accounted for by a combination of three adjustments: £78,600 in respect of Gritton (paragraph 88 above), a deduction of £33,150 in respect of claimed travel expenses, and a number of smaller items. We have already dealt with the Gritton component. In the case of the claimed travel expenses, it was made clear that the Plaintiffs regarded these as illegitimate and did not wish to rely on them as having any bearing on the true level of profit for the year to 31 st January 1986 or make them part of their claim in any way. Whether this view was or was not well founded was not something on which it was necessary or possible, on the evidence, for us to form a view.

94 Then there is the matter of the Defendants' conduct in response to Mr. Connell's inquiries from the summer of 1989 onwards and their conduct as regards discovery in the action (paragraph 65 (iv) and (v)). Advocate O'Connell, with reluctance, invited us to draw the inference that, to some extent at least, there had been a policy of deliberate concealment on the Defendants' part and it is not difficult to see why he considered that such a submission, strong as it was, was one that it was legitimate to make. On any view, the Defendant's repeated shortcomings as regards the discharge of their discovery obligations put the Plaintiff's at considerable disadvantage in a number of respects and have given us considerable pause for thought as to what we should read into this. We return to the subject later.

95 There is one other aspect of the Defendants' case that also calls for particular comment and that is the Alex Picot audit of the accounts to 31 st January 1986 of Strachans and SMS. In each case their report, dated 15 th July 1986, expressed the opinion that, subject to certain qualifications, the annexed financial statements gave a true and fair view of the state of the firm's affairs as at 31 st January 1986 and of the profit for that year. The qualifications were as follows:

(i) Both reports emphasised, under the heading "Basis of Opinion" that as Alex Picot had not audited earlier year accounts *"the evidence available to us was limited"* and *"it was not possible for us to perform the auditing procedures necessary to obtain sufficient appropriate evidence regarding balances included in preceding years' financial statements.* Any adjustment to these figures would have a consequent effect upon the profit for the year ended 31 st January 1986." The point was also reiterated under the heading "Qualified opinion arising from disagreement about accounting treatment" in the following terms: *"In respect alone of our work relating to opening balances, we have not obtained all the information and explanations that we consider necessary for the purpose of our audit."*

(ii) In the case of STR it was noted under "Qualified opinion arising from disagreement about accounting treatment" that events subsequent to the balance sheet date indicated that the provisions in the accounts against doubtful debts and liabilities were under-stated by £23,773 and £5,474 respectively; it was also noted that there was no provision for amortisation of leasehold improvements.

(iii) In the case of SMS the corresponding heading included the following:

> *"Included in the balance sheet is an amount of £1,200,000 shown as good will.* In our opinion the goodwill should not have been included in the financial statements in accordance with the Statement of Standard Accounting Practice No. 22. Consequently, the net assets and reserves are overstated by that amount."

96 In relation to each audit report there was also a Letter of Representation, dated 29 th April 1996, signed by each of the Defendants. This included statements to the effect that the authors had no knowledge of any pending litigation or other claims against the entity and that no matters had come to their attention *"up to the present time"* which could materially affect the accounts for the year ended 31 st January 1986 or the financial position at that date, or which required disclosure as major events occurring after 1 st February 1986. Despite these assurances, it was, however, by no means clear that Alex Picot had been properly apprised of the nature and terms of the issues raised by the Order of Justice served in January 1986.

97 Against this background it was surprising that the Defendants considered it appropriate to rely on the Alex Picot audit reports to the extent that they did, without calling anyone from that firm to give evidence. On any view, there were matters of some significance which invited further inquiry and on which the Plaintiffs would no doubt have wished to cross-examine. We were not convinced that there would have been any real obstacle to procuring someone to speak to the report and were left with more than a vague impression that the Defendants were happier without any representative of Alex Picot in person giving evidence.

