Neutral Citation Number: [2011] IEHC 517

THE HIGH COURT

2010 162 COS

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

AND

IN THE MATTER OF SECTION 205 OF THE COMPANIES ACT 1963

IN THE MATTER OF SKYTOURS TRAVEL LIMITED

BETWEEN

MARK EDMOND DOYLE

PETITIONER

AND

JOHN BERGIN

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 29th day of July, 2011.

1. Previous judgment

1.1 In a judgment delivered on 9th July, 2010 on an interlocutory application in these proceedings, in which the petitioner claims relief under s. 205 of the Companies Act 1963 (the Act of 1963), I set out the reasons for dismissing a motion which had been brought by the respondent seeking the following orders:

> (a) an order that these proceedings be heard *in camera*; and
>
> (b) an order "pursuant to the inherent jurisdiction" of the Court precluding evidence being adduced in relation to a communication in respect of which the respondent contended that he was entitled to legal professional privilege.

The judgment and the order of the Court, which was perfected on 28th July, 2010, were the subject of an appeal to the Supreme Court. By order of the Supreme Court made on 8th October, 2010, which recited that the relief which the respondent was seeking was –

> (i) an order that the matter be heard *in camera*, and
>
> (ii) an order staying further prosecution of the High Court proceedings pending the determination of the appeal by the respondent,

the application for a stay was refused.

1.2 The substantive proceedings were heard in open Court. While issues were raised in relation to privilege during the course of the hearing and certain evidence was taken *de bene esse*, for the avoidance of doubt, I record that I consider that none of the evidence on which this judgment is based was evidence in respect of which legal professional privilege could be properly invoked.

2. The substantive proceedings and the factual background thereto

2.1 In the substantive proceedings, which were initiated by a petition which was presented on 18th March, 2010, the reliefs claimed by the petitioner are:

> (a) a declaration that, by reason of certain actions of the respondent adverted to in the petition, the affairs of Skytours Travel Ltd. (the company) are being conducted in a manner oppressive to the petitioner and/or that the affairs of the company are being conducted in disregard of his interests as a member of the company; and
>
> (b) an order that the respondent and/or the company be compelled to purchase the petitioner's shares in the company at a value to be determined by the Court.

Unfortunately, a confused picture of how the interest of the petitioner in the company was acquired was presented in the pleadings.

2.2 The company was incorporated on 30th October, 1987. From 1988 it was the corporate vehicle through which the respondent carried on his travel agency business, which over time developed into a very successful business. The current issued share capital of the company comprises 30,000 shares, as I understand it, at €1.20 per share (although I would have expected the nominal value to be at the Euro equivalent of IR£1 per share), of which 28,420 are owned by the respondent and the balance of 1,580 shares are owned by the petitioner. In other words, the petitioner owns 5.266%, rounded to 5.3%, of the issued share capital of the company. Neither the pleadings in the case nor the evidence of the petitioner or the respondent properly reflected how the petitioner and the respondent built up their respective shareholdings until, on the third day of the hearing, an agreed position was put before the Court, albeit in what I found to be a rather confusing manner.

2.3 In the points of defence delivered on behalf of the respondent it was pleaded that at the time the petitioner acquired his shareholding he was, and still is, the principal of the solicitors' firm known as Actons. It was pleaded that he had acted in family law proceedings on behalf of the respondent and that as part of the settlement of those proceedings in 1990 the respondent's wife

relinquished her shareholding and directorship in the company. Therefore, it was necessary to have a replacement director. The petitioner proposed himself as a replacement director and it was agreed between the petitioner and the respondent that the petitioner would acquire the respondent's wife's shareholding of 1,000 shares in the company at their nominal value. It was not disclosed how the petitioner acquired the remaining 580 shares. As was clear from his evidence, the petitioner's recollection was that in 1990 he purchased 1,580 shares which had been owned by the respondent's wife at the price of IR£l,580.

2.4 The true position, however, is difficult to extrapolate from the transcript of the evidence. Working back from the current position, I assume that in October 1990 the respondent was already the owner of 14,000 shares in the company. On 31st October, 1990, 4,400 shares were issued for cash, of which the respondent acquired 3,400 shares and the petitioner acquired 1,000 shares. The annual returns for 1990, accordingly, show the respondent as the owner of 17,400 shares and the petitioner as the owner of 1,000 shares. On 23rd March, 1995, a further 11,600 shares were issued on capitalisation of reserves, of which 11,020 were allotted to the respondent and 580 allotted to the petitioner. Therefore, as appears, apparently, in the annual returns for 1996, the respondent was then the owner of 28,420 shares and the petitioner was the owner of 1,580 shares, which remains the position. When the agreed true position was put before the Court, it remained the position of the petitioner that he had paid IR£1,000 for 1,000 shares. I accept his evidence on that point.

2.5 There was no shareholder agreement put in place to regulate the rights and obligations of the petitioner and the respondent *inter se*. Both on the pleadings and on the evidence there was a conflict as to the incidents attaching to the petitioner's position as director and shareholder.

2.6 It was pleaded in the points of defence that the understanding between the respondent and the petitioner was that, when the petitioner's directorship and shareholding would no longer be of mutual assistance to the company and the petitioner, in terms of the petitioner and Actons providing legal advice to the company, the petitioner would return the shares to the respondent at the price the petitioner paid for them. A letter dated 5th March, 1990 from the petitioner to the respondent was relied on as corroboration of the alleged agreement. In the letter in question, the petitioner stated:

> "In relation to the shares held by me, I confirm that in addition to the safe-guards given by the Company's articles of association, the shares in the event of my death are to be offered to you or to your nominee at the price which I paid for them plus the Consumer Price Indexation from the date of purchase."

