THE HIGH COURT

[2017/377 COS.]

IN THE MATTER OF

SEDA

(SKILLS AND ENTERPRISE DEVELOPMENT ACADEMY) LIMITED

AND

IN THE MATTER OF

SECTION 212 OF THE COMPANIES ACT 2014

BETWEEN

TIAGO MASCARENHAS

APPLICANT

AND

REZAUL KARIM AND MAHBUBA SULTANA

RESPONDENTS

JUDGMENT of Mr. Justice John Jordan delivered on the 23rd day of May, 2019

Introduction

1. The applicant is a company director and he resides at 74 The Ice Rink, Reuben Square, Dublin 8. He is a Director of a company named SEDA (Skills and Enterprise Development Academy), hereinafter 'the company'.

2. The first named respondent resides at 92 Patching Hall Lane, Chelmsford, Essex, CM 14DB, United Kingdom. The second named respondent is the wife of the first named respondent and resides at the same address. The second named respondent is a shareholder in the company. The second named respondent is the registered holder of 85% of the issued share capital of the company and has, throughout, been a majority shareholder in the company. She also describes herself (for example in her affidavit dated the 5th April, 2018) as a founding subscriber member to the original memorandum and articles of association on the 26th August, 2008 when the company was first incorporated in the state.

3. The company runs an English language school at 68-72 Capel Street, Dublin 1. Between them, the applicant and second named respondent hold 100% of the issued share capital of the company. According to the Companies Registration Office (C.R.O.), the second named respondent owns 85% of the issued share capital of the company and the applicant owns the remaining 15% of the shares.

4. The applicant claims to be the beneficial owner of 43% of the company shares by reason of the settlement of earlier High Court proceedings (Record No. 2016/8689 P) concerning the company with the balance held by the second named respondent (although the beneficial ownership of her shareholding is one of the matters at issue).

5. The first named respondent has had a close association with a number of English language schools both in Ireland and England which have failed or gone out of business over the years. The applicant asserts that the second named respondent in fact holds the shareholding in the company on behalf of the first named respondent. The applicant says that the first named respondent was in the past in *de facto* control of the company and that the second named respondent has been in effect a proxy for his interest in the company. It is clear from the evidence that the first named respondent has been intimately involved in the affairs of the company – and more so than the second named respondent. I am satisfied that it is he who is the beneficial owner of the shareholding which is registered in the name of his wife, the second named respondent. It seems to me that the alternative finding open to me on the evidence is that the first and second named respondents are joint owners of the shareholding in circumstances where it is absolutely clear to me that the first named respondent has had significant control of the company and has an interest in it in terms of the shareholding registered in his wife's name. On the evidence, I could not be satisfied of the third alternative – which is that the second named respondent is the legal and beneficial owner of the shareholding which is in her name. Of the three alternatives, it is the first one which commends itself to me on the evidence and which causes me to find that it is the first named respondent who is in actual fact the beneficial owner of the shareholding in question.

6. The earlier set of High Court proceedings were issued on the 29th September 2016. These earlier proceedings were compromised and two separate written agreements were entered into. Firstly, a formal shareholders' agreement was entered into and this was executed on the 11th April 2017. Secondly, an agreement between the directors of the company was entered into.

7. One of the issues in the 2016 proceedings was that the first named respondent had taken money from the company and he did acknowledge that he owed the company €30,000 as part of the settlement.

8. Under the shareholders' agreement, the second named respondent together with the applicant and a Mr. Saiful Islam were to receive what was described as a monthly salary of €3,000. The company paid this monthly amount for some months to the second named respondent following the execution of the shareholders' agreement but difficulties then arose in relation to its payment as a result of queries from the company accountants concerning the tax treatment of this payment. When the applicant sought certain information from the respondents in relation to their tax affairs, difficulties ensued and the respondents (especially the first named respondent) became quite threatening in relation to the conduct of the company's affairs.

9. The applicant says that the first named respondent regards the company's assets as his own and believes that he should be free to use them as he sees fit. In April 2015, before the earlier proceedings were commenced, the first named respondent sent an email to the applicant in which he threatened to do the following:

(a) Transfer the shares in the company to other parties.

(b) Appoint three new directors to the company.

(c) Add his own signatory to the bank account.

(d) Issue himself with a loan in the sum of €100,000.

(e) Close the bank account so that salaries and rent could not be paid.

(f) Inform the company's accreditation body (ACELS) and the statutory authority (Irish Naturalisation and Immigration Service) of certain unspecified and unsubstantiated allegations against the applicant.

10. Then, after the settlement, in August/September 2017, the respondents recommenced making similar threats.

11. Around September 2017, the first and second named respondents convened a general meeting of the company with the intention of appointing new directors and removing the applicant. This concerned the applicant as it seemed to him to be the first step in the respondents' plan to take control of the Board of Directors, with a view to wrongfully extracting money from the company.

12. The applicant is of the view that the new directors, when appointed, were to arrange for the company to pay all overseas director and shareholder expenses. He says that it is clear as a result of other communications from the respondents that these payments were to be backdated for a period of four years.

13. It is noteworthy that the company has approximately 600 students on its courses at any one time and these students pay for their courses in full and in advance of commencing their studies. This means that at any one time the company could have a significant sum of money in its bank account. This money is not all profit; rather it is largely money that is required by the company to cover the costs of running the courses, including the wages of its lecturers, the company's rent and the accommodation costs of the students. Once these costs are covered, the objective is to have a profit for distribution amongst the shareholders at the end of each financial year. The company does not always make a profit according to the accounts furnished.

14. In the past, the respondents wrote to the company's bank, Bank of Ireland, and made very serious allegations of fraud in respect of the company's account. More recently, the respondents wrote again to the bank and made unsubstantiated allegations. As a result of the allegations which were made previously, the bank suspended the company's account for a period of time in 2016. As a result of this, cheque payments to staff bounced, rent was not paid, host families went unpaid and insurance went unpaid. The applicant resolved these problems. Ultimately, however, he had to arrange for the first named respondent to be paid some money in cash by the company in return for the allegation of fraud to be withdrawn to allow the company again function normally with the benefit of its banking facilities.

15. The settlement agreement entered into as part of the earlier proceedings provided for independent solicitors to be appointed as the solicitors for the company. Subsequently, however, the respondents wished to have their own solicitors (Actons) appointed as the solicitors for the company.

16. The respondents (or one or other of them) also attempted, subsequent to the settlement, to sell the respondents' shareholding in the company to other parties. This is a breach of the pre-emption rights set out in the shareholders' agreement.

17. The respondents also threatened to make contact with Accreditation and Coordination of English Language Services (ACELS) to make certain criticisms about the company. Any such criticisms, the nature of which remain unclear, could have potentially undermined the business of the company.

18. In addition, the respondents threatened to make contact with various journalists or media outlets to make complaints about either the company or the applicant. Again, the nature of the complaints remain unclear but the making of such complaints obviously would have the potential to undermine the business and reputation of the company.

19. The English language school operated by the company holds an accreditation commonly referred to as "ACELS". This is a valuable accreditation in the English language school sector and requires protection by the holders. The ACELS regulations provide that if there is a change of directorship in the company, this will trigger an inspection by the statutory authority, Quality and Qualifications Ireland (QQI). This inspection can be a protracted process and can involve time, effort and often expense on the part of the school as a result of changes requested by the regulatory authority. As it is, the college is in an ongoing process with the accreditation authority over the adaptation of the school premises to suit their specific requirements, specifically insofar as toilet capacity is concerned. This is of relevance insofar as the endeavours of the respondents to have additional directors appointed is concerned.

20. Contrary to what they assert, it is clear to me that the respondents were kept reasonably up to date with the financial affairs of the company, up to and including the board meeting of 15th November 2018. Detailed and comprehensive financial information was provided to them. The second named respondent confirmed at the board meeting on that date that she was satisfied with the information she had received and this is recorded in the minutes of that meeting. In fact, the applicant did hold a legitimate concern about the use to which the financial information of the company was being put in circumstances where it became clear that the first named respondent was utilising the up to date financial information and sharing it with third party competitors of the business when attempting to sell his shareholding in the company. Not alone was this detrimental to the interests of the company, but it was as mentioned above also in breach of the terms of the pre-emption clause provided for in the shareholders' agreement– as a result of which the shares should have been offered first to the applicant. Insofar as the applicant's shareholding is concerned, I am satisfied that the execution of the shareholders' agreement and the stock transfer form exhibited by the applicant are confirmation of the transfer of shares into his name and confirm his entitlement to a 43% shareholding in the company. I will now move to consider the events subsequent to April, 2017.

21. Whilst the second named respondent has complained that she did not have board representation, the fact of the matter is that Mr. Ian Fleming, the independent academic director, was in effect introduced to the company by the respondents (although his view of them both and of the first named respondent in particular, has now changed considerably) . Additionally, Mr. Amjad Hussein was appointed to the Board when he was the respondents' nominee.

22. Mr. Amjad Hussain was removed from the Board of Directors in circumstances where the applicant says he decided to resign due to the pressure he was under from the first named respondent. At a later stage, Mr. Hussain denied this and again did so, unconvincingly, in the witness box.

23. The second respondent sought to be appointed as a director herself. Secondly, she sought to have a document which was filed in the Companies Registration Office (removing Mr. Hussain as director and company secretary) reversed. Thirdly, she also sought to remove Mr. Fleming as a director.

24. If Mr. Hussain and the second named respondent were added as directors and Mr. Fleming was removed, there would have been three directors. The respondents would have two representatives on the Board of Directors and the applicant would be the third director. This would have enabled the respondents to do precisely as they wished in relation to the company notwithstanding the earlier terms of settlement. That would not be a problem if their intentions were good, but they were not.

Motions of the Second Named Respondents

25. The respondents issued six separate motions in the course of these proceedings claiming various forms of relief. I am dealing with all six in this Judgment as well as the Application by the Applicant. All are intertwined. The first motion is dated the 17th day of April, 2018 and it is referred to by the second named respondent as the motion "seeking boardroom representation".

26. By consent, the applicant conceded that the second named respondent should be entitled to boardroom representation in October 2018 and the second named respondent was then appointed a director of the company. She says that she was told that she was being appointed as an additional director to the company and that she would be entitled to online banking access but that this was later denied to her – and that this refusal to allow her online banking access continues to this day.

27. Of note is that this motion also sought an order, if necessary, pursuant to s.179(5) of the Companies Act 2014, giving a direction that one member of the company, Mahbuba Sultana present in person or by proxy is a valid quorum or such other directions as the court thinks expedient.

28. Firstly, it seems to me that this motion was not necessary and that the issues addressed in the motion and referred to in the affidavit grounding it could all have been dealt with adequately in the original proceedings instituted by the applicant. Secondly, the order sought pursuant to s.179(5) of the 2014 Act does serve to confirm the view that the respondents have throughout been anxious to gain total control of the company in order to achieve their ultimate objective of extracting cash from the company notwithstanding the fact that this would impact severely on the company and on the interests of the other shareholder.

Insofar as this motion is concerned, I am striking it out and will address the issue of costs following submissions in that regard.

29. The second motion brought by the respondents and dated the 18th April, 2018 is a motion referred to by the respondents in the legal submissions as a motion "seeking access to the statutory books of the company and audit of the financial statements for the years 2016, 2017 and 2018." Insofar as this motion is concerned, the applicant did agree to have the books and records of the company audited but with the caveat that the second named respondent would pay the costs of this audit. In this regard, the letter from the solicitors for the applicant dated the 25th May, 2018 sets out the position. Once more, it seems to me that the issues raised in this motion and referred to in the affidavit grounding it are all matters which could have been addressed in the proceedings brought by the applicant. As part of the relief claimed in the motion the second named respondent seeks, an order, if necessary, pursuant to s.212(3) and 797 of the Companies Act 2014 requiring Tiago Mascarenhas to provide the applicant with access or copies of the statutory registers requested pursuant to s.216 of the Companies Act 2014 on foot of the 14-day statutory notice issued on the 3rd April, 2018. The reality is that this claim for relief is difficult to make any sense of given the level of familiarity which the respondents had and continue to have with the company, its makeup and its affairs. I am striking out this motion and I will hear submissions in relation to costs.