Conclusions

98 On any view the net profit figure shown in the manuscript accounts dated 22 nd March 1986 presented at the meeting on 1 st April 1986 was mis-stated in two respects: first as regards the Gritton refund, as to which we find (as previously stated) that the mis-statement was not made known to the Plaintiffs; and secondly as regards the absence of any deduction representing amortisation of the leasehold improvements. The amount that should have been deducted in respect of Gritton was, at the very least, £59,884 and in respect of leasehold improvements at least £2,146. These two factors alone would have reduced the net profit figure to £1,006,442. To this extent, if no other, there were breaches of the implied warranty of substantial accuracy.

99 Although Alex Picot, ten years later, reported that the provisions for bad debts were under-stated by £23,773 and although this, in itself, was a factor that gives rise to concern in this sensitive area of debt-provision, we do not consider that we could properly conclude, on the basis of this statement alone, that the 22 nd March 1986 accounts can be described as inaccurate at the time when they were drawn up.

100 Whether and to what extent it would be right to conclude (i) that the omission of any allowance for the Gritton refund and amortisation of the leasehold improvements was deliberate or (ii) that there was any other form of manipulation of the accounts by means of bad debt provisions or prior year adjustments, depends in the end on a weighing of the evidence over a large number of inter-related issues. In addition to the various areas that we have already discussed that give rise to concerns of one kind or another, the more sceptical observer would probably also point out that there would have been no shortage of motive on the part of the Defendants to ensure that the net profits did not slip below the £1 million mark. Had this happened there could well have been difficulties with Mr. Watkins in particular, who had fought and won the contest over a “variable” versus “fixed” percentage, while the Defendants themselves were plainly adamant that they were only prepared to part with 5% to each of the Plaintiffs. By 1 st April 1986 it was also important that the proposed deal should continue smoothly on course: the 3i loan moneys were needed, among other things, to effect the Gritton repayment, and Mr. Richard Egglishaw in particular stood to obtain a very substantial tranche of cash from the transaction. With the benefit of what is now known about the ability, in those days, to defer filing tax accounts for several years, and the accounting treatment of bad debts, it is plain that the combination of these two factors created the potential for substantial adjustments one way or the other.

101 But against all this we also have to make proper allowance for a number of important considerations, the first and foremost of which is the extended interval of time since the events in question took place and the notorious frailty of people's memories. We are also conscious

— of the limitation and uncertainties of much of the documentary evidence (paragraph 60 above);

— of the fact that it can be easier to start the hare of suspicion running than to stop it;

— that the facility of being able to keep accounts open for several years before submitting them to the tax authorities was almost certainly something of which the Defendants made the most, and that some of the matters that appear to have no obvious or satisfactory explanation may, in truth, have had more to do with Mr. Jehan adjusting the accounts to optimum fiscal advantage than with any improper manipulation for the purpose of improving the Defendants' position in relation to the sale of shares to Mr. Connell and Mr. Watkins;

— of the possibility that the Defendants' conduct towards Mr. Connell's inquiries in July 1989 and subsequently, as well as their conduct in the course of the litigation, was the product of arrogance rather than any intention to conceal or deceive;

— that in a case like this, affidavit evidence such as that from Mr. Watkins is, even on the most generous view, a poor substitute for live testimony and that without hearing and seeing him in person the Court is deprived of a number of important pieces of the jig-saw puzzle;

— the fact that at no stage in cross-examination of Mr. Richard Egglishaw or Mr. Philip Egglishaw was the essence of the Plaintiff's case in deliberate deceit or recklessness (*aliter* fraudulent misrepresentation) actually put to either of them: we readily acknowledge that in complex litigation such as this it is not possible to put to a witness every aspect of his opponent's case, but a party faced with allegations of fraudulent misrepresentation is entitled to have the essential elements of the allegations – particularly those of material knowledge – unambiguously put to him.

102 Weighing all this in the balance, we conclude that, even in those areas in which we entertain considerable misgivings (as will be evident from the terms of this judgment), the evidence is insufficiently compelling to displace the necessary elements of caution to which we have referred and to justify a finding of fraudulent misrepresentation against any of the Defendants. Nor do we consider that the Plaintiffs have successfully established any breach of warranty beyond that referred to in paragraph 98 above. And, because the extent of the proven inaccuracy of the 22 nd March 1996 accounts in respect of these breaches was not such as to reduce the net profits for the year to 31 st January 1986 below £1 million, the Plaintiffs' claim that they were entitled to more than 5% of the shares is, we find, not made out.