Further, it was represented that the petitioner furnished to the respondent a draft codicil to his will to be executed in 1990 to that effect. The petitioner's evidence was that the codicil was, in fact, executed. However, as the petitioner has remarried, the codicil has been revoked by operation of law (s. 85 of the Succession Act 1965). The evidence of the petitioner was that the codicil was designed specifically to give the respondent comfort that, if anything happened to the petitioner, the respondent, who had just come through a marriage breakdown, would not have to deal with the petitioner's widow, who did not know the respondent and did not have any connection with, or understanding of, the travel industry and was not a lawyer. The petitioner's evidence was that there was no agreement or understanding between the respondent and himself that the respondent would be entitled during the lifetime of the petitioner to get the petitioner's shares back at par value.

2.7 I am satisfied, on the evidence, that the understanding of the parties was that in the event of a situation arising during the lifetime of the petitioner which would give rise to the petitioner's shareholding being realised, for example, if the company was sold to a third party, the petitioner would be entitled to be paid the value of his shares on the transfer thereof. In an e-mail dated 13th December, 2007 from Cathal Saunders, the principal of the firm of McInerney Saunders, the company's auditors, to the respondent, which was forwarded by the respondent to the petitioner, Mr. Saunders stated that his understanding was that, if the company was sold at a future date, both parties "would share in the sale". Indeed, as late as 28th January, 2010, the respondent, in the context of a suggestion by the petitioner that the respondent should get independent advice in relation to a joint venture in which the respondent was considering the company should engage, pointed out that what was in the proposal for the petitioner was "that the business may gain some value over the next few years and in a sell out they (*sic*) may be some gravy", from which I infer that what was being suggested was that the petitioner would share in the "gravy". I cannot find in the mountain of communications which passed between the parties from 2003 onwards any suggestion by the respondent that the petitioner's shareholding was not worth its real value to the petitioner.

2.8 The position of the respondent as pleaded, and in his evidence, was that the petitioner agreed to become a director on the basis that no dividend would be paid to him and that the benefit he would derive was exclusively travel related discounts and workflow for Actons and that he would not receive directors' fees. The evidence of the petitioner was that his understanding was that there were not going to be any dividends in the early stages of his involvement in the company. However, as the business grew he took the line with the respondent that he should get a reward for his involvement with the company. In the late 1990s he started to raise that issue with the respondent. There is plenty of documentary evidence available corroborating the attempts by the petitioner to procure a reward in the form of dividends or directors' fees, and the resistance of the respondent to that approach.

2.9 In broad terms, the position of the respondent, both as pleaded and in his evidence, was that the petitioner was in fact remunerated by being given "travel perks", that is to say, free and discounted travel, and by his firm, Actons, being given opportunities to earn fee income through advising the company. The respondent's position was that the petitioner never made any contribution to the direction or management of the company and, for instance, that he did not attend board meetings. The petitioner on the other hand testified that, while the respondent did not call board meetings, he did meet the respondent on a regular basis in a coffee shop for "lattes" and at those meetings issues in relation to the running of the company were discussed. The respondent also had access to him on his "mobile" and his "landline". I do not intend those observations, which, replicate the evidence, to sound trite, because I am satisfied on the evidence that the petitioner did contribute as much as any non-executive director in his position would be expected to contribute and, in reality, the only reward he got was discounted travel. Most significantly, as a director, he performed the functions which a director is required by law to perform, for example, in signing off the annual returns and suchlike, until the beginning of 2010.

2.10 In summary, therefore, I find that the allegations which the petitioner has made of oppression and disregard of his interests fall to be considered on the basis that the petitioner is the owner of a 5.3% stake in the shares of the company and his ownership thereof is not subject to any special agreement between the petitioner and the respondent governing the incidents of ownership during the lifetime of the petitioner, or affecting the consequences of any finding of oppression of the petitioner, or disregard of his interests. It is on that basis that I will now consider the allegations of oppression and disregard of his interests made by the petitioner against the respondent.

3. Oppression

3.1 The principal allegations of oppression against, and disregard of the interests of, the petitioner pleaded are that –

(a) between March 1997 and May 2006, unbeknownst to the petitioner, the respondent fraudulently operated a secret bank account into which rebates from travel companies and cheques drawn on the company's accounts were lodged, the total amount of which, as disclosed by the respondent to the Revenue Commissioners, was €1,220,090, and

(b) in June 2009, again unbeknownst to the petitioner, the company entered into a settlement with the Revenue Commissioners in the sum of €1,164,297 in relation to the undisclosed income.

As a result of the actions of the respondent set out at (a) and (b) the total loss to the company is €2,384,387. The text of the voluntary statement of disclosure to the Revenue Commissioners made by the respondent in October 2008 is quoted in the judgment of 9th July, 2010.

3.2 It was also pleaded by the petitioner that the respondent consistently failed to provide the petitioner with information to which he was entitled as a director and shareholder, or, alternatively, the respondent gave him false information. Further, it was pleaded that the petitioner was never apprised of the true financial position of the company and that his opportunity to sell his shareholding at a significant profit, of which he would have availed, was thereby lost as a direct result of the oppressive conduct of the respondent.

