

JERSEY / JUDGMENT

Connell v Egglishaw [2001]

JRC 167 (31 July 2001)

[2001] JRC 167

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judgment

the COMMISSIONER:

Introduction

1. This is the second of two actions involving the Plaintiff and the Defendants. In the first action Mr. Connell was one of two Plaintiffs in a claim arising out of the incorporation in 1986 of the firm formerly known as Strachan & Co. In this action he sues Mr. Richard Egglishaw, Mr. Philip Egglishaw and Mr. Terence Jehan in respect of his remuneration as a senior employee of Strachan & Co. ("Strachans") between 1984 and 1986. Strachans, at the time, was a partnership consisting of the three Defendants. Mr. Richard Egglishaw was the senior of the three, having acquired the business in about 1974. Mr. Philip Egglishaw and Mr. Jehan had become partners in 1981. Before joining Strachans Mr. Connell had been a senior trust officer with National Westminster Bank Jersey Trust Co. Ltd. He joined Strachans in September 1979 as General Manager of its Trust and Company Administration Department and a director of the partnership's in-house trust company (Roker Trustees Limited) at an initial salary of £115,000 and was provided with accommodation in a property rented by Strachans specifically for his occupation in accordance with the terms of a Housing Committee licence which was conditional, in effect, on his continued employment by Strachans. In a formal letter confirming Mr. Connell's appointment Mr. Richard Egglishaw undertook that Strachans would, at some mutually agreed time in the future, approach the Housing Committee to seek permission for the purchase of a property for occupation by Mr. Connell. 2. Mr. Connell remained with the firm for the next fourteen years. During that time five milestones in particular mark the progress of his career: First his promotion in December 1981 to "partnership status", accompanied by a revised remuneration package which gave him not only an increase in salary but also a percentage share of turnover above a certain figure. Secondly, his acquisition of a minority shareholding in the newly incorporated form taken by the firm, as STR Holdings Limited, in 1986 (the subject of the first action). Thirdly, the onset in about July 1989 of a deterioration in relations between Mr. Connell and the Defendants arising out of disagreements about bringing in other shareholder directors and growing concerns on Mr. Connell's part that he

had been cheated of his full entitlement to shares in 1986 and part of his remuneration in earlier years. Fourthly, Mr. Connell's notice of resignation in December 1991. And, fifthly, his final departure in June 1993. 3. It is from the first of these events that the claim in this action arises, although most of the subsequent stages also have some relevance to it. In short, Mr. Connell claims that he has never received the full amount due to him under his turn-over related remuneration for the years 1984 and 1985. He claims that there was a shortfall in his entitlement in 1984 of £8,500 and in 1985 of £29,210. When interest is added to these figures the total claim comes to £99,901. The Defendants' original case as pleaded and opened at trial was that Mr. Connell never had any legal entitlement to any such payment; that he was in practice merely the beneficiary, annually, of a bonus, the grant and amount of which was wholly within their discretion to determine; that he received and accepted without challenge the amounts that were in fact paid to him by the Defendants; and that he has no claim to anything more. However, that case underwent a fundamental shift in the course of the trial in certain respects. 4. One of the principal characteristics and difficulties of this dispute, as in the first action, was that most of the material events occurred a very long time ago: in this case between twelve (1989) and almost twenty (December 1981) years ago. There were, in addition, no more than a handful of surviving contemporaneous documents of any consequence in evidence. The principal oral evidence of fact was given by Mr. Connell, Mr. Richard Egglishaw and, to a lesser extent, Mr. Jehan. We also heard evidence from Mr. Philip Egglishaw but did not find this of any significant assistance. In the event, it was unnecessary to hear any expert accountancy evidence as the material figures were agreed by the parties for the purpose of the hearing. History December 5. Having moved from National Westminster to Strachans in 1979, Mr. Connell evidently made a success of his new position. A little over two years after he started, he attended a meeting with Mr. Richard Egglishaw in December 1981 at which Mr. Egglishaw informed him that, had he been a qualified Chartered Accountant, as Mr. Philip Egglishaw and Mr. Jehan were, he would have been made a partner in the business; but, as this was not a qualification that he held, such an appointment was not possible. He was, however, to be appointed to "partnership status" and this was duly announced by Mr. Richard Egglishaw in a memorandum addressed to all staff in the following terms: "As from 1 st January 1982, the Partners are pleased to announce that R. G. Connell has been promoted to partnership status" . At the same time Mr. Connell's salary was increased to £25,000 and he was informed by Mr. Richard Egglishaw that he would, in addition, receive 5% of the annual turnover of the business in excess of £750,000. Shortly after this, early in 1982, approaches were made to the States Economic Adviser's office by both Mr. Connell and Mr. Egglishaw with a view to the purchase by the firm of a property for occupation by Mr. and Mrs. Connell. A formal application followed in March 1982, and on 13 th May 1982 consent was granted by the Housing Committee for the purchase by the partnership (in effect) of a particular property for a sum not exceeding £100,000 on condition, among others, that it should be "occupied by Mr. Raymond Connell, on a service basis, for the duration of his full-time employment with Strachan & Co. as a partner, or by persons specifically approved as occupiers by the Committee." 6. Purchase of the property was to be financed principally by a long-term £90,000 loan from National

