Neutral Citation Number: [2011] IEHC 342

THE HIGH COURT

2008 9814 P

BETWEEN

JOE SIMPSON

PLAINTIFF

AND

ALAN TORPEY, EDUARDO DOANDES, PAUL DOODY AND GERRY COSGRAVE, TRADING AS R.I. INVESTMENT GROUP

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 4th day of August, 2011

1. Introduction

1.1 There is often a tension between businessmen and their advisers stemming from the pace at which each might feel that business can safely be progressed. Understandably, businessmen wish to grasp opportunities as soon as they arise. Their advisers often counsel caution and emphasise the need to have legal and accountancy details clarified in advance. There is not necessarily a right or a wrong answer to the question posed by that tension. Often, businessmen press ahead and hope that the necessary details will be put in place in due course. When things work out well, it may transpire that it is possible to allow the legal and accountancy structures to "catch up" with the actual conduct of business. However, allowing business to get ahead of formalities necessarily involves a risk, most particularly where things go wrong. It is not that there is anything intrinsically inappropriate in business forging ahead of the putting in place of the necessary formalities. Rather, it is that businessmen who make a conscious decision to allow business to progress faster than those formalities, take a risk. Where things go wrong, and it is necessary to define with some precision the rights and obligations of the respective parties, then the absence of necessary formalities creates an obvious difficulty.

1.2 This case arises out of such a background. The defendants, in one guise or another, became involved in property development in Romania. The precise legal structure within which that business was engaged in, and which it was intended in the future to be engaged in, was both complex and, to a significant extent, not fully worked out. However, the conduct of the business galloped ahead. The plaintiff ("Mr. Simpson") was employed as a project finance director. The business was expanding and it was felt that a person such as Mr. Simpson, who had experience in putting together advantageous financial arrangements for property projects, would be a very useful addition to the team. That Mr. Simpson started work as project finance director is not in doubt. Who precisely his employer was, however, is of significant dispute. While there is written confirmation of his terms of employment, the precise way in which those terms were to be implemented does not, in reality, appear to have been fully worked out. For reasons which are not of particular relevance to the issues which now arise between the parties, Mr. Simpson's contract came to an end and he now brings these proceedings, claiming various sums said to be due from the defendants arising out of that contract. Against that general background, it is necessary to turn to the issues which arise.

2. The Issues

2.1 As noted earlier, there is a serious issue as to what party or entity contracted with Mr. Simpson. Mr. Simpson alleges that his contract was with the defendants as individuals. The defendants say that Mr. Simpson's contract was with a corporate entity, although the precise identity of that corporate entity is itself, on one view, a matter of some doubt. Clearly, if the defendants are right in their contention under this heading, no further issues arise for the claims made in these proceedings are as against the defendants in their personal capacity, and if the defendants have no liability, in such personal capacity, arising out of Mr. Simpson's contract, then the claims must necessarily fail.

2.2 However if, and to the extent that Mr. Simpson has direct contractual relations with the defendants, then further issues arise in relation to the amounts said to be due under the contract. It will necessary to go into Mr. Simpson's claim in somewhat greater detail in due course. However, in general terms, it is perhaps appropriate to divide Mr. Simpson's claim into two broad parts. The first part of his claim concerns monies said to be due arising directly out of his capacity as an employee. While there was some doubt about the matter in the course of the hearing, it was, quite properly and fairly, indicated by counsel on behalf of the defendants in closing submissions, that it was accepted on behalf of the defendants that Mr. Simpson had not been paid his last month's salary. Certain other sums are also said to be directly due in respect of expenses and notice. I did not understand there to be any significant dispute between the parties as to the fact that certain sums had not been paid, although it is, of course, said on behalf of the defendants that, even if a net sum is due under those headings, such sum is not due from them in a personal capacity. The final, and by far the most significant, element of Mr. Simpson's claim arising directly out of his employment is in respect of a bonus. Mr. Simpson's contract of employment provided that he was entitled to a bonus of 150% of his base salary (which was fixed at €200,000.00) subject to the achievement of targets to be mutually agreed. It does not appear that either side progressed the question of the setting of targets or that the employer's side (whoever that may be) ever formally considered whether or not to grant a bonus. Independent, therefore, of the question of the identity of the party with whom Mr. Simpson contracted, there is an issue as to his entitlement to the bonus.

2.3 The second broad heading involves an entitlement, at least at the level of principle, on the part of Mr. Simpson to a profit share. It will be necessary to go into the details of how that profit share was to work in due course. Indeed, one of the things that became clear in the course of the hearing was that much of the relevant details had not been worked out at all. It would appear that Mr. Simpson was, however, at least in some way, supposed to be entitled to 5% of the profits. The question of what profits this share was to come from will be addressed later in this judgment. In addition, there was one project known as the Titan Deal, which was already at a relatively advanced stage when Mr. Simpson joined the operation (to use a neutral term). It was agreed that Mr. Simpson, rather than being entitled to a specific percentage profit share arising out of the Titan Deal, would be entitled to the sum of €1m whenever the four named defendants received "their return on the deal" subject to certain conditions. It is also common case that the arrangements between the parties provided, again, at the level of principle and again, in circumstances where it is by no means clear that the details were ever properly worked out, that Mr. Simpson would, in effect, have an option to reinvest his profit share in future projects in circumstances where a failure to reinvest would mean that Mr. Simpson would not be entitled to share in

the profits from those future projects. In general terms, it appears that there may have been, at least in a broad sense, an intention that Mr. Simpson would have the same financial rewards as if he owned 5% of the venture, but that it was not intended that Mr. Simpson would have any actual shareholding in any of the projects. The broad intention may well, therefore, have been to structure a contract of employment under which Mr. Simpson would be entitled to a profit share broadly along the lines of what he might have expected to receive as a shareholder with 5% equity in the venture. It does not, however, appear that the mechanism for achieving that result was ever fully worked out. In those circumstances, there are a range of issues as to Mr. Simpson's entitlements, if any, under the profit share arrangements. Those issues arise in addition to the question as to the persons or bodies against whom such an entitlement might be said to lie. Against the background of those issues, it is next necessary to turn to an outline of the undisputed factual background and to consider the issues which arise.

3. The Factual Background

3.1 Mr. Simpson was and remains involved in an investment concerning what is known as the "Xerox building" in Romania. Also involved was a John Lowe, with whom Mr. Simpson was previously acquainted. Mr. Lowe introduced Mr. Simpson to the first named defendant ("Mr. Torpey") and the second named defendant ("Mr. Doandes"). It was through this connection that the parties to the present proceedings initially came into contact. At this time, Mr. Simpson was acting as the project finance director with Treasury Holdings.

3.2 In conversation with the fourth named defendant ("Mr. Cosgrave"), who had gotten Mr. Simpson's number from Mr. Torpey, some time in 2006, the subject of an opening within the defendants' business was broached. Mr. Cosgrave explained the business and how it was then expanding into what was described as its development phase, which gave rise to an opportunity for someone to join who had experience sourcing and structuring developmental finance. There is some dispute as to whether Mr. Simpson was headhunted by the defendants, which is his contention, or whether he expressed an interest to join. There was a subsequent lunch meeting at Croke Park which then evolved into discussions. Mr. Simpson was excited by the prospect of joining the defendants' business due to the scale of the projects.

3.3 Due to the proximity of his relationship with Mr. Torpey, Mr. Simpson instead carried out his primary contract negotiations with Mr. Doody. However, on occasion, he did meet with all four of the defendants in order to settle any difficult issues. Such issues included the profit share arrangement and the Titan deal to which it will be necessary to return in due course.