3.3 The petitioner also relied on the fact that, after he became aware of the expropriation by the respondent of the rebates and money which were the property of the company and of the settlement with the Revenue Commissioners on the basis of the company's liability for the tax, interest and penalties due to the Revenue Commissioners on the undisclosed rebates and money, he was requested to "sign off" on the accounts of the company for the year ended 31st October, 2009, which accounts referred to the expropriation and subsequent Revenue settlement, without sight of independent legal advice and tax advice, which he was informed had been obtained by the company. He considered that, without sight of the independent legal advice, he was constrained to refuse to sign the accounts, which were signed by the respondent and the third director of the company, despite the petitioner's objection. Thereafter, the petitioner remained a director of the company but, at the time the petition was presented, he had not been shown the independent legal advice or tax advice. That treatment, it was contended, is another incidence of oppression and disregard of his interests.

3.4 Since the petition was presented the following events have occurred:

(a) By letter dated 9th November, 2010 the respondent, as a director of the company, has made the following statement to the Director of Corporate Enforcement (DCE):

> "During the period from March 1997 to May 2006 I operated two deposit accounts with First Active Building Society, one in the name of [the company] and the other held personally. The details of the transactions for the account in the name of [the company] were not previously included in the financial statements of the company. The source of lodgements to these accounts was rebates from travel companies and some cheques drawn on the current account of [the company]. The lodgements to these deposit accounts ceased in December 2003, and some subsequent rebate cheques received were cashed by me for personal use. I had personal use of the funds which were lodged in each of these accounts until I closed the accounts in May 2006. The undisclosed income in question totalled €1,220,090.
>
> In June 2009 [the company] finalised a settlement with Revenue in the amount of €1,164,297. This followed on from an unprompted voluntary statement of disclosure which I made to the Revenue Commissioners."

(b) On 9th December, 2010 the company's auditors, McInerney Saunders, submitted a report entitled "Indictable Report" in respect of the company to DCE, reporting that they had "formed the opinion that there are reasonable grounds for believing that … indictable offences under the Companies Acts may have been committed" arising from the voluntary statement of disclosure made by the respondent to the Revenue Commissioners, which was quoted. The provisions of the Companies Acts particularised as giving rise to the indictable offences were s. 202(10) of the Companies Act 1990 (the Act of 1990) (failure to keep proper books of account), s. 242(1) of the Act of 1990 (furnishing false information), and s. 297(1), (2) of the Act of 1963 (fraudulent trading).

(c) At the end of 2010 McInerney Saunders submitted to the Companies Registration Office (CRO) a form H.4 (Notification of notice that proper books of account not kept: s. 194 of the Act of 1990), to which was annexed the "Auditors' Special Report", to the directors of the company pursuant to s. 194 of the Act of 1990 which stated:

> "With respect to the period March 1997 to May 2006, in our opinion the company failed to maintain proper books of account in accordance with s. 202 of the Companies Act, 1990.
>
> The failure to maintain proper books of account related specifically to the exclusion of two bank accounts, and related receipts and payments, from the accounting records of the company.
>
> We understand that this matter has since been rectified."

(d) On 16th February, 2011 McInerney Saunders made a report to An Garda Síochána pursuant to s. 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001 reporting a possible offence arising from the expropriation of money by the respondent from the company between 1997 and 2006. The report referred to the company settlement with the Revenue Commissioners and it also stated that the matter had "been rectified and recompense made to the Revenue for the tax liability arising".

3.5 On the basis of the evidence, I have a number of observations to make in relation to those matters. First, as regards the reference to "an unprompted voluntary statement of disclosure" in the letter of 9th November, 2010, in which the respondent exercised the option which a director of a company has to furnish a separate statement with the company's auditors' report to the DCE regarding reporting possible indictable offences, it is clear on the evidence that the statement of disclosure made by the respondent to the Revenue Commissioners on 20th October, 2008 was made subsequent to the notification of Revenue audits of both the company and the respondent given by the Revenue Commissioners in July 2008. While, on the evidence, I am satisfied that the petitioner became aware in the summer of 2008 that Revenue audits of the affairs of both the company and the respondent were

taking place, he did not become aware of the existence or content of the voluntary statement by the respondent to the Revenue Commissioners, or the settlement with the Revenue Commissioners, until the e-mail of 8th February, 2010 from McInerney Saunders, to which there was attached the "Memo" of 4th February, 2010, the contents of which are outlined in the judgment of 9th July, 2010, was forwarded to him by the respondent. Secondly, while the taxation implications of the defalcation by the respondent of rebates and monies due to the company may have been rectified, the wrong to the company and its members has not been rectified nor has the additional wrong whereby liability for the tax due, coupled with the interest and penalties imposed, has been borne by the company pursuant to the settlement with the Revenue. In my view, as a matter of probability, those wrongs will never be rectified. Thirdly, the actions of the respondent necessitated the auditors' special report pursuant to s. 194 of the Act of 1990, which is registered in the CRO, and, as such, is a public document. The consequence is that the world at large has been told that, while the petitioner was a director of the company, the company failed to maintain proper books of account. The evidence of the petitioner was that it caused him a great deal of personal embarrassment that it had been made public and had been the subject of comment in a magazine that he had been involved with a company which had not been keeping proper books and records. Further, as the report related the failure specifically to the exclusion of the two bank accounts from the accounting records of the company, the report conveyed the impression that he, as a director, was aware that this had been done, which I am satisfied was not the case.

