[2020] IEHC 325

**THE HIGH COURT**

**[No. 2019/107 COS]**

**IN THE MATTER OF CLADDAGH JEWELLERS LIMITED**
**AND IN THE MATTER OF THE COMPANIES ACT 2014**
**AND IN THE MATTER OF SECTION 212 OF THE COMPANIES ACT 2014**

**BETWEEN**

**ANDREW FRIED**

**APPLICANT**

**AND**

**PHILIP FRIED**

**RESPONDENT**

**JUDGMENT of Mr. Justice Mark Sanfey delivered on the 2nd day of July 2020.**

**Introduction**

1. These proceedings concern an application pursuant to s.212 of the Companies Act 2014 by Andrew Fried ('the applicant') in respect of the company Claddagh Jewellers Limited ('the company'). Mr. Philip Fried ('the respondent') is the brother of the applicant, and the applicant and the respondent each hold 50% of the shares of the company.

2. The company was incorporated on 20th January, 2006 to carry on the business of jewellers. In particular, the company manufactures and sells rings and other jewellery, particularly Claddagh rings and other types of Celtic jewellery. The company – which trades as 'Claddagh Jewellers' – markets itself as "the home of the authentic Claddagh ring", and sells its products online and from premises in Dublin and Galway. The applicant avers that the company is a substantial business with approximately 30 employees, and an annual turnover in excess of €4m.

3. Unfortunately, over the course of the last several years, relations between the brothers have deteriorated, with unfortunate consequences for the company and its governance. For reasons that will become apparent, it is not necessary or desirable for the purpose of this judgment to analyse in detail the allegations of both parties set out in the affidavits in this application.

4. When the application came on for hearing before this Court on 16th June, 2020, the applicant did not attend before the court and effectively declined to prosecute the application. The respondent on the other hand was represented by senior and junior counsel, and applied for a number of reliefs pursuant to s.212 in view of the failure of the applicant to prosecute the application. I queried whether I had jurisdiction to make such orders, given that the applicant was declining to prosecute his s.212 application, and no originating motion on behalf of the respondent pursuant to s.212 was before me. Counsel for the respondent considered the matter overnight, and made detailed oral and written submissions as to the court's jurisdiction on 17th June, 2020.

5. This judgment therefore concerns, not the substance of the application by the applicant, but the jurisdiction of the court to deal with the applications by the respondent for s.212 relief. If I am satisfied that the court does have such jurisdiction, I must then decide what orders should be made.

**Procedural history**

6. By originating notice of motion of 29th March, 2019, the applicant made application to this Court for relief pursuant to s.212 of the Companies Act 2014. Section 212 is the statutory successor to s.205 of the Companies Act 1963 as amended, and comprises the "protection for minorities" section at Chapter 8 of Part 4 of the Companies Act 2014. The section, in as far as it is relevant to the present application, is as follows:

"212. (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 –

(a) in a manner oppressive to him or her or any of the members (including himself or herself), or

(b) in disregard of his or her or their interests as members, may apply to the court for an order under this section.

(2) If, on an application under *subsection (1*), the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised in a manner that is mentioned in *subsection (1)(a)* or *(b*), the court may, with a view to bringing to an end the matters complained, make such order or orders as it thinks fit.

(3) The orders which a court may so make include an order –

(a) directing or prohibiting any act or cancelling or varying any transaction;

(b) for regulating the conduct of the company's affairs in future;

(c) 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; and

(d) for the payment of compensation.

(9) If, in the opinion of the court, the hearing of proceedings under this section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company, the court may order that the hearing of the proceedings or any part of them shall be *in camera*." [emphasis in original].

7. The originating notice of motion is accompanied by an extensive affidavit from the applicant setting out the grounds on which he sought relief. An appearance was entered by solicitors acting for the respondent on 11th July, 2019, and a brief affidavit was sworn by the respondent on 8th July, 2019 exhibiting an exchange of correspondence between the solicitors in which the respective positions of applicant and respondent were set out, and seeking an order – also sought by the applicant at para. 2 of the originating notice of motion – that the hearing of the proceedings be held in camera pursuant to s.212(9) of the Companies Act 2014 ('the Act').

