Neutral Citation Number: [2009] IEHC 570

THE HIGH COURT

2007 47 COS

IN THE MATTER OF MARTIALONE LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2006

AND IN THE MATTER OF SECTION 205 AND SECTION 213 OF THE COMPANIES ACT 1963

BETWEEN

MIKE HENNESSY

PETITIONER

AND

PATRICK GRIFFIN, PATRICK KEANE, ENTERPRISE 2000 FUND LIMITED, CAMPUS COMPANIES CUSTODIAL LIMITED AND MARTIALONE LIMITED

RESPONDENTS

Judgment of Ms. Justice Laffoy delivered on the 23rd December, 2009.

The proceedings

These proceedings were initiated by a petition dated 1st February, 2007, which was presented by the petitioner on 6th February, 2007. The petitioner is the owner of 20.12% of the issued share capital of Martialone Limited (the Company), which was incorporated on 13th August, 1998 and is involved in the business of supplying and maintaining whirlpool and hydrotherapy systems and related products. The petitioner invokes s. 205 of the Companies Act 1963 (the Act of 1963) and asserts that the affairs of the Company are being conducted by the respondents in a manner which is oppressive to him and in disregard of his interests as a member of the Company. He seeks, *inter alia*, an order that the respondents sell their share holding in the Company to him at a fair and reasonable price to be determined by the Court. In the alternative, he seeks an order appointing an agent to sell the entire issued share capital in the Company with the net proceeds of sale to be distributed in accordance with the directions of the Court. He also invokes s. 213(f) of the Act of 1963 seeking, if necessary, an order that the Company be wound up on the grounds that it is just and equitable to do so.

The petitioner was the first managing director of the Company. He resigned from that position in 2001. He remained a director of the Company until he resigned from that office in October 2003.

The status of each of the respondents in relation to the Company is as follows:-

(1) The first respondent is the owner of 10.35% of the issued share capital of the Company. He is a former director and chairman of the board of the Company, having resigned as a director in 2005.

(2) The second respondent is the current managing director of the Company, having been appointed to that position on the retirement of the petitioner in 2001. He is the owner of 14.64% of the issued share capital of the Company.

(3) The third respondent is a Business Expansion Scheme (BES) investor in the Company and holds 15.63% of the issued share capital of the Company.

(4) The fourth respondent is also a BES investor in the Company and owns 23.74% of the issued share capital of the Company.

(5) The fifth respondent is the Company.

There are five other members of the Company who, between them, own 15.52% of the issued share capital of the Company, who are not parties to the proceedings.

A very considerable body of affidavit evidence was filed in support of and in answer to the petition, which is replete with factual conflicts. Pursuant to the petitioner's motion for directions, the Court ordered that pleadings be delivered. The plaintiff's points of claim were delivered on 6th September, 2007. The pleadings have been closed.

This application

On this application the first respondent and the second respondent seek an order pursuant to Order 19, Rule 28 of the Rules of the Superior Courts 1986 (the Rules), or under the inherent jurisdiction of the Court, striking out the proceedings against them on the grounds that they are vexatious, have no prospect of success and are an abuse of the process of

the Court. When the application was listed for hearing, there was also listed for hearing a similar application by the third named respondent. That application was compromised, but the Court was not apprised of the terms of the compromise. The Court made an order by consent striking out the motion of the third named respondent with no order as to costs and also striking out the proceedings against the third named respondent with no order as to costs.

The current position, accordingly, is that members of the Company, who between them own 31.17% of the issued share capital of the Company, are not before the Court.

The fourth respondent, which had previously intimated an intention to bring a motion to strike out the proceedings against it, had not done so by the date of the hearing. However, counsel for the fourth respondent made it clear that the fourth respondent wished to reserve its position in relation to bringing such a motion.

