Neutral Citation Number: [2006] IEHC 257

THE HIGH COURT

2005 NO. 377 COS

IN THE MATTER OF SECTION 122 OF THE COMPANIES ACT, 1963 – 2001

BETWEEN

BANFI LIMITED

PLAINTIFF

AND

NOEL MORAN, KARINA RAY, ANDREW KAVANAGH, GARVAN FENELON AND EMERALD GROUP HOLDINGS LIMITED

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 20th July, 2006.

The application

1. This is an application for an order rectifying the register of members of the fifth defendant (the Company) to allow for the registration of the plaintiff as a member thereon. The application is brought pursuant to s. 122 of the Companies Act, 1963 (the Act of 1963), sub-s. (1) of which provides as follows:

> "If –
>
> (a) the name of any person is, without sufficient cause, entered in the register of members or omitted therefrom, in contravention of sub-ss. (1) and (2) of s. 116; or
>
> (b) …
>
> the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register."

2. Section 116 requires every company to keep a register of members, which must contain certain particulars, including the names and addresses of the members and a statement of the shares held by each.

3. As it is entitled to do, the plaintiff has brought this application by way of originating notice of motion grounded on affidavit. The application has been heard on the affidavit evidence. Leave was not sought by any party to cross-examine a deponent of his opponent. In some respects there are serious conflicts of evidence on the affidavits. The court cannot resolve such conflicts.

The Company

4. The Company is a private company limited by shares. It was originally incorporated under a different name on 22nd April, 1995, but it has been incorporated under its current name since 20th June, 2002.

5. The most recent annual return in relation to the Company filed in the Companies Registration Office on 18th October, 2005 discloses that the only directors of the Company are the first defendant (Mr. Moran) and the second defendant (Ms. Ray), who is the wife of Mr. Moran. It is clear on the evidence that the third defendant (Mr. Kavanagh) was a director of the Company from the date of its incorporation until 19th February, 2004, when he retired on the grounds of ill health. The annual return discloses that the share capital comprises ordinary and A ordinary shares. It is ordinary shares that are in issue here. There are 87,777 ordinary shares, which, according to the annual return, are registered as follows:

- 16,525 in the name of Mr. Kavanagh.
- 16,525 in the name of ICT Nominees Limited (ICT), being the shares in issue here.
- 47,327 in the name of Best Christmas Trees Limited (Best), a company which was incorporated on 7th June, 2001, of which Mr. Moran and Ms. Ray are the directors and shareholders.
- The remaining 4,400 shares in the name of another party who does not feature in these proceedings.

6. Clause 7 of the articles of association of the Company provides as follows:

> "The directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share, whether or not it is a fully paid share …"

7. There is a proviso to clause 7 which has no application here.

8. Another company, which was incorporated on 28th February, 1989 and had two changes of name before it was incorporated as Emerald Group Limited (the Subsidiary) on 20th June, 2002, is a single-member company and a wholly-owned subsidiary of the Company. The Subsidiary is a trading company which is involved in a scheme under which investors are able to avail of tax advantages from investment in forestry, in this case, Christmas trees. I do not pretend to understand the intricacies of the scheme. However, on the evidence, relying in particular on a report of a financial review carried out by McStay Luby, Financial Consultants, dated 12th June, 2001 for what they refer to as the "Emerald Group", my understanding of the function of the Subsidiary in the overall scheme is that of managing a series of individual plantations owned or leased by other entities for investors. The husbandry and harvesting requirements of those entities are the drivers of the activity level and the cash flow of the Subsidiary.

9. The fourth defendant was joined on the application on the basis that he was a director of the Company. On the basis of the evidence I accept that he is not, and never has been, a director of the Company. Therefore he was incorrectly joined in the proceedings. As I understand the position, there has been no appearance on his behalf. Unless the plaintiff or any of the other respondents objects, I propose to strike out the proceedings against him.

