THE HIGH COURT

COMMERCIAL

[2019 No. 181 COS]

IN THE MATTER OF COLORMAN (IRELAND) LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2014

AND IN THE MATTER OF SECTION 212 OF THE COMPANIES ACT 2014

BETWEEN

GARY CLARKE

APPLICANT

AND

COLORMAN (IRELAND) LIMITED, CLARE NIXON, DAVID CLANCY AND ANDREW DUNNE

RESPONDENTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 11 July, 2019

Introduction

1. This is an application by the respondents for an order, under the inherent jurisdiction of the court, to strike out or stay these proceedings on the basis (so it is claimed) that the applicant is obliged to refer the dispute between the parties to binding expert determination pursuant to Clause 7.09 of a shareholders' agreement dated 6th December, 2000. The application is brought pursuant to a motion dated 21st May, 2019, in relation to the proceedings instituted by the applicant on 16th May, 2019.

2. Each of the applicant and the respondents are directors of Colorman (Ireland) Limited ("the Company") which is based in Broombridge Industrial Estate near the Royal Canal in Dublin. The Company was established in 1959 and is well known for its high quality printing and packaging services.

3. The company was established by the late Mr. Bob Burke. Following his death in 2000, the then management team bought out the business and together entered into a shareholders' agreement dated 6th December, 2000, ("*the shareholders' agreement*"). The agreement in question is in relatively short form. Clause 1.04 provides that it is to be governed by and construed in accordance with the laws of Ireland. Clause 1.05 identifies that the purpose of the agreement is (*inter alia*) to deal with the management of the Company's affairs and the regulation of the future conduct and the relationship of each of the parties. The provisions dealing with subscription for shares are contained in Clause 2.01 of the agreement. Business management is addressed in Clause 4.01 which also provides that no material alteration is to be made to the nature of the business unless unanimously agreed between the parties.

4. Clause 4.05 deals with transfers of shares and also provides for pre-emption rights in the event that any shareholder wishes to dispose of shares. There is a significant dispute between the parties as to the interpretation of Clause 4.05. Of central importance to the present application is Clause 7.09 which envisages that disputes in relation to the agreement or the conduct of the Company's affairs will be referred by the parties to an independent expert for determination. The text of Clause 7.09 is set out further below.

5. I do not propose to set out the nature of the dispute in any detail. It would be inappropriate and potentially unhelpful to do so. A broad outline of the dispute is sufficient in order to understand the context in which this application falls for consideration. The applicant holds a significant number of shares in the Company. The balance of the shares are held as between the respondents. In the course of 2018, it was decided by the parties to explore the possibility of a management buyout. At some point during that year, an offer was received by a US company but, ultimately, in February 2019, the proposed purchaser withdrew. There is a dispute between the parties as to what happened next. It is unnecessary, for present purposes, to go into detail in relation to the nature of that dispute. It is sufficient to record that, subsequently, a further prospective purchaser emerged, namely Ryhall Limited ("*Ryhall*") which is incorporated in Malta. However, the applicant contends that negotiations were conducted by the respondents with Ryhall over the course of several months without reference or notice to him and he alleges that this was done without any attempt being made to offer the respondents' shares to him in the manner required by Clause 4.05 of the shareholders' agreement. He also argues that, in addition, this alleged behaviour on the part of the respondents constitutes oppression or conduct in disregard of his interests within the meaning of s. 212 of the Companies Act 2014 ("*the 2014 Act*").

6. The applicant also complains that the respondents have entered into heads of terms with Ryhall which includes an exclusivity clause which purports to be legally binding on the parties thereto and which obliges the respondents not to engage with any third party whatsoever with respect to a possible sale of their shares in the Company, other than Ryhall. Again, the applicant contends that this alleged conduct on the part of the respondents constitutes a breach of the shareholders' agreement and is oppressive to him and in disregard of his interests within the meaning of s. 212 of the 2014 Act.

7. The applicant also alleges that a valuation of shares was carried out by the Company's auditors without his knowledge or consent and that there had been a failure to circulate a draft record outlining the auditor's provisional view on valuation prior to finalising the valuation. The applicant also complains that the valuation provided by the auditors does not comply with the requirements of the shareholders' agreement insofar as it states that the value could lie anywhere within a range of figures (with a margin between them of €2.5 million).

8. A further complaint made by the applicant as against the respondents is that they have wrongfully (so he contends) sought to suggest that the time periods under the pre-emption provisions of the shareholders' agreement had commenced to run notwithstanding his complaint that the valuation had not been carried out in accordance with the requirements of the shareholders' agreement. The applicant makes the case that this is further conduct in disregard of his interests and/or constitutes oppression within the meaning of s. 212 of the 2014 Act. He also alleges that there is a deliberate attempt to frustrate a due diligence exercise which he seeks to carry out and he alleges that this is designed to "*frustrate*" the exercise of his right of first refusal under the shareholders' agreement and is done for the benefit of Ryhall and to his detriment.

9. All of the allegations made by the applicant are strenuously rejected by the respondents who have said on affidavit that the

complaints made are without foundation and untrue. On the basis of the affidavits filed by the respondents, there is a significant factual dispute between the parties and, in circumstances where I heard no argument on the merits, it would be impossible at this stage to form any view as to the validity of the respective positions of the parties in relation to the substantive matters in dispute.

The Initiation of the Proceedings by the Applicant
10. A formal letter of complaint was written on behalf of the applicant on 22nd April, 2019, by Crowley Millar, solicitors. In their written response of 24th April, 2019, the respondents rejected the allegations against them and indicated that if the applicant intended to acquire their shareholding in accordance with Clause 4.05 of the shareholders' agreement, the price certified by the auditor would have to be paid by bank draft in accordance with the time limit set out in the agreement. This provoked a short response from Crowley Millar on 24th April, 2019, in which they warned that, in the absence of appropriate undertakings from the respondents, the applicant would take steps to protect his position. On the following day, the respondents replied expressing disappointment at the approach taken by Crowley Millar and indicated that, if further steps were to be taken by the applicant, they required to be put on notice prior to any such applications. Later on the same day, Crowley Millar indicated that the applicant would be prepared to engage in without prejudice discussions and it appears from the affidavit evidence before the court that some discussions of that nature subsequently took place. Regrettably, the parties did not reach an amicable resolution of the dispute and on 16th May, 2019, the present proceedings were instituted. They first appeared in the chancery list before Reynolds J. on 21st May, 2019, when, for the first time, it was indicated by the respondents (through their counsel) that they intended to rely on Clause 7.09 of the shareholders' agreement providing for expert determination of disputes between the parties. On the same day, the respondents filed the present application (which also sought an order pursuant to O. 63A admitting the proceedings into the Commercial List). Subsequently, by order of Haughton J. the proceedings were admitted into the Commercial List and Haughton J also directed that a preliminary issue should be tried on Friday 28th June, 2019 as to whether these proceedings should be stayed pending expert determination pursuant to Clause 7.09.

The Jurisdiction of the Court to Stay Proceedings pending Expert Determination
11. There was no dispute between the parties as to the jurisdiction of the court to stay proceedings for the purposes of expert determination. The jurisdiction was recognised by the Supreme Court in *Via Net Works Ireland Limited* [2002] 2 I.R. 41. Although that case was concerned with the enforceability of an arbitration clause rather than an expert determination clause, Keane C.J., at p. 58, approved the following passage from the speech of Lord Mustill in *Channel Tunnel Group v. Balfour Beatty Limited* [1993] AC 334 at p. 353:-

> *"I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go."*

12. On the same page of the report, Keane C.J. explained that, while the contract in the Channel Tunnel case was one which was "*more characteristic of the high level world of international commerce than the agreement now under consideration*", he had no doubt that the general principle was equally applicable to the shareholders' agreement considered by the Supreme Court in that case. There is an obvious parallel between that case and the present not only because it concerned a shareholders' agreement but also because, in that case, an allegation of oppression was made pursuant to what was then s. 205 of the Companies Act 1963. An argument had been made in that case that it would be contrary to public policy to refer a dispute under s. 205 of the 1963 Act to arbitration since this would deprive the petitioners of their statutory right to have the allegations determined by the High Court. Keane C.J. rejected that argument as misconceived. As noted above, that case was concerned with an arbitration agreement rather than an expert determination clause. However, there is no reason to suppose that the same principle does not apply in the context of an expert determination clause. Thus, there is no reason in principle why an expert determination clause (if sufficiently widely drafted) should not apply to a claim under s.212 of the 2014 Act.

13. There is, however, an important distinction between an arbitration agreement and an expert determination clause insofar as the jurisdiction of the court to stay proceedings is concerned. In the case of arbitrations, the power of the court is circumscribed by statutory provisions. In the case of an expert determination clause, the jurisdiction of the court is discretionary. Kelly J. (as he then was) made that clear in *Campus and Stadium Ireland Limited v. Dublin Waterworld Limited* [2006] 2 I.R. 181 at page 187.

14. The manner in which the discretion of the court is to be exercised is now well established. As Hogan J. explained in the Court of Appeal in *Dunnes Stores v. McCann* [2018] IECA 238 at para. 37, the starting point in any consideration of the issue is that the courts will generally hold the parties to the terms of their contractual bargain. This is consistent with what was said by Lord Mustill in the *Channel Tunnel* case at p. 353. In that case, Lord Mustill stressed that the presumption is that the expert determination clause should be enforced and it is up to the parties opposing expert determination to show "good reasons" for departing from the agreement which they have themselves signed up to.

