Unapproved **No Redactions Needed**

THE COURT OF APPEAL

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IN THE MATTER OF CHARLES KELLY LIMITED
AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2006
AND IN THE MATTER OF SECTION 205 AND SECTION 213
OF THE COMPANIES ACT 1963

Costello J.
Haughton J.
Murray J.

BETWEEN/

EDWARD GERARD KELLY

PETITIONER/RESPONDENT

- AND -

WILLIAM KELLY

APPELLANT/RESPONDENT

-AND-

CHARLES KELLY LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Haughton delivered on 24th day of September, 2021

Contents

Introduction

1. This is an appeal by the appellant ("Mr. William Kelly") from four judgments of Ms. Justice Laffoy following modular hearings in what may loosely be described as "oppression" proceedings initiated under section 205 of the Companies Act, 1963 ("the 1963 Act") by the petitioner ("Mr. Gerard Kelly"), the brother of Mr. William Kelly, and relating to Charles Kelly Limited ("the Company").

2. In this judgment I will outline what was decided in each module, and then give a brief background to the proceedings. I will then address in relation to each Module in turn the relevant evidence, decision and grounds of appeal/argument, and my decision on this appeal.

The four modules and judgments

- Module 1 – Judgment delivered on 12 February 2010 in which it was determined that Mr. Gerard Kelly was a member of the Company and had been since 30 April 1992, and that he owned 7,936 shares in the Company jointly with Mr. William Kelly, the only other two shares in the Company being owned by the estate of their mother, Mrs. Kelly. The High Court also noted an undertaking on the part of Mr. Gerard Kelly that certain unstamped documents would be stamped, and that pursuant to s.22 of the 1963 Act that the Register of Members of the Company would be rectified to reflect the issued share capital of the Company as a

consequence of the buying back and cancellation of 7,062 shares in 1992, that the Company furnish details of the rectification to the Registrar of Companies to record various transactions that had taken place since 1987 and which had not been recorded in the Register, and that the hearing of the second module be deferred until the stamping of the various share transfer documents had taken place.

- Module 2 – Judgment delivered on 31 August 2011 in which Laffoy J. concluded that Mr. Gerard Kelly had made out a case of oppression against Mr. William Kelly and ordered that the Company purchase the 3,968 shares beneficially owned by Mr. William Kelly at fair market value, that the share capital of the Company be reduced accordingly, whereby the court directed that Deloitte & Touche be appointed to report independently on fair market valuation of the shares as of 31st August, 2011 that there be set off against the value of the shareholding of Mr. William Kelly in the sum of €180,000 (later adjusted to €165,000), and that Mr. William Kelly resign as a director forthwith.
- Module 3 – in this judgment delivered on 19 June 2012 Laffoy J. valued the beneficial shareholding of Mr. William Kelly at €339,000 as at 31 August 2011 and directed that four properties of the Company situate in or near Ramelton, County Donegal be transferred by the Company *in specie* to Mr. William Kelly as consideration for the shares of which he was beneficial owner, subject however to Mr. William Kelly remitting the sum of €165,000 to the Company.
- Module 4 – Judgment delivered on 31 July 2012 in which Laffoy J. declared that Mr. Gerard Kelly be entitled to recover the costs of the proceedings against Mr. William Kelly, save that the costs and remuneration to be paid to Deloitte &

Touche for performing the task of valuing the shares of Mr. William Kelly, which were to be discharged by the Company; whereby it was ordered that the remittal of the sum of €165,000 by Mr. William Kelly to the Company should take place by 24 August 2012, that the transfer *in specie* from the Company to Mr. William Kelly as consideration for Mr. William Kelly's shares should take place by 24 August 2012; and it was ordered that each party have liberty to apply on notice.

In addition, certain applications were made by the parties which are not central to the issues arising on this appeal, but which will be referred to as necessary in the course of this judgment.

3. The combined orders in respect of these four judgments are recorded in one order made on 31 July 2012 and perfected on 1 October 2012. There was no stay on any of the orders. Pursuant to the 'liberty to apply' by order made in late 2012, a short extension was granted to Mr. William Kelly of the period of time for remittal of the sum of €165,000 and transfer of the four properties in Ramelton. In addition, by order dated 19 March 2013 the High Court extended by 21 days from that date the time for notifications to the Companies Registration Office in respect of historic share transfers and cancellations consequent on the primary orders.

4. On 19 October 2012 Mr. William Kelly in person lodged the instant appeal to the Supreme Court. On 29 October 2014 it was transferred to this court pursuant to Article 64. The Notice of Appeal raised 198 separate grounds of appeal. On 1 May 2018, on foot of an application brought by Mr. William Kelly an amended Notice of Appeal was ordered by Irvine J. The amended grounds A – J purport to be "a refinement of the original grounds and retaining the numbering therein", groups together some 188 of the original grounds under 10 headings, and calls into question almost every aspect of the judgments in the High Court, including an

order of the trial judge which allowed Mr. Gerard Kelly to amend the Petition to seek an order that the Company buy out Mr. William Kelly's shares.

5. The dispute between Mr. Gerard Kelly and Mr. William Kelly that gives rise to these proceedings can be traced to a breakdown in relations in 2006, if not earlier in time, and the different modules in the High Court took up some 28 days. It is regrettable that despite the absence of any stay on the orders in the High Court, and despite the passage of almost 9 years since those orders were made, nothing has been done to implement the solution crafted by the High Court beyond the resignation of Mr. William Kelly as a director and the cancellation of his shares, and the correction of the details in the CRO. As a result, there has been no closure brought to the dispute between Mr. William Kelly and Mr. Gerard Kelly which, over a decade later, still lingers as a dark cloud over the affairs of the Company.

Background

6. Mr. Gerard Kelly is Chartered Certified Accountant and is the younger brother of Mr. William Kelly, who is a Chartered Accountant. They both reside in Letterkenny.

7. The Company was incorporated on 18 July 1932 under the Companies Acts, 1908 – 1917. The parties' grandparents, and their grandparents' descendants, have been involved in the business of the Company since 1932.

8. The Company carries on the business of builders/merchant and retail hardware at Letterkenny, Co. Donegal, and had a smaller outlet in Ramelton. The Company also owns certain other properties. It had up to 50 employees, and in 2008 had a recorded turnover of €10 million.

9. The original nominal share capital of the Company was £15,000 (stated in the Petition as €19,046.07, the euro equivalent) divided into 15,000 shares of £1 each. As a result of the purchase of two tranches of shares by the parties' father, Edward Joseph Kelly ("Mr. Kelly") and the purchase of two tranches of shares by Mr. William Kelly in 1981, Mr. Kelly and Mr. William Kelly between them became the owners of 7,938 ordinary shares of £1 each, giving them a majority stake, leaving 7062 shares in the ownership of other members of the extended family.

10. Mr. William Kelly left work as an accountant to become employed in the Company in 1980. In 1984 Mr. Gerard Kelly gave up his work in Haughey Boland as a qualified accountant to work exclusively for the Company.

11. Mr. Kelly became very ill with cancer and certain share transactions took place in apprehension of his death. He died in 1987, leaving his shareholding to his wife Margaret Mary Kelly ("Mrs. Kelly"). In the section of this judgment dealing with Module 1, I address the transference of shares and ultimate beneficial ownership of shares in some detail, but suffice it to say at this stage that in 1987 Mr. William Kelly and Mr. Gerard Kelly both became directors and by the 1990s between them they managed the Company's affairs – Mr. William Kelly being responsible for the sales and business management, and Mr. Gerard Kelly being responsible for managing the financial and property affairs (Chief Financial Officer – CFO) of the Company. Mr. William Kelly also regarded himself as the *de facto* Chief Executive Officer (CEO).

12. In 2000 a third brother, George, commenced working for the Company and in 2001 became Chief Operations Officer (COO). New premises in Letterkenny were completed in 2002.

13. While relations between Mr. Gerard Kelly and Mr. William Kelly seem to have cooled as early as1998, from December 2005 onwards there was significant deterioration, and matters came to a head in April 2008 when Mr. William Kelly purported to suspend Mr. Gerard Kelly and sought to exclude him from the workplace on health and safety grounds. There were frequent verbal and physical altercations in the work place, and allegations and counter-allegations of failure to cooperate in the finalisation of Company accounts and Annual Returns, which were by this time overdue and resulted in the CRO issuing a warning letter on 15 August, 2008 in respect of a strike off of the Company. These matters which formed the basis of Mr. Gerard Kelly's claim of oppression, are addressed below in more detail under Module 2.

14. Mr. Gerard Kelly then commenced these proceedings by Petition issued on 26 September 2008. The Petition is brought pursuant to s.205 of the 1963 Act (since repealed and replaced by s. 212 of the Companies Act 2014). It provided:

> "(1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised in a manner oppressive to him or to any of the members (including himself), or in disregard of his or their interests as members, may apply to the court for an order under this section."

Module 1

15. The Petition did not – as it should have done – plead that Mr. Gerard Kelly was a member of the Company or set out his shareholding. It did plead that he and Mr. William Kelly –

> "8….over the years conducted and managed the affairs of the company on the basis of acknowledging their equal shareholding in the company and their entitlement to share

equally in the management of the affairs of the company's affairs. …they have an equal entitlement and responsibility to share in the management and conduct of the company's affairs and that the successful operation of the company and development of its business is depend upon the existence and fostering of mutual trust and confidence between [them]…"

16. When the matter was opened in the High Court by Counsel for Mr. Gerard Kelly on 15 December 2009 the trial judge noted the technical deficiencies in the Petition, and that in Points of Defence prepared by counsel Mr. William Kelly had put in dispute whether Mr. Gerard Kelly was a member or had standing to seek relief under s.205, and that he further disputed the legal and beneficial ownership of the shares in the Company and whether there was an equal shareholding, or that the business and affairs of the Company were conducted and managed by the parties on the basis that they had an equal shareholding. As a result, the trial judge directed that she would hear evidence related to these issues in a first module, and determine these issues first, and the trial proceeded on that basis. That was the logical way to proceed in that if Mr. Gerard Kelly did not have standing that was an end to the proceedings, and if he did have standing, the issue of what shareholding the parties held, and whether it was equal, was relevant to other issues in the case.

17. In Module 1 Mr .Gerard Kelly was represented by solicitor and counsel. Mr. William Kelly was also represented by solicitor and counsel, and his solicitors Gibbons & Associates (formerly Gibbons & Kelly) were also on record for the Company.

18. The trial judge heard extensive evidence from Mr. Gerard Kelly and Mr. William Kelly in respect of the shareholding issues over 15, 16 and 18 December 2009, heard legal submissions on 18 December 2008 and 28 January 2009, and delivered judgment on Module 1

on 12 February 2010. It is convenient to refer to the relevant evidence and share transfers when addressing the comprehensive findings of the trial judge in Module 1.

19. It appears that in early 1987 Mr. Kelly became seriously ill with cancer, and in apprehension that his death was imminent in January 1987 certain share transactions took place. These occurred against the background of Article 5 of the Articles of Association of the Company (which contained a restriction on the transfer of shares, conferring a right of pre-emption on existing registered holders of one or more shares), and Article 8 (which stipulated that the "qualification of a Director shall be the holding of 500 shares in the Company").

20. Under the first relevant transaction by Share Transfer form dated 26 January 1987 Mr. William Kelly transferred 500 shares to Mr. Gerard Kelly, who then executed a "Declaration of Trust" acknowledging that these 500 shares at £1 each "now registered in my name are your property and that I hold same in trust for you." An undated but executed transfer of the 500 shares from Mr. Gerard Kelly back to Mr. William Kelly was prepared on the same day. The trial judge was sceptical of the parties' evidence that this was executed in1992, rather than 1987 – but felt nothing turned on that. The undisputed object of the share transfer and declaration was to enable Mr. Gerard Kelly to qualify to become a director of the Company under Article 8.

21. By a further share transfer form of 26 January 1987 Mr. William Kelly transferred one share to his mother Mrs. Kelly at nil consideration. The undisputed object of this transfer was that Mrs. Kelly would become a registered shareholder in the company so that, when she succeeded to the shareholding of Mr. Kelly on his death, a right of pre-emption under Article 5 would not arise. The trial judge found that Mrs. Kelly "appeared" to have executed a Declaration of Trust on 26 January 1987 and that she held this share in trust for Mr. William

Kelly. The share transfer in her favour was not stamped, nor was she registered as owner of one share in the Register of Members.

22. On 26 January 1987 the directors and secretary of the Company approved the share transfers outlined above, and on the same day the Board of Directors of the Company resolved that Mr. Gerard Kelly and Mr. William Kelly be appointed directors with effect from 26 January 1987.

23. When Mr. Kelly died in February 1987 Mrs. Kelly became beneficially entitled to his 4,219 shares in the Company. She was also his personal representative.

24. In the 1980s as CFO Mr. Gerard Kelly worked on a buy back of the minority shareholdings (7,062 shares). In 1992, as a result of the settlement of proceedings involving the then minority shareholders, the Company acquired the minority stake of 7,062 shares. This buy back was concluded at an EGM on 22 May 1992, and led to the cancellation of 7,062 shares, although the Register of Members did not reflect the change in the issued share capital and the CRO was not updated. As a consequence, the issued share capital of the Company after that EGM was IR£7,938 divided into 7,938 shares of IR£1 each.

25. There were a series of further share transactions in 1992 and 1995 which became the focus of Module 1 in the High Court. These transactions and the findings of the trial judge in relation to them, may be summarised as follows:

(1) A transfer bearing date 30 April 1992 from Mrs. Kelly to Mr. Gerard Kelly of five hundred shares in consideration of "natural love and affection". Although the Share Transfer form was not stamped, the transaction was registered in the Register of Members. This transfer was approved by the directors of the Company on 30 April,

1992. The trial judge inferred that this transfer was executed and approved because of the EGM of the Company that was about to be convened for 22 May 1992 to approve the buyback of the minority stake.

(2) A Share Transfer form executed by Mrs. Kelly bearing date 16th September, 1991, transferring the 4,219 shares which Mrs. Kelly had inherited from Mr. Kelly, to herself as beneficial owner. The trial judge found that Mrs. Kelly "was obviously acting as a personal representative of Mr. Kelly", although she is not so described, and she found that "it is reasonable to infer that in April 1992, sometime before the transfer dated 30th April 1992 [of 500 shares to Mr. Gerard Kelly] this share transfer was executed by Mrs. Kelly". The Share Transfer form was presented to the Revenue Commissioners in October 1992 for adjudication, and the trial judge was satisfied that a transfer from Mrs. Kelly as personal representative of Mr. Kelly to herself would attract no *ad valorem* stamp duty and that therefore the document was admissible. The trial judge stated (page 9) –

> "I am also satisfied that it must have been executed prior to the execution of the transfer dated 30th April, 1992 of 500 shares by Mrs. Kelly to the petitioner, because, otherwise, Mrs. Kelly would not have title to voluntarily transfer 500 shares to the petitioner."

(3) The trial judge also had before her a Share Transfer form signed by Mrs. Kelly as "Margaret Kelly", completed in manuscript and bearing the date 27 April 1992, but otherwise "on all fours with the typed transfer which bears the date 16th September 1991". The trial judge found –

> "The existence of this document leads me to believe that Mrs. Kelly effectively vested the shares she inherited from her husband in herself as beneficial owner

on 27th April, 1992. Moreover, the directors of the Company, including the petitioner and the first respondent, executed a document approving Mrs. Kelly being registered as the registered owner of 4,219 shares registered in the name of Mr. Kelly on 30th April, 1992."

(4) The trial judge thus found (page10 of her judgment) that after the 1992 EGM the 7,938 shares not the subject of the buyback were held as follows: -

- Mrs. Kelly – as successor to Mr. Kelly, 3,719 shares as legal and beneficial owner (having transferred 500 shares to Mr. Gerard Kelly).
- Mr. William Kelly – 3,218 shares as legal and beneficial owner.
- Mr. Gerard Kelly – 500 shares transferred to him by Mr. William Kelly in 1987, as legal owner, but with Mr. William Kelly as beneficial owner.
- Mr.Gerard Kelly was the legal and beneficial owner of the 500 shares transferred to him by Mrs. Kelly on 30th April, 1992.
- Mrs. Kelly was the legal and beneficial owner of one further share received from Mr. William Kelly in 1987.

(5) The trial judge then considered two Share Transfer forms dated 17 September 1991, which it was common case had been executed after the EGM in May 1992, and which, on the evidence of Mr. Gerard Kelly, were executed in September 1992. By the first of these Mrs. Kelly transferred 3,938 shares to Mr. Gerard Kelly at a consideration of IR£1, and by the second Mrs. Kelly transferred 249 shares to Mr. William Kelly at a consideration of IR£1. The trial judge found (page 11) –

"The combined effect of the two transfers was that Mrs. Kelly transferred, or more correctly purported to transfer, 4,217 shares. Of course she did not have

> 4,217 shares; she only had 3,719 shares, because she had already transferred 500 shares to the petitioner by virtue of the transfer of 30th April, 1992. I am satisfied on the evidence that the object of the exercise in September 1992 was that Mrs. Kelly would transfer all but two of her shares in such a way that the petitioner and the first respondent would have an equal shareholding in the Company. As the first respondent acknowledged in evidence, Mrs. Kelly transferred 249 shares to him to bring his existing shareholding up to 3,968 shares, which was the number of shares which Mrs. Kelly purported to transfer to the petitioner. I can only conclude that the 500 shares which had already been transferred by Mrs. Kelly to the petitioner were overlooked and that the assumption that Mrs. Kelly had 3,968 shares to transfer was a mistake."

The trial judge recorded the explanation given for backdating these two transfer forms to 17 September 1991 as being that the Company's then auditors Price Waterhouse had already carried out a valuation of shares in September 1991 and the objective was to avoid the expense of further valuations. The trial judge recorded that "neither Share Transfer form is stamped and neither transaction was entered in the Register of Members".

(6) Further transactions, which the parties testified were executed in 1995 after Mr. Gerard Kelly announced his intention to get married later that year, involved six documents which, while bearing the date 17 September 1991, were stated by the parties to have been executed in 1995. They included Share Transfer forms executed by Mr. Gerard Kelly transferring 3,968 shares to himself and William Kelly at a consideration of IR£1, a transfer executed by Mr. William Kelly transferring 3,968 shares in

consideration of IR£1to Mr. William Kelly and Mr. Gerard Kelly, and cross-declarations that the transfer into joint names was "as joint tenants". The trial judge held (pages13-14) that the purpose was to created joint tenancies over their shares so that the survivor would become–

> "one hundred per cent owner of the company, or, more correctly, all the issued shares except two. The purpose of having the undated transfers executed was with a view to meeting the exigency of one or other of them dying."

(7) Directors' reports in the financial statements filed with the Annual Return for the year ended 30 December 2005, and draft reports for the years ended 30th December, 2006, 2007 and 2008, stated the interest of the directors' shareholding to be Mr. William Kelly 3,968 ordinary shares of €1.27 each, and in the case of Mr. Gerard Kelly 3,968 ordinary shares of €1.27 each.

(8) Mrs. Kelly died on 22 October 2006, and her last Will dated 9 October 2006 was put in evidence (although not probated). By her Will she bequeathed her shareholding (which at her date of death was two remaining shares) to her sons Mr. Gerard Kelly and Mr. William Kelly to be divided as to one share each. In the Will Mrs. Kelly also expressed the wish that her sons, Mr. Gerard Kelly and Mr. William Kelly "will duly reward my son George Kelly for his contribution to the business over the years", although the trial judge found this to be of "little probative value".

(9) The trial judge recorded that there were two areas of factual dispute arising from the documentation. The first related to the transfer dated 30 April 1992 by which Mrs. Kelly transferred 500 shares to Mr. Gerard Kelly. Mr. William Kelly in evidence said he only became aware of that document a few days before the hearing and that he never

saw the actual Share Transfer form signed by Mrs. Kelly transferring 500 shares to Mr. Gerard Kelly. The trial judge resolved this by finding as follows: (p.15) –

> "… But the fact is he was a party to the approval given by the directors to the transfer on 30th April, 1992. Therefore, he must have been aware that the transfer was happening at the time."

26. The second dispute related to Mr. William Kelly's claim that Mrs. Kelly's motivation in transferring all but two of her shares was part of a "*family arrangement*" that was being put in place so that the business and the Company would be passed on from generation to generation. His evidence was that he understood the documents executed in 1995 to be "temporary arrangements to enable the family arrangements which they were in the process of organising to be put in place" (page 16). Mr. William Kelly relied particularly on a contemporaneous note of a meeting held on 31 July 1995 made by Mr. Gerard Kelly. Present were a Mr. Gerard McDevitt, Mr. William Kelly and Mr. Gerard Kelly, and the note refers to "Family Assets" and "WJK-1991/2 Arrangement was of a temporary nature". Over page the same document refers to –

> "3.1 Alternatives?
>
> 3.2 Trusts: …
>
> 3. Use of preference shares…
>
> 3.4 Possible use of shares to freeze value in Co.
>
> 3.5 Split value around family now!"

27. The trial judge addressed the evidence on this issue at pages 16 - 19 of her judgment: -

*"*As I understand the evidence of the first respondent, his view of his shareholding in the company, not just the 249 shares which Mrs. Kelly transferred to him but also the 3,719 shares which he purchased in 1981, is that all those shares are held by him subject to his responsibilities to other members of the family to allow other members of the family participate in both the benefits and the responsibilities of the company and its business. While that is a worthy position to adopt, in my view, on the evidence it is impossible to conclude that Mrs. Kelly in transferring all but two of her shares in the company in 1992, so as to give the petitioner and the first respondent, both of whom had abandoned careers as accountants to work full-time in the company's business in the 1980's, equal shareholding in the company, intended that they should hold the shares as trustees only pending the putting in place of some sort of family arrangement which would dilute the ownership of the shares. Further on the evidence, Mrs. Kelly had little or no input in the meetings of family members in the late 1990's. Whatever aspirations certain families may have had came to nought.

Accordingly, on the evidence, I am satisfied that currently the first respondent and the petitioner hold their respective shares un-trammelled by any trust in favour of their siblings or other members of their family.

… On the evidence, I have come to the conclusion that in 1992 after the EGM, Mrs. Kelly decided to transfer her shareholding in the company to the petitioner and the first respondent in such a way as that they would be equally entitled to all of the issued shares in the company except two shares. The fact that she had already transferred 500 shares to the petitioner by virtue of the transfer dated 30th April, 1992 was obviously overlooked. I am satisfied that the intention of Mrs. Kelly was that, following the

execution of the transfers by her which bear the date 17th September, 1991, it was her intention that the petitioner should acquire 3,468 shares, so as to give him a total shareholding of 3,968 shares. Further, I am satisfied that, notwithstanding a mistake in the transfer, the transfer should be regarded as having had that effect – nemo dat quod non habet. In any event, it has been regarded by the company as having had that effect for the past eighteen years, as the directors' reports filed with the financial statements in the CRO establish.

The evidence that the 1995 transactions creating joint ownership were only intended to be temporary arrangements does not accord with the documentary evidence before the Court. Among the documents put in evidence is an undated letter from the company, signed by the petitioner, to Price Waterhouse & Co., in Derry, the text of which is as follows:

> "I enclose the forms for stamping as discussed:
>
> (1) Stock transfer form dated 16th September, 1991 referring to the transfer to my mother's name on the death of my father, which seems to be in order.
>
> (2) Two sets of stock transfer forms, alternate wording, of 17th September, 1991, confirming the joint tenancy set up between William and I.
>
> (3) Copy declarations by William and I confirming the joint tenancy in the interest of clarity as suggested. These for your file and general information only.

I trust you find the above in order for present and will review same and proceed to stamping in due course."

The transfer form which bears the date 16th September, 1991 was lodged in the stamps branch of the Revenue Commissioners in October, 1992 but was returned to Price Waterhouse by the Stamps Adjudication Office in March, 1993 'for amendment'. However, the undated letter strongly suggests that the transfers into joint names were contemporaneous with the transfer which bears the date 16th September, 1991, which was executed in September 1992 and that they were not executed in 1995. Of more significance than indicating the proper date of the transfers, however, is the fact that the undated letter clearly indicated that they were intended to have effect.

A letter dated 3rd October, 2008 from the petitioner to the first respondent, which was put in evidence, corroborates what the undated letter clearly indicated – that the transfers into joint names were to take effect. The purpose of the letter was to explain the basis on which fees had been charged by PricewaterhouseCoopers. The explanation is that the fees were charge for tax advice, including tax advice about the shareholdings of the petitioner and the first respondent in the company – '(separating the joint-tenancies etc.)'. The petitioner records in the schedule that, because of the potential liability to capital acquisition tax, the advice 'strongly recommended we forget about or split the joint tenancies as soon as possible.'

I am satisfied that the transfers executed to create the joint tenancies were intended to have effect and that they took effect. The Court cannot ignore them."

28. Accordingly, the trial judge concluded (page 19) that –

"… The current beneficial ownership of the 7,938 ordinary shares in the company is as follows: -

(1) [Mr. Gerard Kelly] and [Mr. William Kelly] are joint owners of 3,968 shares;

(2) [Mr. William Kelly] and [Mr. Gerard Kelly] are joint owners of 3,968 shares; and

(3) the estate of Mrs. Kelly is the owner of two shares."

Having reached this conclusion, the trial judge then turned to the Register of Members, noting that the current position was that it recorded three members and their shareholdings as follows: -

(1) Mrs. Kelly as the owner of 3,719 shares;

(2) Mr. William Kelly as the owner of 3,719 shares; and

(3) Mr. Gerard Kelly as the owner of 500 shares.

29. The issue raised in relation to this by Mr. William Kelly was whether the Transfer dated 30 April 1992 of 500 shares to Mr. Gerard Kelly by his mother was lawfully registered, because of s. 81(1) of the 1963 Act which provided –

"Subject to sub-section (2) and notwithstanding anything in the articles of the company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company."

The Transfer of 30 April 1992 had never been stamped, and the issue was whether it was a "proper instrument of transfer" within the meaning of s. 81(1). The trial judge adopted a passage from Courtney on the *Law of Private Companies*, 2nd ed., at para. 16.007 as follows:-

> "One question that arises is whether the phrase 'proper instrument of transfer' as used in [the Act of 1963], s. 81, implies that a transfer must be stamped. It is thought on balance, that it is lawful for a company to register an instrument transferring shares on which stamp duty has not been paid."

The trial judge then referred to an authority that was quoted by Courtney for the proposition that the failure to stamp does not invalidate the document, as stamping is simply a Revenue requirement. This authority is *Nisbet v Shepherd* [1994] 1 BCLC 300 where (at page 305) Leggett L.J. indicated that the corresponding phrase in the United Kingdom analogue of s. 81 does not mean that the instrument must comply in all respect of statutory requirements, and that "proper" in context means no more than "appropriate" or "suitable".

The trial judge also referred to the decision of the Supreme Court in *Re. Motor Racing Circuit Limited* [1997] 1 JIC 3102, and concluded (p. 22) –

> "As a matter of principle, it would seem that the company was entitled to register the petitioner as a member notwithstanding that the transfer of 30th April, 1992 was not stamped."

