# William John Watkins and Raymond Gerard Connell v Richard Jepson Egglishaw

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| **Jurisdiction:** | Jersey |
| **Judge:** | H.W.B. Page, Jurats Le Brocq, Tibbo |
| **Judgment Date:** | 17 December 2001 |
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**Text**

[2001] JRC 248

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**.

**No Authorities**

Residual Issues left over for further argument from the Court's Judgment of 31 st July, 2001 (q.v.):

1. Mr. Connell's claim that he remains director and shareholder of STR; and

2. The Defendant's counterclaim,

**THE COMMISSIONER:**

***Introduction***

1 This judgment deals with two residual issues that were left over for further argument in the Court's judgment of 31 st July, 2001: (i) Mr Connell's claim that he remains a shareholder and director of STR and (ii) the Defendants' counterclaim. We heard further submissions on these two matters by Advocate Robertson on behalf of Mr Connell and Advocate Hoy on behalf of the Defendants in the week beginning 18 th September, 2001. In accordance with the direction given in paragraph 103 of our earlier judgment no further evidence on these issues was adduced. Although these matters, in the context of this litigation as a whole, were very very much the Cinderella of the trial in terms of evidence, time and attention, they are of considerable significance in their own right.

2 The background to these issues is summarised in paragraphs 46 to 50 of that earlier judgment and the heart of this particular aspect of the dispute can be stated very simply. Mr Connell says that, although he wrote to Mr Richard Egglishaw on 31 st December, 1991 giving notice of his intention to resign with effect from 1 st February, 1994, that notification was and remained at all times conditional on the anticipated new agreements between himself and the Defendants being concluded and signed; this never happened; and that, accordingly there was never any effective and binding resignation on his part. He therefore claims that he has remained at all times a director of STR and SMS, and a shareholder in STR, and seeks recovery of both the dividends and the salary that he should have, but has never, received since 1 st February, 1994. He also seeks an indemnity from the Defendants against any liability that he may incur as a director in respect of anything that has happened during the period when he has been excluded (as he contends) from participation in the management of the two companies.

3 The Defendants, for their part, say that when the totality of events is looked at, it is plain that, although the proposed new agreements were never signed, Mr Connell intended to and did resign with effect from 1 st February, 1994; that in this intention he was at one with the Defendants' own wishes; and that, accordingly, he has not been a director or shareholder since that date. They go on to assert – and this is their Counterclaim – that the effect of his resignation was that Mr Connell became obliged to sell his shareholding (held via his nominee company Dreamin Design Limited) to the Defendants, and they became bound and entitled to acquire it, on the basis of a valuation as at 31 st January, 1994. As we summarised the matter in paragraph 58 of our earlier judgment:

> ***On this basis and (i) putting a value on Mr Connell's shareholding at 31st 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 to them (ignoring for present purposes the parties' respective trusts and companies)*** .

***Mr Connell's resignation letters.***

4 Although we referred in our earlier judgment to the course of events that caused Mr. Connell to write his first resignation letter of 31 st December, 1991, it is necessary now to make mention of a number of additional factors that have a material bearing on the issues in hand.

5 The proposed new arrangements discussed in mid to late 1989 included, among other things, (i) a new shareholders agreement to replace the First Shareholders Agreement (‘the FSA’) and (ii) a new service agreement for Mr. Connell. Neither was ever finalised.

6 It is impossible to say with certainty exactly what would or would not have been in those agreements had they ever been concluded. On any view the arrangements under discussion were of some complexity, involving as they did, among other things, the terms on which Mr de Figueiredo would become a shareholder, the ‘re-valuation’ of Mr Connell's shares in order to create a measure of parity between him and Mr de Figueiredo, adjustments to Mr Connell's loan and current accounts, and – importantly – the relinquishing by Mr Connell of the provision in the FSA concerning unanimity of decision making (which had had the effect of giving any one shareholder-director a power of veto, and which the Defendants were anxious to remove). A further level of complexity arose from the involvement of the various nominee companies through which the parties' shareholdings were held (in the case of Mr. Connell, Dreamin Design Limited, the Second Defendant to the Counterclaim). Both parties asserted in their pleadings that an agreement of some kind had been reached: Mr. Connell pleaded what he called ‘The Oral Agreement’; the Defendant's what they termed ‘The General Shareholders Agreement’, but there was no unanimity about either the precise terms agreed or the definitive draft agreement.