15. It is, therefore, very properly, accepted by counsel for the applicant in this case that his client bears the burden of persuading the court that, in the exercise of its discretion, it should depart from the presumption that the expert determination clause should be enforced. In the course of the hearing on 28th May, 2019 I was not referred to any Irish authorities which address or identify the range of factors that might be sufficient to persuade a court to exercise its discretion against enforcing the stay. In due course, it will be necessary to consider a number of decisions from other common law countries on this issue. Before doing so, it is important to have regard to the terms of the expert determination clause contained in the shareholders' agreement here.

The Expert Determination Clause in Issue
16. Clause 7.09 is in the following terms:-

> *"Any dispute relating to this Agreement or the conduct of the Company's affairs shall be referred for decision by the parties to an independent Expert to be approved by agreement and in default of agreement between the parties within seven days of a dispute arising the matter shall be referred to the President for the time being of the Incorporated Law Society of Ireland for the appointment of an Expert. The decision of the Expert will be final and binding on the parties and shall not be questioned by any of them in any way. The provisions of the Arbitrations Act 1954 – 980 (sic) shall not apply."*

17. A number of aspects of this clause should be noted:-

> (a) In the first place, it is in relatively straightforward terms. It is quite broad and lacking in detail. In particular, there is no provision dealing with the procedure to be adopted by the expert. Nor is there any provision in relation to the qualifications of the expert although it would seem likely that what the parties had in mind was that a lawyer would be

appointed as expert. This would appear to follow from the fact that the parties envisaged that, in the event of a failure to agree on a nominee, it would be up to the President of the Law Society to make the nomination.

(b) While the breadth of the clause was criticised by counsel for the applicant, the clause very clearly provides that any dispute relating to either the shareholders' agreement itself or the conduct of the company's affairs is to be referred for decision to an independent expert. Although it is not commonplace to do so, I can see nothing in principle or in any of the case law (to which I have been referred) which would prevent the parties agreeing to refer a broad a range of disputes to an appropriate expert. As the case law discussed below shows, a different conclusion might possibly be required if the clause appeared to envisage that a particular dispute might be referred for determination by a person without the necessary expertise to resolve that dispute. That would raise an issue as to whether the parties could plausibly have intended such an outcome. However, on its face, the clause here is sufficiently wide to cover the dispute sought to be ventilated by the applicant in these proceedings. Insofar as the applicant alleges a failure to comply with the terms of the shareholders' agreement that is covered by the words "*any dispute relating to this Agreement*". Insofar as it is alleged that the affairs of the Company are being conducted in a manner oppressive to the applicant or in disregard of his interests, that would equally appear to be covered by the words "*any dispute relating to … the conduct of the Company's affairs…*".

(c) As discussed in more detail below, the expert determination clause does not provide any guidance to an expert as to how he or she should proceed. There are no rules of procedure laid down in Clause 7.09. Given the breadth of the clause, it is potentially unhelpful that the clause does not set out the procedures to be followed by the expert or by the parties themselves in the expert determination process.

(d) The clause also very clearly provides that the decision of the expert will be final and binding on the parties and cannot be questioned by any of them in any way. It is equally clear that the expert is not to act as an arbitrator. Such a provision is common in an expert determination clause. It is understandable why parties might wish to proceed in this way since it means that the decision of the expert will, in all likelihood, bring complete finality to the dispute without any significant prospect of challenge. Furthermore, in contrast to a court process, there would be no ability to appeal (with all of the attendant delays that may ensue as a consequence).

(d) Somewhat unusually, the clause does not impose any time limit on the expert in rendering a decision. This has some relevance to the arguments made by the parties (discussed further below) and to the concern of the respondents to ensure that should be the earliest possible final resolution of the dispute between the parties lest Ryhall were to lose interest in acquiring the shares as a consequence of delay.

The Case made by the Respondents in support of a Stay

18. The case made by the respondents is simple and straightforward. They say that the applicant, as one of the parties to the shareholders' agreement, is bound by its terms. He cannot, on the one hand, contend that there has been a breach of the pre-emption provisions of the agreement and, on the other, allege that Clause 7.09 is not binding on him. They stress the importance of the Ryhall offer, particularly in circumstances where, at least, two of the respondents would like to retire and realise the value of their shares in the Company in order to support them in their retirement. They say that it is vitally important that the dispute be resolved as quickly as possible and that, even with the benefits of the Commercial List, there is no prospect that the proceedings initiated by the applicant will be resolved within a timeframe that would be likely to keep Ryhall on board. In the affidavit grounding the present application, the respondents also stress the importance of commercial confidentiality and they suggest that expert determination will provide an entirely private and confidential forum for the resolution of the dispute with the applicant. It is also clear from the affidavits sworn on their behalf in the substantive proceedings that they have concerns about the financial ability of the applicant to acquire their shares in the event that the Ryhall acquisition falls through. They suggest that an expert determination will achieve a significantly quicker resolution of the dispute than court proceedings. They rely, *inter alia*, on the observation made by Hogan J. in the *Dunnes Stores* case at para. 44 where he said:-

> *"…the entire object of adjudication by expert is to achieve a speedy and final resolution of the dispute, even if the ultimate conclusions and the reasoning contained in the expert's adjudication is not always perfect or completely justified on the evidence. But there are compelling policy reasons which warrant the courts respecting the choice of the parties to submit to adjudication by expert in commercial disputes of this nature. Accordingly, such respect means that the courts must – and will – accept a ruling from the duly nominated expert who is appointed with exclusive authority to determine a particular dispute…"*

19. The respondents say that it is a matter for the applicant to show that there are sufficient reasons in the present case to justify the court exercising its discretion against a stay of the proceedings and that, on examination, none of the arguments put forward by the applicant (addressed in more detail below) are sufficient to justify the refusal of a stay.

The Position of the Applicant

20. As noted above, the applicant, very properly, accepts that he bears the burden of demonstrating that the discretion of the court should be exercised against the grant of a stay. In the course of the written and oral submissions of counsel, a number of individual points were raised which, it was argued, when viewed collectively and in their entirety, justify a refusal of the stay. It is therefore necessary to consider each of the individual factors on which the applicant relies and to determine whether the issues raised by the applicant are sufficiently weighty (whether individually or collectively) to persuade me to exercise my discretion against the grant of a stay. At the same time, I must always bear in mind that, as all of the case law makes clear, the presumption is that the parties should be held to their bargain and that if they have agreed expert determination as the mechanism for resolving disputes, that is the mechanism which they are obliged to follow in the absence of good reason to the contrary.

The Breadth of the Clause

21. One of the factors relied on by the applicant is the sheer breadth of the clause. For the reasons already explained in para. 17(b) above, I do not believe that the breadth of the clause is necessarily problematic. Nonetheless, this contention may become relevant in the context of some of the other arguments addressed further below in the context of the nature of the dispute which arises in the s. 212 proceedings. As explained below, counsel for the applicant places significant emphasis on the fact that, quite apart from any question of interpretation of the shareholders' agreement, there are substantial factual disputes between the parties in relation to a range of matters which will have to be determined by the expert if he or she is to reach a decision in relation to the factual disputes in issue including the disputes relating to the conduct of the affairs of the Company. Counsel submitted that the breadth of the dispute here is in marked contrast to the nature of disputes that one frequently encounters in the context of expert determination

clauses relating to, for example, the value of shares or the value of some other asset.

The Silence of the Expert Determination Clause in relation to the procedures to be adopted
22. In relation to the procedures to be adopted by the expert, counsel for the applicant placed emphasis on the lack of any provision within the expert determination clause relating to the powers of the proposed expert to determine the dispute, the form of procedure to be adopted by the expert (including the question whether the expert can conduct a hearing on sworn evidence and whether the expert is bound by the rules of natural and constitutional justice), the procedure for the remuneration of the proposed expert, and the consequences of non-cooperation with the expert.

23. While I acknowledge that it would be preferable for an expert determination clause to spell out the powers of an expert and the procedures to be followed, I do not believe that the failure to do so in Clause 7.09 is fatal to the expert determination process. It is not unusual for an expert determination clause to be silent on, at least, some aspects of procedure. In many cases, no significant difficulty arises because, at the commencement of the process, the expert will usually organise a meeting with the parties, and agree the procedures to be adopted. The nature of the procedures to be adopted will frequently be dictated by the subject matter and ambit of the dispute in question. For example, if what is involved is essentially a valuation exercise, very little, by way of procedures, may require to be put in place. It is often the position in such cases that the expert determination clause in question will envisage that the exercise to be carried out by the expert will largely involve the deployment of the particular expertise of the expert concerned rather than the rendering of a decision after a full oral hearing. Again, a determination as to value is a typical example of such a process.

24. The lack of detail however, has the potential to be somewhat problematic if there is a dispute as to the procedures to be adopted or if one of the parties were to fail to cooperate with the process. Even where those difficulties arise, it is essential to bear in mind that, as explained further below, it will ultimately be for the expert to decide how all of these issues should be addressed. That said, the resolution of any disputes as to process or procedure has the potential to create delay. It may become necessary for the expert to convene several meetings in order to iron out any disputes as to the procedure to be adopted. In cases which involve a net issue and which do not require oral evidence, it may transpire that any such difficulties can be readily resolved. On the other hand, in cases where there is a significant dispute between the parties (including a dispute on factual issues) the resolution of any dispute between the parties as to the procedures to be adopted may take some time to resolve. It is in that context that the blank canvas contained in Clause 7.09 may give rise to some level of difficulty and delay. For example, Clause 7.09 makes no provision whatever in relation to the disclosure of documents – even though disclosure of documents may be important in the resolution of any factual disputes and in particular in the cross-examination of witnesses as to fact.