Noting that the maintenance of a register of members is required by the 1963 Act, and that default in compliance is a criminal offence, the trial judge stated (p.22) –

> "[Mr. Gerard Kelly] and [Mr. William Kelly] , as directors of the company at the material times, must take responsibility for the failure of the company to fulfil its obligations under s. 116."

She noted that s. 124 provides that the Register of Members shall be *prima facie* evidence of any matters by the Act directed or authorised to be inserted therein, but that that provision must be considered in the light of s. 123 which provides –

> "No notice of any trust, expressed, implied or constructed, shall be entered on the Register or be receivable by the Registrar."

30. The trial judge then concluded (page 23): -

> "The conclusion I have reached is that the Register of Members does not properly record the legal ownership of the 7,938 shares representing the current issued share capital of the company, which I conclude coincides with the beneficial ownership. In other words, I consider that the Register of Members should reflect the following ownership: -
>
> (1) [Mr. William Kelly] and [Mr. Gerard Kelly] as the owner of 3,968 shares, by the addition to the first respondent's shareholding on Folio 11 of the 249 shares which he acquired from Mrs. Kelly and by the transfer of the first respondent into joint names;
>
> (2) [Mr. Gerard Kelly] and [Mr. William Kelly] as the owner of 3,968 shares, on the basis that the transfer from Mrs. Kelly to the petitioner took effect as a transfer of 3,468 shares to be added to the 500 shares of which he is now owner on Folio 9 and of the transfer into joint names; and
>
> (3) the estate of Mrs. Kelly as the owner of two shares."

31. At pages 23 – 25 of the Module 1 judgment the trial judge rejected the contention that Mr. William Kelly can place any reliance on the pre-emption right arising under Article 5. She finds (page 24) –

> "Mrs. Kelly's title to transfer the 500 shares she transferred to the petitioner derived from the Will of Mr. Kelly and from the transfer in April 1992 by her, in her capacity as personal representative, to herself as beneficiary of the 4,219 shares she inherited from Mr. Kelly. At the date of that transfer Mrs. Kelly was the holder of one share, which was transferred to her by the first respondent in 1987, although she was not the registered holder of one share. The whole purpose of the transfer of the one share to her in 1987 was to obviate pre-emption rights in relation to her inheritance from Mr. Kelly. If any issue had arisen in 1992 as to whether her entitlement to transfer the shares she inherited to herself was the subject of pre-emption rights under Art. 5, then she would have relied on the transfer of 1987 and procured her registration as a member and the legal owner of one share. However, apparently, no such issue arose and I cannot see how it can arise now, almost 18 years later. Apart from the petitioner, the first respondent and the personal representative of Mrs. Kelly, none of whom, in the light of their subsequent actions, can complain about the transactions in April 1992, all of the persons who were the registered holders of shares in April 1992 ceased to be registered holders almost 18 years ago.
>
> I take a similar view in relation to the transfer of 30th April, 1992 in favour of the petitioner. When it was executed, on foot of the 1987 transfer from the first respondent, the petitioner was entitled to be registered as legal owner of the 500 shares transferred to him by the first respondent. Although registration had not taken place, that transfer

was clearly acted on, as it was regarded as qualifying the petitioner to become a director of the company. If any issue had arisen that there were pre-emption rights which had to be given effect to under Art. 5 when Mrs. Kelly wished to transfer 500 shares to the petitioner in 1992, the petitioner could have relied on the 1987 transfer and procured his registration as a member and the registered owner of 500 shares. However, apparently, no such issues arose and I cannot see how such issue could arise now. Apart from that, as I have outlined, the three directors of the company, including the petitioner and the first respondent, approved the transfer by Mrs. Kelly to the petitioner in writing at that time."

32. The trial judge then addresses the Stamp Duty issue, noting that five of the transfers upon which she placed reliance in reaching her conclusions, were not stamped, namely: -

(1) The transfer dated 30th April, 1992 of 500 shares by Mrs. Kelly to Mr. Gerard Kelly;

(2) the transfer in September 1992 to Mr. Gerard Kelly from Mrs. Kelly, which the trial judge held took effect as to 3,468 shares;

(3) the transfer in September 1992 of 249 shares by Mrs. Kelly to Mr. William Kelly;

(4) the transfer of 1995 by Mr. William Kelly of 3,968 shares into the joint names of himself and Mr. Gerard Kelly; and

(5) the transfer in 1995 by Mr. Gerard Kelly of 3,960 shares into the joint ownership of himself and Mr. William Kelly.

The trial judge quoted s. 127 of the Stamp Duty Consolidation Act, 1995, subsection (1) of which requires that –

> "On the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the State… notice shall be taken by the judge… of any omission or insufficiency of the Stamp on the Instrument, and if the Instrument is one which may legally be stamped after execution, it may, on payment to the officer of the court whose duty it is to read the Instrument… of the amount of the unpaid duty, and the penalty payable on stamping the same, be received in evidence, saving all unjust exceptions on other grounds."

33. The trial judge then states (page 26) –

> "When the issue arose at the hearing, counsel for the petitioner indicated that the petitioner would undertake to have the relevant unstamped document stamped."

The court then proposed that Mr. Gerard Kelly obtain from the Revenue Commissioners an assessment of the relevant amounts due in respect of Stamp Duty and penalties, and that compliance should be effected by the Company, and she indicated that no order would be made in the proceedings until there was compliance with s. 127(1). It appears that subsequent to her decision Mr. Gerard Kelly complied with the undertaking and the unpaid Stamp duty together with penalties were duly paid.

34. Finally, the trial judge considered rectification of the Register of Members required to be kept by s.116 of the Act of 1963. On behalf of Mr. William Kelly an originating Notice of Motion (Record No. 2010/10COS) had been issued seeking an order pursuant to s. 122 of the Act of 1963 determining whether the Register should be rectified to record various transactions that had taken place since 1987 that were not recorded in the Register. As the trial judge understood the position Counsel on both sides recognised that it would be necessary for the

court to order rectification of the Register of Members to reflect the current issued share capital of the company as a result of the buyback and cancellation of 7,062 shares following the EGM in 1992, *and* the High Court's findings as to the legal ownership of the remaining shares. Accordingly, the trial judge indicated that on foot of this application she would order rectification under s.122, and further the order would direct the company to furnish details of the rectification and a perfected copy of the order of the court to the Registrar of Companies within 21 days after perfection of the order.

The Module 1 appeal

35. Mr. William Kelly lodged an appeal on 19 October 2012 against the order perfected on 1 October, 2012 – which, as I have noted, was a composite order following judgments in all the modules. By this time Mr. William Kelly was unrepresented. In his original lengthy Notice of Appeal he appears to rely on Grounds 14 – 30 inclusive in respect of Module 1. Most of these grounds are repeated at Ground A(i) in the amended Notice of Appeal (ordered by Irvine J., with singular lack of success, for the purpose of trimming back the number of grounds). For the most part these grounds assert that the trial judge erred in not giving "sufficient weight" to evidence that was before her, and also assert that she failed to "take cognisance" of certain evidence, or went "beyond reasonable discretion in accepting and interpreting… the share transfer documents with wrong dates and other wrong details". Typical examples of the pleaded grounds are: -

> "17. The Court did not give sufficient weight to the fact that share transfer documents had not been stamped or registered.

"28. The Court has failed to give sufficient weight to the evidence that I could not confirm that the Petitioner was the beneficial owner of the shares as described by the Court."

36. Mr. William Kelly as a litigant in person also prepared Written Submissions for this court. His initial 'Outline Submission' is dated 13 February 2020. Under direction from the Court he filed a revised 'Outline Submission' dated 5 April 2021. As new solicitors came on record for him, and counsel was briefed for the appeal, leave of the court was given for counsel to add to this document, and the last 6 pages of this 33 page document are the "Submission of Counsel" April 6 2021 to supplement that of William Kelly", prepared by Ms. Eithne Reid O'Doherty BL, who appeared and made oral submissions at the appeal hearing.

37. The written submissions insofar as they relate to Module 1 are relatively short, and primarily directed at suggesting that the trial judge erred in her findings of fact based on the Register of Members and the Share Transfer forms, and in her reliance on director's statements in the annual accounts. Mr. William Kelly then raises a new argument at page 25: -

"The Court mentions an unstamped transfer form in manuscript dated 27 April 1992 purporting to transfer shares from the late Mr. Kelly to Mrs. Kelly stating that it was on all fours with the unstamped form dated 16 September 1991 upon which the Court relied. However, the Court was unaware that the original form of 27 April 1992 had been stamped on 30 May 1992 with £10, the same day as the Extraordinary General Meeting to approve the buy-back of 7,062 shares. In cross-examination, [Mr. Gerard Kelly] identifies to the unstamped [sic] copy of this form. He also confirmed that the original was in his filing cabinet in the office [Module 1, p. 14 of Transcript]. However, he failed to mention that the original had been stamped.

[Mr. William Kelly] subsequently received a copy of the stamped form from [Mr. Gerard Kelly] on or about 12 April 2010 as part of the stamping process ordered by the Court at the end of Module 1.

Based on the aforementioned unstamped form of 27 April 1992, and despite evidence to the contrary, the Court wrongfully concluded that the transfer form dated 16 September 1991 was executed prior to 30th April 1992. The Court states,

> 'For the reasons set out below, I am satisfied that it is reasonable to infer that in April 1992, sometime before the transfer dated 30th April 1992, a Share Transfer form was executed by Mrs. Kelly which bears the date 16 September 1991 and on which the particulars of the transaction are typed. That was a transfer of the 4,219 shares which Mrs. Kelly had inherited from Mr. Kelly…'

This inference of the Court cannot be sustained in light of the stamped transfer form."

38. Before this court counsel for Mr. William Kelly also argued that the transfer dated 30th April, 1992 by Mrs. Kelly to Mr. Gerard Kelly of 500 shares was not a valid transfer, as it purported to be for "natural love and affection" and because it had never been seen by Mr. William Kelly, notwithstanding that he was a party to the approval given by the directors to that transfer. Counsel argued that the Transfer had to be stamped before it was returned to the Board for approval. Counsel also argued that this was consistent with the "family arrangement" contended for by Mr. William Kelly. As I understand the argument made, counsel contended that the reason the transfer of shares by Mrs. Kelly as personal representative of the estate of Mr. Kelly to herself as beneficial owner was stamped was because that transfer was intended to take effect, whereas the transfers of 500 shares to Mr. Gerard Kelly and 249 shares to Mr. William Kelly were not stamped because of the existence of the "family arrangement". Counsel

contended that that family arrangement was one in which Mrs. Kelly intended to divide her shares equally between Mr. Gerard Kelly and Mr. William Kelly to "hold them equally as part of the family arrangement". Counsel placed particular store on the note in the handwritten note of Mr. Gerard Kelly of the meeting on 31 July 1995 attended by Mr. Gerard McDevitt, Mr. William Kelly and Mr. Gerard Kelly, and the words "1991/2 Arrangement was of a temporary nature" to support the existence of a family arrangement under which the two brothers held the shares in the Company on trust for the wider family.

Decision

39. In my view Mr. William Kelly's appeal in respect of Module 1 cannot be sustained for a number of reasons.

40. Firstly it is by no means clear that Mr. William Kelly has included in his Books of Appeal all of the evidence and documentation that was before the High Court and considered by the learned trial judge. Module 1 was heard on 15, 16 and 18 December 2009, and there appear to have been legal submissions made on 18 December 2009 and to a limited extent on 11 and 14 January 2010, with further submissions made on 28 January 2010. Both parties were represented by solicitors and counsel at that time. It is apparent from the transcripts that there was a large volume of papers before the court, and many of these were referred to in evidence and legal argument, but not all of them appear to be before this court. For instance, the Transcript for day 1 (15 December 2009) discloses that there were Folders or Books numbered 5A and 5B containing documentation, and these are not before this court. These appear to have been booklets of relevant Company documents, and also contained a Table and Schedule which are referred to in the evidence. The High Court also received in evidence a notarised copy of the Register of Members, and a complete suite of relevant Companies Registration Office

documents. The Book of Pleadings lodged with this appeal, while it included the Petition, and amended Petition, did not include any verifying affidavit of Mr. Gerard Kelly or any of the exhibits, and it omitted two of the exhibits referred to in the replying affidavit of Mr. William Kelly sworn on 5 December 2008. While some of the missing documentation was drip fed to this court as attachments in emails sent by Mr. William Kelly's solicitors to the court both during and soon after the appeal hearing (which was held remotely), the court has no means of knowing whether it is in possession of all documentation that was before the High Court, or even all relevant documentation.

41. Order 86A, rule 17(1) requires an appellant to lodge appeal booklets comprising *inter alia* (e) copies of all affidavits and exhibits relied upon or opened in the court below and (k) copies of the documents relied on by each party as specified in the Notice of Appeal and respondent's Notice. Practice direction CA06 at para. 9 stipulates what should be comprised in the appeal books, and includes copies of each affidavit and relevant exhibits, "an agreed book of extracts of the transcript of the evidence relevant to the issues in the appeal" or where oral evidence was given over more than four days, and "the extracts must be sufficient to enable the Court understand the context in which the evidence was given". Paragraph 9C.(iv) stipulates that any documents admitted in evidence in the High Court relied on by either party as relevant to the appeal should be in one agreed Core Book. Mr. William Kelly is in breach of these provisions, and it is a material breach because in my view it would be unsafe for this court to make different findings of fact or draw different inferences from those drawn by the trial judge without being certain that it is considering precisely the same documentation, in tandem with the witness evidence and the legal arguments evident from the Transcripts

42. The second reason is that this court is an appellate court, and its function is not to conduct a rehearing. This court will be slow to interfere with the High Court's primary findings of fact. This has long been the position, and it is worth referring to some of the caselaw because it informs my approach to the appeals in Modules 1, 2 and 3.

43. In *Hay v O'Grady* [1992] I.R. 210 McCarthy J. (*nem diss.*) enunciated the following principles at page 217:

"The role of this court, in my view, may be stated as follows:—

1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.

2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.

3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in *"Gairloch," The S.S., Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R. 1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of

inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.

4. A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference — in a case of this kind, was there negligence? I leave aside the question of any special circumstance applying as a test of negligence in the particular case. If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.

5. These views emphasise the importance of a clear statement, as was made in this case, by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows.

44. *Hay v O'Grady* was approved by the Supreme Court in *Doyle v. Banville* [2012] IESC 25. Clarke J. (as he then was) emphasised "…the obligation of the trial judge to analyse the broad case made on both sides" but stated:

> "2.4…it is no function of this court (nor is it appropriate for the parties appealing to this court) to engage in rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling."

He also stated:

2.7 Finally, before moving on to the specific issues which arise in this appeal, it is also important to note that part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated reason and credible reason. In the latter case it is no function of this court to seek to second guess the trial judge's view."

45. *Hay v O'Grady* was followed in *McCaughey v. IBRC* [2013] IESC 17, and more recently in *The Leopardstown Club Limited v. Templeville Developments Limited and Philip Smyth* [2017] IESC 56. There Denham J. stated:

"[81] In this case, while the Court of Appeal referred to the principles of *Hay v. O'Grady* [1992] I.R. 210, and the findings of fact by the trial judge, it then proceeded as if it were a trial court rehearing a case and considering evidence afresh. It dismissed the trial judge's findings as to credibility and facts.

[82] The principles identified by the *Hay v. O'Grady* [1992] I.R. 210 jurisprudence include the following:-

• An appellate court does not proceed by way of a full rehearing of a case.

• An appellate court is bound by the findings of fact of a trial judge which are supported by credible evidence.

• In general, an appellate court proceeds on the findings of fact of a trial judge.

• The fact that there is contrary evidence does not alter the position.

• An appellate court should be slow to substitute its own inferences of fact where such depends upon oral evidence, and a different inference has been drawn by the trial judge.

• The fact that there is some evidence before a trial judge which may lead to a different conclusion does not alter the fundamental principle.

• A finding of the credibility, or not, of a witness is a primary finding of fact.

[83] I am satisfied that the Court of Appeal exceeded its jurisdiction by misapplying *Hay v. O'Grady* [1992] I.R. 210. The trial judge heard and observed the witnesses, and his findings of fact were supported by credible evidence."

Most recently in *McDonald v Conroy* [2020] IECA 239 Collins J. in this court reminds us of the underlying rationale for the limits on the role of the appellate court:

"33. In addressing this aspect of the appeal, it is essential to keep the proper boundaries of this Court's role in mind. It is important not to overstep the Court's appellate function by substituting the Court as fact-finder. That is not its role. At the same time, it is important that the Court should not surrender its proper appellate function; it is entitled – indeed it is the Court's duty – to "*ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts.*

34. In approaching this task, the Court must have due regard to the nature of the High Court hearing. A large number of witnesses gave evidence over very many hearing days, spread over a period in excess of 6 months. That evidence related to events which had occurred (or were alleged to have occurred) between 9 and 12 years before the High Court hearing commenced. It was inevitable that there would be many conflicts,

inconsistencies, gaps and uncertainties in the evidence. The Judge was not obliged to identify and resolve all of these. He was deciding a civil claim for damages, not conducting an inquiry. It was important for the Judge – as it is for this Court on appeal – not to lose sight of the wood for the trees or get lost *"in the undergrowth of the evidence tendered or the arguments made."* The Judge's task was to have regard to the evidence, to identify the issues that required to be resolved, to make findings on those issues and to explain the basis for those findings sufficiently, within the parameters set out in the case-law discussed above. This Court must be astute to avoid applying any exaggerated or unrealistic standard in its review of the Judgment."

46. It is apparent from a reading of the Transcript in respect of Module 1, and from a reading of the judgment, that the trial judge had before her credible evidence from which she could make the findings which she did in respect of the shareholding in the Company. She had before her share transfer documentation, the Register of Members and oral evidence, from which she could reach the conclusions that she did in relation to the share transactions in 1987, the buyback, the 1992 transactions and the 1995 transactions, and the transmissions on the deaths of Mr. Kelly and Mrs. Kelly respectively. She plainly had regard to the evidence adduced on behalf of Mr. William Kelly, and the arguments pursued on his behalf. In my view she was clearly entitled to conclude that Mrs. Kelly transferred 500 shares to Mr. Gerard Kelly by transfer dated 30th April, 1992, and that the further transfer to him dated 17 September 1991 but executed in September 1992 had the effect of Mrs. Kelly transferring the bulk of her shares to Mr. Gerard Kelly, such that he ended up being the beneficial owner of 3,719 shares – the same number as Mr. William Kelly – and that such equality was what Mrs. Kelly intended. There was ample evidence from which the trial judge could conclude that, as a result of the

transactions in 1995, 7,936 shares in the Company are owned by Mr. Gerard Kelly jointly with Mr. William Kelly, and that the only other two shares in the Company belong to the unadministered Estate of Mrs. Kelly.

47. The principles in *Hay v O'Grady* are particularly relevant to the determination of the trial judge rejecting Mr. William Kelly's contention that there was some sort of "family arrangement", or that either or both of Mr. Gerard Kelly and Mr. William Kelly held their shares as trustees for the family. When counsel before this court was asked to identify details of any alleged binding "family arrangement" reached in 1995 she was unable to identify when such an agreement was reached, the parties to that agreement, and the terms of that agreement. There was in fact no evidence of these critical elements and the only possible conclusion was that no such binding agreement was ever concluded.

48. Counsel placed particular reliance on the Memo in Mr. Gerard Kelly's handwriting made of the meeting in 1995, at which Mr. Gerry McDevitt and Mr. William Kelly were also present, but it is clear on the face of that document that it merely records a discussion that took place on 31 July 1995, of possibilities and alternatives. Taken at its height it simply does not support Mr. William Kelly's assertions.

49. Thirdly, in my view Mr. William Kelly is not entitled to rely on his submission in relation to the original Transfer form dated 27 April 1992 stamped on 30 May 1992, the same day as the EGM that approved the buyback from minority shareholders, which came to light after the Module 1 hearing, having been located in Mr. Gerard Kelly's filing cabinet.

50. In the first instance Mr. William Kelly became aware of this stamped form on or about 12 April 2010, but did not seek to reopen any issue before the High Court. Secondly, no

application was made to this court to admit fresh evidence. Had Mr. William Kelly seriously wished to rely on new evidence *that came to light before the proceedings in the High Court were concluded*, then it was incumbent on him to make an application to this court pursuant to O.86A r.4 of the Rules of the Superior Courts for leave so to do. This court would have had a discretion to grant such leave, but under established jurisprudence would have to have been satisfied that the evidence existed at the date of trial in the High Court, and would have to have had regard to when such new evidence ought to have come to Mr. William Kelly's attention had he been exercising reasonable diligence. I note in this regard that the original Transfer Form could have been obtained through discovery, but discovery was not pursued in the High Court.

51. In any event, I do not see that the emergence of this stamped original Transfer assists Mr. William Kelly. If anything, it supports the conclusion of the trial judge that the execution of the transfer by Mrs. Kelly as personal representative to herself *preceded* the transfer of 500 shares by her to Mr. Gerard Kelly and occurred on 27 April 1992 (p. 10 of her judgment). It also preceded the transfer *executed in September 1992* (backdated to 1991) of 3,938 shares to Mr. Gerard Kelly (500 more than she intended – the trial judge holding that she could only conclude that this number was a "mistake" as the earlier transfer of 500 shares in 1987 was overlooked).

52. Counsel for Mr. William Kelly, as I understood her oral submissions to this court, argued–

(a) that the stamped Transfer form of 27 April 1992 was never produced to the meeting on 30 April, 1992 so the Board never instructed/resolved that it be registered. It was, she asserted, never seen by Mr. William Kelly;

(b) that the Transfer signed in September 1992 backdated to September 1991 needed to be stamped before it could be brought back to the Board for approval/registration;

(c) that the reasoning for the stamping of the Transfer of 27 April 1992, but the non-stamping of the 30 April 1992 transfer to Mr. Gerard Kelly of 500 shares, was the "family arrangement", and that Mr. Gerard Kelly was only the holder of 500 shares under a temporary arrangement for the purposes of the buy-agreement, and for the purpose of enabling him to attend a meeting in May 1992, and that it was never intended that he be registered as owner of those shares.

The argument at (a) is based on fresh evidence, was not made in the High Court, and cannot be made now. The trial judge was also clear that the directors of the Company, including Mr. Gerard Kelly and Mr. William Kelly, *executed* a document approving that Mrs. Kelly be registered as the owner of 4,219 shares on 30 April 1992 (page 10 of the judgment).

As to the argument at (b), this raised the question whether the unstamped transfers were "proper instrument(s) of transfer", and this was fully addressed by the trial judge at pp. 20 – 23. It will be recalled that she concluded that as a matter of principle the Company was entitled to register Mr. Gerard Kelly notwithstanding that the Transfer of 30 April, 1992 was not stamped – and no argument was addressed to this court as to why this finding might be wrong. Separately at pages. 25 – 26 the trial judge addressed stamping generally and cited s. 127(1) of the Stamp Duty Consolidation Act, 1999, which provides that an instrument may be stamped after execution and may be received in evidence on payment – and she cites the undertaking from Mr. Gerard Kelly that it would be paid, and directed that no order was to issue in the matter

until stamping had occurred. No argument was addressed before this court to suggest that this approach by the trial judge was wrong in any respect. It was not disputed that the Stamp Duty was discharged.

53. The argument (c) is without merit for the reasons given earlier, and the trial judge's rejection, on the evidence before her, that there was any "family arrangement" – a finding of fact which this court should not disturb.

54. For all of these reasons I would affirm the judgment and order of the High Court in respect of Module 1.

Module 2

55. In this Module, the trial judge heard and determined Mr. Gerard Kelly's substantive claim under s. 205 for an order under s.205(3) bringing an end to the matters complained of by the purchase of Mr. William Kelly's shareholding.

In the prayer to the Petition Mr. Gerard Kelly sought, in the alternative, an order for the winding up of the Company pursuant to s. 213(f) of the Act of 1963, which provides that –

> "213. A company may be wound up by the court if –
>
> …
>
> (f) the court is of the opinion that it is just and equitable that the company…should be wound up;".

56. Module 2 was heard by Laffoy J. over seven days, commencing on 29 June 2010. She reached the conclusion that Mr. William Kelly had exercised his powers as a director of the

Company in a manner oppressive to the Mr. Gerard Kelly within the meaning of s. 205(1). She held that there had been a total breakdown in the relationship of the parties at every level, both business and personal, and that they were deadlocked to the extent that they were incapable of running the company properly together, and that the situation was irretrievable and required to be remedied by the court in accordance with s. 205(3) or otherwise. Her findings will be addressed in more detail later in this section.

57. Having advised the parties to her decision, and that she would give her reasons at a later date, and in order to enable her to decide on the appropriate remedy, she then gave directions on 9 February 2011 – (a) related to the finalisation of Company accounts for the years 2006 – 2009 inclusive; (b) that the parties as Directors procure the finalisation of the draft accounts for the year 2010 and produce up to date management accounts for the period since 31st December 2010; (c) that the parties agree on an independent accountant to prepare an up to date statement of affairs and report on the Company's financial state; (d) that Mr. Gerard Kelly procure at his own expense an up to date valuation of the properties of the Company from a professional valuer with expertise of property values in the Letterkenny area; and (e) that Mr. William Kelly reimburse to the Company sums aggregating €180,000 which he withdrew from the Company after 14 September 2009 to discharge fees due to Gibson & Associates, that sum to be held in escrow pending the final determination of the proceedings.

58. Following these directions the matter came back before Laffoy J. on 16 March 2011, 13 April 2011 and 5 May 2011. On the first of these dates, as the parties had been unable to agree an independent accountant to prepare the statement of affairs, the court appointed Deloitte & Touche, Chartered Accountants to perform that task. That Statement of Affairs, prepared by Mr. David O'Flanagan and dated 12 April 2011, was furnished to the court on 13 April 2011.

The parties were afforded an opportunity to make written submissions arising out of that report, and the court then heard both sides on 5th May, 2011 before coming to a determination as to the appropriate remedy. Her determination was that the Company should purchase Mr. William Kelly's shares (para.21.1) –

> "at fair market value and that the share capital of the company be reduced proportionately and the necessary consequential matters be addressed (for example, the alteration of the Memorandum and Articles of Association of the Company)".

The trial judge then directed, subject to them being willing, that Deloitte & Touche carry out a fair market valuation of Mr. William Kelly's 3,968 shares as at 31 August 2011. She also directed the set-off against the value of the shareholding of all or so much of the sum of €180,000 as was taken by Mr. William Kelly from the Company to discharge legal fees of Gibson & Associates, and as had not been reimbursed to the Company, so that the purchase price to be paid by the Company for the shareholding would be the value so determined less the amount of the set-off. She further ordered that Mr. William Kelly resign as director of the Company forthwith, and that Mr. Gerard Kelly be at liberty to appoint a director in his place.