General approach to the application

I am satisfied that the jurisdiction of the Court to dismiss proceedings pursuant to Order 19, Rule 28, or in exercise of its inherent jurisdiction, is applicable to a s. 205 petition. On a Supreme Court appeal in *Re Via Net Works (Ireland) Limited* [2002] 2 I.R. 47, Keane C.J. stated (at p. 55):-

> "It was not contended on behalf of the respondents in this case that the jurisdiction of the High Court to dismiss an action pursuant to Order 19, Rule 28 on the ground that the pleadings disclose no reasonable cause of action or one which is frivolous or vexatious or to strike such proceedings as an abuse of process in the exercise of its inherent jurisdiction, is inapplicable in the case of such petitions. I think that they were correct in adopting that approach, since it appears to be the clear implication of the judgments of this court in *Horgan v. Murray* (No. 1) [1997] 3 I.R. 23 that the jurisdiction is applicable in case of such petitions, although it is one that should in those cases as in all other cases, be exercised sparingly and, on the facts of that particular case, was unsuccessfully invoked".

Earlier in his judgment, Keane C.J. had outlined the proper approach to an application such as this where relevant facts are in dispute. He stated (at p. 52):-

> "To the extent that any of these contested issues of fact are relevant to the granting or withholding of relief pursuant to s. 205 of the 1963 Act, their resolution would have to await a plenary hearing. It is also clear that the test to be applied in considering the application to strike out the proceedings as being an abuse of process is whether, assuming the respondents succeed in establishing the facts as pleaded in their petition at such a plenary hearing, they would be entitled to relief under s. 205. If they would, the pleadings cannot be struck out as being an abuse of process (see the decision of this court in *Jodifern v. Fitzgerald* [2000] 3 I.R. 321)".

In this case, counsel for the first and second respondents followed the approach laid down in that passage in recognising that the Court must assume that the petitioner's allegations of oppression and disregard of his interests as a member of the Company, as particularised in the petitioner's points of claim, would be established as facts in a plenary hearing and, on that basis, the Court must determine whether the petitioner would succeed in obtaining the relief he has claimed under section 205 and section 213(f).

The submissions of the first and second respondents

Counsel for the first and second respondents prefaced his analysis of the allegations of oppression and disregard of interest made by the petitioner by pointing to four features of the petitioner's case which, it was submitted, are significant, namely;-

> (1) The petitioner has not asserted that there exists between him and the other members or between him and the directors a quasi-partnership which would entitle him to participate in the organisation and management of the Company.
>
> (2) The petitioner does not seek an order that his shareholding be bought out by the other members of the Company for a fair price.
>
> (3) What the petitioner seeks is that he, a minority shareholder, be allowed buy out the shareholding of the respondents, which was characterised as a majority shareholding. The point made on behalf of the first and second respondents was that the petitioner had adduced no satisfactory evidence to establish his ability to fund such a buy out and, in particular, a loan facility letter which he furnished sanctioned a loan to the Company and the conditions attached to the offer were redacted.
>
> (4) The first and second respondents have made two offers to purchase the petitioner's shareholding. Both offers were rejected. The most recent offer was contained in a letter dated 26th June, 2008 from the solicitors for the first and second respondents to the solicitors for the petitioner. The basis of the offer was that the first and second respondents were prepared to offer to purchase the petitioner's shares in the Company "at a fair valuation (with no discount to reflect the minority holding of the Petitioner)", the valuation to be carried out by an independent firm of chartered accountants to be agreed or, failing agreement, appointed by the President for the time being of the Institute of Chartered Accountants in Ireland. It was stressed that the offer was made solely for the purpose of resolving the proceedings.

In relation to the matters at (3) and (4), I would comment that it is difficult to see how, insofar as the relief claimed by the petitioner or proffered by the first and second respondents arises as an issue, it can be considered in isolation and without regard to the outcome of the compromise between the petitioner and the third respondent, the uncertain position of the fourth respondent and the position of the absent shareholders. This comment will become relevant later.

Counsel for the first and second respondents also prefaced his analysis of the petitioner's allegations by referring to two recent authorities.

