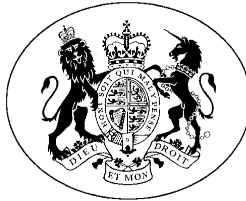

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
STEPHEN PENNY (C1)	**AND**	**SWANSEA CITY ASSOCIATION**
DONALD KEEFE (C2)		**FOOTBALL CLUB (R1)**
		HUW JEMNKINS (R2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 11TH / 12TH / 13TH / 14TH / 15TH DECEMBER 2017

EMPLOYMENT JUDGE MR P CADNEY MEMBERS: MRS C MANGLES
MRS L BISHOP

APPEARANCES:-

FOR THE CLAIMANTS:- **MR J MILFORD (COUNSEL)**

FOR THE RESPONDENT:- **MR J JENKINS (COUNSEL)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The first claimant was not an employee of the first respondent within the meaning of s230 Employment Rights Act 1996 under the terms of a consultancy agreement entered into between the first claimant, the first respondent and Parc Beck Ltd.

2. Both claimants' claims of constructive unfair dismissal are well founded as against the first respondent and upheld.

3. Both claimants' claims of age discrimination are dismissed against both respondents.

Reasons

1. By this claim both claimants bring claims of constructive unfair dismissal and age discrimination. In addition to determining those claims there is an issue in the case of Mr Penny as to his employment status. It is not in dispute that in relation to part of his service he was an employee. The respondents contend that in respect of other elements of his duties that he was engaged under a consultancy agreement and that for the purposes of the Employment Rights Act the duties carried out under the aegis of the consultancy contract were not carried out as an employee. It is convenient to deal first with the issue of Mr Penny's employment status as in order to understand it is necessary to set out the background of the involvement of both Mr Penny and Mr Keefe in the management of Swansea City Football club.

Mr Penny's Employment Status

2. Mr Penny qualified as a solicitor in 1979 and had a career in both local government and private practice, and in 1990 he became a founding partner of the firm JCP solicitors. Mr Penny specialised in commercial work and became head of the firm's commercial division. In 2007 he was appointed managing partner, and in 2011 the firm's chairman. He left JCP solicitors during the 2013 football season (although he continued to be paid for consultancy work) as a result of the duties he was required to perform for the club.

3. He is a lifelong Swansea City supporter having been attending matches since 1968. By the year 2000 the club was in significant financial difficulty and changed hands three times in a very short period, the last owner being Mr Tony Petty who acquired the club for £1. Mr Petty's stewardship of the club was not universally popular amongst its supporters, and in December 2000 Mr Penny was approached by a group of local businessmen and asked to assist with a rescue of the club. He offered his services free of charge and, having been granted a sabbatical by his firm, spent the next three months working on the rescue. That deal was finally concluded in January 2001.

4. Following the acquisition of the club a full investigation revealed that the club's creditors were owed in the region of £1.4 million, with no realistic prospect of the club being able to meet those debts. As a consequence a CVA was proposed. The bulk of the work in relation to that was carried out by Mr Penny and Mr Keefe, who is a chartered accountant, together with a licensed insolvency practitioner Mr Garry Stones. The club entered a CVA and was initially run by an interim committee but subsequently a board was formed. Mr Penny and Mr Keefe were appointed as directors of the club on 6 April 2002. Neither of them, either then or later, held shares in the club. Mr Gwylim Joseph was also appointed as a director and Mr Leigh Dineen was appointed Vice Chairman. They too were both non shareholding directors. Mr Huw Jenkins, who was and is a significant shareholder, was appointed Chairman.

5. During the following two years the club met all of its financial obligations under the CVA. During this period none of the directors took any remuneration for the work they had carried out for the club.