Westminster Bank Finance (C. I.) Limited, and on 16 th April 1982, Mr. Richard Egglshaw wrote to the bank referring to the firm's application to the Housing Committee and continuing:- "Meanwhile I confirm that Mr. Connell was elected to Partnership Status on 1 st January 1982 on the basis of 5% of the annual turnover in excess of £750,000. We do not produce audited accounts but I confirm that the projected turnover for 1982 will hopefully be in excess of £900,000 which would mean that Mr. Connell's profit sharing for 1982 should be at least £7,500." 7. This letter is the only surviving near-contemporaneous record of what was said about Mr. Connell's future entitlement to an amount based on a percentage of turnover as part of his overall remuneration package. It was the bed-rock of Mr. Connell's claim and there are several observations that need to be made about it: First, the use - towards the end of the passage set out above - of the expression "profit sharing": Mr. Connell himself tended in his pleadings and his evidence to use the term "profit sharing" to describe this component of his remuneration; but it is plain and was not really disputed by him that what he was to get was a percentage of turnover rather than net profit. The Defendants, for their part, objected to this term, preferring to describe the arrangement as a "bonus". In truth, little turns on the terminology used. What matters is the substantive agreement; and, in discussing the matter in this judgment, we use the terms "profit share" and "bonus" interchangeably except where the context otherwise makes clear. It is, however, not difficult to understand why Mr. Connell should have preferred to use the former term as a more appropriate short-hand than "bonus" to describe the remuneration of someone who had been formally accorded "partnership status". Secondly, much play was made by the Defendants of the fact that the letter bears the reference 'RJE/RGC' in the top left-hand corner. This, it was suggested, indicated that the letter had been drafted by Mr. Connell for Mr. Egglshaw's signature and that this explains the use of the term "profit share". It was also suggested inferentially that the letter was to some extent self-serving on the part of Mr. Connell. On the evidence that we heard, it may very well be that the letter was the product in part of Mr. Connell's drafting and in part that of Mr. Egglshaw (who, as Mr. Connell pointed out, would have been the only one of the two who could have supplied the figure of £900,000 for expected turnover in 1982); but the matter is of little consequence (i) as Mr. Egglshaw accepted in the witness box that he had signed the letter and did not suggest that he had done so without reading it and (ii) for the reasons we have already given above. Thirdly, when it came to his evidence Mr. Richard Egglshaw insisted that the arrangement was only ever intended to be one in which the base-line or threshold was revised annually to whatever figure he, in his discretion, thought appropriate and that he made this clear to Mr. Connell from the start. It was, he said, the way that he had always dealt with bonus payments of this kind and that it would be absurd to do otherwise, as a permanently static base-line would in time produce excessive bonuses, disproportionate to salaries. Mr. Connell, when re-called to deal with this suggestion - which had played no part in Advocate Hoy's original cross-examination of him - denied that anything of this kind had ever been put to him and we accept his evidence on the point. There is nothing to this effect in Mr. Egglshaw's letter of 16 th April 1982. The final sentence of that letter speaks of projected figures for 1982, but the first sentence conveys the clear impression that the formula

mentioned (5% of annual turnover in excess of £750,000) is one that is to apply indefinitely to the future and not for one year only. As Mr. Connell said, in the context of an application for a long-term (25 year) loan, the Bank would hardly have been interested in the terms of an arrangement that was only to apply for the next twelve months. Mr. Egglshaw's claim that the arrangement was one under which Mr. Connell always knew that the base-line would be revised annually was a wholly novel aspect of the Defendants' case, not previously canvassed. We return to this later. 8. This was not the only occasion on which a senior member of staff had been remunerated in part by reference to a percentage share of the business's turnover. Mr. Jehan said that he believed that a similar arrangement had been obtained in his own case, for a brief period prior to his appointment as an equity partner in 1981, although he could not remember the precise terms. And Mr. Philip Egglshaw may also have had some such arrangement before he became a partner. But at the time with which we are concerned, the only other member of staff with such an arrangement was, it seems, Mr. William Watkins. He, like Mr. Connell, was someone of considerable seniority and standing within the firm but was not a qualified Chartered Accountant and as such was ineligible in those days to join the partnership as an equity partner. We were told by Mr. Jehan that in Mr. Watkins' case the base-line or threshold from which turnover was assessed was not the same as that in Mr. Connell's (initially £750,000), Mr. Watkins being the more senior of the two. There appeared, however, to be no surviving documentary record of the arrangements that applied to him; at least, none was put in evidence. 9. It was Mr. Richard Egglshaw's practice in December each year to have a meeting with each senior member of staff for the purpose, among other things, of reviewing his or her salary and agreeing a remuneration package for the coming year. What took place at each of Mr. Egglshaw's end-of-year meetings with Mr. Connell between 1982 and 1985 is at the heart of the present dispute. In addressing these events it is, however, important to keep in mind that although discussion of salary and other aspects of staff contracts of employment normally tended (as one would expect) to be conducted by reference to calendar years, the firm's accounting year ended annually on 31 st January. One consequence of this was that at the time when Mr. Egglshaw held his annual reviews with Mr. Connell the turnover figures for the current financial year had not been finalised. As a result Mr. Egglshaw would normally arrange for the bulk of any turnover-related remuneration to be paid immediately, in December, with a balancing amount being paid some months later once the final figures were known. December 1982 10. Mr. Connell's profit-share arrangement for 1982 was duly honoured. In December 1982, towards the conclusion of his first twelve months at "partnership status", he received a payment of £7,500, and the following March he received a balance of £1,436 making a total of £8,936. But, to his surprise and disappointment, he was informed by Mr. Egglshaw at their meeting that, as regards the future, the base-line turnover figure was to be increased from £750,000 to £1,050,000. While it was common ground that a conversation on these lines did take place, there was an issue between the parties as to whether the revised base-line was to apply indefinitely (as Mr. Connell contended) or was to be applicable only to the following year (as the Defendants contended). Mr. Connell's evidence was that there was no specific discussion about the future. Mr. Egglshaw adhered to his theme that there was

