Neutral Citation No. [2011] IEHC 335

THE HIGH COURT

2007 47 COS

IN THE MATTER OF MARTIALONE LIMITED AND

IN THE MATTER OF THE COMPANIES ACTS 1963/2003 AND

IN THE MATTER OF S. 205 AND 214 OF THE COMPANIES ACT 1963

BETWEEN

MIKE HENNESSEY

PETITIONER

AND

PATRICK GRIFFIN, PATRICK KEANE,

ENTERPRISE 2000 FUND LIMITED,

CAMPUS COMPANIES CUSTODIAN LIMITED AND

MARTIALONE LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Roderick Murphy dated the 29th day of July 2011

1. Petition
The original petition was that of the 6th February, 2007.

A purported amendment dated the 28th May, 2010, was refused by Laffoy J. Mr. Hennessey, the petitioner, a registered shareholder of Martialone Limited ("the Company") had sought the following reliefs:-

> 1. An order directing the respondents to furnish to the petitioner all information . . . to which the petitioner is entitled as a member of the Company;
>
> 2. An order appointing a receiver and manager to manage the affairs of the Company and report to the court;
>
> 3. (deleted from original petition of the 6th February, 2007) or an order directing the respondents to sell their shareholding in the Company to the petitioner at a fair and reasonable price to be determined by the court. . .
>
> 4. In the alternative an order appointing an agent to sell the entire issue share capital in the Company with the net proceeds of sale to be distributed in accordance with the directions of the court and, if necessary an order for the winding up of the Company pursuant to s. 205 or, alternatively, pursuant to s. 213 on the grounds that it is just and equitable that the Company should be wound up.

The petitioner stated that the petitioner held a 20.12% shareholding and was at the time of the presentation of the petition the single largest shareholder of ordinary shares (as distinct from preference shares) in the Company. It would appear that the Campus was, in fact, the largest minority shareholder.

> Each of the respondents held shares as follows:
>
> Pat Keane 10.35%
>
> Pat Griffin 14.64%
>
> Enterprise 2000 Fund Limited (Enterprise) 15.63%
>
> Campus Companies Custodian Limited (Campus) 23.74%

The remaining 15+% shares were held by John Rahill (7.41%) and Ken McLaughlin, Claire McCarthy, executors of the will of P. Barnes and Tony Haugh each with approximately 2% shareholdings.

The Company was formed so the Mr. Hennessey, Mr. Keane and Mr. Rahill could develop and exploit whirlpool systems, hydrotherapy systems, shower systems, fixtures and fittings and associated accessories. Mr. Hennessey became managing director and Mr. Keane became chairman. Patents were required from Kalandros by Faiso Limited (Faiso), with similar shareholding as the Company and to whom Faiso licensed the patents.

Since in or around 2001 relations between the petitioner and the respondents became strained and had deteriorated markedly. The respondents had attempted to dilute the petitioner's shareholding and acted in an oppressive manner and in disregard to of the petitioner's rights as a member. The first named respondent had exercised share options which were unsigned and unapproved by the Board and contrary to the terms of his agreement with the Company.

2. Grounding Affidavit

2.1 Investment
In his affidavit sworn on the 8th February, 2007, the petitioner referred to having the know-how and expertise to develop new whirlpool jets.

On the 9th March, 2000, Campus (including Trinity Venture Capital) invested IR£49,935 for 12% of the total equity of the Company. Enterprise 2000 fund invested IR£37,500 for 9% and also made a loan of IR£12,500. The investments from these corporate shareholders was contingent on securing IR£30,000 in unsecured loan funds from Bank of Ireland and IR£25,000 in research and development grants from Enterprise Ireland.

All shareholders signed the Enterprise 2000 Fund Shareholders Agreement as warrantors. Mr. Hennessey and Mr. Keane signed the Campus Companies Shareholders Agreements as warrantors.

Since 2001 relations between Mr. Hennessey and the respondents had become strained. He claimed that the respondents had been attempting to dilute his shareholding in the Company and that he had been increasingly excluded from the affairs of the Company.

He complained that the respondents had exercised and were exercising their powers as directors and/or members of the Company in a manner oppressive to him and in disregard of his interest as a member.

In particular, he complained that he had been pressurised into handing over equity in the Company for zero consideration to some of the respondents; that his shareholding had been diluted by improperly purporting to offer new shares in the Company; that he felt compelled to resign as a director; that the respondents refused to call an EGM of the Company as requested by him on the 4th July, 2003; had refused to explain to him the circumstances in which various directors of the Company had either resigned or been appointed.

He complained, in particular, that at the AGM that the Company held on the 4th September, 2006, he had asked a number of questions about pre-emption rights and the issue of shares which questions were not answered. He said that he had been excluded from the affairs of the Company and had not yet received the information to which he was entitled in relation to the affairs of the Company, including such information which would enable him to carry out his duties as warrantor under the Shareholders' Agreements.

Mr. Hennessey maintained in his affidavit that after he resigned as a director in October, 2003, the investment funds were used to redevelop the Company's existing whirlpool system product, most notably the design development and production of new plastic mould tools for the whirlpool jet components. The new design was to have been based on his developing a powerful multi whirlpool jet and on his understanding of market requirements from a consumer, technical and commercial perspective. The product could be offered to the consumer at a much lower price than competing products, thus growing the overall market and still allowing the Company to enjoy gross margins of 65% plus the cost of the component inputs. That would open up the potential to export jet components to substantially larger markets for such systems in the United Kingdom, Continental Europe and elsewhere. He further said that the developments were successful and results were greater than the stated objectives set when Campus and Enterprise invested. While most of the developments were based on the patents acquired from Kaladross, some of the new developments were unique and a new patent application was lodged.

Mr. Hennessey claimed that the redevelopment system was launched in January, 2001, with an immediate doubling of sales and a higher unit sale value and margins. He referred to a business plan produced in August, 2001.

He said on the basis of the successful launch of the redeveloped system, Campus and Enterprise indicated a willingness to further invest.

However, he said that one of the major difficulties with the development and the successful launch was that he was unable to take his full contracted salary and by the end of September, 2001, he had only received one third of the remuneration which he was owed; the outstanding amount was approximately IR£34,000 which in equity terms was equivalent to approximately 7.65% of the equity. Furthermore, over the previous years he had to borrow heavily from friends and family to survive financially due to the lack of funds in the Company.

He dealt in particular with the position of the managing director. He said that in March, 2001, that he indicated to the Board that it was time to appoint a new managing director, but that he wanted to remain and be actively involved in the Company as a non executive director with regard to future developments on the technical side. The business plan referred to him being involved to ensure a smooth transition period and that he would also remain actively involved in the technical development on an ongoing basis as a director and would assist in the selection of a new managing director.

Mr. Hennessy said that Mr. Keane asked for Mr. Griffin to be added to the shortlist of applicants for the post of managing director. Mr. Keane told him while he did not know Mr. Griffin, he knew of him. The Board failed to agree on the appointment of Mr. Griffin. Pat Ryan, who was the head of the Campus, insisted on interviewing Mr Griffin and approved his appointment. Mr. Hennessey, despite serious reservations, said that he had relented and agreed to the appointment.

As chairman, Mr. Keane proposed that Mr. Griffin be offered a salary of IR£45,000 per annum plus 15% of the profits plus 20% of the equity in the Company. The equity portion of the package was rejected by the Board. On the insistence of Campus it was agreed to offer Mr. Griffin equity options based on performance. The revised share option agreement was drafted when Mr. Griffin rejected the share option offer. The revised share option provided for a share price of IR£37.20 (€47.23) and IR£1.00 (€2.27) for Faiso shares if minimum net profit targets were reached. If higher net profits were achieved, Mr. Hennessey said that Mr. Griffin had an option to buy the shares at a discounted price up to a 50% discount.

