Neutral Citation Number: [2011] IEHC 349

THE HIGH COURT

2008 402 COS

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(F) OF THE COMPANIES ACT 1963

BETWEEN

EDWARD GERARD KELLY

PETITIONER

AND

WILLIAM KELLY AND CHARLES KELLY LIMITED

RESPONDENTS

Judgment of Miss Justice Laffoy delivered on the 31st day of August, 2011.

1. Background

1.1 The background to these proceedings, in which the petitioner seeks relief under s. 205 or s. 213(f) of the Companies Act 1963 (the Act of 1963), is outlined in the judgment I delivered on 12th February, 2010 ([2010] IEHC 38) (the 2010 judgment) on the first module of the proceedings. In the first module the Court determined the issues which had arisen when the matter first came on for hearing, namely, whether the petitioner was a member of Charles Kelly Ltd. (the company) and, if he was, the extent of his shareholding in the company. Having addressed those issues, I found as follows:

> (a) that the current issued share capital of the company is represented by 7,938 shares at the Euro equivalent of IR£1 (€1.27) each;
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> (b) that the petitioner and the first respondent are the legal and beneficial owners jointly of 7,936 shares; and
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> (c) that the remaining two shares form part of the estate of the mother of the petitioner and the first respondent, Margaret Mary Kelly (Mrs. Kelly), who died on 22nd October, 2006, but whose will had not at that stage, and still has not been, admitted to probate.

1.2 As outlined in the 2010 judgment, the company was incorporated on 18th July, 1932. It carries on the business of builders merchant and retail hardware at Letterkenny in County Donegal. Both in connection with, and distinct from, that business the company has a substantial property portfolio. However, since these proceedings commenced in September 2008 the turnover of the business and the value of the property portfolio has diminished considerably. Nonetheless, the company still has between forty and fifty employees.

1.3 As also outlined in the 2010 judgment, the petitioner and the first respondent are brothers. Both are qualified accountants but they have worked exclusively for the company for most of their working lives, in the case of the first respondent since 1980 and in the case of the petitioner since 1984. Each has had three distinct roles in relation to the company. First, each has been, and is, either an employed executive or a self employed executive of the company. On the evidence, it would appear that for most of the period during which they worked in the company, they were treated and remunerated as employees of the company, although in the recent past an issue has arisen as to their proper classification for the purposes of Pay Related Social Insurance (PRSI), which had not been finally resolved when the matter came on for hearing. Secondly, they are shareholders of the company, jointly owning 99.975% of the issued share capital of the company. The Court has directed that they be registered in the register of members of the company in accordance with the Court's finding in the 2010 judgment. Thirdly, they are directors, and since 2004, they have been the only directors of the company. In that capacity they have been paid directors' fees annually.

1.4 A brother of the petitioner and the first respondent, George Kelly, has been employed by the company since 2000. He is neither a shareholder nor a director of the company. In the dispute between the petitioner and the first respondent, which is the subject of these proceedings, he has aligned himself with the first respondent. An affidavit sworn by him on 5th December, 2008 was filed in response to the petition and he was called by the first respondent to testify on the hearing of the second module of the proceedings.

1.5 On the basis of the findings made in the 2010 judgment and the procurement of the stamping of the various share transfers which had not been stamped, and the steps being taken to update the register of members, I am satisfied that the petitioner has established that he has standing to bring the substantive proceedings.

1.6 Unfortunately, prior to the commencement of the hearing of the second module, the solicitors previously on record for the first respondent and the company, Gibson & Associates, had applied, and were given liberty, to come off record. In consequence, the first respondent appeared in person and there was no legal representation on behalf of the company. An application made by the first respondent at the commencement of the hearing of the second module that he be at liberty to appoint lawyers to represent the company and to discharge the resulting fees out of the assets of the company was not acceded to on the basis that the issues which arose on the petition arose primarily between the petitioner and the first respondent. In ruling on the application, the Court 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 … s. 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."

1.7 The evidence at the hearing of the second module of the substantive proceedings was heard over seven days. It focused almost entirely on the allegations and counter allegations made by the petitioner and the first respondent against each other and only minimally on what the appropriate remedy would be, if the Court were to conclude that a case of oppression had been made out by the petitioner. Having reached the conclusion that the petitioner had made out a case of oppression and disregards of his interest against the first respondent, I informed the parties of that finding on the 9th February, 2011 and gave directions and made orders with a view to obtaining the necessary information which would assist the Court in determining what the appropriate remedy was to bring that state of affairs to an end. The directions given and the orders made are outlined later in paragraph 13.1.

1.8 The structure of this judgment is as follows:

(a) paragraphs 2 to 12 deal with all matters relating to the allegations and finding of oppression and the difficulties encountered in dealing with the remaining issues in the case;

(b) paragraph 13 sets out the directions given and the orders made on 9th February, 2011; and

(c) paragraphs 14 et. seq. deal with events subsequent to the 9th February, 2011 and all matters dealing with the determination of the appropriate remedies to bring the oppression to an end.

2. The pleadings

2.1 A lot of the allegations and complaints made by the petitioner against the first respondent, on the one hand, and by the first respondent and George Kelly against the petitioner, on the other hand, related to matters which post-dated the petition. Therefore, I consider it appropriate to consider the case made by the petitioner and the answer of the first respondent to it on the pleadings, before outlining the allegations of oppression relied on by the petitioner at the hearing of the second module and the evidence adduced in relation thereto.

2.2 While the petition is not dated, it would appear that it was filed in this Court on 26th September, 2008 and given a return date of 20th October, 2008. In the petition it was expressly pleaded that the petitioner and the first respondent had 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 company's affairs and that they had at all times operated the company on the basis of a quasi-partnership existing between them. It was specifically pleaded that the petitioner had been and is responsible for managing the financial and property affairs of the company, while the first respondent was and is responsible for the sales and business management of the company. Having narrated the chronology of the allegations of oppression on the part of the first respondent against the petitioner, the petitioner pleaded a list of examples of the serious, oppressive and persistent conduct in which it was alleged the first respondent had been and was engaging towards the petitioner, which included assertions that the first respondent had –

(i) in April 2008 purported to suspend the petitioner from his duties as a director of the company,

(ii) obstructed the preparation and completion of the company's accounts for the years 2006 and 2007,

(iii) refused to enter into mediation with a view to attempting to restore normal working relations between them in the interests of the proper and efficient management of the company's business,

(iv) instructed the employees of the company to ignore and disregard instructions given by the petitioner,

(v) sought to undermine the petitioner's position in the company and to damage his reputation among its employees and customers,

(vi) refused to consult with and had acted unilaterally in disregard of the petitioner's entitlement to participate in the management of the company's business,

(vii) proceeded to make decisions and instruct employees of the company of decisions made without consulting in advance with, and securing the agreement of, the petitioner,

(viii) disrupted management meetings conducted by the petitioner,

(ix) harassed and assaulted the petitioner in the course of the petitioner acting as a director of the company,

(x) refused to operate and sought to undermine established reporting and management structures in the company,

(xi) wasted company resources (including employees' time) in incurring unnecessary costs and expenses by undertaking unnecessary tasks and/or duplicating tasks already completed,

(xii) engaged in activities unrelated to the company's business and had taken prolonged absences from the business without consulting with, or obtaining the agreement of, the petitioner and/or without seeking to co-ordinate matters with the petitioner in his absence,

(xiii) made ad hoc additions and/or changes to the company's computer system which prevented the company from complying in a timely fashion with its financial tax and other legal reporting requirements, and

(xiv) refused to sign a long-term loan agreement with the company's bank.

2.3 It was alleged that, as a result of the foregoing, the first respondent was acting in a manner oppressive to the petitioner and in disregard of his interests as a member of the company and it was pleaded that such conduct would continue unless restrained by the

Court.

2.4 The reliefs initially sought by the petitioner in the petition as presented were the following:

> (a) an injunction restraining both defendants from conducting the affairs of the company and/or exercising the powers of the directors in a manner oppressive of and/or in disregard of the interests of the petitioner as a member of the company;
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> (b) an order directing the company to purchase the petitioner's shareholding in the company at a fair market value;
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> (c) if necessary, an order for the winding up of the company pursuant to s. 205 of the Act of 1963;
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> (d) in the alternative, an order for the winding up of the company pursuant to s. 213(f) of the Act of 1963 on the grounds that it is just and equitable to do so;
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> (e) such further and other relief as the Court should see fit; and
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> (f) an order providing for the costs of and incidental to the proceedings.

2.5 When the matter first came on for hearing on 15th December, 2009, before the problem which necessitated the hearing of the first module as a separate module which resulted in the 2010 judgment was identified, counsel for the petitioner indicated that, in reliance on paragraph (e), the petitioner would be seeking further or alternative reliefs. The Court required that, if the petitioner proposed seeking further or other reliefs in reliance on paragraph (e), the reliefs in question should be set out. In consequence, later that day the petitioner's counsel produced an amended draft petition, which was the subject of submissions by both legal teams. The additional reliefs proposed were as follows:

> (i) an order requiring the petitioner to purchase the first respondent's shareholding in the company at a fair market value;
>
> (ii) an order directing the first respondent to purchase the petitioner's shareholding in the company at a fair market value;
>
> (iii) a declaration that the petitioner is an equal shareholder in the company with the first respondent and is entitled to be registered as such;
>
> (iv) an order directing that the petitioner be entered in the register of shareholders with a shareholding equal to the shareholding registered in the name of the first respondent; and
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> (v) an order directing the first respondent to refund to the company all monies paid by the company to the first respondent's solicitors in discharge of the legal costs incurred by the first respondent in defending the proceedings.

As regards the matters at (iii) and (iv) above, those matters were dealt with in the first module. In the course of the second module of the proceedings, counsel for the petitioner made the point that the relief at (b) in para. 2.4 above should be expanded to enable the petitioner to seek an order that the company purchase the petitioner's shareholding "or the first respondent's shareholding" in the company at a fair market value.

2.6 While the Court did not rule on the petitioner's application to amend the petition, either during the hearing of the first module or the hearing of the second module, it was submitted on behalf of the petitioner that, because of the distinct discretionary nature of the reliefs which it is open to the Court to grant pursuant to subs. (3) of s. 205, it is not strictly necessary for the Court to accede to the petitioner's application to amend the prayer for relief in the petition. Alternatively, it was submitted that the Court has ample power to amend the petition and no prejudice would accrue to the respondents, if the Court were to do so having regard to the fact that the issue was raised so long ago.