103 This disposes of the principal heads of the Plaintiffs' claims, the residual items being those relating to Mr. Connell's current status (as he claims) as a shareholder and director. As to these, we shall invite further written submissions (not evidence) from the parties, as these issues were barely touched on in either side's closing speech. The same applies to the Defendants' Counterclaim.

104 We cannot, however, end this judgment without adding an important rider to our conclusions. While the Defendants may legitimately claim a substantial measure of overall

success in relation to the issues of misrepresentation and breach of warranty, this is unquestionably one of those cases that occur from time to time where it can be said that the defendant, to a large extent, brought the proceedings on his own head. In this case it is as plain as can be that this is exactly what the Defendants did

On any view the Defendants must have known that what Mr. Jehan's accounts showed as regards the net profits of the business for the year to 31 st January 1986 was a matter of considerable consequence and potential sensitivity for all five participants, given that the net profit, after allowing for Gritton, was at best just over £1 million (on the Defendants' own case) and that any shortfall from £1 million would upset the basis on which the Defendants had been hoping to complete the deal. With a greater degree of candour on the part of the Defendants towards their prospective fellow shareholder-directors, and respect for the terms of the contract that had been negotiated, after some dissent, concerning the relationship between the net profit for 1985/86 and the percentage shareholdings that Mr. Connell and Mr. Watkins were to receive, we are confident that the need for this litigation would never have arisen. These are matters to which it may be necessary to return when the Court comes to deal with the matter of costs.

ANNEX

Application was made on behalf of the First plaintiff, Mr. William Watkins, for leave to adduce his evidence by affidavit, instead of in person, on grounds of ill-health.

— by drawing up and presenting to the meeting on 1 st April 1986 a set of accounts that contained nothing on its face, or in any accompanying note, to show that the stated net profit figure of £1,068,614 needed to be reduced by something of the order of £60,000 in respect of Gritton (representing an overstatement of the correct figure of almost 6%);

— by failing to draw a final line under, or otherwise formalise, the accounts on which the parties concluded their deal on 1 st April 1986 (either at the meeting itself or shortly thereafter);

— by continuing, instead, to adjust them (if only, be it assumed, for tax purposes) without telling the Plaintiffs what they were doing and why, and when they should have known that this would be likely to engender suspicion about the true level of net profit for the year to 31 st January 1986;

— in particular, by adopting a figure of £78,000 for Gritton in the tax accounts, (an increase of 30% over the figure said by Mr. Jehan to have been mentioned at the meeting on 1 st April 1986, which alone reduced the net profit for 1985/86 to significantly less than £1 million) without drawing this to the Plaintiffs' attention;

— by failing to explain to the Plaintiffs at the time, the extent to which the net profits shown were dependant on prior-year adjustments in respect of bad and doubtful debts; and

— by failing to respond to Mr. Connell's justified inquiries in the summer of 1989, and later through Baihache Labesse, as straightforwardly as they might have done.

Introduction

105 The application was first foreshadowed at a directions hearing on 9th January this year. At that time it was acknowledged by Advocate O'Connell on behalf of Mr. Watkins, that any such application would need to be supported by up-to-date medical evidence, and it was directed that such evidence, preferably in the form of a report from an expert appointed by agreement of the parties, should be provided to the Court by not later than 6th February 2001 (the trial of this action being set to begin on 5th March).