Mr. Hennessey said he retired from the position of managing director at the end of September, 2001, and remained on the Board as a non executive director. He was paid approximately 65% of his outstanding salary in October, 2001, with the remainder outstanding. He believed that all other non executive directors were being paid fees, either directly or by the charging of a management fee, and he requested parity in that regard which was refused by the other directors despite the fact that he continued to give a substantial amount of time to the Company and was the Company's secretary. He took a very active interest in the patent process on behalf of Faiso and insisted on being copied with all correspondence between Faiso and the patent attorneys. He believed that it was quite obvious at Board meetings that his input was no longer wanted and in the circumstances in the early part of the following year, 2002,

he decided not to push those ideas any further and allow Mr. Griffin to run the business.

In October, 2001, Campus and Enterprise had invested sums of IR£60,000 (€76,184) and IR£48,000 (€60,947), respectively, in the Company. Mr. Griffin invested a sum of IR£20,013 (€25,411). The share price (and converted equivalent for preference shares) was £IR37.20 (€47.23)

The investors in the Company were also offered the opportunity to secure matching equity positions in Faiso at a nominal price of IR£1.00 (€1.27) to ensure that the Company and Faiso maintained common and matching shareholdings. Enterprise 2000 made a loan of IR£12,000 to the Company.

As a result shareholdings in the Company post October, 2001, gave the petitioner a shareholding of 23.44% while Enterprise had over 18% and Campus over 23%. Mr. Griffin had 4.75%.

In September 2002, by the end of Mr. Griffin's first year as managing director, the petitioner averred that the Company had continued to lose money and was making little inroads into the market. He was concerned, as was the Campus nominee director, who asked for an annual budget for the year ending September 2003, to be prepared for the forthcoming Board meeting. He said he had made numerous attempts to provide input to the Board in relation to the preparation of the budget. He said that his input was not responded to by Mr. Keane or Mr. Griffin.

The nominee director of the Campus had written on the 17th October, 2002 and again on the 5th December, 2002, requiring an annual budget which, after three months, was not complete.

On the 17th October, 2002, at a Board meeting of the Company the budget was still not completed to the satisfaction of the Board. Mr. Griffin was asked to leave the room while he and the nominee of Enterprise expressed great concern with Mr. Griffin's competence. It was agreed that Mr. Keane meet with Mr. Griffin. On the 17th January, 2003, Mr. Keane wrote to the nominee director saying that if he was unhappy with the progress and achievements of the Board, Mr. Keane was surprised that he had remained silent for so long. He said that his actions were hardly designed to encourage trust and harmony at Board level. The nominee director emailed Mr. Keane on the 29th January, 2003, asking if he has talked with Mr. Griffin about whether he is the right person to derive value from the shareholders in the business. The petitioner believed that no response was received on that email and that Mr. Keane never reported back to the Board as instructed.

On the 10th February, 2003, a Board meeting was held in Mr. Keane's premises in Kildare. The budget was eventually agreed and signed off. Certain marketing proposals were made which, in the petitioner's view, would have solved the whole marketing budget for the financial year. Because of that, and out of frustration, he left the meeting before it was over.

He said that the audit accounts for the year ending September 2002, were presented to the Board on the 4th April, 2003. Losses were reduced by about €20,000 "by charging this amount over and above the agreed 10% royalty fee which meant that Faiso would owe the Company that sum at the end of the year". He objected to the approval of the accounts, but the new non executive director nominated by Campus expressed agreement with the accounts. The petitioner said he spoke to the auditors and insisted that the losses be headed back to refer to a true picture of the trading situation in the Company. Paragraph 65 of his affidavit states that the accounts were amended and subsequently signed off.

The petitioner averred that prior to the meeting of the Board on the 14th April, 2003, he had written to Mr. Griffin in relation to finalising the Research and Development charges and royalty fees between the Company and Faiso. He expected that the Company would have positive royalty payments to Faiso. Mr. Griffin failed to respond to his communication. He said that it appeared that other Board members, without his involvement, had agreed to "manipulate the inter company charges to the detriment of Faiso". This decision was made between them and prior to the holding of any Board meeting to approve the accounts which resulted in him being effectively frozen out of all communications between the Board members.

The subsequent Board meeting of the 25th May, 2003, was not followed up on the matters discussed on the 14th April. On the 13th May he wrote to the Board members highlighting his concerns.

On the 4th July, 2003, Mr. Keane replied to him by email referring to his management of the Company for three to four years and his failure to do anything apart from returning losses. He continued:-

> "Mike . . . the only reason you are the biggest shareholder is that naïve fools like me allocated you that shareholding to incentivise you to deliver the goods. You failed to do that and now you won't let anyone else complete the job. I'm only one member of the Board but if you feel your position is compromised take it up with the Board or call and EGM.
>
> Pat"

The petitioner asked Mr. Keane to call and EGM. Mr. Keane replied that he would be delighted to follow the wishes of the Board rather than a single shareholder in relation to his own resignation.

No EGM was ever called despite the petitioner's tabling of resolution to be considered at the AGM on the 15th August, 2003.

The next reference in the petitioner affidavit is to early 2006, when he reviewed the patent status of the EU Patent Application for the whirlpool system owned by Faiso and exclusively licensed to the Company. He believed that the patent had been allowed to lapse at the final stage of issue after the Company had spent significant sums to seek protection over a seven year period. He believed that this would have serious financial consequences for both the Company and Faiso.

The petitioner said that he formally withdrew his request for an EGM and resigned as a director of the Company.

2.2 Shareholdings

Paragraph 79 to 107 of the petitioner's grounding affidavit referred to the reduction in percentage terms of his shareholding from 38.5% by way of transfer of certain of his shares to Mr. Griffin which, Mr. Keane maintained, had been given for free to the new managing director between March and September 2001.

He said that in January 2004, on behalf of Claire McCarthy, Tom Howe and Paul Burns and himself, he had offered to sell their share at

the October 2001 share price of €47.23. He never heard from Mr. Keane in relation to his offer. Later in 2004, Mr. Rahill sought to buy out those shares. The petitioner said that he would have considered a sale if he was given access to management accounts and other pertinent financial information. He received an out of date balance sheet. Mr. Rahill valued 4,120 shares (29.72%) at €80,000 or €19.42 per share. The petitioner rejected that offer and did not hear subsequently from Mr. Rahill.

A year later in December 2005, he was aware that Mrs. Burns, executor of the will of Paul Burns, sold her shares to Mr. Keane at €17.33 per share. He was informed that the share transfer was never registered.

On the 13th January, 2006, he asked for certain information from the Company and was told that it was not material to which he was reasonably entitled. He asked his accountant to write to the Company requesting information and was told that the Company had not produced a BES prospectus as the offer was restricted to existing shareholders who were reasonably familiar with the activities and annual performance of the Company. He said that his accountant advised him not to invest.

On the 22nd March, 2006, on an inspection of the share registers of the Company and Faiso, no new shares had been issued since the issue to Campus in 2003.

He received an offer to subscribe for additional shares on the 25th September, 2006, at €37.50. There was no business plan circulated, no cash flow statements, no up to date management accounts and no indication that the conditions laid down in the shareholders agreement had been met.

On the 9th October, 2006, he reviewed the books of the Company in the registered office but was denied access.