8. It may be that there were some reporting restrictions imposed at some point, as there is reference in an order of Reynolds J. of 9th July, 2019 in the proceedings to "reporting restrictions" being "lifted". It was accepted at the hearing before me that the question of reporting restrictions or hearings in camera did not arise.

9. In accordance with the order of Reynolds J. of 9th July, 2019, a notice of motion was issued on 10th July, 2019 by the applicant, in which the applicant sought, *inter alia*, various interlocutory orders against the respondent concerning the running of the company. A substantial affidavit in support of the respondent's position was sworn by him on 12th July, 2019. The concluding three paragraphs of this affidavit were as follows:

"71. Andrew has:

(a) terminated my directorship and refused to reinstate me.
(b) has diluted my shareholding.
(c) failed to restore my property rights.
(d) blocked me from the Company's online banking.
(e) denied me any payments for approximately 2 years.
(f) abused my trust.
(g) removed monies from my personal accounts.
(h) removed monies from the account of a company he claims not to be involved with.
(i) insulted me and reported me to the Gardaí for theft.
(j) brought untold stress to his parents and exacerbated matters by terminating regular payments he had organised.
(k) set up a new company with a stolen name to which he intends to trade using my intellectual property which he has brazenly taken having posed in front of a Notary Public with an old Power of Attorney he happened to have to hand.
(l) written to suppliers and taken steps to divert a major part of the business of the Company into his new venture.

I say that in the face of all of the above Andrew claims to be oppressed!

72. To the extent that I have not specifically addressed any other aspect of the applicant's Grounding Affidavit, same should not be construed as an acceptance of same.

73. I therefore pray this Honourable Court to refuse the orders sought by the applicant and/or for such other reliefs as may be deemed appropriate in light of the foregoing including such orders as will preserve and protect the assets and undertaking of the Company (including should this Court deem fit the making of Mareva –type orders)."

10. On 25th July, 2019, an application was made by Michael McAteer, Aengus Burns and Promontoria (Aran) Limited ('Promontoria') that all pleadings and affidavits in the

application be served on them as parties potentially affected by orders in the s.212 proceedings. Mr. McAteer and Mr. Burns had been appointed joint receivers by Promontoria over premises at 25 Mainguard Street, Galway, the property of Jaszai Limited, a company connected with Mr. Laszlo Fried, the father of the applicant and respondent. The applicant in his grounding affidavit described the Mainguard Street premises as "a landmark four storey premises at the intersection of Mainguard Street, High Street and Shop Street in Galway", and identified it as one of the premises from which the company conducted its retail business.

11. The parties seeking access to the documents had initiated proceedings against a number of entities. There were proceedings entitled "Michael McAteer, Aengus Burns, Ulster Bank Ireland DAC and Promontoria (Aran) Limited v. Laszlo Fried, Laszlo Jewellers Limited, Jaszai Limited and Claddagh Jewellers Limited, record no. 2014/4713P" ('the Receiver proceedings'), and further proceedings instituted by Promontoria against Jaszai Limited and Laszlo Fried, record number 2019/3416S ('the summary judgment proceedings). Applications in these proceedings were listed before me to be heard in conjunction with the application herein, although it is not necessary to refer to those applications in any detail.

12. Notwithstanding an affidavit from Mr. Philip Fried opposing the application for documents, an order was made by Ms. Justice Reynolds on 11th October, 2019 that the Receivers and Promontoria be served with all of the pleadings and affidavits in the s.212 proceedings. A further order by Ms. Justice Reynolds gave leave for further affidavits to be filed, and adjourned the matter to 16th January, 2020 to fix a date for the hearing of the applicant's motion for interlocutory relief. The applicant then swore a lengthy affidavit on 14th January, 2020, replying primarily to the respondent's affidavit of 12th July, 2019. No affidavit in response was sworn by the respondent.

