Neutral Citation: [2015] IEHC 195

THE HIGH COURT

[No. 418 COS 2014]

IN THE MATTER OF VANTAGE RESOURCES LIMITED, AND IN THE MATTER OF THE COMPANIES ACTS, 1963-2013 AND IN THE MATTER OF SECTION 205 AND SECTION 213 (F) OF THE COMPANIES ACT, 1963

BETWEEN

PAUL HAMILL

PETITIONER

AND

VANTAGE RESOURCES LIMITED AND SIMON MARTIN

RESPONDENTS

JUDGMENT of Mr. Justice Binchy delivered on the 20th day of March, 2015

1. In these proceedings the petitioner seeks the following reliefs:

> 1. An order pursuant to section 213(f) and/or section 213(g) of the Companies Act, 1963, (as amended) for the winding up of the first named respondent, Vantage Resources Limited (the "company").
>
> 2. In the alternative, such order or orders pursuant to section 205 of the Companies Act, 1963 including one or more of the following:
>
> > (i) An order dividing the assets and liabilities of the company among the petitioner and the second named respondent in such proportion as the court may seem fit;
> >
> > (ii) In the alternative an order directing the second named respondent to sell his shares in the company to the petitioner, at such price as the court shall deem fit.
> >
> > (iii) In the further alternative, an order directing the respondents to purchase the petitioner's shareholding in the company for such a price as to which the court shall deem fit.
> >
> > (iv) An injunction restraining the second named respondent from continuing to involve the petitioner in the day to day operations, running and decision making of the company.
> >
> > (v) Further, or in the alternative, an order for the winding up of the company.

Background

2. The proceedings came on for hearing before the court on 5th February, 2015 and concluded on 13th February, 2015. At the conclusion of the petitioner's case, counsel for the respondents, Bill Shipsey SC, moved an application for a direction from the court to dismiss the proceedings, indicating that Mr. Martin would go into evidence if this application was unsuccessful. In the event, the application was not successful on the basis that I considered that the applicant had established a prima facie case of oppression of his interests in the company as minority shareholder.

3. The company was incorporated on 25th April, 2000. Its initial shareholders were Mr. Martin who held 80% of the shares and Mr. Jeff Ruddell who held the remaining 20% of the shares. At that time Mr. Martin had already had some success with another company called Vantage Software which he had established in 1995 and in 2000 he identified a new opportunity in supplying IT staff to existing customers of Vantage Software, and for this purpose he, together with a Mr. Jeff Ruddell formed the company. Mr. Martin held 80% of the shares and Mr. Ruddell held 20% of the shares.

4. Approximately a year later, Mr. Ruddell informed Mr. Martin that he wished to retire from the company. Mr. Ruddell invited Mr. Martin to purchase Mr. Ruddell's shareholding, but Mr. Martin said that he did not want to invest further money in shares in the company and nor did he want to own 100% of the company, so he agreed to assist Mr. Ruddell in identifying another party who might be interested in acquiring Mr. Ruddell's shareholding. An acquaintance of Mr. Martin's suggested that the petitioner, who Mr. Martin already knew from a time when they both worked with Bank of Ireland, might be interested in acquiring Mr. Ruddell's shareholding. In the event, the petitioner agreed to acquire Mr. Ruddell's shareholding (which he acquired in two tranches, the first of 15% and the second of 5%) on condition that he could subsequently acquire an extra 10% in the company from Mr. Martin. Mr. Martin agreed to this on the basis that certain targets would be met in the following years. While these targets were not fully reached, Mr. Martin nonetheless honoured the commitment and Mr. Hamill acquired a further 10% of the issued share capital in the company from Mr. Martin in or about 2004/2005. At the time that the petitioner originally acquired a shareholding in the company, the petitioner and Mr. Martin entered into a management agreement dated 30th May, 2002. This agreement provided, *inter alia*, for the increase in the petitioner's shareholding described above. The parties i.e. the petitioner and the respondent subsequently entered into a shareholder's agreement dated 17th February, 2005. This agreement contains many of the provisions which one would expect to see in an agreement of this kind and, most relevant to these proceedings:

> (a) Clause 4 of the Agreement is a "best endeavours" clause requiring the parties to act with the utmost integrity and good faith in relation to the company and their dealings with and on behalf of the company.
>
> (b) Clause 7 provides that "the Directors shall be paid such fees as they shall from time to time agree. In the event of a dispute, the view of Simon Martin, as majority shareholder shall prevail."
>
> (c) Clause 14 contains comprehensive provisions in relation to the transfer of shares in the company. This clause permits any shareholder to transfer his shares in the company in accordance with the procedures set out therein. These

procedures require a shareholder wishing to dispose of his shares to offer them by notice in writing to the holders of other shares in the company who are then given 28 days within which to respond. If the other shareholders are interested in acquiring the shares, there is a mechanism set out for determing the price of the same, in the absence of agreement. If either party does not wish to proceed on the basis of the share price as so determined, then he is not bound to do so and in that event the shareholder who wishes to transfer his shares may offer the shares to a third party or parties who are not members of the company.

(d) Clause 25 of the shareholders agreement states that it embodies the entire agreement between the parties and supersedes all prior agreements.

(e) Clause 27 of the agreement states that it shall not be deemed to create any partnership between the parties in relation to the company.

5. The company traded successfully from the outset and continued to do so from the time the petitioner became a shareholder. It was agreed from the outset of the petitioner's involvement in the company that he would work for the company on a part-time consultancy basis, providing his services to the company through another company of which the petitioner was the sole shareholder namely Aspect Consulting Limited. Through this company, the petitioner also provided services to the Gowan Motor Group and it was always understood that he could continue to do so, dividing his time between providing services to the Gowan Group and the company. In addition to receiving their remuneration as an employee, in the case of Mr. Martin, and as a consultant, in the case of the petitioner (in his case via Aspect Consultancy Limited) it was agreed that the petitioner and Mr. Martin would be paid Directors fees to be divided in accordance with their shareholding in the company i.e. 70% of all fees to be paid to Mr. Martin and 30% to be paid to the petitioner. For reasons of legitimate tax planning, this method of payment was preferred to declaration of dividends. By arrangement between them, the manner in which the petitioner and Mr. Martin received these payments was different in each case. In the case of the petitioner, it was arranged that the company would open a separate bank account with Rabo Bank (in the name of the company) into which payments would be made on behalf of the petitioner to be drawn down by him in accordance with his directions. In the case of Mr. Martin, and with the agreement of the petitioner, a separate company, Ecoview Ltd. was formed as a subsidiary of the company. Since this was to be Mr. Martin's vehicle for receiving directors fees, only he and his wife were directors of this company. Mr. Martin's directors fees were to be paid into Ecoview Ltd for his use and benefit, although that company was a fully owned subsidiary of the company. This had the legitimate effect of avoiding any liability to taxation on these payments (in the hands of Mr. Martin at least) until such time as Mr. Martin drew down any funds form Ecoview Ltd for his personal use.

6. At all relevant times, Mr. Martin was the managing director of the company and the petitioner was the operations director. According to the grounding affidavit of the petitioner dated 11th September, 2014, the managing director concentrated on the financial aspects of the company, while the petitioner managed a number of client relationships and in more recent years chaired monthly operations meetings involving two other managers in the company. The premises from which the company conducts business is jointly owned by the petitioner and Mr. Martin, both of whom also jointly own a house in Spain, a personal investment unconnected to the company.