His solicitor's letter of the 19th October, 2006, was sent to the shareholders of the Company setting out his concerns that he was being oppressed. The six page letter of the 19th October, 2006, referred to the petitioner being forced into resigning as a director over the way the Company Board operated, lack of consultation and failure to observe pre-emption rights. He offered to buy the shares of the other shareholders at €52 per share subject to conditions and that offer was open until the 25th October, 2006.

By letter of the 3rd November, 2006, the Company's solicitors responded enclosing a letter which they caused to be sent to all of the shareholders of the Company, which he deemed to be inappropriate. Further correspondence ensued.

He believed that both Mr. Keane and Mr. Rahill expressed an interest in taking up the offer set out in his letter of the 3rd November, but they requested a letter of comfort from a financial institution in relation to the proposal to acquire shares. The Company solicitor refused access to up to date management accounts as he had requested. A stalemate ensued. He believed that there was efforts made to manipulate the share structure of the Company such the chairman and the managing director (Mr. Keane and Mr. Griffin) could gain control over the issue of the ordinary share capital of the Company.

2.3 Corporate Governance Issues
The remainder of the affidavit (paras. 108 to 137) dealt with complaints regarding general meetings, in particular in relation to the BES issue, to annual accounts and to Company directors.

The final few paragraphs of the affidavit summarised his progressive exclusion from the affairs of the Company, his complaint that the respondents were conducting the affairs of the Company in a way which steadily diluted his shareholding causing him considerable financial loss, had exercised their powers as directors in a manner oppressive and that he had no longer any trust or confidence in them.

On the 6th September, 2007, points of claim were delivered on behalf of the petitioner in terms set out by the petition and the grounding affidavit and seeking identical reliefs.

The petitioner's affidavit filed on the 21st April, 2010, in respect of the amended petition of the 28th May, 2010, particularised a claim of oppression in respect of share options issued to the first named respondent which he averred to be invalid and which denied him pre-emption rights during the December 2005, issue. No executed copy of the share option agreement was furnished. His motion for further and better discovery returnable for 10th November, 2008, had not yet been heard.

The first named respondent's solicitor stated that he was not entitled thereto and that their client had been issued with shares in accordance with his contract of employment. An amendment of April 2005, had not been discovered.

In January 2007, an additional 625 share options were issued to the first named respondent of which the petitioner was not aware.

He wished to amend his petition accordingly.

3. Affidavit of Patrick Keane
Mr. Keane's affidavit of the 18th May, 2007, referred to him being a member of the Company and a former director and chairman. Certain matters would be more appropriately dealt with by the current managing director Mr. Griffin and Mr. Pat Ryan, another director.

He says that the substance of what the petitioner averred was disputed and, even if established, was incapable of amounting to oppression within the meaning of section 205. Many of the matters were in any event historic, dating back some years.

The Company in trading terms was a young Company and since the petitioner's resignation as manager, did manage to build a successful and growing business with a turnover of some €2 million generating a net profit of €164,615 and employing thirteen people at the time of swearing the affidavit.

He had become involved with Mr. Hennessy in the early 1990s in the Middle East when they were both part of the Massock Dairy Company. The petitioner was area sales manager and he was head of marketing. He said that Mr. Hennessey had identified an opportunity which he felt could be commercialised in relation to whirlpool bath technology which was the property of Walsh Whirlpool Systems Limited and Kaladros Limited. Mr. Walsh had developed the technology and Mr. Hennessey had provided marketing advice to the Walsh Companies. The petitioner approached Mr. Keane with the view of his investing money. He brought in another investor

named Sean Rahill and his brother. He invested IR£50,000, Mr. Rahill a further IR£50,000 and his brother IR£12,000 under a BES scheme. He was invited by Mr. Hennessey to join the Board of Walsh Companies and act as chairman with Mr. Hennessey as managing director. The Walsh Company made little progress and Mr. Hennessey and Mr. Walsh were constantly at loggerheads. The Companies went into voluntary liquidation.

He and the other investors had lost their investment and were determined to set up a company to acquire the assets of the Walsh Company from the liquidator. Mr. Hennessey was incorrect and his assertion that it was agreed prior to the acquisition that he would invest some IR£50,000 in the Company appears to confuse that with the investment in the Walsh Company. He did invest what he could afford at the time which was IR£28,000.

On reflection he said that even in the Middle East in the 1990s, Mr. Hennessey, as petitioner, did not seem to be able to establish good working relationship with his colleagues and superiors. He had a contentious management approach which manifested itself in the conflict with Mr. Walsh and his dealing with the Company, the subject of these proceedings.

When Mr. Griffin took over from him as managing director of the Company, Mr. Hennessey appeared unwilling to accept that the day to day management of the Company had passed to someone else.

He referred to the original shareholdings in the Company. Mr. Hennessey was the managing director and the single largest shareholder, although he had invested a smaller amount of capital than either Mr. Rahill or himself. It was envisaged that Mr. Hennessey would be the managing director and would devote his time and energy into growing the business and to that end both Mr. Rahill and he halved their original shareholding and transferred the same to Mr. Hennessey in order to incentivise his role. Such an agreement should have been target linked but was, unfortunately, not. Share certificates to reflect the change were never provided by Mr. Hennessey.

His role as managing director was to get the investment of Campus Custodian Limited and the Enterprise 2000 Fund. Mr. Hennessey was involved in another business project in New York which required considerable time. Accordingly, in 2001, on order to devote his energies to that project he announced that he intended to resign as managing director of the Company. Mr. Keane averred that he expressed his unhappiness with the petitioner's decision given that their investment in the Company had been based on Mr. Hennessey being the managing director and that he and Mr. Rahill had voluntarily transferred their shares to him for no monetary consideration in an attempt to provide Mr. Hennessey with an incentive and grow the business and increase shareholder value. During his tenure the Company returned losses.

The transfer of shares complained of were the shares which had been transferred to Mr. Hennessey as an incentive in his role as managing director – they did not reflect his investment in the Company.

Mr. Keane requested that he transfer his shares to enable the Company to allot them to his successor as part of an incentive package which he agreed to do. Mr. Keane averred that he voluntarily transferred his shares when requested and that it was proper that he did so given the circumstances of the allotment of the shares to him and of his resignation as managing director a relatively short time thereafter.

The appointment of Mr. Griffin as managing director resulted in the Company being able to grow and to return a profit.

The position as to the suggestion of the appointment of Mr. Griffin was in some way irregular and that he had conceded to the board his knowledge of Mr. Griffin was not so.

He said he had played squash with Mr. Griffin but had never worked with him and had made that clear to the Board. He interviewed the final two candidates which Mr. Hennessey and the Campus representative proposed, one of whom was Mr. Griffin. Mr. Hennessey and the Campus nominated director, Mr. Dowling, agreed with his decision to appoint Mr. Griffin.

Mr. Ryan of Campus was then not a director of the Company, he insisted on re-interviewing the candidate despite Mr. Keane's objections as Mr. Griffin had already been approved by the Campus nominated director and the Board. In any event, Mr. Griffin's appointment was confirmed. The proposed salary package was discussed and agreed by the Board in line with responsibilities for the job.

Mr. Hennessey appeared to resent Mr. .Griffin and he asked Mr. Hennessey to give Mr. Griffin the time and space to manage and to receive the objectives which resulted in growth and productivity.

Subsequent to his resignation Mr. Hennessey attended very few Board meetings in 2002 and 2003. He resigned as director and company secretary in 2003 voluntarily. He did not, as claimed, continue to invest time, effort and labour into developing the Company and its products. He interfered with management decisions and tried to undermine Mr. Griffin's role. He refused to accept proper management decisions taken on the normal course of the Company's business. His response, both in Board meetings and at AGMs was to abuse the credentials of everyone at the meeting and depart abruptly.