3.4 A written document was produced and went through several iterations, the original being based on a template document which had originally come from NTR, with whom Mr. Doody had previously worked. This document was ultimately agreed by Mr. Simpson in the form of a final draft letter dated 12th June, 2007, and identified the employer as "RI Investments" (abbreviated to "RI"), although it did include a clause which noted that "[a]ny reference to RI is deemed to cover RI Trust and RI Investment Grup and any other RI vehicle that may be used to hold investments/developments". The letterhead used listed the sender as "R.I. Investment Grup" with an address in Bucharest, Romania. The contract itself was signed "for and on behalf of RI Investments" by Mr. Doody, with the title of "partner". In his evidence, Mr. Doody suggested that in Romania, the equivalent term for "director" is "administrator", which created problems in translation between the two countries, and it was for this reason that the term "partner" was adopted. There was no suggestion, however, that any partnership was formally constituted between the four defendants. It is worthy of note, at least in passing, that while Mr. Doody signed the contract, Mr. Simpson did not. However, there was also no suggestion by any of the parties that he was not bound by or entitled to rely on its terms.

3.5 While "RI Investments" was described as a company in the contract, it was not disputed that there was, in fact, no legal person by that name, or at least there was not at the date the contract was signed. The defendants explained that it was their goal to take the disparate special purpose vehicles ("SPVs") which held and managed the various investments in which they were involved and to arrange them within an overall group structure. The model in mind was that of Treasury Holdings, details of which were familiar to Mr. Simpson. The professional advices of a number of firms were solicited, including that of William Fry, Solicitors and KPMG Accountants, as to the most tax efficient way to reorganise the defendants' collective business interests. However, nothing came of this, in part, because differing and sometimes contradictory advice was produced, but also because the view was taken that a reorganisation would involve significant outlays which could instead be better invested, and with the proceeds of matured developments, those costs could be better met. While it was accepted that RI Investments was not a company in the legal sense, there is no doubt that it was intended to be the banner under which the future holding company for a group structure would operate.

3.6 In practise, the form of operating structure that was adopted appears to have followed a similar course in each case: some of the defendants would incorporate a relevant Romanian limited liability company in respect of each project. It seems to have been accepted by the defendants that, at least in most cases, the identity of the named shareholders was not considered relevant as the beneficial entitlement to ownership was held by them all. As with much else, no specific mechanism to recognise this ownership was either agreed or implemented. Through the defendants' efforts, each company would then go on to secure investment, both equity and financial. Any relevant defendants would hold their shareholding effectively on trust for all of the defendants along with any other equity investors. The individual companies concerned would then use those resources to purchase and ultimately develop a project with the goal that, once a development had matured, it could then be restructured to officially reflect the various interests of the parties involved.

3.7 It was suggested by the defendants that the original intended employer was to be either R.I. Investment Grup or R.I. Investment Trust, both Romanian limited liability companies. The defendants contended that Mr. Simpson refused to be employed by a Romanian company for tax reasons, and so an Irish option had to be explored. It was for this reason, it was said, that the "R.I. Investment Group" name was adopted. It was registered as a business name by one of the defendants. On the other hand, it was Mr. Simpson's case that Mr. Doody had suggested to him that it would be advantageous to move his residence for tax purposes, although this suggestion was not taken up. In any event, it was clear that the defendants had arranged their business in such a way that two apparently separate, yet interconnected, management structures operated, one in Ireland under the direction of the Mr. Doody and the other in Romania under Mr. Doandes.

3.8 Mr. Simpson gave evidence that he understood "R.I. Investment Group" to be the four defendants, who have also been variously described throughout the proceedings both in the oral and written evidence adduced as "shareholders", "principals" and "partners". It is not immediately apparent that each of these descriptions served as any more than a badge of convenience. Nevertheless, the defendants indicated that it was never their intention to employ Mr. Simpson personally. Instead, he was to be employed by a company. Mr. Doody expressed the view that he and the other defendants sought to employ high calibre people, such as Mr. Simpson, and consequently did not expect to have to manage them. It was envisaged that such persons would take up specific areas of responsibility and thereafter require very little direction from any of the principals. However, there was no suggestion that Mr. Simpson was not an employee.

3.9 An attempt was made to register R.I. Investment Group as a limited liability company in Ireland. However, this was not permitted by the Companies Registration Office for reasons which were not elaborated on. Instead, a company, Sanlink Limited, was incorporated or acquired in November, 2006, and was subsequently renamed as RIIG Properties Limited on 11th December, 2007. There were some suggestions that this company might become the ultimate holding company for the group, although this aim was never realised.

3.10 Mr. Simpson's title under his contract was that of project finance director and he was required to report to the "Board of Directors". Within a short time following his appointment, a group finance director, Marie Joyce, was also hired, a move which was not announced to Mr. Simpson in advance and which came as somewhat of a surprise to him. Mr. Simpson's role was to source developmental finance, that is to say, the money to purchase land and to finance construction costs and also to structure deals. It is undoubtedly true that, at the time of his appointment, and in particular during the final months of his tenure, what became known as the "credit crunch" had emerged with the effect that project finance was increasingly difficult to secure.

3.11 Mr. Simpson's salary was initially paid (for approximately two months) by a company owned by Mr. Cosgrave called Unique Investments Limited. This company was used to provide management services to various projects. Unbeknownst to him, Mr. Simpson was issued with a P45 from this company and the responsibility for the payment of his salary transferred to Sanlink Limited (later RIIG Properties Limited). While this was not something that Mr. Simpson could recollect being informed of, he was able to assert that he was not provided with any documentation to that effect.

3.12 There was no suggestion that any of these changes as to who paid Mr. Simpson's salary amounted to anything like a situation involving a transfer of undertaking which might serve to amend Mr. Simpson's terms and conditions of employment.

3.13 The defendants contend that the pension entitlement under the contract was never finalised because Mr. Simpson was "shopping around". For his part, Mr. Simpson disagreed with this characterisation of events and suggested that the only discussions he had on his pension was with his previous employers for the purposes of carrying his entitlements with him. However, Mr. Doody did accept that it was an omission on his part not to have followed up on Mr. Simpson's pension entitlements under the contract.

3.14 During the contract negotiations, Mr. Simpson's bonus was one of the difficult issues between the parties. This stemmed, in part, from the nature of the bonus to which Mr. Simpson was entitled from his then position with Treasury Holdings, which company operated a long-term bonus scheme that was to mature over the course of a five-year period. By leaving his former employer, Mr. Simpson claims to have lost any entitlement to this bonus, which, at the time, was worth in the region of €1.3m. In part, this issue was said to have been bridged through the inclusion of a profit share into Mr. Simpson's terms of employment.

3.15 As set out in the contract of employment, there was an understanding between the parties that bonus criteria would be agreed. However, it was accepted by Mr. Doody that the responsibility was his to settle the bonus terms and he acknowledged that it never happened and that he failed to follow due process in this regard.

3.16 Some time in early April 2008, Mr. Simpson raised the issue of his bonus to which the initial response was that it was not payable until he had spent twelve months in continuous employment. On 18th April, 2008, Mr. Simpson sent an email to Mr. Doody, again enquiring about his bonus following the financial year end, which he understood to be the normal time for bonuses to be paid. Mr. Simpson was met with an email raising issue with his timekeeping and attendance at work. Although a matter of dispute, Mr. Simpson contended that, following this email, the relationship between him and the defendants, and Mr. Doody in particular, deteriorated during the summer of 2008. This was in a context where business was difficult, finance hard to achieve and there was no sign of any of the projects progressing.

3.17 It was Mr. Simpson's case that he was being "shut out" by the defendants. He illustrated this by referring to various updates on projects which were being given to the four defendants with which he was not provided, notwithstanding the fact that such updates would have facilitated his position given that it was part of his function to keep the projects' financiers abreast of developments. The defendants disputed this allegation and suggested that, as Mr. Simpson had full access to the files on the computer server, it was, therefore, open to him at all times to review any and all of the business's files. The question of any documentation which might have been stored locally by some or all of the defendants was raised but not addressed in this context.