30. The third motion of the respondents is dated the 16th May 2018 and is described in the second named respondent's legal submissions as the motion "seeking removal of the CRO statutory forms purporting to remove Amjad Hussain as company secretary and company director". By consent set out in a letter dated 25th of May, 2018 from the applicant's solicitors it was agreed that Amjad Hussain would take his place again as a director of the company although the applicant refused to appoint him as the company secretary. Again, the matters embodied in this motion are all matters which could have been addressed in the s.212 proceedings originally brought by the applicant. This third motion was unnecessary. In addition, the removal of Mr. Hussain was as a result of his own decision in that regard which was clearly communicated to the applicant and which communication was proved in court although denied by Mr. Hussain insofar as the meaning of the communication is concerned. I am striking out this motion and will decide on costs after hearing submissions in that regard.

31. The fourth motion brought by the respondents is dated the 30th of May, 2018 and seeks an order pursuant to s.212(3) of the Companies Act 2014 deeming the agreement of the 11th April, 2017 deemed terminated and/or rescinded for the purposes of regulating the conduct of the company's affairs in future and/or such consequential directions as the court thinks expedient. It also seeks an order pursuant to s.212(3) cancelling the Company's Registration Office form B10 bearing submission no. 9812720/2 filed on the 22nd May, 2015 purporting to appoint Ian Christopher Fleming as an additional director of the company and authorising the Registrar of Companies to remove the said form from the file of the company and for the purpose of regulating the conduct of the company's affairs in future and/or such consequential directions as the court thinks expedient. Again, the relief claimed in this motion could have been addressed in the hearing of the original s.212 proceedings. Insofar as this motion is concerned the second named respondent has indicated in her legal submissions that by way of letter dated the 19th June, 2018 from her solicitors she was willing to agree to having the position of Ian Fleming regularised as a quid pro quo in return for regularising the position of Amjad Hussain. This was elaborated on further in the course of submissions made by counsel for the second named respondent at the end of the hearing when it was indicated that the second named respondent had no objection to Ian Fleming provided the payments of salary to her were started again.

32. The order sought deeming the agreement of the 11th April 2017 terminated or rescinded was capable of being resolved in the original proceedings brought by the applicant. A separate motion was unnecessary in this regard. Likewise, the order sought in the remainder of the motion concerning the removal of Ian Fleming as an additional director could have been addressed adequately in the original proceedings. Again, it is noteworthy that this separate motion seeks the removal of Mr. Fleming as a director of the company in circumstances where it was then apparent to the respondents that his continued existence as a director in the company was an obstacle in their way in terms of their ultimate objective of extracting as much cash as possible from the company.

I am striking out this motion and will decide on costs following submissions.

33. The fifth motion brought by the respondents is dated the 12th June 2018. It seeks an order directing the exchange of pleadings, points of claim and defence and compliance with High Court Practice Direction 75. It seeks an order for directions with regard to the reliefs sought by the second named respondent and it seeks an order if necessary pursuant to s.212 of the Companies Act 2014

giving any ancillary or consequential directions which the court thinks expedient.

34. This motion was in fact dealt with by Ms. Justice Stewart in the High Court on the 5th July, 2018. That court order speaks for itself. The court reserved the costs of the motion and order. In that regard, I will decide on those costs following submissions.

35. The sixth motion issued by the second named respondent is dated the 27th June, 2018 and names the Applicant, Saiful Islam and SEDA as the Respondents. It is described in the second named respondent's legal submission as the motion "for directions with regard to the beneficial ownership register". At this point in time the motions being issued had become quite absurd. It is as if the respondents had their legal advisers trawling through company law text books with a view to finding something else to propel in the direction of the applicant. To my mind there was no justification for the motion. If any issues did arise in relation to the beneficial ownership register they are issues which could have been canvassed and dealt with in the original s.212 proceedings. I am striking out this motion and will again hear submissions on the costs of the Motion.

36. I should add that whatever technical justification there may be for any of the above motions I do not consider that they were justified given the entire context, save perhaps the motion concerning Practice Direction 75. All of the other issues could have been canvassed at the hearing of the original motion as part of the entire case rather than creating a cumbersome vehicle with significant cost implications to air grievances and issues which were live in terms of the dispute to be decided in the original Section 212 proceedings.

37. It is clear to me that the respondents did endeavour to take over the Board of the company after the settlement of the earlier proceedings and it is also clear to me that their strategy in this regard did not have the interests of the company at heart but was intended to allow them indulge themselves in terms of the company assets at the expense of the company and in particular at the expense of the students of the college.

38. Mr. Hussain was appointed director on the 28th October 2009 and was the representative of the respondents on the Board. He never attended a Board meeting in Dublin. On all relevant matters of compliance, it was always Mr. Karim (the first named respondent) and the applicant who dealt with each other, and Mr. Hussain or the second named respondent were not involved.

39. I am satisfied that Mr. Hussain did advise the applicant that he wished to resign as director of the company by reason of the pressure which was being exerted on him by the first named respondent and which he could no longer cope with. I am satisfied also that his decision to deny that he had indicated that he wished to resign is as a direct result of the respondents' influence over him.

40. By reason of the volte-face on the part of Mr. Hussain and because of the concerns expressed by the second named respondent, the applicant filed a B10 reappointing Mr. Hussain to the Board of Directors as of the 4th June 2018.

41. The improper allegation of fraud made by Mr. Karim to Bank of Ireland before the earlier proceedings, and in which Mr. Hussain participated, resulted in the suspension of the company's operating bank account for a period of approximately 5 weeks and the near closure of the only operating account for the company. This was rectified by the actions of the applicant and the representations of his solicitor. At that time Mr. Hussain and the applicant attended at the bank as Mr. Hussain "regretted" his actions.

42. The later behaviour of the respondents concerning the filing of the company accounts and its status as an audit exempt company serve further to illustrate the lengths which they are and have been prepared to go to achieve their own ends at the expense of the company and the college.

43. Mr. Karim also made an allegation concerning the immigration status of the applicant. His residency permit was valid until October 2017. Mr. Karim made an allegation to the Irish Naturalisation and Immigration Service (INIS) which effectively resulted in them putting a hold on the stamp for the residency permit which would have been available to him. The applicant has at all times acted properly and applied for his residency status. However, in circumstances where Mr. Karim made a whole series of complaints against him the INIS became suspicious of the applicant. This resulted in the applicant having to institute judicial review proceedings in order to prevent any further compromise of his entitlement to remain in the state. These judicial review proceedings were compromised to the satisfaction of the applicant.

44. Although the respondents have suggested a willingness to engage in mediation from an early stage the fact of the matter is that they have frustrated two attempts at mediation in the same way as they endeavoured to evade service of the original proceedings. Whilst indicating a willingness to engage in mediation they issued the six separate motions – and later the first named respondent issued a separate and wholly unmeritorious motion to have his name struck from the proceedings.

45. The High Court granted an order permitting substituted service of the pleadings on the respondents on 12th February, 2018.

46. This order was sought and obtained notwithstanding efforts to serve the documentation by email and by a summons server in circumstances where no appearance or communication was received on behalf of the respondents. It did seem clear that the emails and attachments which were sent on 8th and 9th November, 2018, to the email address believed to be that of the respondents were received. A download confirmation receipt was received by the applicants' solicitors from the file transfer service www.wetransfer.com dated 9th November, 2017, and it confirmed the successful download of the file. On 27th November, 2017, at 11:50am, the summons server (Ashley Sweet) attended at 92 Patchinghall Lane, Chelmsford, CM1 4DB and received no reply but effected service of the court proceedings by placing them in through the letter box. As no communication was received in response to these attempts at service, Mr. Sweet again attended on 15th January, 2018, at 92 Patchinghall Lane and received no reply. He then telephoned a number he had been given and spoke with an adult male who was initially apprehensive and asked questions concerning his identity before confirming that he was Mr. Karim. Mr. Sweet then advised the reason for his call and that he had attended 92 Patchinghall Lane with no response. Mr. Karim advised that he no longer resided there but he refused to provide a current address stating that they mainly live in India (Bangladesh). Mr. Sweet explained that this was a very urgent matter and that he would be happy to meet him at an address convenient for him. Mr. Karim stated it would be impossible as he was nowhere near London or Essex. He asked that Mr. Sweet text him his address and he would arrange to collect the documents but he could not give a date at this time as to when he could attend. After this phone call, Mr. Sweet went back to 92 Patchinghall Lane and again failed to gain an answer from the property but he spoke with the female occupant of a neighbouring property, No. 94, who identified herself as a Mrs. Walsh and who confirmed that Mr. Karim and Mrs. Sultana remained living at No. 92.

47. The proceedings were eventually served in accordance with the court order dated 12th February, 2018, on 20th February, 2018, and it was only then that the respondents engaged. Having studiously attempted to evade service since 9th November 2017, the respondents then changed tack and issued the raft of strategic motions.

48. The manner in which the respondents have sought to leverage their position by questioning the immigration status of the applicant and cause him difficulty in that regard is one illustration of their ruthless pursuit of their agenda to extract cash at all costs from the company.

49. Quite apart from the settlement of the earlier proceedings and the acknowledgment of his indebtedness to the company, the first named respondent signed the minutes of the Board meeting in April, 2017 acknowledging his liability to the company in the sum of €30,000.

50. In her affidavit sworn on 2nd July, 2018, the second named respondent confirmed that she has a director's loan outstanding in the company in the sum of €10,000 which she has indicated she is willing to discharge over time.

51. For completeness it should be pointed out that the earlier proceedings involved Tiago Mascarenhas, Seiful Islam and Ian Fleming (plaintiffs) and Mohammad Rezeul Karim (otherwise Rezeul Karim), Mahbuba Sultana, John White, Mohammad Bhuiyan and James Coyle (defendants). Those earlier proceedings were compromised in April of 2017 and that compromise acknowledged a transfer of shareholding (ultimately to the applicant) bringing his total shareholding up to 43%. As a result of that the respondents executed a stock transfer form which was furnished to the then company's accounts, Messrs OCC Accountants. Due to inadvertence or inaction the stock transfer form was neither dated nor stamped and the company register was not updated to reflect an agreed transfer bringing the applicant's total shareholding up to 43% in the company.

52. The respondents had run the college in effect from 2009-2014. The applicant was appointed a director in February of 2014. The college was established by the first named respondent through other parties and all shares were held in the name of the second named respondent. It is clear that the first named respondent preferred to distance himself from the front line because monetary gain was his sole objective. The applicant had received a 15% shareholding in the company and held that prior to the earlier proceedings.

53. I am satisfied that the earlier proceedings resulted from the respondents, and in particular the first named respondent, failing to get his way in terms of withdrawing sums of money from the company which the company could not afford and which withdrawals would have placed the company in jeopardy – as well as causing difficulty for the staff and students. It is clear to me on the evidence that the respondents, and in particular the first named respondent, have felt throughout that the company's money (the money on deposit in the bank account) was theirs and ought to be available to them to do with as they wished. After being appointed a director in 2014 it is clear to me that the applicant did engage immediately with the company accountants with a view to putting in place proper protocols and procedures to protect creditors and ensure that the company's overheads and taxation liabilities were discharged. In 2015 when the demands of the first named respondent for the extraction of large cash sums from the business were not being facilitated he embarked upon a strategy which was designed entirely to achieve his one objective – and that was to enable him have his way in terms of having at his disposal the cash held to the credit of the company with a view to extracting cash as he wished. It is clear on the evidence that the respondents, and in particular the first named respondent, were prepared to be quite ruthless in pursuit of this objective – even if that meant destroying the financial standing and reputation of the company and/or the reputation of the applicant and anyone else who stood in their way.