6. In May 2005 the club moved from its previous home ground the Vetch Field into a new stadium, the Liberty Stadium. By that time the club had secured promotion to Division 1 (the third tier of league football), and in 2008 was promoted from Division 1 to the Championship (the second tier). In May 2011 the club was promoted to the Premier League where it has, despite some anxious flirtations with relegation, remained since. Promotion to the Premier league brought an immediate and significant increase in the club's income from some £12 million per annum to £80 million per annum. There was a consequential increase in regulation by various authorities include including the Premier League itself. Mr Penny's role developed into leadership of the club's Legal, Human Resources, Health and Safety, and Regulatory and Compliance functions. By the time of his resignation the club employed something of the order of 400 staff and its annual turnover was close to £100 million.

7. No director received any remuneration in the years 2002 to 2010. In the 2010-11 season Mr Penny received £11,000. Following promotion to the Premier League there were a number of increases in directors' remuneration, and by April 2015 Mr Penny and Mr Keefe were each paid £100,000 per annum.

8. It is not in dispute that prior to July 2015 both claimants were employees of the club. That remained the case in respect of the entirety of Mr Keefe's duties. However Mr Penny's contractual arrangements were structured differently. As set out above by April 2015 it had been agreed that Mr Penny's remuneration should be a total of £100,000. Under the terms of a Director's Service Agreement which commenced on 1 July 2015 the respondent agreed to employ the director at a salary of £30,000 per annum. The director's duties were to ".. *undertake such duties and exercise such powers in relation to the company and its business to the Board of Directors of the company ….. shall from time to time assign to or vest in him and at all times and in all respects conform to and comply with the memorandum and articles of association and the proper and reasonable directions and regulations of the board.*" It is not in dispute that this is a contract of employment.

9. However at the same time the claimant entered into a consultancy agreement. That was a tripartite agreement between Parc Beck Ltd, Mr Penny and the club. It provided that Parc Beck Ltd (the service company) covenanted to procure the services of the consultant (Mr Penny) and the performance and observance by the consultant of all of his duties under the agreement. The consultant (Mr Penny) undertook to provide management, general and human resources advisory services to the company, and exercise such powers as the company assigned to and vested in him. The agreement provided that the club pay £70,000 per year to the service company for the provision of the services of the consultant and it specifically contained a "no employment" clause; "*The parties to this agreement agree that nothing contained in this agreement shall be construed or have effect as constituting any relationship of employer and employee between the company and the director*".

In addition there is no term entitling the claimant to holiday pay or sick pay and there is no term in relation to a contribution to any pension scheme.

10. Both Mr Keefe and Mr Gwylim Joseph entered into Director's Service Agreements which were in the main identical to that entered into by Mr Penny but under which both were paid £100,000 per year rather than the £30,000 per year paid to Mr Penny. Neither entered into any form of consultancy agreement.

11. It is accepted that the consultancy agreement was entered into by Mr Penny following accountancy advice he had received, and that its primary benefit for him related to the amount of tax that he would pay. It also had a number of benefits for the club. It is also accepted that it was Mr Penny himself as the Legal Director who produced both the Director's Service Agreements and the Consultancy Agreement under which he worked. As is apparent from the Directors Service Agreements entered into by Mr Keefe and Mr Joseph, whilst the Consultancy Agreement may have been to the financial benefit of the club it was clearly happy to retain them as wholly employed Directors if that was their choice.

12. The claimant's case is that, despite the express terms of the consultancy agreement he was in fact an employee under the terms of both contracts. This is based on a number of propositions. The first is that whether a person is self-employed or employed is a question of law and cannot simply be determined by the agreement of the parties; the intention of the parties is relevant but not necessarily determinative. Secondly the importation of a limited company into the relationship does not in and of itself prevent the relationship remaining one of employment (See Catamaran Cruisers Ltd v Williams [1994] IRLR 396). Thirdly, as is demonstrated by well known cases such as Autoclenz Ltd v Belcher [2011] ICR 1157, the written terms of the agreement may not reflect the reality of the relationship and the task of the tribunal is identify the reality of the contractual relationship..