3.18 There was some suggestion from the defendants that Mr. Simpson, while entitled, in principle, to a bonus payment under his contract, would not have been eligible for one where it was measured on performance. This, it was said, was down to his failure, in admittedly difficult circumstances, to raise any project finance. Part of this criticism was tied into complaints that Mr. Simpson was not spending enough time in Romania dealing with banks there.

3.19 Nevertheless, evidence was led that approximately €1.5m was raised by Mr. Simpson to fund the purchase of the project referred to as "Little Bacau". He also achieved the extension of repayment dates on a number of facilities and the increase of loan limits (for example, in the Independentei project). However, these achievements were discounted by Mr. Doody first, as not within Mr. Simpson's role, but moreover, for the fact that they were said to be insignificant due to their size and the fact that they were straightforward applications in the scheme of their business.

3.20 It was suggested by Mr. Doody that the defendants had originally wanted to give Mr. Simpson an equity stake in the various projects. However, in the end, Mr. Simpson received an entitlement to a 5% profit share under his contract of employment instead.

3.21 The Titan project involved what was, in effect, a joint venture between R.I. interests (however, that might be characterised legally) and a company by the name of Cayleum. It was a 49%/51% split in favour of Cayleum. Between September and November 2007, Cayleum approached Mr. Simpson as to the possibility that the defendants' interest in the Titan deal would be sold to Cayleum so that Cayleum would own a 100% interest in the project. There were a series of discussions on this proposal and the evidence was that the four defendants were evenly split over whether to agree to the early sale of their interest which would involve a discount on the original estimated return. For his part, Mr. Simpson supported the sale proposal, as his view was that it represented a good deal. Ultimately, the proposal was accepted and terms agreed.

3.22 The money from Cayleum was paid in three tranches. The first was in October/November 2007, with the second following in November/December 2007. The final payment, for tax purposes, was made by way of a loan to Lepilux, a Luxembourg registered company, on 26th June, 2008. It was a condition that this final payment could not be realised for a number of years, and so the view was taken that the better option in the interim was for the money to be reinvested instead.

3.23 There were payments made from these monies, some of which went to the individual defendants. It was, however, their case that while this money flowed out to them, it shortly thereafter was reinvested back into a number of projects. Indeed, part of the

motivation for cashing in on the Titan deal would appear to have been the pressing need for an injection of finance into the Timisoara project, with which the four defendants were also involved. Some of the Titan funds were subsequently reinvested in this project. However, as became a feature of this case, the precise destination of those funds was opaque at best.

3.24 On 18th September, 2007, a loan agreement was signed granting a thirty day facility for the Timisoara project from funds which arose out of the Titan monies. It was witnessed by Mr. Simpson. The defendants placed a considerable amount of emphasis on this point as evidence that Mr. Simpson was aware of the destination of the Titan monies generally and, in particular, his €1m share in the profits.

3.25 It is Mr. Simpson's evidence that he never agreed to reinvest the €1m to which he was entitled. The defendants contended that Mr. Simpson was fully aware of the funding issues which arose in other projects and the details of the reinvestment and, as such, he acquiesced to same. It was further noted that he never raised any objection to the reinvestment of the €1m.

3.26 It was acknowledged that the defendants did not have a formal consultation process prior to the taking of decisions, and that sometimes decisions were made without the involvement of all of the defendants, or indeed, Mr. Simpson. Nevertheless, it was asserted that Mr. Simpson would have known what was involved in any large investment decision; however it was common case that no formal document existed which was evidence of this agreement.

3.27 During the course of his evidence, Mr. Doody also acknowledged that Mr. Torpey, Mr. Cosgrave and DOS Holdings Limited, a Maltese company owned by Mr. Doandes, received cash payments out of the Titan monies. He noted, however that he personally had not received any similar return from the Titan monies.

3.28 In September, 2008 Mr. Simpson instructed his solicitors to correspond with the defendants, calling on them to honour the terms of Mr. Simpson's contract of employment. While Mr. Simpson described a meeting with Mr. Cosgrave in the Romanian office at which the letter was acknowledged, it was not discussed.

3.29 On 31st October, 2008, Mr. Simpson arrived into his office in Dublin to find a letter on his desk addressed to him which purported to terminate his employment. He immediately challenged Mr. Doody, who took back the letter explaining that it was a mistake. The letter was thereafter torn up. Mr. Doody explained in his evidence that Ms. Joyce had suggested that, if the company were to close down, which by then, it was said, appeared impending, the employees would require a letter, so as, for example, to be able to claim their mortgage protection insurance. Mr. Doody agreed and signed the drafts which she then proposed to him for all of the employees. The Dublin office closed on the same day.

3.30 Following that meeting, there were some discussions between Mr. Simpson and Mr. Doody as to how Mr. Simpson might continue on in his role, without payment, in an attempt to save the business and bring the various projects to maturity. Indeed, it was noted that Ms. Joyce continued on in her role for a further six months thereafter without payment. The relevant discussions came to an end with Mr. Simpson taking his laptop and mobile phone home to consider his position. It was agreed that the proposal made was for Mr. Simpson to work for free, including travelling to Romania, in an effort to generate some dividends from the developments, from which he would then be paid as a form of "sweat equity" arrangement. There appears to be some dispute as to who was to contact who on the following Monday. In any event, no contact was made and Mr. Simpson did not return to work thereafter.

3.31 There is some dispute between the parties as to the responsibility for the termination of the employment relationship. However, as the case does not centre on a claim under the Unfair Dismissals Acts, or for wrongful dismissal, little would appear to turn on this point. What is clear is that the defendants' business ran out of money, to the extent that it could no longer pay the wages of its employees, and it was at least for this reason that the employment relationship with Mr. Simpson ended.

3.32 As pointed out, Mr. Simpson's claim includes a claim for salary which was due but not received for October. Ordinarily, his salary was transmitted by direct debit. The defendants produced a remittance advice dated 24th October, 2008, which, it was contended, was proof of such payment. However, when pressed, Mr. Simpson's contention that the money was not paid was accepted by Mr. Torpey.

3.33 Since October 2008, Mr. Simpson has not secured fulltime employment. He has done some contract work and is also involved in a life settlements deal with Mr. Torpey.

3.34 While there is a P45 in the discovery documentation, Mr. Simpson claims not to have received it. Furthermore, there was also correspondence before the court which suggested that Mr. Simpson's P45, which had been submitted to Revenue in October 2008, was subsequently cancelled in November 2008. In any event, it was clear that, howsoever the mechanics of the termination of Mr. Simpson's contract of employment came about, for present purposes Mr. Simpson's employment ended on 31st October, 2008. Against that background, it is next necessary to turn to the contract itself.

4. The Contract

4.1 As pointed out, the contract is to be found in correspondence which passed between the parties. On the evidence, the ultimate letter of employment went through a number of drafts. It would also appear that Mr. Simpson took legal advice. While it is, of course, the case that the contract of employment, like any other contract, must be seen in the context of the factual matrix against which the parties contracted, nevertheless, the primary and principal question is to construe the document as it stands. In those circumstances, it is necessary to set out those aspects of the contract which are material to the disputes which arise.