54. Mr. Hussain was the company secretary as well as being a director of the company until September of 2017. Following his "resignation" and subsequent reinstatement as a director the applicant declined to allow him be reinstated as company secretary. I am satisfied on the evidence that the applicant had very good reason for his decision in that regard. Mr. Hussain could not be trusted to act in the best interests of the company.

55. The evidence of Mr. Saiful Islam is that he is the director of finance in Seda which is a management role only. He is not a director of the company nor is he an officer of the company.

56. He knows the first named respondent for over 14 years and was approached by him in 2009 as part of the establishment of what is now Seda College. He had previously been engaged by the first named respondent in a marketing role in Medway College Limited which business closed in 2008. He says, and I accept, that notwithstanding the resignation of the first named respondent as a director of that company in 2004 he continued as the de facto business owner up until its closure in 2008. Insofar as the first named respondent has sought to assert otherwise I do not accept his evidence.

57. Mr. Islam says his involvement with Seda College was predicated on an agreement of a transfer of shareholding into his name in lieu of work completed by him at that time and in the future. He says this was a contractual promise which he received in return for an agreement from him to take on a professional role in Seda College. He also says that he only ever dealt with the first named respondent whom he saw as being the party exercising the full control over the shareholding held by the second named respondent.

58. In 2016 Mr. Islam was a party to the proceedings initiated (the earlier proceedings). Those proceedings resulted in the settlement referred to previously. Following the settlement Mr. Islam recoiled from his request for an actual shareholding in the college although he was entitled to it under the settlement. Mr. Islam said that the relationship between himself and the first named respondent was damaging to his person and to his health and that he decided to have no further dealings with the respondents. As a result of this he executed an agreement which had the effect of transferring the shares which he was entitled to get to the applicant in these proceedings. That is how it comes to be that the applicant is entitled to the 43% beneficial shareholding pursuant to the settlement. Mr. Islam gave evidence as to the impact of the actions of the first named respondent on him – and produced social media/text messages between them both. It was quite apparent to me when he gave evidence that Mr. Islam was impacted to a significant degree in a truly adverse way by the conduct of the first named respondent. In his affidavit sworn on the 30th July, 2018 Mr. Islam describes the first named respondent as a ruthless and unscrupulous character who is prone to any and all acts to pursue his own ends regardless of the consequences. He also says that he and the applicant worked tirelessly to establish Seda College as the leading English Language College in Ireland and one of the few colleges holding both the ACELS accreditation and Eaquals Accreditation. Mr. Islam's testimony was persuasive and credible and I accept what he has said and which I have summarised above.

59. The evidence of Paul Browne (in his affidavit sworn on 13th September, 2018) is that he is Quality Coordinator in SEDA College and is responsible for overseeing compliance with the regulatory regime in which the college operates and also the accreditations it holds. He acted previously in the role of college principal.

60. He has known the first named respondent since 2006, having met him first in Medway College. Notwithstanding his resignation in 2004, Mr. Browne states that the first named respondent continued on as a de facto owner in the company which closed as an operating college in 2008, and was liquidated in 2014.

61. The first named respondent and one Peter Offwood were the main decision makers in that organisation. The first named respondent visited periodically with Peter Offwood spending two to three days in Dublin initially. As time progressed up to the ultimate

closure of the college in 2008, the first named respondent and Mr. Offwood attended less and less but continued to attempt to control events from London. In January 2008, the college was suspended from the International register on the basis of poor quality of provision. The college appealed this decision and the appeal was ultimately unsuccessful.

62. Mr. Browne and some members of the staff kept the college going until September 2008 – often without payment of salary. It became apparent during that period that the organisation had not been run in a professional or ethical manner but rather from the perspective of short term gain. It soon became impossible to continue as staff and creditors continued to remain unpaid. Mr. Browne is very clear in his own mind that the first named respondent was largely responsible for the collapse of the college.

63. In the Autumn of 2009, Mr. Browne was approached about becoming Principal of SEDA College which was then based in Dolphin's Barn in Dublin. He said he would consider the offer but he expressed concern that the first named respondent appeared to be involved in the management of the organisation. However, in the Spring of 2010, he agreed to take up the position on a part time basis on the understanding that the first named respondent would have no part in the day to day management of the organisation.

64. At an early stage afterwards, Mr. Browne discovered that the party who approached him, Mr. Haque, had left the company and that the directors were Amjad Hussein and Maria Lukacs, both resident in London. He found out that the shares were held by the second named respondent.Later, the applicant became a director and 15% shareholder.

65. On a subsequent visit to Dublin, the first named respondent informed Mr. Browne that he and his wife were the owners and that he had invested STG£100,000 to set up the company. He explained that this money was a loan which he had received from a wealthy Indian lady who lived in North London.

66. The first named respondent visited the college periodically thereafter – perhaps four to five times a year. The second named respondent never appeared in Dolphin's Barn although Mr. Browne did meet her once during 2014 at the Capel Street premises. During all of this, Mr. Browne never once spoke to or met Amjad Hussein or Maria Lukacs. It was always Mr. Browne's clear understanding that Mr. Hussein was a nominee who took no obvious part in the management of the organisation.

67. According to Mr. Browne, the first named respondent's contribution to the college was negative. According to Mr. Browne, the first named respondent had little interest in the pursuit of quality which the rest of the participants championed but rather he seemed more interested in short term gain.

68. In a discussion and difference of opinion between Mr. Browne and the first named respondent, the latter expressed the view that there were always ways to get around rules and regulations. This discussion centred on the future direction of the college. The first named respondent's visits to the college nearly always involved arguments and confrontation. During 2014 and 2015, the first named respondent's behaviour become increasingly belligerent and unpredictable. He rarely visited the college and when he did normally caused difficulties. In January 2016, he came to Dublin against the wishes of management and without notice took up temporary residence in the school. He proceeded to sleep in the teachers' room.

69. Attempts at reconciliation between management and the first named respondent failed because of the conduct of the first named respondent. Mr. Browne has sworn on affidavit that it is his view that the first named respondent is not an individual who can be trusted to run an educational establishment in an ethical manner as his main priority is personal gain and he has no commitment whatsoever to the provision of quality education. On the evidence, I find this opinion to be well-founded.

70. Mr. Ian Fleming swore an affidavit on 5th June, 2018, and gave evidence at the hearing. As stated above, he is a director of SEDA. After he left full time employment as a senior manager with Pearson plc in October 2008, he began to run his own business in the United Kingdom as a self-employed consultant and trainer. In the initial stage he engaged with a particularly large number of colleges and individuals, mainly for short term assignments in order to meet specific outcomes, especially assisting colleges with QAE review. In the UK, QAE is the higher education review body. At the time he was a QAE review coordinator and also a lead inspector for the British Accreditation Council (BAC). He worked with a large number of small and often struggling centres at the time.

71. Mr. Fleming initially met the first named respondent when he did some work for him in a small college which the first named respondent was running, in Whitechapel in East London. The first named respondent then asked Mr. Fleming if he could assist with his college in Dublin, SEDA. The first named respondent wanted the college to develop into a higher education provision. Mr. Fleming suggested that an initial overview of the institution would be desirable and proposed to undertake a BAC style inspection engaging fully with the college staff – after which he would prepare a detailed report and then consider whether the higher education option was really feasible. It soon became evident that this was not at all what the first named respondent wanted. He favoured some kind of quick fix without the trouble of a detailed investigation or engagement with members of staff.

72. In London, at around the same time, Mr. Fleming began to realise just what kind of colleges the first named respondent was running and setting up. He visited another of his centres in Whitechapel and in a warehouse building in Tottenham, both of which he owned and operated. It was clear at first glance that there were a large number of problems and these were simply brushed under the carpet. Mr. Fleming states that he thinks he fully realised what kind of operator the first named respondent really was when, during what was supposed to be a formal discussion at the Tottenham Centre about preparing for a QAE review, he showed absolutely no interest in the details of the process and stated his belief that there are always ways to get around such formal requirements.

73. The completion of the SEDA overview process demonstrated to Mr. Fleming that there was no immediate way that the college could provide higher education. However, the senior management at SEDA asked him to act as an external advisor on a regular basis and this arrangement continued throughout 2013 and 2014 as the college moved to the current Capel Street premises. During 2015, Mr. Fleming drafted the basis of the current SEDA policies and procedures framework. By now, his direct contacts with the first named respondent were limited to fending off his increasingly strident and accusatory telephone calls. Mr. Fleming had completely severed links with the London and Harlow Colleges of the first named respondent and only dealt with the SEDA senior management team.

74. At the end of 2014, Mr. Fleming took on the chair of a new board of governance at SEDA. He was, at that time, also chairing two other boards in colleges in London. The board in SEDA was never a complete success and it was difficult to attract useful external independent members. Towards the end of 2016, the first named respondent started attending board of governance meetings and things came to a head on 7th December, 2016, when he proved demanding and intransigent, openly insulting long serving SEDA managers. As chair, Mr. Fleming terminated the meeting and told the first named respondent, in extremely direct terms, that his behaviour was completely unacceptable.

75. Mr. Fleming resigned as chair of the SEDA board of governance in the first part of 2017, mainly due to other commitments – but also because he felt that the model was not really working in SEDA. Since that time he has attended senior management meetings on

a monthly or two monthly basis and has also attended for director's meetings as needed. He does all of this at small cost to the college – essentially getting his expenses paid.

76. In the context of the allegations and cross allegations made in these proceedings, the evidence of Mr. Fleming stands out as that of an expert, honest and fair minded individual.

77. If support is needed for the view which I have drawn, somewhat inevitably, from the evidence before me as to the actions, conduct and motivation of the respondents (and the first named respondent in particular), it can be found in the last paragraph of the affidavit of Mr. Fleming – which view he confirmed without hesitation in his oral evidence. It is worth quoting that short paragraph in full:-

> *"The affidavit has clarified how I came to be involved with SEDA and about my early links with Mr. Raza Jawad, also known as Mr. Rezaul Karim. My feelings about him have evolved since 2011/2012, when I thought him plausible, if uninformed, to 2012/2013, when I realised he was a completely unscrupulous operator. I have since realised that he is grasping and immoral, without an ethical compass, and focused only upon personal financial gain."*

78. Mr. Amjad Hussein swore an affidavit on 9th May, 2018, and gave oral evidence. Amongst other things he denied ever indicating a desire to resign as company director and secretary – despite a text message to that effect being produced to him. Indeed, his affidavit refers to the applicant improperly and illegally submitting an erroneous company's registration office form B10 to the register of companies showing his resignation as company director and company secretary with effect from 19th September, 2017, in circumstances where he did not tender his resignation as director and company secretary. In answering the question as to why he was saying this having indicated by text that he wished to resign, he effectively said that his text did not really mean what it said. His affidavit goes on to make assertions, many technical in nature, concerning the corporate governance of the company, his belief that the applicant as a Brazilian national is not in possession of a valid work permit with regard to his position within the company, a mandatory reporting requirement to the Office of Director of Corporate Enforcement concerning the possibility that the applicant had committed a category 2, possibly criminal indictable offence by signing a statutory form that was false in a material particular and also the possibility of further mandatory reporting requirements by other persons and the statutory auditors pursuant to s. 19 of the Criminal Justice Act 2011, in respect of alleged incidents of serious breaches of corporate governance and statutory compliance with regard to the company. In evidence, Mr. Hussein proved himself unreliable, evasive and not credible. His evidence, and in particular his affidavit evidence, is clearly no more than a "construct" which is being set up as a defence in answer to serious and well-founded allegations made on the part of the applicant and his witnesses. He is and came across as a person entirely under the influence of the respondents and of the first named respondent in particular.