**The motion to come off record**

13. The application pursuant to s.212 and the applicant's interlocutory application, in addition to the applications in the Receiver proceedings and the summary judgment proceedings, were listed before me for hearing on Tuesday 16th June, 2020. On the previous Thursday, 11th June, 2020, the solicitors on record for the applicant applied and obtained an order for short service on the applicant of an application to come off record. This application was listed before me on Monday 15th June, 2020.

14. Counsel for the applicant's solicitors moved the application in the presence of the applicant himself. I was informed that the solicitors had been unable to obtain instructions from the applicant to progress the matter on his behalf, and that the applicant no longer wished to instruct them. The applicant confirmed that this was the case, and that he had no objection to the application. I asked the applicant whether he understood the implications of ceasing to be represented, and assured him that the hearing would go ahead the following day whether he was represented or not. The applicant confirmed that he understood this, but did not state definitively whether he intended to proceed with the s.212 application without representation. At no stage did

the applicant apply for an adjournment of the s.212 hearing. Accordingly, I ordered that the applicant's solicitors be permitted to come off record.

15. Before that hearing could conclude, Mr. Martin Hayden SC, acting for the respondent, indicated that he wished to apply for short service of a further motion, to be returnable for the hearing on the following day. The notice of motion was proffered to the court, and given to the applicant, who was present in court. The reliefs sought on the notice of motion - which was not accompanied by any grounding affidavit – were as follows:

"(1) An Order pursuant to section 212(3) of the Companies Act 2014 or otherwise pursuant to the inherent jurisdiction of this Honourable Court directing that Philip Fried be restored as Director of the company Claddagh Jewellers Limited;

(2) An Order pursuant to section 212(3) of the Companies Act 2014 or otherwise pursuant to the inherent jurisdiction of this Honourable Court directing that, pending the trial of this action or further or other order, Andrew Fried, his servants or agents, be immediately restrained or prohibited from dealing in any way with the assets of the company Claddagh Jewellers Limited;

(3) An Order pursuant to section 212(3) of the Companies Act 2014 or otherwise pursuant to the inherent jurisdiction of this Honourable Court directing that, pending the trial of this action or further or other order, Andrew Fried, his servants or agents, immediately deliver up to the respondent, his servants or agents, any and all assets of the company Claddagh Jewellers Limited to include but not limited to keys, alarm codes, user identification, passwords etc.;

(4) An Order pursuant to s.212(3) of the Companies Act 2014 or otherwise pursuant to the inherent jurisdiction of this honourable Court directing that Andrew Fried and/or the company secretary of the company Claddagh Jewellers Limited to account on oath for all monies expended or property disposed of by or on behalf of the company since this action commenced to date;

(5) An Order pursuant to s.212(3) of the Companies Act 2014 or otherwise pursuant to the inherent jurisdiction of this Honourable Court directing that, pending the trial of this action or further or other order, Philip Fried shall be entitled to be remunerated by the company Claddagh Jewellers Limited and to have his expenses reimbursed.

(6) Further or in the alternative, an Order pursuant to the inherent jurisdiction of this Honourable Court striking out the within proceeding as an abuse of process;

(7) Such further or other order as this Honourable Court may deem fit;

(8) The costs of and incidental to this application."

Mr. Hayden said that he had only latterly been instructed in the matter, and had formed the view that the reliefs sought should be formally before the court.

16. In the circumstances, I said that I would allow the motion to be served on the applicant, and made returnable for the hearing on the 16th June, although I would defer consideration of whether I should entertain the application until the hearing the following day.

