

THE HIGH COURT

COMMERCIAL

2008 211 COS

IN THE MATTER OF SECTION 205 OF THE COMPANIES ACTS

1963 – 2005

AND IN THE MATTER OF EMERALD GROUP HOLDINGS LIMITED

AND IN THE MATTER OF A PETITION BY BANFI LIMITED

PETITIONER

AND

NOEL MORAN

AND

KARINA RAY

AND

BEST CHRISTMAS TREES LIMITED

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 8th day of October, 2009

1. The petitioner, Banfi Limited ("Banfi"), is the registered holder of 16,525 ordinary shares in Emerald Group Holdings Limited ("EGHL"). This represents approximately 19.5% of the issued share capital of EGHL. Mr. David Hasslacher is the beneficial owner of the issued share capital of Banfi.

2. Mr. Moran, the first named respondent, and Ms. Ray, the second named respondent, are husband and wife. They are the directors of EGHL. The third named respondent, Best Christmas Trees Limited ("BCTL"), is the registered holder of either 75.5% or 80.5% of the issued ordinary shares in EGHL. Mr. Moran and Ms. Ray jointly hold 100% of the issued ordinary shares in BCTL.

3. Banfi claims, as a member of EGHL, pursuant to s. 205 of the Companies Act, 1963, that the affairs of EGHL are being conducted, or the powers of the directors of EGHL are being exercised, in a manner oppressive to it or in disregard of its interests as a member of EGHL. It is not in dispute that Banfi is a member of EGHL and has been a member since 2007. The present claim must be considered in the context of the corporate structure and Christmas tree business of the group of companies of which EGHL is part, which commenced in 1989, and to which I will refer as the "Emerald Group". The corporate structure and participation of the Emerald Group has varied since that date.

Emerald Group

4. By 1988, Mr. Hasslacher and Mr. Andrew Kavanagh had a business idea for the planting, raising and selling of Christmas trees. They made contact with Mr. Moran who was already known to Mr. Kavanagh. At that time, Mr. Moran and Ms. Ray were in practice together as chartered accountants.

5. Plans were put in place for the business and in February, 1989 Mr. Hasslacher, Mr. Kavanagh and Mr. Moran arranged for the incorporation of Irish Christmas Trees Management Limited ("ICTML"). ICTML was established to carry on the business of growing, marketing and selling Christmas trees. Each of the above three gentlemen, and a Mr. Godwin, controlled in equal shares the majority of the issued share capital. ICTML subsequently changed its name to Emerald Group Limited ("EGL"), and will be referred to by that name in this judgment.

6. Initially, Mr. Hasslacher was the managing director of EGL. The original business concept appears to have been that monies were raised through Investor Funds or Companies ("Investor Companies") for yearly plantations. The Investor Companies owned the plantations. The trees were planted on leased lands. The management of the plantations and planting, husbandry, harvesting, marketing and selling of the trees was carried out by EGL for a management fee to the Investor Companies. Whilst it was envisaged that EGL would carry on its business at a profit, the main attraction of the Christmas tree business appears to have been the potential tax-free dividends from selling trees at a profit. EGL also had a 'profit share' in certain of the Investor Companies.

7. EGHL was incorporated on 22nd April, 1995. It was incorporated to become the holding company of EGL and buy out the shareholding of Mr. Godwin. Subsequent to its incorporation, EGHL acquired all the issued share capital of EGL from its then shareholders in consideration for the issue of shares other than to Mr. Godwin. Mr. Godwin did not become a shareholder of EGHL. However, Mr. Moran (either alone or jointly with Ms. Ray), Mr. Kavanagh and Mr. Hasslacher each, became, directly or indirectly, the beneficial owners of 30% of the issued share capital of EGHL. The remaining 10% was issued to Mr. Williams and Mr. McKenzie, both employees. In 1995, Mr. Hasslacher's interest in the shares in EGHL was a shareholding registered in the name of ICT Nominees Limited. ICT Nominees Limited became a member of EGHL but held the shares in trust for Banfi. Mr Hasslacher was the beneficial owner of the entire share capital of Banfi.

8. In 1995, Mr. Moran became the Managing Director of EGL in place of Mr. Hasslacher who continued to be employed by EGL and focused on the plantations.

9. EGL procured the incorporation of a wholly owned UK subsidiary, Emerald Trees (UK) Ltd., for the purpose of UK sales. It acquired a property in England. That corporate structure continues.

10. Subsequent to the incorporation of EGHL, the plantations for the next few years continued to be funded and made through Investor Companies. It appears from the evidence of Mr. Wallace, chartered accountant, who gave expert evidence on behalf of the respondents, that EGHL held, at all material times, what is referred to as a "profit share" in most if not all of the Investor Companies. EGL had a minority interest in two such companies. Those companies were primarily owned by the relevant individual investors. The holding by EGHL of a profit share appears to have been for the purpose of permitting EGHL to participate in profits which might be made by the Investor Companies on the sale of the Christmas trees. The normal cycle for the Christmas trees is stated to be seven to ten years: sales commencing in year seven and continuing, on average, through year ten. It is of importance to the issues in these proceedings that the shareholders of EGHL, through the holding by EGHL of "profit shares" in the Investor Companies, had the opportunity of participating in the profits from the sale of plantations and, in particular, the valuable aspect of potentially tax-free dividends.

11. Anglo Irish Bank commenced financing plantations in 1998, through First Irish Christmas Trees plc - an Investor Company.

