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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	19/02/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(COMMERCIAL HUB)

Between:

NORTH SOUTH PIG COMPANY (NI) LIMITED

Plaintiff

and

MICHAEL McAULIFFE, JAMES McGRATH, JOHN HANRAHAN,
DAVID ROWAN, TRULY IRISH COUNTRY FOODS LIMITED

Defendants

Mr G Simpson QC and Peter Girvan BL (instructed by Johnsons, Solicitors)
Mr M Humphreys QC and Stuart Spence BL (instructed by A&L Goodbody

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HUDDLESTON J

Introduction

[1] This dispute arises out of the breakdown in relations between two sets of shareholders in a Northern Irish Company – North South Pig Company (NI) Limited ("the Company" or "NSP") – and the plaintiff to these proceedings. The plaintiff's claim is set out in its Further Amended Statement of Claim – giving some hint to the protracted and convoluted nature of these proceedings. In summary (and allowing for those sections of the claim that have already been removed) the amounts claimed are as follows:

(a) €40,000 which is alleged to have been unlawfully paid to the first, second, third and fourth defendants in breach of: (i) a Shareholders' Agreement; and (ii) the fiduciary duties owed by those defendants as the directors of the Company;

…

(d) €84,000 alleged to have been administrative payments paid to Truly Irish Country Foods Limited ("Truly Irish") (the fifth defendant) by those defendants or on their direction in breach of the Shareholders' Agreement and the directors' fiduciary duties as directors. This figure is not, however, carried through into the plaintiff's summary of its claim as set out in the closing submissions;

(e) €397,210 in respect of "share payments" (as they are described) made to the fifth defendant in breach of the Shareholders' Agreement and again constituting an alleged breach of the directors' fiduciary duties. Again, this sum is not contained in the plaintiff's closing summary of its claim;

(f) €189,856 representing dividend payments made to shareholders which were allegedly paid in breach of the Shareholders' Agreement and in breach of the directors' fiduciary duties;

(g) Unquantified haulage costs paid to a third party owned and/or controlled by the first defendant but again alleged to have been paid in breach of the Shareholders' Agreement, and/or constituting a breach of contract and a breach of the fiduciary duties owed;

(h) €4,095,531 representing a loss of profit to NSP (comprised of €1,549,380 for the period from 1 September 2013 to 30 April 2018 and €2,229,184 for the period from 1 May 2018 to 30 April 2028 plus €316,967 interest);

(i) €2,359,180 representing loss of value in the plaintiff by the alleged actions of defendants 1-4 again in breach of the Shareholders' Agreement, and constituting a breach of contract and/or a breach of the directors' fiduciary duties;

(j) Accounts, enquiries and equitable compensation/disgorgement of profits on foot of the breaches of the Shareholders' Agreement, contract and fiduciary duties as pleaded above in the plaintiff's closing submissions (at Paragraphs 69 and 77 this is described as damages for lost and future profits *i.e.* as profits earned by the defendants in breach of their duties. The figure of €2,890,984 is claimed (as valued by the plaintiff's expert) as representing the "equity value" of Truly Irish – in the absence (it says) of the fifth defendant having provided a breakdown of revenue/profit streams; together with

(k) Interest claimed pursuant to section 33A of the Judicature (NI) Act 1978.

[2] The claim, however, focuses in the main on the alleged breach of contract (*i.e.* the Shareholders' Agreement that is alleged to have been in existence) and, in the alternative, a breach of the fiduciary duties owed by the defendants 1-4 ("D1-4") to the Company as set out in ss. 172 and 177 of the Companies Act 2006 ("CA 2006").

[3] It is the pleaded case which defines the remit of this action and upon which (lest there be any doubt) the court focuses its attention – *per* Order 18 Rule 6 and 15 of the Rules of the Court of Judicature (NI) 1980 and *Rolled Steel v British Steel* [1986] Ch 246 and it is the pleaded case upon which this judgment focuses.

[4] As for the defendants, they deny the claim in all its material respects.

[5] The plaintiff was represented by Mr M Humphreys QC and Stuart Spence BL and the defendants by Mr G Simpson QC and Peter Girvan BL. I am indebted to counsel for their detailed arguments and submissions.

[6] The evidence that the court considered consisted of voluminous documentary evidence spanning the period from incorporation of the plaintiff up to the final stages leading up to the breakdown in relationships between the two groups of shareholders in September 2013 and beyond. For the plaintiff I heard oral evidence from the following principal witnesses: Paul Gilmore (former employee); Michael Monagle (Director of the Plaintiff); Mr Seamus McCaffrey (Accountant); Mr James Neill (Expert Witness Partner in HNH Partners Ltd); Mr Patrick Plunkett (Director); and Mr Brendan Hanley (Director) and for the defendants I heard from: Michael McAuliffe (first defendant); Brendan Thomas Dwyer (Expert Witness, Partner in Harbinson Mulholland); and Mr Stephen Finn (Finn Meats). I have not sought to rehearse all of this evidence but have used it when relevant to detail the complex background to the dispute (as will be apparent below) and have detailed that upon which I have relied in coming to my determination.

Background – The History and Nature of the Dispute

[7] The origins of this dispute date back to the late 1990s and early 2000s when, as a result of, firstly, a reduction in pig processing capacity in Ireland and, secondly, a perceived concentration of profit margin with pig processors (at the expense of pig producers), a number of pig farmers decided to adopt a co-operative style approach to pig processing to redress those perceived imbalances.

[8] A co-operative was formed in 1999 on an all-island basis with the objective of improving pig prices for pig farmers but, ultimately, with an objective of slaughtering and processing pigs and retailing the final product itself – essentially cutting out the "middle man" processors (as they were seen). In part, this co-operative was launched on the back of a report jointly commissioned on an all-island basis – *The Pig Industry in Ireland – a Strategic Study (2001)* ("the 2001 Study").

[9] In October 2002 the co-operative (then named North South Pig) identified its longer term objectives broadly as:

- the securing of an outlet for pig sales;
- direct involvement in slaughtering and marketing; thus

- [securing] the benefit of "*farm gate to consumer control*" – otherwise categorised as a "*farm to fork*" concept – a concept which has significance to this case.

It was felt that if these three strategic objectives were addressed that, in turn, would result in an increase to "producer profitability".

[10] The co-operative venture secured grant assistance from the Department of Agriculture and Rural Development in Northern Ireland ("the Department") to conduct a feasibility study. Matrix Business Services Limited ("Matrix"), Omagh, was appointed as its consultant to undertake that study and further develop the strategic objectives. Mr Seamus McCaffrey, a principal in that firm, also became, in due course, the company's accountant. He gave evidence to the court in relation to his inputs which have greatly assisted the court in its deliberations.

[11] As a result of Matrix's conclusions, a decision was taken to incorporate the North South Pig Co-operative into a company under the name North South Pig Company (NI) Limited (*i.e.* the plaintiff in these proceedings). The Company was incorporated in May 2005 in Northern Ireland with a view to then qualifying for additional NI grant assistance to support its operation. The second, third and fourth defendants together with Oliver Leddy, Rory O'Brien, Charles Beverland, Liam McGuckin and Paul Gilmore were its initial directors. Mr Gilmore was the only employed executive – his wages being paid in part by the initial grant funding. It was he who was charged to drive the venture forward. Although he left the Company's employment in 2008 he was available and, as will appear below, gave evidence to the court around the formation of the Company and its initial operation. His evidence on the creation of the Shareholders' Agreement is an important part of this case.

[12] The initial business model of the Company was to raise funds from participating pig farmers. The decision was taken initially to focus on culled sows as an introduction into developing the wider market for pork pigs. At that stage the culled sow market then represented just 2% of the total pig market in Ireland. To give some context to the market in culled sows and to explain the underlying rationale of the Company, at the time it was incorporated the evidence before the court was that a farmer received approximately €30-40 for a culled sow if sold as livestock compared to €200 per sow if that sow was slaughtered, processed and then exported. The most lucrative market for culled sow meat was in Germany which took 80% of the finished product. To access that market, the Company entered into a supply contract with a German company, Westfleisch, with whom some of the producers had a good relationship. The process, very broadly, was that pig farmers arranged for the transportation of culled sows to a nominated meat plant where they were slaughtered after which the Company was responsible for transporting the carcasses to Germany for sale. The proceeds of that transaction were received by the Company who made a number of deductions to pay for; (a) the transportation of the carcasses to Continental Europe; (b) at various times an administration cost for the running of the Company; and (c) the purchase of shares in the Company (see below)

finally remitting a net amount back to each supplier. The aim was that each supplier would, through that approach, fund the Company at the same time as becoming a paid up shareholder in it but would also receive overall a higher price for its sows – sows which are essentially a by-product of the commercial production of pork pigs. Ultimately, however, the intention was to roll this approach out to the wider and more lucrative pork pig market.

The Constitution of the Company

[13] The law firm L'Estrange & Brett was instructed to incorporate the Company and to draft a Shareholders' Agreement. I declared at the commencement of the case that I had been a former partner in that firm making it clear that I had no personal involvement in the matter itself. Both parties were happy that no conflict issues arose.

[14] The Company, as I say, was incorporated in Northern Ireland on 16 May 2005 under The Companies (NI) Order 1986, adopting Table A of the Companies (Tables A-F) Regulations (NI) 1986 ("Table A") with amendments. One of its primary objectives was:

> *"3(A)(ii) To produce, promote, sell and distribute pigs of high genetic quality which will improve the competiveness of the Irish pork and bacon industry and have the additional benefit of improving such products for the consumer. …"*

[15] It was suggested on the papers that the Company had 182 initial shareholders which represented 50% of all pig farmers throughout Ireland. This is a point that I will return to below.

The Shareholders' Agreement

[16] A draft Shareholders' Agreement was also prepared by L'Estrange & Brett. There is debate as to whether it is binding or not but as it is core to the plaintiff's case and before considering that question we need to look at the more material provisions. Whether binding or not, it certainly is helpful in clarifying the parties' intentions at that time. Under its terms there were the following core definitions. Any emphasis is mine:

"Ordinary Shares"	*"means the* ***ordinary shares of €20 each*** *in the share capital of the Company"*
"Business"	*"means the business of acting as the holding company of the Subsidiaries and pursuing (on its own, with or via any of its subsidiaries) the object of*

*processing, promotion, sale and distribution of pig and sow meat of high genetic quality and of erecting and operating the Plant (**on its own, with or via any of its Subsidiaries**)."*

"Business Plan"	*"means the business plan for the Company in the Agreed Terms as approved by the Shareholders from time to time …*
"Plant"	*"means the pig slaughter and packaging plant which the Company intends to procure or it or one of its subsidiaries shall construct within the island of Ireland."*
"Subsidiary"	*"means any company which at any time is a wholly owned subsidiary of the Company and "Subsidiaries" shall have a corresponding meaning."*
"the Shareholders"	*"means those individuals holding shares in the Company from time to time …"*

We then turn to the relevant operative provisions:

Clause 2 (Pre-completion) provided that to set the Company up*:*

"2.1 Immediately prior to Completion:

*2.1.1 the authorised share capital of the Company shall be increased to €18,000,000 divided into **900,000 Ordinary Shares of €20** each and all existing issued Ordinary Shares of £1 shall be re-designated as Deferred Ordinary Shares of £0.01 each; and*

2.1.2 the Company shall adopt the Articles."

[17] The rationale behind that approach and to the capitalisation of the Company is set out in Clause 3.3 of the Agreement:

*"3.3 The parties agree to subscribe for further Ordinary Shares on the basis of one Ordinary Share **for each sow***

> ***supplied** to the Company under Clause 5.1.1. The parties acknowledge that the subscription **payment** for such Ordinary Shares **will be deducted by the Company** from monies owed or owing to the relevant party by the Company pursuant to Clause 5.1.1. Such deductions should be **based on a deduction of €20 per sow supplied to the Company**."*

It was through these deductions that the Company was to be funded and shares bought with a view to those shares being issued to the participating farmers.

[18] A resolution was passed by EGM on 21 August 2006 increasing the authorised share capital to 900,000 ordinary €20 shares. At this point I note that the Memorandum of Association of the Company was updated in 2008 - differing from the intention originally set out in the Shareholders' Agreement and 2006 Resolution as set out above. Clause 5 of the updated Memorandum of Association (*i.e.* the 2008 version) provides as follows:

> *"The Company's share capital is £13,252,876 based on mid-market exchange rates of 21 August 2006 (being £999,998 divided into 999,998 Ordinary Shares of £1 each plus €18M divided into 900,000 Ordinary Shares of €20 each and two deferred Ordinary Shares of £1 each)."*

That distinction between the £1 and €20 Ordinary Shares has an import to which I shall return below.

[19] As is common with most Shareholders' Agreements it was provided that certain reserved matters required a "*Majority Vote*" of the shareholders which in turn was defined as *"the vote or votes exercised by the **holder** or **holders** of **75% or more of the <u>issued</u> Ordinary Shares** on any matter put to a vote of the Shareholders."* That substantive requirement is material to the plaintiff's case as, in essence, it says that material actions were taken by the Board which did not satisfy that requirement thereby constituting a breach of contract.