The first authority relied on was the decision of the Supreme Court in the *Via Net Works* case. Counsel for the first and second respondents relied on that case as supporting his contention that the allegations made by the petitioner in this case, even if established as facts, could not amount to oppression or disregard of his interests within the meaning of section 205(1) of the Act of 1963. In his judgment, Keane C.J. summarised the grounds on which the respondents on that appeal, who were the petitioners under s. 205, were seeking relief. They were asserting that the appellants, who were majority shareholders, were responsible for a state of affairs in which the managing director of the company had been wrongfully dismissed at what they claimed was considerable cost to the company, where the debts of the company had not been collected in a timely fashion at a considerable cost to the company, and where they had been excluded from any prospect of real participation in the affairs of the company. They also alleged that their interests in the company had been greatly diluted because of the activity of the appellants and, in particular, they asserted that the making of cash calls by the company upon the shareholders was further diluting their interest and adversely affecting the value of their shareholding.

Counsel for the first and second respondents relied on the following passage from the judgment of Keane C.J. (at p. 56), in which he considered some of the allegations made by the respondents:

> "In any event, it is difficult to see how the allegations made by the respondents, even if they were established, could constitute a case of oppression or disregard of their interests within the meaning of s. 205(1). They are, in the main, claims that the appellants are running the company in a manner which is damaging to the interests of the shareholders. It has been the law, however, since the venerable decision in *Foss v. Harbottle* [1843] 2 Hare 461, that only the company can maintain proceedings in respect of wrongs done to it and that neither the individual shareholder nor any group of shareholders have any right of action in such circumstances. That rule was emphatically re-affirmed by the decision of both the High Court and of this Court in *O'Neill v. Ryan* (No. 3) [1992] 1 I.R. 166. There are undoubtedly well established exceptions to the rule, but it is clear that this case does not come within any of them".

As to other allegations, Keane C. J. continued:

> "While the respondents also maintain that they have been excluded from participation in the company's affairs – a plea which, if established, might amount to the sort of conduct aimed at by s. 205 – the averment by Mr. Nydell that the first respondent attended board meetings … has not been denied. Nor, it would seem, has he exercised his right pursuant to the Shareholders' Agreement to request that further board meetings be called. I am satisfied that, in the result, if the petition were allowed to proceed, on the undisputed facts of this case, the respondents would not be in a position to establish that the affairs of the company were being conducted or the powers of its directors exercised in a manner oppressive to them and in disregard of their interests".

The other authority relied on by the plaintiff was the decision of this Court (Smyth J.) delivered on 18th December, 2007 in *Re New Ad Advertising Company Limited* [2007] I.E.H.C. 436. The aspect of the judgment that Smyth J. relied on by counsel for the first and second respondents was his focus on the distinction between the conduct of the company's affairs, the meaning of which is limited, on the one hand, and the rights of shareholders *inter se* arising from acting in a private capacity in relation to their shareholdings, on the other hand. Smyth J. paraphrased the observations of Peter Gibson L.J. in the Court of Appeal in *Re Legal Costs Negotiators Limited* [1999] BCLC 171, in the context of the corresponding, although "more refined", provision of the legislation in the United Kingdom to the effect that it is concerned with the company's affairs rather than the affairs of individuals and is concerned with acts done by the company or those authorised to act as its organs.

Turning to the analysis of counsel for the first and second respondents of whether the petitioner's case under s. 205 discloses a cause of action, he did so by reference to the particulars of oppression and disregard of his interests pleaded by the petitioner in para. 13 of his points of claim. The following submissions were made in relation to the matters pleaded:-