12. Regretfully, in the early years the plantations did not prove profitable and no profits arose in the Investor Companies. On the contrary; very significant financial difficulties arose, not only for the Investor Companies but, by reason of their inability to pay EGL for the husbandry and management services performed by it, EGL, and the Emerald Group in general, also had severe financial difficulties. By 1999, it was not possible to organise the plantation for that year through an Investor Company. EGHL, with the assistance of bank borrowings from Anglo Irish Bank, carried out the plantation itself in that year. It also had to enter into arrangements with investors in one of the Investor Companies as a result of which, in return for the transfer of plantations, it created and allotted "A" ordinary shares with preference rights to dividends after January, 2002. Loan notes were also issued by EGHL to certain investors.

13. In early 1999, each of ICT Nominees Ltd. (at the direction of Banfi) and Mr. Kavanagh transferred to Mr. Moran and Ms. Ray, jointly, 8,800 shares in EGHL, which represented approximately 10% of the issued ordinary shares. A consideration of IR£1.25 per share was paid by Mr. Moran and Ms. Ray. These transfers formed part of the matters relied upon by Banfi in these proceedings and will be referred to further below. Subsequent to those transfers, Mr. Moran and Ms. Ray became the majority shareholders, jointly holding approximately 56% of the issued share capital in EGHL, and each of Banfi and Mr. Kavanagh was beneficially entitled to 19.5%. Those transfers were made in connection with additional bank borrowings obtained by EGHL and personal guarantees given therefor by Mr. Moran and Ms. Ray.

14. In 2001, the Emerald Group continued to be in financial difficulty. It had significant borrowings from Anglo Irish Bank. Anglo Irish Bank appointed McStay Luby who prepared a report dated 12th June, 2001, considering various options for the Emerald Group. The report which was the first of three was prepared in the context of requests for additional funding by EGHL to Anglo Irish Bank.

15. The name 'Best Christmas Trees' was first used for a website intended for the benefit of the business of the Emerald Group and for the purpose of protecting that name for the Christmas tree trading of the Emerald Group. BCTL was incorporated by Mr. Moran and Ms. Ray in 2001. They were the only shareholders. Its existence does not appear at that time to have been brought to the attention of the then other directors and/or members of EGHL.

16. In early 2002, the Emerald Group remained in a difficult financial situation. It required further funding and the continued support of Anglo Irish Bank to survive. Mr. Moran also commenced negotiations with Mr. Hasslacher in respect of his employment position in the Group including, in particular, the period for which his fulltime employment should continue. Until early 2002, there were good relations between Mr. Hasslacher and Mr. Moran, but more difficult ones between Mr. Hasslacher and Ms. Ray. Mr. Hasslacher believed he was entitled to continue in employment until age seventy. That entitlement was then, and is now, disputed by the respondents. He was due to reach age sixty-five in June 2003. There were extremely difficult meetings between the two men in early 2002. My summation is that there were faults on both sides as to how this was personally handled. I make no findings as to any breach of any legal obligation by either party. Ultimately, Mr. Hasslacher was suspended in May 2002. Relations between Mr. Hasslacher and Mr. Moran then totally broke down.

17. A further report was prepared by McStay Luby in May, 2002 in relation to EGHL and its subsidiaries and their financial position. Ultimately, by letter dated 28th May, 2002, Anglo Irish Bank agreed to continue to make facilities available to the Emerald Group. Additional loans were to be made to BCTL. There are very significant disputes in the proceedings as to from whence the requirement that the additional facilities be made to BCTL and not to EGHL originated.

18. The negotiations in 2001 and 2002 with Anglo Irish Bank, conducted principally by Mr. Moran, were, I am satisfied, for the purpose of preserving the Christmas Tree business carried on by the Emerald Group, which then comprised EGHL as the holding company and its subsidiaries with their rights in and obligations to the Investor Companies. Insofar as it became necessary to have a new corporate entity to which additional loans might be made available, I find that Mr. Moran decided that the new company to be used should be BCTL which had been incorporated and in which he and Ms. Ray jointly held all issued ordinary shares. Mr. Moran, in evidence, stated that in June, 2002 (after agreement had been reached with Anglo Irish Bank for continued funding) he and Ms. Ray transferred the ordinary shares then held by them in EGHL to BCTL for the purpose, as he put it, of bringing EGHL within the same group structure. However, it appears to me, more correctly, that its purpose was to bring a new company, i.e. BCTL, within the group structure of the existing Emerald Group, of which, at that time, the holding company was EGHL. The effect of the transfer by Mr. Moran and Ms. Ray of their shares in EGHL (being approximately 56% of the issued ordinary shares) in June, 2002 to BCTL was to make BCTL a new holding company of the then Emerald Group, of which EGHL had been the holding company. No evidence was given of the consideration paid by BCTL to Mr Moran and Ms Ray for those shares. However, as Mr. Moran and Ms. Ray were already the joint holders of 100% of the issued ordinary shares in BCTL, in terms of percentage ownership, it makes no difference whether or not additional shares in BCTL were issued as consideration for the transfer of the shares in EGHL. There was no evidence of any new equity introduced into BCTL by Mr. Moran and Ms. Ray at that time. There is no evidence that any offer was made to Banfi or ICT Nominees Ltd. in June, 2002 to transfer the shares then beneficially owned by Banfi in EGHL to BCTL in consideration of shares in BCTL. At that time Mr. Hasslacher had been suspended as an employee and was in serious dispute with Mr. Moran and Ms. Ray.