4.2 As pointed out, the contract was in letter form. The first important aspect of the document is the entity on whose behalf the letter is said to be written. On the top right hand corner of the letter there appears the following:-

> "R.I. Investment Group
>
> Primaverii Street
>
> nr55
>
> Floor 2, District 1
>
> Bucharest, Romania"

4.3 The letter starts by confirming an offer of employment in "R.I. Investments (the "Company"/ "R.I.") as project finance director. It is said that the reporting structure is to the "Board of Directors". Under the heading 'Remuneration', the following appears: there is provision at subpara.(a) for an annual salary of €200,000.00 per annum. As pointed out earlier, the question of a bonus is one of the matters in contention in these proceedings. Subclause (c) provides as follows:-

> "You will be entitled to a 150% annual performance related bonus as may be approved by the Board of Directors. It is understood that you agree to defer part of this bonus if there are insufficient funds to pay the same level of bonus to the four key shareholders. The remaining part of the bonus to be paid when funds become available. (Any Bonus payment will be subject to the achievement of key expectations/goals and objectives to be defined at a later stage)."

In addition, the question of the profit share is in controversy. In the contract, subpara.(d) provides as follows:-

> "You will also be entitled to a 5% Profit share bonus in development projects together with a one off payment in relation to the Titan deal as specified in Appendix A."

Furthermore, subclause (e) provides for:-

> "A pension contribution of 10% of base salary to be contributed by R.I. . . "

4.4 The agreement goes on to make detailed provision for a range of matters which one might normally expect to find in a contract of employment relating to such items as functions, duties and hours of work, leave and sickness, together with confidentiality and disciplinary matters. There is also a restrictive covenant providing that Mr. Simpson should not work in competition with what is described as "the Company".

4.5 As has been noted, more detailed provisions in respect of the profit share arrangements are set out in Appendix A. Under the heading 'Profit Share' in that Appendix, the following is set out:-

> "5% of RI Development Projects (including RI's share of Development Projects SPV profit) (or any other vehicle that may be used to hold shares in the Development Projects SPVs where the projects are housed.)
>
> If the shares in a Development Projects SPV are held directly by the 4 shareholders rather than RI, then Party A is still eligible for the 5% profit share. This 5% can never be diluted. i.e. if RI/the 4 shareholders decide to give/sell equity/profit share to other individuals/companies, this 5% profit share given to Party A will never get diluted.
>
> For clarity, if shares in a Development Project are sold to a third party investor, then Party A is eligible to receive 5% of the proceeds or if these proceeds are reinvested in that or another project, then Party A will receive 5% of any profit generated from the project that the proceeds are reinvested in. If the proceeds (in full or in part) are distributed to the four principals, then Party A shall receive his 55 at the same time." (sic)
>
> If shares in a Development Project are given to an employee/consultant for joining RI or doing work for RI, then Party A's 5% profit share shall not be diluted.
>
> This 5% profit share applies to the Development Projects deals already entered into by RI that Party A is aware of , and any other RI Investment Development Project deals entered into during the course of Party A's employment."

4.6 The subsequent provision contains specific reference to the Titan Deal, that is to say:

> "€1m to be paid to Party A whenever the 4 principals (Alan Torpey, Eduardo Doandes, Paul Doody and Gerry Cosgrave) receive their return on the deal subject to the protection clauses below,
>
> The Profit Share and Titan Deal clauses are effective form the date of this contract." (*sic*)

4.7 The Appendix also contains, under the heading 'Protection Clauses', provisions to apply in the event of termination of the employment by "either R.I. or Party A". For the purposes of Appendix A, Mr. Simpson is Party A. There is no real dispute but that Mr. Simpson's contract with R.I. (however R.I. might be considered) was terminated more than 12 but less than 24 months after its commencement. In those circumstances, the provisions of the protection clauses seem clear. Under Clause 1 and the second indent thereof, the protection clauses provide that, if R.I. terminates Mr. Simpson's contract between months 12 and 24, Mr. Simpson is to receive "two-thirds of both the Titan €1m and the 5% of the estimated net value of existing development projects (via profit share) at the date Party A leaves". Likewise, the protection clauses provide that if Mr. Simpson terminates his employment with R.I. "for any reason" between months 12 and 24, like provisions apply. Therefore, for the purposes of the protection clauses, it does not matter whether R.I. or Mr. Simpson terminated the contract. In either eventuality, Mr. Simpson is entitled to two-thirds of the Titan €1m and 5% of the estimated net value of existing development projects.

4.8 Insofar as there may be disputes as to the precise meaning of those contractual terms, it will be necessary to return to those questions under the various heads of claim in due course.

4.9 The first issue which needs to be addressed is, however, as to the party with whom Mr. Simpson had contractual relations.

5. Who was the Employer?

5.1 There seems to me to be little doubt as to what the medium or long term intention of all of the parties was. It was the view of the defendants that they would ultimately seek to bring all of their Romanian interests into one corporate group with a single group holding company. In that context it is, perhaps, important to note a number of aspects of the general intent of the parties. First, it was mentioned by a number of the defendant witnesses that, at least in broad terms, the model which they were contemplating was a model which they believed had been successfully employed by Treasury Holdings, the large Irish property company. Mr. Simpson had, of course, worked for Treasury Holdings. As I understand it, what was contemplated was that potential individual investors would be secured for specific projects which would be managed by R.I. This, indeed, was already the case in respect of some of the projects which were in place prior to Mr. Simpson becoming involved. Up to the time of Mr. Simpson's involvement, each separate project had an SPV established. The precise shareholding in each SPV varied from case to case. In addition, independent investors (that is to say, investors independent of the defendants) had shares in some of the relevant SPVs. It appears to be the case that it was intended that that broad model would continue so that individual projects would be directly owned by an SPV, with there being a

significant possibility that some of the shareholding in each separate SPV would be held by independent shareholders who would have been induced to invest in the project concerned. However, what appears to have been contemplated is that the interests of the defendants in any of the relevant projects (presumably represented by the shareholding of the defendants in the SPVs concerned) would be held in a group structure with an ultimate group holding company.

5.2 However, as is often the case, the structure which was already in place had grown up in a somewhat haphazard way. The evidence disclosed that quite an amount of work had been done by professional advisers (including taxation advisers) in attempting to work out the best way (including from a tax perspective) of achieving the end of bringing all of the defendants' ownership in the relevant projects within a single corporate group. While the evidence suggests that such a project was ongoing, it was clear that it was far from straightforward. No final decision on how it was to be achieved had been arrived at. Different proposals as to an appropriate structure had been put forward.

5.3 I have no doubt but that the overall intent of the parties was that, in due course, and subject to it being possible without incurring unacceptable tax liabilities, such a group structure be put in place and that, in that eventuality, it would be the ultimate group holding company which would employ Mr. Simpson.

5.4 However, the problem with which I am faced is that that group structure never came into place. It was indeed a case that the identification of suitable projects continued apace and a certain degree of progress on the exploitation of those projects was maintained. In the meantime, some effort was made to address the question of putting in place an appropriate group structure. However, there can be little doubt that the business on the ground was moving ahead much faster than the nuts and bolts of establishing, with the benefit of legal, accountancy and taxation advice, an appropriate group structure.

5.5 If such a group structure had been put in place, then I would have little hesitation in finding that Mr. Simpson's contract was with the ultimate holding company of the group. The more difficult question which arises is as to how Mr. Simpson's contract of employment should be construed in the absence of such a group being in place and in the light of the fact that the shareholding of what might loosely be called "R.I." in the various SPVs was, in the main, held by the individual defendants, although some of those holdings were through intermediate corporate entities. As pointed out earlier, the terminology of the contract points in different directions. In those circumstances, it is necessary to look at the contract as a whole to see if any assistance can be obtained in resolving the clear ambiguity which exists as to who Mr. Simpson's employer was to be pending the establishment of a group structure as envisaged.