79. Of some assistance in his evidence, was Mr. Hussein's description of the respondents' interaction and connection insofar as the affairs of the company are concerned. As he put it "they eat from the same pot". He assisted also in the translation of certain of the text messages (or parts of same) written by and in the native language of the first named respondent to Mr. Saiful Islam. These texts as with many of the emails emanating from the respondents side are angry and threatening. Some allowance has to be made for the fact that angry exchanges are to be expected in the course of a dispute of this nature – but the threatening language used by the first named respondent in particular are disquieting. They must be read in full and in context but some extracts do stand out. Amongst the texts are the following extracts as translated by Mr. Hussein :

> *"Again I will see to the end of it"– 8th June, 2017*
>
> *"Go to hell with the college" – 8th June, 2017*
>
> *"He will know how many days there are in a year" – 8th June, 2017 (this is the first named respondent referring to the applicant)*
>
> *In this same text message, the first named respondent texted in English :*
>
> *"I will offer everything, nothing hiding. I will loose [sic] college and lets [sic] se what Tiago and you loose [sic]*
>
> *Next 5/7 years this all case continue….."*

80. In the course of their affidavits, the respondents have raised many issues. A recurring theme is the alleged misappropriation of money by the applicant. There is absolutely no evidence to support this allegation. Indeed, the available evidence is to the contrary. For example, in 2014, SEDA Limited was selected for a Revenue audit which commenced in the week beginning 17th November, 2014. Prior to the audit, undisclosed PAYE liabilities were uncovered by the company accountants (OCC) in a review of the company's records. A voluntary disclosure was made in respect of these liabilities at the outset of the audit. The voluntary disclosure related to underpaid PAYE in 2012 (€14,601), underpaid PAYE in 2011 (€9,691) and underpaid PAYE in 2013 (€16,463). The total of these figures came to €40,755 with interest of €6,915 and a penalty of €6,574 – making a grand total of €54,244. Revenue accepted the voluntary disclosure and indicated during the course of the audit, that the company's accounting records were of the highest standards.

81. On 13th July 2015, the Revenue Commissioners wrote to the applicant and to OCC advising that the audit was concluded and that no additional liability was identified. Revenue thanked both for their cooperation during the course of the audit.

82. It is the position that there has been a reluctance on the part of the applicant to detail his own income from the College. It seems to me that this is a reaction to the behaviour of the respondents who appear to be of the view that they are entitled to the same income as the applicant despite the fact that he is running the college full time while they are living abroad and doing little if anything in terms of actual work for the college.

83. In addition to the school accreditations referred to above, the applicant has taken out a policy of insurance which provides learner protection insurance by Aspen Insurance to students studying at SEDA College in the event that the college should fail.

84. The respondents have challenged the applicant's dedication to the college and his stewardship of it. In this regard, the EAQUALS Oversight Body prepared a report on SEDA College dated 12th – 13th September, 2018. EAQUALS (European Association of Quality Language Services) is a body involved in excellence in language education and is a registered UK charity. It is a company limited by guarantee and is registered in England and Wales at 29/30 Fitzroy Square, London. The report prepared following its inspections which was produced in the course of the hearing shows that SEDA College meets the high quality standards required by the EAQUALS Charters in almost all categories bar one where the grading 2.5 indicated one or more relatively minor indicators to be attended to in relation to the learning environment. In short, the report of this independent body gave SEDA College an excellent verdict.

Furthermore, ACELS conducted an unannounced inspection at the college on 3rd and 4th May, 2018, and produced a written unannounced inspection report. Although some areas were indicated as requiring attention, it is correct to say that the report is a very positive report in relation to the college.

85. The independent evidence shows clearly that the respondents' complaints and indeed attacks on the applicant are unjustified insofar as the running and progress of SEDA College is concerned.

86. I am satisfied on the evidence that the first named respondent was much more closely connected to Central College, Medway College, United College Limited and Raya Academy Limited than he is prepared to admit. The failure or "disappearance" of Medway College, United College Limited and Raya Academy Limited is, in my view, not unrelated to the first named respondent's involvement with these colleges and his greed for money.

87. It is clear to me that SEDA College would not be the reputable and progressive English language school that it is at present if it were not for the efforts of the applicant and the staff and management working with him. It is clear to me that its current position in the market and its success have occurred not as a result of the input of the respondents but rather despite their input.

88. Another recurring complaint on the part of the respondents is the assertion that the applicant appears to be in complete one hundred percent control of the company and in receipt of a considerable amount of cash which they have no oversight of or access to in terms of sight of the financial accounts concerning the affairs of the company. It would obviously be a concern if a minority shareholder in the company was effectively running the company for his own benefit and without appropriate consultation or cooperation with the majority shareholder. But that is not the true position in relation to SEDA College. At the very core of the dispute between the parties is the resistance which the applicant has offered to the objective of the respondents to create a situation where the cash assets of the company are at their disposal. It is true that all of the salary payments of €3,000 per annum were not paid in accordance with the shareholder's agreement to the second named respondent although some of the payments were made to her. The second named respondent ought to have been paid in accordance with the settlement agreement. Against that, the latest dispute which has led to these proceedings came about subsequent to the settlement and essentially because the respondents still felt cash could be extracted as they wished and because the company accountants started questioning the tax situation of the second named respondent insofar as this €3,000 salary per month was concerned. After being questioned in this regard, in particular, the respondents once more became aggressive and oppressive in their dealings with the applicant and the staff and management working with him in SEDA College. It is obvious to me that their anger and focus of attention was as a result of the realisation that SEDA College was no longer going to be run without proper financial controls and accountability being in place in relation to the cash assets of SEDA College. They realised that the rules and regulations could not be easily circumvented any longer.

89. The respondents have difficulty deciding whether they want to abide by the settlement agreement or have it rescinded. In the course of the hearing they were uncertain as to their position. After taking some time to consider the issue the indication was that they wanted the agreement rescinded. However, in an affidavit sworn by the second named respondent on the 27th February, 2019 she states at para. 12:-

> *"…the applicant has specifically made my life very difficult by stopping my salary in or around October 2017 and has refused to discharge arrears and we have failed to agree payment of my full arrears and ongoing salary to my satisfaction."*

90. It is also the position that the second named respondent's solicitors wrote to the applicant's solicitors on the 2nd October, 2018 stating that the agreement was rescinded, that no further payments were to be made and advising that all payments made to that date were to be refunded. In fact, no refund was made. Indeed, the second named respondent was even uncertain when the issue arose during the course of the hearing as to how many monthly payments of salary she had received. Ultimately, there was agreement that she had received seven instalments of salary totalling €21,000 (gross).

91. The company is audit exempt and I am satisfied on the evidence that the costs of an audit are prohibitive for the company. Paying for the audit which the respondents have been demanding would prejudice the solvency position of the college which is operating in a highly regulated and very competitive market – although the respondents wish to remain oblivious to this.

92. Rather than engage with the facts, the respondents have chosen to raise technical points and arguments as a defence to the application under section 212. In addition, they have raised an issue concerning an allegation that the applicant and Saiful Islam were the subject of an in-depth Garda investigation arising from 'Operation Advantage' and in particular arising from their respective marriages in 2010 and 2011. They raise an issue concerning the fact also that Saiful Islam is a Bangladeshi non-national residing here in Ireland since around 2008, originally as a student although having consistently worked at SEDA College since that time. They suggest that the applicant has engaged in deception and deceit towards the Department of Justice in using misleading information for the purpose of obtaining his visa. They have suggested that the applicant was the subject of a fifteen day notice of deportation order at the time the second named respondent swore her affidavit on 12th June 2018. The second named respondent has flagged her concern concerning his legal entitlement to reside and work in the State being at risk in circumstances where they allege that he and Mr. Saiful Islam are thus facing the prospect of deportation while being two senior managers in the college. Suffice it to say in this regard, that no such deportations occurred and SEDA College continues to do well under the stewardship of the applicant. The applicant says that he is in the process of completing his application for naturalisation and I accept his evidence on this.

93. The first named respondent retained his own firm of solicitors and a notice of change of solicitor was served on his behalf on 27th June 2018. He then issued his own motion seeking an order dismissing the claim of the applicant as being frivolous and vexatious and being bound to fail against him or as an abuse of process – returnable to 16th July, 2018. This application and indeed the strategy of changing solicitor were utterly unmeritorious for the reasons detailed in this judgment concerning the first named respondent's involvement with SEDA College.

94. The first named respondent's affidavit sworn on 26th June 2018, in support of his application seeking an order dismissing the claim against him on the basis that he ought not to be joined in these proceedings is simply not credible. His application in that regard is entirely at odds with the truth of the situation and at odds with the finding I have outlined earlier, to the effect, that he is the beneficial owner of the shareholding in the company which is in the name of his wife.

95. The application is audacious in the extreme. His affidavit sworn on 26th September, 2018, is equally incredible. In the course of it, he makes many bare assertions without producing a shred of credible evidence to support his serious allegations made against the applicant and others. For example, he alleges that the applicant and Saiful Islam unlawfully misappropriated SEDA money and he believes this may have occurred between 2010 and 2014. He says he confronted Saiful Islam about this in 2014 and he says he believes he took over €1m which he invested in assets in Bangladesh. He goes on to make outlandish allegations about the applicant

and Mr. Islam having, in the period from 2014, used SEDA's money and intellectual property to spend on marketing all over the world. He says that from this marketing, they supplied students to other colleges and he believes that they are beneficial owners of other language schools and have also received money from student accommodation and commissions that ought to have been paid to SEDA but they have kept these unlawful profits. He says that the sources of revenue have been used to set up and to support or invest in various companies as far apart as Bangladesh, Brazil, Mexico and Ireland. He says that many of these investments are in the names of third parties. Not a shred of support in terms of credible evidence is available to stand up any of the outlandish allegations made. The foreign entities actually identified have been clearly and comprehensively explained by the applicant.

96. In the shareholders' agreement there is reference to the first named respondent's debt to the company in the sum of €30,000. Yet he says that there may be a small amount due by him as a loan from the company but the figure of €30,000 in the shareholders' agreement is not the correct figure. He says it is only there as he was anxious to reach an agreement. He goes on to say that the applicant operates SEDA College like a criminal enterprise.

97. The first named respondent also states in his affidavit of 26th September 2018, that the applicant and those connected to him, hacked into the respondent's main email account on or about 17th July 2017 and deleted many emails that would have assisted in the case against him. He says that they do not have any money for legal and technical assistance to do anything about this hacking to date. This alleged hacking incident is, in my view, not credible. It is fiction.

98. The first named respondent concludes his affidavit of 26th September, 2018 by asserting that the proceedings by the applicant are a total abuse of process and amount to an extraordinary attempt by a minority shareholder to continue to asset strip a profitable company and get away with his prior unlawful behaviour. He asserts that the proceedings form part of a campaign by the applicant to ruin the majority shareholder and her family so that he can secure the rest of the shares not already in his name at a below market value.

99. In fact, the truth of the situation is very different. It is abundantly clear to me that there would be no company at all were it not for the efforts of the applicant and staff working with him.