19. Mr. Hasslachner and Banfi issued proceedings pursuant to s. 205 of the Act of 1963 in July 2002 (Record No. 2002 303 COS). On the 26th November, 2003, those proceedings were struck out as neither Mr. Hasslachner nor Banfi was then a member of EGHL and, accordingly, had no standing to pursue a claim under s. 205 of the Companies Act, 1963.
20. In the meantime, ICT Nominees Ltd. transferred to Banfi the shares held in EGHL on 16th May, 2003, and Banfi applied to the directors of EGHL to register that transfer. The directors of EGHL refused to register Banfi as the holder of the shares on 17th September, 2003. Following proceedings brought in October 2005 (Record No. 2005 377 COS) by order of the High Court (Laffoy J.) made on the 28th July, 2006, it was ordered that Banfi be registered as the holder of the shares. Banfi was registered as the holder of 16,525 ordinary shares in EGHL on 16th July, 2007.
21. Mr. Hasslachner ceased to be a director of EGHL. The respondents assert this happened on 6th August, 2002, when he failed to be re-elected as a director at the AGM held on that day. Mr. Hasslachner contends that he ceased to be a director in 2003. Nothing turns on this difference in these proceedings. It is common case that he was suspended in May, 2002 and has not, since the summer of 2002, participated as a director.
22. Mr. Hasslachner also ceased to be employed by EGL on 12th June, 2003, following his sixty-fifth birthday. This is disputed by him. He commenced further proceedings (Record No. 2003 7120 P) in relation to his employment. Those proceedings have not been brought to trial and remain in being.
23. The final relevant shareholding change in EGHL occurred on 16th January, 2006, when Mr. Kavanagh, by agreement, transferred the 16,525 ordinary shares in EGHL held by him, to BCTL at 1 cent per share. Mr. Kavanagh, in evidence, explained that he considered his investment in EGHL to be a failed investment and then sought to realise his loss. He also ceased to be a director of EGHL and EGL in 2004.
24. In 2002, in accordance with conditions set by Anglo Irish Bank in its letter of 28th May, 2002, for the continuation of facilities to the Emerald Group and the making of certain further facilities, BCTL acquired from EGHL shares in at least two Investor Companies. First, 100% of the "A" ordinary shares in First Irish Christmas Trees plc ("FICT") and 100% of the ordinary share capital of Emerald Woodlands Limited ("EWL"). It also acquired from third parties 100% of the ordinary share capital of FICT and Ballylough Trees Ltd. and 51% of the ordinary share capital of Grangecon Trees Ltd., all Investor Companies, and the plantations then owned by two Davy funds. It became the owner, directly or indirectly, of significant plantations.
25. Subsequent to 2002, the business of the Emerald Group continued as previously under the management of Mr. Moran. There were differences in the internal corporate structure of the Group, now headed by BCTL, and, in particular, the manner in which plantations were owned. However, the arrangements for the management, husbandry, cutting, marketing and sale of plantations by EGL appear to have continued as previously save that the company for which it was carrying out the work had in respect of many plantations become BCTL. These functions were carried out by EGL in consideration of fees payable by the relevant plantation owner.
26. The financial difficulties continued. The 2003 harvest was not as successful as anticipated. There were further financial crises in 2003 and the necessity for additional investment or funding. Mr. Charlie Kenny, who was already an investor through Ballycon Trees Ltd., was identified as a source of further investment. At the same time, Anglo Irish Bank made clear that it did not wish to make further funds available.
27. It was ultimately agreed with Anglo Irish Bank to wait until after the 2004 harvest. This demonstrated some improvement. In 2005, Mr. Moran achieved a very significant financial reorganisation of some complexity. It is, I think, sufficient to record that he achieved a write-down by Anglo Irish Bank of its debt from the Emerald Group by approximately €5.1 million. Mr. Kenny made a further investment through Emerald Woodlands Limited ("EWL"). Mr. Moran and Ms. Ray undertook further potential personal liabilities, as guarantors, and in 2006 made monies available to the Emerald Group as loans, to take out Anglo Irish Bank in accordance with the agreements reached with it in 2005. Mr. Moran also reached agreement with historical creditors of EGL and secured write-downs of over €800,000 from such creditors. Having paid off the reduced sums to creditors, EGL became solvent and has traded at a profit in 2008.
28. The financial statements of BCTL and its subsidiaries for the year ended 28th February, 2008, show the Emerald Group is now in a positive financial situation. The only subsidiary of BCTL with a deficit on its balance sheet is EGHL.
29. The financial statements of BCTL for the year ended February, 2008 show retained profits of €684,908. The write down by Anglo Irish Bank and dividends aggregating €600,000 in 2007 and 2008, from FICT, contribute significantly to this.
30. Banfi, as a 19.5% shareholder in EGHL, is not participating in this positive turnaround in the Emerald Group. The complaint of Banfi in these proceedings, whilst put in a number of different ways, is that the respondents have conducted the affairs of EGHL and, in particular, permitted the Christmas tree business of the Emerald Group, of which EGHL was the holding company in 2002, to be developed and conducted since that date in such a way that Banfi, as a minority shareholder of EGHL, is effectively excluded from participating in the benefits of the now successful business. It submits that such conduct was and continues to be oppressive to it or in disregard of Banfi's interest as a member of EGHL within the meaning of s. 205 of the Companies Act, 1963.

Section 205 of Companies Act, 1963

31. Section 205(1) of the Companies Act, 1963 (as amended) provides:

"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, may apply to the court for an order under this section."

32. Counsel for the petitioner and respondents are in substantial agreement as to the meaning of the section in accordance with the decisions of the Supreme Court and High Court, as well as the English authorities referred to. The latter, as has been pointed out on a number of occasions, must be considered carefully, having regard to certain

differences between the relevant English sections and s. 205(1) of the Act of 1963.

33. First, it is agreed that Banfi, as the petitioner, must be a member of EGHL, as indeed it is and has been since July, 2007. Secondly, the conduct of which it complains must be oppressive to it or in disregard of its interests as a member of EGHL and not in some other capacity. Thirdly, the conduct of the respondents, of which complaint is made, must relate to the conduct of the affairs of EGHL or the exercise of their powers as directors of EGHL and not their conduct as directors of some other company, even within the Emerald Group. Fourthly, whilst certain of the submissions made on behalf of Banfi were directed to allegations of wrongdoing by Mr. Moran and Ms. Ray, as directors of EGHL, counsel for Banfi correctly submitted that it is not necessary for the Court to make any finding of wrongdoing in order to uphold the complaint made under section 205(1). This was not disputed on behalf of the respondents. In the matter of the *Visiting Motorists' Bureau Limited* (Unreported, the High Court, 7th February, 1972), Kenny J. at p. 33, stated, in relation to section 205:

"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. One of the most terrifying aspects of human history is that many of those who we now regard as having been oppressors had a fanatical belief in the rightness of what they were doing. 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."