7. The company traded well up to 2010 when along with so many other businesses in the country it began to experience the effects of the financial crisis. Up until this point it had been somewhat sheltered from the effects of the crisis for a number of reasons, most particularly because of a contract with Royal Bank of Scotland which the company won in 2007. In 2010 however, Mr. Martin became more and more concerned about the effects of the financial crisis and he felt he was having to work excessive hours in the company. He approached the petitioner and asked him if he would consider working on a full-time basis, but the petitioner declined to do so. Mr. Martin did not pursue the issue further with the petitioner at the time.

8. In the years 2011-2013, turnover in the company declined from approximately €14 million to €10 million per annum. The company had a valuable contract with the Department of Agriculture which was due to come to an end at around the end of 2012, at which point in time the company was obliged to tender for this work again. The outcome of the tender process was that the company lost the majority of the business that it had with the Department of Agriculture. Also during 2013, there was a sharp decline in the value of the margins from the business the company had with AIB Bank, which up to that point had been a significant source of revenue to the company.

9. In December 2013, Mr. Martin entered into a contract to purchase a site in Foxrock for the sum of €806,000. Although the contract to purchase the property was entered into by Mr. Martin's solicitors in trust for Mr. Martin and his wife, and although the deposit was part funded by Mr. Martin and by Ecoview, Mr. Martin subsequently procured that the acquisition of the site was completed and funded in its entirety by the company.

10. Events from February, 2014

The petitioner gave evidence that Mr. Martin became particularly agitated and stressed by these negative developments in the affairs of the company. For his part, the petitioner stated that he worked a significant amount of additional time during October and November of 2013 because of the work associated with the Department of Agriculture tender. In early February, 2014 Mr. Martin suggested to Mr. Hamill that the company might approach a Mr. Martin Walsh with a view to asking him to become a chairman of the company. Mr. Walsh had previously owned a very successful IT company which he had sold for a significant sum of money in 2007. Mr. Martin had the objective of enhancing the presence of the company in the marketplace (through a chairman such as Mr. Walsh) with a view to making it more attractive for sale in the future. In principle, Mr. Hamill agreed to this proposal and the petitioner and Mr. Martin met with Mr. Walsh during the course of February. Ultimately nothing came of this (because the petitioner and Mr. Martin could not reach agreement on the terms to be given to Mr. Walsh in relation to such an appointment) but the petitioner complains in these proceedings about the manner in which Mr. Martin conducted himself during these discussions and in particular that, the petitioner says, Mr. Martin offered the position of Chairman of the company to Mr. Walsh during their meeting with him, when the petitioner understood that the purpose of the meeting was merely to explore the possibility of such an appointment and related issues.

11. In late February/early March 2014 Mr. Martin again approached the petitioner to ask him if he would agree to work full-time for the company. The petitioner contends that Mr. Martin said to him at a meeting that the provision of services through Aspect Consulting Limited added little or nothing to the business and profitability of the company and according to the petitioner, this was the reason advanced by Mr. Martin for the request that the petitioner should now work full-time for the company. Mr. Martin however differs and states that the request, which was made by Mr. Martin at a meeting on 5th March, 2014, was motivated by Mr. Martin's view that the company needed to address the challenges posed to the company as a result of the loss of the Department of Agriculture contract and the decline in income from AIB. Additionally, Mr. Martin was concerned about his own health, suffering as he does from certain conditions which result in fatigue and pain. In short, Mr. Martin was concerned that his health would suffer if he

continued to run the business as the only full-time director. When requesting the petitioner to take on a full-time role with the company, Mr. Martin assured the petitioner that he would be paid a salary by the company that would reflect his lost income from the Gowan Group. This would have resulted in a base salary of €86,000. The petitioner took exception to this offer because, he said that Mr. Martin was aware that at that particular time his income from the Gowan Group had been reduced owing to the economic downturn generally. Moreover, Mr. Martin's base salary with the company was of the order of €140,000, whereas the original management agreement between the parties of 30th May, 2002 provided that the remuneration package received by each party, while in full-time employment, with the company, was to be equal.

12. In any case there were a number of meetings between the petitioner and Mr. Martin between mid February and mid April. The first of these of which there is a written record (retained by Mr. Martin) is a meeting on 5th March, 2014. Mr. Martin was concerned to address the problems facing the company and to agree with the petitioner a plan for the future of the company. A number of options were discussed:

1. Continue the business without fundamental change and try to cope with erosion of margins and loss of earnings.

2. Grow the business with a view to a future sale of the same;

3. A management buy out of the business;

4. Wind up the business.

13. They were both in agreement that the company should pursue a growth strategy. However, Mr. Martin made it clear that as far as he was concerned he had been taking on too much work and that he was only willing to continue if the petitioner joined the company as a full-time employee. No agreement was reached at this meeting and Mr. Martin and the petitioner again met on 12th March to discuss these issues. They also discussed a matter which had been bothering Mr. Martin for some time and that is the appointment of one of the company's sales men, Mr. Jason McNeill to the position of director and the issue of a minority shareholding to Mr. McNeill. Mr. Martin was concerned that if Mr. McNeill was not incentivised soon, that he might leave the company. This latter proposal would have involved both the petitioner and Mr. Martin diluting their shareholdings (on a proportionate basis) to accommodate the issue or transfer of shares to Mr. McNeill. In his evidence in relation to these discussions, the petitioner said "all of that was going on and he wanted agreements on that and he was pushing me on timeframes. I was driving him mad because I was going away and saying I have to think about that, I have to think about that. I came back and I agreed to some things, then I went away and rethought them and came back and disagreed with them again. To be honest with you I was probably all over the place at the time." The petitioner went onto say that he told Mr. Martin that he wasn't prepared to take a full-time job because he was getting mixed messages from Mr. Martin. He stated that Mr. Martin offered him a full-time position but the terms on which they were offered were completely unacceptable to the petitioner. In particular, this referred to the salary referred to above.

14. Mr. Hamill said that at one point he informed Mr. Martin that he would take the full-time job (in spite of his reservations) but then Mr. Martin said that he would need to think about it. The petitioner alleged that Mr. Martin was surprised when the petitioner agreed to accept the proposal.

15. The petitioner and Mr. Martin met again after St. Patrick's weekend on 19th March 2014. The petitioner said in evidence that "the whole sense I was getting was that our relationship was gone and broken down and effectively he wanted me out at that stage." He also said that he had the impression that Mr. Martin had a preference for the petitioner to exit the business, notwithstanding his request that the petitioner join the company as a full-time employee. Mr. Martin, in his account of this meeting, stated that the petitioner came to his office and abruptly told Mr. Martin that he was not prepared to take a permanent position with the company under any circumstances, and then left the meeting.

16. There was a further meeting on 21st March and Mr. Martin stated in his evidence that at that meeting the petitioner informed Mr. Martin that he really didn't like the business and that he didn't like working in the company anymore. Mr. Martin stated that the petitioner informed Mr. Martin that he wanted to sell his shares in the company, but his linked his shares to the Aspect Consulting contract. The petitioner stated in evidence that at that meeting, having changed his mind (and rejected the offer of full-time employment with the company) he believed that Mr. Martin was intending to terminate the Aspect Consultancy contract and accordingly he had a conversation with Mr. Martin about his exit from the company. The petitioner further stated that at that stage things had become so fraught that he realised that "the relationship was gone and there was no way forward" and so the petitioner suggested that he was prepared to sell his shares and exit the business because the relationship between the petitioner and Mr. Martin had broken down.