The shares in issue

10. The shares in issue are still registered in the name of ICT, although by virtue of a stock transfer dated 16th May, 2003 ICT transferred 16,525 ordinary shares in the Company to the plaintiff. The stock transfer form was executed by Mr. Moran and Ms. Ray

for and on behalf of ICT. Mr. Moran and Ms. Ray certified that the transfer was being made to the beneficial owner of the shares pursuant to a declaration of trust dated 1st December, 1995 in order to show that the transfer was not subject to ad valorem stamp duty. The declaration of trust dated 1st December, 1995, which was executed by Mr. Moran, declared that ICT held 25,325 ordinary shares in the Company, which was then registered by its former name, as nominee of, and on behalf and in trust for, the plaintiff. There followed an irrevocable undertaking to transfer the shares to the plaintiff on request and a further irrevocable undertaking at all times to exercise the right of voting only in accordance with the plaintiff's instructions. The plaintiff's stake in the company was reduced to 16,525 shares by virtue of a subsequent transfer of 8,800 shares by ICT to Mr. Moran and Ms. Ray, which gave effect to a sale by the plaintiff to Mr. Moran for IR£11,000.

11. The plaintiff was incorporated on 17th April, 1991 as a private company limited by shares. David Hasslacher (Mr. Hasslacher) is a director of the plaintiff and this application was grounded on affidavits sworn by him. His case is that in 1995 the shares in the Company the subject of the declaration of trust, which were approximately 30% of the ordinary shares of the Company, represented his original stake dating from 1989 (22.5% of the share capital) in the Subsidiary, together with an accretion acquired when one of the four original promoters left in 1995, bringing the stake up to approximately 30%. Mr. Hasslacher averred that for personal financial reasons in 1990/1991 he was advised by his then solicitors that his shares in the Subsidiary should be held on trust. He also averred that Mr. Moran, who is a chartered accountant, and who was his financial adviser, advised him to purchase a shelf company which would hold his stake in the Subsidiary solely for him and that Mr. Moran arranged for him to acquire the plaintiff, a shelf company, for that purpose. Mr. Hasslacher also averred that the scheme devised by Mr. Moran involved ICT holding shares in trust for the plaintiff.

12. ICT is a company which is solely owned by Mr. Moran and Ms. Ray. Mr. Moran has denied that he took any part in advising Mr. Hasslacher in relation to settling the shares in trust. He has averred that he understood that his role as company secretary of ICT was to give effect to Mr. Hasslacher's instructions, which he did. It is not possible to resolve the conflict raised on the affidavit evidence as to whether Mr. Moran advised Mr. Hasslacher in relation to the creation of the trust. I record, for what it is worth, that the evidence establishes that Mr. Hasslacher and the plaintiff made a complaint to the Institute of Chartered Accountants in Ireland (the Institute) in February, 2005 against Mr. Moran. The Complaints Committee of the Institute, in ruling on the complaint, was unable to form an opinion as to whether or not Mr. Moran "advised" Mr. Hasslacher on the transfer of the shares but adjudicated on the complaint on the basis that Mr. Moran "assisted" Mr. Hasslacher to transfer the shares to ICT to be held in trust for the plaintiff. I will return to that ruling later.

13. It is obvious from the evidence that there was some sort of restructuring of the "Emerald Group" in 1995, whereby the Subsidiary became a single member company and former shareholders of the Subsidiary became the holders of an equivalent shareholding in the Company. While details of that process have not been deposed to, it is clear that the shares in issue on this application, as I have said, represent shares in the Subsidiary held by Mr. Hasslacher in 1989. Ignoring the restructuring in 1995 in the interests of simplicity, the following is the undisputed position in relation to the shares in issue:

· The shares were beneficially owned by Mr. Hasslacher from 1989.

· In 1990/1991 Mr. Hasslacher decided to settle the shares in trust. To that end, in 1991, with the assistance of Mr. Moran, he acquired the plaintiff, a shelf company. It is not clear whether at that stage the shares in the Subsidiary were transferred to ICT in trust for the plaintiff, nor is it clear whether a declaration of trust was executed by ICT in favour of the plaintiff. I assume that ICT became the registered owners of the shares in the register of the Subsidiary. However, nothing much turns on that.

· After the restructuring in 1995, ICT became the registered owner of the shares in the register of members of the Company, but declared in the declaration of trust that it held the shares in trust for the plaintiff. At that stage the shares represented approximately 30% of the ordinary shares in the Company.