25. Even more serious difficulties may arise if a party were to refuse to cooperate altogether in the process. I do not believe, however, that it is appropriate to assume that difficulties of this kind will necessarily arise in this case. It is clearly in the interests of both parties that any dispute should be resolved as speedily as possible. Moreover, if a determination is made that the proceedings should be stayed and the dispute resolved by an expert, I believe the court is entitled to expect that the parties will abide by that ruling (unless and until set aside on appeal).

26. Furthermore, if a party refuses to cooperate, the expert may be left with no alternative but to proceed with the determination in the absence of that party. Once the expert has given the recalcitrant party an opportunity to be heard, it is difficult to see how the rules of natural or constitutional justice could be said to be infringed if a party, thereafter, refuses to engage with the process.

27. In the present case, what is key is that the parties have previously, in the expert determination clause, agreed that the expert is to decide any disputes relating to the shareholders' agreement or the conduct of the affairs of the Company. As part of the process of determining such disputes, the expert is empowered to decide all issues which require to be decided in order to determine that dispute. This was made very clear by Hogan J. in his judgment in the Dunnes Stores case at para. 44, where he said:-

> "*It also means a judicial acceptance* that the expert should, *in principle, at least*, have full authority to determine all issues which require to be decided in order to determine the dispute, *including questions of law and the interpretation of contractual terms.*" (Emphasis added)

28. Similar observations have been made by the Court of Appeal in England & Wales in *Barclays Bank plc v. Nylon Capital LLP* [2012] 1 All E.R. (Comm) 912 at p. 925 where Thomas L.J. (as he then was) dealt with the matter as follows:-

> *"36. It was next submitted … that a court has to take into account the speed and informality of expert determination as important considerations to which the parties agreed by selecting that form of procedure. As the expert determination would be carried out quickly without recourse to the formalities of court or arbitration, a court should not deprive the parties of that upon which they had agreed, even if the process was not, on an objective basis, suitable for the dispute which had arisen.*
>
> *37. As I have said, there is no procedural code for expert determination, in contradistinction to arbitration. The activities of an expert are subject to little control by the court, save as to jurisdiction or departure from the mandate given.* Unless the parties specify the procedure, the expert determines how he will proceed; *it is rare for what might be perceived as procedural unfairness in an arbitration to give rise to a ground for challenge to the procedure adopted by an expert…"* (Emphasis added)

29. While I would not subscribe to the suggestion that an expert would be entitled to act with procedural unfairness, there is no doubt that, in the absence of provision for procedure, it is ultimately for the expert to determine the procedures to be adopted. As noted above, an expert, at the outset of the process, will usually speak to the parties about the procedure to be adopted and will take into account the suggestions made by the parties. However, ultimately, it is a matter for the expert to put in place whatever procedures are appropriate to enable the expert to determine the matters in dispute. The observations made by Hogan J. in the *Dunnes Stores* case (quoted in para. 28 above) reinforce this conclusion. That is not to say, however, that difficulties will not arise. As discussed in para. 24 above, in circumstances where the expert determination clause makes no provision for procedures to be adopted, there is significant scope for delay as a consequence of disputes between the parties as to the procedure to be adopted. Furthermore, as previously noted, there is the added difficulty that there is no provision made in Clause 7.09 in relation to the disclosure of documents by the parties to the dispute. While an expert might seek to rely on the authority of the Court of Appeal decision in *Dunnes Stores* to direct the disclosure of documents, there are obvious difficulties in the event that such disclosure is not made or is not made comprehensively. What is the sanction that an expert can impose in such circumstances? In the absence of detail in the expert determination clause, no guidance is given as to the sanctions that might be imposed. In addition, the expert does not have available the panoply of remedies which are available in court proceedings. I do not wish to suggest that this will give rise to insuperable difficulties. I simply draw attention to these potential difficulties in circumstances where the respondents suggest that

expert determination will necessarily be more straightforward and expeditious than court proceedings. If the only issue here were the interpretation of the shareholders' agreement, that would certainly be the case. However, as matters currently stand, the issues here are more extensive and include issues of fact on which there are significant conflicts between the parties on the evidence. It therefore seems to me that some weight should be given to this factor in considering how the discretion of the court should be exercised in this case.

The expert determination clause is silent as to the identity or qualifications of the proposed expert
30. In my view, this is not a concern. Clause 7.09 envisages, in the first instance, that the parties will agree on the appointment of the expert. The parties will therefore be in a position to nominate appropriate experts to deal with whatever form of dispute arises between them. If they cannot agree between themselves, there is an appropriate provision made for the nomination of an expert by an office holder, namely the President of the Law Society, who is peculiarly well placed to make such a nomination. The President of the Law Society is frequently identified as the person to make a nomination of that kind. Clauses to that effect are found in a variety of different situations in both arbitration and expert determination clauses. The President of the Law Society is well used to making nominations and it is inconceivable that the President of the Law Society would not make an appropriate nomination of a lawyer in the event that, as in this case, the dispute between the parties required legal input. In those circumstances, I can see no basis to take this factor into account in considering how the discretion of the court is to be exercised in this case. To my mind, it is inconceivable that the President of the Law Society will not nominate a lawyer of appropriate experience to determine a dispute of the kind which arises here.

The "*failure*" to invoke the expert determination clause within seven days
31. It was argued on behalf of the applicant that, having regard to the text of Clause 7.09, there was an obligation on the part of the respondents, if they wished to rely on the expert determination clause, to refer the dispute to an expert or to the President of the Law Society within seven days from the date of the dispute. It was argued that the respondents had manifestly failed to comply with that obligation. However, counsel on behalf of the respondents argued that the seven-day period ran not from the date of the occurrence of a dispute but from the date when the parties failed to agree on the appointment of an independent expert. Counsel for the respondents submitted that this was the most business like interpretation of Clause 7.09 and that to interpret it in any way would lead to an absurd result. It would impose on the parties an unrealistic obligation to keep referring any disputes which arose between them to expert determination within seven days of the dispute arising, irrespective of the number of disputes that might arise between them in the course of the conduct of the affairs of the company. Counsel also argued that, in any event, time could not be said to be of the essence and that, accordingly, any failure to refer the dispute to expert determination within seven days of the letter from Crowley Millar of 22nd April, 2019 was not fatal.

32. For completeness, it should be noted that, in this case, no argument was made that the agreement should be construed *contra proferentem*. Although the agreement appears to have been drafted by O'Hanrahan & Co. Solicitors (who are associated with one of the respondents) the parties agreed (as Recital D of the agreement makes clear) that, at the time the agreement was drafted, O'Hanrahan & Co were not acting for any particular shareholder. It would not therefore have been possible for the applicant to argue that one of the respondents should be regarded as the *proferens*.

33. In my view, counsel for the respondents was correct in suggesting that the reference in Clause 7.092 "*within seven days of a dispute arising …*" refers not to seven days from the date of the original dispute between the parties but to seven days from a dispute arising as to who should be appointed as expert to resolve that dispute. As Lightman J. said in *Don King Productions v. Warren* [1998] 2 All Er 608 at p. 624 (in a passage cited by the authors of McDermott "*Contract Law*", 2nd ed., 2017, at para. 10.118);-

> *"The essential task of construction is to deduce, if this is possible, from the agreements, construed against their commercial background the commercial purpose which the business men …who are parties to them must as a matter of business common sense have intended to achieve by entering into them; and if such intent can fairly be deduced and if this is necessary to effectuate that intent, the court may require what may appear to be errors or inadequacies in the choice of language to yield to that intention and be understood as saying that (in light of that purpose) that language must reasonably be understood to have been intended to mean".*

34. In my view, the construction of Clause 7.09 suggested by counsel for the respondents is the only construction which would make business sense to business people in the position of the parties to the shareholders' agreement here. It would make no sense if the shareholders of the company were required to refer to an expert every dispute that might arise between them in the course of the conduct of the affairs of the company within a period of seven days. There are bound to be disagreements and disputes from time to time between shareholders especially where each of them is involved in some way in the management of a company. The vast majority of those disputes and disagreements would be resolved amicably in the course of discussions over time. If, in the meantime, the parties had to appoint an expert, it would lead to unnecessary expense and unduly elevate the seriousness of the dispute. Over time, it could also lead to a plethora of references of disputes to an expert. That would do little to promote a good working relationship between the shareholders. In these circumstances, it seems to me to be improbable that that is what the shareholders, here, intended.

35. On the contrary, it is inherently more likely (and is consistent with business common sense) that the shareholders would have intended that the seven-day period should refer to any dispute between them as to who should be appointed an expert (if they ultimately are unable to resolve a particular dispute and come to the conclusion that the only way to resolve it is through expert determination). In such circumstances, it makes good sense that there should be a time limit on the reference to the President of the Law Society so that unnecessary time is not wasted in appointing an expert when it becomes really necessary to do so. If the parties are at a stage where they are unable to agree on the appointment of an expert, a dispute has clearly reached a level which requires outside input in order to resolve it. At that point, it is wise that there should be a time limit on the approach to the President of the Law Society so that an expert can be appointed in order to resolve the dispute as speedily as possible.

36. I therefore reject the applicant's argument in relation to this issue. But it is important to bear in mind that this is not the only time point that is raised by the applicant. In addition, the applicant submits that the failure on the part of the respondents to invoke the expert determination clause until after these proceedings were instituted is a significant factor to be weighed in the balance. That is an issue which is addressed further below.