The Company in its infancy was short of funds. Mr. Keane did not, despite resigning as a director in 2005, receive any fees arising out of his role as director or chairman until more recently.

When Mr. Hennessey resigned as managing director, he was asked what outstanding payments were due. The accounts showed a figure of approximately €13,000 which was paid by the Company in full and final settlement of all such claims. Mr. Hennessey signed off the 2001 accounts (in which 2001 he announced that he intended to resign as managing director of the Company).

The proposed buyout of other shareholders by Mr. Hennessey at €52 per share was accepted by both Mr. Rahill and himself but that could not be completed by Mr. Hennessey. Mr. Keane then offered to buy out shares of Mr. Hennessey at the same price, but Mr. Hennessey declined the offer.

He referred to the share sale of the estate of Paul Burns at the time of the BES scheme which allowed investors to reduce the value of shares with the tax benefit. Mr. Burns's executrix was his mother who was Mr. Hennessey's mother in law. Mr. Keane had advised her to seek independent legal and accountancy advice but she persisted with her request and stated that the current value was acceptable to her. Notwithstanding that, the share sale was never completed or registered.

There was no conduct on the part of the respondents which amounted to a repression or which would merit the winding up of the Company.

The annual profit and loss account for year ending the 31st December, 2006, showed a turnover of €1,972,431, gross profit at €896,567 and profit on ordinary activities before taxation of €188,410 which, with no taxation, was retained. An accumulated loss of €48,916, which for the 15 months of 2005 was a loss of €237,326.

The balance sheet showed Equity shareholders funds at €384,196 (2005: €217,174)

4. Affidavit of Patrick Ryan

Mr. Ryan's affidavit sworn on the 25th June, 2007, disputed the substance of what the petitioner, Mr. Hennessey had alleged. Mr. Ryan was a director of Campus and its nominee director of the Company.

He referred to the background of investment by Campus of IR£46,092 in 2000 for the same number of shares. This investment was made in the belief that the petitioner would be managing director. Mr. Hennessey gave a commitment to Campus and the other venture capital investors to that effect. Notwithstanding such commitment, the petitioner informed him in 2001 of his intention to resign as managing director to commence a business venture he wished to develop in New York. In that context he stated that he viewed the Company as being worth only IR£70,000. Mr. Ryan's understanding was that the petitioner's prospects for such a venture were adversely affected by the events of 11th September, 2001, and subsequently did not proceed.

He said that the petitioner undertook to assist in the recruitment of a successor and to support that successor. This he did willingly as he wished to disengage himself from the Company's management.

On his appointment as managing director the petitioner had received 20% of the equity of the Company without paying any consideration on the basis that he would act as managing director. On his resignation as such, on a purely voluntary basis, he transferred a number of his shares which he had received as part of his package as managing director, so that such shares would be used to entice and incentivise the new managing director and he believed he was also doing so, given the high valuation he placed in the Company in order to entice Campus and the other venture capital shareholders to invest in March 2000, in contrast to what was the then valuation of the business at the time of his resignation.

He referred to the appointment of Mr. Griffin and said that he was not aware of any irregularities concerning that appointment which he believed was unanimous. The petitioner was aware that Mr. Keane was acquainted with Mr Griffin. He referred to letters and memorandum from the petitioner regarding the appointments. The letter of the 21st June, 2001, from Mick Hennessey to Pat Griffin addressed to "Dear Pat" stated that: "I have pleasure in offering you the position of General Manager of Martialone Limited" followed with a remuneration package including a reference to share options and concluded as follows:-

> "I hope that the above package is commensurate with expectations, I look forward to welcoming you on board."

The share option package details indicated 500 shares both in the Company and in Faiso for years October 2001, 2002, and for the subsequent four years to September 2005, with an option price from 100 to 50% depending on profits in year one from €50,000 to €100,000 and from year four from €120,000 to €240,000.

Mr. Ryan believed that the appointment was the correct one given the subsequent performance of the Company, in contrast with the performance under the petitioner.

He referred to his appointment as a director and the AGM of 2006. He had been appointed a director on the resignation of the previous Campus nominee, Brian Flavan, on the 21st July, 2006. He said that the petitioner sought to question the appointment at the AGM held on the 4th September, 2006, and continued to make such an appointment an issue in the proceedings. He said that the petitioner attended the AGM with his solicitor, who attended as a proxy of another shareholder and the questioning of the Board by the petitioner was aggressive both in tone and style. Complaints were made that a number of issues were raised in relation to the sending out of proxies and that no satisfactory answers were given. The proxies, at that stage had been noted by the meeting and confirmed as in order at the commencement of the meeting. If any concern over irregularity was suspected that was the time to raise the question. He said that the petitioner and others walked out of the meeting when he queried how the petitioner's solicitor, himself attending as a proxy, could question the validity of the proxies when he had ample opportunity to raise any questions in relation thereto at the beginning of the meeting. He said that he did not suggest that proxies were invalid and could not do so as the Company's solicitor had affirmed the validity of the proxies at the beginning of the meeting.

He referred to other matters raised by the petitioner including the issue of outstanding salary payments due to the petitioner. He said that the petitioner had signed the accounts for the year to September 2000, wherein there was no provision regarding outstanding payments. The petitioner subsequently brought a Circuit Court action for unpaid remuneration which was settled. He believed that the petitioner was confusing investment management fees which were wholly distinct and which were not payable to a nominated director.

The petitioner complained that the Company continued to lose money and was making very little inroad in the market and that he was very concerned for his investment in the Company. The results of year end December 2002, bore a very favourable comparison with the previous years and the petitioner as managing director and the Company moved from losses to profit which was growing steadily.

The petitioner's complaint that no EGM had been called was solved given that the only person to request it was the petitioner who withdrew his request.

The transfer shares from the petitioner when he resigned as managing director was not in contravention of the shareholders agreement because all shareholders including the petitioner had agreed to it.

He said that the share option agreement was amended, following discussion, by Board resolution in 2004 and was granted as part of the managing director's package.

In respect of other concerns, the deponent believed that the appropriate place to raise those was at the AGM which the petitioner voluntarily did not attend.

He believed that the matters relied upon in the petitioner's affidavit did not amount to oppression nor should they lead to an order for the winding up of the Company, particularly in view of its improved trading and financial performance under the direction of Mr. Griffin.

5. Replying affidavit of the petitioner and subsequent affidavits of
Mr. Griffin, Mr. Keane and Mr. Ryan

5.1 Mr. Hennessey replied to Mr. Keane and Mr. Ryan's affidavits on the 5th July, 2007, repeating and standing over the contents of his grounding affidavit and made no admissions in relation to any matters so put in issue.

5.2 He referred to his solicitor leaving the AGM on the 4th September, 2006, when challenged as to why his proxy was not returned within a period of 96 hours rather than 48 hours.

The court also notes that the subsequent affidavit of Mr. Ryan was on the 22nd August, 2007, and averred that at no stage had he informed the petitioner's solicitor that the proxy was invalid. What occurred was that after the Company's solicitors had validated all the proxies received and some 20 minutes after the meeting had commenced, the petitioner's solicitor challenged the validity of the proxies. As chairman, Mr. Ryan, asked the petitioner's solicitor how he could attend a meeting under a proxy which he himself considered to be invalid. The petitioner's solicitor was, as proxy holder, permitted to address the meeting and ask questions which he did.

5.3 The petitioner referred to para 4 of Mr. Ryan's affidavit on the 26th June, 2007, where he stated that the petitioner regarded the Company as worth only £70,000. He regarded this as inconsistent with his views on the value of the Company given that £100,000 had been invested in new tooling and in the successful launch of a new whirlpool system and with the potential for the business stated in the business plans prepared by Mr. Griffin and himself in August 2001.