13. The claimant contends that viewed in that light the consultancy agreement was in reality a contract of employment with the club. Firstly he contends that it was a tripartite agreement under which he owed obligations directly to the club and that he agreed to provide his own work and skill to the club, which duties he could not sub-contract. Secondly that he operated with within the framework of control of the club. Thirdly that in reality the terms of the contract were consistent only with him being an employee, in that the contract did not detail the specific services to be provided under it and he was embedded in the respondent's management structure, managing a team of employees at the club. He was expected to work full-time, and was not in a position himself to benefit financially from sound management in the performance of his work and took no financial risk. Finally the claimant submits that there the reality was that the club made no distinction between fully employed directors and those such as the claimant who had entered into consultancy agreements.

14. The essence of the respondent's position is that whilst it is accepted that the claimant was an employee of the club within the meaning of section 230 of the Employment Rights Act 1996 under the terms of the Director's Service Agreement, the Consultancy agreement was precisely that, and under it he was not an employee of

the club. They point to the fact that he is a very experienced and distinguished solicitor who provided commercial advice to clients whilst in private practice and was the club's Legal Director. He entered into the consultancy agreement having taken accountancy advice and he himself drafted both the Consultancy Agreement which specifically provides that is not a contract of employment, and the Directors Service Agreement which specifically provides that it is. He did so on the basis of a financial benefit to himself at the time, and they contend it is not open to him now to assert that in reality it is a contract of employment simply because it is no longer in his financial interest for it genuinely to be a consultancy agreement; as, if it is genuinely a consultancy agreement it necessarily limits the amount he could receive by way of compensation for unfair dismissal in the event that his constructive dismissal claim succeeds. It is in essence simply an attempt to avoid the consequences of an agreement which he not only freely entered into but actually drafted.

15. In our judgement the strongest points in favour of the claimant's assertion that he is and remained an employee under the terms of both agreements are firstly his duties did not appear to change at all from any point prior to entering into the consultancy agreement and to the point after which he had entered into it. Secondly it is impossible to determine which duties were owed under the consultancy agreement and which under the terms of the contract of employment, which points to the conclusion that his duties which had been in indivisible prior to entering into two separate contracts remained indivisible after entering into.

16. The strongest points in favour of the respondent's contention that the claimant did not remain an employee of the club under the terms of the consultancy agreement are that there was no inequality of bargaining power, as is apparent from the fact that the club took a neutral view as to whether its directors remained employees under the terms of a single contract or separated out their duties into two contracts one of which was a consultancy agreement. Secondly Mr Penny is a highly sophisticated and qualified professional man who chose to order his affairs in a way which were beneficial to him at the time on the basis that part of his duties to the club were provided under the terms of pay a consultancy agreement which he himself drafted and which specifically provided that he was not employee, an agreement which he had entered into having taken professional advice.

17. The tribunal takes the view that the arguments are finely balanced and that this is a dispute which is not easy to resolve. However, in our judgement the duties that were being provided were ones which could equally be provided under a contract of employment or genuinely under a consultancy agreement. When the parties choose to structure their agreement in a mutually beneficial fashion, and where there is no question of any inequality of bargaining power, we can see no basis on which to hold that it does not genuinely reflect the agreement between them. Balancing the competing arguments in our judgement we are not satisfied that under the terms of the consultancy agreement the claimant was in reality an employee of the club.