106 In the event, although a draft of the proposed affidavit by Mr. Watkins was duly served on 6th February, the parties were unsuccessful in finding a suitably qualified and available consultant to act on a joint basis and the principal medical evidence before the Court took the form of a series of reports from (i) Dr. J. Radvan FRCP, Consultant Cardiologist at the Bournemouth Nuffield Consulting Rooms, to whom Mr. Watkins has been referred on a number of occasions for examination, and Dr. W.H. Franklin of the White Lodge Medical Centre, St. Helier who is Mr. Watkins' General Practitioner, and (ii) on the instruction of the Defendants, Dr. Alan Harris FRCP, FESC, Consultant Cardiologist of Harley Street London, who is currently in full-time practice in the private sector but was formerly Consultant Cardiologist at Charing Cross and Chelsea and Westminster Hospitals in London. Various factors also conspired to prevent the requisite examinations of Mr. Watkins taking place until 21st February (by Dr Radvan) and 22nd February (by Dr. Harris). The (far from ideal) result of this delay was that by the time that the trial opened on 5th March, exchanges of reports and comments were still taking place between the respective experts. In these circumstances the Court directed that the application to adduce Mr. Watkins' evidence should wait until after Mr Connell, the Second Plaintiff had concluded his evidence, Advocate O'Connell having previously indicated that it would be his intention to call Mr. Connell as his first witness in any event.

107 Mr. Connell's evidence was concluded on the morning of Friday 16th March (although it appeared likely that he might have to be recalled to deal with a number of outstanding matters). The formal application on behalf of Mr. Watkins was then made by Advocate Robertson, was opposed by Advocate Hoy on behalf of the Defendants and was ruled on by the Court in the afternoon.

The relevant principles

108 Rule 6/18 paragraphs (1) and (3) of the Royal Court Rules provide as follows:-

> *"(1) Subject to these Rules…….*.any fact required to be proved at the hearing of any action by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.

Provided that the Court may:

(a) subject to the provisions of paragraph (3) of this Rule, order that any particular facts to be specified may be proved by affidavit;

(b) order that the affidavit of any witness may be read at the hearing on such conditions as the court thinks reasonable;

(c) ……..

(d) ……."

"(3) Where it appears to the Court that any party reasonably requires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

109 The provisions of the Rule are, unfortunately, not expressed with the clarity or logical structure that they might be (any more than are the corresponding provisions of Order 38, Rule 2 of the old English Supreme Court Rules). In particular there is nothing in sub-paragraph (1)(b) equivalent to the reference in sub-paragraph (1)(b) to paragraph (3). But taking these provisions as a whole we are in no doubt that (1)(b) has to be read in conjunction with (3) in the same way as (1)(a).

110 As regards paragraph (3), Advocate Hoy, for the Defendants submits that there are only two considerations to be addressed: the first is whether the Defendants "reasonably require the production" of Mr. Watkins, and the second is whether Mr. Watkins "can be produced"; if the answer to those two questions is "Yes", then that is the end of the matter and the Court has no discretion under the Rule to admit affidavit evidence. Thus far Mr. Hoy's submissions are in our view sound. We do not, however, think he is correct in submitting in effect that whether it is or is not "reasonable" to require the production of a witness is something to be decided solely by reference to the importance of the issues and the fact that Mr. Watkins' evidence is "hotly in contention", as he put it. There is, in our view, no warrant for limiting the scope of "reasonableness" in this context. Circumstances of all kinds may legitimately have to be taken into consideration, including the personal circumstances of the witness in question: for example, it could be unreasonable to require a witness to attend where time, distance or interference with other obligations would make such attendance unduly burdensome. And physical or medical infirmity must, in principle, be an equally legitimate consideration to be weighed in the balance with all the other factors (which must, of course include the seriousness of the issues, the fact that the proposed evidence is hotly contested and the fact – if such be the case — that the witness in question is not a disinterested third party but a party to the action). But even if we are wrong in this view, infirmity must at the very least come into the second consideration stipulated in the Rule – whether the witness "can be produced": "can" in this context must, we think, be circumscribed by some element of what is reasonably practicable. And if this means that a witness's medical condition is, potentially, a relevant consideration under both limbs of

Rule 6/18 paragraph (3), then so be it. It is unnecessary to insist on a construction of this paragraph that eliminates any potential overlap between the two requirements discussed above.