[20] The other material provisions of the Shareholders' Agreement I set out below as it is convenient to do so at this point:

> *"5.1 **Conduct of the Business***
>
> *The Shareholders agree that their respective rights in the Company shall be regulated by this Agreement and the Articles. The Shareholders and the Company agree to be bound by and comply with the provisions of this Agreement which relate to them and all provisions of the Articles will be enforceable by the parties between themselves in whatever*

capacity. Each Shareholder shall (so far as he lawfully and practically can):

5.1.1 ***supply all culled sows*** *from all pig production operations in which they are involved throughout the island of Ireland exclusively to the Company* ***for a minimum period of 5 years from the date of this Agreement****;*

5.1.2 supply all production pigs from all pig production operations in which they are involved throughout the island of Ireland exclusively to the Company subject to adequate facilities being available to the Company and subject to the Company agreeing acceptable business terms with the relevant Shareholder;

…

5.1.5 promote the best interests of the Company;

5.1.6 ensure that the Company performs and complies with all of its obligations under this Agreement and the Articles;

5.1.7 ensure that the Business is conducted in accordance with sound and good business practice and the highest ethical standards and in accordance with a Business Plan and Budget etc;

…

5.2 ***Promotion of the Business***

5.2.1 The Shareholders shall (so far as they are able) procure that the Company and any Group Company shall have complete independence in operations and that ***any expansion, development or evolution of the Business (whether to be conducted as part of or in connection with the Company's main business or ancillary to it) will only be effected through the Company, a Subsidiary*** *or a joint venture company in which the Company* ***holds not less than 50% of the issued shares which are accorded a vote except where approved otherwise by a Majority Vote*** *for any particular proposal.*

…

*6.1 **The Directors***

*6.1.1 The Shareholders may **by a Majority Vote** and in accordance with the Articles appoint any number of Directors up to the maximum allowed by the Articles.*

…

*6.1.3 Any Director **may be removed by Majority Vote** in accordance with the Articles and in such event the Shareholders shall procure that the Company promptly removes the said Director from his position.*

…

A number of particular matters were reserved to Shareholders ("Shareholder Reserved Matters") each of which required a Majority Vote:

*7. **Reserved Matters***

*7.1 **Shareholder reserved matters***

The Shareholders shall procure, as far as they are legally able, that no action is taken or resolution passed by the Company or any Group Company in respect of the following matters or their nearest equivalent in the case of a Group Company ("Shareholder Reserved Matters") without the consent of at least 75% of the Shareholders holding Ordinary Shares:

7.1.1 any material transaction with a Shareholder or any of its Associated Companies or any third party not in the ordinary course of business or not on arms' length commercial terms;

…

7.1.6 any change in the share capital or the creation, allotment or issue of any shares or the grant of any option or rights to subscribe for or to convert any instrument into such shares or securities;

7.1.7 any reduction of capital or variation of the rights attaching to any class of shares …

…

7.1.11 the cessation of any business operation;

7.1.12 any material change to the nature or geographical area of the Business …

7.1.13 the entering into of any transaction other than in the normal course of the company's business.

…

7.1.17 any transaction or disposition not on an arms' length commercial terms (sic) involving a Director or former Director of the Company …"

In addition to the requirement of a Majority Vote for Shareholder Reserved Matters qualifications were also imposed upon certain Board decisions:

7.2 ***Board Reserved Matters***

The Shareholders shall procure so far as they can that no action is taken or resolution passed by the Company or any Group Company in respect of the following matters or their nearest equivalent in the case of a Group Company ("Board Reserved Matters") without the consent of a majority of at least 50% of the Directors present at a Board meeting:

…

7.2.8 The entry into of any contract or commitment not provided for in the Budget under which the Company may incur €75,000 (or an equivalent value in any other currency) or more which may or may not be fulfilled or completed within one year.

[I note at this point (but will return to it below) that in different iterations of the Shareholders' Agreement which were furnished to the court the figure of "€75,000" reads "€100,000".]

The provisions in relation to the declaration of a dividend are dealt with as follows:

"9. ***Dividend Policy***

Subject to any applicable law, no dividends shall be declared or paid in respect of the Ordinary Shares by the Company ***unless the holders of not less than 75% of the Ordinary Shares have provided their consent in writing to*** *such dividend being declared and/or paid (as applicable).*

Clause 12 then details a number of restrictions which the shareholders committed to:

12. ***Competition with the Business***

12.1 ***Restrictions***

12.1.1 Unless he has obtained the prior written consent of the holders of 75% of the Shares, ***a Shareholder*** *(the "Restricted Shareholder")* ***must not*** *either alone or jointly with, through or on behalf of any person, directly or indirectly:*

(a) ***carry on or be engaged or concerned or interested in any activities which are in competition with the Business within the island of Ireland;***

(b) …

12.1.2 Each Shareholder agrees to procure so far as lies within its power that each of their business undertakings and/or any companies in which they have a controlling interest shall comply with the provisions of this clause as though it applied directly to them."

The duration of the agreement is provided for in Clause 22:

"22 ***Duration and variation of Agreement***

22.1 Subject to the other provisions of this Agreement, this Agreement shall continue in full force and effect without limit in point of time until the earlier of:

22.1.1 All the Shareholders agreeing in writing to terminate this Agreement;

22.1.2 An effective resolution is passed or a binding order is made for the winding up of the Company."

[21] In the context of the draft document, Schedule 2 to the Agreement details the authorised share capital as it was intended to be at "Completion" (namely €18M divided into 900,000 of Ordinary Shares of €20 each) and then made provision for detailing the initial shareholders. Mr Gilmore explained to the court that the list of initial shareholders (182) (and the number of shares for which each could subscribe) (initially totalling 95,755) was the product of: (a) those pig producers who had expressed an interest in participating in the venture; and (b) the number of sows which they each anticipated producing – in turn depending on the number they farmed. That calculation gave each a provisional share entitlement which it was proposed would be paid for through the deduction mechanism in Clause 3 at the rate of €20 per sow supplied. In that way the Company would have its initial

funding and producers would gain a number of shares linked to the sows which they had supplied. There is now debate as to whether the sum subscribed was €20 by way of share capital paid for the shares (thus creating a share premium) or €1 (as the par value of the share) and the balance €19 as loan capital (creating loan capital). This is compounded by the fact that the Company (contrary to the expectations set by the Shareholders' Agreement) only ever appears to have issued <u>€1</u> Ordinary Shares – not the €20 ordinary shares referred to in the Shareholders' Agreement.

[22] There are a couple of initial observations to be made in relation to the Shareholders' Agreement. The first is that the court was provided with three versions of the document. Although in substantially the same terms, as is set out in paragraphs [84] *et seq*. below, the bottom line is that there does not appear to a single agreement or even a series of agreements which can be shown to have been signed by the shareholders and the Company in their correct capacities.

[23] What we do know (from the copies that were made available to the court) is that the annual returns that the Company submitted for the years ending 2011, 2012 and on 24 May 2013 (just prior to the events leading to this litigation) each included a statement that the total number of shares allotted and in issue was 56,802 £1 shares and that for each year it listed its then current shareholders. Mr Gilmore's evidence was to the effect that the annual return and the various iterations of the shareholders list (for each of those years) was reflective of those who had both: (a) signed the Shareholders' Agreement; and (b) supplied sows to the Company; that that list was reviewed annually and that the formal Company returns were then made to Companies House on that basis. Mr McCaffrey, as the Company's accountant and the person who filed the returns, confirmed that position in his evidence. The only qualification I note is that in some of the annual returns the shares are described as £1 and in others as €1 shares.

[24] Mr Gilmore was also able to provide some clarification in relation to the origins of the Shareholders' Agreement. He explained that L'Estrange & Brett put a draft of the Shareholders' Agreement into circulation in July 2005. That document was reviewed by a number of the directors who formally approved it in July 2006. It was presented to a meeting of pig farmers (North and South) at a meeting held on 25 August 2006 when the concept of the Company and its business model was formally launched. In his evidence Mr Gilmore explained that some subscribers signed a version of the Shareholders' Agreement at that meeting. Others took the Agreement away for consideration. Mr Gilmore explained that he, at various points between that meeting and 2008 (when he left the Company), visited those remaining producers and secured signatures on a copy of the Shareholders' Agreement. What is clear from his evidence and the discovery process, however, is that there is no single, or indeed even a single set of, documents. The Defence says it was signed "willy-nilly" and I cannot disagree with that assessment. The best that we can say from the evidence is that there appears to have been a series of versions of the Shareholders' Agreement in circulation signed by some of the listed shareholders but all at different stages or times. As I have already said, Mr Gilmore and then

Mr McCaffrey, gave evidence that the annual returns were completed by reference to the schedule of those who had subscribed for shares – *i.e.* on the basis of sows supplied and deductions made but that is the evidence of the existence of a shareholder agreement at its height.

[25] The second point I note at this stage is that the Company itself is not listed in any of the versions of the Shareholders' Agreement as a contracting party – even though (a) by virtue of the execution clause it was clearly intended to be an executing party and (b) the document is drafted (in terms of its operative provisions) as if it were a contracting party to the obligations assumed.

[26] In relation to the execution of documents Section 43 of CA 2006 states that a contract may be made by a Company (a) in writing under its common seal or (b) by a person acting under its authority, express or implied (Section 43(1) (CA 2006)) but that, if under hand, then it must be signed (i) by two authorised signatories; or (ii) by a director of the Company in the presence of a witness who attests the signature (Section 44(2) (CA 2006)). In short, CA 2006 imposes strict requirements in terms of the execution of corporate documents. As we shall see below none of the versions presented to the court was executed in a way which complies with those statutory requirements. The other point is that there is no documentary evidence that any of the defendants 1-4 actually signed the Shareholders' Agreement in their role as a shareholder.

[27] The reason that these points are significant is because the defendants now say that there is no valid Shareholders' Agreement in place (or certainly not one that is enforceable against the defendants 1-4 in their capacity as shareholders) and that, insofar as the plaintiff's claim is based on a breach of contract on the part of the defendants, its claim must, therefore, fail. The arguments on the Shareholders' Agreement I will set out in more detail below.

The supply obligation(s)

[28] As may be apparent from both what I have said and the extracts of the Shareholders' Agreement cited above, the core theme running throughout the document was the supply of pigs. Initially, (and solely for the purposes of this case) that concerns the supply of sows. The provision in point – Clause 5.1.1 – purported to be a contractual obligation on the part of participating shareholders/farmers to supply their sows for an initial 5 year period and, ultimately, was the basis upon which the payment mechanism for the shares in the Company was to be discharged (*i.e.* by deduction of €20 from the net proceeds arising from the sale of those slaughtered sows).

[29] In practice, it soon became apparent, however, that the obligation to supply was honoured by some but, by others, only in part or not at all. That led, ultimately, to a fall-off in sow numbers and, in turn, increased tensions between the shareholders (*inter se*) and then between the shareholders and the Board. The court

heard oral evidence about this breakdown but the history of this breakdown is also evidenced by the Company's annual information circulars ("Circulars") – circulars which were issued by the Board to all subscribing shareholders. They are useful as contemporaneous pointers to the history of the Company's development. Paul Gilmore's Circular on behalf of the Board issued on 31 May 2006 at an early stage of the Company's evolution sets out in positive terms the goals for the Company:

- He starts by indicating that the business model which had been adopted had exposed the margin that processors were getting within the pig market generally (and culled sows in particular) – verifying the rationale behind the Company;

- That it was to "*producers' credit that they had [had] remained strong and loyal to their own company even when offered more money for their sows above market value*." [This referred to competitive pricing within the pig industry whereby pig processors in response to the business model of North South Pig were offering more money for sows on the basis that they would then also attract pork pigs];

- That the Company was averaging the slaughter of 850 sows per week thus building up "*Shareholder funds*";

- Suggesting that the shareholders' Agreement would be circulated for execution "*in the next 6 to 8 weeks*" – as a precursor to its formal introduction in August 2006;

- That the "*sow business was the first step [in the Company's] aim to* ***take Strategic Ownership***" of the pork processing industry in Ireland which, on the evidence, included the ultimate aspiration of owning and/or developing a processing plant.

[30] A review of the 2007 Annual Circular (which was dated 24 October 2007) shows that competitive pricing had lured more supplier/shareholders to sell their sows elsewhere and that, as a result, a theme of "*loyal*" v "*disloyal*" shareholder suppliers had crept into correspondence and indeed, as will be clear, pervades the entirety of this case.

[31] By 7 May 2010 the Circular (this time issued by the then Chairman, Mr Jim McGrath) was drawing specific attention to Clause 5.1.1 (the obligation to supply sows) and contained veiled threats to shareholder/producers that the Shareholders' Agreement was a "*legal document which you have signed and may have legal implications in the future*" – in an effort to ensure that they continued to supply sows. The 2010 Circular also indicated that "*the Board, auditors and our legal team have* ***fully sorted out the share capital and Shareholders of North South*** *up to 31 August 2009 and will issue share certificates in the near future*" – suggesting that outstanding

issues of corporate governance (and the issue of shares) would be imminently addressed.

[32] I will not rehearse the detail of the deterioration in relations between the parties as it will add to what is already a very long judgment. It is sufficient to say that from the evidence put before the court a distrust grew up between one group of shareholders (headed by the then existing Board) and another group (led by what is the current board of the plaintiff). This appears to have grown from initial concerns over a lack of transparency in the then Board's reporting on the affairs of the Company followed by the deductions made and payments issued to farmers in respect of sows slaughtered. Ultimately, it appears to have ended up in outright distrust over the way the then Board decided to set up and run a separate company – Truly Irish Country Foods Limited (*i.e.* the fifth defendant) – through which to develop the "*farm to fork*" concept as a retail brand for all pork products.

Solicitors' Correspondence

[33] By July 2013 relationships had deteriorated to such an extent that a group of disgruntled shareholders had instructed the solicitors firm of Ronan O'Brien & Company to write to the Board on 23 July 2013 indicating that they had gained the support of 50% of the voting shareholders – sufficient to satisfy the relevant statutory requirement (in CA 2006) - and were giving Notice of Intention to call an EGM seeking the removal of the current Board. Simultaneously, letters were also sent to each director calling upon them "*not to cause or permit in any way the dissipation of any of the assets of the Company. In particular, we are instructed to call upon you not to cause or permit any withdrawal from the Company's bank accounts, including its current and deposit accounts, pending the holding of the general meeting*" and advising that should they do so that they would be '*personally liable*.' This clearly would have put the Board on notice of the concerns being expressed – particularly as regards the Company's funds.