2.7 Points of defence were delivered on behalf of both respondents in answer to the claim in the petition in December 2008. The aspects of the points of defence which are relevant to the issues which remain to be decided are as follows:

> (a) Certain assertions were made as to the status and function of the petitioner, the first respondent and George Kelly respectively in relation to the company. It was asserted that –
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> > (i) the petitioner's sole function has been as Chief Financial Officer (abbreviated as CFO) of the company and that he has had no involvement with, nor responsibility for, trading activities of the company,
> >
> > (ii) since around 1983 the first respondent has been its Chief Executive Officer (abbreviated as CEO), and
> >
> > (iii) since 2001 George Kelly has been its Chief Operating Officer (abbreviated as COO) and has assumed a significant role in its management.
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> It was further asserted that the petitioner, along with the COO, was involved in the day to day management of the company's property, and that the petitioner did not have sole responsibility therefor.
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> (b) It was denied that the petitioner and the first respondent conducted and managed the company's affairs on the basis that they had equal shareholdings and were entitled equally to share in the management of the company.
>
> (c) As regards the difficulties and differences between the petitioner and the first respondent, it was alleged that those matters were principally, if not exclusively, the responsibility of the petitioner and arose from a lack of will rather than a lack of competence or ability on his part and that none of them was irremediable. It was asserted that the first respondent has sought to resolve the difficulties and differences with the petitioner, including seeking the assistance of outside and objective facilitators.
>
> (d) The various allegations of irresponsible and oppressive conduct in the narrative in the petition, as well as the specific alleged examples of oppressive conduct, which I have listed earlier, were denied.
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> (e) It was asserted that the petitioner had acted in an unacceptable manner towards the company and had failed to

perform his functions as Chief Financial Officer, in consequence of which the company faced the threat of being struck off the Register of Companies because the annual returns for 2006 and 2007 had not been filed.

(f) It was alleged that the petitioner had sought to undermine and interfere with the performance of his functions by George Kelly as Chief Operating Officer and was fully responsible for undermining the mutual trust and confidence "which is the backbone of the entire company".

(g) It was asserted that the petitioner had behaved in an aggressive, threatening and sometimes violent manner towards the first respondent and George Kelly.

(h) There was a general denial that the first respondent was conducting and exercising his powers as a director in a concerted manner so as to oppress the petitioner or in disregard of his interests in the company.

3. The bases of the petitioner's claim as pursued

3.1 At the hearing of the second module counsel for the petitioner subsumed the petitioner's complaints against the first respondent, on the basis of which he contends 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 the petitioner on 22nd April, 2008;

(2) the exclusion of the petitioner from the company by denying his standing in the company as a shareholder or as a director, while the first respondent purported to be entitled to control the company;

(3) refusing to engage or co-operate with the petitioner in the management of the company and obstructing the petitioner's efforts to manage the company;

(4) taking funds from the company and, in particular, taking funds to pay the legal costs of the first respondent in defending these proceedings; and

(5) assaulting the petitioner in the office of the company.

3.2 I propose considering in paragraphs 4 to 8 hereafter the evidence adduced in relation to each of those headings separately, although there was a certain degree of overlap of factual matters covered by the headings. Throughout the evidence, there was a tendency to conflate, or at any rate not to differentiate, between the various roles of the petitioner and the first respondent in relation to the company – as employees or management executives, as shareholders and as directors. However, the disputants were the petitioner and the first respondent and the company had no role in the process.

4. Suspension of petitioner

4.1 This incident gave rise to the first and only threat by the solicitors for the petitioner to bring proceedings against the first respondent for relief under s. 205 of the Act of 1963 before the petition was presented in September 2008.

4.2 Considering this incident in isolation does not truly reflect the bizarre manner in which the petitioner and the first respondent had been interacting in relation to the management of the business of the company for a number of years. Rather, that is reflected in letters from the petitioner to the first respondent and the latter's responses. Personal interaction would appear to have almost invariably given rise to tension and acrimony. The petitioner testified that between mid-2007 and January 2008 the first respondent had been effectively out of work. That was denied by the first respondent. George Kelly had been out of work from around Easter 2007 for a year. George Kelly ascribed his absence to the manner in which he had been treated by the petitioner, which he characterised as "verbal abuse". He acknowledged that he stayed out of the office most of the time, but testified that he was still performing some of his duties on the phone. His evidence was that he was encouraged by the first respondent to stay out.

4.3 During the first four months of 2008 the correspondence which passed directly between the petitioner and the first respondent illustrates that there was little, if any, real engagement between them on any level in relation to the running of the business of the company. The petitioner, who initiated the correspondence in a letter of 26th January, 2008, which was accompanied by a schedule detailing his grievances, complained of "persistent, inappropriate and bullying behaviour" on the part of the first respondent towards the petitioner and other staff members in the company. The petitioner requested that the first respondent agree "to let a suitable third party come into the company to help us address and resolve" the alleged "inappropriate behaviour", a person appointed by the Labour Relations Commission (LRC) being suggested. A further letter of 20th February, 2008 from the petitioner in a similar vein elicited a response dated 29th February, 2008 in which the first respondent denied that he had been engaged in "inappropriate and bullying behaviour" and alleged that the petitioner had continually resisted his attempts to get the petitioner "to apply appropriate corporate governance standards to the company". The solution suggested by the first respondent in order "to break the stalemate" was that the petitioner should agree to a formal meeting of the board of directors "to address the serious financial, corporate governance and operational issues that are affecting the business". In his replying letter of 13th March, 2008, the petitioner contended that the first respondent had given a totally untrue and misleading account of "the situation on the ground". He did not dismiss out of hand the calling of a formal board meeting but suggested that it would help if the agenda was discussed and agreed beforehand.

4.4 The letter of 13th March, 2008 gives some insight into the petitioner's long-term objective at that juncture. He stated therein that he, the petitioner, and the first respondent had agreed in principle at the end of January 2008 "to separate completely in a business sense". The petitioner indicated that his preference was that, when they separated, 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 the first respondent or George Kelly, both of whom were absent from their normal work roles. There appears to have been no specific response to the petitioner's suggestion from the first respondent.

4.5 Later in April 2008 the petitioner sought to involve the workplace mediation service of the LRC in resolving the issue of the alleged bullying and harassment by the first respondent of the petitioner and other members of staff. Ultimately, by letter dated 15th May, 2008, the LRC indicated that it would not assist in the absence of the consent of the first respondent to its involvement, which had not been forthcoming.

4.6 The correspondence to which I have referred in the preceding paragraphs illustrates to some extent the relationship between the petitioner and the first respondent during the first four months of 2008. There were other tensions between the petitioner and the first respondent in relation to the draft accounts for 2006 and 2007 and proposed tax returns, which gave rise to interaction which was replete with recriminations from each side.

4.7 The notification to the petitioner of his suspension was contained in a letter of 22nd April, 2008 from the first respondent to the petitioner. On the previous day, there had been a meeting between the first respondent and George Kelly to discuss the health and safety implications of two accidents at work which had occurred earlier in April 2008 in which employees of the company had been involved. A memorandum was prepared and signed by both as to what transpired at the meeting. The gist of the memorandum was that the accidents disclosed deficiencies in compliance by the company with health and safety requirements, the cause of which, it was asserted, was that the petitioner was obstructing George Kelly, who was the designated health and safety officer, from carrying out his responsibilities. The memorandum concluded that the first respondent and George Kelly had concluded that, in the interests of health and safety and to prevent other staff members being injured, the petitioner "should be immediately removed from all operational responsibilities" in the company. In the letter of 22nd April, 2008, which was on the letter-heading of the company and was signed by the first respondent, the two accidents in the workplace were referred to and it was alleged that the petitioner's failure to co-operate "with the established management structures" of the company, particularly in relation to the management of risk, was placing the company and its staff and other individuals in danger and preventing the maintenance of a safe working environment and that it was necessary that the company should take action "to ensure that this dangerous situation" was immediately corrected. The letter continued:

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

It was stated that the company would continue to pay the petitioner pending an investigation of his conduct and a decision on what action should be taken and that the action might include his "dismissal from [the company]". Additional allegations were made against the petitioner, including his alleged failure to complete the company's financial statements on time, to file the annual returns in the Companies Registration Office (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 activities of others", presumably meaning the first respondent 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".

4.8 The first respondent communicated the decision he had made, apparently in conjunction with George Kelly, to suspend the petitioner by going into the petitioner's office and telling him that he was suspended with immediate effect and by handing him the letter of 22nd April, 2008. Later that day the first respondent arranged to have the telephone to the petitioner's office and his computer lines disconnected. There was an incident on that day in which it is acknowledged by the petitioner that he pinched the first respondent's earlobe between his thumb and his first finger because the petitioner came upon the first respondent when he was behind his desk looking at the petitioner's papers.

4.9 On the instructions of the petitioner, the solicitors on record for the petitioner in these proceedings, Gore & Grimes, wrote to the first respondent by letter dated 25th April, 2008 stating that the petitioner was a director and an equal shareholder in the company and alleging that the petitioner's position within the company both as a director and as a shareholder was being oppressed by the first respondent's actions. It was also stated that the purported suspension of the petitioner was clearly "in breach of all procedures including natural justice and company law". Injunction proceedings and proceedings under s. 205 of the Act of 1963 were threatened unless the first respondent desisted from his actions forthwith. The first respondent replied to that letter on the company's letter-heading by letter dated 7th May, 2008 saying that the company suspended the petitioner in his role as an employee of the company. It was stated that the company would write to the petitioner regarding his suspension and any action it proposed to take.

4.10 Despite the intervention of a firm of solicitors on behalf of the petitioner, the petitioner and the first respondent continued to correspond directly to each other during the period of the purported suspension, which lasted until 19th May, 2008. Once again, the correspondence was replete with recriminations on each side. Personal contact between them was obviously extremely fraught. The petitioner had continued to attend at the office and to attempt to do his work, although the first respondent endeavoured to prevent him from so doing. The petitioner acknowledged that, on one occasion, when the first respondent was interrupting his work in the petitioner's office, he pulled a Bluetooth mobile phone earpiece from the first respondent's ears and threw it out the door of his office.

4.11 The manner in which the purported suspension came to an end was that, by letter dated 19th May, 2008 on the company's letter-heading, the first respondent informed the petitioner 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. Those new arrangements made it possible for the company "to lift your suspension" with "immediate effect", it was stated. The letter also stated that the petitioner, in his capacity of Finance Director and Chief Financial Officer, and George Kelly would report directly to the first respondent. There was no mention of the "investigation" referred to in the letter of 22nd April, 2008. In the course of his cross-examination, the first respondent testified that there had been an investigation of the "charges" on which the petitioner was suspended, but when asked if he had informed the petitioner about the investigation, his answer was that he had "just stopped the whole process". The first respondent 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. The position of the first respondent was that the petitioner had been suspended as an employee, not as a director or a shareholder of the company.

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 the petitioner was a sham, which had been contrived by the first respondent, with the aid of George Kelly. It was an attempt by the first respondent to exclude the petitioner 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 the first respondent in purporting to suspend the petitioner and in the steps which he took to enforce the suspension were highly provocative. For instance, it is difficult to conclude other than that the two episodes in which the petitioner admitted physical contact with the ears of the first respondent were the result of extreme provocation from the first respondent. Nonetheless, the conduct of the petitioner cannot be condoned and he must share responsibility for the depths to which the relationship of the petitioner and the first respondent subsequently plummeted.

5. Exclusion of the petitioner from the company

5.1 The petitioner has relied, as a ground of oppression against him by the first respondent, on his contention that he was excluded from the company by the first respondent's conduct in denying his standing as a shareholder and director of the company, while the first respondent purported to be entitled to control of the company. In their written submissions, counsel for the petitioner support that ground on two bases, which, in my view, are formulated in general terms which lack precision.