17. Mr. Martin however, informed the petitioner that he had no interest in purchasing his shares. The petitioner asked Mr. Martin would he mind if he, the petitioner, discussed the possible sale of his shares to Mr. McNeill and Mr. Martin confirmed that he had no difficulty with such a discussion taking place.

18. At this stage the proposal being discussed between the petitioner and Mr. Martin was the termination of the Aspect Consulting contract, but that the petitioner would remain as a director and would be paid non-executive director fees. While the petitioner in his evidence accepted that he agreed to this proposal, he further stated in evidence that he felt it was being imposed on him unilaterally. All of these discussions culminated in a letter from Mr. Martin to the petitioner dated 4th April, 2014 (handed by Mr. Martin to the petitioner on 7th April, 2014) in which Mr. Martin recorded the offer of a full-time position in the company to the petitioner and the rejection of that offer and further stating: "as agreed in our last discussion Aspect Consultancy Services will terminate on Friday 2nd May but you will remain as a director (non-executive) of the company." Mr. Martin sent an email to the petitioner on 8th April, 2014 with a view to implementing these arrangements. On 10th April, 2014 the petitioner met with Mr. Martin and handed him a letter protesting at the manner in which he had been treated by Mr. Martin. In this letter he made it clear that he would not be changing from a part-time role to a full-time role. He stated that the termination of the Aspect Consulting contract had been agreed by him as part of an overall arrangement. He further stated that his shareholding is "on the table for the figures discussed". By this he meant that he was prepared to sell his shares in the company for €2.1 million and he had proposed a mechanism whereby that could be achieved by the company acquiring or redeeming the shares. He concluded by stating that he was not prepared to dilute his shareholding for less than full value and that he would not transfer a portion of his shares at a discount (this latter statement related to the proposal to make shares available to Mr. McNeill and Mr. Martin Walsh). This led to a reply from Mr. Martin which in turn led to a further letter in reply from the petitioner, in which they each set out their respective positions. For this reason, these letters are worth setting out in full:

19. Letter of 14th April, 2014, Mr. Martin to the petitioner

Without prejudice

"Dear Paul,

I read your letter from Thursday the 10th but I have to say I am confused by its contents. There was some very strong sentiment from you in that letter and I feel its content does not represent our discussions from Wednesday the 2nd or previously. Taking into consideration your letters sentiment and content, I think I have a right of reply.

My letter to you on Monday and subsequent emails were a direct response to our conversation in my office on Wednesday 2nd last. For clarity purposes I have listed

below the topics of our conversation, which is my understanding of what was discussed.

We discussed:

a) An Exit Strategy: The part time arrangement we have in place between Aspect Consultants and the company. I did not believe further engagement will have any

benefit to the company considering the plans that are in place for growth and ultimate sale. You told me that you did not want to accept the full-time job offer and would exit day to day involvement in the business. I asked you would 30 days be an acceptable time frame for finishing the Aspect assignment and you agreed with me. I therefore thought it appropriate to give you the letter on Monday the 7th. For compliance alone some form of letter was needed as Aspect has a contract for services with the company.

b) A communication Strategy. What communication would we provide to our Internal staff and externally which primarily is to our customers. We agreed to think about this and discuss things further. I emailed you what I thought was appropriate on Tuesday the 8th, Which was:

1) Senior people inside. We need to let them know sooner rather than later. I include Barbara, Craig, Sam and Jason in this group. I think it's a good idea if you're there at this meeting. Let's confirm a time for this week or early next week. Message is you won't be coming in on a daily basis but are still a Company director with involvement in the business and all that this entails.

2) Other internal staff -Personally I wouldn't specifically mention this to them at all as you will still becoming in for various meetings.

3) Externally: What are your thoughts on this? Mine are is that we don't inform anyone apart from you talking to Mike and Stephen etc. You are still a Director — your clients will still ring you etc.

c) Directors Fees. You said that if you were no longer engaged with the business on a day-to day basis then you should receive a Directors fee and you stated that you would expect €l,500 a month payable to Aspect Consultants. I replied that in principal I didn't see a problem but wanted to verify the correct process for this from a compliance point of view. For example: That Directors fees could continue to be paid directly to Aspect, which is what you asked for. I did not know the answer at that time.

d) Shareholding: The conversation we had was divided up into two parts.

The first being your 30% shareholding in the company. You produced a document from Grant Thornton regarding a share redemption scheme and indicated that a reasonable payment for your shares was €2.1 million. I informed you that I personally had no interest in purchasing your shares and did not think it was in the company interest to purchase them either. I specifically reiterated to you that I had no interest in owning 100% of the company and that if I did I would have purchased Geoff Ruddell's shareholding back in 2003 before you purchased them. We have had similar conversations about this previously.

We then discussed diluting our existing shares in order to incentivise and lock in some key personnel. You specifically said that you were willing to do this under certain conditions. The first was that any dilution would be on a pro rata basis between us.

Secondly, that specific conditions were put in place around their sale and lastly, that you would not lower your holding below 25%. I accepted this and subsequently sent you the email on this with a share valuation formula attached. My email clearly stated this was just rough notes and could you give me your views on the document.

Paul, at this current time we both know that our sales figures have greatly reduced due to the loss of the agriculture business and the reduced numbers in AIB. The last quarter has seen sales figures reduce by over 15%. In addition we have both agreed on many occasions that our ultimate goal is to sell the business so that we can both realise our investment.

However, this will require the help of both key staff members and external expertise and very hard work over the next few years from everyone involved in the management of the company so that we can be in a position to attract a buyer. We both know that we have one critical person, namely Jason McNeil, involved in sales who we cannot afford to lose.

If Jason's expectations are not met and he leaves, then any chance of growth will fail and we will see sales decrease further. This will result in both our shareholdings being significantly reduced in value.

In order for you to realise the return you expect for your shareholding at this present time we would need to sell the company. Due to the current status of the company any sale at this time would in reality be a 'fire sale' which I don't believe would benefit either of us.

This current situation regarding Aspect and Vantage is distracting both of us from critical operational issues in the business which at this time is leaving the company in a precarious position.

Summary.