100. It seems to me that the situation in relation to SEDA College is as follows. The respondents, by looking at the turnover of fees generated annually, are utterly at a loss to understand why they cannot have a large portion of this money for themselves. They wish to remain oblivious to the cost of running the college and to the fact that the fee income is largely expended on running the college and doing so properly. It is clear to me that the respondents have behaved in an oppressive fashion and that the applicant is entitled to relief under s. 212 of the Companies Act 2014. They have placed him under extraordinary pressure and have endeavoured to engineer a situation which would force him and the other staff and management working with him to submit to their demands, and to permit the feeding of their insatiable appetite for cash regardless of the impact on the company. I detail this finding later in this judgment.

The Legal Principles.

Res Judicata *as a preliminary issue*

101. Both respondents, in their submissions, have proffered the view that the applicant is barred from advancing these proceedings by reason of the doctrine of *res judicata* and they draw attention to the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

102. Mr. Walker, on behalf of the second named respondent, has submitted that:-

"The Second Named Respondent was furnished with the grounding affidavit to the 2016 proceedings along with the exhibits and was amazed to read al-most identical text in the 2016 proceedings along with similar exhibits from the 2017 proceedings and notwithstanding that the 2016 proceedings were compromised when the parties signed an agreement dated 11 April 2017, the Applicant has sought to reopen the 2016 proceedings and on that basis the second named respondent prays for an order dismissing the proceedings on the grounds of issue estoppel and/or abuse of process and/or breach of the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

It is submitted that the Applicants claim should be barred by virtue of the doctrine of res judicata or issue estoppel and that there are no special reasons or circumstances making it unfair to hold the parties to the issue estoppel that has arisen." (Outline Le-gal Submissions of the Second Named Respondent, 12th March 2019, at p. 4).

103. Similarly, Mr. Canny, on behalf of the first named respondent, has submitted that:-

> "The attempt to relitigate issues that were or could have been brought before the Court in the 2016 action and prior to 11th April 2017 (which was compro-mised) in these new proceedings is an abuse of process that violates the Rule in Henderson v. Henderson. It is simply not open to the Applicant to rely on the same incidents in new proceedings that come before the Court in 2019." (Out-line Submissions of the First Named Respondent, 12th March 2019, at para. 8).

104. In *Henderson v. Henderson* 3 Hare 100, Wigram V.C. is quoted at p. 115 as follows:-

> "I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".

In *A.A. v. Medical Council* [2003] I.R. 302, Hardiman J. considered, at p. 317, the rule in Henderson and its subsequent application both inside and outside the jurisdiction :-

> "Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities. This point has a particular resonance in terms of article 6 of the European Convention on Human Rights and Fundamental Freedoms 1950.

In *Ashingdane v. United Kingdom* (1985) 7 E.H.R.R. 528 at p. 546, the European Court of Human Rights said:-

> "the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals".

105. The Rule is not an absolute or totally unyielding rule in any event. Here it is urged upon me by the respondents that I should disregard what occurred prior to the earlier proceedings (the proceedings bearing record no. 2016/8689 P.) on the basis that those proceedings were compromised and that an estoppel arises in relation to raising the same issues again and that these proceedings fall foul of the rule. This submission is not correct. Indeed, the core issues I am concerned with occurred after the settlement of the earlier action. I am not deciding issues that have previously been decided, or litigated. I am having regard to the evidence concerning the conduct of all parties insofar as the company is concerned and I cannot ignore the conduct prior to the settlement of the earlier proceedings. That is particularly so when it is manifestly obvious that the respondents' attitude to the company – including its financial standing, creditors, reputation and students has not altered in terms of the nature and substance of the complaints which gave rise to the earlier set of proceedings. If anything, the conduct and pursuit of the cash in the company has escalated subsequent to the settlement of those proceedings. My focus, however, in these proceedings in terms of the oppression alleged is on the events subsequent to the settlement of the earlier proceedings although the history is relevant background.

Statutory basis for Oppression

106. Section 212 of the Companies Act 2014, which the applicant in these proceed-ings relies on, provides:-

> 212. (1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exer-cised—
>
> '(a) in a manner oppressive to him or her or any of the members (including himself or herself), or
>
> (b) in disregard of his or her or their interests as members,
>
> may apply to the court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is of opinion that the compa-ny's affairs are being conducted or the directors' powers are being exercised in a man-ner that is mentioned in subsection (1)(a) or (b), the court may, with a view to bringing to an end the matters complained of, make such order or orders as it thinks fit.
>
> (3) The orders which a court may so make include an order—
>
> (a) directing or prohibiting any act or cancelling or varying any transaction; (b) for regulating the conduct of the company's affairs in future;
>
> (c) for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital; and
>
> (d) for the payment of compensation.
>
> (4) Where an order under this section makes any amendment of any company's consti-tution, then, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company concerned shall not have power, without the leave of the court, to make any further amendment of the constitution, incon-sistent with the provisions of the order.
>
> (5) However, subject to the foregoing subsection, the amendment made by the order shall be of the same effect as if duly made by resolution of the company, and the pro-visions of this Act shall apply to the constitution as so amended accordingly.
>
> (6) A certified copy of any order under this section amending or giving leave to amend a company's constitution shall, within 21 days after the date of the making of the order, be delivered by the company to the Registrar.
>
> (7) If a company fails to comply with subsection (6), the company and any officer of it who is in default shall be guilty of a category 4 offence.
>
> (8) Each of the following—
>
> (a) the personal representative of a person who, at the date of his or her death, was a member of a company, or
>
> (b) any trustee of, or person beneficially interested in, the shares of a company by vir-tue of the will or intestacy of any such person,
>
> may apply to the court under subsection (1) for an order under this section and, ac-cordingly, any reference in that subsection to a member of a company shall be read as including a reference to any such personal representative, trustee or person beneficially interested as mentioned in paragraph (a) or (b) or to all of them.
>
> (9) If, in the opinion of the court, the hearing of proceedings under this section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company, the court may order that the hearing of the proceedings or any part of them shall be in camera.'

107. The foregoing legislative provision is the successor to s.205 of the Companies Act 1963, to which much of the case law applies. The old section is quite similar and need not be set out here.

The Test for Oppression

108. Keane J. (as he then was) defined 'oppression', with due regard paid to the statutory provision in our neighbouring jurisdiction, in *Re Greenore Trading Company Ltd*. [1980] ILRM 94, as follows:-

> "Oppressive" conduct for the purposes of the corresponding s. 210 of the Eng-lish Companies Act 1948 has been defined as meaning the exercise of the company's authority "in a manner burdensome, harsh and wrongful."

109. In his commentary, Dr. Thomas Courtney points out that:-

> *'Although the conduct complained of is to be judged by objective standards, what will be oppressive will vary from company to company. What might be oppressive in the context of a quasi-partnership company may not be oppressive in a private company with unconnected membership.'* (The Law of Companies, 4th ed., at p. 698)

110. In *Charles Kelly Limited & Companies Acts: Kelly v. Kelly & Kelly* [2011] IEHC 349, Laffoy J. considered a situation where it had been claimed the oppression manifested itself in the form of the suspension of the petitioner, the exclusion of the petitioner from the company by denying his standing in the company as a shareholder or as a director, while the first respondent purported to be entitled to control the com-pany, refusing to engage or co-operate with the petitioner in the management of the company and obstructing the petitioner's efforts to manage the company, taking funds from the company and, in particular, taking funds to pay the legal costs of the first respondent in defending these proceedings and assaulting the petitioner in the office of the company.

She held that:-

> '11.5 Objectively assessing the evidence in support of the petitioner's allegations of oppression, which has been comprehensively outlined above, must lead to the conclusion that the "burdensome, harsh and wrongful" test has been met in this case. The first respondent's conduct in purporting to suspend the petitioner, in whatever capacity, from the company, on its own, meets the test. Taking an overall view of the evidence, and having regard to the combi-nation of factors relied on by the petitioner as constituting oppression, in my view, the test is met. While, as I have indicated, the petitioner's conduct, to put it mildly, has been reprehensible on occasion, I have come to the conclusion that, to some extent, but not totally, that conduct is excusable because the petitioner was provoked by the first respondent.
>
> 11.6 Apart from that, as has been clearly illustrated, there has been a total breakdown of the relationship between the petitioner and the first respondent in every capacity in which they are involved with the company, as executives, as shareholders and as directors and I find that the first respondent must bear most of the responsibility for that state of affairs. This is not mere "technical oppression" in the sense in which that expression is used in Courtney (op. cit.) at para. 19.027. *It is a state of affairs which has been primarily brought about by the conduct of the first respondent.'* [Emphasis added] (at para. 11.5-11.6)

111. Barrington J. in *Re Williams Group Tullamore Ltd*. [1985] IR 613 stated;-

> 'If one regards "oppression" as a course of conduct which is "burden-some, harsh and wrongful" or as conduct which involves lack of probity or fair dealing towards some members of the company (see *Scottish Cooperative Wholesale Ltd. v. Meyer* [1959] A.C. 324; *In re Jermyn Street Turkish Baths Ltd*. [1971] 1 W.L.R. 1042; and the judgment of Keane J., in *In re Greenore Trading Company Ltd*. [1980] I.L.R.M. 94) there is no history of such a course of conduct in the present company prior to the events giving rise to the present case. On the contrary, the ordinary shareholders appear to have been treated extremely well.' (at p. 620)

112. Kenny J. in *Re Irish Visiting Motorists Bureau Ltd.* (7th February 1972, unreported, High Court) held:-

> '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 op-pressive is whether, judged by objective standards, it is.'

113. Dr. Michael Forde, S.C. observed, in respect of applications under s. 212 of the Companies Act 2014, that:-

> '[The applications] are sometimes used as leverage to obtain better bargaining positions and, unless controlled, can themselves become a medium of oppres-sion. For the threat of such proceedings by a shareholder in a small company can bring pressure on a majority to accept the price he demands for them to buy his shares. The burden of legal costs and expenditure of management time in defending these cases can be crippling. Regardless of size, many companies would be concerned about confidential information about their affairs getting into the public domain. But where it can be shown the proceedings are de-signed to achieve some entirely collateral purpose, they will be dismissed; as for instance, where the petitioner was seeking to pressurise his company to pay a substantial debt to another company in which he was interested.' (*Company Law*, 5th ed., at p. 355)

114. It is also clear that a petitioner does not have to wait until a particular transaction has been put into effect before instituting proceedings. *In Re Williams Group Tullamore Limited* [1985] 11 JIC 0801, Barrington J. was satisfied that one transaction alone could give rise to a claim for oppression. In addition, he stated as follows:

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

The application of legal principles to this case

115. The first named respondent regards the Company's assets as his own and he believes that he should be free to use them as he sees fit. In April 2015 the first named Respondent sent the Applicant a threatening email detailed earlier in this judgment.

116. When this email was followed up by action on the part of the respondents, the applicant, with others, issued proceedings for redress and protection of the company bearing High Court Record No. 8689P/2016. The proceedings were then compromised by agreement and the parties entered into a Shareholders Agreement executed on the 11th April 2017.

117. The applicant hoped that this would regularise his relationship with the respondents and bring some order to the affairs of the Company. This did not happen.

118. In or about September 2017, the first and second named Respondents convened a General Meeting of the Company with the express purpose of appointing new directors to the Company and removing the applicant.

119. The applicant was concerned with this development as it appeared to him to be the first step in the respondents' plan to take control of the board of directors with the view to extracting money from the Company. Furthermore, any appointment of new directors was clearly in breach of the settlement agreement entered into between the parties as the Company had yet to obtain the QQI International Education Mark. The respondents also refused to sign off on the accounts and annual return.