5.6 In closing submissions, counsel on behalf of the defendants made the point, which is indeed valid so far as it goes, that there is no reason in principle why employees of a group may not have their contract of employment with a specific service company within the group. The way in which groups of companies organise their business can, of course, vary significantly from case to case. One model involves certain general services (such as, for example, administration or financial services) being provided for the group as a whole by an individual service company. In those circumstances, the relevant service company bills each of the other companies within the group for the value of the services rendered. So far as the group as a whole is concerned, such transactions are neutral. However, where such a structure is put in place, it would not be surprising that those engaged in the relevant type of services might well be employed by the service company. Where, for example, administrative and secretarial services for the group as a whole were provided centrally by a service company and billed out on an appropriate basis, it would be expected that administrators and secretaries would be employed by the service company. There is nothing, therefore, in principle, wrong with an individual service company within a group being the employer of persons who provides services of a particular type. Indeed, it might well be that in certain circumstances such a situation would not be seen as anything unusual.

5.7 However, taken as a whole, it does not seem to me that it is reasonable to look at Mr. Simpson's contract in that way. It might be possible to look at what one might call the basic employment terms of Mr. Simpson's contract as being capable of being referable to such a service company. His salary, bonus, expenses and pension provisions could easily be provided by a service company, which would then charge out his services to the individual operating companies within the group as appropriate. However, it is difficult to see how such a model (that is, the service company model) sits happily with the provisions for profit share contained in Appendix A. As noted earlier, the profit share entitlement states that, if shares in an SPV are held directly by the four shareholders rather than "R.I.", then Mr. Simpson was still eligible for his profit share. In the event that the project for the creation of an overall holding group came to fruition, then it would be easy to see how that would work in practice. The profits deriving from any SPV (insofar as they were not attributable to independent investors in that SPV) would ultimately form part of the profits of the overall holding company. Mr. Simpson's contract of employment would be with that holding company and his contract of employment would entitle him to an additional payment by way of profit share equivalent to 5% of the profits which would, of course, be profits of that holding company wherever they originated within the group. However, as long as the shareholding in individual SPVs remained held directly by the defendants (or by corporate entities under the control of the defendants which were outside any group structure), then it is hard to see how that model could work. If a particular SPV were to make a profit, then that profit is, at least initially, the profit of the SPV concerned. If that profit is to be distributed, then it can only be distributed to its shareholders who, in that scenario, are the defendants rather than any R.I. group entity. In what way would any R.I. entity be in a position to pay Mr. Simpson his relevant profit share where no R.I. entity actually had any interest in the relevant profits? It is easy to see how there could be a contract for a company to pay a senior employee a sum calculated by reference to that company's profits. It is a lot harder to see how a workable contract could be entered into on behalf of a company to pay monies to an employee as a profit share, when the company concerned had no interest in the profits at all, but where those profits were held by an SPV and would go directly to the individual defendants in the event that they were distributed by the SPV.

5.8 At one point in the evidence, it was suggested by one of the defendants that it might be that Mr. Simpson's contract would, in those circumstances, entitle him to get a profit share directly from each SPV. Indeed, it was suggested that he would have been entitled to send (and, indeed, possibly should have sent) an invoice to any relevant SPV for his appropriate share in the profits of the SPV concerned. However, it came to be accepted that there were a number of problems with that proposition. The first, and most obvious, problem stemmed from the fact that it was agreed both by Mr. Simpson and by the defendants that Mr. Simpson's profit share entitlement was to be based on the net position across each of the relevant entities. Thus, if some projects made a profit and others made a loss, then Mr. Simpson's profit share was to be calculated by reference to the net position. In those circumstances, the profits of any one particular SPV would be but one element of the calculation. It follows that it is really not possible to construct a workable model whereby the individual SPVs had an obligation to Mr. Simpson, for Mr. Simpson's entitlement was not based on the profitability or otherwise of the individual SPV, but rather, the profitability or otherwise of the group as a whole.

5.9 In addition, it seems to me that there were further complications in the suggestion that Mr. Simpson's entitlement related to the individual companies. On what basis could it be said that the individual SPVs were bound by any contract with Mr. Simpson? There is nothing in the letter of appointment which suggests that the individual SPVs are contracting parties. How then could the individual SPVs have a liability to Mr. Simpson? If a group structure had been put in place, then there would be no problem with Mr. Simpson not

having an individual entitlement in respect of each SPV for the profits of each SPV (at least insofar as they were not attributable to independent shareholders) would be profits of the group as whole and the group would, therefore, either directly or indirectly through its subsidiaries, have the wherewithal to meet its obligations to Mr. Simpson.

5.10 In addition, the precise way in which an obligation of the individual SPVs to Mr. Simpson was to work in the event of there being a termination of Mr. Simpson's contract is by no means clear. As has already been pointed out, Mr. Simpson's entitlement in those circumstances was to a share in "the estimated net value" of relevant development projects. In other words, his entitlement was to a share, not in actual realised profits, but estimated profits based, presumably, on valuations and the like as of the time of his departure (indeed, the precise way in which this is to work is a matter to which it will be necessary to turn in due course). Again, it is the net value of all of the projects that is to be taken into account. How can that be said to work on the basis of individual liabilities from individual SPVs when some SPVs might, at the relevant time, be showing a profit and others a loss. For all of those reasons, it seems to me that it was rightly conceded on the part of the defendants that Mr. Simpson's entitlement to be paid his profit share could not be one which lay on the individual SPVs. But if not the individual SPVs, then who?

5.11 The problem stems from the fact that there was, in reality, no group in any real legal sense of the word. I am not here even concerned with technical definitions of groups of companies for accounting or revenue purposes which have their own precise rules. Even in a more colloquial sense, any reasonable description of a group of companies requires that there be some corporate structure into which each company within the group fits. For the reasons already analysed, it is clear that there was an intention to mould the interests of the defendants in Romania into such a group. However, at all relevant times it was no more than that, an intention. The only common thread between each of the SPVs is that they had some degree of common shareholding in the form of the defendants (leaving aside the separate entitlements of independent investors in certain of the projects). Insofar as there was anything resembling a group, it was the individual defendants who formed, in their personal capacity, that group for it was only a commonality of the shareholding of those individual defendants in each of the SPVs that created a group at all. Certainly, so far as any net profit share across the group as a whole is concerned, it is difficult to see how, in the absence of, or prior to, a formal group structure being put in place, the obligation to pay the profit share entitlement of Mr. Simpson could have fallen on any entity other than the individual defendants. For the reasons already analysed, the SPVs could not have any direct liability to Mr. Simpson. There was no other corporate entity as yet in being that had any entitlement to those profits. The only persons who gave a group structure to the set of enterprises was the defendants who, through their individual shareholdings, would have been entitled to the profits deriving from the SPVs of which Mr. Simpson, in turn, was entitled to his share. It seems to me that the only workable construction to place on the arrangements agreed between the parties is to interpret the profit share arrangements as being ones where the individual defendants undertook a personal obligation to pay Mr. Simpson any profit share to which he was entitled, for it is only those individual defendants who were entitled to get their hands on the profits which were to be shared.