59. It should be noted that during the week before the commencement of the hearing of Module 2 Gibson & Associates applied to come off record for Mr. William Kelly and the Company. Despite objection from Mr. Gerard Kelly's legal team, Gibson & Associates were allowed to come off record and accordingly Mr. William Kelly appeared as a litigant in person in Module 2, and also in Modules 3 and 4. Mr. Gerard Kelly continued to be represented by solicitor and counsel, although he appeared in person before this court on the appeal.

Oppression

60. All of the foregoing matters are dealt with in the Module 2 judgment which Laffoy J. delivered on 31 August 2011, in which she sets out her reasons for finding that there was oppression. The Petition set out a series of allegations of oppressive conduct on the part of Mr. William Kelly. At para. 3.1 of her judgment the trial judge identified the bases of the petitioner's claim as pursued at hearing as being –

> "… that the affairs of the Company are being conducted and the powers of the directors are being exercised in a manner oppressive to him and in disregard of his interests as a member of the Company, under the following five headings, namely:
>
> (1) the suspension of [Mr. Gerard Kelly] on 22nd April, 2008;
>
> (2) the exclusion of [Mr. Gerard Kelly] from the Company by denying his standing in the Company as a shareholder or as a director, while [Mr. William Kelly] purported to be entitled to control the Company;
>
> (3) refusing to engage or co-operate with the [Mr. Gerard Kelly] in the management of the Company and obstructing [Mr. Gerard's Kelly] efforts to manage the company;
>
> (4) taking funds from the company and, in particular, taking funds to pay the legal costs of [Mr. William Kelly] in defending these proceedings; and
>
> (5) assaulting [Mr. Gerard Kelly] in the office of the Company."

61. On pages 13 – 40 of her judgment the trial judge sets out the evidence related to each of these five matters, and makes certain findings of fact. She then proceeds to address s. 205(1) and the relevant legal principles (para. 9), and the core issues in the case, and in para. 11 reaches

her conclusions as to oppression. At this point it is appropriate to set out the trial judge's main findings of fact.

(1) Suspension of Mr. Gerard Kelly

62. This is dealt with in para. 4.1 – 4.13 of the judgment in Module 2. The trial judge in para. 4.2 refers to the "bizarre manner in which [Mr. Gerard Kelly] and [Mr. William Kelly] had been interacting in relation to the management of the business of the company for a number of years" prior to the purported suspension in a letter dated 22 April 2008 from Mr. William Kelly to Mr. Gerard Kelly. She refers, uncontroversially, to the evidence that between mid-2007 and January 2008 Mr. William Kelly had not been in the workplace, and that George Kelly had also been out of work from around Easter 2007 for a year.

63. She refers to significant correspondence initiated by Mr. Gerard Kelly on 26 January 2008, setting out his grievances and complaining of "persistent, inappropriate and bullying behaviour" on the part of Mr. William Kelly, and the suggestion that a suitable third party be appointed by the Labour Relations Commission to help resolve issues. His letter of 20 February 2008 repeated the suggestion of mediation. Mr. William Kelly responded on 29 February 2008 denying allegations of inappropriate or bullying behaviour, and alleging that Mr. Gerard Kelly had continually resisted his attempts to get the petitioner "to apply appropriate corporate governance standards to the Company". The trial judge refers to the solutions suggested by Mr. William Kelly in this letter where he states –

> "I have given this a lot of thought and I believe the only way forward is to break the stalemate",

and that there should be a formal meeting of the Board of Directors to address the financial, corporate governance and operational issues. In his reply of 13 March 2008 Mr. Gerard Kelly

rejects Mr. William Kelly's contentions but does not dismiss out of hand the calling of a Board meeting but suggested that an agenda be discussed and agreed beforehand. The trial judge at para. 4.4 notes that that letter gives some insight into Mr. Gerard Kelly's long-term objective which was "to separate completely in a business sense", with a preference that he wished to continue "running the trading operations", asserting that he had done so on his own since the middle of 2007 without the assistance of Mr. William Kelly or George Kelly both of whom were absent from their normal work. The Labour Relations Commission were asked to mediate but did not become involved, indicating that they would not assist in the absence of consent from Mr. William Kelly, which was not forthcoming.

64. The trial judge records that there were other tensions between the parties in relation to draft accounts for 2006 and 2007, which gave rise "to interaction which was replete with recriminations from each side".

65. The trial judge then refers to the notification of suspension contained in the letter of 22 April 2008 from Mr. William Kelly to Mr. Gerard Kelly. This followed a meeting the previous day between Mr. William Kelly and George Kelly at which they discussed the health and safety implications of two accidents at work occurring in April 2008 in which the Company had been involved. A memorandum was prepared and signed by both of them as to what transpired at that meeting, and the trial judge found that the gist of the memorandum was that the accidents disclosed deficiencies in compliance by the Company with health and safety, the cause of which, it was asserted, was that Mr. Gerard Kelly was obstructing George Kelly, the designated health and safety officer, from carrying out his responsibilities. The memorandum concluded that Mr. William Kelly and George Kelly had decided that, in the interests of health and safety and to prevent other staff members being injured, Mr. Gerard Kelly "should be immediately

removed from all operational responsibilities" in the Company. The letter of suspension was on letter heading of the Company and signed by Mr. William Kelly, and referred to the two accidents in the workplace, and alleged that it was Mr. Gerard Kelly's failure to cooperate "with the established management structures" of the Company, particularly in relation to risk, that was placing the Company and its staff in danger and preventing the maintenance of the safe working environment. The letter continued: -

> "In consequence and with immediate effect, you are suspended from all your responsibilities within [the] Company."

It stated that the Company would continue to pay Mr. Gerard Kelly pending investigation of his conduct, and what action should be taken, which might include dismissal. The letter also made allegations against Mr. Gerard Kelly including his alleged failure to complete the Company's financial statements, to file the annual returns in the CRO in time, and to maintain an up to date tax clearance certificate. There was also an allegation that the petitioner was "seriously disrupting the activity of others", which the trial judge took to mean Mr. William Kelly and George Kelly, and that this was "placing added stress and adding unnecessary risk" for the Company and those who depended on it. It was stated that the suspension was extended to cover those "additional matters". The trial judge noted that Mr. William Kelly and George Kelly went to Mr. Gerard Kelly's office to inform him of his suspension with immediate effect, and handed the letter to him, and she finds that "later that day [Mr. William Kelly] arranged to have the telephone to [Mr. Gerard's Kelly] office and his computer lines disconnected". She also finds –

> "4.8 … There was an incident on that day in which it is acknowledged by [Mr. Gerard Kelly] that he pinched [William Kelly's] earlobe between his thumb and his first finger

because [Mr. Gerard Kelly]came upon [Mr. William Kelly] when he was behind his desk looking at [Mr. Gerard Kelly's] papers."

66. The two incidents said to give rise to the suspension are described in the letter of 22nd April, 2008 as follows: -

"On Thursday, April 17, 2008, at about 12:15pm, an accident took place at work in which David Wasson was injured. Following the accident, I saw Davis [sic] Wasson and was extremely concerned about his wellbeing. Key members of staff arranged to have David Wasson transported to hospital. This is the second important accident to have taken place in a week. On Thursday I came to your office on a number of occasions to discuss David Wasson's accident and its wider implications. You repeatedly refused to discuss the subject of health and welfare or to engage with me in any meaningful way.

On or about April 11, 2008, there was also another incident involving Stephen Toner where he was injured near his eye. Stephen Toner's injuries could have been much more serious. You had arranged for Stephen Toner to remove the contents of an old shed on the Company's property. This was a dangerous task. You failed to coordinate with George Kelly Operations Manager and the Health and Safety Officer to decide what action if any should be taken regarding this old shed or if action was taken, to ensure that safe work practices were being followed."

67. In response to the letter of suspension Gore & Grimes solicitors for Mr. Gerard Kelly wrote to Mr. William Kelly on 25 April 2008 stating that Mr. Gerard Kelly was a director and an equal shareholder in the Company and alleging that his position within the Company both

as a director and a shareholder was being oppressed by Mr. William Kelly's actions. It protested that the purported suspension was clearly "in breach of all procedures including natural justice and company law" and threatened injunction proceedings under s. 205 if Mr. William Kelly did not desist from his actions. Mr. William Kelly replied to that under Company's letter heading by letter dated 7 May 2008 saying that the Company suspended Mr. Gerard Kelly in his role as an employee of the Company. The trial judge noted that despite the intervention of that firm of solicitors on behalf Mr. Gerard Kelly, Mr. Gerard Kelly and Mr. William Kelly continued to correspond directly with each other during the period of suspension, which lasted until 19 May 2008. She found –

> "4.10 … Once again, the correspondence was replete with recriminations on each side. Personal contact between them was obviously extremely fraught. [Mr. Gerard Kelly] had continued to attend at the office and to attempt to do his work, although [Mr. William Kelly] endeavoured to prevent him from so doing. [Mr. Gerard Kelly] acknowledged that, on one occasion, when [Mr. William Kelly] was interrupting his work in [his] office, he pulled a Bluetooth mobile phone earpiece from [Mr. William Kelly's] ears and threw it out the door of his office."

68. The trial judge then refers to the letter of 19 May 2008 by which Mr. William Kelly ended the purported suspension, informing Mr. Gerard Kelly that he had decided to arrange for George Kelly "to fully resume his role of Operations Manager and Chief Operating Officer", so that health and safety matters would be carried out under his sole direction, and that these new arrangements made it possible for the Company to "lift your suspension" with "immediate effect". The letter also stated that Mr. Gerard Kelly, in his capacity of Finance Director and Chief Financial Officer, and George Kelly would report directly to Mr. William Kelly. There

was no further mention of "investigation". The trial judge records that under cross-examination Mr. William Kelly testified that there had been an investigation of the "charges", but when asked if he had informed Mr. Gerard Kelly about the investigation his answer was that he had *"just stopped the whole process".* Mr. William Kelly acknowledged that he had obtained no advice at the time as to whether the suspension was procedurally correct or not. He did not know on what authority he was entitled to suspend the petitioner, although he acknowledged that the suspension, as a "significant action", might require the approval of the Board, but he knew he could not get this. His position was that Mr. Gerard Kelly had been suspended as an employee, not as a director or shareholder.

69. The trial judge concluded her findings in relation to the purported suspension as follows:-

> "4.12 While recognising that the responsibility of the persons involved in the management of a business to comply with health and safety requirements and to maintain proper standards in the workplace is of crucial importance, and without expressing any view on the seriousness or otherwise of the incidents which occurred in the Company's workplace in April 2008, the only reasonable conclusion open on the evidence is that the purported suspension of [Mr. Gerard Kelly] was a sham, which had been contrived by [Mr. William Kelly], with the aid of George Kelly. It was an attempt by [Mr. William Kelly] to exclude [Mr. Gerard Kelly] from any role in the running of the Company without any authority on his part to do so. It was designed to annoy, harass and embarrass him.
>
> 4.13 The conduct of [Mr. William Kelly] in purporting to suspend [Mr. Gerard Kelly] and in the steps which he took to enforce a suspension were highly provocative. For

instance, it is difficult to conclude other than that the two episodes in which [Mr. Gerard Kelly] admitted to physical contact with the ears of [Mr. William Kelly] were the result of extreme provocation from [Mr. William Kelly]. Nonetheless, the conduct of [Mr. Gerard Kelly] cannot be condoned and he must share responsibility for the depths to which the relationship of [Mr. Gerard Kelly] and [Mr. William Kelly] subsequently plummeted."

(2) Exclusion of Mr. Gerard Kelly from the Company

70. Mr. Gerard Kelly's contention was that he was excluded from the Company by Mr. William Kelly's conduct in denying him his standing as a shareholder and director, while Mr. William Kelly purported to be entitled to control the Company.

71. The first basis for this contention was that it was "self-evident" from the manner in which the proceedings were defended. This was rejected by the trial judge. She observed that it was not a matter that pre-dated the presentation of the petition. Insofar as Mr. William Kelly challenged Mr. Gerard Kelly's position as a director, the trial judge expressed herself "satisfied that at all material times prior to the commencement of these proceedings [Mr. William Kelly] acknowledged that [Mr. Gerard Kelly] was, and that he acknowledges that he is, a director of the Company." Noting that Mr. William Kelly had also challenged Mr. Gerard Kelly's standing as a shareholder/the beneficial owner of shares in the company, the trial judge stated: -

"5.2 … Having regard to the findings I have made in the 2010 judgment [Module 1], that approach on the part of [Mr. William Kelly] was clearly incorrect and should not have been pursued. Nonetheless, in my view, both [parties] are equally responsible for allowing a state of affairs to prevail as a result of which share transfer forms were not stamped and the Register of Members of the Company was not kept up to date in

accordance with law. In other words, [Mr. Gerard Kelly] was equally responsible with [Mr. William Kelly] for the fact that it was not absolutely clear from the Register of Members what the issued share capital of the Company was and what the respective shareholding of the [parties] were, so that it would have been clear that [Mr. Gerard Kelly] had standing to bring the petition."

72. The second basis for "exclusion" pursued by Mr. Gerard Kelly was the perception of Mr. William Kelly of his role in the Company, which did not acknowledge an "equal say in the affairs" of the Company for Mr. Gerard Kelly. In her judgment the trial judge takes her starting position the Articles of Association of the Company which incorporated Table A in the first Schedule to the Companies (Consolidation) Act, 1908, and under which the management of the business of the company was delegated to the Directors (Regulation 71). She found that from 2004 onwards, when they became the sole directors, the management structure was a matter for agreement between them. From the pleadings she found that the agreed position of the parties was "that at executive level [Mr. Gerard Kelly] was responsible for the financial affairs of the Company and [Mr. William Kelly] for the sales and business management, that is to say, the trading aspect of the Company." She found: -

"5.3 … there is no doubt that, both in his dealings with [Mr. Gerard Kelly] before these proceedings were initiated and in his evidence, the perception of [Mr. William Kelly] was, and is, that he has been, and is, at the apex of the management structure, in his words, that he is the CEO and the 'leader' of the Company, and that [Mr. Gerard Kelly] is answerable to him in respect of the performance by [Mr. Gerard Kelly] of his own management or executive function. His purported suspension of [Mr. Gerard Kelly] is a clear example of that attitude."

73. The trial judge then noted that this historic division of management and executive function was "complicated" by two factors: first the absence of Mr. William Kelly for eight months between November 2004 and July 2005, and again between July 2007 and January 2008, during which periods Mr. Gerard Kelly assumed responsibility for the day to day management of the Company. The trial judge noted that –

> "5.4 … to facilitate that, [Mr. Gerard Kelly] had put in place a system of 'team leadership', which [Mr. William Kelly] moved to dismantle when he returned to the Company at the beginning of 2008. [Mr. William Kelly] did not acknowledge that he was absent from the Company and characterised the putting in place of the 'team leadership' system as a unilateral change by [Mr. Gerard Kelly] in the management structures, which had never been approved of by the Board of Directors."

74. The trial judge also considered a second factor in this context – the role of George Kelly. She considered on the evidence that the view of Mr. William Kelly was that George Kelly should be what he referred to as a full "participant" in the Company and should eventually become a director, while noting that he was neither a shareholder nor a director.

75. The trial judge found the following: -

> "5.5 Taking an overview of the evidence, what it discloses, in my view, is that in recent years, apart from the division of the trading and financial functions between them, there has been no agreement between the two directors of the Company as to the manner in which their delegated powers of management of the business of the Company are to be exercised. In particular, there has been no agreement as to the management structures which should be in place and by whom and how the executive functions are to be

performed. Unfortunately, the consequence is that the Company is a wholly dysfunctional organisation. An employee of the company, who works as a manager in the office and who is called to testify on behalf of [Mr. Gerard Kelly], testified that there has effectively been no management within the Company in recent years. He has found that it has not been possible to get important decisions executed and he gave as examples the failure to finalise the Company's accounts and to address reducing the costs of running the Company, which is necessary in the current economic climate. Indeed, [Mr. William Kelly] conceded that there has been no effective management of the Company over the past four years.

5.6 The conclusion I have come to on the evidence is that [the parties] are deadlocked in relation to what needs to be done to manage the business of the Company in a proper manner. On the evidence, I do not think it would be fair to ascribe total responsibility for that situation to [Mr. William Kelly]. Each party seems to adhere stubbornly to his own point of view on everything. However, I accept [Mr. Gerard Kelly's] evidence as to the absences of [Mr. William Kelly] and the consequential additional burden placed on him, which he had to address. I also accept that [Mr. William Kelly] has attempted to promote the involvement of George Kelly in the Company to the disadvantage, and against the wishes, of [Mr. Gerard Kelly]. The evidence supports the conclusion that, for whatever reason, the conduct of [Mr. William Kelly], probably since 2005 and certainly since 2007 has not been conducive to the proper management of the business of the Company in the interest of its shareholders and its other stakeholders, for example, its employees and creditors. His antipathy towards and treatment of [Mr. Gerard Kelly] in response to the latter's attempts to remedy the situation to some extent justify the behaviour of [Mr. Gerard Kelly] towards [Mr. William Kelly]."

76. While the trial judge did not express in this section of the judgment a concluded view that there was "exclusion of Mr. Gerard Kelly from the Company", I have dealt with it at some length because it seems to me that on a full reading of her judgment her findings on this issue informed her ultimate conclusion that Mr. William Kelly's conduct was oppressive.

(3) Refusal to engage or cooperate with Mr. Gerard Kelly in the management of the Company (long term loans, cost cutting), accounts, filing of annual returns.

77. The trial judge considered this in the context of the alleged lack of engagement or cooperation on the part of Mr. William Kelly in the preparation of the accounts, the alleged wrongful refusal to sign off on the Company's accounts for the years 2006 and 2007, failure to cooperate in the filing of annual returns, and issues in relation to the auditors of the company. She did so in the context of the issuance on 15 August 2008 by the CRO of a notice under s. 371 of the 1963 Act on the Company requiring the delivery of outstanding annual accounts within 56 days, because of existing default. On the same day the CRO also issued an involuntary strike off notice in relation to a subsidiary of the Company, Harup Limited.

78. The position adopted by Mr. Gerard Kelly was that the draft accounts for 2006 had been completed since January/February 2008 and copies of them had been furnished to the Company's then auditors in March 2008, and that the draft accounts for 2007 were in the course of preparation. She noted that –

> "6.2 … Eventually, a meeting of the Board of Directors was held on 18th September, 2008, although, in fairness, [Mr. William Kelly] had endeavoured to convene a meeting earlier, at which the draft accounts for 2006 and 2007 were considered. There was, apparently, disagreement between the parties in relation to two aspects of the accounts. On 19th September, 2008 [Mr. Gerard Kelly] wrote to [Mr. William Kelly] asking for

his 'agreement with the drafts' before they were given to the Company's then auditors, or 'at the very least your agreement as to what your specific concerns are'. [Mr. Gerard Kelly] went on to record that he had prepared the drafts on the basis that the directors were in disagreement over the treatment of the controversial items and that he had suggested various ways it could be dealt with. He requested specific comments on them by [Mr. William Kelly]. [Mr. William Kelly's] three line response of the 25th September, 2008 stated that he agreed that 'the draft accounts' which [Mr. Gerard Kelly] had prepared should be submitted to the Company's then auditors. He deliberately failed to address the controversial items. That was the state of play when the petition was presented."

79. The trial judge then goes on to trace the proposal of Mr. William Kelly in early October 2008 (post the presentation of the Petition) that the Company consider changing auditors, and that on 30 April 2009 PricewaterhouseCoopers gave the Company notice that they were resigning as auditors, which notice was filed in the CRO on 24 June 2009. Subsequently in July 2009 the firm of Stewart & MacLochlainn was appointed auditor of the Company. The trial judge then records: -

"6.4 In mid-November 2009 Stewart & MacLochlainn furnished draft accounts for the years 2006, 2007 and 2008 to the Company via [Mr. Gerard Kelly], who in turn furnished them to [Mr. William Kelly], requesting that [Mr. William Kelly] adopt a more pragmatic approach than he had hitherto adopted, so that the drafts could be agreed, finalised and signed off on. On the evidence, in the past pragmatism was not a policy to which [Mr. William Kelly] subscribed and that remains the position. It is a policy to which [Mr. Gerard Kelly] frequently paid lip service in the past, although it

has to be acknowledged that in initiating these proceedings he took practical steps to obtain a solution to a very difficult problem. In any event, while the first module was at hearing, by letter dated 18th December, 2009 the solicitors then on record for [Mr. William Kelly] wrote to [Mr. Gerard Kelly's] solicitors suggesting that, having regard to the impasse in relation to the finalisation of the accounts, by 22nd December, 2009 three independent persons should be nominated from which they would select one who would act as an expert 'to determine the outstanding issues that are preventing finalisation of the accounts'. There was no positive response to that suggestion and the solicitors on record for [Mr. William Kelly] wrote to [Mr. Gerard Kelly's] solicitor again on 13th January, 2010 setting out certain matters to which they required formal responses which covered the controversial items. Later, by letter dated 26th January, 2010 [Mr. William Kelly] raised the outstanding matters directly with Stewart & MacLochlainn and requested Stewart & MacLochlainn 'to assist the Directors, either individually or collectively, to produce and finalise all outstanding annual accounts of the Company and to help return the Company to fiscal compliance'. [Mr. William Kelly] also sought the assistance of Stewart & MacLochlainn 'in carrying out an inspection of the books of account in support of the annual accounts'."

At paragraph 6.5 the trial judge records that Stewart & MacLochlainn endeavoured to maintain a neutral stance between the parties, and that despite Mr. Gerard Kelly asking Mr. William Kelly not to interact directly with Stewart & MacLochlainn without him being present, Mr. William Kelly continued to correspond directly. The trial judge then addressed the two accountancy matters in issue between the parties: -

"6.6 The principal matters of a technical accountancy nature in respect of which [Mr. William Kelly] has reservations or canvassed in the evidence of both [parties] – the treatment of stock reserve and the treatment of inter-company balance in relation to Harup Limited. It is important to emphasise that no member of the firm of Stewart & MacLochlainn was called to give evidence and no independent accountancy evidence whatsoever was adduced by either side, so that it is impossible for the Court to form an objective view on the accounting issues raised by [Mr. William Kelly]. Nevertheless, it is difficult to understand how two qualified accountants, who have been running the business of the Company for in excess of a quarter of a century cannot, in conjunction with the Company's auditors, agree on the manner in which those arguments should be dealt with in the accounts of the Company. In an attempt to resolve the impasse, in the directions given on 9th February, 2011, it was made clear that [Mr. William Kelly] was allowed to have separate communication with the auditors, who are the professionals whom I consider to have been chosen by both parties. On the basis of the evidence given at the hearing of the second module, I consider that the proper conclusion to draw was that the failure to procure compliance with the Company's statutory obligations in relation to preparing accounts and filing annual returns was due to obduracy on the part of both [parties], because there is no doubt, that if both had acted reasonably, the reservations of [Mr. William Kelly] could have been addressed and properly resolved, if there is substance to them. While I had concluded that fault on the part of both [parties] had been the source of the failure of the Company to comply with its statutory obligation in filing annual returns, I was of the view that [Mr. William Kelly] had been more at fault than [Mr. Gerard Kelly] and that, to a large extent, the obduracy of [Mr. Gerard Kelly] had been provoked by the conduct of [Mr. William Kelly]. In light of the

events since the directions were given on 9th February, 2011, I have come to understand better the frustration of [Mr. Gerard Kelly] and, I suspect, of the auditors, in endeavouring to get the agreement of [Mr. William Kelly] in relation to the finalisation of the accounts."

The trial judge went on to find that there had been "other aspects of the conduct of [Mr. William Kelly] which had been wholly unreasonable". She found –

"6.7 … A constant refrain of [Mr. William Kelly] has been that his access to, and his right of inspection of, the books and records of the Company had been impeded. This was raised in his letter of 26 January, 2010 to Stewart & MacLochlainn and in his subsequent letters of 25th May to Stewart & MacLochlainn when he stated he would expect that firm 'to assist' him 'to inspect the books of account' of the Company. I am satisfied that [Mr. William Kelly] has had access to the accounting systems of the Company at all material times. As regards electronic records, he acknowledged that he could have gained access by ascertaining the relevant password. When pressed in cross-examination, [Mr. William Kelly's] complaint was that the manner in which the accounts were put together was 'convoluted and complicated and difficult to understand' and the system was 'non-transparent' and 'opaque' and he did not understand how the accounts have been put together. However, it is clear on the evidence that, when he sought assistance from the relevant manager, he was given that assistance. I am satisfied that the contention of [Mr. William Kelly] that he has been denied access to the books and records of the Company was, and is, utterly without foundation.

6.8 Apart from the issue of finalisation of the accounts for the years 2006 onwards, which, despite the directions given on 9th February, 2011 still has not been resolved, and the issue of the appointment of auditors, which was eventually effected, evidence was given on matters which related to the running of the business of the Company on which there was no consensus between [the parties], for example:

(a) entering into long-term loan agreements which were proffered by the Company's bank, Ulster Bank Ireland Limited, (the Bank), in substitution for existing facilities, of which [Mr. Gerard Kelly], properly in my view, considered would be beneficial to the Company but which [Mr. William Kelly], wholly illogically and contrary to common sense in my view, refused to sign'

(b) the outsourcing of computer programming by [Mr. William Kelly] which [Mr. Gerard Kelly] was of the view the Company could not afford from 2009 onwards; and

(c) the failure of [Mr. William Kelly] to agree cost cutting measures when the Company's turnover decreased and the Company started incurring heavy losses.

All of the foregoing matters, but in particular, those at (a) and (c) which are likely to be of crucial importance to the ongoing viability of the Company, illustrate the degree to which [Mr. Gerard Kelly] and [Mr. William Kelly] are deadlocked. The position adopted by [Mr. William Kelly], which may fairly be characterised in colloquial terms

as a 'head in the sand' position, on an objective assessment, was not, and is not, in the interests of the Company or its shareholders."

(4) Taking funds from the Company

80. This ground relates to payments which Mr. Gerard Kelly contended were made by Mr. William Kelly out of funds of the Company which were not authorised by Mr. Gerard Kelly. These payments were made for the benefit of Mr. William Kelly personally, to pay his solicitors Gibson & Associates for legal services in Module 1, and not for the benefit of the Company. The payments in question are recorded by the trial judge at para. 7.4, and were: three payments made to Gibson & Associates by cheque drawn on the Company's account in November 2008, February 2009 and September 2009, aggregating in total €29,328.21; and payments made to Gibson & Associates from the Company's account by Giro or bank draft on 29 October 2009 (€30,000), 9 December 2009 (€100,000), 12 February 2010 (€35,000) and 12 February 2010 (€15,000). These payments totalled €180,000, but the final draft of €15,000 was not handed over or negotiated, reducing the total to €165,000. Two other smaller payments are noted in para. 7.5 of the judgment – a sum of €4,983.75 which Mr. William Kelly said was paid to a firm of solicitors in Dublin for advice on "proper governance procedures and to try and understand the membership issue", and a payment of €2,904 in favour of Mr. William Kelly to reimburse him for a similar amount he had paid to yet another firm of solicitors in Dublin in early 2008 for advice on corporate governance, annual accounts and the shareholding.