· While ICT, which was controlled and managed by Mr. Moran and Ms. Ray, was the registered owner of the shares, it was acknowledged that the plaintiff was the beneficial owner of the shares.

· In 2003, at the request of the plaintiff, the beneficial owner, ICT, acting by Mr. Moran and Ms. Ray, transferred the reduced stake, equivalent to approximately 20% of the ordinary shares of the Company, to the plaintiff. In his replying affidavit in these proceedings Mr. Moran has referred to the stock transfer dated 16th May, 2003 as a "purported" transfer. That is an incorrect description. The transfer was unquestionably effective, a fact that forms the basis of the actions of the first, second and third defendants in August and September, 2003.

Refusal to register the plaintiff as a member

14. Following the execution of the transfer dated 16th May, 2003, the plaintiff sought to be registered as a member of the Company.

15. At that time there were three directors of the Company, Mr. Kavanagh, Mr. Moran and Ms. Ray. Mr. Hasslacher had ceased to be a director of the Company when he failed to be re-elected at the Annual General Meeting of 2002. Mr. Kavanagh held approximately 20% of the ordinary shares, that is to say, a stake equivalent to that of which the plaintiff was the beneficial owner. It is not clear on the evidence in whose name the 55% (in fact 55.82%) stake, which the plaintiff averred was owned by Mr. Moran, was registered. By 2005 that stake was registered in the name of Best, a company managed and controlled by Mr. Moran and Ms. Ray. On the evidence, I am satisfied that Mr. Moran and Ms. Ray jointly or severally controlled the 55.82% stake in 2003.

16. By letter dated 1st August, 2003 from Mr. Moran, as Managing Director of the Company, the plaintiff was informed that the board of the Company had convened on 31st July, 2003 to consider the plaintiff's request to register the transfer from ICT to the plaintiff and had concluded "that the decision to register or to refuse registration should only be taken once certain clarifications had been received from the applicant". The plaintiff was informed that, if the information sought was not provided, a decision would be made in any event. By further letter dated 19th August, 2003 from Mr. Moran, as Managing Director, certain information was sought and certain questions were asked. The first item was a question which asked what the Company was gaining by having itself registered and what actions it intended taking as a registered shareholder that could be not accomplished through its beneficial holding through ICT. Information was sought as to the beneficial owners of the plaintiff together with verifying documentation. Its up to date audited accounts, a list of directors, a detailed list of its activities and those of its directors engaged in any way related to Christmas trees and a detailed list of contacts made by the Company or its directors during the previous eighteen months with competitors, suppliers and so forth of the Company and its subsidiaries were also requested. The plaintiff did not furnish the information or documents sought.

17. However, the lack of response has to be seen in the context of proceedings under s. 205 of the Act of 1963 which were then pending in this Court. The proceedings in question were brought in the matter of the Company on the petition dated 10th July, 2002 of Mr. Hasslacher and the plaintiff against Mr. Moran, Ms. Ray and Best (Record No. 2002 No. 303 COS). Certain aspects of those proceedings were canvassed on this application. In August and September, 2003 there was pending a motion by the respondents, which I understand was by notice of motion dated 3rd March, 2003, in which the respondents sought to strike out the s. 205 proceedings for lack of *locus standi* in that neither the plaintiff nor Mr. Hasslacher was a member of the Company. There was also pending a motion brought by the petitioners, as I understand it, by notice of motion dated 19th May, 2003, to compel the registration of the plaintiff as a member of the Company. The petitioner's motion was, apparently, listed before Smyth J. on 10th September, 2003. On the previous day the plaintiff's solicitors wrote to the defendants' solicitors in connection with that motion. It is not clear on the evidence what transpired on 10th September, 2003, but it is clear that the adversarial process between the parties to the s. 205 proceedings was approaching its climax.