[34] Connolly Geraghty Solicitors, replied on behalf of the Company on 2 August 2013 – denying the allegations and countering it by suggesting that not all of the newly proposed Board members had honoured "*their legal agreement to supply all culled sows for a 5 year period*" under the Shareholders' Agreement of 31 August 2006 and that they, therefore, had a conflict of interest. It suggested that legal proceedings would issue to enforce the supply obligation in Clause 5.1.1 of the Shareholders' Agreement. The letter denied any suggestion that the Members of the Board had fettered their duty as directors or squandered monies; underpaid for sows or had wrongly used monies for Truly Irish – countering those specific suggestions that were made within the initial letter which had been received.

[35] By 30 August 2013, and because the Company was incorporated in Northern Ireland, the solicitors firm Johnsons in this jurisdiction had entered the fray indicating that they had been instructed to act on behalf of the then directors of North South Pig Company Ltd. They wrote to Ronan O'Brien & Co calling into

question the validity of the notice which had been served pursuant to s.307 CA 2006 calling for the EGM on the statutory basis (*i.e.* with support of 50% of shareholders) and, in turn, placed reliance upon Clause 6.1.3 of the Shareholders' Agreement which they pointed out required a Majority Vote of 75% for the valid removal of a director. It was also specifically pointed out that Clause 7 (*Reserved Matters*) required that "*no resolution [is] passed by the Company in respect of the appointment, removal or change … of any current or former Director* ***without the prior consent of at least 75% of the Shareholders****" (Clause 7.1.8)*, closing with the suggestion that they would pursue an injunction to prevent the EGM.

[36] At shareholder level a further Circular was issued to shareholders by the Board on 12 August 2013. By this stage the two camps of shareholders had clearly formed and the dispute had accelerated to one of confrontation. The tone and content of the August 2013 Circular:

- emphasised that "*the Shareholders' Agreement [is] a legal binding contract [which] has been breached by many … who decided to sell their sows elsewhere, thereby undermining the work of the Company and efforts of the Compliant Shareholders to the financial detriment of the Company and its Compliant Shareholders;*"

- alluded to the right in favour of the compliant shareholders to sue as a result of others' failure to comply;

- highlighted that the then Board felt that the cohort of disgruntled shareholders who had promoted the calling of the EGM – Messrs Sean Murphy, Michael Monagle, Mick McDonnell, Rory McCormack, Billy Costello, Ivor Ferguson, Jim Wright, Michael Doherty, Brendan Hanley, Michael Maguire, Tim Cullinane, Brian Dowley and Jim Foran - were wrong in the allegations that had been made;

- indicated that the then current Board (consisting of John Hanrahan, Michael McAuliffe, Jim McGrath, David Rowan and Pat Plunkett) (being the Board whose removal was sought and who (excluding Pat Plunkett) are Defendants 1-4 in the present action) had sought legal advice and that "*pursuant to the Shareholder Agreement (Clauses 6.1.3 and 7.1.8) [that it was] quite clear that no Director [could] be removed without the prior approval of Shareholders that hold at least 75% of the issued shares in the Company*"; and

- suggested that any shareholder who "*permits such resolution to be passed will be in breach of contract and [the Board would] have no option but to initiate immediate legal action against such persons.*"

[37] In the events that occurred, however, the formal resolution was not required because on 9 September 2013 the acting directors *i.e.* Messrs Hanrahan, McAuliffe, McGrath, Ronan and Plunkett (the "Outgoing Board") resigned – their resignation taking effect from 18:00 on 10 September 2013. An interim Board consisting of the

leadership group of the disgruntled shareholders (*i.e.* Messrs Murphy, Monagle *etcetera*) ("the New Board") was approved at the EGM which was then held on 10 September 2013 at 20:15.

[38] That New Board wrote to the shareholders in its next circular (on 1 October 2013) indicating:

(i) that they would investigate the affairs of the Company under the control of the Outgoing Board;

(ii) that they were trying – with limited success – to get information from the previous directors;

(iii) that they had suspended all payments from the Company's bank accounts following legal advice – which included a dividend that had been paid by the Outgoing Board just prior to its departure;

(iv) that they were looking for an "*alternative for the supply of sows*."

[39] That latter alternative turned out to be a supply contract with a slaughtering company called Rosderra. The arrangement arrived at with that firm formed a departure from the Company's previous business model insofar as the Company simply became an introducer to Rosderra for the culled sows supplied by the shareholders. In short, it negotiated a price but pigs were supplied and payments were made directly between the slaughterer and the supplier.

The 2013 Dividend and Directors' Payments

[40] One of the major issues in this case is the lawfulness of the payment of (a) a dividend and (b) certain directors' payments which were made, respectively, to the shareholders and to the Outgoing Board but in each case authorised by it before its resignation in September 2013. The plaintiff now asserts that these payments were unlawful – both as a breach of the Shareholders' Agreement but also as a breach of the fiduciary duties owed to the plaintiff.

[41] Leading up to those payments Johnsons, having been instructed on behalf of the directors, asked Tughan & Co, Solicitors, to advise the Company - on an independent basis - about the legality of paying a dividend out of its then current reserves. The detail around that advice needs to be described in some depth.

[42] Rhys Jones of Johnsons wrote to John Turley of Tughans by email on 23 August 2013 in the following terms asking him to provide independent advice to the Company. His email of that date referred to the Company's reserves of £1.3m and its wish to distribute them. Having referred to the dispute between the shareholders, Mr Jones then continues to give his own view:

> *"Pursuant to the Articles (Article 103 Table A)* ***the Directors may pay interim dividends if it appears to them that they are justified by the profits of the Company available for distribution****.*
>
> *Notwithstanding this, the Shareholder Agreement requires approval of 75% Shareholder approval in order to approve a dividend.* ***My initial view is that although a payment of an interim dividend by the Directors may breach the contract****, such a dividend is nonetheless permissible under Company law.* ***As there are ongoing disputes between the Shareholders on other matters I do not believe it is appropriate for me to advise the company on this matter … "*** [Emphasis added]

Having thus set the scene, he left it that Mr Turley would contact two of the directors, Mr James Taylor (the then in-house accountant for the Company) and Mr McAuliffe (the first defendant) who were both copied into that email.

[43] By way of additional discovery the court was also provided with Mr Jones' Attendance Note (dated 29 August 2013) of a telephone conversation between Mr Turley and Michael McCord of Tughans and Mr Jones. After explaining that he had been advising on "factual non-legal points" Mr Jones goes on to explain:

> *"I advised them my take on it was that the Company was authorised pursuant to the Articles to pay a dividend.* ***I appreciated there were a variety of risks, most notably personal liability of the Directors****.* ***This stems from the prima facie breach of contract under the Shareholders' Agreement.*** *John Turley advised that he felt that the Company was a party to the Shareholders' Agreement as it had both signed the Agreement and that certain clauses imposed obligations on the Company. From this he took it to mean that clear intention was that the Company was to be a party notwithstanding that it is not listed as a party in the relevant schedule …"* [Emphasis added]

[44] The court has concluded from these exchanges that everyone involved in the correspondence (including Mr McAuliffe) was aware of the potential existence of a Shareholders' Agreement and its importance and indeed, at that stage, assumed its binding effect.

[45] There follows an email from Mr Turley to Mr Jones (timed at 12:48 on 30 August 2013) containing a draft of his proposed email advice to the Company – presumably for Mr Jones' comment or review.

[46] The next event in sequence is an email of 30 August 2013 (14:45) from John Turley to James Taylor of the Company containing his final advice. It is in the following terms and follows exactly the draft sent earlier to Mr Jones:

> *"We have received instructions from Johnsons to provide an independent opinion to North South Pig Company (NI) Ltd (the "Company") on its ability to declare an interim dividend …*
>
> ***You have confirmed that there is no Shareholders' Agreement or other Agreement currently in place for the Company which would deal with the procedure to be followed by the Company in declaring a dividend,*** *or indeed its ability to do so whether such dividend is a final dividend, interim dividend or special dividend. In such circumstances, usually the procedure for a Company in declaring an interim dividend should be set out in the Articles of Association (the Articles)."* [Emphasis added]

[47] Having set that context and making it clear that the advice was predicated on there being no Shareholders' Agreement, the email then refers solely to Regulation 103 of Table A (as above) which speaks only in terms of the lawfulness of declaring a dividend from distributable profits. It proceeded to confirm the appropriateness of the directors proceeding along that route on the facts - ignoring entirely the issue of the alleged Shareholders' Agreement - before concluding that:

> *"Subject to the provisions of the Order, the Directors may pay interim dividends if it appears to them that they are justified by the profits available for distribution."*

[48] That email is followed by an email of 2 September 2013 (*i.e.* the following Monday) which provides draft Board minutes providing for the payment of a dividend. Those Board minutes recite the distributable profits of the Company as at 31 August 2012 referring specifically to a figure of €1,562,706 and detailing that after "***due consideration of the requirements of ss 170-174 Companies Act 2006***" a resolution be passed to pay a dividend of €24 per Ordinary Share to the registered members at a total cost to the Company of €1,363,248. Included with the draft minutes was a draft letter to shareholders referring to the resolution passed at a Board meeting on 3 September 2013 and informing them of payment of the €24 dividend.

[49] What happens next is both confusing and concerning. The court was provided with a set of minutes purporting to be in relation to a Board meeting held at the Charleville Park Hotel, Co Cork on 15 February 2013 ("*the February 2013 Meeting*"). The minutes bear the initials of the then directors (the Outgoing Board) (on each page); are signed by each of them and dated 30 September 2013 (*i.e.* after

the termination of their office). The minutes begin by recording a desire to help farmers by the release of funds because of the then current "*feed crisis*." There is a strong impression of the directors' desire to focus that on "loyal shareholders." What is significant, however, is the Section entitled "Dividend" which, as it transpires, **follows verbatim** the wording provided by Tughan & Co in the draft minutes which they supplied on 2 September 2013 (*i.e.* some 7 months after the February 2013 Meeting) – albeit changed to remove the specific amounts of distributable profits and the size of the dividend. That section of the minutes simply purports to record that there was a proposal for a dividend based on the distributable profits as at 31 August 2012 and "***after discussion and following due and careful consideration by the Directors of those matters set out at Sections 170-174 of the Act***" [emphasis added] it was resolved:

> "*The Directors having satisfied themselves that its payment would not affect the Company's ability to pay its foreseeable debts as they fell due, a dividend (the "Dividend") be paid immediately to the members of the Company whose name(s) appear on the Register of Members at the time of the resolution*."

[50] It was noted that the Company had sufficient cash to satisfy that dividend.

[51] The minutes continued to separately record under a heading entitled "Accounts" that:

> "*it has been brought to the Board's attention that in the Accounts some shareholding funds have been classified incorrectly as share capital as it should have been classified as a loan*" and that this "*needs to be corrected in the Accounts for the year ending 31 August 2013. The Board have agreed to pay back this loan due to the worldwide financial crisis and some Shareholders looking for their loan to be repaid*."

[52] In short, the minutes of the February 2013 meeting suggest that there is a resolution (a) to pay a dividend and (b) that the capitalisation of the Company be re-ordered and to re-designate what had previously been accounted for as "share capital" as "loan capital." As a result, a payment of €1,533,654 was made to shareholders in September 2013 – just before the Outgoing Board resigned. In contrast the draft minutes supplied by Tughans the total amount to be distributed was given as €1,363,245 – an increase of c. €170,000 on the original proposal.

[53] The suggestion made by the plaintiff – and accepted by the defendant at the Trial – is that this set of minutes is a forgery and that these two sections in particular were inserted <u>after</u> the Tughan & Co advices had been received in September 2013. Mr McAuliffe, in his oral testimony, lays the fault for that at the door of Mr Taylor,

the then Company Accountant who was not available to the court to deal with that allegation.

[54] Taking that acknowledgment on its face the plaintiff argues (aside from the questions of bad faith and dishonesty which it raises) – that there was, therefore, no effective resolution passed in relation to the dividend **at all** and certainly not one which satisfied Clause 9 of the Shareholders' Agreement *i.e.* which required a 75% majority of the shareholder vote.

[55] As to the question regarding the re-capitalisation of the Company the plaintiff says similar considerations apply. It cites that the resolution passed on 21 August 2006 (just prior to the Shareholders' Agreement) which increased the share capital to 900,000 Ordinary Shares of €20 each and (in line with the draft Shareholders' Agreement) that all of the shareholders proceeded on that basis *i.e.* that they were acquiring a €20 share with the €20 being deducted in respect of sows supplied. Given that it was a shareholder reserved matter under the Shareholders' Agreement, any change in share capital, the plaintiff says, could only have been achieved **if** there had been a Majority Vote applying (Clause 7.16) approving that proposal and that no such resolution exists. It follows, the plaintiff argues, that the 2008 reorganisation referred to at paragraph [18] above and in more particular detail in paragraphs [103] *et seq*. below was not properly authorised.