5.2 The first basis contended for is that it is "self evident" from the manner in which these proceedings were defended. My first observation on this point is that one would have expected the petitioner to point to, and support by evidence, conduct on the part of the first respondent which pre-dated the presentation of the petition on the 26th September, 2006 as evidence of oppression against him in denying his standing as a director and shareholder, which justified him in initiating these proceedings on that ground, apart from the purported suspension episode. As regards his standing as a director, while it is true that in the points of defence filed on behalf of the first respondent it was pleaded that it was not admitted that the petitioner became a director of the company in 1987, I am satisfied that at all material times prior to the commencement of these proceedings the first respondent acknowledged that the petitioner was, and that he acknowledges that he is, a director of the company. As regards the standing of the petitioner as a shareholder of the company, it is true that, not only did the first respondent deny in the points of defence that the petitioner had an equal shareholding in the company with the first respondent, but the tortuous process with which the Court was involved in the first module of these proceedings was, primarily, necessitated by the fact that the first respondent did not acknowledge that the petitioner was the beneficial owner of any shares in the company. Having regard to the findings I have made in the 2010 judgment, that approach on the part of the first respondent was clearly incorrect and should not have been pursued. Nonetheless, in my view, both the petitioner and the first respondent 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, the petitioner was equally responsible with the first respondent 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 shareholdings of the petitioner and the first respondent were, so that it would have been clear that the petitioner had standing to bring the petition.

5.3 The second basis is the contention that the perception of the first respondent of his own role in the company, which did not acknowledge an "equal say in the affairs" of the company on the part of the petitioner, was exclusionary. I have difficulty in following the petitioner's argument. The rights and duties of the shareholders and the directors are governed by law and the company's constitutional documents, in particular, its memorandum and articles of association. While neither side referred to the memorandum and articles of association, that document was exhibited in the plaintiff's grounding affidavit and is before the Court. The company was incorporated under the Companies (Consolidation) Act 1908 and the provision of Table A contained in the first schedule of the Act of 1908, under which the management of the business of the company was delegated to the directors (Regulation 71), applied. Therefore, from 2004, when they became the sole directors, onwards the management structure was a matter for agreement between the first respondent and the petitioner. Having regard to what is pleaded in the petition, the agreed position of the parties was that at executive level the petitioner was responsible for the financial affairs of the company and the first respondent for the sales and business management, that is to say, the trading aspect of the company. There is no doubt that, both in his dealings with the petitioner before these proceedings were initiated and in his evidence, the perception of the first respondent 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 the petitioner is answerable to him in respect of the performance by the petitioner of his own management or executive functions. His purported suspension of the petitioner is a clear example of that attitude.

5.4 The evidence illustrates that the historic division of management or executive functions as between the petitioner and the first respondent, which was recognised by the petitioner in the petition, has been complicated in recent years by two factors. First, it was the petitioner's evidence that the first respondent was absent from the company for eight months between November 2004 and July 2005 and was effectively absent between July 2007 and January 2008. During those periods the petitioner had to assume responsibility for the day to day management of the company. To facilitate that, he had put in place a system of "team leadership", which the first respondent moved to dismantle when he returned to the company at the beginning of 2008. The first respondent 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 the petitioner in the management structures, which had never been approved of by the board of directors. The second factor is the role of George Kelly. On the evidence, it would appear that the view of the first respondent was that George Kelly should be what he referred to as a full "participant" in the company and should eventually become a director. Whatever expectations the first respondent or George Kelly may have had, the fact is that George Kelly is neither a shareholder nor a director of the company.

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 was called to testify on behalf of the petitioner, 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, the first respondent 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 petitioner and the first respondent 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 the first respondent. Each party seems to adhere stubbornly to his own point of view on everything. However, I accept the petitioner's evidence as to the absences of the first respondent and the consequential additional burden placed on him, which he had to address. I also accept that the first respondent has attempted to promote the involvement of George Kelly in the company to the disadvantage, and against the wishes, of the petitioner. The evidence supports the conclusion that, for whatever reason, the conduct of the first respondent, 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 the petitioner in response to the latter's attempts to remedy the situation to some extent justify the behaviour of the petitioner towards the first respondent.

6. Refusal to engage or co-operate with the petitioner in the management of the company

6.1 The second example set out in the petition of serious, oppressive and persistent conduct on the part of the first respondent was his alleged wrongful refusal to sign off on the company's accounts for the years 2006 and 2007. I propose considering the allegation of lack of engagement or co-operation on the part of the first respondent in the management of the company primarily in the context of the preparation of the accounts, the filing of the annual returns and issues in relation to the auditors of the company.

6.2 As regards the default in fulfilling the company's obligations in relation to preparation of accounts and filing annual returns, I am taking as the starting point the issuance by the CRO of a notice under s. 371 of the Act of 1963 on the company on 15th August, 2008 requiring the delivery of outstanding annual returns to the CRO within fifty six days, because of existing default. On the same day, the CRO issued an involuntary strike off notice in relation to a subsidiary of the company, Harup Ltd. (Harup). The position consistently adopted by the petitioner in the subsequent voluminous correspondence from the petitioner to the first respondent in relation to the accounts was that the draft accounts for 2006 had been completed since January/February 2008 and that copies of them had been furnished to the company's then auditors in March 2008. The draft accounts for 2007 were in the course of preparation. Eventually, a meeting of the board of directors was held on 18th September, 2008, although, in fairness, the first respondent 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 the petitioner wrote to the first respondent 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". The petitioner 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 they could be dealt with. He requested specific comments on them by the first respondent. The first respondent's three line response of the 25th September, 2008 stated that he agreed that "the draft accounts" which the petitioner 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.

6.3 The petitioner proposed to the first respondent in early October 2008 that the company consider changing auditors. It is unnecessary to outline the saga to which that proposal gave rise. Suffice it to say that, eventually, on 30th April, 2009 the company's then auditors, PricewaterhouseCoopers, gave the company notice in accordance with s. 185(1) of the Companies Act 1990 that they were resigning as auditors of the company. The notice was filed in the CRO on 24th June, 2009. Subsequently in July 2009 the firm of Stewart & MacLochlainn was appointed auditors of the company.

6.4 In mid-November 2009 Stewart & MacLochlainn furnished draft accounts for the years 2006, 2007 and 2008 to the company via the petitioner, who in turn furnished them to the first respondent, requesting that the first respondent 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 the first respondent subscribed and that remains the position. It is a policy to which the petitioner 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 the first respondent wrote to the petitioner'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 the first respondent wrote to the petitioner'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 the first respondent 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". The first respondent also sought the assistance of Stewart & MacLochlainn "in carrying out an inspection of the books of account in support of the annual accounts".

6.5 Understandably, Stewart & MacLochlainn have endeavoured to maintain a neutral stance as between the petitioner and the first respondent, while these proceedings have been pending. However, the first respondent had copied his letter of 26th January, 2010 to the petitioner who, typically, in a tirade in an internal memorandum of 18th March, 2010 railed at a variety of matters, including a complaint that the first respondent had furnished information to and had meetings with the auditors secretly. The petitioner issued an injunction to the first respondent not to hold any more meetings or have any interaction with the auditors without the petitioner being present. Despite that injunction, the first respondent wrote directly to the Stewart & MacLochlainn on 28th May, 2010 stressing the urgency of completing and finalising the outstanding annual accounts, including the accounts for 2009, having regard to the imminence of the hearing of the substantive proceedings. However, I consider that no meaningful proposal as to how that could be achieved was made.

6.6 The principal matters of a technical accountancy nature in respect of which the first respondent has reservations were canvassed in the evidence of both the first respondent and the petitioner – the treatment of the stock reserve and the treatment of an 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 the first respondent. 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 items 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 the first respondent 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 the first respondent and the petitioner, because there is no doubt that, if both had acted reasonably, the reservations of the first respondent could have been addressed and properly resolved, if there is substance in them. While I had concluded that fault on the part of both the petitioner and the first respondent had been the source of the failure of the company to comply with its statutory obligations in relation to filing annual returns, I was of the view that the first respondent had been more at fault than the petitioner and that, to a large extent, the obduracy of the petitioner had been provoked by the conduct of the first respondent. In the light of events since the directions were given on 9th February, 2011, I have come to understand better the frustration of the petitioner and, I suspect, of the auditors, in endeavouring to get the agreement of the first respondent in relation to the finalisation of the accounts.

6.7 While, in the absence of independent objective evidence, it was not possible to conclude that there was no substance to the reservations which the first respondent had as to the treatment of the controversial items which he had identified in the accounts or that the first respondent was acting unreasonably in pursuing those matters, there had been other aspects of the conduct of the first respondent which had been wholly unreasonable. A constant refrain of the first respondent has been that his access to, and his right of inspection of, the books and records of the company have been impeded. The issue was raised in his letter of 26th January, 2010 to Stewart & MacLochlainn and in his subsequent letter of 25th May, 2010 to Stewart & MacLochlainn he stated that he would expect that firm "to assist" him "to inspect the books of account" of the company. I am satisfied that the first respondent 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, the first respondent'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 had 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 the first respondent 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 the finalisation of the accounts for the years from 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 petitioner and the first respondent, for example:

> (a) entering into long-term loan agreements which were proffered by the company's bank, Ulster Bank Ireland Ltd. (the Bank), in substitution for existing facilities, which the petitioner, properly in my view, considered would be beneficial to the company but which the first respondent, wholly illogically and contrary to commonsense in my view, refused to sign;
>
> (b) the outsourcing of computer programming by the first respondent, which the petitioner was of the view the company could not afford from 2009 onwards; and
>
> (c) the failure of the first respondent 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 the petitioner and the first respondent are deadlocked. The position adopted by the first respondent, 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.

7. Taking funds from the company

7.1 This ground relates to payments which the petitioner contends were made by the first respondent out of the funds of the company which were not authorised by the petitioner, which I understand to mean that they were made without authority by the first respondent. In relation to certain payments there is an additional implication that the payments were made for the benefit of the first respondent personally, not for the benefit of the company. There was no plea in the petition that the first respondent had made unauthorised payments or had expropriated funds of the company for his own benefit. The issue was first raised in the proceedings when the application of the solicitors on record for the respondents, Gibson & Associates, to come off record was before the Court during the week before the commencement of the hearing of the second module. That application was resisted by the petitioner and, in support of that resistance, the petitioner exhibited in an affidavit a schedule of "personal payments" and "other unapproved payments" allegedly made by first respondent between February 2008 and February 2010. As I understand the evidence, although some of the payments go back to February 2008, payments on the company's account authorised by the first respondent without the agreement of the petitioner first became an issue for the petitioner within the management of the company in September 2009. The reaction of the petitioner, which could have had serious ramifications for the company, was triggered by a cheque issued by the company to Gibson & Associates on 14th September, 2009 in the sum of €25,000 on the instructions of the first respondent and signed by the first respondent and George Kelly.

7.2 The reaction of the petitioner was immediate. On 14th September, 2009 he issued a direction to the Letterkenny branch of the Bank to stop payment of the cheque in favour of Gibson & Associates, which happened. On the following day, 15th September, 2009, the petitioner wrote to the Bank instructing the Bank not to make any further payments or transfers, directly or indirectly, to certain named payees, including Gibson & Associates, subject to the proviso that future payments or transfers might be made with the prior written approval of the company's board of directors. It was also asserted that earlier payments had been made to the payees in question in breach of the company's "established internal payment approval procedures" and that the payments related only to personal expenditure of one of the directors, who acted outside his authority in making the payments. It was also stated that the matter was the subject of civil legal proceedings against the director and a complaint to An Garda Síochána.