5.12 The difficulty in construction with which I was faced stemmed from the fact that, in truth, the precise structure of this significant property venture by the defendants in Romania had not really been worked out. Mr. Simpson was taken on board and became entitled to a profit share at a time when a proper group structure was an intention and an aspiration but not a reality. The contract would be relatively well worked out (subject to some points of detail to which it will be necessary to turn) if it were to be a contract with an overall group holding company. It seems to me that the implications of what was to be the case in terms of contractual relations pending the establishment of a proper group structure were, in reality, not really addressed, and most certainly were not worked out in any detail. In those circumstances, the court has to do the best it can with the written terms of the contract looked at against the factual background at the time the contract was entered into. In so doing, the court has to seek to give business efficacy to the arrangements entered into by the parties. At least, so far as the profit share provisions are concerned (and in that context the Titan €1m forms part of the relevant profit share), it seems to me that the only workable construction to place on the contract is that it is taken to be a contract with whichever persons or body for the time being might represent the R.I. group. At all times material to the issues between the parties, the R.I. group was nothing more than a set of SPVs who had something approximating to a common beneficial shareholding. The group was, therefore, the common shareholders (although not, obviously, the independent shareholders in any SPV). The exclusion of those independent shareholders does not, in any way, do violence to the contract, for Mr. Simpson would not have been entitled to share in the profits of those independent investors in the first place. It seems to me, in those circumstances, that Mr. Simpson's profit share arrangement can only be construed as an arrangement with the individual defendants rather than with any company, at least until a proper group structure was put in place. As such a group structure did not materialise during any time when Mr. Simpson was employed, it seems to me that Mr. Simpson is entitled to enforce the profit share arrangements against the individual defendants. It will be necessary, in due course, to turn to the precise implications of that finding.

5.13 It is also necessary to deal with whether the remainder of Mr. Simpson's entitlements (those that might loosely be described as "ordinary" employee entitlements) are against the individual defendants as opposed to a group company. As pointed out, there would have been no reason, in principle, why an individual service company within the group could not be Mr. Simpson's employer for those purposes, with the service company billing other companies within the group for the value of the service rendered by Mr. Simpson. For the reasons already analysed, I am not satisfied that such an arrangement is the proper construction to place on the profit share element of the contract. To construe the ordinary employment elements of the contract as being with a service provision company within the group (there were, of course, such companies), would require construing the contract as being, in substance, with two different entities so that the salary, bonus, pension and the like arrangements were with a company but the profit share was with the individual shareholders. On balance, I have come to the view that that would be an inappropriate way to construe the contract. There is nothing in its language, or in any of the surrounding circumstances, which would allow the contract to be construed as being partly on behalf of a company and, in respect of other provisions, partly on behalf of individuals. On balance I have, therefore, come to the view that the entire contract was with the individual defendants for as long as those defendants failed to put in place the contemplated overall group structure.

5.14 In a related vein, no issue was raised by the defendants with the authority of Mr. Doody, or lack thereof, to bind all four of them to an employment contract with Mr. Simpson. As such, it was not necessary for the court to make any determination on the precise nature of the relationship between the defendants, save to the extent that they are to be held jointly and severally liable to Mr. Simpson.

5.15 One further matter does, however, need to be addressed. It is common case that the actual payment of Mr. Simpson's salary was made through two different corporate entities operating in Ireland. It would appear that there was at least some possibility that Mr. Simpson would be paid through a Romanian company. However, I am satisfied that Mr. Simpson indicated that he would prefer to be paid through an Irish company. It would seem that for the first number of months of his employment, he was paid through a company that had little or nothing to do with R.I., save that the company concerned was a registered employer and was beneficially owned by one of the defendants so that PAYE/PRSI deductions and the like could readily be dealt with. Thereafter, payment was made by another company, Sanlink Limited, which was later renamed to RIIG Properties Limited.

5.16 The question which arises is as to whether Mr. Simpson might now be prevented from arguing that at least the ordinary employment terms of his engagement were not with that company. It is necessary to look at the context in which payments were routed in that way. The initial payment through the unconnected company seems to me to be relevant. If Mr. Simpson was project finance director of "R.I. Group" (whatever that might mean), then how was he contracted to a company which had little or nothing to do with R.I. Group, save that it was owned by one of the shareholders who provided the common link to form that group? It seems to me, therefore, that the only reasonable construction to place on that initial period of payment was that it was a vehicle of convenience, such that Mr. Simpson did not work for the company concerned, but was simply being paid, by agreement between the defendants, and himself, in that way, because it was an effective way of making payments to him with appropriate deductions. Presumably, the company concerned would have incurred an entitlement to recoup any monies paid to or on behalf of Mr. Simpson from the group as a whole. Did anything really change when Mr. Simpson's payment moved from that company to another company? In my view, it did not. It remained a vehicle of convenience. If there had been a change to the situation where Mr. Simpson was paid by a true group holding company (or, indeed, a formal service company properly established within a properly established group), then things might have been different. However, that stage was never reached.

5.17 I have, therefore, concluded that the ordinary employment terms of Mr. Simpson's contract were also with the individual defendants. It may well be that it was not those defendants' intention to directly employ Mr. Simpson. However, what they, in truth, did was to employ him on terms which only make sense if his contract is with an overall group. At the time of his employment, the only thing that resembled an overall group was their direct personal beneficial common shareholding. In those circumstances, Mr. Simpson's contract must be construed as being with them personally for they, in their personal capacity, were the only entities around which resembled a group.

5.18 I am, therefore, satisfied that, at the level of principle, Mr. Simpson's contract was with the defendants as individuals until such time as the defendants had put in place a group structure which would have been in a position to deliver on the obligations agreed to in the relevant contract. As that group structure had not been put in place by the time Mr. Simpson's contract came to an end (and indeed, as best I understand it, has not, as yet, been put in place), then it seems to me that, again, at the level of principle, Mr. Simpson is entitled to enforce his contract as against the defendants in their individual capacities. Against the background of that finding, it is necessary to turn to the specific heads of claim. I turn first to those parts of the claim which arise under those aspects of the contract of employment other than those connected with profit sharing.

6. The Ordinary Employment Terms

6.1 There is no dispute but that Mr. Simpson was not paid one final month's salary. On that basis, a sum of €16,667 is due and owing. A very minor sum for expenses is claimed. While the sum is not, in itself, disputed, it was accepted in the course of evidence by Mr. Simpson that he had the benefit of some facilities, such as a laptop and a mobile phone, for quite a period of time after his contract came to an end. It does not, therefore, seem to me that anything should be allowed under this heading.

6.2 Mr. Simpson also claims the sum of €46,154 which represents three months' pay in lieu of notice. The contract of employment provides that:-

> "Termination of employment:
>
> Both parties may terminate your (*sic*) contract of employment on giving four weeks' written notice during your probationary period and 12 weeks written notice thereafter."

The contract then goes on to deal with termination in situations of either gross misconduct/negligence or illness/incapacity, neither of which was suggested to be relevant to Mr. Simpson and, therefore, have no bearing on his entitlement to the sum claimed.

6.3 In the circumstances of the case, Mr. Simpson did receive a notice of termination on 31st October, 2008, only for it to be taken back by Mr. Doody and passed off as a mistake. It is accepted by the parties that one way or another, Mr. Simpson's employment thereafter finished with the defendants.

6.4 I am satisfied that Mr. Simpson is entitled to the notice payment in lieu claimed. RI Investments did not have the means to pay him as of the end of October, 2008 and the only continuing employment available was on the basis of no pay. In those circumstances, it seems to me that the only proper characterisation of the events of 31st October, 2008, is that same amounted to a termination without notice of Mr. Simpson's contract of employment.

6.5 The two remaining parts of Mr. Simpson's claim under this general heading have, however, an element of dispute relating to them. The first concerns his bonus. As pointed out, the sequence of events concerning the bonus was that Mr. Simpson raised the question of the payment of his bonus in early April 2008. The answer given at that stage was that the view of the defendants was that the bonus was paid on an annual basis and would not become due until the end of a year's service or, to put it another way, it was suggested that Mr. Simpson was not entitled to a bonus at that time based on the proportion of the previous calendar year which he had worked.