120. In correspondence the respondents *inter alia* made clear that once the new directors were appointed they were to arrange for the Company to pay "all overseas director and shareholder expenses." The respondents wanted those payments to be backdated for a period of four years. They wanted to take control of the bank account and remove the applicant as a signatory.

121. As far as the applicant is concerned the respondents have no entitlement to those payments. Indeed, the shareholders agreement referred to above set out that the first named Respondent actually owed the Company the sum of €30,000.

122. The respondents' conduct threatened the very existence of the school and the company. If the respondents did extract a significant sum of money from the company the removal of this money could seriously and fundamentally undermine the viability of the company. No real justification for their conduct has been put forward by the respondents.

123. It is also clear that the respondents (or one or other of them) has been attempting to sell their shares in the Company to other parties. This is in clear breach of the pre-emption rights that are set out in the shareholders agreement. I accept that the applicant's solicitor was contacted by one of these potential purchasers after he was offered the shares.

124. The respondents have once again threatened to make contact with the School's Governing Body and to make a number of allegations about the Company. While it is not entirely clear what criticisms the respondents intend to make what is clear is that such allegations have the potential to undermine the Company's business.

125. The second named respondent has sought to resile from the written agreement to transfer shares to the applicant to ensure his legal shareholding matched his equitable shareholding of 43%. She purported to cancel the share transfer that she had previously executed.

126. The applicant can no longer remain in business with the respondents. As far as he is concerned he is entitled to 43% of the shares in the Company and he is seeking an Order allowing him to buy the second named respondents/respondents shares. His valuation has been shared with the respondents.

127. The second named respondent has obtained her own valuation.

128. I have considered the assertion on behalf of the respondents that the applicant is essentially motivated by a desire to acquire the entire shareholding in the company and that these proceedings are but a means to an end in that regard. The observations of Dr. Michael Forde referred to previously are pertinent in this regard and it is neces-sary to be vigilant lest s.212 proceedings be abused in order to obtain leverage when there is in place a power struggle within a company. Following the settlement of the earlier proceedings it did not take long for the same old problems to re-emerge insofar as demands for money by the respondents were concerned. An email from the appli-cant to the respondents on 21st July, 2017 referred to the fact that they had *"requested to distribute dividend again through Mr. Bhuiyan but we have replied saying that the company is not in a situation to give dividend…".* In a reply email the first named re-spondent referred to the fact that "*…last four months around one millions euro spent but there is no single penny for partners…".* Then on the 1st of September, 2017 the applicant was writing to the respondents looking for tax details (PRSI or equivalent registration details) and receipts related to their personal tax affairs in circumstances where each individual was responsible to be tax compliant in Ireland or in the place of residency. There was also a request in that email of the 1st September 2017 for receipts for dividends and remunerations previously paid. The applicant indicated that he would provide the exact dates and amounts transferred if required. This latter request generated a long and somewhat vitriolic email from the first named respondent to the applicant on the 4th September 2017 where the first named respondent thanked the applicant (and Siaful) "*very much for interfering into my personal tax life and others*". In that long email the first named respondent stated that he had been patient for the last few years for the sake of protecting the company but that he had now been given no other option other than to implement "*my major shareholder rights*". In fairness to the first named respondent he did also request the applicant to conform to the share-holder agreement and stated that the law did not only apply to him (the first named respondent) but to the applicant as well.

129. The last section of that email from the first named respondent to the applicant (and Saiful) is worth quoting in full:-

> *"I am persistently asking you to maintain and implement the agreement policies. In return this may keep both the businesses alive and stop the immediate storm in the Irish education sector aside with preventing anyone trouble in the business and anyone's personal life. Legal battles and personal assault will damage everyone more and more. Believe me, you will gain nothing at the end of the day, rather you will lose more. Your aggressiveness and destructivity will destroy more. Think reasonable and wisely; give everyone rights, legal battle for you and me as well. Law for you and for me as well. I have legal rights and you have legal rights but end of day result is zero. Still there is a last hope where you can make things going on other than immediate more troubles. You know very well from the previous experience that once we start again then both the college will automatically suspend all the affiliations and newspaper will broadcast each and everything.*
>
> *Please think and consider carefully about all of the troubles, losses and consequences of next four/five years that will cause suffering, lots of issues and involve things that you may not know about now and you will be held accountable as you controlled both the companies. It will not be ending here or soon, it will continue for years and years. Both the colleges will be suspended due to partnership/ownership problem and we can fight for skeleton only. You have legal rights, I have legal rights and Saiful has legal rights. So no one will win, believe me. Let's maintain and follow the agreement to avoid any more hassle. We may have lost a part of our lives, which we can possibly recover but believe*

me there is more to lose if you keep holding everything. Anger destroys people. I hope you understand the whole circumstance and future consequences wisely.

One last thing I would like to mention, the lawyer is going go through the law books. They don't suffer only clients are sufferers. Clients lose or win. The end result is zero and clients pay high bills.

Lawyers are always saying: 'Your rights, same way lawyer advice me I am the major shareholder so I have all the right etc. same way they strongly saying you will win/you will win and you have the strong legal rights and so on, so on and on….. don't stop…… continue fights and go for legal battles…etc end of the day who loose? It's the clients…this is the reality. I hope it will make sense to you.

Think and take your own wise decision please and let me know.

Regards.

Mahbuba."

While this email is signed off "*Mahbuba*" (the second named respondent) it is an email from "*reza–r.jawad@gmail.com*". I am quite satisfied that the email was com-posed and sent by the first named respondent.

130. In a letter from the applicant's solicitors to the respondents on 7th September 2017 they refer in the introductory paragraph to having been made aware of an im-proper request of Mr. Amjad Hussain director of SEDA to interfere with the bank ac-count for the business and they say they assume the request has come from the re-spondents. The letter goes on to protest about this behaviour and indicates that the applicant and Mr. Saiful Islam are not prepared to accept improper behaviour without seeking the appropriate redress of a court.

131. The letter goes on to point out that it has come to their client's attention that third parties in Ireland have been approached by the respondents with a view to the sale of the respondents' shares. It points out that the shareholders' agreement execut-ed provides that no sale can be completed without a first option being given to the other shareholders and that the actions concerning an attempted sale are a further at-tempt to breach the terms of the shareholders' agreement.

132. The letter goes on to refer to the request by SEDA for information regarding tax in the UK as there is a duty on the company to properly account for Irish taxes in the manner of Universal Social Charge, PAYE and PRSI where these apply to funds being drawn down by the respondents from the company. The letter states that: -

"We understand that our client has requested confirmation as to the structure or designation of payments to be made to you on an ongoing basis. Our clients have already been subject to a tax audit and are reluctant to allow a scenario to arise where a payment to any of the shareholders result in a further audit as this would alert the Revenue Commissioners to possible suspicions about the company's finances in itself. We understand that you have refused to co-operate with our clients in this regard and your most recent email passed to the applicant has also been passed to us with persistent threats."

133. The letter then goes on to state as follows:-

"Clearly in all of the circumstances there is no future to the relationship between you, Mr. Islam and Mr. Mascaranhas. The company administration cannot continue in this haphazard manner where the shareholders on the ground diligently adhere to their regulatory obligations under Irish law and regulation but are equally subject to persistent demands of additional funds to be drawn from a company that must maintain careful financial management at all times.

Our clients now demand the transfer of your shares in the company to our clients. To facilitate agreement on this point we are now requesting that you agree to a process of mediation to resolve the outstanding issues within the company".

134. Another long email was sent from the email address of reza-r.jawad@gmail.com on the 8th September, 2017 in response to the letter of the 7th of September, 2017 written on behalf the applicant and Mr. Saiful Islam. This long email complains about the applicant's behaviour in disregarding the major share-holders' rights, in failing to adhere to the settlement agreement and in demanding the tax details. This email made the point that the previous accountants for the company never requested this information and that essentially it was none of the applicant's business. The email stated that it was interesting that there was now a demand for a transfer of the shares - which the email stated "in fact now officially declared that it is the main intention for the last five/six years mechanism against me".

135. The email goes on to make threats including:-

"…I also aware and assumed that your clients is involved with lots illegal activated in Ireland which is related to the SEDA because of that my company is badly effected. So I hope relevant valuable accreditations authorities such as Irish Revenue, Sunday Times, Office of the Director of Corporate Enforcement, Acels, Eaquals, Cambridge English Language Authority, they will investigate the relevant such activities from tomorrow for the purposes of all the legal rights. I hope to get honest judgment from the courts for those actions".

136. The email finishes as follows:-

"Anyway now is the opportunity for all of us to open all of our legal/illegal activities to Irish public, Irish immigrations and educational authorities as well as to the court. So High Court may give us the right decision based on our all activities.

For your kind information I will not appoint any legal or third party representation in this stage. I will represent myself in the court and all other authorities where necessary. I am giving the last opportunity to your client once again if your client don't stop force controlling the whole company and don't implement all the agreed terms and conditions by today 3pm (Friday 8th September, 2017) then I will informed all the relevant authorities including court for my major shareholder rights which I am asking for last five years. Again court will decide who is liable for all damage and court cost.

Once again if your client is not willing to give the major shareholders' rights back as we agreed before then after 3pm

today all the Irish journalist, all the Irish public, all the authorities will be informed all about our personal and business life history and activities including ICOT, SEDA, NED Training Centre, where has gone millions of euro and who is responsible for those and some other investment here there by your clients with SEDA's money. So let's all Irish public and world knows about our history. For this reason if company suffer any damage then court will decide who is liable for such aggressive damage of my company and identify the reason why.

Thanks for your understanding and waiting hear from you by 3pm today.

Wish you have a good day.

Regards,

Mahbuba Sultana."

137. Again, I am satisfied that this email was composed and sent by the first named respondent. As was a subsequent email from the same email address on 18th Septem-ber, 2017 where the subject was headed "*True inform to all relevant authorities*" and it stated: -

"Dear all,

This is to inform you that I am informing all authorities today that I call urgent EGM on 27th September. As we have ongoing partnership problem last four year now I should must inform everything to the relevant authorities who are involved with SEDA and NED. I am informing the truth today to secure my company interest.

Regards,

Mahbuba Sultana

Shareholder."

138. The applicant's solicitors responded to the same email address shortly after-wards on 18th September, 2017 as follows: -

"M. Karim and Mrs. Sultana,

Good afternoon. We have been advised of the following:

(1) You went to extraordinary lengths to attempt to force Mr. Amjad Hussain to issue notice of an extraordinary general meeting. We understand the actions of Mr. Karim have been persistent up to today.

(2) You now wish to issue notice of an EGM as shareholders.

(3) You deny that you have attempted to dispose of your shareholding when this office received a query from a party approached by you.

(4) You have sought sensitive company information with the express wish to share it with other parties for the purpose of such a proposed sale.

(5) You have been requested to supply the necessary information to the company accountants to properly record the payments made to you. You have not done so.

(6) You now wish to further malign and damage the reputation of the company with authorities and, if our instructions are correct media personnel, who are not concerned with the internal matters of the company.

(7) You have in fact now contacted QQI with your unproven allegations of wrongdoing against the college and in particular Mr. Mascarenhas. You have sent an email to Bank of Ireland in an effort to clearly frustrate the operation of the bank account.

It is clear your intent is the same as the previous occasion when your efforts to act to the detriment of the company resulted in the necessity for court action. Our client's instructions are again to act to protect both the interests of the other shareholder and the company itself. Your actions are clearly oppressive to the minority shareholder.

We now require confirmation by return that you will do the following:

(1) Immediately cease and desist with all communication with all third parties not connected with the company or its corporate administration.

(2) Immediately in particular retract your comments with the Bank of Ireland.