81. The issue was first raised in the proceedings when Gibson & Associates applied to come off record in the High Court during the week before the commencement of Module 2, an application which was opposed by Mr. Gerard Kelly. This was triggered by him becoming aware of a cheque issued on the instructions of Mr. William Kelly by the Company to Gibson

& Associates on 14th September, 2009 in the sum of €25,000, and signed by Mr. William Kelly and George Kelly. Mr. Gerard Kelly's first reaction was to issue a direction on 14th September, 2009 to the Letterkenny branch of the Bank to stop payment, which happened. The initial response of the Bank by letter of 21 September 2009 was to suggest that the Company make alternative banking arrangements, and to give notice the Company's overdraft facility, the balance of which was in excess of €1.4M at the time, should be repaid within 21 days. Subsequently the Bank abandoned that approach and notified the Company by letter dated 22 October 2009 that the original Company mandate would continue to operate – and the Bank did in fact maintain the Company's overdraft facility in place, showing what the trial judge characterised as "considerable forbearance towards a company and its directors".

82. The trial judge noted that Mr. William Kelly's justification for the payments made to Gibson & Associates was that that firm were acting for the Company in these proceedings, and acting for Mr. William Kelly in his capacity as a director, and not in his personal capacity. The trial judge noted that in the Petition it is expressly stated that Mr. William Kelly was being sued "in his capacity as a Director of the Company". The trial judge's finding in relation to this was as follows: -

> "7.6 … That does not mean that any liability established on the part of [Mr. William Kelly] attaches to the Company, rather than to him personally. On the contrary, in essence, as I have already recorded, [Mr. Gerard Kelly's] dispute is with [Mr. William Kelly] not with the Company, and it was [Mr. William Kelly's] opposition to [Mr. Gerard Kelly's] claim that he was an equal shareholder with [Mr. William Kelly] which necessitated the determination of the membership issue. Having regard to the decision of the High Court in the United Kingdom in Re Milgate Developments Limited [1993]

BCLC 291, which is cited in paragraph 19.052 of Courtney, Op. Cit., it is hard to see how there could be any justification for the Company bearing the costs of defending these proceedings up to the conclusion of the first module, which is, in effect, what has occurred as a result of the action of [Mr. William Kelly] in making the payments from October 2009 to February 2010 to Gibson & Associates."

Noting that Mr. Gerard Kelly had also lodged a complaint about these payments with an Garda Siochána, but that it was not clear what the outcome of that complaint was, the trial judge proceeded –

"7.8 For the purposes of these proceedings, the only findings I made prior to 9th February, 2011 in relation to the schedule of payments produced by [Mr. Gerard Kelly] was that, as regards the payments to Gibson & Associates after 14th September, 2009, aggregating €180,000, those payments were made by [Mr. William Kelly] without the authority of the Company. Moreover, the fact that [Mr. William Kelly] made those payments in the knowledge that [Mr. Gerard Kelly] considered that they should not be made out of the funds of the Company, coupled with the fact that [Mr. William Kelly] circumvented the endeavours of [Mr. Gerard Kelly] to stop such payments by utilising the Giro and bank draft method of payment, was wholly improper and illustrates a complete breakdown of trust and confidence between [Mr. Gerard Kelly] and [Mr. William Kelly]."

(5) Assaults

83. This concerned allegations that Mr. William Kelly had harassed and assaulted Mr. Gerard Kelly in the course of him acting as a director of the Company. These allegations were met by counter allegations that Mr. Gerard Kelly had assaulted and misconducted himself in

relation to Mr. George Kelly. The evidence in relation to the allegations and counter allegations heard in the High Court is set out by the trial judge at paras. 8.1 – 8.7 of her judgment, and included CCTV footage of an incident on 19 November 2009 showing Mr. William Kelly restraining Mr. Gerard Kelly. In my view it is not necessary to reprise that evidence. The trial judge made her findings in relation to it at paras. 8.8 – 8.10, describing "the catalogue of incidents" which involved some or all of the three brothers, "as disgraceful behaviour". Taking an overview, the trial judge found –

> "… It is not possible to conclude that it was entirely the fault of [Mr. William Kelly] that the differences between them resulted in various forms of aggressive behaviour and physical force" (para. 8.8).

She found that –

> "… [Mr. Gerard Kelly] embarked on a campaign of constant pursuit that could be regarded as harassment of [Mr. William Kelly] which on occasion provoked a physical reaction from [Mr. William Kelly]" (para. 8.8)

and that

> "…the conduct of [Mr. Gerard Kelly] in endeavouring to get his own way was wholly inappropriate." (para. 8.8)

She concluded –

> "8.8 … Notwithstanding that he had invoked the jurisdiction of the court to resolve the issues which arose between him and [Mr. William Kelly] in relation to the running of the affairs of the Company, [Mr. Gerard Kelly] persisted in conduct against [Mr.

William Kelly] which amounted to bullying and harassment when [Mr. William Kelly] did not accede to his request to interact with him in a particular way. The conduct of [Mr. Gerard Kelly] cannot be condoned. Unfortunately, the baser instincts of both [parties] have emerged in the course of their differences in relation to the running of the Company in recent years and each has acted according to them. The significance of that is that the only reasonable inference which can be drawn from the evidence is that it would be impossible for [Mr. Gerard Kelly] and [Mr. William Kelly] to jointly conduct the business of the Company in the future.

8.9 The significance of the evidence of the disgraceful behaviour of each of the parties towards the other is that it demonstrates the degree to which the personal and working relationship of the parties has broken down and that one can only conclude that it has broken down irretrievably.

8.10 While I am satisfied that the relationship of [Mr. Gerard Kelly] and [Mr. William Kelly] as equal shareholders, directors and employees or executive managers of the Company is irretrievably broken down, I consider that [Mr. Gerard Kelly] has contributed to and must share the responsibility for that state of affairs with [Mr. William Kelly]."

84. Having made those findings the trial judge set out the relevant parts of s. 205 and s. 213(f) of the 1963 Act, and also noted para. (g) of s. 213, which was not invoked, and which allowed the court to wind up a company if –

"the court is satisfied that the company's affairs are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any member or in disregard

> of his interests as a member and that, despite the existence of an alternative remedy, winding up would be justified in the general circumstances of the case so, however, that the court may dismiss a petition to wind up under this paragraph if it is of the opinion that proceedings under s. 205 would, in all the circumstances, be more appropriate".

In quoting this the trial judge noted that both Mr. Gerard Kelly and Mr. William Kelly indicated a preference for a remedy *other than* a winding up order. The trial judge then identified the core issue in Module 2 as being –

> "10.1 (a) Has the petitioner established oppression or disregard of members' interests within the meaning of subs. (1) of s. 205 on the part of [Mr. William Kelly] in the conduct of the affairs of the Company or the exercise of the directors' powers?".

The trial judge records that she had considered the written and oral submissions of the parties, and the authorities referred to by counsel for Mr. Gerard Kelly, namely Courtney on *The Law of Private Companies* (2nd ed.), and Joffe on *Minority Shareholders, Law, Practice and Procedure* (3rd ed.). In para. 11. 1 of the decision the trial judge found that –

> "11.1 … an analysis of [Mr. Gerard Kelly's] complaints in the context of the wording of subs. (1) of s. 205 discloses that he has not made a claim (notwithstanding the terms of the injunction sought) or made out a case which impugns the manner in which 'the affairs of the Company are being conducted'. As is pointed out in Courtney (Op. Cit.) at para. 19.033, the conduct of the 'affairs of the company' in subs. (1) refers to the conduct of the member-shareholders when acting together as corporators. That is not the basis of [Mr. Gerard Kelly's] invocation of s. 205".

85. It is worth observing at this point that there was no cross-appeal by Mr. Gerard Kelly against this finding. It is not therefore an issue that is before this court..

86. The trial judge then sets out her reasons for finding oppression in the ensuing paragraphs:-

> "11.2 Accordingly, on a proper analysis of [Mr. Gerard Kelly's] complaints in the context of subs. (1) of s. 205, the conclusion must be that they related to the exercise by [Mr. William Kelly] of 'the powers of the directors'. Indeed, the acts on his part complained of, such as the purported suspension of [Mr. Gerard Kelly], or defaults alleged against him, such as his failure to cooperate in the finalisation of accounts and submission of annual returns or to address the need to cut the costs of the business, where acts of omissions which were either done, or should have been done, by him in his capacity as a director.
>
> 11.3 [Mr. Gerard Kelly's] case is that his power as a director is being exercised by [Mr. William Kelly] in a manner which is both oppressive to [Mr. Gerard Kelly] and is in disregard of his interest as a member of the Company. In relation to the complaint of disregard of [Mr. Gerard Kelly's] interest, the broad proposition advanced by [Mr. Gerard Kelly] is that the actions of [Mr. William Kelly] and his failure to act appropriately have had a detrimental effect on the Company and, consequently, upon the interests of the shareholders of the Company. The only reasonable inference which can be drawn is that the type of conduct on the part of [Mr. William Kelly] of which [Mr. Gerard Kelly] complains and which has been established, for example taking money out of the Company without authority from the Company to discharge legal costs, or exposing the Company to the risk of the statutory sanction of strike-off for

failure to comply with the statutory requirements in relation to filing annual returns, must have a detrimental effect on the Company and, accordingly, must damage the interests of the shareholders of the Company.

11.4 In reality, the true basis of [Mr. Gerard Kelly's] claim for relief under subs. 1 of s. 205 is that [Mr. William Kelly] is exercising his powers as a director of the Company in a manner which is oppressive to [Mr. Gerard Kelly]. As to what constitutes oppression, counsel for [Mr. Gerard Kelly] submitted that oppressive conduct means the exercise of the Company's authority in a manner 'burdensome, harsh and wrongful', citing *Re Greenore Trading Company Limited* [1980] ILRM 94. It was also submitted that the conduct complained of should be judged by an objective standard and it matters not that the alleged oppressor is acting honestly or in good faith, citing *Re Irish Visiting Motorists Bureau Limited* [1980] ILRM 94. Those principles, which have been consistently applied, represent the law. As was pointed out in *Re Greenore Trading Company Ltd*., the words of subs. (1) of s. 205 envisage that the oppression complained of is operative at the time the petition was launched. The jurisdiction conferred on the Court by subs. (3) of s. 205 is aimed at bringing the oppression to an end.

11.5 Objectively assessing the evidence in support of the [Mr. Gerard Kelly's] allegations of oppression, which has been comprehensively outlined above, must lead to the conclusion that the 'burdensome, harsh and wrongful' test has been met in this case. [Mr. William Kelly's] conduct in purporting to suspend [Mr. Gerard Kelly], in whatever capacity, from the company, on its own, meets the test. Taking an overall view of the evidence, and having regard to the combination of factors relied on by [Mr. Gerard Kelly] as constituting oppression, in my view, the test is met. While, as I have

indicated, [Mr. Gerard Kelly's] conduct, to put it mildly, has been reprehensible on occasion, I have come to the conclusion that, to some extent, but not totally, that conduct is excusable because [Mr. Gerard Kelly] was provoked by the [Mr. William Kelly].

11.6 Apart from that, as has been clearly illustrated, there has been a total breakdown of the relationship between [the parties] in every capacity in which they are involved with the company, as executives, as shareholders and as directors and I find that the [Mr. William Kelly] must bear most of the responsibility for that state of affairs. This is not mere 'technical oppression' in the sense in which that expression is used in Courtney (op. cit.) at para. 19.027. It is a state of affairs which has been primarily brought about by the conduct of [Mr. William Kelly].

11.7 Accordingly, prior to listing the matter for further hearing on 9th February, 2011, I had made the following findings of which the parties were informed at the hearing on that day:

(a) that [Mr. William Kelly] has exercised his powers as a director of the company in a manner oppressive to [Mr. Gerard Kelly] within the meaning of s. 205(1), and

(b) that there has been a total breakdown in the relationship of [parties] at every level, both business and personal, that they are deadlocked to the extent that they are incapable of running the company properly together and that the situation is irretrievable and requires to be remedied by the Court in accordance with s. 205(3) or otherwise."

87. The trial judge proceeded then to consider the appropriate remedy, and I will return to that later in this judgment. I will now address Mr. William Kelly's appeal in respect of the finding of oppression.

Grounds of appeal in respect of oppression

88. In the Notice of Appeal originally filed by Mr. William Kelly, grounds 16 to 160 broadly relate to the Module 2 findings related to oppression. In the amended Notice of Appeal – which was directed by the court with the aim of trimming the number of grounds – Mr. William Kelly has in fact refined the original grounds. He has set out in sections A – J broad grounds, and within these he has restated almost all of the numbered grounds in the original Notice of Appeal.

89. These restated grounds typically assert that the High Court failed "to give sufficient weight to the evidence" in making findings of fact, or coming to certain conclusions, or failed "to take cognisance" of the evidence given by Mr. William Kelly or witnesses called by him.

90. For instance, under section D, Mr. William Kelly re-states para. 62 in his Notice of Appeal that "the court failed to give sufficient weight to the evidence that the suggested breakdown in relations between the Petitioner and me was only because of the conduct of the Petitioner" and thereafter he re-states paras. 13, 32 and 10, and 54 – 69 as set out in the original Notice of Appeal.

91. What Mr. William Kelly appears to have done is trawled through the Module 2 judgment and picked out every finding of fact, or inference, which he perceives to be adverse to his interest or in some way in conflict with the evidence that was given by him or witnesses called by him, and to assert that the trial judge was wrong or failed to give sufficient weight to some piece of evidence.

92. What is clear is that Mr. William Kelly, who was a lay litigant when the Notice of Appeal and the amended version were prepared and filed, had no knowledge or understanding of the role of this appellate court, or the principles established in *Hay v O'Grady* and associated jurisprudence referred to earlier in this judgment. The regrouping of grounds of appeal in under headings A - J far from streamlining matters creates a further layer of complication. Mr. William Kelly's written submissions are also in breach of Practice Direction CA 06, Rule 4 of which states –

> "4. Where a party seeks to set aside any findings of fact made by the High Court, the submissions must identify, having regard to the principles enunciated in *Hay v O'Grady* [1992] 1 I.R. 210 and subsequent judgments, the basis upon which they maintain they are entitled to do so."

93. While Mr. William Kelly does, in his written submissions at pp. 10 – 20, address the five headings under which the trial judge considered oppression, and I will deal with these in turn shortly, I have come to the overall conclusion that he has failed to identify any basis upon which the key findings of fact made by the trial judge in Module 2 in relation to oppression should be set aside. It is clear that the trial judge engaged with the key elements of the case on both sides, and that her findings of fact were supported by credible evidence given by or on behalf of Mr. Gerard Kelly. Where the trial judge draws inferences, or prefers the evidence of one party over another, she explains why this is so, and she makes clear findings where there are material conflicts of evidence. Nor can it be said that she did not deal with or advert to anything that went to the core of her findings. Further, the trial judge was in a position to observe the demeanour of the parties over the considerable period of time that each of them was giving evidence, and while most of her findings of fact are based on evidence of events

that was substantially not disputed, or was corroborated or supported by documentary evidence – such as the correspondence between the parties, and the payments made by the Company to Gibson & Associates, and the CCTV coverage - the trial judge was also entitled to have regard to the demeanour of the parties when giving their evidence.

(1) Purported suspension

94. In his written submission Mr. William Kelly points to the Safety, Health and Welfare at Work Act, 2005 which extends the offences created by that Act to persons including a director or a manager within an undertaking to whom the acts constituting the offence have been "authorised, or consented to, by or is attributable to connivance or neglect on the part of" such person. It was submitted that the trial judge's conclusion that the suspension was "sham" was made without first expressing a view on the seriousness or otherwise of the incidents, and that this was contrary to common sense. Mr. Gerard Kelly submitted that the finding that "he did not know on what authority he was entitled to suspend [Mr. Gerard Kelly], although he acknowledged that the suspension, as a 'significant action', might require the approval of the Board, but he knew he could not get this", was not a fair representation of Mr. William Kelly's evidence which made it clear that he believed he had such authority (Transcript p. 1093:13) and at another time "that these matters were extremely grave" (Transcript 786:9). It was further submitted that Mr. Gerard Kelly was suspended only from his operational role as an employee, and while the suspension of a senior employee would normally be taken to the Board for consideration, as the only other director was Mr. Gerard Kelly this was not practical. In particular, Mr. William Kelly submitted that the court could not make its findings without first considering "the seriousness or otherwise of the incidents related to health and safety". If there were reasonable grounds to believe that they were serious in nature then the officer/manager who failed to act could have committed an offence under the 2005 Act. It was submitted that

during the trial Mr. William Kelly attempted to open to the court a report drafted on 21 April 2008 by him and the Operations Manager (George Kelly), to which objection was taken and which was not considered by the court. This submission also points out that Mr. Gerard Kelly was suspended on full pay and not required to leave the premises, but simply to cease working on operational matters, and that the suspension lasted only until 19 May 2008. He also relied on the letter dated 22 April 2008 setting out the reasons for the suspension, which had been set out earlier in this judgment. The submission relies on descriptions given by Mr. Gerard Kelly under cross-examination as to the two incidents, and is evidence to the effect that they were not serious accidents, that Mr. Turner was wearing safety goggles, but removed the goggles before "he got touched here in the eye" (Transcript 781:10) whereas Mr. Kieran O'Malley, the office manager, under cross-examination agreed that if the rope had hit Mr. Turner in the eye the consequences would have been extreme. Accordingly, Mr. William Kelly submitted that his decision to suspend was within the range of reasonable responses to "the grave health and safety situation".

95. This Submission is in my view misconceived. It is correct to say that Mr. William Kelly attempted to introduce into evidence a report dated 21st April, 2008 drafted by himself and George Kelly, and that counsel for Mr. Gerard Kelly objected. The reason was that a lot of the evidence that Mr. William Kelly had just given in relation to these incidents had not been put to Mr. Gerard Kelly in cross-examination. On objection being made the following exchange took place: -

> "Ms. Justice Laffoy: As I explained to you [at the] start, Mr. Kelly, that anything that you wanted to say that was at variance with Gerard's version of events, you should put

it to him so that he would have an opportunity to comment. Now I don't know that we need to go into this detail in any event.

Mr. Kelly: Okay, that's fine.

Ms. Justice Laffoy: Yes.

Mr. Kelly: Yes, if I could say Gerard was not aware of this document, but I do not know if that is significant or not but it does not matter. It is not relevant.

Ms. Justice Laffoy: I think we can limit it to what your view was on the health and safety issues within the company.

Mr. Kelly: Okay, my view was that a serious situation existed at this time. George did the review and we sat down and talked about it…" (Transcript 992-993)

96. In circumstances where Mr. William Kelly did not put the report, or indeed all the evidence that he gave subsequently to the court, to Mr. Gerard Kelly in cross-examination, the court was entitled to exclude the draft report of 21 April 2008.

97. Moreover, in my view the trial judge was entitled to take the view that she did not need to decide on the seriousness or otherwise of the two incidents. Firstly, in order to reach such a view the trial would have been further prolonged by the need to hear detailed evidence, including expert engineering or other evidence, of the sort that could be expected to feature in a contested personal injury action. This petition was about allegations of oppression of Mr. Gerard Kelly, and the trial judge cannot be faulted for finding in all the circumstances that it was not necessary for her to reach a view on the seriousness of the two incidents. Furthermore,

while the seriousness or otherwise of the two incidents was disputed, what was not in dispute was that no serious injuries resulted.

98. Of more significance is that the trial judge made findings of fact in relation to the suspension in the light of the wider surrounding circumstances and in particular the absence for extended periods of Mr. William Kelly and George Kelly from direct involvement in the Company operations and then their return to the Company in circumstances where personal contact between them was "extremely fraught." (Para. 4.10 of the judgment). I find of particular note in this correspondence is the sentence in the letter dated 29th February, 2008 in which Mr. William Kelly stated his belief "… that the only way forward is to break the stalemate". His proposal at that time was to meet at Board level, although he was happy that a third party would act as facilitator at the Board. His use of words however indicates a mindset at that time, to the effect that the situation could not continue. It will be recalled that in his reply of 13 March 2008 Mr. Gerard Kelly did not dismiss out of hand the calling of a Board meeting but suggested that it would help if the agenda was discussed and agreed in advance. The trial judge found that there was no specific response to that suggestion from Mr. William Kelly. That was the context in which Mr. William Kelly delivered the letter of 22 April 2008 purporting to suspend Mr. Gerard Kelly.

99. I would also observe that an employee who is facing suspension is normally entitled to fair procedures, and an immediate suspension is a measure usually reserved for serious misconduct or other exceptional circumstance. There appears to have been no evidence which could justify immediate suspension. This underscores the entitlement to conclude that the suspension was a "sham".

100. In my view there was ample evidence from which the trial judge could find that the purported suspension was a "sham, which had been contrived by" Mr. William Kelly with the aid of George Kelly. Likewise in my view there was ample evidence for the next finding that "it was an attempt by [Mr. William Kelly] to exclude [Mr. Gerard Kelly] from any role in the running of the company without any authority on his part to do so."

(2) Alleged exclusion of Mr. Gerard Kelly from the Company

101. Aside from the circumstances of the purported suspension of Mr. Gerard Kelly, which the trial judge found to be a "sham", the section of her judgment dealing with exclusion of Mr. Gerard Kelly from the Company does not make a finding of such exclusion as such, but rather concludes that there was no agreement between the two directors as to the manner in which their powers of management were to be exercised, and that the Company was dysfunctional. As Mr. William Kelly points out in his written submissions, the trial judge did not accept that Mr. William Kelly excluded Mr. Gerard Kelly from the Company by denying his standing in the Company as a shareholder or director *prior to the presentation of the petition on 26 September 2018*. She was however, critical of Mr. William Kelly's failure to acknowledge that Mr. Gerard Kelly was the beneficial owner of shares in the Company and a director, which necessitated the Module 1 in the proceedings. In his submissions, Mr. William Kelly takes issue with this, and seeks to pick holes in the judgment in Module 1. I have already found that the appeal in respect of Module 1 must fail, and in my view there was overwhelming evidence to support the trial judge's conclusion that that entire module was indeed necessitated by Mr. William Kelly's failure and refusal to acknowledge Mr. Gerard Kelly as the beneficial owner of shares.

(3) Management, accounts, CRO filings and auditors

102. Mr. William Kelly submits that there was no evidence that he acted unreasonably regarding Company management decisions, the preparation of the accounts, the annual returns and in relation to the auditors. He highlights evidence that he says supports this case: -

> "(1) that the decision to replace PricewaterhouseCoopers as auditors soon after the CRO Section 371 notice was against his recommendation, as set out in the solicitor's letter of 10 November 2008;
>
> (2) that the court ignored the evidence of the office manager Mr. Gerry McDevitt and Mr. William Kelly to the effect that Mr. William Kelly did not have access to the accounting systems of the Company at all times, but rather that this was restricted by the actions of Mr. Gerard Kelly. Mr. McDevitt said in evidence in relation to this access that 'I think more recently it would be much more restricted and would require, in a sense, [Mr. William Kelly] to agree with [Mr. Gerard Kelly] before directing me or involving me in work with [Mr. Gerard Kelly]' (Transcript 918:25)
>
> (3) long term finance, outsourcing of computer programming and cost cutting measures were management matters which Mr. William Kelly sought to address by calling Board meetings and seeking the assistance of PricewaterhouseCoopers."

103. The difficulty with this approach is that it fails to take into account the evidence as a whole. For instance, the trial judge stated, at para. 6.7, that –

> "I am satisfied that [Mr. William Kelly] has had access to the accounting systems of the company at all material times. As regards electronic records, he acknowledged that he could have gained access by ascertaining the relevant password."

It's also clear that she had regard to the evidence of Gerry McDevitt, noting that "when he [Mr. William Kelly] sought assistance from the relevant manager, he was given that assistance". These were findings of fact, based on the evidence, and this court should not interfere. They led to her conclusion that Mr. William Kelly's contention that he was denied access to the books and records of the Company was "utterly without foundation". Similarly, the trial judge's observations in relation to long term loan agreements were based on evidence of the enormous Bank overdraft and the commercial need to replace this in part with a long term loans, and Mr. Gerard Kelly's attempts to persuade Mr. William Kelly to cooperate in putting these in place, and the trial judge was entitled to agree with the view expressed by Mr. Gerard Kelly that they would have been beneficial to the Company and that Mr. William Kelly "wholly illogically and contrary to common sense in my view refused to sign". The trial judge was entitled to bring her knowledge, experience and common sense to bear on such matters having had regard to the evidence. She was entitled to conclude on the evidence that this issue and the failure of Mr. William Kelly to agree to cost cutting measures, in light of the Company incurring heavy losses, were evidence that Mr. William Kelly put his "head in the sand" and was not acting in the interests of the Company or its shareholders.

104. As to the outstanding Company accounts and CRO filings, neither in Mr. William Kelly's written submissions nor in the oral submissions of counsel was any meaningful argument raised that challenged the trial judge's findings in relation to the completion of company accounts, and hence the statutory filings. The key findings are that Stewart & MacLochlainn, the new auditors, sought to maintain a neutral stance and prepared accounts for the years 2006, 2007 and 2008 and that they requested the directors to sign – asking Mr. William Kelly to adopt "a more pragmatic approach", and dealing with the two technical accountancy issues of treatment of the stock reserve and treatment of the inter-company balance in relation

to Harup Limited, but Mr. William Kelly still did not sign off on the accounts; and the trial judge came to the view that Mr. William Kelly was more at fault than Mr. Gerard Kelly in this regard. It is also important to recall the trial judge's finding that Mr. Gerard Kelly had consistently adopted a position on the accounts since the draft accounts for 2006 were completed in January/February 2008, at a time when the draft accounts for 2007 were in course of preparation, and this remained the position when the CRO issued the s. 371 Notice on 15th August, 2008, and when the Petition issued on 26th September, 2008. Mr. William Kelly's disagreement on the two technical aspects of accounting in the drafts therefore existed prior to the issue of the Petition, and persisted after the change of auditors, and still gave rise to non-compliance by the Company with statutory filings at the time of hearing of Module 2. At para. 6.8 of her judgment the trial judge also notes that "the issue of the finalisation of the accounts for the years from 2006 onwards… despite the directions given [by the court] on 9th February, 2011 still has not been resolved…".

105. The significance of the accounting issues, and the failure to address cost cutting is apparent from para. 11.2 in the judgment where the trial judge finds that the purported suspension of Mr. Gerard Kelly *"*or defaults alleged against him, such as his failure to cooperate in the finalisation of accounts and submission of annual returns or to address the need to cut the costs of the business" informed her conclusion that there was oppression by Mr. William Kelly in the exercise of director's powers.

106. In my view this is a very significant finding of oppression in the context of the argument, considered later, that s.205(1) in its reference to complaints that *"*the powers of directors are being exercised in a manner oppressive to him*"* can only apply to the exercise of the powers of directors plural, or as a body. The argument made is that the acts or omissions of one director,

here Mr. William Kelly, could not amount to oppression in law. However, the trial judge's finding here is that the effect of Mr. William Kelly's failure to sign off on accounts was that the directors i.e. the Board, could not submit statutory annual returns and this effect was oppressive to Mr. Gerard Kelly.