My main considerations in our ongoing discussions on all these subjects has very specific and definitive points which I have tried to outline verbally to you in our many conversations. I think it relevant now that I put these down in writing.

a) If you are working for Vantage on a part time basis what are you going to contribute to company operations in order that we can realise a sale. I believe your involvement with Gowans distracts you from providing a 100% contribution to company business especially now when your input will be needed most.

b) If we do not provide Jason with an equity stake and a Directorship he will leave the company to seek advancement with another company. I think you would agree that neither you nor I have the enthusiasm or energy to replace the input Jason makes to the business. This point I am 100% convinced of and you are welcome to have a conversation on this subject with Jason yourself.

c) We need to rapidly change our business strategy to cater for changes in the current marketplace and commit to working on this plan or we face continued erosion of our sales. This requires every ones 100% commitment to show solidarity to all our employees involved in our plan to sell the business.

d) I engaged with MW to become Chairman of the company (after agreeing this with you) because he has successfully sold a business and brings his expertise into the company. A man at his level who is independently wealthy will only be interested in helping us get us a sale if he is rewarded accordingly. MW has the knowledge and the experience of selling a business that neither of us has.

e) it is inherently unfair to me and all the other employees in the company who work full time in the business and apply 100% of our time and energy in growing the business in contrast to your situation where you have a part time role dividing your time between Vantage and Gowans. This is especially relevant when Vantage provides you with the level of remuneration that you receive. To get to the stage of attracting a buyer everyone needs to be completely focused on Vantage Resources.

f) We had a similar conversation about the Aspect engagement approximately 3+ years ago and again at that time you declined to come on board in a full time capacity despite me clearly detailing my concerns to you. For the sake of harmony I did not pursue this topic further as you were so adamant. However, both of us know that the market we operate in today has changed significantly since then and what was a compromising situation in the past is not acceptable now especially when the company is of its present size and needing growth to survive at this dangerous time with aggressive competition eroding our traditional business. During our current discussions you have not provided me with specific reasons for not taking up full time employment with the company.

In order for me to clearly understand your views of the current situation I would be obliged if you could detail for me in writing as soon as practical the following two specific items:

A) Your own interpretation of our conversation on Wednesday 2nd last. Our conversation was the reason for my letter and emails. If your recollection is completely different, please detail this for me.

B) Can you please respond to the points made in the Summary above.

Regards, Simon."

20. Letter: 17th April, 2014 Petitioner to Mr. Martin

"Dear Simon,

I note your letter dated 14th April marked Without prejudice.

I have devoted 12 years to the business, on a part time basis as has always been the case. At all times I have given 100% commitment and your suggestions otherwise are unfair and offensive to me.

I don't propose to reply to each item mentioned in the letter other than to say that it is biased and one-sided. I have already summarised my views in my letter of the 10th. We had a general discussion on Martin Walsh being brought in, at which point I

expressed some reservations and while I have a great deal of respect for him I have not yet agreed to his participation in the company.

If it becomes necessary to present further information to any forum I will go into whatever detail is required. Your persistent attempts to railroad through your views in flagrant breach of any company law will be seen for what it is.

In our discussions, during many of which I felt I was being presented with fast de complete decisions, we reviewed a number of issues, the shares, which we both desire to see grow in value; the business, which can and will adapt; and my working position, which remains as is.

The discussions concerning Aspect Consulting were one aspect of the overall situation. An exit strategy for Aspect was discussed and I indicated conditions upon which that could be agreed. I did not agree to the arrangement ending on the 2nd May full stop.

I do believe that the redemption of shares is in the best interests of the company and indeed if for a moment the tone and innuendo of your letter were accepted as being accurate, which is denied, it is clearly in the interests of the company to go down this route.

Notwithstanding all the pressure I have dealt with in recent weeks I am prepared to resolve this amicably for now.

I am still willing to proceed on that basis. If the shares are redeemed at a value of €2.1m within 14 days, with all

ancillary matters completed and both of us and the company waiving any non compete provisions.

I will vote with the Board to end the Aspect agreement and that will happen in a coordinated manner.

If the above are agreed to in open correspondence within 5 working days we can move on to consider communications strategy and other peripheral matters.

Yours sincerely,

Paul Hamill."

21. Also on 17th April, 2014 the petitioner wrote to the company stating that the termination of the contract with Aspect Consulting Ltd was invalid. On 25th April, 2014 Mr. Martin wrote to the petitioner apologising for any misunderstanding on his part of his conversations with the petitioner and acknowledging that the termination of the Aspect Consulting contract was invalid. He confirmed that the had "no issue with Aspect's continued involvement" but he went on to say that it remained his belief that the business would need the full-time support of the petitioner in order to achieve its growth potential with a view to subsequent sale. He said that he could not keep up his own current workload in running the business.

22. Following the meeting of 10th April, 2014, the petitioner did not return to work on behalf of the company citing stress. On cross examination he clarified that he did continue working with the Gowan Group subsequently but he could not contemplate returning for work with the company or with Mr. Martin because of the deterioration in his relationship with Mr. Martin.

The Proceedings

23. During the course of the proceedings, the petitioner alleged the following examples of oppressive behaviour on the part of Mr. Martin:

1. The insistence of Mr. Martin that the petitioner should take up a full-time position within the company;

2. The termination of the Aspect Consultancy contract with the Company;

3. The approaching of a third party, Martin Walsh to become chairman and director of the company;

4. The purchase of a site at Avalon, Brighton Road, Foxrock in the name of the company and using funds provided by the company, without the knowledge of the petitioner and

5. The use of company funds to purchase lands at Roundwood, Co. Wicklow, through a subsidiary of the company, Ecoview Ltd.

6. The Petitioner made two additional complaints about the conduct of Mr. Martin which it was asserted also constituted oppressive conduct on the part of Mr. Martin. The first of these was the attempt by Mr. Martin to convene an EGM in August 2014 to approve banking facilities for the company.

7. The second complaint related to the issue by Mr. Martin of proceedings on 26th September 2014, seeking an injunction to restrain the disclosure of material exhibited by the Petitioner in these proceedings.

24. Additionally, the petitioner claims that the relationship between the petitioner and Mr. Martin is one of a quasi partnership which was based on mutual trust, good faith and confidence, and that having regard to the breakdown of this relationship the company should be wound up in accordance with section 213(f) of the Companies Act, 1963.

Relevant Statutory Provisions

25. Section 205(1) of the Companies Act, 1963 provides that:-

"Any member of a company who complains that the affairs of a 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, may apply to the court for an order under this section.

26. Section 205(3) provides that:-

"If, on any application under subsection (1) or subsection (2) the court is of the opinion that the company's affairs are being conducted or that 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 the 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, further reduction accordingly of the company's capital or otherwise."

27. Section 213(f) provides that a company may be would up if the court is of the opinion that it is just equitable that the company should be would up.

28. Section 213(g) provides that a company may be wound up by the court 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 in 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 section if it is of the opinion that proceedings under section 205 would, in all circumstances, be more appropriate.

Meaning of Oppression

29. It is now well established that "oppressive conduct" for the purposes of section 205 means the exercise of the powers of a company "in a manner burdensome, harsh and wrongful" to the petitioner. This was accepted by Keane J (as he then was) in *Re Greenore Trading Company Ltd* [1980] ILRM 94 and, more recently, by Laffoy J in *Re Charles Kelly Ltd : Kelly v. Kelly & Kelly (No. 2)* [2011] IEHC 349.

30. It also established that an isolated act of oppression may meet the requirements of the section. In *Re West Winds Holding*

Company Ltd., (21 May 1974, unreported, High Court) Kenny J, referring to a sale of lands of the company (which in the particular circumstances of the case he found was conducted fraudulently at the expense of the petitioner) stated that that ground alone was adequate to justify an order under section 205. In *Re Williams Group Tullamore Ltd.* [1985] IR 613 Barrington J held that a resolution passed in general meeting which had the effect of altering the rights attaching to classes of shares to the detriment of the ordinary shareholders (which resolution was passed at a meeting at which the ordinary shareholders could not vote) was in objective disregard to the ordinary shareholders interests, as well as being an act of oppression. While the transaction complained of could be said to be an isolated act, it was ongoing at the date of the hearing of the petition.