34. Both parties accept the well-known definition of "oppressive conduct" as meaning the exercise of the company's authority in a manner "burdensome, harsh and wrongful" (see *Scottish Co-operative Wholesale Society Limited v. Meyer* [1959] A.C. 324 at p.342). It must, of course, be recalled that s. 205(1), in addition to referring to "oppressive conduct" as was referred to in the then corresponding s. 210 of the English Companies Act 1948, and to which the above definition relates, also includes, as a matter of potential complaint, acting in disregard of the petitioner's interests as a member of the company.

35. The parties were in dispute as to the timing of conduct which may form the basis of a complaint under s. 205(1), having regard to the wording of the opening phrase that "any member of a company who complains that the affairs of the company are being conducted . ." [emphasis added]. This dispute must be considered in the context of the relevant facts of this petition.

36. At the commencement of proceedings, the petitioner made multiple allegations of oppressive conduct towards it or acting in disregard of its interests as a member of EGHL. However, at the hearing, the complaints were more focused, and the primary complaint made by counsel on behalf of Banfi was the diversion by the respondents, as directors of EGHL, of its business or a significant part of its business, to BCTL, a company in which Banfi had and has no interest, and consequently preventing Banfi from participating in the continuation of its existing business and in the now positive turnaround of the Emerald Group. Counsel continued to pursue a second allegation that the first and second named respondents fraudulently procured the transfer to them by ICT Nominees Ltd. (at the direction of Banfi) of 8,800 shares in EGHL in 1999. For reasons set out below, I do not consider the second allegation is made out and therefore exclude that allegation from any consideration of the timing of events to which s. 205(1) may properly apply.

37. In relation to the first allegation, counsel for the respondents, whilst submitting that the alleged conduct does not amount to oppressive conduct towards or conduct in disregard of the interests of Banfi as a member of EGHL, also submits the alleged conduct commenced in 2002, at a time when Banfi was not registered as a member of EGHL, and, as such, cannot now form the basis of a claim by Banfi pursuant to s. 205(1) of the Act of 1963.

38. The temporal requirement of s. 205(1) was considered by Keane J. (as he then was) in the High Court in *Re Greenore Trading Company Limited* [1980] ILRM 94. In that case, the petitioner complained, *inter alia*, of the acquisition by the respondent (a director and shareholder) of the shares of another member, partly in consideration of monies paid out of the company, and for the purpose of giving the respondent 75% of the issued share capital. At p. 101, Keane J. stated:

"It is true that the wording of the section envisages that the oppression complained of is operative at the time when the petition is launched. (See *Re Jermyn Street Turkish Baths Ltd.*). In this case, the transfer of shares took place in March 1978. The accounts for the year were certified by the company's auditors on 9 June 1978. The petition was presented just over a year later on 15 June 1979, after protests had been made in correspondence on behalf of the petitioner at the manner in which the company's affairs were being conducted. The company had not merely failed to take any steps to deal with these gross irregularities in its affairs prior to the issuing of the petition; it had also wholly ignored letters written on behalf of the petitioner which clearly called for an answer. It seems to me that in these circumstances the oppressive conduct can properly be regarded as having continued up to the date of the issuing of the petition."

39. As is clear from the above, and indeed the wording of the section, the effect on the petitioner of the conduct complained of must be continuing up to the date of presentation of the petition. Further, its continuing effect must be oppressive to the petitioner or in disregard of its interests as a member of the company. However, where the conduct complained of relates to a transaction which has taken place, provided the transaction has continuing effects which are oppressive to the petitioner or in disregard of its interests as a member, and the effects have not been remedied, then the alleged conduct will be considered as operative at the date of presentation of the petition.

40. The conduct complained of by Banfi commenced in 2002. Banfi was then the beneficial owner of 19.5% of the issued share capital of EGHL, but such shares were registered in the name of ICT Nominees Limited. The existence of Banfi as the beneficial owner of the shares was known to the respondents. It does not appear to me that there is anything in the section which precludes Banfi complaining of conduct allegedly oppressive to it or in disregard of its interests as a member, which commenced at a time that it was the beneficial owner of shares, albeit not a member of the company, provided, of course, that prior to the presentation of the petition it is a member of the company, and that the oppressive conduct to it or conduct in disregard of its interests as a member is continuing in the sense set out above.

41. The Supreme Court considered a factual situation almost the converse of the present in *Re Via Net Works (Ireland) Limited* [2002] 2 I.R. 47. The petitioner, under s. 205 in that case, had entered into a binding contract to transfer the shares prior to the presentation of the petition, but had not done so. It was contended, on appeal, that it had no *locus standi* under section 205. Keane C.J., on this issue, stated at p. 55:

"Persons, such as the petitioners, who have voluntarily disposed of their entire shareholding in a company, could not conceivably have been contemplated by the legislature as persons who would be entitled to relief under s. 205. Nor is it any answer to say that, because the petitioners have not transferred their shares, as they are contractually bound to do, they remain registered as members of the company. It is undoubtedly the case that a person who has become entitled to be registered as a shareholder may be unable to exercise any of his rights as a shareholder until his name has been entered on the register. But if does not follow that a person who, conversely, has voluntarily divested himself of all his shares in the company, but remains on the register must be treated as a member of the company for all the purposes. I have no doubt that, when the legislature enacted s. 205(1), it was not envisaged that persons without any interest in the company but who, for whatever reason, remained on the register as members would be entitled to present a petition grounded on alleged oppression of them as members."