3.6 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."

Sub-section (3) deals with the type of order the Court may make and provides as follows:

> "If, on any application under subsection (1) ….. the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised as aforesaid, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or cancelling or varying any transaction or for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

3.7 In my view, it is absolutely clear in this case that, when the petition was presented, the affairs of the company were being conducted and the powers of the directors were being exercised in a manner oppressive to the petitioner and I so find. If authority is needed to support that finding, it is to be found in a decision of the High Court (Keane J. as he then was) relied on by both counsel for the petitioner and counsel for the respondent: *Re Greenore Trading Co. Ltd.* [1980] ILRM 94. An issue in that case concerned the sale by one of the shareholders, who was also the manager of the company, of his shares to the respondent. The seller received either consideration of £22,500 for the shares or, alternatively, received consideration of £8,000 for the shares at par value together with a severance payment from the company of £14,500. In any event, £14,500 of the total amount which he received, £22,500, came out of the company. In relation to that transaction, Keane J. stated (at p. 100) that it was immaterial whether the real price for the shares was £22,500 or whether the sum of £14,500 represented compensation to the seller for quitting the company, as the respondent had claimed. If it was compensation, the transaction was clearly unlawful because the proposed payment had not been disclosed to the other member of the company, the petitioner, nor had it been approved by the company in general meeting, and the illegality was compounded by the fact that the sum paid in respect of compensation was not specified in the company's accounts. On the other hand, if the sum of £14,500 represented consideration for the shares, the transaction was unlawful, since it was in violation of s. 60 of the Act of 1963, which prohibits a company from giving financial assistance for the purchase of its shares. Keane J., having characterised the transaction as "grossly irregular" went on to say:

> "I am satisfied that this latter transaction constituted conduct of such a nature as to justify, and indeed require, the making of an order under s. 205(3) of the Act. Prior to that transaction, [the respondent], as a result of the issue of 10,000 shares to him in 1975 was the holder of over 50% of the issued share capital. Had the transfer of shares by [the seller] to him gone unchallenged, he would have become the owner of more than 75% of the company share capital. 'Oppressive' conduct for the purposes of the corresponding s. 210 of the English Companies Act, 1948 has been defined as meaning the exercise of the company's authority 'in a manner burdensome, harsh and wrongful'. (See *Scottish CWS Ltd. v. Meyer* [1959] AC 324 at p. 342). The patent misapplication of the company's monies for the purpose of giving [the respondent] a dominant position in its affairs seems to me to be properly described as 'burdensome, harsh and wrongful' *quoad* the petitioner. … Nor can the actual misapplication of the funds be properly treated as an isolated act of oppression (which would not normally be sufficient to justify relief under the section: see *Re Westbourne Galleries* [1970] 1 WLR 1378. As I have already noted, not merely were the company's monies purportedly applied towards an unlawful purpose, i.e. the payment of compensation to a director for loss of office without sanction of a general meeting: the payment of that compensation was not separately dealt with in the company's accounts for the relevant year, as required by law."

3.8 Courtney in the *Law of Private Companies* (2nd Ed., 2002) considers the concept of oppression under various headings including fraudulent and unlawful transactions. In that context he refers to the decision of the High Court (Kenny J.) in *Re Westwinds Holding Company Ltd*. (21st May, 1974, unreported), in which it was found that the sale of lands owned by the company at a gross undervalue was "a fraud on the other member of the company" and that the sale benefited the respondent only at the expense of the company and the petitioner. On that ground alone, Kenny J. held that the conditions for the exercise of the powers of the Court under s. 205(3) had been fulfilled.

3.9 In this case, the position which has been adopted by the respondent in denying that his actions constituted oppression of the petitioner is utterly untenable. It is difficult to imagine conduct by one director, who is the majority shareholder, of a company, which is more burdensome, harsh and wrongful to another director who is a minority shareholder of the company, than the admitted conduct of the respondent in this case. For over almost a decade he expropriated for his own use monies due to the company. In consequence of that, the company failed to comply with its statutory obligation to maintain proper books of accounts. The petitioner was put in the position of unwittingly signing accounts which did not represent the true financial position of the company. The respondent made a disclosure to the Revenue Commissioners of which the petitioner was wholly unaware, and he made a settlement with the Revenue Commissioners which resulted in liability for tax, interest and penalties on the undisclosed income being borne by the company without any notification to, or the approbation of, the petitioner. As I have stated, the oppression was ongoing when the petition was presented and it is properly regarded as still operative and ongoing because, as regards the company and its members, the adverse effect of the acts complained of, in reality, has not been redressed. In my view, as regards the petitioner, an order under subs. (3) of s. 205 is necessary "with a view to bringing to an end the matters complained of" by the petitioner.

3.10 Accordingly, I propose making a declaration in the terms sought by the petitioner that the affairs of the company are being conducted in a manner oppressive to him. I also propose making an order that the respondent be compelled to purchase the petitioner's shares in the company. The only difficult issues in this case which require careful consideration, in my view, are issues concerning the proper approach to the valuation of the petitioner's shares.

4. Valuation: the law

4.1 Two issues of law arise in relation to the proper approach to be adopted by the Court in valuing the petitioner's shares, namely:

> (a) the date at which the valuation should be carried out; and
>
> (b) whether the value should be discounted on the ground that the petitioner's shareholding is a minority shareholding.