31. It is also well established that in determining whether or not conduct can be considered to be burdensome, harsh and wrongful the test is an objective one. In *Re Irish Visiting Motorists Bureau Ltd.* (7 February 1972, unreported, High Court), Kenny J said:-

> *"The affairs of a company may be conducted or the powers of the directors may be exercised in a manner oppressive to any of the members although those in charge of the company are acting honestly and in good faith. If one defines oppression as harsh conduct or depriving a person of rights to which he is entitled, the person whose conduct is in question may believe that he is exercising his rights in doing what he does… the question then when deciding whether the conduct of the affairs of a company or the passing of a resolution is oppressive is whether, judged by objective standards, it is."*

32. As to what constitutes a disregard of the interests of a member, it has been held that this may be established even where there has not been a finding of oppression. In *Re Williams Group Tullamore* (Supra), Barrington J said of the resolution passed by the preference shareholders that:

> *"It appears to me that the implementation of these resolutions is an ongoing matter in the company and justifies the view that the affairs of the company are being conducted in disregard of the interests of the ordinary shareholders. I fully accept that the proposal put forward in the resolution was put forward in good faith. Nevertheless, it appears to me that it is in objective disregard of the interests of the ordinary shareholders and that to persist in implementing it would, in the circumstances, be oppressive to the ordinary shareholders."*

In effect therefore it appears that the learned judge found that the original passing of the resolution was in disregard of the interests of the ordinary shareholders, and its implementation (if permitted) would be oppressive.

33. The concept of oppression also includes oppression of a member in his capacity as director – Re *Murph's Restaurants Ltd.* [1979] ILRM 141. However, this does not arise in this case because the petitioner confirmed in evidence that the interests that he asserts are being disregarded are his interests as a shareholder and not as a director.

34. The fact that conduct is not in strict compliance with the requirements of the Companies Acts will not by itself be sufficient to establish oppression. In *Re Clubman Shirts Ltd*. [1983] ILRM 323, O'Hanlon J stated:

> *"I would not classify as oppressive conduct within the meaning of the Act, the omission to comply with the various provisions of the Act referable to the holding of General Meetings and the furnishing of information and copied documents. These were examples of negligence, carelessness, irregularity in the conduct of the affairs of the company, but the evidence does not suggest that these defaults or any of them formed part of a deliberate scheme to deprive the petitioner of his rights or to cause him loss or damage."*

35. Nor will mismanagement, inefficiency or carelessness in the management of the affairs of the company necessarily amount to oppression. In *Re 5 Minute Carwash Service Ltd.* [1966] 1 All E.R 242, and also *McCormick v. Cameo Investments Ltd.* [1978] ILRM 191, where McWilliam J held that mere mismanagement by the directors of the company was not sufficient to constitute oppression.

36. Exclusion from management and non consultation with shareholders have also been found to constitute oppression. This is of some relevance in this case where the petitioner alleges that in a number of respects he was either excluded from management or not consulted in relation to the affairs of the company.

37. Finally, it is also possible to establish oppression on the basis of equitable principles in companies in which the relationship of a quasi-partnership is also found to exist. This can arise where the relationship of equality, trust and confidence, upon which a quasi-partnership is based, is found to have broken down.

The Impugned Conduct

38. I turn now to consider the conduct relied upon by the petitioner in support of his application. The petitioner relies on a number of grounds (as set out above) which he says constitute either individually or collectively oppressive conduct or conduct that is in disregard of his interests as a shareholder. Counsel for the petitioner, Mr. Walker, said that the petitioner is not relying on any single act in support of his application and submitted that the various acts of Mr. Martin as set out above in paragraph 23 may all together be considered to be conduct in disregard of the petitioner's interests as a shareholder, even if it is the case that no single act relied upon by the petitioner would be sufficient to merit the granting of any of the reliefs sought. I agree with this submission. It seems to me that it is entirely reasonable, when considering whether or not the conduct of a party is in disregard of a shareholder's interests, that the conduct of that party as a whole should be considered in determining the application. In this particular case, it was submitted on behalf of the petitioner that Mr. Martin was in many respects operating the company as though it were his alone, without regard to the petitioner's interests. It was also submitted that the relationship between the petitioner and Mr. Martin was one of a quasi-partnership and that in circumstances where that relationship has broken down, that it would be just and equitable for the court to order the winding up of the company in accordance with s.213(f) of the Companies Act, 1963.

39. It was clear from the evidence, and accepted by the petitioner, that the relationship between the petitioner and Mr. Martin was at least satisfactory as late as October 2013 when the petitioner and Mr. Martin were viewing a property which the petitioner was interested in purchasing, and the petitioner acknowledged in evidence that "things were fine" as of that time. It seem clear that relations only began to deteriorate when Mr. Martin began to consider the strategy that he felt the company needed to adopt in order to address its decline in business and revenue, in or about late February or early March of 2014.

40. As stated above, part of the strategy conceived by Mr. Martin was to invite Mr. Martin Walsh to become chairman of the company with a view to making it more attractive for sale in the future. It is common case that from the time that the petitioner became a shareholder in company, both he and Mr. Martin shared a common objective of growing the company with a view to sale at an opportune time. In his evidence, Mr. Hamill accepted that having somebody with the experience and abilities of Mr. Walsh would be of benefit to the company and he confirmed that he had high regard for Mr. Walsh. The nub of his complaint however, was that at

the meeting with Mr. Walsh, Mr. Martin asked Mr. Walsh if he would be prepared to "come on board as chairman". The petitioner was surprised by this because that wasn't the agreed purpose of the meeting; the purpose of the meeting, as far as the petitioner was concerned was to get to know Mr. Walsh and understand his plan for the company. It seems from the evidence of both the petitioner and Mr. Martin that Mr. Martin did not actually offer the position of chair to Mr. Walsh – he simply asked him if he would consider accepting the position. After the meeting, the petitioner expressed his concern to Mr. Martin about the cost associated with the proposed appointment of Mr. Walsh as chairman. He was also concerned about the dynamic of bringing a chairman into the company whom he didn't know and how it would impact upon his own position in the company. While there was a certain amount of follow up correspondence between Mr. Walsh and Mr. Martin (and also Mr. Hamill, at the request of Mr. Martin, sent Mr. Walsh certain information which he had been promised at the meeting) ultimately this did not lead to his appointment because of the petitioner's objection. On cross examination, Mr. Hamill accepted that he got his own way in relation to this matter and upon a specific question being put to him by counsel for Mr. Martin, he agreed that logically this issue could not form any basis for either oppression or disregard of his interests.

41. It could not be clearer that in exploring this strategy as he did, Mr. Martin was acting in furtherance of the interests of both the company and its shareholders. Perhaps he should not have put the question that he did to Mr. Walsh (i.e. would Mr. Walsh be prepared to come on board as chairman) without first having obtained the agreement of the petitioner in this regard, but it seems to me from the way that the question was put to Mr. Walsh that this was not so much an offer as an enquiry as to whether or not Mr. Walsh would be interested in such a position. There can be no doubt but that this particular matter, either by itself or taken in conjunction with other complaints of the petitioner, could not be considered to be conduct on the part of Mr. Martin that is either oppressive or in disregard of the interests of the petitioner.