Mr. Ryan replied that it was difficult to see how the investment in new tooling could of itself have such an impact on the valuation of the Company and that it was more telling that the petitioner decided to leave to seek prospects elsewhere.

5.4 The petitioner said that no shares were transferred to him for any monetary consideration by any of the shareholders in the Company and that he invested £13,000 in cash for shares. The remaining shares were issued as new shares; they were not transferred as stated by Mr. Keane. He said that the issue was in lieu of unpaid salary for the period of September 1998, to March 2000, which he said was contained in a written proposal from him to Mr. Keane and Mr. Rahill in January to February 2000. That written proposal was not in his possession.

He referred to the capital shareholder agreement of the 9th March 2000, which confirmed in Clause 2.1.3 of Schedule 5, that:-

> "There is no agreement, arrangement or obligation in force which calls for in the present or future allotment, issue or transfer or the grant to any person of the right (conditional or otherwise) to call for the allotment, issue, transfer of, any share or loan capital of the Company . . ."

He referred to the pressure to hand over shares initiated by Mr. Keane and after sustained pressure from Mr. Dowley he relented and handed over his shares. At the same time he informed Mr. Dowley that the contracted salary which was due to him from the period of March 2000, had not been fully paid.

Mr. Keane, in his affidavit of the 22nd August, 2007, averred that the petitioner's unpaid salary was not included in the management accounts nor was there any provision made in relation to those accounts. Mr. Keane's previous affidavit of the 18th May, 2007, referred to at para. 25 that the petitioner had signed off the 2001 accounts which showed a figure of approximately €13,000 which had been paid to the petitioner by the Company in full and final settlement of all remuneration claims.

5.5 The petitioner clarified that there were two distinct patent applications, one for the whirlpool bath assembly which was the original patent purchased by Faiso and the second, Venturi Jet. The first was the valuable one and was allowed to lapse.

There was no response in relation to this issue in the affidavits of Messrs. Griffin, Keane or Ryan.

The court regards a decision in relation to the patents to be a matter for the Board of Directors of the Company.

Mr. Griffin had averred, in his affidavit of the 6th June, 2007, that the decision not to continue with the patent application was made for good commercial reasons and he exhibited a booklet of documents which showed that the issue was raised regularly at board meetings regarding the cost of renewing patents not being commercial justifiable. He also referred to correspondence with the petitioner in January 2005, in relation to the petitioner giving instructions to Crookshanks, the Company's patent agents, with regard to renewal. He was concerned about the situation and telephoned the patent agents requesting clarification of the patents requested. After consultation with other members of the board, it was decided for good commercial reasons to seek patents in Ireland, the United Kingdom, Germany and Spain only as the commercial cost a wider renewal was not justified. Mr. Griffin referred to the petitioners' own memo of the 7th July, 1998:-

> "I believe the real value is in us using the patent application as a means of keeping other Companies away from our designs for one or two years, and in this time we can make the best effort to commercialise the product."

Mr. Griffin said that the cost of maintaining the patents set out in the cost sheet attached to Crookshanks letter of the 31st May, 2005, amounted to a total of €35,000 plus VAT plus annual renewal fees. This presented too much of a commercial risk for little or no gains.

5.6 The replying affidavit of the petitioner deals at length with the share option agreement. He referred to para. 117 of his grounding affidavit where he understood that Mr. Griffin had a separate share option agreement with the Company which was in fact incorporated into his contract of employment and allowed him to buy shares should he achieve certain targets.

He said no explanation was given why such option agreement was amended and believed that no mention was made at the AGM on the 4th September, 2006, of such amendment. He said that when he asked, Mr. Griffin stated the option agreement was the one given when he joined the Company as managing director. The petitioner said that under the terms of the amended agreement the targets were reduced by 61% and the target period increased by 25%. The base option share price was reduced by 24% which gave Mr. Griffin 2.4 times the options offered in his original agreement, ie. 1,500 versus 625.

He said that the document referred to by Mr. Griffin, was never circulated to him as a Board member and was not approved prior to

the start of the financial year, October 2003, when the petitioner resigned. He said that as warrantor on the capital shareholder agreement, he was not informed of any change or proposed change in the share option agreement given to Mr. Griffin. Furthermore, the draft option agreement provided for options on 1,500 shares and not the 1,654 that were actually issued.

Mr. Griffin referred to the share option agreements set out in his previous affidavit and said that the petitioner had a clear understanding that he, Mr. Griffin, had the ability to acquire up to 20% of the equity of the Company as part of the package of measures designed to incentivise him. The petitioner was incorrect when he stated that he had said to the petitioner that the share option agreement was the one given to him when he joined the Company.

Changes in his share option agreement were confirmed in writing at various stages by Mr. Dowley and Mr. Flavin (nominees of the Institution of Investors).

In his previous affidavit of the 5th June, 2007, he had exhibited documents dealing with the shares at p. 3 which was the subject of full cross examination during the hearing of the petition.

Mr. Griffin's remuneration and bonus had been reviewed in January, 2005, at a time when the petitioner, was not a Board member.

Mr. Ryan said he did not say that any other shares were transferred to the petitioner from others and that the petitioner himself, in his grounding affidavit, had set out how he received his shares.

Mr. Ryan said that there was no pressure or duress and that the petitioner had recognised the need to rebalance the shareholding and his departure as managing director. He referred to an exhibit in his previous affidavit of a memorandum prepared by the petitioner dated the 3rd September, 2001, which concluded: ". . . hopes the attached proposal is acceptable to you."

The shares were transferred consensually by agreement.

6. Affidavits in relation to Section 218

This section deals with the avoidance of dispositions of property and transfer of shares after the commencement of winding up. An application had been made by the petitioner which resulted in the order of Laffoy J. of the 30th July, 2006. The court granted the respondents' motion that all dispositions of the Company's property carried out in the normal course of the Company's business be validated. The affidavits of Mr. Griffin sworn on the 23rd March, 2007, grounding the application, referred to the concern, reinforced by the action of the Company's bankers, who having had notice of the petition suspended the Company's overdraft facility.

Mr. Hennessey's replying affidavit stated, *inter alia*, that he believed that the members of the Company should be entitled to certain financial information about the state of the Company on an ongoing basis, particularly in regard to the payments being made by the Company, as such payments could ultimately effect the distribution of the net surplus of the Company's assets.

This aspect of the motion was also granted in the order of Laffoy J.

7. Submissions of the Petitioner

The submissions detailed the background of the Company, the role of the petitioner and his resignation as managing director and as director.

Specific submissions were made regarding the equity dilution.

The petitioner submitted that the nominee directors were not entitled to remain silent and inactive. It was further submitted that it was not open to the fourth named respondent, Campus, to make a case that it played no role in the management of the Company as it was initially involved in the unauthorised share transfers of 1,654 shares to Mr. Griffin and played an active part in the financial calculations supporting the transaction. Campus also advised the first and second named respondents, Mr. Griffin and Mr. Keane, had disregard to the retrospective targets for Mr. Griffin in the performance share option agreement.

The petitioner submits that the first named respondent, in order to unlawfully dilute the equity of the Petitioner, exercised share options in December 2005, and January 2007, pursuant to an agreement which was unexecuted and unapproved by the Board that resulted in an issue to the first Respondent of 1654 shares and 625 shares respectively. The issue of shares to the first respondent pursuant to the unexecuted agreement was a matter which was known to all the respondents, who acquiesced in these unauthorised transactions in order to unlawfully dilute the equity of the petitioner. The nature of the transfer was concealed by the late filing of an incorrect B5 in the Companies' Office and was denied by the respondents at the AGM on the 4th September, 2006. The share transfer was claimed to be part of a BES scheme by the company accountant Mr. Fitzgerald when no such scheme in fact existed.