(3) Immediately retract your remarks and further cease and desist with all defamatory allegations against Mr. Mascarenhas with any party in future.

(4) Liaise with the company accountant Mr. O'Connor to supply the necessary information regarding tax treatment of your payments so that the monthly payments may be resumed without further delay.

(5) Confirm by return that you will adhere in future to the terms of the shareholders' agreement executed earlier this year including the proviso for change of mandate and appointment of directors.

If you fail to confirm as necessary to all of the above four [sic] points then our instructions are to issue proceedings against you for all remedies available to the remaining shareholder and/or the company as the case maybe.

Given your actions it is clear that the company and its creditors are being placed at risk. We would repeat our request for mediation with a view to the sale of your shares to the remaining shareholder.

If mediation is not agreeable, we will have no option but to pursue litigation against you.

Kind regards,

Martin Maloney

Solicitor and Notary Public."

139. I have not recited or referred to all of the email correspondence and hardcopy correspondence between the parties but I have considered all of it when considering the evidence in the case.

140. The following facts are clear ;-

a) The first named respondent is the beneficial owner of the shareholding which the second named respondent is entitled to have in her name and which is a 53% shareholding.

b) The actions and involvement of the second named respondent and of Mr. Am-jad Hussain have been at the behest of and have been controlled by the first named respondent throughout.

c) The first named respondent is a man of some business ability in terms of iden-tifying business opportunities. He has shown this through his involvement with English language speaking schools including his actions in relation to the setting up of SEDA.

d) However, the first named respondent is not committed to excellence and has not been committed to excellence in SEDA. Instead, his objective throughout has been to maximise profits at all costs and to extract cash from SEDA – and indeed from the other ventures in which he has been involved, at any oppor-tunity and from a distance.

e) The applicant is not without fault. It is clear that the respondents have been isolated by the applicant and the team of management who support the appli-cant insofar as the company is concerned. It does seem to me that the re-spondents' perception of being frozen out of the company, if I put it that way, is an understandable interpretation of the events that have arisen over the last number of years. However, I am also satisfied that this state of affairs is a consequence of the actions of the respondents, and of the first named re-spondent in particular, insofar as the company is concerned. To borrow a sen-tence from the judgment of Laffoy J. in *Kelly v. Kelly & Kelly, "It is a state of affairs which has been primarily brought about by the conduct of the first re-spondent*."

f) Fundamentally, the respondents and in particular the first named respondent, are unable to grasp the reality that the profits available for distribution are not what they would wish.

g) If the applicant and the staff supporting him did not act in the way in which they have acted in standing up to the respondents and to the first named re-spondent in particular I am satisfied that SEDA would have long since ceased to exist. It would have ceased to exist at the expense of the students enrolled in the college, at the expense of the applicant, at the expense of the staff of the college and probably also at the expense of the taxpayer.

As an aside, it is interesting to note that the minutes of the Board meeting at the time of the settlement of the earlier proceedings included the following provision on the second page at para. 8: -

"Any disputed issue relating to SEDA has to be dealt within the company. If anyone tried to report to any third party regarding this to dominate others which may hamper the business then he/she will be personally liable for the entire loss (if any) of the business".

This is interesting because the wording was clearly carefully considered. Carefully considered because the first named respondent was involved. His actions subsequent to the settlement of the earlier proceedings were in my view an attempt by him to dominate the applicant and the others involved in the management of the company.

h) His actions were burdensome, harsh and wrongful. The actions of the second named respondent and of Mr. Amjad Hussain which are detailed in this judgment were done at the bidding of the first named respondent and were also burdensome, harsh and wrongful. I am satisfied that the respondents, and the first named respondent in particular, have engaged in a campaign of oppression against the applicant since the summer of 2017.

i) The strategy of the respondents, and in particular the first named respondent, was clearly a strategy to create such a climate of fear within the company that would permit the first named respondent to coerce the applicant and the company to allow him withdraw cash routinely and regardless of whether or not the company could afford to meet such withdrawals without its liquidity/solvency being affected.

j) It is clear from the shareholder's agreement entered in 2017 that the second named respondent is entitled to 57 ordinary shares of the company. The applicant was entitled under the agreement to 25 ordinary shares and Saiful Islam was entitled to eighteen ordinary shares. However, the latter were transferred (and this is noted in the agreement) to the applicant – thus giving him beneficial ownership of 43 ordinary shares in the company

141. I am conscious of the fact that Mr. Grant has criticised the accounts and bookkeeping of the company. I am conscious also of the fact that the company has a high turnover with hundreds of students passing through and that there is scope for a black economy operating within the finances of the company. However, having heard the applicant and the other witnesses, including Mr. Fleming, I accept that the appli-cant and the staff supporting him in the management of the company are doing so honestly. Having considered the respondents' affidavits, and the oral evidence of and on behalf of the respondents, I am not satisfied that the

respondents are as concerned about regulatory and revenue compliance as they would like the court to believe.

142. I am satisfied also that SEDA College, as a result of the input of the applicant and the staff employed in the college, is a reputable English language school which operates to high standards. In addition to the ACELS accreditation, the courses of-fered are recognised on the Interim List of Eligible Programmes (ILEP) by the De-partment of Justice and Equality.

143. As mentioned above, it is clear that the applicant and the respondents cannot work together. It is also clear that it is not in the interests of the company that the re-spondents be involved in the day to day running of the college. Equally, it is clear that the involvement of the applicant and the staff and management supporting him in the company are essential to its survival and progress.

144. In all of the circumstances, I find that the applicant is entitled to relief under s.212 of the Companies Act 2014. It does not seem to me that it is appropriate or de-sirable that I make an order that the company be wound up pursuant to s.569 of the Companies Act 2014. I will make such orders as I consider necessary to bring finality to this dispute.

145. It does not seem to me that it is appropriate to make an order that the respond-ents be compelled to purchase the applicant's shares in the company, in light of the above findings which I have made.

146. In these circumstances I will make an order directing the respondents to sell to the applicant if he is prepared to buy at the price fixed by me [i.e. a first option]. I am finding that the share purchase agreement is valid and it follows from that that the second named respondent is entitled to hold a 53% shareholding in the company by virtue of that agreement. However, as already indicated, I am finding that the first named respondent is the beneficial owner of that shareholding which shareholding would now be registered in the name of the second named respondent if the paper-work required by the shareholder agreement had been completed. In these circum-stances I will make an order directing the respondents to do all such acts as are neces-sary to sell and transfer that 53% shareholding in the company to the applicant pursu-ant to s.212 of the Companies Act 2014 if he exercises the option to purchase at the price I am fixing.

147. I will hear counsel for the parties in relation to the actual form of the order to accomplish the share transfer and the time limit to be applied for doing so and all re-lated matters, which are to happen if the applicant decides to avail of the option. I will allow him a period of time to decide , perhaps 14 days , and I will hear Counsel on the length of this period . I will decide on the costs of the proceedings when hearing sub-missions in relation to the form of the order and on the issue of costs. If the applicant declines to exercise the Option I will consider what should then happen and I will then make the appropriate orders. I will adjourn the matter for mention for that reason.

The Financials

148. Insofar as the price of the shareholding is concerned, I have considered the ev-idence of the accountants who were called to give evidence before me and I have considered also their written reports and affidavits.

149. Mr. Paul Leonard of Cooney Carey (Chartered Accountants) swore an affida-vit, provided a report and gave evidence on behalf of the applicant. Mr. Liam Grant of Grant Sugrue & Company (Chartered Certified Accountants) swore an affidavit, pro-vided a report and gave evidence on behalf of the second named respondent.

150. According to Mr. Paul Leonard, *'the Future Maintainable Earnings (FME) methodology is the most common method of valuing profitable businesses. Earnings based valuations involve capitalising the earnings of the business at an appropriate multiple and requires consideration of the following factors: -*

> *• An estimation of the FME having regard to historical and forecast operating re-sults after taxation and interest, eliminating non-recurring incomes and costs, including sensitivity to key industry risk factors, future growth prospects and the general economic outlook.*
>
> *• Determination of an appropriate capitalisation rate which reflects risks inherent in the business and industry and future growth possibilities. This capitalisation rate is called the "multiple".*
>
> *• An assessment of surplus or unrelated assets and liabilities being those items which are not essential to producing the FME.'*

Mr. Leonard reached a calculation of value by way of: -

> *• Calculation of the weighted average of PAT – profit after taxation and interest (receivable and payable) over the year ended 30/6/2018 (management ac-counts), an 18-month period ending 30/6/2017 and years ending 31/12/2015 and 2014 (audit exempt accounts). We have carried out a review, though not detailed, of the business – this review to eliminate non-recurring costs and rev-enues.'*
>
> *'The PATs were weighted 2:4:0:2 (2018-2014), and this was to give more empha-sis to the profitable trading periods and to eliminate 2015 being an exceptional year and to reflect the erratic trading results of the company.'*
>
> *The weighted average PAT figure calculated amounted to €45.4k and this figure is the calculation of the Future Maintainable Earnings (FME).*

151. Mr. Leonard considered a number of strengths, opportunities, weakness and threats insofar as SEDA is concerned when deciding upon the multiple.

152. Mr. Leonard's view is that a company with an FME of the level of SEDA, given the competitive nature of the business, property lease in place, impend-ing/existing regulatory requirements and new competitor entrants would attract a mul-tiple of between 2.75 to 3.25. Application of the multiple to the FME produces a val-uation of €125,000 to €148,000.

153. This FME calculation excluded any other balance sheet value. The balance sheet value at 30th June 2018 is a negative value of €271,000 which will have to be funded according to Mr. Leonard. On this basis he determined that this is reflected in the weighting of PAT. His assessment of the total value of 100% of SEDA is in the range of €125,000 to €148,000.

154. Mr. Leonard did his calculations on the basis that the second named respond-ent has a 57.5% interest in SEDA and that the applicant is the holder of the balance of the shareholding in the company. This is an error as the shareholding is 57% to the second

named respondent and 43% to the applicant. This error is not of significance in the overall context of the valuation. In determining the value attributable to the second named respondent's shareholding in SEDA Mr. Leonard multiplied the 100% value per shareholding and applied a minority interest ("MI") deduction.

155. Mr. Leonard also pointed out that the size of the shareholding reflects the amount of control that a shareholder can exercise on the running of a company. The value of a particular shareholding is normally discounted to reflect the degree of con-trol. He says that the discount range for a shareholding of between 50-75% is normal-ly 10-15%. Given the shareholding of the second named respondent and the role of the applicant in the business Mr. Leonard took the view that a MI discount of 15% was appropriate.

156. His assessment of the value of the shareholding of the second named respond-ent (erroneously said to be 57.5%) less a discount for MI is €61,000-€72,000 with a median value of €66,600.

157. Using the correct 57% shareholding less a discount for MI the assessment should read €60,562.00 to €71,706.00. The middle of these figures is €66,134.

158. Mr. Grant differs significantly insofar as the valuation is concerned. He also makes the point that he was without essential information which he required to com-plete an independent share valuation despite efforts made on his part to obtain that in-formation. He has stated that he is not in a position to complete an independent share valuation report based on unaudited financial statements produced by Mohammed Farooq/Easy Books and that he sought that the relevant accounts be subject to inde-pendent scrutiny and an independent audit. He says that this matter was never re-solved to his satisfaction.

159. Notwithstanding these averments in his affidavit, which was sworn on the 20th March 2019, Mr. Grant did prepare a detailed report which was before the court and he did give evidence.

160. At page six of his report Mr. Grant raises a number of serious issues and incon-sistencies in the figures and reporting framework insofar as the financial statements are concerned.