There is little by way of relevant authority in this jurisdiction which directly bears on those issues. I propose considering first the authorities in this jurisdiction which address, in general terms, the valuation of shares on a forced sale under s. 205(3).

4.2 In *Re Greenore Trading Co. Ltd.,* Keane J. decided that the petitioner's shares should be purchased by the respondent at a fair price. Having concluded that it was unlikely that, having regard to the uncertain financial future of the company, a majority shareholder or an outsider would pay more than par value for the shares (£8,000), Keane J. continued:

> "That, however, does not conclude the matter, since it is clear that, in prescribing the basis on which the price is to be calculated, the court can, in effect, provide compensation for whatever injury has been inflicted by the oppressors. (See *Scottish Co-Operative Wholesale Society v. Meyer* [1959] AC 324). The accounts in the present case show that the company has been pursuing a conservative policy in relation to the payment of dividends in the years immediately preceding the wrongful purchase of [the petitioner's] shares; and this policy may well have been justified by the company's uncertain trading future. There seem[s] to me, however, no reason why the petitioner should be deprived of the share to which he would have been entitled of the £14,500 wrongfully applied in the transaction regarding Mr. Boyle's shares. It is immaterial whether that sum comes back to the company following these or other proceedings and it is ultimately paid out by way of dividend or as a return on capital to the contributors, since the petitioner will derive no benefit from that once the shares have been purchased by [the respondent]. It follows that he is entitled, in my view, to be paid a sum bearing the same proportion to that sum of £14,500 as his shareholding of £8,000 did to the total issued share capital of £34,000 prior to the unlawful transaction in relation to [the seller's] shares; and I will order that sum to be paid, in addition to the sum of £8,000 representing the par value of his shares."

4.3 Counsel for the petitioner, in this case, advocated a somewhat similar approach, which was referred to as the "straightforward" approach to the valuation of the petitioner's shares in the company. I will return to that submission later.

4.4 In *Irish Press Plc. v. Ingersoll Irish Publications Ltd.* [1995] 2 I.R. 175 the Supreme Court held that, while in cases under s. 205, where the oppressor is ordered to purchase the share of the oppressed member, the determination of a fair price for the oppressed member's shares might include an incidental element of compensation, there was no general right to compensation for loss arising from the oppression. On that point, in his judgment, Blayney J., with whom the other Judges of the Supreme Court concurred, quoted the first sentence in the second passage from the judgment of Keane J. in *Re Greenore Trading Co. Ltd*. quoted at 4.2 above and also the following passage from the judgment of Lord Denning in *Scottish Co-Operative Wholesale Society v. Meyer* [1959] AC 324 (at p. 369):

> "One of the most useful orders mentioned in the section – which will enable the court to do justice to the injured shareholders – is to order the oppressor to buy their shares at a fair price: and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression. Once the oppressor has bought the shares, the company can survive. It can continue to operate. That is a matter for him. It is, no doubt, true that an order of this kind gives to the oppressed shareholders what is in effect money compensation for the injury done to them: but I see no objection to this. The section gives a large discretion to the court and it is well exercised in making the oppressor make compensation to those who have suffered at his hands."

Having noted that the statutory provision to which Lord Denning was referring was exactly similar to the provision in s. 205, in that it provided that one of the reliefs which the Court might give was an order "for the purchase of the shares of any members of the company by other members of the company", Blayney J. went on to state:

> "While compensation was included in the relief given in each of these two cases, it was given in an extremely limited context – where the oppressor had been directed to purchase the shares of the oppressed shareholder, and where the compensation resulted from the court's determination of what would be a fair price for the shares in the particular circumstances. The element of compensation was incidental to the main relief which was the purchase of the shares. The cases are not authority for a general right to compensation for loss resulting from oppression, which is what is being contended for, and in my opinion this submission is not well-founded."

The Supreme Court also held that it is not open to a Court to award damages under s. 205(3).

4.5 The most recent decision of the High Court on the question of valuation of shares in the context of a forced purchase under s. 205(3) to which the Court has been referred is the decision of the High Court (Finlay Geoghegan J.) in *Re Emerald Group Holdings Ltd., Banfi Ltd. v. Moran and Ors.* [2009] IEHC 440. Both parties referred the Court to paragraph 71 of that judgment, in which Finlay Geoghegan J. recorded that the accountancy expert on behalf of the respondent contended that the value put on the shares in issue there should be discounted by 30%, as the shares constituted a minority interest. There was a complication in that case, in that the Court ordered that the 19.5% shareholding of the petitioner, Banfi Ltd., in Emerald Group Holdings Ltd. be valued having regard to the probable value of a 19.5% shareholding in Best Christmas Trees Ltd., an associated, not using that expression in any technical sense, company of Emerald Group Holdings Ltd. Finlay Geoghegan J. stated that the contention of the respondents' accountancy expert –

> "… was opposed on behalf of the petitioner and reference made to authorities which, undoubtedly, suggest that whilst this might be a typical discount for the sale of a minority shareholding, it should not apply where the Court is directing a forced sale pursuant to s. 205 of the Companies Act 1963. I accept those authorities. Nevertheless, what I am dealing with, on the facts of this case, is something slightly different."

The comment in relation to the authorities, which, apparently, had been cited but which are not identified, in that passage was clearly *obiter*.