Similarly, it appears to me, that when the legislature enacted s. 205(1), whilst it required a person to be a member to bring proceedings pursuant to the section, it did not envisage that a person who was the beneficial owner of shares, but not yet a member of the company, would, once he became a member and entitled to exercise his rights pursuant to s. 205(1), be precluded from relying upon conduct which commenced whilst he was the beneficial owner of the shares which he now held as a member.

42. Accordingly, I now turn to the question as to whether or not Banfi has made out its complaint that the respondents, in particular the first and second named respondents, have acted and continue to act in an oppressive manner to it or in disregard of its interests as a member of EGHL. This conduct is alleged to have commenced in the summer of 2002.

43. The evidence adduced by the respondents, in particular in relation to the financial position of the Emerald Group in 2002, and the documents relating to Anglo Irish Bank's continued financial support at that time, have satisfied me that, as a matter of probability, Anglo Irish Bank did require the additional funding for the Emerald Group to be made to a new company which did not have historic liabilities and which did have assets (plantations) to support the funding, and I so find. However, I have also concluded that Anglo Irish Bank did not identify BCTL as that company, nor did it require that the new company be the holding company of the Emerald Group, nor did it stipulate who should be the shareholders of the new company.

44. I find, as fact, that the decisions taken in 2002, that BCTL be used as the new company for the purpose of the Anglo Irish Bank financing, was a decision taken by the first and second named respondents. Further, the decision that BCTL be brought into the then Emerald Group by becoming the holding company of EGHL, was also a decision taken by them. The third and most important decision to the complaints made, namely, that BCTL would only acquire the then majority shareholding of Mr. Moran and Ms. Ray in EGHL, and that no offer be made to ICT Nominees Ltd. or Banfi in respect of its shareholding, was also a decision made by them. It appears probable that the decision that the new company be introduced as a holding company was influenced at least in part by the rights of the "A" Ordinary shareholders in EGHL. However, their position had no bearing on whether all the existing ordinary shareholders of EGHL would be given the opportunity of exchanging their shares for shares in the new holding company. Such exchange appears to have been contemplated in a document prepared by Mr. Moran in May 2001 entitled '*The Emerald Group Financial Strategy - May 2001*'.

45. Further, I have concluded that the above decisions were decisions taken by the first and second named respondents in 2002, as directors of EGHL. It was EGHL which was in negotiation with Anglo Irish Bank for its continued support. They had to determine, as directors of EGHL, whether or not it would accept the terms and conditions offered by Anglo Irish Bank. They must have made the decision, as directors of EGHL, to accept the funding from Anglo Irish Bank on the conditions set out and to make changes to the corporate structure and plantation ownership within the Emerald Group, as stipulated in the letter of 28th May, 2002. As directors of EGHL, they must have approved the registration of BCTL as a shareholder on the transfer by Mr. Moran and Ms. Ray of the 56% of the issued share capital in EGHL then held by them, without requiring BCTL to make any similar offer to Banfi. Some of the decisions may have been made with Mr. Kavanagh, who was also then a director. Some of the decisions were also taken as directors of other companies including BCTL, but that does not take away from the fact that the relevant decisions set out above were also taken by them as directors of EGHL.

46. In 2002, the then business of EGHL may be divided into three parts. First, it was the holding company for the Emerald Group which had carried on a Christmas tree business since approximately 1989 with the ability to determine policy and strategy for the Group. That Christmas tree business had been developed in Ireland and the United Kingdom with a supplier and customer base *etc.* Notwithstanding the financial difficulties and very precarious financial position of the Group in 2002, it was a business in which its promoters and members of EGHL believed and considered to be potentially profitable. The second part of its business was, by that time, as the owner of plantations. The third aspects of its business was that it had a right, through the holding of "A" ordinary shares or a profit share in certain of the Investor Companies, to receive dividends if the plantations owned by them were ultimately profitable.

47. In 2002, the right of Banfi, as the beneficial owner of shares and entitlement to become a member of EGHL, was primarily to participate in the financial rewards of what was believed to be a potentially profitable Christmas tree business carried on by the group of companies of which EGHL was the holding company. Those financial rewards might have come in a number of ways. On the evidence, it would appear that the most potentially profitable aspect of the Group's business was from the plantations. Whilst at that time many of the plantations had been owned by Investor Companies, I am satisfied on the evidence that, through the profit share or "A" share arrangements, EGHL had the possibility of participating in profitable plantations. It also owned some plantations. Insofar as its subsidiary, EGL, traded at a profit, it might have received, indirectly, dividends declared by EGL to EGHL. However, I have concluded that it was not intended that significant profits be created within the group in this manner. Any profits accruing in EGL were primarily dependent upon the pricing arrangements between EGL and the plantation companies. At that time it appeared a less likely source of profit. If the Emerald Group established a successful and financially sound business, Banfi also had the possibility of selling its 19.5% interest at a capital gain, subject, of course, to compliance with the transfer requirements of its Memorandum and Articles of Association.