7.3 The initial response of the Bank, by letter of 21st September, 2009 to the company, was to suggest that the company make alternative banking arrangements and to give notice that the company's overdraft facility was being cancelled and that the existing balance on the account, which was in excess of €1.4m at the time, should be repaid within twenty one days. Subsequently, however, the Bank abandoned that approach and, on the basis of legal advice, notified the company by letter dated 22nd October, 2009 that the original company mandate should continue to operate and that the Bank would continue to operate the account in accordance with the terms of the mandate. Despite what I consider to be unnecessarily belligerent correspondence from the petitioner, the Bank has maintained the company's overdraft facility in place, notwithstanding that it has been unable to procure a properly executed acceptance on behalf of the company of the facility from the company and notwithstanding that, as with the world at large, it has not seen any audited financial statements of the company from 2006 onwards. In short, the Bank has demonstrated considerable forbearance towards the company and its directors.

7.4 Prior to the intervention of the petitioner on 14th September, 2009 in seeking to stop payment on the cheque for €25,000 in favour of Gibson & Associates, three payments had been made to Gibson & Associates by cheque drawn on the company's account in November, 2008, February, 2009 and September, 2009. Those three payments aggregated €29,328.21. Subsequent to 14th September, 2009 payments were made to Gibson & Associates from the company's account by giro or bank draft on the following dates: 29th October, 2009 (€30,000), 9th December, 2009 (€100,000), 12th February, 2010 (€35,000) and 12th February, 2010 (€15,000). Those payments aggregate €180,000. As emerged recently, the final draft for €15,000 was not handed over or negotiated.

7.5 Two other payments were made by giro out of the company's account on 11th November, 2009 in respect of legal advice obtained by the first respondent. The first was in a sum of €4,983.75 for advice which the first respondent had obtained from a firm of solicitors in Dublin in relation to, as he described it, "proper governance procedures and to try and understand the membership issue". The second payment in the sum of €2,904 was in favour of the first respondent to reimburse him for a similar amount he had paid to a different firm of solicitors in Dublin in the early part of 2008 for advice on corporate governance, the annual accounts and the shareholding. The first respondent testified that the reason he made a personal payment to that firm was because he did not want the petitioner to know that he was getting legal advice.

7.6 The first respondent sought to justify the payments which were made to Gibson & Associates after September 2009 on the basis that Gibson & Associates were being paid for acting for the company and for acting for him in his capacity as a director of the company, not in his personal capacity. In his written submissions the first respondent has pointed to the fact that the petition, as presented to the Court, expressly stated that the first respondent was being sued "in his capacity as a Director of the company". That does not mean that any liability established on the part of the first respondent attaches to the company, rather than to him

personally. On the contrary, in essence, as I have already recorded, the petitioner's dispute is with the first respondent not with the company, and it was the first respondent's opposition to the petitioner's claim that he was an equal shareholder with the first respondent 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 Ltd.* [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 the first respondent in making the payments from October 2009 to February 2010 to Gibson & Associates.

7.7 As I have recorded earlier, in his letter dated 15th September, 2009 the petitioner informed the Bank that certain payments were the subject of a complaint to An Garda Síochána. The evidence of the petitioner was that he reported the matter to An Garda Síochána and made a statement in December 2008 (presumably, meaning 2009) alleging misappropriation and theft from the company. It is not clear on the evidence what the outcome of that complaint was.

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 the petitioner was that, as regards the payments to Gibson & Associates after 14th September 2009, aggregating €180,000, those payments were made by the first respondent without the authority of the company. Moreover, the fact that the first respondent made those payments in the knowledge that the petitioner considered that they should not be made out of the funds of the company, coupled with the fact the first respondent circumvented the endeavours of the petitioner 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 the petitioner and the first respondent.

8. Assaults

8.1 One of the examples of the serious, oppressive and persistent conduct which it was alleged the first respondent had engaged in, as set out in the petition as presented, was that the first respondent had harassed and assaulted the petitioner in the course of the petitioner acting as a director of the company. In his affidavit grounding the petition, the petitioner did not give details of the alleged harassment and assault and particulars were not sought by the respondents before the hearing. In his replying affidavit, which was sworn on 5th December, 2008, the first respondent alleged that the petitioner was extremely aggressive and violent to him during the period of the petitioner's suspension and averred to acts of violence towards him by the petitioner during the course of 2008 aside from the instances to which I have referred earlier. Moreover, in an affidavit filed on behalf of the respondents, which was also sworn on 5th December, 2008, George Kelly averred that he had witnessed some abhorrent and wholly unacceptable aggressive behaviour on the part of the petitioner towards the first respondent and that he himself had been subject to frequent assaults, threatening behaviour and foul language from the petitioner. Particulars of the allegations of aggressive behaviour and physical abuse made by the first respondent and George Kelly against the petitioner were not sought by the petitioner, before the hearing of the substantive proceedings. Of course, the substantive proceedings were heard on oral evidence and are decided on the oral evidence adduced by the parties. However, I mention the lack of particulars of the allegations made by each side because the lack of structure on the case and the manner in which the evidence of such serious matters was presented to the Court was far from satisfactory and was exacerbated by the fact that the first respondent was not legally represented. The oral testimony of the petitioner, the first respondent and George Kelly was, in relation to some incidents which occurred within the company's office, supported by close circuit television (CCTV) footage. The office is open plan in design. The first respondent operates from a work station in the open plan area, whereas the petitioner operates from a separate office.

8.2 There was evidence that criminal proceedings were pending in the District Court against the first respondent arising out of a complaint made by the petitioner. There was also evidence that an incident which occurred in the office in April 2010 had been the subject of a Garda investigation. The evidence of the petitioner was that the An Garda Síochána had been called to the company's premises or the vicinity of those premises by the first respondent eight or nine times in April and May 2010 on the basis that he was being harassed by the petitioner. In the light of the foregoing, I propose being circumspect in relation to the incidents which may be the subject of criminal proceedings.

8.3 It is clear on the evidence that there was a considerable degree of hostility between the petitioner and George Kelly before the purported suspension of the petitioner in April 2008, not all of which was related to their dealings within the workplace. Chronologically the earliest complaint from George Kelly against the petitioner dated back to December 2005 and occurred in the petitioner's office in the presence of a member of the company's then audit team. The incident arose outside the office after George Kelly got "quite sharp" (his version) or "lost his temper" (the petitioner's version) when the petitioner asked him to furnish him with a printout of a document which he had sent to the petitioner the previous day. There is a total conflict as to what happened outside the office: whether the petitioner merely placed his hand on the arm of George Kelly to calm him down (the petitioner's version) or whether the petitioner verbally and physically assaulted George Kelly, grabbing him around the neck (George Kelly's version). The matter was raised in early January 2006 by the first respondent with the petitioner on the basis that it was a very serious incident. At the time the petitioner denied the account which had been given by George Kelly and sought an independent investigation into the allegation. No investigation took place, notwithstanding that the petitioner pursued the issue. Seeking to have complaints made against him by George Kelly formally investigated was a constant theme of the petitioner in his internal memoranda. He also proposed that approach a year later in 2007, when a complaint of verbal abuse in the office and their poor interaction in the company generally was made by George Kelly against the petitioner. However, that investigation did not take place either. The fact that the petitioner was exploring having a formal investigation of a complaint made by his brother, George Kelly, who was his co-employee does not necessarily lead to the conclusion that the account given by the petitioner of those incidents is correct. Nor does it lead to the conclusion that George Kelly was the instigator of the incidents. However, on the evidence, I am satisfied that when they came into contact in the work environment and outside it, to use a colloquialism, each was on a short fuse, and each was prone to resorting to aggressive physical contact.

8.4 In outlining what happened during the purported suspension of the petitioner in April and May 2008 above, I have referred to two incidents in which the petitioner acted in a most inappropriate manner towards the first respondent, although I considered that what happened had been provoked by the conduct of the first respondent. Both the first respondent and George Kelly complained about another encounter with the petitioner during the suspension, when they alleged that the petitioner, who was holding a letter opener, wagged it in the face of the first respondent in an angry and threatening manner. The matter was first raised by the first respondent with the petitioner about six months later at a directors' meeting in September 2008, by which time the interaction between the petitioner and the first respondent had deteriorated. On the evidence, I am satisfied that the petitioner did not intend to inflict any harm on the first respondent on the occasion in question.

8.5 That the tension and animosity between the petitioner and the first respondent had escalated between the lifting of the suspension and September 2008 when the petition was presented and that the situation deteriorated further thereafter is borne out by the evidence. The evidence, and in particular the CCTV footage, clearly demonstrates that the conduct of both the petitioner and the first respondent in the open plan office in the presence of the employees of the company was utterly disgraceful. What is even

more shocking is that neither party seems to have any comprehension that such was the case, which is illustrated by an incident which occurred on 19th November, 2009 in the open plan office.

8.6 The CCTV footage of the incident on 19th November, 2009 showed the first respondent restraining the petitioner by holding his arm behind his back and later pinning him to the floor of the office, while George Kelly was standing close by. The manager who testified was also working in the area. The petitioner's explanation of the background to the incident was that he was seeking information from the first respondent in relation to payments from the company's account which had come to his attention that morning. When he was circulating in the office, he noticed what appeared to be an invoice protruding from a notepad on the first respondent's desk, which, as I have recorded, was located in the open plan area. He insisted on seeing the document and he took it from the desk. The evidence of the first respondent was that he asked the petitioner to return the document and stated that it was personal. The petitioner refused, whereupon the incident depicted on the CCTV ensued. The petitioner eventually released the document to the first respondent, who in turn released the petitioner, who rose from the floor and moved aggressively towards George Kelly before moving away towards his own office.

8.7 In his cross-examination of the petitioner and in his evidence during cross-examination by counsel for the petitioner, the first respondent showed no appreciation of how inappropriate that conduct was in the workplace. His position was that the incident was provoked by the petitioner taking his personal papers and that what ensued was choreographed by the petitioner to camera. He explained that by saying that when he was doing what he did, it felt like when they were young boys and "used to wrestle and Mick McManus was on TV". However, when he was being cross-examined, the first respondent testified that he did not remember the incident, although he did admit that there were incidents in which he used physical force against the petitioner first. By the same token, the petitioner seemed to have no appreciation that what he did in taking the document from the first respondent's desk was provocative and, more importantly, that the incident could have been avoided if he had handed the document back when asked for it. He acknowledged that he gave it back only at the end of the interaction.

8.8 That incident and the incidents which I have recorded earlier are some only of the catalogue of incidents of which evidence was given, which involved some or all of the three brothers which, in any context, are justifiably characterised as disgraceful behaviour. Most of them occurred in the workplace. At least two of them occurred at the workstation of an employee who reported to the first respondent. In relation to the latter incidents, the characterisation of conduct as "disgraceful behaviour" is probably not sufficiently condemnatory. In relation to the incidents which involved the petitioner and the first respondent, taking an overview of the evidence, it is not possible to conclude that it was entirely the fault of the first respondent that the differences between them resulted in various forms of aggressive behaviour and physical force. The picture which emerged from the evidence was that it was the petitioner's perception that the first respondent was not interacting with him in relation to the running of the business of the company as he should have been. In order to get the first respondent to interact, the petitioner embarked on a campaign of constant pursuit and what could be regarded as harassment of the first respondent, which on occasion provoked a physical reaction from the first respondent. Even if the first respondent was not performing his duties as a director and as a senior employee and manager of the company and had not been interacting with his co-director and fellow senior employee as he should have been, the conduct of the petitioner in endeavouring to get his own way was wholly inappropriate. Notwithstanding that he had invoked the jurisdiction of the Court to resolve the issues which arose between him and the first respondent in relation to the running of the affairs of the company, the petitioner persisted in conduct against the first respondent which amounted to bullying and harassment when the first respondent did not accede to his requests to interact with him in a particular way. The conduct of the petitioner cannot be condoned. Unfortunately, the baser instincts of both the petitioner and the first respondent 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 the petitioner and the first respondent 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 the petitioner and the first respondent as equal shareholders, directors and employees or executive managers of the company is irretrievably broken down, I consider that the petitioner has contributed to and must share the responsibility for that state of affairs with the first respondent.