> (a) The petitioner alleges that a transfer of 600 shares by him for no consideration in October, 2001, as to 343 shares to the fourth respondent, 257 shares to the third respondent and 100 shares to first respondent, was the result of sustained pressure derived from the fact that the second respondent made it clear at board meetings in 2001 that, if the shares were not handed over, there would be no progress made in relation to further investment made in the Company. It was submitted on behalf of the first and second respondents that, even if it happened, pressure of that nature could not amount to oppression. The petitioner also alleges that the "demand for equity" was also in contravention of a Shareholders' Agreement of 9th March, 2000 signed by him as shareholder. It was submitted on behalf of the first and second respondents that that was factually incorrect. Apart from the submission that what is alleged could not have amounted to a breach of the Shareholders' Agreement, it was contended that, even if it had, on the authority of the decision in the *New Ad Advertising* case, it could not amount to oppression.
>
> (b) The petitioner alleges that the respondents or some of them have attempted to dilute his shareholding by purporting to offer new shares in the Company (a BES funding proposal in December 2005) in an irregular manner, particularising the irregularity as:-
>
> > (i) that no Extraordinary General Meeting [EGM] was proposed for the approval of the issue of the new BES shares;
> >
> > (ii) there was no prospectus, which was in breach of "the Shareholders' Agreement";
> >
> > (iii) the petitioner was not informed in advance of the offer;
> >
> > (iv) there was no process of due diligence, no business plans, no financial projections, no cash flows and no statement on the use of the funds despite requests; and
> >
> > (v) the petitioner was denied access to the share register.

In relation to these allegations, it was submitted on behalf of the first and second respondents:-

(i) there was no need for an EGM;

(ii) the absence of a prospectus was not in breach of any provision in the Shareholders' Agreements;

(iii) the petitioner was not entitled to advance notice of the offers;

(iv) the absence of a due diligence process and the other information processes could not constitute oppression; and

(v) the petitioner attended at the registered office of the Company without warning when the share register was not available.

(c) The petitioner alleges certain irregularities in the issue of shares to the first respondent in December, 2005, contending, *inter alia*, that the shares were paid for from the accumulated bonus of the first respondent and, as such, with money the property of the company. Wrongdoing was also alleged against the first respondent in relation to seeking tax relief on the investment and in the notification of the transaction to the Companies Registration Office. It was submitted on behalf of the first and second respondents that, if what was alleged happened and amounted to a wrong, it was a wrong against the Company and, as such, it is a classic situation which falls within the rule in *Foss v. Harbottle* and cannot be pursued by the petitioner.

(d) The petitioner complains about lack of information in connection with an offer to subscribe for additional shares in September, 2006 and, in particular, lack of an explanation as to the quantum of the share price and the absence of business plans, up to date management accounts and such like. It was submitted on behalf of the first and second respondents that, if there was a dearth of information as alleged, that could not amount to oppression within the meaning of section 205.

(e) The petitioner alleges that the respondents refused to call an EGM as requested by the petitioner on 4th July, 2003 in order to address his concerns relating to the way in which the board of the Company was operating and also the fact that there were no board meetings held between July 2003 and November 2003. Counsel for the first and second respondents submitted that unless there was an obligation on the respondents to call an EGM, and it was submitted that no such obligation has been pleaded by the petitioner and none existed, the conduct complained of could not amount to oppression, nor could the absence of board meetings. As a matter of fact, contemporaneously with his resignation as a director of the Company in October 2003, the petitioner formally withdrew his request for an EGM.

(f) The petitioner alleges that the respondents put him in a position whereby he felt compelled to resign as a director on foot of concerns extensively raised by him relating to the way in which the board was operating and the petitioner's belief that the board had failed the shareholders of the Company. Counsel for the first and second respondent submitted that how the board operated in relation to the business of the Company was a matter of commercial judgment. While the petitioner may have a different view as to how the board should have operated, that does not constitute oppression or disregard of the petitioner's interest as a shareholder.

(g) The petitioner alleges that at the annual general meeting of the Company on 4th September, 2006, questions which the petitioner raised about pre-emption rights and the issue of shares were not answered and he specifies the questions. It was submitted on behalf of the first and second respondents that, even if questions were raised by the petitioner, he did so *qua* shareholder and, if the questions were not answered, this does not amount to oppression.