4.6 A considerable number of decisions of courts in the United Kingdom on the question of valuation of shares in the context of an order that an oppressor acquire the oppressed shareholder's minority shareholding under the corresponding legislation in the United Kingdom were cited.

4.7 The line of authorities commences with the decision of the High Court in England and Wales *In Re Bird Precision Bellows Ltd.* [1984] 1 Ch. 419. The question which was being addressed by Nourse J. there, as stated in his judgment (at p. 425), was whether the price of shares in a small private company, which were ordered to be purchased pursuant to the then United Kingdom analogue of s. 205(3) (s. 75 of the Companies Act 1980), should be fixed pro-rata according to the value of the shares as a whole or should be discounted on the ground that they constituted a minority in number. In addressing that question, Nourse J. distinguished two different categories of company. The first was a quasi-partnership company, which he addressed in the following passage (at p. 430):

> "I would expect that in a majority of cases where purchase orders are made under section 75 in relation to quasi-partnerships the vendor is unwilling in the sense that the sale has been forced upon him. Usually he will be a minority shareholder whose interests have been unfairly prejudiced by the manner in which the affairs of the company have been conducted by the majority. On the assumption that the unfair prejudice has made it no longer tolerable for him to retain his interest in the company, a sale of his shares will invariably be his only practical way out short of a winding up. In that kind of case it seems to me that it would not merely not be fair, but most unfair, that he should be bought out on the fictional basis applicable to a free election to sell his shares in accordance with the company's articles of association, or indeed on any other basis which involved a discounted price. In my judgment the correct course would be to fix the price pro rata according to the value of the shares as a whole and without any discount, as being the only fair method of compensating an unwilling vendor of the equivalent of a partnership share."

Nourse J. dealt with the second category of cases in which, broadly speaking, shares in a small private company are acquired in the following passage (at p. 431):

> "It is not of direct relevance for present purposes, but I mention it briefly in order finally to refute the suggestion that there is any rule of universal application to questions of this kind. In the case of the shareholder who acquires shares from another at a price which is discounted because they represent a minority it is to my mind self-evident that there cannot be any universal or even a general rule that he should be bought out under section 75 on a more favourable basis, even in a case where his predecessor has been a quasi-partner in a quasi-partnership. He might himself have acquired the shares purely for investment and played no part in the affairs of the company. In that event it might well be fair – I do not know – that he should be bought out on the same basis as he himself had bought, even though his interests had been unfairly prejudiced in the meantime. *A fortiori*, there could be no universal or even a general rule in a case where the company had never been a quasi-partnership in the first place."

It is worth recording that Nourse J. stated (at p. 436) that the question of any discount is a question of law to be decided by the Court.

4.8 The Court of Appeal, on the appeal in that case, which is reported as *In Re Bird Precision Bellows Ltd*. [1986] 1 Ch. 658, dismissed the appeal holding that the relevant section (s. 75) conferred on the Court a wide discretion to do what was fair and equitable in all the circumstances, so as to put right the unfair prejudice to a petitioner and cure it for the future. It was held that Nourse J. was right in concluding that it was appropriate to treat the company as a quasi-partnership and value its shares as a whole and that the petitioners be paid the proportionate part of that value which corresponded to their shareholding, not its market value as a minority shareholding.

4.9 It is interesting to note that in Courtney (*op. cit.)* it is stated that it has been accepted as the law in Ireland by Costello J. in *Colgan v. Colgan & Colgan* (the High Court, 22nd July, 1993, unreported), a case in which the valuation was being carried out on an application under s. 205, that in a quasi-partnership private company a minority shareholding should not be discounted, nor a majority shareholding attributed a premium. Costello J. stated that "all the authorities indicate that there should not be a discount when dealing with a quasi partnership, as this was".

4.10 The discount or non-discount issue has been considered more recently by the Court of Appeal of England and Wales in *Strahan v. Wilcock* [2006] 2 BCLC 555. In that case (at para. 17) Arden L. J. made the following general observations in relation to the issue before the Court of Appeal:

> "The burden of the dispute between the parties on this appeal is as to the basis of valuation in the buy out order. Shares are generally ordered to be purchased on the basis of their valuation on a non-discounted basis where the party against whom the order is made has acted in breach of the obligation of good faith applicable to the parties' relationship by analogy with partnership law, that is to say where a 'quasi-partnership' relationship has been found to exist. It is difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where there was unfair prejudice for the purposes of the 1985 Act but such a relationship did not exist. However, on this appeal I need not express a final view on what those circumstances might be."

4.11 That decision of the Court of Appeal was applied by the High Court of England and Wales in *Irvine v. Irvine* [2006] 4 All ER 102. There, the petitioner's shareholding which was being valued was a 49.96% shareholding. Having considered the authorities, Blackburne J. stated (at para. 11):

> "A minority shareholding, even one where the extent of the minority is as slight as in this case, is to be valued for what it is, a minority shareholding, unless there is some good reason to attribute to it a pro-rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstance, there is no reason to accord to it a quality which it lacks."

On the facts, Blackburne J. held that the company in issue was not a quasi-partnership and that there were no exceptional circumstances. The shareholdings were to be valued as minority shareholdings and the extent of the discount applied was to be a matter for the valuers.