never any question but that the base-line would be constantly moving, year-on-year. 11. It is easy to see why Mr. Connell might have been disappointed at this development. It was plain from his evidence that his promotion the previous December and the considerably improved remuneration offered to him at that time had left him more than well-pleased, both financially and, no doubt, in terms of morale. Had he stopped to think about it coldly, he would probably have recognised that, with the passage of time and ever increasing turnover (were that to come about), there would be likely to come a point when he would be obliged to accept a revision of the formula in one respect or another. But to find himself faced with a 40% up-lift in the base-line after only one year must have been dispiriting. In practice he had, of course, little option but to accept this revision if he wanted to stay with Strachans. Leaving the firm at a stage when he had only just moved into a new house (which he might have had to vacate, given the conditions on which the Housing Committee consent had been granted) and had taken on responsibilities in connection with a substantial mortgage, would have involved a considerable upheaval to say the least. This is not to say that the bargaining counters were all entirely on one side. Mr. Connell had no doubt proved to be a valuable member of the Strachan team and they, we may assume, would have been reluctant to lose him. But we have little doubt that the balance of bargaining advantage was in Mr. Richard Egglshaw's favour. December 1983 12. As in the previous year the revised arrangement was, in due course, honoured according to its terms. When they met in December 1983 for the annual salary review Mr. Egglshaw indicated that Mr. Connell would shortly be receiving £10,000 on account of his profit share for the year 1983/84 (as indeed he did shortly afterwards) and that the balance due would be paid as before once the year-end accounts had been finalised (as indeed it was in June 1994 in the sum of £1,023, making a total of £11,023). But, according to Mr. Connell, nothing more on the subject of profit share was said. In particular nothing was said about any further revision of the formula as regards the coming year. Mr. Richard Egglshaw claimed otherwise. According to him, arrangements for the ensuing year were specifically discussed and a new, revised (higher) base-line was set by him for the purpose of Mr. Connell's profit share formula. He could not now remember what the figure was; he would, he said, have written it on a piece of paper (long since thrown away) and put it in a drawer in his desk. This was in accordance with his invariable practice and the basis on which he awarded bonuses as explained to Mr. Connell at the outset. For reasons that we give later, we do not accept Mr. Egglshaw's evidence. We also find that, in the absence of any specific discussion of the matter, the natural inference must have been that the base-line was to remain unchanged for the coming year. December 1984 13. When the customary meeting came to take place in December 1984 Mr. Richard Egglshaw made it plain that he proposed to make a one-off round-sum payment to Mr. Connell for the year 1984/85 of £11,000 (as indeed he subsequently did), with no subsequent top-up as in previous years. This much is common ground. But there was a conflict of evidence as to the explanation given by Mr. Egglshaw for doing this. According to Mr. Connell, Mr. Egglshaw said in effect two things: first, that it was anticipated that the turnover figures for 1984/85, in other words the year due to end on 31 st January 1985, were going to be significantly worse than those for 1983/84; and secondly that, as this was not in

any way Mr. Connell's fault, he would be given the same amount, by way of profit share, as he had received in the previous year - hence the £11,000. Mr. Egglshaw denied the first part of this account of their conversation. He said that what had happened was that he had explained to Mr. Connell that the turnover for 1984/85 was going to fall short, not of the 1983/84 result, but of the figure that he himself had expected when he had set the current year's base-line in December the previous year. In other words, he had been over-optimistic in his projection of the rate at which turnover would increase in the course of the year. The consequence was, he said, that he had set too high a base-line, so that the formula, if applied according to its terms, would have operated to Mr. Connell's disadvantage, producing as it would have done an entitlement below the previous year's: by how much, he could not say as he could no longer remember what base-line he had fixed. This was the first occasion on which he had got it wrong, he said. 14. According to Mr. Connell, faced with this unwelcome news he went on to ask Mr. Egglshaw for an assurance of some kind about his profit share in the event that turnover was to fall again in the coming year, and was informed that he would in any event receive at least £10,000. Beyond this, however, there was no specific discussion about the profit share formula and in particular no discussion of what would happen should the turnover prove to be better than expected. But here again there is a conflict of evidence. Mr. Egglshaw told us that the pattern of events was substantially the same as in December 1983: he had established with Mr. Connell a new base-line figure for the coming year's profit share formula (although he could not now recall what it was); he had written it on a piece of paper and put it in his drawer. And, for the second time, events were to prove that he had been over-optimistic about the likely increase in turnover during the coming year and had set the base-line too high. Here again we prefer the evidence of Mr. Connell. 15. Had the story ended there, we might (for reasons similar to those relating to 1983) have formed the view that the natural inference was that the same profit formula and base-line as before (£1,050,000) would continue for yet another year, subject only to a minimum guarantee of £10,000. But, in the light of subsequent events, we do not regard this as tenable. We return to this below. December 1985 16. On 20 th December 1985 a payment of £10,000 was made to Mr. Connell in respect of his profit share for the year 1985 (1985/86). According to Mr. Egglshaw, he had a conversation with Mr. Connell on much the same lines as the previous year and the £10,000 was "agreed" as the amount that Mr. Connell was to receive. But Mr. Connell's evidence was that, instead of his traditional one-to-one December meeting with Mr. Richard Egglshaw, there was a meeting in December of all five of the prospective "partners" in the new company but no discussion of his profit share entitlement for the closing year of the old partnership. He had assumed that any balance over and above that due would be paid in due course. None, in the event, was ever forthcoming. Mr. Egglshaw, for his part, said in evidence that he had got his estimate of the increase in turnover - and hence the base-line for Mr. Connell's profit share