(4) Alleged taking of funds to pay legal fees

107. At the outset certain facts should be restated. It is absolutely clear that that Gibson & Associates (formerly Gibbons & Kelly) were solicitors on record for both Mr. William Kelly and the Company from the beginning until they were given liberty to come off record *for both respondents* on 25 June, 2010, shortly before Module 2 commenced. The Points of Defence was filed for both respondents, and the trial judge records at paragraph 1.6 that they were on record for both. Thus Mr. William Kelly cannot contest that Gibson & Kelly acted for him in the circumstances.

108. Mr. William Kelly tried to argue that Gibson & Kelly were acting for him *qua* director, and not in his personal capacity, but that cannot be so. Counsel were instructed and argued the case in Module 1, which related primarily to the beneficial shareholdings of Mr. Gerard Kelly and Mr. William Kelly, and in truth Mr. William Kelly's role as director was not an issue. It is only necessary to consider Mr. William Kelly's argument about a family trust/arrangement to see that his argument must be wrong.

109. The trial judge was correct to hold, as she did at paragraph 7.1, that the Company had no role in the Module 1 process – the disputants were Mr. Gerard Kelly and Mr. William Kelly. She was also correct to hold that it was Mr. William Kelly's opposition to Mr. Gerard Kelly's claim that he was an equal shareholder "which necessitated the determination of the membership issue" (paragraph 7.6).

110. It is therefore clear that the payments extracted from the Company resources were obtained to pay for legal services provided to Mr. William Kelly personally, and in defiance of objections from Mr. Gerard Kelly.

111. Two submissions are made by Mr. William Kelly in relation to the payment of legal fees to Gibson & Associates. Firstly, it is contended that the trial judge wrongfully interpreted Mr. Gerard Kelly's allegation that the payments were "not authorised by [Mr. Gerard Kelly]" to mean that they were made "without authority". It is contended that the payments were made with authority because the Company mandate to Ulster Bank specified any two of five named authorised signatories to instruct payments, and the impugned payments were made by Ulster Bank directly to Gibson & Associates following instructions from two of the five authorised signatories (Mr. William Kelly and George Kelly).

112. In my view this submission is overly narrow and misses the point. It does not appear to have been Mr. Gerard Kelly's case that there was a technical breach of the mandate between the Company and Ulster Bank. Rather his case was that the payments *of their nature* required his knowledge and consent, and that they were for Mr. William Kelly's benefit personally, not for the benefit of the Company.

113. The second contention is that as a matter of law Mr. William Kelly as a director was entitled to use Company resources to fund his defence in Module 1. The first factual basis for this contention is that Gibson & Associates were being paid for acting for the Company and for acting for Mr. William Kelly in his capacity as a Director of the Company, not in his personal capacity, and that he was, as the Petition expressly stated, being sued in his capacity as a director of the company. However, for the reasons given earlier I reject the contention that Gibson &

Associates were acting for Mr. William Kelly in his capacity as a director – they were acting for him personally.

114. In addition, reliance was placed on the grounding affidavit of 17 June 2010 sworn to support the application to come off record. Mr. William Kelly's solicitor averred –

> "Since [Mr. Gerard Kelly] sought *inter alia* orders providing for the winding up of the Company, I considered it appropriate to take instructions from [Mr. William Kelly] to defend the Petition both insofar as it was directed against himself and against the Company."

This is a reference to the claim in the alternative for an order for the winding up of the Company under s.213(f) (the 'just and equitable' ground) or (g) (where oppression is found and there is an alternative remedy but the winding up is justified in the general circumstances).

115. It was submitted that in impugning the payments to the solicitors, and thereby effectively denying the Company and Mr. William Kelly legal representation for Modules 2, 3 and 4, the court misapplied *Re Milgate Developments Limited* [1993] BCLC 291 which refers to the "balance of convenience" and "the possibility of a Bathampton Order being made at the conclusion of the proceedings… shifting the burden of the costs from the company to the true party interested". Reliance was placed on the decision in *Dowling v Minister of Finance* [2013] IEHC 406, a s. 205 proceeding in which the director respondents were permitted to use a Company indemnity insurance policy or the Company's resources to fund their defence of the action. It was submitted that the court failed to apply the tests outlined in *Dowling*.

116. I do not believe that *Re Milgate Developments Limited* assists Mr. William Kelly. In that case the petitioner was a minority shareholder who alleged that the two companies

concerned were a quasi-partnership and that he had been wrongfully excluded from participation in their businesses and that the Company's affairs were being conducted in a manner which was unfairly prejudicial to his interests as a member. While the primary relief sought was that his shareholdings be purchased by one or other of the shareholders, he was concerned that when the petitions came up to be heard the only option might be a winding up, given that both companies were property development companies. Accordingly, the petitioner brought two preliminary motions seeking in the first one an injunction restraining the individual shareholders from utilising the funds of the companies in payment of their own legal and other expenses of the petition. That application was accepted without question, and solicitors for the individual shareholders stated that they had no intention of doing so. Secondly, the petitioner sought an order that the individual shareholders should not, until after judgment on the petitions, cause or procure the companies to be represented on the hearing of the petitions on the ground that the dispute was in substance one between individual shareholders, and that the company's money should not be expended on disputes between them. In the course of his judgment Mr. Edward Nugee QC referred to the decision of Hoffman J. in *Re Crossmore Electrical and Civil Engineering Limited* [1989] BCLC 137, a case where there were two petitions pending against the Company, one a creditor's winding up and the other a s. 459 petition alleging unfair prejudice. Hoffman J. stated at p. 138:

> "I am, however asked to clarify in advance one question which may be a matter of potential dispute: whether payment of legal costs by the company would be in the ordinary course of its business for the purposes of the order. *The company is a nominal party to the s. 459 petition, but in substance the dispute is between the two shareholders. It is a general principle of company law that the company's money should not be expended on disputes between the shareholders*: see *Pickering v Stephenson* [1872] LR

14 Eq 322. Consequently it seems to me clear that such expenditure on defending the s. 459 petition would not be in the ordinary course of business and the order should be subject to a proviso which states that expressly." [Emphasis added]

The words in emphasis show that the general principle is that company assets should not be utilised to discharge costs in a dispute that is between shareholders, as Module 1 was.

In *Re Crossmore Electrical* Hoffman J. did allow payments out of the company bank account in defending the creditor's petition to wind up, and it was in that context that he considered any injustice to the petitioning creditor could be remedied by a *Bathampton* Order – a reference to the type of order made in *Re. Bathampton Properties Limited* [1976] 3 AER 200, which at the end of the case shifts the burden of the costs from the company to the true party interested. But the payments by the company were not allowed in respect of the s.459 to which the company was a nominal party. In the instant case in Module 1 the Company was only a nominal party, and the alternative claim for a s.2013 winding up order was not in play.

117. What in fact happened in the instant case was that the payments to Gibson & Associates were made out of the Company's account. Thus the effect of the trial judge's decision and ultimate order that those payments were not made in the Company's best interests, and must be reimbursed to the Company, has the same effect as a *Re. Bathhampton* order in that the burden of such costs, having been initially borne by the Company, was removed by the subsequent order for repayment by Mr. William Kelly to the Company.

118. Returning to the decision in *Re Milgate,* Mr. Edward Nugee QC held (at p. 296) that –

"There is in my judgment nothing in the petition or in the evidence filed by the petitioner which suggests that there is any possibility of the companies being affected by the

dispute between the shareholders to any greater extent than was the case in *Re. Kenyon Swansea Limited* or *Re. Crossmore Electrical and Civil Engineering Limited*. Notices of motion were given three weeks ago and if there had been any justification for the companies taking an independent part in the litigation, which is not apparent from the evidence filed by the petitioner, there was ample opportunity for the individual respondents or even the companies themselves to file evidence stating what that justification was.

On the evidence before me I can see no possible justification for the companies incurring further expense in taking part in this dispute;"

Accordingly, in that case an injunction was granted restraining the companies from incurring further expenditure in the s. 459 proceedings.

119. *Re Kenyon Swansea Limited* [1987] 3 BCC also does not assist Mr. William Kelly. It was an application to strike out a s. 459 petition on the ground that it disclosed no cause of action. The application failed, but the company had incurred considerable expense in retaining solicitors, filing evidence and instructing counsel to oppose the application. Vinelott J. stated at D.265: -

"I can see no possible justification for this course. The directors concerned no doubt have very strong feelings as to the person they would like to see in control of the company and able to appoint and remove its directors including themselves. But they are not entitled at the expense of the company to take part in a dispute as to whether (one director's) shares should be compulsorily acquired by (another director) *or by the*

company. I have not heard argument as to the order I should make in relation to the costs incurred by the company."

120. Counsel also relied on the *Fusion Interactive Communications Solutions Limited v Venture Investments Placement Limited* [2005] EWHC 224 as an example of a case where there was no authority from the company board for the appointment of solicitors to represent it, and for the proposition that Gibson & Associates had implied authority to act on behalf of the Company and to be paid by the Company for their legal services. However the facts in that case were very different. There the board of Fusion was deadlocked on the appointment of a chairman. There were serious differences between the managing director and operations director who between them held 50% of the shares. The other two directors were appointed to the board by the defendant ("Pertemps") which held 45%, the remaining 5 % being held by Mr. B whose connection with Fusion had come to a close. Fusion sued Pertemps for a declaration that a sum of £423,000 formed no part of Fusion's indebtedness to Pertemps, and sought repayment of €397,997 claimed to be due, and also sought an injunction to restrain the Pertemps appointing a liquidator or receiver.

121. The solicitors purporting to act for Fusion were Maxwell Batley. Pertemps asserted that Maxwell Batley had no authority to commence the proceedings on behalf of Fusion. While that discrete issue was pending Pertemps sought to call in a loan on which they said £1.071 million was due by Fusion, with a view to appointing administrative receivers. Fusion applied in the action – notwithstanding that it was stayed to decide the authority issue – for an injunction to restrain any such appointment. Fusion's counsel argued that he had at least a serious argument that Maxwell Batley had implied authority to represent the company, despite the absence of a board resolution appointing them to act and commence the proceedings. He relied for implicit

authority *inter alia* on Maxwell Batley seeking and obtaining a one week undertaking from the defendant's solicitors not to proceed while they applied to court for an injunction. Rimer J. was reluctant to decide the question whether this conferred a wider authority on the solicitors "here and now on the limited argument that I have heard and with such a limited opportunity to familiarise myself with the detail of the background of this case". He stated that "the perhaps slightly unusual factual history of the unfortunate dispute between Fusion and Pertemps does lend support to an argument that there is at least implied authority for Maxwell Batley to act as Fusion's solicitors in relation to this litigation…". He felt unable to conclude that Fusion had no argument at all, and ultimately was "…at least prepared to accept that Fusion has an arguable case that these proceedings have been properly authorised."

122. It will be clear from this summary of what occurred in *Fusion* that the circumstances were very different. It was not a proceeding analogous to a s.205 oppression claim, or one in which an issue had to be determined in relation to the shareholdings of disputing parties. It was a case in which it could be argued that the company needed to issue proceedings/seek an injunction as a matter of urgency, and it was 'necessary and expedient' in the interests of the company thus satisfying the third principle enunciated by Lindsey J in *Re A Company No.001126 of 1992* [1993] B.C.C. 325, to which I refer shortly. Moreover it was a decision on an application for an interlocutory injunction where the test was only whether Fusion had an arguable case – it did not decide the issue of authority.

123. In the subsequent hearing of the stayed issue on authority which is reported at [2005] 2 BCLC 250, Peter Smith J commented that the decision of Rimer J was "tentative" and noted that the parties considered it "provisional". He did decide that in the circumstances two of the

directors were entitled to instruct Maxwell & Batley on behalf of the company, because had they not done so Fusion -

> "[55] …would now be in administrative receivership when it would be quite wrong for it to be in that state of affairs. As such state of affairs would have been procured by breaches of fiduciary duty of two of its directors blocking any action it cannot be right that Pertemps should be advantaged by such actions. I cannot believe, therefore, that Pertemps did not expect Fusion to be able through Maxwell Batley to fight this issue."

By comparison in the instant case Module 1 concerned a dispute between individuals as to their respective shareholdings and it could not be said that it was either necessary or expedient that the Company participate or incur costs in that Module.

124. The UK jurisprudence was reviewed by Lindsey J. in *Re A Company No. 001126 of 1992*, following which he suggested the following principles in relation to costs incurred by a company on a s. 459 petition (*333): -

> "… As a body they suggest to me the following:
>
> Firstly, that there may be cases (although it is unlikely nowadays when wide objects clauses are the norm) where a company's active participation in or payment of its own costs in respect of active participation in a sec. a 459 petition as to its own affairs is *ultra vires* in the strict sense.
>
> Secondly, leaving aside that possible class, there is no rule that necessarily and in all cases such active participation and such expenditure is improper.

Thirdly, that the test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole (to borrow from *Harmon* J. in *Ex Parte Johnson*).

Fourthly, that in considering the test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The chorus of disapproval in the cases puts a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case. What will be necessary to discharge that onus will obviously vary greatly from case to case.

Fifthly, if a company seeks approval by the court of such participation or expenditure *in advance* then, in the absence of the most compelling circumstances proven by cogent evidence, such advance approval is very unlikely."

In *Re Permanent TSB Group Holdings Plc: Dowling and Ors. v Cooke and Ors.* [2013] IEHC 406 Laffoy J. considered the UK authorities and in particular approved the analysis contained in the judgment of Lindsay J. in *Re A Company.*

125. At para. 1.6 in her judgment in the present appeal the trial judge noted -

"that the legal position is correctly stated in Courtney on *The Law of Private Companies* (2nd Ed.) at para. 19.052 where it is stated: -

> "Disputes under … section 205 are typically between the members *inter se* or the members and the directors. The separate legal entity which is the company will usually not play an active part in the litigation, although for practical reasons

> they may be separately represented at a section 205 hearing. In the particular context of disputes involving the exclusion of quasi-partners from the company's management it would be wrong for the company's controllers to utilise the company's resources in connection with the proceedings."

Virtually identical wording appears at para. 11.057 in the Third Edition of Courtney, published on 30 September 2012. I would adopt this general statement as correct.

126. I am satisfied that for the purposes of analysing this issue s. 459 of the Companies Act, 1985 in the United Kingdom may be taken as the analogue of s. 205 of the Act of 1963 in this jurisdiction, and that therefore it is useful to consider the UK jurisprudence. I agree with Laffoy J. in the *Sterling* case that the principles enunciated by Lindsay J. in *Re. A Company No. 001126 of 1992* are persuasive and logical. In particular where the battleground in a s. 205 oppression petition is essentially between quasi-partners and relates to the company's management it is wrong for one of those parties having control over the company's finances to use company resources to fund the prosecution or defence of such proceedings, at least without leave of the court. Of particular relevance to the present case is the third test enunciated by Lindsay J. namely "whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole". The fourth observation talks of the starting point being "a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expendiency". I would prefer to emphasise the second part of the fourth principle in which Lindsay J. imposes "a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case." In the present appeal that onus is not one that falls to be

discharged by the Company *per se*, but rather by Mr. William Kelly who was a co-respondent to the petition and orchestrated the payment of fees by the Company to Gibson & Associates.

127. In her judgment at para. 7.6 the trial judge rejected Mr. William Kelly's proposition that Gibson & Associates were being paid for acting for the company and for him in his capacity as a director, rather than in his personal capacity. She found –

> "7.6 … On the contrary, in essence, as I have already recorded, [Mr. Gerard Kelly's] dispute is with the [Mr. William Kelly] not with the company, and it was [Mr. William Kelly's] opposition to [Mr. Gerard Kelly's] claim that he was an equal shareholder with [Mr. William Kelly] which necessitated the determination of the membership issue. … it is hard to see how there could be any justification for the company bearing the costs of defending these proceedings up to the conclusion of the first module, which is, in effect, what has occurred as a result of the action of the [Mr. William Kelly] in making the payments from October 2009 to February 2010 to Gibson & Associates."

128. This court cannot disturb that finding of fact and it appears to me to be entirely warranted by the manner in which Mr. William Kelly raised and pursued the shareholding issue at the outset, and challenged Mr. Gerard Kelly's standing to bring the s. 205 petition, and his pursuit of this issue notwithstanding the overwhelming evidence that Mr. Gerard Kelly was a beneficial shareholder, and a director, and that this had been acknowledged by Mr. William Kelly by his conduct and in company accounts over a period of time. Was it "*necessary or expedient*" in the interests of the Company to contest or participate in Module 1? The answer must be an emphatic "*no*", and in my view Mr. William Kelly went nowhere near satisfying the heavy onus that he bore to satisfy the trial court, or this court that his opposition in Module 1 was in the interests of the Company.

129. Before leaving this subject it is worth pointing out that nowhere in her Module 2 judgment does the trial judge make a finding of oppression based on these payments. Their significance in the judgment is twofold. Firstly, they support the trial judge's conclusion that the payments were wholly improper and illustrated a complete breakdown of trust and confidence between the parties. Secondly, it follows from the trial judge's finding that the payments were improper that they needed to be reimbursed to the Company, and this became part of her subsequent directions and order.

130. The reason the trial judge does not base her findings of oppression on these payments is presumably because they post-date the presentation of the Petition. The general view is that the words "are being conducted/exercised" in s.205 in the context of conduct of affairs or director oppression requires the complainant to show the oppression or disregard of member interest when the complaint is made i.e. at the date of the presentation of the petition. However, and without deciding this point, it seems to me at least arguable that improper conduct occurring during the course of s.205 proceedings, at least if it reaches the requisite threshold of seriousness, may in itself constitute oppression or may, when viewed in context or alongside pre-petition acts alleged to constitute oppression, and taken cumulatively, constitute oppression. It may be open to argument that "*are being* conducted" and "are being exercised" should be interpreted as relating to the date of hearing of the s.205 claim, and can encompasses post-petition conduct that might be seen as a continuum or exacerbation of pre-petition conduct – particularly if the petition is amended to include additional complaints. It would indeed be surprising if such post-petition conduct could never be taken into account, or could only be put in evidence to support a further petition under s.205. Unusual circumstances such as improper use of Company assets post-petition might in such circumstances be an exception to the general

principle that the complaints of oppression or conduct of the affairs must always exist at the date of issue of the petition. I would leave this question open for determination in a future case.

(5) Assaults

131. Mr. William Kelly in his written submissions, and counsel in her written and oral submissions, argued that the trial judge failed to recognise that the absences of Mr. William Kelly and George Kelly from the workplace were as a result of the verbally and physically aggressive behaviour of Mr. Gerard Kelly, and that the alleged assaults were to restrain his violence. I am satisfied however that the trial judge's findings of fact and her conclusions in paragraph 8 of her judgment in relation to allegations and counter-allegations of assault are firmly grounded on evidence and are not such as would warrant interference by this court under the principles in *Hay v O'Grady.*

132. Counsel made a more nuanced argument in reliance on the UK decisions of *Re. London School of Electronics Limited* [1985] 3 WLR 474, and *Noble (R.A.) & Sons (Clothing) Limited* [1983] B.C.L.C. 273. In *Re London* Nourse J. stated at p. 482 –

> "The conduct of the petitioner may be material in a number of ways in which the two most obvious are these. First it may render the conduct of the other side, even if it is prejudicial, not unfair cf: in *Re R.A. Noble and Sons (Clothing) Limited* [1983] B.C.L.C. 273. Secondly, even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant under subsection 3. In my view there is no independent or overriding requirement that it should be just and equitable to grant relief or that the petitioner should come to the court with clean hands."

Re Noble was a case in which conduct disentitled the petitioner to a remedy.

133. Counsel argued that the court must undertake a balancing exercise, considering the conduct of both parties, in relation to the decision on oppression, and in fashioning a remedy under s. 205(3). She argued that while the trial judge did consider the conduct of both parties no reasons were given as to why she found the conduct of Mr. William Kelly oppressive. It was submitted that the evidence pointed to a deadlock engineered by Mr. Gerard Kelly through his violence and aggression in the workplace, and that Mr. William Kelly had no option but to seek to contain it by his actions, and by reporting matters to an Garda Siochána, and suspending Mr. Gerard Kelly. It was submitted that in this balancing exercise the trial judge's conclusions could not be sustained, and in particular counsel challenged the conclusions of the trial judge in relation to the company accounts and annual returns, and that Mr. William Kelly was "more at fault" having regard to the correspondence between the parties.

134. The test in s.459 is of course different – it refers to "unfairly prejudicial" conduct of the affairs of the company. But if I were to accept, for the purposes of the argument without deciding it, that a petitioner's conduct can disentitle them to relief even if he/she satisfies a court that the respondent has acted oppressively, and that a balancing exercise is required, I am quite satisfied that such an exercise was undertaken by the trial judge. The trial judge did find each party was on a short fuse, and each was prone to resorting to aggressive behaviour, and she found that both of them acted disgracefully in front of their employees. But she found as a fact that inappropriate behaviour by Mr. Gerard Kelly was provoked by Mr. William Kelly; she also recounts the CCTV footage of the incident on 19 November 2009 when Mr. William Kelly restrained Mr. Gerard Kelly by holding his arm behind his back and then pinning him to the floor. Importantly at paragraph 11.5 of her judgment she stated –

> "While, as I have indicated, [Mr. Gerard Kelly's] conduct, to put it mildly, has been reprehensible on occasion, I have come to the conclusion that, to some extent, but not totally, that conduct is excusable because [Mr. Gerard Kelly] was provoked by [Mr. William Kelly]."

At paragraph 11.6 she then refers to the *"*total breakdown of the relationship" and states that "I find that [Mr. William Kelly] must bear most of the responsibility for that state of affairs." It is also clear that in reaching this conclusion the trial judge had considered the correspondence and evidence in relation to the company accounts and annual returns in determining that there was oppression.

The Legal Argument that there was no jurisdiction to make a finding of oppression against Mr. William Kelly in his capacity as a single director

135. Section 205(1) of the 1963 Act bears repeating: -

> "Any member of a company who complains that the affairs of the company are being conducted *or that the powers of the directors of the company are being exercised in a manner oppressive to him or any members of the company (including himself), or in disregard of his or their interests as members*, may apply to the court for an order under this section." [Emphasis added]

136. Counsel argued that the "powers of the directors" can only be exercised collectively, by the board of a company or on the authority of the board. Counsel developed the argument by reference to Company's Articles of Association which provide:

> "11. Patrick J. Kelly shall be Managing Director of the Company, and he shall, while holding such office, have all the powers of the Directors (except the power to make

calls, forfeit shares, borrow money or issue debentures) and clause 72 of Table A shall apply subject to this Article."

It was submitted that Mr. William Kelly was never in a position to exercise "the powers of the directors", nor did he have such powers, which remained with the board. It was further submitted that the power to delegate directors' powers should be construed strictly, and there was no delegation of powers by the board to the directors, of whom there were three up until 2004, and thereafter just two, who were deadlocked. Counsel argued that insofar as Mr. William Kelly was CEO this was under his contract of employment with the Company, and he was an employee, and this was different to being managing director, and Mr. William Kelly's acts/omissions alleged to constitute oppressions fell outside of the exercise of the "powers of the directors". Counsel accepted that if her argument was correct it meant that there was something in the nature of a *lacuna* in s.205(1) as it could not apply to a deadlocked board where one director was alleging oppression by another director.

137. Counsel relied for this strict approach on the House of Lords decision in *O'Neill v. Phillips* [1999] 1 W.L.R. 1092 and the judgment of Lord Hoffman in that case. That was a claim brought under s.459 of the Companies Act 1985 (UK), as amended, by O'Neill, a minority shareholder. Initially he was an employee of the company which was wholly owned by the respondent. The petitioner was later made a director and given 25% of the shareholding, and Phillips expressed the hope that he would take over the running of the company and draw 50% of the profits. O'Neill did take over the running of the company, and divided the profits 50/50, and in 1989/1990 there were negotiations in which Phillips indicated that in principle he was willing to increase O'Neill's shareholding to 50% when certain targets were reached. Differences arose in 1991 and Phillips told O'Neill he would no longer receive 50% of the profits, but only salary and 25% of dividends. The petition issued, but was dismissed at first

instance as Phillips commitment had not be permanent or unconditional, and he had not acted unfairly, and O'Neill had not suffered prejudice to his interests as a shareholder. The Court of Appeal allowed the appeal, but the House of Lords allowed Phillips further appeal, for reasons helpfully summarised in the Headnote:

> "*Held,* allowing the appeal, that, although it might in certain circumstances be unfair for those conducting the affairs of a company to rely on their strict legal powers, ordinarily unfairness to a member required some breach of the terms on which he had agree that the company's affairs should be conducted; that, since P. had not agreed unconditionally to give O. more shares or to share equally in the profits, he could not be said to have acted unfairly in withdrawing from the negotiations to that end; and that a member of a company who had not been dismissed or excluded from participation in its management was not entitled to demand the purchase of his shares simply because of a breakdown in trust and confidence between the parties."

At p.1098 Lord Hoffman stated:

> "In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of association are contained in the articles of association and sometimes in collateral agreements between shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain

relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law."

Discussion

138. Ussher, *Company Law in Ireland* (1986) records the origins of s. 205. At p. 256 he states –

> "Section 205 was broadly modelled upon s. 210 of the Companies Act, 1948 [UK], now repealed, but with modifications in parts suggested by the Jenkins Committee, in part by the draftsman's own perception of defects in s. 210 brought to light by British interpretations of it, and in part without any recognisable provenance. The chief Jenkins Committee recommendation followed (and by no means all were) is that the Irish courts in exercising jurisdiction under S. 205 are liberated from the necessity, present in s. 210, of finding grounds justifying a just and equitable winding up of the company. This was the most fundamental departure from the British model, and British authorities, occasionally referred to in Ireland as aids to the construction of s. 205, should always be treated with caution because of the absence of this restrictive element from the Irish jurisprudence. Other departures will become apparent as this analysis proceeds."

139. I agree with the observation that caution should be exercised in approaching the UK jurisprudence, and this is the case in relation to both decisions addressing s. 210 of the Companies Act 1948 (which was similar to s.205) and those (such as *O'Neill v. Phillips*) which arose from the altogether different terms of s.459 of the Companies Act 1985. The latter provision requires a petitioner to show that –

> "the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members

(including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

140. The concept of company affairs being conducted in a matter unfairly prejudicial to members is more reflective of the first limb of s. 205(1) (which concerns the affairs of the company), but in any event is different to the concept of "*oppression*". The UK section focuses on the affairs of the company rather than the exercise of the powers of directors. In *O'Neill*, Lord Hoffmann at p. 1098 says –

> "5. *"Unfairly prejudicial"*
>
> In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history … that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles."