7 It is, however, fairly clear that it was contemplated that there would be an important difference between the provisions of the old FSA and those of any new shareholders agreement as regards the circumstances in which any of the shareholders was entitled to give notice of intention to retire and to require the others to buy him out. Both agreements called for a period of two years' advance notice. But, under the FSA this was not permitted (except in Mr Watkin's case) until the expiry of a period of eight years from the date of the signing of the agreement, which meant that as long as his relationship with the Defendants was governed by the FSA, the earliest that Mr. Connell could have given lawful notice of retirement was 1 st February, 1994 to take effect on 1 stFebruary, 1996 (taking, for the purpose of this discussion, the date of ‘signing’ the FSA as 1 st February, 1986): premature retirement would result in the retiring party getting no more than a “nominal par value” for his shares unless the remaining shareholders otherwise agreed. The corresponding provisions of the proposed new agreements were, however, considerably more favourable to a shareholder wanting to retire, permitting as they did two years' notice to be given at any time. Similarly, under the terms of clause (7) of Mr Connell's proposed new service agreement, he was entitled to terminate it on two years' notice at any time.

8 It is also reasonably clear that it was contemplated that the heart of the formula to be used for determining the value of a retiring party's shareholding under the proposed new arrangements (though not necessarily all the refinements of that formula) would remain substantially the same as under the FSA, in as much as it was to be arrived at principally by reference to a pro-rata share (by reference to the total issued share capital) of the product of the (i) net pre-tax profits of the STR Holdings Group in the last financial year completed before the date of the outgoing party's retirement, and (ii) a factor of eight.

9 It is also necessary to understand a little more of the circumstances that led Mr Connell to write the second of his two letters concerning his resignation, dated 20 th January, 1992.

10 Mr Connell's letter of 31 st December, 1991, had opened in the following terms:

> ***Further to my meeting yesterday, with Terry, Philip, and yourself, it is with deep regret that I tender my resignation, under clause (7) of my new Service Agreement, to leave Strachans on 1st February, 1994.*** This is subject to all our new agreements being executed before 31st January, 1992, which you all indicated to me yesterday, would be the case .

Having referred to a number of grievances, including the protracted delay in getting the proposed new agreements finalised and signed, his letter concluded as follows:

> ***Whilst at our meeting yesterday, when I first indicated my intention to resign, I was flattered at your offer of perhaps having a new contract to run from 1 st February, 1994, I would like to confirm, that, in the circumstances, regardless of the consequences, this would be the last thing I would ever consider.*** For record purposes I am also copying this letter to our fellow directors, thereby giving you all notice, regarding the purchase back of my shares, as at 31st January, 1994 .

11 But early in the new year Mr Connell was incensed to receive documents in the form of draft minutes of board meetings of SMS and STR on 6 th January, 1992 (meetings that had not yet taken place) which purported to record the fact that he had been given notice of (i) termination of his service agreement and (ii) and obligatory retirement as a director, and not that it was he, Mr Connell, who had given the Defendants notice of his desire to retire. He regarded this as tantamount to saying that he had been sacked.

12 According to the terms of the draft minutes, notice had been given to Mr Connell under clause 5(b) of his (new) service agreement and under clause 4 (d) (vi) of the (new) shareholders agreement, both of which remained no more than draft documents. The relevant period of notice provided by each of these clauses was, as with clause 7 of the proposed new service agreement invoked by Mr Connell, also two years. Although both sides were, therefore, seeking to act under different provisions of agreements that had not yet been concluded and signed, there was plainly a common desire to part company from one another at the earliest possible lawful opportunity, which in practice meant in two years' time – irrespective of whether, in truth, Mr. Connell had elected to resign or had been dismissed.

13 Mr Connell's immediate response to these minutes was to write to Mr Richard Egglishaw as follows:

> ***As a result of the minutes handed to me on last Friday 3rd, I must inform you that I will not be attending any meetings, nor signing anything until I have taken legal advice.*** Although this letter is addressed to you, it is also meant for our fellow directors .

Having taken legal advice, he then wrote again on 20 th January, 1992:

> ***Further to my letter of 6th January, in the light of the libellous defamatory minutes which have been circulated and on which I am taking advice, 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.*** Also I confirm that my resignation is to the companies and where appropriate also to the directors and shareholders. I will not be prepared to sign the new agreements, until the following points are reflected therein .