- wrong for the second year running, but little more. 17. By this time plans were under way for the incorporation of the partnership with effect from February 1986 and negotiations were in hand for Mr. Connell and Mr. Watkins each to acquire a substantive equity stake as

minority shareholders in the new company. The result was that the whole basis of Mr. Connell's earnings, including salary and pension contributions, was to be the subject of revised arrangements. It had already been made clear to Mr. Connell in the course of November 1985 that the old profit share arrangement would be coming to an end as he would now be, in effect, an equity partner. Summary to December 1985 18. We reject as not credible Mr. Richard Egglshaw's evidence that at the two meetings in December 1983 and 1984 he specifically set a new base-line for Mr. Connell's profit-share in his discussion with him and that setting such base-lines at too high a level was the reason behind the round-sum amounts paid to Mr. Connell in December 1984 and December 1985. Nor, as indicated earlier, do we believe that Mr. Egglshaw ever told Mr. Connell at the outset in December 1981 that he should expect the base-line to be moved upwards year-on-year. Although the issues that arise in this action have been live since 1989 and the subject of exchanges between the respective legal representatives since May 1993, it was not until Mr. Richard Egglshaw gave evidence that any such case was advanced by the Defendants (although it was foreshadowed in his evidence in the first action). Neither in their original pleading, nor in Mr. Hoy's written opening submissions on their behalf, nor in the protracted correspondence that took place between Voisin & Co. on behalf of the Defendants and Bailhache & Bailhache on behalf of Mr. Connell from May 1993 onwards was any reference made to what Mr. Egglshaw claimed in the witness box to have happened. Nor was any such account of events put to Mr. Connell in cross-examination (until he was re-called to deal with the point, when he firmly denied that any such thing had ever occurred). 19. The closest one comes to anything of this kind in the pre-action correspondence is in a letter dated 15 th September 1993 in which Voisin & Co. had written "Deputy Jehan has reviewed the turnover figures on which the bonus was due in the light of the subsequent adjustments. These show that adjusted turnover figures on which the bonus should be calculated are as follows: 1982/1983 £3,891,560

- base line £750,000 - bonus 5% 1983/1984 £1,162,631
- base line £1,050,000 - bonus 5% 1984/1985 £1,440,013 1985/1986 £1,834,205 On the basis that the base-line figure was increased to £1,300,000 in 1984/1985 and £1,500,000 in 1985/1986, then the actual total bonus due would be £36,420.45 compared with £40,959.60 actually paid. If anything, there therefore appears to have been an over-payment of bonus." To this Bailhache & Bailhache replied on 27 th October 1993: "My client ... maintains that your letter is the first time [that] "base-line" figures for 1984/85 and 1985/86 have been mentioned. In July 1989 Deputy Jehan gave my client a schedule detailing all the amounts paid and confirmed that the only base-line figures were £750,000 agreed in 1982/83 and £1,050,000 agreed in 1983/84. The fact that my client has previously only asked for a breakdown of the calculations for those two years surely proves the point. If the base line figures for 1984/85 and 1985/86 had been agreed at the time, then why was my client paid £11,000 and £10,000 respectively for the two years in question?" The reply to this was not, however, what one would expect to have seen in the light of Mr. Egglshaw's evidence but ran as follows (in a letter from Voisin & Co. dated 28 th January 1994): "... The base-line figure for those

payments for the years 1984/85 and 1985/86 has been based upon a reasonable increase over that used for the previous years, although for those years it is believed that the bonus was settled by an agreed lump sum payment which in fact accounts substantially for the over-payment." There was nothing here to the effect that Mr. Egglshaw had in fact agreed new base-lines in these two years but could not now remember what they were: only that the figures given in Voisin & Co.'s previous letter had been arrived at on the basis of "a reasonable increase over that used for the previous year." And when it came to his evidence, Mr. Jehan readily acknowledged that he had in effect plucked the figures out of the air. He did not suggest that he had been given them by Mr. Richard Egglshaw as his best estimate of what the base-line figures actually agreed might have been or anything like that: he had not even discussed them with Mr. Richard Egglshaw or Mr. Philip Egglshaw. They were just Mr. Jehan's own estimate, some years after the event, of what a reasonable increase on previous years might have been and, accordingly, what figures might have been discussed. He was unable to offer any explanation for the omission from Voisin & Co.'s letters of any specific equivalent of what Mr. Egglshaw had claimed in evidence. 20. There was, moreover, nothing in the Defendants' documentary records showing any revised base-line subsequent to the £1,050,000 agreed in December 1982. And on this particular point we have no doubt that, if anything had been agreed, Mr. Connell would have had a clear recollection of it. 21. We find, therefore, that the base-line for the purpose of Mr. Connell's profit share, having originally been set at £75,000 in December 1981, was varied by agreement to £1,050,000 in December 1982 but was not the subject of any further express revision in either December 1983 or December 1984. We return below to the conclusions to be drawn from this. 22. For the same reasons we do not accept Mr. Egglshaw's evidence that the explanation that he gave Mr. Connell in December 1984 for paying him only £11,000 (for 1984/85) had anything to do with any revised base-line having been set too high, or that in December 1985 he gave Mr. Connell an equivalent reason in relation to the payment of £10,000 (for 1985/86). 23. On the other hand, although it was Mr. Connell's case and evidence that the reason given by Mr. Egglshaw at their meeting in December 1984 for limiting his profit-share for that year to £11,000 was that the turn-over for 1984/85 was going to fall short of that for the previous year 1983/84 and that (unbeknown to Mr. Connell until much later) this was untrue, we do not consider that we can safely conclude that this was indeed what Mr. Egglshaw said. It may well be what Mr. Connell believes Mr. Egglshaw to have said. And we are inclined to accept Mr. Connell's evidence that, in the course of their discussions in July 1989, Mr. Connell challenged Mr. Egglshaw with having made such a statement and Mr. Egglshaw merely replied that he recalled their meeting but not the figures discussed. It is, however, not difficult to see how, in the context of references of one kind or another to actual and projected turnover, there could easily have been some misunderstanding between the two men. It is plain that, in attempting to justify the single payment of £11,000 for 1984/85 to Mr. Connell in December 1984, Mr. Egglshaw must have said something to the effect that results for the current year had in one way or another been disappointing in order to induce Mr. Connell to accept his proposal. But whether that something involved a comparison between the current year's figures and those of the previous year (per Mr. Connell) or between the