141. The concept of "oppressive conduct" was part of UK law until 1980, as s.210 of the Companies Act, 1948 provided that the conduct complained of must be "oppressive to some part of the members (including himself)". In *Re Greencore Trading Co. Limited* [1980] ILRM 94, Keane J. accepted the dictionary meaning given by Lord Simonds in *Scottish Cooperative Wholesale Society v Myer* [1959] A.C., 324,. By this definition oppressive conduct is "*burdensome, harsh and wrongful*", which was the definition applied by the trial judge (11.4).

142. In *Re Irish Visiting Motorists Bureau Limited* [1970 1 JIC 0101, Kenny J. said –

> "The affairs of the company may be conducted or the powers of the directors may be exercised in a manner oppressive to any of the members although those in charge of the

company are acting honestly and in good faith. If one defines oppression as harsh conduct or depriving a person of rights to which he is entitled, the person whose conduct is in question may believe that he is exercising his rights in doing what he does. One of the most terrifying aspects of human history is that many of those whom we now regard as having been oppressors had a fanatical belief in the rightness of what they were doing. The question then when deciding that the conduct of the affairs of the company or the passing of a resolution is oppressive is whether, judged by objective standards, it is." (p. 33).

143. The trial judge referred to this authority and at para. 11.5 affirms that she carried out an objective assessment of the evidence related to oppression.

144. It is also well-established that while *unlawful* conduct may found jurisdiction under s. 205, it is not a pre-condition to the invocation of the provision – see *Re Clubman Shirts Limited* [1983] ILRM 323, where a mere failure by the directors to consult a principal shareholder at a time of crisis in the company's affairs was held to be conduct oppressive to him. Furthermore, an isolated act of oppression, which remains un-redressed at the date the petition is presented, can be sufficient. In *Re Westwinds* [1974] 5 JIC 2102 Kenny J. in dealing with the first of several acts of unlawfulness perpetrated on the company found that on that first act alone the conditions for the exercise of the powers of the court under s. 205(3) had been fulfilled. See to similar effect Barrington J. in *Re Williams Group Tullamore Limted* [1985] IR 613, where he stated, at p. 620: -

"in the present case we are dealing with a transaction which is ongoing at the date of the hearing of this petition in the sense that it is one which will be implemented if the petitioners do not obtain the relief they are seeking."

145. The decision in *Re Clubman Shirts Limited* [1983] ILRM 323 is of some relevance. The petitioner, formerly a director and financial controller of the company, complained about a failure to hold annual general meetings or present audited accounts for a number of years, a failure by the directors to produce properly audited accounts, and a transaction undertaken by the directors which involved handing over the business of the company to a newly formed company without providing information to minority shareholders. O'Hanlon J. did not find oppression made out on the technical grounds related to general meetings and the provision of properly audited accounts, although he did ultimately find oppression in respect of the transfer of the business. He regarded the omission to comply with provisions of the 1963 Act referable to general meetings and the furnishing of information and accounts as –

> "examples of negligence, careless, irregularity in the conduct of the affairs of the company, but the evidence does not suggest that these defaults or any of them formed part of a deliberate scheme to deprive the petitioner of his rights or to cause him loss or damage." (p. 327)

It is implicit from this that had the failures to comply with provisions of the 1963 Act formed part of a deliberate scheme to deprive the petitioner of rights or to cause him loss or damage then O'Hanlon J. would have taken a different view.

146. In my view there can be no doubt – and it was not argued otherwise on behalf of Mr. William Kelly – that omissions by directors, particularly in relation to the preparation and signing off on accounts, and the making of statutory filings, the absence of which may risk a company strike-off, can properly give rise to complaint under s. 205(1). The trial judge was therefore entitled to find oppression in the refusal and prevarication by Mr. William Kelly in the exercise of the directors' powers and duties in respect of the Company accounts and

statutory filings, and to find that his conduct and omissions were, in the particular circumstances identified by her, "harsh" or "burdensome".

147. This is particularly so where quasi-partnership companies are concerned, and relationship between directors is akin to that of partners. Courtney (*The Law of Companies*) 3rd. Ed. at [11.035] states –

> "Where a relationship of *equality, mutuality, trust, and confidence,* based on a personal relationship, subsists in a private company it may be appropriate that it be considered as a quasi-partnership. Such a finding may result in members and directors being found to be restrained on equitable grounds from enforcing rights found in the "black letter of the law". In such companies, acts and omissions may be found to amount to oppression or disregard of members' interests, by reason of equitable consideration; formal rights may be forced to give way to equitable principles implied from the law of partnership."

148. An example of this arose in *Re Murph's Restaurants Limited* [1979] ILRM 141, which concerned a company with three shareholders who were also directors. One of these, P.S., brought a petition for a winding up pursuant to s. 213 of the Act of 1963 on the grounds that the affairs of the company were being conducted and the powers of the directors being exercised in a manner which was oppressive to him and in disregard to his interests, and also that it was just and equitable so to order. The other two directors purported to hold a general meeting, and to pass a resolution that P.S. be removed from his office of director, and thereafter they purported to relieve him of his "responsibility as a working director and want you to clear out your desk". Gannon J. found from the evidence that "the previous relationship essential to the continued association" between the three of them had effectively come to an end, and that subsequent events made this position irretrievable. He found that –

"It is quite clear from the evidence taken as a whole and from practically every aspect of evidence relating to the different events and the conduct of the affairs of this company that P.K. and M. were equal partners in a joint venture, and that the company was no more than a vehicle to secure limited liability for possible losses and to provide a means of earning and distributing profits to their best advantage with minimum disclosure. The company was never conducted in accordance with statutory requirements nor in accordance with normal regular business methods. … This was achieved, and could be achieved, only by a relationship of mutual confidence and trust and active open participation in the management and conduct of the affairs of the company particularly in the irregularity or informality of its corporate quality of existence. … It is said that B.S. remains a director, but without views, and is being and will be denied any active participation in the affairs of the company. He is being and has been treated by his two co-directors as if he was an employee of theirs liable to be and purported to have been dismissed by them peremptorily and not under any colour of regular exercise by directors of their powers under the Articles of Association of the company. The action of K. and M. on 3rd February, 1979 was entirely irregular, and no attempt has been made to make or confirm this action in regular manner on behalf of the company. The action of K. and M. on the 3rd February was not and could not be accepted in law as an action of the company. The action of K. and M. on the 3rd February was a deliberate and calculated repudiation by both of them of that relationship of equality, mutuality, trust and confidence between the three of them which constituted the very essence of the existence of their company. …"

While P.S. sought a winding up, in reply the other two directors submitted that P.S. had been deprived of his directorship for good reason and as a shareholder could be afforded sufficient

relief under s. 205 of the Act of 1963 by allowing them to purchase his shares at valuation. Gannon J. clearly accepted that he could have made an order under s. 205(3), but declined to do so because there was no form of order which he considered would bring an end to the matters complained of by P.S. At p. 19 of the judgment he commented –

> "As to the matter of P.S.' removal from directorship I am satisfied from the evidence that the reasons advanced were neither good or sufficient and are wholly inadequate to justify that action. But the evidence further discloses that their purported removal was irregular and ineffective in law. Furthermore, it is clear from the evidence that in the conduct of the affairs of the company the directors did not exercise their powers in a regular manner so far as the company is concerned, and the purported exclusion of P.S. by K. and M. in an irregular and arrogant manner is undoubtedly oppressive."

Gannon J. went on to accept principles enunciated by Lord Wilberforce, and Lord Cross of Chelsea in *Re Wesbourne Galleries Ltd* [1973] AC 360 on the broad circumstances in which a court may order a winding up of a company on the just and equitable ground. Gannon J. cited with approval Lord Cross of Chelsea at p. 383 where he stated that the court may apply its just and equitable jurisdiction to wind up a company where persons repose trust and confidence in each other as equal shareholders in a limited company. He quoted with approval the following statement of Lord Cross at p. 383 that –

> "The relationship between Mr. Rothmann and Mr. Wineberg was not, of course, in form that of partners; they were equal shareholders in a limited company. But the Court considered that it would be unduly fettered by matters of form if it did not deal with the situation it would have dealt with had the parties been partners in form as well as in substance".

Gannon J. also approved the following statement of Lord Wilberforce at p. 379 –

> "The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality and law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which the shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the Court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way."

149. What *Re Murph* demonstrates is the willingness, in principle, of the High Court to exercise the s. 205 oppression jurisdiction in respect of the purported expulsion of a director/employee, in circumstances where the purported expulsion was not the subject of a valid decision at a general meeting or a meeting of the directors. Although Gannon J. for other reasons decided not to order a s. 205(3) remedy, he clearly considered that the conduct of the two respondent directors as quasi-partners in purporting to expel P.S. was an exercise of the "powers as directors" which could form the basis for such an order. It would in my view be a surprising result, and hardly one intended by the framers of s. 205, if such matters could be

taken into account under the s. 213(f) "just and equitable" ground for winding up, yet not form the basis for oppression under s. 205(1).

150. *Irish Press Plc v Ingersol Irish Publications Limited* ([1995] 1 ILRM 117, was a petition brought pursuant to s. 205 where the petitioner and the respondent agreed to enter a partnership to manage three newspapers, and to that end formed two companies in which they held equal shareholdings, and executed *inter alia* a management agreement. The relationship deteriorated, and the respondent was found to have acted in furtherance of its own agenda in not managing the subject company in accordance with its agreement, and to have acted oppressively. Barron J. comments, at p. 70: -

> "It can be seen that the powers of the Court upon an application under this section are very wide indeed.
>
> Where there are equal shareholdings in a company and where the reality is that the shareholders have entered into a partnership the Court will where necessary apply the principles of the Law of Partnership."

Barron J. then refers to the decision of Gannon J. in *Re Murph*, noting that P.S. objected to the application being dealt with under the provisions of s. 205 (on the grounds that the proposed buyout would be at a gross undervalue), and noting that Gannon J. found as a fact that P.S. was being oppressed.

151. *Irish Press Plc* is a further example of the operation of s. 205 in the case of a company where there were equal shareholdings and a quasi-partnership relationship between the members. These decisions underpin the passage from Courtney at para. [11.0353] quoted earlier, and it seems to me that there is well established practice and authority in this jurisdiction

at a High Court level over many years for the proposition that the acts or omissions of a director/shareholder involved in the management of the company may constitute oppression even if they are not formal exercises of decision making at Board level. These decisions undermine counsel's contention to the contrary, and her reliance on the argument that a court faced with a s.205 petition alleging oppression arising from the exercise of the powers of directors must strictly construe the Articles of Association and any delegation of the director's functions in the Articles or by resolution, by reference to each alleged act or omission said to constitute oppression, before it can be satisfied that such act or omission constitutes oppression.

152. The contention that s. 205 is inoperable in cases where there is deadlock at Board level is also undermined by the more recent decision of Charleton J. in *Re Dublin Cinema Group Limited* [2013] IEHC 147. That case concerned a company which began as a family concern, being involved in the running of cinemas. The petitioner and respondent were for many years directors and members of the company, but over time differences arose between them. When those could not be resolved the petitioner sought a winding up under s. 213(f) on the "*just and equitable*" ground, but no alternative relief was sought. The question arose as to what order the High Court was empowered to make under the 1963 Act. The petitioner contended that the only power in the court was to wind up the company, or to refuse the petition, whereas the respondent contended that under s. 216 the court had a wide discretion as to the order to be made. S. 216(1) provides –

> "(1) On hearing a winding-up petition, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, *or any other order that it thinks fit*, …" (Emphasis added)

Charleton J. held that if a court was required to consider whether it was just and equitable to wind up a company, the court had also to consider whether there was any other order available under s. 216 of the Act of 1963 which would be more just and equitable. The court was therefore entitled to make an order under s. 205 with a view to reordering the company so that it might survive profitably into the future, and that could include a share buy-out at an appropriate rate as between two members such as the petitioner and respondent in that petition. Charleton J. reasoned: -

> "If a court must consider whether it is just and equitable to wind up a company, it seems to me that a court must also consider whether there is any other order available to the court under s. 216 that would be more just and equitable. That is especially so, it seems to me, where it is not just the original people founding and running the company that are involved. Where substantial numbers of employees are added in to the matrix of justice and equity because they depend on the company, it is hard to see why the wide discretionary powers under s. 216 should be ignored in favour of a hedged-in assessment of the breakdown of a quasi-partnership in the guise of a company and the remedy that can traditionally be applied of winding up. Where a company expands to embrace the dependency of many more than the original founders and their successors, there are other people to be thought about. Nor is the just and equitable ground for winding up to be applied without proper consideration of not just how the company started but also what the company may have developed into. It is to be noted that s. 205 refers, in particular, to oppression of a member or a disregard of their interests. It is to be remembered as well that whereas s. 205 is a specific provision that is predicated on particular grounds, the existence of that specific provision does not thereby fetter the court's wide powers on the hearing of a winding up petition under s. 216.

The canons of construction require that I should give every section of every Act a meaning and should not presume that the Oireachtas in using surplusage or rhetorical advices in setting out the law. It is clear from the wording of the various provisions quoted that I have to give a meaning not only to the dismissal of a winding up petition under s. 216, or the adjournment of a winding up petition instead of a dismissal under s. 216, or the making of an interim order instead of a winding up petition, but I must also give a meaning to the power of the court, instead of winding up a company, to make any other order that it thinks fit. Clearly, the Oireachtas contemplated that a wide discretionary power was to be exercised by the High Court in hearing any winding up petition. That is not surprising as a winding up order involves the dissolution of a corporation, a most serious step. An application under the just and equitable ground does not at all exclude the kind of sensible powers that are characteristic of s. 205 in the rectification of a company's affairs without the need to wind it up. Nor are such wide powers as described in s. 205 excluded by the absence of any petition to that end. … s. 213(f) in enabling a company to be wound up on just and equitable grounds does not exclude the implication of sensible powers to rectify the divisions within a company that are characteristic of many of the orders under s. 205 simply because s. 213(g) expressly incorporates those powers where a company is in danger of being wound up because of oppression or disregard of a member's interests. My view is that if circumstances are shown in evidence to exist whereby it is appropriate that one or other family member or quasi-partner should, on fair compensation, leave the management or membership of the relevant company in respect of which a winding up petition is brought on the just and equitable ground, then any appropriate order that the court 'thinks fit' is an order I am empowered to make under s. 216."

153. I respectfully agree with those observations of Charleton J. In particular I agree with his emphatic restatement that s. 205 applies to "family companies" where there is within a quasi-partnership deep division between members of the family/quasi-partners. That decision was delivered in 2013 and was not therefore considered by the trial judge in the present appeal. While it was briefly addressed by counsel for Mr. William Kelly no argument was made that it was wrong in principle, or that the construction of the relevant sections of the 1963 Act by Charleton J. was in any way flawed.

154. Turning to the words actually used in subsection (1) of s. 205, it will be recalled that counsel's primary argument was that the words "powers of the directors", in using the plural, must necessarily refer only to the exercise of the powers of directors at Board level. This in my view is an unduly narrow interpretation of the section. The term "powers of the directors" is not defined in the Act of 1963. S. 18 of the Interpretation Act 2005 provides that –

> "(a) *Singular and plural*. A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular".

On this basis alone the term "powers of the directors" must be construed to include an exercise of one or more powers by one or more directors in an oppressive manner. Thus the oppression could consist of the exercise of one power or multiple powers and equally it could be such exercise by one or more than one of the directors of the company. There is no reason to distinguish between the plural in "powers" and the plural in "directors". Further, the section must also apply to the *purported* exercise of powers, even if the purported exercise is in strict law *ultra vires* or otherwise ineffective; if it were otherwise the objective of the section would be frustrated by the additional fact of illegality of oppressive acts or omissions intended by the perpetrator(s) to be the (lawful) exercise of power(s) of director(s).

155. Aside from this, in my view the Oireachtas cannot have intended that s. 205 would be inoperable in circumstances where there is deadlock at Board level because of equality of board representation and shareholding and where, as a result of oppressive conduct on the part of one director/shareholder, the company is unable to comply with its statutory obligations, in particular the preparation and signing off of accounts, and statutory filings with the CRO. Had the Oireachtas intended that that should be so, and, for instance, that the only remedy or resolution available in such circumstances would be a winding up, then it would have so provided within s. 205 or elsewhere in the Act of 1963. It did not do so. Nor in my view is this a mere *lacuna* in s. 205. In my view this was always intended to be a provision conferring on the court a wide jurisdiction to afford a remedy where it found oppression in the conduct of the affairs of the company or in the exercise of the powers of directors, and to avoid the winding up of a company where that is not necessary and can be avoided, particularly where there are a number of employees. It is of note that the preservation of jobs for the 40-50 employees in the Company was something that exercised the mind the trial judge, and she was entitled to take this into account in the remedy that she fashioned under s.205(3).

156. It follows that in my view the trial judge was entitled, as a matter of law, to treat Mr. William Kelly's "conduct in purporting to suspend [Mr. Gerard Kelly], in whatever capacity, from the company, on its own" as meeting the test of oppression, notwithstanding that no formal resolution was made by the board. It is clear from the authorities that a single act or omission, of sufficient gravity, may amount to oppression within the meaning of the section. The fact that Mr William Kelly purported to reverse his decision prior to the presentation of the petition was not, in the circumstances, sufficient to either remove the oppression or bring to an end the impugned conduct of Mr William Kelly. The trial judge clearly formed the view that the parties could no longer work together, a view which was amply supported by the evidence. *A fortiori*

the trial judge was entitled as a matter of law to regard that suspension in combination with other factors relied on by Mr. Gerard Kelly, including the failure of Mr. William Kelly to sign off on the accounts presented by and recommended by the auditors, and the consequent failure to comply with statutory requirements in relation to the filing of annual returns, thus exposing the company to a risk of strike off, as constituting oppression and meeting the test.

157. The trial judge as a matter of law was also entitled to come to this decision notwithstanding that she also held Mr. Gerard Kelly bore some responsibility for the breakdown of the relationship and for the company's state of affairs. The fact that a petitioner may also bear such responsibility is something that the court must take into account – and the trial judge did – in considering a s.205 petition, but it does not preclude the court from finding oppression, and granting a remedy under the section. If it were the case that relief could only be granted to a blameless petitioner, this would seriously undermine the utility of the section, especially in circumstances where it is most likely to be resorted to bring to an end an intractable situation/problem. Of course the conduct of the petitioner may be of relevance, most obviously in determining whether it is proper to characterise the reaction of the respondents to that behaviour as '*oppressive'.* In any event as I have pointed out earlier the trial judge made a specific finding that Mr. William Kelly "must bear most of the responsibility for that state of affairs … which has been primarily brought about by the conduct of [Mr. William Kelly]." (para. 11.6). These findings undoubtedly opened the gateway for the exercise of her jurisdiction under the section.

158. To this I would add that the broad intentions of the Oireachtas are apparent from ss. (3) of s. 205 in its provision that the court "may, with a view to bringing an end to the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or

cancelling or varying any transaction or for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise".

This demonstrates flexibility in the exercise of the court's discretion when it comes to deciding on the appropriate remedy. As Ussher comments (p. 267, *op. cit.*) "The court may under s. 205(3), make any conceivable order affecting the participants in the company". Given the breadth of that provision it would not be logical or consistent for the court to narrowly construe the phrase "powers of the directors" in the manner contended for by counsel, as to do so would potentially remove the application of the section from a large number of companies, family run or otherwise, which are quasi-partnerships or there is otherwise an equality of shareholding.

Appropriate remedy – practical difficulties

159. In Module 2 the trial judge, having found that there was oppression, and a total breakdown in the relationship between the parties at a business and personal level, proceeded to address what might be the appropriate remedy to bring an end to the oppressive use by Mr. William Kelly of his powers as a director.

160. The preliminary difficulty that she highlights in para. 12.1 is that there was a lack of evidence in relation to the then current financial and trading position of the Company, and the value of its assets, and indeed no evidence to back up any assumption of solvency, particularly as the last audited accounts of the company were for the year 2005. The trial judge was conscious that there were other stakeholders of the Company, its creditors and employees, whose interests the court should bear in mind when considering the exercise of its broad discretion under subs. 3 of s. 205, rather than ordering a winding up. At para. 12.7 the court

noted that at the hearing of Module 2 Mr. William Kelly testified that personally he did not have enough assets to pay a fair value for the shareholding of Mr. Gerard Kelly, while expressing the opinion that by means of a "reorganisation of the company to utilise some of the assets of the company" he would acquire the shareholding of Mr. Gerard Kelly at a fair value. As to the capacity of the Company to acquire either shareholding, the court noted Mr. Gerard Kelly's opinion that it could only do so "by paying for it with assets", and he put a net asset value on the Company at "around" €8M. The court noted that "this figure which, unfortunately, has proved to be wholly unrealistic as to the true value, which is marginally greater than 50% of that figure, was based on an out of date property valuation of land and premises of the company at €11,000,000, which he had discounted by 20%". Mr Gerard Kelly had also indicated his preferred remedy which was a split of the Company into two, separating the property element from the trading element, with him being allowed to continue running the trade as he had done in 2007 and in 2008.

161. At para. 12.8 the court noted the position of Mr. William Kelly was that he could not afford to acquire Mr. Gerard Kelly's shareholding at fair value and did not know whether the Company would be in a position to acquire Mr. Gerard Kelly's shareholding. He clarified that at an earlier stage in the proceedings he had indicated a preference for winding up, but that view was expressed because he had been told that "that would be the eventual outcome" and because he believed "the company is going to end up liquidated anyway because we are going to run out of money".

162. These matters led the trial judge to the conclusion at that juncture that if relief was to be granted under s. 205(3) rather than ordering a winding up under s. 213 "the most obvious course to pursue would be to direct [Mr. Gerard Kelly] to acquire the shareholding of [Mr.

William Kelly] at fair value." This led the trial judge to give the directions to which I have referred earlier in this judgment. In summary direction (a) was that within two weeks Mr. William Kelly furnish in writing his objections to the draft accounts of the company for the years 2006-2009 to Stewart and MacLochlainn, that they as companies auditors consider those objections and write to the parties indicating how they considered the matters so raised should be addressed; and direction (b) was that the parties as directors procure the finalisation of the draft accounts for the year 2010 and produce up to date management accounts for the period since 31st December, 2010; direction (c) was that within two weeks i.e. by 23 February 2011 the parties retain an independent accountant to prepare a statement of affairs and report on the Company's current financial state, and in default of "an agreement between the parties as to the nomination of an independent accountant, I directed that [Mr. Gerard Kelly] should apply to court to make the nomination of an independent accountant from a list of three names submitted to the court".

The trial judge stated that the objective in obtaining the statement of affairs was to enable the court to determine whether the appropriate course would be to wind up the company rather than to formulate remedies under s. 205. The independent accountant was to be retained at the expense of the Company. Direction (d) required that Mr. Gerard Kelly at his own expense obtain an up to date valuation of the properties of the Company from a professional valuer with expertise of property values in the Letterkenny area within four weeks; direction (e) required Mr. William Kelly to reimburse to the Company the sums aggregating €180,000 which he withdrew from the Company after 14 September 2009 to discharge fees due to Gibson & Associates, that money to be held in escrow by the Company pending the final determination of the proceedings. "For the avoidance of doubt", the trial judge also directed that Mr. William Kelly should be given the passwords necessary to enable him to access all the electronic

financial records of the Company, and that he could communicate directly with Stewart & MacLochlainn, and that firm directly with him (without reference to Mr. Gerard Kelly) if it needed clarification of any issue raised by Mr. William Kelly.

163. At para. 14 of the judgment the trial judge recorded that the matter came back before her on some four occasions between March and May 2011, and on the 16 March as the parties had failed to agree on an independent accountant the court appointed Deloitte & Touche, Chartered Accountants, to prepare the statement of affairs. At para. 14.3 the trial judge noted that both parties were afforded an opportunity to make written submissions arising out of the report of Deloitte & Touche dated 12 April 2011, and that the court heard submissions from both sides on 5 May 2011.

164. There was in reality no appeal in relation to these directions. Subsequently, in the context of the valuation undertaken by Mr. David O'Flanagan of Deloitte & Touche, the complaint is raised by Mr. William Kelly of objective bias on the basis that Mr. Gerard Kelly, prior to taking up employment with the Company, worked as an accountant with Haughey Boland, a firm which was later subsumed into Deloitte & Touche. Counsel informed the court that this point was made to the trial judge, and not accepted by her, but it is not referred to in any of her judgments and this court was not referred to any part of the transcript to bear this out.

165. Absent that level of detail, and absent any clear ground of appeal directed at this point, this is not a ground upon which this court could make an informed decision on appeal. However, even on the basis upon which it was put by counsel it is in my view untenable to suggest any basis for objective bias; no reasonably well informed observer being aware of all of the facts would consider that the appointment of Deloitte & Touche a large firm of

accountancy of high repute would be tainted by bias where Mr. Gerard Kelly had never worked for that firm, and had not worked as an accountant for Haughey Boland for nearly twenty years. Even if the submission of objective bias could be made – and in my view it cannot in the circumstances – it would be bound to fail.

The balance of Module 2, and the determination as to appropriate remedy

166. At para. 15 of the judgment the trial judge addressed the outstanding accounts which were finalised by the new independent auditors Stewart & MacLochlainn. This was after taking into account the written objections of Mr. William Kelly. The trial judge was not satisfied that there was any substance to those objections, and stated that "what emerges from the documentation is that [Mr. William Kelly] is not prepared to take cognisance of any reasonable approach suggested either by [Mr. Gerard Kelly] or by the company's auditors in relation to points which he contends affect 'the true and fair view' of the accounts."

167. On an issue raised by Mr. William Kelly in relation to the treatment of insurance proceeds the trial judge concluded that he was not acting in a constructive manner "but was being deliberately obstructive" (para. 15.2). The trial judge also noted that Stewart & MacLochlainn had done 90% to 95% of the work on the auditing of the accounts for the years in question, and their view was that if the directors had "adopted a common sense approach, the accounts for those years could have been finalised in October or November 2009". Noting that in a follow up letter of 2 April 2011 Mr. William Kelly did not reconsider his position on the insurance proceeds issue the trial judge found that "not only did he persist in his objections, but he embarked on an unjustified course of what I consider to be specious fault-finding in relation to the auditor's response, in one instance accusing the auditors of 'a fundamental misunderstanding of the difference between the role of auditors and directors' because of the

use of certain non-technical language.". In para. 15.5 the trial judge reached the conclusion that "the evidence leads inevitably to the conclusion that [Mr. William Kelly] will continue to obdurately refuse to act in a sensible manner and, as things stand, there is little prospect of having the outstanding accounts finalised in the near future."

168. The trial judge then noted that the draft accounts for 2009 were submitted by Mr. Gerard Kelly to the auditors on 16 February 2011, with the request that Stewart & MacLochlainn commence their audit for that year, and that the draft accounts for 2010 were submitted on 29 March 2011, but were based on estimated stock valuations as the final stock valuations for the year had not yet been completed by Mr. William Kelly. The trial judge considered there was "little prospect" of Mr. William Kelly cooperating with Mr. Gerard Kelly in a manner that would result in audit-ready draft accounts for 2010 being available to enable the audit to be carried out.