The status of the applicant
37. Counsel for the applicant also argued that the applicant's status as a lay person is quite different to the parties to the expert determination clause considered by the House of Lords in the Channel Tunnel case. He drew attention, in this context, to the language of Lord Mustill at p. 353 in that case where he said:-

> *"This is not the case of a jurisdiction clause, purporting to exclude an ordinary citizen from his access to a court and*

featuring inconspicuously in a standard printed form of contract. The parties here were large commercial enterprises, negotiating at arm's length in the light of a long experience of construction contracts, of the types of disputes which typically arise under them, *and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognised the potential weaknesses of the [procedure applicable under clause 67] and concluded that, despite them, there was a balance of practical advantage over the alternative of proceedings before the national courts…"* (Emphasis added)

38. Counsel argued that the applicant was in the position of an ordinary citizen. He was far removed from the large commercial enterprise mentioned by Lord Mustill. I do not, however, accept this argument. A similar consideration was dismissed by Keane C.J. in *Via Net Works Ireland Ltd* [2002] 2 I.R. 41 at p. 58 where, having cited the speech of Lord Mustill in the Channel Tunnel case, he continued as follows:-

> *"While, as the passage makes clear, in that case the contract was one which was more characteristic of the high level world of international commerce than the agreement now under consideration, I have no doubt that the general principle is equally applicable to the agreement in this case".*

39. It should be noted that, in the *Via Net Works* case, the applicants (like the applicant here) were shareholders in the relevant company. Similarly, the agreement in issue in that case was a shareholders' agreement. The observations of Keane C.J. in that case are therefore equally apposite here.

40. Moreover, as Hogan J. made clear in *Dunnes Stores v. McCann* at para. 37, the circumstances in which the courts are unwilling to enforce an expert determination clause as a consequence of the particular status of an applicant are limited to cases where the applicant is a consumer or where there was a manifest inequality of bargaining power between the parties to the relevant contract. He said:-

> *"The starting point … is that the courts will generally hold the parties to the terms of their contractual bargain. This is especially true in the context of the resolution of a commercial dispute between commercial equals, all of whom have been fully advised and are (presumably) aware of the implications of their actions. Different considerations might, …, come into play where the agreement had been reached where there was a manifest inequality of bargaining between the parties or where the agreement involved a consumer."*

41. I cannot see any basis in the present case to suggest that the parties to the shareholders' agreement, at the time of its conclusion, were not, in the words of Hogan J., "*commercial equals".* While counsel for the applicant attempted to argue that the respondents were in a stronger position than the applicant in negotiating the shareholders' agreement (as evidenced by the fact that it was drafted by O'Hanrahan Solicitors), I do not believe that there is any sufficient basis to take that view. In particular, there is no evidence to support that proposition. While the applicant, in para. 16 of his affidavit, says that the agreement was drafted in its entirety by Mr. O'Hanrahan (who is the spouse of one of the respondents) there is no evidence to suggest that the applicant did not have an opportunity to take his own legal advice or that it was presented to him on a "*take it or leave it*" basis. On the contrary, Recital D to the agreement expressly records:-

> *"The Subscribers each acknowledge that they have been separately legally advised and received accountancy advice or alternatively that they have waived the rights to obtain such legal advice or accountancy advice before the signing of this agreement. It is further acknowledged that the firm of O'Hanrahan & Co. Solicitors are not acting for any particular shareholder and the Subscribers acknowledge that O'Hanrahan & Co. Solicitors have no legal professional obligation to the Subscribers in regard to the contents hereof".*

42. In my view, the applicant is bound by the Recital contained in the shareholders' agreement. I therefore do not believe that it is open to the applicant to rely on the argument made by counsel as summarised in para. 38 above. Quite apart from that consideration, there is insufficient evidence in the affidavits before the court to support the argument made.

The failure to invoke the clause until after the proceedings were instituted.

43. In para. 10 above, I have already drawn attention to the relevant timeline. On the evidence before the court, the threat of legal proceedings was first made by the applicant in his solicitor's letter of 22nd April, 2017. Although that letter does not explicitly threaten legal proceedings per se, the letter spoke of the applicant being advised "*to take such steps as are available to him to prevent the majority shareholders progressing with any proposed transaction involving Ryhall or any third party in contravention of the provisions of the Shareholders Agreement*". It is clear that the respondents understood this as a threat of legal proceedings. In their letter of 25th April, 2019 they expressly stated that they required to be put on "*prior notice of any applications concerning this matter"*. This is reinforced by what is said by the third named respondent in para. 85 of his affidavit where, with reference to the correspondence, he expressly refers to the applicant "*threatening legal proceedings*".

44. As noted above, it was not until 21st May, 2019, after a full legal team (including both senior and junior counsel) had been retained by the respondents, that the first intimation was given that the respondents wished to rely on the expert determination clause. Counsel for the applicant strongly argued that it was telling that the clause was not raised until after counsel were retained. He suggested that the mechanism of expert determination cannot have been regarded as of fundamental importance to the respondents in circumstances where they did not ever seek to invoke it themselves. By the time the clause was invoked, the proceedings were already up and running with a very full affidavit having been sworn and served on behalf of the applicant.

45. It might be thought that it is not material that a period of only four weeks elapsed between the letter from Crowley Millar of 22nd April, 2019 and the date when the expert determination clause was first mooted by the respondents at the hearing before Reynolds J. on 21st May, 2019. However, a shorter period has been held to be material in somewhat analogous circumstances considered by the Supreme Court in I*ntermetal Group Ltd v. Worslade Trading Ltd* [1998] 2 I.R. 1. That case was not concerned with an expert determination clause but with a dispute as to jurisdiction. Proceedings had been commenced in Ireland and an application for an interlocutory injunction was sought by the plaintiffs alleging that the defendant (an Irish registered company controlled by Russian interests) had wrongfully induced breaches of contract between the plaintiff (which was involved in the steel business) and certain steel suppliers. One week after the proceedings had been instituted, the defendants contended for the first time that the dispute should properly be determined in the courts of Russia rather than in Ireland. The defendants brought an application to stay the Irish proceedings on *forum non conveniens* grounds. There is some parallel between the test applied in such circumstances and the test applied in applications of the present kind. In a *forum non conveniens* challenge, once the defendant has established that the dispute should more appropriately be tried in the courts of some other forum, the onus then shifts to the plaintiff to show that it is not in the interests of justice that the stay should be granted. To some extent, that approach is mirrored in the present case insofar as the test to be applied is concerned. Here, the respondents must show that there is an expert determination clause in place which binds both

parties. Once the respondents discharge that initial onus, it then falls to the applicant to demonstrate that there is good reason for the court to conclude that a stay should not be granted.

46. Ultimately, the Supreme Court, in *Intermetal*, determined that Russia was the most appropriate forum for the determination of the dispute but that, nonetheless, the interests of justice required that the proceedings should continue in Ireland. The *forum non conveniens* challenge was therefore dismissed. While the facts of that case are therefore very different to the present case, the rationale for the decision of the Supreme Court is of some relevance in the context of the issue raised in these proceedings that the respondents have delayed in invoking the expert determination clause. In particular, the following passage from the judgment of Murphy J. in the Supreme Court is of some relevance where he said at p. 38:-

> *"The beneficial owners of the Defendant must have realised that the activities of that company would be called into question by the Plaintiffs. Whilst the correspondence pre-dating the institution of these proceedings took place over a period of little more than one week, importance must be attached to the failure of the Defendant in the one letter written on their behalf to address the complaints made against them or to dispute expressly or by implication the appropriateness of Ireland as the forum in which to institute proceedings. Whilst it could not be suggested that the entry of the conditional appearance on 27th November or the delivery of the Defendant's notice of motion on the 28th of November 1997, claiming the stay …involved anything approaching delay, the fact remains that the proceedings were instituted and the motion for an injunction apparently served before the appropriateness of the forum was challenged. Furthermore, it is clear that both parties recognised the urgency of the matter and must have overcome extreme difficulties to extract information, assemble documents and draft the numerous affidavits filed in connection with the two motions. Justice required that the action and in particular the interlocutory aspects thereof should be dealt with expeditiously. If the learned trial Judge had granted a stay and refused to hear the interlocutory application such a refusal would have constituted the denial of justice not merely to the Plaintiff but also the Defendant. They shared a concern to have this extremely important commercial problem resolved at the earliest date even though their expectations as to the ultimate outcome necessarily differed. The trial of this action in a different forum would not serve the ends of justice.*
>
> *In these circumstances I am of the view that the … trial Judge was correct in refusing the stay sought by the Defendant…"*

47. Counsel for the respondents has argued that it would be wrong, in this case, to take the same approach particularly in circumstances where, just three days after the Crowley Millar letter of 22nd April, 2019 threatening proceedings was written, Crowley Millar wrote again on 25th April, 2019 proposing without prejudice discussions. It is clear from the affidavit evidence that such discussions subsequently took place between the parties. In those circumstances, it is suggested that it would be wholly wrong to take a similar approach in this case to that taken by the Supreme Court in *Intermetal*. It seems to me that there is some force in that submission. In addition, counsel drew attention to the fact that an offer to buy the respondents' shares was made by the applicant and there was engagement on the part of the respondents in relation to that offer. Counsel submitted that it was unrealistic to think that it would occur to the parties, in those circumstances, to consider referring the matter to expert determination.