161. For the period of review there was no audit completed on the financial state-ments. The financial statements were prepared by various parties as follows: -

> (1) Financial statements for the years ended 31st December 2014, 31st De-cember 2015, 31st December 2016, were prepared by OCC Chartered Ac-countants.
>
> (2) Financial statements for the 18-month period 30th June 2017 were pre-pared by Mr. Mohammed Farouk Amin on behalf of the company.
>
> (3) Financial statements for the period 31st December 2017 were prepared by Easy Books, a Dublin based bookkeeping services company.

162. The financial statements were historically prepared on a 31st December year end. A B83 was prepared to alter the financial year end to 30-June beginning with an eighteen-month period ending 30th June 2017. The B83 was certified by the director Tiago Da Silva Mascarenhas and signed on 12th February 2018.

163. The CRO returns feature the company financial statements for the eighteen months ended 30th June 2017.

164. Mr. Grant says that the difference between the 31st December 2016 and 30th June 2017 results highlight a concern regarding the apparent re-analysis of the admin-istrative expenses. He reiterates that the financial statements for this period were not subject to an audit.

165. Also, the inclusion of a "student expenses" administrative expense is a change in the historical reporting of administrative expenses. There was no adjustment made for the comparative periods. Mr. Grant states that he did not receive sufficient infor-mation to review the consistency or reliability of the "student expenses" as included in the 30th June 2017 financial statements.

166. Furthermore, in the period of review Mr. Mascarenhas was a full-time salaried employee and a director of the company. There was no disclosure of the director's remuneration in the financial statements for the periods 31/12/13 to 30/6/17. Mr. Grant points out that this represents a breach of the Company's Act and it is one which he considers to be an extraordinary omission from the financial statement.

167. The balance sheet of the company as at 31st December 2017 shows nil tangible fixed assets. Mr. Grant says that this is the result of the 100% depreciation of fixtures and fittings at 31st December 2017. He points out that the college has fully fitted classrooms, equipment and fixtures whose value has been fully depreciated but would need to be taken into account when considering net assets.

168. Mr. Grant carried out a CRO search on other similar type school businesses which allowed sight of abridged financial statements for three such entities of compa-rable size to SEDA. These were Delfin English School Limited, Atlas Language Insti-tute Limited and Malvern House Ireland Limited.

169. After this exercise and having regard to the trading results of these companies Mr. Grant expressed the opinion that the financial performance of SEDA is below that of comparable businesses operating in the same market. After making this point Mr. Grant reiterates that he has requested financial information and documentation con-cerning Seda which has not been provided.

170. In Mr. Grant's opinion the appropriate basis for valuing the company is on a multiple of earnings.

171. Mr. Grant does not consider the financial statements provided to him to be re-liable and indicates in his report that he has major concerns on whether or to what ex-tent the trading results are properly quantified and disclosed in the financial state-ments made available.

172. Profits before tax for the year ended 31/12/2017, as per the draft financial statements are shown at €82,081 and for the previous year ended 31/12/2016 at €117,668. However, comparative figures for other similar entities of comparable size show significant disclosed profits after charging director's remuneration and after charging tax/levies summarised in his report by Mr. Grant. For example, Delfin achieved profit after corporation tax in 2017 quantified at €351,811 and Atlas achieved profits after tax in 2017 of

€441,623. Profits for previous years varied. However, some showed very significant profits. For example, Atlas showed profits in 2015 of €162,911 and profits in 2016 of €102,773. Malvern showed profits in 2015 after tax of €361,226 and in 2016 of €228,602. [In evidence it did however appear that Malvern had encountered some trading difficulty of late].

173. Mr. Grant has stated that he was not furnished with financial projections. However, in his view, if the business was properly managed he says that there would appear to be substantial scope for significant increased profits. In his view, when con-sidering the valuation of the company, he feels that the minimum achievable profits before tax on an ongoing basis, based on other similar entities should be in excess of €200,000 per annum.

174. Mr. Grant considers the earnings before interest, tax and depreciation (EBIDTA) for the year ended 31st December 2017 and 31st December 2016 based on the draft financial statements. The average EBIDTA for these two years amounts to €109,687. This performance is substantially below the profits achieved by other simi-lar entities.

175. In Mr. Grant's view the company has the potential to achieve profit before tax of circa €300,000 - €350,000 and for the purposes of his report he has used a con-servative achievable profits of €200,000 per annum.

176. For this reason, it is his view that a more realistic profit figure on which an earnings multiple should be applied is the minimum figure of €200,000 per annum.

177. Mr. Grant expresses the view that if the business was put up for sale as a going concern there would be substantial interest from a number of other similar companies operating from Dublin/Ireland as well as similar companies from abroad apart from new persons wishing to enter the market. Furthermore, in his view, the likely achieva-ble price on sale of the entire business as a going concern would be likely to be in ex-cess of €1.2m on the basis that the trading results as presented show figures that are well below the achievable profits based on a company with annual sales in the year ended 31/12/17 quantified at €3.6m. Mr. Grant states that it would take many years for any company in the business to build up a very substantial turnover and this would add substantial value to the realisable value of the business/entity. Mr. Grant values the entire company at €658,000 to €1.2m.

Thus, there is a very great disparity in the valuations.

178. In his evidence, Mr. Leonard confirmed he had quite a degree of experience in this area in auditing, valuing, buying and selling entities of this nature. On the other hand, while no doubt experienced, Mr. Grant's experience seems to concern other business interests with little by way of specific exposure to educational institutions such as SEDA College. In his evidence, Mr. Leonard demonstrated a greater degree of insight to and appreciation of the nuances of the commercial trading environment relevant to this case.

179. In his report Mr. Leonard does include in Appendix 3 a SWOT analysis – de-tailing the strengths, weaknesses, opportunities and threats facing SEDA.

> *This analysis is worth setting out: -*
>
> *'Strengths:*
>
> *Established since September 2008.*
>
> *Good turnover levels – 600 students per term.*
>
> *The bespoke college building.*
>
> *Good staff levels with experience in teaching, marketing, administration and operations.*
>
> *Accreditations in place – ASCELS, EAQUALS, TIE and others – demonstrates college is well run.*
>
> *Well run and meeting required standards of industry/regulators.*
>
> *Weaknesses:*
>
> *Low profitability levels.*
>
> *Building lease expires on 1st December, 2022.*
>
> *Increase in competition from international schools – Russian, UK and Australi-an.*
>
> *Regulated industry – leads to higher costs.*
>
> *In 2015, a large loss as a result of the bank account being frozen by the bank for circa one month.*
>
> *Opportunities:*
>
> *Turnover may be increased subject to the 28 classrooms and 15 students/class limits.*
>
> *Threats:*
>
> *Increased competitors leads to additional marketing costs to attract students.*
>
> *Price competition for staff.*
>
> *Loss of key staff e.g. Tiago Mascarenhas.*
>
> *Rent costs in Dublin.*
>
> *New legislation – higher costs.*

Rent increase when lease expires.

Student attraction cost increases.

ACELS reviewed annually and required to trade.

EAQUALS reviewed every five years.' (Report of Mr. Paul Leonard, Cooney Carey Accounting Ltd. – 21st September 2018.)

180. In the introduction to the report quoted above, Mr. Leonard does refer to the Qualifications and Quality Assurance (Education and Training) (Amendment) Bill 2018 which is making its way through the Dáil and Seanad. He points out that this is expected to bring higher standards into the industry and this will result in higher costs for operators.

181. It is the position that it is unsatisfactory when dealing with valuations and when having to decide on a valuation to have experts who differ so significantly in re-lation to the values. The valuations smack of the standard negotiation strategy; the seller starts high and the purchaser starts low. In John McArcavy's booklet, "Private Company Shares: Valuation for Estate Duty and Capital Gains Tax" (Institute of Chartered Accountants in Ireland, 1973), the author is dealing with Valuations in a very different context. However, his work quotes a UK estate duty official comment-ing on the "science of valuations" [and that is my choice of words] and who stated :

> "…though it is possible to enumerate all the ingredients that go to make up a value, such as dividend, earnings cover, and assets cover, I have yet to meet anyone who can state without fear of contradiction, how much of each ingre-dient to take. A valuation is like a recipe from which quantities are omitted. The finished article depends very much on the skill of the cook and to some extent on the taste of the consumer".

182. I do accept much of which Mr. Grant says in relation to the fundamental value of SEDA and the importance of the comparative analysis which he has carried out. Against that, I do not believe that Mr. Grant has given appropriate consideration to the strengths, weaknesses, opportunities and threats facing SEDA. It does seem to me that SEDA is operating in a volatile,competitive and niche industry and I do not see the company having the valuation which he attributes to it. Having given careful consideration to the evidence in the case and to the figures and the full content of the reports of both experts – and their oral evidence – I do not believe that the entire company is worth €658,000 to €1.2m. It is my view that this is an overvaluation of the entire company in all of the circumstances.

183. It seems to me also that the valuation of Mr. Leonard of the company as hav-ing a total value in the range of €125,000 to €148,000 is a significant undervaluation of the company given the success it has enjoyed to date and its turnover and its pro-spects.

184. Mr. Grant arrives at the market valuation of €658,122 by multiplying the aver-age EBIDTA of €109,687 by six. He arrives at the valuation of €1.2m by multiplying the minimum projected achievable profits which he puts at €200,000 by six. In my view the multiple which he applies and grounds his valuations on is too high in all of the circumstances.

185. Mr. Leonard applies a multiple of between 2.75 to 3.25. If one takes the mid-dle of these two figures one has a multiple of three and that is the multiple I consider realistic.

186. If one applies a multiple of three to Mr. Grant's average EBIDTA of €109,687 one gets a figure of €329,061.

187. If one applies that same multiple of three to the minimum projected achievable profits of Mr. Grant one has a figure of €600,000.

188. This places the value of the company between €329,061 and €600,000.

189. The middle of these two figures is €464,530. It is my view that this is a realis-tic valuation of the entire company. It is a troubled company in a volatile and competi-tive and niche market. Without the Applicant and his loyal team who are running the school with him it would be in a precarious position. As a Director of the company the Applicant displayed an appreciation of his responsibilities as such when giving evi-dence and I believe that his awareness of his responsibilities is a big part of his motiva-tion to stay with the company as opposed to setting up on his own. All of the difficul-ties in the company and risks in the Industry must feature in what a willing purchaser would be prepared to pay for the company if it was being sold on the open market by a willing vendor.

190. I accept Mr. Leonard's evidence that the discount range for a shareholding of between 50% and 75% is normally 10%-15%. I accept also that the applicant has a hugely important role in SEDA and I accept that the value attributable to the 57% shareholding should have a minority interest deduction which I find should be 15%. That figure is €264,782 (being 57% of the total figure) from which I am deducting 15% leaving the total valuation of the 57% shareholding at €225,065.

191. The respondents between them owe €40k to the company. The second named respondent was since 11/4/17 entitled to €3k gross salary per month. She was paid €21k gross. If one calculates that salary up until 11/4/19 [a date I am fixing as an ap-propriate cut-off point in light of these proceedings and their course] one has 24 months x €3k = €72k.

192. The salary outstanding on that basis is €72,000.00 - €21,000.00 = €51,000.00 gross. I am setting off the money due of €40,000.00 against that figure leaving a bal-ance outstanding of €11,000.00 gross to the respondents. That figure is to be paid to the respondents by the company in settlement of that outstanding liability if the op-tion being granted to the Applicant is exercised by him and is to be paid within 21 days of the share transfer being completed. If the option is not exercised by the appli-cant, then I will re-visit the issue of time and manner of payment/discharge of this sum to the respondents when giving directions in light of the non-exercise of that Option by the applicant. I am not making any further deduction from this sum even though the Respondents have delayed the conclusion of this litigation.