**The Section 212 application**

17. When the matter came before me on Tuesday 16th June, 2020, there was no attendance by the applicant. Accordingly, Mr. Hayden opened the pleadings and affidavits relating to the applicant's application. There were three applications before the court:

    (1) The originating notice of motion;

    (2) the notice of motion of 10th July, 2019 in which the applicant sought interlocutory orders against the respondent; and

    (3) the notice of motion of 15th June, 2020 in which the respondent sought various reliefs pursuant to s.212 of the Act.

18. Mr. Hayden submitted that s.212 gave the court jurisdiction, in accordance with sub. (2), to "make such order or orders as it thinks fit". He urged that I should strike out the applicant's motion of 10th July, 2019 for interlocutory relief, given that the applicant had declined to present that motion, and that I should grant the reliefs sought by the applicant in the motion of 15th June, 2020. He submitted that this was relief that I was entitled to grant in the respondent's favour pursuant to s.212, and effectively sought the relief in that notice of motion by way of determination of the issues under the originating notice of motion.

19. I indicated that I had two difficulties in this regard. Firstly, as there had been no order for plenary hearing or examination of deponents, I said that I would not be able to resolve any direct conflict of fact between the deponents. Notwithstanding that the applicant was not present in court to press his case, I could not ignore the affidavit evidence before the court, particularly in the complete absence of oral evidence. Mr. Hayden submitted that there were sufficient uncontested facts to enable the court to hold that the reliefs sought by the respondent were warranted.

20. Secondly, and more fundamentally, it seemed to me doubtful that, once an applicant declined to proceed with his s.212 application, a respondent who had not himself applied to court for relief in accordance with the section would be entitled to avail of the court's power to grant relief under the section. As the allegations in the respondent's affidavit of 12th July, 2019 set out at para. 9 above made clear, the respondent effectively alleged that, rather than being "the oppressor", he was in fact the "oppressed", and it was submitted that, as such, the court should grant him relief under the section. I said that it seemed to me that this might not be permissible, given the need under the section for an application by a member to court for an order under the section (sub-section 1); the court forming an opinion under sub-section 2 as to the matters set out in sub-section 1(a) or (b) "on an application under sub-section (1)"; and the court making an order "with a view

to bringing to an end the matters complained of …" [sub-section 2]. The respondent had not made an application by originating notice of motion for an order under the section; the only attempt to invoke s.212 by the respondent was made by the notice of motion of 15th June, 2020, which had been introduced by the respondent extremely late in the proceedings. I was concerned that, given that the court's jurisdiction to make an order derives entirely from the section itself, the court could not grant relief to a party who had not applied to it for relief in a manner required by the section and the Rules of the Superior Courts.

21. In the event, having considered the point overnight, counsel for the respondent produced detailed written submissions which addressed the issue. These submissions may be summarised as follows:

- Relief 11 of the applicant's originating notice of motion states: "in the alternative, an order pursuant to s.212(3)(b) regulating the conduct of the company's affairs in the future". The originating notice of motion itself therefore contemplated that the court would have jurisdiction to make "orders as it thinks fit" (s.212(2)) regarding the conduct of the company's affairs;

- Dicta of the Supreme Court in *Hogan v. Murray* [1997] 3 IR 23 emphasised the necessity for practicality on the part of the court, and the fact that "the relief obtained may not be what the petitioner has proposed…", [Murphy J. at p.42]. In this regard, see also the decision of the Court of Appeal in England and Wales in Re. *Neath Rugby Limited (No. 2)* [2009] 2 BCLC 927;

- As the petitioner had sought in the originating notice of motion relief in the alternative that a winding-up order be made pursuant to s.569(1) and/or s.569(1)(f) of the Act, it was open to the court to avail of the jurisdiction under O.74, r. 28 to substitute for a petitioner in a winding-up who "fails to appear in support of his petition when it is called in court" … "any person who would have a right to present a petition, and who desires to present the petition".