18. At a board meeting of the Company held on 17th September, 2003 and attended by Mr. Kavanagh, who acted as chairman, Mr. Moran and Ms. Ray, the board reached a unanimous decision that, in accordance with article 7, it would decline to register the transfer from ICT to the plaintiff. The minute of the meeting, which was put in evidence, indicates that the decision was made after the board had considered "the correspondence and the impact of the registration on all interested parties". It would seem that the reference to "interested parties" is a reference to "all shareholders of the Company, its creditors, guarantors, its subsidiaries and the employees of the group", who were referred to earlier in the minute. I have read the minute carefully and I have come to the conclusion that it is not possible to discern from it why the directors considered that the registration of the plaintiff would have an adverse impact on all or any of the interested parties. But on this application the court is not restricted to contemporaneous documents in trying to fathom the reasons and motivation underlying the refusal..

19. Mr. Moran has averred in his replying affidavit that the decision was taken *bona fide* in the interest of the Company. He specifically averred that the board considered their position bearing in mind their fiduciary duties to the Company. As to the reasons for refusal, he averred that, in the absence of a response to the letter of 19th August, 2003 requesting information, it "did not appear to be in the best interest of the Company to approve the transfer". However, that is not recorded in the minute and the minute does not reflect the thrust of the position adopted on this application, that it was the lack of engagement by the plaintiff which caused concern to the board. Mr. Moran also averred that prior to the meeting of 17th September, 2003 a list of guidelines was "drawn up by the Board" of matters which it considered ought to be taken into account. This list has been exhibited. However, the guidelines are not expressly referred to in the board minute, which merely reflects the broad statements in the last two paragraphs of the guidelines as to the requirement to consider the best interests of the Company but not the considerations which preceded them. There is no evidence of the extent to which the directors considered the guidelines or attached weight to them in arriving at their decision.

20. Mr. Kavanagh, in an affidavit filed on behalf of the defendants, has averred that the account provided by Mr. Moran in his replying affidavit is "completely accurate". He has set out the reason why the board agreed that the transfer to the plaintiff "should not be approved" was –

> "… because the Board of directors had received no co-operation whatsoever from [the plaintiff] with regard to the request to provide information which was requested of it in the letter (dated 19th August, 2003) … . In the light of this failure to address those issues, bearing in mind my fiduciary duty to the company, I was very concerned that the interest of the company as a whole, together with its creditors and shareholders , would be adversely impacted by registration of [the plaintiff] as shareholder. To the best of my knowledge, [the plaintiff] has provided no proper response to the request for assurances and information requested on 19th August, 2003."

21. It was submitted on behalf of the plaintiff that the foregoing averment is inconsistent with the minute of the meeting.

Outcome of the Section 205 proceedings

22. The respondents to the s. 205 proceedings were successful in their contention that, in the absence of the registration of the plaintiff as a member of the Company, the petitioners did not have standing to prosecute the proceedings. In the final order in the proceedings, which was made by Smyth J. on 26th November, 2003, the petition was struck out. In relation to costs, the order provided that the respondents pay the petitioners' costs of the petition up to 11th October, 2002 and that the respondents recover against the petitioners their costs of the motion filed on 3rd March, 2003, which, as I have stated, I understand to be the motion to strike out. The respondents have appealed the order for costs against them to the Supreme Court.

23. In his second affidavit sworn in support of this application, Mr. Hasslacher has referred to the comments made by Smyth J. in striking out the s. 205 proceedings. I consider that those comments, which related to the issues then before Smyth J., which were assessed by him against the evidence adduced before, and the submissions made to, him, are irrelevant to the determination of the issues on this application. Accordingly I have had no regard to them.

24. Mr. Hasslacher in his grounding affidavit averred that it was conceded by counsel for the respondent in open court during the course of the s. 205 proceedings that it was most unlikely that the respondents would under any circumstances allow registration of the plaintiff's shareholding in the Company to take place. This averment has not been expressly denied by the respondents.

Allegations and counter-allegations

25. In his grounding affidavit Mr. Hasslacher has made serious allegations against Mr. Moran and Ms. Ray, for instance:

> · That after 1995 there was a concerted strategy on their part to take over effective control of the Company and to conduct its affairs in disregard of and to the detriment of the Company and its shareholders.
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> · That they acted in a manner which constitutes a breach of fiduciary duty in diverting assets, which I understand to mean business opportunities in relation to new plantations, from the Subsidiary to Best, their company.
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> · That through Best they planned to acquire the entirety of the shareholding in the Company at a time and for a consideration which would be detrimental to the interests of the plaintiff and Mr. Hasslacher.
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> · That in 2002 they excluded Mr. Hasslacher from the affairs of the Company and the Subsidiary.