The Directors' Payments

[56] A collateral issue raised by the plaintiff is a challenge to what it calls an unauthorised payment of €40,000 made to the Outgoing Board before its departure. This also relates to the Board meeting on 3 September 2013. The minutes of that meeting records that the Directors had resolved to resign but that they "*felt very upset over what [was] happening*" and that they "*agreed to take a termination payment of €10,000 each*", it being agreed "*that each Director should invoice the Company for €10k per year for every year spent on the Board to cover expenses etc as this was agreed at the beginning but Directors never sent invoices*." There is a degree of confusion here. The plaintiff, variously makes reference to larger payments (for example in its closing submissions) and, indeed, it would seem that the Outgoing Board individually did issue invoices for earlier years (each for the sum of €60,000) that were not, in the final instance, paid. On the case as presented, however, it would seem that the amount claimed in the Statement of Claim is limited to a sum of €40,000 as paid to four of the Outgoing Directors in September 2013 and it is on that sum that the court focuses its attention (*i.e.* €10,000 for each outgoing director).

[57] It is noted that Pat Plunkett, who was the fifth director in the Outgoing Board, received payment but returned his cheque after the subsequent events in September 2013.

Summary of 2013 Events

[58] Frankly, this chain of events is difficult to unpick but in chronological order the following seems to have occurred. In February 2013 there does appear to have been an acknowledgement of the urgent need for cash to be distributed to some shareholder producers. During the spring and early summer of that year relationships between a certain body of shareholders and the Board deteriorated leading to the exchanges between solicitors which are referred to above. The advices provided by Tughan & Co/Johnsons (however orchestrated) appear to have been interpreted by the then current directors (*i.e.* the Outgoing Board) as authority for the Board (in line with Table A and ignoring the Shareholders' Agreement even though they believed it to be binding and were then asserting its validity) to declare a dividend. As the practicalities of that distribution came under closer scrutiny it would appear to the court that it was determined that the capitalisation of the Company was incorrect and that in fact shares had a nominal par value of £1. It was thus decided that a repayment of loan capital was the appropriate way forward. [The court notes that this approach coincidentally would have been more tax efficient than a payment of a dividend – which would attract withholding tax.] This all appears to have been concentrated into a very short period commencing in late August and ending on 10 September 2013 – being the period during which pressure clearly mounted on the Board with calls for its removal.

[59] At some point, as Mr McAuliffe acknowledged, a decision was taken to "*retrofit*" (my term) this process into the minutes of the February 2013 meeting with the intention of providing the appropriate authorisations to allow the accounts to be restated and provide authority for the dividend.

[60] What the Company finally purported to distribute to shareholders (in mid-September) was (i) a dividend of €8 per share and (ii) a refund of €19 per share as a repayment of the re-designated "*loan capital*" making a total distribution of €27 per share - €3 more than contemplated by the Board when Tughan & Co were asked to advise (in mid-late August). In total a schedule produced in evidence shows that a sum of €1,533,654 was paid by cheques issued to shareholders - including substantial payments to the directors as shareholders prior to their departure as the Outgoing Board.

[61] Suffice it to say, at this stage, that the question of the dividend and the other payments which were authorised by the Outgoing Board prior to its resignation in September 2013 is one of the major heads of claim relied upon now by the plaintiff. In this regard the Statement of Claim claims (a) the sum of €189,856 which was paid by way of dividend (and not refunded) and (b) the €40,000 in fees to the Outgoing Board. Both, it is asserted, were paid in breach of the Shareholders' Agreement and the fiduciary duties owed by the Company's then directors.

Truly Irish Country Foods Limited – "Truly Irish"

[62] The balance of the plaintiff's claim focuses on Truly Irish. As I have indicated above, one of the main issues which led to the fracture in the Company was a suggested lack of transparency in the operation of the Board leading to the 2013 call for an EGM. In large part, this related to the (a) setting up; and (b) operation of Truly Irish Country Foods Limited ("*Truly Irish*"), a company incorporated in the Republic of Ireland and the fifth defendant to these proceedings. It is Truly Irish which is the registered owner of the "*Truly Irish*" Trademark. This Trademark was registered in the Republic of Ireland on 24 August 2009 and is applied to a number of finished pork retail products such as bacon, black pudding *etcetera*. I note, merely in passing, that any question of trademark infringement is not a part of this case and that in any event it would be for the courts of the Republic of Ireland to determine that, or indeed any question relating to the constitution of Truly Irish, they having jurisdiction in respect of both matters.

[63] From the evidence to the court the issues around Truly Irish would seem to have arisen when it was established (after a check had been undertaken into the constitution of Truly Irish, in Companies House, by an accountant acting for one of the shareholders) that ownership of the voting rights in that entity rested exclusively with its Board and that the *"'A' Ordinary Shares which individuals* [*i.e. producers*] *were receiving (by way of deduction) did not carry substantive rights.*"

[64] Before delving into this in any detail one has to look at the history of the creation of "Truly Irish" as a concept. It is clear that the "*farm to fork*" idea had its origins as far back as the strategic report undertaken in 2001 (*i.e.* the 2001 Study (above)). That concept, in large part, formed the basis underpinning the strategic objectives of, firstly, the co-operative and then, latterly, the Company (for example see Article 3(A)(ii) of the Plaintiff's constitution (above at [12]). In March 2008 the Company's annual Circular spoke of the fact that "*the Company is about to spearhead new innovations … to ensure that the financial benefit from the success of the new ventures is only for those who are 100% committed*" [emphasis added]. In retrospect that was alluding to the incorporation of Truly Irish, as a new company and the way that shares would be allocated.

[65] Truly Irish was incorporated in April 2008 in the Republic of Ireland. Its objectives were described as "*[carrying on] businesses packers, preparers, processors and producers of all types of meat and meat products, as slaughters of livestock, as importers, exporters, wholesalers and dealers in all types of livestock and meat products, and all related activities.*" As I have indicated, it secured registration of the "*Truly Irish*" brand in 2009.

[66] The first to fourth defendants together with Mr Rory O'Brien were appointed as Truly Irish's initial directors. In terms of the shareholding, this was divided as follows:

- Five ordinary shares (which incorporated full voting rights) were issued to those five initial directors;

- A class of "A" ordinary shares was created on the basis that those shares could be subscribed for by pig producers at the rate of €15 per sow supplied to NSP. The underlying rationale for this approach appears to have been that it was seen by the Board of NSP at that point as a way of encouraging and rewarding "loyal" shareholders (*i.e.* those who had supplied sows to NSP) and excluding the "*disloyal*". The "A" shares did not carry voting rights. The plaintiff's case as set out in the Statement of Claim is that this resulted in a payment of €397,210 being received by Truly Irish. The plaintiff, in its Statement of Claim, says that this sum was paid (a) in breach of the Shareholders' Agreement and the constitution of the plaintiff and (b) is further a breach of the directors' fiduciary duties. This aspect of the claim is not carried through into the plaintiff's closing submissions;

- 50,000 preference shares were also created at this time and issued to the plaintiff in exchange for a cash injection of €50,000 – essentially by way of securing the initial funding for the venture. These shares (together with interest calculated at 2%) were redeemed prior to the change in Board in September 2013 - and minuted in the minutes of the meeting of 3 September 2013. [Notwithstanding its repayment, this sum was also initially claimed by the plaintiff (together with interest) in its Statement of Claim.]

[67] Dealing first with the shareholder deduction it would seem that the origins of the €15 deduction and its payment to Truly Irish appear to have been based on a resolution passed at the Company's EGM on 23 June 2009 when (according to the minutes of that meeting) after a discussion of how Truly Irish was "*going to work*" a deduction of €15 to "*market the brand*" (which ultimately became the Truly Irish brand) was "*unanimously backed*".

[68] The essence of that marketing campaign was based on the fact that the products to be sold under it were 100% Irish sourced and, therefore, free from the dioxin issues which had affected the pig industry throughout other parts of Europe at that time. The ability, therefore, to establish local origin was a major and unique selling point.

[69] On the back of that concept farmers and shareholders of the plaintiff were encouraged by the plaintiff Company to promote Truly Irish products "*on a local community basis …*" - through individual attendance at local stores, agricultural shows and the like. The by-line adopted and promoted extensively **by the Company** was "*Truly Irish – Not Just Our Name – Our Guarantee*". A formal launch of the brand was proposed for the early part of 2009. In the Company's Circular of 7 April 2009 there was reference to the "*continued supply of sows … is what allows us to build a consistent supply chain and enables us to invest in the marketing of Irish pork going forward.*" It also noted that "*it is vital that we now say to you as a shareholder that this*

milestone only marks the very beginning of the Truly Irish lifestyle." At the same time the Circular exhorted shareholders to support the efforts of the NSP Board "*in establishing the Truly Irish Country Foods concept ... as a live brand.*"

[70] The May 2010 Circular – whilst reminding people as to their legal obligation to comply with Clause 5.1.1 of the Shareholders' Agreement in relation to the supply of sows (as mentioned above) also recorded that "*an agreement between NS and TI has been put in place for NS to collect €15 from the farmer/supplier for each sow slaughtered by NS and pass on to Truly Irish in lieu of a 'Truly Irish share'. The share will be issued to the individual farmer/supplier and not NS.*" All of these actions, it is quite clear, were initiated and promoted by the plaintiff and its Board.

[71] In October 2010 a bonus of €10 per sow supplied for the months May/June/July of that year was also offered to "*loyal shareholders who could convert the sum into bonus shares in [Truly Irish]*".

[72] In summary, the court concludes that clearly the essence of these arrangements was to ensure that loyal shareholders in NSP were incentivised – potentially at the expense of other members. In each case, however, it is clear that it was the Company who was representing to its shareholders that it was in control of the Truly Irish concept.

[73] The plaintiff's case on the issue of Truly Irish is that in the events that have occurred, firstly, the broad concept behind the Truly Irish brand was "*appropriated*" by the Outgoing Board and developed through the separate company of which they had retained control when it was set up in 2008 and, secondly, that in the face of the disagreement within NSP, farmers were also encouraged to supply sows direct to Truly Irish in the lead up to the EGM in September 2013 (and afterwards) – with a corresponding detriment to the plaintiff's business.

[74] The basis of the latter allegation is that after its departure, the Outgoing Board continued (and indeed continues) to use Truly Irish as the vehicle through which sows continue to be slaughtered – utilising a plant which is operated by Finn Meats in County Cork. The plaintiff, it asserts, had no other option but to act as an introducer to Rosderra. The plaintiff's claim, in summary, is that the setting up of Truly Irish in: (a) the manner in which it was incorporated; (b) the manner it was funded by NSP shareholders; and (c) the diversion of trade that resulted individually and collectively constituted a breach of both the Shareholders' Agreement and the fiduciary duties which the outgoing directors owed to the Company and its shareholders. It is on those allegations that the claim for loss of profits in the Statement of Claim (valued at €4,095,531) and loss of shareholder or "equity" value (put at €2,359,180) in NSP flowing from those events as set out at (Paragraph 11(h) of the Statement of Claim) is based. In addition the plaintiff raises a claim for "*accounts and enquiries and equitable compensation/disgorgement of profits*. (Para 11(i))." In reality what this latter allegation translates to in terms of the

evidence is (*per* the plaintiff's expert) a claim for the "equity value" of Truly Irish which in turn is placed at €2,890,984.

Finn Meats

[75] As I have said part of the plaintiff's claim for loss of profits and loss of value is based on the allegation that the Outgoing Board sought to attract sows in competition with the plaintiff's original business model. The alternative slaughtering was arranged through a company called Finn Meats based in Cork. The plaintiff's case is that this arrangement was set up in August 2013 and was done with the "*purpose of preventing Finn Meats from doing business with the Plaintiff and/or [the Plaintiff] securing the services of Finn Meats.*"

[76] As I have explained the very origins of NSP arose from the fact that there were a very limited number of slaughtering facilities in Ireland that were appropriate for the slaughtering of sows. Finn Meats was one such plant because:

- Its racks had been designed for the slaughter of venison and therefore were sufficiently high off the ground to facilitate the slaughtering of sows; and

- It had the on-site capability of chilling carcasses down to the requisite temperature of 7°C before the carcasses could be transported to Germany in refrigerated containers.

[77] The court was provided with a letter from Truly Irish to Finn Meats confirming that Truly Irish had entered into a contract for the slaughtering of sows with them on 1 September 2013 – some 9 days before the Outgoing Board resigned.

[78] In bald terms the plaintiff says that in 2013 the Company had a turnover of €5.3m which declined to nil in the financial year 2014/15 as a result of a lack of a suitable slaughtering facility due to the defendant's actions. That left them with no option (says the plaintiff) – both practically and in order to mitigate potential losses - other than to enter into the arrangement with Rosderra by which the Company acted only as an "*introducing agent*" – negotiating a higher price for sows than individuals might otherwise obtain themselves. The plaintiff's loss of profit and value claim is, therefore, based on: 1. the additional competition that the fifth defendant created by which alternative slaughtering arrangements were provided; and 2. the Company's perceived inability to use Finn Meats to slaughter sows in line with the original business model of the Company and the perceived losses that flow from that. The losses it suggests are as a result of a turnover in NSP of €5.3m being reduced to nil. This it lays entirely at the feet of the Outgoing Board and says that their actions forced the Company to then adopt the alternative of becoming an introducing agent to Rosderra which in reality does not produce any income for the Company and which has led to the fall-off in turnover and thus both loss of profit and shareholder value.

The plaintiff (in summary) says that all of the events related to Truly Irish were:

- in breach of the Shareholders' Agreement; and
- a breach on the part of the Outgoing Board of the duties owed by them pursuant to sections 171-177 CA 2006; thus
- resulting in its claim for loss of profit; loss of value and/or disgorgement of profits.

The McAuliffe Transport Contract

[79] The final plank in the plaintiff's case relates to the nature and propriety of a haulage contract which was entered into between the plaintiff (1) and the first defendant/McAuliffe Transport (2) on 17 May 2006. Given the original business model of the Company, this contract was critical because it provided for the transport of sow carcasses to Germany where they were sold to end users in order to gain more of the producer's margin. It was entered into at a point before Mr McAuliffe became a director of the Company.