4.12 The most recent authority of a court in the United Kingdom cited was a decision of the Court of Session (Outer House of Scotland) in *Fowler v. Gruber* [2010] 1 BCLC 563. There, Lord Menzies, having referred to the passage of Arden L. J. in *Strahan v. Wilcock*, which I have quoted at para. 4.10, and to the passage from the judgment of Blackburne J. in *Irvine v. Irvine* which I have quoted at para. 4.11, stated as follows (at para. 186):

> "In the present case, the company was not a quasi-partnership at the relevant times. Even at its formation, the petitioner did not own a majority shareholding. Originally he held a 40% shareholding, but voluntarily reduced this by sale of one quarter of his shareholding … . Thereafter his shareholding was further diluted by the acquisition of shares by Aberdeen City Council, in an arrangement of which the petitioner was aware and in which he played some part. To value his shares on a pro-rata basis would be to give him a benefit to which he is not entitled. I consider that it is appropriate that his shares should be valued on a discounted basis. This is not a case of a quasi-partnership, there are no circumstances sufficiently exceptional so as to justify no discount being applied."

4.13 I am persuaded by the decisions of the courts of the United Kingdom to which I have referred above that it is only in the case of a quasi-partnership company or where some other exceptional circumstance exists that a minority shareholding should be valued on a non-discounted basis where the Court has directed that the petitioner's minority shareholding should be purchased by the respondent shareholder or by the company pursuant to s. 205(3) of the Act of 1963. In this case, the company is not, and never was, a quasi-partnership company. There is nothing in the circumstances of the case which would justify a non-discounted basis of valuation of the petitioner's shareholding. Accordingly, in the valuation process, in order to fix a fair price, the appropriate discount, having regard to the minority nature of the petitioner's shareholding, must be applied.

4.14 Turning to the other issue, namely, the date at which the shares are to be valued, counsel for the respondent relied on the following dictum of Nourse J. in *Re London School of Electronics Ltd.* [1985] BCLC 273 (at p. 281):

> "If there were to be such a thing as a general rule, I myself would think that the date of the order or the actual valuation would be more appropriate than the date of the presentation of the petition or the unfair prejudice. *Prima facie* an interest in a going concern ought to be valued at the date on which it is ordered to be purchased. But whatever the general rule might be it seems very probable that the overriding requirement that the valuation should be fair on the facts of the particular case would, by exceptions, reduce it to no rule at all."

In Courtney (*op. cit.)* it is stated (at para. 16.122) that the case law demonstrates that the general rule has been departed from in a great many situations and the courts have fixed the appropriate valuation date variously, giving the following examples: the date of the oppression (*Re Clubman Shirts Ltd*. [1983] ILRM 323); the date the shares were ordered to be purchased at the value which they would have had at the date of the petition, if there had been no oppression (*Scottish Co-Operative Wholesale Society Ltd. v. Meyer* [1959] AC 324 referred to at para. 4.4 above); and a date a few weeks before the court's order to purchase the shares (*Colgan v. Colgan,* the High Court, 22nd July, 1993, unreported).

4.15 There is very little guidance as to what is the appropriate date of valuation in the more recent decisions of the courts in the United Kingdom which have been put before the Court. In *Re Sunrise Radio* [2010] 1 BCLC 367, there is a quotation from the judgment of Robert Walker L. J. in *Profinance Trust SA v. Gladstone* [2002] 1 BCLC 141, where having referred to the judgment of Nourse J. in *Re London School of Electronics Ltd*., Robert Walker L. J. stated:

> "The general trend of authority over the last 15 years appears to us to support that [the date the shareholding is ordered to be purchased] as the starting point, while recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date. It would be wrong to try to enumerate all those cases … ."

Of the examples enumerated by Robert Walker L.J., it was stated that the strongest example from the point of view of the petitioner in *Re Sunrise Radio* was *Re Cumana Ltd*. [1986] BCLC 430, where a fall in the market during the currency of the petition justified an earlier valuation and the Court had strongly disapproved of the respondent's conduct.

4.16 In this case, the expert called on behalf of the petitioner, Brendan Traynor, Chartered Accountant, of the firm BDO, carried out valuations based on the company's financial statements for 2003 and the company's audited accounts for 2009, which were the most up to date accounts available at the date of the presentation of the petition. The expert called on behalf of the respondent, Peter Dawson, Chartered Accountant, of the firm Leahy & Co., had available to him the company's audited accounts for the year ended 31st October, 2010, for which year the results were marginally better than the previous year. From a purely pragmatic standpoint, on the basis of the evidence before the Court, there would, in reality, be little or no material difference in the outcome were the Court to adopt the date of the presentation of the petition rather the date of this judgment, or vice versa, as the appropriate valuation date. The real issue is whether the valuation should be carried out by reference to the accounts for 2003 or the most recent accounts.

4.17 There is no doubt that utilising the accounts for 2003 as the basis of the valuation of the petitioner's shareholding will produce the optimum result, because the company performed better in that year than in any other year. It is true that at first instance in *Irish Press Plc v. Ingersoll Irish Publications Ltd*. (the High Court, 15th December, 1993, unreported) Barron J. addressed a submission made on behalf of the respondent that the date of the presentation of the petition should be the date at which the shares should be valued by stating:

> "This may be the correct approach when the wrongdoer is being compelled to buy the shares but not if their value has already fallen by that date by reason of the oppression."