current year's figures and what had been expected for that year (per Mr. Egglshaw) we have little to go on other than the conflicting accounts of the two participants in relation to a conversation that took place over 16 years ago. 24. Mr. Connell may claim with some justification that the written record from July 1989 onwards shows that he has been consistent in his account of the December 1984 conversation; that until he gave evidence at the trial, Mr. Egglshaw's version had never previously been put forward; that no attempt was made by the Defendants to support Mr. Egglshaw's version by reference to historic budgeted and actual turnover figures for 1984/85; and that his version of this conversation should be preferred. But in the absence of any contemporaneous or near-contemporaneous written record on either side, or any other compelling circumstance, these factors alone are insufficient to satisfy us that Mr. Connell's recollection of this particular conversation was wholly accurate and that Mr. Egglshaw misrepresented the turnover in the way suggested. It would, as it seems to us, have been rash of him to do anything as stark as expressly misstating comparative turnovers, the figures for which might have been accessible to someone of Mr. Connell's seniority (unlike those for net profit, which Mr. Richard Egglshaw, as he was at pains to emphasise in his evidence, kept confidential to himself and his two partners). What is clear, however, because it was common to the evidence of both Mr. Connell and Mr. Richard Egglshaw, is that Mr. Egglshaw presented the £11,000 as an amount that exceeded what Mr. Connell would otherwise have been entitled to and thus as a gesture of generosity on Mr. Egglshaw's part. 25. As regards December 1985 we conclude that nothing specific was said with reference to the forthcoming payment of £10,000: either to the effect that it was to be a single payment as in the previous year or as to its justification. Quite apart from the other factors concerning Mr. Egglshaw's evidence already discussed, the idea that he would have wanted to draw attention to the fact that turnover had fallen short of his expectations for the second year in succession seems to us most improbable, given that he was at this time engaged in negotiating the terms on which Mr. Connell and Mr. Watkins were to acquire shareholdings in the business. 26. At or shortly before the meeting on 1 st April 1986 at which the basis on which Mr. Watkins and Mr. Connell were to become minority shareholders was concluded, Mr. Jehan supplied Mr. Connell and Mr. Watkins with a manuscript set of accounts showing the consolidated income and expenditure figures for Strachan & Co. for the year ended 31 st January 1986 together with comparative figures for the previous year. The gross income figures for the two years were shown, respectively, as £1,660,472 for 1984/85 and £1,980,378 for 1985/86. 27. It was put to Mr. Connell in cross-examination by Mr. Hoy that, had he applied his mind to these figures at the time he first saw them, he could readily have calculated that his profit share entitlements (according to his view of things) for the two years 1984/85 and 1985/86 respectively were very substantially in excess of the one-off payment of £11,000 that he had received in December 1984 and the £10,000 that he had received a few months previously in December 1985: in fact, on the basis of Mr. Connell's case that the base-line of his entitlement was £1,050,000 and that 'turnover' meant gross fees received, he could have calculated that his entitlements were some £30,400 and £47,000 for these years. It would, suggested Mr. Hoy, also have been very simple for Mr. Connell to have deduced the turnover