26. Mr. Hasslacher has averred that the refusal to enter the name of the plaintiff on the register of members of the Company has been actuated by fraud and *mala fides* on the part of the respondents, the alleged ultimate motivation being to enable Mr. Moran and Ms. Ray to continue their activity of diverting business from the Subsidiary to Best.

27. In his replying affidavit Mr. Moran accused Mr. Hasslacher of attempting to "re-run" the s. 205 proceedings, which he asserted were unnecessary and divisive. He averred that no substance had been put forward to support Mr. Hasslacher's "scandalous suggestion", with which he took issue, that he had been guilty of fraud and he characterised this aspect of Mr. Hasslacher's affidavit as "frivolous and vexatious". He described Mr. Hasslacher's endeavour to have the plaintiff registered as a member of the Company as a gambit in his overall scheme to undermine the business of the Company and the Subsidiary. He refuted all contentions by Mr. Hasslacher that he (Mr. Hasslacher) did not have a full role as a director in the Company. He also refuted the various contentions of Mr. Hasslacher that he or Ms. Ray acted improperly in any aspect of the running of the business of the Subsidiary or the Company. He described as "baseless" the assertion that the activities of Best were calculated to undermine the Company and countered that Best had, in fact, provided very substantial financial support for the Company and the Subsidiary.

28. It was submitted on behalf of the plaintiff that Mr. Moran had not expressly denied Mr. Hasslacher's assertion that Mr. Moran and Ms. Ray had diverted, and were continuing to divert, business opportunities from the Subsidiary to Best, thereby inviting the court to infer a tacit admission on the part of Mr. Moran. There was also a debate as to whether the word "refute" comprehends denial of an allegation. Whatever the view of purists and lexicographers of the usage of "refute" as meaning "deny", in assessing evidence on affidavit a court must ascertain the intended meaning of the deponent from the general thrust of the language used. In this case the court has to ascertain what Mr. Moran intended to convey in the two affidavits sworn by him. I have no doubt that Mr. Moran intended to deny all allegations of fraud, *mala fides*, misfeasance, breach of duty and all other wrongs alleged by Mr. Hasslacher against him and Ms. Ray.

29. The court was also invited to draw inferences from documents which have been exhibited, for example, the McStay Luby report, a finance planning document dated March, 2002 prepared by Mr. Moran, and a letter dated 28th May, 2002 from Anglo Irish Bank Corporation plc outlining the general conditions on which the bank would be prepared to provide continuing facilities to the Company. In my view, it would not be proper to draw the inferences the court was invited on behalf of the plaintiff to draw from those documents, because I am by no means satisfied that they give a complete picture of the matters to which they relate or that their true import can be gleaned from considering them on their own or, in any event, it is as contended for by the plaintiff.

30. There is a total conflict on the affidavit evidence as to whether Mr. Moran and Ms. Ray have engaged in the wrongful conduct alleged against them. That conflict cannot be resolved. Therefore, it is not possible to find that the plaintiff has established an element of its core allegation, which is that the primary reason for refusal of the registration of the plaintiff as a member of the Company was to pre-empt the plaintiff from acquiring standing to prosecute s. 205 proceedings, so that Mr. Moran and Ms. Ray would thereby avoid the consequences of such proceedings. Those consequences, the plaintiff has asserted, are that Mr. Moran and Ms. Ray would be exposed to potential personal liability for the past misfeasance alleged by the plaintiff and would be prevented from continuing in their activity of diverting business from the Subsidiary to Best. Given the conflicting affidavit evidence it is not possible to make any finding as to the probability of such consequences ensuing the prosecution of s. 205 proceedings.