The first point was the re-instatement in the proposed new agreements of the 'unanimity' provisions contained in the FSA. When he agreed to relinquish this safeguard (said Mr Connell) he had done so on the basis that Mr. De Figueiredo would be becoming a shareholder-director and would be followed in due course by other senior managers. Now that Mr de Figueiredo was not going to proceed and as Mr Richard Egglishaw had made it clear that he did not intend to admit anyone else in the foreseeable future, Mr Connell was not prepared to give up the unanimity provisions. The letter went on to list a number of other matters which had been set out in an earlier Heads of Agreement which Mr Connell also wished to see incorporated in the new agreements.

14 the first question for decision is what meaning and effect is to be given to Mr Connell's statement in his 20 th January 1992 letter:

> *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*.

15 Advocate Hoy for the Defendants argued that this meant that Mr Connell's previous 'conditional' resignation notice thereby immediately became wholly unconditional and that this is the end of the matter. We do not agree. Although the passage in question was not expressed as clearly as it might have been, it seems to us that, on a fair reading of it in the context of the events that we have described above, it meant, *at that point*, that Mr Connell's notice was still conditional on the new agreements being signed but not conditional on that event taking place by 31 st January, 1992. The letter was plainly the product of a number of conflicting concerns on Mr Connell's part: a desire to preserve his ability to retire lawfully in two years time on 1 st February, 1994, which depended on the continuing effectiveness of his 31 st December 1991 notice; a concern that this was something that would only technically be possible under the terms of the proposed new agreement (without which he would not be able to get out until February 1996); a desire, for this reason – as well as others – to keep pressure on the Defendants to incorporate the changes that he wanted to see in the new agreements and to sign them as soon as possible; but a recognition that, as matters then stood, it was most unlikely that this was going to happen before 31 st January, 1992

16 That said, the combined effect of the two letters was both something and nothing:

'something' in the sense that they expressed a clear desire of Mr Connell to retire and sell out with effect from 1 st February, 1994; but 'nothing' in the sense that they purported to exercise a contractual right that did not yet exist (the proposed agreement not yet having been finalised and signed).

17 But the element of conditionality that still attached to Mr Connell's notice of resignation at the time of writing his letter of 20 th January 1992, was it seems to us, swiftly overtaken by events.

***Subsequent events***

18 At a meeting between the parties on 27 th January, 1992 (technically board meetings of STR and of SMS, and also a meeting of the shareholders STR), it was, in effect, formally resolved that Mr Connell would resign as a director of STR and SMS and be bought out on and with effect from 1 st February, 1994. The event was recorded in a letter dated 3 rd February 1992 written by Mr Jehan on behalf of Mr Richard Egglishaw as follows:

> *The meeting held on 27th January confirmed acceptance of your resignation as a Director of both STR Holdings Ltd and Strachan Management Services Ltd, effective 1st February 1994 and presumably also that your shares would be purchased on their value as shown by 31st January 1994 accounts.*

Mr Connell, for his part acknowledged in a letter in reply dated 14 th February 1992 that this was a correct statement of what had happened, although it did not in his view go far enough, (because he wanted an appropriate apology for the earlier suggestion that he had been dismissed):

> *The fact that the board agreed unconditionally to accept that I had given notice on 31 st December to resign as a shareholder /director with effect from 1 st February 1994, I do not think goes far enough.*

In a subsequent letter to Mr Richard Egglishaw dated 19 th March 1992, he also described a recent remark of Mr Egglishaw's at a board meeting (implying that he continued to adhere to the view that Mr. Connell had been dismissed) as

> *Contrary to the unconditional resolution passed at the board meeting on 27th January, 1992.*

19 In letters to Mr Connell dated 10 th March and 26 th May, 1992, Mr Richard Egglishaw wrote that he and the other Defendants accepted that Mr Connell had resigned (as opposed to being dismissed). In the earlier of these letters he also said:

> *With reference to your resignation we propose to tell the staff; keeping such facts concealed are counterproductive in the long run, the staff do suspect something because of your non attendance at the Christmas lunch.* We also

need to start working on the smooth hand over of your clients.

20 In October, 1992, Michael Voisin & Co writing to Mr Connell in response to a continuing series of grievances contained in a letter dated 29 th June, 1992, said:

> *It has been agreed by everyone that your notice of resignation given on 31st December 1991 has been accepted.* This was noted in the Minutes of the meeting of shareholders of SMS and STR held on 24th January 1992 [an incorrect reference to the meeting on 27 th January]. *It was also confirmed to you in Richard's letter to you of the 10th March 1992 and again in his letter of 26th May 1992.* Your resignation is effective from 1st February, 1994.