Constructive Dismissal

18. The broad outline of the basis of both claimants' claims is as follows. Both had for many years, as outlined above, been employed directors of the club and members of the board which had managed its affairs. As such they had been party to strategic decisions as to the club's future such as the move from the Vetch Field to the Liberty Stadium. As part of the proposed takeover it was decided at a very early stage that only shareholder directors would remain on the board, and that automatically in consequence that non-shareholder directors would not. It followed automatically that as non shareholder directors both claimants would cease to be directors of the club. The claimants contend that irrespective of any other breaches the simple fact that it was intended to remove them as directors in which capacity they were employed is in and of itself sufficient to amount to constructive dismissal. They assert that it is effectively self-evident that to form the view that in order to be involved at board level with strategic decision making required the director to be a shareholder necessarily involves the proposition that those who are not shareholders will no longer be involved in strategic decision making. Given that the claimants' had been involved in strategic decision making for the whole of their involvement with the club since 2002 the decision to remove them as directors involved not simply the removal of their titles but the removal of parts of their role. Irrespective of whether they had retained some role in the club and had retained some management function the removal of their participation in the strategic decision making function was necessarily a removal of a significant part of their role, and in effect a demotion, and that irrespective of any other breach the respondents decision necessarily amounted to a fundamental breach of contract.

19. For the sake of clarity we should say at this stage that we accept this analysis and as a result it will not be necessary to examine in detail the other potential bases of the claimant's constructive dismissal claims.

20. The background and the immediate cause the claimant's removal as directors was the acquisition of the club by a group of investors. One of those investors was Mr Jason Levien from whom we have heard evidence. He has been the owner of a number of sporting franchises in America including the Philadelphia 76ers the Memphis Grizzlies and DC United. In 2015 he became aware that there was the possibility to acquire a majority shareholding in Swansea City Football Club and discussions began towards doing so. As part of the acquisition of the shares in the club the purchasers took the view that there were a number of changes to the management of the club which needed to be made. Firstly they took the view that the board of directors was too large and needed to be smaller to be more effective and manageable. Secondly they took the view that as a matter of principle that directors should also be shareholders. As Mr Levien put it "*Our management theory was that only significant shareholders i.e. those who retained their shares should be on the main board. This is reflected by the fact that despite the club now having a large amount of investors who have a nominal shareholding there have been two new directors appointed. Romie Choudhury and Robert Heinrich hold greater than a 5% shareholding and chose to exercise their right to a seat on the board. The other part*

of our management theory was that a management board should be created that would take care of and have responsibility for day-to-day governance and compliance." Or, as it was put more bluntly, the new owners wanted board members to have "*skin in the game*".

21. We accept that this genuinely reflects the views of those purchasing the club, and that the evidence the respondent's witnesses have given as to this is entirely honest and reliable. This is reflected in a number of emails sent on the 18th and 19th of April 2016. Mr Porter on 19 April emailed Mr Farnell, "Chris below are the terms we can offer to sellers who decide to retain some level of ownership in the club", and one of those was the right to a board seat for an individual with at least 5% ownership.

22. It is not in dispute that neither Mr Penny nor Mr Keefe was officially informed of the proposal to purchase at the club at any stage prior to an announcement to the media on 5 June of 2016. It is however unlikely that they did not have a very good idea as to the proposal since in an article written by David Conn published in the Guardian on 19 April 2016 the details of the proposed agreement are set out considerable detail. Whilst for our purposes nothing turns on the accuracy of its content it has not been suggested that anything contained in the article is factually incorrect.

23. Having discovered through the formal announcement that the sale was to go ahead the claimants had a meeting with Mr Jenkins and Mr Dineen on 7 June 2016. It is not in dispute that at that meeting Mr Jenkins informed Mr Penny, Mr Keefe, Mr Gwylim Joseph and Mr Dineen that they were required to resign by reason of Premier league rules. It is also accepted by the respondent that their understanding that the rules of the Premier League required this was wrong. As is set out in the evidence of Mr Farnall, the suggestion Premier League rules required this came from him to Mr Jenkins, which was why Mr Jenkins relayed it to the claimants. Mr Farnall's evidence which we accept was that on further analysis he did not believe that in fact it was Premier league rules which required the claimant's resignation as directors. Irrespective of the reason for their removal as directors they were also informed the meeting of 7 June at that they would not be reinstated as directors but would be part of a management team.