22. The respondent's position in the written submissions was summarised as follows:

"16. Mr. Andrew Fried has brought an oppression action which he has effectively abandoned at the last possible moment. In order to discourage the use of a s.212 as merely a tactic and to ensure 'fair dealing' with all of the company's members and wider stakeholders, it is respectfully submitted that this Court has a wide jurisdiction under the Companies Act and/or under the Rules of the Superior Courts to make such orders as it deems fit in the circumstances.

17. It is further respectfully submitted that this court has a discretion to effectively, if not necessarily procedurally, make orders as if Philip Fried were the applicant and which the original applicant does not (presumably) agree with." [Emphasis in original].

23. I expressed the reservation to Mr. Hayden during his oral submissions that the only application as required by s.212(1) for relief under the section before me was that of the respondent. Mr. Hayden urged me to regard the notice of motion of 15th June, 2020 as the application required by the section, if I were of the view that, in the absence of such an application, I had no jurisdiction to deal with the matter.

**Jurisdiction of the court under section 212**

24. I should say by way of preliminary remark that my concern is to ensure that this Court has jurisdiction to make the orders sought by the respondent. The court's jurisdiction to relieve oppression in the manner envisaged by the section derives entirely from the section itself. There is no inherent jurisdiction in the court to make the sort of order contemplated by the section. It follows that, if there has not been compliance with the requirements of the section as to jurisdiction, the court cannot make the orders sought.

25. The text of the relevant portions of section 212 are set out at para. 6 above. As the section makes clear, jurisdiction derives from the complaint by a member as to the matters set out in sub-section (1), who applies to the court for an order under the section. Under sub-section (2), the court "on an application under sub-section (1)", if of the opinion that the affairs are being conducted in a manner referred to in sub-section (1), "may, with a view to bringing to an end the matters complained of", make such order or orders as it thinks fit.

26. The wording of the section suggests that:

- There must be a complaint by a member as to the matters in sub-section 1;
- that member must apply to the court for an order under the section;
- the court makes it's order in relation to the matters which are the subject of that complaint.

27. In the present case – and leaving aside for a moment the question of whether the motion of 15th June 2020 could constitute an "application" – there is only one application before the court. The applicant's complaint is contained in the originating notice of motion. The court can make orders only in respect of "the matters complained of".

28. Counsel submitted that the court has an application pursuant to s.212 before it, although it is not being prosecuted by the respondent. He contends that the court's jurisdiction to "make such order or orders it thinks fit" with a view to "bringing to an end the matters complained of" applies equally to the complaints of Mr. Philip Fried as set out in the affidavits as it does to those of Mr. Andrew Fried.

29. In order to see whether counsel is correct in this assertion, one must examine the procedure for actions pursuant to s.212.

30. The appropriate procedure is set out in certain sub-rules of O.75 of the Rules of the Superior Courts as follows:

"3. (1) Any application under the Act, not being an application:

(a) which may be made *ex parte*;
(b) for which provision has been made in Order 74, Order 74A or Order 74B, or
(c) made in proceedings which have already been commenced shall be made by originating notice of motion.

(5) Every application referred to in sub-rule (1) shall be grounded upon the affidavit of the party making the application and shall be heard and determined on affidavit unless the Court otherwise authorises.

4. (1) Where an originating notice of motion has been issued under rule 3, an application shall in every case be made to the court on the return date of that motion for directions as to the proceedings to be taken.

(3) The Court may, in any case where it considers it necessary or desirable in the interests of justice so to do, direct a plenary hearing in the matter and may make order or give such directions as to the exchange of pleadings and to the settling of the issues between the parties as appears proper in the circumstances."

31. It is clear from the foregoing that:

- Section 212 applications are to be initiated by originating notice of motion;

- Section 212 applications are determined on affidavit unless the court determines otherwise;

- An application for directions must be made on the return date of the originating notice of motion;

- The court can give further directions in relation to the hearing of the petition, including directing a plenary hearing.

32. It does not appear that there was any application for directions in the present proceedings in accordance with the foregoing rules. Accordingly, the matter proceeded on affidavit, which as we have seen is the default position under the rules.