169. The trial judge then addressed the property valuations set out in a report of 14 March, 2011, from Trevor Porter of Property Partners Paul Reynolds & Co. Limited Auctioneers Estate Agents and Valuers in Letterkenny. It should be borne in mind that this was directed by the court to assist it in determining the appropriate remedy – a winding up or some other remedy such as share purchase by the Company under s. 205. Mr. Porter put an aggregate value of €4,314,000 on the 12 properties owned by the Company. He valued the Company's main retail warehouse building, a modern unit on a 12.5 acre site at Letterkenny Mills, within the town boundaries of Letterkenny, at €1.5M. Of the remaining properties, only two were used in connection with the Company's principal business of builders merchants – one of those buildings was at Castle Street, Ramelton, County Donegal, a single storey building in use as a hardware store. Although refurbished in 2006, and although business was still carried out from

it, Mr. Porter reported that it was in poor condition. There were two adjoining buildings used as grain stores which Mr. Porter described as derelict but having redevelopment potential. The other property of significance was the Coal Yard and lands located at Ballyraine, Letterkenny comprising one building situate on 7.3 acres of land. Mr. Porter's view was that the building was in poor repair and in need of demolition and redevelopment, subject to planning permission. The trial judge noted from the Deloitte & Touche report that the company maintained stock at the Coal Yard in April 2011.

170. It is apparent that no valuations were carried out by or on behalf of Mr. William Kelly which were furnished to Deloitte & Touche, or put in evidence in the High Court in Module 2. In his written submissions/observations on the valuations Mr. William Kelly gave as his understanding that there had been "an absence of market transactions since 2007 on which to base the valuations". The trial judge considered (at para. 17.4) that the valuations of Mr. Porter could be accepted as realistic having regard to the level of detail included in his report. She also noted from the Deloitte & Touche report that some of the properties were subject to fixed charges in debentures, and that all of the assets of the company were subject to floating charges.

171. At para. 18 of her judgment the trial judge dealt with the reimbursement of €180,000. She noted that the sum had not been repaid by Mr. William Kelly, although he informed the court that he had inherited land under his mother's Will and that it could be made available. It emerged, and is recorded in para. 18.2 of the judgment, that Mr. William Kelly had discovered that one of the bank drafts made out to Gibson & Associates, which was dated 12 February 2010 and was in the amount of €15,000, had never been negotiated. This led the trial judge to direct that that sum be re-lodged to the company's account. This had the effect of reducing the aggregate amount of payments to be refunded to the company to €165,000.

172. The trial judge also recorded that when the matter came before her on 5 May 2011 Mr. William Kelly informed the court that the land he had inherited had been valued at €120,000 and he proposed to use this to repay the monies to the Company, and that he had applied to Ulster Bank for a loan as that was his only means of making repayment. The report of Deloitte & Touche (David O'Flanagan) dated 12 April 2011, running to some 47 pages (including indices) is next addressed by the trial judge. The Statement of Affairs in Table 2.1 of the report is as of 30 December 2010. This records the Company properties, i.e. the 12 properties as valued by Mr. Porter, at €4,314,000, and with "other fixed assets" of €238,061 gives a total of fixed assets of €4,552,061. Total current assets – stock, trade debtors, other debtors and cash at bank are then inputted at €2,192,095. Total current liabilities – bank overdraft, trade creditors and other creditors come to €3,946,698, giving net current liabilities of €1,754,603. The Table therefore indicates that the net assets before adjustment for other assets and excess provisions was €2,797,458. Adding in "other assets" and "excess provisions" gave total Net Assets of €3,434,958.

173. The trial judge addressed the narrative that accompanied these figures, and also addresses Mr. William Kelly's objections. One matter that remained in controversy was the adjustment for €537,000 in respect of "other assets". As the trial judge notes at para. 19.3(i) this adjustment relates to a document entitled "summary of receivables for 2011" presented by Mr. Gerard Kelly to Mr. O'Flanagan, and Mr. O'Flanagan's decision that two of the five items on the document should be included. The first of these relates to an outstanding insurance claim in respect of a fire in 1999, in respect of which a settlement offer had been made in a letter of 11 May 2010 from the company insurance broker, which had been seen by Mr. O'Flanagan. On this basis he included €305,000. The second sum of €233,000 arose from a Compulsory Purchase Order. In respect of this Mr. O'Flanagan reported –

"I have seen a copy of a letter from Patrick McCarroll, Chartered Valuation Surveyor, dated 10 December 2010, which indicates that the Counsel calculate the compensation to be €232,500. On the basis of this evidence I believe this amount should be included in the statement of affairs."

174. The trial judge also noted, at para. 19.4, that Mr. O'Flanagan in his report addressed the current financial state of the Company, in April 2011, based on books and records of the Company as well as the draft accounts for 2010, and he also analysed the movement of the company balance sheet between December 2009 and 2010. She noted that his conclusion was that the Company was "significantly loss making in 2010, showing net trading losses of €733,930, based on book values. He concluded that the losses would continue for 2011 on the basis for the budget for the current year at the level of €850,000". The trial judge then noted Mr. O'Flanagan's conclusions at 3.10 in his Report –

In very broad terms, for the company to achieve profitability one of the following, or a combination of them would need to take to take place.

- Sales need to increase. If the gross margin and overheads and interest costs stay at the projected 2011 levels, the sales would need to increase to around €8.3M to achieve a break even position;

- The gross margin would have to increase. If sales and overheads and interest stay at the projected 2011 levels, the margin would have to increase to 41% to achieve a break even position, which is unrealistic.

- The costs would have to decrease. If sales and gross margins stay at the projected 2011 levels, the overhead and interest costs would have to decrease by €850,000 (from €1,877,155 to €1,027,155) to achieve a break-even position.

The trial judge also noted from his Report that the Company was reliant on ongoing support from its bankers and that the overdraft position appears to be permanent. The trial judge found –

> "19.6 … It does not appear appropriate that what is in fact a debt of a medium to long-term nature is financed by a short-term source of finance, that is to say, an overdraft. [Mr. William Kelly] must be blamed for that unsatisfactory state of affairs."

She observed that Mr. O'Flanagan's overall view was that the Company faced very real and urgent difficulties, pointing out that it was currently trading losses of €750,000 to €850,000. Mr. O'Flanagan estimated that after accounting for depreciation in excess of capital expenditure, the Company was suffering cash losses in the order of €500,000 per annum, which in his view was not sustainable. He pointed out that the cash losses were depleting the Company asset base and left the Company dependent on banking facilities. He also reported his concern about the large amount of trade creditors aged 90 days or more, with current liabilities in the amount of €1.7M at December 2010. In his Report at 3.18 Mr. O'Flanagan opined that –

> "In these circumstances, I would expect to see significant actions taking place to reduce the level of costs and restructure the company so that it can live within its means. I see no evidence of such action having taken place, and note that the current dispute between the petitioner and the first respondent have impacted on the ability of the company to address these significant issues".

At para. 19.9 the trial judge expressed the grave concern that Mr. William Kelly did not appear to have taken on board the seriousness of these observations by Mr. O'Flanagan, and produced a 32 page document, one quarter of which was addressed in Mr. O'Flanagan's Report. In this Mr. William Kelly continued to blame Mr. Gerard Kelly for the state of the Company, and for "dismantling the established management structures and systems within the Company". The trial judge commented "The most disconcerting aspect of the written submissions, however, is the degree to which [Mr. William Kelly] remains fixated on detail".

175. In paragraph 20 of the Module 2 judgment the trial judge sets out her determination of the appropriate remedy and her reasons for same. The starting position was that neither party wished the court to make a winding up Order, and the parties could not run the company together, and "until such time as [Mr. William Kelly] is divested of his interest in the company and control passes to [Mr. Gerard Kelly], the affairs of the company cannot be stabilised". The trial judge rejected Mr. William Kelly's genuinely held view that his presence would be in the best interests of the Company, and expressed her assessment of his in remarkably robust and clear language –

> "I have informed the view that [Mr. William Kelly] is incapable of acting in a sensible and constructive manner in order that the company's statutory obligations be fulfilled and that its business be managed in such a way as to ensure its viability".

In para. 20.6 the trial judge stated –

> "I am satisfied that while [Mr. William Kelly] remains as a director of the company those difficulties cannot be realistically addressed, because I am satisfied that he has no appreciation of what is necessary to enable the company to survive and that he has no

> capacity to act in a constructive manner in the best interests of the company. Therefore, I consider the only path to survival of the company is that [Mr. William Kelly] should cease to be both a shareholder and a director of the company. As [Mr. Gerard Kelly] is not in a position to acquire the shareholding of [Mr. William Kelly] for value, then the only option available to the court to avoid making a compulsory winding up Order, is that, in principle, the company should be ordered to purchase the share of [Mr. William Kelly] at fair market value, with a consequent reduction in the company share capital."

As the trial judge went on to state, this made it necessary to sever the joint ownership of the shares, jointly owned by the parties, and this required an order to that effect. Secondly, as it was not possible to determine the value of 3,968 shares in the Company on the basis of the evidence then before the court the trial judge proposed, subject to that firm being prepared to take on the task, to appoint Deloitte & Touche to conduct a valuation of those shares in the Company as of 31 August, 2011, and to direct that the remuneration for performing that task be paid by the Company (para. 20.8). In the event they agreed to undertake that task on that basis. Thirdly, the trial judge addressed the outstanding figure of €165,000 and in para. 20.9 stated that –

> "I consider that the practical approach to the matter is, as suggested by counsel for [Mr. Gerard Kelly], that the purchase price for the shareholding of [Mr. William Kelly] be reduced by the amount not so reimbursed by [Mr. William Kelly]."

The trial judge indicated that she would also consider whether a direction should be given to sell some of the properties in the company's portfolio, or distribution *in specie* to Mr. William Kelly, while noting that it was unclear to what extent the Company would be able to procure

the release of properties in its portfolio which were subject to existing fixed charges. The trial judge accordingly made the orders set out at para. 21.1 of her judgment in Module 2.

176. While the foregoing is set out at some length, it is more by way of background to Module 3, in which the High Court undertook the valuation of the 3,968 shares, rather than because this appeal relates to her determination as to the appropriate remedy. Mr. William Kelly in his written submissions, and counsel in her add-on written submissions before this court made submissions in relation to the valuation issue but do not appear to have made any submissions to suggest that the appropriate remedy, i.e., the purchase by the Company of Mr. William Kelly's shares, should be set aside because of any error of law or fact, and the trial judge's findings and reasoning, and her directions at the end of Module 2, do not appear to be impugned. Those findings therefore stand.

Module 3 – Valuation

177. Following the directions given by the trial judge in her judgment of 31 August 2011, Deloitte & Touche were willing to take on the appointment to carry out a fair market valuation of Mr. William Kelly's shares, and Mr. O'Flanagan assumed the task. Before the Report was drafted a meeting was held with Mr. William Kelly in the offices of Deloitte & Touche, and he was invited to give his opinions on various matters, including the Company's business prospects, and in relation to the annual and twenty two months' accounts now available to Mr. O'Flanagan. A draft report was prepared by Mr. O'Flanagan, and sent on 24 April 2012 to the parties for their observations on its factual content, and both parties responded with their observations which were made available to the court at the Module 3 hearing. The Report as finalised is dated 1 May 2012.

178. The trial judge also had the benefit of Mr. O'Flanagan's Statement of Affairs, and written submissions on behalf of both parties, and she heard oral submissions on 22 May 2012.

179. It is important to note here that neither party adduced additional evidence at the Module 3 hearing. However, and this is noted by the trial judge at para. 8 of her Module 3 judgment, Mr. William Kelly in his written submissions stated that there had been a recent valuation of the company's twelve properties by GVA Donal O'Buachalla, commissioned by Mr. William Kelly's then current solicitors Purdy FitzGerald, and that that valued the properties, excluding the effect on valuation of special purchases, at between €3,525,000 and €3,600,000. That valuation was proffered by Mr. William Kelly to the court, but, as the trial judge recorded, it was submitted on behalf of Mr. Gerard Kelly that the court should not have regard to it. It seems that, whether as a result this objection or otherwise, no further property valuation was put in evidence beyond those referred to in Mr. O'Flanagan's Valuation Report.

180. I do not believe that anything turns on this. Mr. O'Flanagan had available to him two valuations of the Company's properties: -

- the first, that of Trevor Porter of Property Partners Paul Reynolds & Company Limited, updated to the valuation date of 31st August, 2011, with an overall value of €3,958,000, and

- secondly a CBRE valuation, valuing the same properties as of the valuation date at €2,213,000.

This meant that Mr. O'Flanagan worked off two divergent valuations, and the court did likewise. While the trial judge was made aware by Mr. William Kelly of the GVA Donal O'Buachalla valuation, Mr. William Kelly did not call that valuer as a witness; if he wished to

call valuation evidence it was up to him to do so, and of course that could then have been tested on cross examination. In any event the GVA Donal O'Buachalla valuation range was significantly less than that of Mr. Porter of Property Partners Paul Reynolds & Co. Limited.

181. The trial judge delivered her Module 3 judgment on 19 June 2012. It is clear that the court took into account Mr. O'Flanagan's report, the two valuation reports which informed it, and the parties' written and oral submissions. In summary the trial judge found: -

(1) That Mr. O'Flanagan was correct in not applying a minority discount in respect of Mr. William Kelly's shareholding as the reality was that both parties had equal beneficial shareholding equivalent to 49.99% and the business of the Company was operated as a quasi-partnership.

(2) Mr. O'Flanagan was correct to adopt an asset approach to valuing the Company, and correct to conclude that there would have been limitations in valuing the Company using a methodology based on current or future earnings.

(3) The greatest impact on the outcome of the exercise of valuing the shareholding of Mr. William Kelly related to the valuation of the various properties owned by the Company – a total value on the valuation date of 31 August 2011 of €3,958,000 from Mr. Porter, and €2,213,000 on foot of the report of CBRE, which was a "desktop". As mentioned above the trial judge noted the GVA Donal O'Buachalla valuation in the range €3,520,000 - €3,600,00.

(4) At paragraph 8 the trial judge noted –

"The property valuation set out in Table 6.2 of Mr. O'Flanagan's Report (at p. 29) differentiates between properties which are core to the business of the Company and properties which are non-core to the business. Of the difference of €1,745,000 between the CBRE valuation and the Property Partners valuation as at 31st August, 2011, €902,000 is attributable to the two properties in Letterkenny and one property in Ramelton which are core to the business of the Company."

(5) One "contingent" asset was a piece of land owned by the Company at Ballyraine, Letterkenny, the subject of a compulsory purchase order made in 1999 by Donegal County Council. At para. 6.33 of his Report Mr. O'Flanagan states –

"6.33 I have seen a copy of a letter from Patrick McCarroll, Chartered Valuation Surveyor dated 10 December 2010, which indicates that Donegal County Council calculate the compensation to be €232,500. On the basis of this evidence I believe this amount can reasonably be included as a contingent asset in my consideration of the valuation of the Company."

Addressing this the trial judge at para. 9 of her judgment stated –

"9. Another area of contention is the treatment of contingent assets and contingent liabilities. The only contingent asset is the amount payable to the Company by Donegal County Council on foot of a compulsory purchase order made in relation to land near Letterkenny as long ago as 1999. The amount ascribed by Mr. O'Flanagan in respect of the compensation is the figure of €232,500 put on the property by a chartered valuation surveyor in a letter dated

> 10th December 2010. [Mr. William Kelly] contended that the compensation will be higher and that, in addition, interest will be payable to the Company, which proposition, I assume, is based on Donegal County Council having taken possession of the property. It may be that the compensation which will eventually be forthcoming will exceed €232,500."

The trial judge then noted the contingent liabilities in relation to the termination of employment of formal employees, redundancy costs, and the cessation of salary payments to one employee on sick leave, and Mr. William Kelly's redundancy. These, the trial judge noted, were estimated by Mr. O'Flanagan at between €146,000 and €346,000.

(6) The trial judge expressed herself as satisfied, based on the audited accounts of the Company considered by Mr. O'Flanagan, and his adjustments in relation to balance sheet dates and valuation dates, that he had provided for an appropriate figure for "roll back" of €120,000.

(7) The trial judge noted that the bottom line of the adjusted balance sheet showed assets of the Company at €613,226 as of 31 August 2011 (para. 11 of the judgment refers to 31st August, 2010, but this is clearly a date error because later in the same paragraph the trial judge correctly refers to 31st August, 2011). The trial judge noted that that bottom line figure is based on the CBRE valuation, and took into account the sum of €160,000 previously ordered by the court to be paid by Mr. William Kelly to the Company, and the sum of €120,000 representing the roll back provision.

(8) The court noted that Mr. O'Flanagan further reduced the figure of €613,226 by €113,000 to allow for a level of compensation for future losses, on the basis that a buyer would need some compensation for likely future losses incurred until the Company should return to break-even point, and his view that any buyer would only become involved if the losses could be stemmed more quickly than shown in the 2012 budget, in all probability through a combination of revenue generation and cost reduction measures. The budget for the year 2012 set out at Table 5.3 in Mr. O'Flanagan's Report indicated on EBITDA deficit of (€118,032). The trial judge states –

> "12. … I consider that it is appropriate for the Court to defer to Mr. O'Flanagan's expertise on this point."

(9) The trial judge addressed the contingent assets and liabilities in para. 13 as follows:-

> "13. That leaves the matter of contingent assets and contingent liability. As I have already indicated, [Mr. William Kelly] contends that the figure of (€232,500) ascribed to contingent assets is too low, where it was submitted on behalf of [Mr. Gerard Kelly] that the Company's contingent liabilities in respect of the matters to which I have referred earlier will, in reality, be much higher than Mr. O'Flanagan's assessment. While the true position in relation to the contingent asset (the CPO compensation) is easily ascertainable, the estimation of the contingent liabilities is much more difficult. The approach adopted by Mr. O'Flanagan was based on the proposition that a purchaser of the share capital of the Company would place some weight on the potential contingent assets and contingent liabilities and that he would assess, as best he could, the

probabilities of different contingent gains and losses arising and in all likelihood he would assign different probabilities to each. Mr. O'Flanagan then stated:

> 'In my judgment, having considered the different nature and quantum of the contingent assets and liabilities in this case, I believe a buyer might reasonably offset the contingent gain against the contingent liabilities. As such I make no adjustment for these matters in arriving at my valuation opinion.'

Given the imponderable nature of the contingent liabilities, that pragmatic approach seems to me not to be unreasonable. Further, I am of the view that it is the approach which it is most probable will give rise to a fair and just outcome in valuing the beneficial shareholding of [Mr. William Kelly] in the Company."

(10) The trial judge then addressed the valuation differences and gives her decision in the ensuing paragraphs: -

> "14. However, there is a further major imponderable in this matter, which is more likely to impact on the ultimate fairness of the outcome of this matter, that is to say, the property valuation and, in particular, whether the difference between the CBRE "desktop" valuation, which Mr. O'Flanagan properly had regard to on the one hand, and the Property Partners valuation, on the other hand, is justifiable. For instance, there are four non-core properties situate in Ramelton (no.'s 8, 10, 11 and 12 in Table 6.2 at p. 29 of the Report) which are valued at €640,000 by Property Partners at 31st August, 2011, whereas they are valued by CBRE on a "desktop" basis at €339,000. I have come to the conclusion that

justice and fairness as between [Mr. Gerard Kelly] and [Mr. William Kelly] would be best achieved if those four properties were transferred by the Company in specie to [Mr. William Kelly] as consideration for the shares of which he is beneficial owner, subject, however, to [Mr. William Kelly] remitting the sum of €165,000 to the Company.

15. That means that, while I am wholly in agreement with the approach adopted by Mr. O'Flanagan in his thorough and comprehensive report, to take account of the imponderable in relation to the property values, I am valuing the beneficial shareholding of [Mr. William Kelly] at €339,000 as at 31st August, 2011 on the basis that giving [Mr. William Kelly] such value is effected by transferring those properties to him in specie."

Grounds of Appeal Module 3

182. While the Notice of Appeal included a number of grounds (no.'s 166 – 174 inclusive, 180, 182) related to Module 3, it is appropriate to focus on the grounds actually pursued by Counsel at the appeal hearing. In what follows I summarise and address these grounds/arguments.

Deloitte & Touche were objectively biased because they subsumed the firm of Haughey Boland in which Mr. Gerard Kelly was formerly employed.

183. This ground was raised in Module 2 when Mr. William Kelly objected to the Deloitte & Touched preparing a Statement of Affairs of the Company for the court. For the reasons given earlier in my view the same objection does not succeed in relation to the court appointing Mr. O'Flanagan to provide a valuation of Mr. William Kelly's shareholding. No objective observer with all relevant information could reasonably apprehend that Mr. O'Flanagan or

Deloitte & Touche would be impartial or biased, or lacking in independence, particularly in light of the fact that Mr. Gerard Kelly had not worked for Haughey Boland for nearly two decades.

Mr. William Kelly having resigned as a director on 31st August, 2011 thereafter had no information in relation to the Company.

184. While no longer a director, it must be borne in mind that Mr. William Kelly had available to him Deloitte & Touche's first Report dated 12 April, 2011, prepared when Mr. William Kelly was still a director, giving the Statement of Affairs as at 30 December, 2010, and he had access to all the documentation that informed that first report.

That Statement of Affairs was based on and took into account *inter alia*:

- Trevor Porter's first valuation of Company property;
- the Company fixed asset register;
- stocktakes undertaken at three locations during December, 2010 and January 2011and the stock sheets with list cost, description, quantity, valuation and date of stocktake;
- the comments of both parties on the stock take 'provision' (ultimately in Module 2 the trial judge found "little difference" between Mr. William Kelly's stock value estimate and that of Mr. O'Flanagan after making downward adjustment – see para.19.9 of the judgment);
- the Company list of trade debtors, with exclusion of an interest on bad debts (both parties agreed on this);

- bank and cash balances, certain bank reconciliation reports, and bank statements (the Ulster Bank overdraft was (€1,897,068));

- the Company trade creditor listing (on which Mr. O'Flanagan did an ageing analysis and reconciliation);

- information on the 1999 fire insurance claim (€292,000 had been paid, and insurance broker's letter of 11 May, 2010 recommending settlement for a further €305,000);

- CPO correspondence;

- PAYE/PRSI and VAT information which was verified from returns and Collector General receipts;

- possible VAT refund depending on fuller consideration of trade debts;

- documentation concerning estimated PRSI refunds for Director's Class S (for the two directors) of €85,000 – then being blocked by an appeal by Mr. William Kelly;

- potential overprovision for company pensions, the subject of a report of Alexander Clay of May 1997;

- the differing views of both directors on what adjustment should be made to the stock/trade debtors/trade creditors figures;

- historic accounts – finalised and signed off to year ended 31 December, 2005, unfinalized accounts for later years, and draft accounts for the year ended 30 December, 2010, completed on 29 March, 2011;

- the Company budget for year 2011;

- Company debentures;

- information obtained by Deloitte & Touche staff during meetings on the Company premises on 4th and 5th April, 2011, when there was review of preliminary information and additional documentation and explanations from personnel was obtained;

- information from a number of meetings held with Mr. Gerard Kelly and Mr. William Kelly and Mr. Kieran O'Malley, the Office Accountant; and

- comments from the parties on a draft of the report, and telephone discussions with the parties on 8 and 11 April, 2011.

Mr. William Kelly also had the opportunity to cross examine Mr. O'Flanagan and the petitioner's other witnesses on the Statement of Affairs during the Module 2 hearing.

Further it will be recalled that in her Order dated 9 February 2011 the trial judge had directed:

> "For the avoidance of doubt, [Mr. William Kelly] should be given the passwords necessary to enable him to access all of the electronic financial records of the company. [Mr. William Kelly] may communicate directly with Stewart & MacLochlainn and that firm may communicate directly with [Mr. William Kelly] without reference to the petitioner, if it needs clarification of any issue raised by [Mr. William Kelly]."

When it came to preparing the valuation report, Mr. O'Flanagan now had financial statements for the 22 month period ended 31 October, 2011, and for the years ended 30 December, 2009 and 2008 – all audited by Stewart & MacLochlainn. He also had Management Accounts for

the year ended 30 December, 2011, and the Management budget for the year ending 30 December, 2012. This material was significant as it provided a firmer basis for Mr. O'Flanagan's valuation, at least when taken with property valuations for the valuation date. As Mr. William Kelly notes in his written Outline Submission to the High Court for Module 3, before Mr. O'Flanagan's report was drafted, a meeting was held with him in the offices of Deloitte and he was invited to give his opinions on various matters, including the Company's business prospects and in relation to the annual and 22 months accounts – although he complains that they were not mentioned in the valuation Report.

There was also now an updated valuation of the property from Trevor Porter, as of 31 August, 2011, and Mr. O'Flanagan obtained the desktop valuation from CBRE. In addition to seeing these, Mr. William Kelly obtained his own 'recent' valuation from GVA Donal O'Buachalla, which was closer to that of Trevor Porter than that of CBRE.

The manner in which Mr. O'Flanagan approached his task was transparent; his assets based valuation, and the materials that informed him, were all laid out in his Valuation Report, as was the manner in which he resolved issues such as contingent assets and liabilities where the information available was limited at that time. Although Mr. William Kelly complains at Ground 168 about the asset based method of valuation adopted by Mr. O'Flanagan, this was not a ground of appeal that was developed in any meaningful way at the oral hearing.

As I have note above Mr. William Kelly furnished written Outline Submissions to the trial judge on Module 3, and he made oral submissions on 22 May 2012. In these he argues that there should have been a critical review of certain aspects of the balance sheet information, and he refers to (1) the CPO compensation and interest that it would attract, (2) undervaluation of plant and machinery (3) under valuation of stock, and (4) increase in the travel expenses from

€31,670 to €73,000. He states, at the bottom of page 4, that as he had to resign as a director he had no right to "insist on getting this information".

But it is clear from her judgment that the trial judge took into account Mr. William Kelly's Outline Submissions, and his oral submissions, and she addresses the main areas of contention.

For all these reasons I am satisfied that Mr. William Kelly had a body of relevant information, and had everything that informed Mr. O'Flanagan's Valuation Report, and he was not disadvantaged by his resignation as a director which in any event did not occur until the valuation date of 31 August, 2011.

The valuation information and other information in Mr. O'Flanagan's Report came too late for Mr. William Kelly to be able to make an informed decision or put in his own evidence – Mr. William Kelly couldn't contribute, and it was an error of law on the part of the trial judge to proceed on the basis of a "one sided" valuation.

185. This ground cannot be maintained. Firstly, Mr. O'Flanagan furnished his draft report to the parties for their comments on 24 April, 2012 and he received a response from Mr. William Kelly before finalising his report on 1 May 2012, and the parties' observations were furnished to the court.

Secondly, Mr. William Kelly self-evidently had sufficient time to obtain his own property valuations, and proffered his valuation to the High Court. In fact he had from 1 May 2012 to 22 May 2012 to prepare his case for the Module 3 hearing, which was ample time.