(h) The petitioner complains that the respondents have refused to explain to him the circumstances in which various directors of the Company have either resigned or been appointed. He also alleges irregularity in the registration of particulars in relation to such resignations and appointments in the Companies Registration Office. Counsel for the first and second respondents asked rhetorically how that could amount to oppression of the petitioner in his capacity as a shareholder, implying that it could not.

(i) The petitioner alleges that he has been excluded from the affairs of the Company and that he has not received information to which he is entitled and he gives other examples of the alleged exclusion. It was submitted on behalf of the first and second respondents that the matters adverted to by the petitioner as amounting to exclusion, in the absence of a plea of quasi-partnership, are not of the type which would be regarded as exclusion in the context of an allegation of oppression. Taking the allegations at face value, as the Court must do, they do not amount to oppression of the petitioner *qua* shareholder.

For the sake of clarity, I think it is worth recording what the petitioner pleads in relation to his ceasing to be an officer of the Company. The petitioner pleads that he voluntarily resigned from his position as managing director of the Company in 2001. However, in relation to his resignation as a director of the Company in October 2003, he pleads that the respondents put him in a position whereby he felt "compelled to resign" in the circumstances outlined at (f) above.

In relation to the reliefs claimed by the petitioner, while recognising that the Court has an absolute discretion as to the relief which is appropriate in a particular case in which s. 205 is invoked, it was submitted on behalf of the first and second respondents that it is extremely rare that an order is made ordering the majority to sell to the minority, citing the decision of the English High Court (Rattee J.) in *Re Brenfield Squash Racquets Club Limited* [1996] 2 BCLC 184, who referred to such an order being "comparatively unusual".

As regards the alternative claim for a winding up order under section 213(f), counsel for the first and second respondent argued that there is no basis on which the Court could make such an order and that claim is bound to fail because there is no evidence that the Company is insolvent. In the absence of a plea that the Company is a quasi-partnership company, which it was asserted would not in any event be sustainable, or the establishment of deadlock between the members in the management of the Company, there would be no basis for finding that it would be just and equitable to wind up the Company.

Submissions on behalf of the petitioner

Certain matters were not in issue. Counsel for the petitioner emphasised the high threshold which a defendant or a respondent has to meet to succeed in an application to have a claim dismissed or struck out under Order 19, Rule 28 or the Court's inherent jurisdiction. The existence of a high threshold was acknowledged by counsel for the first and second respondents. The submission made on behalf of the petitioner that actions do not have to be illegal to constitute oppression was also accepted as being correct by counsel for the first and second respondents.

Counsel for the petitioner emphasised the observations of McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 (at p. 428) to the effect that this Court should only exercise its inherent jurisdiction to dismiss an action on the basis that it cannot succeed sparingly. Counsel for the first and second respondents readily acknowledged that stricture.

The nub of the petitioner's response was that, while each of the matters particularised by the petitioner as constituting oppression and disregard of his interest standing alone might not constitute oppression, taken together they did constitute oppression and disregard of the petitioner's interest. In relation to the reliance by the respondents on the decision in the *New Ad Advertising* case, it was submitted that whether an activity, the subject of a complaint, is activity in the conduct of the affairs of a company is a mixed question of law and fact. It was submitted that such a question could not possibly be resolved on an application of this nature. In this case there are issues of fact to be resolved, it was submitted, which can only be resolved at a plenary hearing. An example given was the conflict between the petitioner, who contends that his transfer of shares without consideration was made under pressure and that his resignation as managing director was under compulsion, whereas the first and second respondents assert that in both cases the petitioner acted voluntarily.

The response of counsel for the first and second respondents to that example was that the conflict between "forced" actions and "voluntary" actions was more a conflict of description than of fact. The proper approach, he submitted, was to look at the particulars of oppression pleaded by the petitioner and to ask whether what is alleged could amount to oppression.

Conclusions

Before outlining my conclusions on the issues raised in this application, I propose addressing the following matters:-

(a) the relevance of the authorities relied on by the first and second respondents;

(b) the significance, if any, of the remedies sought by the petitioner and proffered by the first and second respondents;

(c) how factual disputes should be viewed, if at all; and

(d) the absence of a quasi-partnership plea.