48. The decisions taken in 2002 had the effect of moving from EGHL that part of its business as the holding company of the Emerald Group of companies. It ceased to be the holding company. It also ceased to be the company to carry out future plantations. The rights to profits in certain of the earlier Investor Companies appear to have been transferred, in particular, in relation to FICT and EWL. I am satisfied that the decisions taken by the respondents to use a new company within the Group, without historic debt, for future plantations to secure funding from Anglo Irish Bank was a decision which was taken *bona fide* in the overall interests of the Emerald Group and the continuation of the Christmas tree business of the Emerald Group and its survival. However, I have also concluded that the decision that the particular corporate structure would be that a new company (BCTL) would become the holding company of the Group and the company to own the plantations, without offering Banfi the opportunity to acquire shares in BCTL, made the decisions taken ones which were in disregard of the interests of Banfi as the beneficial owner of the shares and a person entitled to become a member of EGHL. The respondents sought to rely on the failure of Mr. Hasslacher to engage in a meaningful way in discussions with Mr. Moran in the spring of 2002, and to suggest that if he had, that different decisions about the shareholding in BCTL might have been made. It does not appear that even if there was any such failure by Mr. Hasslacher (which I am not holding), it is any answer to Banfi's complaint in the absence of any offer from BCTL to Banfi or ICT Nominees Limited.

49. Whilst the decisions taken in 2002, were the basis for the new corporate structure of the Emerald Group, the respondents, as directors of EGHL, have continued to permit the former businesses of EGHL, both as holding company of the group and as the owner of plantations or a company with rights to participate in the profits from Investor Companies owning plantations, to be carried on by BCTL, whilst continuing to exclude Banfi, as a member of EGHL, from participating in any profits from the plantations or Investor Companies or any increase in value in the overall Emerald Group, now headed by BCTL due, *inter alia*, to the success of the Christmas tree business of the Emerald Group. That position continued up to the date of presentation of the petition and appears to me to constitute conduct by the respondents which, whilst of itself, is not wrongful or illegal, is conduct which is oppressive, in the sense of being harsh or burdensome, of the position of Banfi as a member of EGHL and is conduct which is in disregard of the interests of Banfi as a member of EGHL.

50. The decisions taken (or perhaps, more accurately, steps not taken) by the first and second named respondents as directors of EGHL, at the time of the Anglo Irish Bank write-down of €5.1 million in 2005, are indicative that they continue to conduct the affairs of EGHL in disregard of the interests of Banfi as a member of EGHL. First, no steps were taken to deal with the historical liabilities of EGHL to the loan note holders and/or the "A" ordinary shareholders as was done with the historical creditors of EGL. Both had been identified as necessary in the March 2004 document entitled 'Review of Key Issues for the Emerald Group' prepared by Mr. Moran. Secondly, a debt of €256,000 from EGHL to BCTL was written off in BCTL as not collectible, but was left as a liability in EGHL.

51. Mr. Moran and Ms. Ray are experienced and competent accountants with a keen understanding of corporate structures and financial management. They have also developed an expertise in the Christmas tree business. As, *inter alia*, directors of EGHL, they have continued and developed, or permitted to be continued and developed, the Christmas tree business of the former Emerald Group with EGHL as its holding company by the current Emerald Group with BCTL as its holding company. In taking or failing to take decisions, as directors of EGHL, the consequences of which continue to exclude Banfi, as a member of EGHL, from participating, directly or indirectly, through the current corporate structure of the Emerald Group, in the positive turnaround of the Christmas tree business of the Emerald Group, and in particular, in the profits arising on the sale of plantations and improvement in its financial position by settlement of historical debts and write-offs, they continue to act as directors of EGHL in a manner oppressive to and in disregard of the interests of Banfi in its capacity as a member of EGHL within the meaning of s. 205 of the Act of 1963.

52. Accordingly, I am satisfied that Banfi has made out an entitlement to relief under section 205 of the Act of 1963.

53. Prior to considering the form of relief, it is necessary to set out my findings on the other ground of oppression pursued.

54. As already stated, in 1998, Mr. Moran (either alone or jointly with Ms. Ray), Mr. Kavanagh and Banfi were the beneficial owners each of 30% of the issued share capital of EGHL. In the summer of 1998 Mr. Moran and Ms. Ray approached Mr. Kavanagh and Mr. Hasslacher seeking to acquire from each of Mr. Kavanagh and Banfi 10% of their shareholdings in consideration of IR£1.25 per share. There is a dispute between Mr. Moran and Mr. Hasslacher as to what was stated in connection with the proposed purchase. Mr. Hasslacher contends that Mr. Moran told him that it was a requirement of Anglo Irish Bank that Mr. Moran become the majority shareholder in EGHL but that, in fact, this was not a requirement of Anglo Irish Bank.

55. It does not appear to me necessary to resolve this dispute. Regardless of what may have been said between Mr. Moran and Mr. Hasslacher at the relevant time, I am satisfied and find as fact that in 1998 Mr. Moran made clear that he and Ms. Ray wished to become the majority shareholders in EGHL in connection with their continuing commitment to the Emerald Group. Further, that a decision was taken by Mr. Kavanagh and Mr. Hasslacher, as directors of Banfi, that it was then in the interests of EGHL and Banfi, as a beneficial owner of shares in EGHL, that it obtain the commitment of Mr. Moran and Ms. Ray to EGHL and, for that purpose, that it should sell 10% of its shareholding in consideration of IR£1.25 per share. I have concluded that the decision made to sell the shares was not by reason of any misunderstood requirement of Anglo Irish Bank, but rather to obtain the 100% commitment of Mr. Moran and Ms. Ray to the Emerald Group business.

56. Banfi's complaint and allegation of oppressive conduct in relation to this transaction has not been made out. Accordingly, the relief to which Banfi is now entitled pursuant to s. 205 is on the basis that it is a member and the holder of 19.5% of the issued share capital in EGHL and not any greater amount.

Relief

57. Section 205(3) gives the Court a wide discretion as to the form of order to be made where it concludes that a company's affairs are being conducted in breach of section 205(1). The order must be "with a view to bringing to an end the matters complained of". It expressly includes a power to make an order for the purchase of the shares of any members of the company by other members of the company. This appears to be the appropriate order in this case.