[80] The plaintiff suggests that the contract is an example of self-dealing, that it was not a contract which was properly procured or tendered and, that, as a result of the costs which resulted, represented a *de facto* erosion of the profits within the Company. The plaintiff cites breach of the Shareholders' Agreement and breach of the fiduciary duties owed by defendants 1-4 in support. Based on that assertion it claims an unliquidated sum by way of damages and/or that it suppressed the plaintiff's overall profitability.

[81] To that the defendants say:

- That on the evidence of Paul Gilmore and because of the very particular requirements of the transport contract "*no [other] haulage company would touch it*";
- That Mr McAuliffe was "*persuaded*" by Mr Gilmore to enter into the contract against his initial reluctance;
- That that reluctance arose from the fact that specialist containers containing "*euro rails*" had to be purchased by him at a cost of circa €80,000 per unit;
- That the initial contract was heavily negotiated with Mr McAuliffe with the Board before he was a director and that it was entered into and that the uplift (€300 per consignment) (when agreed) (in November 2007) were both heavily negotiated and that the uplift was essential to reflect increasing costs such as diesel *etcetera*; and

- That consequently both the original contract and the subsequent variation were properly approved by the Board and within the Board's powers – and that on both occasions the Board were fully aware of the relationship with Mr McAuliffe and that accordingly the plaintiff's claim has no merit and that the contract entered into and/or varied fell within the powers of the Board.

[82] That lengthy and convoluted history of the nature of the dispute as detailed from the oral and documentary evidence is a prerequisite to addressing the issues before the court to which I now turn my comments.

Is there a Shareholders' Agreement?

[83] This simple (but in this case critical) question is normally easily answered as a question of fact but not, I fear, in this case. Neither party has produced a single document – or even a series of documents – executed by:

(i) the Company – in a manner that complies with the statutory requirements of sections 43/44 CA 2006 (as detailed above); and

(ii) all of the individual shareholders (either individually or collectively); or

(iii) (in particular) any documentary proof that a Shareholders' Agreement was executed by those that are named as defendants 1-4 in this action in their capacity as shareholders - whether recorded in a single or even a series of documents;

[84] What was presented were three different copies of a document each purporting to be a Shareholders' Agreement:

(a) the first is paginated and undated but is signed by an unidentified shareholder. It is wrongly (one assumes) executed as a deed by David Ronan and John Hanrahan as directors but in the place where a corporate shareholder would have been expected to execute and then purports to be executed as a deed by the Company by virtue of the signatures of David Ronan and Michael McAuliffe without clarity as to the capacity in which they signed. It is not clear the capacity in which they signed and it certainly was not established in evidence that the requirements of Section 44 CA 2006 were met. That version has a schedule appended identifying 182 individual shareholders with the "*number of ordinary shares subscribed for at the date hereof*" by each specified in varying amounts ranging between 3,800 and 45 shares. It suggests that the total number of shares subscribed for was 95,755;

(b) The second version is dated in typescript "31 August 2006" (the "2006 version") and from Mr Gilmore's evidence would appear to be the document which was presented to the shareholder meeting on 21 August 2006. At

Clause 7.2.8 this, when compared with version 1, has a threshold figure of €100,000 (being the threshold figure for transactions above which a 75% vote of shareholders is required for certain transactions). In the first version that threshold figure is inserted as €75,000. Otherwise they seem to be in almost identical terms. This version incorporates an alternative Schedule 2 which: lists 179 shareholders; refers to the total number of shares subscribed for as 100,905; and is un-paginated in its entirety. There is no evidence of it having been executed by anyone;

(c) The third version which the court reviewed is paginated but undated. This is the version which Mr Monagle, now one of the current directors of the plaintiff, produced to the court. It is executed, firstly (and incorrectly), by him at the foot of a Draft Deed of Adherence which is merely an appendix to the document. It is then executed again by him in two locations – firstly, (and correctly) as an individual shareholder and secondly, (and incorrectly) as a corporate shareholder. None of those signatures is witnessed. In this version Clause 7.2.8 has the threshold figure of €75,000. This version lists 182 shareholders and Schedule 2 resembles that in version 1. It does not appear to have been executed by anyone other than Mr Monagle.

[85] All of this is highly unsatisfactory from a corporate governance perspective but not, perhaps, surprising given the evidence of Mr Gilmore as to how the various versions of the Shareholders' Agreement were signed.

[86] Due to the unorthodox manner of its production, approval and execution and taking into account the specific requirements of sections 43 and 44 CA 2006 the court simply cannot say on the basis of the documents put before it and the evidence of the witnesses on the point that there is a fully executed and complete copy of the Shareholders' Agreement in existence. The Plaintiff asserts rights under it, but no evidence of the existence of a single complete Shareholders' Agreement (even if executed as individual counterparts) was produced and rather reliance was placed on the recollections of the witnesses who attended and gave evidence that various versions had been executed. None of those was actually able to confirm, at any stage, the execution of a single complete document and certainly not one that has been executed by the defendants in this case in their capacity as shareholders and, certainly, the plaintiff did not assert one particular version which met that requirement.

[87] At its core the court accepts that there is clear evidence of an offer having been made on the part of the plaintiff to subscribing shareholders that in return for the supply of sows (in the manner set out at Clause 5.1.1 of the draft) they in turn could acquire shares in the Company by way of the €20 deduction. That "supply contract" – albeit limited to the 5 year period set out in Clause 5.1.1 - is the core tenet running through this case. The court finds that there is ample evidence in the foundation materials leading up to incorporation of the Plaintiff (by which I refer to the presentations and circulars made to individual farmers) and, between that date

and the August 2006 meeting – that demonstrate that an "offer" was made that each farmer could participate in the venture upon those terms. It is equally evident that through their conduct a number of farmers (approximately 182 in number) accepted that offer. That acceptance is established through the course of conduct they adopted by which they supplied their sows for slaughter. In turn, through the deduction method anticipated in the draft Shareholders' Agreement, they paid for the shares to which they felt they were each entitled. Both Mr Gilmore and Mr McCaffrey confirmed in oral evidence that the annual returns were completed and filed on that basis. The disputed dividend(s) and/or loan repayments (which are dealt with below) were made to those who were thus registered as shareholders and, therefore, clearly acknowledged as members of the Company. However, whilst the court accepts that there is evidence of the basis of a "core" contract for the supply of sows by the producers and the issue of shares by the Company on those terms it is of the view that it is going too far to ask the court to accept that the contract thus created was one which then by implication incorporated all the terms of the very detailed draft Shareholders' Agreement – particularly when there is ambiguity as to which version prevailed.

[88] In reaching this conclusion, the court is also conscious that the Company's case (as against defendants 1-4) is asserted against them, in their capacity as shareholders, that material provisions of the Shareholders' Agreement have been breached and that loss has resulted. In support of the binding effect of the Shareholders' Agreement to establish that case reliance is placed by the plaintiff on the following grounds:

(a) That there was a partial execution of the document by some of the defendants in their capacity as directors (albeit not as shareholders);

(b) The oral evidence of Mr Gilmore as to the execution of the documents;

(c) Mr McAuliffe's evidence that he "abided by its terms 100 per cent";

(d) That D1-D4 are individually referred to (by name) in Clause 6.1.2 – although again that is as its initial directors;

(e) That there are numerous references where the Board of the plaintiff sought to enforce the terms of the Shareholders' Agreement and that by calling upon the principle that one cannot approbate and reprobate –see *Express Newspapers v News UK* [1990] 1 WLR 1320 (*per* Sir Nicholas Browne-Wilkinson V-C) - the plaintiff seeks to assert that the defendants cannot now resile from the binding effect of the Shareholders' Agreement.

[89] There is absolutely no doubt that the rights and obligations set out in the draft Shareholders' Agreement were frequently invoked by both shareholders and more importantly the defendants when they were directors (and notably in that capacity) on numerous occasions. The parties acted as though the document was in place.

The voluminous correspondence and circulars I have referred to confirm that fact – as does the solicitors' correspondence leading up to the EGM in September 2013. The reality, however, is that there is absolutely no evidence that D1-D4 (being the persons against whom the plaintiff now seeks to enforce the Shareholders' Agreement) actually signed it in their capacity as shareholders – and yet the capacity in which they signed is all important – see *Williams v Redcard Ltd and Ors* [2011] EWCA Civ 466. Notwithstanding the comment in Clause 5.1 of the draft Shareholders' Agreement that it might be "*enforceable by the parties between themselves in whatever capacity*" failure of proof of actual execution of the draft by D1-D4 in the correct capacity in my view negates that position.

[90] It is simply going too far for the court to find on the facts that there was a binding Shareholders' Agreement in place which was certain in respect of its terms – particularly in respect of the areas that are in dispute - and, importantly, which has been executed by all of the requisite parties in their correct capacities and (in the Company's case) in a manner that complies with the statutory requirements.

[91] The plaintiff's attempt to rely on the parol evidence of Mr Gilmore and others to circumvent this inadequacy is simply not sufficient to overcome the issue. Indeed, the fact that the plaintiff itself has not actually committed to the adoption of any one of the three versions of the Shareholders' Agreement which was presented to the court bolsters the court's view. On the principal question, therefore, whether a Shareholders' Agreement exists or not the court finds that there is no fully consummated and/or binding Shareholders' Agreement.

[92] Given that conclusion, it is unnecessary for the court to look at the specific - and indeed extensive arguments - between the parties over the terms of the Shareholders' Agreement and/or the ramifications which might flow from that.

[93] That conclusion does, however, as a result mean that the Company's constitution and the fiduciary obligations owed by the directors therefore come into much sharper relief.

Directors' Duties

[94] As an alternative to the breach of contract allegations, the plaintiff's Statement of Claim relies heavily upon a breach of the duties owed to the Company by defendants 1 to 4 in their capacity as directors during the operative period to which the claim relates. No other directors are party to that allegation (or indeed the claim) although clearly there were a number of other directors who acted in that role during the period from 2008-2013 when most of the events to which this action relates occurred. The action, though, is focused, in the main, on the events leading up to September 2013 – which is the period when they were each on the Board.

[95] The duties which directors owe under sections 171 to 178 of the CA 2006 are well known but, in summary, are as follows:

"Section 171 - A director must act within a company's constitution, and exercise any powers conferred for the purposes for which they are given – in other words for their proper purpose;

Section 172 – A director has an obligation to act in a way which he considers, in good faith, would best promote the success of the Company for the benefit of all (not just some) of its members and then provides at (a)-(f) a "statutory checklist" of matters which should be taken into account including (for example, and relevant to this case):

(a) the likely consequences of any decision in the long term;

(f) the need to act fairly as between the members of the Company;

Section 173 - A director must exercise independent judgment in a way that is authorised by the Company's constitution;

Section 174 - A director must exercise reasonable care, skill and diligence in the performance of his or her duties;

Section 175 – A director must avoid conflicts of interest."

[96] Section 178 provides that where there is a breach of those duties the consequences "*are the same [as] if the corresponding common law rule or equitable principles applied.*" In short where the directors of a company have been guilty of a breach of the statutory duties which they owe they are potentially liable in damages at the suit of the company. The principles at play are described in *Gower and Davies* at 16-31 and, indeed, in the helpful summary of the law in *Madoff Securities International Ltd v Raven and others* [2013] EWHC 3147 at [287] *et seq*. both of which have assisted the court in its deliberations.

[97] In the present case the plaintiff alleges that there has been a breach of those statutory or fiduciary duties on the part of the named former directors (*i.e.* defendants 1 to 4) which manifests itself by (and here I infer for it is not clearly articulated):

(a) The "stripping" of the Company of its capital through the actions taken by them in September 2013. Essentially this allegation focuses on, firstly, the payment of the dividend and/or repayment of loan capital and, secondly,

payment of what the Plaintiff describes as "*excessive*" director's expenses (*i.e.* the €40,000 paid to the Outgoing Board and now claimed within the plaintiff's Statement of Claim). The circumstances relating to both of these have been rehearsed extensively above;

(b) the "purloining" (to use the plaintiff's word) of the Truly Irish brand and the "*farm to fork*" concept through the incorporation of a separate company (*i.e.* Truly Irish) which was within the sole control of the defendants 1-4 and Truly Irish's subsequent exploitation of that brand/concept; and (post 1 September 2013),

(c) the diversion of sows from the plaintiff to Truly Irish for slaughtering and sale; and,

(d) the removal of Finn Meats as a potential slaughterhouse for the plaintiff and its members and the corresponding impact which that had on the plaintiff in terms of its ability to continue its previous business model and, therefore, maintain its profitability (and thus shareholder value).

[98] Each of these claims, the plaintiff says, constitutes a breach of the statutory duties owed by defendants 1-4 and, further, is a patent failure on the former directors' respective parts, to exercise the reasonable skill and care required of them pursuant to section 174.

[99] On the question of conflict (and alleged breach of section 175) it is, specifically, contended that the entry into the contract with Finn Meats on 1 September 2013 by the fifth defendant, (as promoted by the first to fourth defendants) put those named directors in a "*hopeless position of conflict*" – a conflict that has its roots in the "*incorporation of Truly Irish … its corporate structure, coupled with the use of the brand belonging to the Plaintiff and the provision of funding*" (thus placing the origins of the conflict back as far as 2008). Based on all these factors the plaintiff also seeks to claim "*damages or disgorgement of profits*" from the defendant former directors in breach of their fiduciary duties. The authority cited is *Sinclair Investments v Versailles Trade Finance* [2011] EWCA Civ 347 as support, *inter alia*, for the proposition that where a director has profited by using company assets or diverted an opportunity the resulting profits should be held on a constructive trust for the plaintiff. It relies, therefore, essentially on the exploitation of the Truly Irish brand and, by extension, the "farm to fork" concept and uses this to base its claim for the equity value of Truly Irish.