Thirdly, I am unable to identify any ground of appeal asserting that Mr. William Kelly was unable "to contribute" i.e. to present his valuation evidence by calling a witness in the normal way in the High Court. This is of considerable importance. Had Mr. William Kelly called a witness from GVA Donal O'Buachalla that supported the case for a higher valuation of the

property then that witness would doubtless have been subjected to cross examination, and the High Court would have been required to weigh that evidence and form a view based on all the valuation evidence before her. Instead the trial judge was left with just the Trevor Porter reports and the CBRE desktop valuation relied upon by Mr. O'Flanagan.

Fourthly, no part of the Module 3 transcript was opened to support the assertion that Mr. William was unable to present valuation evidence.

No due diligence was undertaken by Deloitte & Touche on the valuation. In particular Mr. William Kelly had no input in relation to the figure of €232,000 provided to and accepted by Mr. O'Flanagan as the contingent value of the CPO compensation, save that Mr. William Kelly represented that it was a gross undervalue.

186. Firstly, in support of a similar submission in the High Court Mr. William Kelly in his written submission stated –

> "a) €232,500 has been included as a contingent asset in relation to the compulsory purchase of land from the Company over ten years ago. The opinion on this matter expressed in the [Valuation] Report has apparently been based solely on a letter from Mr. Patrick McCarroll which reports "the Council's calculation of compensation". Mr. Gerard Kelly estimated the value of the CPO to the Company at €450,000 in April 2011. It is also noted that the valuation of the [CPO] has also been omitted from the annual and 22 months accounts of the company. The lowest available figure has been chosen without checking to see if a higher value is realistic.
>
> In addition, it has recently been discovered that the Company is entitled to interest on the CPO compensation to be paid from the date of entry onto the land by the local

authorities. Thus, there is about 10 years of interest due to the Company that has not been included for the purposes of valuing Mr. William Kelly's shares."

It will be recalled that at paragraph 9 of her judgment the trial judge expressly referred to Mr. William Kelly's contention that the compensation would be higher than €232,000 and "that, in addition, interest will be payable to the Company, which proposition, I assume, is based on Donegal County Council having taken possession of the property." She therefore approached this issue on the basis that "It may be that the compensation which will eventually be forthcoming will exceed €232,500". She then took into account contingent liabilities estimated by Mr. O'Flanagan at between €146,000 and €346,000. In her further analysis in para. 13 of the judgment the trial judge accepted Mr. O'Flanagan's expressed belief that a buyer of Mr. William Kelly's shares "might reasonably offset the contingent gain against the contingent liabilities." She did so on the basis that, such were the imponderables, this pragmatic approach was the most likely to give rise to a fair and just outcome in the valuing of the shareholding.

The difficulty that faced Mr. O'Flanagan, and in turn the trial judge, is that, despite the lapse of time since the making of the CPO, the process for assessment of compensation did not appear to have progressed beyond a first offer by the County Council at the shareholding valuation date; there was therefore little more than Mr. Patrick McCarroll's report to go on. On the evidence before the High Court it is entirely unclear as to what further "due diligence" could usefully have been undertaken by Mr. O'Flanagan. What is clear is that the trial judge took into account that the compensation might exceed the initial offer, and that it would attract interest from the date of possession.

Secondly, at the appeal hearing Counsel for Mr. William Kelly sought to place reliance on a Schedule from Donegal County Council website listing payments, including, in Quarter 3,

payments to the Company in respect of "compulsory purchase order €1,353,740" and "Land Purchase – CPO interest €1,109,046.86."

Taking this document at face value, the amount of compensation seems to be the first of these figures, and it is certainly well in excess of what the anyone expected at the time that Module 3 was heard, and as a result the second figure for interest is also high - although I would observe that some eight years of the interest postdates the valuation date of 31 August, 2011 and would therefore have to be discounted. The printout does not establish when the CPO compensation was fixed or agreed.

The first difficulty facing Mr. William Kelly is that no evidence on affidavit showing that this was indeed compensation and interest assessed or agreed in respect of the 1999 CPO of Company property, or the date on which it was assessed or agreed and paid, was presented to this Court. At the hearing before this court Counsel belatedly indicated that she would, if necessary, apply to put this evidence before the court. However, given that this relates to matters that have occurred since the date of the Module 3 hearing and decision, it would have been open to Mr. William Kelly to present such an affidavit without special leave of the court (Order 86A rule 4(b) of the RSC). His failure to do so means that it is not appropriate for this court to rely on this website printout, and for the reasons that follow I am of the view that this court should not now countenance the late introduction of evidence of the CPO compensation and interest. Furthermore, to do so would unjustly prejudice Mr Gerard Kelly who would thereby have been deprived of an opportunity to respond to the evidence sought to be adduced.

Apart from the evidential objection, which might be seen as overly technical, there is the substantial objection that this evidence could not be relevant or admissible. The High Court could only determine the shareholding value as of 31 August 2011 on the basis of the evidence

that was available at the hearing in May, 2012, at which point in time the CPO compensation had yet to be assessed. If Mr. William Kelly wanted to make the case that the compensation was likely to be far higher, then it was for him to produce evidence to persuade Mr. O'Flanagan or the High Court of why this might be so, and not just express his own opinion. That was evidence related to the location, nature and extent of the property the subject of the CPO, its planning status, and its development potential, and expert evidence as to what a willing purchaser would have paid for it on the open market at the date of the Notice to Treat. It was also evidence related to the date on which Donegal County Council went into possession, which seems to have predated 31 August 2011 date by some 10 years, because of the relevance of this to the accumulation of interest on the compensation. Such evidence was or ought reasonably to have been available to Mr. William Kelly *prior to the hearing in the High Court*, and had it been adduced in the High Court it *might* have led to a different result. He did not adduce any such evidence. It is certainly not open to him to seek to adduce such evidence on appeal when he did not seek special leave of this court to admit new evidence.

Before leaving this subject I should add that it was not the function of Deloitte & Touche to probe the CPO claim or undertake greater "due diligence" than was in fact undertaken by Mr. O'Flanagan. As he stated in his Letter of Engagement dated 20 February, 2012, appended to his Valuation Report –

> "Our procedures and enquiries will not include verification work or constitute an audit in accordance with generally accepted auditing standards."

It was his brief as an accountant to review the Company accounts and records, such as they were, obtain independent property valuation evidence, and consider the parties' observations, and then to value Mr. William Kelly's shareholding, and to do so within a reasonable timeframe.

It was not his task, to borrow a phrase, to rummage in the undergrowth, hunting for clues that might lead him to undertake a fuller evaluation of the CPO claim which would necessarily have involved obtaining an expert valuation report.

There were no accounts for the previous five year period.

187. I have previously addressed this issue, noting that by the time of his Valuation Report Mr. O'Flanagan in fact had financial statements for the 22 month period ended 31 October, 2011, and for the years ended 30 December, 2009 and 2008, audited by Stewart & MacLochlainn. He also had Management Accounts for the year ended 30 December, 2011. The trial judge in Module 2 had directed that Mr. William Kelly furnish his objections in writing to the draft accounts for the years 2006 - 2009 inclusive to Stewart & MacLochlainn, and that those accounts, and the accounts for year 2010, be finalised. That process having been completed the trial judge was entitled to be satisfied that there was sufficient accounting information available to Mr. O'Flanagan to enable him to provide his Valuation Report, and it is not now tenable for Mr. William Kelly to pursue this complaint on the basis of differences in approach to accounting issues in the face of decisions made by Stewart & MacLochlainn the independent auditors and the analysis of Mr. O'Flanagan who was also independent.

At the valuation date the registered shareholdings showed Mr. Gerard Kelly as holding 4,468 shares and Mr. William Kelly as holding 3,467, whereas the beneficial ownership was 3,968 shares each as joint tenants.

188. This argument goes nowhere because the trial judge had found in Module 1 that the register of members did not properly record the legal ownership of 7938 shares representing the current issued share capital of the Company, in respect of which she held that 7,396 shares were held jointly by the parties, with the remaining two being held by the estate of Mrs. Kelly. As part of her order she directed rectification. The fact that that process had not been completed

by the time Mr. O'Flanagan came to prepare his Valuation Report is neither here nor there because it is plain that what he in fact valued was 3968 shares the beneficial ownership of which was attributable to Mr. William Kelly.

Because of the differential of €1,745,000 between the valuations of Trevor Porter (Property Partners Paul Reynolds & Co. Ltd) and CBRE, Mr. O'Flanagan's Report, and in particular the "desktop" valuation of CBRE, should not have been accepted by the High Court, and the trial judge gave no reason for preferring one valuation over the other.

189. There are a number of reasons why I am not persuaded by this argument. The first is that the trial judge did in fact indicate why she had reservations about the Trevor Porter valuations. In paragraph 7 she states that she was "somewhat perturbed" by the fact that Mr. Gerard Kelly in his observations on Mr. O'Flanagan's draft Valuation Report –

> "…stated that Property Partners had kept their March 2011 valuation [an aggregate value of €4,314,000] on the "high side" at the time, given that they would be used in a viability review of the Company. That valuation was put before the Court on the basis that it represented the true market value of the properties."

Secondly the trial judge was clearly influenced in her decision, by the fact that in respect of the 12 properties, €902,000 of the difference between Trevor Porter's valuation as at 31st August 2011 of €3,958,000 and the CBRE valuation of €2,213,000 was attributable to the two properties in Letterkenny and one property in Ramelton "which are core to the business of the Company". This meant that some €800,000 represented the differential between the valuations of the remaining 9 properties. The differential between the four properties which the trial judge directed be transferred to Mr. William Kelly *in specie* was €301,000, as follows:

Non-core property	PP Val @ 31/08/11	CBRE Val @ 31/08/11	Difference
No.8 – 12 acres at Aughnagaddy	190,000	144,000	46,000
No. 10 – 2 Townhouses, Ramelton	130,000	100,000	30,000
No.11 Cornmill & land at Drummonagh	220,000	43,000	177,000
No. 12 Cottage at Drummonaghan	100,000	52,000	48,000
Total	**640,000**	**339,000**	**301,000**

Thirdly, the trial judge stated that her cash valuation of Mr. William Kelly's shareholding is €339,000, which is substantially more that the €250,000 valuation advised by Mr. O'Flanagan.

While the €339,000 valuation presupposes that CBRE's desktop valuation is correct, what the trial judge in fact orders is the transfer of properties *in specie*. This is critical, and in so ordering it cannot be said that the trial judge "preferred" the CBRE valuation.

At paragraph 15 the trial judge expressly states that this order is to take into account of "the imponderable" in relation to property value. She does not decide that imponderable. The solution crafted by the trial judge sidestepped the imponderable by ensuring that Mr. William Kelly would receive actual property which he could, if he chose so to do, sell on the open market and thereby receive the actual value. The effect of the order was therefore that if Mr. William Kelly were to sell and if he were to achieve prices in line with the Property Partners' valuation,

he would in fact receive €640,000, or prices reflected in his own GVA Donal O'Buachalla valuation.

190. It may be observed therefore that the trial judge considered that justice and fairness between the parties warranted giving Mr. William Kelly considerably more than the valuation before the court in the form of Mr. O'Flanagan's Report, and, if the higher property valuation were to prove accurate in respect of the four properties in question, Mr. William Kelly would potentially receive over 2 ½ times the €250,000 case value which Mr. O'Flanagan placed on the shareholding.

191. It must be borne in mind that s.205(3) provides that –

> "..the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or cancelling or varying any transaction or for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any member of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

In *Re Clubman Shirts Ltd* [1991] ILRM 43 O'Hanlon J cited with approval the following dictum of Oliver L.J. in *Re Bird Precision Bellows Ltd* [1985] 3 AER 523 –

> "In my judgement the "proper price" is the price which the Court in its discretion determines to be proper having regard to all the circumstances of the case."

In Courtney (Third Ed) the author further comments on the extent of the judicial discretion –

> "[11.073] …..It is thought that the enormous width of the court's power is encapsulated in the words 'make such order as it thinks fit'. Although the particular powers set out in s.205(3) are themselves extensive, they ought not be viewed as being exhaustive. The court's general power must not be viewed as prejudiced by the specificity of its particular powers. This is, of course, subject to the important limitation that the court may not award damages for oppression or disregard of members' interests…"

192. I agree with this commentary. In carefully choosing non-core properties of the Company for transfer *in specie*, the trial judge was clearly trying to avoid placing obstacles in the way of the Company returning in due course to profitability. In this regard the trial judge must have been mindful of the 2012 budget, mentioned above, and other elements in Mr. O'Flanagan's Report, such as the fact that the Company had consistently made losses over the period 2008 to 2011, at operating and pre-tax levels, and that trading in the first quarter of 2012 suggested that the loss for that calendar year would be worse than budget by some €63,000. In Module 2 the trial judge commented (Transcript p.606 line28) –

> "Ms .Justice Laffoy: I just want to remind everybody that this case, the outcome of this case will not just determine the future of two people. It will term [sic] the future of 40 to 50 people and I am very concerned about it."

As I have stated earlier, that was a factor that the trial judge was entitled to keep in mind. Having decided that the company should purchase Mr. William Kelly's shareholding, the trial judge in the exercise of her wide discretion was entitled to opt for a solution that provided for the transfer to him of non-core Company property, with a value potentially far in excess of the cash valuation of his shareholding, while at the same time minimising the effect on the

Company's trading operations and thus maximising its prospect of returning to profitability and surviving as a going concern with a significant number of employees.

The four properties that the trial judge directed be transferred to Mr. William Kelly are of little value to him as he cannot afford to insure or develop the properties, the land has little value, the two Georgian houses are derelict and listed structures, and there are legal proceedings in relation to the Old Mill premises, and the small cottage premises is in need of repair.

193. It should be noted that the High Court order required the transfer of the four properties to Mr. William Kelly unencumbered, but otherwise Mr. William Kelly was to take them as they stood. This was clarified by the trial judge in her judgment in Module 4 where she stated:

> "19….The transfer in specie to [Mr. William Kelly] is not an ordinary transaction. The court has made an order that the Company's existing interest in those four properties be transferred to the [Mr. William Kelly] in specie. For the avoidance of doubt, what is intended is that whatever interest and title the Company has in those properties is to be transferred in specie to [Mr. William Kelly]. Of course, [Mr. William Kelly] should be furnished with the title documents and all other relevant documents in relation to those properties in the possession of the Company. However, the properties are to be conveyed by the Company to [Mr. William Kelly] on the basis of the Company's title "as is", with the benefit of all appurtenant rights, but subject to such rights as the properties are subject to, other than the debenture in favour of Ulster Bank. If Ulster Bank will not release those properties from the debenture, the appropriate remedy will have to be reconsidered by the Court."

The fact that the properties may be in a poor state of repair, or that Mr. William Kelly may not be in a position financially to insure or develop them, is simply not relevant and cannot be a

ground for setting aside the order. On completion of the transfers it is entirely a matter for Mr. William Kelly what he does with the properties, and it would of course still be open to him to sell any one or more of them without undertaking development.

It was suggested that the sum receivable in respect of the fire insurance claim exceeded the sum of €304,737, the figure taken by Mr. O'Flanagan from the audited financial statements as at 31 October 2011, and that it failed to take into account the second page of the letter dated 11th May, 2010 from the Company's insurance broker FBD Brokers to Mr. Gerard Kelly which was furnished to Mr. O'Flanagan.

194. This was not a point made by Mr. William Kelly in his written submission to the High Court on Module 3. It attempts to go behind figures in the accounts audited by Stewart & MacLochlainn to which Mr. O'Flanagan was reasonably entitled to have regard.

There is also no evidence that Mr. O'Flanagan did not take into account the information on the second page of the insurance broker's letter.

That letter has three pages of text followed by a page with a table setting out all the figures claimed and the insurer's Loss Adjuster adjustments. Page 2 sets out the detailed *explanation* given by FBD Brokers to the Company of the claims made under 'Plant & Machinery', 'Gross Profit' loss, and 'Staff Costs' for IR£580,652, IR£227,323, and IR£98,865, and why the insurance Loss Adjustor reduced the sums offered under these heads to IR£25,000, IR£96,350 and IR£25,748 respectively. In the table appended to the letter FBD Brokers set out all the heads of claim, and in one column set out the sums *claimed* under each head, totalling IR£1,220,008, and on the righthand column set out under "Adjustment IR£" the sums as adjusted by the insurer totalling IR£437.139.95. This latter figure is featured in the first page of the letter from the Company broker FBD Brokers where the critical paragraph reads:

> "In an effort to reach a compromise, your insurers were approached and following our representations on your behalf they have proposed an overall increase in the settlement offer from IR£437,139.95 to IR£470,000 in a final attempt to reach a settlement in this case. As Interim Payments of IR£230,000 have already been made, this would leave a balance of IR£240,000 to be paid in concluding the claim."

FBD Brokers in an earlier paragraph advised –

> "…I feel that we have now arrived at a point where the proposed settlement offer, while less than I would have hoped, should nonetheless be seriously considered with a view to concluding this claim."

This advice was repeated on page 3, where FBD Brokers indicated that "there is merit in the arguments presented by the Loss Adjusters" and advised –

> "I believe we have reached the end of a difficult and protracted process where there is little benefit to be derived from deferring a settlement any further. The process and tactics engaged since the loss in February 1999 have resulted in a significant change in the Loss Adjusters attitude to this claim and the current offer of IR£470,000, less the interim payment of IR£230,000 already made is reflective of the improvement achieved. This converts to an overall settlement offer of €596,777 and an outstanding amount to be paid to you of €304,737."

It could be said that, even without considering page 2, the first and third pages and the table appended gave very clear financial information on the claim, and the settlement figure recommended by FBD Brokers.

In the written and oral submission on this appeal counsel for Mr. William Kelly referred to a "fire insurance claim for up to €2.5m" which "may have been valued in the Deloitte report at €304,000". This was patently wrong. In fact the insurance claim was for IR£1.22 m., and as adjusted was only IR£437,139. The adjustment included substantial reductions of the claims for machinery and contents of the Milling Plant, Business Interruption and Staff Costs, which were obvious from the table. Mr. William Kelly at no stage makes any observation on these deductions, or the detailed explanations on page 2 that he wished to bring to the attention of this court.

It is also clear from the broker's letter that the Company had already received an interim payment of IR£230,000. So, on the basis that the Company would accept the offer of settlement – and as this was recommended by its broker it was entirely reasonable that Mr. O'Flanagan would proceed with his valuation on that basis - the Company was due to receive a further IR£240,000. The euro equivalent of this sum is €304,737, and that is the contingent asset referred to in the audited accounts, and the figure that Mr. O'Flanagan took into account.

There is therefore nothing of substance in this complaint, and it seems that Mr. O'Flanagan fully and correctly took into account the fire insurance claim details in his calculations and his Valuation Report.

195. For these reasons the challenge to the Module 3 judgement and orders cannot succeed.

Module 4

196. At this hearing on 17 July, 2012, and in her judgment delivered on 31 July 2012, Laffoy J. dealt with the costs and also adjusted the form of order to be made on the substantive aspect of the proceedings having regard to the then current position. At paragraphs 2-11 of her

judgment the trial judge set out relevant legal principles in relation to the granting of costs, and no issue was taken on this appeal with these principles.

197. In respect of Module 1 costs at paragraph 12 the trial judge repeated her earlier finding that that the need to undertake that hearing was attributable to the stance adopted by Mr. William Kelly in asserting that Mr. Gerard Kelly did not beneficially own an interest in the share capital of the Company. She considered that Mr. William Kelly should have conceded at the outset that 7,936 shares were jointly owned, and accordingly she was satisfied that Mr. Gerard Kelly was entitled to the costs of Module 1 as against Mr. William Kelly.

198. In respect of Module 2, in which evidence was given over seven days and the trial judge at paragraph 13 found that oppression was established, and she expressed herself satisfied that Mr. Gerard Kelly "had to pursue the course he pursued in order to procure the appropriate remedy in his own interest as a member, and in the interests of the Company and all its stakeholders." Accordingly Mr. William Kelly was ordered to pay the costs of Mr. Gerard Kelly arising from Module 2.

199. In respect of Module 3 at paragraph 14 the trial judge was satisfied that in the absence of agreement over the valuation of the shareholding it was a necessary consequence that the court would have to value it, and Mr. O'Flanagan was appointed to prepare a valuation of fair market value – a process *"designed to keep the costs …to a minimum".* Again the trial judge was satisfied that Mr. William Kelly should pay the costs of Mr. Gerard Kelly, but that the Company should pay the remuneration of Deloitte & Touche.

200. In respect of motions brought on behalf of Mr. Gerard Kelly to amend the petition and to seek an expansion of the reliefs the trial judge did not regard them as increasing the costs of

the proceedings and made no order as to costs. As to stenography costs of €3,860.49 paid by Gibson & Associates when acting for Mr. William Kelly in Module 1, the trial judge confirmed that these formed part of the legal costs extracted from the Company by Mr. William Kelly and totalling €165,000 (formally €180,000, but reduced as a Company bank draft for €15,000 was not encashed), being the amount which Mr. William Kelly was required to remit to the Company.

201. The trial judge ordered that all costs, other than the Deloitte & Touche remuneration, including any reserved costs, be taxed in default of agreement.

202. As the €165,000 had not been remitted to the Company by Mr. William Kelly by the time of the Module 4 judgment the trial judge at paragraph 20 decided :

> "20. The final order will provide that the remittal of the sum of €165,000 by [Mr. William Kelly] to the company and the transfer in specie from the Company to [Mr. William Kelly] as consideration for [Mr. William Kelly's] share shall take place by 24th August, 2012. There will be liberty to each party to apply to Court on notice to the other party."

No stay was granted on the orders.

203. The Module 4 order was perfected on 1st October, 2012. Pursuant to the liberty to apply an application was issued by Mr. William Kelly on 22nd August, 2012 on notice to Mr. Gerard Kelly seeking an extension of the time for closing the transfer and payment by 6 months.

Subsequently an application was issued by Mr. Gerard Kelly seeking a 21 day extension of time for rectification of the record in the Companies Registration Office, and that was granted by

Laffoy J. and the order perfected on 19 March, 2013. Within that 21 day period the Registrar of Companies duly altered the Register to give effect to the High Court orders, including reduction in the Company share capital to reflect the 1991 buyback of shares and the cancellation of Mr. William Kelly's shareholding resulting from the High Court order, and by recording Mr. Gerard Kelly as the holder of 3,968 shares.

204. I can find no ground of appeal that addresses the costs orders made in the High Court. Further there was no written or oral submission suggesting that the trial judge erred in law or in fact, or in the exercise of her discretion, in the making of these costs orders. In my view they were proper orders to make, and the trial judges' reasoning is unimpeachable.

205. Counsel for Mr. William Kelly appeared to argue that by reason of Mr. William Kelly's financial position, and the further application for the 21 day extension, Mr. Gerard Kelly should not be entitled to all the costs ordered by the trial judge. However impecuniosity is not a ground for altering a costs order, and I can see no good reason why availing of the 'liberty to apply' provision in the order dated 31st July, 2012 should give Mr. William Kelly any equity for changing the costs orders.

Summary

206.1 The trial judge did not err in fact or in law in approving and giving effect to the buy back by the Company of 7062 shares in 1991, and in determining that 7936 shares were held jointly by the parties, and that the remaining two shares were beneficially owned by the estate of Mrs. Kelly.

206.2 The trial judge was entitled to find on the facts and on the correct interpretation of s.205(1) of the Act of 1963 that the purported suspension of Mr. Gerard Kelly by Mr. William

Kelly was an exercise of the "the powers of the directors", and that his defaults such as his failure to co-operate in the finalisation of accounts and the submission of annual returns and his failure to address the need to cut the costs of the business were omissions by him in his capacity as director.

206.3 The trial judge was entitled to find that these acts/omissions were "burdensome, harsh and wrongful" and to conclude that a case of oppression of Mr. Gerard Kelly was made out.

206.4 The trial judge was correct to find that monies (ultimately €165,000) paid by the Company, at the instigation of Mr. William Kelly, to Gibson & Associates solicitors in respect of costs incurred in Module 1, were not paid to them for acting for the Company or Mr. William Kelly in his capacity as a director, and were not authorised by the Company, but rather were payments for acting for Mr. William Kelly in his personal capacity, and were improperly paid and must therefore be repaid by Mr. William Kelly to the Company.

206.5 There was overwhelming evidence to support the trial judge's conclusion that there had been a total breakdown in the relationship between the parties at business and personal levels, and that they were deadlocked and incapable of running the Company together, and the situation required to be remedied in accordance with s.205(3).

206.6. The trial judge having satisfied herself on the independent evidence and report of Mr. O'Flanagan of Deloitte & Touche that the Company was viable, was entitled in the exercise of her wide discretion under s.205(3) to determine that the appropriate remedy was that Mr. William Kelly should cease to be director and that his beneficial shareholding (3,968 shares) should be acquired by the Company at fair value to be assessed as at 31 August, 2011, and for

this purpose to appoint Deloitte & Touche to prepare a valuation report to assist in the assessment.

206.7. The trial judge did not err in law or in fact in Module 3 in which she assessed fair value and determined that in discharge of fair value the Company should transfer to Mr. William Kelly four properties which were not core to the business (valued between €339,000 and €640,000 at the valuation date), with such title as the Company held and in the state and condition as they stood but otherwise free from encumbrances, in exchange for cancellation of 3968 shares beneficially owned by him. Nor did she err in ordering in Module 4 that the sum of €165,000 which Mr. William Kelly was to repay to the Company should be paid at the date of transfer of the four properties to him.

206.8 The trial judge did not err in law or in the exercise of her discretion in the costs orders made in Module 4.

207. I would therefore dismiss this appeal and affirm the orders of the High Court, save possibly in one respect concerned with bringing finality to this dispute. Despite the absence of any stay on the High Court orders, the transfer of the four properties to Mr. William Kelly and the payment by him of €165,000 (together with such interest as that sum may attract since expiry of the date for transfer and payment in 2012) to the Company, have not yet taken place. This state of affairs appears to be because Mr. William Kelly asserted that he was not in a position to comply with the order, but it may have persisted simply because this appeal had yet to be decided. The whole purpose of the order under s.205(3) was to bring an end to the circumstances that warranted the bringing of the petition. At any rate matters have drifted far enough and I would propose that in the first instance Mr. William Kelly be afforded a period of four weeks from the date of publication of this judgment in which to make the payment, in

exchange for transfer of the properties. If Mr. William Kelly is not in a position to make the payment within that four week period then, in the absence of agreement between the Company and Mr. William Kelly, there should be appropriate adjustment by order of this court of the property to be transferred. This would require the matter to be re-entered before this court and for there to be up to date valuation of the four properties, and for that reason I would propose that this matter be relisted before this court for mention only in six weeks time.

208. As Mr. Gerard Kelly has been entirely successful in this appeal I would propose that he should be entitled to have his costs of the appeal paid by Mr. William Kelly, to be adjudicated by a legal costs accountant in default of agreement. In case Mr. William Kelly wishes to seek a different costs order to that proposed the Court of Appeal Office should be notified and a short hearing will be arranged.

Costello and Murray JJ. having read this judgment have indicated that they agree with it and the orders proposed.