111 It is, in any event, common ground between the parties that in addition to, and independently of, the provisions of the Royal Court Rules, the Court has power to admit affidavit evidence at trial under its inherent jurisdiction to control its own procedure in order, among other things, to do justice between the parties and to secure a fair trial: *Finance & Economics Committee of the States of Jersey v. Bastion Offshore Trust Company Limited* [1994] JLR 370, CA. As pointed out in that case by Neill JA, giving the judgment of the Court, this inherent jurisdiction can exist alongside an identical or similar Rule of Court, and the Court does not lose its power because a rule is made (at 382). As he also observed (at 383):

> *"Rules of procedure have to be servants, not masters."*

The medical evidence

112 Unfortunately the Court was faced with a marked disagreement between on the one hand Dr. Radvan and Dr. Franklin and on the other Dr. Harris as to the level of risk likely to be involved in Mr. Watkins appearing in person to give evidence and undergoing cross-examination. What then, in our judgement, did the evidence show? This inquiry was, in itself, a far from perfect process, dependent as we were on evidence in the form of written reports and correspondence from witnesses who have not appeared before us in person. However, the following matters appeared to us to be reasonably clear:-

(1) Mr. Watkins is aged 77 and will be 78 in June.

(2) On any view he has a coronary condition that results periodically in atrial fibrillation, which has in the past been accompanied by angina.

(3) On a number of occasions (including three in 1995 and one in September 1998) this has resulted in admission to hospital, though usually only for brief periods. On three occasions (including the September 1998 incident) he required DC counter-shock treatment for persistent atrial fibrillation.

(4) He also has a history of transient ischaemic attacks (TIAs) from time to time and this has also led to hospitalisation (in January 1997).

(5) There are indications of hypertension.

(6) In October 1998 he underwent surgery on his right carotid artery in order to remove what had been diagnosed as a 55% obstruction of that vessel. The result is reported to have been wholly satisfactory.

(7) Mr. Watkins has a serious belief in the benefits of what may broadly be called

'alternative' medicine and therapies, and relies on these to a large extent to help control his atrial fibrillation.

(8) He appears to be intolerant, in the medical sense, of the undesirable side effects of a number of orthodox medications that might otherwise help his condition. In other cases it may be that he is fearful of what the side-effects might be. An important consequence of this is that he is, as Dr. Radvan puts it in his 21st February 2001 report, "currently unprotected by atrial stabilising agents".

(9) The onset of atrial fibrillation and/ or TIAs appears to be linked with experience of stress and emotion, the series of episodes in 1995 almost certainly being associated with a time when his daughter was dying of cancer: see in particular Dr. Radvan' letters dated 12th October 1998 and 21st February 2001 to Mr. Simon Darke (the surgeon who performed the carotid endarterectomy in October 1998).

(10) The underlying problem may, in Dr. Radvan's view, be one of sino atrial node disease (that is, disease of the heart's natural pace-making mechanism).

(11) In his report to Mr. Darke dated 21st February 2001, Dr. Radvan recommended that Mr. Watkins should undergo ambulatory monitoring over either a period of seven days or two serial twenty—four hour periods in order to identify any rhythm disturbance that may be causing his symptoms.

(12) He also recommended that Mr. Watkins should have a transoesophageal echo-imaging examination in order to determine his cardiac thromboembolic stroke risk, adding "His left atrium was enlarged two years ago (3.8 x 5.8) and given the likely development of hypertension this may well have increased in size." Dr. Radvan's comment on this enlargement at the time (in his letter of 12th October 1998) was "…as a consequence one would judge his risk of thromboembolism from atrial fibrillation as being above normal".

(13) Two 24-hour ambulatory monitoring tapes had been completed, the second in the last day or so but no echo—imaging examination had taken place yet.

113 The principal difference between Mr. Watkins' current medical team and Dr. Harris lay in their respective assessments of the risks entailed in Mr. Watkins having to appear in Court and undergo cross-examination. Dr. Radvan's conclusion in his report to Mr. Darke of 21st February 2001 was expressed as follows: "For now I do not think that he is fit to attend a court trial until his investigations are complete and we have adopted a satisfactory treatment strategy. He is currently unprotected by atrial stabilising agents and my own view is that the stress of a court appearance may well precipitate another episode of AF". Dr. Franklin, having read both Dr. Radvan's and Dr. Harris's reports, said (in a statement dated 5th March 2001): "Mr. Watkins has had a recent episode of visual disturbance and the factors that make him at risk from cardiac arrhythmia, transient ischaemic attacks or stroke remain." And Dr. Radvan, in a further letter dated 14th March 2001 said:

"……I would agree with Dr. Franklin's view. Although the risk of a visual disturbance or thromboembolic stroke with court appearance must be very small

they are nonetheless present. If Mr. Watkins has admediated atrial fibrillation (and that *seems likely from the clinical history) the stress of court appearance might well lead to this."*

114 Mr. Harris plainly took a more robust and sceptical view of things. He said that he thought it unlikely that Mr. Watkins would suffer paroxysmal atrial fibrillation or TIAs as a result of having to appear in court and undergo cross-examination; in any event, he said, "TIAs only last 20 minutes, so this could be accommodated during the course of the trial": see report dated 27th February 2001 (paragraph 3). On examination of Mr. Watkins, Dr. Harris found no abnormal signs in the cardiovascular or respiratory systems and said: "….on the balance of probability it is unlikely that he suffers from ischaemic heart disease (coronary artery disease)" (paragraph 4). He concluded:

> *"Physically in my opinion Mr. William Watkins is capable of attending Court in order to give evidence, but undoubtedly psychologically because of his fear of precipitating a cardiac event it may be extremely difficult to persuade him to give Evidence, but I see no physical reason why he should not do so" (paragraph 5)*

And in his letter to Voisin & Co. dated 27th February 2001:

> *"You will see in my report on Mr. Watkins' consultation with me that I formed the impression that physically Mr. Watkins is able to attend Court and give evidence, but my main concern is that it [is] his attitude to conventional medicine and his rather strange ideas he has about his state of health.* He spends four and a half hours every day exercising which to me would suggest that he would be able to attend Court without any significant risk or danger of sudden death"

115 One of the main considerations that appears to have influenced Mr. Harris was the interval of time that had lapsed since Mr. Watkins last experienced any significant recurrence of his problems. But Dr. Harris's treatment of this subject was less than satisfactory. He made the same point in varying terms in five different places, twice in his letter to Voisin & Co. and three times in his Report:-

> — *"Mr. Watkins told me that he had not experienced any paroxysmal atrial fibrillation for more than three years."*
>
> — *"…he has not had any significant symptoms for more than three years";*
>
> — *"…he has not had any episodes of paroxysmal atrial fibrillation since before he had his carotid artery surgery in 1998. In other words he has gone for nearly three years without an episode of paroxysmal atrial fibrillation and he has therefore not had to be admitted to hospital on an emergency basis due to an episode of atrial fibrillation."*
>
> — *"…. he has not had episodes of atrial fibrillation for the past three years and it is therefore unlikely that that he is going to have another episode in the near future."*
>
> — *"However, Mr. Watkins has not had an episode or [sic] paroxysmal atrial fibrillation*

requiring admission to hospital for over three years. I have therefore concluded that it is unlikely that he is going to have another episode because of his attendance at Court."

116 A correct statement of this point would be that, at the time of Dr. Harris's consultation with Mr. Watkins, a period of just under two years and five months — not "almost three years", let alone "over three years" – had elapsed since the last occasion on which Mr. Watkins had been hospitalised with an episode of atrial fibrillation; the last occasion being in late September 1998. This was perfectly clear from Dr. Radvan's letter to Mr. Darke dated 12th October 1998. Equally clear, lest it be thought that the incident was of no great consequence, was that this was the third occasion on which it was necessary for Mr. Watkins to be given electric shock treatment in order to correct the atrial fibrillation – a point not acknowledged in Mr. Harris's report.

Conclusion

117 All in all, we regarded Dr. Radvan's assessment of the situation as the more authoritative of the two and we took the view that to require Mr. Watkins to give evidence in person would put him in the wholly unfair position of having to choose between (i) exposing himself to and a real and, by any reasonable standards, unacceptable risk to his health and (ii) foregoing the opportunity of having any evidence of his own admitted. We concluded, accordingly, that, exceptional though such a course is, the ends of justice in this case could only be met by admitting Mr. Watkins' affidavit in evidence subject to a number of caveats as expressed in the Court's Ruling given on 16th March 2001.