[100] To this allegation, the defendants say that the plaintiff has failed to particularise such breaches (or indeed its case) in sufficient detail and further argues that the defendants acted at all times within the plaintiff's constitution.

[101] This argument is developed in a number of guises. For example, on the issue of Truly Irish, it says that the Objects (as enshrined in the Company's constitution) permit the plaintiff generous powers to (as set out in its adopted Articles):

(q) *Enter into any arrangement for reciprocal co-operation or [to] engage in any business, trade or transaction within the Objects of [the plaintiff] or which is capable of being carried on so as to directly or indirectly to benefit [the plaintiff] and to subscribe for, take or otherwise acquire and hold, sell, deal with or dispose of any shares or stock in any such company and to subsidise or otherwise assist any such company;*

(x) *To establish or promote … any company … which may directly or indirectly [seem] calculated to benefit [the plaintiff].*

(DD) *To do all such other things as may be deemed incidental or conducive to the attainment of [its Objects].*

[102] On the question of the stripping of the Company of cash the defendants rely squarely on the provisions of Table A (as adopted) which specifically allow "*Directors to pay interim dividends if it appears to them that they are justified by the profits available for distribution*" and, on the question of the recapitalisation of the Company, that the "*bespoke*" Articles provide the Company with wide powers to "*increase or reduce its capital*" and/or consolidate its share capital.

[103] On the question of the recapitalisation of the plaintiff and the 2013 distributions the defendants also raise a very specific defence in relation to the events which occurred. That argument is quite technical but can be summarised as follows:

(a) Although the Defence disputes the validity of the Shareholders' Agreement there is an acknowledgment that under its terms (as drafted) the plaintiff Company was obliged to amend the initial authorised share capital of the Company (*i.e.* £2) by the increase of its authorised share capital to €18M divided into 900,000 ordinary shares of €20 each and to re-designate the two existing (subscriber) shares to a nominal value of £0.01 with a corresponding amendment to its Articles;

(b) The Defence appears to accept that the thrust of the Shareholders' Agreement (as initially drafted) was that the shareholders were thus agreeing to buy 20 shares for the sum of €20 to be paid by way of deduction (from sow prices) and that the plaintiff Company was to allot and issue shares accordingly. As I have already indicated I agree that this was reflective of the "core" contract between the plaintiff and shareholder parties;

(c) In terms of the structure of the Company, what happened next was the passing of a special resolution (on 21 August 2008) filed with Companies House (on 23 October 2008) in the following terms:

> *"1. The existing issued share capital of the Company of two ordinary shares of £1 each to be re-designated into two deferred ordinary shares of £1 each.*
>
> *2. The authorised share capital of the Company be increased by €18m by the creation of 900,000 ordinary shares of €20 each. The authorised share capital of the Company is therefore £1m (999,998 ordinary shares of £1 each plus two deferred ordinary shares of £1 each) and €18m (900,000 ordinary shares of €20 each) plus two deferred ordinary shares of £1 each. The issued share capital of the Company is £2 divided into two deferred ordinary shares of £1 each."*

(d) The updated Memorandum of Association of 11 November 2008 amended/updated the share capital to accord with the special Resolution thus:

> *"The Company share capital is:*
>
> *£13,252,800.76 based on mid-market exchange rates of 21 August 2006 (being 999,998 divided into 999,998 ordinary shares of £1 each plus €18m divided into 900,000 ordinary shares of £20 each) and two deferred ordinary shares of £1 each."*

(e) Between 31 August 2008 and 31 August 2010 the plaintiff issued (overall) 56,802 ordinary £1 shares with a capital value of £56,802 – contrary, therefore, to the expectation of shareholders <u>and</u> the provisions anticipated in the draft Shareholders' Agreement (and indeed the Schedules to each of the drafts) insofar as it failed to issue any €20 shares;

(g) The annual returns made on behalf of the Company in those and subsequent years (as one might expect) reflected various amounts of paid up capital. In the years from 2011 onwards the issued share capital was described variously as £56,802 and/or €56,802 – oscillating (in error) between a Euro and a £stg denomination. Each of those annual returns (and the statutory accounts) failed to make any reference to either a share premium or loan capital account. The shareholder funds were, therefore, calculated in each of those returns on the €20 per share basis;

(h) [As an added complication, the restatement of the share capital within the Articles refers to <u>€</u>56,802 whereas the restatement should have referred to the share capital at <u>£</u>58,802 – the result being that in relation to some issued shares shareholders received a £1 share for a payment (on the argument advanced by the Defence) of €1 - resulting in what amounts to a minor infraction of the no discount rule (*per* section 508 of the 2006 CA);]

(i) In relation to the events leading up to the September 2013 distribution, the Company (having treated the par value of each £1 share as a €1 share) then decided to reclassify the remaining €19 previously paid (through the €20 deduction mechanism) as loans from the shareholders. This was dealt with under the heading of "Accounts" in the minutes of the February 2013 Meeting (above) which it has been established were "retrofitted";

(j) The result of this recapitalisation is that the called up share capital (as reflected in the 2010 annual accounts) (£1,136,044) was reduced to €56,802 (again using the incorrect currency) (in the restated 2013 accounts) and, accordingly, the overall shareholder funds were reduced from £1.183m (in the 2010 accounts) to £466,846 (in the restated 2013 accounts);

(k) Given all of this, the Defence argues that what was paid in August/September 2013 was, firstly, a repayment of the shareholder loans (calculated at €19 per share and totalling €1,079,238) along with, secondly, the dividend of €454,416 (calculated at €8 per share) – the latter amount being one which the defendants say was easily repayable out of the then distributable reserves of the Company (applying Table A);

(l) The defendants say that their approach is confirmed by the accounting approach adopted by the new Board post September 2013 and since (and confirmed in the annual accounts and in evidence);

(m) They further say that the restatement accorded with CA 2006, Good Accountancy Practice and the common law in relation to mistaken payments - see Re *Cleveland Trust PLC* [1991] BCLC 242 and *Kinlan v Crimmin* [2006] EWHC 779.

[104] As regards each of the Board's decisions to (i) recapitalise, (ii) pay a dividend and (iii) pay directors' fees – the defendants say that all of these were within the competence of the Board as set out in the Articles (adopting Table A) (as amended).

[105] In summary, whilst they acknowledge the errors made in relation to the corporate governance, what the defendants are in essence saying is that the consequences of those errors mean that there have been no actual breaches of the statutory duties which the directors owed in relation to either the distribution of funds to shareholders or indeed for the sums paid as directors' fees and that the plaintiff's claim in this regard fails in its entirety.

[106] The parties' respective positions on the question of compliance with their fiduciary duties are, as one would expect, diametrically opposed. The plaintiff argues that the facts demonstrate that there are obvious breaches of those statutory requirements. The Defence, on the other hand, has advanced (as above) technical arguments as to how the defendants 1-4 in this action, as the Outgoing Board,

complied with the Company's constitution – thereby denying the existence of a breach.

[107] On balance, however, and having considered the evidence in some depth, the court finds for the plaintiff on this point on the grounds that the facts demonstrate what, in any context, must be considered a breach of the fiduciary duties which the Outgoing Board owed at the operative point in time *i.e.* when the monies were paid out. In saying this I am mindful that in questions such as this the court must both look at what happened and also query the motivations that led to:

(a) The September 2013 distributions;

(b) The payment of the directors' fees; and

(c) The events surrounding the incorporation and then operation of Truly Irish (the fifth defendant) both leading up to and after the 2013 change in the Board of the plaintiff.

[108] In that context, for the Defence to plead what are essentially quite technical defences based on corporate governance – sometimes which the court concludes inadvertently played to the defendants' advantage – is to divorce events entirely from what was happening in reality.

[109] If one looks, firstly, at the 2013 distribution the minutes of the February 2013 meeting (when one abstracts the sections in contention dealing with "Dividends" and "Accounts") one sees a picture of a business with ambitions to grow and profit and indeed there is evidence of substantial discussion around the Board's analysis of the purchase of a meat plant (McCarrens) which was likely to come onto the market as a distressed sale. That was discussed as a way of fulfilling the Company's original goal of securing a meat plant and, so, consistent with the original Mission Statement – a Mission that had been pursued from the date of original incorporation (or at least adhered to as an aspiration) by successive boards. That discussion focussed on the ability to fund the acquisition coupled with the potential of bank borrowing to achieve it – all of which would have pre-supposed the existence of a balance sheet at least as strong as that which existed in February 2013. In fact, as indicated above, the events surrounding the September 2013 distributions did nothing more than decimate the balance sheet both through a combination of the recasting of shareholder capital as shareholder loans and the payment of a significant dividend. Added to that one has the question of directors' fees – of which there had been no prior mention in the Company's 8 year history and which are recorded in the minutes initially not as "expense claims" but rather as a "termination payment." Indeed, the "termination payments" originally invoiced purported to backdate those payments for a period of 6 years at a sum of €60,000 each. Those invoices (as raised) do refer to directors' fees and "expenses" but on the evidence remain entirely unvouched or particularised.

[110] The abstraction of what in reality was a large percentage of the company's funds at any point is bound to raise questions. In this case, it is more than just coincidental. I find that this change in attitude coincided with the exchange of solicitors' letters and the very real threat of an EGM aimed at a removal of the existing Board. In that context, when one looks at the detail around:

(a) the manner of the procurement of the advices from Tughans and Johnsons – the detail of which is set out extensively above at paragraphs [39] *et seq.*;

(b) how that advice was interpreted and/or used by the Outgoing Board – taking into account that:

(i) at that point they sought to rely on the existence of the Shareholders' Agreement to bolster their position; and

(ii) that the defendants had on foot of the solicitors' letters, both collectively (as a Board) **and individually** (as directors) been warned or put on notice of the potential ramifications of an extraction of funds; and

(c) the final and acknowledged "retrofitting" of the disputed sections into the minutes of the February 2013 meeting

the court cannot help but conclude that the Outgoing Board had formed a determination that they would distribute as much of the reserves of the Company as they could whilst they were still in control. All of the registered shareholders benefitted from that decision but it cannot be ignored that each member of the Outgoing Board, individually, also received cash payments of (a) dividends of between *ca.* €11,000 and €28,000 and (b) loan repayments of between *ca.* €26,000 and €66,000 corresponding to their respective shareholdings.

[111] The previously expressed desire (discernible from the February 2013 meeting) to "assist" farmers in the face of a "feed crisis" (notably in the absence of any firm evidence before the court demonstrating the strength or frequency of those demands) does not in my view provide a sufficiently cogent explanation for the extraction of a total of €1,529,740 and the writing of cheques of €50,000 to the directors in respect of expenses which constituted the majority of the cash reserves in the Company at that time. The resultant balance left, as working capital, was in the region of c €285k. The Defence says that, given the subsequent operation of the Company (and the limited demands for working capital at that time) that was more than sufficient – sufficient in any event to discharge the Board's fiduciary duties. The court's view is that the manner of the extraction, coupled with the speed at which it was carried out (over a time period of less than one month), suggests strongly that there were other motivations at play and that the Outgoing Board failed to give any serious consideration to the ongoing operation of the Company post their departure much less its financial operational requirements. Certainly no

evidence was put before me that other issues were considered – much less anything to establish that they considered the question of the requirements imposed on them by statute. The cumulative effect, in the court's view, amounts to a breach of the directors' fiduciary duties as set out in ss.172-7. It finds that the Outgoing Board's motivation simply overrode any questions of corporate governance and due consideration of their statutory duties and that their subsequent actions (such as the "retrofitted" minutes) have been attempts to cover up or put a gloss on those inadequacies.

[112] In addition, the actual Board resolution that purported to express that the directors had considered the matters in ss.170-174 CA 2006 has now been accepted by the defendants to have been false. There does not, therefore, appear to be a valid resolution to pay the dividend and/or to repay the loans. Nor was there anything put to the court in evidence or on the papers to demonstrate that defendants 1-4, at the stage when funds were extracted, were using the powers vested in them for a proper purpose or that they had even attempted to consider:

(a) what was in the best interests of the Company (as required, for example, under section 172) and (in particular) that they gave consideration for example (*per* s.172(a)) to the longer term interests of the Company;

(b) that they were exercising independence (*per* the requirements of section 173) (as opposed to being motivated by self-interest); or

(c) that they were correctly managing the conflicts of interest that were obviously in play (as required under section 175) when one considers Truly Irish. There is, therefore, absolutely no evidence before the court that defendants 1-4 properly took into account any of those matters or anything in evidence to rebut the suggestion that they breached their fiduciary duties.

[113] In arriving at this conclusion the court has also had regard to the credibility of some of the witnesses for the Defence. The first defendant, Mr McAuliffe, did not, in the court's view, adequately explain how the minutes of the February 2013 meeting came to be falsified. It was convenient to lay the blame on Mr Taylor but from a review of the contemporaneous correspondence and email exchanges there is no doubt in my mind that Mr McAuliffe was also aware of the detail of the advices of Johnsons/Tughans in August/September 2013 - not least on what was then considered the fundamental question of whether a Shareholders' Agreement existed or not - and the actions which were taken on the back of it. It was convenient, to say the least, at that point to ignore the possibility of its existence. As against that at almost every other stage – as evidenced by the Circulars and correspondence - both the Board and defendants 1-4 sought to rely on the Shareholders' Agreement's existence. The then Board's approach at that crucial time is, in my view, truly a blatant attempt to "approbate and reprobate." In bold terms, they sought to deny the existence of the Shareholders' Agreement entirely as regards the question of the dividend but intentionally at every earlier stage sought to assert it to maintain their

own position as current directors and to determine issues as between "loyal" and "disloyal" shareholders. In the final instance the Outgoing Board collectively signed what are now acknowledged to be falsified minutes. Given the timing of those signatures (30 Sept 2013) and the actions which had been taken on the back of them the then directors – particularly Mr McAuliffe – cannot have been ignorant of the significance of what was going on. That conclusion is strengthened I feel given the fact that Ronan O'Brien & Co, Solicitors, had already written to each director in July 2013 highlighting their potential personal liability if monies were extracted. From that date onwards each must have been on notice of the issue and the potential personal ramifications.