I will then set out my conclusions by reference to the particulars contained in para. 13 of the points of claim.

The authorities

While the principles enunciated by Keane C. J. in the *Via Net Works* case, to which I have already referred, are relevant to the determination of this application, it is instructive to consider the context in which those principles were applied in the striking out of the petition in that case. First, it was held that the respondents to the appeal, the petitioners, had no *locus standi* to maintain an action under s. 205 because, while still registered as owners of shares in the Company, they were contractually bound to divest themselves of their rights as shareholders and to transfer them to the appellants. It was on that basis that Keane C.J. held that the petition should have been struck out in the High Court in exercise of the jurisdiction to strike out, because no cause of action was disclosed and it constituted an abuse of process. Secondly, Keane C. J. held that the Court had an inherent jurisdiction to stay the s. 205 proceedings because of the existence of an arbitration clause in the Shareholders' Agreement which regulated the parties' shareholding, thereby accepting the submission made on behalf of the appellants that the respondent petitioners were seeking to make use of the s. 205 procedure in order to circumvent the provisions of the Shareholders' Agreement. While the *Via Net Works* case was not decided primarily on the basis of the *Foss v. Harbottle* argument, nonetheless, it is clear, that, if the *locus standi* issue had not been determinative, the allegations which could not have been pursued because to do so would contravene the rule in *Foss v. Harbottle* would have been struck out, as would the allegations of exclusion from participation in the company's affairs which, given the undisputed facts, could not have amounted to oppression.

In relation to the application of the principles to be derived from the *New Ad Advertising* case relied on by the first and second respondents, while in that case the relevant principles were applied in the course of the plenary hearing of the section 205 proceedings, not on a motion to dismiss under Order 19, Rule 28 or the Court's inherent jurisdiction, if by their application in this process it is disclosed that the petitioner does not have a cause of action, then the proceedings should be struck out.

The remedies

The issue on this application is whether a cause of action has been disclosed, not what would be the appropriate remedy if one was. A number of observations are necessary in relation to the arguments advanced in relation to the remedies sought and proffered.

First, in my view, it would not be proper at this juncture to express any view on what remedy the Court might give under s. 205(3), if the petitioner established oppression or disregard of his interests. Under section 205(3) the Court is given a broad discretion to make such order as it thinks fit "with a view to bringing to an end the matters complained of". A significant factor in this case is that, as things stand, the owners of 31.17% of the issued share capital of the Company are not before the Court at all, the fourth respondent, the owner of 23.74%, is not before the Court on this application, and the impact on the shareholdings of the compromise with the third respondent is unknown. It seems to me that

following the approach adopted by Murphy J. in *Horgan v. Murray* (at p. 41), if I were to conclude that there is an issue to be tried as to whether there was oppression, I should take the view that, if oppression is established, there is an issue as to the appropriate remedy or solution which the Court should provide. Therefore, in determining whether the proceedings should be dismissed against the first and second respondents, I attach no weight to the arguments made on behalf of the first and second respondents in relation to the appropriateness of the nature of the remedy sought by the petitioner. Therefore, it is unnecessary to express a view on the petitioner's financial ability to acquire the shares of those respondents.

Secondly, in my view, it would not be proper to attach any weight to the offers made by the first and second respondents to acquire the petitioner's shares. On that point, the following observations of Murphy J. in *Horgan v. Murray* (at p. 40) in relation to an offer made by the respondents in that case similar to the offer made in this case by the first and second respondents, which relate to a situation in which oppression has actually taken place or is alleged, are apposite:-

> "… I believe that a court, in this jurisdiction at any rate, would not strike out the petition as being an abuse of the process of the court. It is difficult to see how the court could be satisfied that the precise remedy offered by the oppressor was the appropriate means by which to bring an end to the oppression".