A B5 for the issue of 1,366 shares, (625 Option shares and 741 BES shares) to the first named respondent was filed on the 22nd July 2008, ie. 18 months late. At the time this B5 was filed, the second named respondent was in his second term as a director. The 18 month delay was a breach of the s. 58 of the Companies Act 1963, which states that the return of allotments must be made within 1 month from the date of the allotment.

The Annual Accounts for the year ending December 2006, at p. 2, state that the first named respondent had 2,292 shares, (i.e. the initial shares he received (638) plus the 1,654 shares in December 2005). The accounts also state that "there were no changes in shareholdings between 31st December, 2006, and the date of the signing of the financial statements, i.e. the 2nd August, 2007".

The petitioner referred to the B 1 Annual Return filed on the 2nd October, 2007 to August, 2007, stating that the first named respondent has only 2,292 shares, confirming the share position of the Audited Accounts. If the 1,366 share issue was validly done, then the annual accounts and the B 1 should have stated that first named respondent had 3,658 shares. The first named respondent was unable to explain how these inaccuracies occurred. The returns to the Companies Registration Office had the effect if concealing the true share issues from the Petitioner.

It was submitted that the respondents facilitated the transfer of shares to the first named respondent at €18.75 instead of at the price set out in the Executive Service Agreement, dated 18th October, 2001, namely IR£37.50 (€47.23). The subsequent purported performance share option agreement was not only not signed or executed but also set targets retrospectively in light of knowledge

already had. The evidence of the first and second named respondents was that the fourth named respondent drafted the purported agreement. It is accepted by all parties that the first named respondent failed to achieve any of the targets set out in the Executive Service Agreement.

The petitioner complained that the audited accounts for the year ending December 2004 state that Mr. Griffin had share options for that year of 1,500 shares but no validly executed share option agreement was put forward in evidence. The points of defence of the second named respondent allege that the amended share option agreement was incentive based. The evidence given by the first named respondent was that the shares were bonus shares issued by the directors with no reference to a target, performance parameters or the existing Shareholders and in disregard of pre-emption rights. In the points of defence of the first and second named respondents it is pleaded that "prior to the expiry of the share option agreement term a new option agreement again incentive based, was entered into between the first respondent and the Company in April 2005". This supposed April 2005, amended option agreement has never been discovered and was not produced during the trial of the action.

It was submitted that the respondents acted in breach of s. 28 of the Companies Act 1990, by failing to approve by resolution of the company in general meeting any amendment to the terms of employment of the first named respondent.

Moreover it was claimed that the respondents flagrantly breached the terms of the shareholder agreements in issuing the option shares to the first named respondent. Not only did the fourth named respondent approve of the share issues but according to the evidence of the first named respondent it did the calculations.

It is further contended that the petitioner when he received an offer to subscribe for additional shares in September 2006 was not given sufficient information in order to determine whether he should make the required investment.

Despite numerous requests be made by the petitioner he was unable to obtain a copy of the share option agreement of the first named respondent, in breach of s. 50 of the Companies Act 1990. The petitioner, during his period of office as a board member, was excluded from internal discussions between the other board members, namely the respondents herein, about the future direction of the company and concerning the remuneration of the first named respondent. The exclusion of the petitioner from the affairs of the company led to his resignation as a director.

An offer to purchase the petitioner's shares was made subsequent to the institution of proceedings at a gross undervalue which did not take into account the unlawful dilution of the petitioner's shares.

The respondents gave evidence as to the existence of a remuneration committee, which was set up by the board around September 2003. The petitioner was a member of the board at that time and knew nothing at that time or at any time subsequently as to the existence of that committee. No documentary evidence was adduced at the trial by the respondents confirming the existence of the committee. It is therefore submitted that the committee is a fiction.

It was also contended that all share issues to the first named respondent were in breach of s. 27 of the Companies Act 1983. It is submitted that in the context of the proceedings herein the court is free to inquire into the adequacy of the consideration paid for the shares issued to the first named respondent as there has been evidence that the true number of shares allotted to the first named respondent was concealed from the petitioner. Further, according to the valuation by Mr. Coyle the price of the share issue of £37.50 was manifestly inadequate. The shares issued to the first named respondent were at a price which was between 10% - 20% of the true price of those shares.

The respondents asserted that the shareholding of all shareholders was diluted by the unlawful option share issues to the first named respondents. However, the effect of the unlawful share issues was to change the majority share structure of the Company when the Venture Capital companies exited so that the first and second named respondents, Mr. Rahill and Mr McLoughlin would be the majority shareholders and not the petitioner. The control of the company was changed in an oppressive manner and in disregard of the interests of the petitioner.

At the AGM of the Company on the 4th September, attended by the petitioner and his solicitor, Declan Fitzgerald (the Auditor) stated "that these related to the issue of BES shares". There was no mention of the shares being option or bonus shares. This is minuted in the minutes of the AGM. This statement misled the petitioner, was inaccurate, was not corrected by the directors at the AGM and is therefore in breach of s. 197 of the Companies Act 1990.

Reference was made to the case law on oppressive conduct as the exercise of the Company's authority in a "burdensome, harsh and wrongful" manner. Objective disregard of interest of ordinary shareholders.

It was submitted, in conclusion, that the petitioner was entitled to succeed either of oppressive conduct or that the respondents acted in disregard to the petitioner's interest.

8. Submissions of the Respondents

Counsel for the Company, in response, submitted that the winding up order would be given draconian relief which would be disproportionaly prejudicial to the rights and entitlements of the employees and the creditors of the Company.

Counsel categorised that main sources of complaint and personal differences and some various complaints of failures in corporate governance.

The petitioner had admitted in evidence that he attempted to negotiate the sale of the Company as a going concern to an unidentified competitor in the United Kingdom without the prior knowledge of the Board. He said he presented himself at the Company premises when no longer a director and conducted himself in a certain manner with claims that that was due to his frustration with the failure of the Company to provide him with certain information which he claimed to be entitled to under s. 50 of the Companies Act 1990, which provides for the inspection of directors' service contracts.

In relation to the claim of failures in corporate governance, the Company says that the petitioner had failed to include a provision for his salary in the Company's account for 2001. He had sued for a salary and the matter was compromised at considerable cost to the Company.

The complaint regarding the petitioner's unhappiness with the manner in which the Company had been run since 2002, came to a head

in 2003 with his request for an EGM that summer. That request was withdrawn. No issue was tabled for the AGM shortly afterwards.

In respect of the issue of shares to Mr. Griffin and to Enterprise and Campus, the Company says that this was a voluntary act for which the Company received consideration and it was a precursor to subsequent investment. The petitioner gave no particulars of duress or undue influence in relation to his transfer of shares to Mr. Griffin. He remained on the Board until 2003 and failed to seek the return of those shares until the petition issued in 2007. It was submitted that the petitioner was, accordingly, guilty of laches, delay or acquiescence.

The claim of forced resignation as a director of the Company is not relevant to proceedings under section 205. The matter could have been brought to the attention of the Office of the Director of Corporate Enforcement. Even if such a matter could be brought to the court's attention, it should have been done properly.

It was admitted that the amended "bonus" arrangements based on the revises executive service agreement were not signed by any Company officer but were offered to Mr. Griffin in writing as an email attachment. As such Mr. Griffin would have been entitled to claim against the Company under employment legislation. The Board members admitted in evidence that the amended executive service agreement was agreed at board level. Copies of the various communications in respect of these shares were proven in evidence. Campus approved the transfer.