33. As a result, there is no originating pleading on the part of the respondent such as is envisaged by O.75, or "application" as envisaged by s.212. If there had been a direction for plenary hearing in accordance with O.75 r.4(3), the respondent would have had the opportunity to plead a counterclaim. I am satisfied that the Rules of the Superior Courts in relation to counterclaims, and in particular O.19, r.2, O.21, r.14, and O.21, r.15 would have applied to such a counterclaim, with the result that the counterclaim would have been regarded as an independent action and would have continued in existence notwithstanding the discontinuance or dismissal of the claim by the applicant.

34. Under the law of England and Wales, prior to the enactment in 1998 of the Civil Procedure Rules ("CPR") , the usual practice was that an alleged "oppressor" who wished to

establish that he or she was in fact the "oppressed" and seek relief accordingly, would have to issue a cross-petition. An example of this was the decision *in Re Neath Rugby Limited (No. 2)* [2009] 2 BCLC 427, where this was the procedure adopted. It is suggested in "Minority Shareholders, Law Practice and Procedure", Joffe & Others, 5th Edition (2015) at paras. 7.41-7.49 that it may now be appropriate following the enactment of CPR Part 20, the purpose of which is to enable "additional claims" to be managed in the most convenient and effective manner, for a respondent to bring a counterclaim seeking relief in proceedings pursuant to s.994 of the Companies Act 2006 (the equivalent of s.212 of the Act in this jurisdiction), rather than issuing a cross-petition.

35. However, there is nothing to suggest that it is permissible for a respondent, in the absence of an "application" by him within the meaning of s.212 to seek relief pursuant to s.212 by relying on averments in affidavits which the respondent has sworn in response to the applicant's affidavits supporting the applicant's claim by way of originating notice of motion under s.212.

36. It is submitted on behalf of the respondent that the request by the applicant in his originating notice of motion seeking relief under s.212(3)(b), which permits the court to make an order "regulating the conduct of the company's affairs in future" is sufficient to enable the court to make orders in the respondent's favour. However, the beginning of sub-section (3) – "the orders which a court *may so make* include an order …" [emphasis added] - makes it clear that the orders in sub-section (3) are simply examples of orders which may be made under sub-section (2). Any such order must be made "with a view to bringing to an end the matters complained of…". If there has been no application by the respondent containing the sort of complaints envisaged in sub-section (1), none of the orders set out in sub-section (3) can be made.

37. Also, while it is certainly the case that, as Murphy J. pointed out in *Hogan*, it may well be that, in a given case, "the relief obtained may not be what the petitioner proposed…", the fact remains that the order which the court "thinks fit" must be with a view to "bringing to an end the matters complained of". If there is no application by the respondent before the court containing the complaint required by sub-section (1), in my view the court does not have jurisdiction to regard the respondent to the complaint as a *de facto* complainant, and to make orders pursuant to sub-section (2) in his favour.

38. Neither do I think that the respondent can "take over" the applicant's originating notice of motion in the manner envisaged in O.74, r.28 in respect of a winding-up petition. Even apart from the fact that there is no specific power to do so in respect of a s.212 originating notice of motion, there is a fundamental difference between a petition to wind-up a company and a s.212 originating notice of motion. By way of example, where a creditor petitions to wind-up a debtor company, that company may settle the debt with the petitioning creditor, with the result that the petitioning creditor agrees not to proceed with the petition. If the company has other creditors, the petitioning creditor has thus been preferred by the debtor company at the expense of those other creditors. To

discourage this practice, the rules of the Superior Courts permit a petition to be taken over by any other creditor who has the right to present a petition. This is because the purpose of a winding-up petition is to ensure the realisation of the debtor company's assets and the appropriate *pro rata* distribution to the creditors.

39. On the other hand, the court in a s.212 application only has jurisdiction to deal with the specific complaint made by way of application. Such an application, it seems to me, cannot be "taken over" by the person against whom the complaint is made.