Later (at p. 42), offering advice to the parties on the benefits of solving their problems, rather than litigating them, Murphy J. observed:

> "In particular, it may be appropriate to draw attention to the fact that the proposal by the respondents that the shareholding of the petitioner should be valued as if that shareholding formed part of a majority shareholding seems to offer an element of generosity or compensation which if directed by the courts might offend the principle that relief granted under section 205 may not require the payment of monies in the nature of damages".

Thirdly, as regards the claim for a winding up order under s. 213(f), it is framed as an alternative plea which is invoked only if it is necessary. I do not think that any weight should be attached to the argument of the first and second respondents in relation to this remedy in determining whether the proceedings against them should be struck out. Whether a winding up order should be made at the suit of the petitioner is an issue which would only fall to be considered at the very end of the process.

Factual Disputes

Even though counsel for the first and second respondents advocated what I consider to be the correct approach to this application, it is clear that he envisages that, in implementing that approach, the Court would take a certain view on factual disputes. In some instances, doing so, it seems to me, is not problematical. For instance, the petitioner's assertion that the "demand for equity", in other words, that he transfer 600 shares without consideration, was in contravention of a clause of a Shareholders' Agreement of 9th March, 2000 obviously does not accord with the facts as presented by the petitioner. As was pointed out by counsel for the first and second respondents, the petitioner has quoted the relevant clause of the Shareholders' Agreement , clause 2.1.3 of the fifth schedule, in para. 7 of his replying affidavit sworn on 5th July, 2007. I accept as correct the submission of counsel for the first and second respondents that it is quite clear that this clause was a representation or warranty as to what was the then current position, not as to what would happen in the future. Therefore, as regards that complaint, I consider that it is appropriate to have regard to the true factual position.

However, in relation to other factual disputes, it seems to be it would not be appropriate on this application to form any view as to the true position. In particular, I think it would be inappropriate to come down on either side in the "voluntary" versus "forced" argument in relation to the share transfer in 2003 or the petitioner's resignation as a director. In particular, it would be inappropriate to assess the petitioner's allegations that he felt that he acted under "sustained pressure" or that he "felt compelled" or that he considered himself "excluded from" certain activities in the context of the factual situations to which those complaints relate.

The crucial question on this application is whether s. 205 is engaged at all. Sub-section (1) of s. 205 provides:

> "Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised in a manner oppressive to him or any of the members (including himself), or in disregard of his or their interests as members, may apply to the court for an order under this section."

Is there is an issue to be tried as to whether there was oppression of the petitioner or disregard of his interest? The Court may only form a view on that question on this application on the basis of undisputed facts or on the assumption that the petitioner will establish the facts he asserts as giving rise to an entitlement to relief under s. 205.

No quasi-partnership plea

The significance of the absence of a plea that the Company is a quasi-partnership company is that equitable principles implied from partnership law do not come into play in determining what constitutes oppression or disregard of members' interests. In this case, the treatment of the petitioner falls to be determined on the basis that he is a minority shareholder, who is not an officer or a director of the company, and it falls to be determined within the parameters of s. 205 and the established principles on the application of that provision.

Conclusions in relation to allegations particularised in para. 13

Taking each of the sub-paragraphs of para. 13 individually, I find as follows:

> (a) As I have already indicated, I consider that counsel for the first and second respondents was correct in his interpretation of his clause of the Shareholders' Agreement relied on by the petitioner, so that I am satisfied that

reliance on an alleged contravention of the Shareholders' Agreement does not stand up. However, in the context of the allegations made by the petitioner that he was forced to relinquish part of his shareholding without consideration to advance the interests of the company and against his own personal interest, I do not think that the ensuing share transfers can be regarded as private dealings in the share capital of the company which fall outside the conduct of the affairs of the company. Therefore, I do not think it is open to make a finding at this juncture that what the petitioner complains of could not amount to oppression.