Mr Connell's reply was dated 20 th November, 1992. In it he continued to insist that Mr. Richard Egglishaw should withdraw the remark made by him at the board meeting in March that year, but otherwise did not take issue with, or offer any comment on this part of Voisin & Co's letter.

21 In that same letter dated 20 th November, 1992 Mr Connell also made it plain that, as he had not been consulted concerning proposals for the replacement of certain security that had originally been provided by Sommerville Estates Limited and “as I have now tendered notice to resign effective from 1st February, 1994” he was certainly not prepared to come up with any security himself.

22 In reading the correspondence from which we have quoted in the paragraphs above, it is of course necessary to keep in mind that one of Mr Connell's chief pre-occupations was to ensure that the record correctly reflected the fact (as he saw it) that he had chosen to retire and had not been dismissed. This would undoubtedly have been a matter of the first importance to him. But we cannot accept that the significance of this correspondence is limited to this particular consideration. In our view it is reasonably plain that by October/November 1992 at latest both sides were operating on the common assumption that Mr Connell was going to be retiring with effect from 1 st February, 1994,. There was still a number of unresolved disputes, and little progress had been made towards reaching agreement on the terms of the proposed new agreements; but the relationship was clearly in a state of “run-off” and the parties were proceeding, as it seems to us, on the basis of a mutually agreed parting date of 1 st February 1994 irrespective of the ‘true’ state of their contractual relations more generally. Neither side was suggesting at this stage that this parting was in any way still conditional on finalisation and execution of the proposed new agreements: indeed we suspect that it was tacitly recognised in both camps that the chances of reaching agreement were slim.

23 It was not until September the following year that Mr Connell adopted a different stance. The immediate cause appears to have been a letter from Bailhache & Bailhache, on his behalf to Voisin & Co dated 12 th May 1993 which was evidently designed to bring things to a head. This listed a number of matters requiring resolution and warned of imminent

litigation if a satisfactory conclusion could not be reached. Among other matters, the letter sought clarification of the contractual position as regards restraint of trade (plainly with a view to Mr Connell's plans for the future after leaving STR/SMS). In a lengthy reply dated 16 th June, 1993, Voisin & Co., dealing among many other matters with the restraint of trade point, asserted that the position must be governed by clause 6(n) of the original FSA, Mr Connell having refused (as they put it) to sign the proposed new shareholders agreement. On the more general front, Voisin & Co also gave notice that in view of the tone and content of Bailhache & Bailhache's letter and the threat of proceeding, Mr Connell was required to cease undertaking any functions at the offices of SMS and to remove himself and his effects from its offices at the earliest possible date. *"Needless to say"* it went on *"all obligations towards Mr Connell will be strictly honoured until termination of his contractual arrangements on 31 st January 1994"*.

24 As a result of this letter Mr Connell ceased to attend the offices of SMS. But in a letter dated 3 rd September 1993, Bailhache & Bailhache responded to Voisin & Co's comments on the subject of restraint of trade as follows:

> *If as you say in (8) of your letters of 16th June and July that the provisions of the 1986 Agreement applies because the 1989 ones were never signed then I think the question of notice is academic because under the 1986 Agreement neither party can have given notice until 1st February 1994 and it would seem that my client will have to return to his office and continue working under the 1986 Agreement until proper notice is given in due course*.

25 From this point onwards, the Defendants continued to assert that the question of Mr Connell's notice was governed by the terms of the proposed new agreements that he had given due notice under the relevant terms of those agreements, and that his resignation and the sale of his shares as at 1 st February 1994 had been confirmed by both sides at the meeting on 27 th February, 1992. They also made it clear that they were not prepared to allow Mr Connell to return to work. Mr Connell, for his part, while continuing to argue through Bailhache & Bailhache that the provisions of the original 1986 FSA applied because Mr Connell's resignation notice had been conditional on the proposed new agreements being signed (which had never happened), appears not to have done anything active to challenge his exclusion from SMS's offices (other than by agreement for the purpose of inspecting documents) notwithstanding that, on his case, he was not only an employee but was also still a director of STR and SMS.

26 On 1 st February, 1994 itself, Voisin & Co wrote to Bailhache & Bailhache referring back to a previous letter of 21 st December 1993, in which Voisin & Co had set out their contentions as to the practical steps that would need to take place in order to give effect to Mr Connell's retirement on 1 st February, 1994. They enclosed a cheque for £20,000 representing a payment on account in favour of Mr Connell, pending preparation of the full accounts for the year ended 31 st January, 1994, and a definitive calculation of the amount due to Mr Connell, and recorded (as the Defendants saw it) the formal termination of contractual

relations between Mr Connell and STR/SMS.