24. Mr Penny, Mr Keith and Mr Gwylim Joseph, who was not present at the meeting, all indicated that they would not resign as directors. The next meeting took place on 19 July 2016 at which Mr Jenkins informed Mr Keefe and Mr Penny that they were required to resign their positions as directors with immediate effect; and they were informed for the first time that it had been agreed as part of the sale process that the resignations of some of the directors were would be delivered prior to the sale. We have seen a number of drafts of the agreements in which it is perfectly correct to say that it was anticipated that a number of directors would resign. By way of example in what is described as the Execution Version of 4th June 2016 the "Completion Deliverables" by the sellers includes the written resignation of all directors other than Hugh Desmond Cooze, and at Part Two "Matters for the board meetings at completion" is acceptance of the resignations of the directors.

25. Following the meeting with Mr Jenkins Mr Farnall had a conversation with the claimants. There was dispute as to precisely what was what was said; however it is not in dispute that it was confirmed that they were being requested to resign as directors, and that if they refused to resign it could put the whole acquisition at risk which could result in costly litigation. The claimant's allege that this was in reality a direct threat of what might happen to them if they did not resign, Mr Farnall states that he was simply pointing out the potential consequences of their actions for all involved, not simply them.

26. The purchase was completed in the evening of 21 July 2016 without the resignations of either of the claimants or Mr Gwylim Joseph. On Friday, 22 July both claimants met Mr Levien and Mr Porter. There was a further meeting with Mr Porter on 2 August at which Mr Penny said that he would not resign, and Mr Porter indicated that it did not matter as the shareholders could remove him as a director. Mr Porter stated that the claimant could remain as an in-house lawyer but not as a director.

27. Mr Penny discovered on 4 August that according to Companies House he and Mr Keefe had been removed as directors on 21st July. This was a result of minutes of a board meeting of 21st July 2016, signed as being an accurate record by Mr Jenkins, being lodged with Companies House as part of the documentation relating to the purchase, in which the claimants were said to have resigned, and that their resignations had been accepted at that board meeting. It is in fact accepted by the respondent that they had never resigned and that there had not been any such board meeting. The claimant's submit that in essence the respondent sought to achieve by fraud what it had not been able to achieve by persuasion and that there can be no innocent explanation for these events. The respondent, and in particular Mr Jenkins, have no specific explanation as to how this occurred save that a wealth of documentation had been prepared in anticipation of the purchase and that these documents must have been signed and supplied to Companies House in error. Generous as it may seem to the claimants we accept this explanation. Having seen and heard the evidence of Mr Jenkins we view it as improbable in the extreme that he was a party to a deliberate deception as alleged, and that the more likely explanation is simple error.

28. Following these events Mr Penny resigned on 9th August 2016 and Mr Keefe on 18th August.

29. As set out above the fundamental part and of the claimants claims for that constructive unfair dismissal are the diminution in role and responsibility as a consequence of demotion from the role of director in addition to that fundamental proposition there are a number of matters which the claimants submit also, whether individually or cumulatively, constitute a breach of the implied term of mutual trust and confidence. Firstly it was known from a very early stage that it was likely that non-shareholding directors would be removed as directors, and Mr Levien in evidence identified December 2015 as the likely starting point for those discussions. However prior to 7 June and despite the publicity not least from the article in the Guardian on 19 April 2016 there was no information provided to the claimants. They assert that if they had been consulted but asked to treat any information disclosed as