9. The relevant statutory provisions

9.1 An application to Court under s. 205 may be brought by 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 of the members (including himself), or in disregard of his or their interests as members …."

9.2 The Court is given a very wide discretion under s. 205 as to the remedy which it may grant where oppression is established. Sub-section (3) deals with the type of order the Court may make and provides:

> "If … the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised as aforesaid, 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 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."

9.3 In the petition as presented, as I have recorded, the petitioner sought alternative relief in the form of a winding up of the company pursuant to s. 213(f) of the Act of 1963 on the ground that it is just and equitable to do so. While paragraph (g) of s. 213 was not invoked, that paragraph empowers 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 opinion that proceedings under section 205 would, in all the circumstances, be more appropriate."

I mention that provision because, as I will outline later, both the petitioner and the first respondent have indicated that the

preference of each is a remedy other than a winding up order.

10. The issues
10.1 The core issues raised on the petitioner's case are the following:

> (a) Has the petitioner established oppression or disregard of members' interests within the meaning of subs. (1) of s. 205 on the part of the first respondent in the conduct of the affairs of the company or the exercise of the directors' powers?
>
> (b) If he has, what order should the Court make with a view to remedying the situation?
>
> (c) Alternatively, has it been established that it would be just and equitable to wind up the company and should a winding up order be made?

10.2 As I have stated at the outset, having considered the first issue and found that a case of oppression had been made out, I informed the parties of the finding and postponed the issues as to the appropriate remedy until the directions and the orders made on 9th February, 2011 had been complied with. I propose now explaining the basis on which I have reached the conclusion that there was oppression.

10.3 The Court has had the benefit of outline written submissions from both the petitioner and the first respondent. Understandably, without the benefit of legal representation, the written submissions of the first respondent exclusively address issues of fact. In outlining the law in their written submissions, I think it is not unfair to say that counsel for the petitioner have drawn primarily on the text of Chapter 19 of Courtney on *The Law of Private Companies* (2nd Ed.) and to a lesser extent on Joffe on *Minority Shareholders, Law, Practice and Procedure* (3rd Ed.). I do not think it would serve any useful purpose in this case to outline the submissions made on behalf of the petitioner or to embark on an intensive analysis of the legal principles applicable.

11. Oppression or disregard of members' interests established?
11.1 Notwithstanding that last comment, I think it is apt to note that an analysis of the petitioner'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 comparators. That is not the basis of the petitioner's invocation of s. 205.

11.2 Accordingly, on a proper analysis of the petitioner's complaints in the context of subs. (1) of s. 205, the conclusion must be that they relate to the exercise by the first respondent of "the powers of the directors". Indeed, the acts on his part complained of, such as the purported suspension of the petitioner, or defaults alleged against him, such as his failure to co-operate in the finalisation of accounts and submission of annual returns or to address the need to cut the costs of the business, were acts of omissions which were either done, or should have been done, by him in his capacity as a director.

11.3 The petitioner's case is that his power as a director is being exercised by the first respondent in a manner which is both oppressive to the petitioner and is in disregard of his interest as a member of the company. In relation to the complaint of disregard of the petitioner's interest, the broad proposition advanced by the petitioner is that the actions of the first respondent 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 the first respondent of which the petitioner 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 the petitioner's claim for relief under subs. (1) of s. 205 is that the first respondent is exercising his powers as a director of the company in a manner which is oppressive to the plaintiff. As to what constitutes oppression, counsel for the petitioner submitted that oppressive conduct means the exercise of the company's authority in a manner "burdensome, harsh and wrongful", citing *Re Greenore Trading Company Ltd.* [1980] IRLM 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 Ltd*. [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 petitioner'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. The first respondent's conduct in purporting to suspend the petitioner, 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 the petitioner as constituting oppression, in my view, the test is met. While, as I have indicated, the petitioner'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 the petitioner was provoked by the first respondent.

11.6 Apart from that, as has been clearly illustrated, there has been a total breakdown of the relationship between the petitioner and the first respondent in every capacity in which they are involved with the company, as executives, as shareholders and as directors and I find that the first respondent 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 the first respondent.

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 the first respondent has exercised his powers as a director of the company in a manner oppressive to the petitioner within the meaning of s. 205(1), and
>
> (b) that there has been a total breakdown in the relationship of the petitioner and the first respondent 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.

12. Appropriate remedy – the practical difficulties

12.1 The appropriate remedy or remedies necessary to bring an end to the state of affairs reflected in those findings required to be determined. However, I was not in a position to make such a determination at that juncture. The primary difficulties I encountered, and the concerns to which they gave rise, were due to lack of evidence in relation to the then current financial and trading position of the company and the value of its assets.

12.2 On the assumption that the company was not insolvent and that its business could continue to be conducted as a viable business, I was of the view that the optimum solution to bring an end to the oppressive use by the first respondent of his powers as a director was to utilise the Court's broad discretion under subs. (3) of s. 205, rather than to make a winding up order. I was satisfied that it was appropriate for the Court to consider the added reliefs suggested by counsel for the petitioner in the proposed amendment to the prayer in the petition, because the first respondent was not in any way prejudiced thereby, having been aware of the proposed additions since the first day of the first module when he was represented by counsel. In any event, I considered that it would have been open to the Court to consider the additional reliefs, even if they were not specifically pleaded.

12.3 However, there was no evidence before the Court to back up the assumption of solvency which I have expressed in para. 12.2 and such evidence as there was cast doubt on whether it was justified. The evidence before the Court as to the financial standing of the company was limited to general statements by both the petitioner and the first respondent that the turnover in the profits of the company had deteriorated. Accordingly, there was a possibility that the Court might have to consider making a winding up order when it would have obtained clear evidence of the current financial state of the company. In that connection, it is appropriate to reiterate that the last audited accounts for the company were for the year 2005, and, regrettably, that is still the position.

12.4 Aside from the complete absence of acceptable evidence of the company's then current financial state, the only evidence on which the Court could form a view as to the capacity of the company or, alternatively, the capacity of one or other of the petitioner and the first respondent to acquire the shareholding of the first respondent or the petitioner was very vague and non-specific evidence which was elicited by the Court. No evidence had been adduced on the basis of which the Court could form even a preliminary view as to the value of the company or the shareholding of the petitioner or the first respondent.

12.5 If the Court were to order that either the company or one or other of the petitioner or the first respondent should acquire a specific shareholding in the company, whether that of the first respondent or the petitioner, it was undoubtedly the position that there were various mechanisms that the Court could adopt with a view to ensuring that a fair value was put on the shares. It had been suggested by counsel for the petitioner that the Court could follow the approach adopted by O'Hanlon J. in *Re Clubman Shirts Ltd*. [1983] ILRM 323 and direct an accountant to carry out a valuation, while reserving the ultimate decision to the Court, as O'Hanlon J. did. Alternatively, as was also suggested by counsel for the petitioner, the Court might direct the parties to agree to endeavour to agree the valuation and the mechanisms by which the acquisition was to be given effect to and, in default, the Court could determine those issues in a further module of the proceedings.

12.6 While I could see little prospect of agreement between the parties on that or any issue, if the Court were to determine that the appropriate remedy was the acquisition of the shareholding of either the first respondent or the plaintiff, whether by the company or by the other party, there was no doubt that various approaches would be open to the Court to procure the ascertainment of the fair value of the shareholding. However, the difficulties which the Court encountered which arose from the dearth of evidence which would have enabled the Court to reach an informed view as to the then current financial state of the company, its net asset value, including the respective values of its trading element and its property element, did not solely impact on the valuation of the shares of the company. It impacted on the Court's ability to identify the appropriate remedy to redress the situation which prevailed and continues to prevail. In reality, on the evidence, the Court was being asked to determine what the appropriate remedy was in the abstract. Moreover, I was very conscious that there were other stakeholders of the company, for example, its creditors and its employees, whose interests the Court had to bear in mind in view of the alternative relief in the form of a winding up order which had been claimed. In the light of the foregoing, I considered that the appropriate course at that juncture was to make such orders and give such directions as I considered appropriate and necessary to address the evidential deficit before making a final determination as to the appropriate relief to be granted.

12.7 When questioned by the Court at the hearing of the second module of the substantive matter, the petitioner testified that personally he does not have enough assets to pay a fair value for the shareholding of the first respondent in the company. However, his opinion was that by means of a "reorganisation of the company to utilise some of the assets of the company" he could acquire the shareholding of the first respondent at a fair value. As regards the capacity of the company to acquire either the shareholding of the first respondent or his shareholding, the petitioner's opinion was that it could only do so "by paying for it with assets". The petitioner put the net asset value of the company at "around" €8m. This figure which, unfortunately, has proved to be wholly unrealistic as 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 €11m, which he had discounted by twenty per cent. It is only fair to record that the petitioner acknowledged that this was his "own guesstimate" of the property values and he pointed out that the business of the company also had a value. The petitioner also indicated his preferred remedy, in the event of a finding of oppression, which he had expressed to the first respondent, was that they split the company into two, separating the property element from the trading element and that his preference was to be allowed to continue running the trade, as he had been during 2007 and 2008. In other words, his preference on a split, as expressed to the first respondent and to the Court, was that he would acquire the trading activities and the trading assets. However, he realistically recognised that he might have to be willing "to go the opposite direction", which I understood to mean, to acquire the property element on a split of the assets.

12.8 The position of the first respondent, when questioned by the Court at the hearing of the second module of the substantive issue, was that personally he would not be in a position to acquire the petitioner's shareholding at a fair value. He frankly admitted that he did not know whether the company would be in a position to acquire the petitioner's shareholding, stating that the company had some assets which could be liquidated but the question of bank borrowing would also have to be taken into account. While, at an earlier stage in the proceedings, the first respondent had indicated that his preference was that the company be wound up, he clarified that he had expressed that view because he had been told that "that would be the eventual outcome". He explained that he had made his decision based on the fact that he believed that there was no point in these proceedings and because "the company is going up end up liquidated anyway because we're going to run out of money".

12.9 On the basis of the conclusions I had reached at that juncture on the application of subs. (1) of s. 205 to the facts, I came to the conclusion that, if relief was to be granted under subs. (3) of s. 205, rather than under s. 213, the most obvious course to pursue

would be to direct the petitioner to acquire the shareholding of the first respondent at fair value. Unless the parties could come to some agreement, the alternative mechanism proposed by the petitioner of splitting the company did not seem to be a realistic approach, at any rate on the basis of the evidence then before the Court. Therefore, on 9th February, 2011, with a view to eliciting the evidence necessary to form a view as to the proper approach to adopt in relation to remedying the oppression, I gave certain directions and made certain orders.