48. On the other hand, counsel for the applicant argued that if expert determination was of such importance to the respondents, it was difficult to understand why they had not, in response to the Crowley Millar letter threatening proceedings, set out their position that, if the matter could not be resolved through negotiation, expert determination was the appropriate means of resolving any dispute rather than court proceedings. Instead, they stayed silent on that issue and simply demanded that (as noted above) they should be put on notice of any application to the court. However, counsel frankly acknowledged that this point, on its own, is unlikely to be enough to persuade the court to exercise its discretion against the grant of a stay. Nonetheless, he submitted that it was a factor to be considered and weighed in the exercise of the discretion.

49. For my part, I agree that the proposal for without prejudice discussions is a factor which differentiates this case from *Intermetal*. Nonetheless, the fact that the expert determination clause was not invoked until several weeks after the Crowley Millar letter of 22nd April, 2019 is an element to be borne in mind when I come to consider whether there are sufficient factors at play in this case to justify the refusal of the stay. I agree that it is not sufficient in itself to justify the refusal of a stay. It is simply a factor to be borne in mind.

The inherent unsuitability of expert determination to resolve a dispute of this kind

50. In the course of his submissions, counsel for the applicant drew a distinction between cases such as *Campus & Stadium Ireland Development Ltd v. Dublin Waterworld Ltd* and the present case. In the *Dublin Waterworld* case, the relevant clause dealt with a specific issue – namely a dispute between a landlord and a tenant concerning compliance by the tenant with its obligations under a lease concerning repair and maintenance. The clause provided that any such dispute should be referred to the determination of a single architect to act as expert. Based on what was said by Kelly J. at p. 186 of the report, it appears that the clause told the expert what he was to do upon appointment and required that any decision of the expert be rendered within three months of a submission of the dispute or such extended time as the parties might agree. Counsel suggested that this was a fairly typical expert determination clause which contemplated expert determination by an expert in respect of a specific issue which was plainly within the particular expertise of that expert. It also provided appropriate details as to how the expert should proceed and, very importantly, provided for a time limit for the expert to reach a determination. Counsel also referred to expert determination clauses which are frequently encountered such as those dealing with valuation of shares or valuation of a premises and where the clause provides for the appointment of a valuation expert. In such cases, the expert valuer will be in a position to very quickly reach a determination following what are likely to be quite brief written submissions from both sides (and in the case of the valuation of a premises, after an inspection of the premises). The expert will be able to bring his or her own experience and expertise in play in arriving at the determination. In such cases, the expert will usually not have to resolve issues of fact or to determine which party is telling the truth.

51. In contrast, in the present case, the expert will have to address a much more broad ranging dispute involving not only questions of interpretation of the shareholders' agreement (something which could readily be done by an expert) but also a contest on the facts. In particular, on the basis of the case as currently constituted, the expert will have to make findings of fact based on disputed evidence. That process is inherently more likely to take time than the exercise contemplated by the much narrower terms of the expert determination clause in the *Dublin Waterworld* case.

52. Counsel argued that, in light of the nature of the dispute, the respondents had not established that the process would be more expeditious than the Commercial Court. If the President of the Law Society is to appoint an expert at this stage, it may be difficult to find someone who will be available immediately. The long vacation is looming. The expert will have to determine the procedures to be adopted. There will have to be meetings with the parties in order to agree a procedure. Issues may arise in relation to the exchange of documents. As noted above, there is no provision in the expert determination clause requiring the parties to provide any relevant

documents to each other and the expert. All of this would have to be considered and debated at procedural meetings. Even more importantly, given the extent of the factual issues between the parties, it is impossible to envisage that an expert could determine the dispute without hearing oral evidence and without witnesses being subject to cross examination. The process would therefore be very similar to a court process. Counsel submitted that the process here will, accordingly, be quite unlike that envisaged by Hogan J. in *Dunnes Stores v. McCann* where he spoke of "*the entire object of adjudication by expert is to achieve a speedy and final resolution of the dispute …*". Counsel drew attention to the fact that in the *Dunnes Stores* case, the dispute related to whether a particular development had been completed in accordance with the development agreement. The expert determination clause envisaged that this would be determined by a particularly well qualified expert and it clearly envisaged a very truncated process given that, in contrast to clause 7.09 here, it required the expert to report within 20 working days of his appointment. Crucially, the clause there envisaged the appointment of an expert architect who would be in a position to readily form a view as to whether a particular building had been constructed in accordance with the development agreement in question.

53. Counsel for the applicant placed significant reliance upon a decision of Chesterman J. in the Supreme Court of Queensland in *Zeke Services Pty Ltd v. Traffic Technologies Ltd* [2005] 2 Qd R563. Counsel drew attention to the fact that, as in Ireland, it is plain from a consideration of the judgment of Chesterman J. that the *Channel Tunnel* case is the origin of the modern approach taken by Australian courts in relation to the enforcement of expert determination clauses. Furthermore, as para. 21 of the judgment makes clear, the test applied is the same. In that paragraph, Chesterman J. said:-

> *"The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. This factor was emphasised by the House of Lords in Channel Tunnel, … However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.*

54. In para. 22 of his judgment, Chesterman J. explained that the onus could be discharged where the dispute was not suitable for expert determination. He said:-

> *"Ordinarily I would think that that onus can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen. This consideration includes the procedure, if any, for which the parties have contracted, and the qualification of the expert … to embark upon the determination of the dispute. The parties are presumed not to have intended that their dispute should be resolved by someone not qualified for the task, or in some inappropriate manner. This presumption, based on legal theory, removes any violence to the agreement which refusing the stay would otherwise have done."*

While there is some force in the balance of what is said by Chesterman J in that extract, I am not sure that it is wise to suggest that the onus can only be discharged by showing that a particular dispute is not amenable to resolution by the mechanisms the parties have chosen. That seems to me to unduly circumscribe the discretion of the court on an application of this kind.

55. The observations of Chesterman J must also be read in the context of the particular facts of that case. The expert determination clause there provided for the appointment of an accountant to resolve a dispute between parties. Most of the complaints made in that case related to the state of certain accounts which Chesterman J. held were well within the competence of an accountant. However, some of the complaints related to questions of fact and mixed questions of fact and law which Chesterman J. suggested were more readily answered by a lawyer than an accountant. It is clear from a consideration of the judgment as a whole that Chesterman J was very concerned that an accountant lacked the necessary skills to resolve issues of law or of disputed fact and his observations in the extract quoted in para. 54 above must be seen in that light.

56. Consistent with the argument made by counsel for the applicants, Chesterman J. observed at paras. 23-24 of his judgment as follows:-

> *"Einstein J … in Heart Research Institute noted that 'Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind.' The most common examples are where a valuer is appointed to fix the rent … or a man experienced in a particular line of business is called on to fix the price of stock in trade, or say whether it is saleable.*
>
> *24. It follows that if a dispute is not of a kind which can be determined in an informal way by reference to the specific technical knowledge or the learning of the expert, it may be appropriate to refuse a stay. Complicated disputes of fact or of law may be of such a character."*

57. Counsel expressed the concern that if the present dispute is to be determined in some summary way, it would inevitably involve a serious abrogation of procedural safeguards which would call into question the appropriateness of expert determination. In this context he emphasised what was said by Chesterman J. in *Zeke Services* at para. 27:-

> *"The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and because the expert applies his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar. The less amenable the dispute is to this mode of resolution, the less appropriate this paradigm will be and the more likely it will be that the court will decline to stay an action brought on the contract so as to allow the expert determination to proceed."*

58. Counsel for the applicant submitted that it was unreal to suggest that the dispute here could be determined without putting in place a procedure very similar to that which would be adopted in the High Court for resolution of the dispute. Counsel expressed the concern that if the respondents are correct in suggesting that the expert determination can provide a more expeditious mechanism for resolving the dispute, they must envisage that the expert will dispense with some of the necessary procedures and processes involved in any adversarial fact finding exercise. Counsel submitted that it would expose the applicant to injustice if the expert were to proceed in that way. On the other hand, if the expert is to essentially replicate the procedures that would be involved in a High Court case, this would inevitably mean that there would be no saving of time or expense and it called into question the appropriateness of expert determination in a full scale dispute of this kind.

59. Counsel also relied on a decision of Judge Hegarty Q.C. in *Cott UK Ltd v. FE Barber Ltd* [1997] 3 All ER 540. In that case, the

court refused a stay in circumstances where the relevant expert determination clause provided no guidance as to the procedures to be adopted and where, in common with the position in *Zeke*, the relevant expert (appointed by the Director General of the British Soft Drinks Association) had no appropriate expertise to resolve an issue in relation to the proper construction of a commercial agreement between the parties. At p. 550, the court said:-

> *"It may well be, that for certain types of disputes which might conceivably have arisen under this contract, the intervention and decision of a soft drinks industry expert would have been entirely sensible and appropriate. However, I do not consider on the evidence before me, that the parties, like the parties in the Channel Tunnel case, gave thought to the full range of possible disputes which might arise between the parties, and determined clearly, positively and explicitly that the appropriate person to resolve the entire range of disputes would be someone with this particular expertise. In this context, it is perhaps significant that they chose to describe him specifically as acting as an expert. Yet, in relation to this dispute … he would not appear to have any relevant expertise. …".*

60. In response, counsel for the respondents argued that *Cott* is inconsistent with the subsequent decision of the Court of Appeal of England & Wales in *Barclays Bank v Nylon Capital LLP*. It also appears from the decision of Chesterman J. in *Zeke* that the Australian courts have doubted the relevance of some of the matters relied upon by the court in *Cott*. In addition, the fundamental difficulty that arose in *Cott* (arising from the lack of appropriate expertise of the nominee expert) does not arise in the context of Clause 7.09. As discussed above, although the clause says nothing about the particular expertise of the expert to be appointed, it is inconceivable that the President of the Law Society would not appoint a suitably experienced lawyer in this case. For that reason, it seems to me that *Cott* is not an apposite authority.