27 Although correspondence between the parties' respective legal advisers continued for a further two years, culminating in the issue of formal proceedings by Mr Connell (and Mr Watkins) in February 1986, the essential developments in this period can be summarised shortly: The parties came close at one point to reaching an accommodation, but failed in the end to agree on the contractual regime that governed their relations at the time of Mr Connell's resignation notice in December 1991 and thereafter, this aspect of the correspondence coming to an end with a letter from Bailhache & Bailhache dated 4 th August 1994 announcing that proceedings were in the course of being drafted. Despite this, there then followed a period of some months during which correspondence was exchanged concerning the instruction, by the Defendants, of Alex Picot to carry out an audit of STR and SMS for the year ended 31 st January 1994 and to prepare a valuation of Mr Connell's shareholding for the purpose of transferring his shares to the Defendants: all without prejudice to Mr Connell's contention that he remained a shareholder and director. Copies of the audited accounts and valuation thus prepared were supplied to Bailhache & Bailhahce in late May 1995. In February 1986 Mr Connell issued and served his Order of Justice in this action.

28 Although Mr Connell formally ‘reserved his position’ in relation to the payment on account of £20,000, the fact of the matter is that he (or Bailhache & Bailhache on his behalf) presented the cheque for payment and he has, throughout the subsequent history of this matter, retained these funds.

29 At no stage since the end of June 1993 has Mr Connell played any part as a director in the affairs of STR and SMS. Nor has he sought to enforce his claimed right to participate as a director other than by seeking a declaration in the present action.

***Conclusion as to Mr Connell's claim to be a director and shareholder***

30 In our view, Mr Connell's contention that he remains a director and shareholder is not sustainable. The only tenable construction to put upon the events that we have endeavoured to summarise above is, we believe, as follows.

31 First, although at the time he wrote his letter dated 20 th January, 1992, Mr Connell may have intended (and would reasonably have been understood as intending) that his resignation was dependent on the proposed new agreements being concluded and signed, that element of conditionality quickly dwindled in significance to the point where it ceased to be of any consequence at all. We doubt in fact whether it even survived the meeting of 27 th January, 1992. If it did, it was certainly of no relevance by October/November that year. Still to be talking or thinking in terms of a ‘conditional’ two year notice after an elapse of eight or nine months, with an end date only sixteen months away, would have made a nonsense of the whole purpose of giving notice of this kind. Given that the original

notification had purportedly been made pursuant to the provisions of an agreement that had never been concluded, it would have been open to the parties – or either of them – to have made it clear that the notice was of no effect had they said as much at an early stage; but by September 1993 it was, on any view, far too late to do this. As we see it, the truth of the matter is that, while Mr Connell was (understandably) uncertain as to exactly where he stood contractually throughout 1992, he had a strong desire to get out of STR and SMS on 1 st February, 1994; that that desire on his part was matched by a corresponding desire on the part of the Defendants to see him retire on that date; that these complementary aims came together in a binding mutual agreement that Mr Connell would retire and be bought out on and with effect from 1 st February 1994; and that for a period of some fifteen months or so he, as well as the Defendants, acted on the basis that this was what was going to happen irrespective of whether the proposed new agreements were or were not going to be signed.

32 Secondly, it is also perfectly plain that the parties were at one in intending that Mr Connell would be bought out by the Defendants by reference to a pro-rata share of a valuation based on eight times the pre-tax-profits of the group for the year ended 31 st January 1994.

33 Thirdly, from 1 st February 1994 onwards, at the very latest, Mr Connell did in fact cease to be a director of either STR or SMS (In fact it is difficult to see how he could properly be regarded as continuing to be a director in any real sense at any time after he was excluded from attending his former office in late June 1993). All other considerations apart, the suggestion that, despite an interval of over seven years during which Mr Connell has played no part of any kind in the affairs of these companies, he has remained and is still today a director, in is our view wholly unrealistic.

34 Fourthly, although the peculiar circumstances in which the problem arises do not admit of any neat and tidy legal analysis, if and insofar as it is necessary to decide the point, the better view in our opinion is that Mr Connell is to be treated as having given notice of retirement under the terms of Clause 6(j) of the 1986 FSA, the Defendants being regarded as having waived the restriction in Clause 6 (1) that would otherwise have prevented Mr Connell from retiring before February 1996.