figures for 1982/83 and 1983/84 from the known base-line figures and the amounts he received in those two years, and that he would thus have seen that the turnover had increased steadily over the years in question and that, contrary to what he believed Mr. Richard Egglshaw to have said, there had been no decline in turnover between 1983/84 and 1984/85. But, despite this, Mr. Connell had made no attempt to take up the matter with Mr. Egglshaw. Mr. Connell, for his part, readily acknowledged that these figures and comparisons could have been made. But, he said, it had never occurred to him to do this at the time. He was, he said, pre-occupied with the new arrangements which were then at an important stage: his mind was not on the old 'profit share' arrangement but on the future. 28. While this line of cross-examination was by no means unfair, we observe that there was no evidence of the Defendants having made any similar point in July 1989 (as to which see the next paragraph) or at any time before the trial itself: on the contrary, the line adopted in correspondence in June 1993 was that there was no direct mathematical relationship between Mr. Connell's profit share and turnover figures in the annual accounts and that he would be wasting his time if he were trying to deduce one from the other (see paragraph 31 below). July 1989 29. In the event, it was not until July 1989 that Mr. Connell, according to his own case, first gave expression to any complaint about under-payment of the profit share element of his remuneration in earlier years. This came about, he explained, when for the first time he saw a comparative presentation of turnover and profit figures from 1983/84 onwards in a draft 'Sale Memorandum' prepared in September 1988 by County NatWest in anticipation of a possible sale of the business of Strachan Management Services Limited (which, in the event, did not materialise). Exactly when Mr. Connell first saw this memorandum is not clear; but, whenever it was, it was one of the factors that led in due course to him developing suspicions about the circumstances surrounding the acquisition of his shareholding in 1986 and also appears to have prompted a retrospective review of his profit share entitlements in earlier years: on both points he began to think that he had been cheated of part of what he was properly entitled to. These concerns led in turn to a series of exchanges of written notes between Mr. Connell and Mr. Jehan in July and August 1989; the former asking a series of questions and the latter responding (or in some cases - Mr. Connell would say - not responding). By this time relations between the Defendants and both Mr. Connell and Mr. Watkins had deteriorated substantially. Mr. Watkins had agreed, or was on the point of agreeing, to sell his shareholding back to the Egglshaw brothers and Mr. Jehan, and Mr. Connell was also negotiating with them with a view to adopting the same course. 30. The contemporaneous notes passing between Mr. Connell and Mr. Jehan made specific if brief reference, among other things, to Mr. Connell's old profit share entitlement and there appeared to be no dispute that the matter was expressly raised at that time both in the written notes and in the course of a series of meetings that took place in July and August 1989. It was, however, a substantial part of Mr. Connell's complaint that he was in effect fobbed off with inadequate responses to his questions and, in some cases, a straight refusal to supply the information that he needed in order to examine the true position for himself. He complained in particular (i) that Mr. Jehan refused to allow him sight of the accounts of the business for the years before Mr. Connell became a shareholder, in other words the

accounts of the former partnership of Strachan & Co. and (ii) that although Mr. Jehan was able to supply a document showing the calculation of Mr. Connell's profit share for 1982/83, he was unable to produce any equivalent calculation for the following year. May 1993 onwards 31. In the event, it was not until June 1993 that Mr. Connell finally ceased to attend the firm's offices. But there appears to have been bad blood and, in effect, a running dispute between Mr. Connell and the Defendants from July 1989 onwards. In May 1993 the cudgels were taken up by Bailhache & Bailhache on Mr. Connell's behalf, and for the best part of the next two years there was extensive correspondence between them and Voisin & Co. on behalf of the Defendants on a number of issues, of which Mr. Connell's profit share was just one. From this it is plain that although Mr. Connell was given access to a considerable number of documents (i) that the Defendants continued to refuse disclosure of pre-incorporation accounts relevant to the calculation of Mr. Connell's profit share; (ii) they asserted that the accounts would not in any event enable him to make the necessary calculations because the relevant turnover figures "related to fees charged to clients and was calculated on a January to December basis, whilst the accounts of the business were made up on a February to January basis and turnover, as incorporated in the accounts of the business itself, included client disbursements and adjustments for movements in bad debt provisions. If Mr. Connell is trying to determine his bonus calculations by reference to the accounts of the firm, then for the reasons set out above the accounts of the business to the January year end do not form a proper basis for calculating the bonus" (Voisin & Co. letter dated 16 th June 1993); and (iii) there was a good deal of equivocation in the Defendants' responses to perfectly reasonable inquiries made on behalf of Mr. Connell. 32. The Order of Justice in these proceedings was issued in January 1995 and the pleadings closed later that year. Thereafter, however, the action appears to have received little attention from either side (being over-shadowed no doubt by the first action) until September 2000 when an order was made for the exchange of lists of documents. The Defendants having failed to comply with this direction, an order was then obtained on behalf of Mr. Connell requiring the Defendants to serve the necessary lists by 18 th December or have their answer struck out. The Defendants then served a list of documents but omitted the account files for all years prior to 1985/86. In the event, it was not until April this year, halfway through the trial of the first action that the Strachans account files for 1983/84 and 1984/85 were eventually produced by the Defendants. It must have been obvious from the start that these files were of prima facie relevance to the issues in this present action. No satisfactory explanation for them being withheld from disclosure was ever provided. Mr. Connell's entitlement 33. The principal difference between the parties is that Mr. Connell claims to have had an enforceable contract for the payment of specific profit share determinable in accordance with an agreed formula, whereas the Defendants insist that he had no such defined right to anything by way of profit share or bonus. On the Defendants' case the payments made to Mr. Connell were "payments at will", created no contractual obligation, and were subject to review at the discretion of the Defendants. The discretionary nature of the payments made was the central plank of their case as it appeared in their Answer to the Order of Justice and in Mr. Hoy's opening Skeleton Argument, and was also the main theme of the evidence given