61. With regard to *Zeke*, counsel for the respondents submitted that, in contrast to *Zeke*, it could not plausibly be suggested that the present case involved complicated questions of law or fact. He stressed that the principal issue related to the interpretation of the shareholders' agreement which, he submitted, was very obviously a matter which could be readily addressed by any expert lawyer. He therefore suggested that this was quite different to the kind of case which Chesterman J. had in mind in para. 24 of his judgment in *Zeke*.

62. According to counsel for the respondents, there is a compelling policy reason to refer the present dispute to expert determination. Parties to expert determination clauses are bound by what they agree. In addition, he suggested that the speed of resolution weighed heavily in favour of expert determination. He suggested that, even if the expert has to adopt somewhat similar procedures to the High Court, an expert dedicated to determine this dispute and who is available over the coming long vacation must necessarily be in a better position to resolve the dispute more quickly than the court. He also submitted that if the court had any concern about the lack of any time limit imposed by Clause 7.09 on the decision of the expert, the court could tailor its order to make clear that the stay would be granted on condition that the person to be appointed as expert will determine the dispute within a period of time fixed by the court or such longer period as the parties may agree.

63. Counsel emphasised that while there is no evidence as to Ryhall's intentions before the court, the longer that ultimate determination of the dispute is delayed, the greater will be the probability that Ryhall will withdraw.

64. With regard to *Zeke*, counsel for the respondents also argued that it predated *Barclays Bank* and that, accordingly, the court should treat it with caution. Counsel for the respondents also suggested that *Barclays Bank* is an example of a "*more extreme*" provision than Clause 7.09 and yet, he suggested, it was enforced by the court. In that case, the relevant clause provided that there should be an expert determination by an accountant in respect of any dispute arising between members of a limited liability partnership relating to either the amount of any profit or loss due to a member or in relation to any payment due to an outgoing member. In response, counsel for the applicant argued that the clause in Barclays Bank was of a radically different shape to Clause 7.09 in that it confined the nature of the dispute to be resolved by the expert to matters which were clearly within the competence of an accountant and were relatively net and discrete issues. It should also be noted at this point that, as discussed further below, the court in *Barclays Bank* did not ultimately grant a stay.

Discussion and analysis

65. Although each of the three Irish decisions discussed above show very clearly that the Irish courts will apply similar principles to those discussed by Lord Mustill in the *Channel Tunnel* case, none of those decisions address, in any level of detail, the factors which might potentially persuade a court to refuse to grant a stay of proceedings brought in contravention of an expert determination clause. In fact, there is nothing in the judgments in any of those cases which suggests that any argument was made that the presumption in favour of a stay was outweighed by more cogent countervailing considerations supporting the continuation of court proceedings. There is no indication in the judgment of Kelly J. in the *Dublin Waterworld* case that any argument of that kind was made by the plaintiff there. Based on the report of the judgment, the plaintiff appears to have argued that there was no sufficient dispute in existence that required determination by an expert. That argument was rejected by Kelly J. It is significant that the expert determination clause in that case was enforced even though this resulted in parallel proceedings before the expert in relation to the repairing covenant in the lease notwithstanding the ongoing court proceedings in relation to the balance of the lease.

66. Similarly, in *Dunnes Stores v. McCann*, it does not appear that any argument was made by the plaintiff there that there were countervailing factors that outweighed the presumption in favour of a stay. On my reading of the judgment, the argument made by Dunnes Stores to resist the stay was simply that the dispute which it sought to litigate in the courts was outside the ambit of the expert determination clause. As para. 46 of the judgment of Hogan J. demonstrates, there was no merit in that argument which Hogan J. described as "*specious*". However, the Court of Appeal did not address the factors that might appropriately be taken into account by a court in considering whether there is a sufficient basis to refuse a stay. Nevertheless, the final paragraph of the judgment of the Court of Appeal enjoins the High Court to:-

> *"…stand ready at the earliest opportunity to strike out as abusive attempts of this nature to frustrate and undermine commercial agreements providing for adjudication by expert in the event that any future similar litigation of this kind should manifest itself….".*

67. In essence, the argument in the *Via Networks* case also focussed on the ambit of the dispute resolution clause in that case (which provided for arbitration rather than expert determination) and in particular as to whether it could be said to extend to the statutory right to pursue an oppression claim under what was then s. 205 of the Companies Act, 1963. As noted previously, the fact that the Supreme Court, in that case, took the view that such a claim could properly be remitted to arbitration demonstrates very clearly that there is no reason in principle why the claim asserted by the applicant in these proceedings could not be dealt with by way of expert determination. While counsel for the applicant is undoubtedly correct in suggesting that expert determination clauses are frequently confined more narrowly to very specific issues, there is nothing to prevent parties from agreeing to submit to expert determination more widely.

68. As noted above, counsel for the respondents placed significant reliance on the decision of the Court of Appeal of England & Wales in *Barclays Bank v Nylon Capital*. However, I am not convinced that this decision takes the matter much further. While the decision is useful, insofar as it deals with an expert determination clause which is silent on procedures, the court does not address, in any detail, the nature of the factors that might be sufficient to persuade a court to refuse a stay. The dispute in that case related to the jurisdiction of the expert. While the court reiterated the principle underlying the approach taken in the *Channel Tunnel* case, the court did not ultimately grant a stay. The court's decision was not prompted by any factors which outweighed or displaced the presumption that a stay should ordinarily be granted. The reason for the court's decision was simply that the relevant dispute between the parties was not within the ambit of the expert determination clause. In contrast to the provisions of Clause 7.09 here, the expert determination clause was narrowly focussed. It is noteworthy that, in the course of his judgment, Thomas L.J. highlighted that expert determination clauses are usually limited in nature. At para. 28, he said:-

> *"…expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court…. The LLP agreement illustrates this: the parties agreed by cl 26.2 to submit to the exclusive jurisdiction of the English courts, but reserved specific disputes under cl 26.1 to the expert. They carved out of the exclusive jurisdiction of the English courts, to which they had submitted all disputes between the parties, a limited class of dispute. …. The simple question is whether the dispute which has arisen … is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. …."*

69. In light of the approach taken by the Court of Appeal in the *Barclays Bank* case, I cannot agree with the submission by counsel for the respondents that the approach taken by Chesterman J. in *Zeke* is inconsistent with *Barclays Bank*. On the contrary, there is nothing in the Barclays Bank decision which addresses the issue which fell for consideration in *Zeke* - namely whether there were factors which outweighed the starting presumption that the parties were bound by the expert determination clause which they had expressly incorporated in the agreement between them.

70. The decision of Chesterman J. is not an outlier. Insofar as I can see, it is consistent with a line of Australian authority which includes *Badgin Nominees Pty Ltd v. Oneida Ltd* [1998] VSC 118, *Dance with Mr. Dance Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSW S332 and *Mineral Resources Ltd v. Pilbara Minerals Ltd* [2016] WASC 338. The decision is very useful in the way in which it analyses the factors that fell for consideration in that case. In particular, Chesterman J. drew attention to the inherent difficulties that are likely to arise where an expert determination clause purports to entrust a complex dispute to an "*expert*" who lacks the necessary skills, experience and expertise to resolve the issue. Chesterman J., at para. 28 of his judgment, identified that, in that case, most of the issues that fell for consideration were well within the competence of the accounting expert who was required to be appointed under the expert determination clause in issue in that case. It is clear from a consideration of Chesterman J. that if those were the only matters in issue, a stay would have been granted. As Chesterman J. said at para. 28:-

> *"All that is involved in the determination of these complaints is that the accountant uses his professional knowledge in a perusal of the company's accounts and other records. The determination is likely to be quick and relatively cheap. There can be no sensible objection to the parties being held to their bargain that those disputes be resolved in that way".*

71. The difficulty that arose in *Zeke* was that the matters in dispute between the parties also extended to more complex issues which involved the resolution of disputes as to fact and as to law. At para. 30 of his judgment, Chesterman J. said:-

> *"The dispute, … raises a question of what the company's officers believed about the recoverability of the debts and the reasonableness of any grounds for that belief. There are, therefore, questions of mixed fact and law to be resolved as to whether a representation was made and the content of any representation. Such questions are more readily answered by a lawyer than an accountant. Whoever makes the determination, the process must involve some argument, legal in nature. This is not the paradigm of applying one's special knowledge to one's own observations."*

72. At para. 31 of his judgment, Chesterman J. highlighted that there were significant issues of fact to be resolved which he said was

> *"not a matter with respect to which an expert accountant is particularly well equipped to answer. It is more the province of a trained fact finder, such as a judge or arbitrator."*

73. Against the backdrop of the factual dispute, the silence of the expert determination clause in relation to procedures weighed heavily with Chesterman J. At para. 32 of his judgment he said:-

> *"It is at this point that the absence from the agreement of procedural rules to be observed by the expert becomes of importance. Their absence is unremarkable in a case where the expert relies upon his own senses and learning, but where he is obliged to investigate disputed questions of fact and/or law, and come to a conclusion about them, the lack of a methodology for the inquiry is significant. An expert, unless obliged to do so by the contract or the terms of his appointment, does not have to comply with the requirements of procedural fairness or natural justice. The agreement does not contain such a requirement."*

74. It is clear from a consideration of paras. 32-36 of his judgment, that it was this factor, combined with a concern that the parties would be bound by the outcome of the process (notwithstanding the obvious lack of relevant skill on the part of the designated expert to equip infra an adjudication of disputed fact) that ultimately led Chesterman J. to refuse a stay in that case.