***The Counterclaim***

35 In their written submissions on the main issues, following conclusions of the evidence, the Defendants adopted a somewhat curious stance saying, in effect that they had been proceeding on the understanding that the trial so far has been confined to *"the issue of liability on the Plaintiffs' claim"* and that this " *was to be determined prior to residual matters arising from that issue of liability*." As a result, they said, the defendants had not sought to address the Counterclaim so far, or to adduce evidence in relation to it, and they sought 'leave' to pursue it, in effect at a later stage. Advocate Voisin developed the point in his oral submissions, adding however that it might prove unnecessary to pursue the Counterclaim

but he wished to keep the possibility open. This submission was vigorously opposed by Advocate O'Connell on behalf of Mr Connell on the basis that there was no justification for the Defendants assuming that this issue would be left over to a later stage, and that the Defendants having failed to adduce any evidence or otherwise address it, the Counterclaim should be dismissed with indemnity costs.

36 Because it was evident, on any view that the 'residual issues' had received comparatively cursory treatment in the parties' main closing submissions, we ruled in our judgement given on 1 st July, 2001 that these matters should be the subject of further written submissions. It seemed to us at the time, however, that it would not be right to admit any further evidence, either on the Counterclaim or on Mr Connell's claim that he was still a shareholder and director (the two being inter-related) and for this reason directed that the further hearing should be confined in the first place submissions without further evidence of any kind.

37 The conflicting positions previously adopted by the parties at the July hearing were maintained by Advocate Hoy for the Defendants and Advocate Robertson for Mr Connell on the subsequent hearing of these further submissions in September. We have given further consideration to the respective contentions of the parties on this issue but remain of the view that it would be wrong to accede to the Defendants' suggestion that there should be any further hearing of evidence in relation to the Counterclaim.

38 The premise of the Defendants' stance that it had been understood that the Counterclaim was not to form part of the main trial, is not one that we can accept. It is true that the possibility of dividing up the trial in some way or other was canvassed between the Court and the advocates for the respective parties both before the start of the trial and at one point in the course of the trial itself. But (i) the parties were never able to reach any firm agreement among themselves as to how this might happen (ii) it was made clear by the Court in the course of the trial that, unless and until any direction for a split trial was given, the parties should proceed on the basis that the trial was of all matters in issue; (iii) the only specific application made by either side at any stage was by Advocate Voisin for the issue of alleged fraudulent misrepresentation to be taken as a separate issue, and this was refused; and (iv) in the event, no direction was ever made for the trial to be split in any way.

39 The Defendants assert that because of their understanding of the basis on which the trial was being conducted no evidence was adduced in relation to the Counterclaim. But the position is not quite as straightforward as that. It seems to us that the Defendants' approach to this issue involved a degree of ambivalence, because Advocate Voisin did in fact go some way towards tackling the subject of his clients' Counterclaim both in cross-examination of Mr Connell and in examining Mr Jehan in chief, though in neither case did he pursue the matter to its logical conclusion. On the other hand, it must have been obvious that unless Mr Connell was going to admit that he was indebted to the Defendants as alleged (which he did not), it was going to be necessary to call someone from Alex Picot as a witness in order to prove the audited net profit-figures for the year end 31 st January, 1994 and the calculation of the value of Mr Connell's shareholding which was the pleaded

cornerstone of the Counterclaim. This would have left Alex Picot open to cross-examination not only on the 1994 accounts but also on the 1986 ones and in the event no such witness was called, a matter on which we have already voiced our thoughts in our earlier judgment. For this reason alone, we would regard a further hearing of evidence in relation to the Counterclaim, in which – we must assume – someone from Alex Picot would be called to prove 1994 accounts, but would no longer be open to cross-examination on the 1986 accounts (that issue now being closed by our judgment of 31 st July this year), as profoundly unsatisfactory and unfair to Mr Connell. At a practical level such a further hearing would, moreover, potentially involve the recall of a number of witnesses of fact and possibly also a further raft of expert evidence.

40 All in all, we are firmly of the view that the Defendants had every opportunity in the course of the several weeks occupied by the trial of this action in March and April this year either to prove their case or to seek a specific direction from the Court that the Counterclaim be stood over for hearing at a later date. No such application having been made or agreed with Mr Connell's representatives, it would not be consistent with the requirements of justice for this Court to permit the Defendants to have a second bite at the cherry. The Counterclaim must, accordingly, stand or fall on the evidence deduced at the trial. That evidence being plainly insufficient, on the Defendant's own acknowledgement, to establish the matters pleaded, the Counterclaim must be dismissed.