6.6 When a calendar year had elapsed, neither side seems to have done very much about the bonus. In addition, it is clear from the agreed terms that the bonus was conditional on Mr. Simpson meeting agreed targets. However, there was no suggestion that the bonus entitlement was one purely at the discretion of the employer; instead, a bonus, however it was to be calculated, was at least in principle, guaranteed. That said, it does not seem that either side did much about setting out targets in an appropriate way as a benchmark against which Mr. Simpson's entitlement to a bonus could be measured. In the ordinary course, the bargaining strength of the parties in an employer/employee situation is imbalanced in favour of the employer. However, in the circumstances of this case, where Mr. Simpson held a senior position and could be said to have had a more balanced position when compared with that of the defendants, it seems to me that the failing to set out targets was as much a matter of fault on Mr. Simpson's part as it was on the part of the defendants. It is clear from the terms of Mr. Simpson's contract that he was not entitled to a bonus just for working. If that were to be the case, there would be very little point in distinguishing between a bonus and ordinary salary. A bonus is designed as an extra payment to be paid in the event of certain circumstances arising. It is for the contract of employment to specify what needs to be done in order for the bonus to be paid and as to who is to make the decision as to whether the criteria necessary for the payment of the bonus had been met. It is not possible, on the basis of any of the evidence which was presented to me, to form any view as to what criteria might have been fixed as a prerequisite to the grant of a bonus. In the absence of either criteria being specifically agreed, or there being materials from which the court can reasonably infer what level of performance was to be expected, then it is difficult to see how an agreement to pay a bonus can amount to anything more than an arrangement which is not dissimilar

to an agreement to agree. It is agreed that there will be a bonus, but it is also agreed that that bonus will only be paid provided certain unspecified criteria are met. The criteria are not themselves specified, nor are there materials from which one might infer what the criteria would be.

6.7 Although, not opened in the course of submissions by the parties, there is case law from the High Court in England and Wales dealing with a situation, similar to the present, where a court is asked to make a ruling on the quantum of a conditional bonus. Coulson J., in *Rutherford v. Seymour Pierce Ltd* [2010] EWHC 375 (QB), [2010] IRLR 606, held that an exercise of discretion which, on the face of the contract of employment, was unfettered or absolute, would be in breach of contract if no reasonable employer would have exercised the discretion in that way. Accordingly, where a decision is made as to a bonus, an employee can challenge it in the courts only on the grounds of irrationality or perversity. Where the discretion has not, in fact, been exercised at all, the court's task is to assess, without unrealistic assumptions, what position the employee would have been in had the employer performed its obligation. That will involve the court in assessing the employee's bonus, on the basis of the evidence before it, and thus, to that extent, putting itself in the position of the employer. The judge went on to hold that if the court is required to calculate the bonus, it has the same unfettered discretion as the original employer, which must be exercised reasonably. In particular, it cannot be assumed that the discretion would have been exercised so as to give the least possible benefit to a claimant, if such an assumption would be unrealistic on the facts.

6.8 As pointed out earlier, it was clearly accepted by the defendants that no actual decision had been taken either on bonus criteria or whether a bonus should, in fact, be paid. On the basis of *Rutherford,* it seems to me that the proper role of the court is, therefore, to consider objectively whether a bonus would have been paid and, if so, what amount. There is no doubt that the trading conditions at the time in question were difficult and that, in particular, Mr. Simpson's task as project finance director was most particularly difficult. Little project finance was, in fact, raised. It may well not have been Mr. Simpson's fault that this was the case. Doubtless, those charged with raising finance in a great number of companies in a great number of countries faced similar difficulties because of the credit crunch. Also, there was little profit available for distribution and the employers would have been entitled to take that fact into account. Clause (c), as earlier cited, provided for deferral if no funds were available. In the events that have happened, any deferral would probably have been permanent or at least for a very long period. Against that background, it seems to me that it would have been reasonable for the defendants, as employers, to pay Mr. Simpson a bonus but a greatly reduced one. Mr. Simpson's maximum bonus would have been 150% of salary or €300,000.00. In all the circumstances, it seems to me that a bonus of €50,000.00 would have been a reasonable exercise of the employer's discretion. I, therefore propose to award Mr. Simpson €50,000.00 under this heading.

6.9 The position in respect of Mr. Simpson's pension contribution of 10% is, however, in my view, different. There was a clear agreement that a 10% payment was to be made into a pension fund on Mr. Simpson's behalf. It is undoubtedly the case that no specific arrangement was ultimately settled on as to precisely how that was to be done. However, the fact remains that Mr. Simpson was entitled to have a payment made into a pension fund of his designation in the appropriate amount. The mere fact that, while he continued in employment, no formal specification as to what fund the money was to go into had been arrived at does not, in my view, deprive Mr. Simpson from an entitlement to have monies put into such a fund. In the circumstances, I am satisfied that Mr. Simpson is entitled to an order requiring the defendants to put €24,712 (being 10% of his salary for his period of employment) into a pension fund of his designation.

6.10 That deals with the questions concerning the direct ordinary employment terms of Mr. Simpson's contract. It is then necessary to turn to the profit share arrangements.

7. The Profit Share

7.1 It is convenient to divide the issues which arise in relation to profit share between, on the one hand, the Titan deal and, on the other hand, all other projects. There are, however, some common features to the issues that arise under both headings. As will be recalled, Mr. Simpson's entitlement under the Titan deal was dealt with separately in his contract of employment because, it would appear, that deal was already in place prior to his joining the defendants' operation. It was agreed that Mr. Simpson was to obtain €1m as his share of the profits from the Titan deal subject to certain conditions to which it will be necessary to refer in due course. However, it is important also to note that, in circumstances where Mr. Simpson's contract of employment came to an end between 12 and 24 months after its commencement, his entitlement to a profit share, both in respect of Titan and in respect of all other development projects, was reduced to two-thirds of the value. In substance, therefore, Mr. Simpson is, at a maximum, entitled in respect of Titan to claim only two-thirds of €1m on that basis.

7.2 However, the defendants dispute any entitlement on the part of Mr. Simpson to a profit share arising out of Titan. The defendants' reason for so doing concerns a contention that the monies which were derived from the sale of the R.I. interest in Titan were reinvested in other projects. It will be recalled that there was a term in Mr. Simpson's contract which, in effect, allowed him to elect between taking his profit share in respect of any particular project, or allowing same to be reinvested in further projects. The balancing factor was that, in the event that Mr. Simpson chose to take his profit share and not allow it to be reinvested (presumably, in circumstances where the defendants were reinvesting their share of the profits in a new venture), then Mr. Simpson would not be entitled to a share in the profits of that further venture. In substance, the term seems to be an attempt to design a contractual profit share arrangement in favour of Mr. Simpson that would place him in a similar position to the one in which he would have been were he to actually have a 5% shareholding in the ultimate holding company which, for the reasons that I have already set out, it was intended might ultimately be put in place. In those circumstances, profits deriving from any one venture within the group could either be reinvested elsewhere in the group (perhaps in existing projects or, indeed, new projects), or alternatively, would be available to be distributed to the shareholders as profits. It seems that the general intention was, in truth, that Mr. Simpson would be broadly in the same position as a shareholder so that he would not get a profit share out of profits which stemmed from an individual venture in circumstances where those profits were reinvested. Likewise, the shareholders would not directly obtain a share of those profits for the same reason – i.e they were reinvested. The only difference seems to be that the term contemplated that Mr. Simpson would have some choice in the matter and could take out a 5% share in the profits from a particular venture, even though the shareholders were going to arrange that the balance of the profits was to be reinvested. However, the price paid by Mr. Simpson for so doing was clearly to be that he would then exclude himself from being entitled to any share in the profits from the venture into which the earlier profits were reinvested.