75. In contrast, in the present case, I do not believe that the same level of concern arises. This is for the simple reason that, in contrast to the *Zeke* case, the clause here clearly envisages that an expert will be appointed by the President of the Law Society. As noted earlier in this judgment, it is inconceivable that the President of the Law Society will not appoint a suitably qualified and experienced lawyer to deal with the dispute between the parties. Any such lawyer will be well familiar with the procedures to be adopted in relation to a fact finding exercise and the very basic requirement that both parties should be heard and both parties should be given an opportunity to test the evidence of the other.

76. Furthermore, in light of the approach taken by the Court of Appeal in *Dunnes Stores v. McCann*, the lack of any provision in Clause 7.09 as to the procedures to be adopted is not an insuperable obstacle. While it may take some time for any expert appointed in this case to consider the issues, hear the submissions of the parties in relation to the procedures to be put in place, and to formulate and decide on those procedures, the judgment of Hogan J. in *Dunnes Stores* makes clear that the expert will be entitled to decide on the procedures to be put in place. While there are disputes as to fact, any lawyer appointed as expert in this case, will undoubtedly conclude that, if it is necessary to decide the disputed issues of fact, appropriate procedures will need to be put in place to ensure that the parties have a proper opportunity to present their evidence and to contest the evidence of the opposing party.

There may well be disputes between the parties as to the procedure to be adopted but ultimately the expert will have to rule on these disputes. Equally, there may be difficulties in relation to the disclosure of documents. However, while I believe that there is no perfect solution (in the absence of specific provisions in Clause 7.09 dealing with the disclosure of documents) I cannot accept that the expert will not be able to devise appropriate procedures that will provide sufficient incentive to the parties to make disclosure of any documents relevant to the issues of fact in dispute. For example, the expert could determine that, in the absence of full disclosure by a party of all relevant documents, this would go to the weight of the evidence adduced by that party. In my view, it would be perfectly reasonable for an expert to take that approach in circumstances where the expert was satisfied that appropriate disclosure had not been made. In the absence of appropriate disclosure, the opposing party may well have difficulty in fully testing, by cross-examination, the veracity of the evidence to be given. I stress, however, that this is no more than a potential approach which an expert might take. I have no doubt that an experienced lawyer would be well capable of devising other equally appropriate mechanisms.

77. In these circumstances, I believe that there is a significant distinction to be made between Clause 7.09 here and the clause in issue in *Zeke* which led Chesterman J. to refuse the application for a stay. In contrast to *Zeke*, the expert to be appointed here will, as a lawyer, be equipped and qualified to determine the issues in dispute including procedural issues. However, the complete lack of procedures in Clause 7.09 is nonetheless relevant for a different reason. As outlined above, the lack of any detail as to the procedures to be adopted carries with it a real risk that there will be significant time spent at the outset of the expert determination process in addressing the procedures to be adopted and resolving any disputes between the parties as to those procedures. This has the potential to delay the expert determination. The fact that the risk of delay exists significantly undermines the case made by the respondents, on the hearing of this application, that the expert determination process will be substantially more expeditious than proceedings in the Commercial Court. In order to ameliorate this concern, counsel on behalf of the respondents suggested, in the course of the hearing, that the court might impose, as a condition to the grant of a stay, a requirement that the expert appointed by the President of the Law Society should agree, on his or her appointment, to render a determination within a period fixed by the court or within any longer period that might be agreed between the parties. In my view, that is not an appropriate approach for the court to take. That would involve, in effect, a re-writing of Clause 7.09 by imposing a time limit which does not exist within the four corners of the clause. In my view, the court is not at liberty to re-write a clause of this kind. All of the case law emphasises that the parties are stuck with the terms of the clause which they agreed. They are bound by its terms. That works both ways. If the applicant is bound by the clause, so too are the respondents.

78. The most that can be said is that, where a clause of this kind is silent as to time for performance, it is usual to imply a term that performance will be completed within a reasonable time. In this context, Lewison in "*The Interpretation of Contracts*", 6th ed., 2015 at para. 6.16 cites the following observation of Lord Watson in *Hick v. Raymond & Reid* [1893] AC 22 at p. 32:-

> *"When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts, the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably".*

79. If an expert accepts appointment in this case, it seems to me that the expert will be under an obligation to render a decision within a reasonable time. However, as always, what is reasonable will depend on the circumstances. It is in this context that the silence of Clause 7.09 as to the procedures to be followed is most relevant. The lack of any guidance as to the procedures to be adopted is not the fault of any expert to be appointed. As noted above, there is a real risk that some significant time may have to be spent at the outset of the process in determining the procedures to be followed in this case.

80. Furthermore, to the extent that there are issues of fact to be resolved, the process involved in finding those facts will also take significantly more time than the usual expert determination which largely involves the deployment by the expert of his or her own expertise to a very specific issue (within that expert's peculiar competence to resolve). Again, this is a natural consequence that flows from the terms of the clause which the parties have agreed. By agreeing that *all* issues relating to the conduct of the company should be referred to expert determination, the parties have thereby committed themselves to that process even in so far as factual issues are concerned. They have not confined the clause to disputes that relate to a narrow area within the specific competence of a particular class of expert.

81. While it has been suggested in the affidavit sworn on behalf of the respondents that the issues of fact which arise cannot be said to give the applicant a cause of action under s. 212 of the 2014 Act, I cannot prejudge that issue at this stage. I heard no argument on this issue. There is a possibility that an expert may be able to determine that there is no cause of action under s. 212 such that the only issues that arise are those relating to the proper construction and operation of the shareholders' agreement. If that is the view ultimately taken by the expert, it may well be possible to form a view relatively quickly as to the merits (or otherwise) of the applicant's claim. Regrettably, I am not a position to predict whether such an outcome is likely. I must therefore proceed on the basis that the dispute as to fact may well have to be resolved by the expert in which case the process is, of necessity, likely to replicate many of the processes that would be followed in court proceedings including the delivery of pleadings or position papers, the provision of witness statements, the giving of oral evidence, and the cross-examination and re-examination of witnesses. It is therefore impossible to be assured that the expert determination process in this case will be significantly shorter than proceedings in the Commercial Court. This is particularly so in circumstances where the expert, pending any determination by him or her as to the procedures to be adopted, does not have available the well-established and readymade procedures of the Commercial Court in relation to the expedited delivery of pleadings, the delivery of interrogatories (where necessary), the ability to request discovery on a voluntary basis, and the ability to have preliminary issues disposed of in a very speedy and efficient way. All of the powers of the Commercial Court are enforceable in the same way as any other order of the court. This position is further reinforced in the Commercial Court by the undertaking required of a solicitor in such proceedings to use best endeavours to ensure that the court's directions are complied with in full.

82. In light of these considerations, I have come to the conclusion that the expert determination process will not be significantly shorter than proceedings in the Commercial Court. It is in this context that the approach taken by the Supreme Court in Intermetal is of potential relevance. Will any useful purpose be served by remitting this dispute to expert determination when it is already up and running (so to speak) in the Commercial Court (just as the proceedings in *Intermetal* were in progress before the *forum non conveniens* issue was first raised)? Does it serve the interests of justice to stay the proceedings in these circumstances? I am very conscious, in this context, that detailed affidavits have already been delivered in the Commercial Court proceedings. It may or may not be necessary for points of claim and points of defence to be delivered. It may well be possible to proceed to fix the hearing of issues for trial on the basis of the issues as disclosed in the affidavit evidence. That raises the question as to the utility of repeating that process before an expert.

83. This is an issue which weighed with Clarke J. in the High Court of England & Wales in *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm). In that case, the court was able to come to the conclusion that there was no substance to the case which Total wished to have determined by an expert (as to the existence of force majeure). That aspect of the judgment is not of immediate relevance. However, in addition, in paras. 55-56 of his judgment, Clarke J. relied on the following considerations (which seem to me to have some resonance here), in support of his decision to refuse a stay:-

> *"55. …I bear in mind not only that the question at issue is one of construction, but that the parties have prepared for the hearing [of this application] and conducted it on the footing that unless there is a stay the court will finally determine the agreed issues. There is, or should be, nothing that has been held back whether by way of evidence or submission which would or might be available at a later trial. It follows that if there is a stay, the proceedings before the chosen expert will represent a complete duplication of effort and expense. I accept that prima facie disputes are to be determined in the manner that the parties have agreed, but that does not mean that the court is bound to refer an issue for expert determination when it has become apparent after what amounts to a trial that the construction argued for is erroneous and unsustainable.*
>
> *56. … I [also] take into account and give some weight to the importance to both sides, and to some extent to the wider public, of a speedy resolution of the issues. Although [Thames Valley Power Ltd] is the creature of large and powerful corporations, the financial consequences for it are potentially disastrous. The force majeure issue has been unresolved since early July. … The court itself ordered expedition so that the hearing has come on in vacation. It may be that the expert determination procedure could be speedily completed, but it is also possible that there may be significant delays in the agreement or appointment of an expert, his determination, and any proceedings that may follow thereafter. …".*

84. There is obviously not a complete parallel between the facts considered by Clarke J. in that case and the facts here. Nonetheless, there is something of a parallel. While it cannot be said, in this case, that all of the evidence and submissions as to the substantive issues are already before the court, there has already been a significant exchange of affidavits which has set out the respective positions of the parties in some considerable detail. All of this has occurred prior to the hearing of the present application. Furthermore, as noted above, the proceedings were launched and an application for an interlocutory injunction filed before any suggestion was made that the proceedings should be stayed pending expert determination. The applicant has therefore been put to some significant trouble and expense in mounting these proceedings before the question of a stay was ever mooted.