40. It is clear that no formal application as required by the Rules of the Superior Courts has been made by the respondent in order to invoke an entitlement to relief under s.212. There is no originating notice of motion on his behalf, or any counterclaim arising from an order for plenary hearing. In the normal course, I would feel constrained to hold that this Court in such circumstances simply had no jurisdiction to make an order under s.212(2) or (3) in favour of the respondent.

41. However, it remains to be considered whether the motion of 15th June, 2020 is capable of being an application sufficient to confer jurisdiction on the court to make an order in favour of the respondent.

42. While there is no affidavit sworn with this notice of motion, the notice of motion itself makes it clear that the application is grounded upon "the affidavits already filed in this action…". It is very clear from the respondent's affidavits – as the concluding excerpt from his affidavit sworn on 12th July, 2019 quoted at para. 9 above demonstrates – that, far from being the oppressor as alleged by the applicant, the respondent regarded himself as the victim of numerous acts of oppression or in disregard of his interests as a member on the part of the applicant, who was a 50% shareholder of the company and purporting to conduct its affairs. Also, the concluding para. 73 of his affidavit of 12th July, 2019, quoted at para. 9 above, suggests to me that the respondent intended to request the court to grant appropriate relief in respect of what he clearly regarded as the oppressive acts of the applicant against him.

43. The motion was served only the day before the hearing. If the applicant, having considered it, had turned up at the hearing on 16th June, 2020 and objected to the introduction of the motion at such a late stage and sought to proceed with his own originating notice of motion, he might well have had strong grounds for doing so. On the other hand, if the court had refused to entertain the respondent's motion and the application of the applicant proceeded, while the court would not have had jurisdiction to make orders pursuant to s.212 in favour of the respondent, the affidavits of the respondent would have been fully considered by the court, and it might well be that the orders ultimately made by the court would not have been those sought by the applicant.

44. The motion of 15th June, 2020 is not an originating notice of motion as required by the Rules of the Superior Courts, and as an "application" under s.212, it does not comply with O.75, r.3(1) as quoted at para. 30 above. As against that, O.124, r.1 of the Rules of the Superior Courts provides as follows:

> "Non-compliance with these rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit."

45. The question for decision is whether the notice of motion of 15th June, 2020 should be regarded as an "application" for the purpose of s.212, and thus, whether I should excuse non-compliance with the rules in accordance with O.124.

46. In my view, the notice of motion of 15th June, 2020 clearly purports to be an application for an order under the section within the meaning of s.212(1). The notice of motion is grounded upon the respondent's affidavits in the proceedings, which clearly contain complaints in relation to the matters set out in s.212(1). As such, it seems to me that the essential components of an application are present in the motion.

47. In all the circumstances, I am satisfied to regard the motion of 15th June, 2020 as an application which engages the jurisdiction of the court and permits orders to be made in favour of the respondent. I do so with some hesitation, as it seems clear to me that, in the normal course, the jurisdiction to make an order under s.212 does not arise in the absence of an originating notice of motion or a counterclaim pursuant to a direction by the court for plenary hearing. However, it seems to me that it would unduly penalise the respondent and cause unwarranted expense and delay if I were to refuse to entertain the motion of 15th June, 2020 as an application for the purpose of s.212, in circumstances where it seems clear from the substantial affidavits of the parties in the action that each of the parties maintains that he is the "oppressed" shareholder who is deserving of orders of the court "bringing to an end the matters complained of". In circumstances where the applicant has brought the respondent to the day of the hearing and then abandoned his action, it seems to me that it would be unfair to the respondent to prevent him from seeking orders of the court on the ground that his application does not comply with the Rules of the Superior Courts.

48. I am prepared, then, to deal with the respondent's motion as engaging the jurisdiction of the court under s.212. However, I must be satisfied that there is sufficient uncontested evidence to warrant the reliefs sought in the notice of motion.