confidential, there is no reason to suppose that they would not have done so, and therefore no reason not to consult them. The claimants assert given their status within the club that to fail to inform them that there the one consequence of the proposed sale would be to affect their position as directors is in and of itself a breach of the implied term, or certainly is so taken together with the other matters. Further they were told that they needed to resign in order to fulfil the rules of the Premier league which was false; that they were given no specific details of what their management duties would be going forward; that they received no reply to the letter of 11 July other than being asked to attend the meeting on 19 July. In addition it is contended that Mr Farnall's conversation on 19 July 2016 was an attempt to bully at the claimants into resigning. Further the respondent misrepresented the claimants position by signing minutes of the board meeting on 21 July 2016 which had never occurred.. There was a further attempt to persuade them to resign on 22 July and thereafter that there was very little contact between Mr Jenkins and the claimants until their resignations. It is said that the meeting between Mr Porter and the claimants on 2 August effectively reiterated their reduction in roles, as is further demonstrated by the fact that Mr Porter became Director of Legal Affairs for the club on completion which had been Mr Penny's role prior to completion. Finally there is the fact that Mr Penny's position in respect transfers was removed from him. There is dispute of fact as to when this occurred. On the claimant's case it is from 22 July 2016, and on the respondents 4 August 2016. The claimants also rely on the evidence of how the club operated after the share sale. Following the share sale Mr Porter became the new director of Business and Legal affairs which of necessity was effectively Mr Penny's role. All of the non-footballing affairs were overseen by a non-board level Chief Operating Officer Chris Perlman, from which the claimants infer that had they remained as head of in-house legal or in the CFO role that they too would have reported to Mr Perlman, and would effectively been part of the third tier of management within the club.

30. As is set out above we accept the fundamental proposition that the decision to remove the claimants as directors was necessarily a demotion. It did not merely involve a change of title but reflected a genuine loss of status within the company. We have not, however, as yet set out the respondent's submissions as to that fundamental proposition and why we have not accepted it. The respondent's submissions are set out in essence from paragraph 44 onwards of the written submissions and are essentially summarised in paragraph 45 "*It is patently clear from the that evidence that whilst the claimants would lose the title of directors their day-to-day role group would remain substantively unchanged and indeed the new owners were actively keen for the claimants to remain in their roles because of the knowledge and experience that they brought to those roles."* For the reasons set out above in our judgement the new role proposed as part of a management would be substantially different to that the claimants had previously occupied, so as to amount to a fundamental breach of contract entitling them to resign. It follows that in our judgment the claimant's were dismissed within the meaning of s95 Employment Rights Act 1996.

Fairness of the Dismissals

31. The respondent submits that even if, as we have found, the decision to remove them as directors amounts to a fundamental breach of contract entitling them to resign, that the dismissal was still fair. The basis for this is the proposition that the dismissals are potentially fair as being for "some other substantial reason". The respondent contends that having taken the business decision, which the new owners were entitled to, that only shareholders with a shareholding of 5% or greater in the company should sit on the main board and be directors of the company that it necessarily and inevitably followed that the claimants were bound to be dismissed as directors. In the circumstances as that was a decision the new owners were entitled to take the dismissals were necessarily fair.

32. We bear in mind certain basic propositions. Firstly the right of shareholders to remove a director from his position as director has no necessary bearing on his employment status with the company itself. A change in the ownership of a company will in and of itself have no bearing on the reemployment relationship between a company and its employees. However, where the roles of director and employee are inextricably linked and where the reasons for removing a director are essentially the same as those for removing him as an employee the dismissal is potentially fair. (See *Cobley v Forward Technology Industries plc [2003] ICR 1050*)

33. The claimants submit that even if the decision to remove a director is a potentially fair reason for dismissal, that in this case on any analysis their dismissal was unfair. Firstly this is not a case like Cobley where by reason of a hostile takeover the new owners reasonably wanted the removal of a director both from his role as a director and his employment responsibilities. In this case it is the respondent's own case that they wished to retain the claimants experience and expertise at least at a senior management level. Thus in this case the acquisition by the new owners and their position as to board membership, did not inevitably have any effect on their position as employees.