13. Directions given/orders made on 9th February, 2011

13.1 On 9th February, 2011 I gave the following directions and made the following orders and explained the objectives in so doing as follows:

> (a) A direction that within two weeks, that is to say, by 23rd February, 2011, the first respondent furnish in writing his objections to the draft accounts of the company for the years 2006, 2007, 2008 and 2009 to the company's auditors, Stewart & MacLochlainn. I requested that, as soon as reasonably practicable, the company's auditors consider the objections and write to the first respondent and the petitioner, as the directors of the company, indicating how they considered the matters raised by the first respondent in his objections should be addressed. In so doing, I made it clear that I appreciated that the members of the firm of Stewart & MacLochlainn are not parties to these proceedings and that the Court could not make a direction against them, but I requested that they facilitate the Court.

The objective in issuing that direction against the first respondent was so that the Court would have the material to determine whether an order should be made against the first respondent directing him to sign the outstanding accounts and annual returns forthwith.

> (b) A direction that the petitioner and the first respondent, as directors of the company, procure the finalisation of the draft accounts of the company for the year 2010 and produce up to date management accounts for the period since 31st December, 2010 as soon as possible.

The objective in issuing that direction was to ensure that the Court would be able to obtain an up to date statement of affairs of the company and a report on its current financial state.

> (c) A direction that within two weeks, that is to say, by 23rd February, 2011, the petitioner and the first respondent retain an independent accountant to prepare, as soon as reasonably practicable, an up to date statement of affairs and a report on the company's current financial state. In default of agreement between the parties as to the nomination of the independent accountant, I directed that the petitioner should apply to Court to make the nomination of an independent accountant from a list of three names submitted to the Court.

The objective in obtaining the statement of affairs and the report was to enable the Court to determine whether the appropriate course would be to wind up the company rather than to attempt to formulate remedies under s. 205. I declared that the independent accountant might be retained at the expense of the company.

> (d) A direction that the petitioner procure at the expense of the petitioner 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.

The objective was to enable the Court to make a realistic determination of the current value of the property element of the company's assets.

> (e) An order that the first respondent reimburse to the company the sums aggregating €180,000 which he withdrew from the company after 14th September, 2009 to discharge fees dues to Gibson and Associates, the sum of €180,000 to be held by the company in escrow pending the final determination of these proceedings.

That order was intended to provisionally redress unauthorised payments made by the first respondent out of company funds pending the determination of liability for those costs of the proceedings.

13.2 I indicated that no order was being made at that stage in relation to the counter-complaint made against the petitioner by the first respondent in his written submissions, in respect of which there was no evidence before the Court, in relation to the discharge of invoices presented by Gwen Malone Stenography Services in relation to the provision of stenography services throughout these proceedings. As I understand it, that issue has been resolved.

13.3 For the avoidance of doubt, I directed that the first respondent should be given the passwords necessary to enable him to access all of the electronic financial records of the company, that he might communicate directly with Stewart & MacLochlainn, and that that firm might communicate directly with the first respondent without reference to the petitioner, if it needed clarification of any issue raised by the first respondent. While at subsequent hearings the first respondent complained as to the level of access he obtained and the assistance which was forthcoming to him, I am not satisfied that the direction was not complied with.

13.4 I ordered that the proceedings be listed for mention on 16th March, 2011 at 10.30am to review progress. In the meantime either party had liberty to apply to Court on notice to the other party.

14. Subsequent hearings in outline

14.1 The matter came back before the Court on 16th March, 2011, on 13th April, 2011 and 5th May, 2011.

14.2 By 16th March, 2011 the petitioner and the first respondent had failed to agree on an independent accountant to prepare a statement of affairs and report on the company's current financial status. On that day, the Court appointed Deloitte & Touche, Chartered Accountants, to perform that task, if they were prepared to do so. They were. On 13th April, 2011 the Court was furnished with the report of Deloitte & Touche dated 12th April, 2011.

14.3 The first respondent and the petitioner were afforded an opportunity to make written submissions arising out of the Deloitte & Touche report. Having done so, the Court heard submissions from both sides on 5th May, 2011.

14.4 I now propose dealing with the current position in relation to each of the directions given and orders made by the Court on 9th February, 2011.

15. Outstanding accounts

15.1 On 25th February, 2011 the first respondent wrote to Stewart & MacLochlainn, as the company's auditors, enclosing a document in which he set out his objections and concerns relating to the draft annual accounts for the years 2006, 2007, 2008 and 2009 and to the books of account of the company. In the covering letter, he set out his general objections to the accounts: that they did not properly reflect material matters related to the activities and financial position of the company; that they were not properly prepared and completed in accordance with the provisions of the Companies Acts; that they were based on improper books of account and did not agree with the books of account; and that they were always prepared considerably in arrears and no up to date management information was available for comparable review. It would appear that the first respondent fails to appreciate that, if there is substance in those objections, and I am not satisfied that there is, they are matters for which he shares responsibility, as a director of the company, with the petitioner, even though, historically, the petitioner was in charge of financial management. Further, they are matters which the first respondent should seek to remedy in a practical way. Turning to the specific objections and concerns expressed in the enclosure, obviously, the Court cannot form a view on whether any of the objections and concerns are well founded or not. Many of the points he raised have been canvassed with the petitioner and with the auditors many times since 2007 or 2008, for example, the inter-company balance with Harup Limited. What emerges from the documentation is that the first respondent is not prepared to take cognisance of any reasonable approach suggested either by the petitioner or by the company's auditors in relation to points which he contends affect "the true and fair view" of the accounts. To take just one example, he complained about the treatment of "insurance proceeds" in his objections. One of the matters he complained about was that there was an amount, shown in the list of accruals, of €76,861 being insurance proceeds, which he contended had been incorrectly recorded in the accounts as a creditor falling due within one year. He also referred to the fact that there was an outstanding insurance claim for some €300,000, which did not appear to be recorded anywhere in the accounts or the books of account.

15.2 In their response dated 14th March, 2011, Stewart & MacLochlainn dealt with the "insurance proceeds" objection as follows:

> "We understand that this amount was included in the 2000 accounts as a deferred capital receipt and that it has been treated similarly in each year since. We understand that the final insurance proceeds figure has not yet been agreed. It is proposed that this matter be finalised when a final settlement is reached with the insurance company."

More light is thrown on the insurance proceeds issue in the Deloitte & Touche report, as will appear later. However, in his next letter to Stewart & MacLochlainn, dated 2nd April, 2011, the first respondent persisted in his contention that "there is a clear possibility that significant amount of insurance proceeds have not been properly accounted for in the annual accounts and the books of account of the company". Further, he stated that he was not aware of the inclusion of "a deferred capital receipt" in the accounts for any year. The Deloitte & Touche report suggests that the amount of €76,861 was carried as deferred income in the accounts. I have come to the conclusion that the first respondent was not acting in a constructive manner in pursuing the insurance proceeds issue with the auditors, but was being deliberately obstructive.

15.3 In addressing the general objections made by the first respondent, Stewart & MacLochlainn pointed out that they had been engaged to carry out the audit of the 2006, 2007 and 2008 accounts in 2009, that, by September 2009, 90% to 95% of the audit work had been completed, and that their belief was that, if the directors had adopted a commonsense approach, the accounts for those years could have been finalised in October or November 2009. They made the point that, in the accounts for those years, many of the matters raised by the first respondent in his specific objections were treated in the accounts in a manner which was consistent with the way they had been dealt with in previous years, when the accounts had been signed off by the first respondent and the petitioner and had been audited by one of the largest firms of auditors in the country. That appears to be correct and confirms me in the view that there was very little constructivity in the first respondent's objections and that he is being deliberately obstructive. The auditors concluded their letter by stating that, if the directors adopted a pragmatic approach to the various provisions, they could complete their post-balance sheet event review and get the accounts finalised. In that context they invited the first respondent to reconsider his position in relation to the accounts.

15.4 Unfortunately, as will be clear from the manner in which the insurance proceeds issue was dealt with by the first respondent in his letter of 2nd April, 2011, the first respondent did not reconsider his position. 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 auditors' response, in one instance accusing the auditors of "a fundamental misunderstanding of the difference between the role of auditors and directors" because of their use of certain non-technical language.

15.5 As I have stated earlier, I understand why Stewart & MacLochlainn do not wish to take sides in the dispute between the petitioner and the first respondent. However, I think it is reasonable to infer that their assertion of lack of commonsense on the part of the directors and their emphasis on the need for a pragmatic approach is directed at the first respondent, not at the petitioner. The evidence leads inevitably to the conclusion that the first respondent 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.

16. Accounts for 2010

16.1 The company's draft accounts for 2009 were submitted by the petitioner to the auditors on 16th February, 2011 and the auditors were requested to commence the audit for 2009. The company's draft accounts for 2010 were submitted to the auditors on 29th March, 2011, but were based on estimated stock valuations as the final stock valuations for that year had not been completed by the first respondent.

16.2 Having regard to the contents of subsequent correspondence, I do not get the impression that the first respondent will co-operate with the petitioner in a manner which will result in audit ready draft accounts for 2010 being available to enable the audit to be carried out. On the contrary, having regard to his attitude to date, I think there is little prospect of that happening.

17. Property valuations

17.1 In a comprehensive report of 14th March, 2011, Trevor Porter of Property Partners Paul Reynolds & Co. Ltd., Auctioneers, Estate Agents and Valuers, a firm carrying on business in Letterkenny, has given up to date valuations on the twelve properties owned by the companies. He has put an aggregate value of €4,314,000 on the twelve properties.

17.2 In relation to the company's main retail/warehouse building, which is a modern unit located on a 12.5 acre site at Letterkenny Mills, which is located within the town boundaries of Letterkenny, he has attributed a value of €1,500,000 to it. That means that the aggregate value of the remainder of the twelve properties is estimated at €2,814,000.

17.3 Of the remainder of the properties, only two would appear to be used in connection with the company's principal business of builders merchant. One is one of three buildings owned by the company at Castle Street, Ramelton, County Donegal. This is a single storey building, which is currently used as a hardware store. Although the building was refurbished in 2006, Mr. Porter stated that it is in poor condition. However, I understand from the Deloitte & Touche report that business is carried on from it. In relation to the two

adjoining buildings, which were formerly used as grain stores, Mr. Porter has described them as being derelict but as having re-development potential, subject to planning permission. Mr. Porter has put a single value on the three buildings, which no doubt could be apportioned. The other is the Coal Yard and lands located at Ballyraine, Letterkenny, which comprises one building situate on 7.3 acres of land. According to Mr. Porter the building is in poor repair and, in his opinion, is in need of demolition and re-development, subject to planning permission. However, I note from the Deloitte & Touche report that the company maintained stock at the Coal Yard in April of this year. Mr. Porter has put a composite current market value on this entire property, including the land, which no doubt could be apportioned.

17.4 The only observation made by the first respondent in relation to the valuations in his written submissions was that his understanding was that there has been "an absence of market transactions since 2007 on which to base the valuations". It is true that Mr. Porter does not cite any recent market comparisons. Nonetheless, for the purpose of the determinations which the Court has to make, I am satisfied that his valuations can be accepted as realistic having regard to the level of detail included in his report.

17.5 Although Mr. Porter does not allude to this fact, it is clear from the Deloitte & Touche report that some of the properties which Mr. Porter has valued are subject to fixed charges in debentures, while all of the assets of the company are subject to floating charges.