The decision of the Complaints Committee of the Institute

31. As I have already stated, the Complaints Committee of the Institute has adjudicated on a complaint by Mr. Hasslacher and the Company against Mr. Moran. The decision of the Complaints Committee was communicated to Mr. Moran in a letter dated 12th May, 2005 which sets out the decision as follows:

> "The decision of the Complaints Committee was that a prima facie case had been made out. In reaching that decision the Committee was of the view that you had assisted Mr. Hasslacher to transfer his shares to [the plaintiff], to be held in trust by ICT … . The Committee was of the view that you failed to manage the conflict of interest which arose for you as a director of the Emerald Group Limited (sic) by reason that you participated in the decision of the board not to register the company as a shareholder in the company. The complaints committee were firmly of the view that you should not have participated in that decision-making process."

32. For completeness, I should record that the Committee decided that no further action would be taken against Mr. Moran and that the matter is closed, as far as the Institute is concerned.

The Law

33. There was no real divergence between counsel for the plaintiff and counsel for the respondents as to the legal principles which govern the determination of the issue whether a transferee of shares was refused registration as a member of a company "without sufficient cause". Both relied, *inter alia*, on the comprehensive review and analysis of the relevant authorities which is to be found in Courtney on *The Law of Private Companies* (2nd Edition, 2002, Butterworths). Where they diverged was in relation to the application of those principles to the facts of this case.

34. The relevant principles for present purposes are the following:

> (1) The exercise of the directors' power to refuse to register must be gauged by reference to the relevant regulation in the company's articles of association, which may take many forms. However, in all cases the powers of the directors to refuse registration must be exercised *bona fide* and for the benefit of the company as a whole (Courtney, para. 16.037).
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> (2) Where, as here, the material part of the relevant regulation replicates verbatim model reg 3 of Table A, Part II, the directors have the most unfettered of powers (Courtney, para. 16.038). The breadth of the discretion given in an article so worded was recognised by Lord Greene M.R. in In *re Smith and Fawcett Limited* [1942] 1 Ch. 304 in the following passage in his judgment (at p. 308):
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> > "In the present case the article is drafted in the widest possible terms, and I decline to write into that clear language any limitation other than a limitation, which is implicit by law, that a fiduciary power of this kind must be exercised *bona fine* in the interests of the company. Subject to that qualification an article in this form appears to me to give the directors what it says, namely, an absolute and uncontrolled discretion."
>
> (3) The Table A, Part II model permits the directors to decline registration without giving any reasons for their decision. As Courtney points out (at para. 16.040) it was recognised by Black J. in In *re Hafner* [1947] I.R. 426 (at p. 440) that there are exceptions to that general rule. However, in this case, the respondents gave reasons in the minute of the meeting of 17th September, 2003 and in the affidavits filed by them in these proceedings. Accordingly, unlike the *Hafner* case, this is not a case in which the plaintiff has to penetrate the total reticence of the directors. As Courtney points out (at para. 16.042), the directors are not confined to the reasons they gave at the time of the refusal: *Village Cay Marine Limited v. Ackland (Barclays Bank Plc third party)* [1998] 2 B.C.L.C. 327.

(4) As to the nature of the court's jurisdiction under s. 122 and the process the court is required to engage in, I agree with the view expressed in Courtney (at para 16.048) that is to review the result of the exercise of their power by the directors where it is established that they have acted otherwise than *bona fide* and for the benefit of the company. In In *re Smith and Fawcett Limited* Lord Greene M.R. emphasised the subjectivity of the discretion which is reposed by an article on the lines of the article at issue here in the directors. He stated (at p. 306):

> "They must exercise their discretion *bona fide* in what they consider – not what the court may consider – is in the interests of the company, and not for any collateral purpose."

In In *re Hafner*, on appeal to the Supreme Court, Sullivan C.J. recorded (at p. 470) a concession made by counsel for the defendants that the power conferred by the directors by the relevant article was a fiduciary power to be exercised *bona fide* in the interests of the company, the exercise of which might be controlled by the court if there was evidence which justified the conclusion that the directors had acted improperly. Later in his judgment Sullivan C.J., having adverted to the difficulty which the plaintiff faced in seeking to establish that the actions of the directors was not a *bona fide* exercise of their fiduciary power because the directors were not obliged to assign any reason for their refusal to register, went on to identify the burden placed on the plaintiff as follows (at p. 471):

> "And accordingly the plaintiff had to adduce evidence of relevant circumstances from which the court could legitimately infer that the directors had acted improperly."