34. The essential basis for the proposition that the dismissals were unfair is that respondents did not engage in any process of consultation or discussion with the claimants as to the proposal to remove them as directors. This was not simply procedurally but substantively unfair. It is not in dispute that the decision was presented as a fait accompli as part of a decision which had been taken prior to the new owners acquiring the club. As is set out above in respect of the various meetings that there is no dispute that they were informed that they were required to resign as directors.

35. We agree with the proposition that fairness fundamentally required such consultation or discussion. Whilst we fully accept that the club in the final analysis was entitled to have the directors the new owners wished, it found itself in an unusual if not unique set of circumstances in this case. The claimants had been directors for some 14 years in the circumstances which spoke of their devotion to the club. The distinction between them and the shareholder directors was that they had not invested money in the club nor thought to have their contribution to the club recognised by the allocation

of some shareholding. This in our judgment should at the very least have allowed for a discussion as to whether the strict application of the respondent's management theory might be varied in the case of the claimants. In our judgement it cannot be ignored that the claimants had embarked on their roles as part of a process designed to save the club and had for many years that worked without remuneration, and even when remunerated had done so in general at levels far below that which might be expected for directors of what was by then a Premier league football club.

36. Even if discussion had not resulted in a change in the position of the new owners, some form of compromise may have been found, or failing that some mutually satisfactory means of recognising the claimants' contribution to the success of the club in some other way. In our judgment, at the risk of repeating ourselves, this is a very unusual if not unique set of circumstances which required very careful thought and consideration. It is in our view a paradigm case underlining the importance of consultation and the entire absence of it in our judgment renders the dismissals unfair.

Age discrimination.

37. The age discrimination claim can be dealt with relatively briefly. It is a claim for direct age discrimination on the basis that the true reason for the removal of directors was not in fact that they were non-shareholding directors but was in reality because of their age. In support of this they point to the fact that they were two of the three oldest directors, together with Mr Gwylim Joseph, and that none of them was appointed to the new board of directors. It is, however, not the claimant's case that the new owners themselves were themselves motivated by their age in the removal of the claimants as directors, but rather that they were influenced by Mr Jenkins and a fellow board member Mr Morgan who exerted pressure on them to exclude the claimants. It is alleged that Mr Morgan had commented on a number of occasions at board meetings on the need for the board to have new or fresh blood and/or younger members. They say that at no point did Mr Jenkins ever contradict Mr Morgan and therefore that he must be taken to have agreed with him. From this they conclude that Mr Jenkins and/or Mr Morgan must have use the opportunity of the purchase to remove the oldest directors.

38. In addition they point to the fact that Mr Liegh Dineen was subsequently albeit briefly appointed to the board despite the fact that there he was a non-shareholding director. The fact that he was relatively swiftly removed, because, says the respondent he was appointed in error is not accepted by the claimants.

39. The respondent's submission is that the claimant's case is threadbare to the point of nonexistence. There is they submit, simply no evidence supporting the theory that Mr Jenkins and/or Mr Morgan either sought to or did influence the new owners in any way, and a wealth of evidence to the point to the fact that the requirements for directors also to be shareholders was one which was genuinely held by the new owners. Whilst there is no specific magic in the 5% figure, all the evidence points to

the fact that the respondent was genuinely of the view that directors needed to be shareholders with a significant shareholding in order to be members of the board.

40. As is set out in our decision in respect of the constructive dismissal claim we accept the respondent's evidence that they were genuinely of the view that directors needed to be shareholders with a sufficiently significant shareholding to have "skin in the game" to be directors. In our view there is little to no evidence to the contrary and in reality insufficient to transfer the burden of proof to the respondent. Even if we are wrong about that and the burden has transferred we are satisfied by the evidence the respondents given that the claimant's age paid no part in the decision to remove them as directors.

Remedy

41. The case will be listed for a TPH to give directions for a remedy hearing.

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EMPLOYMENT JUDGE

Dated: 23 March 18

Judgment entered into Register
And copies sent to the parties on

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..........23 March 2018............
for Secretary of the Tribunals