18. Reimbursement of €180,000 to the company by the first respondent

18.1 When the matter came before the Court on 16th March, 2011 the sum of €180,000 had not been repaid by the first respondent to the company. However, the first respondent told the Court that he had inherited land under his mother's will and that it could be made available. However, as I understand it, Mrs. Kelly's will has not been proved and a caveat has been entered by the first respondent.

18.2 The position remained the same on 13th April, 2011 and on 5th May, 2011. However, the Court was informed on 5th May, 2011 that €180,000 had not been withdrawn from the company, because the first respondent had discovered that one of the bank drafts, which was dated 12th February, 2010 and was in the amount of €15,000, had never been negotiated. He still had it. The Court directed that the amount in question, €15,000, be re-lodged to the company's account as soon as possible. On that occasion, the first respondent informed the Court that the land which he had inherited and which he proposed to use to repay the monies to the company had been valued at €120,000. He had applied to Ulster Bank for a loan. His evidence was that obtaining a loan is the only way in which he can make the repayment, because the land is his only substantial asset.

19. Report of Deloitte & Touche

19.1 The report dated 12th April, 2011 was authored by David O'Flanagan, a Chartered Accountant and a partner in the firm of Deloitte & Touche. Mr. O'Flanagan set out in the report the constraints he laboured under in producing the report. The information on which the report is based was not the subject of an independent audit verification by either Deloitte & Touche or by Mr. O'Flanagan. His understanding was that the majority of the information had been extracted from underlying accounting records of the company. He had meetings with the petitioner, the first respondent and the office accountant of the company. He presented his report in draft form to the petitioner and the first respondent and he sought their views on his factual accuracy. A point which Mr. O'Flanagan stressed was that management information which he would expect to be available is not produced in the company, for example, monthly management accounts and an ageing of debtors.

19.2 Mr. O'Flanagan prepared a statement of affairs for the company as at 30th December, 2010. The absence of management accounts prepared on a monthly basis informed his decision to base the statement of affairs on the draft accounts for the year 2010, which were produced by the petitioner at the end of March 2011. However, he did also examine the current financial state of the company as of April 2011 and I will return to that aspect of the report later.

19.3 The statement of affairs is set out in tabular form in the report and its various components are fully explained in the text of the report. In summary, the statement of affairs discloses the following:

> (a) That there are two components in the fixed assets. The first is the twelve properties which were valued by Mr. Porter. Mr. O'Flanagan used Mr. Porter's valuation of these properties, that is to say, €4,314,000. He noted that, while the petitioner had provided him with the petitioner's assessment of the Capital Gains Tax which would arise on the sale of the property assets at the value shown and indicated that there would be no Capital Gains Tax payable, Mr. O'Flanagan expressed the view that there was a risk that some tax could arise and he estimated the potential tax charge, based on information provided by the company, which could arise as being in the region of €250,000. He also noted that the company has created various mortgage debentures, which I assume are in favour of the Bank, at various times from 1959 onwards under which the company's overdraft is secured by way of floating charge and by way of fixed charge over certain assets, the description of which, in some cases, I find it difficult to relate to Mr. Porter's descriptions. The mortgage debentures have not been put in evidence. However, I think it must be assumed that, in the event of some of the properties being sold, the issue of procuring a release from the mortgage debentures would arise. The second component of the fixed assets is plant and machinery and motor vehicles. Mr. O'Flanagan has based his figure of €238,061 on the fixed asset register of the company, which sets out the cost of each asset, accumulated depreciation and depreciation charge in 2010. He has confirmed that he has verified that the depreciation applied is consistent with the policy of the company. However, he has not verified the existence of any item on the register and has relied on the assurances from the directors of the company as to its accuracy. As with so many elements of the report, the first respondent has stated that he was not able to give Mr. O'Flanagan any assurance and that he had reservations about the proper maintenance of the register, as if he is entitled to stand aloof from the record keeping and accounting process within the company, of which he is a director. The total value of fixed assets is given as €4,552,061.
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> (b) The total of the current assets of the company is given as €2,192,095 which comprises mainly of stock, trade debtors and other debtors.
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> (c) In relation to stock, the figure which appears in the statement of affairs is €1,603,844. Mr. O'Flanagan disclosed that he was aware that the stocktake which the Court directed should be completed in connection with the preparation of the 2010 accounts had not been completed when he was preparing the statement of affairs. He stated that he was also aware that there had been no detailed examination or analysis of slow-moving or obsolete stock and he pointed to the risk of under or over provision for obsolete and slow-moving stock. However, he proceeded on the assumption that the figure that he had included was not materially incorrect, in that it included a provision of €331,914 to take account of old and slow-moving stock, which equated to around 20% of the gross value of the stock. The first respondent also raised issues in relation to the stock valuation and also made the point that Mr. O'Flanagan's figure was based on an incomplete stock figure for 2010. The fault for that, it has to be stressed, lies fairly at the door of the first respondent. In the

context of the stock provision, the first respondent also raised with Mr. O'Flanagan a point which he has made repeatedly in relation to the treatment of a figure of €102,914 in the accounts of the company, the detail of which I do not propose to go into, save to say that it is connected with the oft referred to inter-company balance in respect of Harup Ltd. While I am not in a position to determine whether what the first respondent suggests would be the proper treatment of that figure in the accounts of the company over the years is correct or not, the fact is that it is a relatively small figure in the context of the statement of affairs. Mr. O'Flanagan's view was that prudence dictated that, for the purposes of producing the statement of affairs, that figure should be treated as part of the provision against stock. He emphasised that the adequacy of the stock provision could only be determined after completion of the stock count and a detailed line by line assessment of the stock items, which is the responsibility of the petitioner and the first respondent.

(d) Trade debtors are included in the sum of €374,116, having made provision for bad debts based on the company's debtors listing, which Mr. O'Flanagan had not verified to customer statements. He made the point that a proper consideration of bad debts needed to be undertaken by the directors to assess the adequacy of the bad debt provisions.

(e) As regards other debtors, the bulk of the figure of €203,589 assigned was made up of the sum of €180,000, which the Court had directed the first respondent to repay to the company on 9th February, 2011. In the light of what I have stated at 18.2 above, it is probable that the amount to be repaid is now €165,000. Mr. O'Flanagan rejected a submission made to him by the first respondent that €161,140 of the figure of €180,000 should be treated as a contingent asset rather than as another debtor. Obviously, on the basis that the first respondent told the Court that he had not been in a position to discharge the sum ordered to be repaid to the company, I have to have regard to the fact that the company may not recoup the sum of €165,000 in the short term.

(f) One further quibble which the first respondent had in relation to "other debtors" related to the amount included by Mr. O'Flanagan for "sundry investments", that is to say, investments by the company in unrelated companies, which he put at €391. Mr. O'Flanagan rejected the issue raised by the first respondent, as he had not provided any evidence in support of his suggestion and, given the small amount involved, he did not consider it a material issue to his findings. In his written submissions, the first respondent stated that he had subsequently obtained documentary evidence of the value of the investments in question, which he put at €10,220. While the first respondent's figure is probably correct, it is still not material to the outcome of Mr. O'Flanagan's analysis. However, the pursuit of this issue illustrates the extent to which the first respondent has failed to identify the real issues which arise in relation to the matters with which the Court is concerned and with which, as a director of the company, he should be concerned.

(g) The total current liabilities of the company are shown as €3,946,698, covering bank overdraft, trade creditors and other creditors. As regards the bank overdraft, Mr. O'Flanagan verified the balance to a bank reconciliation report supplied by the company and to bank statements. He verified the figure for trade creditors against the creditors' listing, which was presented to him, but he did not contact creditors or other third parties to verify the accuracy of the listing. In relation to "other creditors" Mr. O'Flanagan outlined in detail the approach he had adopted in relation to various items, which I am satisfied was a sensible approach. In relation to accruals and deferred income he pointed out that the sum included the sum of €76,861 in respect of deferred income relating to an insurance refund dating back to 2000. He set out his understanding of the issue raised by Mr. Kelly in relation to that figure, stating that he had been informed that it was part of a sum of €292,000 which was paid by the company's insurers in relation to a fire in 1999, the balance, €215,139, having been released to the profit and loss account in 2000 and the sum in question having been carried as deferred income in the current accounts. While he acknowledged that it appeared that the amount in question could be released to the profit and loss account, he made no adjustment of that account. However, in providing for a sum of €100,000 in respect of "excess provisions", to which I will refer later, he did take it into account. I have set out Mr. O'Flanagan's explanation because it supports the view I have formed that the first respondent has not adopted a constructive approach in relation to the outstanding accounts.

(h) Arising from the totals referred to at (b) and (g) above, net current liabilities are shown as €1,754,603.

(i) Arising from the totals referred to at (a) and (h) above, net assets before adjustment are shown as €2,797,458. Two adjustments have been made to that figure. The first is the addition of a sum of €537,000 to cover other assets. The petitioner had presented Mr. O'Flanagan with a document entitled "Summary of Receivables for 2011", which covered seven items which aggregated €955,000. Mr. O'Flanagan did not consider it appropriate to include five of the items in the statement of affairs, for the reasons he set out. The first of the two items he included related to a settlement offer made by the insurer in relation to the fire in 1999. Mr. O'Flanagan recorded that he had seen a copy of a letter from the company's insurance broker which indicated that a settlement offer had been made by the insurer and, on that basis, he considered it appropriate to include the relevant sum in the statement of affairs. Similarly, in relation to money due to the company arising out of Compulsory Purchase Order, which I understand was made by the Local Authority over property of the company, he included a figure which appeared in a letter from a Chartered Valuation Surveyor calculating the compensation due by the Local Authority. The second adjustment provided for the addition of a sum of €100,000. Mr. O'Flanagan had been furnished with a document entitled "Summary of Provisions in Accounts", which the petitioner contended were overprovided and should be written back. Mr. O'Flanagan rejected the petitioner's contention that there should be an adjustment in the amount of €698,000, as suggested by the petitioner, pointing out, however, that it was for the directors to finalise their views on the point. His figure of €100,000 was what he considered to be a prudent estimate of potential excess provisions, noting that it was common case between the petitioner and the first respondent that some of the provision amounts could potentially be written back.

(j) Having made those adjustments, the "bottom line" on the statement of affairs showed net assets in the amount of €3,434,958 as at 30th December, 2010.

While noting the limitations under which Mr. O'Flanagan was constrained to operate, which he made absolutely clear, his approach in preparing the statement of affairs seems to me to be both prudent and reasonable and it has been of considerable assistance to the Court.

19.4 Mr. O'Flanagan also addressed the current financial state of the company at the date of his report. He was furnished with an updated 2011 rolling assessment of the expected financial performance of the company, which was based on the books and records, which he compared with the comparative actual figures for 2010 based on the 2010 draft accounts. He also analysed the movement of the company balance sheet between December 2009 and December 2010, again based on the draft accounts. 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 of the budget for the current year, at the level of €850,000.