42. Shortly after this issue concluded, Mr. Martin requested the petitioner to take up a full-time position with the company and the discussions between them, described above, ensued. It is clear from the evidence of both the petitioner and Mr. Martin, that the petitioner was as unwilling to take up a full-time position in the company as Mr. Martin was insistent that he should do so. Mr. Martin was clearly putting a lot of pressure upon the petitioner at this time and I accept the evidence of the petitioner that he found this very stressful. However, I also accept the evidence of Mr. Martin that in putting this proposition to the petitioner, Mr. Martin was acting in pursuit of an agreed strategy to grow the company which he felt he could not do by himself. The petitioner's initial reaction, following due consideration of it (over the course of a week) was to confirm that he would take up a full-time position in the company, but when the parties discussed the terms upon which he would do so, the petitioner was unhappy with what was proposed by Mr. Martin in terms of salary and also because of what he considered to be the uncertainty of his role in this full-time position. As a result of this the petitioner changed his mind and at this point the petitioner indicated to Mr. Martin that he wanted to sell his shares in the company for a price of €2.1 million and he put forward a mechanism (proposed by Grant Thornton Consultants) whereby the company could acquire the shares under a share redemption scheme. Mr. Martin had two objections to this. Firstly he felt that the price was too high and secondly he did not in any event want to own 100% of the shares in the company.

43. Further discussions followed during the course of which the petitioner acknowledges that he agreed to exit the company, but that that was only one element to be agreed as part of an overall agreement. This led Mr. Martin to issue to the petitioner the letter of 4th April, 2014 terminating the Aspect Consultancy contract. There followed the correspondence already described herein and ultimately the retraction of the termination of the Aspect Consultancy contract by Mr. Martin and an unreserved apology from Mr. Martin to the petitioner for any misunderstanding. In his evidence, Mr. Martin accepted that he may have "jumped the gun" in the issue of the letter of 4th April.

44. It is the petitioner's contention that Mr. Martin always wanted him to leave the company (and to end the Aspect Consultancy contract) and indeed it was submitted on his behalf that the offer of a full-time position was in the nature of a ruse by Mr. Martin. The petitioner himself said in evidence that Mr. Martin offered him a salary, that, contrary to their 2002 management agreement, was substantially less than that of Mr. Martin and furthermore that it was artificially low because of the time his earnings from Gowans were temporarily less than they had been because of the state of the economy. He was asked in cross examination if he asked Mr. Martin to increase the proposed salary package at all and he said that he did not because he knew that Mr. Martin would not have agreed to do so.

45. The petitioner agreed that he had accepted that the Aspect Consultancy contract could be terminated but stated that this was because it was the only option he was given (other than to accept the permanent position on terms that he would not agree to accept). The petitioner also agreed that he proposed that in lieu of the income being paid to Aspect he should be paid non-executive director fees and he accepted that Mr. Martin was to investigate the appropriate level of such fees. Under cross examination, the petitioner stated that:

> *"I wanted to stay as we were but he was withdrawing that option from me unilaterally".*

46. But I do not believe that that is a fair reflection of the discussions that were taking place between the petitioner and Mr. Martin. Mr. Martin was undoubtedly unhappy with the status quo and wanted either to terminate the existing arrangement or to have the petitioner committed fully to the company. For his part, while the petitioner really wanted to maintain the status quo, at the same time he had first indicated a willingness to Mr. Martin to become a full-time employee of the company and subsequently indicated a willingness to terminate the Aspect Consultancy contract on terms. Even on the petitioner's own account of events, it is not difficult to see how Mr. Martin could have been under a misunderstanding that led him to issue the letter of 4th April 2014.

47. As to the pressure being exerted by Mr. Martin upon the petitioner to commit on a full-time basis to the company, I do not believe that that of itself could amount to oppression. Mr. Martin was attempting to further an agreed strategy to grow the company in the interests of the company and its shareholders. Moreover, from time to time it is inevitable that company executives will be subjected to stresses and pressures not just from external sources, but from within the company itself. This a fact of commercial life which everybody in business must accept and in such circumstances interested parties may assert their own position as they see fit, as indeed the petitioner did in the end, resulting in an unreserved apology from Mr. Martin and a withdrawal of the termination of the Aspect contract.

48. The petitioner doubts the sincerity of Mr. Martin in this regard but clearly Mr. Martin cannot retreat from the position set out in his letter 25th April, 2014, and even though from a practical point of view the parties might have difficulty working together, the legal entitlements of the petitioner in this regard are clear. Accordingly, I hold that these events do not constitute conduct oppressive of the Petitioner or conduct in disregard of his interests.

49. I turn now to the complaint of the petitioner that Mr. Martin has used Ecoview Ltd in order to pursue his own financial property interests at the expense of the company, resulting in a substantial inter-company debt due by Ecoview Ltd to the company. As mentioned above, it was agreed between the parties that the petitioner and Mr. Martin would draw their director's fees in different

ways. In the case of Mr. Martin, it was agreed that he could do so through Ecoview Ltd. It was accepted by the parties that the distribution of director's fees over the years was broadly speaking in line with their entitlements. The evidence showed that between 2005 and 2014 Mr. Martin received €1,723,024 in Directors fees and Mr. Hamill received €984,567. The company's auditor, Mr. Bollard, gave evidence in relation to the loan apparently due by Ecoview to the company and in his evidence he confirmed that this amount equates to monies transferred by the company to Ecoview which in turn used the money to purchase a small farm. The net result of this is that Ecoview Ltd has an asset on its balance sheet (the farm) which equates to the liability of Ecoview Ltd to the company; and in turn that equates director's fees paid by the company to Mr. Martin. Upon cross examination by Mr. Shipsey, the petitioner confirmed that he did not make any complaint at all that Mr. Martin had "advantaged himself" in relation to directors fees and he also confirmed that Ecoview Ltd belonged to Mr. Martin. His only concern as expressed in evidence was that in terms of valuing the company, it is important to know the value of Ecoview. While this may well be so, it is clear from the evidence, and accepted by the petitioner, that he has been in no way disadvantaged by the Ecoview structure to which he consented from its inception. If anything, the Ecoview structure appears to represent a risk to Mr. Martin in that in the event of the insolvency of the company a liquidator would be likely to claim an entitlement to all of the assets of Ecoview as it is on the face of it a fully owned subsidiary of the company. Since this is a structure to which the petitioner agreed and by which he suffers no prejudice, it cannot constitute a ground either of oppression or of proof of disregard of the petitioner's interests.

50. The petitioner also complains that Mr. Martin was responsible for the appointment of employees without the involvement or knowledge of the petitioner. Two employees were identified in this regard. The first was a Mr. Vlad Pop and the second was a Ms. Yvonne Ryan. There was something of a conflict of evidence in relation to these appointments, but one thing that they both had in common was that the appointments related to employees of a junior position in the company. As regards the process, the petitioner gave evidence that there were four people involved in the process, the petitioner, Mr. Martin, a Mr. Sam Reilly (Resource Manager with the company) and Mr. Jason McNeill (Sales and Business Development Manager). The petitioner stated that the appointment of employees was a collaborative effort involving CV sharing, discussion, interview and appointment. The evidence did establish however that he was at least involved at a preliminary stage in relation to the review of CV's of new candidates for the position to which Mr. Pop was appointed. Mr. Reilly stated in evidence that the petitioner would have seen the two CV's received for the position (to which Mr. Pop was appointed) and Mr. Reilly thought that the petitioner knew who was to be interviewed and who was selected. Mr. Reilly further stated that on the date on which he interviewed Mr. Pop, it was necessary for Mr. Pop to travel to the offices of the company after 6pm. Since the petitioner would have been on a half day on this particular day, Mr. Reilly and Mr. McNeill went ahead and interviewed Mr. Pop.