The increase in share value based on Mr. Griffin's performance benefited all shareholders, including the petitioner, was the largest single individual shareholder. The result of Mr. Griffin's converting his bonus to shares was not only that the petitioner, but all shareholders, had their interests diluted but that the Company received further capital.

The Company asks the court to consider the petitioner's own conduct in relation to the share issue. The original attempts to obtain share capital from a rights issue in 2005 at over €50 per share were not successful. The offer of IR£37.50 per share was offered to all shareholders equally and to accommodate the petitioner, the closing was extended. Mr. Griffin remained the only subscriber. The petitioner had at all times the same rights and opportunities as all other shareholders. The board was conscious in particular about fair play with them.

The petitioner's assertion regarding his entitlements under s. 50 of the Companies Act 1990, the inspection of director's service contracts, applies to director's service agreements and not executive service agreements.

The concern in filing returns to the Company's office was corrected when the same was noted and a suitable amending return made.

It was admitted by the Company at all stages before the trial that not all formalities were strictly observed. It was submitted that there was sufficient discovery in evidence from the directors to show that they had acted in the best interest of the Company and all other shareholders.

However, other shareholders gave evidence in support of the petition. The petitioner assumed the burden of proof.

9. Decision of the Court

9.1 The court, having carefully considered the eleven affidavits sworn between February and September 2007, and having considered the oral evidence in chief and in cross examination notes the factual conflicts which arise as between the parties.

The petitioner sues as a minority shareholder. He resigned as office holder of the Company in September 2003, and many of the complaints of oppression arises after his resignation. They all arise after Mr. Griffin was appointed managing director.

There is no special relationship alleged such as a quasi partnership or agreement that a petitioner would have rights other than those appropriate to a minority shareholder.

The fact that he had been managing director and, after his resignation as managing director, had continued as a director and company secretary, does not change his position as of the date of the petition on the 6th February, 2007.

By that time the earlier issues referred to in the petition and grounding affidavit had occurred some years previously.

The fact that the petitioner held just over 20% of the shareholding and claimed that he was at the time of the petition the single largest shareholder of ordinary shares does not, of course, alter his rights other than in relation to the dividends, when declared, and voting rights, where a poll is demanded. As these issues had not arisen, they are of no significance.

It is a critical principle of company law that only a Company can maintain proceedings in respect of wrongs done to it. Neither the individual shareholder nor any group of shareholders have any right of action where they are excluded from participation in the Company's affairs other than at general meetings, in the absence of contrary agreement or arrangement.

9.2 The petitioner bases his application on two main submissions, that the first named respondent, Mr. Griffin, in order to unlawfully dilute the equity of the petitioner exercised share options in December 2005, and January, 2007, pursuant to an agreement which was unexecuted and unapproved by the board.

The second ground was that of oppression or disregard of the interests of the petitioner by the respondents.

The court is not satisfied from the evidence that the issue of shares to Mr. Griffin was done in order to unlawfully dilute the equity of the petitioner. Mr. Griffin had received shares issued by the Company as an incentive approved by the directors in a similar manner to the issue to Mr. Hennessey when he was managing director.

The allegation that the nature of the transfer was concealed by the late filing of an incorrect B5 Form at the CRO does not make issue unlawful. It is not clear to what extent the transaction was denied by the respondents at the AGM on the 4th September, 2006. The claim that it was to be part of the BES scheme when no such scheme in fact existed does not invalidate the issue. The filing was made on the 22nd July, 2008, eighteen months later. This was of course a breach of s. 58 of the Companies Act 1963, which provided that the return of allotments had to be made within one month from the date of the allotment, but does not render the allotment void. The B5 Form was for the issue of 1,366 shares being 625 option shares and 741 BES shares.

The petitioner had argued that Mr. Griffin had received 1,654 shares in December, 2005, which, added to the initial shares he received of 638, made a total of 2,292 shares as provided for in the annual accounts for the year ending December 2006, and the B1 Annual Return filed on the 2nd October, 2007. The petitioner submitted that if the 1,366 shares referred to in the B5 Form filed on the 22nd July, 2008, were validly done, then the annual accounts and the B1 Form should have stated that Mr. Griffin had 3,658 shares (2,292 + 1,366). The register of shareholders is decisive.

The court will not intervene where the majority of members approve of issues. The Board of directors are entrusted with the management and administration of the Company which includes the issue of shares subject to the provisions of the Memorandum and Articles of Association and to the provision of the Companies Acts.

The petitioner submitted that the respondents facilitated the transfer of shares to Mr. Griffin at €18.75 instead of the price set out in the executive service agreement of the 18th October, 2001, namely €47.23 (IR£37.50). He said that the subsequent purported performance share option agreement was not only not signed or executed, but that he also set retrospective targets in light of knowledge already had. The purported agreement had been signed by Campus Companies Custodian Limited.

9.3 The court is not satisfied from the evidence that it was accepted by all parties that Mr. Griffin failed to achieve any of the targets set out in the amendments to the executive service agreement. Targets had been revised by the board having duly considered the performance of Mr. Griffin and the market conditions. Audited accounts for the year ending December, 2004, stated that Mr. Griffin had share options of 1,500 shares. The petitioner said no validly executed share option agreement was put forward in evidence. The 2005 amended option agreement had never been discovered and was not produced in evidence at the trial of the action.

The failure to approve the directors contract of employment by resolution of the General Meeting or any amendment of terms is a breach of s. 28 of the Companies Act 1990, only where the contract may be continued for a period exceeding five years. Even if this was not so, it cannot on its own give rise to an application under section 205.

9.4 It was further contended that the petitioner was not given sufficient information in order to determine whether he should make the required investment when he received an offer to subscribe for additional shares in September, 2006. He was unable to obtain a copy of the share option agreement for Mr. Griffin which, it was contended, was a breach of s. 50 of the Companies Act 1990. During his period in the office as board member, he was excluded from internal discussions between other Board members about the future direction of the Company and about the remuneration of Mr. Griffin. This led to his resignation as a director. He had no knowledge of the existence of a remuneration committee set up by the board in September, 2003. The petitioner had retired from the position of managing director of the Company at the end of September 2001, and resigned as a Board member in October 2003.

Breach of s. 50(1) - (5) is sanctioned in s. 50(7) by way of fine. Breach does not to give rise to an action under section 205

The petitioner submitted that all share issues to Mr. Griffin was in beach of s. 27 of the Companies (Amendment) Act 1983.

That section deals with prohibition on allotment of shares at a discount which is below par value. Prohibition was already well established at common law (*Oregum Gold Mining Company of India v. Roper* [1892] A.C. 125.

In the case of a private company, the court cannot inquire into the adequacy or otherwise of a non cash consideration paid for in the allotment of shares except in the case of fraud or where the consideration is clearly inadequate or illusory. Section 30 of the same Act provides for an independent valuation of no cash consideration which it to be paid for in the allotment of shares in public limited companies.

9.5 The petitioner submitted that the valuation given by Mr. Coyle on behalf of the respondents, of a share price of IR£37.50 was manifestly inadequate and that the shares issued to Mr. Griffin were 10 to 20% of the true value of those shares.

There was no evidence as to the adequacy of share price which was in any event a matter for the directors. The court is satisfied, from the evidence of the respondents, that the price was commercially considered in the light of the market.