by each of the Defendants. 34. In addressing this issue it is important to distinguish between (i) a prospective agreement between employer and employee that the latter's remuneration should include payment, at the end of the coming year, of a profit share or bonus to be calculated by reference to a specific formula; such agreement crystallising at the end of the year in an accrued right to a specific sum of money; and (ii) the retrospective award by an employer, at the end of the year, of an arbitrary sum of money independent of any prior commitment. The second is what might naturally be called a "discretionary" bonus. The first involves a binding contractual engagement on the part of the employer. The contractual right thereby conferred on the employee is, of course, only as strong as the underlying contract of employment; and in a situation where, as here, that contract could be terminated by one month's notice on either side it would in practice always be open to an employer to change the terms of any such profit share/bonus arrangement unilaterally on a take-it-or-leave-it basis: to that extent, but no more, the arrangement might loosely be described as dependent on the employer's 'will' or 'discretion'. The Defendants' case involved, among other things, a fusion of these two concepts. 35. In our view the correct analysis on the evidence in the present case is as follows: (i) The original arrangement made in December 1981 was one that conferred on Mr. Connell prospectively, as part of his remuneration package, a contractual entitlement to receive at the end of the coming year 1982, and in every subsequent year unless and until otherwise agreed, a profit-share calculated in accordance with the formula subsequently set out in Mr. Richard Egglshaw's letter to National Westminster Bank Finance dated 16 th April 1982. No other interpretation is reasonably maintainable. There is no case for implying a term that the base-line would vary from year to year. The answer to the Defendants' argument that a base-line that is not confined in its operation to one year is liable, as turnover increases from year to year, to generate excessive amounts of bonus is that it was always open in practice for Mr. Egglshaw to insist on a variation of the base-line if he wanted one: in practice, if not in law, he "called the shots" (to use his own expression). (ii) In December 1982 this was varied, by agreement (albeit reluctantly on the part of Mr. Connell), so as to confer on Mr. Connell, prospectively as regards the coming year 1983, a contractual entitlement to a profit share as before except that the turnover base-line was increased from £750,000 to £1,050,000. (iii) In December 1983, in the absence (as we find) of any specific discussion of the subject, the natural inference at the time (or, to put it another way, the presumed intention of the parties) would have been that the previous year's arrangement should continue for 1984, so that there was a renewed prospective contractual engagement by Mr. Richard Egglshaw to pay Mr. Connell a profit share on the same basis as that agreed in December 1982. (iv) Mr. Connell having remained in employment throughout the next year, 1984, he had acquired by December a crystallised contractual entitlement to a sum of money calculated on the basis of the previously agreed formula (with a £1,050,000 base-line), and the payment of £11,000 that was in fact offered by Mr. Egglshaw fell short of Mr. Connell's true entitlement and involved a breach of contract. On the basis of the turnover figures agreed by the parties for the purpose of the litigation the amount properly due to Mr. Connell was £19,500. (v) But in the absence once again (as we find) of any discussion and agreement in December 1984 as to the terms of

Mr. Connell's profit share for the coming year 1985 other than Mr. Egglshaw's promise that Mr. Connell would receive at least £10,000, the natural inference and presumed intention of the parties on this occasion must, we think, be that the formula for 1985 (prospectively) should be based on a fair and reasonable (though unspecified) base-line, subject only to a 'long-stop' minimum entitlement of £10,000. Our reasons for reaching this conclusion appear below. (vi) As to what a reasonable base-line would be in those circumstances, in the absence of any other evidence the only figure that we have to go on (and which we accept) is Mr. Jehan's £1,500,000. (vii) Mr. Connell having remained in employment throughout 1985 and nothing further having been said about the basis of his profit share entitlement, by the time that the end of the year came he had acquired a crystallised contractual entitlement to payment of an amount equal to 5% of the excess of turnover above £1,500,000. Taking turnover for this period at the agreed figure of £1,834,295, Mr. Connell was entitled to a payment of £16,710 of which, in the event, he only ever received £10,000. 36. As to our reasons for the conclusion at (v) above, the only reasonable inference to be drawn, in our view, is that by the end of Mr. Connell's conversation with Mr. Egglshaw in December 1984 there must have been (i) on Mr. Connell's part, a recognition that there was no certainty any longer that the previous base-line would continue unaltered for 1985, but an understandable expectation that, instead, a fair and reasonable base-line would apply (subject to a minimum guarantee of £10,000), and (ii) on Mr. Richard Egglshaw's part, a corresponding recognition that a reasonable base-line would have to apply even though nothing had been expressly agreed. There is certainly nothing in the evidence that leads us to conclude that the parties intended to abandon the previous formula in its entirety and switch instead to an arrangement under which Mr. Egglshaw could determine retrospectively (that is, at the end of the coming year) and at his absolute discretion how much Mr. Connell should receive by way of 'bonus' for the past year. Such a switch would, as we have explained above, have involved a wholly different concept of remuneration and a substantial departure from the spirit of Mr. Connell's elevation to partnership status. This is not to say that such a switch could not have been perfectly possible if it had been the subject of specific discussion and agreement; and it might very well have been that, had this happened, Mr. Connell would have been faced once again with a take-it-or-leave-it choice. But in the absence of any such specific discussion it would be wrong to impute to the parties any such radical intention. 37. We have given careful consideration to Mr. Hoy's submission that the absence of any protest from Mr. Connell about under-payment of the profit-share element of his remuneration for 1984 and 1985 between April 1986 and July 1989 is indicative of knowledge on Mr. Connell's part that he had no contractual entitlement of any kind to an annual profit share/bonus and that any such payment was a matter within the absolute discretion of Mr. Egglshaw, and is suggestive of a claim that has been constructed retrospectively on the basis of a smattering of contemporaneous documents. 38. Exactly why Mr. Connell did not pursue the matter before 1989 is unclear. Looking back now, it is difficult to reconcile his inaction between 1986 and 1989 with a contemporaneous belief on his part that he was entitled to a profit share calculated by reference to a base-line of £1,050,000 or to accept that, having seen Mr. Jehan's draft accounts for the year ended 31 st January 1986 together with the comparative