[114] Similarly, I do not accept that Mr McAuliffe was unaware of the more recent attempts on the part of his son to have the existing Board of the plaintiff replaced – an attempt which was (as the court sees it) nothing short of a flagrant attempt to bring an end to this litigation by other means.

[115] On an objective assessment and adopting the approach of Gillen J in *Thornton v NIHE* [2010] NIQB 4 I did not consider Mr McAuliffe to be a credible witness.

[116] On the question of the dividend/loan repayment and the "termination payments" the court concludes, firstly, that in the case of the dividend/loan there is no evidence of a valid resolution for such payment(s) (they both being subject to the 'retrofitting' exercise) and, secondly, that all three payments are tainted by the personal motivations of the directors to extract funds before they lost control leading to my conclusion that their specific actions were in breach of their fiduciary duties as owed to the Company at that time.

[117] As the plaintiff contends, the reality is that as far back as 2008 when Truly Irish was incorporated – and the voting control concentrated in the hands of the then Board – one can discern an inevitable and growing conflict of interest as between that company's operation and its success and the operation of the plaintiff for the benefit of its members.

[118] Whilst the court accepts the argument of the Defence that the Board had a wide discretion of operation under the plaintiff's constitution (more so in light of the court's finding that the Board and the defendants were not constrained by a Shareholders' Agreement), that does not deal with the requirement that the powers which were vested in defendants 1-4 fundamentally had to be exercised in a proper manner, in good faith and for a proper purpose.

[119] To particularise this, while the constitution of the Company (for example per Article 3(r)) specifically allowed for the incorporation of (a) subsidiary(ies) and/or (*per* Article 3(q)) the engagement of "*any arrangement*" it is clear that when one considers those provisions in full those powers were excisable only where it was "*[calculated] to directly or indirectly benefit [the Plaintiff]*" (see the relevant Articles set out at Para [101] above.) The powers that were vested in the directors under the

constitution were all directed to that end *i.e.* in furtherance of the objects of the plaintiff and that is what the directors should have had uppermost in their minds. The facts around the incorporation of Truly Irish suggest a different intent. It is very clear that Truly Irish was created as a parallel company in the control of its Board – not as a subsidiary of the plaintiff. Its control, and indeed, the profits which arose from its operation fell outside the plaintiff's influence.

[120] As against that, all of the Circulars to shareholders which were sent out by or on behalf of the Board of the plaintiff, and all of the promotional activities which the Board encouraged shareholders to undertake were, the court finds, based on representations that those endeavours would be directed towards the benefit of the plaintiff which in turn clearly gave the impression that it was the plaintiff who was driving the "farm to fork" objective. Some of the examples of that are set out above at paragraph [69] *et seq*. In addition, the intention behind the Shareholders' Agreement on this point also gives direction. Clause 5.2.1 (quoted above) required that any "expansion, devolution or evolution [of the Business]" would only be done through a subsidiary or a JV Company in which the plaintiff would hold more than 50% of the shares. Equally, by the same token, each of the directors would have (at that stage) been on notice of the restrictions in Clause 12 of the Shareholders' Agreement, namely that they would "*not be engaged or concerned in any activities … in competition with the business*."

[121] I accept, from the evidence of Mr Monagle and others, that it is very clear that the majority of the shareholders saw the incorporation of Truly Irish as little more than a vehicle to realise the goal of that "*farm to fork*" concept under the auspices of NSP and to penetrate the wider pork market. A wholly owned and controlled subsidiary company could and would have achieved that. To be clear I am not using the term "farm to fork concept" in this context in any intellectual property protected sense – fundamentally it does not have that protected character. It is a concept. Mr McAuliffe gave evidence that the concept was always his idea. I do not accept that given that: (a) it had been around as an objective or goal since the earliest beginnings of the Co-Operative and then the Company (see the 2001 Study referred to at Paragraph [6]); and (b) it is paralleled in other industries besides pork production. Even if it were true, whilst he and the other defendants were directors of the plaintiff their duties, first and foremost, were to direct their efforts to the discharge of their statutory obligations to further the Company's goal of achieving its "*farm to fork*" objective. To the court's mind the actions of the Outgoing Board in its approach to the incorporation of Truly Irish and the first to fourth defendants' 1-4 retention of control demonstrates a more concentrated self-interested motivation which dates as far back as 2008 when it was incorporated. There was no cogent evidential or logical basis advanced by the Defence to suggest why Truly Irish could simply not have been constituted as a subsidiary of the plaintiff and/or been more reasonably developed to further the plaintiff's objects as both expressed and promoted in the Articles and in the Shareholders' Agreement which (at that time) the Board undeniably considered to be binding. At the very least there was an

impermissible attempt to exclude the members of NSP who were perceived as being "disloyal."

[122] Overall, in their retention of control of Truly Irish through the voting shares held by the Outgoing Board there was, the court concludes, a move away from (a) what they were properly permitted to do under the plaintiff's constitution and (b) what they both publicly and privately had represented to the plaintiff's members. It was the growing awareness of exactly what had happened, (as will be apparent from the foregoing paragraphs), that led to the call for an EGM to remove the Board in the first place and, indeed, this litigation.

[123] In the context of what was happening one can see how the growing issue of the "disloyal" or "non-supplying" shareholder may have coloured the Board's view but, regardless, that did not, in the court's opinion, entitle the Outgoing Board to set up what was capable of being (and indeed has become) a rival trading company. Those actions, the court concludes, most certainly led the Board into a conflict of interest and ultimately, for the reasons given, a breach of the directors' fiduciary duties as they came to adopt it as an alternative and rival to the plaintiff in the summer of 2013 and since.

[124] Inevitably that, in turn, brings into sharp relief the arguments around the fifth defendant's contract with Finn Meats. That, the plaintiff asserts, is yet another breach by defendants 1-4 in two ways: (a) through its direct competition and (b) in its denial of slaughtering facilities to the plaintiff. The court heard from Mr Stephen Finn about his Company's long association with Mr McAuliffe. I have concluded that Mr McAuliffe was in a position of influence as regards Finn Meats. I also find that he used that influence to persuade Finn Meats to continue slaughtering for Truly Irish. The letter from Truly Irish which confirms that contractual relationship speaks of a contract which began on 1 September 2013 – notably some 9 days before the Outgoing Board resigned. I have no doubt from the evidence that I heard from Mr McAuliffe, Mr Finn and Mr Monagle (with others) that the foundations of that arrangement were laid somewhat earlier than that date. The letter is, therefore, further and direct evidence of the conflict of interest which the Outgoing Board of the plaintiff then faced. I have no doubt in concluding that the aim of the contract between the fifth defendant and Finn Meats was to provide farmers with an alternative to the plaintiff – for the slaughtering of sows - and thereby to continue the association with "loyal shareholders". In doing so, I conclude that the Board was totally ignoring the obligations that it already owed to the plaintiff and its members.

[125] To conclude, therefore, on the question of adherence to fiduciary duties the court finds that the Outgoing Board was driven by a desire: (a) to extract cash which was ultimately to the detriment of the plaintiff in that it narrowed the options of what it could do and led to the less advantageous trading relationship with Rosderra; and (b) to secure a continuing location for the slaughtering of sows through the relationship with Finn Meats. Both had a material impact on the

plaintiff. The court, therefore, finds that the plaintiff's claim for a breach of the fiduciary duties has been established.

Remedies

[126] Having concluded that the breach of contract claim fails but that the claim in respect of breach of the fiduciary duties owed by the defendants succeeds for and to the extent of the reasons given I must now turn to the question of remedies. That, in itself, opens up another area of dispute between the parties as to what remedies are appropriate.

[127] Under this heading the plaintiff's claims fall into the following broad categories:

(a) **The dissipation of assets/funds**

Essentially this focuses on the following liquidated amounts as per the current Statement of Claim:

(i) €189,856 being "*dividend payments to shareholders which should not have been made*." In essence on the basis of the case these appear to be dividend payments which were made but have not been refunded and, according to the plaintiff therefore amount to a "*loss*" [Para 59 of the plaintiff's closing submissions];

(ii) €40,000 paid to defendants 1-4 and which the plaintiff claims were in respect of "excessive" expenses;

(iii) €50,000 paid by the plaintiff to the defendant in respect of an investment in preferential shares in Truly Irish – although not carried through in the case itself or the plaintiff's closing submissions.

[128] Taking (iii) first (*i.e.* the question of the preferential shares), having found that the Shareholders' Agreement is not "in play" the only question that arises for this court is:

(a) Was the investment of €50,000 authorised under the constitution of the plaintiff at the relevant time; and

(b) Did the plaintiff suffer loss?

[129] To deal with that in short order I am entirely satisfied that the investment itself – as an investment – was within the generous powers of the directors at the relevant time. As the Defence says the powers which the Board had under the bespoke Articles read in conjunction with Table A are very generous and essentially permissive in their nature on this point. I have concluded on the facts that the

investment was properly made and within the authority of the then Board. As to the question of loss, the minutes of the September 2013 meeting record a resolution to repay the preferential shares before the Outgoing Board resigned. That resolution and subsequent payment (together with the appropriate interest which had accrued) was made. I do not, therefore, see any basis for an alleged continuing loss or, indeed, the claim overall. No contrary position was advanced but out of an abundance of caution I have dealt with the point in any event.

[130] As to the question of the dividend (*i.e.* the €189,856 claimed per (i) above) and the directors' fees (*i.e.* per (ii)), as I have set out, the Defence essentially argues that both payments are entirely within the generous powers of the plaintiff's constitution and, therefore, were properly authorised by the Board. I need not rehearse the very detailed technical argument which was advanced and which is dealt with at paragraph [103] above. In summary, however, the Defence advances (much in accord with the advice from Tughan & Co) that Table A (as adopted) permitted a Board to: (a) pay expenses; and (b) (per Regulation (f)) pay dividends "*if it [appeared] to them (i.e. the Board) that they are justified by the profits of the Company …*"

[131] As I have already intimated it is my conclusion that it was not sufficient for the directors simply to have the requisite powers but that they had to be exercised by them for a proper purpose. In finding against them on that point I have had regard to the "statutory check list(s)" set out in section 172 CA 2006. In particular, section 172(1)(a) provides a non-exclusive list of matters which a director should consider "*would must likely [be] to promote the success of the Company for the benefit of its members as a whole.*" These specifically include:

(i) At (a) "*the likely consequences of any decision in the long term*"; and

(ii) At (f) the need to act fairly as between members of the Company.

[132] For the reasons I have given I see no evidence whatsoever that those issues were even considered by the Outgoing Board in the period of mid-August to mid-September 2013. The decision made was to extract funds and was, obviously, "short termist" in nature. In my view it was driven by the fear of losing control. It left the Company with very little working capital – certainly not enough to develop or grow in the manner originally intended (*i.e.* by the acquisition of a processing plant) as noted in the February 2013 meeting. The issues around Truly Irish (as I will come to below) by their very nature preferred one set of shareholders (those perceived as "loyal") over the remainder (perceived to be "disloyal") but who were, nonetheless, still members of the Company. As I have also said there was no valid resolution to pay the dividend and, even if there were, I have concluded that it would not have been a proper exercise of the power because of the directors' motivation at that time. On the question of the payment of the dividend I have already found that that was in breach of the fiduciary duties of defendants 1-4 and so find in favour of the plaintiff against them in respect of the sum claimed in the Statement of Claim. As I said at the start of this case the plaintiff's claim is defined

by its pleadings in the sum of €189,856 in that regard. The Defence on this point raised an argument that the first to fourth defendants should only be liable for the excess or unlawful preparation of the dividend that was paid out. (*Re Marins Ltd* [2003] EWHC 334.) In the facts of the present case I do not accept that contention because the "constitutional argument" (if I could call it that) only served them by accident in the face of what I consider to be a flagrant breach of their duties. The practical reality is that the loss claimed is capped by the figure claimed in the Statement of Claim.

[133] As to the question of the 'termination payment' or 'expenses' claim (*i.e.* the €40,000 per (ii) above) I do not find that the expenses were "excessive" *per se* (as the plaintiff claims) but as with the dividend I do find the timing of it to be reflective of and part of the motive of retribution which had overtaken the Outgoing Board. Constitutionally, therefore, whilst the defendants may have been entitled to a payment for expenses I find that the claim for it (and, indeed, earlier years) arose not out of good governance and/or a proper exercise of the powers vested in them but rather through personal vengeance or an erroneous sense of entitlement at the relevant time. In the September 2013 minutes it was described as a 'termination payment' and their annoyance at unfolding events was expressed. Certainly no cogent specific or invoiced expenditure on the Outgoing Board's part was advanced to demonstrate entitlement to such a payment other than the position arising on the defendants' oral evidence. That oral evidence confirmed that these were *ad hoc* payments to reflect the Outgoing Board's unverified time spent on the Company's affairs. That inevitably would have differed from individual to individual. In this case it did not – each director invoiced the same amount. Nor were the "expense" claims (indeed if they could properly be categorised as such) vouched or itemised as one might ordinarily expect. In the absence of cogent evidence the figures, I conclude, were plucked from thin air motivated by grievance more than to properly compensate the outgoing directors for work done.