7.3 While that overall concept seems clear from the contract, again, like so much else in this case, the precise mechanism by which it was to operate was a long way short of being properly worked out. If it was possible to identify the precise new project into which the profits from an earlier project were invested, and if all of the profits from that earlier project were so invested, then the scheme as agreed would work in a reasonably straightforward way. To take an example: I might assume that project A generated, through its SPV, a profit of €5m. Mr. Simpson would, on that basis, be entitled to a profit share of 5% or €250,000. If it was proposed to put all of those profits into one specific other project (project B), then there were two possibilities. In the first case, Mr. Simpson might be

happy to allow his 5% to be rolled over into project B so that he did not collect his €250,000 at that stage, but became entitled to a profit share in the profits that would ultimately derive from project B at the end of the day. On the other hand, if Mr. Simpson "cashed in his chips" at that stage, and took his €250,000, then the remaining €4.75m would still be invested into project B, but whatever profits derived from project B would not be available to Mr. Simpson and would be shared by the defendants without the need to pay 5% to Mr. Simpson. So far, so good.

7.4 The problem, however, is to discern what the contract, on its proper construction, says about cases which were not so straightforward. What was to happen when some but not all of the profits were reinvested? What was to happen where the profits were invested in a range of further projects? In truth, the contract is silent as to what is to happen in those circumstances. Like so much else, the parties had just not thought through how it was to work in detail. And the devil is, in such matters, in the detail.

7.5 That really is the problem that arises in respect of the Titan project. By the time the case finished, the defendants had belatedly put before the court a form of analysis as to what, in fact, happened to the Titan monies. The truth seems to be that, perhaps unsurprisingly, the defendants (and to some extent, Mr. Simpson) moved available monies around wherever and whenever they were needed. As pointed out earlier, much reliance was placed by the defendants on the fact that a significant portion of the Titan monies went into another project (Timisoara) on the basis of a 30-day loan where the documents in question were witnessed by Mr. Simpson. However, my understanding of Mr. Simpson's case was that, while he accepted that it would be appropriate to use some of the Titan monies in the short term to shore up other projects where there was an immediate cash requirement, he never agreed that he was to forego his profit share in the Titan monies, although it equally seems to be the case that he never agreed to forego a possible future share in the range of other projects into which, in one way or another, and whether directly or indirectly, the Titan monies ultimately seem to have gone. In truth, it does appear that some but not all of the defendants did receive a portion of the Titan monies for their own benefit. It is said on behalf of those defendants that if one takes a broader view of the picture and looks at monies which they have personally invested (previously) in those other projects, then the net position was that the Titan monies, in substance, did end up in those other projects. The reality is that the profits deriving from the Titan project were never ring fenced. Some of them found their way to individual defendants, most of them ended up in other projects. Those other projects were themselves financed in many different ways at different times by some or all of the defendants. There was no direct agreement one way or the other between Mr. Simpson and the defendants as to whether Mr. Simpson was to take his 5% profit share from Titan and forego an interest in those projects into which the Titan monies went.

7.6 There are, therefore, two layers of difficulty with attempting to ascertain the legal rights of Mr. Simpson in those circumstances. First, the contract as whole did not really address what was to happen in circumstances such as those which did ultimately prevail, that is, where the Titan monies, rather than being treated as a discrete sum available either for distribution or reinvestment, were simply treated as part of the overall funds available to the group to be used from time to time where the greatest need arose. When, in those circumstances, could it be said that, in the words of the contract, the four principals had received their return on the deal? Some of them, on one view, got a small return; most of the funds were reinvested.

7.7 Second, it seems to me on the facts that Mr. Simpson at least tacitly accepted that the Titan monies (or at least most of them) were going to be used in that way. While I accept Mr. Simpson's evidence that he was not aware of precisely what happened to each and every penny of the Titan monies, neither does he appear to have sought the ring fencing of his profit share from Titan (at least until his solicitor raised the matter in correspondence in September 2008) and, in particular, to have addressed the question of the consequences of his insisting on being paid that profit share in having to forego his entitlement to subsequently share in the profits of such other ventures into which the balance of the Titan monies were undoubtedly going to go.

7.8 Having tacitly accepted that situation, by permitting the monies to be so invested, it seems to me that the only inference that can properly be drawn is that Mr. Simpson was content to allow the Titan monies to be reinvested for the understandable reason that he would, thereby, secure his entitlement to share in the profits of the other ventures into which those monies went when such projects, as was expected, came to fruition. In those circumstances, I am not satisfied that Mr. Simpson is entitled to a profit share in respect of the Titan monies.

7.9 So far as the rest of the profit share is concerned, the terms of the contract are at least relatively clear. In the events that have happened, Mr. Simpson is entitled to two- thirds of 5% of what is described as the "estimated net value of existing development projects" as of the date of his departure. There is no great doubt about what that means. The identity of the projects is known and did not seem to me to be in dispute. The concept of net value is unlikely to raise any great difficulty. The real problem stems from valuation itself.

7.10 Mr. Simpson's case was straightforward enough. He produced in evidence a document which had been prepared by staff in the Dublin office. It would appear on the evidence that the context in which that document was produced was for the purposes of attempting to reach an overall view as to the value of the set of investments in what might loosely be called "the R.I. group". That exercise was designed, it would appear, with a view to discussions with either bankers or investors or, indeed, both. Not unreasonably, from his point of view, Mr. Simpson suggested that the document in question provided a realistic view of the net value of the various projects at the time in question (which was close to but not at the date of valuation being his date of departure). Somewhat belatedly, in the course of the evidence, documentation was put together on behalf of the defendants which suggested that the valuation in question was optimistic. Some valuation reports were produced. Some different figures for the entitlements of third party investors and bank liabilities were also produced. Frankly, even by the close of the case, the state of the evidence on this topic was wholly unsatisfactory. While it was reasonable to conclude that the document produced by Mr. Simpson was not fully accurate, there was simply insufficient information to allow me to form any realistic judgment as to what the net value of the relevant development projects was as of the date of the ending of Mr. Simpson's employment, being 31st October, 2008.

7.11 On the other hand, it seems to me to be clear that Mr. Simpson is entitled, as against the defendants, to obtain two-thirds of that net value. In all the circumstances, it seems to me that the justice of the case would best be met by directing an inquiry into the net value of the relevant development projects as of that date, and by declaring that Mr. Simpson is entitled to recover two-thirds of 5% of the sum that might be determined as a result of that inquiry. Also, in view of the fact that Mr. Simpson was, it seems to me, entitled to rely, at least initially, on the document to which I have referred and also in view of the extremely belated and unsatisfactory nature of the documents produced by the defendants, the cost of that inquiry, at least initially, must, in my view, be borne by the defendants. For the purposes of putting that inquiry in train I, therefore, direct that the defendants must produce, at their own expense, a detailed valuation, backed up, where appropriate, by expert reports, of what is said to be the net value of the relevant projects as of 30th October, 2008.

7.12 If Mr. Simpson is happy with that valuation, then there will be an award of two- thirds of 5% of that sum in his favour. It will, of course, be open to Mr. Simpson to question that valuation. In the event, however, that further court hearings are required to resolve any such dispute, then the costs of any such hearings will, in the ordinary way, follow the event, subject to the usual exceptions.

8. Conclusions

8.1 In conclusion, therefore, it seems to me that the defendants were the contracting party with Mr. Simpson and are liable to pay him the sum of €16,667 for arrears of salary, €46,154 for pay in lieu of notice and, for the reasons already set out, are also obliged to pay €50,000 in respect of bonus. Nothing is allowed in respect of expenses. The defendants are also required to pay €24,712 into an appropriate pension fund nominated by Mr. Simpson.

8.2 Mr. Simpson is not entitled to a profit share arising out of the Titan deal but is entitled to two-thirds of 5% of the net value of the development projects the subject of these proceedings. The defendants will be directed to produce a valuation of that sum based on professional assistance. Mr. Simpson will be entitled to two-thirds of that value or such higher value as the court may ultimately determine should Mr. Simpson dispute the defendants' valuation.