The petitioner alleged that the effect of the alleged unlawful shares was to change the majority share structure of the Company so that the first and second named respondents, Mr. Griffin and Mr. Keane and Mr. Rahill and Mr McLoughlin would be the majority shareholders. The control of the Company was changed in an oppressive manner and in disregard of the interest of the petitioner. He said that at the AGM of the Company on the 4th September, 2006, the auditor stated that the shares related to the issue of BES shares and that there was no mention of the shares being option or bonus shares. He said that the notes of the AGM were inaccurate and not corrected by the directors and were in breach of s. 197 of the Companies Act 1990. A statement in the minutes misled him.

There was no evidence that the respondents or any of them had given misleading, false or deceptive statements to the auditor. Section 197 is, accordingly, not relevant.

9.6 The court is also satisfied that the petitioner had been issued shares from the Company in recognition of his assuming the role of managing director. There was no evidence of duress or undue influence in the request to him to deliver up those shares for the benefit of his successor while, undoubtedly, there was pressure, falling short of duress and undue influence. His transfer of those shares was unconditional and no claim appears to have been made in respect of those shares in the petition issued in 2007.

The court is further satisfied that from the period when he reigned as managing director in September 2001, to his resignation as a director in September 2003, that, notwithstanding that he had approved of Mr. Griffin succeeding him, was not supportive of him or the board.

Once he ceased to be a director then his right to information from the Company was necessarily limited under the 1963 Companies Act to information given to shareholders at the AGM to include the directors and auditors report and the financial statements for year ending. In addition members are entitled to inspection of the Registers to be kept in the Company's registered office at reasonable times. Under the provisions of the 1990 Act, members are also entitled to inspect directors' service contracts other than those in respect of which the unexpired portion of the term for which the contract is to be enforced is less than three years or at a time in which the contract can, within the next ensuing five years, be terminated by the Company without payment of compensation.

9.7 Finally the court is of the view that the considered judgment of Laffoy J of the 23rd December, 2009, would appear to be dispositive of a number of the issues raised in the petition. The findings in that decision were made after considering the distinction between the conduct of a Company's affairs, on the one hand, and the rights of shareholders inter se in relation to their

shareholdings, on the other hand. The particulars of oppression, in this regard, of interests are detailed in paras. 13(a) to 13(i) of the Points of Claim delivered the 6th December, 2007.

(a) Transfer for zero consideration of 600 shares.

The petitioner alleged that the transfer of those shares was as a result of sustained pressure derived from the fact that the second named respondent made it clear at board meetings in 2002 that if the shares were not handed over there would be no progress made in relation to further investment in the Company. Laffoy J. did not think that the ensuing share transfers could be regarded as private dealings in the share capital of the Company which fell outside the conduct of the affairs of the Company.

This Court is satisfied, having carefully considered the evidence that a voluntary transfer was made, however, reluctantly, on the basis that the shares had been given to the petitioner for no consideration so that he would act as managing director. The court is satisfied that the expectation of the institution and other shareholders was that he would remain as managing director.

While the court heard no evidence of an agreement that he would remain on indefinitely or for any certain period, it does seem that it would be logical to maintain that he could be entitled to such shareholding without such commitment. In any event, the court is satisfied from the evidence that there was no oppression in relation to the transfers.

The court has also considered the provisions of Schedule 5, Clause 2.1.3 of the Campus Company's shareholder agreement of the 19th March, 2000, which was signed by the petitioner as shareholder.

Laffoy J. was satisfied that reliance on an alleged contravention of the shareholders' agreement did not stand up.

The court is fortified by this conclusion in that the petitioner took no action in relation to these shares when he continued as director of the Company until October 2003. The first complaint in relation to the transfer was made in the petition on the 6th February, 2007.

(b) The second allegation of dilution of shareholding by the Company purporting to offer new shares in the BES Scheme in December 2005, in a manner which was irregular insofar as no prospectus - EGM information or financial projections was given in relation to the offer.

No issue took place. No cause of action could arise under s. 205 of the Companies Acts.

(c) The allegation of grant of shares to the first named respondent in December 2005.

If it was wrongdoing it was a matter for action by the Company and not by the petitioner.

(d) The Complaint regarding lack of information in connection with an offer to subscribe for additional shares in 2006 did proceed. The plaintiff did not subscribe.

Having carefully considered the evidence in relation to the proposal to get outside investors and the agreement of the board and the majority of shareholders, this was done for the benefit of the Company. What the petitioner claims was not that he was excluded but that he did not get the information which he required, being business plans and up to date management accounts.

Having heard the evidence, the court is not satisfied that there was any element of oppression in relation to his rights as minority shareholder.

(e) The issue regarding the refusal to call an EGM as requested by the petitioner in July 2003, was, on the plaintiff's own evidence withdrawn.

(f) The allegation that the petitioner was compelled to resign as a director on foot of concerns extensively raised by him has to be determined in the light of attending few board meetings in 2002 and 2003 and the evidence of difficulties in board meetings he did attend.

There was no evidence of any pressure by the other Board members to force him to resign nor was there any attempt to remove him as a director at an AGM.

The court is aware that there are differences of opinion on how the board should operate a Company. This is a matter to be resolved in the normal way. Where a director feels that his opinion is not being followed or considered, he or she may of course feel forced to resign. There was no evidence of any impropriety in relation to the board of directors. There is no evidence that the management of the Company by the board of directors constituted oppression or disregard for the petitioner's interest as a shareholder.

(g) The allegation that questions put regarding pre-emption rights and the issue of shares were not answered. These questions were, of course, as a shareholder at a general meeting and, while a shareholder may feel dissatisfied by the lack of complete or any answer in relation to which shareholder has an interest, it does not amount to oppression. It is the right of directors to issue shares up to the authorised number in the Memorandum of Association. There was no specific complaint about the petitioner being excluded from pre-emption rights.

(h) Irregularities with regard to the returns made to the Company's Registration Office in respect of directors resigning or being appointed may be matters for complaint but not matters grounding an application for oppression.

(i) The allegation that the petitioner had been excluded from the affairs of the Company does not relate to information to which a shareholder has an entitlement absent agreement to the contrary. No such agreement has been alleged. In the circumstances this does not constitute oppression or disregard of the petitioner's interests as a shareholder.

9.8 In general the court is of the view that the matters addressed on affidavit before Laffoy J. as already indicated, were dipositive of a number of issues and, indeed, could be taken as an indication of the requirement of law in relation to oppression.

While there may have been some non compliance, the court is satisfied that taken at its highest, this could not ground an action for oppression.

Moreover, the court is satisfied that the relief sought, in any event, cannot arise in the circumstances of the case against the

respondents other than the Company, the fifth named respondent. No relief arises in particular against the minority investors.

The court does not accept the petitioner's submission that Campus, the fourth respondent "knew of the alleged unauthorised share transfer, played an active role in the financial calculation supporting the transaction" and "also advised Mr. Griffin and Mr. Keane" regarding "the targets for Mr. Griffin in the performance share option agreement", that this justified making an order against Campus.

A *fortiori,* it is inappropriate to make an order against Enterprise.

The court is satisfied, having considered the oral evidence and evidence on affidavit of Mr. Griffin and Mr. Keane, the first and second named respondents, that they acted in the best interest of the Company as a whole and that they did not act in disregard of the petitioner's interest.

The shareholders' agreement binds the parties thereto. Breach gives rise to action between the parties. It is not, on its own, a matter for a s. 205 application.

The court has considered the open letter of the 27th May, 2011, sent four days before the hearing by solicitors for Campus to the petitioner's solicitor. The proposals therein were rejected by the petitioner.

The court is of the view that, in the light of its findings, a positive engagement with those proposals may have avoided this litigation.

The court, accordingly, will refuse the reliefs claimed.

In the circumstances the court does not consider it necessary to make any decision on valuation.