[134] For these reasons I find in favour of the plaintiff and against defendants 1-4 in relation to each of the specific sums claimed at (i) (*i.e.* €189,856) and (ii) (*i.e.* €40,000) above but not (iii). Interest will also be payable in respect of those amounts at the rate provided in section 33A. The pleaded case for €84,000 in respect of administrative payments was not seriously pursued at the trial or in closing submissions and, in any event, I have concluded was properly authorised (and ratified) by the shareholders in May 2013.

(b) **Conflict of Interest/failing to promote the Plaintiff/Truly Irish**

The next "grouping" of the Plaintiff's claims focuses in the main on the circumstances around the incorporation and operation of Truly Irish. The circumstances which are pleaded in support of those claims are:

(i) the diversion of sows from being slaughtered by the plaintiff to being slaughtered by Truly Irish in the period post August 2013 – a position which continues;

(ii) the contract with Finn Meats and the allegation that Finn Meats was prevented from contracting with the plaintiff both immediately and in the future;

(iii) the diversion of the "farm to fork" objective or concept from a goal being promoted by the plaintiff to being a trading reality undertaken by Truly Irish.

I shall broadly refer to these as the "Truly Irish Claims." In relation to these, the Statement of Claim pleads:

(i) €397,210 in respect of "share payments" which it is claimed are essentially payments which were collected by the plaintiff and paid to Truly Irish. They arise from the €15 deduction which was originally approved by the General Meeting of the plaintiff on 23 June 2009 and ultimately represented a method of payment for shares in Truly Irish. These are pleaded in the Statement of Claim but, again, that does not follow through to the case or the plaintiff's summary of its case in closing submissions. As the plaintiff did no more than act as a collecting agent I do not see how its claim arises. In any event the €15 deduction was authorised in General Meeting;

(ii) A claim for €4,095,531 representing the loss of profits in the plaintiff which tangentially brings in the question of the McAuliffe Transport Contract. This sum is (per Mr Neill's expert report) comprised of:

- €1,549,380 for the period from 1.9.11 to 30.4.18;
- €2,229,184 for the period from 1.5.18 to 30.4.28;
- €316,967 for interest;

(iii) A loss of equity value in the plaintiff which Mr Neill has assessed at €2,359,100 based on its weighted EBITDA multiplied by a factor of 4;

(iv) The equity value of Truly Irish – assessed at €2,890,894 - again based on its EBITDA multiplied by a factor of 4.

The Loss of Profits Claim

[135] The loss of profits claim is detailed in the plaintiff's expert's report as prepared by Mr Neill who also attended and gave evidence. It was critiqued and challenged by the defendants' expert, Mr Dwyer of Harbinson Mulholland who also produced a report and gave evidence.

[136] In addressing the claim for lost profits I shall deal first with the unquantified claim in respect of transport costs which tangentially it has been alleged by the plaintiff would potentially affect the profitability of NSP. Without rehearsing the detail of it the plaintiff says that this is an example of self-dealing and that the plaintiff has suffered a loss in profits as a result. Mr Neill has advanced an argument that the commercial effect of the transport contract was to supress the plaintiff's profits by a factor of 10%. I do not accept that. I find that the rationale for awarding the contract originally (and the subsequent extension to it) - and the reasons which led to each - were all entirely properly pursued within the constitutional prerogative of a proper functioning Board (as it was at that time). I adopt the position outlined in paragraph [81] above as sufficient rationale for the propriety of that contract and, therefore, discount the Plaintiff's claim in that regard. The result is that I am satisfied that we should deal with the <u>actual</u> figures which relate to the plaintiff's trading <u>not</u> ones that need to have adjustments to reflect the plaintiff's view on transport costs.

[137] In respect of the remaining allegations, insofar as they relate to the Truly Irish Claims, the Plaintiff asserts that as the remaining breaches are essentially equivalent to a breach of contract claim and that (applying section 178 CA 2006) the plaintiff should be compensated in damages for the resultant loss of profits. Various figures were suggested but Mr Neill, the plaintiff's expert, has assessed lost profits to be in the order of €4,095,531 (to April 2028) (and to include interest).

[138] It is important to note that in arriving at his calculation as regards the loss of profit:

- Mr Neill has taken into account a period which commences in September 2011 and ends in May 2028 – the later period of 10 years he has ascribed to future profits;

- Mr Neill has assumed an upward trajectory of 10% *per annum* in the turnover of the plaintiff for each of the years 2012 and 2013 – in the face of evidence for earlier years showing a downward trajectory in turnover and evidence of widening competition. That inflated assumption then feeds through into his calculation for the entire period and thus the plaintiff's claim;

- He has assumed a growth trajectory of 3% for future turnover;

- He has assumed that operating profit is to be calculated at 5% of the gross turnover throughout that period – a figure which he has arrived at on the basis of an adjustment to reflect "inflated" transport costs;

- He has applied a discount value (for the purposes of the claim) of 7% to work out a net present value;

- He has made a number of other assumptions based on <u>his</u> unchallenged market research/market share of NSP etc. Some of this relates to the trend in pig prices rather than pertaining specifically to the price of sows;

[139] Whilst I have found in favour of the plaintiff on the question of a breach of fiduciary duties I am equally sure that the measure of that loss should follow ordinary principles – which by necessity raises questions of both remoteness and the plaintiff's duty to mitigate its loss. In my view, if the plaintiff can establish a loss on primary principles it need do no more.

[140] I find myself in the position, however, that I do not accept the plaintiff's evidence as to the loss which has actually been sustained. The assumptions made in Mr Neill's expert report are too bold and, frankly, unsustainable. The loss of profits claim which has been advanced completely ignores considerations of mitigation and/or remoteness.

[141] It is clear to me from the evidence that from September 2013 the plaintiff operated what was termed a "group agreement" with Rosderra – initially for the period 2014 to 2016. I accept that in the immediate aftermath of the breakdown in relations between NSP and the Outgoing Board such a solution might have been required but, after a reasonable time, it was entirely open to the plaintiff to re-establish the former NSP business model or, if it wished, as an alternative to introduce a charge for the "introduction" which it effected for the benefit of its members in terms of securing advantageous pricing or, indeed, levy an administration charge. Having reviewed the evidence – most particularly the Board minutes of 20 January 2016 and others – it is clear that the new Board of its own volition chose to do adopt none of those approaches. That was a conscious choice on the part of the new Board and, under the ordinary principles of the calculation of damages, it flows against the obligation which that board faced to mitigate its loss. Instead, the plaintiff continues to assert that the pre-breakdown turnover of €5.3m was reduced to nil and that the continued cessation of business should form the basis of its claim.

[142] That is a position which I simply cannot accept. On that basis, I am therefore, firstly going to discount the claim for future loss (*i.e.* in the sum of €2,229,184) for the period 1 May 2018 to 30 April 2028 in its entirety. In my opinion it is both too remote and, further, completely ignores the plaintiff's obligation to mitigate.

[143] I am prepared, however, to accept that the sum claimed for the initial and direct loss of profits in the sum of €1,549,380 is a valid claim but I disagree with the quantum because of the following material caveats:

- In looking at the question of the "loss of profits" claim one has to accept that after the initial "tie-in" of 5 years (which existed under the draft Shareholders' Agreement) (Clause 5.1.1)) there was no guarantee of the future supply in the

number of sows and, indeed, there was likely to be a fall-off in the number of sows;

- The evidence confirms that the Company's entire history was plagued by competition – leading to the "loyal" vs "disloyal" split in suppliers. In Paul Gilmore's Circular to shareholders of May 2006 the average number of sows per week was placed at 850. In the February 2012 Board minutes the average throughput of sows was placed at 400 sows per week. When I turn then to consider the Harbinson and Mulholland report which the Defence produced in challenge to Mr Neill's evidence that demonstrates that for the years 2012 to 2013 the total throughput of sows was *circa* 46,000 which distils to a figure of approximately 307 sows per week. That report goes further and highlights a potential 6% downturn in turnover;

- Taking all that into account I do not follow (and indeed reject) Mr Neill's assumed (and discretionary) increase in turnover of 10% *per annum* in the years 2012 and 2013 upon which his later calculations are entirely based. I see no evidence to support any such conclusion. The measure of loss should be based on actual turnover and profitability;

- On that basis I prefer the Harbinson and Mulholland report which calculates the underlying profitability of the NSP business at 3.83% of turnover as opposed to Mr Neill's assumption of a 5% yield on an assumed higher turnover – a point which again feeds through to his overall calculations.

[144] The consequences of these conclusions are dealt with in Appendices 8 and 9 of the Harbinson and Mulholland report which, after taking those issues into account, reduces the loss of profits claim to a figure of €997,700 (Appendix 9.1) and adjusting that to remove Mr Neill's 10% inflation of turnover reduces that figure by a further €53,231 (Appendix 9.2) leaving a net claim of €944,469.

[145] I have concluded that in respect of the plaintiff's loss of profit that is the proper measure of damages under this head of claim.

The Loss of Equity Value

[146] I consider this claim to be akin to the claim for future loss – it is too remote and ignores entirely the Plaintiff's duty to mitigate its loss. I have concluded that the incoming Board could have reverted to NSP's original trading model and/or sought contributions from its members as a levy for the services which it provided. I do not find that its argument that the opportunity to use Finn Meats was denied to it sufficiently compelling to justify a contrary conclusion. Mr Finn's evidence confirmed that there were commercial issues (such as NSP's refusal to give a guarantee of the number of sows it would supply and the financial treatment of offal) that equally prevented a deal being reached with the New Board. Both were capable of resolution and potentially could have allowed the use of Finn Meats by

both companies. Mr Finn confirmed that possibility. I have concluded that both the original business model and the introduction of a levy were considered and discounted by the Board as evidenced, for example, by minutes of its Board Meeting of 20 January 2016 where both options were discussed and discounted. That decision, <u>of itself</u>, had a material impact on the turnover of NSP and, inevitably, its value. It is not something which I feel falls wholly to the account of the defendants in the manner suggested by the plaintiff. Moreover, Mr Neill's report:

- Uses projected rather than actual trading figures – as I have already highlighted;

- Ignores the fact that post 2011 there was no "tie-in" for farmers whatsoever and that entirely contrary to his assumptions there is actual evidence which shows a decline in the number of sows being supplied (see above); and

- Ignores the commercial reality of a downward trend in NSP's business.

Both, therefore, as a matter of legal principle and, indeed, as a question of evidence I do not accept the loss of equity claim.

Valuation of Truly Irish Country Foods

[147] As I have indicated above the plaintiff's claim under this head is quasi equitable in nature. It largely rests on the authority of *Sinclair Investments Limited v Versailles Trade Finances* (above) which is to the effect that where a director has profited or diverted assets (or an opportunity) away from the plaintiff company in breach of a duty owed to that company then those profits can properly be regarded as the property of the plaintiff company.

[148] According to its closing submissions (particularly at paragraph 68) the plaintiff asserts that the "Truly Irish Brand" was an asset "owned" by the plaintiff that was unlawfully diverted and exploited by Truly Irish. It certainly does not articulate what other "property" was either transferred or exploited. If it is the "farm to fork" initiative I discount that as a sufficient basis for the claim on the grounds that it was just a concept. Adopting its analysis, however, Mr Neill for the plaintiff has valued the equity value of Truly Irish in the amount of €2,890,984 and it is that figure which is subsequently claimed.

[149] Frankly, this claim for the "equity value" of Truly Irish is hard to fathom – both in the specifics of the pleadings themselves and on the legal basis upon which it is claimed. If (as is suggested in paragraph 68) the claim is based on what is essentially trademark infringement then this court is not the one with competent jurisdiction to deal with it. If it is an "account for profits" then –

- That is not how Mr Neill has approached it in his report – seeking to value the "equity value" of Truly Irish;

- Even if it were an account for profits it needs to be borne in mind that not all of the profits accrue to the culpable defendants on the question of the breach of fiduciary duty;

- Finally, the claim (as drafted) ignores in its entirety the distinction between the trade in sows and the trade in pig meat more generally.

[150] I appreciate the difficulty that Mr Neill had in obtaining the underlying figures of Truly Irish but even if he had the detail that would not have changed my view. A "Truly Irish" competitor or its equivalent was always a possibility. The problem for the defendants is that they sought to exploit it whilst being directors of NSP. In short, in relation to the equity claim in respect of Truly Irish I have concluded that:

(a) The claim lacks a properly articulated basis in law bearing in mind that the courts are wary of imposing "new" constructive trusts in such circumstances (see *Bailey v Angrove PTY Ltd* [2016] 1 WLR 3179);

(b) Even if such a claim existed it is not fully pleaded nor is a consistent or sufficient evidence base provided - given that the expert evidence in point is focussed entirely on the question of the "value" of Truly Irish and does not follow the alleged claim for "profit and turnover" – which in itself ought properly to be limited to "profit."

[151] For all of those reasons the claim thus formulated is rejected.

Conclusion

[152] In terms of the final claim, therefore, I find for the plaintiff against defendants 1-4 in:

(a) The "dividend" claim of €189,856 as per the Statement of Claim;

(b) The directors' "expenses" of €40,000 – again as claimed in the Statement of Claim;

(c) The loss of profits in the reduced amount of €944,469; and

(d) I award interest on the cumulative amount to be calculated in accordance with section 33A of the Judicature Act the total amount (as appropriate) to be converted at the date of issue of this judgment.

[153] If required I will hear the parties in relation to the question of costs.