85. In light of the considerations discussed in paras. 77 to 84 above, I do not believe that the proceedings before the expert will necessarily be completed more expeditiously than if these proceedings are permitted to continue in the Commercial Court. If anything, the process before an expert - starting from scratch and with a completely blank canvass as to the procedures to be adopted – is likely to take some time to get off the ground.

86. If speed and efficiency were the only relevant considerations, I would be inclined to refuse the application for a stay on the basis that (a) the proceedings are already up and running and can be effectively and efficiently managed in the Commercial List and (b) the lack of any provision for procedures in clause 7.09 means that it will take any expert a significant time to catch up. Having regard to the discussion in paras. 77-84 above, such considerations seem to me to have the capacity to outweigh the presumption in favour of a stay.

87. There is, however, a further consideration which requires to be taken into account. In para. 13 of the affidavit sworn on behalf of the respondents in support of the present application, the deponent says:-

> *"Finally, I say that it is in the interests of all the parties that these proceedings are referred to Expert Determination. I say and believe that this will allow the dispute to be resolved on a confidential basis which will protect vital commercial interests of the Company, including but not limited to, sensitive information relating to the Company's affairs and commercial information which is the subject of non-disclosure agreements entered into between the Company, the Respondents and various third party bidders…."*

88. I can well understand the concern expressed in that paragraph. Shareholder disputes of this nature have the capacity to do significant damage to the commercial interests of the company to which they relate. If they proceed to a hearing, they almost inevitably involve disclosure in public of material relevant to shareholder value and also material relating to the conduct of the affairs of the company which would not ordinarily be known to outsiders including potential bidders (albeit that the latter, if they pursue a bid, will usually do so subject to a due diligence exercise). Experience shows that disputes of this kind often become very bitter and protracted and, if aired fully in public, there is a risk of damage to the reputation both of the company itself and its individual shareholders. The public airing of such a dispute also has the very obvious capacity to adversely affect the morale of the workforce on which the success of the company's business ultimately depends.

89. I am very conscious that, in the present case, a significant rationale underlying Clause 7.09 is likely to have been the desire to ensure that shareholder disputes should not be aired in public but should be resolved privately. That would explain why, somewhat unusually, Clause 7.09 envisages that all disputes relating to (*inter alia*) the conduct of the affairs of the company should be resolved through the expert determination process – a process which is entirely private. For the reasons already discussed above, I do not believe that the requirement for speed of resolution of disputes can be said to provide the only rationale for Clause 7.09. While there are likely to be relatively net disputes which are capable of being resolved by an expert in a very expeditious way, the present dispute illustrates that this will not be so in every case. In circumstances where Clause 7.09 extends to all disputes relating to the conduct of the affairs of the company, it seems to me that the requirement of privacy is likely to have been an equally important consideration underlying the inclusion of the clause in the shareholders' agreement.

90. In contrast, if these proceedings go forward to a hearing in the High Court, it is difficult to envisage that they will be heard otherwise than in public. While s. 212 (9) of the 2014 Act confers a power on the court to hear proceedings under s. 212 otherwise than in public, it is now well established, as a consequence of the decisions of the Supreme Court in *Re R. Ltd* [1989] ILRM 757 and *Irish Press Plc v. Ingersoll Irish Publications Ltd* [1993] ILRM 747, that it is extremely difficult to satisfy the requirements of s. 212 (9). In essence, Article 34.1 of the Constitution requires that s. 212 (9) be given a very strict construction. As Courtney "*The Law of Companies*", 4th ed., 2016 at para. 11.068 makes clear, it is now well established that in order to have s. 212 proceedings held *in c*amera, an applicant must prove two matters to the court's satisfaction:-

> (a) That the hearing of the proceedings in public would involve the disclosure of information which would be seriously prejudicial to the legitimate interests of the company; and
>
> (b) That the hearing in public of the whole or part of the proceedings would fall short of doing justice.

91. As Courtney explains in para. 11.069 – 11.072, the first limb of this test is a difficult obstacle to overcome while the second limb is particularly difficult to overcome. As a consequence, applications under s.21 2(9) are rarely, if ever, encountered in practice. Consequently, if no stay is granted in the present case, the probability is that the entire hearing of the present proceedings will have to take place in public. In my view, that carries with it a real risk of damage to the interests of the company and of the individual shareholders. This seems to me to be a significant consideration which must be weighed in the balance with the countervailing consideration discussed in paras. 77-84 above.

Conclusion

92. In short, in the absence of the concern in relation to a public airing of this dispute addressed in paras. 87-91 above, the considerations identified in paras. 77-84 above would, in my view, be sufficient to displace the presumption in favour of a stay. The dispute is one which requires to be resolved as urgently as possible and there is accordingly a concern that remitting it to an expert at this stage has the capacity to cause delay- particularly in light of the time it may take for the procedural issues to be heard and determined.

93. However, given the risk that a public hearing may harm the company, the additional consideration in favour of a private hearing seems to me to provide an effective counterweight to the factors discussed in paras. 77-84. In these circumstances, it seems to me that the factors in favour and against a stay are evenly balanced. Where the factors are evenly balanced, it would seem to follow that, but for the further consideration discussed in para. 94 below, the presumption in favour of a stay cannot be said to be displaced or outweighed in the present case by any contrary considerations. As noted earlier, the grant of the stay is the default position unless there is a countervailing consideration that outweighs it. I cannot see how the presumption can be outweighed if there is an even balance of factors for and against the grant of a stay.

94. The one remaining consideration relates to the application by the applicant for an interlocutory injunction. In my view, even if the substantive claim for relief in the present proceedings were to be stayed, this could not affect the right of the applicant to pursue an application for interlocutory relief pending the determination of the dispute by the expert. This is for the very simple reason that Clause 7.09 does not purport to exclude applications to the court for injunctions or orders which an expert would ordinarily have no authority to grant. The decision of the Court of Appeal of England & Wales in *Barclays Bank* is relevant in this context. As noted above, in para. 28 of his judgment in that case, Thomas L.J. explained that the parties in those proceedings had, by their contract, chosen two alternative forms of dispute resolution – one which expressly referred certain disputes to resolution by way of expert determination and the other which conferred exclusive jurisdiction on the English courts. The clause in the present case is not as sophisticated. However, it is clear from Clause 7.09 that what it does is to give the expert exclusive jurisdiction to determine disputes relating to the shareholders' agreement or to the conduct of the affairs of the company. It does not purport to exclude the jurisdiction of the court (which arises under the Constitution) in respect of the hearing of an application for an interlocutory injunction. In my view, if the clause was to have that effect, it would have to say so either expressly or by necessary implication.

95. I can see nothing in the terms of Clause 7.09 which would prevent any shareholder from seeking interlocutory relief (where appropriate). That means that the application for interlocutory relief could proceed even if a stay is granted insofar as the substantive relief is concerned. It follows that there could, in the course of the hearing of that application, be a significant disclosure of information relating to the affairs of the company. So far, the relevant affidavits have not been opened to the court. There has been no argument in court as to the merits of the respective parties' positions (which will inevitably involve an assault by each side on the other side's position). There has, as yet, been no public disclosure of the value of the company's shares. While that information is contained in the affidavits before the court, those affidavits have yet to be deployed in any court hearing and the quantum of the valuation has not yet been mentioned publicly. If, however, the application for an interlocutory injunction proceeds, the affidavits will have to be opened and the respective positions of the parties would have to be debated at some length. There would be nothing to prevent a court reporter from reporting on the detail of what was aired in court on the hearing of any such application. If this were to happen, it has the capacity to substantially undermine the considerations summarised in paras. 87-91 above which, for the reasons already discussed, would otherwise persuade me that it is appropriate to stay the proceedings.

96. In these circumstances, if a stay has to be granted, it seems to me that it can only be granted if the respondents are prepared to give an undertaking to the court in the terms of the interlocutory relief sought by the applicant pending (a) the determination of the merits of the dispute between the parties by the expert to be appointed by the President of the Law Society, or (b) if earlier, a determination by the expert that any complaint relevant to the interlocutory relief now sought, is not maintainable in law by the applicant. That seems to me to be the only way in which the privacy consideration discussed above can be maintained.

97. In the absence of such an undertaking, I do not believe that it would be appropriate to give weight to the consideration outlined in para. 13 of the affidavit sworn on behalf of the respondents in support of the application for a stay. If such an undertaking is not forthcoming, it seems to me that it would be inappropriate to give any weight to the privacy consideration since the affairs of the company are likely to be aired to a significant extent on the hearing of the application for an interlocutory injunction. Thus, if an undertaking is not forthcoming, I would be of the view that the application for a stay should be refused.

98. I therefore propose to give the parties an opportunity to consider this judgment and in particular to give the respondents an opportunity to confirm whether such an undertaking will be forthcoming. If such an undertaking is forthcoming, I propose to grant a stay on the proceedings (including the application for an interlocutory injunction). On the other hand, if the undertaking is not forthcoming, it would seem to me to follow that the application for a stay should be refused. If any issues arise in relation to the form of the undertaking, I will hear the parties to the extent that it may be necessary to do so.