58. Were it not for the regrettable total breakdown in the relationship between Mr. Hasslacher, on the one part, and Ms. Ray and Mr. Moran, on the other, it appears to me that the appropriate relief in relation to the purchase of Banfi's shareholding in EGHL by BCTL, for the purpose of bringing to an end the matters complained of, might have been an order directing BCTL to purchase the shares of Banfi in EGHL in consideration of the issue of a specified number of shares in BCTL. This would have permitted Banfi to have participated as an ordinary shareholder in the holding company of the Emerald Group and to have participated in the potentially profitable Christmas tree business of the Emerald Group. However, I am satisfied that such an order would not be in the interests either of Banfi or of the respondents. Whilst the remedy must be appropriate for the bringing to an end of the complaint made out by Banfi, as a member of EGHL, pursuant to s.205, it appears to me unrealistic to ignore, for the purpose of determining appropriate relief, the fact that Mr. Hasslacher is the beneficial owner of the shares in Banfi and a director thereof, and the breakdown in the relationship between him, and consequently Banfi, with Mr. Moran and Ms. Ray.

59. However, if I were simply to direct the purchase of the shares of Banfi in EGHL at a cash consideration which reflected the fair value of the shares in EGHL, this would not bring to an end the matters complained of. Valuing the shares in EGHL on the basis simply of the current value of EGHL, and excluding the now profitable business in BCTL, would not bring to an end the matters complained of.

60. I have concluded the order should be an order directing BCTL to purchase the shares of Banfi in EGHL for cash, at a fair value which takes into account an estimated fair value of BCTL at 28th February, 2008 for the purposes of a sale and has regard to a probable value of a 19.5% shareholding in BCTL at that date. The reason for which the date 28th February, 2008, is chosen is that that was the latest date to which accounts for BCTL and its subsidiaries were available. Both parties appeared to have been in agreement that it was appropriate for me, in determining any value to be placed on BCTL or EGHL, that I should do so as of that date.

61. I have had the benefit of evidence from two experienced accountants, Mr. Kirby, on behalf of the petitioner, and Mr. Wallace, on behalf of the respondents, in relation to the valuations of BCTL and EGHL and differing approaches to reaching a fair value at which I should, if I had reached this stage in the proceedings, direct the purchase of the shares of Banfi in EGHL. Both accountants gave evidence, which was clear and helpful, and I have concluded that each of them gave evidence in accordance with a genuinely held independent professional view. Each prepared written reports, which I have carefully reviewed. They met together at the direction of the Court in accordance with Commercial List practice. Following that meeting, they prepared a succinct statement setting out the matters on which they were in agreement and in disagreement and the reasons for the latter which is of assistance. In the course of their oral evidence, they fairly identified matters about which there is uncertainty and also, at the end of their evidence, attempted to answer questions which I put to them. Notwithstanding the helpful evidence and a genuine attempt to deal with each other's approaches, there remains a very significant gap in their valuations of BCTL. I have also concluded, whilst each genuinely attempted to value in accordance with what they considered to be the proper approach, each was of the view that there is considerable uncertainty attaching to any valuation of BCTL as of February 2008.

62. Mr. Wallace, in his report to the Court, describes his valuation method as being "a basic economic value method which takes the net assets of a company and adjusts it to take account of market values (often referred to as a fair value) of applicable assets such as investments and property". Whilst Mr. Kirby offered the Court initially a number of different approaches, he ultimately pursued a valuation method which appears to me consistent with the above. The significant differences between Mr. Kirby and Mr. Wallace were the adjustments which should be made to take account of market values of applicable assets.

63. Both accountants were in agreement that the starting point is the net asset value of BCTL in accordance with its financial statements as at 28th February, 2008, at a figure of €685,806. Both were in agreement that such figure should be adjusted by the addition of €122,000 in respect of subsidiary reserves, and the write-back of the EGHL loan of €256,000 already referred to above. This gives an aggregate value of €1,063,806. There agreement ends. Mr. Wallace's view is that there should be no further positive adjustment and that there should be a reduction of €400,000 in respect of a potential liability of BCTL to Mr. Charles Kenny in connection with EWL. This potential liability is not recorded in the financial statements as at 28th February, 2008, but is referred to in a note prepared by Mr. Moran for Mr. Kenny in April 2008, in respect of which evidence was given.

64. The primary dispute between the accountants is whether or not any adjustment should be made for the value of the trees planted and owned by BCTL and by a subsidiary, Ballylough Trees Limited ("BTL"). The latter's trees are due to be harvested between 2008 and 2012, and estimated to give rise to a profit in BTL and a potential dividend to BCTL.

65. Both accountants agree that the correct accounting treatment is that the stock of planted trees is carried in the accounts at the lower of cost or realisable value. It is also agreed that the trees planted by BCTL since 2002, were given a correct accounting treatment in the financial statements by being valued at cost on the balance sheet of BCTL. There is substantial agreement that the number of trees planted as at 28th February, 2008, in BCTL was approximately 905,283 (there is a relatively small issue about some jointly owned trees). Mr. Kirby's view is that the adjustment to be made in respect of the valuation of trees should be the estimated profits realisable over ten years in respect of the 905,283 trees. He presented to the Court a detailed set of figures estimating such profits, based significantly on BCTL's own figures in relation to selling price, harvesting costs, growing costs and other relevant costs, including a mortality rate of 25%. While Mr. Kirby accepted in evidence that there was room for variation in some of the figures used, his best estimate was that those trees should realise, for BCTL over the next ten years, a profit in the order of €5,571,164, and suggested that this should be used as the current or market valuation of the trees and added to the above agreed net asset value of €1,063,806. In response to questions from me, he accepted that there might be an argument in favour of discounting his figure for use as a current valuation as it is an aggregate figure for profits realisable over ten years. It appears to me some discount would have to be applied if the profit figure were to be used for a current valuation.