As was pointed out in the written submissions on behalf of the first and second respondents, the transfer of the shares is historic, in that it took place in October 2001. However, the petitioner continued as a director of the company until October 2003 and he first made a complaint in relation to the transfer in the petition presented in 2007. While it may be that, by reasons of those factors, there is a defence to the allegation, that is not a matter which can be adjudicated on now. In my view, a finding that the allegation in paragraph (a), other than the last sentence thereof alleging the breach of the shareholding agreement, could not give rise to a cause of action under s. 205 is not open.

(b) It is an undisputed fact that the share issue proposed in December 2005 never took place. Even if, contrary to the denials on the part of the first and second respondents, such irregularity as is alleged could amount to oppression of the petitioner or constitute a disregard of his interest or the interest of any member of the Company, in its totality this allegation is merely hypothetical and cannot succeed. In so finding I am not overlooking the fact that, as a member of the Company, the petitioner has a right under s. 119 of the Act of 1963 to inspect the share register and a denial of that right constitutes a criminal offence. This allegation cannot give rise to a cause of action under s. 205.

(c) Counsel for the first and second respondents was correct in contending that any wrongdoing involved in the grant of shares to the first respondent in December 2005 was a wrong to the company and, having regard to the rule in *Foss v. Harbottle*, the proper plaintiff in an action in respect of such wrong is the company. It is not a matter which can be pursued by the petitioner on an application under s. 205. It is only fair to record that the allegations of wrong are wholly disputed. Apart from that, the allegation that the accumulated bonus of the first respondent was the property of the company simply does not make sense. This allegation cannot give rise to a cause of action under s. 205.

(d) Unlike the proposed share issue in December 2005, the issue of additional shares in September 2006 did proceed but the plaintiff did not subscribe. I do not think it appropriate to make a finding at this juncture that failure to provide the type of information to which the petitioner claims he was entitled, but did not get, could not amount to oppression, so that one could conclude that the petitioner does not have a cause of action under s. 205.

(e) This allegation relates to a request by the petitioner for an EGM in July 2003. On the plaintiff's own evidence, he withdrew that request in October 2003 when he resigned as a director. In the circumstances, it is impossible to conclude that the failure to hold an EGM amounted to oppression of him.

(f) The factual conflict as to whether the petitioner's resignation as a director was voluntary, as the respondents contend, or "forced", as he contends, cannot be resolved on this application. Making a determination as between voluntary and involuntary would necessitate drawing inferences, which I do not think it is appropriate to do on this application. Therefore, I consider that a finding that the conduct complained of on the part of the respondents does not constitute oppression or disregard of the petitioner's interest as a shareholder is not open at this juncture.

(g) The questions raised by the petitioner to which this allegation relates centred on the share option agreements of the first respondent and his entitlement to be issued shares. I find that the submission made on behalf of the first and second respondents, that the failure to furnish information of the type in issue to the petitioner *qua* shareholder could not amount to oppression or a disregard of the petitioner's interest, is correct. By analogy to paragraph (c), the petitioner is not entitled to pursue this allegation under s. 205 and, accordingly, could not succeed on it.

(h) None of the matters in respect of which the petitioner complains in this sub-paragraph are matters which, if they can be established as facts and as having flowed from either deliberate policy or bad management or maladministration on the part of the company, are matters which could conceivably amount to oppression of the petitioner *qua* shareholder.

(i) Similarly, on the assumption that the petitioner was deprived of the information in relation to the affairs of the company itemised in this sub-paragraph, such deprivation, which he equates with exclusion with the affairs of the company, does not relate to information to which a shareholder has an entitlement, in the absence of some special agreement or on the basis of some equitable principle. In the circumstances, the matters alleged could not constitute oppression or a disregard of his interests as shareholder.

Summary of conclusions and order

In summary, I am satisfied that the allegations contained in the last sentence in sub-paragraph (a) and the allegations contained in sub-paragraphs (b), (c), (e), (g), (h) and (i) do not amount to oppression or disregard of the plaintiff's interests so as to give an entitlement to relief under s. 205. To that extent the plaintiff's claim will be dismissed.