The Supreme Court affirmed the finding of Black J. in that case, which was a witness action, that the directors' exercise of their discretion was actuated by an illegitimate motive (to facilitate payment of exorbitant emoluments to themselves) and, as such, was not a *bona fide* discharge of their fiduciary duty.

(5) As is pointed out in *Courtney* (at para. 16.056), the rights of a transferor of shares are not entirely dependent upon common law principles. If the directors have exercised their powers in a manner oppressive to, or in disregard of, a transferor-member's interests he may bring a petition under s. 205. Further, the personal representative of a deceased member has *locus standi* by virtue of s. 205(6).

Application of the law to the facts

35. Applying the foregoing principles, the crucial question in determining whether the refusal of the board of the Company to register the plaintiff was without sufficient cause is whether or not, in exercising their discretion under article 7, the members acted *bona fide* in what they considered to be in the interests of the Company as a whole. To succeed on this application to have the register rectified, the plaintiff must discharge the burden of proving that they did not.

36. As I have stated, this is not a case in which the court has to penetrate total reticence on the part of the directors, as might have been the case if the directors had stood on their right to remain silent on their reasons or reason for refusing to register the plaintiff as a member of the Company. The defendants broke their silence by putting in evidence contemporaneous documentation and by adducing affidavit evidence as to why they refused to register. So there is evidence from both sides to be assessed.

37. On the defendants' side, it is necessary to abstract from the evidence what is being advanced by the first, second and third defendants as the reason for the refusal, as distinct from the bald assertions made in the minute and by their deponents that they acted *bona fide* in the interest of the Company. As I understand it, the reason advanced is that it was the failure of the plaintiff to respond to the letter of 19th August, 2003, to furnish the information sought and to engage with the board which gave rise to the belief on the part of the board members that to accede to the registration of the plaintiff as a member of the Company would not be in the interest of the Company. Accepting as I must, in the absence of a challenge through cross-examination, the evidence of Mr. Moran and Mr. Kavanagh at face value, the question which must be asked is whether, against the background of the pending s. 205 proceedings and, in particular, the pending motions, such subjective belief could have been justified in the context of a requirement to act in good faith. It is not necessary to agree with the submission made on behalf of the plaintiff that the request for information was a mere contrivance to conclude that such belief could not have been justified. At the time the request was made, realistically, Mr. Hasslacher and the Company could not have engaged with Mr. Moran and Ms. Ray, who were the respondents in the s. 205 proceedings, in the manner suggested, nor could the directors of the Company realistically have expected the petitioners in the s. 205 proceedings to so engage. Aside from that, on the totality of the evidence, I am not satisfied that the plaintiff's failure to respond to the letter of 19th August, 2003 was the real reason for the refusal to register.

38. The evidence on the plaintiff's side is that the reason for the directors' refusal to register the plaintiff as a member was to prevent the plaintiff having standing to prosecute s. 205 proceedings against two of the directors, Mr. Moran and Ms. Ray. Even without being in a position to make a finding as to what would have been the strength of the plaintiff's case and the likely outcome of the proceedings had the plaintiff standing to prosecute such proceedings, I am satisfied that the real reason for the refusal to register the plaintiff as a member was to ensure that the plaintiff would never have standing to prosecute such proceedings against Mr. Moran and Ms. Ray. The plaintiff's beneficial shareholding represented the interest of Mr. Hasslacher in the Company, which interest had existed since 1989. Since 1995 at least, and perhaps earlier, ICT held that interest in trust for the plaintiff and through the plaintiff for Mr. Hasslacher. Mr. Moran and Ms. Ray were the directors of ICT and, as such, owed fiduciary duties to ICT, to the plaintiff and Mr. Hasslacher. From 1995 those arrangements were formalised in the declaration of trust in 1995 and remained unchanged thereafter. What changed in the relationship of the human agents of the plaintiff and ICT was that in 2002 Mr. Hasslacher initiated the s. 205 proceedings against Mr. Moran and Ms. Ray. The proper inference to be drawn from the conduct of the defence of the s. 205 proceedings by Mr. Moran and Ms. Ray, in my view, is that the reason for the refusal to register the plaintiff as a member was to ensure that the pending proceedings would be struck out and that the plaintiff would not be in a position to initiate any further proceedings under s. 205. Indeed this is resonated in the first question in the letter of 19th August, 2003.