figures for the previous year, he did not make some rough estimation of what he was entitled to, even if he did not make the precise calculations that Mr. Hoy suggested (and Mr. Connell accepted) could readily have been made. The amount involved is too substantial to ignore. But if the truth of the matter is, as we believe it must be, that Mr. Connell knew in December 1984 that there was no longer any certainty that the base-line for 1985 would remain unchanged, his subsequent conduct is more readily explicable. We are acutely conscious of the difficulty of trying to reconstruct, at this remove in time, an accurate picture of all the factors that may have had a bearing on Mr. Connell's thought process at the time. On any view the months between November 1985, when Mr. Connell was first approached about the possibility of becoming a shareholder in the new company, and November 1986, when the formal agreements were finally concluded, must have been a time of exceptional activity and importance for Mr. Connell, and one can well imagine that there would have been a good many aspects of the proposed transaction that would have taken much of his time and attention. It is also important to bear in mind that this was a time when Mr. Connell was - to use the vernacular - going up in the world in a way that almost certainly meant a great deal to him: he was no longer to be an employee but a proper co-partner or (more strictly speaking) a co-shareholder with those who had formerly been his employers; together with Mr. Watkins, he was at last to be admitted to the 'family' (or so it must have appeared). The prospects financially were presented to him as being very attractive. And, according to Mr. Richard Egglshaw, at the meeting on 1 st April 1986 Mr. Connell was doing very nicely out of the deal in that he was getting more shares than he was technically entitled to. It is also plain that, at that time, Mr. Connell was both trustful of Mr. Richard Egglshaw and at the same time of the view that he and, in particular, his brother, were not people to be crossed lightly.

39. Against this background it is not difficult to see that Mr. Connell's primary concern may well have been, as he said in evidence that it was, for the future rather than the past; that it is possible that he simply did not focus on the aspects of his former profit share entitlement that now seems so obvious, in retrospect, to the detached observer; that, even if he had had some concerns about underpayment in respect of his previous remuneration arrangements, he may have thought it ungracious or impolitic to press the matter at the very stage when events had unexpectedly taken so favourable a turn for him in other respects; and that it was only when relations began to deteriorate in July 1989 that he was prompted to look into the matter in detail for the first time. There is, moreover, no reason as far as we can see why Mr. Connell should ever have had occasion to suppose that his profit share payments were entirely dependent on the discretion of Mr. Egglshaw and not founded on any contractual entitlement. If the 16 th April 1982 letter to National Westminster Bank Finance had not existed we might have found the matter less certain. Nor is it as if that letter is a document that Mr. Connell only came across in the course of the Defendants' discovery: it was common ground at the trial that he had a copy of it among his own papers. As it is, the terms of the letter are wholly incompatible with a purely discretionary arrangement and there was (as we find) no subsequent occasion on which a switch to a purely discretionary basis of reward was ever discussed let alone agreed. Whether Mr. Connell has in some way lost his earlier right to claim the balance of his profit share entitlement for 1983/84 and 1984/85 40.

The Defendants originally asserted a defence of prescription in respect of any payment due for any period prior to 31 st January 1985, but did not pursue this at trial. They also pleaded an estoppel in their Answer to the Order of Justice. ("The Plaintiff in the full knowledge of the annual turnover of Strachans for the years in question accepted and agreed the payments of the bonus at will and is estopped from making any claim in respect thereof"); but no evidence in support of this plea was led or authority cited and it did not, as such, form any specific part of the Defendants' case as argued at trial. Nor was any attempt made to advance a case of waiver as such. The only way in which it was suggested at trial that Mr. Connell had lost any right that he might otherwise have had in respect of bonus payments for 1983/84 and 1984/85 was to the effect that he had accepted the payment of £11,000 made to him in December 1984 and the £10,000 paid to him in December 1985 in full and final settlement of his entitlement. Little or no elaboration of this submission was offered. But neither in December 1984 nor in December 1985 were the circumstances such as to make this a fair construction to put on events. For a start, in neither case was there any pre-existing dispute or bone of contention between the parties. 41. All that happened in December 1984, we find, was that Mr. Egglshaw, as Mr. Connell's employer, said that he proposed to give Mr. Connell a sum of money (£11,000) that exceeded what Mr. Connell was technically entitled to, results for the year being (in some way or other) disappointing, and Mr. Connell accepted on trust what he was told and what, in the event, he was given. There was no argument and no cause, in the legal sense, of any kind on Mr. Connell's part sufficient to give rise to anything that could properly be characterised as a contractual settlement. And in any event the premise on which this discussion took place was false, in that Mr. Connell's true entitlement was substantially in excess of £11,000. 42. In the case of the £10,000 payment in December 1985, the Defendants' submission is even weaker, in that there was (we find) no discussion either generally about what Mr. Connell would be receiving for 1985 or specifically about the £10,000. Mr. Connell treated the latter as a payment on account and assumed that anything further to which he was entitled would follow in due course as it had done in March 1983 and June 1984. Again there was no pre-existing dispute which could sensibly be described as having been "settled" by the £10,000 payment and no cause on Mr. Connell's part sufficient to give rise to a binding contract. 43. In the absence of either (i) a contractually binding settlement, or (ii) a sustainable case of prescription, or (iii) an established estoppel or other similar recognised ground of defence, there is nothing to bar Mr. Connell from pursuing his claims in this action. Lapse of time without more does not, of itself, defeat an otherwise valid claim.

Conclusion

44. There will, therefore, be judgment in Mr. Connell's favour on his claim in the Order of Justice (i) in the principal sum of £8,500 in respect of 1984; (ii) in the principal sum of £6,710 in respect of 1985; and (iii) for interest. 45. We shall hear further submissions from the parties as to the appropriate period and rate of interest and the resultant figures. No Authorities Page Last Updated: 19 Aug 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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