51. Mr. Reilly felt that the petitioner would almost certainly have been present at meetings when this position was being discussed and the appointment proposed, but the petitioner does not recall this and feels excluded from the process. The petitioner did accept however that he had no complaint with the suitability of the candidate or his performance at work. His complaint concerned exclusion from the process. I should add that the position in question was that of a trainee resourcer candidate.

52. It seems likely from the evidence that the petitioner would have had at least some early involvement in the consideration of the appointment of Mr. Pop, and quite probably also received certain documentation even if he does not specifically recall having received same. In fairness to the petitioner he acknowledged that his recollection in relation to the issue may not be complete. Most importantly of all however, there was no evidence at all of any deliberate exclusion of the petitioner from the process.

53. The petitioner had a second complaint relating to the appointment of an employee namely Ms. Yvonne Ryan. He gave evidence that Mr. Martin proposed engaging Ms. Ryan, who had previously worked for the company, in order to assist them in managing their own personal investments. The petitioner said that he did not think that this was necessary, but stated that he thought that Mr. Martin had employed Ms. Ryan, at the expense of the company, to manage Mr. Martin's private investment interests. Ms. Ryan had previously worked for the company and Mr. Martin confirmed in evidence that he proposed her re-engagement both to assist with personal work and also to do administration work for the company. He confirmed that the petitioner resisted the suggestion, and stated that he, Mr. Martin, would pay for Ms. Ryan's salary out of his director's fees. Mr. Martin informed the court that Ms. Ryan is currently working full-time for the company and does no work at all on his personal investments. The petitioner was not in a position to dispute this evidence. Accordingly, the evidence did not establish that Ms. Ryan's engagement by Mr. Martin on behalf of the company was in any way improper or conduct amounting to oppression or in disregard of the interests of the Petitioner.

54. The single most significant complaint that the petitioner has in relation to the conduct of Mr. Martin relates to the purchase by Mr. Martin in December of 2013, using the resources of the company, of a site in Foxrock for the sum of €800,000. Mr. Martin explained that the purpose of acquiring this site through the company was to enable him to bridge the gap in time between the acquisition of the site and the sale of his own dwelling house, from the proceeds of which he would then purchase the site at market value from the company. He would not otherwise have been able to fund the purchase of the site from his own personal resources at the time. Mr. Martin explained, and it was accepted by Mr. Hamill, that he had discussed such a mechanism for acquiring a property in this way with Mr. Hamill as far back as early 2012. At that time he and Mr. Martin were to attend a meeting with Bank of Ireland about company business, and Mr. Martin wanted to ask the bank about the possibility of getting a loan through the company to buy a site for Mr. Martin personally. The petitioner accepted that he did not object to such a mechanism at the time but that transaction did not proceed.

55. While that transaction did not proceed, Mr. Martin was continuing to explore the market for the acquisition of a suitable property including one property which was being sold by NAMA. The petitioner confirmed his awareness of that property. However, that came to nothing either. In September/October 2013, the petitioner was interested in acquiring a property in Foxrock and asked Mr. Martin for his opinion and Mr. Martin encouraged him to bid for the property. There is some dispute about precisely what Mr. Martin may have said to the petitioner in this regard in that Mr. Martin maintains that he told the petitioner that if he did not have adequate funds to purchase the property that any shortfall could be made up by the company on the same basis that Mr. Martin himself was proposing to purchase property with the assistance of the company i.e. that any funds advanced by the company in this regard would be later reimbursed from the sale of another property, or repaid from future directors' fees. However, the petitioner does not accept that this discussion took place.

56. In any case the petitioner was unsuccessful with his bid in the property. The next development of relevance is that on 11th December, 2013 Mr. Martin informed the petitioner that he had purchased a site in Foxrock. He simply said to the petitioner that "I've got that site" and "the company may make a few bob out of it". The petitioner acknowledges that Mr. Martin said this and that he understood this to mean that in due course Mr. Martin would purchase the property from the company at market value, at a possible profit to the company.

57. Mr. Martin was asked whether or not he said anything else to the petitioner about the transaction and in reply he said that the petitioner raised a concern about the tax treatment of the transaction and in particular as to whether or not it would be revenue compliant. Mr. Martin said that he understood from the Petitioner that if the auditor of the company, Mr. Bollard, confirmed that the

structure was compliant, then he was not objecting to the transaction. The petitioner said that he had no recall of saying this to Mr. Martin but he did accept, on cross examination, that it was possible that he might have raised this query with Mr. Martin. Mr. Bollard confirmed in evidence that he had a record of a discussion with Mr. Martin about the matter on the same day and that having checked the matter, he informed Mr. Martin that there was no reason why the transaction could not be implemented (from a Revenue standpoint). However, if the company made a profit that would give rise to a liability to capital gains tax, and if the property was developed that might give rise to a liability to VAT on a subsequent sale.

58. Mr. Martin acknowledged that he did not communicate the content of this conversation to the petitioner. He said he did not think it was necessary to do so because the petitioner had, in effect, confirmed to him that he had no objection to the transaction if Mr. Bollard confirmed that it was Revenue Compliant.

59. The petitioner maintains that Mr. Martin did not inform him as to the price of the transaction, but Mr. Martin maintains that he did so during the discussion on 11th December. What is clear however is that there was no further discussion about the transaction at all. In fact, as of 11th December, the company had not entered into the contract to purchase the property, it had actually been entered into it by Mr. Martin and his wife personally and he only arranged after the discussion with the petitioner for the company to take the conveyance of the property into its name and to pay for the property in its entirety. This of some relevance because undoubtedly the petitioner felt that he was being presented with a fait accompli and he says that for that reason there was no point in his objecting to the transaction.

60. Moreover, Mr. Martin did not disclose that a special condition in the contract for sale of the property requires the purchaser to construct a dwelling house on the property within 18 months from the completion date of 12th December, 2013. Furthermore, the property was subject to a planning condition requiring payment of a development contribution to the planning authority in the sum of €45,000. None of this was disclosed to the petitioner.

61. Mr. Martin was asked if he had taken any steps to sell his own dwelling house, with a view to acquiring the site from the company and he said he had not yet done so because of the uncertainty created by these proceedings.

62. Save in so far as he may have asked Mr. Martin to obtain Mr. Bollard's view of the transaction, the petitioner did not raise any queries about this transaction at all until the initiating letter of his solicitors on 22nd May, 2014. This is to some extent surprising if the Petitioner objected to or had reservations about he transaction. The company reviewed its finances in detail on a monthly basis and the Petitioner, a very experienced and astute businessman, participated fully in this review. While it was established that the transaction was not specifically recorded in the monthly financial commentary (the evidence given established that fixed asset movements were not commented upon in the commentary), in the monthly dashboard of financial data comparing December with January one would have seen a movement in the value of fixed assets from €220,000 to €1.1 million. The petitioner says that he did not notice this because it was necessary to compare one month with the other. Also, the petitioner gave evidence that he did not notice any change in the cash reserves in the company because the payment coincided with an almost equivalent and contemporaneous reduction in the value of debtors of the company.