39. That leads to the question whether, in refusing to register the plaintiff as a member so as to ensure that it would not be in a position to prosecute s. 205 proceedings, the directors were acting *bona fide* in the interest of the Company as a whole. It was submitted on behalf of the plaintiff that, in making that decision, Mr. Moran and Ms. Ray were consulting their own interest, not the interest of the Company. I have no doubt that the proper inference to draw from the evidence and, in particular, the evidence as to the defence of the then pending s. 205 proceedings, is that Mr. Moran and Ms. Ray were motivated by self interest, not the interest of the company as a whole, in participating in the decision to refuse to register the plaintiff. Their participation was necessary to carry the resolution to refuse. The minute of the meeting of 17th September, 2003 records no input by Mr. Moran other than to

produce the letters of 1st August, 2003 and 19th August, 2003, to be part of the consensus that the application for registration should be considered without further reference to the plaintiff which had been given every opportunity to provide the information and support of its application, and to read article 7. Ms. Ray's input, as recorded, was that any change in the registered owners of shares needed to take full account of the interests of all of the interested parties and should have no potential disadvantage for them. The minute records that she also made the point that, whether or not the plaintiff was registered as a shareholder, the board "had a duty to ensure that its interest in the Company as a beneficial shareholder should be protected by the directors". The minute records that the board agreed that, regardless of the decision reached by the board, "the directors would act to protect the interests of all the beneficial owners including [the plaintiff]". When set against the reality of the plaintiff's position in consequence of the decision the board made, I think it is not unreasonable to describe Ms. Ray's input and the board's consensus as a meaningless platitude.

40. Mr. Moran and Ms. Ray could, if they wished, ensure that the interests of the plaintiff are protected by enabling it to pursue the remedies which are open to all shareholders since 1963, the remedies available under s. 205, either through the trustee which is the registered owner of the shares, or by allowing it to become registered. They have effectively closed off one avenue by the decision to refuse to register the transfer to the plaintiff and they are in control of the other avenue. Having regard to the position they have adopted in relation to registering the transfer, and given their position as directors of ICT, the registered owner of the plaintiff's shares, it is reasonable to assume that ICT as a transferor member will not be pursuing the statutory remedies available under s. 205 on behalf of the plaintiff. Through ICT, and in the face of their fiduciary duties, Mr. Moran and Ms. Ray have maintained a stranglehold on the plaintiff's shareholding in the Company and have wholly stymied the plaintiff in pursuing the statutory redress which is available to all shareholders. I have no doubt, on the evidence, that in participating and, in effect, carrying the resolution to refuse to register the plaintiff as a member they were pursuing their own self interests, not the interests of the Company as a whole.

Delay
41. The defendants' primary answer to the plaintiff's application was that the plaintiff has not established that the refusal to register was without sufficient cause. The defendants' secondary position was that the relief claimed should be refused by reason of the plaintiff's unexplained delay in not initiating these proceedings until 17th October, 2005. The basis on which it was asserted that delay could defeat the plaintiff's application was that the rectification of the share register is essentially an equitable remedy and the court should, in exercising its discretion, take account of equitable principles.

42. Section 122 has created a statutory remedy of rectification and it has not imposed any time limit for bringing such application. That is not to say that situations could not arise in which a court would consider that it would be inappropriate to exercise its discretion because of delay in bringing an application if it was shown that delay was prejudicial to the Company. However, in this case, there is no evidence of any prejudice to the Company by reason of the fact that the application directed by the register was initiated more than two years after the refusal. Therefore, in my view, that time gap is not a bar to relief under s. 122 in this case.

Order
43. Accordingly, there will be an order directing the rectification of the register of the members of the Company to provide for the registration thereon of the plaintiff as the owner of 16,525 ordinary shares.