66. Mr. Wallace had a multiple response to this approach. His primary view is that no adjustment should be made to the value of trees at cost. However, if an adjustment is to be made, he also opposed Mr. Kirby's approach. First, he did not accept that an estimate of profits realisable on existing trees over the next ten years is an appropriate method of placing a current value on BCTL's stock of planted trees. Secondly, he makes what is essentially a common sense point. Having regard to the historical record of the Emerald Group, the multiple difficulties experienced in relation to financing, harvesting problems and risks associated with the trees such as needle drop, and the probable impact of the current economic climate on the Christmas tree market, he simply does not believe it probable that BCTL will make profits of the order estimated by Mr. Kirby over the next ten years. He made the telling point that if such profits were available, then

one would expect to see significantly more people in the business of Christmas trees. Thirdly, he made a number of detailed criticisms of the figures used by Mr. Kirby and his estimate, if one were to adopt the approach of Mr. Kirby, was that the value of the trees, based on future profits to be used for such an adjustment, should be between €141,340 and €593,382.

67. In relation to the potential dividend from BTL, estimated by Mr. Kirby at €865,000, Mr. Wallace made somewhat similar principled objections (though the trees in that company are closer to maturity), also detailed criticisms, and valued the potential dividend at €464,000.

68. I have concluded, in accordance with Mr. Wallace's valuation method, that a positive adjustment must be made to the agreed net asset value for the probable market or fair value of the planted trees, as at February 2008, if the Court is to reach a fair value of BCTL for the purpose of determining a fair value at which the shares of Banfi in EGHL should be purchased by BCTL. I do not accept the evidence of Mr. Wallace that no adjustment should be made to the correct accounting treatment of the valuation of the trees at cost, particularly having regard to the trees which are approaching maturity, both in BCTL and BTL, and the respondents' own financial estimates prepared in their proposals for financing to the banks in May 2008. However, I do not accept in full the approach of Mr. Kirby to the adjustment to be made. It does not appear to me that the adjustment should be the estimated profits over a ten-year period (even discounted by a factor) having regard to the historical record of this Christmas tree business and uncertainties and risk identified by Mr. Wallace in relation to future trading. On the evidence of the accountants, I am satisfied that there is considerable uncertainty both as to how planted trees should be valued and how a willing purchaser and vendor might value BCTL as at February 2008. There does not appear to be any established approach in Ireland to valuing Christmas tree plantation stocks for the purpose of sale of the business or company. Nevertheless, the Court must, on the evidence presented, make a reasonable estimate of the probable value of BCTL for sale purposes. It appears to me that the Court should determine the amount of the positive adjustment relative to the fair or market value of the planted trees by having regard to the range of potential profits estimated by the two accountants (which depend on factors, not all of which are predictable); the historical record of the Christmas tree business of the Emerald Group and the risks and uncertainties inherent in the Christmas tree business emphasized by Mr. Wallace. I have determined that such an adjustment in respect of the planted trees should be in the order of €1.25 million. This represents in my view a fair balance between the estimated profits and the historical record and risks and uncertainties attached to the Christmas tree business of the Emerald Group.

69. In relation to the alleged liability of BCTL to Mr. Kenny of €400,000, again, this is a matter which I have concluded that I should have regard to in the following sense. While it has not been established as a legal liability of BCTL, nevertheless, I am satisfied from the letter of understanding produced by Mr. Moran, that he considers BCTL to have an obligation to Mr. Kenny of this order. It appears to me that, having regard to the ongoing relationship between the companies within the Emerald Group and Mr. Kenny, there will have to be some resolution of this issue, and whilst it may not cost BCTL €400,000, I am taking into account a probable liability in the order of €250,000.

70. Accordingly, I have concluded that I should make a positive adjustment for the value of the trees, less a potential liability to Mr. Kenny, in the order of €1 million, giving, in aggregate, a valuation for BCTL in February 2008, in the order of €2,063,806. This, I have also concluded on all the evidence, is a reasonable estimate of a probable value of BCTL for sale purposes in February 2005.

71. Mr. Wallace contended that if the Court were to reach a value of 19.5% of the issued ordinary share capital of BCTL, that it should discount the 100% value of BCTL by 30%, as the shares constitute a minority interest. This was opposed on behalf of the petitioner and reference made to authorities which, undoubtedly, suggest that whilst this might be a typical discount for the sale of a minority shareholding, it should not apply where the Court is directing a forced sale pursuant to s. 205 of the Companies Act 1963. I accept those authorities. Nevertheless, what I am dealing with, on the facts of this case, is something slightly different. I already indicated that I had determined that I should "have regard to" the value of a 19.5% interest in BCTL. I used those words advisedly. Banfi does not hold 19.5% of the issued share capital of BCTL. In addition to the ordinary shareholders in BCTL, there are "A" ordinary shareholders who have potential entitlements to profits but not a right to vote or attend meetings of the company. The current value, is based upon anticipated profits in BCTL. The current holders of the "A" ordinary shares are a Mr. Fenelon and Mr. Williams, both employees of the group. It appears that I should have regard to their potential entitlement to be considered for a profit distribution and to the fact that Banfi does not hold 19.5% of BCTL. I have concluded that in such circumstances it would be reasonable to apply a reduction of approximately 20% to the overall value of BCTL, for the purpose of reaching a fair value at which Banfi's shares in EDHL should be purchased by BCTL.

72. I have concluded, based upon the above decisions that the fair value at which the Court should direct the purchase by BCTL of the 16,525 shares now held by Banfi in EGHL is at €20 per share i.e. a total consideration of €330,500. This approximates to 19.5% of 80% of €2,063,806 which is €321,953.

73. The form of relief will be an order against all three respondents that the third named respondent purchase the 16,525 shares of Banfi in EGHL at €20 per share within a specified period of time. However, I will hear counsel prior to fixing the time.