19.5 For purely illustrative purposes to assist the Court, Mr. O'Flanagan conducted what he described as a very high level analysis of the likely break-even position of the company, using the profit and loss account for the year 2004, which had been agreed by both the petitioner and the first respondent, as the basis of the analysis. As he put it, in very broad terms, for the company to achieve profitability one of the following circumstances would have to arise, or a combination of them:

> (a) Sales would need to increase. However, he made the point that, if the gross margin and overheads and interest costs were to stay at the projected 2011 levels, the sales would need to increase to around €8.3m to achieve a break-even position, as against €4.95m in 2010. Given the current economic climate, I think it is reasonable to assume that it is unlikely to happen.
>
> (b) The gross margin would have to increase. If sales and overheads and interest were to stay at projected 2011 levels, he calculated that the margin would have to increase to 41% to achieve a break-even position, which he regarded as unrealistic, which is obviously the case.
>
> (c) The costs would have to decrease. If sales and gross margin were to 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.

19.6 Mr. O'Flanagan made a number of additional very important observations. He emphasised that the company is reliant on the ongoing support of its bankers, and commented on the fact that, given that the overdraft position appears to be permanent, it does not appear appropriate that what is in fact debt of a medium to long-term nature is financed by a short-term source of finance, that is to say, an overdraft. The first respondent must be blamed for that unsatisfactory state of affairs. His overall view was that the company faces very real and urgent difficulties, pointing out that it is incurring trading losses of €750,000 to €850,000. He estimated that, after accounting for depreciation in excess of capital expenditure, the company is suffering cash losses in the order of €500,000 per annum which he stated is not sustainable. He pointed out that the cash losses are depleting the company's asset base and leave the company dependent on facilities from its bankers, which are not secure, in that there is no formal agreement in place.

19.7 Mr. O'Flanagan also pointed out that the company has a large amount of trade creditors which are aged 90 days or more and had net current liabilities in the amount of €1.7m at December 2010. He opined that this must bring into question the ability of the company to settle its debts as they fall due. On that point, no evidence has been adduced that the company is not dealing with its creditors.

19.8 Finally, Mr. O'Flanagan stated that he would expect to see significant actions taking place to reduce the level of costs and to restructure the company so that it can live within its means. He had seen no evidence of this action taking place, but recognised how the current dispute between the petitioner and the first respondent has impacted on the ability of the company to address the significant issues which he had outlined.

19.9 It is of grave concern that the first respondent does not appear to have taken on board the seriousness of the observations made by Mr. O'Flanagan. He produced a 32 page document to the Court, approximately one quarter of which addressed Mr. O'Flanagan's report. In relation to Mr. O'Flanagan's opinion that the company faces real and urgent difficulties, his comment was to blame the petitioner for this state of affairs. He expressed the view that the company is better positioned to face the challenges of the market today than it was during the recession in the 1980s. In relation to cost reduction, while stating that there was a clear willingness among staff members to address the issues facing the company, including cost reduction, he stated his view that there must be a commitment from management to minimise the impact of cost reduction on staff members. Once again, he blamed the petitioner for "dismantling the established management structures and systems within the company". The most disconcerting aspect of the written submissions, however, is the degree to which the first respondent remains fixated on detail. That manifested itself at the hearing on 5th May, 2011, when he handed into the Court a copy of a letter to the petitioner dated 4th May, 2011 enclosing an appendix showing a stock valuation comparison with the year 2008. What that document discloses is that there was very little difference in relation to the estimated value of stock before provision as set out in the statement of affairs in Mr. O'Flanagan's report, in the accounts for 2010 and the first respondent's calculation. The detail in relation to the provision as calculated by the first respondent brought the stock valuation to €1,388,274 for 2010, €215,570 less than Mr. O'Flanagan's figure after making provision. Unfortunately, that level of detail does not assist the Court in determining what the appropriate remedy is in this case. It does, however, suggest that the first respondent has no conception of the real issues which have to be tackled to ensure that the company survives.

20. Determination of appropriate remedy

20.1 I now propose summarising the final position put to the Court on behalf of the petitioner and by the first respondent following the reports of Mr. Porter and of Mr. O'Flanagan.

20.2 It has been made clear to the Court that neither party wishes the Court to make a winding up order. Moreover, it has been made clear that neither party is in a position to acquire the shareholding of the other party.

20.3 The position of the petitioner is that the petitioner and the first respondent cannot run the company together and that, until such time as the first respondent is divested of his interest in the company and control passes to the petitioner, the affairs of the company cannot be stabilised. I am satisfied that that is the reality of the situation.

20.4 As to how that is to be achieved, it was submitted on behalf of the petitioner that the Court should order that the company acquire for fair market value the shareholding of the first respondent in the company and that the first respondent should be ordered to resign as a director of the company. Counsel for the petitioner also submitted that the Court should order the sale or transfer of such part of the company's property portfolio as is necessary to meet the cost of the purchase by the company of the shareholding of the first respondent. As I understand that submission, what is envisaged is that the company would either pay the purchase price in cash or by a distribution *in specie* to the first respondent of some of the property assets of the company. Counsel for the petitioner also submitted that insofar as the sum of €180,000 taken by the petitioner out of the company to pay legal costs has not been refunded to the company, the price which the company should pay for his shares should be adjusted accordingly, which implies that the Court should make a permanent order for reimbursement.

20.5 The position of the first respondent, as articulated by him, is that the interest of the company should be put first. While I have no doubt that he genuinely subscribes to that view and believes that his presence is in the best interests of the company, unfortunately, one has to conclude that his perspective of what is in the best interests of the company is not merely naïve but totally misguided. To illustrate that point, the first respondent submitted that his first objective still is to achieve an amicable settlement, which he stated can only be done in the context of constructive dialogue. The time for an amicable settlement was three years ago. I

have formed the view that the first respondent 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. Specifically, the first respondent submitted that it is not in the best interest of the company that he should leave the company or that the petitioner should assume control, stating that the petitioner was intent on cutting the number of staff and that his only concerns were with sales and revenue. Once again, I would observe that the respondent does not appear to have taken on board what Mr. O'Flanagan has stated about the current financial state of the company and he seems to have no appreciation what is needed to be done if the company is to survive. The first respondent made the point that it would be open to the Court to direct the company to acquire the petitioner's shareholding and to leave him in the company, referring to the commentary in Joffe (*op. cit*.) at paras. 5.203/204/205, which had been referred to by counsel for the petitioner in their written submissions.

20.6 Putting the interest of the company first, as urged by the first respondent requires consideration of whether and by what means the real and urgent difficulties adverted to by Mr. O'Flanagan can be overcome. I am satisfied that while the first respondent 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 that the only path to the survival of the company is that the first respondent should cease to be both a shareholder and a director of the company. As the petitioner is not in a position to acquire the shareholding of the first respondent 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 the first respondent at fair market value, with a consequent reduction in the company's share capital. Making that decision in principle involves raising and addressing a number of issues.

20.7 First, it is necessary to reiterate the outcome of the first module of these proceedings, which I have outlined at the outset, which is that 7,936 shares of the 7,938 issued shares of the company are owned jointly by the petitioner and the first respondent and the remaining two shares are part of the estate of Mrs. Kelly, deceased. While no submissions were made by either of the parties on this point, in order to give effect to an order for the sale of the shareholding of the first respondent, it is necessary to sever the joint ownership of the shares which are jointly owned by the petitioner and the first respondent, so that each of the petitioner and the first respondent becomes the sole owner of 3,968 shares. I consider it necessary to make an order to that effect. In the interests of clarity, as the will of Mrs. Kelly has not been proved, insofar as the first respondent has an interest in the two shares to which she was entitled at the date of her death, that interest will not be affected by the orders made by the Court.

20.8 Secondly, the issue as to how the purchase price of the shareholding of the first respondent is to be determined has to be addressed. It is not possible to determine the value of 3,968 shares in the company as of now on the basis of the evidence before the Court. What I propose, subject to the firm being prepared to take on the task, is to appoint Deloitte & Touche to conduct a valuation of 3,968 shares in the company as at 31st August, 2011, and to direct that the remuneration for performing that task is to be paid by the company. Obviously, an alternative approach will have to be adopted if Deloitte & Touche are not prepared to take on the task. Further, as happened in *Re Clubman Shirts Ltd*., the objective of making such an appointment under the Court's inherent jurisdiction is to assist the Court, but the ultimate decision as to the value of the shares and the purchase price will remain with the Court.

20.9 Thirdly, having regard to what has happened, or, more correctly, what has not happened since the Court ordered the first respondent to reimburse the company of the sums aggregating €180,000, which he improperly withdrew from the company to discharge legal fees, I consider that the practical approach to the matter is, as suggested by counsel for the petitioner, that the purchase price for the shareholding of the first respondent be reduced by the amount not so reimbursed by the first respondent (whether €180,000 or €165,000). That approach is based on the determination that the sum in question should be repaid to the company permanently because, in reality, the dispute in respect of which the legal fees discharged were incurred was a dispute involving the first respondent, not the company, and the sums in question, which were taken from the company without authority, should not be borne by the company.

20.10 Finally, it is not possible to determine in what manner the purchase price for the shareholding of the first respondent is to be discharged by the company. While it is implicit in the approach advocated by the petitioner that he anticipates that some of the properties in the company's property portfolio will be available to meet the purchase price, for a number of reasons, it is not possible to form a view at this stage as to whether a direction should be given to sell some of those properties or that a distribution *in specie* to the first respondent be made. First, and most importantly, it is not clear to what extent the company would be able to procure the release of such of the properties in its property portfolio as are subject thereto from existing fixed charges thereon. Secondly, it is not clear which of the properties in the property portfolio, aside from the company's principal retail and warehouse premises at Letterkenny Mills, is essential for the proper conduct of the business of the company. Thirdly, until the value of the shareholding of the first respondent is determined and adjusted to fix the purchase price of the shareholding, it will not be clear how much of the property portfolio, other than properties essential for the conduct of the business of the company, will be required to meet the purchase price.

21. Orders

21.1 In summary, the following orders will be made:

> (a) an order amending the petition to incorporate a claim that the company be directed to purchase from the first respondent his shareholding in the company at fair market value;
>
> (b) an order that each of the first respondent and the petitioner be registered as the owner of 3,968 shares in the company;
>
> (c) an order that the company purchase the 3,968 shares of the first respondent in the company 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);
>
> (d) subject to Deloitte & Touche being willing to take on the appointment, an order that Deloitte & Touche be appointed to carry out a fair market valuation of the said 3,968 shares as at 31st August, 2011, the remuneration to be paid to Deloitte & Touche for performing the said task to be discharged by the company;
>
> (e) an order that there be set off against the value of the shareholding of the first respondent in the company all or so much of the sum of €180,000 taken by the first respondent from the company to discharge legal fees as has not been reimbursed to the company, so that the purchase price to be paid by the company for the said shareholding of the first respondent will be the value so determined less the amount of the set off;

(f) an order that the first respondent resign as a director of the company forthwith and that the petitioner be at liberty to appoint a director in his place.

21.2 It is to be hoped that the foregoing orders will enable the petitioner to take steps to assure the company's banker that the company should continue to be supported by it and to explore and implement the most appropriate course of action to improve the profitability of the company and secure its viability for the benefit of all of the company's stakeholders, in particular, its creditors and employees. However, the petitioner will have to bear in mind that the purchase price of the first respondent's shareholding in the company will have to be either discharged in cash or by distribution *in specie* of properties in the company's property portfolio.

21.3 It is clear that further involvement by the Court may be necessary. The matter will be adjourned until 10.30am on Friday, 7th October, 2011 to review progress.