49. Before considering the reliefs sought in the notice of motion pursuant to s.212, some context as to the present situation is required. On Thursday 18th June, 2020, - the third day of hearing the various applications listed before the court - an application was made to this Court by the respondent for urgent interim injunctive relief against the applicant in relation to certain acts alleged by the respondent to have been perpetrated by the applicant with regard to assets of the company. I made certain interim orders, and the matter was made returnable before me on Monday 22nd June, 2020.

50. On the return date, an application for further injunctive relief was made by the respondent in relation to certain actions alleged to have been taken by the applicant with regard to the company's website. The applicant attended in court on this occasion, and

indicated that he wished to contest the applications for injunctive relief, but did not oppose the continuation of the interim orders or the making of the orders sought on that date by the respondent, pending the hearing of a motion on notice for such orders. Accordingly, I made the orders sought by the respondent on an interim basis, and the parties, having filed affidavits, will address the matter before me on 9th July, 2020.

51. We therefore have a somewhat bizarre situation where the applicant chose not to prosecute either his application of 10th July, 2019 for interlocutory relief, or the s.212 petition itself, but wishes now to contest applications for interlocutory relief against him in the very proceedings he abandoned.

**Conclusions**

52. For the reasons given, I am satisfied - in the unusual and exceptional circumstances of the present case – that I have jurisdiction to make orders pursuant to s.212 in favour of the respondent.

53. The applicant did not prosecute his application of 17th July, 2019 for interlocutory relief, and I will strike out that application with costs to the respondent. The applicant also abandoned his application pursuant to s.212 by way of originating notice of motion. In the normal course, those proceedings would also be struck out. However, I cannot strike out the proceedings until I have determined the respondent's application for relief, and in particular the applications returnable before me on 9th July, 2020.

54. As regards the relief sought in the first paragraph of the notice of motion of 15th June, 2020, the respondent seeks an order directing that he be restored as a director of the company. It is not contested by the applicant on affidavit that he unilaterally removed the respondent as a director of the company, without regard to the various procedures required by the company's constitution or the Act itself. Having regard to all of the circumstances set out in the affidavits, it seems to me in principle that it is appropriate that the respondent be restored as a director. The respondent may wish to consider the precise terms of the order required to give effect to this, and whether any further orders are required to avoid deadlock between the applicant and the respondent as directors of the company.

55. In relation to the relief sought in the second paragraph of the notice of motion, I do not propose to make any order at this point. The extent to which the applicant should be permitted to deal with the assets of the company is presently the subject of the application which I will hear on 9th July, 2020. The existing interim orders protect the position of the company pending that date. I will therefore defer a ruling on the respondent's application under this paragraph until then.

56. It seems to me that, given the matters set out in the affidavits, orders pursuant to paras. 3 and 4 of the affidavit are warranted, i.e. that the books, records and other assets of the company be delivered up to the respondent, and that the applicant account for "monies expended or property disposed of by or on behalf of the company since this action

commenced to date”. I will defer making those orders until 9th July, 2020, as my view on them may be affected by matters put before the court by the parties on that date.

57. The relief at para. 5 of the notice of motion was not pursued by the respondent at the hearing.

58. As this judgment deals mainly with jurisdictional and procedural issues, I have refrained from setting out or discussing the nature of the dispute between the parties in any more detail than necessary. However, it is clear that the dispute between the parties has been bitter and protracted. It would be unfortunate for any shareholders to fall out in this way, but it is doubly so when the shareholders in question are brothers. I was informed by counsel that there had been two attempts at mediation, both unsuccessful.

59. I can only urge the applicant and the respondent to make renewed efforts to resolve matters without further recourse to outings in the court which will likely harm the company, deplete its resources, damage its reputation and endanger the jobs of its employees.

60. I will finalise the orders which I consider appropriate in the proceedings at the conclusion of the applications before me on 9th July, 2020.