63. At the time the company purchased the site, it had cash reserves of €1.1 million. There can be no doubt at all therefore that a transaction that reduces its cash reserves by €800,000, even if only intended to be temporary in nature, is a highly significant transaction. That said, there was no suggestion or any evidence given to the effect that this use of the company's cash reserves caused the company any cash flow difficulties.

64. If Mr. Martin failed to disclose this transaction at all to the petitioner, I would have no doubt at all but that by causing the company to expend such a significant amount of its cash reserves, without reference to his co-shareholder, Mr. Martin would be acting in disregard of the petitioner's interests. The net question that I must address therefore is whether the simple disclosure of the transaction by Mr. Martin to the petitioner on 11th December can either constitute an act of oppression by Mr. Martin upon the petitioner or be regarded in disregard of his interests.

65. On balance, I am inclined to the view that the transaction should not be regarded as either oppressive or in disregard of the petitioner's interests. I say this because in mentioning the fact of the transaction to the petitioner, even though giving only minimal information, he was affording the petitioner the opportunity to ask questions and to object. When one considers Mr. Martin's reactions to subsequent events i.e. when the petitioner objected to the appointment of Mr. Walsh as chair and disputed the termination of the Aspect Consulting contract, in each case Mr. Martin acceded to the petitioner's point of view. There is no reason to believe that he would have done otherwise had the petitioner objected to this particular transaction. Granted the petitioner may have felt that there was nothing that could be achieved by objecting at that stage, but by not expressing any concerns or making any inquiries at all, other than that one relating to revenue compliance (assuming he did so) the petitioner was giving the clear impression that he either consented to or did not object to the transaction, and this was consistent with his view of the 2012 proposal of Mr. Martin. Moreover, if the petitioner truly considered the transaction oppressive in nature, or in disregard of his interests, one would have expected him to raise some objection, even if he felt it would not result in the abandonment of the transaction. Furthermore, I accept the evidence of Mr. Martin that this facility is intended to be temporary in nature only and that in due course he will re-purchase the site from the company, and quite possibly at a profit to the company given the increases in property values that have occurred in the meantime. While it would have been desirable for Mr. Martin to handle the matter differently and to furnish the petitioner with detailed information in a timely manner, nonetheless it is my view that in the particular circumstances of this case, and also having regard to the background whereby the structure of such a transaction was discussed (and not objected to by the petitioner) in 2012, the transaction should not be regarded as oppressive to the interests of the petitioner or in disregard of his interests.

66. In relation to the petitioner's complaints regarding the convening of an EGM to approve of banking facilities, this was done by Mr. Martin because it had become a matter of great urgency that the company should finalise agreement with its new bankers following the termination of Danske Bank of its banking facilities with the company (as part of its national strategy whereby Danske Bank was exiting the Irish market). Given the absolute imperative of finalising banking facilities for the company at this time, the convening of an EGM with a view to concluding agreement on such facilities could not be considered in any way oppressive to the interests of the petitioner.

67. In relation to the application for an injunction, this was made after the presentation of the Petition in these proceedings. The reason for this application was that Mr. Martin was very concerned that some of the documentation exhibited by the petitioner in these proceedings disclosed highly confidential information relating to the affairs of the company. Mr. Martin was concerned that the information should not come into the public domain, and in bringing the application for an injunction, Mr. Martin was, I believe, motivated by the best interests of the company and was not intending to frustrate these proceedings or to oppress the petitioner in any way.

Quasi Partnership
68. It has been argued on behalf of the petitioner that the company constitutes a quasi partnership and is thus amenable to remedies under s.213(f) of the Companies Act, 1963. The concept of a quasi partnership, while recognised in law, is somewhat vexed and uncertain. Courtney describes it thus:

> *"Where a relationship of equality, mutuality, trust and confidence, based on a personal relationship, subsists in a private company it may be appropriate that it be considered as a quasi partnership. Such a finding may result in members and directors being found to be restrained on equitable grounds from enforcing rights found in the "black letter of the law"".*

69. In the matter of *Dublin Cinema Group* [2013] IEHC 147 Charleton J put it slightly differently where he said that a quasi partnership could exist in a company when:

> *"Its background is two or more friends, two or more family members, two or more business partners operating together through a limited liability or other corporate vehicle for the purpose of carrying on their business…"*

In such circumstances he said it may be just and equitable to wind up the company where there is a situation of deadlock.

70. It was argued on behalf of the petitioner in this case that the petitioner and Mr. Martin had been friends before the petitioner became a shareholder in the company. Subsequent to his becoming a shareholder, their friendship continued and they went on holidays together, purchased properties together (an apartment in Spain and the premises from which the company operates) and also viewed other properties together from time to time. It was argued that against this background, there was a special relationship of trust and confidence between the petitioner and Mr. Martin.

71. In the matter of *Re Vehicle Buildings and Insulations Ltd.* [1986] ILRM 239, Murphy J made an order for the winding up of the company on the grounds that it was just and equitable to do so, having found that both parties to the proceedings were in complete agreement on the fact that the dispute between them was both comprehensive and irreversible. That cannot be said to be the case here, where Mr. Martin has made it clear that he is happy to continue working with the petitioner and for the petitioner to resume providing services to the company through Aspect Consulting Ltd.

72. In the case of *Crindle Investments v. Wymes*, Murphy J said:

> *"I believe that the presumption that parties who elect to have their relationship governed by corporate structures rather than, say, a partnership, intend their duties – and where appropriate their rights and remedies – to be governed by the legal provisions relating to such structures and not otherwise. It would require, in my view, reasonable clear evidence to impose obligations on directors or shareholders above and beyond those prescribed by legislation or identified by long established legal principles."*

73. In the case of *O'Neill v. Phillips* [1999] BCC 600 it was held by the House of Lords that:

> *"Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the Articles for the business of the partnership to be continued."*

And as Lord Wilberforce Observed in *Re Westburn Galleries Ltd.* [1973] AC 360 at 380b, "*one should not press the quasi partnership analogy too far: a company, however small, however domestic, is a company not a partnership or even a quasi partnership*."

74. Turning the the facts of this case, it appears that while the parties knew each other at the time that the petitioner became a member of the company they were not especially close, although they later developed a close relationship. Although undoubtedly entrepreneurs, they were not two entrepreneurs setting off to pursue a dream using the vehicle of a company as an expedience to secure limited liability or tax advantages, where the real nature of the relationship was more in the nature of a partnership. The petitioner invested in an existing company. He did so in a formal way, firstly by entering into a management agreement with Mr. Martin in 2002, and subsequently entering into a shareholders agreement with him in February 2005. This agreement contains very specific provisions in relation to the sale of shares by either of the parties. While the relationship of mutuality, trust and confidence that developed between them over the years has now broken down, this is not owing to the fault of either party and is not owing to an act of oppression or disregard of the petitioner's interests on the part of Mr. Martin. Against that background, I believe that it would be far from just and equitable to order a winding up of the company because the petitioner wants to avoid the express provisions of the shareholders agreement in relation to the purchase of his shares. While the petitioner might well regard such an order as just and equitable, Mr. Martin would be entitled to consider it unfair that the express provisions of an agreement which he had entered into with the petitioner should now be overridden by the Court in circumstances where the Court has not found Mr. Martin to be acting oppressively or in disregard of the petitioner's interests. For all these reasons I dismiss the proceedings.

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