It was submitted on behalf of the petitioner that, in line with that statement, which was *obiter* because in that case it was the oppressing respondent which was ordered to transfer its shares to the oppressed petitioner, the Court should determine the value of the petitioner's shareholding as at 2003. It was further submitted that such approach was the correct approach because the petitioner's evidence was that he would have commenced proceedings in 2003 if he had been aware of the respondent's expropriation of the company's monies, which had been going on for about six years at that stage.

4.18 In my view, in order to determine a fair price for the petitioner's shareholding, it is not necessary that it should be valued by reference to the company's accounts for the year 2003 and there is no basis in law or in equity for adopting that approach. Therefore, I consider that the proper course is to determine the value by reference to the most recent accounts, the accounts for 2009 or 2010, or by reference to the so called "straightforward" method.

5. Valuation: application of the law to the facts

5.1 Mr. Traynor did two valuations on the basis of the accounts for 2009, the second of which adjusted the figures from the 2009 accounts to factor in the accumulated amounts of profit which would have arisen from the misappropriated rebates and also the Revenue penalty. He described the methodology as being a hybrid of an earnings basis plus surplus assets. On the basis of that methodology, he valued the company at €2,708,000 and the petitioner's share, non-discounted, at €144,000. Mr. Traynor's valuation of the company at 31st October, 2009 on the basis of the balance sheet at that date was between €200,000 and €300,000. He recognised that the company was not trading profitably.

5.2 On the basis that the company does not currently have any future maintainable earnings, Mr. Dawson valued the company at zero. However, he did do an exercise similar to the exercise carried out by Mr. Traynor calculating future maintainable earnings on the basis of an average of recent results, which included the results for the year ended 31st October, 2010 and factoring in the surplus cash of the company as adjusted for the Revenue audit settlement and also the after tax value of undisclosed income, assuming the income had been retained in the company. The value he put on the company on that basis was €2,365,508. He valued the petitioner's share, on the basis that it is a 5% share rather a 5.3% share, before discount, at €118,275. On the basis that the petitioner's shareholding is 5.3%, his figure before discount, would have been €125,372.

5.3 The various technicalities canvassed in the cross-examination of the experts, for example, whether the starting point in valuing on a maintainable earnings basis is earnings before interest, tax, depreciation and amortization, which was the approach adopted by Mr. Traynor, or average profit or loss after tax, as advocated by Mr. Dawson, or whether the adjustment to substitute an open market emolument for the emolument actually taken by way of remuneration by the respondent should be €140,000 (Mr. Traynor's figure) or €150,000 (Mr. Dawson's figure) are, in reality, wholly immaterial, because Mr. Traynor's valuation of the company on an earnings basis was €169,000 and Mr. Dawson's, as I have stated, was zero. The reality is that they both came up with figures for the petitioner's 5.3% shareholding which were approximately similar when adjustment was made for the misappropriated monies and the Revenue penalty. That brings me to the so called "straightforward" method of valuation. It was submitted on behalf of the petitioner that it is open to the Court to determine the value of the petitioner's shares at 5.3% of the aggregate of the misappropriated monies and the Revenue settlement for which the company assumed liability (€2,384,387), which is €125,371 less corporation tax at an approximate rate of 10% plus the par value of the 1,580 shares. Mr. Dawson acknowledged that that was a fair way to value the loss of cash to the company, which I understand to mean loss as a result of the conduct of the respondent. As he correctly pointed out, that, in essence, represented his alternative valuation to which I have referred to above, because he had put zero value on the company on an earnings basis.

5.4 The so called "straightforward" approach seems to me to be a fair method of valuing the petitioner's shareholding. It is reasonable to assume that, but for the actions of the respondent which I have found to constitute oppression, the asset value of the company would be in the region of €2.3m greater than it is. That approach is in line with the approach adopted by Keane J. in *Re Greenore Trading Co. Ltd.,* although that authority indicates that the petitioner should also be refunded the par value which he paid for his shares. The other methodologies deployed by the experts certainly did not produce any fairer figure. Accordingly, I find that, for the purposes of applying s. 205(3), the value of the shareholding of the petitioner, before discount, is €115,000. However, in the light of the view I have expressed earlier in para. 4.13, that value must be discounted. The evidence of both Mr. Traynor and Mr. Dawson was that the minority discount rate would be in the region of 40% to 60%. In view of the size of the petitioner's shareholding, I consider it appropriate to apply a discount of 50%. Accordingly, for the purposes of applying s. 205(3), I find that the discounted value of the petitioner's shares is €57,500. That figure plus the par value (IR£1,000 equivalent to €1,269.74) which he paid for the 1,000 shares he purchased, totalling €58,769.74, is the price that the respondent should pay for the petitioner's 1,580 shares in the company.

5.5 By way of general observation, in adopting the approach that the petitioner's shareholding be valued, before being discounted, as a percentage of the monies expropriated from and the liability for the Revenue settlement imposed on the company by the respondent, there is a notional redress of the defalcation of the respondent for the purposes of the valuation. Accordingly, the basis on which counsel for the petitioner sought to distinguish the decisions of the United Kingdom courts to which I have referred earlier, that those cases were concerned with mismanagement rather than misappropriation does not stand up to scrutiny. Applying a discount, in my view, results in a fair price, in accordance with the evidence.

6. Order

6.1 There will be a declaration that by reason of the matters complained of in the petition the Court is of opinion that the company's affairs are being conducted in a manner oppressive to the petitioner and in disregard of his interests and an order directing the respondent to purchase the shareholding of the petitioner for cash in the sum of €58,769.74 by 16th September, 2011.